
(1981) 09 BOM CK 0056

In the Bombay High Court

Case No : Misc. Petition No. 989 of 1978

Ramasamuz Narsing Upadhyaya

APPELLANT

Vs

Vinubhai M. Mitra

RESPONDENT

Date of Decision : 29-09-1981

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25B, 25B(1), 33C(2)
Payment of Gratuity Act, 1972 — Section 4

Citation : (1982) 44 FLR 406 : (1982) 2 LLJ 186

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. By this petition filed under Art. 226 of the Constitution of India, the petitioner is challenging the legality of the order dated September 27, 1977 passed by the Presiding Officer, 4th Labour Court, Bombay whereby the application filed by the workmen under S. 33C(2) of the Industrial Disputes Act, 1947 (hereinafter referred to as the "Act") was dismissed.

2. The petitioner was in the employment of respondent No. 1 mills between January, 1945 and April, 1975 and was drawing daily wages at the rate of Rs. 18. The petitioner tendered resignation in the month of April, 1975 under Voluntary Retirement Scheme. On retirement, the Company paid the petitioner an amount of Rs. 3,260 towards the retrenchment compensation. The petitioner claims that he was entitled to receive a sum of Rs. 8,100 and to recover the balance amount, the petitioner filed the application under S. 33-C(2) of the Act before the Labour Court. The petitioner claimed that he is entitled to retrenchment compensation as per the provisions of S. 25F of the Act. The application was resisted by the respondent No. 1-Mills-Inter-alia claiming that the petitioner had joined the service in January, 1955 but he was not in continuous service till April, 1975. The company claimed that the service of the petitioner was interrupted as the petitioner left the service in the year 1958 and was re-employed. The company also claimed that as the petitioner had not worked for a period of 240 days every year in the years 1948, 1958, 1965, 1967 and 1971 to 1974, the

petitioner could not be deemed to be in continuous service as contemplated by S. 25B of the Act.

3. The Labour Court, after recording the evidence led on behalf of the workman and the employer, came to the conclusion that the contention of the employer that the petitioner was re-employed in the year 1958 could not be accepted. The Labour Court accepted the claim of the mills that the petitioner did not work for a period of 240 days every year in eight years during his service. The Labour Court thereupon held that the claim made by the petitioner that he was in continuous service could not be accepted. The workman had made a grievance that the company had deducted an amount of Rs. 916.88 towards the lay-off compensation while determining the amount of retrenchment compensation and that was contrary to the rules. The Labour Court declined to consider that question on the ground that it was not pleaded in the application filed by the workman.

4. Shri Desai, the learned counsel appearing in support of the petition, submitted that the conclusion recorded by the Labour Court that the petitioner was not in continuous service is clearly erroneous. The learned counsel also challenged the observation of the Labour Court that the petitioner did not plead that the company was in error in deducing lay-off compensation out of the retrenchment compensation. It would be convenient to dispose of the ground about the deduction of lay-off compensation before turning to the main controversy involved in the petition. It is not in dispute that the application did not specifically set out that the deduction of lay-off compensation was not justified but Annexure "A" to the application clearly refers to this deduction while computing the amount claimed by the workman. The Labour Court was clearly in error in taking a hyper-technical view of the pleadings ignoring that while determining the disputes under the Act, it would not be proper to give undue importance to the pleading and ignore the justice to the workman. Apart from that consideration the Labour Court overlooked the specific admission made by Shri Ramnath Upendra Thawly, the Assistant Labour Officer, examined on behalf of the mills before the Labour Court. In paragraph 7 of the deposition in cross-examination, the officer stated -

"We have deducted lay-off compensation out of retrenchment compensation paid to the applicants. There was no agreement for deduction with the Snagh. There is no agreement for deduction with the workers also".

From this admission, it is crystal clear that the employer had deducted the lay-off compensation and the Labour Court was clearly in error in closing its eyes to the reality and proceeding to refuse the claim on the technical ground that it was not specifically pleaded in the application. The deductions by the mills was not supported by Shri Shetye, the learned counsel appearing on behalf of the employer and the learned counsel very fairly stated that the workman would be entitled to that amount of Rs. 916.88.

5. The main question which requires answer in this petition is whether the petitioner could be treated as in continuous service from January, 1945 to April, 1975 for the purpose of determination of quantum of retrenchment compensation under S. 25F of the Act. It would be convenient at this stage to set out the provisions of sub-s. (1) and sub-s. (2) of S. 25-B of the Act to understand the controversy involved in the petition :

"25B. Definition of continuous service :

For the purposes of this Chapter :

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) Where a workman is not in continuous service within the meaning of cl. (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -

(a) for a period of one year if the workman, during period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) One hundred and ninety days in the cases of workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other cases;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than :

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) On hundred and twenty days, in any other case."

6. Definition "continuous service" given under S. 25B of the Act is for the purpose of Chapter VA which deals with "lay-off and retrenchment". Sub-section (1) of S. 25B of the Act provides that the workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service. The question which requires answer in this petition is whether the workman was in continuous service or his service was interrupted service. The Labour Court has recorded a finding that in eight years, the workman had not worked for a period of 240 days every year and the workman had gone on leave which was not authorised. Shri Desai, the learned counsel appearing in support of the petition did not dispute the finding of fact recorded by the Labour Court but submitted that the mere fact that the workman had gone on leave which was not

authorised would not lead to the conclusion that there was a break in the continuous service as contemplated under sub-s. (1) of S. 25B of the Act. The learned counsel urged that the definition under sub-s. (1) is a deeming one and the inclusive definition would not lead to the conclusion that the unauthorised leave would amount to interruption in the continuous service. The learned counsel urged that the continuous service would be interrupted only by two modes and that is by the workman leaving the employment or the employer terminating his service by dismissal or discharge. The submission of the learned counsel deserves acceptance. Section 25B of the Act 36 of 1964 and the contents of sub-s. (1) of the Act were initially included in S. 2(eee) of the Act.

7. Shri Desai relied upon the decision of the Division Bench of this Court in the case of *Jairam Sonu Shogule v. New India Rayon Mill Company Ltd.*, 1958 I L.L.J. 28, where the Division Bench took the view that taking part in an illegal strike amounts to misconduct on the part of an employee and for misconduct an employee invites an order of dismissal; but unless the employee is dismissed from service, it is difficult to see how there could be no continuity of service. In the case before the division Bench, the workman was in service from January, 1945 to the date of his retrenchment which occurred on October 15, 1954. The workman had taken part in a strike between October 6, 1954 and November 24, 1951. The strike was an illegal strike and the claim of the employer was that as the workman was not in service during the period the illegal strike was in operation, the petitioner could not be treated as in continuous service. The Division Bench took the view that once an employee is in service of the company, the employee would continue to be in service until he is dismissed or discharged, The Division Bench observed :

"When a strike takes place and an employee takes part in an illegal strike, at the date when the strike takes place, the employee is in the service of the company and unless an employee is in the service of the company, it is inconceivable that he will take part in a strike while he is not in the service of the company."

The Division Bench considered the definition of "continuous service" as given under S. 2(eee) of the unamended Act and held that taking part in an illegal strike would invite the dismissal but unless the employee is dismissed it cannot be held that there is a break in the continuous service. The decision undoubtedly supports the claim of Shri Desai that under sub-s. (1) of S. 25B of the Act which is in identical terms as that of S. 2(eee) of the unamended Act, the service of the workman cannot be treated as interrupted merely because the worker is on leave which is not unauthorised.

8. Shri Desai also relied upon the decision of the Supreme Court in the case of *Jeewanlal (1929) Ltd., Calcutta Vs. Its Workmen*, , where the Supreme Court was considering the expression "continuous service" in the context of gratuity scheme. The Supreme Court observed :

"Continuous service" in the context of the scheme of gratuity framed by the

Tribunal in the earlier reference postulates the continuance of the relationship of master and servant, between the employer and his employees. If the servant resigns his employment, service automatically comes to an end. If the employer terminates the service of his employee that again brings the continuity of service to an end. If the service of an employee is brought to an end by the operation of any law that again is another instance where the continuance is disrupted; but it is difficult to hold that merely because an employee is absent without obtaining leave that itself would bring to an end the continuity of his service. Similarly participation in an illegal strike which may incur the punishment of dismissal may not by itself bring to an end the relationship of master and servant. It may be a good cause for the termination of service provided, of course, the relevant provisions of the standing orders in that behalf are complied with : but mere participation in an illegal strike cannot be said to cause breach in continuity for the purpose of gratuity."

The observations made by the Supreme Court leave no manner of doubt that merely because an employee is absent without obtaining leave, that itself would not bring to an end the continuity of service. The learned counsel also relied upon the decision of the Supreme Court in the case of Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, and the decision in the case of Mohan Lal Vs. Management of Bharat Electronics Ltd., . Shri Desai relied upon these decisions to point out that cl. (1) and (2) of S. 25-B of the Act provide for two different contingencies and the claim of the workman would not attract sub-s. (2) unless it is held that he was not in continuous service as contemplated by sub-s. (1) of S. 25-B of the Act. In my judgment the submission is correct even on a plain reading of the section. Sub-section (2) opens with the words "where a workman is not in continuous service within the meaning of cl. (1)" and these words unmistakably indicate that the Legislature desired to cover cases even of those workmen who were not in continuous service for the purpose of grant of retrenchment compensation.

9. As observed by the Supreme Court, while considering the social legislation, the Court should lean in giving an interpretation which would advance the cause of justice and in my judgment, the decision of the Supreme Court in the case of M/s. Jeewanlal (1929) Ltd. case concludes the controversy. The mere fact that the workman had not worked for 240 days in some years during his long employment would not debar him from claiming the entire amount or retrenchment as provided by S. 25-F of the Act and the Labour Court was clearly in error in not awarding the retrenchment compensation by taking into consideration the entire period of service from January, 1945 to April, 1975. The mere fact that during some years in this long period, the workman had not worked for 240 days is not a sufficient answer to deprive him of the retrenchment compensation by ignoring the entire period. Once, it is found that the workman is in continuous service, then it is wholly immaterial whether he has worked for a particular number of days in a particular year. The contingency

with demands the worker to work for a period of 240 days as provided by sub-s. (2) of S. 25-B would come into play provided the workman is not in continuous service, as required under S. 25-B(1) of the Act. In the present case it is clear that the workman was in continuous service all along and his claim for retrenchment compensation as made in the application ought to have been granted. There could not be any interruption in the service of the workman because neither he has left the service, nor he has been dismissed for not being on leave which was not authorised and, therefore, the Labour Court was clearly in error in holding that the service of the petitioner was interrupted.

10. Shri Shetye, invited my attention to a decision of the Supreme Court in the case of *Lalappa Lingappa and others v. Laxmi Vishnu Textile Mills Ltd.* [1981-I L.L.J. 308]. The Supreme Court was considering the ambit of Explanation I and Explanation II of sub-s. 2(c) of S. 4 of the Payment of Gratuity Act, 1972. The controversy was about the expression "actually worked" in Explanation II. Though the expression "continuous service" in sub-s. 2 (c) of S. 4 of the Payment of Gratuity Act is in identical terms as under sub-s. (1) of s. 25B of the Act, the question which arises in the present case was neither argued, nor considered by the Supreme Court and, therefore, the decision relied upon by the learned counsel could have no application. In my judgment the controversy stands concluded by the decision of the Division Bench of this Court and by the decision of the Supreme Court reported in 1958 I L.L.J. 28 and *Jeewanlal (1929) Ltd., Calcutta Vs. Its Workmen*, , respectively.

11. Accordingly the petition succeeds and the order dated September 27, 1977 passed by the Labour Court Bombay is set aside. Shri Shetye very fairly did not challenge that the claim of Rs. 2,997.68 made by the workman is accurate and the petitioner would be entitled to that amount in case the decision of the Labour Court is reversed. Accordingly, the rule is made absolute and respondent No. 1 is directed to pay an amount of Rs. 2,997.68 to the petitioner forthwith. In case, the amount is not paid within a period of four weeks from today, the workman would be entitled to an interest at the rate of 12% per annum. The respondent No. 1 is at liberty to deposit the amount in the Labour Court. The respondent No. 1 shall pay the costs of the petitioner.