

MANU/MH/1596/2008

Equivalent Citation: [2009(120)FLR1020]

IN THE HIGH COURT OF BOMBAY

O.O. Civil Jurisdiction Civil Writ Petition No. 1952 of 2003

Decided On: 14.07.2008

Appellants: **Bharat Kumar Motilal & Company**

Vs.

Respondent: **Balu Baburao Mhatre**

Hon'ble Judges/Coram:

Abhay Shreenivas Oka, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Vinay Menon and C.R. Naidu

For Respondents/Defendant: Rajesh Gohani

JUDGMENT

Abhay Shreenivas Oka, J.

1. By this Petition under Article 226 of the Constitution of India, the Petitioner has taken exception to the judgment and Award dated 10th April, 2002 passed by the learned Presiding Officer of the Labour Court at Mumbai in a reference under the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act of 1947).

With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The Respondent was in the employment of the Petitioner for a period of eight years. According to the case of the Respondent, his employment was illegally terminated with effect from 2nd December, 1992. On the basis of the demand made by the Respondent, a reference was send by the Deputy Commissioner of Labour, Mumbai to the Labour Court under section 10(1) and section 12(5) of the said Act of 1947 for adjudication of a dispute over the demand of reinstatement with full back-wages and continuity of service.

2. According to the case of the Respondent his last earned wages were Rs. 1600 per month. According to the case of the Respondent the wages paid to him were less than what was provided in the terms of agreement executed by employers in hosiery market with the Mumbai Kamgar Sabha. Instead of paying wages as per the agreement, the Petitioner orally terminated the employment of the Respondent on 2nd December, 1992. According to the case of the Respondent the termination was void on account of non-compliance with section 25-F of the said Act of 1947.

3. The case of the Petitioner before the Labour Court was that the Respondent was an unskilled employee. According to the case of the Petitioner, the Respondent stopped attending the duties and infact there was no termination. In the written statement filed before the Labour Court, the Petitioner contended that the Respondent can be still taken back in service. By the impugned judgment and award, the learned Presiding Officer of the Labour Court directed the reinstatement of the Respondent

with back-wages. The learned Presiding Officer directed the Petitioner to pay back-wages to the Respondent from 2nd December, 1992 till 31st December, 1995 and from 16th March, 1997 at the rate of 50%. The learned Presiding Officer held that the Petitioner failed to establish that the Respondent abruptly stopped reporting to the duty. Therefore, the case of illegal termination made out by the Respondent was accepted. The learned Presiding Officer noted that an interim order was passed during the pendency of the reference directing the Respondent to report to the work with effect from 1st February, 1996. The learned Presiding Officer noted the admitted position that since 1st January, 1996 till 15th March, 1997 the Respondent worked with the Petitioner. However, on 15th March, 1997 the Respondent was asked to carry a bag weighing 60 to 70 kgs and, therefore, he expressed inability to carry the bag. According to the case of the Respondent, no work was provided to him thereafter by the Petitioner.

4. The learned Counsel appearing for the Petitioner submitted that the impugned judgment and award is perverse in as much as there was absolutely nothing on record to show that there was termination of employment of the Respondent. He submitted that the Labour Court has travelled beyond scope of the reference by dealing with a cause of action which arose during the pendency of the reference. He submitted that no award could have been passed on the ground that from 16th March, 1997 work was not provided by the Petitioner to the Respondent. He submitted that on the basis of the said cause of action, the Respondent could have sought a separate reference under the said Act of 1947. He placed reliance on decision of the Apex Court in the case of Delhi Cloth and General Mills Company Ltd. v. Workmen and others 1067 (14) FLR 4 (SC) : 1967 (1) III 423 (SC). He submitted that the impugned award deserves to be quashed and set aside.

5. The learned Counsel appearing for the Respondent submitted that now there is no dispute about the fact that the Respondent needs to be reinstated in service. He submitted that the relief which is granted by the Tribunal was relating to a matter which was incidental to the dispute which was referred for adjudication of the Tribunal. He submitted that on the basis interim order made during the pendency of the reference, the Respondent resumed his duty and in breach of the interim order, the Petitioner declined to give any work to the Respondent from 16th March, 1997. He submitted that the learned Judge of the Labour Court has taken a liberal view of the matter in favour of the Petitioner and has granted back-wages only to the extent of 50%. He submitted that in jurisdiction no interference was called for with the impugned judgment and award which is just, legal and proper.

6. I have considered the submissions. The case of the Petitioner is that there was an oral termination effected on 2nd December, 1992. The contention of the Petitioner is that the Respondent stopped attending the duty from 2nd December, 1992. Reliance was placed by the learned Counsel appearing for the Petitioner on certain portion of the cross-examination of the Respondent. The said portion reads thus:

Since 2.12.1992 we had not reported for duty.

However, in the later part of the cross-examination, the Respondent has denied the correctness of the suggestion that the company had sent message to him to report for duty but he had not reported. Instead of considering the examination-in-chief and cross-examination as a whole, only one sentence in the cross-examination cannot be picked up and a conclusion can be drawn that it was the Respondent who declined to attend to the duty. The learned Judge of the Labour Court has held that there was no

documentary evidence on record produced by the Petitioner-Employer to show that intimation was given to the Respondent to report to the duty and that notwithstanding the receipt of the intimation the Respondent did not report to the duty. The learned Judge of the Labour Court referred to the specific contention raised by the Petitioner that though the Respondent was told to resume the duty he failed to resume the duty. Even in the cross-examination of the Respondent no suggestion was given that either a written intimation was sent to the Respondent or that any one on behalf of the Petitioner orally called upon the Respondent to resume his duty. Considering these factual aspects of the case, the learned Judge of the Labour Court accepted the case made out by the Respondent that there was an oral termination on 2nd December, 1992. The finding of fact recorded by the Labour Court as regards termination of the employment of the Respondent with effect from 2nd December, 1992 is based on appreciation of oral and documentary evidence on record and therefore, no interference is called for with the said finding.

7. During the pendency of the complaint, in the light of what was stated in the written statement of the Petitioner, an Application was made by the Respondent at Exhibit U-3 seeking a direction against the Petitioner to allow the Respondent to resume duty. On the said Application a reply was filed by the Petitioner recording therein that the Petitioner had no objection if the Respondent reports for duty on 1st January, 1996. In terms of the said reply filed by the Petitioner, by order dated 22nd December, 1995 passed on Application at Exhibit U-3 the Respondent was directed to report to work with effect from 1st January, There is no dispute between the parties that the Respondent was on duty from 1st January, 1996 till 15th March, 1997. The controversy is regarding period from 16th March, 1997. According to the case of the Respondent from 16th March, 1997 no work has been allotted to him. According to the Respondent on 15th March, 1997 he was asked to carry a bag weighing 60 to 70 Kgs. As it was not part of his duty, the Respondent declined to do so. There was an exchange of correspondence between parties. On 27th June, 1997 the Respondent made an application at Exhibit U-7 and made a prayer directing the Petitioner to provide work. No reply was filed to the said Application by the Petitioner though. Petitioner was called upon to file reply. The question whether the Respondent is entitled to back-wages from 16th March, 1997 is altogether a different issue. The said issue is dealt in later part of the judgment. The submission of the learned Counsel for the Petitioner was that from 16th March, 1997 onwards a fresh cause of action arose for the Respondent and there could not have been order of reinstatement for the period after 16th March, 1997 and therefore, the direction to pay backwages passed by the Labour Court was beyond scope of the reference. There is no merit in the said submission for the simple reason that from 1st January, 1996 the Respondent was given work under the interim order passed by the Labour Court. It is not the case of the Petitioner that from 16th March, 1997 the employment of the Respondent was terminated. The work was not made available to the Respondent in breach of the order passed below Application at Exhibit U-3 dated 22nd December, 1995. It is not possible to accept the submission that the Labour Court has travelled beyond the scope of reference. The Labour Court passed order for payment of 50% of the back-wages after noticing the breach of interim order passed on 22nd December, 1995. The Labour Court has dealt with a matter which is incidental to the main reference.

8. Serious grievance was made by the learned Counsel appearing for the Petitioner about order grant of back-wages. The Apex Court in the case of U.P. State Brassware Corporation Ltd. and another v. Udai Narain Pandey MANU/SC/2321/2005 : 2006(108) FLR 201 (SC), has summarised the law on the question of grant of back-wages. The Apex Court held that merely because order of reinstatement is passed in

a case, the order for payment of back-wages cannot be passed mechanically. The Apex Court held that a person is not entitled to get something only because it would be lawful to do so. The Apex Court, therefore, held that payment of full back-wages cannot be a natural consequence of order of reinstatement. The Apex Court held that it is well-settled that it is for the workman to raise a plea that he was not gainfully employed from the date of termination of employment. The Apex Court held that it is not for the employer to raise a contention that the workman was in gainful employment. In this context the evidence on record will have to be appreciated as the Labour Court could not have considered the question of grant of backwages in the light of law laid down by the Apex Court in the case of U.P. State Brassware Corpn. Ltd (supra) as the said decision is of the year 2006.

9. The Respondent in his evidence has stated that on 22nd December, 1995 as per the order passed by the Labour Court he reported for duty. He stated that on 15th March, 1997 the Proprietor of the Petitioner asked him carry bags weighing 60 to 70 kgs. and he refused to do so as it was not his duty. He stated that from 18th March, 1997 no work has been assigned to him. He has not stated that from 2nd December, 1992 to 31st December, 1995 and from 18th March, 1997 onwards he was not employed or that he had no source of income.

10. In cross-examination the Respondent stated that on 9th May, 1996 he got married. He stated that in the year 1991 he purchased a residential premises for Rs. 50,000 to Rs. 60,000. He stated that the said amount was paid by him by obtaining loan and before 1995 the loan was repaid. He stated that his brother was incurring family expenditure. He stated that he required Rs. 3,000 to Rs. 4000 per month for expenses for maintaining his family consisting of his wife and a daughter. He admitted that his brother's income was Rs. 6,000 to Rs. 7,000 per month.

11. Thus, the evidence on record shows that in the year 1991 the Respondent borrowed a sum of Rs. 50,000 to Rs. 60,000 and thereafter he repaid the said loan and re-payment was completed before 1995. Admittedly the Respondent was allowed to resume duty on 1st January, 1996 on the basis of interim order of the Court and till March 1997 he was provided work and was paid salary: The Respondent has not even stated on oath that from December 1992 he was not employed elsewhere and had no source of income. On the contrary he admitted that in 1991 he obtained loan in the sum of Rs. 50,000 to Rs. 60,000 and the same was repaid by him up to the year 1995. Thus, not only that Petitioner has failed to discharge the burden on him but the evidence on record indicates that he was receiving sufficient income and therefore, he could repay the loan. It is thus obvious that there was no justification for awarding backwages from 2nd December, 1995 till 31st December, 1995.

12. In examination-in-chief the Respondent has stated that from 18th March, 1997, no work was provided to him and he remained idle for one and half to two years. Under the interim order passed by the Labour Court, the Petitioner was duty bound to provide work to the Respondent and to pay him salary. However admittedly that has not been done. Therefore, for the period from 16th March, 1997 there was justification for awarding 50% of the backwages. Therefore, the impugned judgment and award needs modification.

13. Hence, I pass the following order:

- (i) The impugned judgment and Award dated 10th April, 2002 as regards order of reinstatement with effect from 2nd December, 1992 is confirmed.

However, direction given by the impugned award for payment of backwages is modified and it is directed that the Petitioner shall pay to the Respondent 50% of the back-wages from 18th March, 1997 till the date of his reinstatement. The claim for back-wages for the period from 2nd December, 1992 to 31st December, 1995 is rejected.

- (ii) There will be no orders as to costs.
- (iii) Rule is made partly absolute in above terms.

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