
(1991) 03 BOM CK 0063
In the Bombay High Court
Case No : Writ Petition No. 2869 of 1990

Pyarelal

APPELLANT

Vs

Municipal Council and Another

RESPONDENT

Date of Decision : 07-03-1991

Acts Referred:

Industrial Employment (Standing Orders) Act, 1946 — Section 15

Citation : (1995) 3 LLJ 273 : (1991) 1 MhLj 1408

Hon'ble Judges : M.M. Qazi, J

Bench : Single Bench

Advocate : S.D. Thakur, for the Appellant; V.C. Daga, for the Respondent

Final Decision : Allowed

Judgement

M.M. Qazi, J.—The petitioner joined the services of the respondent No. 1 Municipal Council, Ramtek as Safai Mazdoor (Sweeper) some time in the year 1969. By the end of 1984 the post of Safai Jamadar fell vacant and the petitioner was appointed in that post vide order dated 13.12.1984 (Annexure-A) for a period of three months on an experimental basis. It was clarified that if his services were found satisfactory, he would be deemed to be fit for the post of Safai Jamadar and he would be paid the salary of Safai Jamadar. In fact, there were no complaints against his work till he was reverted as Safai Mazdoor vide order, dated 30.7.1985, which was received by the petitioner on 31.7.1985. The respondent No. 2 was appointed as Safai Jamadar in place of the petitioner.

2. The petitioner challenged the order of his reversion by filing a complaint under Sections 5, 28, 30 read with Sections 26, 27 and under Items 5, 7 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Unfair Labour Practices Act"). It was stated in the complaint that the petitioner had completed about 8 months' service as Safai Jamadar continuously without any complaint against his work and hence he should have been confirmed as Safai Jamadar in view of the Model Standing Orders. According to the petitioner, there were about

150 workers with the respondent No. 1 Municipal Council and, therefore, the Model Standing Orders were applicable to them. The petitioner also applied u/s 30(2) of the Unfair Labour Practices Act along with the complaint. The Industrial Court allowed the application and directed the respondent No. 1 Municipal Council to withdraw the unfair labour practice complaint temporarily and further directed not to revert the petitioner from the post of Safai Jamadar during the pendency of the proceedings. This order was confirmed after hearing the respondent No. 1 and remained in force till the complaint was finally dismissed by the Industrial Court vide order dated 12.11.1990.

3. The respondent No. 1 contested the complaint essentially on the ground that the petitioner was appointed purely on temporary and experimental basis till the final arrangement was made in his place. It was further contended by the respondent No. 1 that the period of probation was of two years under the Municipal Laws and since the petitioner was reverted within a period of two years he had no right to claim the permanent status. The petitioner examined himself to substantiate his contention, whereas the Chief Officer was examined on behalf of the respondent No. 1. The Industrial Court dismissed the complaint vide order, dated 12.11.1990, essentially on the ground that the petitioner was appointed on experimental basis and he was not found suitable for being continued as Safai Jamadar.

4. There is no material on record at all to show that there was any complaint about the working of the petitioner, except the resolution dated 23.9.1985 (Annexure-D), which was passed by the Standing Committee of respondent No. 1 after seven months, expressing its view that Safai Jamadar should be a Matriculate. This in my view, cannot be called a complaint against the working of the petitioner. There is another document (Annexure-B) on record, which was the application received by the respondent No. 1 on 20.12.1984. In this application, Safai Kamgars have expressed their view that it was not expedient to appoint a man as Safai Jamadar from their category. Even in this application there are no complaints regarding the working of the petitioner as Safai Jamadar. It is, therefore, surprising as to how the Industrial Court found that the work of the petitioner was not satisfactory. The Industrial Court did not address itself to the main grievance of the petitioner that he was governed by the Model Standing Orders, wherein the period of probation was of three months and, therefore, he should have been made permanent after having completed that period satisfactorily.

5. Mr. Daga appearing on behalf of the respondent No. 1 vehemently contended that the petitioner being a Municipal employee is governed by Municipal Laws where the probation period is of two years. According to him, the Municipal Laws are special laws and, therefore, would prevail over the Industrial Employment (Standing Orders) Act - general law. He further contended that the probationary period under the Municipal law is two years and since the petitioner was reverted within a period of two years, he did not acquire any vested right to the post of

Safai Jamadar, He has relied on several decisions to substantiate his contention that the Industrial law is a general law. In those decisions, Industrial law was held to be a general law-not qua the industrial law but some other laws. Those decisions are distinguishable. On the other hand, Mr. Thakur has relied on the following decisions which apply with full force:

(i) 1984 L.I.C. p. 1290 : S. Baginathan and Ors. v. Secretary to Govt. of Tamil Nadu, Rural Development and Local Administration Dept., Madras and Ors.

Paragraph 16 of the said judgment reads thus-

"16. Applying the ratio of the decision of the Supreme Court in the U.P. State Electricity Board v. Hari Shankar Jain AIR 1979 SC 65 : 1978 L.I.C. 1657 referred to earlier, we hold on the third question set out at the beginning that the provisions of the Standing Orders Act, if applicable to a Municipal undertaking as an "Industrial establishment" defined in the Standing Orders Act, being in the nature of a special enactment, will prevail over the provisions of the District Municipalities Act, and the rules thereunder and to this extent, the decision of the Division Bench in the Coimbatore Municipality v. Thiruvengkataswami ILR 1973 (I) Mad. 405 : 87 Mad. L.W. 462: 1974 L.I.C. 667 is not correct."

(ii) Pune Municipal Corporation Vs. Keshav Ganpat Bhise and Another, .

The controversy in this case was whether the employee therein was governed by the Industrial Employment (Standing Orders) Act or by the Corporation laws. This Court held that the employee shall be governed by the Industrial Employment (Standing Orders) Act and not by the Corporation Laws. In paragraph 11, this Court has observed as under:

"11. Shri Sawant the learned counsel also relied on the provisions contained in Section 13-B of the Act to suggest that the provisions under the Act would not be applicable to the respondent since the Corporation have themselves made Rules and Regulations and, therefore, those Standing Orders or Rules would govern the parties. For obvious reasons this contention cannot be upheld inasmuch as the dominating requirement of the said provision is that such rules or regulations are required to be notified in this behalf meaning thereby that a general prescription or enactment of the rules is not enough and those must be so notified, so as not to make them applicable to certain Industrial Establishments as contemplated by Section 13-B. That contention, therefore, also is of no substance".

(iii) 1980 L.I.C. 160 : M.P.S.R.T. Corporation v. Heeralal and Ors.

The Full Bench has observed in paragraph 13 as under:

"..... We may only add that it is on this principle that regulations made u/s 45(2)(c) of the Road Transport Corporations Act are to be subordinated to Standing Orders on matters specified in the Schedule to the Standard Standing Orders Act unless the regulations are notified u/s 2(2) or Certified as Standing Orders in accordance with the procedure laid down in the said Act."

6. Mr. Daga has heavily relied on the decision reported in. 1989 L.I.C. p. 837 : Berar Oil Industry, Akola v. National Berar Oils Industry Workers Union, Akola. In my view, this decision is distinguishable inasmuch as it deals with the certified Standing Orders as envisaged u/s 123-A, proviso (b), of the Bombay Industrial Relations Act, 1946. In view of this, this decision is not relevant to the facts of the present case. From the above decision it is obvious that between the Municipal Law and Industrial Law, it is the Industrial law which has to be treated as a special law and, therefore, must prevail over the general law, viz., Municipal Law.

7. Sub-section (3) of Section 1 of the Industrial Employment (Standing Orders) Act, 1946, reads as under:

"(3) It applies to every industrial establishment wherein Fifty or more work-men are employed, or were employed on any day of the preceding twelve months;

Provided that the appropriate Government may, after giving not less than two months" notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any Industrial establishment employing such number of persons less than Fifty as may be specified in the notification."

It was never disputed before the Courts below that the present establishment is not an industrial establishment and, therefore, there can be no doubt that the Industrial Employment (Standing Orders) Act, 1946, must apply to the present establishment. Even during the arguments before me it was not urged that the present establishment is not an industrial establishment. However, after the arguments were over, Mr. Daga gave a note disputing that the present establishment is an industrial establishment, as defined in Section 2(e). In my view, it involves a factual aspect and unless the same is raised before the Trial Court it is not possible to entertain such objection in a writ petition after the arguments are over. However, it may be mentioned here that this Court in the decision reported in Pune Municipal Corporation Vs. Keshav Ganpat Bhise and Another, has observed:

"The only other requirement pertains to the question as to whether the establishment in question can be styled an industrial establishment under the said Act. Section 2, Sub-clause (2) defines Industrial Establishment under the said Act, and it splits up into different clauses. Clause (1), however, is more relevant under which an industrial establishment as defined in Sub-clause (2) of Section 2 of Payment of Wages Act is embraced by the concept and definition of Industrial Establishment under the Act. This, therefore, makes it necessary to read the said provision of Payment of Wages Act and under Sub-clause (g) of Section 2(ii) an establishment in which any work relating to construction, development and maintenance of building roads, bridges, etc. arc carried out, it is embraced by the definition of Industrial Establishment. Transplanting this phrase in Section 2(c) Sub-clause (i), as contemplated under that provision itself, it would be clear that the respondent who has been working in the establishment

is concerned with the construction, development of buildings and roads, etc., could be squarely covered (sic). The net result would be that the division or establishment in which the respondent was working is an industrial establishment as defined under the said Act and it has a strength of more than 100 Workers and, therefore, both the requirements of Section 1, Sub-section (3) are satisfied."

In my view, applying the above analogy, there is no reason as to why the present establishment should not be covered by the definition or "Industrial Establishment", particularly when there is already an averment in the complaint that there are as many as 150 employees working with the respondent No. 1, which fact has not been denied in the written statement. It can hardly be disputed that the establishment, where the petitioner is working, is concerned with the development activities. Thus, I am satisfied that the present establishment is fully covered by the definition "Industrial Establishment" as defined in the Act.

8. According to the Model Standing Order No. 3 as framed by the State Government in exercise of the powers conferred by Section 15 of the Industrial Employment (Standing Orders) Act, 1946, under the Bombay Industrial Employment (Standing Orders) Rules, 1959 in Schedule I, workmen has been classified as under:

"3(1) Workmen shall be classified as, (a) permanent workmen;

(b) probationers;

(c) badlis or substitutes;

(d) temporary workmen;

(e) casual workmen; and

(f) apprentices."

The word "Probationer" has also been defined in Clause 2(b) of Model Standing Order No. 3 as under:

"(b) "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 the post."

There is no dispute that the petitioner was appointed in a permanent vacancy for a period of three months. In view of this, there can be no doubt that he was appointed as a probationer and therefore, as per Rule 4-A of the Bombay Industrial Employment (Standing Orders) Rules, 1959, he should have been made permanent as soon as he completed three months" service under the Model Standing Orders. Here a reference may also be made to Model Standing Order No. 1, under Schedule I of the Bombay Industrial Employment (Standing Orders) Rules, 1959, which reads as under:

"1. These orders shall apply to all workmen employed in the establishment to do manual or technical work."

9. Section 123A of the Bombay Industrial Relations Act, 1946, has repealed the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. Sub-section (b) of Section 123-A reads as under:

"(b) any standing order settled, agreement or settlement recorded or registered changes which have come into operation, submissions entered into, awards made or orders passed by the State Industrial Court, a District Industrial Court, the Labour Commissioner, the Registrar or the Wage Board, under the provisions of the Act so repealed shall be deemed to have been settled, recorded or registered, come into operation, entered into, made or passed by the appropriate authority under the corresponding provisions of this Act."

Section 35 of the Bombay Industrial Relations Act, 1946, deals with the settlement of Standing Orders by Commissioner of Labour. In the present case, there is no dispute that there are no Certified Standing Orders and hence the Model Standing Orders alone would apply. There is also no dispute that the provisions of the Bombay Industrial Relations Act, 1946, are withdrawn vide Notification dated 23.5.1968 and, therefore, Section 7 of the Bombay General Clauses Act, 1904, will govern the effect of repeal. After withdrawal of the provisions of the Bombay Industrial Relations Act, 1946, the employees are governed by the Central Act, viz, the Bombay Industrial Employment (Standing Orders) Act, 1946.

10. Mr. Daga submitted that the petitioner did not challenge the reversion order dated 30th July 1985, passed by the Municipal Council. As already stated earlier, the order of reversion was received by the petitioner on 31st July 1985, after the complaint was already filed by him under the Unfair Labour Practices Act. As I have already found above the petitioner was appointed on three months" probation and he would be deemed to have been made permanent by the end of that period particularly when there was no complaint against him and when he was not reverted immediately after the expiry of the period of three months. In view of the legal position as enunciated above the order of reversion is redundant and even if it was not challenged by the petitioner, I do not think it would make any difference. Having regard to these facts, the impugned order is quashed and set aside and the petition is allowed. Rule is made absolute in the above terms.