

(2015) 06 BOM CK 0061

In the Bombay High Court

Case No : Writ Petition No. 5201 of 2011

Shaikh Sabir Lad Mohammad

APPELLANT

Vs

The Commissioner, Ahmednagar Municipal Corporation

RESPONDENT

Date of Decision : 08-06-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 16

Industrial Disputes Act, 1947 — Section 11A, 2(k), 25B, 25-B, 25F

Citation : (2015) 5 BomCR 742 : (2015) 3 LLJ 295 : (2016) 1 MhLj 804

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : P.L. Shahane and Parag S. Shahane, for the Appellant; V.S. Bedre, Advocates for the Respondent

Judgement

R.V. Ghuge, J.—Rule. Rule made returnable forthwith by the consent of the parties and heard finally.

2. The petitioner takes exception to the judgment and award of the Labour Court dated 01/04/2010 delivered in Reference I.D.A.No.39/2004. The reference has been rejected and the prayer of the petitioner seeking reinstatement with continuity and back wages, has been turned down.

3. The contentions of Mr.Shahane, learned Advocate can be summarized in brief as follows :-

(a) The petitioner was working with the respondent/Corporation from 01/07/1989 till his oral termination dated 19/05/1990.

(b) The petitioner has worked in continuous and uninterrupted service of the respondent / Municipal Corporation thereby entitling himself to the benefits and protection of Section 25-B, 25F and 25-G of the Industrial Disputes Act, 1947. (Hereinafter referred to as the Act).

(c) Juniors have been retained in employment in the face of the oral termination

of the petitioner.

(d) The law and procedure laid down u/s 25-F and 25-G of the Act r/w Rule 81 of the Industrial Disputes (Bombay) Rules 1957 have been violated thereby rendering the oral termination of the petitioner as an illegal retrenchment.

(e) Documents directed to be produced by the Labour Court to indicate that Juniors have been retained in employment, were not filed by the respondent / Corporation.

(f) On account of non filing of relevant documents as per the directions of the Labour Court, an adverse inference, which, therefore, establishes the case of the petitioner u/s 25-G of the Act, was required to be drawn.

(g) The impugned judgment and award of the Labour Court is unsustainable and deserves to be quashed and set aside.

(h) Reference I.D.A.No.39/2004 needs to be allowed.

4. Mr.Shahane, has further submitted that an Industrial Dispute was raised by the petitioner in 2004, which was practically 14 years after the alleged oral termination dated 19/05/1990. He submits that there is no limitation prescribed in raising an industrial dispute either u/s 2A or u/s 2(k) of the Act. He, therefore, prays that the petition be allowed.

5. Mr. Bedre, learned Advocate on behalf of the respondent / Corporation has submitted as under :-

(a) The petitioner was never appointed as a "temporary employee" on an available post.

(b) Similarly, he was not appointed as a "Probationer" on an existing permanent vacant post.

(c) The petitioner was appointed as a "Badli Employee" in the place of such permanent workmen who were temporarily absent for specific periods.

(d) He points out from paragraph Nos.8 and 13 of the impugned judgment that the petitioner was apparently appointed only to perform work during the temporary absence of such workmen, who had proceeded on leave.

(e) The petitioner has not disputed the facts recorded by the Labour Court in paragraph No.8 of the impugned judgment, which clearly indicate that he was appointed in place of Hari Jadhav, Sayanna, Horilal and Syed Rashid, who were temporarily on leave.

(f) The petitioner had never worked in continuous and uninterrupted service of the respondent from 01/07/1989 till 19/05/1990.

(g) The petitioner is not entitled to any protection u/s 25-B and 25-F of the Act.

(h) It is not the case of the petitioner that junior employees identically appointed

as like the petitioner, have been continued in service and have been regularized in employment.

(i) Though the petitioner has stated in his evidence by way of an affidavit that Shivnath Patwekar, Dattatraya Kokate, Narayan Harba, Dhananjay Kalamkar, Nitin Vitthal Hucche, Subhash Jagtap, Baban Berad, Chetan Thakur and Rajashri Raut have been appointed after the petitioner was terminated, it is not the contention of the petitioner that they were also appointed as "Badli kamgar".

(j) The entire case of the petitioner is based on the mis-conception that he was appointed as a "temporary or daily wager employee" when, in fact he was appointed as a "badli worker" only to perform duties during the temporary leave enjoyed by some permanent employees.

(k) The reference has been rightly rejected and the petition deserves to be dismissed with costs.

6. Mr.Shahane has placed reliance upon the judgments of the Apex Court, which are as follows :-

(a) Harjinder Singh Vs. Punjab State Warehousing Corporation, AIR 2010 SC 1116 : (2010) 124 FLR 700 : (2010) 1 JT 598 : (2010) 2 LLJ 277 : (2010) 1 SCALE 613 : (2010) 3 SCC 192 : (2010) 1 SCC(L&S) 1146 : (2010) 1 SCR 591 : (2010) 2 SLR 15 .

(b) Director, Fisheries Terminal Division Vs. Bhikubhai Meghajibhai Chavda, AIR 2010 SC 1236 : (2009) 123 FLR 875 : (2010) 1 LLJ 3 : (2010) 157 PLR 243 : (2009) 13 SCALE 636 : (2010) 1 SCC(L&S) 1 : (2009) 15 SCR 761 : (2009) 6 SLR 632 : (2009) 10 UJ 4971 : (2010) AIRSCW 542 .

(c) Regional Manager, S.B.I. Vs. Rakesh Kumar Tewari, AIR 2006 SC 839 : (2006) 108 FLR 733 : (2006) 1 JT 252 : (2006) 1 LLJ 748 : (2006) 1 SCALE 59 : (2006) 1 SCC 530 : (2006) SCC(L&S) 143 : (2006) 1 UJ 617 : (2006) AIRSCW 235 : (2006) 1 Supreme 151 .

7. Mr.Shahane has also relied upon the reported judgments of this Court (Division Bench) which are as follows :-

(a) Navbharat Hindi Daily, Nagpur Vs. Navbharat Shramik Sangha and another, 1984 Lab.I.C.445,

(b) Mackinon Mackenzie Ltd. Vs. G. S. Baj and others, (2006) 4 BomCR 625 : (2006) 3 LLJ 810 : (2006) 4 MhLj 492 .

8. I have considered the submissions of the petitioner and the respondent as well as the reported judgments. It is not in dispute that the petitioner was appointed for specific periods under specific orders which are as follows :-

(a) Order dated 10/07/1989 From 01/07/1989 upto 30/07/1989 in place of Hari Jadhav, who was on leave.

(b) Order dated 21/08/1989 -From 18/08/1989 till 17/09/1989 in place of Sayanna.

(c) Order dated 21/09/1989 -From 15/08/1989 till 14/09/1989 in place of Horilal.

(d) Order dated 09/11/1989 -From 03/11/1989 to 02/12/1989 in place of Syed Rashid.

(e) Order dated 11/12/1989 -From 16/12/1989 to 14/01/1990 in place of Syed Rashid.

(f) Order dated 22/01/1990 -From 16/01/1990 till 15/02/1990 in place of Syed Rashid.

(g) Order dated 17/02/1990 -From 17/02/1990 till 18/03/1990 in place of Syed Rashid.

(h) Order dated 17/03/1990 -From 20/03/1990 to 18/04/1990.

(i) Order dated 28/04/1990 -From 20/04/1990 till 19/05/1990 in place of Narayan Deokar.

9. It is also not in dispute that all the above referred orders were for particular periods specifically mentioned therein and in view of the temporary leave granted to the permanent workmen for the said periods. It is also not in dispute that whenever these permanent employees reported back for duties after the end of their leave period, the petitioner was discontinued on each occasion (8 times).

10. Considering the finding on facts which are not disputed, it is apparent that the petitioner has made an incorrect statement in his statement of claim as well as in the affidavit in lieu of oral evidence contending that he was working in the continuous and uninterrupted employment of the respondent from 01/07/1989 till 19/05/1990.

11. All said and done, the petitioner was not appointed on a permanent vacant post or to perform such work which was perennial in character and continuous in nature. Whenever a permanent employee was sanctioned leave, the petitioner was issued a specific order clearly indicating the tenure of his temporary employment and the reason for such engagement.

12. The Apex Court in the case of Bank of Baroda, Kota Vs. Presiding Officer, CGIT-cum-Labour Court, Kota and another, 2011 CLR 199 has observed in paragraph Nos.8, 9, 10, 11,12, 13, 14 and 15 as under :-

"8. Before averting to the legal issue raise by the appellant as to whether working days under different branches can be considered for determining continuous service of non-appellant-workman, it is necessary to deal with the objection raised by the non-appellant. According to the non-appellant, the issue regarding working days under different branches for determining continuous service was not an issue taken before the learned Labour Court, thus the appellant should not be allowed to raise the aforesaid issue here. A reference of

the judgment in the case of *Krishi Utpadan Mandi Samiti v. Arvind Chaubey and Anr.* reported in : (2002) 9 SCC 549 has been given. A perusal of the judgment of the learned Single Judge, we find that main issue raised in the writ petition was, in fact, determination of the working days under different branches. It shows that the aforesaid issue was decided in the light of two judgments referred therein, thus if judgment impugned herein is looked into, it is based on the issue pertaining to determination of working days under different branches. Learned Counsel for non-appellant could not clarify as to why the objection as has been raised herein was not raised before the learned Single Judge and once he has failed to raise such an objection whether aforesaid issue can be raised now, moreso when no review petition has been filed by the non-appellant. Even if, we look into the facts of the case, it comes out from the statement of the claim filed by the non-appellant that he had worked under different branches. Once the statement of facts has been narrated by the employee-workman himself, if not denied, it is to be taken as correct under the normal circumstances, moreso if the same is proved by the evidence. The issue then remains as to whether working under different branches can be clubbed for determining continuous service. It remains a pure legal issue in those circumstances. In fact, the learned Labour Court ought to have looked into the aforesaid aspect while determining the issue pertaining to continuous service of the workman. Once, a factual aspect comes before the Tribunal, it is under obligation to determine the issue in the light of the settled legal position, ignorance of legal position in determining such an issue cannot be put to the advantage to any party, which would otherwise result in nothing, but perpetuation of the illegality by the superior Court. In the aforesaid background of the case, we are unable to accept the objection raised by the non-appellant. This is moreso when the objection regarding determination of issue of continuous service was not raised before the learned Single Judge. In the case of *Krishi Utpadan Mandi Samiti (supra)*, the issue as to whether Mandi Samiti falls within the definition of "industry" or not, was an issue raised for the first time before the High Court. The Hon'ble Apex Court have taken note of the fact that even the High Court had not allowed to take aforesaid issue for the first time before them and was held that the High Court has rightly denied to enter in that controversy as that was not the issue raised before the Tribunal. The High Court otherwise in other judgment held Mandi Samiti to be an industry, thus in those circumstances the judgment was rendered. In the present matter, the factual position is otherwise. It is a case where even workman came with the case that he was engaged under different branches for different periods, thus in view of the facts, it remains only a legal issue as to whether working under different branches can be taken as continuous service or not. It is a settled position of law that a legal issue can be raised at any stage.

9. In view of the above, we cannot accept the objection raised by the non-appellant regarding argument raised by the appellant for determination of issue of continuous service, more so when non-appellant failed to raise objection before the learned Single Bench.

10. Coming to the main issue raised by the appellant, this Court is to determine as to whether working under different branches can be taken as continuous service as per the provisions of Section 25B of the Act. The non-appellant has made reference of certain documents filed along with the additional affidavit in the appeal. Perusal of the orders issued by the Regional Manager as well as Head Office shows that it only an instruction as to in what manner daily rated or casual employee has to be engaged. In none of the orders passed therein shows that the non-appellant was engaged by the Regional Manager or the Head Office. The circulars or instructions providing guidelines for engagement of the daily rated or casual employee cannot be taken as an order of engagement. Even if, we consider the order dated 31.7.1992 art which much reliance has been placed, firstly it does not show to be an appointment order. Further it was issued for Dabi branch whereas non-appellants lastly engagement in Jhalawar road branch. If the letter dated 31.7.1992 is further looked into, then it demolishes the contentions of the non-appellant because in so many words, it has been stated that in what manner a person can be engaged by the Branch Manager. In such given circumstances, it becomes clear that the engagement of the person is by the Branch Manager only. In view of the aforesaid, it cannot be held that even in the light of the documents filed for the first time by the non-appellant, it cannot be said that the workman was engaged by any other authority than the Branch Manager.

11. We have considered the documents filed by the non-appellant-workman despite the objections raised by the Bank. This is only to avoid hyper-technical approach. Now comes the facts regarding the payment of bonus after taking entire working days of the workman. If we look into the definition clause provided under the Payment of Bonus Act, it becomes clear that working under the different branches, units and establishments is to be taken as one whereas such definition does not exist under the provisions of the Act of 1947. In view of the aforesaid, any action taken under provisions of the Payment of Bonus Act, the non-appellant cannot take benefit for drawing any conclusion under the provisions of the Industrial Disputes when substantially the provisions of the law under two Acts are different. Under the provisions of the Payment of Bonus Act, an employer remains one even if workman has worked under the different branches, units and establishments, then obvious consequence is to count all the workings as per the provisions of the Payment of Bonus Act.

12. Now, considering to the provisions of Section 25B of the Act, if the issue is looked into, it becomes clear that the workman having worked under different branches, his total working cannot be taken into consideration for determining continuous service. The aforesaid aspect has already been dealt with by the Hon"ble Apex Court in the judgments cited before us. In the case of Haryana State Co-operative Supply Marketing Federation Ltd. (supra), the issue was substantially same as existed in the present matter. Therein also the workman had worked under different District Managers controlled by the Managing Director of HAFED, but then it was held that the industrial establishment of the

workman being different, working days cannot be clubbed together. Same view has been taken in the case of Haryana Development Authority (supra) so as in the case of Jummasha Diwan (supra). In the case of DGC Oil and Natural Oil and Natural Gas Corporation Ltd. (supra), the workman had worked under different departments, his working days were not clubbed. The aforesaid aspect has been discussed elaborately and therein it was held that working under different department and at a different places cannot be meant that those working days can be clubbed to take it to be continuous service as per the provisions of Section 25B of the Act. In the light of the judgments referred to above, we hold that working of a workman under different units, branches, departments or establishments cannot be clubbed to reckon his continuous service unless his appointment order issued by one and the same authority.

13. In the light of the aforesaid discussions, we cannot accept the finding of the learned Single Judge. The learned Single Judge has placed reliance of a judgment of the Division Bench of this Court, however, now in the light of the judgment of the Hon"ble Apex Court, we cannot pursue ourselves to follow the Division Bench judgment.

14. The outcome of the discussion is that on taking working of the workman in different branches separately, he has not worked for 240 days in the last employment, thus violation of Section 25F of the Act does not exist.

15. In the light of the discussions made above, we allow the appeal and accordingly set aside the order of the learned Single Judge so as the award of the learned Labour Court. The cost of the appeal is made easy."

13. The Apex Court in the case of Accounts Officer (A and I) APSRTC and Others Vs. K.V. Ramana and Others, AIR 2007 SC 1166 : (2007) 112 FLR 918 : (2007) 1 LLJ 1042 : (2007) 2 SCALE 66 : (2007) 2 SCC 324 : (2007) 1 SCC(L&S) 641 : (2007) 1 SCR 231 , has observed in paragraph No.9 as under :-

"9. In our opinion these appeals have to be allowed. It has been held by a Constitution Bench of this Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, AIR 2006 SC 1806 : (2006) 6 CompLJ 1 : (2006) 4 JT 420 : (2006) 2 LLJ 722 : (2006) 4 SCALE 197 : (2006) 4 SCC 1 : (2006) 3 SLJ 1 : (2006) AIRSCW 1991 : (2006) 3 Supreme 415 that absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or ad hoc employees dehors the rules and constitutional scheme of public employment cannot be granted by the Courts. As regards the circular dated 31.3.1998 the same cannot override Article 16 of the Constitution, and hence regularization cannot be granted under the said circular. Even if the contract labourers or casual workers or ad hoc employees have worked for a long period they cannot be regularized dehors the rules for selection, as has been held in Uma Devi's case (supra)."

14. The Apex Court in the case of Jaipur Development Authority Vs. Ram Sahai and Another, (2006) 111 FLR 1178 : (2006) 9 JT 520 : (2006) 11 SCALE 95 :

(2006) 11 SCC 684 : (2006) 8 SCR 95 Supp has observed in paragraph Nos.4, 9 and 12 as follows :-

"4. The fact that Respondent was appointed on daily wages and he has not completed 240 days, is not in dispute. Retrenchment of Respondent by Appellant, therefore, did not require compliance of the provisions of Section 25F of the Act. Section 25G introduces the rule of "last come first go". It is not a rule which is imperative in nature. The said rule would be applicable when a workman belongs to a particular category of workman. An employer would, in terms thereof, be ordinarily required to retrench the workman who was the last person to be employed in that category. However, for reasons to be recorded, the employer may retrench any other workman. Section 25H provides for re-employment of retrenched workman, which will apply in case where the employer proposes to take into employment any person, an opportunity has to be given to him to offer himself for re-employment.

"9. It is not in dispute that he had not been appointed in accordance with the recruitment Rules.

In the Award of the Labour Court it is stated :

"As per the muster rolls submitted by the respondents/management the working period in September 86 vide Annexure-1 is 25 days, in October 86 vide Annexure-2 is 26 days, in December 86 vide Annexure-4 is 27 days, in January 87 vide Annexure-5 is 27 days, in March 87 vide Annexure-7 is 24 days, in April 87 vide Annexure-8 is 26 days, in June 87 vide Annexure-10 is 26 days. In this manner from September 86 to June 87 the applicant workman worked in total for 181 days. If weekly holidays of 21 days are further included in it, then total of work days comes to 202 days only. Thus it does not make 240 days but it is lesser than it."

He was, therefore, not been regularly appointed. He was not in continuous service. He never made any complaint prior to raising any industrial dispute that Appellant had not complied with the provisions of Section 25G or Section 25H of the Act. The Labour Court committed a serious error in opining that only because his name was not included in the muster roll of July, 1987, the same would amount to removal of his services from the muster rolls. Labour Court should have probed deeper into the matter.

It is one thing to say that the workman is retrenched from his services, but, a daily wager who keeps on coming and going and even has not taken or been given any work on any day on each month, it was not necessary, as had been opined by the Labour Court, to initiate a departmental proceeding against him for his absence from duty. It would have been proper in the aforementioned circumstances for the Labour Court to delve deep into the said question as to whether Appellant deliberately and intentionally did not allow him to join in his duties or Respondent himself did not continue to work since 1.7.1987. Labour Court may be correct in arriving at the conclusion that there was nothing to show

that the provisions of Sections 25G and 25H had been complied, but there is also no finding as to whether in a situation of this nature the same were required to be complied with.

"12. We would, therefore, proceed on the basis that there had been a violation of Sections 25G and 25H of the Act, but, the same by itself, in our opinion, would not mean that the Labour Court should have passed an Award of reinstatement with entire back wages. This Court time and again has held that the jurisdiction under Section 11A must be exercised judiciously. The workman must be employed by a State within the meaning of Article 12 of the Constitution of India, having regard to the doctrine of public employment. It is also required to recruit employees in terms of the provisions of the rules for recruitment framed by it. Respondent had not regularly served Appellant. The job was not of perennial nature. There was nothing to show that he, when his services were terminated any person who was junior to him in the same category, had been retained. His services were dispensed with as early as in 1987. It would not be proper to direct his reinstatement with back wages. We, therefore, are of the opinion that interest of justice would be sub-served if instead and in place of reinstatement of his services, a sum of Rs.75,000/- is awarded to Respondent by way of compensation as has been done by this Court in a number of its judgments. [See State of Rajasthan and Anr. vs. Ghyan Chand [Civil Appeal No.3214 of 2006, disposed of on 28th July, 2006.] This appeal is allowed in part and to the extent mentioned hereinbefore. There shall be no order as to costs."

15. In the light of the above, I am unable to accept the contention of Mr. Shahane that the petitioner was working as a temporary employee or a daily wager and was continued for years with an intention of depriving him of the benefits and status of permanency or that the breaks in his service were of a technical or artificial character which could be disregarded and bridged by the Court to conclude continuance of the petitioner in the uninterrupted employment of the employer.

16. In the light of the facts as are recorded by the Labour Court, I have gone through the Apex Court judgments relied upon by the petitioners as well as the judgments delivered by this Court.

17. In the Harjinder Singh judgment (supra), the petitioner was continued in temporary employment and the Labour Court had concluded that the principle laid down under section 25-G was not followed by the employer. The principle of "last come -first go" was not complied with and similarly situated daily wage employees, junior to the petitioner, were retained in employment by the Punjab Warehousing Corporation. In the instant case, it is not in dispute that the petitioner was appointed under specific orders for specific periods only to perform work during the temporary leave granted to a permanent employee. For similar reasons, the judgment of the Apex Court in the Case of Director, Fisheries (supra) and Regional Manager (supra) would be of no assistance to the petitioner.

18. In so far as the judgment of this Court in the matter of Navbharat Hindi Daily and Mackinon Mackenzie Ltd., (supra) are concerned, the said workman was held to have worked continuously as a temporary employee. Similarly engaged workmen were retained in employment while terminating the workman in utter disregard of seniority and the principle of "last come -First go".

19. As is found in the instant case, neither was the petitioner engaged to perform work available with the employer continuously, nor has the petitioner succeeded in establishing that juniors mentioned in the affidavit in lieu of oral evidence, were also similarly appointed "Badli workers" who had performed work due to the temporary absence of permanent workman and retained in employment. It is, in this backdrop, that I am unable to accept the contention of Mr.Shahane that the Labour Court should have drawn an adverse inference against the respondent/ employer for not producing documents. The impugned Award, therefore, cannot be said to be perverse, erroneous or unsustainable.

20. In my view, an employee, who has been specifically engaged as a "Badli Employee" to perform work available due to sanctioned temporary leave vacancy of a permanent employee, would not be entitled to seek reinstatement with continuity and back wages. His termination, which has occurred at the end of each tenure mentioned in each of the 8 orders of temporary engagements, would not tantamount to retrenchment of the petitioner. In this backdrop, the petitioner cannot be said to be entitled to any benefit u/s 25-F and 25G of the Act.

21. In the light of the above, the writ petition sans merit and is therefore dismissed. Rule is discharged. No costs.