

(2004) 04 BOM CK 0128

In the Bombay High Court

Case No : Writ Petition No. 2779 of 1996

Shridhar Mayaji Parab

APPELLANT

Vs

Hindustan Spinning and Weaving Mills Ltd.

RESPONDENT

Date of Decision : 16-04-2004

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42(4)

Citation : (2004) 6 BomCR 388 : (2004) 3 MhLj 1084

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : S.N. Deshpande, for the Appellant; S.K. Talsania, instructed by Manilal Kher Ambalal and Co., for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—This petition challenges the order of the Labour Court passed under Sections 78 and 79 of the Bombay Industrial Relations Act. The Labour Court had granted reinstatement with 50% backwages w.e.f. 26-8-1985 along with continuity of service.

2. It is the case of the petitioner that he was working in the respondent Mill as a Roll Folder from 1976. On 18-1-1982, a general strike was resorted to by some of the Mill workers. According to the petitioner, he could not report for duty because of the tense atmosphere prevailing at the Mill gates, He was beaten up by the striking workers and despite his efforts, he was not able to report for work. The petitioner has also stated that despite all these difficulties, he reported for duty on and off during the period 1982-1985. However, he was not allowed to resume duty. On 25-8-1985, when the petitioner reported at the mill gates for duty he was informed that his services had been terminated much earlier. Immediately thereafter, the petitioner gave an approach notice as required u/s 42(4) of the Bombay Industrial Relations Act. This approach notice was not replied to by the respondent and therefore, the petitioner filed the application u/s 78 read with 79 of the Bombay Industrial Relations Act for reinstatement with

continuity of service and full backwages. In reply to the application, the respondent-mill contended that the petitioner's services had been terminated pursuant to an enquiry held against him for participating in a strike which was declared to be illegal, and that the dismissal order had been issued to him on 3-9-1982. It was pleaded in the written statement that the petitioner was not entitled to maintain the application as the approach letter u/s 42(4) had not been submitted within the requisite time. The respondent had also stated in their written statement that the dismissal order was issued pursuant to an enquiry because the petitioner had not cared to attend duty despite the appeals to report for duty being published in the newspapers. The appeal was published again in "Navakal" on 31-12-1981 requiring permanent operatives to resume work. According to the respondent, the petitioner had sufficient knowledge of the fact that the dismissal order was passed as it was published in the daily newspaper Mumbai Sakal on 2-10-1982.

3. The evidence of the workman was led before the Labour Court and of the Manager of the Mill on behalf of the respondent. The workman in his evidence denied having received either the chargesheet or the letter stating that an enquiry had been instituted against him or the enquiry proceedings or the dismissal order. According to him, he had left his place of residence and had in fact informed the respondent mill of his change of address. He denied having received the dismissal order under Certificate of Posting at his Mumbai address or having received the dismissal order at his native place.

The petitioner also examined his co-workman who has corroborated the petitioner's evidence that they used to report for the duty at the mill even during the strike period but were not allowed to resume duty. The witness for the mill has deposed that the petitioner had not approached the Mill after the dismissal order was served and that therefore, his dues were not settled. According to him, the dismissal order was sent to the petitioner's address by Registered Post as well as under Certificate of Posting. He has also stated that the dismissal order was published in the newspaper on 2-10-1982 and that the copy of the order sent under Certificate of Posting was not returned by the postal authorities.

4. The labour Court by its order dated 30-6-1983 has allowed the application partly by directing the respondent-Mill to reinstate the petitioner with continuity of service and 50% back-wages w.e.f. 26-8-1985. According to the Labour Court, the approach was made by the petitioner within the prescribed time. The Labour Court has held that the registered post letter came back to the address of the petitioner with the postal endorsement "left". The Labour Court held that the respondent had failed to prove by any evidence or material on record that the petitioner had knowledge of the dismissal order or its publication. According to the Labour Court, the approach, therefore, was within time as it was made immediately upon the watchman at the mill gate informing the petitioner that his services had been terminated. The Labour Court on the basis of the evidence on record held that the dismissal was illegal and, therefore, has set aside the order

of the dismissal. The Labour Court held that if at all the petitioner had participated in the strike, it was only passive participation and not an active participation. In view of the observations in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , the Labour Court held that the petitioner was entitled to reinstatement with continuity of service and 50% backwages.

5. An appeal was filed before the Industrial Court by the respondent Mill u/s 64 of the BIR Act. The Industrial Court by its order on 18-11-1995 set aside the order of the Labour Court on the ground that the approach made by the petitioner was not within the prescribed time and, therefore, the application itself was not maintainable. The Industrial Court was of the view that the petitioner had sufficient notice of the dismissal order being passed against him especially since, the petitioner had been paid bonus on 23-10-1982 by approaching the mill on that date. According to the Labour Court, it was impossible, that the petitioner would not have been informed of the order of the dismissal on that date and therefore, has held that the approach made was not within the period of limitation. The Industrial Court has not accepted the finding of the Labour Court that the petitioner came to know of the dismissal order being passed only when he was informed of it by the watchman in August 1985 since it had been published in "Mumbai Sakal" on 2-10-1982. The Industrial Court has refused to enter the controversy as to whether a chargesheet was issued to the petitioner and an enquiry was held as according to the Industrial Court the approach letter itself was not within the prescribed time although the application u/s 78 was made in accordance with law. The Industrial Court was of the view that it was obvious that the petitioner had slept over his rights for more than 2 to 3 years and, therefore, there was no question of granting him any relief.

6. The learned Advocate for the petitioner has submitted that the order of dismissal is void ab initio as it was not preceded either by a chargesheet or any enquiry and hence, the approach made pursuant to such an order was within the period of limitation. It is then submitted that as no enquiry was held, the order of termination amounts to an order of discharge simpliciter and, therefore, Rule 53(I)(iii) would be attracted and not Rule 53(I)(i). That being so, the approach has been made within the period of limitation. The next ground raised is that the dismissal order was not passed under standing orders applicable to the petitioner and therefore, the approach letter was not barred by limitation. It was next submitted that the grounds on which the Industrial Court has set aside the findings of the Labour Court in respect of the approach letter are perverse and untenable in law. The learned advocate also submitted that the date of dismissal was not mentioned in the order of dismissal and therefore, the period of limitation would not be calculated with precision. Further, it is submitted that when the Labour Court had found that the dismissal order which was sent to the petitioner by registered post had been returned with the postal remark "left", no credence could be placed upon the letter having been sent under Certificate of Posting to the petitioner. It is submitted that the evidentiary value of a letter sent

under Certificate of Posting is not the same as that of a letter sent under registered post, accompanied by postal acknowledgements would show that the addressee had received the same. The learned advocate relies on the judgment in the case of Mohan Lal Vs. Management of Bharat Electronics Ltd., in support of his contention that the order of dismissal being void ab initio as it was not passed under the Standing Orders, it is to be treated as not being in existence and, therefore, the approach was covered by Rule 53(I)(iii) and not 53(I)(i). Reliance is also placed on the judgment in the case of Morarjee Gokuldas Spg. and Wvg. Co. Ltd. v. Maruti Yeshwant Narvekar and ors. 1999 (II) CLR 850. According to the learned advocate, since no dismissal order was passed, it deemed to be a retrenchment of the petitioner's services. For this, he relied on the judgment in the case of Sharad Dinkar Dongare v. R.V. Ingale and ors. 2000 (4) M. L J 357 : 2001 (I) CLR 143. The learned Advocate then submits that the finding of the Industrial Court is based on conjectures and surmises and, therefore, should not be accepted. He places reliance on the judgments in The Vegetable Vitamin Foods Co. (P) Ltd. v. Shri C.S. Yadav, and ors. 1998 CLR 271 and Mahesh Chandra Gupta v. The General Manager, M.P. State Road Transport Corporation and ors. 1978 L. I.C. 1381. He also relies on the judgments in Alex Fernandes of Bombay v. Smt. N.A. Kadam and ors. 1988 (I) CLR 370; Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, and Vasant Shivram Nare v. Maharashtra State Co-operative Land Development Bank Ltd. 1982 M.L.J. 28 in support of his propositions.

7. Mr. Talsania, learned Counsel appearing for the respondent-Mill, submits that the findings of the Industrial Court are based on the evidence and on law. He submits that the petitioner had sufficient knowledge of the dismissal order having been passed and, therefore, he sought payment of his legal dues on 3-7-1993. According to the learned Advocate, this factor as well as the fact that the dismissal order was published in Mumbai Sakal would conclude the issue as to whether the petitioner had knowledge of the dismissal order having been passed. Further, the order of dismissal cannot be considered as non est as it has been passed under the standing orders applicable. According to the learned Advocate, all these factors would show that the petitioner had sufficient knowledge and therefore, ought to have approached the Labour Court within the prescribed time of three months. He submits that there is nothing on record to indicate that there was any extenuating factor warranting a punishment lesser than dismissal. According to the learned Counsel, once a strike was declared illegal and notices were issued in the newspaper calling upon the workman to report for duty and if the workman had not done so, the respondent-Mill was justified in holding the workman guilty of the misconduct alleged against. He relies on the judgment in National Textile Corporation (South Maharashtra) Ltd. v. P. Gama (Mrs.) and ors. 1996(1) M.L.J. 265 to contend that although the order of dismissal may not be upheld nevertheless it amounts to an order of termination passed under the standing orders, notwithstanding any violation of the requirements of the standing orders. Merely because the order has been

passed in contravention of the standing orders, it would not cease to be an order under the Standing Orders. The learned Counsel then submits that the Industrial Court has arrived at the finding of fact which should not be disturbed in writ jurisdiction.

8. On a perusal of the judgment of the Industrial Court, I find that it concluded that the petitioner had knowledge of the dismissal order because of the publication of the dismissal order in the daily newspaper. u/s 42(4) of the BIR Act, notice of change is required to be given by any employee desiring a change in respect of any order passed by the employer under the Standing Orders or any industrial matter arising out of the application or interpretation of the standing orders or industrial matters specified in Schedule III except Item 5(10). The application which is filed before the Labour Court for redressal of the employer's grievance must be preceded by a notice of change which has to be issued within three months of the act complained of. Rule 53(I)(iii) is unambiguous in respect of time stipulated. Unless this notice of change is given within time, the application under Sections 78 and 79 is not maintainable. In the present case, the notice of change is given on 28-8-1995 which according to the petitioner is the date on which he came to know of the action taken against him. The Industrial Court has proceeded on the basis that the petitioner had sufficient knowledge of the dismissal order having been passed against him on 3-9-1982 as letter sent under Certificate of Posting was not returned to the sender. The Industrial Court has lost sight of the fact that the letter sent by the registered post was returned with the remark "left". If that be so, then obviously the petitioner had not received the dismissal order. According to the respondent, the dismissal order was despatched immediately after being issued on 3-9-1982. If this was the case, one fails to understand as to why when there is evidence on record to demonstrate that the petitioner was reporting at the mill-gate for resumption of his duty, the dismissal order was not served on him. If the dismissal order has been returned with the remark "left", it could not be inferred that the petitioner had received a copy of that order. Certainly, from the date of the order of dismissal being despatched, the petitioner would have no knowledge of the same.

9. The question then arises as to whether the publication of the order of dismissal would be sufficient notice of the same to the petitioner and would the petitioner be required to approach the employer within the prescribed time from the date of the publication. The company had taken the precaution of publishing the dismissal order in "Mumbai Sakal" which is a Marathi daily newspaper. This dismissal order was published on 2-10-1982. Therefore, it has to be presumed that the petitioner had sufficient knowledge of the dismissal notice. Publication in a newspaper of the dismissal order would in my view; be sufficient notice to the workman concerned. Had the respondent been merely sent the notice by registered A/D or under Certificate of Posting and there was no acknowledgment to the effect that the petitioner had received the same then the petitioner would be right in contending that he had not received the dismissal order and

therefore, had no knowledge of the same. Consequently, the approach made would not be barred by limitation. However, in the present case, the respondent mill having taken precaution of publishing the notice on 2-10-1982, it must be presumed that the petitioner had sufficient notice of the dismissal order being passed against him. Therefore, it was necessary for the petitioner to approach the Labour Court within the time stipulated u/s 42(4) of the BIR Act, i.e., within three months from 2-10-1982 when the dismissal order was published. Not having done so, the application was not maintainable.

10. The contention raised by Mr. Deshpande that the dismissal order was not issued under the standing orders and, therefore, was non est is unsustainable. Reliance placed by him on the judgments in Jayavant Yaswant Raut v. Simplex Mills Ltd. and ors. 1995 (II) CLR 641 and Morarjee Gokuldas Spg. and Wvg. Co. Ltd. (supra) is misplaced. In both these cases, the dismissal order was not received by the workman and, therefore, the Court was of the view that the change would be one in respect of Item 6 of Schedule III and within Section 78(1)(A)(a) of the BIR Act. However, in the present case, there is no doubt that there the dismissal order was served on the petitioner by publication in the newspaper and therefore, these judgments would have no application. The judgment in the case of Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, also does not have any application. A submission is made that the dismissal order has been passed without a chargesheet being issued and without any enquiry proceedings, making the dismissal order non-est and inoperative. The learned Advocate relies on the judgment in Bharat Electronics Ltd. (supra) to submit that the order which is non-est has the effect of not having been passed and, therefore, the approach made by the petitioner pursuant to the order of dismissal which is non-est cannot be delayed or belated. According to the learned Advocate, it would have to mean that there is no dismissal order and, therefore, the principle is laid down in the case of Simplex Mills Ltd.. (supra) would apply. However, there is ample evidence on record that the order of dismissal was passed pursuant to an enquiry held and a chargesheet being served on the workman. In these circumstances, it could not be said that the dismissal order was not passed under the standing orders and that Rule 53(2) was applicable.

11. The other submission made by the learned advocate for the petitioner that the Industrial Court's finding is based on conjectures and surmises-cannot be accepted as there is sufficient evidence on record, to demonstrate that the petitioner had knowledge of the dismissal order having been passed against him.

12. In these circumstances, the order of the Industrial Court is upheld. Writ Petition is dismissed with no order as to costs.