

(2005) 01 BOM CK 0087

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 2574 of 1992

Deputy Conservator of Forest,
Wani Forest Division

APPELLANT

Vs

Santosh Suryabhanji Nimbalkar
and Another

RESPONDENT

Date of Decision: Jan. 11, 2005

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Industrial Disputes Act, 1947 - Section 33C(2)

Citation: (2005) 4 BomCR 346 : (2005) 2 MhLJ 543

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: M.P. Badar, for the Appellant; S.T. Harkare, for the Respondent

Final Decision: Allowed

Judgement

B.P. Dharmadhikari, J.

By this petition under Articles 226 and 227 of the Constitution of India, Deputy Conservator of Forests, an officer of Government of Maharashtra, challenges order dated 26-6-1992 passed by Labour Court, Amravati in Application IDA No. 4 of 1989 whereby the said Labour Court found the respondent entitled to difference of wages and order dated 15-7-1992 by which the Labour Court appointed its Senior Clerk as Commissioner to calculate the amount of difference payable to the respondent and final order dated 30th September, 1992 by which after accepting the report of the said Commissioner, the Labour Court directed the petitioner to pay an amount of Rs. 21,392.75 ps. to the respondent.

2. It appears that the present respondent filed application u/s 33-C(2) of Industrial Disputes Act before the Labour Court, Amravati vide IDA Case No. 4 of 1989 and in it he contended that in response to advertisement for regular recruitment to the post

of Surveyor he applied and he was appointed after scrutiny on 7-1-1985 as a Surveyor. He further contended that though he has been continuously working as a Surveyor, he has not been paid salary in pay scale of Rs. 290-540 and on that account he claimed difference in payment of salary for the period from 7-1-1985 to January, 1988. The said application was opposed by the present petitioner who points out that the respondent was never appointed as Surveyor and he was engaged on daily wages and was infact assisting the Surveyors. They contended that he filed ULP Complaint No. 55 of 1988 before the Industrial Court, Amravati claiming regularisation and in such circumstances, no direction u/s 33-C(2) could have been issued and the application was not maintainable. The parties have led evidence before the Labour Court. The respondent employee examined himself while the petitioners examined their Assistant Conservator of Forests. The learned Labour Court after considering the documents on record recorded findings that the respondent was working as Surveyor and he was also qualified for that post. It therefore, held that he is entitled to the payment of salary as regular Surveyor. As already stated above, this order finding entitlement of the respondent was passed on 26-6-1992 and the employee was directed to deposit the cost of Rs. 500/- towards charges of the Commissioner. Respondent accordingly deposited those charges on 15-7-1992 and the Labour Court appointed its Senior Clerk as Commissioner to calculate the amount of difference. The Senior Clerk of the Court accordingly furnished his report and that report has been accepted by the Labour Court on 30th September, 1992 by which the Labour Court directed the petitioner to pay an amount of Rs. 21,392.75 ps. to the present respondent. The present writ petition has been admitted on 30-11-1992 and interim stay was granted in favour of the petitioner. The said interim order is operating even today.

3. I have heard learned Advocate Mr. Badar for the petitioner and learned Advocate Harkare for the respondent, Advocate Badar places on record an order dated 13-5-1997 which has been passed by the petitioner subsequent to order of Industrial Court in ULP Complaint No. 55 of 1988. As per these orders the respondent has been appointed as Surveyor in regular pay scale w.e.f. 1st April, 1988. Advocate Badar further states that the respondent has been later on regularised as Surveyor and is getting salary in appropriate pay scale, He contends that before that there was no order appointing respondent as Surveyor and in fact the respondent was appointed by order dated 9-1-1985 on daily wages w.e.f. 7-1-1985 to assist in Survey section under the guidance of the Surveyor. He contends that the respondent never worked as Surveyor. He further states that the proceedings u/s 33-C(2) are in the nature of execution and unless and until there is previous adjudication declaring entitlement of the said respondent to regular pay scale of Surveyor the Labour Court could not have been taken cognizance of the matter u/s 33-C(2). He contends that respondent ought to have filed appropriate proceedings and should have obtained declaration that though not appointed as Surveyor, work of superior category i.e. Surveyor is being taken from him and he is

not being paid wages for that work. He contends that the learned Labour Court has overlooked this aspect of the matter, He places reliance upon judgment of the Hon"ble Apex Court reported at 1999(1) CLR 377, Union of India and Ors. v. K. V. Baby and Anr. and another judgment of the Hon"ble Apex Court reported at 2002(1) S.L.R. 751, State of Maharashtra v. Assn. of Court Stenos. He contends that in Government service an employee cannot be given salary and pay scale merely because he is performing same kind of work as that of regular employee.

4. As against this, Advocate Harkare contends that the Labour Court has recorded positive findings of fact that respondent is working as Surveyor and is therefore, entitled to salary as Surveyor. He contends that the Labour Court has found that the respondent is qualified for that work and has therefore, ordered payment of amount of difference to him. He relies upon the judgment reported at 2003(3) CLR 25, State of Haryana and Anr. v. Tilak Raj and Ors. To show that as he has proved the equivalence and has placed relevant material before the Labour Court, the Labour Court was justified in giving salary in pay scale to the said respondent. According to him, no interference is called for in writ petition. He points out that the grievance made by the petitioner that in application only amount of Rs. 10,970.90 has been mentioned is incorrect because in the schedule filed along with said application the amount claimed has been shown as Rs. 21,179.25 and later on he has amended the said application and incorporated the said figure in place of the amount mentioned in prayer clause of that application. He further states that by order dated 13th May, 1997 he has been regularised as Surveyor from 1st April, 1988, but infact, he should have been regularised as Surveyor from 7-1-1985.

5. Perusal of the order of appointment dated 9-1-1985 reveals that the petitioners never appointed the respondent as Surveyor and he was directed to assist in Survey section under the guidance of Surveyor. Thus, it cannot be said that the respondent has been appointed against the post of Surveyor in Government service by this order. In spite of this the respondent has made statement in his application u/s 33-C(2) before the Labour Court that he was appointed as Surveyor and he was doing the work of Surveyor continuously. Perusal of the order passed by learned Labour Court reveals that the Labour Court has tried to consider entitlement of respondent in the background as pleaded by him. The Labour Court has considered the case of the Surveyor on daily wages and has held that such Surveyor appointed on daily wages is entitled to the regular salary of Surveyor i.e. permanent Surveyor who happens to be the Government servant. Thus, the Labour Court has not considered whether the person who is not appointed as a Surveyor in Government service and who has been appointed to assist in Survey section under the guidance of senior, i.e. as Assistant to such Surveyor, can claim regular salary of the Surveyor. It is to be noticed that the Government service is not only matter of contract between parties and the post or the right to occupy Government post is question of status. Recruitment to permanent post in Government service is always governed by relevant rules and the person who has not entered the services in compliance with

those rules can have no right to the post in Government service. Perusal of the order dated 9-1-1985 clearly reveals that the respondent was not appointed in any government service, In such circumstances the finding recorded by the Labour Court that respondent in fact, worked as Surveyor cannot confer upon the respondent right to claim salary in pay scale applicable to regular permanent surveyor. The Labour Court has not considered the said issue at all and thus there is failure to exercise jurisdiction by the Labour Court while allowing application u/s 33-C(2). Perusal of ruling reported at 2003(3) CLR 25 on which reliance has been placed by advocate Harkare reveals that the Hon"ble Apex Court was considering the question of application of doctrine of equal pay for equal work and the judgment of the Division Bench of Punjab and Haryana High Court directing the State of Haryana to pay minimum pay in the scale of pay applicable to the regular employees was challenged before it. The respondents in the said appeal before the Hon"ble Apex Court were appointed as helpers on daily wages in Haryana Roadways and they filed writ petition claiming regularization and in view of their long service and/or that they should be paid same salary as is paid to regular employees since the nature of the work done by them was similar. The High Court granted them relief only to the extent of minimum pay scale with dearness allowance alone and the Hon"ble Apex Court has in paragraph No. 10 found that the scale of pay is attached to a definite post and in case of daily wager, he holds no post, the respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowance. The said paragraph reads as under :

"10. A scale of pay is attached to a definite post and in case of a daily wager, he holds no post. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

"Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identify between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula".

Thus, from perusal of the said paragraph itself it is apparent that if the respondent wants to invoke protection of equal pay for equal work, he ought to have shown that he was appointed as regular Surveyor against the post. Here, the order of appointment itself shows that he was never appointed as Surveyor and further that he was appointed on daily wages. In such circumstances, doctrine of "Equal Pay for

"Equal Work" is not at all directed in the facts and circumstances of the case.

6. Advocate Badar has relied upon two judgments of the Hon'ble Apex Court mentioned above, to substantiate the same facet of the argument which has been commented above in the light of judgment of the Hon'ble Apex Court on which advocate Harkare relies. Second case on which advocate Badar relies i.e. 1999(1) CLR 377, Union of India and Ors. v. K.V. Baby and Anr. also shows that individual contract of employment between parties which determines nature either engagement is also important and the employees who have worked on daily wages or who are not working as regular employees as they are not absorbed as such, are not entitled to pay scale to which regular employees are entitled, Paragraph No. 3 of this judgment reads as under :

"3. The respondents however, contended that pending their absorption they must be paid the same salary as regular employees as they are doing similar work. They have also contended that the Railways have the same disciplinary control and power over them as over their regular employees. The Tribunal has accepted this contention and granted them the same emoluments as the regular employees. However, persons who are engaged on the basis of individual contracts to work on a commission basis cannot by the very nature of their engagement, be equated with regular employees doing similar work. Their appointment and mode of selection, their qualifications cannot be compared with regular employees. The Recruitment Rules and service conditions of Southern Railways do not apply to these employees, Since they are not regular employees on the cadre of Railway Catering Service, we fail to see how they can contend that they are subject to the disciplinary jurisdiction of the Railway Authorities under the relevant Rules. Their responsibilities cannot be equated with the responsibilities of regular employees. Our attention has been drawn in this connection to a decision in the case of State of Haryana Vs. Jasmer Singh and others, (to which one of us was a party), where this Court has, for reasons set out therein, declined to equate daily-rated workers with regular employees for similar reasons. In a subsequent case of State of Haryana Vs. Surinder Kumar and others, employees who were engaged on a contract basis were not considered as on a par with regular employees for the purposes of their salary and other benefits. In the case of T.I. Madhavan, Gen. Secy., All India Railway Catering Services Workers' Union Vs. Union of India (UOI) and Others, also, this Court, although it did not go into this question. Directed that the salary of a regular employee can be paid to such employees only from the date of their absorption. In the premises, the appeals are allowed and the impugned judgment of the Tribunal is set aside. However, the respondents are entitled to absorption in the same manner as directed in T.I. Madhavan, Gen. Secy., All India Railway Catering Services Workers' Union Vs. Union of India (UOI) and Others, and will be entitled to salary as regular employees from the date of their absorption."

Thus, it is to be seen that the Labour Court could not have granted any relief to the respondent by holding that merely because he is working as Surveyor he is entitled to the pay scale as Surveyor.

7. Here, the services of respondent have been regularised by order dated 13-5-1997 in pursuance of the directions of the Industrial Court w.e.f. 1st April, 1988 as Surveyor. This order of the Industrial Court which is in favour of the respondent is not produced on record. However the order dated 13-5-1997 implementing it is available on record. The respondent has not challenged the said order and thus, he has accepted that he has become Surveyor in government service from 1-4-1988. Thus, he has been absorbed in government service as Surveyor from 1st April, 1988, in view of this it cannot be held that he is entitled to the salary of the Surveyor for any period prior to 1-4-1988. Thus, the directions of the Labour Court holding that he is entitled for difference of salary for the period from 7-1-1985 to January, 1988 is unsustainable.

Under these circumstances the impugned order dated 26th June, 1992, at Annexure-4 with the petition, is quashed and set aside. The writ petition is allowed. Rule made absolute. No order as to costs.