
(2023) 08 BOM CK 0069

Bombay High Court

Case No: Writ Petition No.10301 Of 2022

Amit C. Kadam

APPELLANT

Vs

Mumbai Port Authority
And Others

RESPONDENT

Date of Decision: Aug. 22, 2023

Acts Referred:

Constitution Of India, 1950 " Article 12, 14, 16#Industrial Disputes Act, 1947 " Section 2A(2), 2(oo), 25F

Citation: (2023) 08 BOM CK 0069

Hon'ble Judges: N.J. Jamadar, J

Bench: Single Bench

Advocate: Jaiprakash Sawant, Ajai Fernandez, Amit Meharia, Sujith Suresh, Meharia

Final Decision: Dismissed

Judgement

N.J. Jamadar, J

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, heard finally.

2. By this petition the petitioner takes exception to the common judgment and award passed by the Presiding Officer, Central Government, Industrial

Tribunal No. 1 (CGIT) in an Application Nos. CJIT-9, 10 and 11 of 2012 dated 19th February, 2021 whereby the Reference, made under section 2-

A(2) of the Industrial Disputes Act, 1947 (the ID Act, 1947) for adjudication of industrial dispute between the petitioner and respondents No. 2 and 3,

of the one part, and the Mumbai Port Trust, the respondent, of the other part, which arose over the demand for reinstatement in service with full

backwages, continuity in service and all consequential benefits, came to be dismissed.

3. Shorn of unnecessary details the background facts leading to this petition can be stated as under:-

3.1 Mumbai Port Trust, respondent, was a Port Trust established under the Major Port Trust Act, 1963 and now an Authority under Major Port

Authorities Act, 2021. The respondent is a "State" within the meaning of Article 12 of the Constitution of India. In response to a public notice

issued by Assistant Chief Medical Officer (Hospital) of respondent No. 1, the petitioner had applied for the post of X-ray Technician (Jr.). The

petitioner had the necessary qualification prescribed under Mumbai Port Trust Employees (Recruitment, Seniority and Promotion) Regulations, 2010

for being appointed to the said post.

3.2 The petitioner claimed to have undergone a regular selection process. He was interviewed and declared successful, by the Service Selection

Committee. The petitioner was made to undergo pre-appointment medical examination. Post certification of medical fitness, the petitioner was

appointed as X-ray Technician (Jr.) with effect from 5th April, 2007.

3.3 The petitioner alleged, the respondent did not pay full wages and deprived the petitioner of the rights and benefits admissible under various civil and

labour welfare legislations. The respondent No. 1 gave artificial breaks in service after every six months and thereby indulged in unfair labour

practices. As a part of such unfair labour practice, the petitioner was given break in service on 4th October, 2007 and reappointed on 18th February,

2008. Thereafter, the petitioner's services were terminated on 17th August, 2008; only to be appointed on 12th September, 2008. The petitioner

claims in the aforesaid fashion, the petitioner was made to serve with the respondent No. 1 till 9th September, 2011, with artificial breaks in service, so

as to deprive the petitioner of the benefits of permanency.

3.4 The petitioner claimed he was appointed to substantive post after following the prescribed selection process in accordance with the recruitment

rules. Respondent No. 1 resorted to a subterfuge of appointment on locum basis to exploit the petitioner's labour. Two of the similarly

circumstanced employees were, however, made permanent. Hence, the petitioner initially approached the Conciliation Officer. As conciliation failed,

petitioner raised industrial dispute under section 2A(2) of the ID Act seeking reinstatement in service w.e.f. 11th September, 2011 with continuity in

service, full backwages and all the consequential benefits.

4. The respondent No. 1 contested the petitioner's claim. The substance of the resistance put forth by the respondent No. 1 was that the petitioner

was appointed on a purely temporary basis, as a locum. When the petitioner was appointed on locum basis, there was a ban on filling up of the

vacancies. In order to meet the exigency of the situation on account of ban on recruitment X-ray Technician (Jr.) were appointed on locum/temporary

basis, expressly mentioning in the appointment order that the term of service of the persons so appointed on locum basis would be six months or till

filling up the post on regular basis, whichever was earlier.

5. Respondent No. 1 further contends it was on 22nd March, 2010 that the Ministry of Shipping approved two posts of X-ray Technician (Jr.) and two

posts of Laboratory Technician (Jr.). Thereafter, the petitioner did appear for the examination. However, the petitioner could not secure requisite

minimum marks and, therefore, was not called for practical test and viva-voce.

Suppressing the said facts, the petitioner raised the industrial dispute.

The respondent No. 1 thus denied that the petitioner was deliberately deprived of the permanency and was discriminated against.

6. The learned Presiding Officer, CGIT recorded the evidence of the petitioner and that of Administrative Officer of respondent No. 1. After

appraisal of the evidence adduced and documents tendered for his perusal, the learned Presiding Officer was persuaded to dismiss the complaint

holding, inter alia, that the petitioner was appointed on a purely temporary basis. The termination of the services of the petitioner did not amount to

and, therefore, conditions stipulated in section 25F of the ID Act, 1947 were not required to be complied with and, thus, the

petitioner was not entitled to the relief of reinstatement in service and consequential benefits.

7. Being aggrieved, the petitioner has invoked the writ jurisdiction.

8. I have heard Mr. Jaiprakash Sawant, learned counsel for the petitioner, and Mr. Ajai Fernandez, learned counsel for respondent No. 1 at some

length. With the assistance of the learned counsel for the parties, I have perused the material on record including the impugned judgment and award.

9. Mr. Sawant, learned Counsel for the Petitioner, would urge that the learned Presiding Officer CGIT committed an error in appreciating the case of

the Petitioner. The fact that the Petitioner was appointed for years together by following selection procedure prescribed under the Recruitment

Regulations 2001. It was incontrovertible that the Petitioner had put in more than 240 days in each of the six years of service with the Respondent No.

1., and therefore, the learned Presiding Officer, CGIT was not at all justified in holding that the termination of the services of the Petitioner did not

amount to retrenchment, and, thus protection envisaged by Section 25-F of the Industrial Disputes Act, 1947 was not available. Laying emphasis on

the indisputable facts about the appointment of the Petitioner pursuant to selection by the Selection Committee in the manner ordained by Recruitment

Regulations 2010 and the artificial breaks in service given by the employer, Mr. Sawant would urge that the case is squarely governed by the

protective umbrella of Section 25-F of the Act, 1947. Since non-compliance of the said statutory mandate is indisputable, Mr. Sawant would urge, the

Petitioner could not have been denied the reliefs of reinstatement and consequential benefits.

10. To lend support to the submission that once the retrenchment is found foul with the provisions of Section 25-F of the Act, 1947, a workman cannot

be deprived of the admissible reliefs, Mr. Sawant placed reliance on judgment of the Supreme Court in the case of Anoop Sharma V/s. Executive

Engineer, Public Health Division No. 2010 (II) CLR 1 , Panipat Haryana¹ and S.G.Chemical and Dyes Trading Employees' Union v/s.

S.G.Chemicals and Dyes Trading Ltd. And Anr. 1986 LAB I.C.863 and on the judgment of this Court in the case of P.M.More v/s Presiding Officer,

CGIT No.1 and Anr. 2001-III-LLJ (suppl) 689.

11. Mr. Fernandes, learned Counsel for Respondent No.1 countered the submissions of Mr. Sawant. According to Mr. Fernandes, the aforesaid

submissions based on the provisions of 25-F of the Act, 1947 do not merit any consideration as the fact that employment in question is a public

employment is conveniently lost sight of by the Petitioner. Mr. Fernandes would urge that the learned Presiding Officer, CGIT was wholly justified in

non-suiting the Petitioner by following the line of decisions starting from the Constitution Bench judgment of the Supreme Court in the case of

Secretary, State of Karnataka and Ors. v/s Umadevi (3) and Ors. (2006) 4 SCC 1.

12. In the case at hand, according to Mr. Fernandes, it is incontestable that the Petitioner came to be appointed as Jr. Technician on 'ad hoc' basis

basis. Appointment orders indicated in clear and explicit terms that the appointment was to be for the period of six months or till the filling up of the

regular vacancy, whichever was earlier.

13. Mr. Fernandes laid emphasis on the fact that the Petitioner admitted in no uncertain terms that he had accepted the temporary appointment after

clearly understanding the terms of the appointment. Since the appointments on 'ad hoc' basis were made by the Respondent No.1 as there was

a bar imposed by the Ministry of Shipping upon recruitment of the staff, the appointment on 'ad hoc' basis was to meet the exigency of the

situation. Moreover, after the Ministry of Shipping gave approval for filling up the post by direct recruitment, the Petitioner did appear for the

examination, but could not succeed. In this state of affairs, according to Mr. Fernandes, the termination of the services of the Petitioner upon the

completion of the contract of appointment on purely temporary basis, can in no case be termed as retrenchment. It was a termination simpliciter of the

service of an employee appointed for a fixed term, and, therefore, sub-clause (bb) of Clause (oo) of Section 2 of the Act, 1947 came into play and the

termination would not amount to retrenchment.

14. The aforesaid submissions now fall for consideration. To start with, it may be appropriate to note few uncontroverted facts. Incontrovertibly, the

Petitioner came to be appointed for the first time under a letter dated 26 March 2007. The Petitioner joined on 5 April 2007. The appointment letter

and the subsequent order dated 10 April 2007 record that the appointment of the Petitioner to the post of X-Ray Technician (Jr.) was on

locum basis. Secondly, the said appointment letter and the subsequent appointment letters, as well, contained a specific clause that the

appointment was purely on locum basis on a consolidated payment of Rs.8,800/-per month for a maximum period of six months or till the filling of the

post of regular post, which was earlier. Thirdly, the said appointment came to be offered after the Petitioner was selected by the Services Selection

Committee post interview and practical test. Fourthly, the fact that the services of the Petitioner were terminated after few months and the Petitioner

came to be reappointed on the same terms and conditions is also incontestable. Fifthly, the services of the Petitioner came to be finally terminated vide

letter dated 9 September 2011 with effect from 10 September 2011. Sixthly, it is indisputable that the Petitioner had appeared for the regular

recruitment process and did not succeed therein. Lastly the non-compliance of the mandate contained in Section 25-F of the Act, 1947 is also not in

contest.

15. The controversy revolves around the questions as to whether the termination of the services of the Petitioner with effect from 10 September 2011

constitutes retrenchment within the meaning of Section 2(oo) and, consequently, the applicability of the provisions of Section 25-F of the Act, 1947.

16. Retrenchment is defined under clause (oo) of Section 2 as under :

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a 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 the workman as a result of the non-renewal newal 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.

17. On a plain reading, retrenchment implies termination of the services of a workman for any reason whatsoever, otherwise than as a consequence

of disciplinary action. Sub-clauses (a) to (c) carve out the exceptions. Sub-clause (bb), with which we are primarily concerned with the case at hand,

takes the termination of the services of a workman as a result of the non-renewal of the contract of employment or a contract itself being terminated

pursuant to a stipulation contained therein, out of purview of retrenchment. If the termination falls within the excluded category envisaged by sub-

clause (bb), it would not amount to retrenchment and, thus, the employer would not be obligated to satisfy the conditions stipulated under Section 25-F

of the Act, 1947.

18. At the hub of the controversy is whether the termination in question falls within the ambit of clause (bb). For an answer, it is necessary to keep in

view the nature of the employment and the post on which the Petitioner came to be appointed (on locum basis). Mr. Sawant would urge that the

Petitioner came to be appointed on a substantive post by following rigorous selection process by the Services Selection Committee constituted under

Recruitment Regulations, 2010. It was certainly not a backdoor entry to fall within the category of cases governed by the Constitution Bench judgment

in the case of Umadevi (supra).

19. The aforesaid submissions is required to be appreciated in the backdrop of the fact that the circular, inviting applications which preceded the

appointment which preceded the appointment of the Petitioner clearly stipulated that the applications were invited to fill up vacancy of Technician on

locum basis. As noted above, the appointment orders also record the said fact explicitly. The reason for appointment on temporary basis, ascribed by

the Respondent No.1, was that there was no sanction by the concerned Ministry to fill up the posts on regular basis. The said claim of Respondent

No.1 finds support in the proposal dated 19 September 2007 forwarded on behalf of Respondent No.1 to the Secretary to the Government of India,

Ministry of Shipping seeking permission for filling of entry level post under annual contract recruitment plan 2006-2007 and the approval granted by the

Ministry of Shipping vide letter dated 22 March 2010 whereby the Port Trust was permitted to fill up entry level post under annual contract

recruitment plan for the years 2006-07 and 2007-08. These documents lend support to the contention of Respondent No.1 that on account of the ban

on the recruitment and awaiting approval of the Ministry of Shipping, the Respondent No.1 was constrained to fill up the post on temporary basis.

20. At this juncture, the recourse to the provisions contained in Mumbai Port Trust Employees (Recruitment, Seniority and Promotion) Regulations,

2010 would be advantageous. Regulation

14 governs the appointment of a candidate on ad-hoc basis. Relevant part of Regulation 14 reads as under :

14] CONSIDERATION OF RECOMMENDATIONS OF SERVICES SELECTION COMMITTEE AND AD-HOC APPOINTMENTS :-

All appointments by direct recruitment shall be made by the Appointing Authority on the recommendations of the concerned Services Selection

Committee.

Provided that it shall be open to the Appointing Authority, for reasons to be recorded in writing, not to accept the recommendations of Services

Selection Committee;

Provided further that where the Appointing Authority is an authority subordinate to the Chairman and the Authority disagrees with such

recommendations in any case, it shall record its reasons for such disagreement and submit the case to the Chairman who shall decide the same;

Provided also that in the case of a purely temporary post, a leave vacancy or a vacancy earmarked for direct recruitment requiring immediate filling

up, the Chairman may appoint a person who is eligible to fill the vacant post for a period of six months at a time and not exceeding one year on ad hoc

basis subject to the condition that:

(1) Ad-hoc appointment, where unavoidable, should be made only strictly subject to fulfilling the qualifications, experience provided in the RRs.

(2) Total period of appointment to a temporary post will not exceed the tenure of the post.

(3) In other cases the temporary appointment should be replaced by a regular appointment from the select list as soon as possible.

21. The aforesaid regulation, if properly construed, would show that even for making a temporary appointment, the Services Selection Committee

constituted thereunder was required to carry out selection process. Thus, the thrust of the submission on behalf of the Petitioner that the Petitioner

came to be appointed after following proper selection process does not advance the cause of the Petitioner to the extent desired by the Petitioner. The

fact that the Petitioner has undergone the selection process before he came to be appointed on locum basis in the face of the aforesaid prescription in

the Regulations 2001, does not necessarily lead to an inference which was sought to be drawn by Mr. Sawant that the Petitioner was appointed to a

substantive post by following regular selection process. Conversely, an inference becomes inescapable that under the recruitment regulations the

Competent Authority was empowered to appoint candidates on temporary post and such appointments were made after following the procedure of

selection prescribed therein.

22. Mr. Sawant would, however, urge that the Petitioner having been selected by following proper selection procedure and found eligible and suitable

in all respect could not have been designated as a temporary employee and the mere fact that the appointment orders stipulated a period of

appointment when the work performed by the Petitioner was available all along does not change the nature of the appointment. Such artificial break in

service so as to deprive the employee from the benefits otherwise available to a permanent employee has been judicially recognized to be an unfair

labour practice, urged Mr. Sawant.

23. Mr. Sawant placed reliance on the observations of the Supreme Court in the case of Bhilwara Dugdh Utpadak Sahakari S. Ltd. V/s. Vinod Kumar

Sharma (dead) by Lrs and Ors. 2001 III CLR 386 wherein the Supreme Court enunciated that labour statutes were meant to protect the

employees/workmen because it was realised that the employers and the employees are not on an equal bargaining position. Hence, protection of

employees was required so that they may not be exploited. However, a new technique of subterfuge has been adopted by some employers in recent

years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their employees but

are the employees/workmen of a contractor or that they are merely daily wage or short term or casual employees when in fact they are doing the

work of regular employees.

24. Reliance was also placed by Mr. Sawant on a judgment of this Court in the case of Keru Kisan Rokade V/s. Geoffery Manners & Co. Ltd. Nasik

2011-II-LLJ-408 (Bom), wherein this Court having found that the workman therein was continued in service from 4 August 1984 to 4 September

1989, with intermittent breaks, and the appointment orders contained a stipulation of a fixed term, this Court observed that the claim of the employer

that the appointments are for a fixed term is unsustainable. The workman has been continued in service over many years by continuously issuing

appointment orders for a month or two. There was evidence on record to indicate that work was available with the Respondent. In any case, the

Petitioner "workman had completed 240 days in service in the 12 preceding calendar months. The appointment letters were merely a ruse of the

employer to get out of the clutches of Section 25-F of the Act, 1947. Holding thus, this Court repelled the submission on behalf of the employer that

the employment of the workman was on a contractual post and, therefore, the provisions of Section 25-F had no application.

25. The aforesaid pronouncements, as is evident, govern a completely different fact situation. The observations of the Supreme Court in the case of

Bhilwara Dugdh Utpadak Sahakari S. Ltd. (supra) were made in the context of the subterfuge resorted to by the employer of showing the employees

as the employees of a contractor. The judgment of this Court in the case of Keru Kisan Rokade (supra) was not rendered in a case of a public

employment. If in a given case, an employer is shown to have resorted to the stratagem of issuing appointment orders for a short period of time, giving

artificial breaks for a couple of days and reappointing the very same employee to perform the work of perennial nature for years together, the Court

would be justified in penetrating the stratagem. However, when the employment in question is a public employment governed by the Recruitment

Rules and the appointments are made on temporary post in conformity with the power thereunder, different considerations come into play.

26. Mr. Sawant made an endeavour to wriggle out of the situation by placing reliance on the decision of the Supreme Court in the case of Anoop

Sharma (supra) wherein it was enunciated that the judgment of the Supreme Court in the case of Umadevi (supra) has no bearing on interpretation of

Section 25-F of the Act and the employers obligation to comply with the conditions enumerated in that Section. The Supreme Court, inter alia,

observed as under :

19] The judgment of the Constitution Bench in Secretary, State of Karnataka V/s. Uma Devi (supra) and others decisions in which this Court

considered the right of casual, daily wage, temporary and ad-hoc employees to be regularized/continued in service or paid salary in the regular time

scale, appears to have unduly influenced the High Court's approach in dealing with the Appellant's challenge to the award of the Labour

Court. In our view, none of those judgments has any bearing on the interpretation of Section 25-F of the Act and the employer's obligation to

comply with the conditions enumerated in that Section.

20] At the cost of repetition, we consider it necessary to mention that it was not the pleaded case of the respondent before the Labour Court and even

before the High Court that the appellant was engaged/employed without following the statutory rules or Articles 14 and 16 of the Constitution and that

was the basis for discontinuing his engagement. Therefore, the High Court was not justified in relying upon the alleged illegality of the engagement

/employment of the appellant for upsetting the award of reinstatement.

(emphasis supplied)

27. I am afraid the aforesaid pronouncement is of any assistance to the Petitioner's case. In the said case, the Supreme Court found that a clear

case of retrenchment and non-compliance of the mandate contained in Section 25-F of the Act was made out. In the case at hand, as noted above,

since the appointment of the Petitioner was made to fill up a temporary vacancy on account of the ban on regular recruitment and to meet the

exigency of the situation which thereby arose, on a post which was required to be filled up in accordance with the Recruitment Regulations 2010 by

offering public employment and carrying out the structured selection process, the termination of the services of the Petitioner post filling of the regular

vacancy by following prescribed selection process can fall only within the ambit of Sub-clause (bb) of Section 2 (oo) of the Act, 1947.

28. At this stage, the fact that the Petitioner conceded in the cross-examination that he was fully aware that the applications were invited to fill up the

vacancy on locum basis, he understood the terms and conditions on which he was offered appointment for a term of six months or till the filling of the

regular vacancy clearly and that he had, in fact, appeared for the recruitment process carried out to fill up a regular vacancy and was not called for

practical test as he had not secured the requisite marks, in the written test firmly rule out any unfair labour practice or victimization on the part of the

employer. The termination of the services of the Petitioner on 10 September 2011 followed the selection of the candidates who were found successful

in the selection process as is evidenced by the Minutes of the meeting dated 18 August 2011.

29. Resultantly, viewed from any perspective, neither a case of retrenchment, without following the mandate contained in Section 25-F of the Act, nor

unfair labour practice or victimization is made out. The learned Presiding Officer, CGIT thus committed no error in dismissing the complaint.

30. The conspectus of aforesaid consideration is that no interference is warranted in the impugned order in exercise of writ jurisdiction.

Hence, the following order :

ORDER

1. The Writ Petition stands dismissed.

2. Rule discharged.

3. In the circumstances, the parties shall bear their respective costs.