SUPREME COURT OF INDIA

Surendranagar District Panchayat

Vs

Dahyabhai Amarsinh

Appeal (Civil) 6511 of 2005(Arising out of SLP) No.24805 of 2003)

(S.N.Variava and P.P.Naolekar)

25/10/2005

JUDGMENT

P. P. NAOLEKAR, J.

Leave granted.

This appeal is directed against the Judgment of the Division Bench of the High Court confirming the order of the Single Judge and that of the Industrial Tribunal whereby the appellant was directed to reinstate the respondent. The brief facts of the case are that the services of the respondent was terminated by an order dated 15.8.1985. On 1.6.1992, i.e., nearly after 7 years the respondent sent a Demand Notice to the appellant and ultimately the dispute of termination of service of Respondent was referred to the Industrial Tribunal. The respondent filed a claim petition alleging therein that he was in service of the appellant for more than ten years at the wages of Rs.10/- per day till he had been terminated by an order dated 5.7.1985. It is alleged that before the order of termination was issued, provisions of the Industrial Disputes Act were not complied with. An application was moved before the Labour Court for direction to the employer-appellant to produce muster roll, salary register from the year 1976 to 1986. The appellant entered appearance and filed its counter alleging that the respondent himself stopped coming to work; that there was a gross delay of seven years in raising the dispute. The workman was never engaged permanently and he was employed for

miscellaneous work i.e. whenever there was work, he was called for it. It is alleged that the workman had not completed 240 days of continuous service in the 12 months preceding the date of termination of his services. He had worked for 114 days in the year 1982, 63 days in 1983, 124 days in 1984 and 64 days in 1985 and thus there was no necessity for complying with legal requirement, before terminating the service of the respondent, of following the procedure laid down in Section 25F of the Industrial Disputes Act.

The respondent examined himself and deposed that he was employed for 10 years at the salary of Rs.470 per months whereas Mr. Vinod Misra, an official from the appellant side was examined to show that the workman never worked for 240 days in a year.

Before the Labour Court, oral evidence was given by the respondent. The Labour Court relied on the oral evidence of the respondent-workman and drew an adverse inference for non-production of muster roll and the salary register from the year 1976 to 1986 and held that the respondent-workman had worked for more than 240 days and therefore his termination was illegal. The Labour Court directed the reinstatement of the workman with back wages of 20% from the date of reference for non-compliance of sections 25 F, 25 G and 25 H.

The learned Single Judge dismissed the petition. A letter patent appeal was filed and the Division Bench held that the Labour Court was right in holding that the workman by his oral statement had proved his case. Not only that the workman under Ex.4, called upon the appellant-Panchayat to produce his salary Register and muster roll from 1976 to 1986 and also to produce the seniority list of the workmen, which were not produced. On the non-production by the appellant, of the said documents the Labour Court had rightly drawn an adverse inference against the appellant and rightly held that the workman had worked for 240 days in a year. The Court also held that one junior was retained, whereas service of respondent was terminated. Consequently, the Letters Patent Appeal was dismissed. That is how the appellant has come before this Court, challenging the order of reinstatement.

It is contended by the learned counsel for the appellant-Panchayat that the Supreme Court by its number of decisions has categorically held that the initial burden of proof that the workman has worked for 240 days in a year preceding the date of termination, lies on the workman and that the workman has failed to discharge that burden. It is further urged that it is not the case of the respondent- workman that he was in continuous service of the Panchayat for one year within the meaning of sub-section (1) of Section 25B of the Industrial Disputes Act. The case of the workman-respondent was that he had worked for 240 days with the employer in a year, therefore, necessarily the dispute raised by the workman, fall under sub-section (2) of Section 25B of the Industrial Disputes Act, to be regarded as his continuous service, wherein the workman had to prove that he had actually worked for 240 days during the period of 12 calendar months preceding the date of termination, to be retrenchment under Section 2(oo) of the Act. The non- production of the 10 years record by the employer does not call for drawing an adverse inference against the Panchayat. On the other hand, learned counsel for the respondent has urged that the employer being in possession of the relevant material, is duty bound to produce it and non-production of the record, called for by the Labour Court, the Labour Court was right in drawing an adverse inference. He further contended that the employer being in possession of the necessary material, burden lies on the employer to

prove that the workman had not worked for 240 days in a year preceding the relevant period. On the basis of the rival contention, it is necessary for us to consider the scope and ambit of the relevant provisions, namely Section 2 (oo), Section 25B and Section 25F of the Industrial Disputes Act. The appropriate provisions are reproduced below:

Section 2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include –

a) Voluntary retirement of the workman; or

b) Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

bb) Termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

c) Termination of the service of a workman on the ground of continued ill-health;

Section 25B: Definition of Continuous Service: - For the purposes of this Chapter –

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or as strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) Where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer –

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than –

(i) one hundred and ninety days in the case of a workman employed below ground in a mine ; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer not less than –

(i) ninety five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty five days, in any other case.

Explanation-For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall Include the days on which –

(i) he has been laid-off under an agreement or as permitted by Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years ;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment ; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

Section 25F - Conditions precedent to retrenchment of workmen: - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until –

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice ;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

As per Section 25F, no workman who is in continuous service for not less than one year under an employer shall be retrenched by that employer unless conditions laid therein are fulfilled. The retrenchment is defined in Clause (oo) of Section 2 of the Industrial Disputes Act 14 of 1947 (hereinafter referred to as Act). Under the definition termination of the service of a workman by the employer by any reason whatsoever, otherwise than, as a punishment, by way of disciplinary action, would constitute retrenchment except in cases accepted in the Section itself, they are :-

i) A voluntary retirement of a workman;

ii) Retirement of a workman on reaching the age of superannuation;

iii) Termination of the service of a workman as a result of non-renewal of the contract of employment; or

iv) Termination of the service on the ground of continued ill- health of the workman. Unless these reasons are existed and proved, termination by the employer of the service of a workman for any reason, would constitute retrenchment. Therefore, if the employer is to retrench the workmen employed in his industry who is in continuous service has to follow the provisions of Section 25F of the Act. To attract provisions of Section 25F, the workman claiming protection under it, has to prove that there exists relationship of employer and employee; that he is a workman within the meaning of Section 2(s) of the Act; the establishment in which he is employed is an industry within the meaning of the Act and he must have put in not less than one year of continuous service as defined by Section 25B under the employer. These conditions are cumulative. If any of these conditions are missing the provisions of Section 25F will not attract. To get relief from the court the workman has to establish that he has right to continue in service and that his service has been terminated without complying with the provisions of Section 25F of the Act. The Section postulates three conditions to be fulfilled by an employer for getting a valid retrenchment, namely:-

i) one month's clear notice in writing indicating the reasons for retrenchment or that the workman has been paid wages for the period of notice in lieu of such notice;

ii) payment of retrenchment compensation which shall be equivalent to 15 days average pay for every completed year of continuous service or any part thereof, in excess of six months;

iii) a notice to the appropriate Government in the prescribed manner.

To attract the provisions of Section 25F, one of the condition required is that the workman is employed in any industry for a continuous period which would not be not less than one year. Section 25B of the Act defines continuous service for the purposes of Chapter V-A "Lay-off and Retrenchment". The purport of this Section is that if a workman has put in an uninterrupted service of the establishment, including the service which may be interrupted on account of sickness,

authorized leave, an accident, a strike which is not illegal, a lock-out or cessation of work, that is not due to any fault on the part of the workman, shall be said to be a continuous service, for that period. Thus the workmen shall be said to be in continuous service for one year i.e., 12 months irrespective of the number of days he has actually worked with interrupted service, permissible under Section 25B. However, the workmen must have been in service during the period, i.e., not only on the date when he actually worked but also on the days he could not work under the circumstances set out in Sub-Section (1). The workmen must be in the employment of the employer concerned on the days he has actually worked but also on the days on which he has not worked. The import of Sub Section(1) of Section 25B is that the workmen should be in the employment of the employer for the continuous, uninterrupted period for one year except the period the absence is permissible as mentioned hereinabove. Sub-section (2) of Section 25B introduces the fiction to the effect that even if the workman is not in continuous service within the meaning of Clause (i) of Section 25-B for the period of one year or six months he shall be deemed to be in continuous service for that period under an employer if he has actually worked for the days specified in clause (a) and (b) of Sub-s(2). By the legal fiction of Sub-s2(a) (i), the workmen shall be deemed to be in continuous service for one year if he is employed underground in a mine for 190 days or 240 days in any other case. Provisions of the Section postulate that if the workmen has put in at least 240 days with his employer, immediately prior to the date of retrenchment, he shall be deemed to have served with the employer for a period of one year to get the benefit of Section 25F. For the purposes of calculation of number of days worked by the employee, by fiction his days of absence from work have been included if the workman has been laid off under an agreement or as permitted by Standing Orders made under the Industrial Employment (Standing Orders) Act 1946, (20 of 1946), or under the Industrial Disputes Act 1947, or in any other law applicable to the industrial establishment; (ii) has been on leave with full wages, earned in the previous year; (iii) has been absent due to temporary disablement caused by accident arising out of and in the course of employment ; and (iv) has been on maternity leave, in case the employee is a female, however, that the total number of such maternity leave does not exceed 12 weeks.

In S.K. Verma vs. The Central Government Industrial Tribunal-cum-Labour Court, New Delhi, speaking for three Judges Bench, O. Chinnappa Reddy, J. while considering the original provisions of Section 25B and the amendment brought about by Act 36 of 1964 of Section 25B of the Act, has said that Section 25F requires that a workman should be in a continuous service for not less than one year under an employer before that provision applies. While so, present, S.25-B(2) steps in and says that even if a workman has not been in continuous service under an employer for a period of one year, he shall be deemed to have been in such continuous service for a period of one year, if he has actually worked under the employer for 240 days in the preceding period of twelve months.

In the matter of Mohan Lal vs. Management of M/s. Bharat Electronics Ltd., , this Court has said that sub-s.(2) of Section 25B comprehends a situation where a workman is not in continuous service within the meaning of sub-section (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer for a period of 12 months just preceding the date with reference to which calculation is to be made, has actually worked under that employer for not less than 240 days. It is not necessary for the purpose of Sub-s. (2)(a) that the workman should be in service for a period of one year and that his service is continuous service within the meaning of sub-s.(1). If his case is governed by sub-s.(1) then it need not be covered by sub-s.(2). Sub-s.(2) envisages a situation not governed by sub-s.(1) and sub-s.(2) provides for a fiction to treat a workman in continuous service for a period of one year despite the fact that he has not rendered

uninterrupted service for one year but has rendered service for a period of 240 days during the period of 12 Calendar months counting backwards and just preceding the relevant date, being the date of retrenchment.

In the matter of Workman of American Express International Banking Corporation vs. Management of American Express International Banking Corporation reported in, the Court has said that the explanation of Section 25 B is not exhaustive. It does not purport that only those days which are mentioned in the Explanation to Section 25B(2) of the Act should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not worked on those days. The Court said that the expression "actually worked under the employer" is only clarificatory and cannot be used to limit the expanse of the main provision. The expression "actually worked under the employer" is capable of comprehending the days during which the workman was in employment and was paid wages by the employer and there is no reason why the expression should be limited by the explanation.

In the matter of Standard Motor Products of India Ltd. vs. Parthasarthy, , this Court has said that the actual working for less than 240 days would include Sundays and other paid holidays if the workman is in employment of the employer although for less than a period of 12 months.

These decisions in unambiguous words laid down that Sub-s.(1) and (2) of Section 25B comprehends different situations for the calculation of continuous service for not less than one year and continuous service which is less than one year but for 240 days in 12 months preceding the date of termination under an employer.

In Mohan Lal vs. Management of M/s. Bharat Electronics Ltd. , it is said by this Court that before a workman can claim retrenchment not being in consonance of Section 25F of the Industrial Disputes Act, he has to show that he has been in continuous service of not less than one year with the employer who had retrenched him from service.

In Range Forest Officer vs. S.T. Hadimani, - (At Page 26, Para 3), this Court held that *"In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."* *

More recently, in Rajasthan State Ganganagar S. Mills Ltd. vs. State of Rajasthan & Another, , Municipal Corporation, Faridabad vs. Siri Niwas, and M.P. Electricity Board vs. Hariram, , this Court has reiterated the principal that the burden of proof lies on the workman to show that he had

worked continuously for 240 days in the preceding one year prior to his alleged retrenchment and it is for the workman to adduce an evidence apart from examining himself to prove the factum of his being in employment of the employer.

In the light of the aforesaid, **it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The Courts below have wrongly drawn an adverse inference for non production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25B(1) of the Act. In the fact & situation and in the light of the law on the subject, we find that the workman-respondent is not entitled for the protection or compliance of Section 25F of the Act before his service was terminated by the employer.** # As regards non- compliance of Sections 25G and 25H suffice is to say that Witness Vinod Mishra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers.

In the absence of regular employment of the workman, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so called seniority no relief could be given to him for non-compliance of provisions of the Act. The courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the court. In order to entitle the court to draw inference unfavourable to the party, the court must be satisfied that evidence is in existence and could have been proved. As a result of the discussion above, **the appeal is allowed. The orders passed by the Labour Court and the High Court are set aside. However, as a result of the order passed by the Labour Court, if the respondent was employed in service, the wages paid to him shall not be recovered #** . There shall be no order as to the cost.

J