
(2004) 03 BOM CK 0128

In the Bombay High Court

Case No : Writ Petition No. 1350 of 2003

Sitaram Dhondoo Hadkar

APPELLANT

Vs

National Textile Corporation (SM) Ltd.

RESPONDENT

Date of Decision : 03-03-2004

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42(4), 78(1), 79(3)
Bombay Industrial Relations Rules, 1947 — Rule 32(2), 53(1)

Citation : (2004) 5 BomCR 419 : (2004) 102 FLR 1151 : (2004) 3 LLJ 728 :
(2004) 3 MhLj 529

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; Meena H. Doshi, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—The petitioner-workman challenges the order of the Industrial Court allowing the appeal of the respondent-employer whereby the order of the Labour Court directing payment of backwages from 8-1-1993 till 27-12-1999 in lieu of reinstatement in exercise of powers u/s 78 of the Bombay Industrial Relations Act, 1946; hereinafter called as "the said Act" has been set aside and the application filed by the petitioner u/s 78(1)A(a)(iii) of the said Act has been dismissed.

2. The petitioner was the employee of the Elphinstone Spinning and Weaving Mills since 1972. From 18-1-1982 there was a general strike in the cotton textile Industry. In October, 1992 the said mill was nationalised and eventually taken over by the respondent. The petitioner sent an approach letter on 8-1-1993 under the provisions of Section 42(4) of the said Act but there was no reply from the respondent. The petitioner on 17-4-1993 filed application under sections 78 and 79 of the said Act which was contested by the respondent. The Labour Court, after hearing the parties, by its judgment dated 27-12-1999, while answering the issue of limitation against the petitioner, directed to deposit an amount equivalent to the full backwages in lieu of reinstatement from 8-1-1993 till the

date of the judgment within one month. Aggrieved by the said order, the respondent preferred appeal and the Industrial Court by its judgment dated 29-3-2003, holding that the notice of approach was served beyond the period of limitation and therefore allowed the said appeal and set aside the judgment of the Labour Court and dismissed the application which was filed by the petitioner. Hence, the present petition.

3. While assailing the impugned order, the learned Advocate for the petitioner submitted that the Industrial Court failed to appreciate that undisputedly there was no order of termination of service of the petitioner by the respondent in accordance with the Standing Orders applicable to the parties and that therefore there was no occasion for the application of limitation period of three months for the approach letter and in which case the provision of law, which is attracted, is comprised under Item 6 of Schedule III of the said Act, according to which the application is to be filed within three months from the date of the last approach letter. It is sought to be contended that the case which do not fall within the parameter of the Clause (4) of Section 42 of the said Act, the limitation of three months for the approach letter does not apply. Reliance is placed in the decision of the Division Bench of this Court in Shankar Vasudeo Masurkar and Another Vs. Shree Sitaram Mills and Another, and of the learned Single Judge in Parshuram Ganpat Bhoir v. National Textile Corporation (S.M.) Ltd., Mumbai and Ors., reported in 2002 (2) M.L.J. 79.

4. On the other hand, the learned Advocate for the respondent has submitted that in order to invoke the jurisdiction of the Labour Court u/s 78(1)A(a) of the said Act, it is necessary for the employee to comply with the provision of Section 42(2) of the said Act and in the absence thereof, as well as in case of delay in compliance thereof, the same would disentitle the employee to get any relief under the said provision of law and it does not make any difference if there is no order of termination of service. Reliance is placed in the decision of the Division Bench in the matter of Vithaldas Vallabhdas Baishnav v. Kohinoor Mills Co., reported in 1979 M.L.J. 420; 1979 (II) L.L.J. 84 and of the learned single Judge in National Textile Corporation (South Maharashtra) Ltd. v. Mohd. Umar Mohd. Hanif and Anr., reported in 2001 (2) CLR 145 and National Textile Corporation (South Maharashtra) Ltd. v. P. Gama (Mrs.) and Ors. reported in 1996 (1) M.L.J. 265 ; 1995 (1) CLR 84.

5. Upon hearing the learned Advocates for the parties and on perusal of the records, the following question arises for consideration in the matter :

"Whether an application u/s 78(1)A(a)(iii) read with Section 79(3)(b) of the said Act would be maintainable in a case where the employee fails to approach the employer within a period of three months from the first day of disallowing such employee, contrary to his willingness, to do work, or to attend to his duties, without even terminating his services by an order under the Standing Orders applicable to the parties?"

As a prelude to the above question, it would be necessary to ascertain the meaning of the word "Order" in Rule 53(1) of the Bombay Industrial Relations Rules, 1947, hereinafter called as "the said Rules".

6. The Labour Court in its judgment has held that the petitioner did approach with a letter dated 8-1-1993 and there was no response to the same from the respondent. It is also held that there was no approach notice within the prescribed limitation of 90 days from the date of cause of action had arisen; however, simultaneously he has also observed that the cause of action was continuous and recurring one. The said judgment, however, does not reveal as to what was the cause of action which had arisen and when it had arisen for the first time in the matter in hand. The Industrial Court on its part also has not taken any pains to ascertain the date of the cause of action and without application of mind in that regard proceeded to hold that it cannot be disputed that the notice of approach was beyond the period of limitation. While dealing with the issue of limitation, it is too elementary to note that the authority has to ascertain the date of cause of action or the date from which the period of limitation is to be counted and only thereafter, applying the rule prescribing the period of limitation, it is to be found out whether the application before the authority was filed within the statutory period. Any finding arrived at on the point of limitation without such exercise would disclose non-application of mind and would be bad in law. Apparently, the finding about the approach notice being beyond the period of limitation by the Labour Court and confirmed by the Industrial Court is totally arbitrary and is not borne out from the records.

7. The Section 78(1)A(a)(iii) of the said Act provides that the Labour Court shall have the power to decide disputes regarding any change made by an employer or desired by an employee in respect of an industrial matter specified in the Schedule III, except Item 5 thereof, and matters arising out of such change. The Section 79(3)(b) provides that an application in respect of a dispute falling under the Clause (a) of paragraph A of Sub-section (1) of Section 78 shall be made if it is a dispute falling under Sub-clause (iii) of the said clause within three months of the employee concerned having last approached the employer under the proviso to Sub-section (4) of Section 42. The proviso to Sub-section (iii) of Section 79 provides that the Labour Court may, for sufficient reasons, admit any application in respect of any dispute made to it under the said sub-section after the expiry of the period of three months specified thereof under Sub-clause (b).

8. The Section 42(4) provides that 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 provided that no such application shall lie unless the employee or a representative union has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived at in respect of the

change within the prescribed period.

9. The Section 3(8) of the said Act defines the term "change" to mean an alteration in an industrial matter. The expression "industrial matter" has been defined u/s 3(18) to mean any matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees, or the mode, terms and conditions of employment, and inter alia includes all matter"s pertaining to the relationship between employers and employees, or to the dismissal or non-employment of any person. Item 6 of the Schedule III to the said Act enlist "Employment including (i) reinstatement and recruitment, (ii) unemployment to persons previously employed in the industry concerned."

10. The Section 123 of the said Act empowers the State Government to frame rules to carry out the purposes of the said Act and accordingly the said rules have been framed. The Rule 53(1) of the said Rules provides that 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 the 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.

11. The Section 78(1)A(a)(iii) of the said Act, therefore, empowers the Labour Court to entertain disputes regarding any change made by an employer in respect of an industrial matter specified in the Schedule III except under Item 5 thereof as well as in matters arising out of such change. In other words, any change in respect of the industrial matter can be a subject-matter before the Labour Court under the said provision of law and only exception specified is in relation to construction and interpretation of awards, agreement and settlement. The definition clause relating to the expression "industrial matter" clearly specify that the same includes any matter relating to employment as well as non-employment and work, apart from inclusion of subject of employment as well as unemployment of the employed persons under the Item 6 of the Schedule III. On the face of it, therefore, the said provision of law empowers the Labour Court to deal with any dispute relating to employment as well as unemployment and the same would certainly include the work to be allotted to the employee on account of or arising out of any change made in that regard by the employer. Being so, when a person is in the employment and is not allowed to do work or is not allowed to attend to his duties without any lawful justification and lawful right to do so, certainly it would amount to refusal to give work and consequently it would result in denial of the employment to the employed person within the meaning of the said expression under the provision of law contained in Item 6 of the Schedule III read with Section 3(18) of the said Act and therefore could be a subject-matter of dispute u/s 78(1)A(a)(iii) of the said Act.

12. The Section 79(3)(b) of the said Act relates to period of limitation for

entertaining such application under the above referred provision of law. It clearly specifies that such application has to be filed within three months of the employee concerned having last approached the employer under the proviso to Section 42(4). Therefore, there cannot be any dispute that the period of limitation for filing such an application under the said provision of law would be three months, to be counted from the day the employee last approached the employer with request for allowing him to work or perform his duties. Undoubtedly, the proviso to Section 79(3)(b) empowers the Labour Court, for sufficient reasons, to admit such application even after the expiry of the period of three months. Needless to say that the term "sufficient reasons" has to be construed liberally and the construction given to the term "sufficient cause" in Section 5 of the Limitation Act, 1963 can be a guiding principle.

13. While Section 78 speaks of the powers of the Labour Court, Section 42(4) enables an employee to raise dispute before the Labour Court in relation to industrial matters enumerated under Schedule III, except Item 5 thereof. The proviso thereof requires the employee to approach the employer within the prescribed time with regard to change prior to approaching the Labour Court.

14. There can be no doubt that application to Labour Court raising dispute relating to industrial matter enumerated in Schedule III, except Item 5 thereof, would be maintainable provided the employee had first approached the employer in that regard within the stipulated time. If the employee fails to approach the employer within the prescribed period, the employee would not be entitled to file any such application u/s 42(4) nor the Labour Court would be empowered to entertain such application u/s 78. In that case, precondition to enable the employee to file such application would remain without being satisfied. It is only on compliance of the prerequisites under the proviso to Section 42(4) that would entitle an employee to approach the Labour Court under the said provision of law.

15. The provision relating to the period for approaching the employer in terms of the proviso to Section 42(4) is to be found in the said Rule 53(1). Apparently, the period prescribed is three months and it is to be counted from the date of the order. However, the order spoken of is not any order but the one passed by the employer under the Standing Orders. Being so, it is not any order that can be construed as the starting point for the purpose of limitation under the proviso to Section 42(4) but it has necessarily to be the one passed in exercise of powers available under or in accordance with the provision in that regard in the Standing Orders. Hence the employer disputing the claim of the employee under the said provision of law has to place on record the order passed by him under the Standing Orders before raising the point of non-compliance of the proviso to Section 42(4) by the employee as well as the issue of non-maintainability of the application on that count. In other words, unless it is shown by the employer that the employee had failed to approach the employer within three months from the date of order passed by the employer under the Standing Orders, the issue regarding non-compliance of the proviso to Section 42(4) cannot be answered

against the employee.

16. Can a refusal to allow the employee to do the work by itself would amount to an order within the meaning of the said expression under the Rule 53(1) of the said Rules? As already seen above, the order has to be under the Standing Orders. Unless it is established by the employer that oral refusal to allow the employee to do the work is in accordance with the service conditions applicable to the parties and that therefore such oral order itself is an order under the Standing Orders, certainly it cannot be said that any such act would by itself amount to an order under the Standing Orders.

17. The Section 42(4) of the said Act does not relate merely to the orders passed by the employer under Standing Orders. It also relates to any "industrial matter" arising out of the application or interpretation of Standing Orders or even relating to those enumerated under the Schedule III. The proviso to Section 42(4) applies in cases of all such situations and is not restricted to Clause (i) of Sub-section (4) of Section 42 which relates to orders by the employer under the Standing Orders. In other words, Section 42(4) though relates to the industrial matters, the said industrial matters are categorised in three classes and one of them relates to the orders under the Clause (i) thereof and in respect of those orders, the period of limitation is prescribed under Rule 53(1). This is apparent from the Rule 53(1) itself, which though speaks of applications by an employee or a representative union for change u/s 42(4), the prescription of limitation is restricted to the applications relating to the orders passed under the Standing Orders and it does not relate to the subject covered by the Clauses (ii) or (iii) of Section 42(4) of the said Act. Evidently the Clause (ii) thereof relates to application or interpretation of Standing Orders and Clause (iii) thereof relates to the matters specified under the Schedule III to the said Act. Indeed, the relevant provision relating to limitation in the said Rule 53(1) reads as under :--

"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."

The above provision therefore obviously discloses that it relates only to the cases covered by the Clause (i) of Section 42(4) of the said Act and not to the cases relating to the matters referred under other clauses. In a case where there is no order passed under the Standing Orders, there could be no occasion to apply the period of three months. It does not mean to say that no such approach notice is required or that it can be sent at any time at the sweet will of the employee.

18. The undisputed facts in the case in hand are that the petitioner was in the employment of the erstwhile Elphinstone Spinning and Weaving Mills Limited which was taken over by the respondent. Pursuant to nationalisation of the said mill, that the petitioner sent the approach letter dated 8-1-1993 which was duly received by the respondent, however, there was no reply sent by the respondent to the said letter, the petitioner filed an application u/s 78(1)A(a)(iii) of the said

Act, then there was neither any disciplinary inquiry against the petitioner nor any letter of termination of his services was issued to the petitioner. The judgment of the Labour Court also discloses that the claim of the petitioner that he had approached the respondent for assigning of work was sought to be denied by the respondent solely on the basis of the testimony of the sole witness of the respondent and the said testimony disclosed that it was not to his personal knowledge but based on the information derived from the records, and on the basis of such uncorroborated information, that he had denied the said claim of the petitioner. In other words, denial of the claim of the petitioner regarding his attempt to attend to his duties or to work at the mill of the respondent was solely based on the records of the respondent. Neither it is known as to what were those records were, nor there is any reference to such records either by the Labour Court or the Industrial Court. Whether the petitioner had been approaching the gate of the mill is a question of fact and was established on behalf of the petitioner by his solemn assertion in that regard and supported by document in the form of the notice dated 8-1-1993. Undisputedly, the said notice was neither replied nor denied by the respondent. Besides, no material was placed on record in support of the contention of the respondent that there were repeated requests by the respondent to the petitioner to join to his duties. Simultaneously, it is not in dispute that the petitioner was never issued and served with an order in writing terminating his services. In other words, the petitioner continued to be in service of the respondent on the date of approach letter as well as on the date of the filing of the application u/s 78(1)A(a)(iii) of the said Act, and for that matter even thereafter. In short, the petitioner while being in the employment of the respondent was not allowed to attend to the duties, nor there was any order passed by the respondent under the Standing Orders applicable to the parties and the respondent having not arrived at any settlement or agreement pursuant to approach letter dated 8-1-1993, the petitioner was entitled to approach the Labour Court u/s 78(1)A(a)(iii) of the said Act.

19. The view that I am taking finds support from three reported decisions of this Court one of them being the decision of the Division Bench. In *Jaywant Yashwant Raut v. Implex Mills Ltd. and Ors.*, reported in 1995 (2) CLR 641, consequent to the finding of the Industrial Court that there was no order of termination of service served upon the workman, it was held that the dispute which was sought to be raised by the employer could not have been categorised u/s 78(1)A(a)(i) of the said Act, while observing that "As far as the petitioner was concerned, he was merely being orally refused work, right from December, 1982, without any one even having disclosed to him the reason for such refusal or his contract of employment having been terminated." and further it was held that "..... the ends of justice would have been much better served if a liberal construction had been adopted by holding that the dispute was one which fell properly within Clause (iii) of sub-paragraph (a) paragraph A of Sub-section (1) of Section 78. In my view since there was neither an order of termination of service, nor any

declaration of the reasons for which work was not being given to the petitioner, the petitioner was justified in making an approach even on 31st May 1984 and seeking the relief of being kept back on work and in employment. A dispute of such nature, in my view 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(1)A(a). Once we come to the conclusion, it is obvious that the approach letter dated 31st May, 1984 would not be hit by the limitation prescribed in Rule 32(2) of the Bombay Industrial Relations Rules, 1947,".

20. Another learned single Judge in *Parshuram Ganpat Bhoir v. National Textile Corporation (S.M.) Ltd., Mumbai and Ors. (supra)*, after relying upon the decision in *Jaywant Yashwant Raut v. Implex Mills Ltd. and Ors. (supra)* as well as taking note of the decision of a Division Bench in *Changunabai Channo Palkar v. Khatau Makanji Mitts Ltd.* reported in 1992 (2) M.L.J. 1641 and bearing in mind the facts of the case wherein it was admitted position that no order was passed by the employer terminating the services of the employee and that therefore there was no order passed by the employer, acting or purporting to act under the Standing Orders, held that dispute of that nature would fall within the scope of Section 79(3)(b) of the Act since it would be a dispute within the meaning of Section 78(1)A(a)(iii) of the said Act.

21. The Division Bench in *Shankar Vasudeo Masurkar and Anr. v. Shree Sitaram Mitts and Anr. (supra)*, considering the fact that the Labour Court had recorded that there was no termination order passed by the employer, held that the cause of action continued to survive and it was of a recurring nature and there was no question of application of bar of limitation. It was ruled thus :--

"..... In the instant case both the Courts below took judicial notice of the fact that there was widespread 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 any one even having disclosing them the reasons for such refusal or without their contract of employment having been terminated under the Standing Orders. 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(1)A(a) of the Act."

22. As regards the decision of the learned single Judge in *National Textile Corporation (South Maharashtra) Ltd. v. Mohd. Umar Mohd. Hanif and Anr. (supra)* is concerned, it was a case where the Labour Court had categorically held

that the services of the employee were illegally terminated in October, 1982 and therefore, it was held that on the face of the established facts, the mandatory provision of Section 42(4) of the said Act was clearly violated by the employee. In fact, even after taking note of the decisions in the matters of Changunabai Channo Palkar v. Khatau Makanji Mills Ltd. (supra), Jaywant Yashwant Raut, Morarjee Gokuldas Spinning and Weaving Co. Ltd. v. Maruti Yeshwant Narvekar and Ors., reported in 2001 (I) LLJ 1008, Oriental Textile Finishing Mills, Amritsar v. Labour Court, Jullundur and Ors., reported in 1977 (II) LLJ 64 and National Textile Corporation (South Maharashtra) Ltd. v. P. Gama (Mrs.) and Ors. (supra), it was observed by the learned Judge that "In the peculiar facts and circumstances of this case it is not necessary for me to discuss the aforesaid rulings. In the present case the Labour Court has held that the employee was terminated in October, 1932 and he had sent a letter of approach on 9-12-1985. From these facts, it is crystal clear and beyond any manner of doubt that the letter of approach was barred by limitation.". Apparently the decision was delivered in the peculiar set of facts where the fact of termination of service was clearly established.

23. The decision of the Division Bench in Vithaldas Vallabhdas Vaishnav v. Kohinoor Mills Co. (supra) also is of no help and is clearly distinguishable in as much as that in the said case the employee was a store keeper whose services were terminated with effect from 1-10-1973 on the ground of loss of confidence. He approached the employer for reinstatement through Advocate's notices dated 4-10-1973, 8-10-1973 and 31-10-1973. He also approached the Assistant Commissioner of Labour with an application dated 12-11-1973. He then filed an application for reinstatement and backwages before the Labour Court on 4-6-1974 u/s 78 of the said Act. In those facts, dealing with the aspect of period of limitation for such application, it was held that the limitation of three months prescribed u/s 79(3) clearly disclosed that the application was barred by limitation. Simultaneously it was held that the provision of Rule 53(1) and (2) were valid and not ultra vires.

24. The decision of the learned single Judge in P. Gama's (supra) case is also clearly distinguishable as therein the claim of the employee was rejected on the ground that according to the employee herself she had approached for work on 18-2-1984 but she was refused work and after waiting for one year and four months, she filed an application to the Labour Court only on 30-5-1985 and, therefore, the same was on the face of it barred by limitation and there was no application for condonation of delay and no cause was shown for the delay and in those situation there was no basis or justification for entertaining the application beyond the period of limitation. Apparently, the claim was rejected solely on account of the application being filed beyond three months" prescribed u/s 79(3) of the said Act.

25. Feeble attempt was made on behalf of the respondent to contend that, in any case, the application u/s 78 itself was barred by the law of limitation prescribed

u/s 79(3)(b) of the said Act as it was filed beyond the period of three months from the date of approach letter. At the outset it must be observed that neither the Industrial Court nor the Labour Court has given any finding in favour of the respondent in that regard. It is true that the respondent had raised the ground in that regard in the appeal before the Industrial Court. However, no proper foundations were laid by the respondent to get the petitioner non-suited on account of bar of limitation. In the reply filed by the respondent before the Labour Court, no facts revealing bar of limitation were pleaded and a vague plea of bar of limitation was raised. In any case, it is apparent that the Labour Court after considering the case of the petitioner on merits had ordered the payment of arrears from the date of approach till the date of order. Undisputedly, the proviso to Section 79(3)(b) of the said Act empowers the Labour Court to condone the delay on sufficient cause being shown for the same. Even though there is no specific order or detail analysis of the cause for delay, it being a matter of discretion, and considering the fact that the plea of bar of limitation did not disclose the factual foundation in support thereto, it is obvious that the Labour Court condoned the delay and thereafter granted the relief in favour of the petitioner. In any case, the delay was hardly of ten days and certainly, in the facts and circumstances of the case, deserved to be condoned.

26. It was sought to be contended on behalf of the petitioner that the Labour Court erred in restricting the back wages with effect from 8-1-1993, the day of approach. Undisputedly, the petitioner had not filed any appeal against the said order of the Labour Court, nor even has taken any ground in the petition in that regard. In the circumstances, it is not permissible for the petitioner to challenge the order of the Labour Court at the stage of final hearing of the petition.

27. The fall out of the above discussion is that merely because the employer refuses the employee to attend to his duties or refuses to allow him to do the work, that would not amount to passing of the order under the Standing Orders, in the absence of specific provision in that regard in the Standing Orders. In such case, merely because the employee did not sent the approach letter within three months from the first date of refusal of the work, it would not amount to non-compliance of the provision of the proviso to Section 42(4), nor the bar of three months prescribed under Rule 53(1) of the said Rules would be attracted. In such case, the cause of action will be of recurring nature, and the employee approaching u/s 42(4), even after the expiry period of three months from the first date of refusal of work, would be entitled to approach the Labour Court u/s 78(1)A(a)(iii) of the said Act, albeit, within the period prescribed u/s 79(3)(b) of the said Act. An oral order would not amount to an order within the meaning of Section 42(4) read with Rule 53(1), unless the Standing Orders applicable to the parties specifically provides to the contrary. The application filed by the petitioner u/s 78(1)A(a)(iii) of the said Act was maintainable and there was no justification for the Appellate Court to interfere in the order passed by the Labour Court on the said application. The question for consideration formulated above stands answered accordingly.

28. In the result, therefore, the impugned order passed by the Industrial Court cannot be sustained and is liable to be set aside and is therefore, hereby quashed and set aside, while restoring the order of the Labour Court. The rule is made absolute in above terms with no order as to costs.