

(2018) 01 BOM CK 0146
In the Bombay High Court
Case No : 133 of 2007

Sadashiv S/o. Bhaurao Rashinkar Vs Executive Engineer,?Public Works Division,

Date of Decision : 24-01-2018

Acts Referred:

[Industrial Disputes Act, 1947](#), [Section 25](#), [Section 10\(1\)](#), [Section 12\(5\)](#), [Section 2\(s\)](#), [Section 2\(OO\)](#), [Section 25-F](#), [Section 25-G](#) -
Prohibition of financial aid to illegal strikes and lock-outs - Reference of disputes to Boards, Courts or Tribunals - Duties of conciliation officers - Definitions - Definitions

Citation : (2018) 01 BOM CK 0146

Hon'ble Judges : T.V. Nalawade, Sunil K. Kotwal

Bench : Division Bench

Advocate : Pradeep Shahane, R.V. Dasalkar

Final Decision : Disposed Of

Judgement

1. The appeal is filed to challenge the decision of this Court delivered in Writ Petition No.4685/1995. The writ petition was filed by the respondent, Department of the Government to challenge the award delivered by the Labour Court Ahmednagar in Reference (IDA) No.22/1990 dated 26-4-1995. The learned Judge of the Labour Court had given direction to reinstate the appellant with full back wages and continuity in service with effect from 3-5- 1986. This decision is set aside by the learned Single judge of this Court. Both the sides are heard.

2. On the basis of the grievance of the appellant, a reference was made by the Deputy Commissioner of Labour Nashik Division under section 10(1) read with 12(5) of the Industrial Disputes act (hereinafter referred to as "the Act") as under : "Whether Shri. Sadashiv Bhaurao Rashinkar should be reinstated with full back wages and continuity of service with effect from 3-5-1986 ?"

3. It is the case of the appellant that he was engaged in construction activity of the respondent, Department of State Government, and the respondent had employed several thousands of workers on different posts and for that standing

orders were issued. It is his case that he was firstly appointed as daily rated Mazdoor in the year 1979 and he worked continuously till 2-5-1986. It is his contention that he is illegally terminated from service with effect from 3-9-1986. It is his contention that persons who were junior to him were retained in employment and during his service, technical breaks were given. It is his contention that he is entitled to be made permanent but without giving notice of retrenchment and without following the procedure he is terminated, retrenched. It is his contention that there are several posts available with the Department and he is entitled to get one such post on permanent basis.

4. The respondent-Department has denied the aforesaid contentions of the appellant. It is denied that the appellant had worked for 240 days during any calendar year, 12 months prior to the last day of the work. It is contended that as the work was given to him whenever the work was available there was no question of giving notice of termination or retrenchment to him. It is contended that the work was of temporary nature and to the workers like the appellant the work was given at various places. It is further contended by the Department that the appellant did not turn up to get work after 8-6- 1986, he abandoned the work and so he is not entitled to get the relief claimed.

5. To discharge the liability mentioned in section 25-D of the Act, the Department produced various muster rolls. The appellant did not examine any independent witness and he did not produce any record. The learned Judge of the Labour Court has considered different periods like the period from 21-8-1979 to 20-8-1980 and during that period the appellant had worked only for 117 days. During the period from 21-8-1980 to 14-6-1981 he had worked only for 76 days and he had worked only for 14 days during the period from 12-4-1982 to 20-5-1982. The muster rolls for the period 1985-86 were produced but in these muster rolls there is no name of the appellant shown as workman.

6. The burden to plead and prove the case is always on the workman. When the muster rolls were produced it was necessary for the workman, the appellant herein, to substantiate his case but there was no specific pleading and there was no record with him to prove his case. In spite of that the learned Judge of the Labour Court had drawn some inference against the respondent, Department and that is serious error committed by the learned Judge of the Labour Court. The circumstances like the gaps even in the aforesaid periods of work is also not considered by the learned Judge of the Labour Court and these gaps which were not short, show that whenever the work was available it was given to him and those gaps and absence of the name of the appellant in many muster rolls support the case of the Department that the appellant abandoned the work and he did not turn up to get the work.

7. The learned counsel for the appellant took this Court through various provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and submitted in the present proceeding that the order of the learned Judge of the Labour Court does not mean that due to the order, the appellant

was to get permanent job. On one hand he made this submission and on the other, he has produced a copy of Kalelkar Committee Settlement Report which was between the labourers and the respondent, Department of the Government. It was submitted in the year 1967. It can be said that in view of nature of the order made by the learned Judge of the Labour Court the appellant wants to use the said Settlement.

8. The submissions made for the appellant show that the appellant wants to use the order of the learned Judge of the Labour Court to get reinstatement, to get service continuity and for getting appointment on permanent post in time scale. The order was made by the learned Judge of the Labour Court on 26-4-1995 and if the contention of the appellant that he started working from the year 1979 is considered, it can be said that the appellant would be able to use the Kalelkar Committee Settlement which provided for giving permanent post to a daily rated employee who had continuously worked for 10 years. If one completes such service of 5 years, due to this Settlement, he can get job as regular temporary employee in time scale. These circumstances cannot be ignored by any Court including Labour Court but they are ignored.

9. Due to the aforesaid facts and circumstances, the relevant facts of the present matter need to be first ascertained and then the law needs to be applied to those facts.

10. Even in the aforesaid Kalelkar Settlement Report a daily rated employee was not entitled to get wages in respect of the weekly holidays. When there is record to show that the appellant started working as daily rated employee from the year 1979 and the record shows the last date when he worked was 2-5-1986, the learned Judge of the Labour Court ought to have considered the periods of calendar year in view of the provision of the Act. That is not done by the learned Judge of the Labour Court. There is specific case of the respondent- Department that he was given work only when the work was available and so there was no question of avoiding to give work. Thus, in any case it was not possible to have one continuous calendar year in the present matter. Thus, on the basis of the data considered by the Labour Court also it is not possible for the appellant to prove that he had worked for 240 days in any calendar year. Thus, on facts and in applying the law the Labour Court has committed serious error.

11. The case of the appellant that he had approached the Department for getting work after 3-5- 1986 could not have been believed as there is no record in that regard and further there is no independent corroboration to this contention. When he approached the authority with the grievance, the period of more than four years had lapsed from the last day when he had worked for the Department. These circumstances ought to have been given due weight by the Labour Court but those circumstances are ignored by the learned Judge of the Labour Court.

12. It is true that the appellant falls under the definition of "workman" given in section 2(s) of the Act. The respondent, Department has produced the muster

rolls for discharging its liability shown in Section 25-D of the Act. The relevant portions are quoted by this Court.

13. In section 2(oo) of the Act the meaning of "retrenchment" is given as under :

"2. (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health."

It is already observed that for proving termination or retrenchment there is nothing with the appellant. He could have examined at least one workman who was working with him and who was shown on the muster roll but that is not done.

14. In section 25-B of the Act, the definition of "continuous service" is given and the relevant portion is as under: "25-B, 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 lockout 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 clause (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 a 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 case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case.

(b)

Explanation.- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which -

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave, so however, that the total period of such maternity leave does not exceed twelve weeks."

15. Section 25-F runs as under : "25-F. Conditions precedent to retrenchment of workmen,- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b) the workman has been paid at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

16. It is already observed that there is no material with the appellant to show that in any calendar year he had worked for 240 days. There is no material to explain aforesaid gaps. In view of the provisions of the Act and the facts of the present matter, it cannot be said that the appellant was in "continuous service" as mentioned in Section 25-B of the Act.

17. The condition precedent for retrenchment of workman which can be found in section 25-F cannot apply to present matter and also the procedure laid down in section 25-G cannot apply in a case like present one.

18. The learned counsel for the appellant submitted that the learned Single Judge of this Court has committed error in observing that the principles laid down in the case of Secretary, State of Karnataka & Others vs. Umadevi & Others (2006 AIR SCW 1991) are applicable in the present matter. He submitted that the observations made by the Apex Court in the case reported as State of Maharashtra v. R.S. Bhonde ((2005) 6 SCC 751) could not have been used in the

present matter. It is true that the propositions made in those cases are in different context and the provisions of the act which are quoted above need to be considered in the present matter. However, that circumstance cannot change the fate of the present matter.

19. The learned counsel for the appellant placed reliance on the following reported cases.

- (i) 1984 LAB. I.C. 445 (Navbharat, Hindi Daily, Nagpur, v. Navbharat Shramik Sangha)
- (ii) 1999 LAB. I.C. 1125 (Samishta Dube v. City Board, Etawah)
- (iii) 2001 (89) FLR 375 (A.N.Z. Grindlays Bank v. G.S. Grindlays Bank Employees Union)
- (iv) 2003 III CLR 1016 (Gopal v. MDC & Anr.)
- (v) 1996 I CLR 680 (Chief Conservator of Forests & Anr. v. J.M. Kondhare).
- (vi) 2006 LAB. I.C. 893 (Navnath Maruti Chavan v. Conservator of Forest, Pune)
- (vii) 2000 III CLR 773 (P.K. Jadhav & Ors v. R. Chemicals & Fertilizer Ltd.)
- (viii) 1992 I CLR 327 (Pyarelal v. The Municipal Council, Ramtek & Anr.)
- (ix) 1991 II CLR 4 (Chief Officer, Sangli Municipal Council, Sangli v. Daramsing Hiralal Nagarkar)
- (x) 2000 II CLR 600 (Zilla Parishad, Ahmednagar & Ors. R.S. Dukre)
- (xi) 1992 II LLJ 702 (Smt. Pratima Sarkar v. State of West Bengal & Ors.
- (xii) 2000 III CLR 264 (Burroughs Welcome (I) Ltd. v. D.H. Ghosle & Ors)
- (xiii) 1990 I CLR 88 (The Indian Tobacco Co. Ltd. v. The Industrial Court & Ors)
- (xiv) 1990 I CLR 220 (Ichalkaranji Co.op. Spg. Mills Ltd. v. Deccan Co.op Soot & Ors)
- (xv) 1989 I CLR 89 (Laxman Mahadev Teli v. Principal, Shri Pancham Khemraj Mahavidyalaya)
- (xvi) 2000 III CLR 742 (Bijay K. Swain v. Director, Institute of Physics)
- (xvii) 2002 III CLR 743 (Saudi Arabian Air Lines v. Ashok Margovind Panchal & Anr.)

Facts of each and every case are always different. There cannot be dispute over the propositions made in the aforesaid cases. Relevant facts and circumstances of the present matter and the law applicable to those facts are considered. For the reasons given above this Court holds that the learned Single Judge of this Court has not committed any error in setting aside the decision given by the learned Judge of the Labour Court in favour of the appellant. In the result, the

appeal stands dismissed. Pending civil applications stand disposed of.