

(2001) 11 BOM CK 0024

In the Bombay High Court

Case No : Appeal No's. 564 and 936 of 2001 in Writ Petition No's. 26 and 404 of 2001

Shankar Vasudeo Masurkar and Another

APPELLANT

Vs

Shree Sitaram Mills and Another

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 78(1)A

Citation : (2002) 3 BomCR 156 : (2002) 94 FLR 236 : (2002) 2 MhLj 247

Hon'ble Judges : S.A. Bobde, J;A.P. Shah, J

Bench : Division Bench

Advocate : S.N. Deshpande, in Appeal No. 936 of 2001 and P. Ramaswamy, M.A. Banatwala and Manoj Dalvi, in Appeal No. 564 of 2001, for the Appellant; S.N. Deshpande in Appeal No. 564 of 2001 and P. Ramaswamy, M.A. Banatwala and Manoj Dalvi, in Appeal No. 936 of 2001, for the Respondent

Judgement

1. These appeals are directed against the common order passed by the learned Single Judge in Writ Petition No. 26 of 2001 and Writ Petition No. 404 of 2001. Appeal No. 936 of 2001 is filed by the employees of Shree Sitaram Mills whereas Appeal No. 564 of 2001 is filed by the management of the said Mill. For the sake of convenience the employees are hereinafter referred to as "the appellants" and the management of the Mill as "the respondent".

2. Appellant No. 1 and the late husband of appellant No. 2 were working in the respondent Mill as attendance clerk and labour boy respectively. Appellant No. 1 had joined the service in 1970 while the husband of appellant No. 2 joined in 1972. From 15-1-1982 there was a general strike in the cotton textile industry called by an unrecognised union viz. Maharashtra Girni Kamgar Union. Though the strike was called by an unrecognised union not registered under the provisions of the Bombay Industrial Relations Act, 1946, hereinafter referred to as "the Act", it received a 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 the principles of natural justice or any procedure under the

law and the Standing Orders. According to the appellants they were reporting for duty but they were not allowed to enter the Mill premises. The appellants time and again were informed by the security and supervisory staff of the respondent that they could join the duty when their names were put on the notice board. In the meantime the Central Government took over the management of the respondent Mill and certain other Mills by an Ordinance promulgated by the President of India as Textile Undertaking (Taking Over Management) Ordinance, 1983 and the management of the respondent Mill came to be vested in the National Textile Corporation (NM) Ltd. According to the appellants they had not participated in the strike declared by the unregistered union. The appellants made several representations requesting the respondent to allow them to resume their duties but no response was given by the management of the respondent. The services of the appellants were never terminated. No chargesheets were issued to the appellants nor any enquiry was held against them. Finally, the appellants sent the approach letters dated 6-1-1993 and 16-1-1993 thereby calling upon the respondent to allow the appellants to resume the work with continuity of service and full back wages since 18-1-1982. The approach letters were not replied by the respondent and, therefore, the appellants filed applications in the Labour Court, Mumbai u/s 79 read with Section 42(4) of the Act seeking reinstatement with full backwages.

3. The respondent opposed the applications made by the appellants mainly on the ground that the approach letters dated 6-1-1993 and 16-1-1993 were barred by limitation. On the basis of the pleadings, documents and evidence adduced by the parties it was held by the Labour Court that the concerned employees were terminated by the respondent illegally and improperly. It was held that the approach letters were not barred by limitation and applications were maintainable. After answering the said issue the Labour Court granted reinstatement with full backwages and continuity in service to the concerned employees. The Labour Court has categorically found on the basis of the evidence of the parties that they had sent two post cards in the month of May, 1984 and January 1987 and thereafter they had sent the aforesaid letters of approach u/s 42(2) of the Act. The Labour Court further recorded that there was no termination order passed by the respondent and, therefore, the cause of action continued to survive and it was of the recurring nature and, therefore, according to the Labour Court there was no bar of limitation as there was no order of termination passed by the respondent under the Standing Orders as contemplated u/s 78 of the Act. The Labour Court, therefore, upheld the legality of the approach letters and also the maintainability of the applications. The Industrial Court in appeal has held that limitation to submit the approach letters did not commence from the date of refusal of work and that the approach letters dated 6-1-1993 and 16-1-1993 were not barred by limitation. However, the Industrial Court had brought down the period of backwages from 16-1-1993. Against the order of the Industrial Court, both the parties preferred writ petitions which were disposed of by the learned Single Judge by the impugned order. The

learned Single Judge relying upon his own judgment in another writ petition being Writ Petition No. 772 of 2000 National Textile Corporation (South Maharashtra) Limited Vs. Shri Mhmd. Umer Mhmd. Hanif Lal Shah Babaji Darga and Another, held that the approach notices were barred by limitation. However, the learned single Judge has recorded in the impugned order that the counsel appearing for the respondent made a statement that appellant No. 1 would be reinstated with continuity of service till he reaches the age of retirement upto 63 years as provided under the Standing Order 20A without backwages and he would be given continuity of service to enable him to get gratuity for the entire period. The learned Judge further directed the respondent to pay to the appellant No. 2 the amount equal to gratuity as compensation in lieu of reinstatement with continuity of service.

4. Mr. Deshpande, the learned counsel appearing for the appellants, submitted that the appellants had served the respondent Mill for more than 10 years. Their record of service was otherwise unblemished since nothing adverse has been found on record. Their services were never terminated. All along the appellants were reporting for duty but they were not given the work. He submitted that both the Courts concurrently held that the services of the appellants were not terminated in accordance with the Standing Orders at any time. Therefore the approach notices or applications cannot be said to be barred by limitation. He referred to 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 mere non reporting for work by a workman does not lead to an irrebuttable presumption of active participation in a strike and consequently mere absence from duty without more is not sufficient to hold that the worker is guilty of involvement in illegal strike. He also referred to the decisions of this Court in Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, Morarjee Gokuldas Spg and Wvg. Co. Ltd. v. Maruti Yeshwant Narvekar and ors. (1999 II CLR 850); Jaywant Yashwant Rant v. Simplex Mills Ltd. and Ors. 1995 11 CLR 641 and National Textile Corporation SM Ltd. and Shivaji Shankar Gawde and Ors. 994II CLR 1059 .

5. Mr. Ramaswamy appearing for the respondent on the other hand, submitted that the approach letters were hopelessly barred by limitation. Mr. Ramaswamy urged that after the strike was declared illegal, public notices were given to the employees calling upon them to resume duty. The workmen, however, did not resume duty. He submitted that the story of the appellants that they were approaching the supervisory and security staff of the respondent Mill cannot be accepted. Therefore, the approach letters which are issued after the period of 3 months are invalid. Mr. Ramaswamy submitted that after holding that the applications filed by the workmen were barred by limitation, the learned single Judge instead of rejecting the applications on merits, directed respondent mill to reinstate workman in service till he attains the age of superannuation as provided under the Standing Order 20A. Mr. Ramaswamy submitted that the respondent Mill is declared as a sick industry within the meaning of Section 3(1)

(o) of the Sick Industry Companies (Special Provisions) Act, 1985 and by directing the Mill to make the workman permanent would cause additional burden on the resources of the respondent Mill. He submitted that there is no work which is available with the Mill and at present the management of the Mill is paying idle wages to the workmen. He submitted that the learned single Judge also erred in showing misplaced sympathy on the deceased employee's wife by directing the respondent Mill to pay equal amount of gratuity in lieu of compensation.

6. At the outset we may mention that we are unable to agree with the view taken by the learned single Judge that the applications filed by the workmen were barred by limitation. In the instant case both the Courts below took judicial notice of the fact that there was wide spread strike in cotton textile industry during the relevant period. The Courts below also came to the conclusion that there was no termination of services of the appellants under the Standing Orders and the applications u/s 78 of the Act were maintainable. It is further seen from the record that the appellants were being orally refused work right from December, 1982 without anyone even having disclosing them the reasons for such refusal or without their contract of employment having been terminated under the Standing Orders, The appellants time and again approached the management of the Mill by making requests for reinstatement in writing but the applications did not evoke any response. In our opinion since there was neither order of termination of service nor any declaration of the reasons for which the work was not being given to the appellants, the appellants were justified in making an approach even in 1993 and seeking a relief of taking them back on work and in employment. A dispute of such nature, in our view, would be a change sought by the employees in respect of item No. 6 of schedule III of the Act which would properly fall within Clause (iii) of section 78(I)A(a) of the Act.

7. 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 need 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.

8. In Changunabai Chanoo Palkar v. Khatau Makanji Mills Ltd and Anr. (supra) a

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 and for mere passive participation in an illegal strike the extreme punishment of dismissal was not warranted and it was not proper and legal. 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 backwages. The bench observed as under:--

"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 strikes. 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 proceedings 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 no reporting for work and remaining at home for fear or vengeance in a para violent situation or, if the employment is in an urban area on account of economic compulsion and to avoid starvation in case of a prolonged strike, does not lead to a 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 backwages since predating of the award would have no legal sanction. Reinstatement on setting aside a termination which was void ab initio was not compassionate gesture; it was a legitimate right. The claim for backwage had a legal foundation; denial thereof must be based on rational and realistic grounds 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."

9. In a similar situation the learned Single Judge (Srikrishna J) in Jayawant Yeshwant Raut v. Simplex Mills Ud. and Ors. (supra) 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 Court 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 workmen. 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(l)A(a) of the BIR Act.

10. To the same effect is the view taken in the case of Morarjee Gokuldas Spg. and Wvg. and Co. Ltd. v. Maruti Yeshwant Narvekar and Ors. (supra) to which one of us (A.P. Shah J) was a party. Kapadia J. has also taken the same view in National Textile Corporation SM Ltd. v. Shivaji Shankar Gawade and Ors. (supra).

11. In view of the foregoing discussion we have no hesitation to hold that the learned Single Judge was not right in holding that the approach notices were barred by limitation. The order of the learned Single Judge is, therefore, set aside.

12. Mr. Ramaswamy submitted that the respondent Mill is under BIFR and is now practically stopped functioning and therefore the question of granting reinstatement would not arise. He agrees to pay the backwages of the appellant No. 1 upto December 2000 i.e. till the appellant No. 1 had attained the age of 60 years. He also agrees to pay the amount of gratuity of appellant No. 1 upto December 2000. He stated that the respondent has already deposited the amount of backwages in the Court. He produced on record the statement showing the particulars of the amount payable to the appellants. However, it is seen that the leave wages are not included in the calculation made by the respondent. In view of the decision in Sharda Industries and Engineering Works Pvt. Ltd. v. Chandrabali s/o Harbans Choube and Ors. 1989 1 CHR 178 the leave wages are also liable to be paid. Mr. Ramaswamy stated that differential amount along with the leave wages and gratuity will be deposited in the Court within a period of 8 weeks. The appellants are at liberty to withdraw the amount deposited by the respondent Mill. The order of the Industrial Court to stand modified to the above extent.

The parties and the authorities to act on the ordinary copy of this order duly authenticated by the personal secretary of this Court.