

(2018) 10 BOM CK 0176

Bombay High Court

Case No: Writ Petition No.11647 Of 2018

Tanaji Genba Pawge

APPELLANT

Vs

Mumbai Vegetable
Market Unprotected
Workers Board, Navi
Mumbai And Anr

RESPONDENT

Date of Decision: Oct. 30, 2018

Acts Referred:

Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969 " Section 4, 13, 19#Payment of Wages Act 1936 " Section 2(i)(vi)

Citation: (2018) 10 BOM CK 0176

Hon'ble Judges: R. M. Savant, J; Nitin W. Sambre, J

Bench: Division Bench

Advocate: A K Jalisatgi, Meelan Topkar, R M Shinde,

Final Decision: Allowed

Judgement

R. M. Savant, J.

1. Rule, having regard to the nature of the relief sought, made returnable forthwith and heard.

2. The sole question that arises for our consideration in the above Writ Petition is whether the Petitioner is entitled to the payment of suspension

allowance during pendency of the domestic inquiry against him by the Respondent No.1, Board.

3. To address the said issue a few facts are required to be narrated. The Petitioner was registered with the Respondent No.1, Board sometime in

May 1994 and was allotted to Toli No.11A/B/1. Sometime in the year 2002 the Petitioner was appointed as Mukadam of the said Toli. The Petitioner

was served with a show cause notice dated 06/06/2018 calling upon the Petitioner to show cause as to why departmental proceedings should not be

initiate against him and the Petitioner be suspended from service. The Petitioner was thereafter issued a suspension order on 14/06/2018. The

Petitioner has been under suspension ever since then. The Petitioner vide his letter dated 19/06/2018 requested the Respondent No.1 to pay him the

suspension allowance. The Petitioner thereafter sent a reminder on 31/07/2018, however, in spite of the same it is the case of the Petitioner that he is

not being paid the suspension allowance. The Petitioner has been issued a charge sheet on 23/08/2018 and at present departmental proceedings are

pending against him. We are informed that the inquiry has commenced against the Petitioner, however the said fact is sought to be disputed by the

learned counsel for the Petitioner on the ground that the said inquiry is only one which is referable to Section 13 of the Maharashtra Mathadi, Hamal

and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969 (The Mathadi Act, for short) and not Clause 34 of the Scheme.

4. On behalf of the Respondent No.1 an affidavit in reply has been filed. In the said reply the factum of the Petitioner being registered with the

Respondent No.1 Board and being a part of Toli No.11A/B/1 has been stated. It is further stated that a complaint was received on 29/05/2018 by

the Respondent No.1 Board in which complaint allegation was made against the Petitioner in respect of misappropriation of funds (wages and levy

of members of the Toli). The said misappropriation was alleged to be the tune of Rs.30,22,720/-. The allegations were looked into and it is thereafter

that a decision was taken to commence departmental proceedings against the Petitioner and one Maral who were then issued the charge sheet and

the inquiry was started against them. The claim of the suspension allowance of the Petitioner is denied. It is stated that there is no such right which

can be claimed by the Petitioner under the provisions of the Mathadi Act or the Scheme framed thereunder.

5. Heard the learned counsel for the parties.

6. The learned counsel appearing on behalf of the Petitioner Shri Jalisatgi would submit that the manner in which the scheme has been framed would

indicate that in so far as pool workers are concerned, the employer is the Board and if that be so then the Board which has the power to suspend is

liable to pay the suspension allowance. In support of the said contention, reliance was sought to be placed on various clauses of the Scheme. It was

also submitted on behalf of the Petitioner that since there is a power conferred on the Board to suspend, necessary corollary to the same would be

that the Board would be liable to pay the suspension allowance. It was further submitted by the learned counsel for the Petitioner that the stand of the

Board that the Petitioner is not entitled to the suspension allowance as there is no provision either in the Act or in the Scheme cannot be accepted.

The learned counsel for the Petitioner in support of the aforesaid contentions would seek to place reliance on the Judgment of the Apex Court

reported in AIR 1968 SC 800 in the matter of Balvantrai Ratilal Patel v/s. State of Maharashtra wherein the Apex Court has held that if there is a

provision, then the payment during suspension would be governed by the provision but if there is no such provision, the public servant will be entitled to

his full emoluments during the period of suspension.

7. Per contra, the learned counsel appearing for the Respondent No.1 "Board Shri Topkar would draw our attention to such of the clauses of the

Scheme which according to him unequivocally demonstrate that for the implementation of the Scheme the obligation is that of the employer and not of

the Board. The learned counsel for the Respondent No.1 would submit that various aspects which are comprised in the Scheme have been

incorporated on the basis of the suggestions of the employers and the Unions. However, in so far as the suspension allowance is concerned, there is

no such provision in the Scheme and hence the same has been advisedly kept out. It was the submission of the learned counsel for the Respondent

No.1 that once there is no right either under the Act or under the Scheme, then the Petitioner cannot lay a claim to the payment of suspension

allowance.

8. We have heard the learned counsel for the parties at some length. We have also considered the rival contentions. As indicated above, the issue

which is posed before us is whether the Petitioner is entitled to the payment of suspension allowance. It is trite that the object of payment of

suspension allowance is that the employee who is under suspension pending inquiry is able to sustain himself during such inquiry as in a given case the

inquiry would take its own time to culminate in an inquiry report. It is in the background of the aforesaid legal position that the facts of the instant case

would have to be considered. As indicated above, the learned counsel for the parties have drawn our attention to the various facets of the Scheme in

question which has been framed under Section 4 of the Mathadi Act. One of the features of the Scheme is of classifying the workers into "pool

worker" and "monthly worker". A pool worker is a worker who is registered with the Respondent No.1 Board and kept in pool to be

assigned to the principal employer and made a part of Toli which is working with the said principal employer. In so far as monthly rated worker is

concerned, he is one who is doing the Mathadi kind of work and whose principal employer is also registered with the Respondent No.1 Board as

also the monthly rated worker. In so far as the "pool worker" is concerned, the Scheme is replete with the provisions which are indicative of the

fact that he is under the control of the Board. In so far as the "monthly worker" is concerned, though the regulatory powers are that of the Board,

the liability in respect of payment of his wages etc is that of the principal employer and that the principal employer has also the power to take

disciplinary action against him which is without prejudice to the powers of the Chairman of the Board. It is required to be noted that in other Schemes

like The Grocery Markets or Shops Unprotected Workers Scheme framed under Section 4 of the Mathadi Act, the registered pool worker is

deemed to be an employee of the Board.

How the funds of the Board are generated is also part of the Scheme and especially in Clause 41 thereof. However, in the context of the present

Petition the provisions i.e.. Clause 34 of the Scheme relating to the disciplinary procedure assumes importance.. The said Clause is therefore

reproduced herein under for the sake of ready reference.

34. Disciplinary procedure " (1)(i) The Personnel Officer may on receipt of the information whether on a compliant or otherwise that a registered

employer has failed to carry out the provisions of this scheme after investigating the matter give him a warning in writing, or ; (ii) where in his opinion,

a higher penalty is merited the Personnel Officer shall report the case to the Chairman who may then cause such further investigation to be made as

he may deem fit and take any of the following steps as regards that employer, that is to say, he may

(a). censure him and record the censure in his record sheet; or

(b). subject to the approval of the Board and after one month's notice in writing given to the registered employer, remove his name from the register of

employers for such period as determined by the Board or permanently.

(2). A registered worker in the pool who fails to comply with any of the provisions of the scheme or commits any act of indiscipline or misconduct

may be reported in writing to the Personnel Officer who may after investigating the matter give him a warning in writing, or suspend him for a period

not exceeding four days.

(3). Where in the opinion of the Personnel Officer, a higher punishment than that provided in sub-clause (2) is merited, he shall report the case to the

Chairman.

(4). On receipt of the written report from the Personnel Officer under sub-section (3) or from registered employers or any other person that a

registered worker in the pool has failed to comply with any of the provisions of this scheme or has committed an act of indiscipline or misconduct or

has consistently failed to produce the standard or datum output or has been inefficient in any other manner, the Chairman may make or cause to be

made such further investigation as he may deem fit and thereafter take any of the following steps, as regards the workers concerned, that is to say, he

may impose any of the following penalties—

(a). give him a warning in writing;

(b). suspend him for a period not exceeding four days;

(c). terminate his services after giving one month's notice or one month's wages inclusive of dearness allowance in lieu thereof or

(d). dismiss him.

(5). Before any action is taken under this clause the registered worker concerned shall be given an opportunity to show cause why the proposed

action should not be taken against him.

(6). During pendency of investigation under sub-clauses (2) and (4) above the registered workers concerned may be suspended by the Chairman.

(7). Without prejudice to the powers of the Chairman under clause 35 a registered employer shall have full powers to take disciplinary action against

monthly registered workers employed under him.

36 Termination of employment 36.1 (1) The employment of a registered worker in the pool shall not be terminated except in accordance with the

provisions of this scheme.

(2). A registered worker in the pool shall not leave his employment with the Board except by giving 14 days' notice in writing to the Board of forfeiting

14 days' wages inclusive of dearness allowance in lieu thereof.

(3). When the employment of a registered worker with the Board has been terminated under sub-clauses (1) and (2), his name shall forthwith be

removed from the register of workers or record by the Board.

37. Appeals by workers " (1) Save as otherwise provided in the clause a registered worker in the pool who is aggrieved by an order passed by an authority under clause 34, may prefer an appeal against the order of the Personnel Officer to the Chairman and against the order of the Chairman to the State Government.

(2). A worker who is aggrieved by an order of the Secretary :

(i) placing him in a particular group in the register of or workers' record; or

(ii). refusing registration under clause 15; or

(iii). requiring him under clause 28 (4)(b) to undertake any work which is not of the same category to which he belongs may prefer an appeal to the

Chairman.

(3). Any worker who is aggrieved by an order under clause 16(4) may prefer an appeal to the Chairman

(4). No appeal shall lie where due notice has been given of the removal of the name of a registered worker from the register of workers or record in

accordance with the instructions of the Board if the ground of removal is that the registered worker falls within a class of description of workers

whose names are to be removed from the register of workers or record in order to reduce the size thereof;

Provided that, an appeal shall lie to the Chairman where the registered worker alleges that he does not belong to the class or description of workers

referred in the instruction of the Board.

(5). Every appeal referred to in sub-clause (1), (2), (3) or (4) shall be in writing and be preferred within 14 days of the date of receipt of the order

appealed against :

Provided that, the appellate authority may for reasons to be recorded, admit an appeal preferred after the expiry of 14 days

A reading of sub-clause (2) of Clause 34 discloses that a registered worker in the pool who has committed an act of indiscipline or misconduct may

be reported in writing to the Personnel Officer who may after investigating the matter give him a warning in writing or suspend him for a period not

exceeding four days.. The said clause itself postulates the major penalties lgc.

which can be imposed which are contained in sub-paragraph (4) of the said Clause

34.. One of the major penalties that can be imposed is the suspension for a period not exceeding four days. Hence what is contemplated by the said

Clause 34 which spells out the disciplinary procedure in so far as the Respondent No.1 Board is concerned is that a minor penalty can be suspension

for a period not exceeding four days as also the major penalty which can be suspension of not more than four days. Therefore the Respondent No.1

Board has whilst prescribing the punishment which can be imposed has deemed it fit to provide for a punishment which is the suspension for maximum

period of 4 days as either a minor or a major penalty. Hence if the punishment can at the highest be a suspension of four days, then if a worker is to

be kept under suspension pending enquiry which would obviously be for a longer period than four days the same would give rise to an obligation on the

part of the Respondent No.1 to pay suspension allowance to the employee.

9. As regards the aspect of payment of suspension allowance is concerned, it is required to be noted that under sub-paragraph (6) of Clause 34 it is

specifically provided that during the pendency of investigation i.e. inquiry under clauses (2) and (4), the registered worker concerned may be

suspended by the Chairman. It is required to be noted that one of the major penalties that can be imposed is the termination of service after giving one

month's notice or one month's wages inclusive of dearness allowance in lieu thereof. Hence reading of sub-paragraph (4)(c) would indicate that in so far

as the obligation on termination of the service of the registered pool worker in respect of payment of wages at the time of termination is concerned,

the obligation is that of the Respondent No.1 Board, there can be no escape from the said fact. We however are not impressed by the submission of

the learned counsel for the Respondent No.1 Board that though the Petitioner has been suspended, the suspension is qua the Toli with which he was

working and that the effect is that he goes back to the pool and can be assigned to another Toli and therefore there is no obligation of the Respondent

No.1 to provide work to the Petitioner or others of his kind so that he earns his wages, , and therefore there is no question of payment of suspension

allowance to a person like Petitioner.

10. We have already in the earlier part of this judgment mentioned the object behind payment of the suspension allowance. At the cost of repetition

we have to state that the employee is required to be paid the suspension allowance so that he keeps his body and soul together during his suspension

period and is able to sustain himself. Once there is a power to suspend vested in an employer then the necessary concomitant is that the employer

would have to pay the suspension allowance to the employee. Since in the facts and circumstances of the present case such a provision is absent. We

would have to read such a provision in the Scheme so that the Scheme in so far as disciplinary procedure is concerned becomes viable and effective.

Hence both the "poolworker" as well as the "monthly rated worker" would be entitled to payment of suspension allowance. In so far as the

"pool worker" is concerned, the same would have to be paid by the Board. In so far as the "monthly rated worker" is concerned, the Board

would call upon the principal employer to pay the same, if the principal employer does not pay the same, the Board would then be required to pay and

recover the same from the principal employer.

11. The payment of suspension allowance is required to be looked at from one more angle. Section 19 of the Mathadi Act posits that the provisions of

the Payment of Wages Act or the rules made thereunder shall be made applicable to any class of registered unprotected workers employed in any

scheduled employment by a notification issued by the State Government. The learned counsel for the Respondent No.1 fairly concedes to the said

provision that the Payment of Wages Act applies to the Petitioner. If that be so it is well settled that suspension allowance is part of the wages which

is defined under Section 2(i)(vi) of the Payment of Wages Act. Reference could be made to the judgments of the learned Single Judges of the Gujarat

and Allahabad High Courts. The said conclusion has been arrived at by the learned Single Judges after taking into consideration the fact that the

effect of suspension is that the employer is merely prohibited from assigning any work to the employee pending the departmental enquiry. (Reference :

1] 2009 II CLR 292 in the matter of Kshetriya Sri Gandhi Ashram, Gorkhpur Vs. Dy.Labour Commissioner/Prescribed Authority and anr. and 2] 2001

III CLR 878 in the matter of United Catalysts (India) Ltd. Vs. Prabhat Motibhai Gohil & Anr.). In our view, therefore, looking at the issue from the

said perspective also the Petitioner is liable to be paid suspension allowance.

12. The above Writ Petition is therefore required to be allowed. We accordingly direct the Respondent No.1 "Board to pay the suspension

allowance to the Petitioner from the date of his suspension. We however leave it to the Chairman of the Respondent No.1 Board as to the rate at

which the Petitioner is required to be paid the suspension allowance which in our view would not be in any case less than 50% of the wages that the

Petitioner would have otherwise earned if he was continued with the said Toli No.BA,11/1. Rule is accordingly made absolute in the aforesaid terms

with parties to bear their respective costs.

13. At this stage, the learned counsel for the Respondent No.1 "Board seeks stay of the instant order. In the facts and circumstances of the

present case where suspension allowance is to be paid, the said prayer is rejected.