
(2016) 08 CAL CK 0066
In the Calcutta High Court
Case No : W.P. No.24450 (W) of 2015

Vaskar Roy

APPELLANT

Vs

The Syndicate Bank

RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25B

Citation : (2017) 1 CLR 222 : (2016) 151 FLR 886 : (2016) 4 LLJ 75 : (2017) 1 LLN 83

Hon'ble Judges : Mr. Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Mr. Asish Sanyal, Mr. Tapas Kumar Dey, Ms. Sanchayita De and Mr. Nirupam Sarkar, Advocates, for the Petitioner; Mr. C.R. Bakshi and Mr. Kalyan Mukherjee, Advocates, for the Respondent Nos.1

Final Decision : Dismissed

Judgement

Sambuddha Chakrabarti, J.—The Award under challenge in this writ petition has been passed by the learned Presiding Officer, Central Government Industrial Tribunal?Cum?Labour Court (the Tribunal, for short), Asansol, in Reference No.48 of 2004.

2. The case of the petitioner inter alia is that he was engaged as a peon in the Syndicate Bank, (Asansol Branch) under the Branch Manager, i.e., the respondent no. 2. His duties included taking out of ledger books, registers, cleaning of tables, sprinkling of water on the khus khus, serving water to the staff of the bank, so on and so forth. On July 1, 1993, the respondent no. 3 terminated the petitioner from service. During his tenure of service the respondent no. 2 made payment of his remuneration by voucher for a few days of a month and payment for the remaining portion of the month was given to him in hand. This was done, he alleges, to prove that he was engaged for a few days of a month only and it was also noted in the vouchers that the engagement

was for sprinkling water in khus khus.

3. After the rejection of the petitioner's application by the Assistant Labour Commission (Central) for starting a conciliation proceeding, he made an application to the Secretary, Ministry of Labour, Government of India, to treat the dispute as an industrial one. Ultimately, the dispute was referred for adjudication to the Tribunal.

4. The respondent Nos.1 to 3 opposed this application by filing an affidavit-in-opposition. Apart from questioning the maintainability of writ petition on various grounds the answering respondents stated that in order to give comfort to the employees and the customers in general visiting the Asansol Branch of the concerned bank, the bank had put khus khus in the windows and doors of the branch premises. The petitioner was engaged in sprinkling water on them for the years 1991 to 1993 for the summer seasons only as a casual labour with the wage at the rate of Rs. 16/- per day on no work no pay basis. When the heat of the summer receded his assignment for sprinkling water on khus khus was automatically withdrawn. No letter of appointment was ever issued to him and for disengaging him also no letter was issued.

5. It is the further case of the respondents that the petitioner had worked for 78 days, 68 days and 58 days for the years 1991, 1992, and 1993 respectively. After his disengagement, with effect from July 1, 1993, he was never reengaged. He had made an application before the Assistant Labour commissioner (Central) for conciliation proceeding in respect of his alleged termination from service. But the said conciliation had ended in failure. Although initially the Ministry of Labour informed all concerned that the dispute was not fit for reference to the Industrial Tribunal, the same was referred to the Tribunal after an order was passed by this Court. The respondent had denied the statement of the petitioner that he was appointed as a peon in the Asansol Branch of the Bank on and from April 1, 1991. This has been sought to be made by him to get some undue advantage of permanent employment. The petitioner also did not discharge the duties of a peon. The allegation that the petitioner had worked for more than 120 days continuously has also been denied by the respondents. Similarly, the allegation of his termination from service by the Branch Manager of the concerned bank has also been denied. He had never completed 120 days of continuous service and he is not entitled to the benefits of Section 25 B and 25 F of the Industrial Disputes Act, 1947. He was engaged as a casual labour for a limited period which was essentially temporary in nature.

6. The learned Presiding Officer of the Tribunal had set out the respective cases, considered the provision of Section 25B of the Industrial Disputes Act and held that the petitioner had not filed any document to prove that he was appointed by the bank. If he did not have any document he could have summoned the same from the bank to support his version that he was duly appointed. Similarly, the petitioner also did not file any letter of termination.

7. As per Section 25B of the Act a workman can only be regularised if he had put in 120 days of continuous service in any organization. The learned Presiding Officer had discounted the evidence of the petitioner that from 1991 to 1994 he had worked for more than 120 days continuously on the logic that if he had worked continuously for four years his service contribution to the bank would have been for more than 1200 days. If the petitioner had rendered service less than 120 days or more than 120 days with a break in between there was no employer and employee relationship as per the said Act.

8. On the grounds as stated above the reference was rejected.

9. Mr. Sanyal, the learned Advocate appearing for the petitioner, tried to establish that in the year 1993 he was engaged in the month of March till September of that year, i.e., corresponding to the summer months and the total working days were 210 days. Mr. Sanyal argued that if a person is temporarily engaged in a Government organisation he is entitled to a permanent job in the said post. Since the petitioner has worked for more than 210 days from 1991 to 1993 as a temporary worker. He is entitled to a permanent job which has been denied by the bank with a view to oust his claim in respect of the permanent job. Mr. Sanyal further criticized the impugned Award that on merely on the basis of some incorrect statements made by the management, the Presiding Officer concluded that the petitioner had not worked for less than 120 days when the management of the bank did not file any oral or documentary evidence. Thereby, the Tribunal without considering the documentary evidence as well as the pleadings passed the Award impugned. The petitioner has annexed some money receipts to the writ petition. Since the admitted position is that the bank did not issue any appointment letter non-production of the appointment letter was no criteria for the rejecting the claim of the petitioner. The petitioner had worked as a casual worker and therefore, he should have been regularised on the same terms and conditions as other casual workers have been regularized.

10. Mr. Sanyal delved into the area of probability to suggest that in Asansol during the summer season nobody can work without water and it is not possible for a permanent staff to take the water and other essential requirements all by himself.

11. The next limb of the submission of Mr. Sanyal is that after the Constitution of India came into force it has a superseding impact on the application and interpretation of any statute including the Industrial Disputes Act. If the employer is a State within the meaning of Article 12, it is also bound by Article 21. Hire and fire can no longer be the norm of employment whether the engaged person is a workman as defined in the Industrial Disputes Act. If the employer regulates the engagement of a person in such a way as causes break in his continuing employment the court won't deny him the benefit of Section 25 B of the Act, and at least not the rights guaranteed under Article 21 of the Constitution of India. If he has not been appointed in accordance with the mandate of a statute but still appointed and paid from public exchequer it cannot

be said that he did not earn any status which will not mature into full-fledged employment. If the petitioner is denied even a reasonable status in the organisation or the benefit of 120 days' service, he will be made to suffer an irreparable injury in the context of the constitutional guarantee. Right of an assured and continuing livelihood has to be a human right over and above being a fundamental right. Such an act would be a crime against the Constitution.

12. The petitioner in order to justify his claim explored different avenues. After submitting that the Award impugned is against the constitutional mandates and the basic human rights he treaded the path of the labour law to find out if the respondent bank had indulged in unfair labour practise. He admits that unfair labour practise will not apply as he is not a workman under the Act. But that was entirely due to the whims of the authority and it cannot be a ground for a complaint by the employer. The fundamental rights are not so illusory that they can be easily dispelled by the employer's discretion. Job once given and then taken away casually on the pretext that through no valid recruitment process he got the job sabotages the guarantees enshrined under Article 21 of the Constitution of India.

13. In support of his contention, Mr. Sanyal has referred to the case of Senior Divisional Commercial Manager and others v. S.C.R. Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association and Another, reported in AIR 2016 SC 668, wherein it has been held, with reference to the particular facts of the particular case, that if the appellants under the guise of the policy are permitted to deny renewal of the licenses in favour of the licensees, it would amount to deprivation of their rights to freedom of occupation guaranteed under Article 19(1)(g) of the Constitution as well as the right to livelihood. Such an action on the part of the appellants would be opposed to their constitutional duty towards social justice as well as the uplifting of the weaker sections of the society and the unemployed youth of the country.

14. In order to justify his claim and to assail the Award the petitioner had taken recourse to various stands with regard to his nature and duration of engagement under the bank. One of the grounds for assailing the Award was that the Tribunal failed to appreciate the difference between the casual, temporary and permanent labour. But it is not easy to find out what the petitioner claims for himself. One of the grievances of the petitioner is that the Presiding Officer of the Tribunal did not consider the evidence adduced by him. The contention of the respondents is that the petitioner was engaged as a casual labour for a limited period has been denied by the petitioner in his affidavit-in-reply. While adducing evidence in examination-in-chief, he specifically submitted that his appointment was not on temporary basis neither did the management ever employ him intermittently on casual basis. In the written notes of submission filed on behalf of the petitioner, it has been submitted that he worked as a casual workman (Paragraph 8).

15. There is no denying that the petitioner was engaged by the bank on daily basis at the rate of Rs. 16/- per day. The copies of vouchers annexed to the writ

petition also prove the same and the work discharged by the petitioner as appearing from the said vouchers was for sprinkling water to the khas khas. These vouchers were in the hands of the petitioner; otherwise he could not have produced them. After a very long gap of time he cannot turn around and say, as has been sought to be made, that the vouchers contained an incomplete description of the works he had to render as a peon. The vouchers never mentioned that he worked as a peon. Even if he had described the other works associated with the job of a peon he never stated on oath before the Tribunal that the vouchers carried the wrong description of his work neither did he ever raise any objection to the issue of the vouchers in the manner in which it has been done.

16. There is also a good deal of discrepancy in respect of the tenure of his work. At one place he claims to have worked for 120 days continuously in each year. In his evidence, he claimed to have worked for 240 days continuously, in the written notes of submission he claimed to have worked for more than 210 days and in his submission he laid the blame for not being allowed to work for 120 days at a time upon the respondents. Thus, one claim runs counter to the other. When Mr. Sanyal argued that the petitioner was not allowed to work for more than 120 days due to the fault on the part of the employer he admitted that the petitioner did not actually work for that period. I quite agree with the learned Presiding Officer of the Tribunal that the petitioner could have summoned the necessary documents from the bank to support his version that he had been appointed by the bank or the nature of such appointment. Not only that, if it is the case of the petitioner that for a few days of the month payment was made to him in hand by getting his signature on the registers he should have also summoned them from the bank to justify his contention that he had worked for the number of days he claims.

17. Mr. Sanyal made a grievance that the bank could not produce any document neither did he adduce any evidence and the Tribunal went wrong in rejecting the claim of the petitioner relying on the statements made by the bank. I have considered the Award and I do not find that it was merely because the bank said something that the petitioner's claim was rejected. On the contrary the real ground for rejection was the failure on the part of the petitioner to provide any document or to adduce any acceptable case before the Tribunal. Even if the bank does not adduce any evidence, the petitioner is not absolved of his liability to prove his case. After all, the onus of proving the case lies entirely on the person who seeks an affirmative of his case. The law on the point is very well-settled. The petitioner or for that matter the plaintiff in a suit must have to succeed on the strength of his case and not on the weakness of the defence. Thus, if the bank does not give any contrary evidence, the basic and inalienable onus upon the petitioner for establishing his case does never shift. If he had summoned the records from the bank relating to his employment its nature might have been established therefrom.

18. Mr. Sanyal submitted that the Court cannot deny him the benefit of Section 25B of the Industrial Disputes Act.

19. Section 25B defines continuous service under different circumstances. The section lays down that the service shall be deemed to be continuous in spite of his interruption or on account of any of the reasons stated therein and should remain uninterrupted. However, the definition of the words 'continuous service' in Section 25B is preceded by the words 'for the purpose of this chapter' which indicate that the effect of continuity or interruption of service in terms of the definition is to be limited only for the purposes of this chapter i.e., Chapter V-A of the Industrial Disputes Act, viz., for calculating, quantifying and payment of compensation under the provisions contained in Chapter V-A of the Act. The petitioner cannot take advantage of continuous service when he seeks reinstatement and absorption as a permanent staff of the Syndicate Bank.

20. That apart, it is for the workman to show by adducing relevant evidence that he has been in continuous service for the period he claims. In the case of *Range Forest Officer v. S.T. Hadimani*, reported in AIR 2002 SCW 909, the Supreme Court held that the burden of proving that a workman had acted for a number of days is on him. The same was the view of the Supreme Court in the case of *Rajasthan State G.S. Mills Ltd. v. State of Rajasthan*, reported in AIR 2005 SC 4065, where the Supreme Court with reference to the facts of that particular case had held that it was for the claimant to lead evidence to show that he had, in fact, worked upto 240 days in the year preceding his termination but no proof of the receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the labour court to hold that the workman had worked for 240 days as claimed.

21. The same view was also expressed by the Supreme Court in the case of *Manager, Reserve Bank of India, Bangalore v. S. Mani*, reported in (2005) 5 SCC 100. There also the respondents were engaged intermittently as *Ticca Mazdoors* by the Reserve Bank of India. They were not engaged everyday or continuously and were never regarded as a regular mazdoors. In the industrial proceeding that followed the Tribunal directed their reinstatement. Ultimately, when the matter went to the Supreme Court it had held that the initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle and held that the burden of proof was upon the appellant on the premise that they had failed to prove their plea of abandonment of service.

22. In more recent time also the Supreme Court has reiterated the same view. In the case of *Bhavnagar Municipal Corporation etc., v. Jadeja Govubha Chhanubha and Another*, reported in AIR 2015 SC 609, the Supreme Court had held that for an order of termination of service of a workman to be held illegal on account of non-payment of retrenchment compensation it is essential for the workman to establish that he was in continuous service of the employer within the meaning

of Section 25B of the Industrial Disputes Act, 1947. The burden to prove that he was in actual and continuous service of the employer for the period in question lies squarely on the workmen. After referring to a large number of judgments, the Supreme Court observed that they unequivocally recognise the principle that the burden to prove that the workman had worked for 240 days is entirely upon him. However, it is not clear why the petitioner introduced Section 25B of the Industrial Disputes Act for continuous service of 120 days as provided in Section 25B in justification of his claim of absorption as a permanent employee. After all, as mentioned before, continuous service as defined in Section 25B was for the purposes of Chapter V-A of the said Act. It is not the case of the petitioner that his termination of service was bad for non-payment of retrenchment benefits as provided in different provisions of the Act.

23. Even the petitioner is not very sure how many days he will claim of having worked with the bank. I have one more difficulty in applying the concept of 25B of the Industrial Disputes Act. While it has been a case of the petitioner that the Court cannot deny him the benefit of Section 25B of the Act, he in the same go had submitted in his written notes that he was not a workman under the Industrial Disputes Act. Therefore, the question of Section 25B or the application of the Industrial Disputes Act does not arise at all.

24. The judgment relied on by Mr. Sanyal, viz., Senior Divisional Commercial Manager and others (Supra) has no manner of application to the facts of the present case. The Supreme Court was dealing with the dispute arising out of renewal of catering license wherein the Railway Board issued a commercial circular in 2010 regarding renewal of license of the existing licensees of minor units as per the catering policy of 2010 which envisaged that catering licensees need not be included in tender process. In that context, the Supreme Court had held that such a classification of licensees into two categories was arbitrary and discriminatory and refusal to renew license of the existing licensees amounted to deprivation of their right to freedom of occupation. And that is why the Supreme Court referred to two judgments on the concept of social justice and in the context of the evolving concept, the Supreme Court allowed the members of the respondents i.e., the licensees to continue their petty business, especially in the absence of employment potentiality in the country on account of non-governance and non-implementation of the constitutional philosophy of an egalitarian society. The right to live with dignity has been interpreted to be a part of right to live.

25. This has to be appreciated that while laying down the principle of social justice, the Court did not make any observation which may in any manner enure to the benefit of the petitioner. The concept of social justice has not been stretched to the extent of directing an employer to absorb a casual employee who had worked for only a few number of days in a year de-hors the statutory rules. As a matter of fact, such a direction for absorption of a casual employee irrespective of any provision contained in any law would be against the principles of social justice also. The petitioner would thereby prevent the employer from

appointing the most suitable candidate who might be taken through the open advertisement. Not to allow an employer to invite applications for any post because of the absorption of a casual employee will per se be against the basic principle of the concept of the social justice.

26. A similar question has been answered by a Full Bench of the Supreme Court in *Secretary, State of Karnataka and Others v. Umadevi (3) and Others*, reported in (2006) 4 SCC 1. The Supreme Court held:

"50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic feature, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in Government

service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut out eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

27. Achieving social justice which is one of the cherished aims of the Constitution of India must have to be read in the context of and balanced against the larger social realities. As has been observed by His Lordship The Hon^{ble} Justice V.R. Krishna Iyer in *Basti Sugar Mills v. State of U.P.*, reported in (1979) 2 SCC 88, "social realities mould social justice and the compulsions of social justice, in the context of given societal conditions, constitute the basic facts from which blossom law which produces order".

28. The concept of social justice as a concept should not be allowed to be applied to the present case so as to allow the petitioner to occupy the post merely because he had rendered some service for a few days in a year in the distant past as a casual employee. This is clearly impermissible in the name of social justice. On the contrary, the concept of social justice, when viewed in its proper perspective, bars such backdoor entries.

29. In such view of it, I find no merit in the writ petition and the same is hereby dismissed.

30. There shall be no order as to costs.

31. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.