

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11497 of 2008

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Dilip Kumar Mandal, son of late Mahendra Pd. Mondal, resident of Mohallah Ramsar, Kumartoli, P.O. Naya Bazar, P.S. Tatarpur, District Bhagalpur.

.... Petitioner/s

Versus

1. The Union of India represented through the Secretary, Govt. of India, Ministry of Labour, Shramshakti Bhawan, Rafi Marg, New Delhi-1.
2. The Presiding Officer, Industrial Tribunal, Bailey Road, Patna.
3. The Management of Central Bank of India represented through the Zonal Manager, Zonal Office, Maurya Lok Complex, B Block, Patna-800001.
4. The Zonal Manager, Central Bank of India, Zonal Office, Maurya Lok Complex, Block Patna-800001.
5. The Branch Manager, Central Bank of India, Nathnagar, Bhagalpur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. DEVI KANT JHA

Mr. Birendra Kumar Jha

For the Respondent/s : Mr. SUDHIR SINGH(ASST.SG)

For the Central Bank of India-Mr. Ajay Kumar Sinha

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

C.A.V. JUDGMENT

Date: 12-02-2015

1. Petitioner has prayed for setting aside the award dated 16.01.2007 passed by the Presiding Officer, Industrial Tribunal, Patna in Reference Case No. 20 of 2005/13 (C) of 2005 by which and whereunder the Tribunal refused to pass an award of reinstatement of the petitioner in service on the grounds that there was no relationship of employer and employee between the petitioner and respondent no. 3, the Management of Central Bank of India and furthermore, the petitioner could not succeed to establish that he had worked as

daily wage in the concerned bank for 240 days or more in a calendar year.

2. In brief, the case of the petitioner is that the Central Bank of India, Nathnagar, Bhagalpur sent requisition of the names of eligible persons for appointment of peon from the Employment Exchange, Bhagalpur and in response to the aforesaid requisition, the Employment Exchange, Bhagalpur sent the name of the petitioner and four others to above stated bank vide letter no. 26/92/1180 dated 03.09.1992 as it is evident from Annexure-2 to this petition. The petitioner was interviewed and he was selected for the post of peon and accordingly, appointment letter was issued to him and thereafter, he joined the aforesaid bank on 17.09.1992 at Nathnagar Branch of Central Bank of India. At the time of his joining, his appointment letter was taken by the Branch Manager, Central Bank of India, Nathnagar, Bhagalpur. He continuously worked in the said bank as peon right from 17.09.1992 till 04.10.1996 on which date he was orally terminated by the Branch Manager of the said bank without adopting the mandatory provisions of law. Further case of the petitioner is that he was paid his wages through vouchers though some vouchers were issued in others name but all of a sudden his services was orally terminated on



04.10.1996 which was amount to his retrenchment. At the time of retrenchment, no retrenchment compensation was given to him nor any procedure of retrenchment was adopted though he had already rendered uninterrupted service for more than 240 days in a calendar year preceding to the date of his termination. After his termination, he represented before the management for his reinstatement with full backwages and also gave legal notice but of no avail and thereafter, he raised industrial dispute before the Assistant Labour Commissioner (Central) for amicable settlement. The efforts of Assistant Labour Commissioner (Central) proved futile and accordingly, he sent his report to the Central Government under Section 12(4) of Industrial Disputes Act, 1947. Thereafter, the Ministry of Labour, Government of India, New Delhi referred the dispute vide adjudication order dated 16.09.2003 and sent the following reference-

whether the action of the management of Central Bank of India, Bhagalpur in terminating the services of Shri Dilip Kumar Mandal is justified and legal? If not, what relief the workman is entitled to ?

3. After getting the aforesaid reference, the Industrial Tribunal Dhanbad registered the aforesaid reference as Reference Case No. 20 of 2005/13 C of 2005 but subsequently, the matter was transferred to Industrial Tribunal



Patna under the order of Ministry of Labour, New Delhi. Both parties of the aforesaid dispute filed their respective statements and also adduced their evidences. The Industrial Tribunal, Patna vide award dated 16.01.2007 came to the conclusion that since the petitioner was not in the service of the Management of Central Bank of India, the question of termination of his services does not arise and the petitioner is not entitled to any relief. Accordingly, petitioner challenged the aforesaid award in this writ petition.

4. Counter affidavit has been filed on behalf of Central Bank of India and in the said counter affidavit, the concerned bank has supported the findings recorded by the Tribunal in the impugned award.

5. Learned counsel appearing for the petitioner challenged the impugned award contending that the learned Tribunal failed to appreciate the materials available on the record in right perspective because the Tribunal came to the conclusion that the petitioner worked as daily wager in the aforesaid bank and furthermore, the Tribunal also failed to take note of this fact that on 05.12.2005 a petition on behalf of the petitioner was filed before the Tribunal praying therein to call for payment vouchers from 17.09.1992 to 04.10.1996 which



were in custody of concerned bank and the aforesaid prayer of petitioner was allowed on the same day but in spite of direction of the Tribunal, the concerned bank did not produce the entire vouchers and learned Tribunal failed to take note of this fact that the concerned bank did not produce the aforesaid documents without giving any satisfactory explanation and, therefore, an adverse inference ought to have been drawn against the concerned bank due to non production of the relevant and important documents before the Tribunal. Learned counsel for the petitioner submitted that it is well settled principle of law that primarily, it is the duty of workman to prove this fact that he has worked for 240 days in a calendar year preceding to the date of his termination but if the workman comes in witness box and with cogent evidence proves the aforesaid fact, then, burden shifts upon the employer to prove that the workman has not worked continuously 240 days in a calendar year preceding to the date of his termination.

6. Learned counsel for the petitioner relied upon the decision of **R. M. Yellatti vs. Assistant Executive Engineer reported in 2006 Supreme Court Cases (L & S) 1** in which the Hon'ble Apex Court at para 17 of the aforesaid judgment held as follows:-



17. Analysing the above decisions of this court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however, make it clear that mere affidavits or self-serving statements made by the



claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour court unless they are perverse. This exercise will depend upon the facts of each case.

7. It is further contended by him that now, it has already been set at rest that the word 'termination' includes retrenchment and similarly, daily wager also comes under the definition of workman and is protected under Section 25 (F) of Industrial Disputes Act, 1947. Learned counsel for the petitioner further submitted that the learned Tribunal committed error in appreciating the materials available on the record and, therefore, the impugned award is not liable to be sustained.

8. On the other hand, learned counsel appearing for



the Bank refuted the above stated submissions arguing that the petitioner could not produce any document before the Tribunal to show that he was validly appointed on the post of peon and even if it assumed that the petitioner was working in the concerned bank as daily wagger, then also, his engagement as daily worker was not in accordance with the rules because the Branch Manager had no authority to engage any person as daily wages worker and, therefore, the services of the petitioner was not protected under Section 25 F of the Industrial Disputes Act, 1947. It is further contended by him that moreover, petitioner could not succeed to prove that he had uninterruptedly worked as daily wages labour in the bank for the period of 240 days and, therefore, the Tribunal rightly held that the termination of the petitioner from the concerned bank was in accordance with the rules and law. He further submitted that the reference was made to the Tribunal to consider the termination of the petitioner from service and no reference regarding retrenchment was made and it is well settled principle of law that the Tribunal cannot go beyond the reference. It is further contended by him that the petitioner did not raise the issue of adverse inference before the Tribunal and non-raising of the aforesaid issue is amount to waiver and so, petitioner cannot raise the above stated issue

before this court. It is further contended by him that admittedly, the services of the petitioner was terminated on 04.10.1996 and the reference was made in the year 2003 i.e. after inordinate delay and, therefore, the above stated delay is itself sufficient to dismiss this writ petition.

9. Certain facts are admitted in this case. It is an admitted position that petitioner was working in Central Bank of India, Nathnagar, Bhagalpur and his services was orally terminated on 04.10.1996. The claim of the petitioner is that he was appointed in the aforesaid bank on peon but before the Tribunal the concerned bank denied the aforesaid fact and the stand of the bank was that the petitioner was a daily wages worker. The bank produced vouchers of the year 1993 which were marked before the Tribunal as Exhibit-M series. The Tribunal after scrutinizing the oral and documentary evidences came to the conclusion that petitioner had worked as daily wages worker in the aforesaid bank. Now, it is no longer res integra that the daily wages worker also comes under the definition of workman as defined in Section 2(s) of Industrial Disputes Act, 1947. In **Rattan Singh vs. Union of India and another reported in (1997) 11 SCC, 396** it has been held by the Apex Court of this country that Section 25 (F) of Industrial



Disputes Act, 1947 is applicable in the case of termination of even a daily-rated workman who had continuously served for the requisite statutory minimum period in a year. Furthermore, in **2011 AIR SCW, 3455** the Apex Court of this country has held that the source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act and furthermore, the definition of workman also does not make any distinction between full time and part time employee or a person appointed on contract basis. It has also been held by the Apex Court in the aforesaid judgment that once the test of employment for hire or reward for doing the specified type of work is satisfied the employee would fall within the definition of workman. In the present case, the concerned bank admitted this fact that the services of the petitioner was hired casually and the petitioner worked in the concerned bank as daily wages worker and, therefore, in my view, petitioner comes under the definition of workman as laid down under Section 2(s) of Industrial Disputes Act, 1947.

10. It has been argued on behalf of the concerned



bank that concerned branch manager had got no authority to engage the petitioner as daily wages worker and the appointment of the petitioner was ab initio void and therefore, the bank had no obligation to follow the procedure as prescribed in Industrial Disputes Act, 1947 for termination of service of the petitioner but I am not at all convinced with the aforesaid submission because in the Industrial Disputes, the propriety and validity of the retrenchment/termination of the concerned workman is raised and is adjudicated upon by the Labour Court/Industrial Tribunal as envisaged under the Act and any consideration regarding regular or irregular, legal or illegal appointments or appointments made without following the procedures under the rules is wholly foreign to the definition of workman in Section 2(s) of the Act. Moreover, it is now well established beyond any dispute that for the purpose of Industrial Disputes Act a daily wage earner is as much a workman as an employee receiving his wages on a monthly basis in a time scale of pay.

11. It has also been argued on behalf of the concerned bank that the reference was made in respect of termination of service of the petitioner and, therefore, the Tribunal had no right to travel beyond the aforesaid reference as such question of retrenchment was not involved before the

Tribunal and, therefore, section 25 (F) of the Industrial Disputes Act is not applicable in the present case.

12. Here, I would like to refer Section 2 (oo) of Industrial Dispute Act, 1947 which runs 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) voluntary retirement of the workman; or
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
- (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; or
- (c) termination of the service of a workman on the ground of continued ill-health;

13. From bare perusal of the aforesaid provision, I find that retrenchment is amount to termination of service but Section 2 (oo) (bb) clarifies that the termination of service of the



workman as a result of non renewal of the contract of employment on its expiry or of such contract being terminated under a stipulation in that behalf contained therein does not come under the definition of retrenchment. The aforesaid provision was inserted in the Act by Act 49 of 1984 with effect from 18.08.1984. Therefore, it is obvious that prior to 18.08.1884, if an order of termination is passed on the ground of non renewal of contract of employment on the expiry of the said contract or if the contract being terminated under stipulation in that behalf contain therein, the aforesaid termination was under the purview of retrenchment but after insertion of the aforesaid provision, if after the expiry of contract of employment or according to term of contract, if termination is made, the aforesaid termination will not come under the definition of retrenchment. In the present case, petitioner could not succeed to prove that he was appointed on the post of peon and it could be only proved before the Tribunal that he was working as daily wages worker and Exhibit-M series reflect that he got wages as daily wager. There was nothing before the Tribunal to show that the appointment of the petitioner on daily wages was made for a certain period rather Exhibit M series reflect that payment was made to him for his daily work and, therefore, there is nothing



on the record to show that the petitioner was appointed as daily worker for a fix or certain period. It is not the case of the respondent-bank that the petitioner was appointed for a fix or certain period and after expiry of contract, his service was never renewed. Furthermore, it is also not the case of the respondent-bank that service of the petitioner was terminated according to terms and conditions of the concerned contract. Moreover, no document has been brought on the record by the respondent-bank to show that the petitioner was appointed on the basis of contract for certain period and after expiry of aforesaid period, his contract was never renewed. Therefore, in my view, the case of the petitioner does not come under Clause (bb) of Section 2 (oo) of the Industrial Disputes Act, 1947.

14. In the decision of **State Bank of India vs. N. Sundaramoney (I) LLJ 478**, it has been held by Apex Court of this country that even if the appointment letter itself stipulates the period of employment and at the end of the period, employee's service terminated, then also, the aforesaid termination would come under the definition of retrenchment. Admittedly, the aforesaid decision was rendered prior to coming into force of Section 2(oo) (bb) of Industrial Disputes Act, 1947 but in the aforesaid decision, the Apex Court of this country held



that in Section 2 (oo) of Industrial Disputes Act, 1947, the termination of service will come under the definition of retrenchment, if the termination is made for any reasons whatsoever except the exceptions given in the section itself and the words “ for any reasons whatsoever” have very wide range and almost admitting of no exceptions. Therefore, it is well settled principle of law that if termination of service is made, except the exceptions provided in Section 2(oo) (bb) of Industrial Disputes Act, the said termination will come under the definition of retrenchment.

15. It has been argued on behalf of the petitioner that learned Tribunal wrongly came to conclusion that petitioner failed to prove that he had uninterruptedly worked in the concerned bank for 240 days, particularly, in the circumstance when the burden was upon concerned bank to prove the aforesaid fact. In support of above stated contention, cases of **R. M. Yellatti vs. Assistant Executive Engineer (Supra), Director, Fisheries Terminal Division and Bhikubhai Meghajibhai Chavda reported in 2010-1-LLJ-3 SC, Sriram Industrial Enterprises Ltd. vs. Mahak Singh and others reported in (2007) 1 SCC (L & S) 961** have been referred by learned counsel for the petitioner.



16. From bare perusal of the aforesaid decisions, I find that it has been laid down by the Apex Court of this country in the aforesaid decisions that if a workman comes before the Tribunal and proves with cogent evidence that he has worked in an establishment for 240 days uninterruptedly, then burden to disprove the aforesaid fact shifts upon the employer. In the aforesaid case, the petitioner deposed before the Tribunal that he worked in the concerned bank from 1992 to 1996 and furthermore, petitioner had filed a petition before the Tribunal praying therein to call for payment of vouchers from 1992 to 1996 from the concerned bank and the aforesaid prayer was allowed by the Tribunal but the concerned bank did not produce the aforesaid vouchers before the Tribunal and, therefore, in my view, non production of payment of vouchers of the above stated relevant period was fatal to the concerned bank and in that circumstance, the Tribunal was bound to draw an adverse inference against the concerned bank and Tribunal ought to have given the finding that the petitioner had worked for more than 240 days uninterruptedly in a calendar year preceding to the year of his termination.

17. Admittedly, the petitioner was terminated on 04.10.1996 and near about 19 years have already been

elapsed since then. It is obvious that if this court directs the respondent-bank to reinstate the petitioner, the respondent-bank may proceed against the petitioner adopting the procedure laid down under Section 25 (F) of Industrial Dispute Act and the reinstatement of the petitioner shall become futile. Therefore, in the aforesaid circumstance, I think it proper to direct the concerned respondent-bank to make payment of consolidated sum of Rs. 2,00000/- (Two Lacs) to the petitioner in lieu of compensation for back wages as well as reinstatement. The aforesaid amount shall be full and final settlement of all the claims of the petitioner. The above stated amount shall be paid to the petitioner within three months from today.

18. Accordingly, the impugned award dated 16.01.2007 passed by the Presiding Officer, Industrial Tribunal, Patna in Reference Case No. 20 of 2005/13 (C) of 2005 is, hereby, set aside and this petition stands allowed with the aforesaid observations and directions.

(Hemant Kumar Srivastava, J)

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