The Executive Engineer and Another Vs. S.P. Rokade and Others

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Court : Mumbai

Decided On : Jun-20-2012

Judge : Anoop V. Mohta

Appeal No. : Writ Petition Nos. 1850 of 1999, 1851 of 1999, 1855 of 1999, 1856 of 1999, 1857 of 1999, 1858 of 1999, 1860 of 1999, 1861 of 1999, 1871 of 1999, 1872 of 1999, 1874 of 1999, 1875 of 1999 & 1879 of 1999

Appellant : The Executive Engineer and Another

Respondent : S.P. Rokade and Others

Judgement :

The Petitioners-Employers, the Executive Engineer, Public Works Department, Pune, through the State of Maharashtra have challenged the common order dated 18 January 1999 passed by the Industrial Court, Pune, thereby reversed the order passed by the Labour Court, Pune. The operative part of the common order is as under:

“ORDER

1. The Revision Applications 96 to 108 of 1998 are allowed.

2. The order passed by the Third Labour Court, Pune, in Complaints (ULP) Nos. 114 to 124, 129 and 130 of 1995 dt. 4-9-1998 is hereby quashed and set aside.

3. It is hereby declared that the respondent-department has committed unfair labour practice under Item 1 of Schedule IV of the Act in terminating the services of the complainants. Hence, the respondent-department is directed to cease and desist from indulging in such unfair labour practices.

4. The respondent-dept. is further directed to reinstate the complainants in their original posts with continuity of service, within one month from the date of this order and pay them 1/3rd backwages from the date of termination till the date of reinstatement.

5. No order as to costs.”

2 On 7 April 1999, this Court has admitted all the Writ Petitions. No interim relief was granted. This Court, on Civil Applications filed by the Petitioners, has passed the following order on 12 April 2001.

“P.C.

Heard learned Counsel. Civil Application disposed of in the following terms:

1. The order dated 18th January, 1999 passed by the Industrial Court, Pune, directing the reinstatement and

backwagesof the Respondent No.1 shall stand stayed subject to the following conditions:

(a) That the Petitioner shall deposit the wages of the Respondent No.1 at the rate of wages last drawn by him during the pendency of Writ Petition on month to month basis before the Industrial Court. The said amount on deposit shall be paid to the Respondent No.1 on the principle analoguous to Section 17B of the Industrial Disputes Act and the same shall not be recoverable.

(b) The petitioner shall make the aforesaid payment from the date of filing of the petition. The aforesaid shall be deposited within a period of 6 weeks from today.

In case of default on the part of the petitioner to deposit the arrears of the payment as well as the amount mentioned in clause (a) above, the stay granted to

reinstatement shall stand vacated in case of three clear defaults.

(c) The Respondent No.1 shall file an affidavit in this Court about his gainful employment/unemployment within a period of two week from today. The filing of the affidavit shall be condition precedent for granting benefits as contemplated under clauses (a) and (b) above.

Civil Application disposed of accordingly.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Sheristedar/P.A. of this Court."

3 A Division Bench of this Court by order dated 9 December 2003 did not entertain the Letters Patent Appeal against this order. The Petitioners did not raise further challenge to the said order passed by the Division Bench. The order dated 12 April 2001 therefore, has attained finality. Therefore, the amount so deposited and received by the Respondents, pursuant to the said order, are not recoverable now.

4 The learned Labour Court, while rejecting all 13 claims, held that the Petitioners-Respondents did not engage any unfair labour practice by orally terminating the services w.e.f. 10 February 1995. The Respondents, therefore, preferred the Revision Applications. All the Revision Applications arose out of common order, those were consolidated and ultimately after reconsidering the material on record, reversed the findings as recorded above. The Petitioners preferred separate Revisions. Considering the common facts and circumstances, points, material/evidence except different names of complainants, I am also inclined to dispose of the present group of matters by a common judgment.

5 Admittedly, the Complainants were employed orally at new Circuit House, Pune for performing Room Servants-cum-Safai Kamgar in the year 1991. Their services were orally terminated on 10 February 1995. The work was of a permanent and perennial nature and definitely not seasonable and temporary. The New Circuit House is still in existence and in operation since long. Admittedly, the Petitioners without following due procedure as contemplated under Section 25 (F) of the Industrial Disputes Act, 1947 (for short, "I.D. Act") terminated the services of the

Respondents-Complainants and engaged other employees. They were always working under the supervision of the officers of the Petitioners continuously and there was no contractor in between them at any point of time. They used to get the payment from the Petitioners and never from the Contractor. The muster-rolls were accordingly signed by them from time to time. They were never terminated on the ground of any misconduct. The Complainants, therefore, lodged 13 individual complaints. The parties lead the evidence. One witness was examined on behalf of the Complainants, as agreed. The Petitioners examined two witnesses. The learned Labour Court without framing any other issues and without even considering the relationship of master and servant, dismissed all the Complaints. The Industrial Court, in the present facts and circumstances, including the material and the evidence available on record, has rightly noted that there is perversity in the order as the Labour Court failed to consider the basic material, as well as, the evidence, on record. Mere leading the evidence itself is not sufficient. The Petitioners having raised the specific plea that the Complainants were engaged by the Contractor, the burden shifted and lies upon the Petitioners to prove the same. The Complainants' case was throughout that they were under the employment of the Petitioners though appointed orally' they were working under their supervision since more than 3 years and 9 months. Though evidence was led and agreed to place on record, the Petitioners failed to produce the muster rolls along with other supporting documents.

6 The learned counsel appearing for the Respondents has submitted referring to Sections 114(g) and 103 of the Evidence Act read with **GopalKrishnaji Ketkar Vs. Mohamed Haji Latif and ors. (**AIR 1968 SC 1413) that if a party in possession of best evidence which would throw light on the issue in controversy withholding it, an adverse inference against such party notwithstanding that onus of proof does not lie on him, can be drawn. Such party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it. Therefore, the submission of the learned counsel appearing for the Petitioners that the Complainants ought to have called for production of those documents, is untenable.

7 The Principle so laid down by the Supreme Court, therefore, just cannot be overlooked merely because this dispute/conflict governed by the provisions of Industrial Dispute Act read with The Maharashtra Recognization of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. (for short, Unfair Labour Practices Act). In this case those documents were relevant for the adjudication of the issues so raised, basically in the facts and circumstances.

8 The learned Industrial Court, therefore, right in observing that mere raising pleas and/or making averments itself is not sufficient. The party needs to prove the said averments by supporting documents specifically when the other side never admitted such case and specifically averred that they were employees of the Petitioners. Admittedly, the services were under the supervising of the Petitioners' officers. There is nothing brought on record by the Petitioners that the regular salary and/or wages were paid by the Contractor from time to time. The Complainants specifically averred and demonstrated that they were working under the supervision of one Mr. Sherkhan who was permanent employee of the Petitioners and who was allotting the work to them and maintaining their presence in the muster-roll. The said Sharekhan was not examined.

9 The petitioners never even examined any Contractor, who according to them, engaged these Complainants for the work of Petitioners at the New Circuit House. The Petitioners, though examined Mr. Nagapure and Mr. Nawadkar to prove the documents below Exhibit 28 to 31, those documents were neither produced before the Court nor proved by these witnesses.

10 The learned Industrial Court, therefore, right in observing that the Labour Court is wrong in holding that those documents were duly proved as both these witnesses gave evidence contrary to each other. Mr. Nawadkar though signed those documents, Mr. Nagapure stated that he is the signatories to those documents. There is nothing demonstrated and/or averred and/or stated by these two witnesses, who had appointed these Complainants. Their case was throughout that the Complainants were engaged by the Contractor. Had the muster rolls been maintained by the Contractor, there was no occasion for the Petitioners' Department to maintain the muster rolls. Even if, muster rolls though

referred and relied, the Petitioners failed to produced the original on record. Therefore, in absence of these muster rolls, if any, maintained by the Contractor and/or the Petitioners-department, the whole case of the Petitioners is unacceptable. Having once raised the plea that the Complainants were engaged by the contractors, and if failed to prove the same, as in my view, the burden shifted on the Petitioners and the Petitioners ought to have been proved the same. The plea so raised, if not proved, destroyed the defence of the Petitioners on all counts.

11 The Petitioners having once failed to prove the specific case, and as admittedly terminated services of the Complainants orally, the legal consequences need to be taken note of, specifically in view of the fact that all the Complainants have been working for Respondent No.1, for more than 3 years and 9 months as referred above. They were terminated without due notice and the procedures contemplated under the law. These consequences, just cannot be overlooked once the Petitioners failed to prove its case by not supporting the defence/specific plea so raised in the matter. Though, admittedly, they were managing the muster rolls of its employees regularly, in my view, there is no question of bringing this muster rolls on record by the Complainants. This approach, in my view, resulted into dismissal of the Complaints by the Labour Court and which the Industrial Court has rightly reversed and pass the impugned orders.

12 The Petitioners, however, failed to prove that there was no employer-employee relationship. The Petitioners never placed on record even the lists of the employees who were engaged by the Contractor. The tender given to Shri Alhat to engage 5 labours, in no way sufficient to destroy the specific plea raised by all the Complainants. The learned Industrial Court right in observing that 5 persons if engaged by the Contractor as Safai Kamgar, then rest of the employees were engaged by the Petitioners Department only. It is pertinent to note that there was no such specific plea raised by the Petitioners Department, with regard to all the 13 Complainants that they were not working under the supervision as their employees. There is nothing on record to show that they were appointed only by the Contractors, as contended. Such termination therefore, was intended and as contended to deprive the Complainants' permanency rights, as by terminating their

services appointed some other employees/workers, as the work was perennial and permanent nature. The learned Industrial Court, therefore, right in holding that the Labour Court wrongly relied on the judgment, facts and circumstances which were totally different.

13 So far as the backwages are concerned, as recorded, this Court has specifically observed that, not to recover the said amount from the Complainant, that order has attained finality. By the impugned orders only 1/3 backwages from the date of termination have been awarded. Though continuance of service has been granted, I would have interfere with the order, as admittedly during the period from the date of termination, till this date they were not working with the Petitioners, but considering the order already passed and as they were getting the amount as directed by the Court, I am inclined to observe and rightly considered by the learned counsel appearing for the petitioners that the Court may pass appropriate order so far as the back wages are concerned. Therefore, I am inclined to set aside the order, so far as 1/3 back wages so awarded by the impugned order dated 18 January 1999, in view of the fact that the complainants have been getting the amount in view of provisions of Section 17(b) of the Industrial disputes Act, as recorded in the order. It is made clear that the Complainants are entitled to reinstatement with continuity of service and all consequential benefits except the back wages.

14 The reliance was placed that the Revisional Court, ought not to have interfere with the findings given by the Court below, based upon the material and evidence available on record. But as noted, this is a case where the relevant documents and material are inadmissible and wrongly accepted and/or wrongly taken into consideration, so also the provisions of law as observed above. Therefore, the observation by the Industrial Court that the findings are perverse and bad and contrary to record, is correct. The interference so made and taking over all view of the matter, the impugned order so passed and considering the scope of judicial review of High Court, I am not inclined to interfere with it. Therefore, the Judgment **General Manager, Punjab and Sind Bank and Ors. Vs. Daya Singh (**2011-I-LLJ-255 (SC), so cited which is distinct and distinguishable on facts, as well as, on law itself, is of no assistance to the Petitioners.

15 The concept of “continuity of service” cannot be equated with the right of permanency, if termination is contrary to the provisions and without following the due procedure of law. The order of reinstatement needs to follow, that itself in no way means the final decision of rights of permanency, if any. That itself cannot mean that the employees get permanency for all the time to come, basically in the facts and circumstances of the case. Once the reinstatement order and/or continuity of service is directed, the Department and/or employer, in a given case, still entitled to take action by following the due procedure of law, so also the employees to claim permanency. I am not dealing with this facet of permanency. The point is kept open.

16 Therefore, taking overall view of the matter and as noted, there is perversity in the order passed by the Labour Court, which was also contrary to the evidence and the material placed on record. Therefore, the Revisional Court has rightly interfere with the same and passed the order which in my view, in the present facts and circumstances, need to be retained so far as reinstatement and the continuity of service are concerned. As recorded, I am inclined to keep open all points of permanency if any, and/or such other similar points, for both the parties to argue in a given case. In the present case, we are concerned with the order of abrupt termination in question.

17 Resultantly, the following order would meet the ends of justice.

ORDER

a) All the Petitions, so far as the order passed by the Industrial Court, regarding reinstatement and continuity of service with related consequential benefits, are dismissed and so far as 1/3 backwages are concerned the Complainants are not entitled for any backwages. The order dated 18 January 1999 passed by the Industrial Court, Pune is set aside to this extent.

b) All the Petitions are disposed of in the above terms.

c) There shall be no order as to costs.

18 The learned counsel appearing for the Petitioner later on asked for stay of the order of reinstatement and continuity of service. The learned counsel appearing for the Respondents has opposed the same.

19 Considering the reasoning already given, no case is made out to stay the order as prayed. Hence the request for stay is rejected.