Anand

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2452 OF 2013

Navjinath Balkrishna Salunkhe .Petitioner
Aged about 41 years,
Hindu, Adult, Indian Inhabitant,
Occupation : Nil
Residing at : B/2, Room No.183, Second Floor,
Ramdoot Building, Curry Road,
Mumbai – 400 012.

V/s.

M/s. Natixis .Respondent
(Formerly M/s. Natexis Banques Populaires),
14, 1st Floor, Maker Chamber VI,
Nariman Point,
Mumbai - 400 021.

Mr.R.V.Sankpal a/w Mr.Nilesh Sankpal, Advocate for the Petitioner
Mr.A.D.Shetty, Advocate for the Respondent

CORAM : A.A.SAYED, J.

DATE : 10.12.2015

JUDGMENT

. Invoking Article 226 of the Constitution of India, the Petitioner by this Petition has challenged a common judgment and order dated 5 December, 2012 passed by the Industrial Court in the cross Revision Applications filed by the Petitioner as well as the Respondent. The operative part of the impugned judgment and order reads as follows :

“ -: **COMMON ORDER** :-

1. The Revision Application (ULP) No.199/2010 below Exh.U-1 filed under the provisions of Section 44 of the MRTU & PULP Act, 1971; stands allowed in part; of course, with no order as to costs.

2. The very Judgment and Order so passed in original Complaint (ULP) No.88/2008 by the Ld. Judge of 6th Labour Court, Mumbai dt. 31.08.2010 thereby dismissing the complaint stands quashed and set aside.

3. In consequence thereupon the original complainant now the applicant by name; Shri Navjinath Salunkhe is hereby held and declared as entitled to be re-employed as per Section 23'H' of the Industrial Disputes Act, 1947 in the employment with the respondent Company as 'security guard-cum-office boy' in its employment within a period of one month from today.

4. The Revision Application (ULP) No.233/2010 below Exh.C-1 filed by the applicants under the provisions of Section 44 of the MRTU & PULP Act, 1971; stands allowed in part; thereby the finding to Issue No.1 holding that the respondent No.1 Company is an 'Industry' as per the definition Clause of Section 2(j) of the Industrial Disputes Act, 1947 only to that extent stands quashed and set aside.

5. The respondent No.1 establishment stands hereby declared as establishment as per the provisions of the 'Bombay Shops and Establishment Act, 1948.

6. The R & P of the original Complaint (UL) No.88/2007 stands sent back to the respective Labour Court, immediately.

7. The aforesaid Order has to be complied with by both the sides to he litigation, within a month from today.

Date : 05.12.2012 Sd/-
Place: Mumbai (S.K.Shalgaonkar)
Member
Industrial Court,
Mumbai."

2. It is the case of the Petitioner that he joined the Respondent as security guard-cum-office boy on 25.11.2000 on a monthly salary of Rs.5,500/- (as admitted in the Affidavit of Evidence) and was posted at its office at Nariman Point, Mumbai. According to the Petitioner, on 22.02.2007, the Respondent stopped assigning work to the Petitioner and orally terminated his services without following due process of law. On 23.02.2007, the Petitioner addressed a letter to the Respondent to cease and desist from unfair labour practices. The Petitioner served a notice on the Respondent on 27.02.2007 seeking re-instatement in the employment with full back wages and continuity of service from 22.02.2007. On 09.03.2007, the Petitioner filed a Complaint (ULP) No.88 of 2007 of unfair labour practices under items 1(a), (b), (d), (f) of Schedule IV of the MRTU & PULP Act, 1971 in the Labour Court. The Petitioner filed his Affidavit in evidence and was cross examined on behalf of the Respondent. The Respondent examined its employee one Sunil Deshpande and one Dhananjay Patil of Tops Detectives and Security Services Ltd. ('TOPS' for short). On

30.05.2009, the Labour Court allowed the Complaint directing the Respondent to re-instate the Petitioner with 25% back wages. Cross Revision Applications were filed by the Respondent as well as the Petitioner against the order of the Labour Court dated 30.05.2009. On 07.10.2009 by a common judgment and order, the Industrial Court set aside the order of the Labour Court and remanded the matter back to the Labour Court. The Petitioner filed a Writ Petition impugning the order passed by the Industrial Court dated 07.10.2009 which came to be disposed of on 22.02.2010. This Court did not interfere with the order of the remand of the Industrial Court and granted liberty to the parties to led additional evidence. On remand, the Labour Court directed the Respondent to produce the documents called for by the Petitioner. The Petitioner lead further evidence in support of his Complaint and he was cross-examined. The Respondent examined one Shri Swamidas Bhuddapa, the Account Officer of EPF Department. The Respondent also examined Mr.Joseph John, Chief Manager, Corporation Bank. On 31.08.2010, the Labour Court dismissed the Complaint (ULP) No.88 of 2007. It however held that the Respondent was an industry. The Petitioner as well as the Respondent filed cross Revision Applications. The Petitioner in his Revision Application impugned the denial of the relief of re-instatement, back wages and continuity of service whereas the Respondent in its

Revision Application impugned the finding of the Labour Court that the Respondent was an industry. By the impugned order dated 05.12.2012, the Industrial Court granted relief of re-instatement to the Petitioner and held that the Respondent was not an industry. On 16.04.2013, the Respondent filed Writ Petition No.1888 of 2013 in this Court challenging the impugned order to the extent of granting re-instatement of the Petitioner. On 03.10.2013, the Writ Petition No.1888 of 2013 of the Respondent was allowed and the order of re-instatement was set aside by me. The order dated 03.10.2013 of this Court reads as follows :-

> " Rule. Counsel for the Respondent waives service. By consent, Rule is made returnable forthwith and the Petition is taken up for hearing and final disposal.
>
> 2. The Petitioner challenges the order of the Industrial Court dated 05.12.2012, the operative part whereof reads as follows:-
>
> > "1. The Revision Application (ULP) No.199/2010 below Exh.U-1-filed under the provisions of Section 44 of the MRTU & PULP Act, 1971; stands allowed in part; of course, with no order to as costs.
> >
> > 2. The very Judgment and Order so passed in original- Complaint (ULP) No.88/2008 by the Ld. Judge of 6th Labour Court, Mumbai dt. 31.08.2010 thereby dismissing the complaint stands quashed and set aside.
> >
> > 3. In consequence thereupon the original complainant now the applicant

by name; Shri Navjinath Salunkhe is hereby held and declared as entitled to be reemployed as per Section 23H of the Industrial Disputes Act, 1947 in the employment with the respondent Company as `security-guard-cum-office boy' in its employment within a period of one month from today.

4. The Revision Application (ULP) No.233/2010 below Exh.C-1 filed by the applicants under the provisions of Section 44 of the MRTU & PULP Act, 1971; stands allowed I n part; thereby the finding to Issue No.1 holding that the respondent No.1 Company is an `Industry' as per the definition clause of Section 2(j) of the Industrial Disputes Act, 1947 only to that extent stands quashed and set aside.

5. The respondent No.1 establishment stands hereby declared as establishment as per the provisions of the Bombay Shops and Establishment Act, 1948"

6. The R & P of the original Complaint (ULP) No.88/2007 stands sent back to the respective Labour Court, immediately.

7. The aforesaid Order has to be complied with by both the sides to the litigation, within a month from today."

3. Thus, the Industrial Court by the impugned order has concluded that the Petitioner is not an `industry' and has set aside the order of the Labour Court dated 31.08.2010 which had held that the Petitioner is an `industry'.

4. Having held that the Petitioner company is not an industry, there was no question of the Industrial Court granting any relief to the Respondent-workman of reinstatement under section 24-H of the

> Industrial Disputes Act, 1947 inasmuch as the Industrial Disputes Act would not apply. The Industrial Court appears to have acted beyond its jurisdiction in granting relief of reinstatement.
>
> 5. In the circumstances, the impugned order cannot be sustained and deserves to be set aside and is, accordingly, set aside. The Petition is allowed. Rule is made absolute in terms of prayer clause (a).
>
> The Respondent workman has thus far not challenged the impugned order. On the request of learned Counsel for the Respondent, it is clarified that this order will not come in the way of the Respondent-workman challenging the impugned order and the finding of the Industrial Court shall not be treated as conclusive insofar as the Petitioner-company being held as an `industry' and the Respondent-workman would be at liberty to independently sustain the impugned order of the Industrial Court in all respects in the event the Petition if filed by the Respondent-workman is entertained and the delay is condoned."

3. After the disposal of the Writ Petition No.1888 of 2013 on 03.10.2013 (which was filed by the Respondent), the present Petition has been filed by the Petitioner on 11.10.2013.

4. Learned Counsel for the Petitioner made the following submissions:

(i) The termination of the Petitioner was bad in law inasmuch as there was no appointment letter stating the tenure of employment and in absence such letter Section 2 (oo) (bb) the Industrial Disputes Act,

1947 (I.D.Act) is not attracted in the facts of the present case;

(ii) The Petitioner has completed 240 days in the employment and therefore, his service is protected by Section 25F of the I.D.Act and non-compliance of the condition precedent of Section 25F renders the termination illegal and the consequential reliefs should follow;

(iii) The Petitioner has worked with the Respondent since 2000 though the initial appointment was through TOPS and the same has been certified by the authorized signatory of the Respondent;

(iv) The Respondent failed to produce the documents as directed by the Labour Court by its order dated 30.04.2010 (page 94-99 of the Compilation) and an adverse inference ought to have been drawn for not producing the best evidence in spite of the directions;

(v) The activities of the Respondent are covered by the definition of "Industry" under Section 2(j) of the I.D.Act;

(vi) The Petitioner is unemployed from the date of termination. The Respondent has failed to prove the gainful employment of the Petitioner and he is entitled to re-instatement with full back wages and continuity of the service with effect from 22.02.2007.

Learned Counsel has relied upon the case of ***Bangalore Water Supply and Sewerage Board vs. A. Rajappa and ors, (1978) 2 SCC 213.***

5. Learned Counsel for the Respondent, on the other hand, made the following submissions :

(i) The Reserve Bank of India gave approval to the Respondent to open a Representative Office to serve as a communication channel between Natixis Bank Head Quarter in France and its constituents in India. There is no permission to do any commercial transactions/business of Banking nor do they have any branch. It engages the services of only two Managerial personnel. Hence it is not an “industry” under Section 2(j) of the I.D.Act;

(ii) The Respondent had an Agreement with TOPS as a “Contractor” to provide Security & other services from 1999 till February, 2006. The Petitioner was employed directly with TOPS as security guard from 21.05.1999 to 01.02.2006;

(iii) The Petitioner left the services of TOPS in 2006 and he was lastly assigned the job at Metro Adlabs. He received Rs.18,181/- from TOPS as his legal/terminal dues;

(iv) The Petitioner's employment code with TOPS was 79270. He was covered under the ESI Scheme and Provident Fund and his PPF Number was 23909 through TOPS. He collected his PF and his PF Account was closed as is evident from the documents produced on record by the office of the Regional PF Commissioner, Corporation Bank and the oral evidence adduced before the Labour Court;

(v) The Petitioner was appointed in the employment of the Respondent on a temporary basis for a period of one year from 08.03.2006 to 07.03.2007 on a monthly salary of Rs.5,500/-;

(vi) On 22.02.2007 when the Petitioner was orally informed that his temporary services will come to an end on and from 07.03.2007, he stopped attending office and remained unauthorizedly absent after 23.02.2007 till 07.03.2007 on which date his temporary services automatically came to an end. Since he had completed 240 days service, the Respondent paid him Retrenchment Compensation & Notice Pay;

(vii) By a letter dated 05.03.2007 the Petitioner was informed that his temporary services will come to an end at the close of working hours on 07.03.2007 and he was paid an amount of Rs.22,500/- which included Retrenchment Compensation, Notice Pay, Earned Wages up to 07.03.2007, Leave Wages, ex-gratia payment etc. which was admittedly received by Pay Order and encashed. Hence, conditions precedent for a legal Retrenchment under Section 25F of the I.D.Act were complied with;

(viii) The Petitioner has not come to Court with clean hands and made a false statement on oath and deliberately concealed the fact that he was an employee of TOPS and his conduct amounted to perjury;

(ix) The Industrial Court exceeded its jurisdiction under Section 44 of the MRTU & PULP Act, 1971, since the Industrial Court has set aside the order dated 31.08.2010 dismissing the Complaint (ULP) No.88 of 2007 without recording that the findings of the Labour Court are perverse or on the aspect of jurisdiction or that it lacks jurisdiction. The Labour Court had arrived at a finding of fact based on the evidence on record which ought not to have been disturbed by the Industrial Court in revision;

(x) The relief of full back wages as sought cannot be granted as there is no substantial challenge to the impugned order dated 05.12.2012 insofar as it did not grant back wages to the Petitioner. The Petitioner has only sought to set side Clause (4) of the impugned order dated 05.12.2012 of the Industrial Court;

(xi) There was an inordinate delay in filing the Writ Petition and the same was filed only upon being served with the Writ Petition No.1888 of 2013 on 10.09.2013 and after the order was passed by this Court on 03.10.2013 whereby the Respondent's Writ Petition No.1888 of 2013 was allowed in terms of prayer clause (a) contained therein;

(xii) The present Writ Petition is not maintainable and is filed only by way of afterthought. The Petition is barred by the principles of res judicata and amounts to review of the order dated 03.10.2013 in Writ Petition No.1888 of 2013.

Learned Counsel for the Respondent has relied upon the following judgments:

(i) ***Bangalore Water Supply and Sewerage Board vs. A. Rajappa and ors, (1978) 2 SCC 213***

(ii) ***M/s. PARRY & CO. LTD. and P.C.PAL, 1970(21) F.L.R.266 SC***

(iii) ***Mahila Vinod Kumari vs. State of Madhya Pradesh, 2008 AIR SCW 4989***

(IV) State Bank of Bikaner & Jaipur vs. Om Prakash Sharma, 2006-II-LLJ 1046

(v) Export-Inspection Council of India vs. Madhukar Arun Sapkale and others, 2007(4) Mh.L.J.635

(vi) Umashankar Jaswal vs. Royal Auto Centre, 2007 I CLR 928

(Vii) Karwa Commercial Pvt. Ltd. vs. Baburao K. Malgaonkar, 2008(119)FLR 140

(viii) Mohd. Akram Ansari vs. Chief Election Officer And Others, (2008)2 Supreme Court Cases 95

6. I have considered the rival contentions of the parties and perused the material on record. I have also gone through the written submissions and the judgments relied upon by the learned Counsel.

Maintainability of the Petition

7. While disposing of the W.P.No.1888 of 2013, this Court had clarified that the order dated 03.10.2013 in the said Writ Petition No.1888 of 2013 would not come in the way of the Petitioner in challenging the impugned order dated 05.12.2012 and the findings of the Industrial Court shall not be treated as conclusive on the issue of the Respondent being held as an “Industry”. In the aforesaid circumstances, I am not inclined to accept the submission of the Respondent that the present Petition would be barred by the principles of res judicata or that it would amount to Appeal/Review of the order dated 03.10.2013 in W.P.No.1888 of 2013. Though it does appear that the present Petition was filed on 11.10.2013 after the W.P.No.1888 of 2013 was filed by the Petitioner and served upon the Petitioner, however, I would not go so far as to say that the Petition would not be maintainable on this count as sought to be contended on behalf of the Respondent.

Whether the Respondent is an industry under Section 2(j) of the I.D.Act

8. It is the case of the Respondent that, it had issued a letter dated 05.03.2007 to the Petitioner informing him that his services would come to an end at the close of working hours on 07.03.2007 and he was paid an amount of Rs.22,500/- which included Retrenchment compensation and conditions precedent for a legal Retrenchment under Section 25F of the I.D.Act were complied with.

Thus, on the own showing of the Respondent it had complied with the conditions precedent for a legal Retrenchment under Section 25F of the I.D.Act. Now, if the Respondent is not an industry as claimed by it, there was no question of complying with the provisions of legal Retrenchment under Section 25F of the I.D.Act, as I.D.Act would not have been applicable. Prima facie, this would amount to an admission by the Respondent itself that it was an industry. It is not the case of the Respondent that it has wrongly or mistakenly paid the Retrenchment compensation and/or wrongly complied with the conditions precedent for a legal Retrenchment. Apart from the above, it is required to be noted that the Petitioner had filed the Complaint on the basis that the Respondent was an industry. The Petitioner has averred in his Complaint that the Respondent is carrying out business activity and there were about seven employees working in the employment of the Respondent at the relevant time and he was wrongly terminated without complying the provisions of the I.D.Act. In these circumstances and particularly when the Respondent itself proceeded on the basis that it was an industry by claiming that it complied with requirements of Section 25F of I.D.Act, the burden clearly shifted upon the Respondent, and it was for the Respondent to explain and discharge its burden to show it was not an industry. Despite the directions of the Labour Court by its order dated 30-04-2010 on an Application filed by

the Petitioner, the Respondent failed to produce the relevant documents which would ordinarily be in their custody, which documents inter alia included the muster-cum-wage register, Accounts, Circulars issued by RBI granting permission to set up the office of the Respondent after 1998 as mentioned in the said Application of the Petitioner. The claim of the Respondent that it did not maintain or preserve records in respect of the Petitioner is stated only to be rejected. In the facts & circumstances of the case and in view of what is stated above, an adverse inference is required to be drawn against the Respondent. In any event, it can hardly be disputed that the Respondent was rendering 'services'. In ***Bangalore Water Supply & Sewerage Board vs. A. Rajappa And Others***, ***(1978)2 SCC,*** it has been held in para 140 by a Bench of seven learned Judges of the Supreme Court as follows :

> “140. 'Industry', as defined in Section 2(j) and explained in Banerji (supra), has a wide import.
>
> (a) Where (I) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad of food), prima facie, there is an 'industry' in that enterprise.

> (b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.
>
> (c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.
>
> (d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking."

Applying the principles in the aforesaid judgment, even assuming that the Respondent was only carrying liaison activities and only rendering services and there was inter alia absence of profit motive, it would not cease to be an industry on that count. As discussed earlier, the Respondent had failed to discharge its burden in respect of its contention that it was not an industry by producing necessary documents which would only be in custody of the Respondent and not the Petitioner. In ***Gopal Krishnaji Ketkar vs. Mohammed Haji Latif***, ***AIR 1968 SC 14/3***, the Supreme Court has held that even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. In the circumstances, the Industrial Court fell in error in interfering with the finding of the Labour Court that the Respondent is an industry. It is not the case of the Respondent that there was any re-organization of business; therefore, the case of ***M/s. PARRY & CO. LTD. and***

P.C.PAL, ***1970(21) F.L.R.226 SC*** would not apply in the present case. In the circumstances, I hold that the Petitioner is an industry within the meaning of Section 2(j) of the I.D.Act.

Whether termination is bad in law.

9. It is not the case of the Respondent in the pleadings that the Petitioner was rendered surplus or there was no requirement of a security guard in their establishment. As a matter of fact no reasons are given by the Respondent in their Notice dated 05.03.2007 while paying the retrenchment compensation etc., except that the service of the Petitioner was temporary and would come to an end on 07.03.2007. It was the case of the Respondent itself that the Petitioner was employed with the Respondent for one year from 08.03.2006 to 07.03.2007 i.e. for more than 240 days, on a monthly salary of Rs.5,500/-. Admittedly, there was no appointment letter indicating the tenure of appointment of the Petitioner or that his services of temporary nature. Even otherwise, nothing was brought on record to show that the employment of the Petitioner was on temporary basis and had come to an end on 07.03.2007. As a matter of fact the case of the Respondent was that the Petitioner was earlier employed with TOPS as Security-guard from 21-05-1999 until 01.02.2006 and after leaving that employment with TOPS, the Petitioner had joined the Respondent from 08.03.2006. The

Respondent had admittedly completed 240 days of service. In these circumstances, it cannot be said that the services of the Petitioner was temporary in nature and automatically came to an end on 07.03.2007. Admittedly, there was no inquiry or departmental proceedings against the Petitioner. In these circumstances, I am disposed to accept the case of the Petitioner that the Respondent had not followed the provisions of law and that his termination was bad in law and there are patent illegalities including that of jurisdiction in the impugned order which go to the root of that matter.

Whether to grant relief of re-instatement & backwages

10. The evidence on record clearly established that the Petitioner was employed with the Respondent only for one year. There appears to be no averment in the copy of the Complaint produced before this Court that the Petitioner was not gainfully employed elsewhere. In these circumstances, the question of backwages would not arise when it is not even claimed in the Complaint. The Petitioner's conduct in not disclosing that he was employee with TOPS from the year 2000 till 2006 and claiming to be in the services of the Respondent from the year 2000 prima facie indicates that he did not come to Court with clean hands. Moreover, it is seen that the Petitioner was essentially working as a Security Guard with the Respondent which is a position of trust and involves the security of the

assets and property of the Respondent. In view of the above and also looking at the sour relationship of employer-employee between the parties, it would not be appropriate to re-instate the Petitioner. In my view, interest of justice would be served if the Petitioner is granted compensation in lieu of re-instatement. The Respondent is accordingly directed to pay to the Petitioner a lump sum compensation of Rs.1,00,000/- (Rupees one lac only) within six weeks from today.

11. In the result, the Writ Petition is partly allowed in the aforesaid terms. There shall be no order as to costs.

(A.A.SAYED, J.)