
(1991) 06 BOM CK 0028
In the Bombay High Court
Case No : Appeal No. 4 of 1991

Changunabai Chanoo Palkar

APPELLANT

Vs

Khatau Makanji Mills Ltd. and others

RESPONDENT

Date of Decision : 21-06-1991

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 78, 79, 84
Evidence Act, 1872 — Section 114
Industrial Disputes Act, 1947 — Section 25F

Citation : (1992) 1 BomCR 85 : (1992) 65 FLR 118 : (1992) 2 LLJ 640 : (1992) 2 MhLj 1641

Hon'ble Judges : P.D. Desai, C.J

Bench : Single Bench

Judgement

P.D. Desai C.J.

1. The appellant (original writ petitioner) came to be employed in the Winding Department of the Respondent Company sometime in 1944 according to her and in March, 1947 according to the Respondent Company. The Maharashtra Girani Kamar Union called upon all employees in the textile industry in Greater Bombay to resort to strike from 18th January 1982. In view of the said call the appellant along with other employees absented from duty. The strike was declared illegal by an order of the Labour Court dated February 11, 1982. According to the appellant after the Chief Minister made an appeal to the employees to resume duty and the tense situation eased, the employees started reporting for duty and a majority of them were permitted to resume duty. She too reported for duty at the Mill Gate but was not allowed to resume. Her grievance was that she was singled out in that regard and by such discriminatory attitude compulsory unemployment was thrust upon her. She was never chargesheeted and no Departmental Enquiry was held against her. She was not given compensation u/s 25F of the Industrial Disputed Act, 1947. Under such circumstances, she addressed a letter dated October 30, 1984 to the Respondent Company seeking permission to join duty but the request was not entertained. She then sent

(another) letter dated November 1984 but there was no response. She thereupon filed an application under Sections 78 and 79 of the Bombay Industrial Relations Act, 1946, claiming reinstatement in service with continuity and full back wages.

2. The case of the Respondent Company in the course of the adjudication proceeding was that the strike had been declared illegal and that by a notice published in a local newspaper on February 28, 1982 the employees were apprised of the same and were called upon to resume duty. Again on April 6, 1982, by another notice published in a local newspaper the employees were called upon to end the strike and to resume duty and informed that if they failed to do so, appropriate action would be initiated against them. The appellant, however, failed to report for duty which amounted to misconduct. In view of the prevailing circumstances in which a large number of employees had participated in the general strike, it was not possible to give a charge-sheet to the appellant or to hold an enquiry in respect of the misconduct. By an order dated December 22, 1982 she was, therefore, dismissed. The order of dismissal was sent to her at the recorded address but the envelope was returned, which gave rise to a presumption of due service. Under the aforementioned circumstances, according to the Respondent Company the approach notice dated Nov. 10, 1984 was beyond the prescribed time limit and the application, therefore, was not maintainable.

3. During the course of the adjudication proceedings, the parties led evidence. The Respondent Company placed on record, inter alia, the envelope bearing the recorded address and returned by the Post Office. The appellant, however, denied that any such envelope was tendered to her at any stage. The Labour Court drew a presumption u/s 114 of the Evidence Act and held that there was deemed service of the dismissal order upon the appellant and that since the approach letter was not served within three months thereof, the application under Sections 78 and 79 was not maintainable. On merits, however, the Labour Court gave a finding in favour of the appellant. It found that the misconduct of the appellant was mere passive participation in an illegal strike for a fairly long period. For mere passive participation in an illegal strike, the extreme punishment of dismissal was not warranted and it was not proper and legal. Besides, the appellant was discriminated against because all the workers, who had participated in an illegal strike, had not been dismissed. Some of those workers were allowed to resume duty. For all these reasons, it was not legal and proper. In view of the finding on the maintainability of the application, however, the appellant was denied any relief and her claim was dismissed.

4. The matter was carried in appeal to the Industrial Court Section 84 of the Bombay Industrial Relations Act, 1946. The Industrial Court found that one of the envelopes produced by the Respondent Company did not bear any endorsement as to the reasons for its being rejected or returned and the other carried an endorsement that the addressee could not be traced at the address

given. Under such circumstances, mere production of the envelope was not itself sufficient to draw a presumption of due service u/s 114 of the Evidence Act, especially when the receipt was denied by the appellant. Disagreeing with the Labour Court, therefore, the Industrial Court held that the dismissal order was never served on the appellant and that the application filed by her under Sections 78 and 79 could not be held to be barred by limitation. The Industrial Court thereafter proceeded to consider the dispute on merits and observed as follows :

"..... The appellant lady, therefore, gets benefits of the expression by the Labour Court that the dismissal order otherwise for a mere passive participation would have no justification. The decision of our High Court in Jaslok Hospital case 1984 I LLJ 776 and that of Supreme Court in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, fully support the said expression of the Labour Court.

It is, however, found that during the time the application was pending before the Labour Court, the appellant lady crossed 60 years of age and was due for retirement under the Model Standing Orders. Her year of birth recorded happens to be 1925 and this is stated to be correct by the appellant lady herself in the very first answer to a question put in cross-examination. Hence even if the dismissal order is set aside the reinstatement ordered could be for the period upto December 31, 1985 only. The price for participation in an illegal strike and an approach made to the employer after two years had, however, to be paid in terms of total deprivation of back wages."

In view of the aforesaid finding, the appeal was partly allowed the order passed by the Labour Court dismissing the application was set aside and the appellant was held entitled to reinstatement in service for a period upto December 31, 1985. It was further directed that she was entitled to retrial benefits but not to the back wages.

5. The appellant challenged the decision of the Industrial Court denying the benefit of back wages in the writ petition which was heard by a learned single Judge (who held) that the order of the Industrial Court, which virtually converted the order of dismissal into that of retirement, appeared to be compassionate in nature and that there was no error of law in denying to her the back wages for the period she participated in an illegal strike. The writ petition was, therefore, rejected.

6. Hence the present appeal.

7. The pertinent point to be borne in mind in disciplinary jurisdiction, when absence during an illegal strike is admitted or proved, is that the industrial jurisprudence makes a cardinal distinction and maintains a clear dichotomy between passive and active strikers. This is considered essential and of practical importance because the kind or quantum of punishment has to be modulated in accordance with the nature of participation in the strike. The real question

required to be determination in course of the disciplinary proceeding in such cases is : Did the individual worker, who has to suffer the penalty, actively involve himself or did he merely remain a quiescent non-worker during the explosive period ? It must be remembered, for example, that not reporting for work and remaining at home for fear of vengeance in a para-violent situation or, if the employment is in an urban township, leaving the place of work and returning to the native place in a rural area on account of economic compulsion and to avoid starvation in a case of a prolonged strike, does not lead to an inevitable presumption of active participation in an illegal strike. More is needed to bring home the mens rea and that burden is on the Management. The strike being illegal is really a non-issue under such circumstances. The focus is on active participation. Mere absence, without more, does not compel the conclusion of active participation or involvement. See Gujarat Steel Tubes Ltd. v. Its Mazdoor Sabha, (supra)

8. It is apparent, therefore, that before inflicting penalty is disciplinary jurisdiction upon a workman who remained away from work during an illegal strike, an individualised inquiry would be necessary at which it will have to be determined whether there was active or passive participation on his part in the said misadventure. Active participation in the context means that he propelled the illegal strike or indulged in sabotage or vandalism or violence or intimidation or the like. The despair of the Management at facing an illegal strike in which a large number of workmen participate-some of them actively, some of them passively-resulting in a crisis is no justification to invoke the plea of community guilt and to resort to common condemnation. In disciplinary jurisdiction, save on proof of individual delinquency, neither finding of guilt nor infliction of penalty could be justified. Nor is it defensible excuse, much less a valid vindication, for failure to hold an individualised inquiry that in the prevailing circumstances in which a large number of employees had participated in the illegal strike, it was not possible to give a charge-sheet to each individual in respect of the misconduct. Penalty sans inquiry is non est. True, if a dispute arises, the Management may still ask for an opportunity to separately make out a case against each workman before the industrial adjudicator. However, in that forum also, the role of the individual workmen and the degree of his turpitude shall have to be proved and the whole case would be open before the adjudicator to decide whether the charge is proved and what punishment should be awarded. And, if the adjudicator's award is challenged before the High Court in writ jurisdiction, it can be quashed "if it is vitiated by the fundamental flaws of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, jurisdictional failure and the like" (p. 156). The High Court has "to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in." (p. 156). In the ultimate analysis "Article 226, however restrictive in practice, is a power wide enough, in all conscience, to be a friend in need when the summons comes in a crisis from a victim of injustice : and, more

importantly, this extraordinary reserve power is unsheathed to grant final relief without necessary resource to a remand. What the Tribunal may, in its discretion, High Court too, under Art. 226, can, if facts compel, do." (See Gujarat Steel Tubes Ltd.'s case (supra) (pp. 172-173)

9. Before coming to grips with the precise question of the kind or quantum of punishment for participation in an illegal strike, a few principles which are well-established need to be recapitulated. Although the right to unionise, the right to strike as a part of collective bargaining, are processes recognised by the industrial jurisprudence, the exercise of such rights must be within the recognised parameters. Adventurist, extremist, extraneously inspired and puerile strikes, absurdly insane persistence and violent or scorched earth policies boomerang and are anathema for the law. If these limits are not transgressed, the right to strike is integral to collective bargaining. (See Gujarat Steel Tubes Ltd.'s case (supra). A factor of relevance, even if a strike is illegal, is that mere illegality does not per se spell unjustifiability. Unless the reasons for an illegal strike are entirely perverse or unreasonable-an aspect which must be decided on the facts and circumstances of each case - an illegal strike would not be castigated as unjustified. See Crompton Greaves Ltd. Vs. Its Workmen,

10. It is clear that those who take part in an illegal strike make themselves liable thereby to be dealt with their employers, whether such participation is passive or active. This is not to be understood, however, to mean that no distinction has to be maintained in dealing with both the types of workmen who may have been guilty of participation in the illegal strike. It is manifest that both are not liable to the same kind of punishment. Passive participation in a strike which is illegal and, may be, also unjustified, does not ipso facto invite dismissal or punitive discharge. To justify the ultimate penalty, there must be active individual excess, such a masterminding the unjustified aspects of the strike, for example violence, sabotage or other reprehensible role. In the absence of such gravamen in the accusation and proof thereof by cogent individualised proof, the extreme economical penalty termination is wrong, specially in an economic structure where large scale of unemployment stares in the face (See Gujarat Steel Tubes Ltd.'s case (supra).

11. Yet another factor which cannot be overlooked in cases where there is mere participation without anything further is that suspension or dismissal would not be justified if no clear distinction can be made between those persons and the very large number of workmen who had been taken back into service although they had participated in the strike. If an employer makes an unreasonable discrimination in the matter of taking back employees, there would be a valid reason for the industrial adjudicator to interfere on the basis of the examination of circumstances of each case. See Burn & Co. Ltd. v. Their Workmen 1959 I LLJ 450 and The Bata Shoe Co. (P) Ltd. Vs. D.N. Ganguly and Others,

12. One more facet which has relevance in this context is that if the termination is bad, reinstatement is the rule. The normal rule, on reinstatement, is full back

wages, since the order of termination is non est. See *G. T. Lad and Others Vs. Chemical and Fibres of India Ltd.*, and *The Management of Panitole Tea Estate Vs. The Workmen*, . Where no inquiry has preceded a punitive termination and the adjudicator, for the first time, passes an order recording a finding of misconduct pre-dating of the award does not have legal sanction. A void termination is just void and it did and does not exist. When, therefore, the adjudicator breathes life into the dead shell of the Management's order, the doctrine of relation back cannot be invoked. The jurisdictional difference between a void order, which by a subsequent judicial resuscitation comes into being de novo, and an order, which may suffer from some defects but is not still-born or void and all that is needed in the law to make it good is a subsequent approval by the adjudicator which is granted, cannot be obfuscated. Even so, the industrial adjudicator may well slice off a part of back wages if the workmen are not wholly blameless or the strike is illegal and unjustified. To what extent wages for the long interregnum should be paid is, therefore, a variable dependent on a complex of circumstances. Taking a realistic view, however, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself an awesome factor and if, after such a protracted time and energy-consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Any other view may amount to putting a premium on the unwarranted litigating activity of the employer. In other words, the rule is simple that the discretion to deny reinstatement or to cut down the quantum of back wages is ordinarily absent in such cases save for exceptional response. (See *Gujarat Steel Tubes Ltd.*'s case (supra)).

13. Turning now to the facts of the present case, no charge-sheet was served nor an enquiry was held before the appellant was dismissed. Even the dismissal order was not served upon her. The action taken accordingly was illegal rendering the dismissal order non est. The Respondent Company, however, could - as in this case it attempted to do - justify the action and make delinquency before the Labour Court, which had full jurisdiction to adjudge de novo both the guilt and the penalty. In the course of the said proceedings, what has been held proved against the appellant is nothing more than passive participation by not reporting for duty during an illegal strike. There is no finding that the illegal strike was unjustified. It is true that participation in an illegal strike is misconduct as per the Standing Orders. However, the case of the appellant is that she wanted to resume duty when the situation normalised and that she actually reported at the Mill Gate to join duty but was not allowed to resume. This is specifically pleaded and deposed and is supported by documentary evidence on record. The degree of capability as disclosed by these facts, therefore, had necessarily to be kept in view while imposing the penalty. Besides, it has been

found that all the workers who had participated in the illegal strike were not dismissed or terminated. Some of them were taken back and allowed to join duty. There was, therefore, unreasonable discrimination in the matter of dealing with employees who absented during the strike. Having regard to all these circumstances, the Labour Court as well as the Industrial Court concurrently found and, in our opinion, rightly, that the proved misconduct did not warrant or justify the extreme penalty. The Industrial Court, therefore, ordered reinstatement of the appellant in service up to the date of her superannuation and declared her entitled to trial benefits but not back wages. The learned single Judge affirmed the decision in toto holding that the direction regarding withholding of back wages did not suffer from any infirmity and that the decision, in fact, appeared to be "compassionate one" from the point of view of the appellant who had participated in the illegal strike.

14. The Respondent Company acquiesced in the decision. But the appellant feeling aggrieved has come up on appeal and complains that on the facts and in the circumstances of the case, the denial of claim for back wages is unwarranted and unjustified. The only question which survives for consideration, therefore, is whether the claim for back wages has merit and whether the facts and circumstances of the case call for a departure from the normal rule that in cases of void termination the reinstatement with full back wages ought to be granted.

15. The relevant factors to be kept in view in order to determine the question posed above need recapitulation. The dismissal order was void ab initio since no charge sheet was served and no inquiry preceded in accordance with law. The finding of misconduct - passive participation in the illegal strike - came to be recorded, for the first time, in the course of industrial adjudication. The normal relief under such circumstances is reinstatement with full back wages since predating of the award would have no legal sanction. For good and valid reasons, however, back wages or a part thereof could still be denied in the exercise of judicial discretion depending upon the combination of facts and circumstances. The appellant is a female employee who served the Respondent Company from 1944 to 1982, that is, almost for four decades. Her record of service is otherwise unblemished since nothing adverse has been brought on record. She absented from duty during the illegal strike as it was a mass movement directed not only against her own employer but against the entire textile industry. The strike commenced on January 18, 1982 and it was declared illegal on February 11, 1982. There was no individual approach to the workmen, including the appellant, nor any persuasive effort on the part of the Respondent company to induce them to resume duty. Of course, the Respondent Company published notices twice in a newspaper calling upon the workmen to report for duty and also advising that failure to resume might result in appropriate action being taken against them. The notices were published on February 28, 1982 and April 6, 1982. This was a mixture of a call to resume duty and of ultimatum and threat. The appellant nevertheless reported for duty but was not taken back. This treatment was meted out to her discriminatorily since she was denied entry in the Mill premises

whereas many others were permitted to resume duty and even new hands were employed. She addressed two letters to the Respondent Company seeking reinstatement but they evoked no response. The result was that she had to go through a protracted litigation in the Labour and Industrial Courts claiming reinstatement with full back wages from October 30, 1984 - an awesome factor in itself - and to undergo suffering in the process. She apparently sustained herself in the ultimate hope of getting a just relief in the said forum. By the time the litigation ended and she vindicated her right, she had already reached the age of superannuation and the success was rendered illusory in a sense because actual reinstatement could not be gained. The claim for back wages was, therefore, the only relief to which she looked forward and that too for the limited period from October 30, 1984 to December 31, 1985, that is, for an interregnum of 14 months only. The trauma of facing enforced unemployment and prolonged litigation is itself a sort of punishment and also a form of censure. Under such circumstances, to deny back wages due to her in a sum which cannot be regarded as substantial for the employer, would be to visit her with a further penalty which is not justified. Reinstatement on setting aside of a termination which was void ab initio was not compassionate gesture; it was a legitimate right. The claim for back wages had a legal foundation, denial thereof must be based on rational and realistic grounds formulated on a consideration of the entire set of circumstances. The denial thereof on the facts and in the circumstances of the present case is not only unwarranted but would also amount to putting a premium on the litigating activity of the employer.

16. For the foregoing reasons, in our opinion, the discretion to deny reinstatement with back wages was not exercised judicially in the present case. On the facts and in the circumstances of the case, the Industrial Court as also the learned single Judge erred in law in denying the legitimate claim for full back wages for the period from October 30, 1984 to December 31, 1985.

17. In the result, the appeal succeeds and it is allowed. The direction contained in the order of the Industrial Court and confirmed by the learned single Judge denying the appellant's claim for back wages for the period October 30, 1984 to December 31, 1985 is quashed and set aside. The Respondent Company is directed to work out the monetary benefits in the form of back wages due to the appellant and to pay them within a period of eight weeks from the date of service of the writ. Other benefits, if any, flowing out of reinstatement will also be worked out and they will also be simultaneously paid within the same limit. No order as to costs.

18. Office to issue a certified copy

19. No order on Notice of Motion No. 605 of 1990.