

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1735 OF 2003

Executive Engineer,
Kukadi Project Land Development
Division No.2, Narayangaon,
Tq. Junnar, District Pune.

..Petitioner

Versus

Pandharinath Bhau Tarte,
Age 56 years, Occ. Labour,
R/o Ghargaon, Tq. Shrigonda,
District Ahmednagar.

..Respondent

...
Advocate for Petitioners : Shri S.G.Sangle
Advocate for Respondent : Shri Pradeep Shahane
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CORAM : RAVINDRA V. GHUGE, J.
Dated: April 01, 2016
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ORAL JUDGMENT :-

1. This petition was admitted by this Court on 25.6.2003. By order dated 18.10.2007, the impugned award was stayed by this Court as a consequence of which, the respondent / employee is out of employment.
2. The petitioner / establishment is aggrieved by the judgment and award dated 27.6.2002, by which, Reference (IDA) No.126 of 1993 has been partly allowed and the respondent has been granted reinstatement with continuity w.e.f. 1.6.1989. He has been deprived of backwages.
3. Shri Sangle, learned Advocate for the petitioner has made a serious grievance about the impugned award. Contention is that though the

respondent claimed to have worked from 4.5.1984 till 31.5.1989, he had actually worked intermittently in the said period. The petitioner had prepared a chart of the number of days worked below Exhibit E-5/1. The said chart was proved in the Court and it was, therefore, established that the respondent had not worked continuously in the uninterrupted service of the petitioner.

4. It is further submitted that the Labour Court has arrived at a conclusion that the respondent has worked continuously only on the basis of the oral statements made by the respondent and since the petitioner did not produce the record of attendance and pay register before the Labour Court. The petitioner had volunteered to give inspection of the record to the respondent. It expressed its inability to produce the record in the Court as it was bulky and voluminous.

5. Shri Sangle further submits that the onus and burden of proving the completion of the 240 days lies on the shoulders of the employee. Unless the said burden is discharged, the onus to prove the contrary will not shift to the employer / establishment.

6. He places reliance upon the judgment of this Court in the matter of Bibhishan Yeshwant Babar Vs. The Executive Engineer, Kukadi Prkalp Bhuvikas, Pune and others [1996 (72) FLR 446] and the judgment of the learned Division Bench of this Court in the matter of Dashrath Rajaram Solanke and others vs. Executive Engineer and another [2013 (3) All MR

774]. He, therefore, submits that this petition deserves to be allowed and the impugned award deserves to be quashed and set aside.

7. Shri Shahane, learned Advocate appearing on behalf of the sole respondent submits that there is no perversity or error in the impugned award. The respondent / employee had discharged the burden of proving continuous service by categorically stating on oath that he had been working from 4.5.1984 to 31.5.1989. In the event, the petitioner desired to disprove the contention of the employee, it should have relied upon the record available with it and should have proved the otherwise on the basis of the record.

8. He further submits that the petitioner could have prepared a compilation of the record with regard to the attendance of the daily wagers for the period during which the respondent had worked. Said compilation of documents could have been produced on record. Instead, the petitioner prepared a data showing the period of working and the number of days and had attempted to mis-lead the Court by establishing on the basis of the chart that the respondent was not working continuously. Such a chart, prepared by some officer of the petitioner and which did not carry the signature of any officer as an authority who has prepared the chart, cannot be said to be a piece of evidence. He, therefore, submits that the failure on the part of the petitioner to produce the record led the Labour Court to believe that the petitioner was holding back the record.

9. He further submits that once the Labour Court came to a conclusion that the illegal termination of the respondent from 1.6.1989 was illegal retrenchment, the Labour Court has rightly reinstated him on account of the violation of Section 25-F of the Industrial Disputes Act, 1947.

10. Shri Shahane relies upon the following judgments of this Court as well as the Apex Court:-

- (i) *State of Maharashtra Vs. M.V.Ghalge* - 1991 (2) Mh. L.J. 1557,
- (ii) *Chima Shravan Shinde and others Vs. M.V.Patil and others* - Writ Petition No.120 of 1981, dated 15.7.1994,
- (iii) *Director, Fisheries Termination Division Vs. Bhikubhai Meghajibhai Cavda* - 2010 AIR SCW 542,
- (iv) *Harjinder Singh Vs. Punjab State Warehousing Corporation* - 2010 (124) FLR 700 and
- (v) *Anop Sharma Vs. Executive Engineer, Public Health Division*- 2010 (2) Bom. L.C. 231 (SC).

11. I have considered the submissions of the learned Advocates.

12. It is trite law that the onus and burden of proving completion of 240 days in continuous employment lies on the shoulder of an employee. After the burden is discharged, it would shift to the employer for proving the otherwise. The witness of the petitioner stated in cross-examination that he

has not produced the documents since they are bulky and could give an inspection of the attendance registers and pay sheets to the employee. However, it does not appear that the petitioner even made an effort to prepare a compilation of the attendance register and pay sheet for the perusal of the Court. It is observed by the Labour Court, in paragraph No.17 of the judgment, that the witness of the petitioner Shri Bhimraj Jaywant Rahane, Sub-Divisional Engineer, had admitted in cross-examination that the respondent had worked continuously for 240 days and he could not explain whether there was any break period in his service.

13. In the light of the above, it appears that the Labour Court has arrived at its conclusion in view of the petitioner having not produced the record and on account of some admissions by the witness - Shri Rahane.

14. However, it cannot be ignored that the respondent employee was 52 years' old at the time of the recording of evidence as on 16.5.1999. As such, he has attained the age of superannuation in 2007. It also cannot be ignored that he has admitted in his cross-examination that he was working as a Labourer on private work and was initially earning about Rs.13/- per day and thereafter, about Rs.30/- to Rs.35/- per day.

15. This Court had stayed the impugned award. Section 17B of the Industrial Disputes Act, would therefore, become applicable to the employee notwithstanding the fact as to whether the impugned award is sustainable or not. The employee had worked for about 5 years, according

to the conclusions drawn by the Labour Court and was out of employment for 18 years till his date of retirement in 2007.

16. The Honourable Supreme Court has considered situations wherein an employee has put in a short spell of work and was out of employment for a long duration in the following four judgments:-

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

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

(iii) BSNL Vs. Man Singh [(2012) 1 SCC 558] and

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

17. In the above judgments, the Honourable Supreme Court has concluded that reinstatement should not be granted to an employee who has worked for a short duration and is out of employment for a long period. Instead, grant of compensation would be more appropriate. An amount of Rs.30,000/- was held to be sufficient compensation for each year of service put in by an employee as against reinstatement with continuity and backwages.

18. In the instant case, the respondent / employee has admitted in his

cross-examination that he was working as a Labourer on private work after his termination. Keeping this aspect in view, I find that the rate at which the compensation could be paid to the respondent / employee should be Rs.25,000/- per year.

19. I have gone through the case law cited by both the sides with regard to the manner of computing continuous service, effect of violation of Section 25-F and the effect of Clause 28 of the Kalelkar Award. Since I am relying upon the four judgments delivered by the Honourable Supreme Court for granting compensation in lieu of reinstatement in service, I am not advertng to each of the judgments cited by both the Advocates.

20. In the light of the above, this petition is partly allowed. The impugned award dated 27.6.2002, delivered in Reference (IDA) No.126 of 1993 stands modified and replaced by a direction to the petitioner to pay compensation of Rs.1,25,000/- for the five years of service put in by the respondent employee. Said amount shall be paid within four months from today, failing which the said amount shall carry interest at the rate of 3% per annum from the date of this judgment.

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

(RAVINDRA V. GHUGE, J.)

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