



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition (WP) No. 6483 of 2022

The Project Officer, Soil and Water Management, Pilot Project,
Wainganga Nagar, Nagpur and another

Versus

Vijay S/o Bapu Sawwalakhe

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri J.J.Chandurkar, Advocate and Shri H.D.Marathe,
Advocate for the petitioners.

Shri S.S.Deshpande, Advocate for the respondent.

CORAM : ANIL S. KILOR, J.

DATED : 5th OCTOBER, 2023.

Heard.

2. The respondent who was working as a daily
wager under the petitioner was terminated on 10th
September, 2001. Thereupon, he filed a complaint ULP
No. 40 of 2013 challenging the said termination on the
ground that though he completed 240 days in a
preceding year, the procedure as contemplated under
Section 25F and 25G of the Industrial Dispute Act,
1947 (in short hereinafter referred as "Act, 1947") that
has not been followed.

3. The petitioners raised the objection to the
tenability of the complaint on the ground that the
Irrigation Department is not an Industry and therefore

the complaint was not maintainable. It is further contended that the respondent never worked for 240 days in a preceding year and therefore compliance of Section 25-F and 25-G of the Act, 1947 is not necessitated.

4. The learned Labour Court after considering the oral as well as documentary evidence held in favour of the respondent/complainant and allowed the complaint and thereby set aside the order of termination dated 10th September, 2001.

5. The learned Labour Court while dealing with the tenability of the complaint on the ground that the Irrigation Department is not an Industry has held that the petitioner is an Industry within the meaning of 2-J of the Act, 1947 and proceeded further to consider the case as regards of 240 days for completion in every calendar year by the respondent in a service, after observing that he completed 240 days. The learned Labour Court has observed that the termination was without following due procedure of Act, 1947 and thereupon the reinstatement was directed with backwages from the date of filing of the complaint till reinstatement, vide impugned judgment and order dated 13th May, 2019. The petitioners carried the said judgment and order in revision before the learned

Industrial Court, which came to be dismissed vide judgment and order dated 31st January, 2020. Hence, this petition.

6. I have heard learned counsel for the respective parties.

7. Shri Chandurkar, learned counsel for the petitioners submits that the learned Labour Court as well as learned Industrial Court have committed error in holding that the respondent has completed 240 days in any year of his termination.

8. It is further submitted that for non submission of muster roll, the learned Labour Court has wrongly drawn adverse inference which ought not to have drawn by the Labour Court, in absence of any evidence produced by the respondent/complainant to prove that he work for 240 days in any calender year. For this purpose he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Chief Engineer, Ranjit Sagar Dam and another Vs. Sham Lal*¹ and the judgment of the Co-ordinate Bench of this Court in the case of *Executive Engineer, Public Works Department, Wardha Vs. Namdeo Govindrao Nandurkar*².

1 AIR 2006 SC 2682

2 2011(4) Mh.L.J 33

9. It is further argued that the petitioners are not an Industry as held by the Hon'ble Supreme Court of India in the case of *State of Madhya Pradesh and others Vs. Somdutt Sharma*³.

10. On the other hand learned counsel for the respondent points out that the respondent has entered into the witness box and led oral evidence as regards the completion of 240 days in every calender year before termination. It is submitted that, despite the fact that the learned Labour Court directed the petitioners to produce muster roll, the same was not produced and no reasons have been assigned for not producing the muster roll. It is therefore submitted that the learned Labour Court as well as learned Industrial Court has rightly drawn the adverse inference against the petitioner to hold that the respondent has completed 240 days.

11. It is further argued that the petitioners have given up the point of tenability of the complaint on the ground that the Irrigation Department is not an Industry, before the learned Industrial Court in revision. It is submitted that the said stand was never raised in the revision or argued before the learned Industrial Court and therefore once such challenge was given up,

3 2011 III CLR 834

it cannot be again raised before the High Court in Writ Petition, and for all these reasons the order of the learned Industrial Court cannot be faulted with.

12. In the light of the rival submissions of the respective parties, I have perused the record and the impugned judgment and orders.

13. It is evident from the record that the point as regards tenability of the complaint on the ground that the petitioner is not an Industry was not pleaded or argued before the learned Industrial Court.

14. No proper justification has been offered by the petitioner in the petition for not raising or arguing the said point before the learned Industrial Court.

15. Thus, it is clear that, the learned Industrial Court had no occasion to go into the said issue or to decide the same. In the circumstances, it can be said that it amounts to waiver of the challenge by the petitioners, as relates to the point of tenability of complaint.

16. As far as the issue in respect of completion of 240 days are concerned, the record shows that the complainant entered into witness box and he led oral evidence as regards the completion of 240 days in every calendar year before the termination of the respondent.

17. There is no serious challenge raised to the said oral argument, in the cross-examination by the petitioners. There was no suggestion given by the petitioners to the complainant that he never worked continuously 240 days in any calender year before his termination.

18. Thus, there was no serious challenge raised to the oral evidence of the respondent as regards completion of 240 days in every calender year.

19. In addition to the same, the learned Labour Court has considered the oral evidence of the witnesses of the petitioners.

20. Moreover, despite the fact that there was a direction issued by the learned Labour Court to produce the muster roll, it was not produced.

21. The Hon'ble Supreme Court in the case of *Chief Engineer, Ranjit Sagar Dam and another Vs. Sham Lal* (supra) has held that drawing of adverse inference ultimately in such matters would depend facts of each case.

22. Similarly, Co-ordinate Bench of this Court in *Executive Engineer, Public Works Department, Wardha Vs. Namdeo Govindrao Nandurkar* (supra) has held thus:

22. As pointed out earlier, the Apex Court has held that the delay would certainly be fatal if it has resulted in material evidence relevant to the adjudication being lost and rendered unavailable. It has been held that the person supervising cannot be expected to prove after long delay that the employee/workman did not work for 240 days in a year or that he voluntarily left the job. It is difficult for the employer to obtain witnesses, who would be competent to give evidence so many years later if the Labour Court wishes to hold an enquiry into the matter. It has also been held that lapse of time results in losing the remedy and the right as well and the delay in seeking reference causes prejudice to both the employer and the employee. Keeping in view this principle, heavy burden lies upon the employee in such a situation to establish that he has completed 240 days of continuous service. The employee has to lead positive evidence and he cannot rest upon the weakness of other side in not producing the relevant record. In such a situation, mere statement of an employee on oath would not be enough to show that he had completed 240 days of continuous service. The decision of the Apex Court in Bhikubhai Chavda's case, cited supra, does not apply to a situation where a demand for reference is proved to be stale. The employee has failed to establish that he had completed 240 days of continuous service. In view of this, the question of non-compliance of the provisions of Sections 25F and 25G of the Industrial Disputes Act does not arise.

23. The Labour Court has committed an error of law in drawing an adverse inference against the employer for non-production of relevant record including muster roll, pay-slips, seniority list, etc. The employer has examined one Shri K.R. Bajaj, the Assistant Engineer, who deposed that in view of Clause-272 of the P.W.D. Manual, the records of casual labourers

beyond five years were not retained. The witness denied that there existed any relationship of "master and servant" or "employer and employee" between the petitioner and the respondent. The petitioner-employer also denied that the respondent-employee had completed 240 days of continuous service before the date of his termination. Hence, it was not a case for drawing an adverse inference.

23. Thus, it is evident from the above observations made by the Co-ordinate Bench of this Court that the employee has to lead positive evidence and he cannot rest upon the weakness of other side in not producing the relevant record.

24. As I have observed that in the present case, the respondent has entered into witness box and he led the oral evidence in support of his case that he had completed 240 days in every calender year. The said evidence was not seriously challenged by the petitioners in cross-examination. Thus, even if the adverse inference is not drawn, there is oral evidence available on record to establish the said fact.

25. In the matter at hands, in my considered opinion, the learned Labour Court has not committed any error in drawing adverse inference for the reason that no explanation has been offered by the petitioners for not complying with the direction of the learned Labour Court to produce muster roll particularly in light of the fact that in cross-examination no serious

challenge was raised to the oral evidence produced by the respondent about completion of 240 days in every calender year.

26. Hence, I do not find any merit in the present writ petition, accordingly it is dismissed.

27. At this stage, learned counsel for the petitioners submits that some of the respondents have attained the age of superannuation.

28. In the circumstances, it is made clear that if the complainant has attained the age of superannuation, he is entitled for backwages from the date of filing of the complaint till the date of superannuation.

[ANIL S. KILOR, J.]