

(1997) 06 BOM CK 0051

In the Bombay High Court

Case No : O.O.C.J. Writ Petition No. 2301 and 2716 of 1994

Mahamadsha Ganishah Patel and Another APPELLANT

Vs

Mastanbaug Consumers" Co-op. Wholesale and Retail Stores RESPONDENT
Ltd. and Another

Date of Decision : 24-06-1997

Acts Referred:

Citation : (1997) 3 ALLMR 719 : (1998) 79 FLR 874

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Mr. R.G. Hegde, for the Appellant; Mr. S.S. Pathak, for the Respondent

Judgement

R.M. Lodha, J.—These two writ petitions, one by the employer and the other by the employee are directed against the common order passed by the Industrial Court, Bombay on 15-6-1994 whereby the said Court maintained the order passed by the first Labour Court on 10th February, 1994 to the extent the employer was directed to reinstate the workman employee with continuity of service from 12.12.1988 and modified the orders as regards backwages. The first Labour Court directed the employer to reinstate the employee with continuity of service and full backwages except for six months while the revisional Court ordered 50% backwages. The employer in its writ petition is aggrieved by the order of reinstatement of the employee with continuity of service and payment of 50% backwages, while the employee is aggrieved by the denial of 50% backwages.

2. Mastanbaug Co-operative Wholesale and Retail Stores Limited (for short, "employer") is a consumer co-operative wholesale and retail stores and is registered as a shop under the Shops and Establishments Act. Shri Mohamadsha Ganishah Patel (for short, "employee") was employed as mapadi by the employer on 14.09.1981. It appears that the employee applied for one month's leave on 12.10.1988 due to his mother's serious ailment at his native place. One

month leave sought for by the employee was granted. However, the employee did not report on duty after expiry of one month. The case of the employee is that due to illness of other family members he could not join immediately on expiry of leave period and on 12.12.1988 he went to the employer and sought to join his duties but, the employer did not allow him to resume his work. The employee filed a belated complaint before the first Labour Court on 14.9.1989, under Item-I, of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "MRTU & PULP Act"). The complaint was resisted by the employer and the defence set out in the written statement was that the employee on his own remained absent and abandoned the service and, therefore, there was no question of any termination of service by the employer. Accordingly, the employer submitted that it has not indulged in any unfair labour practice. The prayer made by the Complainant for condonation of delay was also resisted by the employer. The first Labour Court after recording the evidence, condoned the delay in filing the complaint and held that the employee was able to prove that the employer has committed unfair labour practice and was entitled to reinstatement and continuity of service with full backwages except for six months. The order passed by the 1st Labour Court, Bombay on 10.2.94 was challenged in revision by the employer before the Industrial Court, Bombay. The Industrial Court partly allowed the revision application, maintained the order passed by the Labour Court, so far as reinstatement of the employee from 12.12.1988 with continuity of service was concerned, but modified the order regarding payment of backwages and ordered 50% of backwages.

3. In support of the writ petition filed by the employer, Mr. Pathak, the learned counsel appearing for the employer submitted that no termination order was passed by the employer and the employee on his own absented from duties and abandoned his service. Referring to the evidence of the employee, the learned counsel submitted that he was never interested in the employment and had habit of remaining absent. He thus submitted that the order passed by the Labour Court directing reinstatement of the employee and his continuity of service from 12.12.1988 was bad in law.

4. There is no dispute that the employee joined his service as mapadi with the employer in the month of September, 1981. There is also no dispute that on 12.10.1988 the employee applied for leave and the employer granted leave for one month. It is common ground that the employer did not initiate any disciplinary proceedings against the employee for allegedly not joining his duties after expiry of leave. There is also no dispute that the employer did not give any notice to the employee workman calling upon him to resume his duties. The muster-roll placed on record clearly showed that with effect from 12.10.1988 leave was granted to the workman employee by the employer. In this view of the matter the burden lay on the employer to establish and prove that the employee had abandoned service but, unfortunately no reliable evidence has been led by the employer before the Labour Court establishing the abandonment of service

by the workman employee. The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then pass appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-1, Schedule IV of the MRTU & PULP Act. The said finding recorded by the Labour Court has been upheld by the Industrial Court. I do not find any infirmity in the order passed by the Industrial Court in holding that there was no abandonment of service by the workman employee and that his services were illegally terminated. In this view of the matter, there is no merit in the writ petition filed by the employer.

5. Coming now to the writ petition filed by the employee, it may be observed that the only grievance raised by him is refusal of 50% of backwages by the Industrial Court. The learned counsel appearing for the workman employee submitted that the Labour Court rightly awarded full backwages and there was no justification and valid reason for the revisional court in interfering with the said order and directing 50% backwages. The learned counsel for the employee submitted that once termination of the workman employee was held illegal and bad in law, the reinstatement with full backwages of the workman follows as a matter of course. According to him, there was no justifiable reason for departure from this normal rule. In support of his contentions, the learned counsel for the Petitioner relied upon judgment of the Apex Court in *M/s. Hindustan Tin Works Pvt. Ltd., v. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and others*, 1978 L.I.C. 1667; the Division Bench judgment of this Court in *Changunabai Chanoo Palkar v. Khatau Makanji Mills Ltd.* and another 1992 1 CLR 660; a single bench judgment of this Court in *Pandurang Manasaheb Jagadale, v. Chairman & Ors.* 1992 II CLR 532; and, *Chandrapur District Central Co-op Bank Ltd., Chandrapur, v. Industrial Court. Nagpur & Anr.* 1995 2 CLR 735.

6. The learned counsel appearing for the employer submitted that after taking into consideration the relevant facts and circumstances the Industrial Court was justified in denying 50% backwages to the employee. He submitted that on 19.1.1994 during pendency of the proceedings before the 1st Labour Court an offer was made by the employer to the employer for resumption of his duties

without prejudice to the rights and contentions in the complaint and workman was called upon to resume his duties. However, employee did not resume his duties. The learned counsel for the employer also submitted that even before the Industrial Court, the employer offered reinstatement to the workman without prejudice to the rights and contentions in the revision application but despite that offer the employee did not resume his duties. According to the learned counsel the employee was never interested in the employment and he was engaged in agricultural activities at his native place. He thus submitted that the 50% backwages awarded by the Industrial Court does not require any interference.

7. The learned counsel appearing for the employee in rejoinder placed certain letters for my perusal to show that his client was prepared to resume duties but no appropriate action was taken by the employer permitting the workman employee to join his duties.

8. In M/s. Hindustan Tin Works Pvt. Ltd., the Apex Court held thus :

"Speaking realistically, 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 such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. 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 backwages 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. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances, reinstatement being the normal rule, it should be followed with full back wages."

Division Bench of this Court in Changanabai Chanoo Palkar's case applied the same principles as laid down by the Apex Court and held thus :

"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 through 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 backwages which would be due to him, the workman would be subject to a sort of penalty for no fault of his and it is wholly undeserved. Any other view may amount to putting 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 backwages is ordinarily absent in such cases save for exceptional reasons."

In Pandurang Jagdale's case the single judge of this Court reiterated the normal rule of the industrial adjudication that when the dismissal order is set aside and reinstatement is granted to the employee, he is entitled to all his backwages and continuity of service and all benefits although there may be departure from this rule only for valid reasons. I had occasion to consider the similar question in Chandrapur Dist. Central Co-op. Bank Limited (supra), and the same principle of normal rule was reiterated and I held thus : "Ordinarily once the termination order is held bad in law, illegal, void, the consequences would be as if such order never came to existence and as a result of such consequence the employee would be entitled to all reliefs as if he was in service unless any exception can be made-out."

9. The legal position thus is well established and the normal rule of industrial adjudication appears to be well defined that once the termination order is held bad in law, illegal, void, the consequences would be as if such termination order never came into existence and as a result thereof the employee would be entitled to all the reliefs. Meaning thereby upon declaration of termination order illegal, the employee is entitled to reinstatement with full backwages unless a case for departure is made out. The exception must be founded on valid reasons. One of which is that employee was gainfully employed during that period.

10. In the present case, the Labour Court held the termination of the workman employee illegal and bad in law and directed the employer to reinstate the workman from 12.12.1988 with continuity of service and full backwages except for six months. Backwages for six months was denied apparently for reason that complaint was filed belatedly by the employee. Full backwages awarded by the Labour Court has been interfered with by the revisional court by setting out the following reasons :

"16. POINT NO. 2 : From the record of the case, admittedly the complainant was on leave for about 2 months. He has not filed on record application, when he has joined the services of the Respondent and refused to allow him to join services. It is seen from the application filed in the month of January, that he has reported on duty on 12/12/1989. Further from the record, it is seen that he was on leave therefore, when the complainant was on leave, how he can abandon the services, and it is also pertinent to note that, there is no termination order from the respondent. Neither it is pleaded by the complainant, that his services are terminated orally or by any order. He has pleaded that, he was not allowed to resume duty, therefore, it should be termed as termination. Under these circumstances, the complainant should have approached the Court at the earlier, but he has filed a complaint after the period of 9 months, including the period of three months of limitation. This shows that, the complainant was negligent in filing the complaint. The LC has taken lenient view in condoning delay, and

allowing the Misc. Application. If the learned Labour Court should have taken a strict view, and rejected the application, then whole complaint of the complainant would have been dismissed, and the complainant would be out of service. But in the light of the observations of the Supreme Court, delay was condoned. Though, there was no sufficient evidence, but the Labour Court has concluded the same taking broad view in favour of the said citation. But, it does not mean that, the respondents should be punished for it by saddling the penalty of backwages upon the Respondents. No doubt, the Labour Court had deducted six months' wages by the order, but in my opinion this will not meet the ends of justice. The documents shows that, the Complainant was having agricultural land at his native place, and he used to go to his native place for his agricultural purposes. Therefore, during the period of unemployment, he should have earned wages, therefore, rejecting 50% backwages to the complainant, will decrease the burden of the respondents, specifically in the circumstances when the entire property of the petitioner was destroyed and looted in recent riots in Bombay. This point should have been considered by the Labour Court, but it was not considered. Therefore, in my opinion, the order of the Labour Court, granting full backwages deserves to be interference with."

11. The Industrial Court appear to have been influenced by the reasons viz. (i) the workman employee did not act diligently in filing the complaint and the complaint was filed after the period of 9 months including the period of three months limitation; (ii) the Labour Court took lenient view on condonation of delay and had the Labour Court taken strict view and rejected the application, the whole complaint would have been dismissed; (iii) the workman was having agricultural land at his native place and used to go to his native place for his agricultural purposes and, therefore, during the period of unemployment he should have earned wages, and (iv) that the entire property of the employer was destroyed and looted in the recent riots in Bombay.

12. The answerable question is whether the reasons assigned by the Industrial Court justify denial of 50% of backwages and make out a case for departure from normal rule. I may straightway observe that most of the reasons assigned by the Industrial Court are extraneous and irrelevant and do not supply valid reasons for departure from normal rule. The fact that complaint was filed belatedly by six months could at best justify denial of backwages for that period and not beyond that. The observation made by the Industrial Court that had the Labour Court not taken lenient view in condoning the delay and the delay was not condoned the complaint would have been dismissed and no relief could have been granted to the workman employee, with respect to industrial court, is pure conjectural statement loaded with ifs and buts and shows irrelevant factor have been taken into consideration by the Industrial Court while considering the question of back wages. Once the Labour Court condoned the delay in making complaints and which has been upheld by the revisional court the said circumstance could not have been used against the workman for denial of backwages. The Labour Court had rightly denied workman six months backwages

for the delay in filing complaint and I think that was fair and just, so far as that circumstance was concerned. The Industrial Court also acted on surmise and conjecture when it observed that employee has agricultural land and used to go to his native place for agricultural purposes and therefore should have earned wages. In the absence of any evidence whatsoever led by the employer that employee was gainfully employed after the period of termination, on surmises and conjectures 50% of backwages could not have been denied on the ground that employee should have earned something from his agricultural operations. If during the enforced idleness, the employee kept himself busy on his agricultural land and cultivated the same, in my view such act on the part of the employee cannot be stretched to mean that employee was gainfully employed. Is employee not expected to survive and sustain his family during enforced idleness ? The last reason assigned by the Industrial Court is that due to loot and riots in Bombay the entire property of the employer was destroyed. The only evidence which has come on record is that during the riots in Bombay the property of the employer worth Rs. 1 lac was destroyed. This was indeed unfortunate incident, but was not the sufficient circumstance to deny the workman employee his due full backwages. This difficulty of the employer could have been taken care of by the Industrial Court by granting more time to the employer to pay backwages or even installments could have been fixed. However, there is substance in the contention raised by the learned counsel for the employer that on 19.1.94 while the complaint was pending before the Labour Court an offer was made by the employer to the employee to resume his duties and despite that offer the employee did not join his duties. It also appears from the material shown by the learned counsel for the parties that even after the order was passed by the 1st Labour Court and when the employer challenged the said order in revision, before Industrial Court by way of interim arrangement, the employer asked the employee to resume his duties. However, it appears that the employee did not resume his duties though he sent certain letters through his representative that he was desirous of joining the duties. Taking overall facts and circumstances into consideration, in my view, the Labour Court was justified in awarding full backwages to the employee workman except for six months. However, from the date of the order passed by the Labour Court in view of the express offer made by the employer to the employee to resume his duties and the fact that the employee did not resume his duties, the employee is not entitled to any wages from the date of the order passed by the 1st Labour Court till the date he joins his duties with the employer. The learned counsel for employer very candidly submitted that the employee may join his duties now immediately and the employer shall permit the employee to join his duties. The learned counsel for the employee submits that his client shall join his duties with the employer.

13. In the result, the order passed by the Industrial Court on 15.06.94 is modified and both the writ petitions are disposed of by passing the following order :

(i) the employer Mustanbaug Co-op. Wholesale and Retail Stores Ltd. shall

reinstate the employee Shri Mohamadshah Ganishah Patel from 12.12.1988 with continuity of service on or before 10th July, 1997;

(ii) the employer shall pay to the employee full backwages from the date of the complaint upto 9th February, 1994;

(iii) the workman employee shall not be entitled to any wages from the date of the order passed by the 1st Labour Court till his joining of the duties with the employer.

14. No costs. Certified copy expedited.