

(2008) 06 BOM CK 0121

In the Bombay High Court

Case No : Writ Petition No. 1310 of 1999

Shri Arvind G. Chaudhari Sub-Divisional Officer Irrigation,
Sub-Division and The Executive Engineer, Jalgaon Irrigation
Division

APPELLANT

Vs

Dhanraj Nathu Patil and The Presiding Officer

RESPONDENT

Date of Decision : 24-06-2008

Acts Referred:

Constitution of India, 1950 — Article 227, 41
Industrial Disputes Act, 1947 — Section 10(1), 2, 25B, 25F
Maharashtra Employment Guarantee Act, 1977 — Section 11, 11(1), 16, 3, 5
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 3(5)

Citation : (2008) 5 ALLMR 89 : (2008) 5 BomCR 106 : (2008) 110 BOMLR
2224 : (2008) 118 FLR 850 : (2008) 3 LLJ 477 : (2008) 6 MhLj 746

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : D.R. Shelke, for the Appellant; V.Y. Patil, Advocate for Respondent
No. 1 and D.V. Tele, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

P.R. Borkar, J.—By this Writ Petition the original respondents are challenging the order passed by the Judge, Labour Court, Jalgaon in U.L.P. No. 52 of 1995 on 07.10.1998 whereby directions are given to the petitioners not to indulge in unfair labour practice and to reinstate respondent No. 1 in service with continuity of service within a month from the date of receipt of the order. However, the prayer of respondent No. 1 for back wages was rejected.

2. Briefly stated, present respondent No. 1 approached the Labour Court stating that he had been in employment of the petitioners since 15.07.1979 as a Muster Assistant till 30.04.1984 continuously. However, thereafter, the petitioners started giving him breaks. He was again appointed on 26.02.1985 and again the petitioners in order to deprive him benefits of permanent employee with mala

fide intention showed technical breaks and terminated his service w.e.f. 04.12.1986. His last drawn wages were Rs. 300/- per month. He had completed more than 240 working days in each year since 1979 to 1986. While terminating the services of the complainant, one month's notice was not given in advance. No pay in lieu of notice was paid. No retrenchment compensation was paid. Thus, there was violation of Section 25-F of the Industrial Disputes Act (I.D. Act). Juniors to respondent No. 1 were retained in service, whereas respondent No. 1's services were terminated. His name was not taken on C.R.T.as per Kalelkar Award. No enquiry was held. No charge-sheet was served on respondent No. 1. Thus the petitioners have indulged in unfair labour practice.

3. The learned Labour Judge held that respondent No. 1 has proved that he had been in employment as Muster Assistant with the petitioners from 15.07.1979 to 04.12.1986 and had completed 240 days of work in the last year. It is held that argument by the petitioners that respondent No. 1 is not an "employee" within the meaning of Section 3(5) of the M.R.T.U. and P.U.L.P. Act and "workman" u/s 2(s) of the I.D. Act has no merit. It may be noted that it is not disputed that the petitioner was working under the employment guarantee scheme which was being implemented by the petitioners. It was also defence that the labour laws are not applicable to respondent No. 1, but it is held that they are applicable. The defence that the Collector and the State Government are necessary party, was also turned down and ultimately the order as stated earlier was passed.

4. In this case, it is argued before me on behalf of the petitioners that the Employment Guarantee Scheme is governed by the provisions of the Maharashtra Employment Guarantee Act, 1977 and the rules and scheme framed thereunder and the persons working under the said scheme are not governed by the provisions of the M.R.T.U. & P.U.L.P. Act or the I.D. Act, as the Employment Guarantee Scheme run by the Government is not an industry. It is also argued that in the termination letter the reason given was that the project was complete and under these circumstances even assuming that respondent No. 1 worked for 240 days in the year preceding termination and was thus in continuous service within the meaning of Section 25-B of the I.D. Act, still there could not have been reinstatement. The complaint was bad for non-joinder of the necessary parties as much as it is the Collector, who is responsible for implementation of the Employment Guarantee Scheme and not the petitioners and in these circumstances the order passed by the Labour Court is illegal and the same be quashed and set aside. On the other hand it is argued by the learned advocate for respondent No. 1 that the order is legal and proper. The Employment Guarantee Scheme is an industry. The labour laws are applicable. It was an illegal termination.

5. Since questions of law of importance have arisen, A.G.P. Shri Tele is heard as amicus curiae on behalf of respondent No. 2 along with advocates of parties. However, in this case no reply affidavit is filed by the respondents and we are concerned mainly with legality of the order of the Labour Court.

6. Reliance is placed on the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, . The relevant portions from para Nos. 14 and 15 are reproduced below:

14. Viewed in the context of the facts of the present case it is apparent that the schemes under which the petitioners were given employment have been evolved to provide income for those who are below the poverty line and particularly during the periods when they are without any source of livelihood and, therefore, without any income whatsoever. The schemes were further meant for the rural poor, for the object of the schemes was to start tackling the problem of poverty from that end. The object was not to provide the right to work as such even to the rural poor-much less to the unemployed in general....

..if the sources used for the Jawahar Rozgar Yojna were in their entirety to be used for providing full employment throughout the year, they would have given employment only to a small percentage of the population in need of income, the remaining vast majority being left with no income whatsoever. No fault could, therefore, be found with the limited object of the scheme given the limited resources at the disposal of the State. Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. It is wrong to approach the problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts, in the context of such schemes are both unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation. They would benefit a few at the cost of the many starving poor for whom the schemes are meant. That would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources. This is not to say that the problems of the unemployed deserve no consideration or sympathy. This is only to emphasise that even among the unemployed a distinction exists between those who live below and above the poverty line, those in need of partial and those in need of full employment, the educated and uneducated, the rural and urban unemployed etc.

15... Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation

knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back-door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of discriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts.

In the result, the requests for regularising the petitioners/workmen who claimed to have right to be absorbed as regular employee and injunction prohibiting termination their services and claiming difference of daily wages of regular employees were turned down. It is, however, ordered that if they have registered with the Employment Exchange, they may be kept on panel and preference be given in employment whenever vacancy arises in regular course.

7. The learned advocate for respondent No. 1 has relied upon case of Chief Executive Officer, Zilla Parishad Vs. Daulat Narsingrao Deshmukh and Another, . This is a judgment of this Court. (Coram : Dr.D.Y. Chandrachud,J.). It was a Writ Petition arising out of decision of the Presiding Officer of the First Labour Court, Ahmednagar in Reference (IDA) No. 25 of 1992. Therein, first respondent was engaged initially as a writing Mukadam on a work charged establishment under an order issued by the Deputy Engineer, Zilla Parishad, Minor Irrigation Sub-Division, Shrigonda. In August, 1976 he was engaged as a Mustering Assistant for the purpose of work which was to be executed under Employment Guarantee Scheme. He was continued to work as the Muster Assistant till 30.06.1986. However, he was not engaged in between 21st July, 1984 until 31st December, 1985. Upon termination, a reference was made u/s 10(1) of the I.D. Act. The Court considered the scheme framed under the Maharashtra Employment Guarantee Act, 1977. The Court referred to the case of Delhi Development Horticulture Employees Union referred to above. The Court also referred to other cases. Ultimately, the Court also observed in para (8) that a scheme has been formulated by the State Government on 1st December, 1995 and 21st April, 1999 for the purpose of regularisation of the services of Muster Assistants and it would be proper if the case of the first respondent was considered in the light of the said Government Resolution. With said observations the Writ Petition was disposed of. However, in said matter the main question which is raised before this Court viz. whether the M.R.T.U. and P.U.L.P. Act and the I.D.Act are

applicable to persons working under the Employment Guarantee Scheme is not answered.

8. This Court in Writ Petition No. 847 of 1996 along with other cases decided by common judgment on 18.08.2001 and 30.08.2001 (Coram : A.P. Deshpande, J.) has considered the entire law on the subject. In that matter the Member, Industrial Court, Ahmednagar had allowed a complaint filed under Item 5,6 and 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971. Respondents therein had been working as Muster Assistants and they had filed complaint stating that they had been appointed as Muster Assistants on the Employment Guarantee Scheme. They were entitled to permanency, but they were continued as temporary and therefore they wanted conferment of status of permanency and all benefits flowing therefrom. The Court considered various authorities including the case of Chief Executive Officer, Z.P. Ahmednagar (Supra), Delhi Development Horticulture Employees' Union (Supra) and other cases. It ultimately came to the conclusions in para 14 and 15 which are reproduced below :

(14)... The approach of the learned Industrial Court in the present matters is toeing in line with the approach of the learned Single Judge, M.F. Saldhana, J., and as the judgment of this Court in Subhash Ahirrao's Case (supra) is set aside by the Apex Court, it is obvious that the said reasons were disapproved by the Apex Court and, in this view of the matter, it is not possible to come to the conclusion that the Muster Assistants who were factually working on the Employment Guarantee Scheme were not appointed under the Act or the Scheme...

(15) From the discussions made herein above, I have no hesitation to conclude that the appointments of the respondents/employees were made on the regular establishment of the State Government but the appointments were made on various works carried on under the Employment Guarantee Scheme and, in this view of the matter, provisions of the M.R.T.U. & P.U.L.P. Act and Industrial Disputes Act are not applicable, as has been also held by my learned Brother, J.A. Patil, J. in Writ Petition No. 703 of 1997 and similar batch of petitions. Having concurred with the view taken by J.A. Patil, J. and Dr. D.Y. Chandrachud, J., that the work undertaken under the Employment Guarantee Scheme is not an industry, I need not deal with other submissions made by the learned Assistant Government Pleader....

9. In para 16 it is further specifically held that the Employment Guarantee Scheme is not an industry and all the respondents/Muster Assistants were in employment on the work and/or project undertaken under the Employment Guarantee Scheme. However, the Court observed in para 17 that they were entitled to be absorbed in regular service in accordance with the scheme prepared by the State Government.

10. Thus this Court has taken a view that the persons working under the Employment Guarantee Scheme are not governed by the provisions of the

M.R.T.U. and P.U.L.P. Act and the I.D. Act. The Employment Guarantee Scheme is not an industry and as such the Labour Court and the Industrial Court will not have jurisdiction to give reliefs which the Labour Court has given in this matter to present respondent No. 1.

11. It is further argued before this Court that the termination letter dated 04.12.1986, copy of which is produced on record at the time of arguments and marked "X", shows that since the work undertaken under Employment Guarantee Scheme was (to be) closed, the termination notice was given w.e.f. 04.12.1986. It may be noted that the impugned order is dated 04.09.1986, and it does give notice of almost three months. Reliance was placed by A.G.P. Shri D.V. Tele on the case of IRCON International Ltd. v. Daya Shankar and Anr. AIR 2002 S.C. 2404, in which it is laid down that whenever a project comes to an end, question of automatic continuation of project employees after duration of project is over, does not arise. In other words, if the work/project is over, employees need not be continued.

12. Reliance was also placed on the case of Branch Manager, M.P. State Agro Industries Development Corpn. Ltd. and Another Vs. Shri S.C. Pandey, . In that case, it is laid down that where appointment is contrary to the provisions of the statute, the same would be void and effect thereof would be that no legal right could be derived by the employee by such appointment. In this case it is not case of the respondent that his appointment was after following necessary procedure. He approached the Labour Court with a case that since he had been in continuous service for more than one year within the meaning of Section 25-B, he is entitled to protection of Section 25-F of the I.D. Act. In the same ruling it is also laid down that daily wager does not hold a post as he is not appointed in terms of the provisions of the Act and rules framed thereunder and therefore he does not derive any legal right. It is further laid down that the appointment to the post of temporary employee can be made where the work is essentially of temporary nature. The learned A.G.P. also referred to law laid down in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , in support of his arguments that temporary employee who is not appointed by following regular procedure does not have right of permanency.

13. It is also argued before this Court that this Writ Petition is not tenable as u/s 44 of the I.D. Act, revision is provided to the Industrial Court. In the first instance, by this Writ Petition, the very jurisdiction to entertain the complaint under the M.R.T.U. & P.U.L.P. Act to the Labour Court is challenged. It is argued that the Industrial Court or the Labour Court have no jurisdiction so far as employment under the Employment Guarantee Scheme is concerned.

14. The learned advocate for the respondent No. 1 has relied upon a case of Clifford Rebello v. Hotel Oberoi Towers 2001 3 CLR 805. In that case the Court held that writ petition is not tenable as there was alternate remedy u/s 44 of the I.D. Act and therefore writ petition should not be entertained. The learned A.G.P. appearing for the petitioner has relied upon a case of Balasaheb Pawar and

others Vs. The State of Maharashtra and others, in support of his argument that revision would not have been alternate, efficacious remedy when jurisdiction itself is challenged and the writ petition can be entertained. The jurisdiction of the Labour Court and the Industrial Court to entertain the matter is challenged before the this Court and therefore the Writ Petition is tenable.

15. It is argued by the learned advocate for respondent No. 1 that under Government Resolution dated 21.04.1999 and 01.12.1995, copy of which are produced on record and marked "Y" & "Z" respectively, the directions are given for absorption of Muster Assistant working under the Employment Guarantee Scheme. In the first place, the Employment Guarantee Scheme is not operated by the present petitioners and in-fact, the objection regarding non-joinder of necessary parties is regarding the same. The State Government and the Collector ought to have been made parties because the Collector is the implementing agency responsible for the Employment Guarantee Scheme. The learned advocate for the petitioner emphatically stated that the present respondent No. 1 is not governed by either of the two Government Resolutions. As per Government Resolution dated 21.04.1999, it is applicable to those persons who were working as Muster Assistant on 31st May, 1993. Present respondent No. 1 was not working on that day. Similarly, the learned advocate stated that the Government Resolution dated 01.12.1995 is also not applicable to present respondent No. 1 whose services were terminated w.e.f.04.12.1986.

16. Moreover, this writ petition is directed against the order passed by the Judge, Labour Court which was necessarily under the provisions of the I.D. Act, because breach of Section 25-F of the I.D. Act is alleged. This is a petition necessarily under Article 227 of the Constitution of India. It is filed by the petitioners. Respondent No. 1 is not entitled to raise new points without necessary material on record, simply by producing some Government Resolutions on record at the time of arguments. So, no relief can be granted to the petitioner in the circumstances of the case.

17. Perusal of the Maharashtra Employment Guarantee Act, 1977 (referred to as "the Act" hereinafter) indicates that there is substance in the arguments advanced before this Court that the State Government and the Collector ought to have been made parties. The relief which respondent No. 1 claims cannot be claimed against the present petitioners who were original opponents before the Labour Court. Preamble of the Act itself makes it clear that the Act was passed as it was expedient to make effective provisions for securing the right to work laid down in Article 41 of the Constitution of India by guaranteeing employment to all adult persons who volunteer to unskilled manual work in the State Government. The object is to bring durable assets for the benefit of the community and the economy and to provide for continuing employment of surplus rural manpower in cottage, village and small industries and in agro-industries.

18. Section 3 of the Act guarantees the employment to every adult person in the

rural areas in Maharashtra. It assures guaranteed employment for doing unskilled manual work. u/s 5 the District and Panchayat Samiti Level Committees are formed and as per Section 6 the Collector of the district shall be responsible for the implementation of the scheme for the district and for this purpose all other officers of the State Government, Zilla Parishad and other local authorities and/or bodies functioning in the district and having for their jurisdiction an area not bigger than the District shall be responsible to the Collector. So, this makes it clear that it is the Collector who is implementing authority. Section 7 deals with preparation and publication of the scheme. The duty of the Collector is to prepare blue prints of the work to be taken up etc. Section 7 gives details regarding how the scheme is to be implemented. Section 8(7) of the Act lays down that it is lawful for the Collector to issue directives to the Village Panchayats to take up works as are prescribed.

19. Section 11 of the Act is also important for our consideration. It lays down whenever any work taken up under the scheme is completed and it is no longer possible to provide unskilled manual employment on such work, it shall be the duty of the implementing officer concerned to report this fact to the Collector as well as the Samiti Officer concerned. It shall be the duty of the Samiti Officer to direct the persons employed on such works as any other work already taken up under the Scheme or to a work to be started under the Scheme with the sanction of the Collector or of the State Government, as the case may be. So, Section 11(1) clearly lays down that whenever work taken up under the scheme is completed, providing alternate work is the duty of the Collector or Samiti Officer, so the Collector was the necessary party to the present petition.

20. Section 16 of the Act lays down that the provisions of this Act or the Scheme, rules, notifications or order made or issued thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of such law. So respondent No. 1 at the most would be entitled to benefits of rules, notifications, orders made or issued under the Maharashtra Employment Guarantee Act, 1977. He is not entitled to get relief by resorting to the M.R.T.U. & P.U.L.P. and the I.D. Act, as held by the Courts in the cases quoted above.

21. With the above observations the Writ Petition is allowed. The judgment and order passed by the Labour Court, Jalgaon in Complaint U.L.P. No. 52 of 1995 is quashed and set aside.

22. Rule made absolute. Parties to bear their own costs.