

(1991) 03 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 572 of 1988

Subhash Narayan Ahirrao

APPELLANT

Vs

Dy. Engineer P.W.D., Sub Division and Another

RESPONDENT

Date of Decision : 22-03-1991

Acts Referred:

Maharashtra Employment Guarantee Act, 1977 — Section 8

Citation : (1991) 3 BomCR 593

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : Neeleema Dutta and Anand Grover, for the Appellant; J.C. Satpute A.G.P., for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—This is a petition filed under Article 226 of the Constitution of India and is directed against an order dated 8-3-1988 of the Industrial Court at Nasik. The petitioner was employed as Muster Assistant by the Deputy Engineer, P.W.D. Sub-Division, Dhule, who is the respondent No. 1 to this petition. It is the case of the petitioner that he was appointed on 4-8-1981 as a muster assistant and that he was doing the work of maintaining the muster roll of persons working under the Employment Guarantee Scheme. According to the petitioner, apart from entering the attendance of the workers, the muster assistant had to supervise the workers employed under the EGS, that he was also required to take measurements of the work done by the employees and to assist the Deputy Engineer in measuring the work done. It is his case, that he was continuously employed from 4-8-1981 until 30-6-1986 i.e., for a period of almost five years when his service came to be terminated. On 15-7-1986, the petitioner received an order appointing him for a period of two months, i.e. upto 30-9-1986. His service were terminated on 31-8-1986. On or about 23-10-1986, the petitioner filed a complaint in the Labour Court on the ground that his services have been wrongly terminated. On or about 1-11-1986, the petitioner was once against

employed by the respondent No. 4 for a short period of a few months and was thereafter discontinued on the ground that the Employment Guarantee Scheme work had been completed and that there was no scope to continue with the services of the petitioner. This pathetic set of facts, ironically signifies the callousness with which a State authority indulges in the operation of hire and fire, lamentably, while executing schemes which are supposed to guarantee the right to work to the poorest strata of society.

2. All through this period, the appointment letters very clearly specified that the appointment is of a temporary nature and that the petitioner was being employed on a consolidated salary of Rs. 200/- per month which was raised to a princely sum of Rs. 300/- per month subsequently, at the same time, with the clarification that he was not entitled to any T.A. or D.A. during his duties. How the man and his family were supposed to survive on these conditions is something that was foreign to the concerned authorities who, in their anxiety, to "safeguard" their position imposed certain other humiliating terms whereby the tenure of his employment was dependent on their largesse. The appointment letters also stated that the right is reserved to terminate his services at any time without assigning any reasons. It is a matter of deep regret, to say the least, that a Government authority under the guise of providing employment to a young man hailing from the weakest sections of society should have imposed on him conditions of this type. It was considerations such as these which impelled the Supreme Court to apply the doctrine of unconscionability to contracts relating to employment, particularly in cases where there are glaring inequalities between the contracting parties. In the Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , the Supreme Court clearly enunciated the principle that in the circumstances such as these, where the employee had no option but to submit to whatever terms were incorporated in an unfair contract that the courts should not enforce the offending parts of such a contract or hold it against the employee.

3. The petitioner in this case filed a complaint before the Labour Court at Nasik, being Case No. 260 of 1986 under the provisions of the MRTU and PULP Act, 1971. Briefly stated, it was the case of the petitioner, that his services had wrongly been terminated in so far as he had been continuously in service between the period 4-8-1981 and 31-8-1986 and that there was no justification for the termination. He essentially contended that since he has put in more than 240 days in a working year, that he is entitled to protection of the Industrial Disputes Act and that consequently, the Court should order his re-instatement in service. The trial Court by an order dated 6-10-1987 directed the respondents to reinstate the petitioner with continuity of service without back wages and to desist from unfair labour practices. Against this order, a revision application being Revision Application No. 68 of 1987 was filed before the Industrial Court at Nasik u/s 44 of the Act. The Industrial Court essentially held that section 16 of the Employment Guarantee Act contained a specific recital that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other

law for the time being in force or in any instrument having effect by virtue of such law. By virtue of that provision, the Industrial Court held that the EGS Act shall prevail over the provisions of the MRTU and PULP Act and consequently, allowed the revision application and set aside the order dated 6-10-1987 passed by the Labour Court. It is against this order that the present petition has been filed.

4. The first contention advanced by Ms. Dutta, learned Counsel appearing on behalf of the petitioner is that the authorities in this case have proceeded on the assumption that the petitioner is a temporary employee and that consequently, he is disentitled from claiming any protection in matters relating to security of tenure of employment and allied issues, Ms. Dutta, has contended, that the petitioner cannot be deprived of the protection available to him under the provisions of section 25 of the Industrial Disputes Act in so far as admittedly, he has put in over 240 days in the employment of the respondents to stick to the letter of appointment or for that matter to the fact that the petitioner was sought to be re-employed from time to time in so far as the petitioner was a person virtually at the receiving end and had no control over the manner in which the respondents treated him. Basically, this Court would have to look to the record and if it is established that the petitioner was in the continuous employment of the respondents for a period of over 240 days per working year, and if the petitioner has been, as in the present case, in such employment for several years, right that had accrued to him by operation of law will have to be recognised and the appointment letters, re-appointment letters etc., will have to be ignored in so far as they are in contravention of existing legal provisions.

5. In support of this argument, Ms. Dutta, has relied on the decision of the Supreme Court in the case of People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, , which was a landmark judgment essentially upholding the concept of the right against exploitation which is enshrined in Article 23 of the Constitution. Undoubtedly, Article 23 of the Constitution has been, to some extent, hitherto in the background, and the Supreme Court in this case very rightly highlighted the spirit embodied in Article 23 which deprecates and prohibits exploitation of any form with particular reference to the sphere of all types of activities touching human labour. The learned Counsel has drawn my attention to a subsequent decision to the Supreme Court in the case of Sajeet Roy v. State of Rajasthan, reported in AIR 1983 S.C. page 238. The Supreme Court in that case was basically concerned with the question relating to the validity of the exclusion of Famine Relief Workers employees from the purview of the Minimum Wages Act. The State of Rajasthan had promulgated a legislation called. The Rajasthan Famine Works Employees (Exemption from Labour Laws) Act, 1964. Bhagwati, J., (as he then was) held that it violated Article 23 of the Constitution and relied on the earlier decision of the Supreme Court in the Peoples Union v. Democratic Rights, case. Pathak, J., (as he then was) also concurred with the view that the Act was unconstitutional but struck it down on the ground that it offended the provisions

and that it was violative of Article 14 of the Constitution.

6. Dealing with the provisions of the Industrial Employment (Standing Orders) Act. Ms. Dutta contended that the petitioner before the Court would be entitled to be treated, as a permanent workman; not as a casual workman or a temporary workman and on completion of 240 days in a period of 12 months by such workman, that he will be entitled to be confined in his service. Ms. Dutta, has relied on a Division Bench decision of this Court in the case of Suresh Nerkar & others v. Food Corporation of India & others, reported in 1984 Labour Industrial Cases, page 267. In that case, the dispute before the Court related to the nature of the employment, it being contended that the type of jobs that were assigned to the workmen provide a test and in so far as the work was not of a casual nature nor was it additional work by virtue of a temporary increase, that he would be entitled to claim permanency. The Division Bench did uphold the contention of the petitioners because it was found that the Food Corporation of India had employed them in jobs that would normally be assigned to regular employees and there appeared little justification for designating them as casual or temporary workmen.

7. The facts of the present case are distinguishable because it is contended by the department that the petitioner was employed for purposes of supervision of the Employment Guarantee Scheme projects which are temporary by nature and are required to be occasionally taken up at certain times when the economic situation so demands, such as when because of failure of monsoon or other calamities, there is large-scale un-employment in an area and that, the projects are time-bound and, therefore, cannot be attributed to any of the features of a permanent scheme. The Division Bench decision of this Court is, therefore, distinguishable and in any event, it is unnecessary to advert to the provisions of the Industrial Employment (Standing Orders) Act because, the petitioner is entitled to succeed in this petition on the basis of some of the other grounds which are far more substantial.

8. Another submission advanced on behalf of the petitioner by Ms. Dutta virtually touches the factual aspect of the case. She has contended that the Maharashtra Employment Guarantee Act, 1977, deals with the manner in which the Employment Guarantee Schemes are to be implemented. A perusal of the provisions of the Act will indicate that the petitioner who was a muster clerk, did not come within the purview of this Act at all. The implementation of the Employment Guarantee Scheme was in the hands of some of the Government Departments and the persons who form the nucleus of the Employment Guarantee Scheme were the unemployed villagers who were guaranteed certain assignments and a remuneration for the work put in by them. The petitioner, admittedly, was not an unskilled manual labourer nor was the petitioner paid daily or weekly wages at the scale provided by the scheme. The learned counsel, therefore, contends that on facts, the petitioner's contention that the limitations that are inbuilt within the Act cannot in any manner defeat the petitioner's claim

that he was essentially an employee of the department and not a casual employee forming part of the Employment Guarantee Scheme.

9. As against this submission, Mr. Satpute, learned Assistant Government Pleader has seriously contested the factual position. He relies on the record and the affidavit in reply and on the letters of appointment, re-appointment, etc., and strongly contends that admittedly, the petitioner was exclusively in charge of the supervision of the Employment Guarantee Scheme work. He has relied on the department's directions which clearly specify that the job such as that of the muster clerk which the petitioner was performing was to be assigned to those among the available EGS workers who had certain minimum educational qualifications which thereby entitled those persons to be made the supervisors, instead of having to do manual work. Mr. Satpute contends, therefore, that a scrupulous examination of the actual nature and function of the petitioner's job must lead to the irresistible conclusion that he was employed for the scheme, that he was part of the scheme, that his tenure of service could only be coextensive with the scheme and that in any event, he would be covered by the provisions of the Act.

10. Unfortunately, a careful examination of the provisions of the Act do not support the submission advanced on behalf of the State. Apart from the generality of provisions, section 8 of the Act very clearly indicates that it covers adult persons residing in rural areas who are willing to do unskilled manual work. There can be no dispute about the fact that the submissions advanced by Ms. Dutta to the effect that the petitioner was not doing any manual work and furthermore, that he was neither paid daily wages or weekly wages as was the case with the workers under the Employment Guarantee Scheme, but was paid a monthly salary and was performing the supervisory functions would cumulatively lead to the irresistible conclusion that he was not part of the Employment Guarantee Scheme as wrongly sought to be contended. The provisions of that Act would, therefore, not be applicable in the petitioner's case. In this view of the matter, I do not propose to deal with the extensive arguments that were advanced by Mr. Satpute, learned Assistant Government Pleader on the question as to whether the non-obstante clause contained in the EGS Act can confer upon it the power to exclude the operation of other statutes as also the detailed submissions advanced by him in support of the fact that the constitutional validity of this Act cannot be assailed. Mr. Satpute, must be commended for the considerable labour put in by him in so far as he has admirably argued these points and placed reliance on a plethora of decisions both of the Supreme Court, this high Court and other High Courts and supported his argument by reference to the position as it obtained before and after the amendment of various provisions of the Constitution. Since it is clear that the petitioner cannot be featured by the provisions of the Act in question, the question as to whether he is circumscribed by its provisions or whether the exclusions apply or for that matter, whether the validity or otherwise of those provisions is to be examined, are issues which though seriously argued by Mr. Satpute are rendered academic

for the decision of the present case.

11. In the course of the arguments, Mr. Satpute, advanced a submission which I consider most necessary to deal with. He pointed out that the State of Maharashtra is one of the few State Governments which has conceived of and implemented the Employment Guarantee Act and that this is a well-intentional move which deserves to be fostered rather than shot down. He submitted that if contentions such as those advanced by the petitioner were to be upheld, that it would be impossible for the State Government to proceed with the implementation of the schemes because the employees concerned would start contending that they must be permanently absorbed by the relevant departments for which there is neither the financial capacity available nor are there the requisite posts and that, consequently, the Departments would be left with no option except to stop the implementation of the schemes. The Court, while considering the plea of the petitioner, must take into account the likely consequences if such a plea is upheld and the long terms effects it will have.

12. In the first instance, having regard to the view that I have taken, viz., that the petitioner is not covered by the provisions of the Act, the grievance made does not survive. It is, however, essential to point out, that the fundamental duty of the State to act fairly and reasonably cannot be abridged, watered down or in any manner reduced merely because it is undertaking a welfare scheme. It is necessary for the decision-makers to realise that the need to function by these principles is all the more necessary and immensely greater when they are dealing with cases of persons belonging to the weaker and weakest sections of society. It is while touching that segment of humanity where the ability of the citizen to enforce his rights and to insist on a fair deal is so weak or nonexistent, that the basic duty becomes not only a legal but an ethical necessity. As indicated earlier, the Supreme Court has also recognised the fact that even in the case of welfare schemes, exclusions from the operation of law which prescribes minimum wages etc.,etc., cannot be permitted and, therefore, the Government cannot be heard to contend that if it has to conform to the law of the land, then, it will close down the scheme. On the other hand, it is as much a necessity that the Government as a model employer sets an example by conforming to the laws which it expects other citizens to abide by.

13. I would like to commend the special efforts put in by the two learned Counsel Ms. Dutta and Mr. J.C. Satpute, learned Assistant Government Pleader, both of whom have done considerable research and have admirably assisted the Court. Considering the fact that the petitioner is a very poor person and comes from a level of society where legal assistance is extremely difficult, the fact that Mr. Anand Grover and Ms. Dutta have taken up his case on his behalf and have seen it through the High Court deserves to be commented. It is only hoped that many more members of the Bar would take up such matters of public interest particularly, where they relate to the poor and needy persons in the rural areas and secure justice for them.

14. In this view of the matter, the petition is allowed. The order of the appellate authority dated 8-3-1988 is set aside. The order dated 6-10-1986 passed by the learned Judge, Labour Court, Dhule shall stand varied to the extent that the petitioner who was directed to be reinstated, shall be entitled to full back wages and continuity of employment. Rule is made absolute in terms of prayer (c). In the circumstances, the respondents shall pay the petitioners' costs.