
(2003) 01 BOM CK 0134
In the Bombay High Court
Case No : Writ Petition No. 792 of 1994

Shashikant Govind Malgaonkar	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25B, 25B(2), 25F

Citation : (2003) 1 ALLMR 810 : (2003) 3 BomCR 22 : (2003) 2 MhLj 437

Hon'ble Judges : D.B. Bhosale, J

Bench : Single Bench

Advocate : N.M. Ganguli, V.S. Deshpande and Poojari, for the Appellant; S.K. Chinchalkar, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.B. Bhosale, J.—The petitioner has impugned the award dated 5th March, 1993 passed by the Presiding Officer, Labour Court, Kolhapur in the reference made for adjudication under Sections 10(1) and 12(5) of the Industrial Disputes Act, 1947 (for short "I.D. Act") regarding the demand of the petitioner for reinstatement with continuity of the service and full backwages.

2. The factual matrix giving rise to the dispute reveals that the petitioner was in the employment of respondent No. 1 from 1st January, 1972 to 31st May, 1986 with seasonal breaks from June to September in few years. The petitioner claims that he had good record of service and his superiors were satisfied with his work. He was initially employed as a River Gauge Recorder (Assistant) and sometimes as Supervisor. The petitioner was terminated on 31st May, 1986 when he was holding the post of Mukadam. It is the case of petitioner that he was initially appointed on daily wages from 1-1-1972 and was continued without any interruption or break in service upto 31st May, 1974. During that period his services were under Dudh Ganga Project. The petitioner was thereafter given so called seasonal break from 1st June, 1974 to 30th September, 1974 and was re-appointed on 1st October, 1974 by the Executive Engineer, Irrigation Division,

Radhanagari. The petitioner continued to work under him till 31st May, 1986 when he was terminated as a Mukadam. Two irrigation projects were going on in Kolhapur District at the relevant time. One such project was known as Dudh Ganga project for which there was an Executive Engineer as its Head and the second project which was known as Radhanagari Dam Strengthening Works, there was another Executive Engineer as its Head. Both these Executive Engineers were under one Head of the Department being the Superintending Engineer.

3. The termination of the petitioner was oral. The petitioner, in the writ petition has given a chart showing the period of his employment, month wise / year wise along with total number of days of his employment under the Executive Engineer, Kolhapur, Irrigation Department. The chart given in the writ petition reads as follows :

From To Type Total number of days employment

1-1-1972	1-1-1973	1-1-1974	1-10-1974	1-1-1975	1-10-1975	1-1-1976
1-10-1976	1-1-1977	1-10-1977	1-1-1978	1-10-1978	1-1-1979	1-10-1979
1-1-1980	1-10-1980	1-1-1981	1-10-1981	1-1-1982	9-3-1982	1-10-1985
1-1-1986	13-3-1986	31-12-1972	31-12-1973	31-5-1974	31-12-1974	31-5-1975
31-12-1975	31-5-1976	31-12-1976	31-5-1977	31-12-1977	31-5-1978	
31-12-1978	31-5-1979	31-12-1979	31-5-1990	31-12-1980	31-5-1981	
31-12-1981	8-3-1982	31-5-1985	31-12-1985	11-1-1986	31-5-1986	Whole year - do-
Seasonal	Seasonal					

Seasonal

Seasonal

Seasonal

Seasonal

Seasonal

Seasonal

Seasonal

monthly scale Seasonal 1985

243

243

243

243

243

243

243

243

243

It is the case of the petitioner that the orders were issued from time to time and on some occasions they were issued on monthly basis. He, however, has stated that orders were not issued in writing when he was employed and continued on daily wages. However, the petitioner has not placed any such order appointing him on monthly basis on record. The petitioner has, thus, contended that he was in the employment of respondent No. 1 from 1st January, 1972 to 31st May, 1986 with seasonal or artificial breaks. According to the petitioner, he did complete more than 240 days in number of years and whatever breaks or interruption was there it was either on account of seasonal breaks or at the instance of respondent Nos. 1 and 2 but it was never caused at his instance. The petitioner has also contended that some similarly situated workers were given different treatment and they were made permanent by the respondents and in view thereof he raised Industrial Dispute u/s 10 of the I.D. Act claiming reinstatement with full backwages and continuity of service from 1-6-1986. Since the Conciliation Officer submitted failure report, the State Government referred the dispute for adjudication to respondent No. 3. The petitioner filed his statement of claim in justification on 25th April, 1988. Respondent No. 2 filed his written statement contesting the claim of the petitioner. The petitioner did adduce oral and documentary evidence. Having considered the case on merits the Labour Court, Kolhapur, rejected the reference by its Award dated 5th March, 1993. Being aggrieved by the said Award, the petitioner has approached this court under Articles 226 and 227 of the Constitution of India.

4. I heard Mr. Ganguli, learned counsel for the petitioners, Mr. Chinchalkar, learned A.G.P. for the respondents, perused the writ petition and documents annexed thereto.

5. Before I advert to the merits of the case it would be proper if I deal with preliminary issue raised by Mr. Chinchalkar, learned A.G.P. for the respondents that the Irrigation Department is not an "Industry" within the meaning of the provisions of Section 2(j) of the I.D. Act and in view thereof the reference itself is bad in law and, therefore, the petitioner is not entitled for any relief whatsoever in the present writ petition. Mr. Chinchalkar has placed reliance on the order of the Apex Court in *Executive Engineer, (State of Karnataka) v. K. Somasetty and Ors.* 1997 (2) L.J. 698. The Apex Court in the report has held that the Irrigation Department of the State is not an "Industry" under the I. D. Act. The short judgment given in the report reads thus :

"1. Leave granted.

2. The respondent was appointed on daily wages in a project taken up by the appellant on July 25, 1986. The respondent was discharged from the work on its

closure on January 15, 1989. Thereafter, he approached the Labour Court u/s 10 of the Industrial Disputes Act. On a reference, the Labour Court held that the respondent is entitled to continuity of service with backwages since it amounts to dismissal. The order was confirmed by the learned single Judge of the High Court subject to payment of 50% of the backwages. Writ Appeal No. 878/96 was dismissed by the Division Bench. Thus, this appeal by special leave.

3. It is now well settled legal position that the Irrigation Department and Telecommunication Department are not an "Industry" within the meaning of definition under the Industrial Disputes Act as held in *Union of India v. Jai Narain Singh* (1995) Suppl (4) SCC 672 and in *State of Himachal Pradesh Vs. Suresh Kumar Verma and another*, . The function of public welfare of the State is a sovereign function. It is the constitutional mandate under the Directive Principles, that the Government should bring about welfare State by all executive and legislative actions. Under these circumstances, the State is not an "Industry" under the Industrial Disputes Act. Even otherwise, since the Project has been closed, the respondent has no right to the post since he had been appointed on daily wages. It is brought to our notice that respondent has been reinstated. The order of the reinstatement has been placed before us which indicates that at the threat of contempt of Court, the order has been enforced. It is stated therein that it is subject to the final order of this Court in this appeal.

4. Under these circumstances, the appeal is accordingly allowed. The order of the Labour Court stands set aside. The order and judgment too stand set aside."

6. He further placed reliance on the order of the Apex Court in *Union of India (UOI) Vs. Jai Narain Singh*, . The short judgment in the report reads thus :

"1. Delay condoned. Special leave granted.

2. We have heard both the learned counsel, for the Union of India (the appellant) and the respondent. We have not the slightest hesitation in holding that the Central Ground Water Board is not an industry. The contrary finding rendered by the Tribunal in the impugned order is incorrect. It follows Section 25-F of the Industrial Disputes Act, 1947 will have no application. Accordingly, the appeal deserves to be allowed and is hereby allowed. However, we may add that having regard to the length of service of the respondent, this is a fit case in which the appellant must take sympathetic attitude and appoint him as a fresh candidate as a Helper and his service is to reckon only from the date of his appointment. We are informed by the learned counsel for the respondent that the said post has been redesignated as Technical Operator (Drilling). The appointment order should be issued on or before 31-3-1994. We make it clear that he shall have no claim for backwages in relation to the earlier service rendered by him."

7. As against this Mr. Ganguli, learned counsel for the petitioner placed reliance on the judgment of the Apex Court in *Des Raj and Ors Vs. State of Punjab and Ors*, . The Apex Court in the report has taken a view that the main function of the Irrigation Department when subjected to the dominant nature test clearly

come within ambit of "Industry". It may be noted that the judgments relied upon by Mr. Chinchalkar, learned A.G.P. in the case of Executive Engineer, State of Karnataka (supra) and Jai Narain Singh (supra), the earlier judgment of the Apex Court in the case of Des Raj was not considered at all.

8. Similar situation arose before this court in Executive Engineer, Yavatmal Medium Project Division and Another Vs. Anant Murate and another, . This court after having considered the several judgments of the Apex Court including the judgments cited by learned counsel in the instant writ petition for both sides has taken a view that the principle laid down in Des Raj's case (supra) is better in point of law and hence it is the view of Des Raj's case which will have to be followed. Paragraph 13 in the case of Executive Engineer, Yavatmal Medium Project Division and Anr. (supra) reads thus :

"13. On considering all the concepts of industry and after reviewing the various tests which need not be repeated, as the tests were laid down in Bangalore Water Supply case (supra). The concept of sovereign and regal function was explained in Chief Conservator of Forests (supra). The Apex Court in para 13 specifically rejected an argument that welfare activities partake sovereign functions on the ground that if such a view was taken it would be eroding the view taken by it in Bangalore Water Supply's case. While observing that welfare activities partake sovereign functions the Apex Court did not notice this in Sub-Divisional Inspector of Post, Vaikam and others (supra). Therefore, considering the various precedents of the Apex Court itself it is clear that the law declared by the Apex Court is that welfare activities do not necessarily partake sovereign functions. In Executive Engineer, State of Karnataka, the reliance was placed on the judgment in the case of Union of India v. Jai Narain Singh (supra). In Union of India v. Jai Narain Singh, the Apex Court has merely noted that the Central Ground Water Board is not an Industry. It is not possible to discern from that judgment as to what were the reasons for the Apex Court to so hold. The other judgment relied on is that of State of Himachal Pradesh v. Suresh Kumar Varma and Anr. (supra). On a perusal of the fact and the law laid down it does not seem that the issue as to whether a particular department was an industry or not was in issue. What was in issue was whether the work charged employees who perform duty of transitory nature were appointed to posts and their appointments were on daily wage basis in an appointment to a post. The Apex Court therein noted that such appointments were not appointments to the posts and, therefore, no directions could have been given to re-engage them in any work or appoint them against existing vacancies. Thus the two judgments relied upon by the Apex Court to arrive at the conclusion arrived at in Executive Engineer, State of Karnataka (supra), nowhere have laid down the tests to hold as to why Irrigation Department is to be excluded from the definition of industry. As pointed out earlier, even the case of Sub-Divisional Inspector of Post, Vaikam and Ors. was considered by the Apex Court in Physical Research Laboratory and explained the same in paragraph 10 of the judgment. After that, it proceeded to apply the tests as laid down in Bangalore Water Supply. In the case of Des Raj v.

State of Punjab (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself culminating in the judgment in Bangalore Water Supply (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 20 of the I. D. Act. I am, therefore, of the considered opinion that the view laid down in Des Raj's case is the better in point of law and hence it is the view in Des Raj's case which will have to be followed. Once it is so held and as I have already set out earlier the work of the Irrigation Department of the State of Punjab and the material placed before this Court including the written submissions filed on behalf of the petitioners show that the projects undertaken by the irrigation department of the State of Maharashtra is discharging the same or similar functions as the Irrigation Department of the State of Punjab. It, therefore, follows that the projects of the Irrigation Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2 of the I. D. Act."

9. Rebello, J., amongst several cases considered for arriving at the conclusion, had also taken into account the judgment of the Full Bench of this court in case of Kamleshkumar Ishwardas Patel Vs. Union of India and others, , The Full Bench of this court noted that what is binding under Article 141 of the Constitution of India is law declared by the Supreme Court. In the case where the High Court is confronted with two conflicting judgments, the principles have to be carved out as to which judgment to be followed when contrary decisions of the Supreme Court emanate from Benches of equal strength. After considering the various judgments and reproducing the various paragraphs from the judgments of the Calcutta High Court in Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others, , the Full Bench of this Court concurred with the law as enunciated in Bholanath's case. The proposition that was accepted in Bholanath's case was that if contrary decision of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. However, when such contrary decisions of co-ordinate Benches cannot be reconciled then the High Court is not necessarily to follow the one which is later in point of time, but may follow the one which in its view is better in point of law. I find no reason to disagree with the view taken by Rebello, J., in the case of Executive Engineer, Yavatmal Medium Project Division and Anr. (supra). In view thereof, I am, also of the considered opinion that the view laid down in Des Raj's case will have to be followed. The projects of the Irrigation Department or work connected with the State of Maharashtra would, therefore, fall within the definition of an Industry for the purpose of Section 2(j) of the I. D. Act.

10. Mr. Ganguli, learned counsel for the petitioner on merits submitted that having considered the entire service of the petitioner from 1st January, 1972 to 31st May, 1986, his service ought to have been computed as continuous service

and given benefit of Section 25-F of the I. D. Act. In support thereof, he further submitted that right from the year 1972 till 31st December, 1986 he had worked almost in all years for more than 240 days and, therefore, his service ought to have been treated as continuous service within the meaning of Section 25-B(2)(a) (ii). Mr. Ganguli based his argument on the inspection report which has been proved by the petitioner in his evidence and which is a part of record. He submitted that the inspection report shows that the petitioner did work for 240 days and in view thereof was entitled for claiming continuity of service and permanency with effect from 1st June, 1986. He also submitted that entire burden was on the department to justify the decision of termination and that the same was legal and proper after leading positive evidence to that effect, There was no reason to terminate the petitioner abruptly in 1986. Mr. Ganguli in support of his contention relied upon the judgment of the Apex Court in *The Workmen of American Express International Banking Corporation v. The Management of American Express International Banking Corporation* 1985 (II) CLR 269. The submission of Mr. Ganguli on the basis of the report was that Section 25-F of the I. D. Act is plainly intended to give relief to retrenched workmen. The qualification for relief is that he should be a workman employed in an industry and has been in continuous service, as defined and explained in Section 25-B of the I. O. Act, for not less than one year under the employer. Mr. Ganguli also placed reliance upon unreported judgment of this court dated 10th April, 1986 in Writ Petition No. 1797 of 1996 in *Gundu Babu Patil and Ors. v. Government of Maharashtra and Ors.* wherein this court had taken a view that once it is held that the concerned employee has completed 240 days in a year, the burden would automatically shift upon the respondents to show as to why, despite work being available for 240 days in a year, the concerned employee had not been made permanent.

11. In opposition, Mr. Chinchalkar, learned A.G.P. appearing for the respondents at the outset submitted that the petitioner had failed to prove that he worked for more than 240 days either preceding the date of his termination or during the earlier years. The respondents in their written statement and also before the Labour Court has specifically denied that the petitioner had completed 240 days of service in a year during his tenure right from 1975 till 1986. Mr. Chinchalkar also has placed reliance on the notes of inspection produced by the petitioner which according to him do not indicate that the petitioner did work for 240 days in a year right from 1975 till 1986. He placed reliance on the judgment of Apex Court in the case of *Mohan Lal Vs. Management of Bharat Electronics Ltd.,* .

12. Though the petitioner has claimed in writ petition that he worked for more than 240 days in almost all years since 1972 till 1986, no material is placed on record in support thereof The only document produced on record by the petitioner to support his contention was the inspection notes. Perusal of the inspection notes indicate that from 2nd October, 1979 till 31st March, 1986 the petitioner did not work for 240 days at all in a year much less the last 12 months preceding his termination. As a matter of fact the inspection notes show that the

petitioner worked for 95 days during 1-4-1985 and 31-3-1986 on daily wages. The notes further show that the period during 1975 and 2nd October, 1979 the breaks given to the petitioner were between three months to 15 months which cannot be termed as notional break. Taking the breaks given, into consideration the petitioner cannot be said to have worked for more than 240 days during the period from October 1975, and 2nd October, 1979. Though the petitioner has contended that he worked even prior to 1975, namely during 1st January, 1972 to 31st December, 1973, and that he worked continuously for two years without any break, in his examination in chief he has stated that he was appointed by the 1st party i.e. by Respondent No. 2 in 1975 as casual labourer. He has not produced anything on record that he did actually worked under respondent No. 2, prior to October 1975.

13. Section 25-F of the I. D. Act provides that 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 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 workmen has been paid in lieu of such notice, wages for the period of the notice. It further provides that the workmen has been paid, at the time of retrenchment, compensation which, shall be equivalent to 15 days average pay for every year of continuous service or any part thereof in excess of six months, and that the notice in the prescribed manner is served on the appropriate Government. According to the petitioner no compliance has been made by the respondents as contemplated in Section 25-F. The expression "continuous service" appearing in Section 25-F has been defined u/s 25-B. Under Sub-section (1) of Section 25-B a workman is 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 authorized 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. It further provides that where a workman is not in continuous service within the meaning of Clause (1) of Section 25-B for a period of one year or six months, he shall be deemed to be in continuous service under an employer for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to calculation is to be made, has actually worked under the employer for not less than 240 days. Mr. Ganguli placed reliance on this provision and contended that, workman shall be said to be in continuous service, if the services are interrupted due to cessation of work which is not due to fault of the workman, his services should be treated as continuous service within the meaning of Section 25-B. Though the proposition of law canvassed by Mr. Ganguli is correct, it would be very difficult to apply to the facts of the present case. As observed earlier the petitioner was daily rated worker and he did not complete 240 days of service in a single year since 1972 and 1986 much less during the period of 12 calendar months preceding the date of his termination and, therefore, in my view no benefit could be given to the petitioner of Section 25-F by treating him a

workman in continuous service. Moreover, in the present case the services of the petitioner were not interrupted due to cessation of work, but on account of completion of the project. It is not disputed that the workmen are engaged on daily wages in respect of construction of irrigation projects. These projects do not provide work of permanent nature. Moreover it is not disputed that the petitioner is not covered by Kalekar Award.

14. The proposition of law laid down in *The Workmen of American Express International Bank Corporation* (supra) may not be of any use to the petitioner. The qualification for relief u/s 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service is defined u/s 25-B of the I. D. Act. Keeping in view the said provision and the facts of the present case the petitioner cannot be said to have completed continuous service for 240 days in a year. The Apex Court in *Mohanlal v. Bharat Electronics Ltd.* (supra) has held that "the period of 240 days is required to be completed preceding the date of retrenchment. Under Sub-section (2) of Section 25-B the workman shall be deemed to be in continuous service under an employer if for a period of one year or six months, as the case may be 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 240 days." Applying the said principle, the petitioner cannot be said to have completed 240 days in 12 calendar months preceding the date of retrenchment.

15. In the result, writ petition is dismissed. No order as to costs. However, before I part, it would not be inappropriate if I observe that the respondents may consider and accommodate the petitioner in future, if the vacancy is available, in any of the projects of the Irrigation Department of the Government of Maharashtra.

No orders as to costs.