

(2006) 07 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No's. 13994 and 13997 of 2006

Jindarsing Bahra and Another

APPELLANT

Vs

Cargo Motors Ltd.

RESPONDENT

Date of Decision : 20-07-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 106
Industrial Disputes Act, 1947 — Section 11A, 25F

Citation : (2006) 111 FLR 190

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Premal S. Rachh, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. Premal S. Rachh for petitioners in these two petitions. Through these petitions, petitioners have challenged the common award passed by Labour Court, Jamnagar in Reference Nos. 591 and 592, 593 of 1992 dated 4th March, 2005 wherein the Labour Court has granted reinstatement without back wages for intervening period. Petitioners herein are workmen concerned in Reference (LCJ) Nos. 593 and 592 of 1992 respectively. They are challenging the aforesaid award insofar as it relates to refusal of back wages alone.

2. While making his submissions on behalf of the petitioners, learned Advocate Mr. Rachh has placed reliance upon the evidence of one workman vide Exh. 61 which is at page 59 Annexure-D, deposition given by one Ghanshyambhai Jivrajbhai Rathod. Learned Advocate Mr. Rachh submitted that the Labour Court has relied upon the evidence of one witness for workman at Exh. 61 for adjudicating the reference, but has not relied upon the evidence of same witness for workmen vide Exh. 61 for determining the question of back wages. He also submitted that in statement of claim, specific averments were made by the

petitioners that they have remained unemployed and have not been gainfully employed during the intervening period. He also submitted that the respondent has not proved gainful employment of both the petitioners. He also submits that the Labour Court has erred in raising an inference that the petitioners are technical persons and more than sixty garages are available in Jamnagar, and therefore, naturally, they would not have remained unemployed or without work for such a period being a technical persons. According to him, labour Court has committed gross error in not granting full back wages for intervening period. Except these submissions, no submissions was made by Mr. Rachh for petitioner. No decision was cited by him before this Court for consideration of this Court.

3. I have considered the submissions made by the learned Advocate Mr. Rachh on behalf of the petitioners. I have also perused the impugned award. Relevant discussion made by the Labour Court on the question of back wages is at internal page 20 of the impugned award. Labour Court has considered the decision of the apex Court as well as this Court and observed that Pravin Valji and Jindarsingh were working as mechanic whereas the workman Hanif Abu was working as Helper. None of the workmen have stepped into the witness box for giving deposition on oath, but they have relied upon the deposition of the another workman Ghanshyambhai at Exh. 61 wherein he has deposed about his unemployment during the intervening period but no specific deposition was given by said witness Ghanshyamsinh at Exh. 61 about the unemployment of present petitioners during the intervening period. Thus, assertions about their unemployment during the intervening period made by petitioners in their respective statements of claim have not been proved by them by giving oral evidence to that effect before the Labour Court, Labour Court has considered that it has not come on record as to whether these two petitioners have remained unemployed during the intervening period or not. Whether these two petitioners had made any efforts to secure any job or employment during the intervening period or not and whether they were not gainfully employed during the intervening period, that aspect has not been proved by the workmen before the Labour Court. Therefore, in absence of such evidence from said petitioners about unemployment, the respondent is not able to get any opportunity to cross-examine the workmen on that aspect. Therefore, in absence of such evidence on the aspect of back wages, Labour Court cannot, at its own, suo motu, infer that the workmen must have remained unemployed during the intervening period. Therefore, in absence of such evidence from petitioners, Labour Court came to the conclusion that the petitioners are not entitled for any amount of back wages for intervening period. Burden to prove unemployment, is initially, upon the workman. Workman is required to discharge such burden by way of oral evidence before the Labour Court, and thereafter, such burden stands shifted upon the employer to controvert the oral evidence of the workman about his unemployment during the intervening period. Here, since that initial burden was not discharged by the present petitioners, according to my opinion, Labour Court was right in rejecting the claim of the workmen for back wages for intervening

period. This aspect has been considered by the Apex Court in *Municipal Council, Sujapur Vs. Surinder Kumar*, The relevant discussion made in Paras 13, 15 and 16 which is reproduced as under:

13. Equally well settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. (See : *Manager, R.B.I., Bangalore Vs. S. Mani and Others*,

15. Apart from the aforementioned error of law, in our considered opinion, the Labour Court, and consequently, the High Court completely misdirected themselves insofar as they failed to take into consideration that relief to be granted in terms of Section 11A of the said Act being discretionary in nature, a labour Court was required to consider the facts of each case therefore, Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.

16. For the said purpose, the nature of the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration.

4. Question of back wages being independent question, is required to be examined by the Labour Court independently on the basis of the evidence led before it by the workman first and then on the basis of the evidence produced by the employer for controverting the evidence of workman. It cannot be said the award of back wages is normal or ordinary consequence of the award of reinstatement. Merely because the termination or dismissal is set aside, the workman is not becoming entitled automatically for back wages. Initially, it is the burden upon the workman to prove by oral or documentary evidence that he has remained unemployed during the intervening period inspite of his earnest assiduous efforts to secure job elsewhere. In absence of such evidence from workman, Labour Court cannot assume or presume that he must have remained unemployed, and therefore, entitled for back wages because that would, otherwise, deprive the employer from his right to contend or controvert the claim of back wages of the workmen. Therefore, while considering the reinstatement, labour Court shall have to examine the issue of back wages independently on the basis of evidence on record. This aspect has been considered by this Court in detail in Special Civil Application No. 13571 of 2006 decided on 13-7-2006 between *Atulbhai Chinubhai Shah v. A.M.T.S.* Relevant discussion made by this Court in Paras 6 and 7 is reproduced as under:

6. Recently, the Apex Court has also considered similar question in case of *Haryana State Electronics Development Corporation Ltd. v. Marnni* reported in AIR 2005 SCW 2979 , wherein, another recent decision in case of *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, The Apex Court has

observed in Paras 15 and 17 as under:

15. This Court in a number of decisions has categorically held that the relief of reinstatement with full back wages is not to be given automatically. Each case must be considered on its own merits.

17. It was further opined:

Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which, would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly improper on the part of the superior Courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.

A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions; of an industrial, Court shall lose much of its significance.

The changes brought about by the subsequent decision of this Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident.

In *Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Anr.* This Court noticed *Raj Kumar (supra)* and *Hindustan Tin Works (supra)* but held:

As already noted, there was no application of mind to the question of back wages by the labour Court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the labour Court or High Court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to (*supra*) in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long drawn litigation it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatements....

7. Recently, again this question. has been examined by the Apex Court in *U.P.S.R.T.C. Ltd. v. Sarada Prasad Misra and Anr.* reported 2006 SCC (L&S) 857, wherein, the Apex Court has observed that right to claim full back wages when to be granted. Held, no precise formula can be adopted nor "cast-iron rule" can be laid down in this regard. Payment of back wages is a discretionary power which has to be exercised keeping in view the facts and circumstances of each case. The approach of the Court/Tribunal should not be rigid or mechanical but flexible or realistic. In cases where the employee is entitled to reinstatement, the

question regarding payment of back wages would be independent of the question as to entitlement to reinstatement. While considering payment of back wages, the Court/Tribunal would consider all relevant circumstances referred to herein and pass an appropriate order keeping in view the principles of justice, equity and good conscience. Relevant discussion in Paras 13 to 16 which are quoted as under:

13. But even otherwise, the award passed by the Labour Court as also the order of the High Court granting back wages deserves interference. In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised keeping in view the facts and circumstances of each case and neither straitjacket formula can be evolved, nor a rule of universal application can be adopted (vide *P.G.I. of Medical Education & Research v. Raj Kumar*; *Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya*). In *Kendriya Vidyalaya Sangathan v. S. C. Sharma* this Court held that when question of determination of entitlement of back wages comes up for consideration, prima facie, it is for the employee to prove that he had not been gainfully employed. Initial burden is on the employee to show that he remained without any employment. In several cases, similar view has been taken by this Court in recent years. In *M.P.S.E.B. v. Jarina Bee*, it was observed that reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside an order of dismissal. In *Allahabad Jal Sansthan v. Daya Shankar Rai*, it was indicated that the law is not in absolute terms that in all cases of illegal termination of services, a workman must be paid full back wages. In *Haryana State Co-op. Land Development Bank v. Neelam*, it was stated that the aim and object of the Industrial Disputes Act is to impart social justice to the workman but keeping in view his conduct. Payment of back wages, therefore, would not be automatic on entitlement of the relief of reinstatement. In *G.M., Haryana Roadways v. Ruddhan Singh* the Court reiterated that there is no rule of thumb that in each and every case, where the Industrial Tribunal records a finding that the order of termination of service was illegal that an employee is entitled to full back wages. A host of factors which are relevevant, must be taken into account.

14. The Court stated (SCC page 596 para 8):

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25F of the Act, Entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisements from the Employment Exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered a considerable period of service and

his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where that total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration, is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily wage employment though it may be for 240 days in a calendar year.

15. In Allahabad Jal Sansthan v. Daya Shankar Rai after considering the relevant cases on the point, the Court stated (SCC page 130 para 16):

16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compiled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.

16. From the above cases, it is clear that no precise formula can be adopted nor "cast-iron rule" can be laid down as to when payment of full back wages should be allowed by the Court or Tribunal. It depends upon the facts and circumstances of each case. The approach of the Court/Tribunal should not be rigid or mechanical but flexible and realistic. The Court or Tribunal being with case of industrial disputes may find force in the contention of the employee as to illegal termination of his services and may come to the conclusion that the action has been taken otherwise than in accordance with law. In such cases, obviously, the workman would be entitled to reinstatement, but the question regarding payment of back wages would be independent of the first question as to entitlement of reinstatement in service. While considering and determining the second question, the Court or Tribunal would consider all relevant circumstances referred to above and keeping in view principles of justice, equity and good conscience, should pass an appropriate order."

Therefore, in view of the aforesaid observations made by the Hon"ble Apex Court as well as this Court in aforesaid decision, according to my opinion, Labour Court was right in examining the issue of back wages on the basis of the evidence before it and was right in coming to the conclusion that when the workmen have not deposed before the Labour Court about their unemployment, then, workmen are not entitled for any amount of back wages for intervening period because initial burden to prove unemployment by producing oral or documentary evidence to that effect was not discharged by workmen and in doing so, Labour

Court has not committed any error warranting interference of this Court in exercise of the powers under Article 227 of the Constitution of India.

This aspect has been considered by the Apex Court in *Laxmikant Revchand Bhojwani and Another Vs. Pratapsing Mohansingh Pardeshi Deceased through his Heirs and Legal Representatives*, . Relevant observations made by the Apex Court in Para 9 of the said judgment, are therefore, reproduced as under:

The High Court under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.

In *Ouseph Mathai and Others Vs. M. Abdul Khadir*, ; the Apex Court observed as under in paras 4 and 5:

It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article cast a duty upon the High Court to keep the inferior Courts and Tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such Courts and Tribunals in accordance with law conferring powers within the ambit of the enactments creating such Courts and Tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals resulting in grave injustice to any party.

5. In *Waryam Singh and Another Vs. Amarnath and Another*, this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, In AIR 1975 1297 (SC) this Court held that the High Court could not in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in *R. v. Northumber Compensation Appeal Tribunal Ex pane Shaw* 1952 (1) All ER 122, 128 this Court in *Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnam* held (SCC 460 para 20):

20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a. view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to

exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior Tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (See Trimbak Gangadhar Telang and Another Vs. Ramchandra Ganesh Bhide and Others,). Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion, therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error

Therefore, in view of the aforesaid discussion, since evidence given by one of the Workmen at Exh. 61 cannot be considered to be the evidence of present petitioners qua unemployment during the intervening period, it cannot be said that there was evidence of workman about his unemployment, and therefore, labour Court was right in rejecting claim of back wages for Intervening period, and therefore, there is no substance in these petitions and the same are required to be dismissed.

In the result, these petitions are dismissed.