
(2000) 04 BOM CK 0034
In the Bombay High Court
Case No : Writ Petition No. 342 of 1995

Sharad Dinkar Dongare

APPELLANT

Vs

R. V. Ingale and others

RESPONDENT

Date of Decision : 24-04-2000

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42(4), 78, 79, 84
Bombay Industrial Relations Rules, 1947 — Rule 53(1)
Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 25

Citation : (2000) 4 BomCR 702 : (2001) 88 FLR 235 : (2000) 4 MhLj 357

Hon'ble Judges : R. J. Kochar, J

Bench : Single Bench

Advocate : Miss N. D. Buch, for the Appellant; Vineet Naik and Ms. C. Salgaocar-Radia, for the Respondent

Judgement

R. J. Kochar, J.—An order dated 4-7-1984 passed by the Industrial Court, Maharashtra at Solapur has given rise to the present petition under Articles 226 and 227 of the Constitution of India. The learned member had dismissed an appeal filed by the petitioner employee in the Industrial Court u/s 84 of the Bombay Industrial Relations Act, 1946 (hereinafter for short referred to as the BIR Act), to challenge the order of the Labour Court, Solapur passed in the application filed before it by the petitioner-employee.

2. The factual matrix of the petition can be summarised as under :---

The petitioner was appointed by office order dated 25th August, 1983 as a Civil Supervisor for expansion of building for a period of one year at the first instance. From the office order, it is clear that he was appointed for the temporary post of Civil Supervisor and his consolidated salary was Rs. 500/- per month. Clause 3 of the order further clarifies that the petitioner was liable to be terminated from employment before completion of one year with one month's notice if his work was found "dis-satisfactory". The petitioner was appointed on 14th July, 1983

and accordingly he appears to have taken charge from that date. By his letter dated 27th August, 1983, the petitioner requested to pay him Rs. 800/- per month instead of Rs. 500/- per month. According to him that was the negotiated pay at the time of his interview. By a letter dated 29th October, 1983, the petitioner again requested the management of the respondent No. 3, employer, that his probation period of 3 months was completed and that he should be absorbed in regular employment in the post of a senior clerk and he should be given the pay scale of a senior clerk. It further appears from the record that by an office order dated 24th December, 1983, the petitioner was put in a monthly pay scale of Rs. 400/- with effect from 1st December, 1983. The order also reflects that his first annual increment was to be released on 1st December, 1984. The last para of the order further clarifies that the other terms and conditions of employment as enumerated in the office order No. 122 dated 25th August, 1983 will remain unchanged. Immediately thereafter the petitioner has represented to the management that he should be given the pay scale of Junior Clerk. By his next letter dated 16th May, 1984 the petitioner once again requested to the management of the 3rd respondent, employer, that he should be paid variable D.A. and that he should be regularised in employment. Instead of regularising the petitioner in employment, he was given a final blow of termination from employment by a notice dated 29th May, 1984 being effective from 14th July, 1984. Being aggrieved by the said notice of termination, the petitioner addressed a letter of request to the General Manager of the respondent No. 3, employer on 9-6-1984 that instead of discontinuing him from employment, he should be regularised in employment and that his application should be sympathetically considered. Since there was no reply to the said letter of request, the petitioner addressed another letter dated 13th August, 1984, wherein he set out whatever appears to have transpired according to him and finally made a request that he should be reinstated with continuity of service and full back wages and compensation. He had forwarded the copies of this letter to the Government of Labour Officer, Solapur as also to the Commissioner of Labour, Mumbai. This letter is called by the petitioner as a letter of approach u/s 42(4) of the B.I.R, Act. By this letter, the petitioner had approached the respondent No. 3 employer pointing out that the notice of termination dated 29th May, 1984 was illegal and improper. The petitioner having not received any response from the respondent No. 3, employer, to his approach letter, filed an application u/s 79 read with section 78(1) and section 42(4) of the B.I.R. Act, challenging legality and propriety of the notice of termination dated 29th May, 1984 and his final termination with effect from 14th July, 1984. This application was filed on 9th November, 1984. The respondent employer by its written statement contested the application of the petitioner on various grounds. None of the parties adduced any oral evidence before the Labour Court. As far as the preliminary point regarding jurisdiction of the Labour Court is concerned, the learned Advocate for the respondent No. 3, employer has not pressed the same before me. The Labour Court, however, has framed an issue in respect of the application being time barred as was contended by the 3rd respondent, employer

and it was answered in favour of the respondent No. 3, employer. It appears from the discussion of the Labour Court in para 6 of the judgment that the point of limitation has been taken by it to be the date of letter of request dated 9th June, 1984. The period of limitation u/s 42(4) of the Act is computed on and from 9th June, 1984. According to Labour Court, the application ought to have been filed within 3 months from 9th June, 1984 and as it was filed on 9th November, 1984, the application was barred by limitation. This finding of the Labour Court has been confirmed by the Industrial Court in appeal. According to me, both the courts below have committed grave error of law while dismissing the application being barred by limitation, it being filed beyond the period of 3 months from the date of request letter i.e. 9th June, 1984. According to me, the petitioner had only received a notice of termination dated 29th May, 1984 while he was in service and the same was to be effective from 14th July, 1984. While in employment itself, if an employee makes a request to the employer to reconsider or review the decision, it cannot be treated as a letter of approach and limitation of 3 months cannot be computed therefrom. The whole philosophy of the B.I.R. Act is based on mutual relations. It is always beneficial for mutual good relations between the employer and the employees that the employees make a request or a representation to the employer bringing to his notice the grievances or complaints. In the present case, on receipt of the notice of termination dated 29th May, 1984, the petitioner employee had pointed out to the General Manager of the respondent No. 3 that the notice to terminate him was not proper and that his case should be considered sympathetically. He had also pointed out in his letter that he was novice in the town and that he would not find a new job elsewhere. By his letter he has invoked the sympathies of the employer and he has not tried to assert his legal rights. He, perhaps, would not have prayed for reinstatement in that letter as he was already in the employment. He has appealed to the good conscience of the employer for reviewing or revising its decision to terminate his employment from 14th July, 1984. If such a request letters or representations made by the employees are to be termed as approach letters u/s 42(4) of the B.I.R Act, in that case, all the doors of the mutual and informal dialogue would remain closed for ever. I, therefore, do not hold that the said letter can be considered to be a letter of approach u/s 42(4) of the B.I.R. Act. Even technically speaking, the said letter cannot be termed as a letter of approach as no copies thereof have been forwarded to the appropriate authorities under the B.I.R. Act. The courts below, therefore, were wrong in computing the period of limitation u/s 79 from the date of the said letter of request. According to me, the period of limitation u/s 79 read with section 42(4) would commence from the letter dated 13th August, 1984 which can be safely termed as a letter of approach u/s 42(4) of the B.I.R. Act. It complies with the formal requisition of the prescribed rules as copies of this letter have also been forwarded to the prescribed authorities under the B.I.R. Act. According to me, this is the letter of approach proper u/s 42(4) of the B.I.R. Act and limitation of 3 months to file an application u/s 79 read with section 78 of the B.I.R. Act would commence therefrom. By computing the period of limitation

from 13th August, 1984, the application being filed u/s 79 of the B.I.R. Act on 9th November, 1984, therefore, is well within the period of 3 months set for limitation. According to me, therefore, the application is not barred by limitation as the same is filed within the prescribed limitation period of 3 months from the date of the letter of approach.

3. Even considering the question of limitation from an entirely another angle, I am satisfied on law that there is no delay of any nature in filing the present application by the petitioner. One of the ground of challenge to the order of termination is violation of section 25-F of the Industrial Disputes Act, 1947 (hereinafter for short referred to as the I.D. Act.). There is no dispute and it is clear from the face of the notice of termination that it is a simple termination which is being attacked as an illegal order of retrenchment being in violation of section 25-F of the I.D. Act. The question of retrenchment will not be covered within the meaning of section 78(1)(A)(a)(i) which reads as under :---

"the propriety or legality of an order passed by an employer acting or purporting to act under the standing order."

Obviously the impugned notice of termination does not fall under this clause to attract the point of limitation as prescribed under Rule 53 of the B.I.R. Rules. If the impugned notice of termination is not covered to be an order under the standing orders in that case, the period of 3 months prescribed under the said rule will not be applied. For ready reference Rule 53(1) is reproduced below :---

"(1) Any employee or a Representative Union desiring a change in respect of (i) any order passed by the employer concerned under standing order or (ii) any industrial matter arising out of the application or interpretation of standing orders or (iii) an industrial matter specified in Schedule III shall make an application in writing to the employer. An application for change in respect of an order passed by the employer under standing orders shall be made within a period of three months from the date of _such order. Where such application is made by an employee it may be made to the employer direct or through the Labour Officer for the local area or the representative of employees concerned. A copy of the application shall be forwarded to the Commissioner of Labour and in cases where such application is not made through the Labour Officer for the local area to that officer."

(emphasis is given by me)

The grievance of the petitioner, therefore, would be shifted to the provisions of section 78(A)(a)(iii) of the B.I.R. Act. The petitioner is desiring a change in respect of his employment, including reinstatement as prescribed under Item 6 of Schedule HI of the B.I.R. Rules. The petitioner is challenging the legality or propriety of the order of retrenchment and his dispute would squarely fall under Item 6 of Schedule 3 of the Rules read with section 78(1)(A)(a)(iii). I am making it further clear that any order of retrenchment cannot be construed to be an order passed under the standing orders and in that case the dispute would be

squarely covered by the aforesaid provisions. If any employee desirous to challenge such an order of retrenchment, his dispute will be governed by Rule 53(1)(iii). On reading the entire Rule 53 it is clear that the period of limitation is prescribed only for an order which is passed or purported to be passed under the standing orders. There is no period of limitation of 3 months from the date of any order contemplated under the said rules. In respect of other matters any aggrieved employee can send a letter of approach under Rule 53 under Schedule III of the Act at any time and thereafter can file an application u/s 79 of the Act within 3 months from the date of such approach. It is significant to note that there is no limitation period for approaching the employer for a grievance which is covered under Schedule III of the Act. The limitation prescribed, however, is for filing an application before the Court u/s 79 of the Act. Such a limitation is 3 months from the date of the approach letter. In the present case, the dispute of the petitioner not being covered by section 78(A)(a)(i) and being covered by section 78(A)(a)(iii) it will fall under Item 6 of Schedule III of the Act, and therefore, even though last approach being made on 13th August, 1984, the application was well within the limitation period of 3 months. The petitioner's application, therefore, could not have been dismissed by the Labour Court on the ground of limitation.

4. Considering the question of limitation from a third angle again I find it difficult to throw the petitioner's application out of Court on the ground of limitation. The notice of termination dated 29th May, 1984 was to be effective from 14th July, 1984. It is, therefore, clear that the real cause of action to challenge the event of termination has taken place on 14th July, 1984. Any correspondence on the part of the employee before the said date cannot be considered to be a letter of approach u/s 42(4) of the B.I.R. Act. The real dispute would arise only after the cause of action or the event of termination takes place and in our case it was 14th July, 1984. Soon thereafter, the petitioner has sent a letter of approach on 13th August, 1984 and thereafter within 3 months, the petitioner has filed an application before the Labour Court. Considering this question of limitation from all the angles, the application is not barred by limitation at all. Both the courts below have committed grave error of law in dismissing the petitioner's application u/s 78(1) read with section 79 of the B.I.R. Act on the ground of limitation.

5. Now, as far as the merits of the case are concerned, the facts are crystal clear. The petitioner was appointed as a temporary Civil Supervisor for expansion of the for expansion of the factory premises. Initially he was appointed for one year. Though by an order dated 24th December, 1983 he was fixed in a pay scale, all other terms and conditions of appointment order dated 25th August, 1983 have been kept unchanged. It means that his nature of temporary employment has not been changed. He continued to be a temporary Civil Supervisor for expansion of the building. What the respondent No. 3, employer has done by its office order dated 24th December, 1983 is to convert his salary into a fixed pay scale instead of consolidated salary of Rs. 500/-. This office order nowhere states that he was

being made permanent or he was being absorbed in regular employment. It is to the contrary that the nature of his temporary employment is kept unchanged. Even the petitioner has not understood that he was permanent by the aforesaid order as by his subsequent letter dated 16th May, 1984 he requested that he should be made permanent. It is, therefore, difficult to agree with the contention of Ms. Buch that by the office order dated 24th December, 1983, petitioner was absorbed in permanent or regular employment, merely because he was given a fixed pay scale. He, still, was continued to be a temporary employee as the expansion of the building work was not completed. The contract of employment initially was for a period of one year i.e. from 14th July, 1983, to 14th July, 1984 on which date his services were discontinued. Since the petitioner was specifically appointed only for a period of one year at the first instance as a temporary Civil Supervisor and since his employment was discontinued as a temporary Civil Supervisor for want of work of expansion of the building, it cannot be said that the petitioner ought to have been continued as a permanent employee. As has been found by the Labour Court that the appointment of the petitioner was for specific purpose for supervising the expansion of building and when that work was over and no fresh building work was available, he could not have been foisted on the respondent No. 3, employer. The petitioner was all along claiming to be absorbed in the clerical category though he was appointed as temporary Civil Supervisor to supervise the work of expansion of the building. It is not the case of the petitioner also that the work of expansion of the building was continuing and was all along available and therefore, he should have been continued further. It is as simple as that the petitioner's employment was discontinued as soon as the work of building expansion was completed. The respondent No. 3 employer had given him a notice dated 29th May, 1984 to discontinue or terminate the employment of the employee i.e. the petitioner. The only mistake the respondent No. 3 committed was that it did not offer him retrenchment compensation by way of 15 days wages for having completed one year's continuous service as contemplated u/s 25-F of the I.D. Act. The clear position is that there is violation of section 25-F of the I.D. Act on the part of the respondent employer and at the same time there is no work of a Civil Supervisor to supervise the building expansion undertaken by the respondent No. 3 employer. In these circumstances, according to me, though the termination order is technically, illegal the petitioner cannot be reinstated as there is no post or work of a Civil Supervisor available in the respondent No. 3 employer. Strictly speaking, in these circumstances, the petitioner does not get a right of reinstatement at all. The concept of reinstatement is clear. The dismissed/retrenched/discharged employee is restored to his original position by reinstatement in the post from which such employee was removed. In our case the post from which the petitioner was discontinued was only a temporary post for temporary period. It was not a permanent or regular post in the cadre of the respondent No. 3 factory. The petitioner was employed only for a temporary period for supervision of the building expansion work. Though strictly speaking the order of termination does not comply with mandatory provision of section 25-

F of the I.D. Act, at the most, the petitioner would get the a reasonable amount of compensation for violation of section 25-F of the I.D. Act by the employer. There is no place or post or work of Civil Supervisor where the petitioner can be reinstated. Merely because, the petitioner has been trying to get absorbed in some clerical cadre, it cannot be said that the respondent employer is bound to employ him in any such clerical cadre and no such legal mandatory directions can be issued. According to me, therefore, the petitioner cannot be reinstated as Civil Supervisor and the respondent employer cannot be directed to reinstate the petitioner as Civil Supervisor for building expansion work. At the most the respondent employer can be directed to pay a reasonable amount of compensation for having committed an illegality in not complying with section 25-F of the I.D. Act i.e. by not making an offer of 15 days wages to the petitioner at the time of termination of his service. Ms. Buch has fairly stated that the petitioner has already reached the age of superannuation on 30th November, 1998 and therefore, there will not be any question of reinstatement today. She has, however, pressed for full backwages from the date of termination i.e. 14th July, 1984 to 30th November, 1998. This figure, as calculated by the respondent employer is Rs. 3 lakhs approximately. The respondent employer has also calculated an amount of Rs. 62,000 approximately being the computation of other benefits during this period. According to Ms. Buch this amount was the amount of arrears of pension. It was however, disputed by Mr. Naik on behalf of respondent No. 3 that the said amount of arrears of pension as there was no scheme pension applicable. Since, I have already held that there is no question of reinstatement of the petitioner, according to me, there is no question of consequential benefits for the relevant period. Considering the entire amount of backwages, which admittedly is Rs. 3 lakhs approximately and considering the technically illegal order of termination, according to me and in the interest of justice, if an amount of Rs. 1,50,000/- is granted to the petitioner it will meet the ends of justice. I, therefore, award an amount of Rs. 1,50,000/- to the petitioner. I direct the respondent No. 3, employer to deposit the aforesaid amount of Rs. 1,50,000/- to the in this Court in three installments of Rs. 50,000/- each within a period of 3 months from today. The respondent No. 3 employer shall complete the whole payment by 31st July, 2000.

6. The petition is disposed of in the aforesaid terms with no orders as to costs. Parties to act on a copy of this order duly authenticated by the Shirestedar of the Court.

Order accordingly.