

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

937. REVIEW APPLICATION (CIVIL) NO.23 OF 2020
IN
WP/626/2002 WITH CA/15120/2019 IN WP/626/2002

Tapi Irrigation Development Corporation,
Jalgaon, through:

1. The Superintending Engineer,
Jalgaon irrigation Project, Circle, Jalgaon.
2. The Executive Engineer,
Jalgaon Medium Project, Jalgaon.
3. The Sub-Divisional Engineer,
Tondapur Dam Sub-Division,
Taluka Jamner, at present merged in
Jalgaon Medium Project Division, Jalgaon. ...Applicants

VERSUS

Shamrao S/o Deochand Pawar
age major occupation labour
R/o Tondapur Dam Sub-Division,
Tondapur Taluka Jamner,
Division, Jalgaon.

...Respondent

Mr. D.R. Shelke, Advocate for applicants
Mr. G.J. Karne, Advocate for respondent.

CORAM : ROHIT B. DEO, J.

DATE : 11th February, 2020

ORDER:

1. The petitioner in Writ Petition 626 OF 2002, decided on
20th September 2019 by the learned Single Judge (Ravindra V.

Ghuge, J.), is seeking review of the said judgment, whereby the writ petition is dismissed.

2. Writ Petition 626/2002 assailed the judgment dated 11th July 1994 rendered by the learned Labour Court, Jalgaon, and the judgment dated 10th September 2001 in Revision (ULP) 129/1999 rendered by the learned Member, Industrial Court, Jalgaon, whereby the complaint preferred by respondent 1-employee challenging his termination dated 3rd February 1988, is allowed and the employee is granted the relief of reinstatement with continuity of service and back-wages.

3. The review petition was listed before me on 24th January 2020, and the following order was passed:

" It would be appropriate if this application is placed before the learned Judge, who passed the order, as and when the learned Judge is available at Aurangabad Bench.

2. Till then, the direction that the interest which may be paid/deposited by the Corporation shall be recovered from the salary of the Superintendent Engineer, Jalgaon Irrigation Project, shall remain suspended.

3. Registry to do the needful. "

4. However, it was not then brought to my notice that vide

order dated 17th January 2020 the Honourable Apex Court was pleased to direct that the Review Petition be decided within four weeks. In deference to the direction issued by the Honourable Supreme Court, I have heard the review petition on 11th February 2020 and passed the following order:

- "1. For reasons separately recorded, review application is allowed.*
- 2. With consent, the writ petition is listed for final hearing on 27th February 2020 at 2.30 pm "*

5. The reasons, which have impelled me to allow the review, are articulated in paragraphs infra.

6. Respondent 1 instituted complaint (ULP) 12 of 1988 contending that he was in the employment of the petitioner as a Machine Operator from 1st April 1983 till 30th January 1988 and that he was terminated with effect from 3rd February 1988. Respondent 1 contended that the work was available and that the retrenchment is predicated on falsehood. Respondent 1 further contended that juniors were retained in service. Respondent 1 contended that in view of the completion of five years service, he was entitled to the benefit of the Kalelkar Award, and the retrenchment is violative of the provisions of Section 25 (F) & (G) of the Industrial Disputes Act, 1947.

7. The employer-petitioner herein did not dispute the factum of retrenchment. The employer denied the allegation that the retrenchment was not bonafide. It was specifically denied that junior employees were retained. The employer contended that respondent 1 was a daily wage employee and was temporarily engaged as per the availability of work. The air machine, which respondent 1 was operating, was non-functional, which constrained the retrenchment.

8. The issues framed by the Labour Court and the findings recorded read thus:

	<u>“ Issues</u>	<u>Findings</u>
1.	Does the complainant prove that he was in continuous service for over 240 days in the year preceding to his termination.	Yes
2.	Does the complainant prove that the respondents have violated the provisions of Sec. 25-F and Sec. 25-G of the I.D. Act.	Yes
3.	Does the complainant prove that the respondents have not followed the rule of 'last come first go' ?	Yes
4.	Does the complainant prove that he is entitled to for reinstatement ?	Yes
5.	Does he entitle for back wages ?	Yes

6.	What order ?	As per the final order. "

9. The Labour Court considered the evidence on record and recorded a finding that there were four air compressor machines in operation and that the retrenchment was not justified. The Labour Court further held that the provisions of Section 25-H of the Industrial Disputes Act, 1947 were breached in view of the recruitment of a new employee in place of respondent No.1. The Labour Court further noted the cross-examination of the witness examined on behalf of the employer and held that respondent 1 having completed five years continuous service, is entitled to the benefits of the Kalelkar Award.

10. The Industrial Court concurred with the reasons and findings recorded by the Labour Court and dismissed the revision. The Industrial Court referred to ULP Complaint 8/1988 and observed that the said complaint, which was filed by a similarly situated employee, is allowed by the Labour Court, the employee is reinstated and the employer has not challenged the judgment of the Labour Court.

11. The petitioner raised the following grounds to assail the

concurrent judgments.

- " I) The impugned judgments and orders passed by the learned Members of Industrial Court and Labour Court, Jalgaon are contrary to the facts and evidence on record. They are also contrary to the merits of the case.*
- II) The impugned judgments and orders passed by Industrial Court and Labour Court, Jalgaon are against justice, equity and good conscience.*
- III) Both the courts below failed to appreciate the facts and evidence on record in its proper perspective and ultimately came to erroneous conclusion.*
- IV) Both the courts below totally adopted erroneous approach while dealing with the relevant provisions of MRTU and PULP Act, 1971 and Industrial Dispute Act, 1947. Both the courts below failed to appreciate properly the legal aspects involved in the case.*
- V) It ought to be seen that since the complainant was appointed purely temporary on daily wages on work charge basis i.e. as per availability of work and since there was no work for him in the concerned division he was retrenched. He was daily rated employee as Air Machine Operator. Since the machine with which he was associated had gone out of order and consequently he had no work as Machine Operator, he was retrenched w.e.f. 3.2.1988.*

- VI) *It ought to be seen that when there was no work in the nature of Air machine Operator for the complainant, his services could be terminated with one month notice alongwith retrenchment compensation, as per provisions of Sec. 25 F & G of Industrial Disputes Act, 1947 and accordingly the complainant was retrenched by giving him one month notice dated 30.1.1988. He was also paid proper retrenchment compensation on 3.2.1988. Thus after compliance of the provisions of Sec. 25 F & G of the Industrial Dispute Act, the complainant was retrenched.*
- VII) *It ought to be seen that, it was clearly mentioned in the notice dated 30.1.1988 that the Air Machine had gone out of order and for want of Air Machine he was found surplus and as such he was retrenched w.e.f. 3.2.1988 and even in said notice it was informed that he would be paid the retrenchment compensation payable to him amounting to Rs.4,652/-.*
- VIII) *It ought to be seen that, the retrenchment compensation as mentioned in the notice was paid to the complainant which he accepted by acknowledging the receipt on 3.2.1988.*
- IX) *It ought to be seen that there was proper compliance of provisions of Sec. 25 F & G of the Industrial Disputes Act on the part of the petitioners herein, while terminating the services of the complainant. And consequently*

his retrenchment is legal and proper.

- X) It ought to be seen that, the petitioners herein had even inform about retrenchment of the complainant in the proper proforma to the Labour Commissioner and Secretary to Industrial & Labour Department, Govt. of Maharashtra.*
- XI) It ought to be seen that, the learned judge of Labour Court has misread the evidence of respondents' witness. the evidence of respondents' witness as reproduced by the learned Judge of Labour Court do not in any manner assist the case of the complainant.*
- XII) It ought to be seen that, both the courts below have clearly misappreciated and misapprised the evidence led by the respondents (petitioners herein) and thereby have arrived at erroneous findings.*
- XIII) It ought to be seen that by referring one document the learned Judge of Labour Court has observed that junior workman namely Shalik Shankar Koli was retained, however it is to be noted that the nature of work assigned to Shalik Shankar Koli was altogether different than the complainant (Shamrao) who was assigned special type of work of operating Air Machine. Hence the case of Shalik Shankar Koli does not establish that juniors to the complainant in the rank of Air Machine Operator was retained when the complainant*

was retrenched.

XIV) The learned Member, Industrial Court is in error in relying upon the decision of the Labour Court in another Complaint (ULP) No. 8 / 88 filed by other employee wherein similar order was passed. The learned Member of Industrial Court did not at all discuss the facts of the complaint (ULP) No. 8/88. Hence the learned Judge of Industrial Court ought not to have relied upon the decision of Labour Court in Complaint (ULP) No. 8 / 88. In order to derive support to the case of present complainant.

XV) It ought to be seen that since the complainant was appointed purely temporary on daily wages on work charge basis i.e. as per availability of work and since there was no work for the complainant in the concerned division, his services could be terminated with one month notice alongwith retrenchment compensation as per provisions of Section 25(F) of Industrial Dispute Act, 1947 and accordingly his services was terminated by giving him one month notice in advance and giving him proper retrenchment compensation, w.e.f. 3.2.88. The complainant did accept the retrenchment compensation by giving the same in writing. Thus the respondent did comply with the provisions of Section 25(F)(G) of Industrial Disputes Act while effecting retrenchment of the complainant w.e.f. 3.2.88.

XVI) It ought to be seen that the learned Judge Labour Court erred in observing that since the complainant completed more than 5 years continuous service he is entitled to the benefits of Kalelkar award and to be taken on C.R.T. list. According to the petitioners in fact, the complainant had not completed more than 5 years continuous service. Assuming for a moment merely for the sake of argument but not admitting that the complainant had completed more than 5 years continuous service, it does not follow that he gets a right to continue in service when the employer has no work for him. As per settled legal position, a daily rated employee can be retrenched by issue of one month notice and retrenchment compensation, if the employer has no work even in the case when the said workman has completed more than 5 years continuous service.

XVII) It ought to be seen that the learned Judge, Labour Court has erroneously held that the respondents have engaged in unfair labour practice under Item 1 (b)(f) to Sch. IV of M.R.T.U. & P.U.L.P. Act, 1971. In fact, the ingredients of Item 1(b)(f) to Sch. IV of the said Act are not at all satisfied in the present case.

XVIII) It ought to be seen that, the findings given by both the courts below are based upon

surmises and conjectures and not on sound reasoning or cogent evidence. Hence those findings are improper and perverse.

XIX) It ought to be seen that the Labour Court lack jurisdiction to deal and decide with the claim of the complainant since as held by Hon'ble Apex Court in 1997(2) CLR 387, Irrigation Department is not a Industry within the meaning of Industrial Dispute Act, 1947. Although this aspect is raised for the first time, it being legal one can be considered by this Hon'ble Court.

XX) It ought to be seen that, the learned Industrial Court adopted perfunctory and mechanical approach while dealing with the challenge to the award passed by the learned Labour Court. Without examining the factual and legal aspects in depth the learned Industrial Court erroneously confirmed the findings of the learned Labour Court.

XXI) It ought to be seen that both the courts below erroneously held that the termination of the complainant is improper and illegal and as such he is entitled for reinstatement with full backwages w.e.f. 3.2.1988. As stated earlier, since the complainant's termination is legal and proper, he is neither entitled for reinstatement nor for backwages.

XXII) The impugned judgments and awards passed by learned Member, Industrial Court and by the

learned Judge Labour Court, Jalgaon are unjust, improper, incorrect and illegal and as such they deserve to be set aside."

12. At this stage, it would be necessary to advert to the reasons recorded by this Court while dismissing the Writ Petition 626/2002. Paragraph 2 of the judgment reads thus:

*"2. I have considered the submissions of the learned Advocates for the respective sides. The learned Advocate for the respondent workman points out that the learned Division Bench of this Court has considered a similar case pursuant to the judgment of the Labour Court and has granted benefits of the Kalelkar Settlement, pursuant to the order of reinstatement by the Labour Court. This order was passed on 26/08/2019 in the matter of **Ulsha Sonu Pawar Vs. Tapi Irrigation Development Corporation Jalgaon in Writ Petition No. 13245/2018.**"*

13. Paragraphs 3 & 4 refer the submissions of the learned Counsel for the employee – that the employee has succeeded before the Labour Court and the Industrial Court, - that the employee has attained the age of superannuation 4 to 5 years ago and that the employee would, therefore, be entitled to notional reinstatement and continuity in service with full back-wages from the date of his superannuation.

14. In paragraph 5, the observation is, that there is no dispute that the Kalelkar Settlement is applicable to the establishment and that the respondent would be entitled for continuity in service, full back-wages as well as retiral benefits from the date of his termination.

15. The concluding paragraph of the judgment reads thus:

"6. Considering the directions of the learned Division Bench of this Court in the matter of Ulsha Sonu Pawar (supra), the petitioner shall pay the entire amounts, as noted above, within THREE MONTHS from today to the respondent/original complainant. If the said amount is not paid within the period stipulated above, it shall carry interest from the date of the superannuation of the respondent @ 4% per annum and the interest component shall then be paid from the personal salary of the Superintending Engineer, Jalgaon Irrigation Projects, Circle Jalgaon under the Tapi Irrigation Development Corporation, Jalgaon."

16. The judgment, of which review is sought, relies substantially if not entirely on the decision of the learned Division Bench in ***Ulsha Sonu Pawar Vs. Tapi Irrigation Development Corporation Jalgaon in Writ Petition No. 13245/2018***. It would, therefore, be necessary to refer to the said decision of the learned

Division Bench and the backdrop in which the decision was rendered.

17. Ulsha Sonu Pawar was a daily wager appointed in the year 1983, who was terminated in April 1986. Ulsha Pawar instituted reference proceedings IDA 42/1992 before the Labour Court, Nashik. The Labour Court passed an award directing that Ulsha Pawar be reinstated with continuity of service and 30% back-wages. The employer-petitioner herein challenged the award in Writ Petition 3604/2003. The learned Single Judge, who decided Writ Petition 3604/2003, did not record any finding on the correctness or validity or legality of the award of the learned Labour Court. The learned Single Judge noted that the Executive Engineer has recommended the proposal to take Ulsha Pawar on the permanent establishment, should Ulsha Pawar and other employees named in the proposal be willing to forego the back-wages and interest. The learned Single Judge disposed of the petition with the following directions:

"3. In view of the said proposal, the concerned superior Authority of the Department shall take appropriate decision in the matter in accordance within the Government Resolution dated 24.4.2001 within SIX MONTHS from the date of this order. Writ Petition accordingly disposed off. No costs."

18. The employer refused to take Ulsha Pawar on the converted Regular Temporarily Employment (CRTE). This refusal dated 1st October 2018 fell for consideration before the learned Division Bench in Writ Petition 13245/2018 preferred by Ulsha Pawar. The learned Division Bench articulated thus:

"5. The learned Single Judge of this Court under order dated 09.11.2017 did not set aside the said judgment, but only observed that the proposal has been submitted and decision shall be taken in accordance with the Government Resolution dated 24.04.2001. As per the said Government Resolution, the employees should have worked for five years.

6. The said argument may not be available now in view of the order passed by the Labour Court, Nashik wherein the petitioner is directed to be reinstated in service in his usual position with continuity from 21.04.1986 and is also granted 30% of the back wages w.e.f. 03.08.1992. This would show that the petitioner would be deemed to be in continuous service. In view of that, the condition of five years atleast notionally would stand satisfied. In view of that, the petitioner would be entitled for the benefit of the Government Resolution dated 24th April 2001 of having worked for five years and more continuously.

7. In light of the above, the impugned order is quashed and set aside. The respondent shall consider the claim of the petitioner. The respondent shall consider the petitioner has worked for more than five years continuously in view of the judgment of the Labour Court. "

19. The learned Division Bench held that in view of the order passed by the Labour Court, Nashik, whereby Ulsha Pawar was held entitled to reinstatement in usual position with continuity in service, Ulsha would be deemed to be in continuous service and that the eligibility condition of five years employment would stand notionally satisfied.

20. The learned Counsel for the review petitioner would submit that the reliance placed by this Court on the judgment in **Ulsha Sonu Pawar** delivered by the learned Division Bench, was not apposite. The submission is, that the legality of the termination of Ulsha Sonu Pawar was not an issue before the learned Division Bench. *Au contraire*, the learned Single Judge, who decided Writ Petition 3604/2003, did not record any finding on the legality of the termination or on the conclusions drawn by the Labour Court and the Industrial Court. The learned Single Judge disposed of Writ Petition 3604/2003 after noticing that a proposal to take Ulsha Sonu Pawar

on the CRTE, was forwarded to the concerned authority. The limited issue addressed by the learned Division Bench was the justifiability of the rejection of the proposal. The observation of the learned Division Bench that Ulsha Sonu Pawar notionally completed five years continuous service, must be understood in the context of the issue dealt with by the learned Division Bench, is the submission.

21. The learned Counsel for the review petitioner would submit that on facts, case of Ulsha Sonu Pawar cannot be compared with the case of respondent 1 herein. The learned Counsel for the review petitioner would submit that in case of Ulsha Sonu Pawar there was no stay granted by the High Court to the award. In the peculiar facts of the case, the Executive Engineer recommended that Ulsha Sonu Pawar be taken on CRTE and the rejection of the said recommendation was the subject matter of the writ petition decided by the learned Division Bench. It is in this context that the learned Division Bench has observed that atleast notionally Usha Pawar satisfied the eligibility of five years continuous service and held the said employee entitled to the benefits of the Kalelkar Award. It is further submitted, that such a course could not have been followed in the present matter without adjudicating the legality of otherwise of the retrenchment of respondent No.1.

22. The learned Counsel for the review petitioner would submit that misconception of facts, even assuming that the misconception was by the Advocate, is covered by the expression "Any sufficient reason" and that it would not be necessary to demonstrate that the judgment sought to be reviewed suffers from mistake or error apparent on the face of the record. Reliance is placed on the following observations in ***Board of Control for Cricket in India & Anr. Vs. Netaji Cricket Club & Ors., [(2005) 4 SCC 741]***:

" 89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even

an advocate. An application for review may be necessitated by way of invoking the doctrine 'actus curiae neminem gravabit.' "

23. The learned Counsel for the review petitioner would submit that all aspects of the matter could not be brought to the notice of this Court at the time of final hearing of writ petition 626/2002 since the file was misplaced due to shifting of the office of the learned Counsel and that had the material fact been brought to the notice of this Court, the fate of the litigation may have been different.

24. The learned Counsel for respondent 1 would rebut the submissions advanced on behalf of the review petitioner, contending, that there is no error apparent on the face of the record. However, statement on oath that in view of the loss of the paper, certain aspects could not have been brought to the notice of this Court, is not controverted by filing an affidavit in response.

25. The edifice, on which the judgment under review is based, is indeed the judgment of the learned Division Bench in Writ Petition 626/2002. It does appear, that the challenge to the correctness of the findings recorded by the Courts below is not independently considered. Several grounds are raised in the petition, which have not been dealt with on merit, presumably since

the learned Counsel appearing on behalf of the petitioner did not bring to the notice of this Court all the relevant aspects, as is fairly admitted in the review petition, which avers that due to the loss of the file the learned Counsel for the petitioner could not assist this Court effectively. Be that as it may, on a holistic consideration, I am satisfied that the legality of the retrenchment of respondent 1 and the entitlement or otherwise of respondent 1 to be brought on CRTE would have to be addressed independently of the observations of the learned Division bench in Writ Petition 13245/2018.

26. In this view of the matter, I am inclined to allow the review petition and direct that the petition be reheard on merits.

27. The review petition is allowed in the aforesaid terms.

(ROHIT B. DEO)
JUDGE

Madkar