

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6818 OF 2014

Rajendra S/o Pralhad Gaikwad,
Age-38 years, Occu-Nil,
R/o Nagnath Road, Near Miyya Bhatti,
Osmanabad, Tq. And Dist.Osmanabad

PETITIONER

VERSUS

The Principal,
Government Polytechnic,
Tuljapur Road, Osmanabad,
Tq. and Dist. Osmanabad

RESPONDENT

Mr.Abhijit G.Choudhari, Advocate for the petitioner.
Mr.S.J.Salgare, AGP for respondent.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 14/10/2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The contentions of the petitioner in challenging the judgment of the Labour Court dated 31/10/2012, dismissing his Complaint (ULP) No.42/2006 and the judgment of the Industrial Court dated 03/02/2014 by which his Revision (ULP) No.44/2012 has been rejected, are as follows :-

- a. The petitioner was appointed directly by respondent No.1 as a "Sweeper" by order dated 21/12/1993.
- b. Period of employment is not mentioned.
- c. By order dated 20/05/1995, the petitioner was appointed as a "Sweeper" on a fixed stipend from the Contingency Fund.
- d. By order dated 05/06/1995, he was again appointed as a "Sweeper" till the work lasts.
- e. By order dated 12/03/1996, he was appointed as a Sweeper at the main building of the respondent/Institution.
- f. Similar orders are issued on 04/04/1996, 04/05/1996, 13/05/1996.
- g. By letters dated 09/08/1996 and 07/05/1997, the respondent forwarded the representation filed by the petitioner seeking continued employment.
- h. By a communication dated 08/12/1997, the fixed stipend of the petitioner was raised from Rs.600/- to Rs.1000/- p.m.
- i. By communication dated 03/12/1998, he was terminated by respondent No.1.
- j. By communication dated 15/12/1998, he was again appointed @ Rs.1,000/- per month stipend, on contractual basis.
- k. By order dated 13/04/2000, he was posted at the Examination Center as a "Sweeper".
- l. By communication dated 31/10/2001, he was terminated w.e.f. 01/11/2001.

3. The petitioner submits that despite the above orders of appointment, his complaint has been dismissed by the impugned judgment dated 31/12/2012 on the ground that he had not

completed 240 days in the continuous and uninterrupted service of the respondent. He submits that the letters produced at Exhibit U-9 upto U-21 would indicate the tenure of employment of the petitioner. The onus and burden cast upon him to prove continuous service, was discharged.

4. He relies upon the judgment of the Apex Court in the matter of Director, Fisheries Terminal Division Vs. Bhikubhai Meghajibhai Chavda, AIR 2010 SC 1236 to contend that the respondent should have established that he did not complete 240 days once he had discharged the burden of proof. He submits that the Industrial Court, by the impugned judgment, has dismissed the revision without considering the perversity in the judgment of the Labour Court.

5. The learned AGP appearing on behalf of the respondent submits that all the appointment orders issued to the petitioner were on contractual basis. There was no sanctioned vacant post of a "Sweeper". He was paid stipend of Rs.600/- per month till November 1997. Thereafter, it was enhanced to Rs.1000/-. The petitioner had not worked continuously so as to construe completion of 240 days in continuous employment with the respondent. He had worked

intermittently.

6. He further points out from the cross examination of the petitioner that there was an apparent admission of having been engaged on contract basis. He has also admitted that as and when the work was available, he was given appointment orders and he used to perform available work. He, however, concedes that had the respondent brought it's record before the Labour Court, it would have been in a better position to prove that the petitioner had never worked for 240 days in continuous service in one calendar year with the respondent.

7. I have considered the submissions of the learned Advocates, as have been recorded hereinabove.

8. The Apex Court in the case of Director, Fisheries judgment (supra), has concluded in paragraph Nos. 15 and 16 as under :-

“15) Applying the principles laid down in the above case by this court, the evidence produced by the appellants has not been consistent. The appellants claim that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to

all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witness produced by the appellant stated that the respondent stopped coming to work from 10 February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also. It has also been observed by the High Court that the muster roll for 1986-87 was not completely produced. The appellants have inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, inspite of the direction issued by the labour court to produce the same. In fact there has been practically no challenge to the deposition of the respondent during cross-examination. In this regard, it would be pertinent to mention the observation of three judge bench of this court in the case of Municipal Corporation, Faridabad Vs. Siri Niwas [(2004) 8 SCC 195], where it is observed:

“A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against this contentions. The matter, however, would be different where despite direction by a court the evidence is withheld.”

16) It is not in dispute that the respondent's service was terminated without complying with the provisions of Section 25F of Industrial Disputes Act. Section 25G of the Act provides for the procedure for retrenchment. The section reads-

"25G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

The labour court based on the pleadings and evidence on record has come to the conclusion that the services of some of the employees junior to the respondent was continued after the respondent was discharged from its duties. The dates of joining of some of the fellow employees of the respondent like Mohanbhai, Kalubhai and Nanjibhai were not produced by the appellants. The appellants have clearly failed to prove that the services of no junior employee was continued when the services of the respondent was terminated. Thus, the procedure laid down in Section 25G has also not been followed. The findings on facts by the labour cannot be termed as perverse and need no interference."

9. The Labour Court, while dismissing the complaint, has concluded that the petitioner did not complete 240 days in each calendar year. However, it does not appear that the Labour Court has taken into account the appointment orders as mentioned above and the two recommendation letters, which is a part of the internal correspondence of the respondent/Establishment.

10. The Industrial Court appeared to be circumspect about the duration of service put in by the petitioner. The Industrial Court has failed to consider that once the workman had led evidence in support of his contention of having worked for 240 days in a calendar year, the burden would shift on the respondent/Establishment to disprove the said contention with the aid of the record which is in the exclusive custody of the respondent.

11. The learned Advocate for the petitioner submits that since the petitioner is litigating for the past about 14 years, he is prepared to face a remand if the respondent/Establishment is prepared to produce its entire record pertaining to the duration of service of the petitioner from December 1993 till his termination dated 31/10/2001.

12. I find that the Labour Court as well as the Industrial Court have failed to consider the effect of the appointment orders of the petitioner, the recommendation to be continued in service and the enhancement in stipend from Rs.600/- to Rs.1000/-. The termination order dated 31/10/2001 does not indicate that the petitioner was working for a short duration. The last appointment order of the petitioner dated 15/12/1998 is the basis of his termination on 31/10/2001 w.e.f. 01/11/2001.

13. I find that the Labour Court as well as the Industrial Court have casually looked at the last appointment order of the petitioner dated 15/12/1998 and his impugned order of termination dated 31/10/2001, which would indicate that he had worked for about 2 years and 10 months. The presumption on the basis of these documents is that he has continued in service in the light of the duties allotted to him by virtue of his last appointment dated 15/12/1998. Any conclusion to the contrary could only have been facilitated by the respondent which has not brought necessary record before the Labour Court to prove that in these 2 years and 10 months, the petitioner was working intermittently and not continuously.

14. Section 25-F of the Industrial Disputes Act, 1947 r/w Section 25-B would be attracted if it is established that an employee was working for 240 days in a period of 12 calendar months preceding the date of reference, which is the termination order dated 31/10/2001. Considering the last appointment order of the petitioner dated 15/12/1998, this appears to be a plausible conclusion.

15. In the light of the above, I am of the view that the impugned judgment of the Labour Court dated 31/10/2012 and the judgment of the Industrial Court dated 03/02/2014 are rendered perverse and erroneous.

16. However, it cannot be lost sight of the fact that the petitioner is out of employment for the last 14 years and is engaged in litigation. Even if his entire period of service is considered presuming that he has been continuously working from January 1994 till October 2001, it would be a duration of about 7 years as against being in unemployment for 14 years.

17. In circumstances similar to those as above, the Apex Court has concluded in the following 4 judgments that it would be practicable to quantify compensation instead of foisting an employee on an

employer after a long duration of unemployment :-

“1. Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Vs. Mohanlal [2013 LLR 1009],

2. Assistant Engineer, Rajasthan Development Corporation and another Vs. Gitam Singh [(2013) 5 SCC 136],

3. BSNL Vs. man Singh [(2012) 1 SCC 558] and

4. Jagbir Singh Vs. Haryana State Agriculture Marketing Board [(2009) 15 SCC 327]. ”

18. In the light of the ratio laid down by the Apex Court, I am inclined to consider the last appointment of the petitioner dated 15/12/1998 till his termination dated 31/10/2001, which is roughly about 2 years and 10 months, as a basis for quantifying compensation. The Apex Court appears to have granted compensation @ about Rs.30,000/- per year of service.

19. In this view of the matter, rather than remanding the matter back to the Labour Court, which would amount to almost a 4th remand to the Labour Court, granting compensation to the petitioner would be more pragmatic and practicable.

20. As such, this petition is partly allowed. The impugned judgment of the Labour Court dated 31/10/2012 as well as the judgment of the Industrial Court dated 03/02/2014 shall stand modified and the respondent shall pay an amount of Rs.80,000/- (Rs.Eighty Thousand only) to the petitioner within a period of 12 weeks. The amount shall be deposited in the Labour Court, Latur and the petitioner shall withdraw the said amount without conditions, but by presenting a tangible evidence of his identity and on being duly identified by an Advocate. On failure to deposit the amount as directed above, the said amount shall carry simple interest @ 3% p.a. from the date of this judgment.

21. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)