

(2012) 02 BOM CK 0117

In the Bombay High Court

Case No : Writ Petition No. 7403 of 2010

Smt. Laxmi Bharat Bavise and Another

APPELLANT

Vs

M/s. Permanent Magnets Ltd. and Others

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Minimum Wages Act, 1948 — Section 11A

Citation : (2012) 3 ALLMR 267 : (2013) 2 BomCR 749 : (2012) 133 FLR 600 :
(2012) 4 LLJ 129 : (2012) LLR 728 : (2012) 3 MhLj 956

Hon'ble Judges : G.S. Godbole, J

Bench : Single Bench

Advocate : R.D. Bhatt, for the Appellant; Anjali Purav, for the Respondent

Final Decision : Allowed

Judgement

G.S. Godbole

1 The original Petitioner who is an Employee has challenged the order of Reference (IDA) No. 22 of 2001 to the extent 50% back wages are denied. The original Petitioner thereafter had died.

2 I had indicated to the parties whether an amicable settlement of the dispute can be made. However, since that was not possible and since notice for final disposal at the stage of admission was also issued by order dated 7th July, 2011, the Petition is taken up for final hearing forthwith.

3. Rule. Rule is made returnable forthwith. Learned Advocate for the Respondents waives service of the Rule.

4. The Labour Court has held that there was no case of mis-conduct and the oral termination of the Petitioner was wholly unjustified.

5. In so far as the question of back wages is concerned, the Petitioner had stepped in the witness box and led evidence. Paragraphs 1 and 2 of the Affidavit in lieu of Examination- in - Chief of the Petitioner read thus :

1. I say that I was dismissed by the First Party Company on 20.04.1999. Immediately thereafter it was not possible for me to look for and take any gainful employment. At that time 3 different proceedings were going on in various Courts viz. Reference (IT) No. 44 of 1999, Approval Application (IT) No. 09 of 1999 and the dispute raised by my Union in respect of my illegal dismissal. I say that I have been attending the proceedings in this Hon'ble Court on every date on which the matter is on board. It would not have been possible for me to pursue this Reference had I taken any gainful employment. Even otherwise I was around 40 years when I was dismissed; no employer would have given me any employment at that age. Thus, I am not gainfully employed from the date of my illegal dismissal till today.

2. I say that my wife earns meagre income by working as a Cook in a couple of households nearby my residence. I and my entire family is dependent on her meagre income. Her income is hardly enough to save us from starvation.

6. There was hardly any cross-examination on this aspect save and except two questions which were answered by the Petitioner as under :

i. I have no documentary evidence to show that I took search of the job. ii. It is not true to say that I am earning good income but I suppress the said facts from the court. It is not true to say that I filed false affidavit and I deposed false.

7. On this background, the learned Judge of the Labour Court has decided Issue No.4 about back wages and observed thus :

During cross examination taken by the first party company nothing is brought on record to show that the workman was gainfully employed or he was doing some other work or he had some income. The workman pleaded and also deposed in his evidence therefore the initial burden is discharged by the workman to prove that he was not gainfully employed. The company has not brought anything on record to show that the workman was gainfully employed.

8. However, the backwages are denied for the following reasons given in paragraphs 27 and 28 which read thus :

27. However our Apex Court in case of Reetu Marbles v/s. Prabhakant Sukla (2010 I CLR 10) observed that :

there is gap of more than 15 years from the date of termination till aware of reinstatement. No any material placed on record that he was not gainfully employed during long spell of 15 years. therefore 50% back wages granted.

28. Taking into consideration the above ratio the reinstatement do not follow with full back wages. The termination is dated 20.4.1999. More than 10 years have been passed. The workman has not done the work and in such circumstances full back wages cannot be granted to the workman but the workman would be entitled for 50% back wages.

9. Mr. Bhatt, Advocate submitted that since the Petitioner had discharged the

burden of showing that he was not gainfully employed and since no evidence to the contrary was led by the Respondents, 100% backwages ought to have been awarded. He relied upon the Judgment of the Supreme Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, . He also relied upon the Judgment of the Division Bench in the case of Taranjitsingh I. Bagga Vs. Maharashtra State Road Transport Corporation, .

10. On the other hand, learned Advocate for the Respondents Ms. Purav relied upon the Judgment of the Supreme Court in the case of Reetu Marbles vs. Prabhakant Shukla 2010 (I) CLR 10.

11. I have considered the rival submissions. The Labour Court has held that the termination was illegal and unjustified. The Petitioner was made to fight a long battle on account of such illegal termination for 9 years and 27 days before the Labour Court. Prior to that he was terminated on 20th April, 1999 and had also to fight a legal battle in conciliation proceedings from the date of termination till the filing of the Reference No.22 of 2001. Thus on account of wrongful action on the part of the Respondents in terminating the services of the Petitioner till the order of reinstatement has been accepted by the Respondents, the Petitioner was made to fight for justice for almost 11 years before the Labour Court.

12. Theoral evidence of the Petitioner to the effect that he was not employed anywhere and that he was required to attend the hearing of the Reference and the averments of being unemployed during hearing of the Reference has gone unchallenged. In the case of Hindustan Tin Works Ltd., (supra) the Supreme Court has held thus in paragraphs 11 and 13 as under :

11. In the very nature of things there cannot be a straight jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear in the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see *Susannah Sharn v. Wakefield*. [1891] A.C. 173 at 179.

13. Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and iniquitous to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more

often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be an unilateral action. It must be a two way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater burst making the shock of sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty.

13 In the Judgment of Taranjitsingh Bagga (supra) the Division Bench has observed thus in paragraph -8 :

8. Learned Advocate Shri Mehadia for the respondent submitted that the law has undergone change and unless the employee pleads and proves that he was not gainfully employed, he would not be entitled to backwages automatically upon reinstatement. As the Apex Court has observed time and again, the question of entitlement to backwages would depend on the facts and circumstances of each case, and there can be no straitjacket formula. The Court cannot be oblivious to the fact that an employee, whose services were terminated wrongly, has not only to fight for his survival by getting such odd jobs as he can, but has also to fight a battle for getting himself reinstated in service. The Courts cannot be oblivious to the fact that such legal adventure is costly and would eat up a large chunk of whatever meagre income that the employee may be able to make by getting any odd job. At the same time, no Court can be oblivious to the grim reality of unemployment pervading all stratas of the society. Therefore, we would not be in a position to conclude that the moment a person is sacked he can find alternate means of his wherewithal. In this situation, it would be unjust to insist upon a technical requirement of pleading and proof of absence of gainful employment by an employee who is wrongfully dismissed.

14. In the Judgment of the Supreme Court in the case of Reetu Marbles which was relied upon by the Respondents, the observations in paragraphs 17 to 21 are as under :

17. From the above observations it becomes apparent that payment of full back wages upon an order of termination being declared illegal cannot be granted mechanically. It does not automatically follow that reinstatement must be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the industry.

18. Again in the case of Haryana State Electronics Development Corporation Ltd. Vs. Mamni, this Court reiterated the principle. The principles laid down in UP State Brassware Corp. Ltd. (supra).

19. Recently this Court again examined the issues with regard to payment of full back wages in the case of P.V.K. Distillery Ltd. Vs. Mahendra Ram, .

20. After examining the relevant case law it has been held as follows:

Although direction to pay full back wages on a declaration that the order of

termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

In *Haryana Urban Development Authority v. Om Pal* it is stated that: (SCC p. 745, para 7)

7....It is now also well settled that despite a wide discretionary power conferred upon the Industrial Courts u/s 11A of the 1947 Act, the relief of reinstatement with full back wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors, one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any.

In deciding the question, as to whether the employee should be recompensed with full back wages and other benefits until the date of reinstatement, the tribunals and the courts have to be realistic albeit the ordinary rule of full back wages on reinstatement. (*Western India Match Co. Ltd. v. Industrial Tribunal*)

21. Applying the aforesaid ratio of law we have examined the factual situation in the present case. The services of the respondent were admittedly terminated on 11.6.87. The Labour Court gave its award on 27.9.02. Therefore, there is a gap of more than 15 years from the date of termination till the award of reinstatement in service. Labour Court upon examination of the entire issue concluded that the respondent would not be entitled to any back wages for the period he did not work. A perusal of the award also shows that the respondent did not place on the record of the Labour Court any material or evidence to show that he was not gainfully employed during the long spell of 15 years when he was out of service of the appellant. In the writ petition the respondent was mainly concerned with receiving wages in accordance with the Minimum Wages Act and for inclusion of the period spent in Conciliation Proceedings for the calculation of financial benefits. The High Court without examining the factual situation, and placing reliance on the judgment in *Hindustan Tin Works Pvt. Ltd. v. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.* held that the normal rule of full back wages ought to be followed in this case. We are of the considered opinion that such a conclusion could have been reached by the High Court only after recording cogent reasons in support thereof. Especially since the award of the Labour Court was being modified. The Labour Court exercising its discretionary jurisdiction concluded that it was not a fit case for the grant of back wages. In the case of *P.V.K. Distillery Ltd.* (supra), it is observed as follows:

The issue as raised in the matter of back wages has been dealt with by the

Labour Court in the manner as above having regard to the facts and circumstances of the matter in the issue, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. There exists an obligation on the part of the High court to record in the judgment, the reasoning before however denouncing a judgment of an inferior tribunal, in the absence of which, the judgment in our view cannot stand the scrutiny of otherwise being reasonable.

15. In the present case, it is difficult to overlook the facts that the Petitioner was made to fight for justice in court for a long time of almost 11 years. There is nothing to indicate that the Petitioner was gainfully employed and the version of the Petitioner that he had tried for employment but could not secure employment has gone virtually unchallenged. In that Judgment of Reetu Marbles the Supreme Court has observed in paragraph 21 as a finding of fact that the employee had not placed any material or evidence to show that he was gainfully employed. In the present case the facts are otherwise and the Petitioner had clearly placed on record the material in the form of his Affidavit in lieu of Examination- in-Chief, which testimony is unshaken in the cross- examination, that he was not gainfully employed anywhere. In my opinion, therefore, the Tribunal ought to have exercised the discretion in favour of the Petitioner and there is improper exercise of discretion by refusing remaining 50% backwages.

16. In the result, the Petition succeeds and the Rule is made absolute. The impugned Judgment and Order dated 30th January, 2010 passed by the Presiding Officer, 7th Labour Court in Reference (IDA) No. 22 of 2001 is modified by directing that the Petitioner will be entitled to get full back wage and all other consequential benefits.