
(2009) 04 BOM CK 0078

In the Bombay High Court

Case No : Letters Patent Appeal No. 78 of 2000 in Writ Petition No. 10 of 2000

The Divisional Controller, Maharashtra State Road Transport Corporation, Osmanabad Division APPELLANT

Vs

Maruti Bapurao Lokhande RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15(1), 15(3), 16, 227
Industrial Disputes Act, 1947 — Section 25F
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 30(2)

Citation : (2009) 3 BomCR 603 : (2009) 111 BOMLR 2056 : (2009) 4 MhLj 869

Hon'ble Judges : Naresh H. Patil, J;N.D. Deshpande, J

Bench : Division Bench

Advocate : A.B. Dhongade, for the Appellant; P.F. Patni, for the Respondent

Final Decision : Allowed

Judgement

Naresh H Patil, J.—The respondent filed a complaint alleging unfair labour practices under Items 6,9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "the Act of 1971"). The respondent contended in the application that he was in the employment of the appellant Corporation since 1-2-1985 as a Cleaner and subsequently from the year 1986 he was working as Fitter but he was paid wages of Cleaner. It was contended by him that he was neither confirmed in service nor given regular pay scale. In the contention of the respondent he worked continuously uninterruptedly. The work was available with the appellant continuously. Some of the workers who were working in the same capacity were made permanent, they were receiving salary of Rs. 2000/- per month. The respondent worked for more than six years without proper pay scale and continuity of service. It was contended that the appellant committed unfair labour practices. The respondent filed complaint after he was informed by one of the officers Mr. Vhatkar working with the appellant Corporation that from 1st

March 1992 his services were not required as he was temporary and his services could be terminated at any point of time. The respondent - complainant averred that he had worked for more than 240 days in a year prior to filing of the complaint. The respondent filed his complaint on 17th March 1992 in the Industrial Court.

2. The appellant filed Written Statement in which it was disputed that the respondent was appointed as Cleaner from 1-3-1985 and a clear stand was taken that the respondent was neither appointed as Cleaner nor as Fitter. He was not selected and appointed by following due procedure for appointment of candidates. The appellant - Corporation adopted a stand that the respondent was given contract of washing buses at the rate of 50 paise per bus. The job of washing buses was not permanent one but was an incidental. In rainy season buses are required to be cleaned and washed more, therefore, the services of the respondent were obtained. The appellant Corporation denied that the respondent completed 240 days on service in the preceding years. It was further contended that the work of washing buses was done through regular helpers.

3. The respondent examined himself who was cross examined by the appellant.

4. By judgment and order dated 26-3-1999 delivered by the Member, Industrial Court, Solapur the complaint was allowed. The operative order passed by the Member, Industrial Court is as under:

O R D E R

I) Complaint is hereby allowed in toto.

II) It is hereby declared that the respondents have committed an unfair labour practice under Items 6,9 and 10 of Schedule IV of the M.R.T.U. & P.U.L.P. Act.

III) Respondents are hereby directed to issue an order of permanency to the complainant on and from as prayed in the complaint and hereby declared that the complainant is entitled for all the consequential and mandatory benefits arrived out of the said permanency from the date as prayed.

IV) No order as to costs.

5. The appellant - Corporation preferred Writ Petition No. 10 of 2000 against the said judgment and order. By an order dated 29th March 2000 the learned Single Judge of this Court rejected the writ petition. The present Letters Patent Appeal was preferred against the said order.

6. The learned Counsel for the appellant submitted that the respondent failed to establish that he had worked for 240 days in any year preceding to the filing of the complaint. The services of the respondent were taken on contract basis. It was not a full time job. In rainy season cleaning of the buses was required more, therefore, the Corporation had taken services of the respondent by paying 50 paise per bus for cleaning and washing the buses.

7. The appellant had filed Written Statement and had even cross examined the respondent to establish their case. As regards the judgment of the Industrial Court, the appellant submitted that assuming the allegations of the respondent to be true, the Industrial Court committed error in passing the order of permanency in favour of the respondent. The counsel further submitted that in view of the judgment of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and in the case of Official Liquidator Vs. Dayanand and Others, , the impugned orders are required to be quashed and set aside.

8. The learned Counsel appearing for the respondent submitted that the concept of public employment is not applicable to the appellant - Corporation. The principles enunciated in the cases of Umadevi and Dayanand (cited supra) are not applicable to the facts of the case. The entry of the respondent in service is not back door as 240 days were completed in previous years. Under the provisions of the Act of 1971 and the Industrial Disputes Act the respondent was entitled to all the benefits which were accordingly granted by the Industrial Court. Heavy reliance was placed on an Experience Certificate dated 7-1-1988 issued by the Depot Manager, Osmanabad to demonstrate that the respondent continuously worked from 1-3-1985 till 7-1-1988 as Cleaner. It was submitted that the Letters Patent Appeal is not maintainable as the learned Single Judge exercised powers under Article 227 of the Constitution of India.

9. We have perused the original Record and Proceedings. The Certificate issued by the Depot Manager (A), M.S.R.T. Corporation Bus Depot Osmanabad is dated 7-1-1988. It is titled as "Experience Certificate". The certificate reads that the respondent worked in the Osmanabad Depot as Cleaner from 1-3-1985 till the date of issuance of the certificate. Along with this the respondent submitted the record concerning Cleaner wherein it is reflected that Re.1.50 paise was paid per bus to the respondent by the Corporation. Original attendance sheets for the month of October 1985, May 1986, September 1986 maintained by the Corporation are produced. 10) The Industrial Court on the application Exhibit U-2 u/s 30(2) of the Act of 1971 passed following order on 17-2-1992.

The papers are perused. Shri. Kakade, learned Counsel for the complainant even by making reference to the documents produced by the complainant forcefully submitted that the complainant has worked for period exceeding 240 days every year from 1-3-1985 onwards and yet undue interference with the termination of the service of the complainant at the instance of the respondent is apprehended to be imminent at any time hence onwards and immediate proper restraint in this context is essential so that the instant claims and the service prospects of the complainant may not be jeopardised. At this stage, the following order is felt to be expedient.

ORDER

I) Until further order, the respondent shall maintain status-quo as to the service

of the complainant.

II) The notice also be issued to the respondent.

11. The Industrial Court in para 9 of the judgment gave reasons. It was observed by the Industrial Court that it is admitted fact by both the parties that the complainant was in the employment of the Corporation as a Cleaner and was working since 1985. The certificate Exhibit U-6 issued by the Depot Manager was relied upon by the Industrial Court in which it was stated that the respondent was in continuous employment since the year 1985. As the appellant Corporation did not lead any oral evidence the Industrial Court found it difficult to accept the submission of the Corporation.

12. The learned Single Judge rejected the writ petition observing that the appellant did not examine any witness to support the contentions raised.

13. The learned Counsel for the appellant in support of his contentions has placed reliance on the following reported judgments:

1) Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

2) Mahboob Deepak Vs. Nagar Panchayat Gajraula and Another, . In the facts of the case, the Apex Court observed in para 9 thus:

9. Due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules. Merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularised.

3) Shri P.R. Nair and Others Vs. Union of India (UOI) and Another, . A Division Bench of this Court, in this case, has observed in para 13 thus:

Rule of law is the core of our Constitution. Hence, a Court would be disabled from passing an order upholding violation of Article 14 r.w. Article 16 of the Constitution consistent with the scheme of public employment. Consequently the Constitutional mandate upon the High Courts is to necessarily hold that unless appointment is in terms of the rules amongst qualified persons there would be no right conferred upon the appointee. High Courts cannot prevent regular recruitment. High Courts also cannot ordinarily issue directions or interim directions for absorption, regularisation or permanent continuance of an employee unless the recruitment was made regularly and in terms of the constitutional scheme. Passing such orders would hold up the regular recruitment procedure and impose an additional burden upon the State. High Courts cannot interfere in the economic arrangements of State or facilitate the bypassing of constitutional and statutory mandates or give a go by to the procedure established by law in public employment.

4) Surendra Prasad Tewari v. U.P. Rajya Krishi Utpadam Mandi Parishad 2007 (1)

ALL MR 461. Para 26 of the judgment reads thus:

26. In the instant case, the appellant has continued in service for 14 years because of the interim order granted by the High Court on 15.9.1992. In the aforesaid case, the Constitution Bench has observed that merely because an employee had continued under cover of an order of the court, which the court described as "litigious employment", he would not be entitled to any right to be absorbed or made permanent in the service.

5) Accounts Officer (A and I) APSRTC and Others Vs. K.V. Ramana and Others, of the judgment reads thus:

9. In our opinion these appeals have to be allowed. It has been held by a Constitution Bench of this Court in Secy., State of Karnataka v. Umadevi (3) that absorption, regularisation or permanent continuance of temporary, contractual, casual, daily-wage or ad hoc employees dehors the rules and constitutional scheme of public employment cannot be granted by the courts. As regards the circular dated 31-3-1998 the same cannot override Article 16 of the Constitution, and hence regularisation cannot be granted under the said circular. Even if the contract labourers or casual workers or ad hoc employees have worked for a long period they cannot be regularised dehors the rules for selection, as has been held in Umadevi case.

6) Gangadhar Pillai Vs. Siemens Ltd., of the judgment reads thus:

28. It is not the law that on completion of 240 days of continuous service in a year, the employee concerned becomes entitled to for regularisation of his services and/or permanent status. The concept of 240 days in a year was introduced in the industrial law for a definite purpose. Under the Industrial Disputes Act, the concept of 240 days was introduced so as to fasten statutory liabilities upon the employer to pay compensation to be computed in the manner specified in Section 25-F of the Industrial Disputes Act, 1947 before he is retrenched from services and not for any other purpose. In the event a violation of the said provision takes place, termination of services of the employee may be found to be illegal, but only on that account, his services cannot be directed to be regularised. Direction to reinstate the workman would mean that he gets back the same status.

7) Official Liquidator Vs. Dayanand and Others, . In para 75 of the judgment the Apex Court relied upon the principles enunciated in the case of State of Karnataka v. Umadevi (3) (cited supra).

14. The learned Counsel for the respondent in support of his submissions has placed reliance on the following reported judgments:

1) Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., . The Apex Court in para 22 of the judgment observed thus:

22. We have given our due thought to the aforesaid rival contentions and,

according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the inference mentioned in the second part of the item, if Badlies, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to the Industrial Court of Pune (and 15 to the Industrial Court, Ahmednagar) had been kept as casuals for long year with the primary object of depriving them of the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered, that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmednagar, whose need is on the increase because of increase in pollution. Permanency is thus writ large on the face of both the types of work. If even in such projects, persons are kept in jobs on casual basis for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants.

2) Sri Satya Narain Singh Vs. District Engineer, P.W.D. and Another, . In para 10 it is observed thus:

10. Admittedly at that date the State was not running any bus services in the United Provinces (now the State of Uttar Pradesh). May be there were no Government-owned buses at all in any other province of India at that time. Moreover it would not be reasonable to assume that a State enterprise of this kind was even in the contemplation of the U.P. Government at that time. At that time, apart from running some railways the State had not entered the commercial field. It is in the light of these facts that the language of the notification of March 16, 1925, must be interpreted. What the notification exempts is a vehicle crossing the river on "public or district board service". Could it be said that plying motor buses by way of commercial activity is running it on a public service? It is undoubtedly not easy to define what is "public service" and each activity has to be considered by itself for deciding whether it is carried on as a public service or not. Certain activities will undoubtedly be regarded as public services, as for instance, those undertaken in the exercise of the sovereign power of the State or of governmental functions. About these there can be no doubt. Similarly a pure business undertaking though run by the Government cannot be classified as public service. But where a particular activity concerns a public utility a question may arise whether it falls in the first or the second category. The mere fact that that activity may be useful to the public would not necessarily render it public service. An activity however beneficial to the people and however useful cannot, in our opinion, be reasonably regarded as public

service if it is of a type which may be carried on by private individuals and is carried on by government with a distinct profit motive. It may be that plying stage carriage buses even though for hire is an activity undertaken by the Government for ensuring the people a cheap, regular and reliable mode of transport and is in that sense beneficial to the public. It does not, however, cease to be a commercial activity if it is run with profit motive. Indeed even private operators in order to attract customers are also interested in providing same facilities to the public as the Government undertaking provides. Since that is so, it is difficult to see what difference there is between the activity carried on by private individuals and that carried on by Government. By reason of the fact that a commercial undertaking is owned and run by the State it does not ipso facto become a "public service". It is not disputed before us that the Roadways department of the Government of U.P. is running a profit making and a profitable activity by excluding every kind of competition. In the circumstances, therefore, we find it impossible to hold that its vehicles crossing over ferries can be regarded as crossing on public service. They are, therefore, not entitled to any exemption under the notification of March 16, 1925. Since they are not entitled to any exemption the question of abatement of rent does not arise.

3) Union of India (UOI) and Another Vs. Ladu Lal Jain, . Para 14 of the judgment reads thus:

14. We are of opinion that "profit element is not a necessary ingredient of carrying on business, though usually business is carried on for profit. It is to be presumed that the Railways are run on a profit, though it may be that occasionally they are run at a loss.

4) Kanhaiyyalal Fattelalji Upadhyaya deceased through LRs. Rukmani Upadhyay and Others Vs. Mahavir Tea Company and Others, . This judgment relates to rent matter. The Division Bench at Nagpur has held that Letters Patent Appeal in rent matter, in the facts of the said case, is not maintainable.

5) Sayyed Salim Sayyed Yusuf and Others Vs. Hrushikesh Pralhad Patil and Others, . In the facts of this case, a Division Bench of this Court held that the Letters Patent Appeal against the order of interim relief granted by learned Single Judge in a writ petition is not maintainable.

6) Maharashtra State Road Transport Corporation Vs. Kishore Kondiram Jagade and Others, . A Division Bench at the Principal Seat at Bombay dismissed the Letters Patent Appeal by confirming the judgment of the learned Single Judge.

7) Kalawati Pandurang Fulzele Vs. Divisional Controller, . A learned Single Judge at Nagpur Bench observed in para 10 thus:

10. Now, the Supreme Court in the case of Madhu Kishwar and others Vs. State of Bihar and others, observed in paragraph 37 as under:

The public policy and constitutional philosophy envisaged under Article 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women

as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they drawn upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilisation and culture advances. The customs and mores must undergo change with the march of time. Justice to individual is one of the highest interests of democratic State. Judiciary cannot protect the interest of the common man unless it would redefine the protection of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

Keeping in mind the constitutional provisions and the above observations of the Hon'ble apex court, I feel, it is the duty of this Court to balance the interest of a poor woman and her small children as against a mighty Public Corporation and to achieve distributive justice.

15. The learned Counsel for the respondent submits that the present Letters Patent Appeal is not maintainable. In the light of the judgment of the Apex Court in the case of State of M.P. v. Visan Kumar Shiv Charan Lal 2009 ALL SCR 15 and in the facts of the present case we find that this Letters Patent Appeal is maintainable.

16. From the pleadings of the complaint and the deposition it could be ascertained that the respondent - complainant was not appointed by adopting proper procedure as envisaged in law. According to the respondent himself initially he was working as Cleaner and he was asked to clean buses on payment of 50 paise per bus and thereafter he started working as Fitter / Helper. the documents produced by the respondent on record do demonstrate that he was not appointed by the Corporation against the vacancy by adopting proper procedure. The stand of the Corporation is that the respondent was cleaning buses which required more cleaning i rainy season. He was paid charges per bus. According to the Corporation it was a contractual employment and whenever work was available the respondent's services were utilised.

17. From the record produced and the deposition of the respondent it is difficult to ascertain that he had worked for more than 240 days in a year. The appellant had denied that the respondent worked any time in previous year for more than 240 days. The respondent placed reliance on the experience certificate issued by the Depot Manager. Perusal of the certificate does not disclose that the respondent worked for more than 240 days during the said period i.e. from the year 1985 to 1988.

18. The argument of the learned Counsel for the respondent is that the Corporation failed to disprove the said certificate issued by an officer of the Corporation. We do not find that, in the facts of the case, it was necessary for

the Corporation to do so.

19. The learned Counsel for the respondent submitted that as the Corporation failed to follow the provisions of Section 25F of the Industrial Disputes Act the fall out would be an order of reinstatement or permanency. We do not accept this proposition in the facts of the case. We find that the Industrial Court committed error in passing the order of permanency in favour of the respondent unmindful of the fact as to whether the post is available with the Corporation or not.

20. Both the learned Counsel appearing for the respective parties argued on the issue as to whether the judgments in Umadevi's case and Dayanand's case (cited supra) are applicable to the cases of this nature arising out of the Act of 1971 and the Industrial Disputes Act. The principles enunciated in the cases of Umadevi and Dayanand could be utilised as guiding principles in respect of matters wherein orders of reinstatement or permanency are sought in view of the claim that the complainant had worked for more than 240 days in a year with a public body or corporation or instrumentality.

21. We find that the appellant Corporation has an element of Government's participation and therefore could not be excluded from the principles applicable to the employment in public bodies, Corporations or Government instrumentalities.

22. Even otherwise if it is presumed that the experience certificate issued in favour of the respondent was a best piece of evidence to show that the respondent had worked for more than 240 days in previous years still we find that the order passed by the Industrial Court directing to make the respondent permanent in service is not sustainable in the light of the facts of the case and the judgments cited supra by the appellant. The respondent was in service on the basis of interim order passed by the Industrial Court on 17-2-1992. The employment of the respondent during pendency of the matter before the Industrial Court was thus "litigious employment". The learned Counsel appearing for the parties state that during pendency of the Letters Patent Appeal due to interim order passed in the proceedings of the Letters Patent Appeal he was not reinstated since last more than 8 years. The appellant - Corporation had contested the matter by filing Written Statement and by cross examining the respondent. The stand taken by the appellant - Corporation was clear. The allegations made by the respondent were refuted by the appellant in the proceedings before the Industrial Court. In the facts of the case we find that drawing adverse inference and presumptions would be defeating the purpose of law.

23. We are informed that the judgment delivered by the learned Single Judge in the case of Kalawati Pandurang Fulzele (cited supra) is stayed by a Division Bench in LPA No. 37 of 2008. Further, the judgment delivered by a learned Single Judge reported in Maharashtra State Road Transport Corporation Vs. Smt. Ramabai Vijay Shende and Member, Industrial Court, is stayed by the Apex Court.

24. We find that the view adopted by the Industrial Court was erroneous and not proper in the light of the observations made by us and in the light of the judgments cited by the appellant. We are, therefore, inclined to quash and set aside the judgment and order of the Industrial Court and the order passed by the learned Single Judge in view of the reasoning adopted by us as above.

25. The Letters Patent Appeal is allowed. The judgment and order dated 26-3-1999 passed by the Member, Industrial Court Solapur in Complaint (ULP) No. 66 of 1992 and the order dated 29-3-2000 passed by the learned Single Judge in Writ Petition No. 10 of 2000 are quashed and set aside. The complaint (ULP) No. 66 of 1992 stands dismissed. No order as to costs.