DIRECTOR, FISHERIES TERMINAL DIVISION

v.

BHIKUBHAI MEGHAJIBHAI CHAVDA

(Civil Appeal No. 7463 of 2009)

NOVEMBER 9, 2009

[TARUN CHATTERJEE AND H.L. DATTU, JJ.]

Industrial Disputes Act, 1947:

ss. 2(oo)(bb), 25A and 25F – Seasonal industry – Daily wager – Termination of – Held: Since respondent-workman was employed for seasonal work /temporary period, he cannot be said to have been retrenched in view of s.2(oo)(bb).

ss. 25B, 25F and 25G – Daily wager – Termination of – Workman filed claim – Plea of employer that workman did not work for 240 days during preceding year to constitute continuous service, and therefore, not entitled to protection under the Act – On facts, held: Not tenable – Being a daily wager, the workman had difficulty in having access to all official documents, muster rolls etc. in connection with his service, yet he came forward and deposed in Court, so burden of proof shifted to the employer – Employer did not produce complete records and muster rolls inspite of direction issued by labour court and practically did not challenge the deposition of workman during cross-examination – Retrenchment procedure laid down in s.25G was also not followed.

Termination – Challenge by workman – Contested by employer as being time-barred – Held: There was no unexplained delay on part of workman in approaching the labour court as alleged by the employer -- Workman had first approached the Conciliation Officer – Only when conciliation proceedings failed that the matter was referred to labour court for final adjudication.

Respondent, working as watchman on daily wage basis, was terminated from service. He filed claim before the Labour Court stating that he was terminated without notice and without compliance with the provisions of

A Industrial Disputes Act, 1947. The Labour Court directed the appellant-employer to reinstate respondent with 20% back wages. The order of the Labour Court was affirmed by the High Court.

In appeal to this Court, the appellant contended that
B being a fisheries department, it was only a seasonal industry and therefore Section 25F of the Industrial Disputes Act, 1947 was not attracted and the lower courts erred in directing the re-instatement of respondent. The other contention raised by the appellant was that
C respondent was employed on purely temporary basis, and as he did not work for 240 days during the preceding year to constitute continuous service, he could not claim any protection under the Industrial Disputes Act, 1947. It was also contended by the appellant that the claim of the respondent was time-barred, since he approached the
D labour court about eight years from the date of termination and therefore, the labour court ought not to have entertained the said claim.

Dismissing the appeal, the Court

HELD:1.1. Where a workman is employed for a
E seasonal work or temporary period, the workman cannot be said to be retrenched in view of Section 2(oo) (bb) of the Industrial Disputes Act, 1947. [Para 11] [767-F-G]

1.2. In the normal course, it is the decision of the appropriate Government which is final in determination
F whether the said industry is seasonal in nature. However in the present case, as observed by the labour court and the High Court, nothing was brought on record by the appellant to suppo t their contention that fisheries is a seasonal industry. No order from the Government was
G produced by the appellant to state that the fisheries industry is seasonal. There was no mention of any decision on part of the appropriate Government with regard to declaring fisheries as a seasonal industry. Therefore, the appellant cannot be classified as a seasonal industry. [Para 12] [768-A-C]

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Morinda Co-operative Sugar Mills Ltd. vs. Ram Kishan **(1995) 5 SCC 653, relied on.** A

2.1. In the present case, the evidence produced by the appellant was not consistent. Being a workman on daily wage basis, it is obvious that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. However he has come forward and deposed, so the burden of proof shifted to the employer/appellant to prove that he did not complete 240 days of service in the requisite period to constitute continuous service. The appellant inexplicably failed to produce the complete records and muster rolls, inspite of the direction issued by the labour court to produce the same. In fact there was practically no challenge to the deposition of the respondent during cross-examination. [Para 15] [769-E-F; 770-A] B C

2.2. Based on the pleadings and evidence on record, the labour court came to the conclusion that the services of some of the employees junior to the respondent was continued after the respondent was discharged from its duties. The dates of joining of some of the fellow employees of the respondent were not produced by the appellant. The appellant clearly failed to prove that the services of no junior employee was continued when the services of the respondent was terminated. Thus, the retrenchment procedure laid down in Section 25G was also not followed. The findings on facts by the labour court cannot be termed as perverse and need no interference. [Para 16] [770-F-H] D E F

R.M. Yellatty vs. Assistant Executive Engineer **(2006) 1 SCC 106 and** *Municipal Corporation, Faridabad vs. Siri Niwas* **(2004) 8 SCC 195, relied on.** G

3. There is no merit in the contention raised by the appellant that there was unexplained delay on part of respondent-workman in approaching the labour court. The workman had approached the Conciliation Officer for resolving the dispute and it is only when the conciliation H

A **proceedings failed that the matter was referred to the labour court for final adjudication. [Para 17] [771-A-C]**

Case Law Reference :

(1995) 5 SCC 653	**relied on**	**Para 11**
(2006) 1 SCC 106	**relied on**	**Para 14**
B **(2004) 8 SCC 195**	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7463 of 2009.

From the Judgment & Order dated 30.11.2007 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. C 29355 of 2007.

R.P. Bhatt, Hemantika Wahi, Somanath Pradhan for the Appellant.

K. Sarada Devi, for the Respondents.

The Judgment of the Court was delivered by

D **H.L. DATTU,J.** 1. Leave granted.

2. This is an appeal against the judgment and order of the Gujarat High Court in S.C.A. No. 29355 of 2007 dated 30.11.2007. By the impugned judgment, the court has affirmed the award passed by the labour court, Junagadh, in Reference E Case No. 192 of 1995 dated 14th May, 2007, wherein and whereunder the labour court has directed the employer to reinstate the workman into service with 20% back wages.

3. The facts in brief are : The Fisheries Terminal Department; ('F.T.D.' for short), the appellant herein, had come F into existence sometime in the year 1976. The activities of F.T.D. inter alia consisted of providing landing facilities for catching fish in a clean and hygienic condition and for that purpose, services of daily wage workmen were utilized as and when it was needed. While this practice was going on, the State Government by its order dated 17.10.1988, directed all the departments of the G State Government to discontinue the practice of engaging the services of daily wage workmen and in lieu of it to hire labourers on contractual basis.

4. The claim of the workman before the labour court was that he was employed by the appellant on 1.12.1985 as watchman

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and he was paid daily wages and his presence was also marked in the muster roll. It was further stated, that, his services were terminated without giving notice and without complying with the provisions of Industrial Disputes Act. The stand of the appellant before the labour court was that, the workman was employed on daily wage basis in the year 1986 and the workman had worked till 1988 and in all these years, the workman had worked for 93 days, 145 days and 31 days respectively, and thereby the workman had not worked for more than 240 days in any preceding year. It was also there plea, that, the appellant is a seasonal industry and, therefore, provisions under Section 25F of Industrial Disputes Act is not attracted.

5. The labour court on consideration of the oral and documentary evidence, has concluded that the appellant is an industry, since there is no evidence to show that the appropriate government had declared the appellant as a seasonal industry or the work is performed intermittently. It has also observed, that, the appellant has not produced any documentary evidence to show that the workman had not completed 240 days in the preceding year and was not in service till 1991 and, therefore, adverse inference requires to be drawn that the workman has completed continuous service of 240 days and, accordingly, has concluded that the appellant-employer could not have retrenched the services of the workman without complying with the provisions of Industrial Disputes Act. In view of the aforesaid finding and the conclusion reached, the labour court had directed the appellant to reinstate the respondent with 20% back wages for the period when the respondent was kept out of service.

6. The award passed by the labour court was challenged by the appellant before the High Court. The High Court has endorsed the award passed by the labour court, on the ground that the labour court has rightly come to the conclusion that the appellant has not established by leading cogent evidence that the appellant is not a seasonal industry. It is also observed, that, once it has come in evidence that the workman has completed 240 days of service in the preceding year, then the initial burden is shifted on the employer to rebut the oral evidence of the workman by producing relevant oral and documentary evidence

A and since the appellant failed to produce the same before the labour court, it was justified in concluding that the workman had completed continuous service of 240 days during the preceding year and accordingly had dismissed the writ petition filed by the appellant.

B 7. Being aggrieved by the judgment and order passed by the High Court, the appellant is before us in this appeal.

8. The learned counsel for the appellant submitted, that, the appellant industry is seasonal in nature and, the respondent was employed on a purely temporary basis and, therefore, the onus lies on the respondent/workman to prove that he had in fact C worked for 240 days in the preceding year. It is further submitted that the claim of the workman was time barred and, therefore, the labour court ought not to have entertained the claim made by the workman, since the workman had approached the labour court nearly after eight years from the date he was supposed to D have been terminated from service by the employer.

9. Per contra, the learned counsel for the respondent submitted that the workman immediately after his services were terminated by the employer, had approached the conciliation officer and on failure of the conciliation proceedings, had E approached the State government to make reference of the dispute for adjudication before the labour court and, therefore, it cannot be said that the workman had approached the labour court after a long lapse of time. It is further submitted, that, the workman in his evidence, categorically had made statement before the labour court that he had worked for more than 240 F days in a preceding year and, since that evidence is not rebutted by the employer by producing the relevant oral and documentary evidence which would be in their possession, the labour court was justified in drawing adverse inference against the employer. It was further submitted, that, since the appellant failed to prove G before the labour court by producing necessary evidence that the appellant industry is seasonal in nature, the labour court has not committed any error whatsoever, to accept the oral assertion made by the appellant before the labour court. It is further submitted, since the findings of the labour court cannot be said as perverse findings or based on no evidence, the High Court H

was justified in declining to interfere with the findings of fact by the labour court in a petition filed under Article 227 of the Constitution of India. A

10. From the facts as set out herein above and the submissions made by the learned counsel for the parties, the question that requires to be decided whether the labour court and the High Court was justified in allowing the claim of the workman. It is not the case of the appellant that it is not an industry as defined under Section 2(J) of the Act, but it was its specific stand before the labour court and also the High Court that it is only a seasonal industry and employ workman like the respondent only during fishing season and are relieved at the end of the season and, therefore, the labour court and the High Court were not justified in not only directing the reinstatement of workman into service but also the payment of back wages. This submission of the learned counsel in the appeal requires to be answered with reference to Section 25A of Industrial Disputes Act. The Section is as under: B C D

> "25A. Application of sections 25C to 25E.-(1) Sections 25C to 25E inclusive [shall not apply to industrial establishments to which Chapter VB applies, or--] (a) to industrial establishments in which less than fifty workmen on an average per working day have been employed in the preceding calendar month; or (b) to industrial establishments which are of a seasonal character or in which work is performed only intermittently. E
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> (2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final." F

11. It is now well settled by several judgments of this court, that, where a workman is employed for a seasonal work or temporary period, the workman cannot be said to be retrenched in view of Section 2(00)(bb). It is relevant to take note of what is stated by this court in the case of *Morinda Co-operative Sugar Mills Ltd. vs. Ram Kishan* (1995) 5 SCC 653, it was stated by this court : G

> "....that since the work done by the respondents is only a H

A seasonal work, the respondents cannot be said to have been retrenched in view of what is stated in sub clause (bb) of Section 2(00) of the Act."

12. In the normal course, it is the decision of the appropriate Government which is final in determination whether the said B industry is seasonal in nature. As has been observed by the labour court and the High Court, there has been nothing brought on record by the appellants to support their contention that fisheries is a seasonal industry. There has been no order from the Government which has been produced by the appellants to state that the fisheries industry is seasonal. There has been no C mention of any decision on the part of the appropriate Government with regard to declaring fisheries as a seasonal industry. Therefore, we concur with the finding of the labour court wherein they have concluded that the appellant cannot be classified as a seasonal industry.

D 13. The next contention of the learned counsel for the appellant is that the respondent had not worked for 240 days during the preceding twelve months on daily wages and, therefore, the respondent cannot claim any protection under the provisions of Industrial Disputes Act, 1947. The case of the E respondent before the labour court was that as he had completed working for more than 240 days in a year, the purported order of retrenchment is illegal, as conditions precedent as contained in Section 25F of the Industrial Disputes Act, 1947 were not complied with.

14. Section 25B of the Act defines "continuous service". In F terms of Sub section (2) of Section 25B that if a 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 240 days within a period of one year, he will be deemed to be in continuous service. The respondent claims G he was employed in the year 1985 as a watchman and his services were retrenched in the year 1991 and during the period between 1985 to 1991, he had worked for a period of more than 240 days. The burden of proof is on the respondent to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. The law on this issue appears to be H

now well settled. This court in the case of *R.M. Yellatty vs. Assistant Executive Engineer* [(2006) 1 SCC 106], has observed :

> "However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."

15. Applying the principles laid down in the above case by this court, the evidence produced by the appellants has not been consistent. The appellants claim that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witness produced by the appellant stated that the respondent stopped coming to work from February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also. It has also been observed by the High Court that the muster roll for 1986-87 was not

A completely produced. The appellants have inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, inspite of the direction issued by the labour court to produce the same. In fact there has been practically no challenge to the deposition of the respondent during cross-examination. In this regard, it would be pertinent to mention the observation of three judge bench of this court in the case of *Municipal Corporation, Faridabad vs. Siri Niwas* [(2004) 8 SCC 195], where it is observed:

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> "A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against this contentions. The matter, however, would be different where despite direction by a court the evidence is withheld."

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D 16. It is not in dispute that the respondent's service was terminated without complying with the provisions of Section 25F of Industrial Disputes Act. Section 25G of the Act provides for the procedure for retrenchment. The section reads-

> "25G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

The labour court based on the pleadings and evidence on record has come to the conclusion that the services of some of the employees junior to the respondent was continued after the respondent was discharged from its duties. The dates of joining of some of the fellow employees of the respondent like Mohanbhai, Kalubhai and Nanjibhai were not produced by the appellants. The appellants have clearly failed to prove that the services of no junior employee was continued when the services of the respondent was terminated. Thus, the procedure laid down

in Section 25G has also not been followed. The findings on facts by the labour cannot be termed as perverse and need no interference.

17. It is also the case of the appellants that there is unexplained delay in approaching the labour court in adjudicating the imaginary grievance by the respondent-workman. In our view, there is no merit in this contention. The workman had approached the Conciliation Officer for resolving the dispute between the employer and the employee and it is only when the conciliation proceedings failed that the matter was referred to the labour court for final adjudication.

18. In view of the above discussion, we do not see any good ground to interfere with the impugned order. Accordingly, appeal requires to be dismissed and it is dismissed. No order as to costs.

B.B.B. Appeal dismissed.