
(1993) 03 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 2172 of 1988

Ramu Appa Desai

APPELLANT

Vs

Dawn Mills Co. Ltd. and Others

RESPONDENT

Date of Decision : 01-03-1993

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42, 42(4)
Bombay Industrial Relations Rules, 1947 — Rule 53

Citation : (1993) 2 BomCR 646 : (1994) 1 LLJ 300 : (1993) MhLj 916

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; Shekhar Naphade and Latha Desai for Respondent (1), for the Respondent

Final Decision : Dismissed

Judgement

D.R. Dhanuka, J.—By this petition filed under Article 226 of Constitution of India, the petitioner has impugned Judgment and Order dated January 19, 1987 passed by the respondent No. 2 in Application (B.I.R.) No. 90 of 1985 and Judgment and Order dated January 18, 1988 passed by the respondent No. 3 in Appeal (I.C.) No. 12 of 1987. By the above referred order dated January 19, 1987, the Labour Court dismissed the application of the petitioner made u/s 79 of Bombay Industrial Relations Act, 1946 read with Section 78 and Section 42(4) of the said Act complaining against Order of dismissal dated February 14, 1983. By the above referred Order dated January 21, 1987, the Industrial Court dismissed the appeal preferred by the petitioner against the said order.

2. In my opinion, the writ petition preferred by the petitioner against the above referred two orders is liable to fail. For the reasons discussed in later part of the order, the petition is dismissed with no order as to costs.

2-A. The relevant facts required to be noticed for purpose of deciding this writ petition are briefly summarised as under:-

(a) Sometime in or about the year 1951, the petitioner joined the service of respondent No. 1. The petitioner used to work in the Ring Department of the Mills. On January 18, 1982, the workmen of Textile Mills in the City of Bombay including respondent No. 1-Mill went on strike. The petitioner participated in the said strike at all material times. The petitioner has so admitted in his evidence recorded before the Labour Court at the hearing of the Application (B.I.R.) No. 90 of 1985. By the Judgment and Order dated February 5, 1982, the Labour Court declared the said strike resorted to by all the employees of respondent No. 1 except Watch and Ward, Technical, Supervisory and Clerical Staff, as illegal. The above referred excepted categories of workers had not resorted to strike. In view thereof, on February 11, 1982, the employers issued public notice calling upon the workmen to report to work. On May 17, 1982, the respondent No. 1 issued a show- cause notice to the petitioner calling upon him to show cause as to why action should not be taken against the petitioner in view of his participation in the illegal strike. The respondent No. 1 referred to provisions contained in Standing Order 21(b) of the relevant Standing Orders in the said show cause notice. The relevant Standing Order provides that striking work in contravention of the provisions of the Bombay Industrial Relations Act, 1946 was liable to be treated as misconduct. The said show cause notice was sent by the respondent No. 1 to the petitioner under Certificate of posting at the correct address. There is a controversy between the parties as to whether the petitioner was duly served with the said show cause notice. The two courts below have disbelieved the version of the petitioner that the petitioner did not receive the said show cause notice after careful consideration of the relevant evidence. The petitioner did not render any explanation in pursuance of the said show cause notice. On February 2, 1983, a public notice was published in Marathi daily newspaper known as "Nav Shakti". Since no reply was received to the said show cause notice on February 14, 1983, the respondent No. 1 passed an order of dismissal under the relevant provisions of the Standing Orders applicable to respondent No. 1. The respondent No. 1 did not service any chargesheet on the petitioner before passing of the above referred order of dismissal. The said order was also despatched by respondent No. 1 to the petitioner under Certificate of Posting at the correct address. On February 15, 1983, public notice in respect of the dismissal of the workmen concerned was published in "Nav Shakti" newspaper. The respondent No. 1 did everything possible to serve the said notice and orders on the respondent No. 1 as contemplated u/s 42(4) of Bombay Industrial Relations Act, 1946. The said approach notice was not issued within time limit of three months from service or deemed service of order of dismissal dated February 14, 1983 on the petitioner. The said order of dismissal was sent by respondent No. 1 to the petitioner on February 17, 1983 under certificate of posting. The petitioner did not send any reply to the said letter. On or about January 21, 1985, the petitioner filed an application before the Labour Court at Bombay invoking Section 78 of Bombay Industrial Relations Act, 1946. The respondent No. 1 contested the said application. At the hearing of the said application, the petitioner gave evidence. At the hearing of the said application,

Shri Kulinkant Jadhavji Kenia, General Manager of the Mills gave evidence on behalf of the management. The respondent No. 1 also examined one Sumant Sahadeo Chavan. During the course of the said evidence, copies of certificates of posting were produced and marked as Exhibits C-1 and C-12. The original note book containing two certificates of posting was also produced before the Labour Court and the same was marked as Exhibit C-13.

(b) The Labour Court as well as the Industrial Court recorded a finding of fact that the said show cause notice and the said order of dismissal were duly served on the petitioner. The petitioner was aware of the said show cause notice and order of dismissal at the material time. Both the courts below have held that the application made by the petitioner u/s 78 of Bombay Industrial Relations Act was not maintainable in law as the petitioner had failed to serve requisite approach notice within a period of three months from communication of the above referred dismissal order. Both the courts below relied on sub-section (4) of Section 42 of Bombay Industrial Relations Act and Rule 53 of the Bombay Industrial Relations Rules, 1947 for the said purpose. The Industrial Court held that on merits also the petitioner had no case as the petitioner had participated in illegal strike and the punishment awarded to the petitioner by the said order of dismissal could not be considered shockingly disproportionate. The Industrial Court held that the petitioner had slept over the matter from February 1982 to November 1984 i.e. for about 2 years 5 months. The Industrial Court observed in para 24 of its judgment that an interim settlement had been arrived at between the management and the recognized union i.e. Rashtriya Mazdoor Sangh to the effect that the workers who reported for duty on or before May 11, 1982 were to be absorbed by the Mills. During the course of his evidence, the petitioner had alleged that the petitioner was reporting for duty at the Mills premises since June 1982 but the petitioner was not permitted to resume duty. According to the petitioner, the petitioner continued with this futile exercise for about 2 years 5 months. This statement is not believable. This statement of the petitioner was in terms denied on oath on behalf of the management. During the course of deposition the two courts below did not accept the deposition of the petitioner in this behalf.

3. It is well settled that the writ Court in exercise of its jurisdiction under Article 226 of Constitution of India, does not and cannot normally interfere with the findings of fact arrived at by the Labour Court and the Industrial Court unless it is satisfactorily demonstrated that the findings of fact in issue are based on no evidence or are perverse in the sense that no reasonable person could have arrived at such findings. Keeping this principle in mind, let me now turn to the submissions made by the learned Counsel for the petitioner at the Bar.

4. Before I refer to the submissions made by the learned Counsel for the petitioner, it is necessary to notice some of the relevant provisions having bearing on these submissions. Section 42(4) of the Bombay Industrial Relations Act, 1946 reads as under:

"42(4) : Any employee or a representative union desiring a change in respect of (i) any order passed by the employer under standing orders, or (ii) any industrial matter arising out of the application or interpretation of standing orders or (iii) an industrial matter specified in Schedule III, except Item (5) thereof shall make an application to the Labour Court and as respects change desired in any industrial matter specified in Item 5 of Schedule III, to the Industrial Court."

Rule 53 of Bombay Industrial Relations Rules, 1947 reads as under:

"53(1): Any employee or a Representative Union desiring a change in respect of (i) any order passed by the employer concerned under Standing Orders, or (ii) any industrial matter arising out of the application or interpretation of Standing Orders, or (iii) an industrial matter specified in Schedule III shall make an application in writing to the employer. An application for change in respect of an order passed by the employer under Standing Orders shall be made within a period of three months from the date of such order. Where such application is made by an employee it may be made to the employer direct or through the Labour Officer for the local area or the representative of employees concerned. A copy of the application shall be forwarded to the Commissioner of Labour and in cases where such application is not made through the Labour Officer for the local area, to that officer."

Section 78(1)(B)(a) of Bombay Industrial Relations Act provides that the Labour Court shall have power to decide disputes regarding the propriety or legality of an order passed by an employer acting or purporting to act under the standing orders:

5. After care fully considering all the relevant material on record, the Industrial Court held that the respondent Mill had led sufficient evidence to indicate that the impugned show cause notice and the impugned order of dismissal were posted by respondent No. 1 under certificate of posting at both the addresses of the workman i.e. at his Bombay address and his native place address. In para 17 of his judgment, the learned Member of the Industrial Court held that it was established that the workman had received copies of the show cause notice and the order of dismissal sent to him under certificate of posting. The two courts below also relied on evidence of witness Sumant Sahadeo Chavan to the effect that the packets consisting of show cause notice and order of dismissal sent by the respondent No. 1 to the petitioner under certificate of posting had never been returned back by the post office to respondent No. 1. The petitioner had undoubtedly stated in his testimony before the Labour Court that the petitioner had not received the show cause notice or the order of dismissal. The petitioner has not been believed by the Court below. The Labour Court as well as Industrial Court have recorded concurrent finding of fact on the above aspect. To my mind, the said finding of fact is not shown to be perverse or unsupportable by evidence on record. The said finding of fact is supported by evidence on record. The learned Counsel for the petitioner has made a valiant attempt to assail the said finding of fact but I have remained unconvinced throughout. The learned Counsel

for the petitioner relied on the judgment of our High Court in the case of Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, . The said case is clearly distinguishable. In that case, the Industrial Court had recorded a finding of fact to the effect that the order of dismissal was never served on the workman. In this case, the finding of fact is to the contrary. The facts of the two cases thus differ. The impugned order was passed or purported to have been passed under the Standing Orders applicable to Textile Mills including respondent No. 1. The impugned order in terms refers to the relevant Standing Orders. Since the impugned order was passed under the Standing Orders referred to therein, application u/s 78 of Bombay Industrial Relations Act, 1946 could not have been made unless an application for change was made by the workman within a period of three months from the date of order of dismissal. The expression "date of such order" used in Rule 53(1) of the Rules must be construed to mean from the date of communication of such order. In the instant case, the impugned order was served on the petitioner under certificate of posting and was also published in newspapers. Many workers resumed duty in the years 1982 and 1983 but the petitioner slept over the matter till November 8, 1984. The learned Counsel for the petitioner submits that the order of dismissal was not communicated to the petitioner and the courts below ought to have attached due weightage to the concerned testimony of the petitioner workman. In my opinion, the courts below have evaluated the entire evidence on record in a manner which cannot be faulted with. The courts below have recorded a finding of fact which could have been reasonably arrived at by the courts below. At any rate the finding of fact regarding communication and/or service of the show-cause notice and the order of dismissal is a reasonably possible finding. It is not possible for the writ court to substitute some other finding in place of the findings of fact recorded by courts below. No case is made out by the petitioner for disturbing the findings of fact recorded by the two courts below. The learned Counsel for the petitioner submits that the impugned order cannot be said to have been passed under the relevant Standing Order or purported to have been passed thereunder. The learned Counsel submits that the impugned order was passed without holding the necessary enquiry. The relevant Standing Order merely requires issue of a show cause notice and giving of an opportunity to the concerned workman to explain himself in respect of the allegations made in the said show cause notice. The said show cause notice does refer to illegal participation of the petitioner in the strike. The said show cause notice refers to relevant facts. The petitioner did not avail of reasonable opportunity offered to the petitioner by the said show cause notice. The petitioner admitted in his testimony before the Labour Court that the petitioner had participated in the said strike. It is, therefore, not possible to hold that the impugned order of dismissal was not passed or purported to have been passed under the relevant Standing Order merely because no "chargesheet" was served on the petitioner. The Learned Counsel for the petitioner submits that even if the impugned order was passed under the Standing Orders and even if condition precedent of serving approach notice on the employer within period of three months would be applicable to the approach

notice issued by the petitioner in this case in so far as challenge to the impugned order of dismissal on this ground was concerned, no period of limitation would be applicable in the instant case as the petitioner was relying also on item 6 of Schedule III appended to Bombay Industrial Relations Act, 1946; Item 6 of Schedule III reads as under:

"(6) Employment including-

(i) reinstatement and recruitment;

(ii) unemployment to persons previously employed in the industry concerned."

The learned Counsel for the petitioner submits that the application of the petitioner for reinstatement was referable not merely to challenge the order passed under the Standing Order but was referable also to item 6 in Schedule III appended to the said Act. The learned counsel for the petitioner submits that consequently the requirement of serving approach notice within 3 months from service or deemed service of order of dismissal would not be applicable. In my judgment, the petitioner is not entitled to rely on Item 6 in Schedule III to the Act at all if the impugned order was passed or purported to have been passed under the Standing Orders. The Court is required to give a harmonious interpretation to the various categories specified u/s 42(4) of the Act and Rules 53 of the relevant rules. In my opinion, the workman can rely on the third category specified in Section 42(4) of the Act only in a case where the order of dismissal is not passed under the Standing Order, applicable to the establishment. If the subject matter of dispute is covered by a specific category, it cannot be brought under a general category. If the interpretation of learned Counsel for the petitioner were to be accepted, it would create an anomaly and confusion. Since category-I is attracted in the instant case, the general category covered under category 3 of Section 42(4) of the Act is not applicable. It is not possible to accept the submission made by the learned Counsel for the petitioner that both the categories specified in Section 42(4) of the Act are applicable to the instant case. It is not possible to accept the submission that since the petitioner is invoking both the categories enumerated in Section 42 of the Act, mandatory requirement of serving approach notice within 3 months from service of deemed service of approach notice is not applicable in this case,

6. It is unfortunate that the petitioner workman has missed the bus by reason of issuing approach notice so late. I have no power to relax the mandatory requirement of Rule 53 of the relevant Rules. Both the courts below were satisfied that the application made by the petitioner u/s 78 of Bombay Industrial Relations Act was in nature of an afterthought as the petitioner had slept over his alleged rights for a period of more than two years. No case for intervention is made out under Article 226 of Constitution of India.

7. In this view of the matter, I confirm the finding of the two courts below to the effect that the application made by the respondent No. 1 to the Labour Court u/s 78 of Bombay Industrial Relations Act was not maintainable in law as the

petitioner had failed to comply with condition precedent prescribed under Rule 53 of the Rules.

8. In this view of the matter, it is not necessary for this Court to examine as to whether the punishment awarded by the management was disproportionate or not. In this view of the matter, it is not necessary for this Court to examine as to whether the participation of the petitioner in the illegal strike was an active or passive one.

9. In the result, the petition fails. The petition is dismissed. Rule is discharged. No order as to costs.