
(1991) 08 BOM CK 0028
In the Bombay High Court
Case No : Writ Petition No. 3637 of 1985

Kala Silk Factory	Vs	APPELLANT
Phankoo Bakas Yadav and Others		RESPONDENT

Date of Decision : 29-08-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1992) 1 BomCR 102 : (1994) 3 LLJ 247

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : C.U. Singh and S.P. Pandey, for the Appellant; N.M. Ganguli, for R-1, for the Respondent

Final Decision : Partly Allowed

Judgement

B.N. Srikrishna, J.—By this writ petition under Article 227 of the Constitution of India, the petitioner has impugned the order of the Industrial Court dated 30th December, 1984 made in Appeal (IC) No. 94 of 1981 under the provision of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act").

2. The petitioner is a silk textile mill covered by the provisions of the Act. The first respondent joined the petitioner's service on 21st Feb., 1972 as a printer. On 14th September, 1975, he applied for leave with wages of 22 days and additional 8 days without wages. He also applied for advance payment of wages in lieu of leave before he proceeded on leave. Though his application for leave was recommended by the General Superintendent of the Department, it was turned down by the authority competent to grant leave, who specifically informed the first respondent that he could not be granted leave, as, too many employees were on leave at the relevant time. He was also informed that, unless some of the employees on leave came back to work, he would not be granted leave. Despite the categorical rejection of his leave application, the first respondent remained away from work with effect from 26th September, 1975. On 26th September, 1975, the first respondent's union addressed a letter to the

petitioner stating that, as the first respondent's ticket had already been booked, the first respondent had to go back to his native place, even though leave had not been granted. About a week later, a letter was addressed by the first respondent, in which he said that he had gone away to his native place, as he was under the impression that the leave sought had been sanctioned. By a letter dated 3rd October, 1975, sent under Registered Acknowledgment Due Post, the petitioner informed the first respondent that he had absented himself from 26th September, 1975, giving notice that, if he did not resume work within 10 days, his services would be terminated. This letter appears to have been received by the first respondent on or about 13th or 14th October, 1975. Despite the receipt of the said letter, the first respondent neither replied, nor resumed work. The petitioner claims that, on 1st November, 1975, it terminated the service of the first respondent by striking his name off the muster roll, since the first respondent had not bothered to reply the Notice dated 3rd October, 1975, nor had he resumed work, as directed therein. There is some controversy as to what transpired when the first respondent come back and attempted to resume work. That, however, need not detain us, as it is not in dispute that the first respondent was riot allowed to resume work on the ground that his service had been terminated. The first respondent issued the letter of approach dated 13th December, 1975, as required by the proviso to Section 42(4) of the Act, and followed it up with an application to the Labour Court u/s 78 of the Act. The first respondent's application was simple, in that he only alleged that his service had been discontinued illegally and arbitrarily, and prayed for a direction for reinstatement with full back wages. The petitioner contested the application, and after setting forth its version of the fact, took up the stand that, since the first respondent had not been granted leave and as he had continuously remained away from work with effect from 26th September, 1975, and further, as he had not cared to resume work despite receipt of the Notice dated 3rd October, 1975, his name had been removed from the muster roll with effect 1st November, 1975. This, the petitioner contended, was not a case of termination of service of the applicant but was a case of voluntary abandonment of service by the applicant.

3. The Labour Court, which tried the application, dismissed the application by holding that, since the applicant had remained absent despite refusal of his leave, he had committed a misconduct and his case was not a case of abandonment at all, as contended in the written statement of the petitioner employer, but it was a clear case of misconduct on the part of the applicant, for which he had been justifiably removed from service. On appeal by the aggrieved first respondent, the Industrial Court reappreciated the entire evidence on record, and came to the finding that the petitioner had terminated the service of the applicant and the termination of service was improper and/or illegal. When it came to the question of affording relief, however, the Industrial Court declined to grant the relief of reinstatement, since, admittedly, the factory of the petitioner had been closed down sometime in or about October, 1982. On the issue of back

wages, considering the conduct of the first respondent, which had led to his loss of service, the Industrial Court took the view that 50% of the backwages for the period from 1st November, 1975 to the date of closure of the original respondent's mill would meet the ends of justice, and, directed the present petitioner to pay such amount. It is this order of the industrial Court which is impugned by the present petition.

4. Though Mr. Singh attempted to contend that the termination of service of the first respondent was for a misconduct, as held by the Labour; Court and attempted to persuade me to disagree with the finding recorded by the Industrial Court on this issue, I am not persuaded. When the attention of the learned advocate was drawn to the categorical case put forth in the written statement, viz., that the service of the first respondent came to an end by reason of his name being struck off from the muster roll, and that it was a case of abandonment of service, he had to confine his arguments to this aspect of the matter. Thereafter, Mr. Singh tried to contend that, considering the circumstances of the case, the stand of the petitioner-employer was that the service of the first respondent came to an end by way of loss of lien by operation of Standing Order 12(5). This argument, in my view, is misconceived. Standing Order 12(5) reads thus:-

"(5) An operative remaining absent beyond the period of leave originally granted or subsequently extended, shall be liable to lose his lien in his appointment unless he returns within eight days of the expiry of his sanctioned leave. An operative who loses his lien under the provisions of this Standing Order but reports for duty within fifteen days and explains to the satisfaction of the authority granting the leave his inability to resume immediately on the expiry of his leave shall be kept as a "badli" if he so desires and his name shall thereupon be "entered in the "badli" register. An operative not reporting for duty within fifteen days of the expiry of his leave shall be treated as having left service from the date on which he was due to return to work."

5. A reading of the Standing Order makes it clear that it is intended to operate in a situation where an operative, who has been granted leave, has over-stayed the leave initially granted to him or subsequently extended, if any. In my view, the Standing Order, as framed, is not intended to apply to a situation where there has been absence without leave ab-initio. In this case of an operative remaining absent without leave ab-initio, his case would be covered by Standing Order 23, Clause (f), provided the absence is of more than 10 days, and it would amount to a misconduct, as defined therein. The employer then can take action by following the procedure prescribed under the said Standing Order. In the face of this clear provision in the Standing Order, I am unable to accede to the contention of Mr. Singh that the first respondent's case was a case of abandonment of service or loss of lien. Once this case fell to the ground, there was no other alternative case pleaded in the written statement, and the Industrial Court was, therefore, justified in its conclusion that the service of the

first respondent had been terminated illegally and improperly. I am, therefore, fully in agreement with the findings recorded by the Industrial Court, though for reasons other than those that appealed to the Industrial Court.

6. On the question of relief, however, I am not inclined to agree with the relief that has been awarded by the Industrial Court, as, I think, some modification therein is necessary. In the petitioner's evidence recorded before the Labour Court on 4th August, 1981, it has come, in reply to a question from the Court, that the petitioner had, an year ago offered to the first respondent to join and work and pay him some amount" but that he had refused. This is not disputed by the first respondent or his advocate. The result would, therefore, be that some time in or about August, 1980, there was an offer made to the first respondent that he should resume work but he did not accept the same. The Industrial Court's order has not been challenged in this Court by the first respondent. When I put it to Mr. Ganguli, learned advocate for the first respondent, as to how the first respondent can legitimately claim wages or as to how the Industrial Court could have granted backwages or any portion thereof after an offer to reinstate had been declined by the first respondent workmen, Mr. Ganguli's only submission was that, irrespective of how it had been done, this Court should not exercise its power under Article 227 of the Constitution. He also relied on the judgment of the Supreme Court in Mohd. Yunus Vs. Mohd. Mustaqim and Others, in support of his proposition.

7. The Supreme Court judgment in Mohd. Yunus's Case (supra), does not lay down that, even if this Court is satisfied that there had been a jurisdictional error, the Court is powerless to interfere under Article 227 of the Constitution. On the contrary; the observations in paragraph 6 and 7 support the view that such interference would be necessary. Turning to the facts of the petitioner's case, I am clearly of the view that, whatever other reliefs the first respondent might have been entitled to, he was not entitled to be paid any backwages from August, 1980, when an offer was made to reinstate him and he declined to accept the same. Mr. Ganguli contended that, at the time this offer was made, he was not offered the full amount of backwages and that would justify the refusal by the first respondent to accept the offer. I disagree. It is not disputed that the offer of reinstatement was unconditional. What was contested was the acceptance of a smaller amount, perhaps, out of the backwages. Nothing prevented the first respondent from accepting reinstatement and continuing to buttress his claim for backwages before the competent Court. The intentions of the first respondent were not made clear. He could have made them clear by addressing a letter to the employer accepting the unconditional offer of reinstatement and rejecting the offer with regard to acceptance of a smaller amount for the backwages without prejudice to his right to litigate. This does not appear to have been done. In the circumstances, I am unable to accept the submission of Mr. Ganguli.

8. The result is that, while maintaining the percentage of backwages directed to

be paid by the Industrial Court, I am of the view that the period needs to be restricted to about August, 1980 when the first respondent declined to accept the offer of unconditional reinstatement. Mr. Singh, learned advocate for the petitioner, has no objection if this modification is made upto 30th November, 1980 and the period for which 50% of the backwages directed is reduced upto 31st October, 1980. On the question of payment of terminal dues, Mr. Singh agrees that the terminal dues which were awarded by the Labour Court and appeared to have been confirmed by the Industrial Court shall be paid upto the date of closure, i.e. 16th November, 1982.

9. In the result, the petition is partly allowed, and the order of the Industrial Court impugned in the petition is modified as under :-

(i) The first respondent shall be paid 50% of the backwages payable to him for the period of 1st November, 1975 to 31st October, 1980.

(ii) He shall, in addition, be paid an amount equivalent to retrenchment compensation as if he had been retrenched on the date of closure i.e. on 16th November, 1982.

(iii) The first respondent shall also be paid such amount of gratuity, which he may be entitled to under law, computing his service as continuity upto 16th November, 1982.

10. All amounts payable to the first respondent under this order shall be deposited in this Court within 8 weeks from today.

11. Rule is partly made absolute, accordingly. There will, however, be no order as to costs.