

(2010) 01 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No. 2227 of 1997

The Executive Engineer, Palkhed Canal Division

APPELLANT

Vs

Shri Pandharinath Chindu Kale

RESPONDENT

Date of Decision : 07-01-2010

Acts Referred:

Constitution of India, 1950 — Article 227

Industrial Disputes Act, 1947 — Section 10, 2, 25B, 25F, 25J

Citation : (2010) 2 BomCR 56 : (2010) 125 FLR 107 : (2010) 3 LLJ 564 :
(2010) 2 MhLj 321 : (2010) 3 SLR 122

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : A.P. Vanarse, AGP, for the Appellant; Kiran Bapat and T.R. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—The Petitioner has sought an order to set aside an award dated 19th June, 1996, passed by the Presiding Officer, Labour Court, Nasik accepting the reference, declaring the termination of the respondent's services with effect from 1st May, 1980 as unfair, illegal and improper and directing the Petitioner to reinstate the Respondent with continuity of service and full back wages from the date of termination viz.1st May, 1980 till reinstatement, after deducting the amounts received by the Respondent from 29th January, 1982 onwards.

2. The Deputy Commissioner of Labour, Nasik Division, made the Reference u/s 10 of the Industrial Disputes Act, 1947 for adjudicating the Respondent's demand for reinstatement with continuity of service and full back wages with effect from 1st May, 1980.

3. The main question that falls for consideration is whether the Respondent is a workman within the meaning of that expression in Section 2(s) and Section 25F of the Industrial Disputes Act. It was contended on behalf of the Petitioner that the Respondent is not a workman within the meaning of these provisions and

that he was employed/engaged only on a temporary basis. I have come to the conclusion that even a temporary employee is a workman within the meaning of the expression "workman" in Section 2(s) and is, therefore, entitled to the benefit of the provisions of Section 25F of the said Act.

4. Between the period 1st July, 1976 and 1st May, 1980, the Respondent worked as a Mukadam and Patkari (canal inspector) during various periods. In other words, he did not work throughout this period. There were breaks/gaps in between. What is important to note, however, is that the Respondent worked for more than 240 days in each year during this period except during the period 1st July, 1976 to 30th June, 1977. The Labour Court has come to the conclusion, after analysing the entire record in this regard. The finding does not warrant any interference. It was not even seriously challenged before me.

5. According to the Respondent, with effect from 1st May 1980, his services were orally terminated as he was from that day not permitted to attend work. There was no written notice terminating the Respondent's employment. That the provisions of Section 25F of the said Act were not followed is also admitted.

In reply to the statement of claim, the Petitioner contended that the Respondent was working as a Patkari between the period 16th December, 1978 to 31st March, 1980 and that there was no extension of the said post. The Respondent's services, therefore, automatically came to an end. In the circumstances, between 1st May, 1980 to 28th January, 1982, the Respondents did not work with the Petitioner in any capacity.

6. It may only be noted at this stage that there was some dispute regarding the precise periods during which the Respondent worked with the Petitioner. It was also contended in the pleadings that the Respondent's services were terminated in the year 1984. The Labour Court, however, proceeded on the basis that from 29th January, 1982, the Respondent was once again taken in employment by the Petitioner and that thereafter the Respondent worked continuously with the Petitioner as an unskilled labour. On completing five years from 29th January, 1982, the Respondent was taken on CRTE (converted regular temporary establishment). Thus, with effect from 29th January, 1987, the Respondent received salary of a regular employee of the Petitioner. This, in fact, was the basis on which the matter was argued before me even on behalf of the Petitioner. I will proceed accordingly.

7. Both the learned Counsel agreed that upon completion of five years, the Respondent would have been entitled to be absorbed as a regular employee of the Petitioner in view of the recommendation of the Kalekar Award which has been accepted and adopted by the concerned department viz. the Irrigation Department of the Petitioner. The Kalekar Award was applicable even at the time of the alleged termination of the Petitioner on 1st May, 1980.

8. Thus, there is no grievance on the part of the Respondent with effect from 29th January, 1987. He has since then been getting the regular salary and was

brought on CRTE from that date. This, the Petitioner did on the basis that the Respondent had been in continuous service for a period of five years from 29th January, 1982.

9. The Respondent's grievance, however, is that he was entitled to be brought on CRTE with effect from 1st July, 1982 as he completed five years of service on that date. The Petitioner, however, contends that the Respondent ceased to be in service with effect from 1st May, 1980 and that the Respondent, therefore, did not complete a period of five years of service with the Petitioner from 1st July, 1976. The Respondent contended that the termination of 1st May 1980 was illegal and void and he must, therefore, be deemed to have been in service throughout from 1st July, 1976 till 1st July, 1981. In that event, he would have completed the period of five years of service with the Petitioner on 1st July, 1981, entitling him to be brought on the CRTE with effect from 1st July, 1981. Accordingly, it is submitted that the Respondent would be entitled to all benefits of a regular employee including salary and other emoluments with effect from 1st July, 1981. The submission that the termination of his services on 1st May 1980, was void is barred on the fact that it was without following the provisions of Section 25F of the Industrial Disputes Act.

10. The principal issue, therefore, is whether the Respondent's services could have been terminated or whether the Respondent could be deemed to have ceased to be in the Petitioner's service with effect from 1st May, 1980 without following the provisions of Section 25F.

11. Mr. Vanarse, the learned Assistant Government Pleader appearing on behalf of the Petitioner submitted that Section 25F would not apply to the Respondent as he was not a workman during the period 1st July, 1976 to 29th January, 1987 by virtue of the fact that during this period he was not a regular employee of the Petitioner.

12. Sections 2(s) and 25F of the Industrial Disputes Act read as under:

2 Definitions.- In this Act, unless there is anything repugnant in the subject or context,

....

....

(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

....

....

25-F Conditions precedent to retrenchment of workmen , - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [for such authority as may be specified by the appropriate Government by notification in the Official Gazette.]

13. In support of his contention, Mr. Vanarse relied upon a judgment of a learned single Judge of this court in the case of Narayan Girjuba Gadhekar v. Chairman, Sillod Taluka Cooperative Marketing Society Limited and Anr. 2007 (2) Mh.L.J. 655. Mr. Vanarse relied upon paragraph 11 of the judgment which reads as under:

11. Learned Counsel Shri Shelke seeks to rely upon certain observations in case of Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, . The Apex Court has held that the workman need not be in continuous service for one year and it would suffice if he had worked for at least 240 days in one year. The learned Counsel would further rely on Shri Jairaj N. Shetty Vs. The Union of India (UOI), . A Division Bench of this court held that the workman may not be in continuous service throughout the year but if he has worked for 240 days of service during the period of one year prior to the termination then he would be entitled to the protection u/s 25F r/w Section 25B. There cannot be duality of opinion about such a legal position. The facts of the given case are, however, on different footings. The claim would depend upon nature of the employment. Here is a case in which the employment of the petitioner was purely temporary and seasonal. He cannot be regarded as workman within the meaning of Section 2(s) of the Industrial Disputes Act. It may be mentioned that learned Counsel Shri Shelke also placed reliance on Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, and Anoop Jaiswal Vs. Government of India and Another, . The learned Counsel would submit that termination order in question is only a colourable exercise of the powers to discharge service of the workman. I do not agree. The authorities referred to above are not relevant to the core issue involved in the present case. I am of the opinion that the petitioner failed to prove his case before the Labour Court. The impugned award is well reasoned. There is no perversity noticed in the impugned order. In the exercise of powers

under Article 227 of the Constitution, this court cannot reappreciate the powers under Article 227 of the Constitution, this court cannot reappreciate the facts. Needless to say, the impugned award and termination of the petitioner is quite legal and proper. There is no substance in the instant petition. In the result, the petition is dismissed. Rule discharged. No costs.

Mr. Vanarse relied upon the observation which have been emphasised by me viz. that the Petitioner therein could not be regarded as a workman within the meaning of Section 2(s) of the Industrial Disputes Act as his employment was purely temporary and seasonal.

14. Firstly, I do not read the judgment as holding that no temporary employee is a workman within the meaning of that expression in Section 2(s) and is, therefore, not entitled to the benefit of Section 25F of the said Act. The error in the submission arises on account of relying upon stray sentences in isolation from the rest of the judgment. In that case it was, in fact, found that the workman had not worked for more than 240 days in the year preceding the termination in question. The Labour Court in that case had found that the employee had not worked for more than 240 days during the relevant period. Further, what was sought by the workman in that case was regularisation or re-employment.

15. Assuming that the judgment ought to be interpreted as suggested by Mr. Vanarse it must, with respect, be held to be per incuriam in view of the judgment of a learned Single Judge of this Court and impliedly overruled by the subsequent judgments of the Apex Court.

16. In *Raymonds Woollen Mills Ltd. Vs. C.S. Sonawane and others*, , a learned single Judge of this court considered a similar question. The Respondent there was a badli workman and not a permanent hand. The learned Judge rejected the contention that his services could, therefore, be terminated without giving him any notice and without following any procedure of law. The learned Judge held that the same would be contrary to the provisions of Section 25F. It was held that Section 25F makes no difference or distinction between a badli workman and a non-badli workman. If the workman had worked for the period stipulated in Section 25F read with Section 25B, he would be entitled to the benefit of the provisions of Section 25F. Paragraphs 7 and 8 of the judgment read as under:

7. Mrs. Doshi then submitted that the employee was a badli workman and, therefore, his services could be terminated without giving him any notice and without following any procedure of law according to Standing Order No. 19(b) by which the relations of the parties were governed. I am afraid, there is no substance in the argument of Mrs. Doshi because any Standing Order inconsistent with the substantive provisions of law, i.e. Section 25F of the Industrial Disputes Act, 1947, cannot have any force in law. In fact, u/s 25J of the Industrial Disputes Act, 1947, the provisions of Chapter V-A of the said Act shall have effect notwithstanding anything inconsistent therewith contained in

any other law including Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946. And, therefore, the services of the employee could not have been terminated relying upon the provisions of Standing Order No. 19(b) governing the relationship between the parties. Whatever the Standing Order, the services of an employee who has completed continuous service of 240 days in a year could not be terminated without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947.

8. In this case admittedly the employee had actually worked as a substitute or a badli workman for 272 1/2 days and had thus completed one year's continuous service and in that view of the matter his services could not have been terminated without following the procedure laid down u/s 25F of the Industrial Disputes Act, 1947. It may also be noted here that Section 25F of the Industrial Disputes Act, 1947 makes no difference or distinction between a badli workman and non-badli workman. The action of the petitioner in doing so was, therefore, illegal, improper and in violation of principles of natural justice.

17. The judgment is clearly applicable in the present case as the Respondent was admittedly not a permanent employee, but worked as a mazoor and patkari. There is some dispute as to whether he was on daily wages or on a regular income. Even assuming that he was on daily wages it would make no difference in view of the judgment of this court.

18. Mr. Bapat's reliance upon the judgments of the Supreme Court in *Rattan Singh v. Union of India*, (1997) 11 SCC 396 and *Div. Manager, New India Assurance Co. Ltd. Vs. A. Sankaralingam*, is well founded.

19. In *Rattan Singh*, the appellant admitted that he had not been issued any appointment letter and that he was a daily rated casual worker. He was, therefore, held to be a simple daily rated worker. However, as he had worked for more than 240 days in the year it was held that he was entitled to the protection of Section 25F and that the provisions of Section 25F could not be denied to him on the ground that he was a daily worker. The termination of the appellant's services was, therefore, set aside. Paragraph 2 and 3 of the judgment read as under:

2. Shri S.M. Ashri, the learned Senior Counsel appearing for the appellant, has submitted that merely because the appellant was a daily-rated worker does not mean that he is not entitled to the protection of Section 25F of the Act. Shri Ashri has invited our attention to the judgment of the first appellate court dated 22-1-1985 wherein it is recorded that admittedly the appellant was a workman and he has served the Telephone Department on the dates mentioned in the said judgment which shows that the appellant has continuously worked for more than 240 days in a year. The submission of Shri Ashri is that the termination of the services of the appellant was in violation of Section 25F of the Act.

3. We find merit in the said submission of Shri Ashri. From the dates mentioned in the judgment of the first appellate court dated 22-1-1985, it appears that the

appellant had continuously worked for more than 240 days in a year. Since he was a workman, he was entitled to the protection of Section 25F of the Act and the said protection could not be denied to him on the ground that he was a daily-rated worker. It is not the case of the respondents that the provisions of Section 25F of the Act were complied with while terminating the services of the appellant. In these circumstances, the termination of services of the appellant cannot be upheld and has to be set aside. The services of the appellant were terminated in the year 1976. Nearly 20 years have elapsed since then. In these circumstances, we are not inclined to direct reinstatement of the appellant. But having regard to the facts and circumstances of the case, we direct that a consolidated sum of Rs. 25,000/- be paid to the appellant in lieu of compensation for back wages as well as reinstatement. This amount is being paid in full and final settlement of all the claims of the appellant. The said amount shall be paid within two months. The appeal is disposed of accordingly. No costs.

20. In *Divisional Manager, New India Assurance Co. Ltd. v. A. Shankaralingam*, the Tribunal held that the Respondent was not a workman within the meaning of Section 2(s) as he had worked only as a part-time employee and that too, on an ad-hoc basis. The Respondent challenged the award before the Madras High Court. The learned single Judge held that the point for decision was whether the Respondent's services had been wrongly terminated ignoring the procedure for retrenchment envisaged u/s 25F. The learned Judge held that the aforesaid provisions were not restricted in applicability to only full-time employees as the all embracing tenor of the definition took within its ambit even part-time employees. The learned Judge, therefore, quashed the award and ordered reinstatement with full back wages. The Division Bench confirmed the judgment. The Supreme Court in paragraph 8 held as under:

8. We have heard the learned Counsel for the parties and gone through the record. It will be seen that the Single Bench and the Division Bench of the High Court have both on a consideration of the oral evidence as well as on the documentary record, and on admissions made in evidence given categorical findings of fact that the respondent had worked till about 5 p.m. every day but even otherwise we are of the opinion in the light of the various decisions of the High Courts and the Supreme Court, that a part-time employee would be a workman as understood in Section 2(s) thereof and would have the benefit of Section 25F of the Act.

21. As stated earlier, the Labour Court, after examining the entire record, came to the conclusion that the Respondent had worked for more than 240 days in each year except during the period 1st July, 1976 to 30th June, 1977. There is nothing on record that militates against this finding. The same was not even seriously challenged before me. In the circumstances, the Respondent falls within the ambit of the term "workman" in Section 2(s) of the Industrial Disputes Act. Having worked the requisite period stipulated in Section 25F read with Section 25B, he is entitled to the protection of Section 25F.

22. It is necessary to note at this stage that it is nobody's case that the Respondent's employment/appointment with the Petitioner was, at any stage, illegal or void. I refrain, therefore, from expressing any conclusive view on the question whether a person would be entitled to be deemed to be a workman if his employment is considered or held to be void ab-initio. This is also not a case where the employment is for a fixed period or may be terminated pursuant to a stipulation in that behalf.

23. In the circumstances, the Respondent was entitled to the benefit of the provisions of Section 25F. Admittedly, the provisions of Section 25F were not followed. The Labour Court, therefore, rightly came to the conclusion that the termination/deemed termination is void. The necessary consequence, therefore, is that the Respondent must be deemed to have been in employment from 1976 till at least after 1st July, 1981. He, therefore, completed the period of five years on 1st July, 1981 and was entitled, therefore, to the benefit of the Kalekar Award with effect from 1st July, 1981. In other words, he was entitled to be considered to be a regular employee and to avail of all benefits consequent thereto with effect from 1st July, 1981.

24. In the circumstances, the Writ Petition is dismissed. There shall, however, be no order as to costs.