

(2010) 01 BOM CK 0057

In the Bombay High Court

Case No : Writ Petition No. 2563 of 2005

Promod Singh Hanuman Singh Parihar

APPELLANT

Vs

The Joint Director (T/E), The Joint Director (IT), Maharashtra
State Electricity Board and The Member, Industrial Court

RESPONDENT

Date of Decision : 12-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 28
Maharashtra State Electricity Board Employees Seniority Regulations, 1961 —
Regulation 21

Citation : (2010) 125 FLR 990 : (2010) 3 LLJ 546

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.D. Thakur, for the Appellant; R.E. Mohrir, and P.D. Kothari, AGP, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this writ petition filed under Articles 226 and 227 of Constitution of India, the petitioner ? employee has sought quashing of the orders dated 02.02.2005 passed by the Industrial Court, Nagpur, in Complaint (ULPA) No. 469 of 1990 whereby his complaint u/s 28 read with items 3, 6, 7 and 9 of Schedule IV of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, (hereinafter referred to as MRTU & PULP Act), came to be dismissed.

2. The facts are not much in dispute. The employer of the petitioner i.e. Respondents No. 1 & 2 is State Electricity Board and the petitioner joined its services on 21.09.1981 as SubEngineer/Chargeman Grade II i.e. in Technical capacity in generation side. The employer Board invited applications vide Circular dated 29.07.1987 for filling in some posts in newly started Computer Section known as EDP Section at Aurangabad, Bombay, Nagpur and Pune. The petitioner applied in response thereto for the post of Assistant Computer Operator/

Assistant Programmer and then he appeared for aptitude test. After his selection, on 05.03.1988 he was called on at Bombay for training and after completing said training of 45 days, he joined as Assistant Computer Operator/Assistant Programmer at Nagpur w.e.f. 28.07.1988. He was posted accordingly by order dated 04.06.1988. Thus, after said order the petitioner started working in EDP Section. As the petitioner was not getting facility of charge allowance or holiday in EDP Section, he along with others filed some court proceedings and in Complaint ULP No. 324 of 1990 on 23.04.1990, the Industrial Court at Nagpur, granted ex parte stay whereby the petitioner was allowed to enjoy public holidays. According to the petitioner, this irked respondents No. 1 & 2 and by order dated 24.05.1990, he was sought to be relieved from EDP Section to join at Khaparkheda on Generation side on the ground of repatriation. This was assailed by him as unfair labour practice by filing Complaint ULP No. 469 of 1990 with separate application for grant of interim stay. The Industrial Court granted that stay which continued to operate till the decision of ULP Complaint on 02.02.2005. This Court has on 29.06.2005 while issuing rule in the matter, refused to grant any interim relief to the petitioner.

3. In this background, I have heard Shri Thakur, learned counsel for the petitioner, Shri Mohrir, learned Counsel for respondents No. 1 & 2 and Shri Kothari, learned AGP for respondent No. 3.

4. Shri Thakur, learned Counsel has contended that the service conditions of the petitioner are regulated by model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946, (hereinafter referred to as model standing orders) and respondents No. 1 & 2 cannot effect any change in classification or categorization of employees as stipulated thereunder unilaterally and contrary to law. He contends that in case of any inconsistency in any service regulation or rules framed by the employer and said model standing orders, the provisions of model standing orders have to prevail. With this, he has invited attention to the mode and manner in which the petitioner was transferred to EDP Section. According to him, on appointment of the petitioner as Assistant Computer Operator and after completion of 90 days on said work, the petitioner becomes permanent as Assistant Computer Operator. He points out that the petitioner was under observation during said period and hence the appointment of the petitioner must be deemed to be on probation and in conformity with Standing Orders. He points out that this aspect is totally lost sight of by the learned Member of Industrial Court. He further states that the respondents were satisfied with working of the petitioner in said section and shortly after he obtained interim orders from the Industrial Court, the order of repatriation was passed. The order of repatriation is legally unsustainable as the petitioner has become permanent employee of EDP Section and there is no question of his repatriation to his original post as Sub-Engineer. In support of his contention, he has relied upon the judgment of the Hon'ble Apex Court in the case of Western India Match Company Ltd. Vs. Workmen, and judgment of learned Single Judge of this Court in the case of The Indian Tobacco Co. Ltd. Vs. The Industrial Court

and others, . He has also invited attention to relevant observations made in the impugned order by Industrial Court to urge that those observations overlooked the mandatory nature of model standing orders and its impact on the arrangement. He states that there cannot be any contract in violation of provisions of model standing orders between the parties.

5. Shri Mohrir, learned counsel, on the other hand, relies upon the Circular by which the applications for filling in various posts in EDP Sections were invited to urge that the posts in EDP Section are clearly specified to be excadre posts. He further points out that entire circular shows that arrangement to be made was temporary in nature and hence seniority of persons selected in EDP Section was to be maintained and retained in his parent post and department. He further states that the undertaking for said purpose was also called for and learned Member of Industrial Court has correctly appreciated this situation flowing from said circular at Exh. 34 and posting order of the petitioner dated 04.06.1988 at Exh. 37. He argues that the petitioner was already a permanent employee and as a temporary measure, he was given excadre work in EDP Section. There is no question of his attending any permanency in EDP Section and Schedule IV, item 6 of MRTU & PULP Act or its item 9 cannot apply in this situation. He also argues that as it was excadre post and the lateral movement of the petitioner was with his consent, item 3 of Schedule IV is also not applicable. He points out that the learned Member of Industrial Court has rightly appreciated the controversy and found that the petitioner was not entitled to claim any right on any post in EDP Section. He invites attention to Circular dated 14.07.1992 placed on record by the petitioner as annexure with Civil Application No. 5270 of 2005 to urge that the employees continuing in EDP Section were called upon to give their options either to continue in that section or to go back to their parent department. He states that those options were to be furnished by 31.07.1992 and the petitioner never furnished that option. He has also invited attention to evidence on record and documents filed along with petition to substantiate his stand. He places reliance upon clause 32 of standing orders to show that a contract of service between the petitioner and the respondents vide Exhs. 34 and 37 is saved, thereby the learned Member of Industrial Court has rightly dismissed the complaint. He has also pointed out during arguments that after this Court refused to grant interim relief, the petitioner joined on generation side and was later on transferred to Chandrapur where he has also been promoted on technical side.

6. The Circular dated 29.07.1987 (Exh. 34) shows that respondents No. 1 & 2 establishment invited applications for filling in excadre posts in EDP Section of Computer Centres. Its clauses use the word "selection" and it is thus clear that the person submitting himself to the process was getting selected to the post he chose after following procedure mentioned therein. The circular also states that seniority and lien on post held in permanent cadre was not to be disturbed and the person selected had to work for minimum period of five years. It also states that the post of Assistant Computer Operator/Assistant Programmer in payscale

of Rs. 720451395 were vacant in EDP Section. The other clauses in this circular are not very relevant because the same are not in dispute between the parties. The posting order Exh. 37 dated 04.06.1988 shows that the petitioner then a SubEngineer was posted as Assistant Computer Operator in EDP Centre at Nagpur against the post of Shri Thosar, who was already transferred to Bombay. In other words, this shows a permanent vacancy in EDP Centre at Nagpur against which the petitioner was accommodated. Clause (2) of this order states that as transfer of the petitioner and other employees was ordered on administrative ground for a period not exceeding three years in first instance, during said period they would be borne on seniority of parent cadre as provided for in Regulation 21(b) of MSEB Employees' Seniority Regulations. By order dated 24.05.1990, the petitioner was sought to be relieved from EDP Centre consequent to order dated 31.08.1989 issued by Head office. The perusal of order dated 31.08.1989 shows that by said order, the petitioner was repatriated to generation cadre on administrative ground with immediate effect.

7. The petitioner has before Industrial Court relied upon the judgment of the Hon"ble Apex Court in the case of the U.P. State Electricity Board and Anr. v. Hari Shankar Jain and Ors. reported at 1978 LIC 1657 (SC), to show the overriding effect of model standing orders. The judgment of the learned Single Judge of this Court in Indian Tobacco Co. Ltd. v. Industrial Court and Ors, (supra) was also pressed into service. The learned Member of Industrial Court has not recorded any finding about the overriding effect given to the provisions of Standing Orders. The perusal of model standing orders framed for workmen doing manual or technical work show that there workmen are classified as permanent workman, probationers, badlis? or substitutes, temporary workmen, casual workmen and apprentices. It has been pointed out to this Court that during cross examination of the petitioner, the respondents have suggested to him that the petitioner was neither a temporary workman nor a casual workman or a Badli or substitute workman.

8. Shri Mohrir, learned Counsel has tried to contend that posting of the petitioner in EDP Section was a temporary measure. The learned Member of Industrial Court has also in para 11 found that the petitioner was transferred to excadre post for limited period only. However, the documents on record are not sufficient to conclude that this transfer was for limited period. It is to be noted that if it is to be viewed as transfer, there is no question of any permanent transfer as such. As already mentioned above, Exh. 34 clearly shows that employee responding to it was to be selected and was to be given requisite training and thereafter he was to be posted in EDP Section. It is no doubt true that it also mentions that his seniority was to be maintained in parent department and lien on parent post was to continue but that by itself does not mean that arrangement was to be temporary only. Clause (6) of said circular put obligation of minimum service of five years in EDP Section on employees like the petitioner but then the posting order Exh. 37 does not mention that the posting of the petitioner as Assistant Computer Operator was a temporary measure. Clause (2) of said posting order

again mentions that the transfer of employee named therein (including petitioner) was on administrative ground for a period not exceeding three years in first instance. It further states that during said period of three years, their names are to be borne on seniority of the parent cadre as provided in service regulations. Thus, these words that "it was for a period of three years in first instance" clearly show that the arrangement could have continued also after three years. The circular cast obligation upon the petitioner to work for minimum five years in EDP Section.

9. The above mentioned classification of employees in Clause 3 of model standing orders needs to be viewed in this background. EDP Section was a new creation and the vacancies therein are accepted by the respondents. The fact that the petitioner was selected and posted there against a clear vacancy and that work load was of permanent nature are not in dispute. The vacancies are mentioned as Excadre post only because of source from which those vacancies were sought to be filled in. The circumstances in which said decision was taken are not on record and the respondents have not placed any other document to show that the decision to fill in vacancies in EDP Section by inviting applications from holders of excadre posts was a temporary measure. The mode and manner in which said decision was reached are also not on record. The phrase "temporary workman" has been defined in model standing orders to mean ? a workman who has been appointed for a limited period for work which is of an essentially temporary nature and who is employed temporarily as an additional workman in connection with temporary increase in work of permanent nature. Thus, emphasis in definition is on duration of work available. If the work is available for limited duration and to take care of that work, person is appointed, he becomes a temporary workman. That is not the case of Respondents No. 1 & 2 anywhere before the Industrial Court. On the contrary, Exh. 34 as also the posting order Exh. 37 clearly show a permanent clear vacancy. The respondents have not accepted that the petitioner was Badli, substitute or casual workman. Mere look at definition of this phrases in clause 3(2)(c) and (e) will show that the petitioner cannot be classified under any of them. It is also not the case of the respondents that the petitioner was a apprentice. Therefore, the only remaining two classifications which the Industrial Court was left with to consider are under clause 3(2)(a) i.e. "permanent workman" and 3(2)(b) "probationer".

10. Because of the circular in response to which the petitioner applied, got selected and his posting order, learned counsel for respondents No. 1 & 2 has tried to make out a case of special contract between the parties and has relied upon the provisions of clause 32 of model standing orders. Clause 32 states that nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment. The respondents have contended that because of rights which accrued to them under the contract of service with the petitioner, the repatriation of the petitioner is permissible and Standing Orders or classification of workers

therein were not in any way relevant.

11. Allahabad High Court (learned Single Judge) had in the case of J.K. Cotton Manufacturers Ltd., Kanpur Vs. J.N. Tewari and Others, and in Banaras Electric Light and Power Co. Ltd., Behlupura v. Government of Uttar Pradesh and Ors. reported at (1961) 25 F.J.R. 420, held that there could be a special contract between a workman and his employer which may not be in accordance with model standing orders. However, in Western India Match Co. Ltd. v. Workmen (supra), the Hon^{ble} Apex Court has overruled those judgments and observed that:

9. In view of the decisions of this Court cited earlier, the decisions in J.K. Cotton Manufacturers Ltd., Kanpur v. J.N. Tewari AIR 1959 All. 639, and Banaras Electric Light and Power Co. Ltd., Behlupura v. Government of Uttar Pradesh and Ors. [1961] 25 FJR 420, no longer lay down good law. They take the view that notwithstanding the standing orders it is open to the employer to conclude an agreement with an individual workman which may be inconsistent with the standing orders. These decisions are overruled.

It is, therefore, settled that it is not open to an employer to conclude agreement with an individual workman inconsistent with Standing Orders. The learned Single Judge of this Court in Indian Tobacco Co. Ltd. v. Industrial Court and Ors. (supra) in para 19 considered provisions of clause 32 and found that the provisions of law or individual contract or custom or usage is protected when employee acquires better rights under it. This judgment of learned Single Judge of this Court was upheld in the case of Indian Tobacco Co. Ltd., Nagpur Vs. Industrial Court, Nagpur and Another, by the Hon^{ble} Apex Court.

12. It is, therefore, clear that the arguments of Shri Mohrir, learned counsel, about special contract with the petitioner cannot be sustained. There is no debate before this Court that the provisions of model standing orders override the service regulations to the contrary. No service regulation to the contrary is in fact pointed out to this Court. It, therefore, follows that the petitioner needs to be classified in the category either as permanent workman or probationer as per clause 3(1) of model standing orders. The petitioner was already a permanent workman since 1981 and he has been transferred to EDP Section on excadre post in June 1988. Thus, at the time of his transfer, he was a permanent workman. The provisions of model standing order 3(2)(a) define a "permanent workman" as under:

Permanent workman" means a workman who has been employed on a permanent basis or who, having been employed as a badli or a temporary workman has subsequently been made permanent by an order in writing by the Manager or any person authorized by him in that behalf and includes an apprentice who is asked for appointed to work in post or vacancy of a permanent workman for the purpose of payment of wages to him, during the period he works on such post or in such vacancy.

Clause 4 stipulates that when a permanent workman is employed as a probationer in new post, he could be reverted to his old permanent post at any time during the probationary period. Thus, model standing orders envisage a situation in which permanent workman like petitioner is placed to work on a new post.

13. Shri Moharir, learned Counsel has placed emphasis on word "as probationer" used in clause 4 to argue that the petitioner was not employed as probationer. Various capacities in which the petitioner could have been employed in EDP Section are mentioned above and if this contention is accepted, it follows that the petitioner will have to be treated as appointed in permanent capacity in EDP Section to shoulder permanent workload. However, this is not the case of the petitioner himself. Model standing orders 3(2)(b) defines "probationer" as under:

"Probationer" means a workman who is provisionally employed to fill a permanent vacancy or post and who has not completed three months' "uninterrupted" service in the aggregate in that post.

14. The circumstances, therefore, clearly show that appointment of the petitioner in EDP Section needs to be viewed as appointment on probation with right to respondents No. 1 & 2 to revert him/transfer him to his parent post if his work is found not satisfactory. The maximum probation period contemplated in model standing order is three months i.e. 90 days and after completion of that period, the employee needs to be made permanent within seven days as per provisions of model standing order 4a. The judgment of Hon'ble Apex Court in *Western India Match Co. Ltd. v. Workmen*, (supra) is also not helpful to respondent in this respect because there the Watchman was employed as probationer for six months while certified Standing Orders prescribed two months probation. He was discharged during said period of six months and he raised Industrial Dispute. The Tribunal held the discharge to be invalid on the ground that the provision of six months period was itself invalid as it was inconsistent with model standing orders. The Hon'ble Apex Court endorsed that view and held that terms of employment specified in model standing order would prevail over terms and conditions of contract in existence. It also held that when model standing orders are in force, it is not permissible for the employer to seek statutory modification thereafter so that there may be one set of Standing orders for one set of employees and another set for rest. For the present purpose, it is apparent that after three months of service as Assistant Computer Operator in EDP Section, the petitioner was entitled to be given permanent status as Assistant Computer Operator in EDP Section.

15. The perusal of order of Industrial Court reveals that the Industrial Court has relied on circular (Exh. 34) and posting order (Exh. 37) and concluded that transfer of the petitioner to excadre post was for limited period only and hence provisions of clause 4a of model standing orders were not applicable. It further found that circular (Exh. 34) did not reveal that it was for regular appointment or for new recruitment in EDP Section or then the services of the petitioner were to

be absorbed in that post after completion of training in that post. The entire approach is contrary to model standing orders and scheme thereof and also to the judgments mentioned supra. The Industrial Court has indirectly found a separate or a special contract between respondents No. 1 & 2 and the petitioner inconsistent with the provisions of model standing orders.

16. The transfer order at Exh. 37 has been issued as repatriation order. It is apparent that after completion of 90 days, the petitioner became permanent employee in EDP Section and hence there was no question of his repatriation. Shri Thakur, learned Counsel for the petitioner has attempted to show that shortly after the petitioner raised his demand for charge allowance for performing additional work and demanded holidays, the order of repatriation came to be issued. He has urged that the demand and the short period within which the order came to be issued, clearly show the malice both factual as also legal. As the order at Exh. 37 is order of repatriation in a plain or simple order of transfer, it is not necessary for this Court to look into said aspect. However, it is significant to note that, head office ordered on 31.08.1989 immediate repatriation of petitioner and actual order to implement it is issued about 9 months thereafter i.e. on 24.05.1990. This itself militate with alleged administrative exigency warranting transfer/repatriation of petitioner back to his parent department. Moreover, by filing ULP complaint No. 469/1990, petitioner has already challenged this repatriation. Hence, when options were called for on 14.07.1992 for permanent absorption in EDP Section, the respondents were aware of this intention of petitioner. They have never contended that work and conduct of petitioner in EDP Section was unsatisfactory. Hence they would have called upon petitioner to withdraw his ULP Complaint to show their bonafides as on said date, he was working in EDP Section due to interim orders in his favour.

17. I, therefore, find the impugned order dated 02.02.2005 delivered by the learned Member of Industrial Court unsustainable. The same is accordingly quashed and set aside. Complaint (ULPN) No. 469 of 1990 is, therefore, allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.