IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1012 OF 2009

The Administrative Officer (School) Municipal Mahanagar Palika .. Petitioner

Versus

Bhujgonda K. Kamble .. Respondent

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- Ms. Dhruti Kapadia a/w Mr. R.Y. Sirsikar and Mr. Sagar Patel for Petitioner – Corporation
- Mr. Sanjiv A. Sawant a/w Ms. Samiksha S. Mane i/by Mr. Samir M. Suryawanshi for Respondent

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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 22, 2023

JUDGEMENT:

1. This Writ Petition is filed under Articles 226 and 227 of the Constitution of India by the Petitioner (for short "**the Corporation**" i.e. employer) to challenge the judgement and order dated 10.03.2008 passed by the 3rd Labour Court, Mumbai in Reference (IDA) No. 397/2003. On 20.03.2009 Rule was granted and interim relief in terms of prayer clause (c) was granted and Petitioner Corporation was directed to reinstate the Respondent worker within the period of one month from the said date. Petitioner has been reinstated and working since then.

2. Briefly stated the facts which are relevant for the purpose or adjudication of the present Writ Petition are as follows:-

2.1. Respondent Worker was employed by the Petitioner Corporation as a Caretaker cum Gardener (Mali) on daily wage basis from 06.04.1995. Admittedly he worked for the period from 06.04.1995 to 31.10.1998 with intermittent artificial breaks given by the Corporation to him on at least 13 occasions during the said period. It is Respondent's case that he worked on all Saturdays and Sundays and on public holidays but was not paid wages for those days nor he was paid any overtime wages for working for more than 12 hours during the aforementioned employment period. According to Respondent he has worked for more than 240 days in a year but the Corporation denied him permanency and in fact granted permanency to 14 similarly placed workers who had worked alongside him.

2.2. Respondent's services were terminated orally without giving any notice or legal dues which amounted to retrenchment and also in violation of provisions of Section 25-F of the Industrial Disputes Act, 1947 (for short "the said Act").

2.3. In the Reference tried before the learned Labour Court Petitioner in its written statement below Exhibit C-6 contended that Respondent worker was employed as Mali cum Caretaker on daily wage basis from 07.04.1995 onwards on Rs. 70/- per day at Chunabhatti Municipal Marathi School No. 2 and he worked upto 31.10.1998 with intermittent breaks. It was stated by Petitioner

Corporation that Respondent did not work on Sundays and public holidays nor did he work for more than 8 hours in a day and he worked for 230 days in the year 1998.

2.4. Learned Reference Court framed the following issues for determination of the trial:-

1) Whether the reference is maintainable?

2) Does the second party workman prove that he has put in 240 days continuous service and he was the permanent employee of the first party?

3) Does the second party workman prove that the first party employer has illegally terminated his services by violating the statutory provisions of law?

4) Does the second party workman prove that he is entitled to the relief of reinstatement with full back wages and continuity of service?

5) What order?

2.5. The aforesaid issues were answered in favour of Respondent worker by giving detailed reasons on the basis of evidence led by the parties and final award was declared directing the Petitioner Corporation to reinstate the Respondent worker with continuity of service and pay him full back wages.

2.6. Ms. Kapadia, learned Advocate appearing for the Petitioner Corporation would submit that Respondent worker has not put in 240 days of continuous service in one calendar year and therefore not entitled to benefit of permanency. She would submit that he was

given artificial breaks between 1995 and 1998 when he was employed by the Corporation and therefore the nature of his employment cannot be termed as continuous. She would submit that his appointment was as a Mali cum Caretaker initially for a period of one month only and he was given a fresh appointment letter after resumption from the artificial break given to him. She would submit that the learned Labour Court has failed to appreciate the evidence of the Respondent worker wherein he himself has admitted that he was engaged as a daily wager and the initial appointment letter given to him on 07.04.1995 was for one month only and thereafter he was given a break of one day and was reappointed on the same work as a daily wager for a further period. This arrangement continued right upto 31.10.1998 and after each artificial break Respondent worker was given a fresh appointment letter which are exhibited below Exhibits. C-7 to C-19. Thus she would submit that admittedly Petitioner issued 13 separate appointment letters for various tenures during Respondent's employment with the Corporation. Next she would submit that Petitioner Corporation led evidence of the administrative officer of the school in which Respondent worker was employed and his evidence was specific to the effect that Respondent was employed by a fresh appointment letter after giving him artificial breaks during his tenure. She would submit that the evidence of this witness was supported by the statement of daily wages payment made to the

Respondent for the period from 02.09.1998 to 31.10.1998 which was produced below Exhibits C-24 and C-25. It is stressed by Ms. Kapadia that in any event the Respondent worker did not serve the Corporation for more than 230 days and therefore the findings returned by the learned Labour Court of the Respondent having completed 240 days in employment was bad in law and contrary to the evidence on record. Hence she would submit that the impugned award deserves to be quashed and set aside in its entirety.

3. ***Per Contra*** Mr. Sawant, learned Advocate for Respondent worker would submit that admittedly the Respondent worked with the Petitioner Corporation in the School from 07.04.1995 to 31.10.1998 on daily wages as per the headmaster's own report which was placed on record. He would submit that as per the duty list of the post held by the Respondent i.e. of Mali cum Caretaker which is also placed on record, he had to work for the entire 24 hours in the school despite been appointed to work on daily wages. He would submit that as per the headmaster's own report which is placed on record, it is an admitted position that Respondent worked for 240 days in the year 1998. He has drawn my attention to the report of the Education Officer dated 29.05.2009 wherein it is clearly stated that in the year 1998, Respondent worker was paid salary for 248 days. I have perused the said letter which is placed on record by the Petitioner.

Hence he would submit that considering the cogent reasons given by the learned Labour Court the impugned award deserves to be sustained.

4. I have heard Ms. Kapadia, learned advocate for Petitioner and Mr. Sawant, learned Advocate for Respondent and with their able assistance perused the pleadings of the present case as also the evidence produced on record. Submissions made by the learned Advocates have received due consideration of the Court.

5. At the outset it is seen that in the report filed by the Education Department and more specifically the Education Officer of the Petitioner Corporation dated 29.5.2009 in respect of the Reference (IDA) proceeding, it is an admitted position that during the calendar year of 1998 i.e. 03.01.1998 to 31.10.1998 Respondent had worked for 248 days for which he was paid salary by the Corporation. It is further seen that the Respondent worker has admittedly worked for more than 240 days in that calendar year. It is further seen that Petitioner Corporation did not count the Sundays and holidays while computing his working days deliberately to deny him the benefit of permanency. As a matter of evidence, Respondent worker placed on record in his list of documents his attendance sheet of having attended work on Sundays and two public holidays in the year 1998 which was accepted by the learned Labour Court. In fact it was proved on record

by the evidence led by the Respondent and on the basis of the documentary evidence that the statement of attendance clearly showed that he had worked continuously for a period of 10 months and his signatures were also endorsed and signed by the headmaster and the administrative heads from which it was proved that the Respondent worker had indeed worked continuously. The evidence considered by the learned Labour court further reveals that the witness on behalf of the Petitioner Corporation admitted in cross examination that Respondent was employed as Garden cum Caretaker in the school and it was his duty to not only look after the garden but also the safety of the school and in that regard he was handed over the keys of the school premises and only on the eve of the holidays, the headmaster of the school used to take the keys from him. Learned Labour court while considering the evidence came to a categorical finding that though the Respondent worker worked for a continuous period during his employment the appointment letter issued to him showed artificial breaks of having discontinued his services which were issued to him only to deny him the rights and benefits of permanency. After scrutinizing the entire material evidence placed on record, the learned Labour Court returned detailed findings in paragraph Nos. 21 to 25 of the award concluding that the Respondent worker had succeeded in establishing that he had worked for 240 days in the preceding 12 months before termination of his services. Learned Labour Court

heavily relied on Exhibit U-8 i.e. statement of employment produced by the Respondent worker which clearly showed that he had indeed worked for 240 days for the period 03.01.1998 to 31.10.1998 which was prepared by the Petitioner Corporation and most importantly which was not rebutted or contradicted in the evidence led by the Petitioner Corporation. For convenience and reference the findings returned in paragraph Nos. 21 to 25 are reproduced below:-

> *"21. Here it is an admitted fact that the first party employed him as a care taker cum gardener on daily wages from 7.4.1995. The first party has admitted that the second party workman worked from 7.4.1995 till 31.10.1998 but he was given one break in the service after one months regular service. Here it is also an admitted fact that the second party workman lastly worked from 3.1.1998 to 31.10.1998 with one break in one months service. It is the grievance of second party workman that he was given artificial breaks to deprive him of the rights and benefits of permanency. The statement of actual working days of December month shows that he worked as Chunabhatti Marathi School right from 7.4.1995 till 31.10.1998. The documents at Exhibit C-8 to C-19 are the appointment letters issued to the second party workman from time to time. Exhibit C-19 shows that he was drawing last wages Rs.90/- per month.*
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> *22. The 2nd party workman admitted in cross examination that he was given break for two days and again he was given work. Further he has no proof to show that he worked during the period when he was given break. He admitted that the work was closed on public holidays, second and forth Saturday and Sundays in B.M.C. Admittedly there is no document to show that he worked for 24 hours. Exhibit C-26 is the statement of actual working days of 2nd party workman which shows that he worked for 230 days from 3.1.1998 to 31.10.1998 in a split up period. In the year ear 1995 he worked for 77 days and in the year 1997 he worked for 79 days.*
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> *23. The witness of the 1st party admitted that the 2nd party workman actually worked with the 1th party for the period mentioned in Exhibit C-19. He admitted that the 2nd party workman worked in break periods as shown in Exhibit C-10 and C-19. As per the statement dated 31.8.2005 addressed to the administrative officer by Head Mistress, Marathi School, Kurla (E), Mumbai 22, that white ants destroyed the service record of the 2nd party workman and other employees. The statement of working days of 2nd party workman filed at Exhibit U-S for the period from 3.1.1998 to 25.9.1998 contains she endorsement of head Master that 2nd party workman worked as per the directions, he was not paid wages for Sundays, but he worked on Sundays. This*

statement shows total 290 days and total working days 248 days Thus in this statement it is clear that the 2 party workman worked even on Sundays and thus worked for 248 days that is more than 240 days in the year 1998, before terminated of his services. The documents at Exhibit C-8 to C-19 support the case of Second Party workman that he worked for 240 days in the employment of first party. It is also clear that he is given artificial break of 2 days in one months service since beginning only to deprive of his legal rights. Moreover Exhibit U-3 that is statement of employment of second party clearly shows that he worked for 240 days including Sundays for the period from 3.1.1998 to 31.10.1998 which is prepared by the first party employer and this evidence of second party workman is no where rebutted, contradicted or shattered by the First party.

24. Thus the second party workman succeeded in establishing that he worked for 240 days in preceding 12 months before termination of his services. The arguments advanced by Advocate Mr. Kajrolkar for the first party is not well grounded and hence cannot be accepted. The first party could not show that the second party workman was employed in violation of constitutional of scheme. Therefore with due respect the dictum laid down in AIR 2006 Supreme Court 1806 is not applicable in the present case as facts are different. On the contrary the argument canvassed by advocate Amberkar for second party workman is up rights and sound hence I am inclined to place reliance on it.

25. Here the first party employer has not calculated the Sundays when the second party workman worked on these days and there are discrepancies in the defence and the document filed below Exhibit U-8 and C-7 therefore it apparently shows that first party employer is engaged in unfair labour practices by denying work and wages to the second party workman which tantamount to termination of services. Further it is also clear that the first party employer has not followed the mandatory provisions of 25-F of the Industrial Disputes Act and did not initiate disciplinary action as per law therefore the termination of his services becomes illegal. My view is bolstered in:

1. *2006 II CLR 1047*

   Haryana State Electronics Development Corporation Ltd. Vis. Mamni

   Ratio: In this case the services of the Respondent had been terminated on a regular basis and she had been reappointed after a gap of one or two days. Such a course of action was adopted by the Appellant with a view to defeat the objection of the Act. Section 2(oo)(bb) of the Industrial Disputes Act 1097, therefore, is not attracted in the instant case.

2. *2006 (1) CLR 607*

   Ram Kishan Gurjar V/s. State of Rajasthan & Anr.

   Ratio: Industrial Disputes Act, 1947-X.25F Termination appellant terminated from service without complying with S.25F - Labour Court held it illegal, as Sundays and

Holidays were not counted while examining continuous service of 240 days in a year - Writ Petition by Respondent was allowed by Learned Single Judge - Hence this Special Appeal by workman - Held that the employer's calculation of working days excluding Sundays is taint of malice - Labour Court committed to illegal while passing the Award particularly when Respondents did not care to file reply nor produce any evidence - Order of the learned Single Judge not tenable.

3. *2006 III CLR 1034,*

Rajeev Sinha Vs. Sardar Vallabh Bhai Government Polytechnic College, Bhopel & Anr.

Ratio: Industrial Disputes Act 1047 – S. 25B - Continuous service - Petitioner removed from service - Labour Court held that he had not put in continuous service of 240 days in preceding year - Hence not entitled to any relief - Award of Labour Court challenged Held that (i) 'Continuous service' means 240 days of employment in preceding 12 months of the date of termination; (ii) 'Law does not require continuous working of 240 days in preceding year - Petitioner entitled to reinstatement.

4. *2003 II CLR 403 State of Gujarat & Anr. V/s. Jitendra M. Raval & Anr.*

Ratio: held that employer ailed to substantiate its case that the employee abandoned the service - It is duty of the employer to send communication calling upon the workman to join duty Industrial Disputes Act, 1947 S.25F.

5. *2006 I CLR 931.*

Executive Engineer, B & C. Deptt. Miraj, Dist. Sangli & Anr. V/s. Riyaj Nasir Daryawardi.

Ratio: It is held that there is no reason to interfere with orders passed by Courts below especially when documentary and oral evidence on record has established beyond reasonable doubt that Respondent was in continuous service of more than 240 days and as such oral termination of Respondent was rendered illegal.

6. *2005 III CLR 106,*

Jairaj N. Shetty V/s. Union of India,

Ratio: That Appellant was in continuous service as he had worked for 240 days in earlier year or years though not in the year immediately preceding termination and that as such S.25F was attracted and consequently termination was illegal."

6. In view of the above the learned Labour Court concluded

that Respondent worker proved that he had completed 240 days and therefore his termination was without following the due process of law.

7. Next on the ground of maintainability of the Reference though it was argued by Petitioner Corporation that Reference was not maintainable, there was nothing placed on record to show and prove that submission. Learned Labour Court on the contrary held that the Respondent worker clearly exhibited an industrial dispute that existed between the Petitioner Corporation and himself on the ground of maintainability.

8. In that view of the matter, learned Labour Court answered the Reference in the affirmative and directed reinstatement of the Respondent worker with continuity of service and payment of full back wages to him.

9. In the fact and circumstances of the present case, it is clearly seen that the Respondent worker was employed form April 1995 to October 1998 continuously though on paper he was given artificial breaks and this was done with the sole intention of ensuring that he would be denied permanency. There are 13 appointment letters issued to the Respondent worker during his tenure for various period of time which clearly exhibit the intention of the Petitioner Corporation of ensuring that despite employing the Respondent's

services, he would be denied the status of permanency. The only case pleaded by the Petitioner Corporation is that Respondent worker had not completed 240 days but according to them had completed 230 days is itself falsified from the record produced by the Corporation itself. As seen above, it is the Corporation's own document prepared by the Education Officer of the Corporation on 29.5.2009 which clearly states that Respondent worker was paid salary for 248 days during his tenure in the year 1998 from 03.01.1998 to 31.10.1998.

10. Once the aforesaid has been clearly established on the basis of oral as well as documentary evidence, there is no reasonable doubt that the Respondent worker was in continuous service for more than 240 days in the preceding calendar year and therefore his oral termination is rendered illegal. It is clearly seen that the Respondent worker was in continuous service and assuming if he was retrenched or terminated, then the provisions of Section 25-F of the said Act would get attracted. Having not done so, the termination of the Respondent worker was bad in law and therefore he is entitled to reinstatement.

11. The findings returned by the learned Labour Court in Reference (IDA) No. 397/2003 therefore cannot be faulted with as they are based on the oral and documentary evidence placed before the Court. The impugned Award passed by the learned Labour Court

dated 10.03.2008 in Reference (IDA) No. 397/2003 is upheld and confirmed. The Respondent is entitled to all benefits under the said Award as directed.

12. As a consequence, Petition is dismissed. Rule is discharged.

[MILIND N. JADHAV, J.]

Amberkar

RAVINDRA MOHAN AMBERKAR

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