

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

WRIT PETITION NO.1676/2016

Ms. Chetana Sitaram Surve

... Petitioner

V/s.

The Municipal Corporation of Greater Mumbai & Ors. ... Respondents

Mr. G. K. Naik i/b. G. K. Naik & Co. for the petitioner  
Mr. A. V. Bukhari, Senior Advocate a/w. Mr. Bhushan Bukhari and  
Fauzia Bukhari i/b. Sheetal Mane for respondents.

**CORAM: K.K. TATED, J.**  
**DATED : FEBRUARY 6, 2017**

**PC. :**

1. Heard the learned counsel for the parties. By this petition under Article 226 and 227 of the Constitution of India the Petitioner complainant challenges the judgment dated 17.12.2014 passed by the Labour Court, Mumbai in complaint (ULP) No.147/2013 dismissing their complaint of unfair labour practice under section 28 read with Item 1(a), (d) and (f) of schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (said Act). The petitioner also challenges the judgment dated 03.03.2016 passed by the Industrial Court, Mumbai in Revision Application (ULP) No.9/2015 confirming the judgment of Labour Court.

2. Few facts of the matter are as under:

The petitioners and other co-workmen whose names are

mentioned in list Exhibit- A to the petition were appointed on the post of Nurse by appointment letter dated 30.09.2010. In the said appointment letter, it was stated that the appointment on the post of Nurse was purely on contract basis w.e.f. 30.09.2010 till 31.10.2010 on consolidated salary of Rs.12,500/- on following terms and conditions:

*“1. The said person shall give an affidavit in writing on stamp paper of Rs.100/-. Specimen of the affidavit is annexed to this letter.*

*2. A consolidated salary of Rs.12,500/- (Rs.Twelve Thousand five hundred only) has been fixed to him/her. No any other allowance shall be paid.*

*3. Her appointment is purely on contractual and temporary basis till 31<sup>st</sup> December 2010.*

*4. The candidate shall have to work in all the three shifts.*

*5. She will be appointed in any of the Hospitals within the territorial jurisdiction of Greater Bombay. So also she will be transferred as per necessity.*

*6. No any kind of leave is admissible to her in the contractual period.*

*7. During the period of contractual employment if his/her performance is found not satisfactory, then by giving one month's notice his/her services will be terminated.*

*8. Her appointment is on contract basis, therefore, she cannot be approached any of the Court.*

*9. This appointment is not made as per terms and conditions of service regulations of Bombay Municipal Corporation; therefore, she is not entitled to benefits such as Pension, Provident Fund or any equivalent benefits. Or any other benefits as admissible to the post on which she is appointed, will not be paid to her.”*

3. Thereafter the respondent issued second appointment letter on 05.02.2011 for the period from 03.01.2011 to 31.03.2011. Another appointment letter dated 06.06.2011 issued by the respondent Corporation in favour of the petitioner and co workmen for the period 16.05.2011 to 13.08.2011, by appointment letter dated 06.02.2012 for the period 27.01.2012 to 25.04.2012 and by appointment letter dated 24.08.2012 for the period 25.06.2012 to 22.09.2012 on same terms and conditions as stated hereinabove. At the time of appointment, the petitioners also executed a bond on a non judicial stamp paper of Rs.100/- stating that their appointment was purely on temporary basis for a specified period on a fixed remuneration. As contractual period was over, the respondent removed them from service. Hence, the petitioner filed complaint (ULP) No.147/2013 before the Labour Court, Mumbai of unfair labour practice under Item 1 (a) (d) and (f) of schedule IV of the said Act for declaration that the respondent has committed and/or continuing to commit unfair labour practice under Item 1 (a) (d) and (f) of schedule IV of the said Act by terminating the services of the petitioner along with other 31 workmen illegally w.e.f. 29.12.2012. The petitioner also made a prayer for declaration that the respondent illegally terminated the petitioner and co-workmen's services and for direction to the respondent to reinstate the petitioner with full back wages and continuity of service w.e.f. 29.12.2012 on their original post.

4. On the basis of the pleadings, the Labour Court framed following issues:

|   | ISSUES                                                                                                                                                                                                                                      | FINDINGS            |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| 1 | Whether complainants have proved that, respondents have engaged in unfair labour practice under item 1(a), (b) and (d) of Schedule-IV of MRTU & PULP Act, 1971 by illegally terminating the services of the complainants w.e.f. 29.12.2012? | No                  |
| 2 | Whether the complainants are entitled to reliefs as prayed for ?                                                                                                                                                                            | No                  |
| 3 | What order?                                                                                                                                                                                                                                 | As per final order. |
|   | <b>Additional Issue :</b><br>Whether the complainants prove that there exists employer employee relationship between corporation and the complainants and this court has jurisdiction to entertain the present complaint ?                  | Yes                 |

5. Considering the evidence on record, the Labour Court held that the petitioners' case falls within the provision of Section 2(oo) (bb) of the Industrial Disputes Act, 1947 (ID Act). The Labour Court also observed in paragraph 30 of the impugned judgment that though during pendency of the litigation, the respondent Corporation issued an advertisement for appointment of Nurses on permanent posts, the petitioners failed and neglected to apply in response to the said advertisement. Considering these facts, the Labour Court dismissed the petitioners' complaint.

6. Being aggrieved by the order passed by the Labour Court, the petitioner preferred revision application (ULP) No.9/2015 before the Industrial Court, Mumbai u/s.44 read with Section 28 of the said Act. On the basis of the pleadings the Industrial Court framed following

points for consideration :

|   | <b>POINTS</b>                                                                                                                                                                                                                        | <b>FINDINGS</b>                        |
|---|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|
| 1 | Whether the complainants prove that their termination was wrongful and illegal for the alleged reason of not following the procedure under the provisions of the I.D.Act ?                                                           | No                                     |
| 2 | Whether the complainants prove that they had worked for more than 240 days in a calendar year and are entitled to the benefits of Model Standing Orders though their appoints were purely on contract basis for a specified period ? | No                                     |
| 3 | Whether the learned Labour Judge has committed an apparent error on the face of record, resulting into manifest injustice ?                                                                                                          | No                                     |
| 4 | Whether the order passed by the learned Labour Judge requires interference ?                                                                                                                                                         | No                                     |
| 5 | What relief and order ?                                                                                                                                                                                                              | Revision Application stands dismissed. |

7. The Industrial Court also observed that the petitioner failed to prove that they continuously worked for more than 240 days in the preceding year. The Industrial Tribunal also held that the appointment of all the petitioners was on temporary contract basis till the candidates were made available for the permanent posts. Considering these facts and the law declared by the apex court, the Industrial Court also dismissed the petitioners' revision application.

8. Being aggrieved by the concurrent findings of facts recorded by both the courts below the petitioner filed the present Writ Petition challenging those orders.

9. The learned counsel for the petitioner submits that the judgment passed by both the courts below is against justice, equity and good conscience and same is required to be set aside. He submits that both the courts failed to consider that the petitioners' case does not fall u/s.2(oo)(bb) but u/s.25-B of the ID Act. He submits that both the courts failed to consider the fact that from 30<sup>th</sup> September 2010 the petitioners and other co-workmen were continuously worked with the respondent till 20.12.2012 except on one or two days artificial brakes in their service. They have completed 240 days in every calender year. He submits that with intention to deprive the petitioners of their rights the appointment letters were issued from time to time for short period. Therefore, section 25-B of the ID Act is applicable.

10. The learned counsel for the petitioner submits that both the courts below failed to consider that after initial appointments of the petitioner and other co-workmen the respondents were issued fresh appointment letters without any brakes in their service and they were carried out the permanent nature of work in various hospitals of the respondent and completed 240 days in previous calender year. He submits that both the courts failed to consider that in the appointment letters of the petitioner and other co-workmen, nowhere it was mentioned that they were appointed against the reserved posts. He submits that till today, the posts for open category are vacant in the respondents' hospital in Mumbai. He submits that both the courts failed to consider that as per Section 25-B of the I.D. Act, the petitioner and other co-workmen continuously worked with the respondent and

therefore, without complying with section 25F and 25G of the I.D. Act, the respondents have no right to terminate their services orally.

11. The learned counsel for the petitioner submits that both the courts below failed to consider that the services of the petitioner and co-workmen were orally terminated on 29.12.2012 without following due process of law. He submits that several fresh appointment letters were issued by the respondent from time to time by showing artificial brakes. He submits that both the courts below ought to have held that the petitioner proved the fact that they worked for more than 240 days continuously in previous year with the respondent Corporation and therefore they are entitled to reinstatement with continuity of service and permanency. He submits that for last more than 4 years the petitioner and co-workmen were unemployed.

12. The learned counsel for the petitioner submits that the respondent published an advertisement on 29.03.2013 in Samna, a daily newspaper for filling up the permanent posts of Nurse in their various hospitals. He submits that pursuant to the said advertisement all the petitioners had submitted their applications for the post of Nurse but they were not considered by the respondent for their appointment.

13. The learned counsel for the petitioner submits that the apex court in the matter of ***Jasmer Singh Vs. State of Haryana 2015 (0) AIJEL-SC-56191*** held that if a workman works for more than 240 days without brakes, then retrenchment without following due process of law as per section 25F, G and H is *void ab initio*. He relies on paragraph

4 and 5 of the said judgment which reads thus:

“4. The appellant-workman was working as daily paid worker in the office of Sub Divisional Officer/Engineer, Provincial Division No. 3, PWD B & R Karnal since 1.1.1993 and remained in service upto December, 1993. He had completed more than 240 days of continuous service in one calendar year. His services were terminated on 31.12.1993 without complying with the mandatory provisions of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The respondent- management neither issued notice nor notice pay nor retrenchment compensation was given to him. The principle of 'last come first go' was not followed as provided under Section 25G of the Act and the persons who were juniors to him in service were retained. Therefore, he has raised an industrial dispute under the provisions of the Act before the Conciliation Officer requesting for setting aside the order of termination as the same is void ab initio in law and sought an order for reinstatement with back wages and other consequential benefits. As the workman's demand made in his Notice dated 27.11.1996 was not complied with, the Conciliation Officer submitted a failure report to the State Government of Haryana. The State Government of Haryana in exercise of its statutory power under Section 10(1)(c) of the Act referred the industrial dispute to the Industrial Tribunal-cum- Labour Court for adjudication as per the points of dispute. The same was registered as Case Reference No. 205 of 1997 for adjudication of the dispute.

5. The Industrial Tribunal-cum-Labour Court answered the points of dispute referred to it. Both the parties filed their respective statements inter alia justifying their demand and order of termination passed against the workman. The respondent-management has taken preliminary objections contending that Reference is bad in law as necessary parties are not impleaded to the order of reference, namely, Sub Divisional Engineer, Province Sub Division No.8, PWD (B & R) Karnal, the claim of the workman is time barred and the provisions of the Act are not applicable to the respondent-employer. Further, the appellant was employed on daily wages muster roll by the Divisional Engineer, Provincial Sub-Division No. 8, PWD (B & R), Karnal, in the month of January, 1993 and he left the job on his own accord in August, 1993 and he

*has not completed 240 days in that Sub Division. It was further pleaded by the respondent-employer that some other daily wage workmen who were working along with him in August, 1993 continued to work in September, 1993 as well and if the workman attended the duty in September, 1993 there is no reason not to employ him along with others. Further, it was pleaded that in October, 1993 the appellant went to another Sub-Divisional Officer where some other work was going on and got himself employed there afresh and worked up to December, 1993 in Sub- division No.6 and again he left the job voluntarily during December, 1993 and therefore, termination order was not passed by respondent-employer. The number of working days of the workman as given in the written statement that he did not complete 240 days in any calendar year and as such, the provisions of Section 25-F clauses (a) & (b) of the Act were not required to be complied with. To the said written statement, a reply statement was filed by the workman.”*

14. On the basis of these submissions and the law laid down by the apex court, the learned counsel for the petitioner submits that the impugned judgment passed by both the courts below are required to be set aside directing the respondent Corporation to reinstate the petitioner and co-workmen with continuity of service by granting permanency and full back wages. He submits that if the petition is not allowed, irreparable loss will be caused to the petitioner.

15. On the other hand, the learned senior counsel for the respondent vehemently opposed the Writ Petition. He submits that both the courts considered the facts on record and concurrently held that the petitioners failed to make out any case for entertaining their complaint of unfair labour practice under Item (1-a) b, d of Schedule IV of the said Act. He submits that in the complaint, the petitioner made a prayer for declaration that the termination order made by the

petitioners dated 29.12.2012 is illegal. He submits that the respondent never terminated the petitioners' services. He submits that as soon as the contract period was over, the petitioners were relieved from their posts. Hence, there is no question of either declaration or setting aside the termination order dated 29.12.2012. He submits that bare reading of appointment letters dated 30.09.2010, 05.02.2011, 06.06.2011, 06.02.2012 and 24.08.2012 clearly show that the petitioner and co-workmen were appointed purely on temporary basis for a fixed period at a fixed remuneration. He submits that it was specifically stated in those appointment letters that the respondents are appointing the petitioners on temporary posts for a fixed period and for a fixed remuneration and they have no right to claim any benefits applicable to the permanent employees.

16. The learned senior counsel for the respondent submits that as per the appointment letters issued by the respondent, the petitioner executed a bond on a non judicial stamp paper of Rs.100/- stating that they were accepting their appointment on temporary post for a particular period on fixed remuneration. He submits that as soon as the petitioners' tenure was over as per appointment letter, they stopped the petitioners from working with them. He submits that each appointment letter clearly shows that the petitioner never worked for more than 240 days with the respondent continuously in any previous year. The appointment letter dated 06.06.2011 shows that the petitioner and co-workmen were appointed from 16.05.2011 to 13.08.2011 on fixed remuneration of Rs.12,500/-. Thereafter next appointment letter dated 06.02.2012 was issued for the period from

27.01.2012 till 25.04.2012. He submits that for a period 14.08.2011 till 26.01.2012, the petitioner and co-workmen were not in service of the respondent. He submits that the respondent used to appoint the petitioner and other co-workmen as and when extra work was available. He submits that as the petitioners failed to prove their case that they worked for more than 240 days with the respondent continuously in previous year, both the courts below dismissed their plea.

17. The learned senior counsel for the respondent submits that it is correct that the respondent Corporation published an advertisement on 29.03.2013 in Samna, a daily news paper for filling up permanent posts of Nurse in their various hospitals. He submits that subsequently, because of the order passed by this court, that advertisement was recalled and canceled by the respondent. He submits that thereafter the petitioner issued an advertisement on 12.07.2014 for total 887 posts of Nurses. That time also the petitioner failed to apply. Moreover, thereafter again by advertisement dated 04.01.2015 called the applications for 137 posts for handicapped and 19.03.2016 for 533 posts of Nurses. He submits that the petitioner failed to respond to those advertisements. He submits that though 118 posts are vacant, they have to follow due process of law before appointing any Nurse. He submits that they have to publish an advertisement in newspaper. He submits that they cannot appoint the petitioners on vacant posts just because of the present litigation. He submits that they have no objection as and when the Corporation calls applications for remaining posts of Nurses, the petitioner can apply and their application can be

decided on its own merits.

18. The learned counsel for the respondent submits that both the courts below concurrently held that the petitioner failed to prove that all of them worked with the respondent for more than 240 days continuously. Hence, the authority cited by the petitioner in the matter of Jasmer Singh (*supra*) is not applicable. He submits that in that case the workers had worked for 240 days without brake. Hence, the apex court held that the workmen cannot be terminated without following due process of law as per section 25-F and G and H of the I.D. Act. He submits that in the present case both the courts below rightly held that the petitioner and co-workmen were appointed purely on temporary basis for a fixed period. Hence, as per the provisions of Section 2(oo) (bb) of the I.D. Act they cannot claim any retrenchment benefit as per the provisions of section 25-F, G, H of the I.D. Act. He submits that being concurrent findings of facts recorded by both the courts below, this Hon'ble Court should not entertain the same under Article 226 and 227 of the Constitution of India. Hence, there is no substance in the Writ Petition. Same be dismissed with costs.

19. Heard both sides at length. It is settled position in law that a finding of fact is open to attack as erroneous in law only if it is not supported by 'any evidence' or if it is unreasonable and perverse. But where there is evidence to consider, the finding of fact recorded by a Tribunal is normally immune from interference even where the writ court might, if it was the court of first instance, have come to a different conclusion. In regard to findings of fact recorded by a

Tribunal a writ of certiorari can be issued only if it is shown that in recording the finding the Tribunal has erroneously refused to admit material evidence or has erroneously relied upon inadmissible evidence which has influenced the impugned finding. Similarly if a finding of fact is based on 'no evidence' or is contrary to 'weight of evidence' or is patently unreasonable and perverse, that would be regarded as an error of law capable of being corrected by a writ of certiorari. When findings of fact are in issue, the writ court can only examine 'reasonableness' of the findings. If the finding is found to be recorded reasonably based upon some evidence, in the sense that relevant material has been taken into account and no irrelevant material has influenced the decision, then judicial review is exhausted even though the finding may not necessarily be what the writ court would have come to, if trying the case as a Tribunal or as a court of the first instance. Therefore in evaluating the rival contentions, I am required to be conscious of the limited scope of interference as against a finding of fact.

20. It is to be noted that in the present proceedings the petitioners were appointed by appointment letters dated 30.09.2010, 05.02.2011, 06.06.2010, 06.02.2012 and 24.08.2012 purely on temporary basis as and when the work was available with the respondents. Hence, the respondent specifically stated in their appointment letter that their appointment was only on temporary basis for a fixed period and on fixed remuneration. Even bare reading of those appointment letters, conditions and considering the period for which the petitioners were appointed, clearly show that the petitioners never worked for more than 240 days in the previous year. The retrenchment is defined

u/s.2(oo)(bb) of the I.D. Act which reads thus:

*“2(oo) “retrenchment” means the termination by the employer of the services 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.”*

21. Bare reading of section 2(oo)(bb) shows that the provisions of retrenchment cannot be applicable to the petitioners and co-workmen. If the termination of the service of the workman is a result of non renewal of contract of employment between the employer and the workman concerned on its expiry period of service or of such contract being terminated under the conditions contained therein, then the workmen are not entitled to any relief. In the present proceedings, the petitioners were appointed for a particular period only. As soon as the said period was over and the contract was not extended for a further period, the respondent restrained the petitioner from working with them. Therefore, in any case, that cannot be termed as retrenchment and/or removal without following due process of law. Even the

authority cited by the petitioner clearly shows that unless and until the employees/workmen worked continuously for more than 240 days in the previous year then only they are entitled to permanency and other benefits. In the present proceedings in hand, both the courts below concurrently held that the petitioner has failed to prove these facts. Apart from that though the respondents issued an advertisement for the post of Nurse on permanent post on 12.07.2014, 04.01.2015 and 19.03.2016, the petitioner failed and neglected to apply in response to the said advertisement.

22. In the above mentioned facts and circumstances of the present case, I am of the opinion that the petitioner has failed to make out any case to entertain the present Writ Petition against the concurrent finding of facts recorded by both the courts below. Hence, the Writ Petition stands rejected.

**(K.K. TATED, J.)**