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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.88 OF 2017
IN
WRIT PETITION NO.3063 OF 2014

Anant Ramchandra Bawkar,
R/at: Vakola Bridge, Dhobi Ghat,
Radheshyam Chawl, Santacruz(E),
Mumbai-400 055. .. Applicant
(Orig. Respondent no.2)

In the matter between
Bank of Baroda,
a Body Corporate, incorporated under
the Banking Companies. .. Petitioner

V/s.
Shashikant Pitale & 44 Ors. .. Respondents

AND

NOTICE OF MOTION NO.89 OF 2017
IN
WRIT PETITION NO.3063 OF 2014

Sunil M. D. Britto,
R/at: Mother Vellankani,
Post Nirmal, Tal-Vasai,
Dist-Thane. .. Applicant
(Orig. Respondent no.12)

In the matter between
Bank of Baroda,
a Body Corporate, incorporated under
the Banking Companies. .. Petitioner

V/s.
Shashikant Pitale & 44 Ors. .. Respondents

AND

NOTICE OF MOTION NO.92 OF 2017

IN

WRIT PETITION NO.3063 OF 2014

Yogesh Manohar Lokhande,
Gorakhnath Pandey Chawl,
Golibar 4th Road,
Santacruz(East),Mumbai -400 055. .. Applicant
(Orig. Respondent no.20)

In the matter between
Bank of Baroda,
a Body Corporate, incorporated under
the Banking Companies. .. Petitioner

V/s.
Shashikant Pitale & 44 Ors. .. Respondents

…..........

Ms. Shobhana Gopal for the Applicant.
Mr. Lancy D'Souza a/w Ms. Deepika Agarwal i/b. V. M. Parkar for the respondents and the original petitioner in WP/3063/2014.

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CORAM : A. K. MENON, J.
DATE : 2ND MAY, 2018.

P.C. :-

1. On 2nd May, 2018, the above Notices of Motion came to be dismissed for reasons to be recorded separately. The reasons are accordingly set out below.

2. These three notices of motion are taken out by the respondents who were employees of the petitioner bank. The applicants hold Awards of the Central Government Industrial Tribunal directing their reinstatement. These awards are subject matter of a challenge in the above petition which came to be admitted on 5th August, 2015. Some of the respondents filed notices of motion of which Notices of Motion no.408 of 2016 and 471 of 2016 came to be rejected vide an order dated 7th April, 2017. The hearing of the writ petition was expedited. These notices of motion were filed seeking relief under Section 17-B of the Industrial Disputes Act (the Act) by disposing of Notices of Motion no.408 and 471 of 2016. The above Notices of Motion no.88, 89 and 92 of 2017 had not been filed. They are filed on or about 22nd February, 2017. Although it was the petitioner's case that the claim of these workmen were covered by virtue of order dated 7th April, 2017, Ms. Gopal appearing on behalf of the Applicants submitted that these motions were initially filed by respondent

no.2, 12 and 20 in person and the facts in the case of these applicants were different from those in notices of motion no.408 and 471 of 2016.

3. It is the case of the applicants that they are not currently employed on a permanent basis and therefore were entitled to the relief under Section 17-B of the Act. Pending the hearing and final disposal of the above petition, it would be appropriate to deal with the contentions of each of the petitioners and the respondents thereto.

4. In Notice of Motion no.88 of 2017, the applicant claiming payment of full wages under Section 17-B has in his affidavit in support contended that termination of his services by the petitioner bank in August 2002 was illegal and that he has since been working on a temporary basis at a fitness centre as a Masseur-cum-trainer. He claims that his is not a permanent job. Ms. Gopal, the learned counsel appearing for the applicants submitted that there is no facility to make permanent employees in the fitness centre and that the applicant had to care of his mother, sick father, wife and two daughters. Although he has been registered with the Employment Exchange he has not been secured any permanent job although his registration with Employment Exchange has been renewed from time to time he was gainfully employed with the

petitioner's bank but ever since the illegal termination of services is without a permanent job and hence he seeks relief.

5. The motion is opposed by Mr. D'Souza who relies upon an affidavit of one Shridhar Rao, Dy. General Manager of the petitioner in which the contentions of the applicant has been denied. It is pointed out that the applicant is admittedly a masseur-cum-trainer in fitness centre but he has suppressed his income. Mr. D'Souza contended that unless the applicant makes a statement on oath that he had not been employed in an establishment during the relevant period he is not entitled to claim benefit under Section 17-B and that Section 17-B does not contemplate a situation where an applicant does not secure a "permanent" job. He therefore, submitted that the applicant is not entitled to any relief. He further submitted that the applicant is not entitled to any relief under Section 17-B since the award under challenge was clearly perverse. Moreover, the applicant has failed to establish that he met the eligibility criteria in respect of the recruitment rules for appointment of sub-staff.

6. In rejoinder, the applicant contends that he worked as a masseur "on and off" in a Gym and that the job was not regular. He contends that

his maximum monthly emolument would be Rs.2500/- 3000/- and that cannot be termed as alternate employment. His father is a pensioner and his wife has no source of income. His brother is unmarried but since they live in a joint family his brother helps him financially and these are aspects which are mentioned in the evidence before the CGIT. Mr. D'Souza submitted that this is a wrong statement and in the evidence before the CGIT no such disclosure was made.

7. In Notice of Motion no.89 of 2017, Mr. Britto, the applicant, seeks similar relief under Section 17-B. It is his case that he has been engaged in farming since August 2002. He was the eldest in the family. He has to care of his mother, father, wife and two daughters. Like Mr. Bawkar, applicant in Notice of Motion no.88 of 2017, Mr. Britto claims that he too registered with the Employment Exchange but he has not received any regular appointment. He worked in the petitioner's branch office from 1999-2000. His services were illegally terminated. The application is opposed by Mr. D'Souza relying upon the contentions of an affidavit of Mr. Shridhar Rao, Deputy General Manager of the petitioner who has denied the contentions in the reply and highlighted the fact that the applicant was admittedly a farmer but has suppressed the income

from farming. In the affidavit in rejoinder, Mr. Britto has stated that he was assisting his family in the agricultural land where vegetables are cultivated which are about 30 gunthas. The applicant estimates his share in the land at 10 gunthas and that he has to support his wife and two school going daughters. His wife is also employed as a teacher and earns about Rs.12000/- p.m. He has undertaken farming only due to his unemployment and farming could not be termed as alternate employment. He has therefore contended that he is entitled to the benefit under section 17-B.

8. In in Notice of Motion no.92 of 2017, Mr. Lokhande also seeks relief under Section 17-B. According to Mr. Lokhande, after termination of his services in August 2002, he was unemployed for a long period and that he depended entirely on his mother's pension. He further states that he has worked with a vegetable seller as a loader and that too temporarily. He was receiving some income on and off. However, the hawking zone was illegal and the Municipal Corporation would take action against it as a result of which he was deprived of work. His wife was learning tailoring work and along with his mother's pension, wife and brother-in-law's support he managed to run the house and educate

the children. He does not have a permanent job despite being registered with the Employment Exchange and had resorted to selling his wife's jewellery. The motion is opposed by the respondents on the basis that he has alternate source of income.

9. In the reply of one Shridhar Rao, Mr. D'Souza relied upon the fact that vague statements have been made by the applicant but he has failed to reveal his actual income. Mr. D'Souza submitted that during cross examination of Mr. Lokhande he had admitted that he was gainfully employed and that the Tribunal had while awarding back wages on the basis considered the fact that he must be working elsewhere for his livelihood. These findings of the Tribunal were not challenged by the applicant and are therefore binding upon him. It is submitted that it is impossible to believe that the applicant was unemployed before the present application is made.

10. In the affidavit in rejoinder, in paragraph 6, I find that the applicant has stated that he was employed in Goregaon market from 2003 as a loader after termination of his services and has given particulars of wage rate at the relevant time. However, later due to

constant raids of the Municipal Corporation the business of hawking was discontinued and he has been doing odd jobs and he cannot precisely say what amount he earns in a month but he hardly earns Rs.2000/-. It is therefore contended that he is entitled to relief.

11. In support of her contention Ms. Gopal relied upon a table showing the depositions of the workmen before the Tribunal which I find had been reproduced in the affidavits in reply. She also relied upon the following decisions:-

(1) ***Lumax Automotive Systems Ltd. and Its Workmen, Hindustan Engineering & General Mazdoor Union and others 2012 (133) FLR 241, Delhi High Court;***

(2) Executive Engineer, Saurashtra Branch Canal Div., Dhrangadhra v/s. Ayubbhai Ladharbhai 2011 (1) CLR 411, High Court of Gujarat;

(3) Kirloskar Pneumatic Kamgar Sangh, Pune v/s. Kirloskar Pneumatic Co. Ltd. Pune 2011 I L.L.J. 622 (Bom) and

(4) S. S. Sayyad alias Saiyed v/s. Hindustan Aeronautics Ltd. 2012 II CLR 1068 (Bom).

12. Relying upon these judgments, she submitted that small time petty business run by family members where the workmen participate would not affect their rights under Section 17-B. In the case of Executive Engineer (supra), she relied upon the observations of the Division Bench that in the absence of evidence and in view of affidavits filed by the workmen affirming their unemployment, there was no option but to grant full wages drawn by them. A Division Bench of this Court in the case of Kirloskar Pneumatic Kamgar Sangh (supra), has observed that the term "*employed in any establishment*" included gainful self-employment, even in agricultural pursuits. Thus this would clearly cover the case of Mr. Britto who had admitted that he was engaged as an agriculturist. These decisions are, therefore, of no assistance to Ms. Gopal.

13. Ms. Gopal relied upon a decisions of this Court Court in S. S. Sayyad alias Saiyed (supra), in which it was held that mere ownership of agricultural land does not help the respondent employer to claim that the applicant was gainfully employed when he was out of service. She sought to contend that in the present case also ownership of agricultural land in the case of Mr. Britto would not constitute alternate employment. I do not find this decision to be helpful to the case of the applicant since

admittedly all the applicants were engaged in gainful vocations, all of them have without exception failed to disclose material particulars as to whether they were gainfully employed and their source of income at the material time before and at the time of filing these Notices of Motion.

14. Mr. D'Souza in support of his contention submitted that there was suppression of material facts as seen from the pleadings and the evidence. He relied upon a compilation of documents considering of the evidence, affidavit in lieu of examination-in-chief and cross examination. In his evidence in chief, Mr. Anant Ramchandra Bawkar, applicant in Notice of Motion no.88 of 2017, has deposed that he and other employees were employed as permanent employees with the bank and that after termination of his services he has not been gainfully employed in any other organization but he has been able to survive with casual jobs and family members have been taking care of him. On the other hand, in the Notice of motion, in paragraph 18 of his affidavit in support, he clearly admits that he has been working in a fitness centre since August 2002. Thus exposing an inherent contradiction in his case viz the deposition made before the CGIT and the statement made on oath before this Court. The affidavit in lieu of evidence in chief before the CGIT is affirmed in

2011 yet it does not disclose of the fact that he was employed in a Gym as masseur-cum-trainer. In the cross examination, he admitted in paragraph 15 that he has been working at a Gym on Saturday and Sunday. He did not disclose his bank account but stated that he does not have a bank account and he has "not tried" for employment anywhere. He later volunteered that he had tried to secure a job but he did not get one.

15. Mr. Lokhande, deposed that he is not gainfully employed in any organization and he has been able to survive with casual jobs and his family members are taking care of him. In fact the evidence of Mr. Lokhande is almost identical to that of Mr. Bawkar. In his cross examination, however, he admitted that after discontinuation of his services, he was working as a loader in Goregaon market. However, contended that he did not have a bank account. Mr. Lokhande in his affidavit dated 19th February, 2017 in the notice of motion stated that he was not employed for a "longer period" and depended on his mother's pension. In his examination-in-chief before the Tribunal he stated that he was surviving on casual jobs and family members helped him. In cross examination, he admitted of working as a loader but declined to disclose

his average monthly income. Whereas in the rejoinder he admitted to be working as a loader from 2002. These aspects have not been stated in the evidence before the Tribunal. Thus, it becomes evident that the deponent had suppressed material particulars at the relevant time.

16. Furthermore, in the case of Mr. Bawkar, in the affidavit in support he admits to be working as a masseur-cum-trainer but there is no scope to make an employee permanent. Before the Tribunal, he stated that he is not gainfully employed and he has survived on casual jobs. Once again before the Tribunal in cross examination, he claimed to be working with the Gym only on Saturdays and Sundays. There is apparently no proper disclosure in his case and therefore suppression of material particulars. Mr. Britto has admitted to be working as a farmer. In the rejoinder affidavit, however, he states that he is "assisting" his family in agricultural land and his share is only 10 gunthas. He also cannot say what he earns per month. These are aspects on which Mr. Britto did not lead any evidence before the Tribunal. I also observe from the order dated 7th April, 2017 in Notices of Motion no.408 and 471 of 2016, the learned Single Judge of this Court had occasion to consider the very same arguments. The Court records that under Section 17-B, it

is the duty of the workman to disclose true facts on oath and that he has required to disclose where he was exactly employed and if so what he was earning and whether he was continued and if it was discontinued it was bound to disclose what he was earning.

17. The contentions taken out by the applicants in this application are similar to those taken up by the applicants in Motion no.408 of 2016. This Court has referred to the decision of the Apex Court in ***North East Karnataka Road Transport Corporation v/s. Nagangouda 2007 (1) CLR 939***, which held that an argument that self employment is not to be treated as employment cannot be accepted. ***In UP State Bridge Corporation Ltd. v/s. Maharashtra General Kamgar Union 2008 (2) BCR 619,*** it held that under Section 17-B some workmen may get double benefit being employed in some institutions and receiving remuneration under Section 17-B and therefore it was necessary that all particulars be furnished. Further reliance was placed on a decision of Division Bench of this Court in UP State Bridge (supra) that gainful self-employment should be taken into consideration at the time of deciding the application under Section 17-B.

18. In these notices of motion, I do not find any differentiating

criteria. The motions are supported by affidavits which are similarly worded, all of which discloses that the applicants were gainfully occupied either by way of self-employment or being employed with some organization such as Gym in one case. None of the workmen in my view satisfy the requirements and the pre-requisites seeking relief under Section 17-B of the Act. Section 17-B clearly envisages that the workman concerned is required to file an affidavit in the lower courts to the effect that during the period of pendency of proceedings he was not gainfully employed. The proviso states that if it is established to the satisfaction of the Court that the workman was employed and had been receiving adequate remuneration, the Court shall not order wages to be paid. In the present case, admittedly the workman concerned had been gainfully occupied. In the circumstances clearly they do not qualify for relief under Section 17-B. The applications by way of notices of motion, therefore fail and are dismissed. There will be no order as to costs.

(A. K. MENON, J.)

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