R.M. Yellatti vs The Asst. Executive Engineer on 7 November, 2005

Equivalent citations: AIR 2006 SUPREME COURT 355, 2006 (1) SCC 106, 2005 AIR SCW 6103, 2006 LAB. I. C. 143, 2006 (1) AIR JHAR R 439, 2006 (1) AIR KANT HCR 330, (2005) 9 JT 340 (SC), (2005) 6 ALL WC 5900, (2005) 9 SCALE 139, (2005) 8 SUPREME 586, (2005) 6 SERVLR 738, (2005) 3 CURLR 1028, (2005) 4 SCT 695, (2006) 2 KANT LJ 447, (2006) 108 FACLR 213, (2006) 1 LABLJ 442, (2006) 2 SERVLJ 1, (2006) 1 KCCR 529, (2006) 2 JCR 5 (SC), (2006) 1 LAB LN 7, (2006) 1 UPLBEC 213, (2005) 8 SCJ 443, 2006 LABLR 85

Bench: S.N. Variava, Ar. Lakshmanan, S.H. Kapadia

CASE NO.:
Appeal (civil) 5124 of 2004

PETITIONER:
R.M. Yellatti

RESPONDENT:
The Asst. Executive Engineer

DATE OF JUDGMENT: 07/11/2005

BENCH:
S.N. VARIAVA,Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:

J U D G M E N T KAPADIA, J.

The appellant questions the correctness of the judgment of the High Court of judicature at Karnataka at Bangalore whereby the High Court, in Appeal, allowed the writ petition filed by the Assistant Executive Engineer (SD-I), Athani and set aside the order of the Labour Court dated 27.10.1999 directing reinstatement with 50% back wages from the date of the award till the date of reinstatement.

Facts necessary for the disposal of this appeal are as follows:

> Appellant was appointed as a daily waged earner by the Assistant Executive Engineer on 26.11.1988. He worked up to 20.6.1994, on which day his services were terminated. He was getting salary of Rs.910/- per month. On termination, appellant claimed that he had continuously worked for more than 240 days immediately prior to 20.6.1994 (date of termination) and that his services were wrongly terminated

> without complying with the provisions of section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the 1947 Act").

Consequently, he contended that the above termination constituted illegal retrenchment which was liable to be set aside. The above industrial dispute was referred by the State Government to the labour court vide reference under section 10(I)(c) of the 1947 Act. The reference was in following terms:

> "Whether the management was justified in removing the claimant from service w.e.f. 20.6.1994? If not, to what reliefs the claimant was entitled for?"

On receipt of the said reference, the labour court issued notices to the concerned parties. The management resisted the reference by filing its counter statement by which the management contended that the appellant was not a worker in terms of section 2(s) of the 1947 Act and consequently, he was not entitled to claim benefit of section 25-F of the said Act. The management also submitted that the "Irrigation department" was not an "industry" under the said 1947 Act and consequently, the question of compliance of section 25-F did not arise. Further, the appellant contended that the reference was time barred.

By award dated 27.10.1999, the labour court held that the appellant was appointed as daily waged earner and that he was a workman under section 2(s) of the 1947 Act. The labour court found on facts and on the basis of evidence led before it that the appellant had worked with SD-1 at Athani continuously for more than 240 days prior to 20.6.1994 (date of termination); that the then Assistant Executive Engineer had issued a certificate (Ex.W1) to the effect that the appellant had worked from 24.11.1988 to 20.6.1994; that although the appellant had been cross-examined on behalf of the management, there was no material to disbelieve the certificate Ex.W1. The labour court found that Ex.W1 was duly proved. It contained the signature of the then Asstt. Executive Engineer. Further, the labour court came to the conclusion that the management had suppressed the material evidence from the Court. We quote hereinbelow the findings given by the labour court in this connection:

> " At the outset I have to state that the respondent has not placed all the material records before the Court and on the other hand, the respondent has followed the method of pick and choose and produced some records before the Court for some period and they are marked as Exh. M.1 to M.15. As per the evidence of MW.1 who has no personal knowledge of claimant has spoken on the basis of records. As per the respondent the claimant has not at all worked with the respondent at any point of time namely with H.B.C. Athani, Belgaum District. However, when the respondent was called upon to produce the N.M.R. extracts for relevant period, it has chosen to produce Ex. M.1 to M.5 and consolidated statement showing the period for which the claimant had worked as on 20.6.1994. As per the documentary evidence adduced on behalf of the respondent and the oral version of MW.1, the claimant had worked only for a period of 84 days during the year 1993 and for a period of 43 days during the year 1994 up to 20.6.1994. The respondent has not chosen to produce the N.M.R.

> extracts for a period of 12 months immediately prior to 20.6.1994. Whether the name of the claimant is found in such NMR extracts during the said 12 calendar months prior to 20.6.1994 or not is immaterial for respondent, it is for the Court to arrive at conclusion or production of N.M.R. records pertaining to the period of 12 calendar months immediately prior to 20.6.1994. There is no explanation offered on behalf of the respondent for non-production of the said N.M.R. It is the evidence of MW.1, the concerned NMR for the said period are available. In my opinion MW.1 has suppressed the material evidence before the Court. On perusing the oral evidence of MW.1 it reveals that in order to suppress the real material, it has not chosen to produce concerned N.M.R. "

On the question as to whether the Irrigation department is an industry under the 1947 Act, the labour court followed the decision of the Karnataka High Court holding that the Irrigation department of the Government constituted an industry within the meaning of section 2(j) of the 1947 Act. On the point of limitation, the labour court held that the Limitation Act, 1963 was not applicable to the proceedings under section 10 of the 1947 Act. However, since there was a delay of three years in raising the industrial dispute and since the appellant was only a daily waged earner, the labour court directed the management to reinstate the appellant into service as a daily wager with 50% back wages from the date of the award till the date of reinstatement.

Aggrieved by the said award, the management challenged the award vide writ petition no.17636 of 2000. The said writ petition was dismissed in limine vide order dated 7.6.2000.

Aggrieved by the decision of the learned Single Judge dated 7.6.2000, the management carried the matter in appeal to the division bench vide writ appeal no.5660 of 2000. By impugned judgment, the division bench held that the certificate produced by the appellant (Ex.W1) nowhere stated that the appellant was in continuous service for 240 days; that there was no evidence on record to show that the certificate was in fact issued by Asstt. Executive Engineer and that the records produced by the department showed that Ex.W1 was a fabricated document. The division bench further observed that the appellant herein had failed to produce the letter of appointment, letter of termination or receipts indicating payment of monthly salary. The division bench observed that except the self-serving statement of the appellant in the witness box, there was nothing on record to support his case of having worked for 240 days. Following the judgment of this court in the case of Range Forest Officer v. S.T. Hadimani reported in (2002) 3 SCC 25, the division bench vide its impugned judgment quashed the award passed by the labour court in favour of the appellant. By the impugned judgment, the division bench also set aside the order of the learned Single Judge. Hence, this civil appeal.

Shri Mahale, learned advocate for the appellant submitted that the division bench ought not to have interfered with the concurrent findings given by the award of the labour court dated 27.10.1999 and by the judgment of the learned single judge dated 7.6.2000. He submitted that there was no perversity in the findings recorded by the labour court. He submitted that full opportunity was given to the management to produce its records. He submitted that the management suppressed the Nominal Muster Rolls (NMRs) which indicated that the appellant had worked for the entire period

between 22.11.1988 to 20.6.1994. It was submitted that in any event, the entire record was not produced before the labour court despite the management being asked by the court to do so and, therefore, the labour court was right in coming to the conclusion that the management had suppressed its records from the court. In the circumstances, it was urged that the division bench ought not to have interfered with the concurrent findings of fact recorded by the labour court in its award dated 27.10.1999. Learned advocate further contended that the workman had stepped into witness box; that he had tendered and produced the certificate (Ex.W1) and that both the labour court and the learned single judge had accepted its correctness and, therefore, the division bench ought not to have interfered with the said findings. Learned advocate further contended that the appellant had worked for 240 days within the meaning of section 25-F of 1947 Act and his non-employment constituted retrenchment under section 2(oo) of the said Act. He contended that the services of the appellant was terminated in breach of section 25-F of 1947 Act and, therefore, the labour court was right in ordering reinstatement. Learned advocate further submitted that no reasons have been given by the High Court for disbelieving Ex.W1 and for coming to the conclusion that Ex.W1 was fabricated document. Learned advocate further contended that the division bench of the High Court had erred in placing reliance on the judgment of this court in the case of Range Forest Officer (supra), as in the present case, the appellant workman had entered the witness box and had produced cogent evidence in the form of certificate Ex.W1 which shows that the appellant had worked between 22.11.1988 to 20.6.1994 as a daily wager. Hence, the learned advocate submitted that the division bench had erred in interfering with the concurrent findings of fact.

Ms. Anitha Shenoy, learned advocate for the management, on the other hand, urged that the "Irrigation department" was not an "industry" as defined under section 2(j) of the 1947 Act. She contended that the judgment of this court in the case of Bangalore Water Supply & Sewerage Board v. A. Rajappa reported in (1978) 2 SCC 213 has been referred to the larger bench by a referral order dated 5.5.2005 in the case of State of U.P. v. Jai Bir Singh reported in (2005) 5 SCC 1 and consequently, she requested this court to adjourn the matter sine die.

On the merits of the matter, learned advocate submitted that the burden of proof was on the appellant to show that he had worked for 240 days in the preceding 12 months prior to his alleged retrenchment; that the appellant-workman in the present case had neither produced the letter of appointment nor letter of termination and, therefore, there was nothing on record to support his case of having worked for 240 days within the meaning of "continuous service" as defined under section 25-B of the 1947 Act. Learned advocate further contended that Ex.W1 contained discrepancies and, therefore, the High Court was right in holding that the said document was fabricated. Learned advocate further contended that in any event Ex.W1 does not indicate as to whether the workman had worked for each and every day between 22.11.1988 and 20.6.1994 or whether he had worked for 240 days during the aforestated period and in the circumstances, the labour court had erred in coming to the conclusion that the appellant had worked for 240 days in the year preceding his termination. Therefore, according to the learned advocate, the workman had failed to discharge the burden of proving that he had worked for 240 days prior to the termination of his service. In this connection, reliance was placed on the judgments of this court in the case of Range Forest Officer (supra); Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan & Others reported in (2004) 8 SCC 161, M.P. Electricity Board v. Hariram reported in (2004) 8 SCC

246.

At the outset, we may mention that we are not inclined to adjourn the matter sine die pending the decision of the larger bench as urged on behalf of the management, particularly in view of the fact that there is nothing on record to indicate that the management had argued the point in question. As stated above, the labour court had ruled that the "Irrigation department" was an "industry" in terms of section 2(j) of the 1947 Act. Against the award of the labour court, the department had filed its writ petition in which the ground was taken as a plea to the effect that the Irrigation department was not an industry in terms of section 2(j) of the said Act. However, there is nothing in the decision of the learned single judge as well as in the impugned judgment to show as to whether the management had argued on this aspect of the case and, therefore, we are not inclined to await the decision of the larger bench following referral order in the case of Jai Bir Singh (supra). Even in the counter affidavit filed before this court, no such plea has been taken.

Now coming to the question of burden of proof as to the completion of 240 days of continuous work in a year, the law is well settled. In the case of Manager, Reserve Bank of India, Bangalore v. S. Mani reported in (2005) 5 SCC 100, the workmen raised a contention of rendering continuous service between April, 1980 to December, 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The tribunal based its decision on the management not producing attendance register. In view of the affidavits filed by the workmen, the tribunal held that the burden on the workmen to prove 240 days service stood discharged. In that matter, a three-judge bench of this court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that they had worked for 240 days; that no document in support of the said plea was ever produced and, therefore, this court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the management to produce relevant documents. The court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this court set aside the award of the industrial tribunal ordering reinstatement.

In the case of Municipal Corporation, Faridabad v. Siri Niwas reported in (2004) 8 SCC 195, the employee had worked from 5.8.1994 to 31.12.1994 as a tube-well operator. He alleged that he had further worked from 1.1.1995 to 16.5.1995. His services were terminated on 17.5.1995 whereupon an industrial dispute was raised. The case of the employee before the tribunal was that he had completed working for 240 days in a year; the purported order of retrenchment was illegal as the conditions precedent to section 25-F of Industrial Dispute Act were not complied with. On the other hand, the management contended that the employee had worked for 136 days during the preceding 12 months on daily wages. Upon considering all the material placed on record by the parties to the dispute, the tribunal came to the conclusion that the total number of working days put in by the employee were 184 days and thus he, having not completed 240 days of working in a year, was not entitled to any relief. The tribunal noticed that neither the management nor the workman cared to produce the muster roll w.e.f. August, 1994; that the employee did not summon muster roll although

the management had failed to produce them. Aggrieved by the decision of the tribunal, the employee filed a writ petition before the High Court which took the view that since the management did not produce the relevant documents before the industrial tribunal, an adverse inference should be drawn against it as it was in possession of best evidence and thus, it was not necessary for the employee to call upon the management to do so. The High Court observed that the burden of proof may not be on the management but in case of non-production of documents, an adverse inference could be drawn against the management. Only on that basis, the writ petition was allowed holding that the employee had worked for 240 days. Overruling the decision of the High Court, this court found on facts of that case that the employee had not adduced any evidence before the court in support of his contention of having complied with the requirement of section 25-B of Industrial Dispute Act; that apart from examining himself in support of his contention, the employee did not produce or call for any document from the office of the management including the muster roll (MR) and that apart from muster rolls, the employee did not produce offer of appointment or evidence concerning remuneration received by him for working during the aforementioned period. It is in this light that this court, speaking through Hon'ble Sinha, J., has held as follows:

> "15. A court of law even in a case where provisions of the 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. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent.
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> 16. No reason has been assigned by the High Court as to why the exercise of discretional jurisdiction of the Tribunal was bad in law. In a case of this nature, it is trite, the High Court exercising the power of judicial review, would not interfere with the discretion of a Tribunal unless the same is found to be illegal or irrational."

In the case of Range Forest Officer (supra), the dispute was referred to the labour court as to whether the workman had completed 240 days of service. Vide award dated 10.8.1988, the tribunal held that the services were wrongly terminated without giving retrenchment compensation. In arriving at this conclusion, the tribunal stated that in view of the affidavit of the workman saying that he had worked for 240 days, the burden was on the management to show justification in termination of the service. It is in this light that the division bench of this court took the view that the tribunal was not right in placing the burden on the management without first determining on the basis of cogent evidence that the workman had worked for 240 days in the year preceding his termination. This court held that it was for the claimant to lead evidence to show that he had worked

for 240 days in the year preceding his termination; that filing of an affidavit is only his own statement in his own favour which cannot be recorded as sufficient evidence for any court or tribunal to come to the conclusion that a workmen had worked for 240 days in a year. This court found that there was no proof of receipt of salary or wages for 240 days; that letter of appointment was not produced; that letter of termination was not produced on record and, therefore, award was set aside.

In the case of Rajasthan State Ganganagar S. Mills Ltd. (supra), the workman had alleged that he had worked for more than 240 days in the year concerned, which claim was denied by the management. The workman had merely filed an affidavit in support of his case. Therefore, the division bench of this court took the view that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination. This court observed that filing of an affidavit was not enough because the affidavit contained self- serving statement of the workman which cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that the claimant had worked for 240 days in a year. Further, this court found that there was no proof of receipt of salary or wages for 240 days and, therefore, 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. On the facts of that case, the court found that even if the period for which the workman had alleged to have worked was taken into account, as mentioned in his affidavit, still the said workman did not fulfill the requirement of completion of 240 days of service and, therefore, this court set aside the award of the labour court.

In the case of M.P. Electricity Board (supra), the workmen were engaged by the board on daily wages for digging pits to erect electric polls. It was the case of the board that on completion of the project, the employment was terminated and whenever a similar occasion arose for digging pits, the workmen were re-employed on daily wages and, therefore, their employment was not permanent in nature nor had the workmen completed 240 days of continuous work in a given year. The project jobs came to an end in 1991 and the workmen were never re-employed by the board. Being aggrieved by the said non-employment, the workmen filed applications under MP Industrial Relations Act seeking permanent employment, primarily on the ground that they have completed 240 days in a year and their discontinuation of service amounted to retrenchment without following the legal requirements. The board denied the allegations made in the application before the labour court. An application was moved before the labour court by the workmen seeking direction to the board to produce the muster roll for the concerned period. However, no other material was produced by the workmen to establish the fact that they had worked for 240 days continuously in a given year. Some of the workmen were also examined before the labour court. However, no document was produced in the form of letter of appointment, receipt indicating payment of salary etc. After examining the entry in the muster rolls, the labour court came to the conclusion that the workmen had not worked for 240 days continuously in a given year, hence, they could not claim permanency nor could they term their non-employment as retrenchment. Aggrieved by the award of the labour court, the workmen preferred an appeal before the industrial court at Bhopal which took the view that since the board has failed to produce the entire muster roll for the year ending 1990, an adverse inference was required to be drawn against the board and solely based on the said inference, the industrial court accepted the case of the workmen that they had worked for 240 days continuously in a given

year. Accordingly, the industrial court granted reinstatement to the workmen with 50% back wages. Drawing of such an adverse inference was challenged before this Court by the MP Electricity Board. In the light of the aforestated facts, this court opined that the industrial court or the High Court could not have drawn an adverse inference for non-production of the muster rolls for the years 1990 to 1992, particularly in the absence of a specific plea by the claimants that they had worked during the period for which muster rolls were not produced. This court observed that initial burden of establishing the factum of their continuous work for 240 days in a year was on the workmen and since that burden was not discharged, the industrial court and the High Court had erred in ordering reinstatement solely on an adverse inference drawn erroneously.

Analyzing the above decisions of this court, it is clear that the 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 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 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 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.

Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box. He had called upon the management to produce the nominal muster rolls for the period commencing from 22.11.1988 to 20.6.1994. This period is the period borne out by the certificate (Ex.W1) issued by the former Asstt. Executive Engineer. The evidence in rebuttal from the side of the management needs to be noticed. The management produced five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex.M4 and Ex.M5, which indicated that the workmen had worked for 43 days during the period 21.1.1994 to 20.2.1994 and 21.3.1994 to 20.4.1994 respectively. There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for discarding the said certificate. In the circumstances, we are of the view that the division bench of the High Court ought not to have interfered with the

concurrent findings of fact recorded by the labour court and confirmed by the learned single judge vide order dated 7.6.2000 in writ petition no.17636 of 2000. This is not, therefore, a case where the allegations of the workman are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workman was working in SD-1, Athani and Ex.W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No.1, Athani-591304. In the present case, the defence of the management was that although Ex.W1 refers to the period 22.11.1988 to 20.6.1994, the workman had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the labour court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this judgment on the shifting of the burden. We are not placing this case on drawing of adverse inference. In the present case, we are of the view that the workman had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the division bench of the High Court had erred in interfering with the concurrent findings of fact.

Before concluding, we would like to make an observation with regard to cases concerning retrenchment/termination of services of daily waged earners, particularly those who are appointed to work in Government departments. Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of termination. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we are of the view that the State Governments should take steps to maintain proper records of the services rendered by the daily wagers; that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and pecuniary liability for the Government.

Accordingly, we find merit in this appeal. We set aside the impugned judgment of the division bench dated 3.9.2000 and we restore the award of the labour court dated 27.10.1999 in I.D. Reference No.59/97. The name of the appellant will be restored as a daily wager in the nominal muster roll.

Accordingly, the appeal is allowed with no order as to costs.