A CHAIRMAN, OIL AND NATURAL GAS CORPORATION LTD. AND ANR.

v.

SHYAMAL CHANDRA BHOWMIK

NOVEMBER 23, 2005

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[ARIJIT PASAYAT AND R.V. RAVEENDRAN, JJ.]

Writ Petition—Maintainability of, when disputed question of facts are
C *involved—Held: Not maintainable—Remedy is to approach proper forum so that evidence could be analysed—Industrial Disputes Act, 1947—Section 25-F, 25-B.*

Respondent was working as casual worker in appellant-corporation. He made representation seeking regularisation of his service but the same
D **was rejected. Thereafter, he sought relief by filing writ petition. Appellant denied his claim of having worked for 240 days. High Court allowed the Writ Petition on the ground that the burden to prove that respondent had not worked for more than 240 days in twelve months preceding retrenchment was on the appellant, which they failed to discharge.**

E **In appeal to this Court, appellant contended that it was not for employer to establish that the respondent had not worked for more than 240 days; on the contrary it was for the respondent to establish the said fact.**

Allowing the appeal, the Court

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HELD: The approach of the High Court is not correct. High Court should not entertain writ petitions directly when claim of service of more than 240 days in a year is raised. Whether a person has worked for more than 240 days or not, is a disputed question of fact which is not to be
G **examined by the High Court. Proper remedy for the person making such a claim is to raise an industrial dispute under the Industrial Disputes Act so that the evidence can be analysed and conclusion can be arrived at. As in the instant case the legal position has not been analysed in the proper perspective, it would be appropriate if the matter is decided by the forum provided under the Act. [413-C-E]**

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Range Forest Officer **v.** *S.T. Hadimani,* **[2002] 3 SCC;** *Even Deinki* **v.** *Rajiv Kumar,* **[2002] 8 SCC 400;** *Rajasthan State Ganganagar S. Mills Ltd.* **v.** *State of Rajasthan and Anr.,* **[2004] 8 SCC 161;** *Municipal Corporation, Faridabad* **v.** *Siri Niwas,* **[2004] 8 SCC 195;** *M.P. Electricity Board* **v.** *Hariram,* **[2004] 8 SCC 246;** *Manager, Reserve Bank of India, Bangalore* **v.** *S. Mani and Ors.* **[2005] 5 SCC 100;** *Batala Cooperative Sugar Mills Ltd.* **v.** *Sowaran Singh* **(2005) 7 Supreme 165;** *Surendranager District Panchayat* **v.** *Dehyabhai Amarsingh,* **(2005) 7 Supreme 307 and** *R.M. Yellatti* **v.** *The Asst. Executive Engineer,* **JT (2005) 9 SC 340, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1909 of 2005.

From the Judgment and Order dated 6.10.2004 of the Gauhati High Court at Agartala Bench in W.A. No. 26 of 2002.

G.E. Vahanvati, Solicitor General, Devdart Kamat, Harikesh Baruah, C.P. Sharma, V.N. Koura, Choudhary, A. Mariarputham and Ms. Aruna Mathur for M/s. Arputham, Aruna & Co. for the Appellants.

Sanjay Parikh, A.N. Singh and Ms. Anita Shenoy for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Oil and Natural Gas Corporation Ltd. (hereinafter referred to as the 'ONGC') calls in question legality of the judgment rendered by a Division Bench of the Guwahati High Court, Agartala Bench, dismissing the writ appeal filed by the appellants and thereby affirming order passed by the learned Single Judge in the writ petition (Civil Rule No.144/1992).

Factual background in a nutshell is as follows:

In May, 1992 respondent filed a writ petition before the Guwahati High Court claiming that he had been working as casual worker in ONGC since November, 1982 with intermittent lay offs and but for such intermittent lay offs which were deliberate, he would have worked for more than 240 days and in any event during the period 1989-90 and 1990-91 he had worked continuously for more than 240 days. It was averred that from 2.12.1984 to 10.6.1985 he had worked as an Automobile Mechanic Helper which established that he is a skilled mechanic and entitled to the said post on a regular basis. It was further claimed that on 10.1.1992 he made a representation/demand seeking regularization in the post of Automobile Mechanic but the same was

A rejected by communication dated 30.4.1992. Respondent challenged the said decision in a Writ Petition (Civil Rule No. 144/1992). In the writ petition, prayer was made to quash the said communication and for a direction to absorb him in the regular post of Automobile Mechanic with effect from November, 1982 with all incidental benefits. Counter-affidavit was filed by the appellants denying the claim of the respondent that he had been engaged B for 240 days. Respondent filed further affidavit stating that he was called for interview for the post of Junior Security Guard (which was open only to contingent workers who had completed 240 days service in a year) which substantiated his claim of having worked for more than 240 days.

C Appellants' further stand was that during the pendency of the writ petition, in December, 2000, demand was raised by several unions for reinstatement for 340 workers of the 180 days category including respondent. Name of the respondent figured in the list of 340 workers at serial no.88. Conciliation was held and settlement was arrived at on 27/28.1.2001. As per the settlement the contingent workers (180 days category) were entitled to be D re-engaged only for 2000-2001 field season, and on completion of 2000-2001 field season, they should be disengaged with one time lump sum terminal benefit payment calculated at Rs.3500/- per field season for the continuous past service. Affidavit was filed before the High Court bringing the said settlement on record.

E On 6.9.2001 learned Single Judge allowed the writ petition holding that the respondent had acquired the right not to be terminated without following provision of Section 25-F of the Industrial Disputes Act, 1947 (in short the 'Act') and further directed absorption against the vacant post subject to qualifying eligibility as prescribed by the applicable service law/recruitment F rules. It was held that the settlement was not applicable to the respondent as he denied to be a member of the union. The learned Single Judge came to the conclusion that the settlement is not applicable to the respondent's case. He accepted the respondent's claim of having completed continuous period of 240 days in preceding twelve months. The said order of the learned Single Judge was challenged by the appellants in Writ Appeal. Alongwith the Appeal G Memo, the appellants filed several documents in support of their contention that respondent had not worked for 240 days. During the course of hearing, Division Bench of the High Court directed the appellants to file some documents. In response to it, certain documents were filed in July, 2004. The Division Bench, however, did not consider the additional documents filed by H the appellants on the ground that they could not be permitted to be produced

at appellate stage. It dismissed the writ appeal primarily on two grounds. Firstly, it was held that ONGC had not established that the respondent had not worked for more than 240 days in twelve months preceding retrenchment and that it failed to establish that the respondent was a member of any union. The dismissal of the writ appeal is challenged herein.

In support of the appeal, Mr. G.E. Vahanvati, learned Solicitor General, submitted that the approach of the High Court is clearly erroneous. It was not for the appellants to establish that the respondent had not worked for more than 240 days. On the contrary it was for the respondent-workman to establish the said fact. Similarly, the binding nature of settlement has not been noticed by the High Court and erroneously it was held that the appellants have not established that the respondent was a member of any union. According to him, the respondent-workman was required to establish that (a) he had worked for more than 240 days; and (b) that he was not a member of any union. Since disputed questions of fact were involved, the High Court should not have entertained the writ petition. It was pointed out that in several Bio-Data Forms filled and filed by the respondent (required to be filed by the contractual/ casual worker), the respondent had acknowledged that he had worked for less than 240 days in each year he served. Reference in this regard is also made to several documents filed as part of Annexure 'P' of the rejoinder affidavit before this Court. It is pointed out that the respondent himself has accepted that the certificate issued to him reflected that he had worked for less than 240 days.

On the contrary, learned counsel for the respondent-workman submitted that the High Court has rightly placed onus on the appellants as the initial burden to establish that he had worked for more than 240 days has been discharged. Further, no explanation has been given as to how the respondent could be called to interview which was restricted to persons who had completed more than 240 days of engagement.

In a large number of cases the position of law relating to the onus to be discharged has been delineated. In *Range Forest Officer* v. *S.T. Hadimani,* [2002] 3 SCC 25, it was held as follows:

> "2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated

A 10.8.1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

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3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in *State of Gujarat* v. *Pratamsingh Narsinh Parmar,* [2001] 9 SCC 713. 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. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

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The said decision was followed in *Essen Deinki* v. *Rajiv Kumar,* [2002] 8 SCC 400.

G In *Rajasthan State Ganganagar S. Mills Ltd.* v. *State of Rajasthan and Anr.,* [2004] 8 SCC 161, the position was again reiterated in paragraph 6 as follows:

"It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had

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in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in *Range Forest Officer* v. *S.T. Hadimani,* [2002] 3 SCC 25. No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed."

In *Municipal Corporation, Faridabad* v. *Siri Niwas,* [2004] 8 SCC 195, it was held that the burden was on the workman to show that he was working for more than 240 days in the preceding one year prior to his alleged retrenchment. In *M.P. Electricity Board* v. *Hariram,* [2004] 8 SCC 246 the position was again reiterated in paragraph 11 as follows:

"The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in the case of *Municipal Corporation, Faridabad* v. *Siri Niwas,* JT (2004) 7 SC 248 wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents. This is what this Court had to say in that regard:

"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 his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant.

A It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent."

In *Manager, Reserve Bank of India, Bangalore* v. *S. Mani and Ors.*, [2005] 5 SCC 100 a three-Judge Bench of this Court again considered the matter and held that the initial burden of proof was on the workman to show B that he had completed 240 days of service. Tribunal's view that the burden was on the employer was held to be erroneous. In *Batala Cooperative Sugar Mills Ltd.* v. *Sowaran Singh* (2005) 7 Supreme 165 it was held as follows:

"So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in *Range Forest Officer* C v. *S.T. Hadimani,* [2002] 3 SCC 25 the onus is on the workman."

The position was examined in detail in *Surendranagar District Panchayat* v. *Dehyabhai Amarsingh,* (2005) 7 Supreme 307 and the view expressed in *Range Forest Officer, Siri Niwas, M.P. Electricity Board,* cases (supra) was reiterated.
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In a recent judgment in *R.M. Yellatti* v. *The Asst. Executive Engineer,* JT (2005) 9 SC 340, the decisions referred to above were noted and it was held as follows:

"Analyzing the above decisions of this court, it is clear that the E provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated 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 F year. This burden is discharged only upon the workman stepping 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 earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the G employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving H statements made by the claimant/workman will not suffice in the

matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls *per se* without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case."

When examined with reference to the principle laid down in the aforesaid decisions, it is clear that the approach of the High Court i.e. the learned Single Judge as endorsed by the Division Bench, is not correct. The relevant issue was not considered in its proper perspective. The respective stand was to be examined in the light of law laid down by this Court in the decisions referred to above. The question of shifting of onus assumes relevance only when evidence is led. Almost all the decisions referred to above related to matters which came to the High Court after evidence was led before the Tribunal by the contesting parties. High Courts should not entertain writ petitions directly when claim of service of more than 240 days in a year is raised. Whether a person has worked for more than 240 days or not is a disputed question of fact which is not to be examined by the High Court. Proper remedy for the person making such a claim is to raise an industrial dispute under the Act so that the evidence can be analysed and conclusion can be arrived at. As in the instant case the legal position has not been analysed in the proper perspective, it would be appropriate if the matter is decided by the forum provided under the Act.

In the circumstances we set aside the judgment of the learned Single Judge as affirmed by the Division Bench and direct that in case a dispute is raised before the appropriate Government, it shall refer the matter to the concerned Tribunal for adjudication within two months from the date of receipt of the dispute. The concerned Tribunal would make an effort to dispose of the reference within six months from the date of its reference. Normally, it is for the appropriate Government to decide whether a reference is called for. But in view of the undisputed position that industrial dispute does exist, in the peculiar facts of the case, we direct the Government to make a reference. This would also shorten the period of litigation.

A The reference shall be on the questions as to whether (a) the workman's claim that he had worked continuously for more than 240 days is correct and (b) whether the settlement arrived at on 27/28 January, 2001 is binding on the workman. We make it clear that we have not expressed any opinion on the merits of the case.

B Appeal is accordingly allowed, but with no order as to costs.

D.G. Appeal allowed.