
(2004) 01 BOM CK 0008
In the Bombay High Court
Case No : Writ Petition No. 2913 of 2001

Navin J. Surti

APPELLANT

Vs

Modi Rubber Limited and Another

RESPONDENT

Date of Decision : 09-01-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 30

Citation : (2004) 2 ALLMR 358 : (2004) 106 BOMLR 314

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the parties. Perused the records.

2. The grievance of the petitioner relates to the refusal by the Labour Court and the Industrial Court below to order payment of entire back wages inspite of the fact that the termination of service of the petitioner was found to be illegal and he was directed to be reinstated with continuity in service.

3. Few facts relevant for the decision are that the petitioner was employed with the respondent No. 1. His services were terminated by an order dated 16th September, 1993, consequent to which, the petitioner filed complaint under Item Nos. I(b) and (f) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter called as "the said Act", and the Labour Court by an order dated 29th November, 1999, while holding the termination of service to be illegal, directed the petitioner to be reinstated with continuity in service and further payment of 50% of the back wages. Aggrieved by the said order of the Labour Court, the petitioner filed Revision Application No. 3 of 2000 in relation to the refusal of 50% of back wages while the respondent No. 1 filed Revision Application No. 1 of 2000

against the order directing reinstatement as well as payment of 50% of back wages. Both the revision applications came to be dismissed by an order dated 2nd May, 2000 by the Industrial Court confirming the decision of the Labour Court. The petitioner being aggrieved by the confirmation of direction for payment of 50% of the back wages has preferred the present petition.

4. The challenge to the judgment and order of the Courts below in relation to the direction for payment of 50% of the back wages is on four grounds. Firstly, that the impugned order is contrary to the well established principle of law that the direction for payment of full back wages should follow as consequence of direction for reinstatement pursuant to the finding that termination of the service was illegal. In that regard, reliance is sought to be placed in the decision of this Court in the matter of Mohammadsha Ganishah Paiel and Anr. v. Mastanbaug Consumers' Co-op. Wholesale and Retail Stores Ltd. and Anr. 1998 (I) C.L.R. 1205 Secondly, that the Courts below ought to have considered that the employer had failed to establish that the petitioner was gainfully employed elsewhere after the termination of his service by the respondent No. 1 and that itself was a justification for direction of payment of full back wages. Reliance is placed in that regard in the decisions in the matter of Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 ,Chhaganlal Prahladrai Singhania v. The Maharashtra State Co-operative Marketing Federation Ltd. 1992 (I) C.L.R. 332 and State of Madhya Pradesh and Ors. v. Chhote Minya and Ors. 1997 (II) C.L.R. 236. Thirdly, that the Courts below failed to consider that the burden of proof regarding gainful employment was entirely upon the respondent No. 1 employer and the respondent No. 1 had failed to discharge the same. Mere impression of the employee about the alleged occupation of the employee cannot be construed as sufficient material to discharge the said burden. In that regard, reliance is placed in the decisions in the matter of Metro Tyres Ltd. v. Presiding Officer, Labour Court, Ludhiana & Ors. 1997 (II) C.L.SR. 1201, Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, and M/s. Burn Standard Co, Ltd. and Ors. v. Tarun Kumar Chakraborty 1998 (78) F.L.R. 714 . Fourthly, it was sought to be contended that the Courts below erred in holding that the petitioner was under obligation to show as to how he had maintained himself after the termination of his service by the respondent No. 1. It was the contention of the learned Advocate for the petitioner that the Courts below failed to appreciate that the petitioner had clearly stated that he was engaged in the agricultural work, even though the burden of proof as to how he survived during the period of unemployment was not upon the petitioner, and, therefore, the Courts below ought to have directed payment of entire back wages.

5. On the other hand, the impugned order for the direction for payment of 50% of back wages is sought to be justified by the learned Advocate for the respondents on the ground that there was not even an attempt made by the petitioner to get himself employed elsewhere or to find out other source of income, whilst, at the same time, he had admitted that he was getting some income from agriculture, after the termination of his service by the respondent

No. 1. It is the contention of the respondent that the source of income to the employee was within his knowledge, and therefore, it was primarily necessary for the employee to disclose the same to the Court while seeking to justify the claim for back wages. It is also the contention of the learned Advocate for the respondent that considering the provisions of Section 30 of the said Act, it is a matter of discretion with the Labour Court in relation to direction for payment of back wages and the same has to be decided based on the facts of the case and mere failure on the part of the employer to establish that the employee was gainfully employed during the time when he was out of employment with the respondent No. 1 elsewhere, that itself cannot be a justification to direct the payment of entire back wages. He has also further submitted that the petitioner had not disclosed any efforts having been made to minimize the losses suffered by him on account of unemployment with the respondent No. 1. Taking into consideration all the materials on record, according to the learned Advocate for the respondents, no fault can be found with the exercise of discretion of the Courts below, and in those circumstances, there is no case made out for interference with the said orders in writ jurisdiction. Reliance is sought to be placed in the decision in the matter of P.G.I, of Medical Education and Research, Chandigarh v. Raj Kumar etc. 2001 (I) C.L.R. 1055 Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Anr. AIR 2002 S.C.W. 3008 and Sadanand Patankar v. M/s. New Prabhat Silk Mills (No. 2), Bombay 1974 Mh. L.J. 761.

6. The Apex Court in Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, while dealing with the subject of payment of full back wages consequent to the order of reinstatement had held that the full back wages would be normal rule and the party objecting to it must establish the circumstances necessitating departure and the Tribunal in that regard will have to exercise its discretion keeping in view all the relevant circumstances but the discretion must be exercised in a judicial and judicious manner. It was clearly observed that "the reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular." In P.G.I, of Medical Education and Research's case (supra), the Apex Court after taking note of its decision in Hindustan Tin Works (supra) as well as Syed Yakoob Vs. K.S. Radhakrishnan and Others, has held that though the normal rule being payment of back wages in its entirety, on the direction for reinstatement of the employee in a case where matter comes up before the High Court in writ jurisdiction against the order of the Labour Court restricting the direction to any amount less than the back wages in its entirety, it is necessary to consider whether the discretion exercised by the Tribunal is erroneous warranting interference by the High Court. It was further observed that "the finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the

Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation to that effect. In the event, however the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law which can be corrected by a writ of certiorari. The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and materials evidence adduced before the Labour Court was insufficient or inadequate, though however, perversity of the order would warrant intervention of the High Court." It was also observed that "payment of back wages, having a discretionary element involved in it, has to be dealt with, in the facts and circumstances of each case and no strait-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety." It was further observed that in the event of the High Court finds it necessary to interfere then there would be an obligation on the part of the High Court to record in its judgment the reasoning before the denouncing a judgment of an inferior Tribunal, and in the absence of such reasons being disclosed in the judgment of the High Court, the same would not stand the scrutiny of otherwise being reasonable because "there ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the Labour Court and it is only upon recording therewith the High Court has the authority to interfere."

7. The Apex Court in Hindustan Motors's case (supra), after referring to the decisions in Hindustan Tin Works" case (supra) as well P.G.L of Medical Education and Research's case (supra) and referring to Section 11A of the Industrial Disputes Act, 1947, as amended in 1971, has observed that the law provides for wide discretion to the Tribunal in the matter of awarding proper punishment and also in the matter of the terms and conditions on which reinstatement of the workman should be ordered, and therefore, it necessarily follows that the Tribunal is duty-bound to consider whether in the circumstances of the case, back wages have to be awarded and if so, to what extent. At the same time, the Apex Court in recent decision in the matter of Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, has held that "Direction for reinstatement does not automatically entitle an employee to full back wages."

8. The above judgments clearly lay down the law to the effect that in the matter of claim for back wages consequent to the order for reinstatement in favour of the employee, the Tribunal or the Court has to exercise its discretion in a judicial and judicious manner and consider the facts and circumstances of each case and there is no strait-jacket formula In the matter of exercise of such discretion. Indeed, even otherwise, in terms of Section 30(1)(b) of the said Act, wide discretion is given to the Courts while disposing the complaints under the said Act in the matter of grant of back wages or the compensation consequent to the order of reinstatement of the employee. The said section clearly provides that where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order direct all such persons to cease and desist from such unfair labour practice, and take such

affirmative action including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation, as may in the opinion of the Court be necessary to effectuate the policy of the Act. The expression "in the opinion of the Court" necessarily discloses the discretion to be exercised by the Court in the matter. Undoubtedly, the discretion has to be exercised in a judicial and judicious manner as has been held by the Apex Court.

9. Applying the said law to the facts of the case and on perusal of the impugned judgments as well as other materials placed on record, it cannot be disputed that the same nowhere discloses that the employer having established the fact that the employee was gainfully employed elsewhere after the termination of his service by the respondent No. 1. Undoubtedly, an attempt was made to show that the petitioner was engaged as a Taxi Driver and was carrying the business of hiring a taxi. However, apart from a mere allegation in that regard neither any documentary material nor any cogent oral evidence was placed on record by the respondent No. 1 in support of the said allegation, and neither the Labour Court nor the Industrial Court has been able to arrive at any finding in support of the said allegation by the employer. In the circumstances, it cannot be disputed, as rightly submitted by the learned Advocate for the petitioner, that the respondent No. 1 had failed to discharge its burden to establish that the petitioner was gainfully employed during the time he was out of the employment of respondent No. 1.

10. The questions then arise are whether, pursuant to the failure by the employer to establish that the employee was gainfully employed during the time he was out of the employment of the respondent No. 1 would it by itself justify the direction for payment of the entire back wages, and whether the Courts below have acted illegally in not ordering the same? The Labour Court in its judgment while observing that the efforts on the part of the employer did not prove fruitful to establish that the petitioner was gainfully employed elsewhere, has held that it was within the personal knowledge of the petitioner as to how he was maintaining himself during the relevant period and as to whether he had tried to find out any job elsewhere and the petitioner had not disclosed any efforts having been made by him in that regard. The said finding has not been disturbed by the Industrial Court. Besides, the records placed by the petitioner along with this petition and more particularly the testimony of the petitioner himself disclose that there was a clear admission on the part of the petitioner in the examination-in-chief itself that he was getting Rs. 1,500/- to 1,700/- approximately from the agriculture at his native place and that is how he was maintaining his family during the relevant period and further that he had not tried to secure any alternative job elsewhere after the termination of the service by the respondent No. 1. Relevant portion of his testimony reads thus :- "I am getting Rs. 1,500/- to 1,700/- approximate Income from the agriculture at my native place thereby I had to maintain my family till the date. I have not tried to secure an alternative

job anywhere after my termination." It was sought to be contended on behalf of the petitioner that there was no obligation upon the petitioner to disclose about his source of income which would have sufficient to maintain himself and his family during the time when he was out of the employment of the respondent No. 1 and further that merely because he was getting some meager amount to keep his body and soul together even by way of begging, that would not be a justification to deny back wages in its entirety to the petitioner, and in that regard, attention was drawn to the decision of the Apex Court in Rajinder Kumar Kindra's case (supra).

11. In Rajinder Kumar Kindra's case (supra), the Apex Court had observed that "if the employer after an utterly unsustainable termination order of service wants to deny back wages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in-law Tara Chand who had a coal depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment so as to reject the claim for back wages." Bare reading of the above ruling discloses that the said ruling was in relation to the point as to what could not be said to be gainful employment to justify denial of the back wages in its entirety. The decision is not on the point that when there is source of income available to the employee during the time when he is out of the employment, even then the same cannot be considered for the purpose of denial of the back wages in its entirety. The Apex Court was dealing with the point relating to the discharge of burden by the employer on the point of gainful employment, and in that regard, the said ruling was given. The binding nature of the decision is to be understood from what is decided in the matter.

12. The Division Bench of Punjab and Haryana High Court in Metro Tyres's case (supra) has held that "the statement of the workman about his doing agricultural operation for earning livelihood cannot be equated with gainful employment in view of the judgment of the Apex Court in Rajinder Kumar Kindra's case." Apparently, the Division Bench of Punjab and Haryana High Court was dealing with the issue regarding the discharge of burden of the employer regarding gainful employment of the employee during the time when he was out of service, and, in that regard, has observed that mere statement of the workman that he was getting some income by way of agricultural operation cannot be sufficient to draw a conclusion that the employer has discharged the burden regarding gainful employment of the employee.

13. In Chhaganlal Prahladrai Singhania's case (supra), the Division Bench of this Court had ruled that the burden is upon the employer to establish that the worker was gainfully employed during the interregnum for denial of back wages. Undoubtedly, the Labour Court therein had declined to award back wages on the

ground that the worker had not taken any steps to secure any job till he was acquitted by Criminal Court, and in that regard, the above observations were made.

14. However, the Division Bench of this Court in Sadanand Patankar's case (supra), after taking note of the earlier decisions of this Court in Bharat Textile Engineering Works Vs. N.A. Athalve and Others, and unreported decision in The Poona District Central Co-operative Bank Limited v. Shankar Nagesh Sarnaik Special Civil Application No. 2640 of 1970 decided on 15.4.1971 as well as of the Allahabad High Court in Rakeshwar Dayal Vs. Labour Court and Others, and Postal Seals Industrial Co-op. Soc. v. Labour Court (1971) I L.L.J. 327 and of the Madras High Court in United Bleachers (P.) Ltd. v. Labour Court (1964) I L.L.J. 156 ruled thus:-

The position of law which emerges from the aforesaid decision may be summarised as follows: The effect of reinstatement is to restore an employee to his former capacity, status and emoluments, as if his services never been terminated, and the employee gets the benefit of continuity service. The general rule in industrial adjudication is that on reinstatement, the employee is to be duly compensated for the loss of earnings during the period of his enforced idleness or unemployment. In the absence of cogent reasons to the contrary such compensation should normally be equal to the full wages or remuneration which the employee would have received had he continued In service but for the order of termination of his service. On such reason will be the extent of the income, If any, earned by the employee elsewhere during the period of his enforced unemployment and/or the nature of the efforts or the absence thereof, on his part, to secure alternative gainful employment. Once the relevant facts are brought on record there will be no difficulty in calculating the income, if any, earned by the employee elsewhere. The assessment of efforts made by the employee or of his inability to make same is bound to present difficulties. It being dependent upon several factors including the nature of employment sought and the general conditions of employment in the country. Since the facts about the employment or non-employment and/or the efforts made or not made to secure an alternative employment during the period of enforced idleness are within the special knowledge of the employee, it is only fair and proper that he should first state whether, he was employed or not and during what period, the amount of income earned by him if any, the nature of efforts made by him for securing alternate employment or the circumstances which prevented him from making such efforts. It is in that sense that the burden of proving the said facts lies on the employee. Once however the said burden is discharged it is for the employer to prove facts to the contrary.

(Emphasis supplied)

15. Undoubtedly, the decisions in Sadanand Patankar's case (supra) and Chhaganlal Prahladrai Singhanian's case (supra), are of the Division Benches of this Court. The decision In Sadanand Patankar's case (supra) was prior In point

of time and it is apparent that the said decision was not brought to the notice of the Division Bench of this Court while deciding the matter in Chhaganlal Prahladrai Singhania's case (supra). However, that does not create any difficulty in deciding the present matter in one way or the other. It is to be noted that the Apex Court in Hindustan Motors's case (supra), after considering the decisions in Hindustan Tin Works' case (supra) and P.G.I. of Medical Education and Research's case (supra), has held thus :-

...There was no application of mind to the question of back wages of the Labour Court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum.

As already noted above, before arriving at the said conclusion, the Apex Court had also noted that u/s 11A of the Industrial Disputes Act, 1947, the Tribunal is duty bound to consider whether in the circumstances of the case, back wages have to be awarded and if so, to what extent. Simultaneously, it is also to be borne in mind that the matter in hand was required to be dealt with in terms of Section 30(1)(b) of the said Act.

16. It would be appropriate to take note of yet another decision of the Apex Court in Haryana Urban Development Authority v. Devi Dayal 2002 AIR S.C.W. 1128. It is also a case relating to the claim for back wages. In fact, the Labour Court therein had awarded full back wages and the said Award was upheld by the Punjab and Haryana High Court. The matter was carried in SLP While interfering with the award of the Labour Court, the Apex Court ruled thus:-

...The award of full back wages covering a period of nearly five years is not warranted. Firstly, it is to be noted that the respondent was in service for a short period with frequent spells of absence. The second and more important aspect is that there is a reasonable possibility of the respondent being gainfully employed somewhere else. The respondent was working as a Helper which, apparently, involves performance of work of manual labourer. In all probability, he would have been working somewhere and earning daily wages, if not regularly, at least for some days in a month. The respondent did neither assert in the claim statement nor did he give any evidence that he could not earn anything throughout by way of daily wages or otherwise during this long interregnum. Considering all these aspects, it would not be a sound exercise of discretion to saddle the appellant with the liability of full back wages. We are inclined to think that the award of back wages to the extent of 50% would be proper and justified, on the peculiar facts of this case.

(Emphasis supplied)

17. The decision of the Apex Court in Devi Dayal's case (supra) clearly reveals that the employer therein had neither asserted in his claim statement nor had given any evidence that he could not earn anything by way of daily wages or otherwise during the long interregnum on account of the termination of the service, and considering the same, it was held that there was no sound exercise

of discretion by the Labour Court while directing payment of the entire back wages, and, therefore, it was reduced to 50%.

18. The decisions of the Apex Court in Hindustan Motors's case and Devi Dayal's case (supra) impliedly confirm the decision of the Division Bench in Sadanand Patankar's case (supra). In other words, merely because the employer has failed to establish the gainful employment of the employee after the termination of his service by such employer that by itself would not be a justification to grant the back wages in entirety. Eventually, there would be a burden cast upon the employee to disclose the efforts made by him to secure another job during the time he was out of employment on account of termination of the service, in order to justify the claim for the back wages in its entirety. Indeed, the Division Bench in Sadanand Patankar's case (supra) has clearly ruled that "Since the facts about the employment or non-employment and/or the efforts made or not made to secure an alternative employment during the period of enforced idleness are within the special knowledge of the employee, it is only fair and proper that he should first state whether, he was employed or not and during what period, the amount of income earned by him if any, the nature of efforts made by him for securing alternate employment or the circumstances which prevented him from making such efforts." It has also been clearly held that once such burden is discharged by the employee, it would be for the employer to prove facts to the contrary. Similarly is the decision of the learned Single Judge, as he then was (Sri Justice B.N. Srikrishna), in *Indiana Engineering Works (Bombay) Pvt. Ltd. v. The Presiding Officer 5th Labour Court and Ors.* 1995 (II) C.L.R. 890 where it has been clearly held that "I am of the considered view that the dismissed workman also owes a duty to the industrial adjudicator to honestly disclose full particulars of the facts which are purely within his knowledge and that any attempt to mislead the Tribunal must surely be looked at askance,"

19. Considering the above decisions therefore, it cannot be said that mere absence on the part of the employer to establish the gainful employment of the employee during the period he was out of the employment on account of termination of the service would entitle him to secure as a matter of course the order for the back wages in its entirety pursuant to order for his reinstatement in the service. Apart from the obligation on the part of the employer to establish gainful employment of the employee during such period, it would also be necessary for the employee to disclose the efforts made by him to get some other job or employment during such period as well as about the source of income during the said period and if so, to what extent. Mere silence on the part of the employee in that regard cannot, in any manner, enure to the benefit of the employee to justify the claim for back wages in entirety. It cannot be forgotten that the order for payment of back wages has to be from the point of view of compensating the employee for the loss suffered during the time he was out of the employment and not a reward for having succeeded in establishing the action of termination of the service by the employer to be illegal.

20. The decision of the Apex Court in Manorama Verma's case (supra) was on the point that once the termination is found to be illegal, the consequential order of grant of back wages has naturally to follow, unless there are reasons on record which could justify a departure from normal order. As already stated above, the Apex Court in Hindustan Tin Works' case. P.G.I. of Medical Education and Research's case and Hindustan Motors's case (supra), while holding that the statutory sanction is to direct payment of back wages in its entirety, the order in that regard should disclose exercise of discretion in judicial and judicious manner and there can be no strait-jacket formula evolved for exercise of such discretion. Besides, in the facts of the case of Manorama Verma (supra), there was nothing on record to justify denial of the entire back wages, and therefore, the Apex Court in those facts of the case had directed reinstatement of the service with back wages in entirety.

21. The decision in Chhote Minya's case (supra) was to the effect that it is not mere employment but gainful employment which is to be established by the employee. Similar is the case in Mohammadsha Ganishah Patel's case (supra), wherein it was held that in the absence of cogent reasons, full back wages must follow consequent to the order for reinstatement. Undoubtedly, both these decisions of the Apex Court are considered in Rajinder Kindra's case (supra). As already observed above, the decision in Rajinder Kumar Kindra's case (supra) was on the point as to what could not be considered as gainful employment and not on the point regarding the obligation of the employee to establish about his efforts to get alternative job or to have source of income for his maintenance during the time he was out of service on account of termination of the service by the employer.

22. The decision in Tarun Kumar Chakraborty's case (supra) is to the effect that mere indication of the occupation of the employee does not amount to proof of gainful employment.

23. Reverting to the facts of the case, as already observed above, though the respondent No. 1 employer has failed to discharge its burden of proof regarding gainful employment of the petitioner, at the same time, the findings arrived at by the Courts below and the materials on record disclose total absence of efforts on the part of the petitioner to secure alternative job and/or to have source of income during the time he was out of employment with the respondent No. 1, besides that he was getting some income from agricultural work. Based on these facts, both the Courts below have held that the petitioner would be entitled for 50% of the back wages. Though the petitioner would be justified in contending that the findings of the Tribunal in respect of the petitioner being engaged himself as Taxi Driver cannot be construed to be borne out from the record, no fault can be found with the direction by Courts below for payment of back wages to the extent of 50% in the facts and circumstances of the case, and it cannot be said that the discretion has not been exercised in a judicial and judicious manner. Hence, there is no case for interference in writ jurisdiction in the impugned

orders as far as it relates to the direction for payment of back wages to the extent of 50% of the back wages, and hence the petition fails and is accordingly dismissed. Rule is discharged with no order as to costs.

24. Parties to act on the ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.