

(2006) 11 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 3764 of 2004

Sunil Sherekar

APPELLANT

Vs

Nagar Parishad, Yavatmal

RESPONDENT

Date of Decision : 30-11-2006

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 2, 25F, 25G

Citation : (2007) 2 ALLMR 53 : (2007) 3 BomCR 972

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : S.S. Khedkar, for the Appellant; D.M. Kale, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—Rule, returnable forthwith. By consent, heard finally.

2. The petitioner takes exception to the order passed by the learned Member, Industrial Court, Yavatmal, in Revision (ULP) No. 152 of 1999, whereby he set aside the order passed by the learned Judge, Labour Court, Yavatmal, in Complaint (ULP) No. 676 of 1994.

3. The petitioner was employed as Junior Engineer on daily wages from 15-11-1991 with respondent Municipal Council. The regular Junior Engineer serving with the respondent Municipal Council, one Shri V. D. Choudhari, retired on 30-6-1992. Since then, the petitioner claimed to have been working as Incharge Junior Engineer of the respondent Municipal Council. The petitioner sought regularisation of his services. He had put in 240 days of service in the preceding 12 months" period. Instead of regularising his services, the respondent Municipal Council terminated his services with effect from 1-6-1994. The petitioner, therefore, filed complaint to the Labour Court, which came to be allowed by judgment dated 30-12-1995. The Labour Court directed the petitioner"s reinstatement with backwages.

4. The respondent-Municipal Council preferred a revision. The petitioner too preferred a revision, since a finding that there was no breach of section 25G of the Industrial Disputes Act was against him. The Industrial Court allowed the respondent's revision and dismissed the petitioner's revision. Therefore, the petitioner has preferred this petition contending that the order was passed by the Industrial Court ignoring the evidence on record; it erred in finding that the petitioner's appointment was not in accordance with law; it failed to see that the petitioner was in continuous service, his services were terminated without any notice or salary in lieu of notice, and so it amounted to retrenchment. According to the petitioner, the judgments on which the respondent's counsel relied before the Industrial Court, were not applicable to the facts of the case and, therefore, according to the petitioner, the order passed by the Industrial Court was liable to be quashed and set aside.

5. I have heard Shri S. S. Khedkar, the learned counsel for the petitioner, and Shri D. M. Kale, the learned counsel for the respondent Municipal Council.

6. The learned counsel for the petitioner submitted that the Industrial Court exceeded the scope of revision and re-appreciated the evidence. He submitted that the scope of revision u/s 44 of the Industrial Disputes Act has been commented upon in the case of Mahila Griha Udyog Lijjat Papad vs. Kamgar Congress and others, reported in 1983 (46) F.L.R. 244, and also in the case of Smt. Sunanda Hari Kadam and Ganesh Hari Kadam Vs. Manisha Hospital, . He further submitted that the power of superintendence u/s 44 of the Industrial Disputes Act could not extend to re-appreciation of evidence.

7. His learned Adversary Adv. Shri D. M. Kale submitted that no finding of fact has been disturbed and that the order passed by the Industrial Court is only based on application of law to the facts pleaded. The Industrial Court had merely held that the Labour Court had not considered material questions of law and had come to erroneous conclusions. Therefore, the Industrial Court had not exceeded its powers, as defined u/s 44 of the Industrial Disputes Act.

8. The power of superintendence u/s 44 of the Industrial Disputes Act is on par with the power of this Court under Article 227 of the Constitution and, therefore, ordinarily would rule out re-appreciation of evidence or examination of findings of fact, as has been held in the two judgments on which the learned counsel for the petitioner placed reliance. It would, therefore, have to be seen as to whether the learned Member of the Industrial Court had, in fact, exceeded his jurisdiction, by upsetting the findings of fact recorded on the basis of admissible evidence by the learned Judge, Labour Court. It may be useful to examine this question only after other contentions raised by the learned counsel are examined.

9. The learned counsel for the respondent-Municipal Council submitted that the petitioner was appointed under the Nehru Rozgar Yojna as Junior Engineer in pursuance of the directions of the Collector. The appointment was temporary and initial orders were issued for a period of two months at a time. Nehru Rozgar

Yojna was under the control of the Collector and the petitioner and others engaged for implementation of the Scheme were put on the work of widening roads within the municipal limits. The petitioner was appointed on daily wages and his appointment was subject to the conditions in the letter dated 21-11-1985 issued by the Authorities to the Municipal Council. According to the learned counsel for the respondent Municipal Council, the petitioner was not appointed after following any regular process of recruitment. The discussion in this behalf in para 11 of the judgment of the Labour Court would also show that the petitioner had been appointed as per the sanction given by the Collector under the Nehru Rozgar Yojna for a fixed period of two months and that he was re-appointed every time by issuing fresh appointment orders.

10. The learned counsel for the respondent-Municipal Council, therefore, submitted that the petitioner's appointment could not have been regularised. For this purpose, he had placed reliance on the judgments of the Supreme Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, , Jawaharlal Nehru Technological University Vs. Smt. T. Sumalatha and Others, , and Dhampur Sugar Mills Ltd. Vs. Bhola Singh, . He submitted that as the judgments in all these cases would show that the petitioner having entered the service by back door, i.e. by entering as a daily wager, was not entitled to have his services regularised.

11. The decision of the Supreme Court in the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, , on which the learned counsel for the respondent had placed reliance, was in respect of persons employed under the very same Jawahar Rozgar Yojna. which, in the State of Maharashtra, may have been called as the Nehru Rozgar Yojna, under which the petitioner had been appointed. When the employees' Union took the matter to the Supreme Court, the Court observed that there was some confusion due to the orders of the Supreme Court directing preparation of Schemes for absorbing casual labourers, who had worked for one or more years. According to the Supreme Court, such orders proceeded on the assumption of the wrong facts. As regards the case before the Court, the Court found that the Jawahar Rozgar Yojna was funded by the Central Government and was being monitored by the District Rural Development Agency, an autonomous body. The Scheme had been discontinued by the Central Government from 1-1-1992. The Court felt that since the object of the Scheme was limited and was to be implemented with the limited resources at the disposal of the State, it was wrong to seek regularisation of those engaged for the Scheme. The Court also felt that the concept of "Equal Pay for Equal Work" was also unwarranted and misplaced for those provided work in such Scheme. In para 23 of the judgment, the Court observed that judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money, has to be taken. Employment is given first for temporary periods with technical breaks, and is continued for 240 days or more with a view to give benefit of regularisation, knowing the trend of judicial decisions that those who have completed 240 days

will be automatically regularised. The Court found that ultimately it was the people of this Country who have to bear the heavy burden of surplus labour on account of such indiscriminate regularisation. The Court, therefore, dismissed the petition.

12. The learned counsel for the respondent submitted that in face of this direct authority in respect of the Jawahar Rozgar Yojna, it would be impermissible for the petitioner to make any claim in the present petition. The learned counsel for the respondent had also referred to a judgment of the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , where the Supreme Court had frowned upon regularisation of back door entrants.

13. The learned counsel for the petitioner submitted that all these authorities on which the learned counsel for the respondent had placed reliance, and even the Industrial Court had relied on, are in fact not applicable to the petitioner's case. He submitted that in these judgments, the provisions of the Industrial Disputes Act and the implications thereof have not been considered. The cases had been decided on the constitutional principles and, therefore, the judgments would not be applicable to the facts of the present case.

14. The learned counsel for the petitioner drew my attention to a judgment of this Court reported in the case of Shri Mohammed Bilal Hanif Shaikh " Bilal Bachkana Vs. Shri A.N. Roy, Commissioner of Police, The State of Maharashtra and The Superintendent, , to support his contention as to what amounts to a judicial precedent, which has a binding effect. The learned counsel for the petitioner submitted that in para 8 in the aforesaid judgment quoting from para 41 from the judgment of the Supreme Court reported in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , it was observed that any declaration or conclusion arrived at without application of mind or without being preceded by any reason cannot be deemed to be a declaration of law or an authority of general nature creating a binding precedent. Therefore, the decisions given without considering the implications of the provisions of the Industrial Disputes Act would, in the view of the learned counsel for the petitioner, have no application to the facts of the present case.

15. There can be no dispute about the theory of precedent quoted in the aforesaid decision on which the learned counsel for the petitioner had placed reliance. However, it cannot be forgotten that when the Apex Court deals with a question after considering the Constitutional scheme or when the highest Court of the land draws from the highest repository of law, it would be inappropriate to examine the decision with reference to pieces of legislation, which are obviously subordinate to the Constitution. Therefore, it would not be permissible to question the pronouncements of the Supreme Court which come after considering the constitutional principles on the basis of what the Industrial Disputes Act prescribes. The decision of the Supreme Court in the case of Secretary, State of Karnataka and others vs. Umadevi and others, cited supra, which is the latest decision, is rendered by the Constitution Bench of the Apex

Court and, therefore, whether the provisions of the Industrial Disputes Act are referred to or not, is immaterial.

16. The learned counsel for the petitioner next submitted that the petitioner in this petition had not sought regularisation. All that the petitioner seeks is that his services could not have been terminated without following the provisions of section 25F of the Industrial Disputes Act. According to the learned counsel, the decisions referred to by the learned counsel for the respondent all relate to regularisation of employment, and may be, as the matters stand, the petitioner may not be entitled to have his services regularised, in view of the judgments of the Apex Court including the one in Umadevi's case. He, however, submitted that his client's right to continue in employment, may be, as a casual labourer, could not be abrogated, because his right to claim regularisation is held not to exist. He submitted that none of the decisions on which the learned counsel for the respondent had placed reliance, took away his right to continue as a daily wager. In sum and substance, the learned counsel for the petitioner submits that the judgments may be read as disentitling the petitioner to claim more than what was ordained by the terms of his employment, but they cannot be read so as to take away what was guaranteed under the Industrial Disputes Act.

17. According to the learned counsel, the petitioner was employed by the respondent-Municipal Council, which is an Industry, as laid down in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, . The petitioner had put in more than 240 days' work in 12 months' period preceding his complaint to the Labour Court. The learned counsel for the petitioner submitted that a person, who has put in more than 240 days of service in 12 months' period preceding his complaint to the Labour Court, is entitled to be continued and striking off his name or discontinuing him without anything more, amounts to retrenchment, as defined in clause (oo) of section 2 of the Industrial Disputes Act. For this purpose, he placed reliance on the two judgments of the Supreme Court in the cases of L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, , and H.D. Singh Vs. Reserve Bank of India and Others, . He submitted that the termination of services of the petitioner thus amounted to retrenchment and since the conditions prescribed in section 25F of the Industrial Disputes Act had not been fulfilled, retrenchment could not have been effected, entitling his client to reinstatement.

18. The learned counsel for the respondent submitted that the employment of the petitioner was not at all one to which the provisions of the Industrial Disputes Act could apply. It was an employment for a particular project and, therefore, the moment the project came to an end, the employment also came to an end. For this purpose, he relied on the two decisions of the Supreme Court in the cases of State of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, and M.D., U.P. Land Dev. Corpn. and Another Vs. Amar Singh and Others, . In these judgments, the Court held that when a project comes to a close, the employees, who are working in the

project, would not get any vested right and the services of the employees also come to an end. Therefore, according to the learned counsel for the respondent, the learned Judge, Labour Court, was not justified in holding to the contrary and hence, the learned Member, Industrial Court, had rightly interfered by exercising his jurisdiction of superintendence.

19. Objecting to this contention, the learned counsel for the petitioner submitted that the examination of this aspect would also demonstrate that the learned Member, Industrial Court, had in fact exceeded his jurisdiction in entering the area of fact finding and had come to a wrong factual conclusion. According to the learned counsel, this wrong factual conclusion further led the learned Member, Industrial Court, to an error in applying inapplicable legal principles. He drew my attention to the judgment of the Supreme Court in the case of Delhi Development Horticulture Employees' Union, cited supra, on which the learned counsel for the respondent had placed reliance. He pointed out that, as observed in the said judgment, Jawahar Rozgar Yojna had been discontinued by the Central Government with effect from 1-1-1992. There could have been no different date for discontinuance of this Scheme in the State of Maharashtra. Further, before the Labour Court, an Officer of the respondent Municipal Council, who had been examined as a witness, too had admitted that Scheme had been closed. The Officer admitted that after the retirement of the respondent's Junior Engineer V. D. Choudhari one post was vacant temporarily and that the Municipal Council had sent a proposal to the Collector to appoint two persons on the vacant post on daily wages basis and that accordingly the Collector had given permission vide letter dated 24-8-1992 to appoint two persons on daily wages. The witness admitted that accordingly the complainant was appointed on daily wages on the vacant post of Junior Engineer. He added that the Municipal Council had taken sanction every time for two months' period from the Collector and that such sanction had been given by the Collector up to 31-5-1994.

20. The learned counsel for the petitioner wondered as to how, in face of these admissions, it could be said that the petitioner was appointed under a Scheme and that his appointment had come to an end with the closure of the Scheme. Though the petitioner may have entered the employment with the respondent Municipal Council under the Scheme, yet his subsequent appointments after the closure of the Scheme were against the post of Shri V.D. Choudhari, who had retired. Therefore, according to the learned counsel for the petitioner, the learned Member of the Industrial Court was in error in holding to the contrary. Indeed it appears from the evidence discussed by the learned Judge of the Labour Court that the petitioner's employment in 12 months preceding his complaint to the Labour Court had nothing to do with the implementation of the Nehru Rozgar Yojna, though the petitioner was appointed on daily wages with appropriate orders from the Collector for doing so. It does not, however, follow that the petitioner's appointment was coterminous with the Scheme and, therefore, could be said to have come to an end with the completion of the Scheme. The learned Member of the Industrial Court ought to have seen that the petitioner's

employment with the Municipal Council was just like that of any other daily wager and that the petitioner had to be treated as a daily wager, who had put in 240 days of service.

21. The contention of the learned counsel for the respondent Municipal Council regarding the petitioner having entered the employment without following regular selection process, etc., has to be ignored, since the question in this petition is not of regularisation of employment but of dealing with the petitioner as a daily wager while terminating his employment. Had the petitioner sought regularisation, the question whether he had been selected after appropriate process would have been germane.

22. Therefore, Clause (oo) of section 2 of the Industrial Disputes Act, the termination of services of the petitioner would amount to retrenchment. The claim of the learned counsel for the respondent that the termination would fall under sub-clause (bb) of Clause (oo) of the said section, has to be rejected, because no such contract of employment has been produced to show that on the expiry of such contract, the petitioner's employment would have come to an end. Further, no such contract of employment could be inferred to put an end to the service of the petitioner on the basis of the last order of appointment because of admissions given by the respondent's witness before the Labour Court. Towards the end of para 10 of the judgment, the Labour Court had observed that the respondent's witness had admitted in cross-examination that the complainant was continued by written orders, and sometimes even without written orders. Therefore, there is nothing to show that the complainant's engagement would have come to an end simply because no further orders were issued after 31-5-1994. It is not the case of the respondent that the Collector had refused to sanction the continuation of the petitioner as a daily wager beyond this period against the sanctioned post of Shri V. D. Choudhari, who had retired. In view of this, since sub-clause (bb) of Clause (oo) of section 2 of the Industrial Disputes Act is not applicable, the termination has to be treated as retrenchment and was required to be preceded by the conditions laid down in section 25F of the Industrial Disputes Act.

23. In view of this, the impugned order passed by the learned Member, Industrial Court, cannot be sustained for two reasons. First, the learned Member of the Industrial Court has gone into the area of fact finding, ignoring the elaborate discussion on the questions relating to employment of the petitioner in the judgment of the Labour Court. Secondly, the learned Member of the Industrial Court applied principles of law enunciated by the Apex Court in litigation about the regularisation for evaluating the petitioner's case, which challenged his termination amounting to retrenchment.

24. The petitioner's claim in relation to section 25G of the Industrial Disputes Act, viz. that at the time of retrenchment the principle of "Last Come First Go" should be followed, was, however, rightly dealt with by the Courts below, since the petitioner has not shown that the principle was not followed.

25. Since the petitioner is not shown to have been retrenched by following the provisions of section 25F of the Industrial Disputes Act, he would be entitled to reinstatement till the conditions precedent for retrenchment are followed.

26. In these circumstances, the question as to whether the petitioner would be entitled to backwages has to be examined. The learned Judge of the Labour Court had granted continuity of service with full backwages. The petitioner has filed on record affidavit bearing Stamp No. 9689 of 2006 stating that the petitioner was not gainfully employed for the entire period up to the year 2004 and that for the year 2005 he earned a sum of Rs. 17,000/- by working as a petty contractor with the respondent Municipal Council. The learned counsel for the petitioner submitted that in view of this, the petitioner would be entitled to full backwages minus the above amount earned.

27. The learned counsel for the respondent Municipal Council submitted that it is hard to believe that the petitioner, a Junior Engineer, would have been without employment for a long period of ten years and that, therefore, the claim of backwages is unjustified. There can be no doubt that to be able to claim back wages, it would be for the petitioner to show that he was not gainfully employed. However, this negative burden can also be discharged by making a statement on oath, which the petitioner has done. Further, as rightly submitted by the learned counsel for the petitioner, the fact that the State had to start the Employment Guarantee Scheme and had to engage qualified Engineers as daily wagers, shows the bleak possibilities of petitioner having been able to secure employment. The learned counsel for the petitioner further submitted that had the petitioner been gainfully employed, he would not have hankered after this job on daily wages. Therefore, the learned counsel submitted that the petitioner must be taken to have shown that he was not gainfully employed from the date his services were terminated.

28. There can be no doubt that considering the difficulties in securing the job, it would be difficult to deny that the petitioner could not have secured gainful employment for himself. But it would be equally difficult to believe that indomitable spirit of an Indian would confine him to his house doing nothing in the prime of his youth for a long stretch of ten years. He would certainly engage in something which may not yield as much as he may legitimately expect, but would cover his bare necessities. In view of this, it would be appropriate to order petitioner's reinstatement with half backwages for the period from his termination of his services till he is actually employed.

29. To sum up, the petitioner would be entitled to be reinstated in his original post as an employee on daily wages. It is also clarified that since the petitioner is not a regular employee, there would be no fetters on the respondent Municipal Council to terminate his employment, but only after following the procedure prescribed under the Industrial Disputes Act. The petitioner would be entitled to half the back wages for the period from his termination of his services, i.e. from 1-6-1994 till he is actually reinstated. Hence, the following order:

30. The order passed by the learned Member, Industrial Court, on 11-10-2002 allowing Revision (ULP) No. 152 of 1999, is set aside. The order passed by the learned Judge, Labour Court, in Complaint (ULP) No. 676 of 1994, is modified in respect of the petitioner's entitlement to backwages and it is ordered that the petitioner would be entitled to half the backwages for the relevant period.

31. Rule is made absolute in the aforesaid terms. However, in the circumstances, there shall be no order as to costs.