

(1979) 01 BOM CK 0039
In the Bombay High Court
Case No : Misc. Petition No. 173 of 1978

Ramasamuj

APPELLANT

Vs

Elphinstone Spinning and Weaving Mills Co. Limited and
Others

RESPONDENT

Date of Decision : 20-01-1979

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42
Constitution of India, 1950 — Article 41, 43

Citation : (1979) 39 FLR 241 : (1980) 1 LLJ 85

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Judgement

S.K. Desai, J.—The petitioner is one Ramasamuj s/o. Jagardeo Upadhya, who was an employee of the 1st respondents-company, hereinafter referred to as "Elphinstone Mills hereinafter referred to as "Elphinstone Mills" for the sake of brevity. The 2nd respondent to the petition is the President of the Industrial Court and the 3rd respondent is the Judge, 4th Labour Court, Bombay, whose orders are impugned in this petition.

2. A few facts may be stated : Elphinstone Mills had employed the petitioner for the last fifteen years or thereabout. The petitioner was a permanent employee of the said mills. He proceeded on one month's leave from 16th May, 1974 to 15th June, 1974. This leave was sanctioned to him by the 1st respondents. The petitioner claims that he fell ill at his native place and thereafter could not resume work on 16th June, 1974. He sent a registered letter along with a medical certificate requesting for extension of leave by another month. The petitioner reported for work on 16th July, 1974 when Elphinstone Mills did not offer him employment as a permanent employee but stated that from the next day, i.e., 17th July, 1974 he could work as a badly worker as and when work is available. The petitioner did not accept the employment as a badly holder.

3. The petitioner thereafter made the necessary approach as required under sub-

s. (4) of S. 42 of the Bombay Industrial Relations Act, 1946. On 10th September, 1974 he filed an application before the Labour Court which application was subsequently numbered as Application (L.C.B.) No. 544 of 1974. In the application it was prayed that the termination of the petitioner's services by Elphinstone Mills under the guise of abandonment of service was mala fide and illegal, and a direction for reinstatement was sought. In the said application the Elphinstone Mills filed their written statement. In that written statement it was, inter alia, admitted that the registered letter together with the medical certificate had been received from the petitioner on 18th June, 1974. But the Mills relied on the fact that this application together with the necessary medical certificate was received three days after the expiry of the sanctioned leave. It was contended that on 21st June, 1974 the mills and replied to the petitioner declining to extend the sanctioned leave and as he had failed to resume within eight days from the expiry of the leave originally sanctioned, he lost his lien on the post as per the provisions of the standing order. Evidence of the petitioner as well as Labour Welfare Officer of the Elphinstone Mills was recorded. It appears that on behalf of the Elphinstone Mills no evidence was brought on record as to why the petitioner should not be awarded back-wages if reinstated.

4. By his order dated 20th October, 1977 the 3rd respondent held that the Elphinstone Mills were not justified in refusing to allow the petitioner to report for work on 16th July, 1974 when he had come back for work with a fitness certificate from his doctor. It was further held that the mills were not justified in offering him "badly" work when in fact the petitioner was and entitled to remain a permanent employee. The order of the Labour Court is annexed as Exhibit "A" to the petition. The Labour Court relied upon the decision of a Division Bench of this Court in Special Civil Application No. 2823 of 1973, decided on 5th February, 1974. A passage from the decision is extracted in paragraph 15 of the judgment of the Labour Court. The Labour Court also relied on the decision of a Division Bench of this Court (to which I was a party) in *Sadanand Patamkar Vs. New Prabhat Silk Mills*, . It was held that the petitioner was entitled to report for duty even after the expiry of the period of eight days and to explain the delay. His explanation must be considered by the employer. As the employees' explanation was not considered by the Elphinstone Mills and, therefore, in the view of the Labour Court the petitioner was entitled to be reinstated. The action of the management of Elphinstone Mills was described by the Labour Court as high handed (see the last sentence of paragraph 15 of the judgment of the Labour Court.)

5. In paragraph 16 of its judgment the Labour Court has very cryptically dealt with the question of back-wages. The entire paragraph which deals with the issue as to back-wages and continuity in service may be set out :

"16. Only question which remains to be seen is that of back-wages. Applicant has claimed back-wages, but he has not adduced any evidence. In view of these circumstances, I hold that he is not entitled to back-wages, but he is entitled to

reinstatement. Accordingly I pass the following order."

6. It may be mentioned that in paragraph 6 of order, the learned Judge of the 4th Labour Court has indicated the issues which arose for his determination. Issue No. 2 being framed in the following words :

"2. Whether the applicant is entitled to be reinstated with full back-wages and continuity of service ?"

7. It was pointed out by Mr. Shetye that these were points indicated in the judgment only and the learned Judge had not really framed the issues earlier and asked the parties to lead evidence on this issue.

8. Mr. Shetye pointed out that the decision of the 4th Labour Court and the manner in which it had determined the question as to entitlement of the petitioner to back wages for the period 16th July, 1974 to 20th October, 1977 (being the date on which the judgment was delivered) was contrary to the law laid down in Sadanand Patankar's case, (supra) and my attention was drawn to the observations to be found in paragraphs 26, 27 and 28 of that decision. These paragraphs read as follows :

"26. 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 had never been terminated and the employee gets the benefit of continuity of 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. One 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 the 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."

"27. As things stand today, a majority of the employees are either unrepresented or inadequately represented in the adjudication proceedings. It is, therefore, unfair either to insist or to expect that the employee should raise the relevant point. It is the duty of the adjudicator himself to frame the necessary point for determination in each and every case and allow parties to lead evidence with regard to it and to contest the same as in the case of the other points in the adjudication. A failure to do will, according to us, be tantamount to failure to exercise jurisdiction and an order either granting or refusing back-wages, in the absence of such determination, will be void, being an improper exercise of jurisdiction. In many cases, the direction with regard to the payment or non-payment of back-wages is as important as, if not more than, the order of reinstatement itself, both from the point of view of the employer as well as the employee. The casual manner in which very often the said direction is given, at present, must be discharged. We are, therefore, of the view that it is obligatory on the industrial adjudicator to frame and decide the point about the payment of back-wages like any other point irrespective of whether the parties have raised the same or not."

"28. In the present case, we find a similar situation. Neither the Labour Council nor the Industrial Court had framed the point for determination as to whether the employee was entitled to back-wages or not. The employee was not given any opportunity to show that he was so entitled, and in the absence of any material on record either the Court denied back-wages to the employee on the ground that the employee had not "shown" that he was not gainfully employed during the period. In the view which we have taken, therefore, that part of the award will have to be quashed and the matter will have to be remanded to the Labour Court for determination of the question of back-wages."

9. Mr. Shetye's submission was that in this case the petitioner had examined himself and that it was then for the employer to put some necessary question on which the employer wanted the back-wages not to be awarded to the petitioner fully or in part. Mr. Shetye submitted that the ratio laid down by us in *Sadanand Patankar's* case was required to be understood in a proper way and that this was not done by the 3rd respondent. He drew my attention to a recent decision of the Supreme Court in *Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others*, where D. A. Desaid, J., speaking for the Court has dealt with a similar question, and in Mr. Shetye's submission the observations made by us in *Sadanand Patankar's* case have been to some extent modified in favour of the employee by the decision of the Supreme Court in the said decision. According to Mr. Shetye, in the said case it has been laid down (1) that the award of back-wages should be the normal rule and (2) that it is for the employer who objects to the award of back-wages to establish the circumstances necessitating a departure from the normal rule. It was submitted by Mr. Shetye that if the principles laid down in *Hindustan Tin Works Limited's* case are

applied, Elphinstone Mills in this case had an opportunity by cross-examining the petitioner to bring on record any circumstances as to why the petitioner was not entitled to the award of full back-wages for the period. Mr. Shetye submitted that the decision of the learned Judge of the 4th Labour Court who held clearly contrary to what has been decided by the Supreme Court in Hindustan Tin Works Limited's case, and my attention was drawn in particular to the observations to be found in paragraphs 7, 9 and 11 of the aforesaid decision. These observations may be set out :

"7. The question in controversy which fairly often is raised in this Court is whether even where reinstatement is found to be an appropriate relief, what should be the guiding considerations for awarding full or partial back-wages. This question is neither new nor raised for the first time. It crops up every time when the workmen questions the validity and legality of termination of his service howsoever brought about, to wit by dismissal, removal, discharge or retrenchment, and the relief of reinstatement is granted. As a necessary corollary the question immediately is raised as to whether the workman should be awarded full back-wages or some sacrifice is expected of him."

"9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectra of common, law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. 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 back-wages 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 underserved. Ordinarily, therefore, 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 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 workman'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. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workman though willing to do the assigned work and earn their livelihood were kept away therefrom. On top of it they were forced to litigation upto the apex Court and now they are being told that something less than full back-wages should be awarded to them. If the service were not terminated the workman ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workman were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of invalid act of employer, there is no justification for not awarding them full back-wages which were legitimately due to them. A Division Bench of the Gujarat High Court in *Dhari Gram Panchayat v. Safai Kamdar Mandal* 1971 I L.L.J. 508 and a Division Bench of the Allahabad High Court in *Postal Seals Industrial Co-operative Society Ltd. v. Labour Court II. Lucknow and others*, 1971 I L.L.J. 327, have taken this view and we are of the opinion that the view taken therein is correct."

"11. In the very nature of things there cannot be a straight jacket formula for awarding relief of back-wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back-wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear in 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 hamuor. It is not to be arbitrary, vague and fanciful but legal and regular (see *Susannah Sharn v. Wakerfield*, [1891] A.G. 173 at 179 (pp. 466, 477 and 478))."

10. There is one factor which creates a slight complication in this matter. The petitioner did not directly come to this Court from the decision of the Labour Court which appears to me, as far as this aspect of the matter is concerned (on the question of back-wages), to be not merely erroneous but totally perverse and directly contrary to the law laid down by this Court in *Sadanand Patankar*'s case and modified subsequently by the Supreme Court in *Hindustan Tin Works Ltd*'s case.

11. The petitioner filed an appeal to the Industrial Court, Maharashtra, Bombay,

as provided by the Bombay Industrial Relations Act. The said appeal was numbered as Appeal (IC) No. 17, 1978. As stated earlier, the decision was given by the 4th Labour Court on 20th October, 1977 and hence the appeal was required to be filed within thirty days from the date of the said decision. The appeal, however, was filed on 29th December, 1977. Accordingly there was a delay of about thirty-one days beyond the period of limitation prescribed by the Bombay Industrial Relations Act. The delay was sought to be explained by an affidavit filed on behalf of the petitioner. According to this affidavit, the petitioners had misplaced all the papers, and found them a few days before the appeal was filed. The application for condonation of delay was opposed on behalf of Elphistone Mills before the Industrial Court and the objection of the mills/ employer was upheld by the learned President of the Industrial Court, although there was no counter-affidavit by the employer nor was any application made for cross-examination of the petitioner. The order of the Industrial Court refusing to condone the delay and dismissing the appeal as time-barred is annexed as Ext. "B" to the petition, and the relevant observations are to be found in paragraphs 12 and 13 of the said order of the learned President of the Industrial Court.

12. One of the points which appealed to the learned President of the Industrial Court was that the affidavit of the petitioner was vague. Now, with respect to the learned President, vagueness by itself can never be a ground on which the affidavit explaining the delay could be rejected. An order could have been passed directing the petitioner to give necessary particulars. If these were not given as directed, then, perhaps, the Industrial Court would have been justified in observing that the affidavit was vague and did not give necessary particulars. Further, the approach of the learned President of the Industrial Court appears to me to be unduly technical and harsh in what the Supreme Court has rightly described in *Hindustan Tin works Ltd.*'s case as the field of industrial jurisprudence. Obsession with the technicalities of the law and the procedural requirement must be pushed in the background while dealing with industrial matters and in particular with the claim of an individual employee who is not represented by any union. It is this technical, therefore, harsh approach which is required to be criticised and such an approach can never be commenced and rarely accepted. Such a view can be upheld only in exceptional cases or in rare circumstances where the conduct of the employee is clearly improper or contumacious. No such exceptional case or rare circumstances exists in the matter before me.

13. In this view of the matter, I am of opinion that the learned President of the Industrial Court was not right in the view that he took in refusing to condone the delay and thereafter in dismissing the petitioner's appeal as time-barred. One of the reliefs sought in the petition is relief against the order in appeal with a direction that the appeal may be sent back to the Industrial Court for proper disposal according to law. In my opinion, this is the normal course which ordinarily I would have been inclined to follow. However, a departure from the normal rule required here because the original order of the learned Judge of the

4th Labour Court on the question of non-grant of back-wages is so totally erroneous that it was clearly required to be reversed in the appeal. The decision of the 3rd respondent on this point is in conflict with the decision of this Court as well as with a later decision of the Supreme Court which is even more in favour of the employee than our decision in Sadanand Patankar's case. If in this background I restore merely the appeal directing the President of the Industrial Court to dispose of the appeal as quickly as possible and then the appeal of the employee is allowed when a remand is likely to be ordered, only more delay would result. The Supreme Court in Hindustan Tin Works Ltd.'s case has warned against the consequences of denying to the employee the full result of his success, which is gained after great delay. I think, in this background, since the appeal of the petitioner had not been dealt with on merits by the Industrial Court, it would be appropriate for me directly to consider the validity, propriety and the correctness of the order of the Labour Court contained in paragraph 16 of its judgment whereunder reinstatement of the petitioner has been directed but without awarding him back-wages. It must be added that this portion of the order of the 4th Labour Court holding that the petitioner is not entitled to back-wages is totally wrong and will be required to be quashed.

14. In the result, I think I will follow what was done by this Court in Sadanand Patankar's case, viz., remand the matter back to the 4th Labour Court for inquiry into the limited question as would not arise on the question of back-wages. This question will be determined by the 4th Labour Court in accordance with the principles laid down by this Court in Sadanand Patankar's case, which, to some extent, stand modified by the approach and decision of the Supreme Court in Hindustan Tin Works Ltd.'s case. The approach to be found in the said decision of the Supreme Court has been earlier indicated by me in this judgment. After remand the 4th Labour Court is directed to frame the specific issue and allow further evidence to be led thereon. The petitioner can also examine himself further and can be re-called by the 1st respondents for further cross-examination. The 4th Labour Court is directed to complete the inquiry and finalise its decision on this question within two months of the writ of this Court reaching it. The office is directed to issue the writ as expeditiously as possible in the circumstances.

15. To the extent indicated above, the Rule is made absolute. Normally in such cases I have made it a practice not to award any costs. But in this case the employer has made the employee run from Court to Court and even in this Court from the initial stage the employer has taken an attitude which is not that of a fair and honest litigant. For this reason I will make a departure from the normal rule and direct the 1st respondents to pay to the petitioner the cost of this petition which are quantified at Rs. 501/- (Five hundred and one). There will be an order accordingly for payment of such costs against the 1st respondents and in favour of the petitioner.