

(1992) 07 BOM CK 0048

In the Bombay High Court

Case No : Writ Petition No. 2683 of 1983

Raymonds Woollen Mills Ltd.

APPELLANT

Vs

C.S. Sonawane and others

RESPONDENT

Date of Decision : 10-07-1992

Acts Referred:

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

Citation : (1993) 1 BomCR 567 : (1993) 1 LLJ 1162

Hon'ble Judges : Maher, J

Bench : Single Bench

Advocate : Meena H. Doshi, for the Appellant; S.B. Naik, for the Respondent

Judgement

H.H. Kantharia, J.—In this writ petition, the petitioner-employer impugns the judgment and order passed by the learned Member of the Industrial Court, Thane, on June 28, 1983 Appeal (IC) No. 12 of 1982.

2. The 1st respondent-employee (hereinafter referred to as "the employee") was working with the petitioner as Machineman in Shearing Department, according to him, for more than one year and thus was a permanent employee. The petitioner terminated his service on January 9, 1976 all of a sudden without giving any notice or without following any procedure of law. The employee, therefore, addressed an approach letter date February 7, 1976 u/s 42(4) of the Bombay Industrial Relations Act, 1946 and having failed to get any redress filed Application No. 308 of 1976 in the Labour Court at Bombay u/s 78 read with Section 79 of the B.I.R. Act. His case was that the action on the part of the petitioner in terminating his services all of a sudden without following any procedure of law was illegal, improper and in violation of principles of natural justice.

3. The application was resisted by the petitioner and it was its case before the Labour Court that the employee was a badli workman and not a permanent hand. The petitioner admitted that the services of the employee were terminated

on January 9, 1976 but it was done under the provisions of Standing Order No. 19(b) governing the relations between the parties according to which no notice was required to be given to a badli workman before terminating his services. According to the petitioner, therefore, it would not be correct to say that their action of terminating the services of the employee was without following any procedure of law and that the same was illegal, improper and in violation of principles of natural justice and as such the petitioner did not think it necessary even to reply the approach letter addressed to it by the employee.

4.. It is not quite clear as to how the matter was taken from the Labour Court, Bombay, to Labour Court, Thane. But on appreciation of the evidence adduced before him, the learned Labour Judge presiding over the Labour Court at Thane came to the conclusion that the employee was not a permanent hand but he was a badli workman and that there was nothing wrong in terminating his services in the manner in which it was done by the petitioner. Accordingly, by his judgment and order dated July 3, 1982 the learned Labour Judge dismissed the application of the employee.

5. Being aggrieved, the employee filed Appeal (IC) No. 12 of 1982 in the Industrial Court at Thane. On the submissions made before him, the learned Member of the Industrial Court came to the conclusion that the services of the employee were terminated in violation of Section 25F of the Industrial Disputes Act, 1947 and that the action on the part of the petitioner was thus illegal and she accordingly set aside the judgment and order passed by the Labour court and granted relief to the employee of reinstatement with full backwages and continuity of service by the impugned judgment and order.

6. Being aggrieved, the petitioner-employer invoked the supervisory writ jurisdiction of this Court under Article 227 of the Constitution by filing the present writ petition.

7. Now, the first submission made by Mrs. Doshi, appearing on behalf of the petitioner, is that there was no proper pleading by the employee in his application that his services were terminated in violation of Section 25F of the Industrial Disputes Act and, therefore, the petitioner did not have enough opportunity of meeting the case of the employee. Replying upon the judgment of the Supreme Court in Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, Mrs. Doshi submitted that it is a well settled principle of law that the allegation, which was not pleaded, and even if evidence is adduced in that regard, cannot be examined because the other side had no notice of it and if such evidence is entertained it would tantamount to granting unfair advantage to the party who had not pleaded its case properly. There is no dispute about the law enunciated by Their Lordships of the Supreme Court in this regard. But it would be unfair to the employer to say that there was no proper pleading on account of which an opportunity was denied to the petitioner to meet the case of the employee that his services were terminated in violation of Section 25F of the Industrial Disputes Act. A perusal of the approach letter (Annexure B) and the

application (Annexure C) shows that it was the case of the employee that his services were terminated all of a sudden without giving any notice or without following any procedure of law and, therefore, the same was illegal, improper and in violation of principles of natural justice. The only thing which the employee omitted to mention in his application was Section 25F of the Industrial Disputes Act, 1947. Merely because this provisions of law was not mentioned in the application by an employee, it cannot be said that there was no proper pleading, in a case like this, and the petitioner-company here was taken by surprise and could not lead proper evidence to meet the case of the employee that his services were terminated in violation of Sec. 25F of the Industrial Disputes Act, 1947.

8. Mrs. Doshi then submitted that the employee was a badli workman and, therefore, his services could be terminated without giving him any notice and without following any procedure of law according to Standing Order No. 19(b) by which the relations of the parties were governed. I am afraid, there is no substance in the argument of Mrs. Doshi because any Standing Order inconsistent with the substantive provisions of law. i.e. Section 25F of the Industrial Disputes Act, 1947, cannot have any force in law. In fact, u/s 25J of the Industrial Disputes Act, 1947, the provisions of Chapter V-A of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law including Standing Orders made under the Industrial Employment (Standing Orders) Act. 1946. And, therefore, the services of the employee could not have been terminated relying upon the provisions of Standing Order No. 19(b) governing the relationship between the parties. Whatever the Standing Order, the services of an employee who has completed continuous service of 240 days in a year could not be terminated without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947.

9. In this case, admittedly the employee had actually worked as a substitute or a badli workman for 272 1/2 days and had thus completed one year's continuous service and in that view of the matter his services could not have been terminated without following the procedure laid down u/s 25F of the Industrial Disputes Act, 1947. It may also be noted here that Section 25F of the Industrial Disputes Act, 1947 makes no difference or distinction between a badli workman and nonbadli workman. The action of the petitioner in doing so was, therefore, illegal, improper and in violation of principles of natural justice.

10. Mrs. Doshi then urged that the employee could not be granted relief of reinstatement and full back wages because a badli workman is not a full time employee and gets work only when and if a permanent hand is absent and has to be substituted by a badli workman. In support of her contention, Mrs. Doshi first relied upon a Supreme Court Judgment in the case of Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd., . But, I am afraid, the said ruling has no relevance inasmuch as Their Lordships of the Supreme Court in the said case were dealing with Payment of Gratuity Act and while dealing with Section 2(c)

and 4(1) of the said Act observed that a badli workman is not entitled to payment of gratuity in respect of the years in which there was no work allotted to him due to his failure to report for duty. Gratuity is given to a workman for the work that he has done for a certain period of his service and no account of his own failure if he was not given any work, he cannot claim the benefit of gratuity. Therefore, this judgment will be of no use to the petitioner here. Mrs. Doshi then brought to my notice a ruling of a Division Bench of this Court in the case of (Bombay Union Dyeing and Bleaching Mills Vs. Narayan Tukaram More and Another, to submit that badli workman cannot be treated as a person who renders continuous service. This is the judgment from which the matter was taken to the Supreme Court which was referred to above in Lalappa Lingappa's case (supra) and the observations by the Division Bench of this Court were made that a badli worker is not rendering any service when he is not actually employed as a badli worker and, therefore, a badli worker cannot be treated as a person who renders continuous service nor can he be said to be a person with whom there is a subsisting contract of employment while dealing with a case under the Payment of Gratuity Act. And, therefore, the observations made by the Division Bench of this Court do not go to the rescue of the petitioner here. Mrs. Doshi then relied upon a Supreme Court judgment in (Prakash Cotton Mills Pvt. Ltd. Vs. Rashtriya Mills Mazdoor Sangh, in which it was observed that "Badli workmen get work only in the absence, temporary or otherwise, of regular employees, and they do not have any guaranteed right of employment. Their names are not borne on the muster rolls of the establishment concerned. Badli workmen are really casual employees without any right to be employed. They are not entitled to any compensation for the closure." Mrs. Doshi relied upon this observation of the Supreme Court and urged that a badli workman would not be even entitled to compensation in case of closure. That is so because when there is closure of an establishment, a badli workman by the very nature of his status does not get work and if he does not get work the question of giving him compensation does not arise. Mr. Naik, appearing on behalf of the employee, respectfully urged that a reference is made in this judgment about Section 25C of the Industrial Disputes Act, 1947 which deals with right of a workman for compensation during the period of lay off and brought to my notice the Explanation to the said provision of the Industrial Disputes Act and submitted that a badli workman shall cease to be so regarded for the purpose of this section of the Industrial Disputes Act if he has completed one year of continuous service in the establishment and admittedly in the present case the employee had done so. Therefore, once again, this judgment of the Supreme Court also does not help the petitioner in any manner.

11. Mrs. Doshi then urged that as observed by a Division Bench of this Court in Special Civil Application No. 318 of 1976 decided on February 29, 1980, when a badli workman is ordered to be reinstated it only meant restoration of such an employee to the list of badli workers at the serial number at which he was placed on the date on which impugned order was passed and also urged that a badli

workman who has really not worked during the period of his forced unemployment cannot be granted back wages because the same cannot be ascertained. Mrs. Doshi also brought to my notice that the Industrial Court while granting the relief of reinstatement and full back wages to the employee ignored the evidence on record that the employee here had worked for about one and a half years to two years in Modella Woollen Mills, Pratap theatre and Mehul Talkies during the period of his forced unemployment and the money earned by him during this intermittent period should have been ordered to be deducted from the back wages. I find substance in all the three submissions made by Mrs. Doshi but the same can be answered by indicating the mode of execution of the relief granted to the employee and I shall presently point out as to how and in what manner the relief granted to the employee in this case could be implemented.

12. In this view of the matter, the writ petition fails and the same stands rejected. Rule is accordingly discharged with costs of Rs. 2,000/- by the petitioner to the 1st respondent-employee.

13. Now, the Industrial Court had granted the relief of reinstatement and full back wages and continuity of service to the employee. The petitioner is hereby directed to reinstate the employee and restore him to his original position as a badli workman and add his name at the then existing serial number in the list of badli workmen. The question is, how would the petitioner compute the full back wages to be paid to the employee. Admittedly, the employee here had worked for about 15 months as a badli workman with the petitioner. The petitioner is directed to work out average monthly income of the employee and pay to him the accumulated sum of money on that basis right from the day of his termination of services till he is reinstated as if he was in continuous service of the petitioner and had earned so much of the average money monthly. Then, admittedly the employee had worked for 1 1/2 years to 2 years during the period of forced unemployment. He is directed to give account of his earnings during such intermittent period to the petitioner and if he does so the petitioner shall be entitled to deduct so much of the money from the back wages of the employee and if the employee does not co-operate with the petitioner, then the petitioner shall be entitled to deduct the same amount of money which the employee would have earned for 1 1/2 years to 2 years had he been in the continuous employment of the petitioner.

14. If the amount of back of wages ordered to be paid to the employee is such that the same would be taxable under the Income Tax Act, then as the payment to be made to the employee is in reality the payment of arrears of back wages and other monetary benefits, the employee would be entitled to have the same spread over the entire relevant period of the financial/assessment years for which the said payment relates. The employee will be, therefore, at liberty to make an application accordingly to the Income Tax Officer having jurisdiction in the matter for such relief u/s 89 of the Income Tax Act. The concerned Income Tax Officer shall grant to the employee relief according to law within 30 days of

the receipt of the said application.