
(1999) 08 BOM CK 0020

In the Bombay High Court

Case No : O.O.C.J. W.P. No. 2060 of 1999 with W.P. No. 2455 of 1998

Morarjee Gokuldas Spinning and Weaving Co. Ltd.

APPELLANT

Vs

Maruti Yeshwant Narvekar and Others

RESPONDENT

Date of Decision : 20-08-1999

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 78

Citation : (2000) 1 LLJ 1008

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : S.M. Naik, for the Appellant; S.N. Deshpande, for the Respondent

Judgement

A.P. Shah, J.—The 1st respondent workman came to be employed in the petitioner Mill sometime in 1961. The Maharashtra Girni Kamgar Union called upon the employees in textile industry in Mumbai to resort to strike from January 18, 1982. The strike was declared illegal by order of Labour Court dated February 11, 1982. Though the strike was called by an unrecognised union not registered under the provisions of the Act it received wide response from the employees in the Cotton Textile Industry. A large number of employees were thrown out of service with scant regard being paid to principles of natural justice or any procedure under the law and the Standing Orders. The respondent employee appears to be one such victim.

2. According to the employee he had not participated in the strike and after tension was reduced to some extent he reported for work but he was not taken back in service by the Mill. According to him on several occasions he approached the Mill but several other employees were taken back but he was not taken back. This situation continued for quite sometime and ultimately on January 21, 1988 the workmen sent letter of approach requesting them that he may be taken back in service and paid his wages. His request was not accepted and therefore he filed an application before the Labour Court u/s 78 read with Rule 79 of the Act.

3. The case or the Mill in the course of the adjudication proceedings was that strike had been declared as illegal and that by notices published in the local newspapers dated February 28, 1982 the employees were appraised 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 workman 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 workman or to hold an enquiry in respect of the misconduct. By order dated October 14, 1982 the workman was dismissed from service. The order of dismissal was sent to the workman at the recorded address under the certificate of posting. Under the aforesaid circumstances according to the Mill the approach notice dated October 21, 1988 was beyond the prescribed limit and therefore the application of the workman was not maintainable.

4. During the course of adjudication proceedings parties led evidence. The Mill placed on record inter alia the certificate of posting alongwith the order of dismissal communicated at his recorded address of the workman. The workman however denied that any such communication was tendered to him at any stage. The Labour Court found that the postal certificate was manipulated and came to the conclusion that the dismissal order was not communicated to the workman. The Labour Court relied upon the decision of the Supreme Court in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, wherein it was held that for the individual delinquent or overt act on the part of the workman, the workman could not have been punished for the alleged participation in the strike. The Labour Court held that the order was void ab initio and directed reinstatement of the workman with 25% backwages.

5. Both the employer and the workman filed appeals to the Industrial Court Bombay which came to be dismissed. Being aggrieved by the impugned judgment and order of the Industrial Court, the employer as well as the workman have approached this Court by filing the petitions under Article 226 of the Constitution of India.

6. Mr. Naik the learned counsel appearing for the employer urged that after the strike was declared illegal, public notices were given to the employees calling upon them to resume duties. The workmen however did not resume duties and therefore the management was constrained to pass the order of dismissal of the workman. He urged that in every case proof of overt act is not necessary pre-requisite. In the present case there is persistent refusal on the part of the workman to join duties notwithstanding the fact the management has done everything possible to persuade the workman and give an opportunity to come back to work but the workman without any sufficient cause refused which would constitute misconduct and justify the dismissal of the service. Mr. Naik also urged

that the application filed by the workman under Sections 78 and 79 of the Act was hopelessly time barred. Mr. Naik urged that according to the employee himself, he has approached for work in February 1982 and thereafter continuously visited the mill, but work was refused. Despite that he decided to wait for almost six years and filed an application to the Labour Court only on October 21, 1988. Mr. Naik submitted that the limitation of 3 months prescribed by Rule 53 would commence from the date of refusal of work and therefore the application, on the face of it, was barred by limitation.

7. In reply Mr. Deshpande submitted that the dismissal order was void ab initio since no charge-sheet was served and no enquiry preceded in accordance with law. The finding of his conduct i.e., 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 backwages. Mr. Deshpande submitted that the respondent is an employee who had served the respondent Mill from 1961 to 1982, that is more than two decades. His record of service is otherwise unblemished since nothing adverse has been brought on record. He submitted that both the Courts concurrently held that the order of dismissal was not communicated to the employee. Under the circumstances, the application cannot be said to be barred by limitation. He submitted that the workman is entitled to full backwages.

8. In *Gujarat Steel Tubes Ltd. etc. v. Gujarat Steel Tubes Mazdoor Sabha and Ors.* (supra) the Supreme Court has held that mere non-reporting for work by a workman does not lead to an irrebuttable presumption of active participation in a strike. More is needed to bring home the mens rea and that burden is on the management. Huddling together the eventful history of deteriorating industrial relations and perverse leadership of the Union of workers is no charge against a single worker whose job is at stake on dismissal. Mere absence from duty without more may not compel the conclusion of involvement of the worker in the strike. In the absence of proof of being militant participant in the strike the punishment may differ. To dismiss a worker, in an economy cursed by massive unemployment is a draconian measure as a last resort. The degree of culpability and the quantum of punishment turn on the level of participation in the unjustified strike. A disciplinary inquiry resulting in punishment of particular delinquent cannot but be illegal if the evidence of mass misconduct by unspecified strikers led by leaders who are perhaps not even workmen.

9. A reference may also be made to the decision of the Division Bench of this Court in the case of *Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others*, . That was a case of female workman who was dismissed from service on the ground that she did not respond to the public notice given by the Mill and failed to resume duty. The Labour Court found that the misconduct of the workman 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.

10. However, the Labour Court finally dismissed the application on the ground that the application was beyond the prescribed time limit and therefore not maintainable. The decision of the Labour Court was confirmed by the Industrial Court which also came to be confirmed by the learned single Judge. In appeal the Division Bench held that the dismissal was void ab initio and directed reinstatement of the workman with full back wages. The Bench observed as under.

11. In the case of Changanabai Chanoo Palkar (supra) the Division Bench observed:

"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 maintain a clear dichotomy between passive and active strikers. This is considered essential and of practical importance because the kind of quantum of punishment has to be modulated in accordance with the nature of participation in the strike. The real question required to be determined 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 quiescent non-worker, during the explosive period? It must be remembered, for example, that not reporting for work and remaining at home for fear or 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 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".

"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 pre-dating of the award would have no legal sanction.

Reinstatement on setting aside of a termination which was void ab initio was not compassionate gesture; it was a legitimate right. The claim for backwages had a legal foundation; denial thereof must be based on rational and realistic ground formulated on a consideration for 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."

12. In a similar situation the learned single Judge (SRIKRISHNA J) in *Jayavant Yeshwant Raut v. Simplex Mills Ltd. and Ors.* 1996 III LLJSuppl.598 (Bom) allowed the workman's claim and granted reinstatement with backwages. The learned Judge held that once it is held that the application made by the employee was maintainable, there does not seem to be any difficulty in granting him the relief sought, because the Industrial Courts has clearly held that there was no valid order of termination by which the service of the employee was disrupted and in any event, the alleged termination of service could not be upheld. The learned Judge rejected the argument of the employer that the limitation of three months would commence from the date of refusal of the workman. It was held that the dispute of such nature, would be a change sought by the employee in respect of Item 6 of Schedule III of the Act which would properly fall within Clause (iii) of Section 78(1)(A)(a) of the BIR Act.

13. Mr. Naik made a faint attempt to contend that the application filed by the workman was beyond the limitation. He relied upon the decision of another single Judge of this Court in the case of *National Textile Corporation (South Maharashtra) Ltd. v. P. Gama (Ms.) and Ors.* 1995 I CLR 84. In that case the learned Judge held that the three months time would commence from the date of refusal of the employer to give work to the employee, as the learned Judge felt that if it is not an order of termination etc. and it will not fall in any of the clauses or sub-clauses of Section 78(1) and the Labour Court will have no jurisdiction to decide any dispute in relation thereto. It seems that the attention of the learned Judge was not drawn to the Division Bench decision in the case of *Changunabai Chanoo Palkar* (supra). It seems that the learned Judge also failed to notice that such a dispute would fall under Clause (3) of Section 78(1)(A)(a). Under the circumstances the plea of limitation raised by Mr. Naik must be rejected.

14. Now the only question is whether the lower Courts were right in awarding only 25% backwages. In the instant case there is no evidence of the employee's actual participation in the strike. The employee has stated in his cross-examination that all the workers were on strike during the relevant period. Relying upon this statement the Labour Court has held that only 25% backwages should be awarded to the employee. I am afraid that the view taken by the Labour Court is totally erroneous. If the order is void ab initio then as held in the case of *Changunabai Chanoo Palkar*'s case (supra) as also in the case of *Jayavant Yeshwant Raut* (supra) the workman would be entitled to reinstatement with full backwages. In the present case, however, there is one distinguishing factor viz. that the employee has approached the Labour Court only in the year 1988. Considering the facts and circumstances of the case I feel that the ends of justice would be served if the employer is directed to pay to the workman 75% of the backwages from the date of termination till his reinstatement. The learned counsel for the parties informed me that as per the Court's order the employee was reinstated and he stood superannuated in 1998. Under the circumstances the employer is directed to pay to the employee amount of 75% backwages

within four weeks from to-day.

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