

(2019) 07 GUJ CK 0146
In the Gujarat High Court

Case No : R/Special Civil Application No. 2364 Of 2009

Vadnagar Nagarik Sahakari BankLtd

APPELLANT

Vs

Dipikaben Arvindbhai Thaker

RESPONDENT

Date of Decision : 22-07-2019

Acts Referred:

Industrial Disputes Act, 1947 — Section 25B(1), 25F, 25G, 25H

Citation : (2019) 07 GUJ CK 0146

Hon'ble Judges : G.R. Udhwani, J

Bench : Single Bench

Advocate : KJ Brahmbhatt, Keyur A Vyas

Final Decision : Allowed

Judgement

1. None has remained present for the respondent workman though repeatedly called out. This court therefore proceeds to decide the matter after hearing the learned counsel for the petitioner- employer.
2. Judgement and award dated 30.01.2009 rendered in Appeal (I.C.) No. 20 of 2006 under the Bombay Industrial Relations Act, 1946 confirming the order dated 10.03.2006 rendered in T Application No. 37 of 1994 lodged by respondent workman in the Labour Court, Mehsana is sought to be assailed in this petition under Article 227 of the Constitution of India.
3. At the outset, it is required to be stated that normally this court under Article 227 of the Constitution of India would not interfere in concurrent findings of the fact; however it is settled law that where the case is decided on misconception or misconstitution of facts consequenting in miscarriage of justice, the court under Article 227 of the Constitution of India would interfere.
4. From the impugned judgement and award, this court finds an apparent error in appreciating the testimony of the witnesses examined by the petitioner. Only on the basis of the bald statement of the petitioner's witnesses that the workman has completed more than 240 days during the required period, finding to that

effect by both the courts below could not have been rested in absence of material to substantiate the said fact. It was the case of workman that she worked with the petitioner as daily wager between 1989 and 1994 and in the year 1994 her services were orally terminated. Such burden lay on the workman which could have been easily discharged through relevant evidence including testimony of her co-workers as indicated in *Surendranagar District vs. Dahyabhai Amarsinh*- (2005) 8 SCC 750 (para 17 and 18) which read as under:

"17. More recently, in *Rajasthan State Ganganagar S. Mills Ltd. vs. State of Rajasthan & Another*, (2004) 8 S.C.C. 161, *Municipal Corporation, Faridabad vs. Siri Niwas*, (2004) 8 S.C.C. 195 and *M.P. Electricity Board vs. Hariram*, (2004) 8 S.C.C. 246, this Court has reiterated the principle that the burden of proof lies on the workman to show that he had worked continuously for 240 days in the preceding one year prior to his alleged retrenchment and it is for the workman to adduce an evidence apart from examining himself to prove the factum of his being in employment of the employer.

18. In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period of twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The Courts below have wrongly drawn an adverse inference for non production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25B(1) of the Act. In the fact & situation and in the light of the law on the subject, we find that the workman-respondent is not entitled for the protection or compliance withf Section 25F of the Act before his service was terminated by the employer. As regards non-compliance with Sections 25G and 25H suffice is to say that Witness Vinod Mishra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers. In the absence of regular employment of the workman, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so called

seniority no relief could be given to him for non-compliance of provisions of the Act. The courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the court. In order to entitle the court to draw inference unfavourable to the party, the court must be satisfied that evidence is in existence and could have been proved."

5. The workman having failed to discharge her burden, dismissal of her case could have been the only consequence. The courts below failed to adhere to such legal position and fell in serious error in shifting the burden of proof upon the petitioner that too erroneously as also rendered decision in absence of the evidence of the workman having worked for more than 240 days.

6. As far as backwages are concerned, it is submitted by the learned counsel for the petitioner that the workman has been employed in Shri Saraswati Sishu Mandir Prathmik Shala run by Lokkalyan Trust, Vadnagar and thus there is reason to believe that the workman is gainfully employed in absence of the contrary evidence. Even otherwise the workman was not appointed under due procedure of law but was concededly a daily wager and as such would not be entitled to reinstatement, but only compensation, if at all the case was made out. Therefore grant of continuity to the workman in absence of proof of her being in continuous employment was illegal. Having regard to the nature of appointment of respondent workman as also applying the doctrine 'dais non' or 'no work no pay', in the opinion of this court the workman would not be entitled to backwages. The courts below did not appreciate the said legal position and thus fell in serious error in awarding the backwages.

7. For the foregoing reasons, the petitioner is entitled to succeed. Accordingly the petition is allowed. Impugned judgement and award is quashed and set aside. Rule is made absolute accordingly.