
(2011) 01 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No. 509 of 2000

Shri Vasant Vishwanath Bordekar

APPELLANT

Vs

The Standard Industries Ltd.

RESPONDENT

Date of Decision : 10-01-2011

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42(4), 78, 78(1), 79, 84
Bombay Industrial Relations Rules, 1947 — Rule 53
Evidence Act, 1872 — Section 114

Citation : (2011) 7 ALLMR 657 : (2011) 3 BomCR 749 : (2011) 129 FLR 882 :
(2011) 2 MhLj 703

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; Sudhir Talsania, instructed by and Kanga and Co., for the Respondent

Final Decision : Allowed

Judgement

Nishita Mhatre, J.—The petition has been filed against the order passed by the Labour Court by which it has been held that the application filed u/s 78 of the Bombay Industrial Relations Act, 1946 (in short, "the B.I.R. Act"), was not maintainable for want of a proper approach letter which is required to be issued by a workman u/s 42(4) of the Act. The appellate Court under the B.I.R. Act has confirmed the order passed by the Labour Court.

2. The facts in the present case are as under:

The Petitioner joined service with the Respondent mill in the year 1969. The Respondent mill claims that its workers had commenced a strike in October, 1981, before the general strike of 18.1.1982 in the cotton textile industry. Many workers had proceeded on strike. According to the Petitioner, he had not joined the strike and he periodically approached the mill gate in order to resume work. However, the situation in the vicinity of the mill was tense. Even after the situation normalized, according to the Petitioner he was not taken in the

employment. His colleagues were given employment. The Petitioner contends that he was neither issued a charge-sheet nor a letter terminating his services. Repeated requests for employment made orally by the Petitioner to the mill, were in vain. Ultimately he issued an approach letter u/s 42(4) read with Rule 53 of the Rules framed under the B.I.R. Act, on 2.5.1988. He demanded reinstatement with continuity of service and back wages from 18.1.1988. Admittedly, the mill did not respond to this letter. The Petitioner therefore filed an application u/s 78 read with Section 79 of the B.I.R. Act before the Labour Court claiming reinstatement with continuity of service and full back wages.

3. A written statement was filed by the Respondent mill before the Labour Court contending that the workman had participated in a strike which commenced on 21.10.1981 which had been declared to be illegal. It was further pleaded that public notices had been published in Marathi newspapers "Navakal" and "Mumbai Sakal" calling upon the workmen to report for duty. Later, notices were issued on 7.1.1983 and 8.1.1983 published in "Loksatta" and "Mumbai Sakal", respectively, informing the striking workmen that their services had been terminated as they had not paid heed to the Mill's appeals to return to work. The Respondent has also pleaded that the workman was discharged from service by an order dated 13.12.1982. This notice indicates that the services of the workman have been terminated as he has not responded to the mill's notice to report for duty. The Mill further pleaded that the application was not maintainable as the approach letter was not sent within the prescribed time limit and was therefore violative of the provisions of Section 42(4) of the B.I.R. Act read with Rule 53 of the B.I.R. Rules.

4. Evidence was led before the Labour Court in which the workman deposed that he had not received any letter dismissing, discharging or terminating him from service, from the employer. He further deposed that, after 18.1.1982 he had not received any letter or notice or termination order despite the fact that he was residing at the same place i.e. the last known address recorded by the mill. The workman has further stated that he was drawing about Rs. 300/- per month on occasions after his termination from service.

5. The evidence of the Labour Officer has been led on behalf of the Mill before the Labour Court. He has deposed that the notice informing the striking workmen that their services were terminated did not specifically mention the name of the Petitioner. He has also admitted that no enquiry was held prior to terminating his service. According to this witness, several appeals were issued to the Petitioner as well as other striking workmen requesting them to join service. They failed to do so and, therefore, the services of the Petitioner were terminated by letter dated 13.12.1982.

6. The Labour Court has accepted the contentions of the Respondent Mill and has rejected the application. It has found that the approach letter was sent beyond the period of limitation prescribed. The application filed under the B.I.R. Act was dismissed as not maintainable.

7. An appeal was preferred by the Petitioner u/s 84 of the B.I.R. Act. The Industrial Court has held that the letter terminating the Petitioner's services dated 13.12.1982 had been sent to the wrong address and, therefore, it was possible to accept the Petitioner's case that the letter had not been received by him. The Industrial Court however held that since the public notices were issued in the news papers intimating striking workmen about the termination of their services, the Petitioner must be presumed to have knowledge of the termination of his services. The Industrial Court has proceeded on the footing that, even if the letter dated 13.12.1982 discharging him from service had not been received by the Petitioner, the public notice issued on 7.1.1983 and 8.1.1983 in the local news papers, was sufficient notice to the workman that his services had been terminated.

8. Mr. Ganguli appearing for the Petitioner submits that the approach letter was issued only after the workman found that he was not being permitted to resume service like the other workmen. He contends that the application had been filed u/s 78(1)(D) of the B.I.R. Act and, therefore, there was no period of limitation for filing the application. He further points out that there is no evidence on record to establish that the workman had in fact received the letter of termination of his services. He submits that unless the order is communicated to the workman and he has knowledge of the same, issuance of such an order is of no consequence. According to Mr. Ganguli, the services of an employee cannot be terminated merely by issuing a public notice in the newspapers as has been done in this case. He submits that adopting such a procedure would not be sufficient compliance of the Certified Standing Orders applicable. The learned advocate points out that as the provisions of the Certified Standing Orders have not been followed the order of termination cannot be said to have been passed under the standing orders. Therefore, according to Mr. Ganguli the limitation of three months for issuing an approach letter, prescribed under Rule 53 of the B.I.R. Rules, 1947 is not applicable in the present case. He relies on the judgment of the Division Bench of this Court in the case of Changunabai Chanoo Palkar v. Khatau Makanji Mills Ltd. and Anr., reported in 1992 I C.L.R. 680, in which the facts involved were similar to the present case. He therefore submits that the workman is entitled to reinstatement with continuity of service and full back wages.

9. Mr. Talsania, the learned Counsel appearing for the Respondent mill submits that the order of termination was issued on 13.12.1982 and communicated to the employee. According to him, the word "communication" merely means the issuance of the order and nothing further. It is not necessary for the Court to ascertain whether in fact the workmen received the order. The employer has only to communicate or transmit the order to the workman. He further submits that even assuming it is possible to contend that the workman did not receive the order dated 13.12.1982 terminating his services, a notice was issued in the Marathi newspapers on 7.1.1983 and on 8.1.1983. This notice indicated that the striking workmen who had not reported for duty with the mills despite several

appeals made to them, were terminated from service. Mr. Talsania submits that since the notice had been published, it must be presumed that the Respondent workman had received the communication that his services had been terminated. He further points out that even after disclosing the fact in the written statement filed before the Court that the order of termination dated 13.12.1982 had been passed, the workman had not challenged that order at any point of time. He further submits that in any event the Certified Standing Orders permit communication of an order of termination from service through publication in the newspapers. He then submits that the Labour Court was right in concluding that it had no jurisdiction at all to entertain the application as the approach letter was issued beyond the prescribed time. The approach letter was based on the Petitioner's contention that he had received the order terminating his services in the year 1988. Mr. Talsania points out that there is no reference to this letter in the application at all and, therefore, the application which was not based on the approach letter was not maintainable. He further submits that the workman had enough opportunity to approach the employer immediately after the appeals were issued in the newspapers. However, he chose not to do so. Therefore, according to the learned Counsel, the impugned order need not be disturbed.

10. A perusal of the letter which is supposedly the order of termination, indicates that the letter was sent to the Petitioner at Chawl No. 10 instead of Chawl No. 3 where the Petitioner resides. The letter was sent to an address which was not contained in the service-book of the Petitioner. As a result of this incorrect address, in all probability, the Petitioner had not received the letter. There is nothing on record to indicate that the Petitioner had acknowledged that letter. In fact, the letter was sent Under Certificate of Posting. Although the presumption u/s 114 of the Evidence Act was available to the Mill, it is a rebuttable presumption. When the Petitioner denied the receipt of the letter and, there is no evidence of him having received that letter it must be held that the order of termination was not served on him. In his testimony before the Court the Petitioner has categorically denied having received any letter, notice or termination letter, etc. from the mill after 18.1.1982, The letter terminating the Petitioner's services is dated 13.12.1982. Therefore this denial by the Petitioner of the receipt of this letter must be accepted. There is no contradictory evidence on record which has been led by the Respondent to prove that the letter in fact had been received by the Petitioner. Thus the order of termination was not communicated to the Petitioner by the letter dated 13.12.1982. The finding of the Industrial Court in this regard is correct. This finding has not been challenged by the Mill. Therefore I need not consider the submission of Mr. Talsania that the employer is expected only to communicate or transmit the order of termination without anything more. Suffice to observe that Certified Standing Order 25 mandates that a summary dismissal or discharge can be effected if the employee is given a written order in the form prescribed. The word "given" would mean that the employee must actually and physically receive the order.

11. The other issue will be whether there would be sufficient compliance of the

requirement of the Certified Standing Orders if the services of the workman are terminated by issuance of a public notice in the newspaper. Could it be said that the approach letter is delayed if no specific date of termination of service is mentioned in the notice ? The gist of these public notices issued on 7.1.1983 and 8.1.1983 in the local newspapers is that the employees had not resumed work after 21.10.1981 despite several appeals made to them. On 12.2.1982 some employees had returned to work in the mill. Letters had been sent to the workmen on 20.11.1982 and 1.12.1982 calling upon them to report for duty. Those striking workmen who had not reported for work by 30.11.1982 and 7.12.1982 were informed by a letter dated 4.12.1982 or issued thereafter that their services had been terminated. The letters were sent to their known addresses either by registered A. D. or Under Certificate of Posting.

12. The Standing Orders applicable to the Petitioner have been certified under the B.I.R. Act. These Standing Orders applicable to operatives came into force on 1.2.1951. Under Standing Order 25 any permanent operative who is summarily dismissed, suspended or discharged or leaves the services of the mill or is granted leave of absence, shall be given an order in writing in the form prescribed by the Company or the Millowners' Association, Bombay, from time to time. However, in case of a general retrenchment closing down of a department or strike or lock-out, this condition has been relaxed. It is the case of the Respondent mill that since the Petitioner's services were terminated after he proceeded on strike, there is no need to issue a written order in the form prescribed by the Company; a general notice published in the news paper was sufficient communication to him of his services having been terminated.

13. It is not possible to accept this contention for more reasons than one. The notice was issued in the newspaper on 7.1.1983 and 8.1.1983 informing the workers that the services of those who had not reported for work either by 30th November 1982 or by 7th December 1982 stood terminated. Letters were sent to the workmen on 4.12.1982 or thereafter informing them about this fact. The date from which the services were terminated has not been mentioned in this notice. The names of the workers to whom this notice was issued were not mentioned in the public notice nor was there a specific mention of the Petitioner's name. The notice only mentions that those striking workers who had not reported for work, despite the several appeals made by the Mills and other governmental agencies, had been informed by letters issued to them that their services stood terminated. The Petitioner has been consistently contending that he was not on strike. Therefore there would be no reason for him to assume that the public notice referred to him. No suggestion has been put to the Petitioner in his cross-examination that although he was aware of the appeals of the Mill published in the newspapers, calling upon the workmen to resume their duty, he had not reported and as a consequence of which his services had been terminated on 13.12.1982.

14. In the present case there can be no doubt that the letter dated 13.12.1982

has not been received by the Petitioner. Even assuming the workman had seen the public notice and could be said to have knowledge that his services had been terminated in the public notice does not indicate that his services had been terminated by a particular date. Therefore the limitation prescribed for sending the approach letter would not be applicable.

15. Mr. Talsania points out that there is a discrepancy between the approach letter issued by the workman in the year 1988 and the application filed by him u/s 78 of the B.I.R. Act. Mr. Talsana has submitted that, in order to overcome the period of limitation prescribed under the Act for sending an approach letter, the Petitioner has stated in his approach letter that he received an order terminating his services in the year 1988. That letter, according to him, has not been produced on record. He further points out that there is no reference to the letter in the application. He, therefore, urges that the application which was not based on the approach letter was not maintainable. In my opinion, this submission of Mr. Talsania may be considered by the Labour Court while deciding whether the termination order passed against the Petitioner is legal.

16. I have already held that the date from which the period of limitation prescribed for sending the approach letter started running in the facts and circumstances of this case is not determinable. This is because the order terminating the Petitioner from service was not received by him. In my opinion, therefore, both the Labour Court and the Industrial Court have erred in concluding that the application filed u/s 78 of the B.I.R. Act is not maintainable because the approach letter was sent not sent within the time prescribed in the Act. The impugned orders will, therefore, have to be set aside.

17. Mr. Ganguli appearing for the Petitioner submits that all the evidence is on record before this Court and, therefore, it would be appropriate for this Court to decide whether the Petitioner would be entitled to reinstatement rather than remanding the matter to the Labour Court to decide the application on merits after eleven years. Although the submission is attractive, in my opinion, it would not be proper to decide the case on merits for the first time before the High Court. The Labour Court must apply its mind to the evidence on record and decide whether the order of termination passed against the workman was legal and justified. Besides this, if the Labour Court finds that the order is not legal or justified, then it would have to consider what should be the back wages payable to the workman. In my opinion, this evidence must be assessed in the first instance by the Labour Court.

18. The impugned orders are set aside. Application (BIR) No. 180 of 1988 is remanded to the Labour Court for a decision on the other issues framed by it. The Labour Court shall decide the application within six months from today as more than twenty years have passed since the application was filed.

19. Accordingly, the writ petition is allowed. Rule made absolute. No order as to costs.