

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5318 OF 2012

Osmankhan Bhure Khan
Age: 55 years, Occu.: Service,
R/o Karla, Dist. Pune.

..PETITIONER

VERSUS

1. Maharashtra Tourism Development
Corporation Ltd., Station Road, Aurangabad.
Through Its Senior Regional Manager.
2. Indian Tourism Development Corporation Ltd.,
Station Road, Aurangabad.
Through its Manager.

..RESPONDENTS

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Mr. Y.R. Marlapalle, Advocate for petitioner.
Mr. S.V. Dankh, Advocate for Respondent No.1.
Mr. D.B. Pawar, Advocate for Respondent No.2.

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CORAM : RAVINDRA V. GHUGE, J.
DATED : 16th MARCH, 2016

ORAL JUDGMENT :

1. The learned Counsels for the respective sides have submitted on instructions that they have no objection if this Court hears this matter, finally.

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

3. In fact this matter was heard at length on 27.01.2016. After considering the submissions of the learned Counsels, this Court had expressed a view and which was recorded in the order dated 27.01.2016 which reads as under:-

“1. The learned Advocates for the respective sides have been heard at length.

2. The facts as they emerge from the record are that the Petitioner was working with Respondent No.2 from 01.03.1981 till 15.02.1983 and then continued in the employment of Respondent No.1 till 31.08.1984 when he was retrenched. The Industrial Court protected his services by order dated 09.01.1985 and reinstated him.

3. The Petitioner continued in employment under various orders of the Industrial Court, Labour Court, learned Single Judge of this Court as well as the learned Appeal Bench of this Court, till the Industrial Court allowed the revision petition of Respondent No.1 on 15.06.2012 and the Petitioner was terminated on 20.06.2012 by the order of termination which was pasted at his residence at Ajantha when he was on duty at Karla, District Ratnagiri.

4. The Petitioner is now 59 years old. Both the learned Advocates are unsure as to whether, the retirement age is 58 or 60 years though Shri Marlapalle, learned Advocate for the Petitioner, canvassed that the retirement age is 60 years.

5. Considering the peculiar facts of the case, in my view, prima facie, since the Petitioner has been working from 01.03.1981 till 20.06.2012 and may have attained the age of

retirement, ends of justice would be met by granting notional continuity in service without causing any financial burden on the Respondents in the nature of unpaid wages from the date of termination till this date. This would entitle the Petitioner for retirement benefits.

6. Shri Dankh and Shri Pawar, learned Advocates seek a short accommodation for taking instructions in this matter.

7. Stand over to 12.02.2016 in the supplementary board.”

4. Mr. Dankh and Mr. Pawar, learned Counsels for the respondents have made an effort for seeking resolution of this dispute and as such the matter was adjourned on 12th February, 23rd February, 4th March and 10th March.

5. Taking into account the statement made by the learned Counsels for the respondents that the matter could not be resolved between the parties, I have heard the learned Counsels.

6. The contention of the petitioner is that he was working as a security guard from 01.03.1981 with Respondent No.2. On 21.05.1982, the petitioner was called upon to appear before the interviewing board for the purposes of regularisation in service.

7. Respondent No.1 thereafter issued a letter dated 15.02.1983 by which the petitioner was appointed as a security guard in Grade-II on

contractual basis. Similar order was also passed on 26.02.1984. Contentions of the petitioner is that there was no contractor in between the petitioner and Respondent No.1. It was merely projected that he was engaged on contractual basis only to deprive him of regular employment and entitlement to regularise with Respondent No.1-establishment.

8. By an order dated 01.06.1984, Respondent No.1 directed the petitioner to report for further duty instructions to the Senior Executive, Maharashtra Tourism Development Corporation, Aurangabad since the erstwhile management of the Aurangabad Tourism was handed over to Respondent No.1. The petitioner accordingly reported for duties and filed a joining report dated 30.06.1984. There is no dispute that there was no break in service till he reported to Respondent No.1.

9. It is further submitted that Respondent No.1 by order dated 28.08.1984 informed the petitioner that his services would be terminated along with three other persons with effect from 31.08.1984. He would be entitled for retrenchment compensation and notice pay as per Section 25F of the Industrial Disputes Act, 1947.

10. Mr. Marlapalle, learned Counsel for the petitioner submits that as soon as the petitioner received the notice of termination, he

approached the Industrial Court in Complaint ULP No. 599/1984 and was protected. It was subsequently withdrawn since the Industrial Court was of the view that it had no jurisdiction to deal with the proposed termination.

11. It is submitted that the petitioner then preferred Complaint ULP No. 384/1993 before the Labour Court, Aurangabad on 21.10.1993. By an ad-interim order, his services were protected vide the direction dated 25.10.1993. It is pointed by the learned Counsel for the petitioner that all the other three employees who were sought to be terminated by Respondent No.1 had filed the complaint alongwith the petitioner.

12. The interim order was challenged by Respondent No.1-management before the learned Single Judge of this Court and then before the learned Appeal Bench in Letter Patent Appeal No. 3/1985. The protection, granted by the Labour Court, was confirmed in continuity to the protection granted by the Industrial Court before whom the petitioner had withdrawn his complaint on 17.09.1993, upto the learned Division Bench of this Court.

13. The petitioner submits that he was reinstated in service during the pendency of the complaint. Respondent No.1 filed a written

statement making an averment that the petitioner was a contractual employee. No recruitment procedure was followed. The four complainants inclusive of the petitioner had no locus standi to file the complaint. Since Respondent No.1 complied with Section 25F of the Industrial Disputes Act, the termination call for no interference.

14. The petitioner submits that by judgment dated 18.03.2008, Complaint ULP No. 364/1993 was partly allowed by the Labour Court. The claim of Complainant Nos.1 and 2 viz. Akbar Khan and Jafar Beg were dismissed by the Labour Court. The claim put forth by the petitioner herein along with Dadarao Narayanrao Pawar was allowed and their termination order dated 28.08.1984 was set aside. Respondent No.1-establishment was directed to continue these complainants in service and since they were continued in employment, claim of back wages did not arise.

15. The petitioner submits that the Labour Court framed issues in the light of the contentions of the litigating sides and has answered the issues in favour of the petitioner. The reasons assigned by the Labour Court are supported by the oral and documentary evidence on record. It is further submitted that since Respondent No.1 took over the management of the establishment by way of transfer of undertaking

along with its employees, Respondent No.1 had therefore stepped into the shoes of the erstwhile employer. The services of the petitioner therefore stood continued with Respondent No.1.

16. The petitioner submits that Respondent No.1 preferred Revision ULP No. 40/2009 against the petitioner before the Industrial Court, Aurangabad. A similar revision was filed by the unsuccessful Complainant No.1. By the judgment and order dated 15.06.2012, the revision petition filed by Respondent No.1 against the petitioner was allowed and the direction to reinstate the petitioner was set aside. The petitioner is aggrieved by the said directions.

17. The petitioner strenuously submits that though there was no dispute that the undertaking was transferred from Respondent No.2 to Respondent No.1 herein in 1984, the Industrial Court did not lift the corporate veil to see through the service conditions of the petitioner as well as the fact that there was no contract between the petitioner and Respondent No.1 and therefore committed an error in allowing revision petition of Respondent No.1.

18. It is further submitted that when the services of the petitioner were accepted by Respondent No.1 when the establishment was transferred from Respondent No.2 to Respondent No.1, the management

of Respondent No.2 stood transferred along with services of the petitioner thereby bringing the case squarely within the ambit of Section 25FF of the Industrial Disputes Act. It is therefore submitted that the Industrial Court has superficially considered the service conditions of the petitioner and not carried away merely by the words of 'contract basis' as were appearing in the appointment orders of the petitioner.

19. The petitioner further submits that Section 2 (oo)(bb) of the Industrial Disputes Act, 1947 is not applicable since the nature of work as a security guard continued as long as Respondent No.1 maintained its establishment/undertaking with its properties. Unless the work comes to an end, Section 2(oo)(bb) cannot be invoked. He therefore submits that as the retirement age of the petitioner with Respondent No.1 is about 60 years, he has less than one year available with him and hence should be reinstated in service with continuity and back wages.

20. Mr. Dankh, learned Counsel for Respondent No.1 has strenuously supported the impugned judgment. He submits that specific contentions were set out by Respondent No.1 in its written statement. Initially, there was no privity of contract between Respondent No.1 and the petitioner. Respondent No.2-establishment was taken over by Respondent No.1. The petitioner was continued since he was already in

employment and a particular contract issued in his favour thereby maintaining his services, was in existence. In order to avoid the contravention of a contract, the petitioner was continued in employment

21. Mr. Dankh strenuously submits that the Labour Court had lost sight of the fact that when Section 25F was complied with, there was no reason for granting reinstatement in employment. He further submits that the Labour Court lost sight of the applicability of Section 2(oo)(bb) and erred in concluding that it was not applicable. When the appointment order of the petitioner in no uncertain terms mentions that it was on contract basis, the Labour Court was not required to look any further. Had the Labour Court appreciated these factors, the complaint would have been dismissed by the Labour Court and the petitioner would not have been continued in services from 1984 till 20.06.2012 when he was finally terminated by the Industrial Court allowed the revision petition filed by Respondent No.1.

22. He further submits that the impugned judgment of the Industrial Court can neither be terms as perverse or erroneous. The Industrial Court has considered the facts of the case squarely within the framework of Section 25F and 2(oo)(bb) of the Industrial Disputes Act. In catena of judgments, It has been held that an employee on contract

basis will have no right to continue in service, much less seek an order of reinstatement on a substantive post.

23. He further submits that the very induction of the petitioner in services on 01.03.1981 can be termed to be a 'back door entry'. Neither was the post advertised, nor were applicants called from the public at large. There was no interview held and there was no selection process followed. The petitioner was appointed as a security guard and he continued thereafter in employment. Respondent No.1 being a state instrumentality, cannot create posts and as such the petitioner could not have been continued in employment even on this count.

24. He therefore relies upon the order passed by this Court on 16.09.2009 in Writ Petition No. 3717/2009 which was a petition filed by Ashok Jaydrath Dhiware Vs. The Senior Executive, Maharashtra Tourism Development Corporation Ltd. and Another. He submits that the said petitioner Ashok Jaydrath Dhiware was similarly placed as the petitioner herein. His complaint against his termination was challenged before the Labour Court. He was unsuccessful as the Labour Court dismissed his Complaint ULP No. 414/1993 by judgment dated 19.03.2008. He preferred Revision ULP No. 33/2008 before the Industrial Court which was also dismissed by judgment dated 16.09.2009. This Court after

considering the contentions of the litigating sides and case law cited, concluded that there was no reason to interfere in the concurrent findings of the lower Courts. Mr. Dankh adds that this judgment was sustained by the learned Appeal Bench of this Court. He therefore prays that this petition be dismissed with costs.

25. Mr. Dankh further makes a submission that in the event this Court is inclined to grant any relief to the petitioner, it may take into account the fact that the petitioner has been occupying one room accommodation belonging to Respondent No.1 despite the severing of employer-employee relationship with effect from 20.06.2012. As such, the petitioner has occupied the said quarter practically for the past about three years and nine months. He hastens to add that Respondent No.1 is not making an issue out of the said matter since this Court had granted interim relief to the petitioner and he was protected.

26. Mr. Dankh further submits that after employer-employee relationship is brought to an end, the petitioner cannot continue to occupy the quarter. As long as he was protected by this Court, Respondent No.1 may not take issue with occupying the quarter. However after this petition is disposed off, the quarter needs to be vacated forthwith.

27. I have considered the strenuous submissions of the learned Counsels as have been recorded hereinabove and have gone through the record available with their assistance.

28. Subsequent events based after the impugned judgment cannot be ignored, in as much as the petitioner is already more than 59 years of age. So also, there is no dispute that the age of retirement of the petitioner is 60 years and he may have few months left for reaching the age of 60 years, in the light of statement made by Respondent No.1 in paragraph no.6 of its written statement.

29. The contention of Respondent No.1 that the petitioner has continued in employment under fortuitous circumstances and has been fortunate to be continued in employment under the Court's orders, cannot be ignored. The petitioner had initially put in only about three years in employment on the basis of the appointment orders issued to him. From September, 1984 onwards, he has continued in employment under Court orders. Mr. Dankh therefore appears to be right in canvassing that the petitioner has not continued in employment on the basis of the service conditions applicable to him, but on account of the orders passed by this Court.

30. The contention of Respondent No.1 that Section 2(oo)(bb) would be applicable to this case, in my view is not sustainable. Section 2(oo) (bb) is an exception to retrenchment. Section 2(oo)(bb) reads as under:-

“2 (oo) (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;”

It is trite law that if the nature of work is available and the said work continues, the engagement of an employee to do the said work in the face of continuous work being available, would not make Section 2(oo)(bb) applicable to the case.

31. Be that as it may, it cannot be ignored from the humanitarian point of view that the petitioner has been in employment from 01.03.1981 and has been terminated on 20.06.2012 which is a period of almost 31 years and three months. The petitioner is practically 60 years of age and at this age in life, he would have nothing to fall back upon. Had it been a case of a small spell of service followed by a long spell of unemployment, that this Court would not have interfered into the matter. However, taking into account that he has put in about 31 years and 3 months in service, ends of justice would be met by protecting his retiral

benefits so as to enable him to sustain himself post retirement in his old age.

32. It is therefore only in the light of the peculiar facts and circumstances as recorded above that this petition is being partly allowed only to the extent of directing Respondent No.1 to consider the case of the petitioner favourable for grant of retiral benefits. This petition fails to the extent of the claim of the petitioner for reinstatement and continuity in service from 20.06.2012.

33. In the light of the above, this petition is partly allowed only to the extent of directing Respondent No.1 to process the papers of the petitioner for grant of retiral benefits as expeditiously as possible and preferably within a period of 4 months from today. This petition fails to the extent of the prayer to be reinstated in service and therefore the petitioner shall not be entitled for reinstatement in service, continuity and full back wages. Respondent No.1 may keep in mind the service period of the petitioner from 01.03.1981 till 20.06.2012 for the grant of retiral benefits.

34. Needless to state, the retirement benefits shall be calculated by Respondent No.1 as per the minimum rates of wages applicable as on

20.06.2012 or the actual salary earned by the petitioner, whichever is more. In so far as the request of Respondent No.1 with regard to the quarter being occupied by the petitioner, I am not inclined to direct the petitioner to pay rent considering the fact that this Court had protected the occupation of the petitioner. However, I am accepting the request of Respondent No.1 of directing the petitioner to vacate the quarter. The petitioner shall vacate the premises as expeditiously as possible and in any case on or before 15.04.2016, only after which, he shall be entitled for retiral benefits.

35. Rule is made partly absolute in the above terms. No costs.

(RAVINDRA V. GHUGE, J.)