
(2014) 09 BOM CK 0034
In the Bombay High Court
Case No : Writ Petition No. 1245/2011

Sumanbai Bhaurao Shinde	Vs	APPELLANT
Marathwada Agricultural University		RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 25-F, 25G, 25H, 25-H

Citation : (2014) 09 BOM CK 0034

Hon'ble Judges : S.V. Gangapurwala, J;A.M. Badar, J

Bench : Division Bench

Advocate : S.R. Barlinge, Advocate for the Appellant; S.K. Kadam, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

A.M. Badar, J.—Heard learned counsel for the parties. Rule. Rule made returnable forthwith and with the consent of learned counsel for the parties, the petition is taken up for final disposal.

2. The petitioner retrenched worker of the respondent by this petition is praying for directing the respondent to consider her claim for absorption as permanent employee on available Class -IV post with the respondent.

3. The learned counsel for the petitioner submitted that land of the father of the petitioner was acquired for the purpose of the respondent University i.e. for starting a research centre at Himayatbaug, Aurangabad. A certificate to the effect was issued which states that she is a project affected person. The petitioner was working as a daily rated employee with the respondent University from the year 1981 till she was retrenched by one months" notice dated 27.2.2001. The learned counsel further submitted that the said notice of retrenchment was challenged by the petitioner by filing a Writ Petition No.5202/2006 wherein a prayer for awarding permanency to the petitioner from project affected person"s category was also made. According to the petitioner,

the respondent University opposed that petition by contending that it has already exceeded the appointments from the category of project affected persons and no vacancy is available. Thereafter, by recording statement of the learned counsel for the respondent University, the said petition was disposed of. Thereafter, according to the petitioner, she submitted a representation requesting the respondent to consider her claim for appointment from project affected person's category. However, respondent University, on 29.8.2009 advertised various posts including 142 posts of Majdoor by ignoring the claim of the petitioner. Hence, according to the learned counsel for the petitioner, the petitioner being a retrenched employee as well as a project affected person is entitled for consideration for absorption as a permanent employee of the respondent University.

4. The learned counsel appearing for the respondent - University opposed the claim by contending that though the respondent University is not disputing the fact that the petitioner is a project affected person, she is not entitled for absorption as she has crossed age limit of 45 years as prescribed by Government resolution dated 3.2.2007. The learned counsel further argued that as per seniority list of the retrenched employee, serial number of the petitioner is 871, whereas she is at Sr.No.56 in the seniority list of project affected person's category. Several seniors to the petitioner are not yet absorbed. The learned counsel further pointed out that on 26.8.2009, an advertisement was issued by the respondent University for filling up various posts including the post of Majdoor / labourer from project affected person's category but the State Government vide Government resolution dated 5.6.2010 has imposed ban on recruitment of persons in group C and D categories. As such no recruitment was taken up as per the said advertisement. It is further contended that as per Government resolution dated 27.10.2009, employment to project affected person cannot be given without advertisement and competition. The State Government has issued a circular dated 25.8.2005 directing ban on back door entry and, therefore, the respondent University is employing the candidates by advertisement of posts.

5. We have considered the rival submissions made by the learned counsel for the parties as well as the documents placed on record.

6. It is not in dispute that the petitioner has worked on daily rated establishment with respondent University from the year 1981 to 1.4.2001 when she was retrenched by issuing a notice u/s. 25-F of the Industrial Disputes Act, 1947. Challenge to that retrenchment notice vide Writ Petition No.5202/2006 failed. Similarly, the parties are at ad -idem on the point that the petitioner is a project affected person due to acquisition of land admeasuring 2.85 Hectares from her father for establishment of research centre of respondent University at Himayatbaug, Aurangabad. The petitioner has placed on record the certificate issued by the District Rehabilitation Officer to that effect. In the wake of this undisputed position emerging on record, let us consider whether the petitioner is

entitled for the relief of consideration of her claim for permanency with the respondent University.

7. Writ Petition No.5202/2006 filed by the petitioner earlier challenging her retrenchment as well as for claiming permanency came to be decided on 8.2.2008. While considering her claim for permanency, the Division Bench of this Court while deciding that petition has observed thus in paragraph no.4 of the judgment: -

"In respect of the second relief which the petitioner has prayed, the respondent in its affidavit in reply, dated 30.8.2006 has categorically stated that the respondent University has maintained a separate list of daily rated labourers and the petitioner's name is appearing in the said seniority list. However, since there are no vacancies, the claim of the petitioner cannot be considered at present. We are informed by Shri S.K. Kadam, learned counsel appearing on behalf of the respondent University that the petitioner has recently got herself enrolled in the wait list of project affected persons. This enrollment has been done some time in the year 2006. That apart, Mr. Kadam, learned counsel states that as and when the vacancies are available, the name of the petitioner for absorption as permanent employee would be considered as per her turn and as per the service seniority list as well as the seniority list of project affected persons. Mr. Kadam has also highlighted that the reservation which is provided for project affected persons is 5%, whereas the University has already far exceeded the said 5% quota and at present the employment of the project affected persons in the University is about 22%."

(Emphasis supplied)

8. It is thus clear that it was respondent University who made a categorical statement before this Court that as and when the vacancies are available, the petitioner will be considered for absorption as permanent employee as per her turn considering her seniority as a retrenched employee as well as seniority from the category of project affected person. From the reply affidavit filed by respondent University in the instant petition, it is seen that the petitioner is at Sr.No.56 in the seniority list of project affected persons category and at Sr.No.871 in the seniority list of retrenched employee. Respondent University on 26.8.2009 has issued an advertisement notifying 142 posts of labourers in Group D and this recruitment was as a special drive for filling in the vacant posts reserved for project affected persons. This implies that at least 142 posts of labourers on regular establishment are available with respondent University and those posts are meant for project affected persons. As such the petitioner is certainly entitled for consideration while filling up these sanctioned posts of Majdoors.

9. For not considering the claim of the petitioner for appointing her on the post of labourer from the category of project affected person, respondent University is relying on a circular dated 25.8.2005 issued by the State Government. That

circular is issued by the General Administration Department of the State relying on the judgment of the Hon"ble Apex Court in the matter of A. Umarani Vs. Registrar, Cooperative Societies and Others, and other connected matters. By this circular, all departments of the State are directed to follow the directions given by the Hon"ble Supreme Court to employ the candidates by resorting to prescribed process for recruitment. It is further directed thereby that if in case of emergent situation, temporary employees are engaged, then services of those employees should be terminated on completion of need of the work. One cannot doubt the proposition that employees seeking back door entry cannot claim permanency and they have no right for regular or permanent public employment. Constitutional scheme of Articles 14 and 16 cannot be bypassed by taking back door entry as a daily wager without adhering to the selection process and then by claiming permanency on the ground of length of service. Apart from her claim for absorption on permanent post on the basis of her engagement on daily wages, the petitioner is also setting her claim on the basis that she is a project affected person and reservation is undisputedly made for this category. As such the circular dated 25.8.2005 will not come in way of the petitioner for considering her claim for appointment on permanent establishment.

10] Apart from circular dated 25.8.2005, respondent University is also relying on Government resolution dated 27.10.2009 for opposing claim of the petitioner. That Government resolution is reiterating settled position of law that for seeking employment from project affected person's category, a candidate has to compete amongst other claimants from the same category and such recruitment is required to be done by proper advertisement of post. Reliance is also placed on Government resolution dated 3.2.2007 which provides that once a project affected person crosses age of 45 years, then his claim for employment lapses and his name is required to be removed from the waiting list.

11. At this juncture, it is apposite to consider that claim of the petitioner is also based on the premise that being a retrenched employee of the respondent University, she has preferential right to claim employment when her employer resorts to fill in the vacant posts. The petitioner has also placed on record retrenchment notice issued by the respondent on 27.2.2001 (Annexure B). The petitioner is entitled for the benefits under the Industrial Disputes Act, 1947, which legitimately flows from this retrenchment. It is worthwhile to reproduce the provisions of Section 25-H of the Industrial Disputes Act, 1947 as well as Rule 82 of the Industrial Disputes (Bombay) Rules, 1957, which read thus: -

"25H. Re -employment of retrenched workman:

Where any workmen are retrenched and the employer proposes to take into his employment any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re -employment and such retrenched workmen who offer themselves for re -employment shall have preference over other persons."

"82.Re -employment of retrenched workmen:

(1) Where any workmen are retrenched and the employer proposes to take into his employ any person, he shall give an opportunity to the retrenched workmen to offer themselves for re - employment in the following manner, that is to say -

(a) if the number of vacancies to be filled is not less than fifty, he shall publish in a newspaper circulating in, and in the regional language of, the locality in which the industrial establishment is situated, a notice giving the details of the vacancies to be filled;

(b) in any other case, he shall send by registered post to the last known address of each of such retrenched workmen eligible for appointment to any such vacancies, a notice giving the details of the vacancies to be filled; and seven days shall have elapsed from the date of publication of such notice, or from the date of the dispatch of the last of such notices, as the case may be: Provided that where there are provisions in any standing orders of an industrial establishment in regard to the notifying of vacancies, notices in respect of such vacancies shall be published or given in accordance with such standing order:

Provided further that if a retrenched workman, without sufficient cause being shown in writing to the employer, does not offer himself for re - employment on the date or dates specified in the public notice given or the individual notice sent to him by the employer under this sub -rule, the employer may not intimate to him the vacancy that may be filled on any subsequent occasions.

(2) A copy of the notice referred to in sub - rule (1) shall also be displayed in the time - keeper's office at the main entrance of industrial establishment and in the case of a department thereof also in the department concerned.

(3) Wherever a notice has been given under sub - rule (1), the employer shall also simultaneously inform the trade union or unions of workmen connected with industrial establishments of the vacancies to be filled giving details thereof.

(4) If the employer seeks the assistance of the Decasualisation Scheme or the Employment Exchange of the area in filling the vacancies, he shall inform the Manager of the Scheme or the Exchange, as the case may be, that the names of such of his retrenched employees, as may be, registered with the scheme or the exchange, may be submitted to him along with the names of any other suitable candidates.

(5) Information regarding the workmen re - employed in accordance with this rule shall be sent in Form XXIV -A by the employer to the Commissioner of Labour Bombay and the Deputy - 13 - Commissioner of Labour of the area concerned within fifteen days from the date of such re - employment."

12. Rule 82 quoted above is framed to prescribe the manner in which the employer is required to give opportunity for re -employment to the retrenched employee. On harmonious reading of Section 25H of the Industrial Disputes Act,

1947 and Rule 82 framed thereunder, position which boils down is that whenever the employer intends to fill up the vacancies with him, he is required to give an opportunity to the retrenched employee to offer themselves for re -employment and if they offer themselves for re -employment, they should be given preference over other persons or outsiders. These provisions are explicit and express, admitting no exception. Principle of fair play and justice is incorporated by the legislature by enacting Section 25H of the Industrial Disputes Act, 1947.

13. It is worthwhile to note that Section 25H of the Industrial Disputes Act is a piece of welfare legislation and is couched in wide language. It is trite that the Courts are required to adopt a beneficial rule of construction while interpreting provisions of social welfare legislation. Section 25H covers into its scope and ambit all retrenched employees, may they be permanent, temporary or on daily rated establishment. There is no reason to restrict ordinary meaning of the language employed in Section 25H of the Industrial Disputes Act which promotes the object of the enactment. This provision is sine qua non for peace and harmony in the relation between employer and employee. Undisputedly, respondent University had resorted for recruitment of Majdoors by issuing advertisement dated 26.8.2009 (Exh.H). The petitioner is one of retrenched employees who worked as daily wage Majdoor for a period of about 10 years with respondent. Let us now examine whether respondent University is duty bound to provide re -employment to the petitioner by adhering to the provisions of Section 25-H of the Industrial Disputes Act, 1947 and Rule 82 of the Rules framed thereunder by directly appointing her on the post of Majdoor on time scale as per advertisement dated 26.8.2009.

14. Notice of retrenchment dated 27.2.2001 (Exh.B) shows that the petitioner was used to be engaged as per availability of work on daily wages. Pleadings of the petitioner do not show that she was engaged by the respondent on daily rated establishment after following due process of recruitment by following mandate of Articles 14 and 16 of the Constitution of India. Article 16 of the Constitution provides that there shall be equality of opportunity for all citizens in the matter relating to employment or appointment to any office under the State. The recruitment in the State sector as such can be made after proper advertisement for inviting applications from eligible candidates and undertaking selection by the committee constituted as per relevant rules. Section 25H of the Industrial Disputes Act needs to be interpreted consistent with the Constitutional scheme of equality of opportunity in public employment. Back door entry in public employment taken or made without participating in selection process as recognized by relevant rules is against the Constitutional scheme. The employees like petitioner who are employed as daily wage workers usually do not acquire employment through legal mode by undergoing selection process and competition. There is nothing on record to suggest that engagement of the petitioner on daily rated establishment was by following selection process in which others waiting for employment had equal opportunity to participate. Such employment, therefore, cannot provide the basis for claiming any right or regular

employment. As such provisions of Section 25H of the Industrial Disputes Act cannot be resorted to by the daily wagers engaged de -hors the recruitment rules for directly securing permanent employment on time scale on totally different terms and conditions without undergoing selection process. The employer is required to offer a job to the retrenched employee provided it belongs to the same category as Section 25H is required to be interpreted harmoniously with Section 25G of the Industrial Disputes Act which recognizes the principle "last come first go" in respect of particular category of workmen.

15. It is clear from the certificate issued by the respondent University (page 28 of the paper book) that the petitioner served respondent University for a considerable period from 24.8.1981 to 31.3.2001. As such considering the principle enunciated in Section 25H of the Industrial Disputes Act, the petitioner though not entitled to direct absorption on the permanent post is certainly entitled for offering herself for re -employment and for preference over other persons keeping in view the fact that during the period of her engagement as labourer on daily wages, she has acquired experience to suit the requirement of the respondent. There is nothing in provision of Section 25H of the Industrial Disputes Act which prohibits consideration of claim of a daily wager for the post of labourer on regular establishment. As such the petitioner is entitled for being considered at the time of recruitment of labourers by the respondent University by giving her preference while judging the suitability for work. Perusal of Section 25H of the Industrial Disputes Act shows that no upper age limit is set for seeking benefit of consideration for re - employment. The petitioner served respondent University as a labourer on daily wages for a period of about 10 years and as such respondent can consider grant of relaxation in upper age limit to the petitioner at least for the period she served them on daily wages. As such the case of the petitioner needs to be considered for relaxation of upper age limit prescribed by the Government resolution dated 3.2.2007 while consideration of her claim, in the light of foregoing discussion.

16. Earlier Writ Petition No.5202/2006 filed by the petitioner was allowed so far as relief of absorption of the petitioner as permanent employee in the category of project affected person is concerned. This relief was granted on the basis of statement made by respondent University to that effect before the Court. Relevant portion of paragraph no.5 of the judgment in that petition can be quoted with advantage and it reads thus:

"In the light of the aforesaid statement which is made by Shri S.K. Kadam, learned counsel appearing on behalf of the respondent, we allow the petition insofar as the statement regarding absorption of the petitioner as per her turn in the seniority list."

(emphasis supplied)

17. The respondent is duty bound to comply this judgment, particularly when posts of Majdoors with it are vacant and it has resorted for recruiting 142

Majdoors in terms of advertisement dated 26.8.2009 from the project affected person's category. However, we make it clear that the petitioner is not entitled for direct appointment on regular establishment as Full Bench of this Court in the case of Rajendra Pandurang Pagare and Sk. Anisoddhin Sk. Kamroddhin Vs. The State of Maharashtra and Executive Engineer, PWD (West) Division, has held that the vacancies reserved for project affected persons are required to be filled in by adhering to the due selection process.

18. In the light of foregoing discussion, the petition deserves to be partly allowed in terms of prayer clause (A) with a direction to the respondent University to consider claim of absorption of the petitioner as permanent employee on Class - IV post available with it in the light of above terms. Rule is made absolute in terms of prayer clause (A). No order as to costs.