

(1979) 01 BOM CK 0001

In the Bombay High Court

Case No : Spl. Civil Application No. 2583 of 1977

Vithaldas Vallabhdas Vaishnav

APPELLANT

Vs

Kohinoor Mills Co.

RESPONDENT

Date of Decision : 11-01-1979

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 123(1), 123(2), 42, 42(4), 78
Bombay Industrial Relations Rules, 1947 — Rule 53(1), 53(2)
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 5

Citation : (1979) 38 FLR 179 : (1979) 2 LLJ 24 : (1979) MhLj 420

Hon'ble Judges : V.S. Deshpande, J;N.B. Naik, J

Bench : Division Bench

Judgement

V.S. Deshpande

1. The petitioner was employed as a storekeeper in the respondent No. I mill since 21-9-1949. His services came to be terminated with effect from 1-10-1973 on the ground of loss of confidence. The petitioner approached the employer for reinstatement through advocate's notices dated 4-10-1973, 8-10-1973 and 31-10-1973. He also made an application to the Assistant Commissioner of Labour on 12-11-1973 to the same effect. He then filed the present application for reinstatement and back wages before the Labour Court on 4-6-1974 under S. 78 of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act"). The employer resisted his claim on the ground, among others, that the same was not maintainable being barred by limitation. The issue of limitation was tried as a preliminary issue at the instance of the employer. The Labour Court upheld that the contention of the employer, holding that the application dated 4-6-1974 was beyond three months and 15 days after the employer was approached for the needful. He also held that he had no powers to condone the delay. Validity of this order of the Labour Court dated 30-9-1976 is challenged in this petition under Arts. 226 and 227 of the Constitution.

2. It will be convenient to take a resume of the relevant provisions of the Act and the Rules to appreciate the points decided and raised. The right to get the employer's order of dismissal cancelled by application to the Labour Court, is conferred on the employee by sub-s. (4) of S. 42 of the Act. It is not in dispute that the dismissal order is passed in exercise of the powers under the standing orders. This is expressly treated as an application for "change". The right to get the same altered by way of "change" is expressly provided under this sub-section along with rights to get the industrial matters specified in Schedules I to III of the Act "changed" in accordance with the procedure under S. 42 and Chapter VIII. Section 79(3) requires the employer to apply to the Labour Court for such a relief within three months from the dispute. The power to adjudicate such dispute is conferred on it under S. 78 of the Act. Proviso to S. 42(4), however, requires an employee as a condition precedent to make an attempt to get such an adverse order "changed" by approaching the employer and securing his agreement to that effect within the period prescribed. It is convenient to quote the proviso at this stage :

"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."

3. Section 123(2)(t) empowers the State Government to make Rules indicating the manner of such approach and the period within which to so approach, and secure such an agreement as contemplated under this proviso. Starting point of limitation of three months under S. 79(3) is not made to run, from the date of dismissal when really the dispute between the employer and the employee arises, but from the date of the failure to get such an agreement, when artificially the dispute is assumed to have arisen under the Explanation to S. 78 of the Act. As indicated in the proviso itself, the contemplated approach to the employer consists of two stages, viz. (1) approaching the employer and (2) negotiating with him to arrive at the agreement, if he is responsive. The object obviously is to secure the redressal of the grievance by conciliation and negotiations and also, secondly, to enable the employer to have a second look at his act of dismissal having regard to the serious consequence with which such dismissal is liable to be pregnant in the even of being set aside.

4. Rule 53 framed by the State Government in exercise of these powers also seeks to cover these two stages by two sub-rules, taking into account the possible response of the employer or total absence thereof. Some flexibility in the date of such failure to reach agreement is inevitable. Rule 53(1) prescribes three months' period for the approach to the employer contemplated under this proviso. The same is required to be made to him by application in writing under this Rule. Rule 53(2) requires such result of the conciliations or negotiations to be achieved within 15 days of the approach, i.e., the receipt of such application by the employer, or 15 days from the date to which negotiations stand adjourned

by mutual consent or by the intervention of the Labour Officer, to whom a copy of the approach application is required to be sent under Rule 53(1).

5. The Labour Court in this case proceeded on the basis that the notice dated 31-10-1973 was an application of approach conceived under Rule 53(1) read with the proviso to S. 42(4) of the Act, which was on the face of it within three months" period prescribed under Rule 53(1). According to the Labour Court, this application should have been filed on 15-2-74, after the expiry of 15 days from his notice dated 31-10-1973 and the further period of three months therefrom. He appears to have calculated this period by reference to Rule 53(2) and S. 79 of the Act, in view of the admitted absence of any response to the said notice from the employer to admit of any extension of the 15 days" period.

6. Mr. Agarwal's reliance on S. 5 of the Indian Limitation Act of 1963 for extension of the period of limitation so prescribed under S. 79 of the Act or Rules 53(1) and (2) is misconceived in view of the judgment of the Supreme Court in the case of Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, . The Supreme Court has held that S. 5 of the Limitation Act does not apply to the applications made to the Industrial Court and the Labour Court as the said Courts are not Courts to the proceedings of which the provisions of the Limitations Act can have any application.

7. Mr. Agarwal contends that Rule 53(2) providing limitation for the period of negotiation is liable to be held as ultra vires, when Rule 53(1) prescribing such limitation for, its inseparably integral main part of this process, namely, of approaching the employer, is held to be ultra vires. He secondly, contends in the alternative, that if the employee can approach the employer at his sweet will, years after his dismissal, without any period of limitation whatsoever; prescribing limitation for merely carrying negotiation is pointless and cannot serve any useful purpose. Rule 53(2) so prescribing limitation therefore, would then turn out to be directly and a mere breach thereof cannot result in the out-right dismissal of any application to the Labour Court. According to Mr. Agarwal, with the Rule 53(1) being held to be void, nothing can prevent the petitioner from approaching the employer afresh even now, and making fresh application to the Labour Court afresh within the period prescribed under Rule 53(2). Dismissing the present application would merely result in prolonging the life of the litigation.

8. In support of his fits contention, Mr. Agarwal relies on the judgment of a learned single Judge of this Court dated 28th November, 1978 in Misc. Petition No. 593 of 1972. He contends that Rule 53 in its entirety is ultra vires. The employee in that case had first approached the Labour Court without complying with the proviso to S. 42(4) of the Act. He, however, withdrew the said application and filed a fresh one after approaching the employer and securing his written refusal to cancel the impugned order. Employer's contention as to non-compliance with the proviso to sub-s. (4) of S. 42 within time was upheld by the Labour Court as admittedly the employer was not approached within three months" period prescribed under Rule 53(1). In the Miscellaneous Petition by the

employee against this order of the Labour Court, the learned Judge did hold that proviso to S. 42(4) of the Act contemplates prescribing limitation only for the period, within which the agreement between the employer and employee should be arrived at, after approach by the latter and not for employee's making such approach to the employer. He further held that specific rule-making power under S. 123(2)(t) cannot by itself extend the scope of the provision by mere reference to it, and the general such rule-making power under S. 123(1) cannot include power to restrict and adversely affect substantive rights of the employee, in the absence of any specific authority in that behalf. Rule 53(1) so prescribing limitation for approaching the employer is thus held by him to be ultra vires.

9. We are, however, unable to hold Rule 53(2) to be void merely because Rule 53(1) is held to be so void. The proviso to sub-s. (4) of S. 42 as also S. 123(2)(t) expressly contemplate prescribing limitation for the condition precedent contemplated to be complied with thereunder. It is difficult to exclude both stages of the approach from this limitation, on the face of the clear and unambiguous concluding words of the proviso, and hold the State Government to have no authority to make the said Rule.

10. The second contention of Mr. Agarwal as to Rule 53(2) being directly cannot be held to be without substance, if Rule 53(1) is held to be void. In that event, Rule 53(2) will assume different complexion exposing its, practical utility, relevance and mandatory character to grave doubts. It is, however, not necessary to deal with it, as with all respect to the learned Judge, we cannot agree with him and hold that Rule 53(1) is in excess of the rule-making powers of the Government or ultra vires. The short question is whether the concluding words of the proviso, i.e., "within the prescribed period" govern only process of arriving at the agreement or also its earlier referred stage of approaching the employer for that purpose. To the mind of the learned Judge, even bare reading of the said words appeared to be governing only the period required for arriving at the agreement adverted to in the immediately preceding clause, and not the act of approaching the employer for the said purpose adverted to in still earlier clause. It must be said in fairness to the learned Judge that such a view cannot be held to be altogether impossible. The word "and" dividing two clauses may create such an impression. The words of the Explanation to S. 78 "no agreement is arrived at" may also confirm the said impression if the process of approach implicit therein is divorced from the process of the agreement.

11. With respect, this approach, however, loses sight of several other important considerations arising out of the provisions discussed earlier. Thus, firstly, the operative part of the proviso deals with a condition precedent for application to the Labour Court, and the contemplated limitation thereunder must be deemed to have been intended to govern this condition in its entirety. Secondly, approach to the employer happens to be the essence of this contemplated process of the agreement and Legislature could not have excluded it from the intended limitation. Thirdly, approach and negotiation for agreement form but integral and

inseparable parts of the same process and the word "and" operates in the context as "conjunctive" rather than "disjunctive" factor and the concluding words even on such bare reading should appear to govern both the stages of this process. Fourthly, prescribing limitation only for the period of arriving at an agreement without so prescribing for the approach, cannot serve any useful purpose and the Legislature ordinarily cannot be presumed to have intended to permit such exercise in futility.

12. Fifthly, and more importantly, Legislature, in its wisdom has already prescribed limitation of three months under S. 79(3) of the Act for such application. The same is merely extended under the Explanation to S. 78 by such period as would be strictly necessary to arrive at the agreement, on approach to the employer on such dismissal, to accord with the scheme under the proviso to S. 42(4). Process of approach is indispensable to the process of arriving at the agreement conceived under this explanation. What is implicit in the Explanation to S. 78 is made explicit in this proviso. The operation of the concluding words of the proviso cannot be held to have been intended thus to be limited only to the process of arriving at agreement, without reducing the provision of S. 79(3) to a dead letter. Such an interpretation would enable the employee to make an application years after such dismissal, and put the limitation contemplated under (1) the proviso to S. 42(4) as also (2) under S. 79(3) in motion, at his sweet will. Limitation of three months prescribed under S. 79(3) thus can be extended by the employee himself to three or thirty years making a mockery of such limitation itself. This would be fatal consequence of excluding the operation of the concluding words of the proviso from the process of the approach and restricting the same only to the process of arriving at the agreement and holding this Rule 53(1) to be ultra vires. This would amount to distorting the legislative scheme indicated in the proviso to S. 42(4), Explanation to S. 78 and S. 79(3) of the Act.

13. The learned Judge relied on the Explanation to S. 78 in support of his contrary view. The provision of S. 79(3), however, does not appear to have been brought to the notice of the learned Judge, of which this Explanation happens to be an integral part. The combined effect of these provisions cannot but indicate to the concluding words of the proviso to S. 42(4) governing both processes of the approach and arriving at the agreement. This is not filling in the lacuna in the plain language of the proviso, but indicating the true width of the concluding words thereof which tend to appear to have restricted operation, if read in isolation. Administrative interpretation of the proviso reflected in the two parts of Rule 53 appears to be correct. Both the parts of this Rule thus are valid. In this view of the matter, it is unnecessary to consider if S. 123(1) of the Act also covers such a rule-making power.

14. Rules 53(1) and 53(2) being thus valid, the second contention of Mr. Agarwal fails.

15. Rule is accordingly discharged. There will be no order as to costs.