
(2009) 06 BOM CK 0141

In the Bombay High Court

Case No : Writ Petition No. 4263 of 1996

The State of Maharashtra and The Executive Engineer, L.M.I. Division APPELLANT

Vs

Balaji Raosaheb Shinde and The Member, Industrial Court RESPONDENT

Date of Decision : 18-06-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 2, 25F
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (2009) 6 BomCR 253 : (2009) 111 BOMLR 2800 : (2011) 1 SLR 89

Hon'ble Judges : S.P. Davare, J

Bench : Single Bench

Advocate : B.R. Khekale, A.G.P, for the Appellant;

Judgement

S.P. Davare, J.—Perused.

2. By the present four Writ Petitions, the petitioners have challenged the common judgment and order passed by the learned Member, Industrial Court, Solapur in respective Complaints (ULP) Nos. 22, 23, 24 and 25 of 1987 on 7.12.1995 thereby directing the reinstatement of respective complainants with continuity of service and full back wages.

3. The factual matrix, in brief, are that the respondent No. 1 in the present Writ Petitions i.e. Original complainants filed complaints u/s 28 with Item Nos. 5 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as, the MRTU and PULP Act) before the learned Member, Industrial Court, Solapur, with prayers to reinstate the said complainants with continuity of service and full back wages. The Complaint Nos. , Writ Petition Nos. and Name of the complainants are as follows :

4. The complainant (respondent) in Complaint No. 22 of 1987 was working as

labourer on Both Tank of the petitioners herein since March, 1982 till 22.1.1987. The complainant in Complaint No. 23 of 1987 was working as Watchman from 1981 till 29.2.1986 on Ganjurwadi M.I. Tank of the petitioners herein and from 1.3.1986 as a regular Watchman till 23.1.1987. The complainant in Complaint No. 24 of 1987 worked as a regular labourer from March, 1982 till 1.4.1986 and from 2.4.1986 was on regular pay scale. The complainant in Complaint No. 25 of 1987 was working as a regular labourer on Ganjur Minor Tank from June, 1983 and from 1.3.1986 till 22.1.1987 and he was on muster roll in the post of Watchman. However, the services of all the afore said four complainants (respondents No. 1 herein) were terminated by the petitioners herein orally from 23.1.1987.

5. It is the contention of the complainants that the termination of the services of the complainants by the petitioners herein was in breach of Section 25F of the Industrial Disputes Act, 1947 since the petitioners herein neither served any notices upon the respective complainants nor paid notice pay or retrenchment compensation to them, although they have completed 240 days in Calendar year preceding to their alleged termination and thereby committed unfair labour practice. It is also the grievance of the complainants that the petitioners herein retained some of the employees in the employment by showing favoritism and partially amounting to unfair labour practice.

6. The petitioners herein resisted the said contentions of the respective complainants contending that the respective complainants were daily rated labourers and they were in the employment of the petitioners herein under the Employment Guarantee scheme launched by the State Government through the District Collector and no work was available with the petitioners herein for assigning to them after completion of the said specific project/scheme and hence they are not entitled to the protection u/s 25F of the Industrial Disputes Act, 1947 and consequently it is the contention of the petitioners herein that there is no breach of any law or service agreement amounting to unfair labour practice under Item 9 of the MRTU and PULP Act.

7. Considering the rival contentions, the learned Member, Industrial Court, Solapur negative the contention of the respective complainants that the petitioners herein committed unfair labour practice by way showing favoritism holding that the complainants did not adduce any evidence in that respect.

8. However, as regards another contention of the complainants herein in respect of completion of 240 days in the Calendar year preceding to their alleged termination and noncompliance of the mandatory provisions of Section 25F of the Industrial Disputes Act, 1947 while terminating the services of the respective complainants with effect from 23.7.1987 was upheld by the learned Member of the Industrial Court, Solapur while delivering the common judgment and order in the aforesaid respective complaints on 7.12.1995 and thereby directed the petitioners herein to reinstate the respective complainants with continuity of service and full back wages.

9. Being aggrieved by the said common judgment and order dated 7.12.1995 the petitioners herein preferred four separate Writ Petitions assailing the impugned order dated 7.12.1995 passed by the learned Member, Industrial Court, Solapur in the afore said respective complaints under Article 227 of the Constitution of India.

10. Heard the learned Assistant Government Pleader for the petitioners. Respondent No. 1 remained absent although served.

11. An emphasis was given by the learned A.G.P. For the petitioners on the very aspect that the services of the respective complainants i.e. the respondents herein were on daily rated and on temporary basis meant for the specific project / scheme of the Employment Guarantee launched by the State Government and implemented by the District Collector and, therefore, there was no work to be assigned to the said complainants after completion of the said specific project/ scheme and therefore, it is the contention of the petitioners that when there is no work available with the petitioners to be assigned to respondent No. 1 and if the petitioners are directed to reinstate the services of the complainants with continuity of service and full back wages, then the petitioners would have to pay the wages to the respective complainants without assigning any work to them and the same cannot be permitted since it would be definitely burden on the public exchequer.

12. To substantiate the said contention, the learned A.G.P. for the petitioners relied upon the observations made in para 3 by the Honourable Apex Court in the judgment reported at State of Himachal Pradesh Vs. Suresh Kumar Verma and another, , which is as follows :

3. It is seen that the project in which the respondents were engaged had come to an end and that, therefore, they have necessarily been terminated for want of work. The Court cannot give any directions to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment dehors the rules.

13. Moreover, the learned A.G.P. For the petitioners also vehemently submitted that the services of the complainants/respondents herein were temporary and their posts were not sanctioned and, therefore, no right of regularization exists into them attributing status of workman under the provisions of the Industrial Disputes Act, 1947 on completion of 240 days of work and such duration of work does not create any right of regularization in them.

14. To substantiate the said contention, the learned A.G.P. for the petitioners relied upon the observations made in para 4 by the Honourable Supreme Court in the judgment reported at Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., , which is as follows :

4. We are unable to uphold the order of the High Court. There were no sanctioned posts in existence to which they could be said to have been

appointed. The assignment was an ad hoc one which anticipatedly spent itself out. It is difficult to envisage for them, the status of workmen on the analogy of the provisions of Industrial Disputes Act, 1947, importing the incidents of completion of 240 days work. The legal consequences that flow from work for that duration under the Industrial Disputes Act, 1947 are entirely different from what, by way of implication, is attributed to the present situation by way of analogy. The completion of 240 days work does not, under that law import the right to regularisation. It merely imposes certain obligations on the employer at the time of termination of the service. It is not appropriate to import and apply that analogy, in an extended or enlarged form here.

15. So also the learned A.G.P. For he petitioners submitted that the respective complainants/respondents in the present Writ Petitions were employed temporarily for the specific project/scheme i.e. Employment Guarantee Scheme to be implemented by the State Government through the District Collector and the said project/scheme has also come to an end and, therefore, no work can be assigned to the respondents herein since the object of the said scheme is over and, therefore, the persons i.e. the complainants herein employed under the said scheme cannot claim regularization merely because they have put in more than 240 days of service.

16. To support the said contention, the learned A.G.P. for the petitioners relied upon the observations made in para 14 in the judgment reported at Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, , which is as follows :

14. Viewed in the context of the facts of the present case it is apparent that the schemes under which the petitioners were given employment have been evolved to provide income for those who are below the poverty line and particularly during the periods when they are without any source of livelihood and, therefore, without any income whatsoever. The schemes were further meant for the rural poor, for the object of the schemes was to start tackling the problem of poverty from that end. The object was not to provide the right to work as such even to the rural poor much less to the unemployed in general. As has been pointed out by the Union of India in their additional affidavit, in 1987-88, 33 per cent. of the total rural population was below the poverty line. This meant about 35 million families. To eliminate poverty and to generate full employment 2500-3000 million mandays of work in a year was necessary. As against that, the Jawahar Rozgar Yojna could provide only 870 million mandays of employment on intermittent basis in neighborhood projects. Within the available resources of Rs. 2600 crores, in all 3.10 million people alone could be provided with permanent employment, if they were to be provided work for 273 days in a year on minimum wages. However, under the scheme meant for providing work for only 80-90 days work could be provided to 9.30 million people.

The above figures show that if the resources used for the Jawahar Rozgar Yojna were in their entirety to be used for providing full employment throughout the

year, they would have given employment only to a small percentage of the population in need of income, the remaining vast majority being left with no income whatsoever. No fault could, therefore, be found with the limited object of the scheme given the limited resources at the disposal of the State. Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. It is wrong to approach the problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts, in the context of such schemes are both unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation. They would benefit a few at the cost of the many starving poor for whom the schemes are meant. That would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources. This is not to say that the problems of the unemployed deserve no consideration or sympathy. This is only to emphasise that even among the unemployed a distinction exists between those who live below and above the poverty line, those in need of partial and those in need of full employment, the educated and uneducated, the rural and urban unemployed etc.

17. Besides that the learned A.G.P. For the petitioners also submitted that the services of the complainants i.e. the respondents herein were availed temporarily for the fixed period i.e. to the extent of specific project i.e. Employment Guarantee Scheme and after completion of the said scheme their services were terminated with effect from 23.1.1987 and hence the said termination is not retrenchment and is not illegal unless it is mala fide, in view of Section 2(oo)(bb) of the Industrial Disputes Act, 1947 and hence the provisions of Section 25F of the Industrial Disputes Act, 1947 will not apply in the instant case.

18. To support the said contention, the learned A.G.P. for the petitioners relied upon the observations made in para 4 by the Honourable Apex Court in the judgment reported at State of Rajasthan and others Vs. Rameshwar Lal Gahlot, , which is as follows :

4. The controversy now stands concluded by a judgment of this Court reported in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, . Therein this Court had held that once an appointment is for a fixed period, Section 25F does not apply as it is covered by Clause (bb) of Section 2(oo) of the Act. It is contended for the respondent that since the order of the learned Single Judge as not challenged, the termination became final. Consequently, the appellant would be liable to pay back wages on reinstatement. In our considered view, the opinion expressed by learned Single Judge as well Division Bench are incorrect in law. When the appointment is for a fixed period, unless there is finding that power under Clause

(bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the services in terms of the letter of appointment unless it is a colourable exercise of power. It must be established in each case that the power was misused by the management or the appointment for a fixed period was a colourable exercise of power. Unfortunately, neither the learned Single Judge nor the Division Bench recorded any finding in this behalf. Therefore, where the termination is in terms of letter of appointment saved by Clause (bb), neither reinstatement nor fresh appointment could be made. Since the appellant has not filed any appeal against the order of the learned Single Judge and respondent came to be appointed afresh on June 27, 1992, he would continue in service, till the regular incumbent assumes office as originally ordered.

19. The learned A.G.P. for the petitioners also relied upon the observations made by the Honourable Supreme Court in paras 9, 10 and 11 in the judgment reported at Kishore Chandra Samal Vs. The Divisional Manager, Orissa State Cashew Development Corporation Ltd., Dhenkanal, as follows.

9. Recently, the question was examined in Batala Coop. Sugar Mills Ltd. v. Sowaram Singh.

10. Section 2(oo) of the Act reads as follows: section 2(oo) retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include -

(a)-(b)

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

11. The decision in S.M. Nilajkar case has no application because in that case no period was indicated and the only indication was the temporary nature of engagement. In the instant case in all the orders of engagement, specific periods have been mentioned. Therefore, the High Courts order does not suffer from any infirmity.

20. The learned A.G.P. For the petitioners made submission that the services of the respondents were on daily rated basis and were availed on temporary basis and, therefore, termination of their services is not in violation of Section 25F of the Industrial Disputes Act, 1947, since their disengagement from the service cannot be construed to be retrenchment under the Industrial Disputes Act, 1947. It is also submitted that the concept of retrenchment cannot be stretched to such an extent as to cover the respondents herein, since they are only daily wager employees and have no right to the posts and consequently their disengagement is not arbitrary.

21. To substantiate the said contention the learned A.G.P. For the petitioners/ State relied upon the observations made by the Division Bench of the Honorable Supreme Court in para No. 3 of the judgment reported at Himanshu Kumar Vidarthi and Others Vs. State of Bihar and Others, , as under :

3. The admitted position is that the petitioner No. 1 came to be appointed as Assistant, Petitioner No. 2 as Driver and Petitioner Nos. 3 to 5 as Peons on different dates, viz., on August 1, 1988, November 10, 1989, May 31, 1987 and April 22, 1992. They were appointed in the Co-operative Training Institute, Deoghar by its Principal. They are admittedly daily wage employees. Their services came to be terminated by the Principal. Calling that termination in question, they filed a writ petition in the High Court. The main grievance of the petitioners before us is that termination of their services is in violation of Section 25F of the Industrial Disputes Act, 1947. The question for consideration, therefore, is : whether the petitioners can be said to have been retrenched within the meaning of Section 25F of the Industrial Disputes Act ? Every Department of the Government cannot be treated to be industry. When the appointments are regulated by the statutory rules, the concept of industry to that extent stands excluded. Admittedly, they were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Under these circumstances, their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of retrenchment, therefore, cannot be stretched to such an extent as to cover these employees. The learned counsel for the petitioners seeks to contend that in the High Court, the petitioners did not contend that it is a case of retrenchment but termination of their services is arbitrary. Since they are only daily-wage employees and have no right to the posts, their disengagement is not arbitrary.

22. Applying the parameters laid down in the afore said Rulings to the present case in hand and coming to the impugned common judgment and order dated 7.12.1995 wherein mainly learned Member, Industrial Court, Solapur held that the respective respondents herein have completed 240 days in the Calendar year preceding to their termination and mandatory provisions of Section 25F of the Industrial Disputes Act, 1947 were not complied with prior to their termination and hence held that the termination of the services of the respondents herein was illegal amounting to committing unfair labour practice prescribed under Item 9 of Schedule IV of the MRTU and PULP Act and, therefore, directed the petitioners herein to reinstate the respondents herein with continuity of service and full back wages, but considering the propositions put forth by the learned A.G.P. for the petitioners as mentioned hereinabove and further considering the observations made by the Honorable Supreme Court in the respective judgments as mentioned hereinabove, it is amply clear that there is substance in the argument canvassed by the learned A.G.P. for the petitioners and merely completion of 240 days by each of the respondents in Calendar year preceding to their termination will not give any right to them, and it is not incumbent upon

the petitioners to comply with the provisions of Section 25F of the Industrial Disputes Act, 1947 prior to their termination when the services of respective respondents were on temporary and daily rated basis on the unsanctioned posts and for the particular and specific project i.e. Employment Guarantee Scheme implemented by the State Government through the District Collector which has come to an end and when the services of the respective respondents were taken for the fixed period of the said scheme and were not renewed since thereafter no work was available to be assigned to the respondents, and hence merely on completion of 240 days work in the last Calendar year preceding to termination of respective respondents, will not import any right of regularisation in them. Moreover, since the present cases are covered u/s 2(oo)(bb) of the Industrial Disputes Act, 1947, compliance of provisions of Section 25F of the Industrial Disputes Act, 1947, will not be attracted.

23. In the circumstances, the impugned common judgment and order passed by the learned Member, Industrial Court, Solapur, dated 7.12.1995 is erroneous and against the established canons of law and, therefore, this is a fit case in which an interference under Article 227 of the Constitution of India is warranted, and hence, the impugned common judgment and order passed by the learned Member, Industrial Court, Solapur dated 7.12.1995 is required to be set aside by allowing the present Writ Petitions.

24. In the result, Writ Petition Nos. 4263, 4264, 4265 and 4266 of 1996 are allowed in terms of prayer clause C thereof and the impugned common judgment and order passed by the Member, Industrial Court, Solapur in Complaint (ULP) Nos. 23, 25, 22 and 24 of 1987, respectively on 7.12.1995 stands quashed and set aside. Rule is made absolute accordingly. In the circumstances, there shall be no order as to costs.