

(2009) 04 BOM CK 0094
In the Bombay High Court
Case No : Writ Petition No. 1796 of 2001

Zilla Parishad and Another

APPELLANT

Vs

Prakash Nagorao Thete and Another

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Evidence Act, 1872 — Section 106
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 25(B), 25(F), 28

Citation : (2009) 3 BomCR 13 : (2009) 4 MhLj 628

Hon'ble Judges : Bhatia J.H., J

Bench : Single Bench

Advocate : J. Mokadam, for the Appellant; None for Respondent No. 1, A.R. Taiwade, A.G.P. for Respondent 2, for the Respondent

Judgement

Bhatia J.H., J.—To state in brief, respondent No. 1 had filed the Complaint (ULP) No. 68 of 1992 before the Labour Court, Chandrapur alleging unfair labour practice on the part of the present petitioners u/s 28 r/w Item No. 1(b), (d) and (f) to Schedule IV of MRTU and PULP Act and claimed reinstatement with continuity of service with full back wages. He contended that he was initially appointed as helper in the Mechanical Section, Irrigation Division of Zilla Parishad, Gadchiroli on daily wages as per the order dated 2/9/1983 passed by the Executive Engineer, Irrigation, Z.P. At that time, he was paid wages at the rate of Rs. 13.90 Ps. per day. The wages were paid for the work done as unskilled heavy rate. According to him, even though an order dated 28.5.87/1.6.87 was issued, terminating his services w.e.f. 31/5/1987, he was not relieved from his duties and he continued to work on the same post till 20/9/1989 when he was not allowed to perform his duties and by oral order his services were terminated. According to him, he had worked for more than six years when his services were terminated. No reason was given for termination. No enquiry was held, no notice was given to him about termination and nor wages in lieu of notice were paid nor any retrenchment compensation was

offered to him. It is also contended that no seniority list was prepared and nor he was terminated according to seniority list. According to him, the work was available on the date of termination and therefore, the termination was illegal and is liable to be set aside. With these contentions, he prayed for reinstatement with continuity of service with full back wages w.e.f. 20/9/1989.

2. Petitioners contested that complaint by filing a written statement (Exh. 27). According to them, there was no post of helper available in Zilla Parishad and the appointment of the complainant was not made as per the Rules and Regulations framed by the Government for recruitment. His appointment as a helper was illegal and against the provisions of Z.P. Services Recruitment Rules, 1965 and 1967. It was further contended that his services were terminated w.e.f. 31/5/1987 and it is denied that inspite of the order of the termination w.e.f. 31/5/1987, he was not relieved from that post. It was denied that he had continued on the said post till 20th September, 1989. It was also contended that he had not completed 240 days continuous service in the year immediately preceding his termination. The complaint was time barred and therefore, it was liable to be dismissed.

3. At the outset, it is to be noted that respondent No. 1 had also filed an application for condonation of delay and the delay was condoned by order dated 26/3/1992 by the learned Judge of the Labour Court. After that, the evidence of both the parties was recorded and the learned Judge of the Labour Court passed the impugned judgment dated 9th April, 1996 holding that unfair labour practice was indulged in by the present petitioners, respondent. No. 1 had completed 240 days work and his services were terminated illegally w.e.f. 20th Sept. 1989. The learned Judge accordingly directed the reinstatement of respondent No. 1 with continuity of service with full back wages. The said order was challenged by the petitioner in Revision (ULP) No, 194 of 1996. The revision application came to be dismissed by the Industrial Court by the impugned order dated 15/3/2001. Hence, this petition.

4. Heard Mr. Mokadam, learned Counsel for the petitioners. None appeared for respondent No. 1.

5. The learned Counsel for the petitioner vehemently contended that the Labour Court has utterly failed to consider the evidence which was on record and came to wrong conclusions that respondent No. 1 was continuously working from 2nd Sept. 1983 to 20th Sept. 1989. According to him, his appointment as a helper by order dated 2nd Sept. 1983 came to an end w.e.f. 31/5/1987 when his services as helper to the Assistant Engineer (Mechanical) were terminated. He contended that the said appointment itself was illegal because there was no such post available and no rules were followed for the recruitment on that post. According to him, possibly that illegal order was issued by the Executive Engineer as father of respondent No. 1 was working as a Office Superintendent in the office of Executive Engineer, Irrigation. According to him, any way that order has come to an end and after termination from the post of helper, he was working on daily

wages in Ground Water Survey Agency under the Zilla Parishad, as and when the work was available. According to him, as per the evidence on record he had not worked on that post beyond June 1989. He contended that there is no evidence that he had worked up to 20th Sept. 1989. He also contended that the onus lies on the worker to prove that he had worked for 240 days in the year immediately preceding his termination and in the present case respondent No. 1 had not produced any such evidence and had not discharged that onus. According to him, the labour Judge wrongly put that burden on the petitioners and without any evidence came to conclusion that respondent No. 1 had actually worked for 240 days. The learned Counsel also contended that respondent No. 1 had neither pleaded nor deposed that after his termination he was not gainfully employed anywhere. In spite of this, the Labour Court presumed that he was not gainfully employed and awarded full back wages for which there is no justification. The learned Counsel also contended that there was no justification to condone the delay in filing a complaint which should be filed within three months from the date of termination.

6. Perused the record and particularly the evidence led by both the parties as well as the impugned orders.

7. There is no dispute that by order dated 2nd Sept. 1983 issued by the Executive Engineer Irrigation, Z.P., respondent No. 1 was appointed as a helper in the Mechanical Section, Irrigation Division on daily wages as unskilled heavy at the rate of 13.90 Ps. per day. He was directed to work under the Supervision of Junior Engineer (Mechanical) Z.P. for two months until further orders. From this, it appears that even though he was appointed on daily wages, it was an appointment until further orders and he was to work under Junior Engineer for two months. Admittedly, as per that order he continued to work on that post and by order dated 28th May, 1987, his services as helper to the Junior Engineer (Mechanical) were terminated. In his evidence recorded on 15/9/1994, in the main proceedings in the complaint, respondent No. 1 maintained that in spite of the termination order he was not relieved and he had continued to work as usual till 20th September, 1989. However, record reveals that his evidence was also recorded on 20th November, 1991 and 2/12/1991 for the purpose of deciding the application for condonation of delay. In examination-in-chief, he deposed that on 31/5/1987 he had received the termination order but according to him, he was working with Z.P. even after that. In the cross-examination he admitted that his services were terminated w. e.f. 31/5/1987 as per the said order dated 28/5/1987. He admitted that he worked with G.S.D.A. i.e. other department of the Zilla Parishad after his termination. From this, it becomes clear that as per the order dated 1/9/1983, since 2/9/1987 he was working as helper to the Mechanical Section, Irrigation Division and according to his own admission in the cross-examination recorded on 20/11/1991, after termination from that post he was working with G.S.D.A. i.e. different department of Zilla Parishad. It means he was not continued as per the original order dated 2nd Sept. 1983. In view of this, his work on daily wages with G.S.D.A. could not be treated as continuation

of his services with the Executive Engineer, Irrigation since 2/9/1983. In the order dated 28th May, 1987, which was admittedly received by him on 31/5/1987, it was clearly stated that the concerned Junior Engineer should relieve respondent No. 1 and take the charge with himself. In view of the admission of respondent No. 1 in the cross-examination, it appears that the said order was fully complied and he was relieved from the post of helper.

8. Respondent No. 1 in his evidence record on 15/9/1994 admitted that as a helper to the Junior Engineer, he was doing work as directed by the Junior Engineer, to write history sheets of vehicles, to prepare the bills of vehicle, to do work of R.T.O., to reply audit objections etc. Even though in evidence recorded on 15/9/1994 he denied that he was working with G.S.D.A., earlier he had admitted that after termination as helper he was working with G.S.D.A., which is different department. Evidence of Prashant Kotepalliwar, Junior Engineer (Mechanical) working with G.S.D.A., Gadchiroli reveals that work of hand-pump repairs was done by the G.S.D.A. and this work would be continued till the commencement of rainy season and it will be discontinued during the rainy season. His evidence also shows that respondent No. 1 was working with G.S.D.A. on daily wages till June, 1989 and he was paid wages for the work done by him as per the number of days. According to him, payment was made for the period during which he had worked. He had not worked during the month of July, August and September, 1989 and no payment was made to him. He admitted that the maintenance of four wheelers is a work of permanent nature while the work of hand-pump repairs is seasonal and this work is stopped during the rainy season i.e. from July to September every year. He produced a report dated 25/1/1993 (Exh. 39) addressed by the Executive Engineer to the Government with reference to the complaint made by respondent No. 1 about nonpayment of the wages for June to August, 1987 and July to September, 1989. That report reveals that during June, July and August, 1987 he was engaged on daily wages and he had worked for 79 days and payment for those working days at the rate of Rs. 31.95 per day would be made to him after obtaining necessary approval from the Zilla Parishad. It was stated in that report that he had not worked for July, August and September, 1989 and therefore, the question of payment would not arise. In the said report, the details were given about the number of days for which he had worked every month from September, 1987 to June, 1989. As per this report, he had worked from September, 1987 to June, 1989 for different number of days. Before that, he had worked in August, 1988 for ten days and before that he had worked for ten days during the month of June, 1988. Taking into consideration this record, it appears that he was not continuously working and he was engaged as and when the work was available.

9. Provisions of Section 25F imposing the conditions precedent to retrenchment of workman, are applicable to workman who has been in continuous service for not less than one year. The definition of continuous service of one year is given in Section 25-B. As per Clause 1, a workman shall be said to be in continuous service for a period of one year if he is for that period, in uninterrupted service,

including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman. As per Sub-section (2), where a workman is not in continuous service within the meaning Clause (1) for a period of one year and six months, he shall be deemed to be in continuous services for a period of one year, if the workman, during a period of twelve calendar months proceeding the date of termination has actually worked under the employer for not less than 240 days. On perusal of the report dated 25/1/1983 vide Exh. 39 referred above, he had last served with the petitioners up to June, 1989 and this fact is proved by Prashant Kotpalliwar, Junior Engineer, under whom he was working during 1987 to 1989. As per this report, the period of work will have to be counted from July, 1988 to June, 1989. As he had not worked during the month of July, it appears that from August, 1988 to June, 1989 he had worked for 121 days and if his work in the month of June, 1988, is also added as the dates are not given, the total number of working days would be only 131. There was no reason for the Executive Engineer to give false report. The report was required to be submitted through the Chief Executive Officer because a complaint was made to Lok-Ayukta by the respondent for non-payment of his wages and for removal from service. Evidence of Prashant Kotpalliwar shows that service tenure of the complainant is shown in Exh. 39. I do not see any reason to disbelieve the evidence of Prashant Kotpalliwar and the contents of this report.

10. Respondent No. 1 i.e. the complainant deposed that he had worked up to 20th September, 1989. Except this word, there is no evidence to support this contention. He has not produced on record any material to show that he had worked up to 20th Sept. 1989 and for 240 days in the year immediately proceeding the date of termination. The Labour Court accepted the contention of respondent No. 1 that he had continuously worked from 2/9/1983 to 20th Sept. 1983 i.e. for more than six years. However, the judgment does not disclose on what basis, besides the oral word of complainant, he had come to the conclusion that he had worked till 20th September, 1989. On the other hand, in para No. 20 of the judgment he observed: "No documents are proved and filed by the respondent to show that the actual working period done by complainant, during six years of service. However, Exhibit 39 disclosed service period with effect from September, 87. It was not prior to September, 1987. Complainant worked since 2/9/1983 and even in the year 87 and till 89. However, respondent intentionally not shown service period of complainant for the period 2/9/1983 to September, 1987. It means that complainant had worked with respondent during this period of 1983 to 1987. Thus, I hold continuous service of complainant since the date of his appointment till his termination. Respondent has not produced muster roll nor any relevant documents to prove actual working days of complainant. Complainant was paid with wages. Therefore, wages register should be before Court to prove actual working days. However, wages registers are also not produced by respondent before Court. Therefore, adverse inference is drawn

against respondent for not producing relevant document of attendance before the Court. In view of not producing attendance register before Court I have drawn inference that complainant rendered continuous service with respondent for the period 2/9/1983 to 20/9/1989 continuously. Thus, complainant rendered more than 240 days continuous service is to be accepted."

11. On perusal of the above reasons and the whole judgment, it appears that the Labour Court had failed to consider the admission of respondent No. 1 in the cross-examination dated 2/12/1991 that after his termination on 31/5/1987 he had worked with G.S.D.A. i.e. other department of Z.P. In view of this, the period of service from 2/9/1983 to 31/5/1987 was irrelevant for the purpose of decision of this complaint. The report Exh.39 dated 25/1/1993 clearly shows the working days from September, 1987 to June, 1989 and in the earlier para of that report the working days from June to August, 1987 were also clearly shown. In view of this, nothing was suppressed by the petitioners. From the observations of the Labour Court noted above, it appears that the Labour Court had put the burden of proving that respondent No. 2 had not worked for 240 days on the employer which is not correct. It is material to note that the complainant/respondent No. 1 had never made any request to the Labour Court to direct the petitioners to produce the wage register, muster roll or any other document on the basis of which he could find support to his contention that he had continuously worked for 240 days.

12. It is well settled position of law that the initial burden of onus to prove that the employee had worked for 240 days in the year immediately preceding termination is on the employee. In *Surendranagar District Panchayat Vs. Dahyabhai Amarsinh*, , after referring to several earlier judgments, the Supreme Court came to conclusion that it was necessary for the workman to produce the relevant material to prove that he had actually worked with the employer for not less than 240 days during the period of 12 calendar months preceding the date of termination. Their Lordships also referred to *Mohan Lal Vs. Management of Bharat Electronics Ltd.*, , *The Range Forest Officer Vs. S.T. Hadimani*, , *Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan and Another*, , *Municipal Corporation, Faridabad Vs. Siri Niwas*, and *M.P. Electricity Board Vs. Hariram etc.*, , wherein it was held by the Supreme Court that the burden of proof lies on the workman to show that he had worked continuously for 240 days in the year preceding retrenchment. In *Sub-Divisional Engineer, Irrigation Project, Investigation Sub Division No. 1 Vs. Sarang Marotrao Gurnule*, , the Division Bench of this Court also held that the burden of proof that the workman had worked for 240 days is on the workman and he has to tender cogent evidence in support of that claim.

13. In the present case, the complainant has not produced any documents or material to show that he had worked for 240 days during the period of one year immediately preceding his termination nor he has produced any record to show that his services were terminated on 20th Sept. 1989. As pointed out earlier, he

had never requested the petitioners to produce the muster roll, wage register or any other document which could show that he had worked for 240 days. In absence of such request and in absence of any evidence led by respondent No. 1, the petitioners were not required to produce the record. It appears that even initial burden to prove that he had worked for 240 days in the preceding year was not discharged by respondent No. 1. The learned Labour Court wrongly placed the burden on the employer to prove that he had not worked for 240 days. Taking into consideration evidence of Prashant Kotpalliwar and the contents of the report (Exh.39), it is clear that respondent No. 1 had not worked for 240 days in the year immediately preceding his termination.

14. The report shows that he had last worked in June, 1989 and during that month he worked for 12 days and payment of Rs. 291/- towards the wages was paid on 13/7/1987. Even respondent No. 1 admitted that no wages were paid to him for July, August and September, 1989. In view of this, it must be held that the Labour Court did not consider the evidence which clearly shows that the appointment of respondent No. 1 w.e.f. 2/9/1983 had come to an end on 31/5/1987. In spite of his admission, the Labour Court had wrongly placed burden of proof on the employment and had wrongly come to conclusion that the complainant was working up to 20th September, 1989 and that too continuously, while there was no material to come to such conclusion. In view of this, the findings of the Labour Court are liable to be set aside. On perusal of the impugned judgment of the Industrial Court, it appears that the Industrial Court also did not peruse the evidence carefully while dismissing the revision.

15. It is also material to note that even though respondent No. 1 had claimed full back wages, he had nowhere pleaded nor he had deposed on oath that he was not gainfully employed after his termination. The Labour Court held that in the case of reinstatement, the back wages are to be given in the normal course. I am unable to accept this proposition. It is necessary for the workman not only to plead but also to depose on oath that he was not gainfully employed. Once, this onus is discharged, the burden would be on the employer to show that he was actually gainfully employed.

16. In J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, , the Supreme Court has observed as follows

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, this Court held:

When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places material in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, . This

Court observed:

61. It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

16-A. Coming back to back wages, even if the Court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *General Manager, Haryana Roadways Vs. Rudhan Singh, and Uday Narain Pandey*. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.

17. Relying on the above authority, learned Single Judge of this Court in *Maharashtra State Road Transport Corporation Vs. Nanuram Verma*, held that initial burden is on the employee to show that he was not gainfully employed. Similar view was taken by another learned Single Judge of this Court in *President, Damini Bahuddeshiya Sevabhavi Sanstha and Another Vs. Dnyanoba Dhawate and Another*, .

18. In the present case, respondent No. 1 had neither pleaded nor deposed on oath that he was not gainfully employed. In spite of this the Labour Court granted him full back wages.

19. Taking into consideration the material on record, it appears that the approach of the Labour Court was totally wrong and against the settled principles of law while passing the order of reinstatement with continuity of service with full back wages.

20. For the aforesaid reasons, the writ petition is allowed. The impugned order passed by the Labour Court in Complaint (ULP) No. 68 of 1992 as well as judgment of the Industrial Court in Revision (ULP) No. 194 of 1996 is hereby set aside. The complaint stands dismissed.