

(1994) 01 BOM CK 0058
In the Bombay High Court
Case No : Writ Petition No. 3026 of 1993

Zilla Parishad, Yavatmal

APPELLANT

Vs

Avinash Devidas Deshmukh and Others

RESPONDENT

Date of Decision : 13-01-1994

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25(F), 25(G), 25(H)
Trade Unions Act, 1926 — Section 28, 30(2)

Citation : (1994) 01 BOM CK 0058

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Judgement

V.S. Sirpurkar. J.

The Zilla Parishad, Yavatmal has challenged the common order passed by the Industrial Court, Amravati by which he finally allowed the three complaints made under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 bearing Nos. 279/93, 387/93, 296/93.

2. The Respondents 1 to 9 herein are the Engineering Diploma holders. Initially they joined as Junior Engineers in Building and Communication Department (B & C Division), Yavatmal. Because of the Zero-budget policy of State of Maharashtra in the year 1987-88 they were declared as surplus employees and their services came to be terminated on 31-5-1987. In fact, prior to that they had already rendered about 3-4 years of service. They went on hunger strike, moved the Government and probably as a result of this they were directed to be absorbed in the Zilla Parishad, Yavatmal and accordingly, the petitioner Zilla Parishad, absorbed the complainants from amongst several other Junior Engineers. There is, a scheme called "Jawahar Rojgar Yojana" which was being implemented by the petitioner Zilla Parishad. There were some construction works and the building activity in that scheme and therefore, these Respondents 1 to 9 who were selected from amongst the other candidates were sent to work in Jawahar

Rojgar Yojana. Their appointment was made on 31-12-1990. Initially the appointment was only for six months. Since the said scheme was extended every year, the petitioner gave normal breaks to these persons by giving fresh appointment orders for duration of six months. In this manner, these respondents continued to work from 31-12-1990 till 31-5-1993. Last order was, however, issued for their appointment on 17-3-1993 as the "Jawahar Rojgar Yojana" was extended only till that date. Ultimately, the respondents were served with the termination orders dated 26-5-1993.

3. These termination orders were challenged by the respondents before the Industrial Court by filing the complaints under the provisions of Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act. Amongst other things, their contention was that they were workmen within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and that in fact the termination order, were colourable exercise of powers and in fact though there was work available with the Zilla Parishad, the Zilla Parishad was unnecessarily terminating their services. They pointed out that the Zilla Parishad had demanded 9 candidates or filling up the posts of Junior Engineers under it and that itself showed that there was work available and yet they were being terminated illegally. Their contention was that they had continued to work for more than six years as Junior Engineers and were absorbed by the Zilla Parishad at the intervention of the Chief Minister and, therefore. It was not necessary for them to be selected by the Regional Selection Board for their permanent appointment. In this view of the matter, they claimed that the Zilla Parishad should not declare these posts to be vacant and should not call the fresh candidates, from the Regional Selection Board. They claimed that they had worked for more than 240 days and thus the provision of Section 25-F, 25-G & 25-H of the Industrial Disputes Act were attracted. Industrial Disputes Act were attracted inasmuch as they were being retrenched with effect from 31-5-1993. In the complaint they sought the declaration that the last order of their appointment dated 17-3-1993 amounted to an unfair labour practice and they were liable to be declared as permanent employees. Along with the complaint, they also filed an application under the provisions of Section 30(2) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 for interim relief and such interim relief was granted to them by the Industrial Court.

4. These complaints were stoutly opposed by the Zilla Parishad - the present petitioner, who pointed out that firstly the respondents could not be termed as "workmen" at all though it was agreed that they were employed under the "Jawahar Rojgar Yojana". It was pointed out that their duty was to supervise the works undertaken in that scheme. It was also pointed out that the main function of the respondents was to supervise the works and their salary was much more than Rs. 1600/- and, therefore, they could not come within the umbrella of the definition of "workmen" as given in Section 2(s) of the Industrial Disputes Act. In fact, a preliminary objection to the jurisdiction of the Industrial Court was raised

and it was not only raised and it was not; only raised but vociferously followed through. The Zilla Parishad further pleaded that it was within its rights to call for the proper candidates from the Regional Selection Board and it was pointed out that the respondents had specifically agreed every time to be terminated on the regular appointments being made by the Regional Selection Board. Without prejudice to their contention that these persons were not workmen, the Zilla Parishad raised further plea that there was no retrenchment at all u/s 2(00)(bb) of the Industrial Disputes Act and there was no question of attracting the provisions; of Section 25-F, 25-G and 25-H of the Industrial Disputes Act.

5. At the time of hearing, both the parties filed a joint pursis expressing their desire not to lead any evidence and chose to rely on the documents filed by them. It was agreed that the documents filed by them. It was agreed that the documents could be read without any formal proof thereof. On this basis, the learned Industrial Court framed to be the preliminary issues as they related to the jurisdiction of the Court and further whether the complainants were the workmen. Since it was also disputed that the appropriate Government in this case was the State Government by the petitioner Zilla Parishad, even that issue was struck as to whether it was an appropriate Government. The further issues Nos. 4, 5 & 6 relate to the merits, i.e. as to whether the termination amounted to retrenchment and if so whether it was illegal as per the provision of Sections 25-F, 25-G and 25-H, as to whether the complainants were the permanent employees of the Zilla Parishad, Yavatmal and whether the complainants were required to approach the Regional Selection Board for their fresh appointments. Ultimately, the last issue was as to whether the last order of appointment dated 17-3-1993 which was for a fixed period of three months was unfair and illegal ?

6. The Court held that the Court had the jurisdiction, that the complainants were the workmen and the appropriate Government was the State Government and, therefore, the Court had jurisdiction to entertain the complaints. On the issue of merits, the Court held that the termination of the respondent did not amount to retrenchment as defined under the Act. The Industrial Court accepted the argument that the provisions of Section 2(00)(bb) would apply and the said terminations, therefore could not amount to retrenchment. The Industrial Court also very clearly held that the respondents were not the employees of the Zilla Parishad as they were employed under the Jawahar Rojgar Yojana" on the recommendations made by the Government of Maharashtra. It held that since "Jawahar Rojgar Yojana" is a scheme introduced by the Central Government to provide employment to needy persons and since the State Government was acting merely as an agent, the complainants cannot be termed as the employees of the Zilla Parishad. However, on issued No. 7, the Court found that the order dt. 17-3-1993 was unfair and illegal as it was a premature order. The Court went into the question as to whether the candidates were to be selected by the Regional Selection Board. The Court observed that "Jawahar Rojgar Yojana" was not included in Schedule B of the Government Resolution and, therefore, the workers thereunder did not fall in the jurisdiction of the Regional Selection Board.

After discussing the issue, the Court came to the conclusion that merely because the respondents were not selected candidates by the Regional Selection Board, the petitioner Zilla Parishad could not oust the said candidates from the service on that ground alone. Ultimately on the last issue as to whether the appointment was unfair and illegal. The Court has treated the "Jawahar Rojgar Yojana" to be an entity in itself and has directed that so long as Jawahar Rojgar Yojana in extended, the complainants, i.e. the present respondents would be liable to be continued under the same. This is the order under challenge in this petition.

7. During the pendency of this petition, an application came to be made for intervention by those candidates who have in fact been selected by the Regional Selection Board. Their contention is that because of the pendency of the present petition, the Zilla Parishad was not employing the regularly selected candidates. The application was allowed and Shri L. G. Deshpande, learned Counsel who appears for the intervenors was heard; on the merits of the petition.

8. Shri V. V. Naik, the learned Counsel appearing for the petitioner Zilla Parishad, has in the first place urged that the finding by the Industrial Court that these respondents were workmen as defined in section 2(s) of the Industrial Disputes Act is not correct. According to him, the finding is not only against the language of the Section 2(s) but a premature one and based on no evidence. He pointed out that these persons were diploma holders and were appointed as Junior Engineers. His contention is that the persons who are employed as Junior Engineers though are nomenclatured as Class-III servants, have to essentially do the supervisory function. Their job is to supervise the workers and even in respect of the present respondents their job was to supervise the working of the labour class which was employed in "Jawahar Rojgar Yojana". He pointed out that Jawahar Rojgar Yojana was meant for the persons who were unemployed and who could not support themselves otherwise. Work was being taken from such persons which was of manual nature by engaging them on various sites of construction, buildings, etc., and these engineers all of whom admittedly were the Civil Engineering Diploma holders were employed as the Junior Engineers to supervise on such staff. Shri Naik contends forcefully that these persons are never asked to do any manual work nor do they engage themselves actually in any technical, skilled or unskilled work. The essential feature of this service is that theirs is a supervisory job and if a person who has the main function of the supervisory nature and if the salary of such person can never be called a workmen. Shri Naik also pointed out that the learned Industrial Court has considered the material which was totally irrelevant for the purposes of deciding as to whether these Engineers were workman or not. Shri L. G. Deshpande also supported the argument of Shri Naik. As a necessary corollary to this argument, Shri Naik contends that if these engineers were not workmen, then the Industrial Court had absolutely no jurisdiction to consider the complaints of these persons under the provisions of Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Shri Naik rightly contends that the provisions of that Act are

meant only for giving the protection to the term "employee" made therein. It is an admitted position that the governing Act would be the Industrial Disputes Act and, therefore, the term employee as defined in Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act would draw its colour from the definition of the term "workmen" defined in Section 2(s) of the Industrial Disputes Act. Shri Naik, therefore, contends that the trial Court has erred gravely in interfering on the basis of the complaints made to it. Even on merits, the contention of Shri Naik is that the order is wholly illegal. He points out that once these persons who were not workmen were contractually engaged and once they had specifically agreed to be terminated on the availability of the persons who were not workmen were contractually engaged and; once they had specifically agreed to be terminated on the availability of the persons selected by the Regional Selection Board, then they could not complain against the Zilla Parishad for unfairness. Shri Naik laboriously points out that the learned judge has not given any finding as to which particular unfair labour practice has been committed by the Zilla Parishad.

9. Shri N. R. Saboo, the learned Counsel for the respondents 1 to 9, supports the order. In the first place, it cannot be disputed that in order that the Industrial Court should have the Jurisdiction in the matter, the concerned persons must be workmen. The legal position is clear and was not disputed by the parties. I will, therefore straightway see whether the finding as reached by the Industrial Court to the effect that these respondents could be covered under the term workmen as defined in Section 2(s) of the Industrial Disputes Act, is correct; or not. The learned Industrial Court it seems was impressed by the fact that these persons were called Class-III employees. It was also impressed by the fact that they were working in "Jawahar Rojgar Yojana". The Industrial Court has totally misunderstood the import of the said scheme. The scheme was not meant for the engineers like the present respondents. The scheme was meant for people who were below the poverty level who had absolutely nothing to support themselves. It is for the sake of those persons that this scheme came into existence. In order to provide work to such persons the State machinery or the Zilla Parishad as the case may be had to create some employment and such persons who could otherwise not support themselves are taken in the scheme to work as manual labourers on those schemes, they being constructions of buildings, roads, bridges, etc. However, if such constructions are to be made then the technical supervision will be a necessary factor. In order that these poor workers work properly and work within the parameters of the technicalities, the posts were created for supervising such work, such posts being manned by the trained engineers. It is an admitted position that all the respondents were the trained hands and they were qualified having armed themselves with a diploma in Engineering. They also had the previous experience in the Building and Construction Department. They also had the advantage of having actually worked on the sites. Probably as a result of this and further because of the fact that they were rendered jobless because of the State policy of Zero-budget, these persons were tried to be

absorbed in the Zilla Parishad. Since the Zilla Parishad also worked and also thrived on Government grants, the monies or the salary which were to be paid to these engineers were to be paid from the money that became available to the Zilla Parishad through this "Jawahar Rojgar Yojana". It cannot, therefore, be said that the "Jawahar Rojgar Yojana" was meant for people like the respondents. It is only that these persons were being paid their salaries through the monies which became available from the grants for implementing the "Jawahar Rojgar Yojana". This is an error which has been committed by the Industrial Court. The Industrial Court treated as if the these persons were employed under the "Jawahar Rojgar Yojana" which is meant for the poor and the persons below the poverty line. The learned Industrial Court thus has faltered on a very substantial issue. The only factor which has been considered by the learned Industrial Court for holding these persons to be covered within the definition of workmen is the fact that they were employed under the "Jawahar Rojgar Yojana". It would have been better if the Industrial Court had consulted the definition of the term "workmen" as given in Section 2(s) and had tried to fit in the facts available to it in that definition. Such exercise has obviously not been done. The learned Industrial Court has merely restricted itself to the fact that firstly these persons were the Class-III employees and secondly, that they were employed in "Jawahar Rojgar Yojana". The stray observations appearing in the order of the Industrial Court to the following effect "it is the settled principle of law that unless the employee is mainly appointed to do the supervisory or managerial work invested with duties like appointments, dismissal, granting of leaves, etc. He cannot be said to have ceased from being termed as "workmen" within the definition of Section 2(s) of the I. D. Act" is also not correct wholly. It is true that it is the main function which has to be considered while considering whether a particular person is a workman or not. It is also true that duties like appointments, dismissal, granting of leaves, etc. do come within the supervisory functions and do point out at the nature of the functions for which the concerned person is engaged or employed. However, this is not a be all and end all of the matter. The learned Industrial Court should have considered the overall duties of these Junior Engineers. In the first place, it should have considered that these Junior Engineers were not to do any skilled or unskilled work themselves. Secondly, all these persons were regularly trained engineers having been armed with diploma in Civil Engineering. Thirdly, these persons were only to supervise the workers and the workers working under them were to be guided by these persons. Merely because these persons had no rights to decide about the working conditions of the subordinates or the labourers under them, it does not necessarily follow that they did not have the supervisory functions or they were not engaged for doing supervisory work. In this behalf, it will be interesting to note that there was nothing available before the Industrial Court. The parties had complacently passed the pursis that they would not like to lead any evidence, probably both the parties were equally confident about their own claim. Even if the parties were complacent it was the duty of the Industrial Court to first see that it had the jurisdiction to enter into the controversy. Unless the Industrial Court had the necessary evidence before it

and unless the Industrial Court reached the conclusion on the basis thereof that the complainants were the workmen within the definition of section 2(s), the Industrial Court should not have proceeded ahead as it did. The following observation of the Industrial Court is to say the least irrelevant for decision of the controversy : "Indeed it would be ridiculous to call the employees working under such philanthropic scheme with a view to save their lives from starvation as Supervisors or Managers". Firstly, that is not the import of the scheme at all to save the lives of supervisors or managers, secondly the philanthropic nature of the scheme is not in any manner relevant for the decision of the question as to whether the persons working under the same are workmen or not.

10. The controversy whether an Engineer who does generally the duties of the Engineer is a workmen or not for the first time came before the Supreme Court in *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, . In paragraphs 19 & 20 the Supreme Court has considered the general duties of the Engineers and has further considered the question whether such Engineers could be called the workmen. The following observations of the Supreme Court should act as a pointer :

"..... The duties, which the District Engineer performs, consist of assessing suitability of the sites for depots from the point of view of the technical and engineering aspects, suggesting lay-out for construction of depots or service stations, seeing that the estimates prepared by the draughtsman are correct from the technical point of view, scrutinising tenders for construction, checking the construction, work given to the contractor certifying bill submitted by contractors for the work done by them, and preparing estimates for maintenance work in respect of depots. He also gives certificates as required by the Inspector of Explosives after satisfying himself about the technical fitness of the installation facilities. On the other hand, it appears that the principal work, for which he is employed, is that of supervision in as much as he is required to supervise work done by others instead of doing the work himself. The estimates are prepared by the draughtsman and he only checks them. The scrutiny of tenders given by the contractors as well as checking the construction work done by the contractors is in the nature of supervision, so also certification of the bills...."

"..... The principles that we have explained above, in dealing with the case of Transport Engineer, manifestly show that the District Engineer is also principally employed to do work which is of a supervisory character and, even though he has to use his technical knowledge for the purpose of properly carrying on supervision, it cannot be held that he is employed to do technical work...."

The Supreme Court in that case was considering as to whether the District Engineers employed by the Company could be termed as workmen within the definition of Section 2(s) of the Industrial Disputes Act. As has been pointed out above, the answer given by the Supreme Court was that the Engineers did only the work of supervisory nature. The further principle that the main function of

the person concerned should be supervisory and if he does something else than that which is incidental to his main function that does not change the nature of his work is also now an accepted proposition of law. Instead of going into the nature of "Jawahar Rojgar Yojana", appreciating that its purpose was philanthropic, nothing that the concerned respondents were from Class III service, it would have been better if the Industrial Court had actually gone into the duties that they were performing. The Industrial Court could have insisted upon the production of the manuals under which the duties of the Junior Engineers have been laid down. It is a matter of common knowledge that the Engineers working in Zilla Parishad have to supervise the constructions, have to check the bills, check the estimates, have to deal with the contractors and to take measurements and in this they are not actually supposed to work. There are some workers under them who actually undertake the work and such work is guided by these Junior Engineers. However, the fact remains that the Industrial Court was not armed with the evidence on this question. It will not be proper, therefore, for me to give a finding at this stage. However, it would be better if the parties are given the opportunities to lead evidence on this aspect which is vitally important and probably the only material aspect. The judgment of the Industrial Court on this issue itself is incorrect as it is based practically on no evidence and based on the inferences which are not germane to the issue.

11. Shri Saboo, learned Counsel for respondents 1 to 9, very strenuously contended that it would not be proper for this Court to send back the matter for the decision particularly because the Engineers concerned are without any jobs. Unfortunately, at least prima facie these Engineers have chosen a wrong forum. At any rate unless it is established that these Engineers are really the workmen within the meaning of Section 2(s) of the Industrial Disputes Act, the further reliefs cannot follow and could not indeed have followed. Since on this issue regarding the jurisdiction, the Industrial Court's order is being set aside, I do not propose to go into the further issue. It is, however, clarified that this does not mean that the findings on other issues have been either affirmed or set aside. The Industrial Court firstly shall examine this question and then in that light give the further findings, if necessary. The order of the Industrial Court is, therefore, quashed and set aside. The matter is remanded back for the enquiry in the light of the observations made in this order it is clarified that the Zilla Parishad might make would be subject to the result of the litigation pending before the Industrial Court. With these observations, the rule is made absolute in the terms stated above. Under the circumstances, there shall be no order as to costs.