

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No.949/2008**

% Date of Decision : February 21, 2008

Chandra Prabhu International Ltd. Petitioner
Through : Mr. S. N. Mehrotra, Advocate

Versus

Shri Ram Avtar Respondent
Through : NEMO

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SUDERSHAN KUMAR MISRA, J :

1. The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India to challenge the award of the Labour Court, which was pronounced on 4.5.2007 whereby the petitioner was held entitled to reinstatement with continuity of service along with 50% back wages and all other benefits.

2. The sole ground of challenge urged by learned counsel for the petitioner is that the impugned award is perverse for the reason that the termination claimed by the workman has in fact not been proved by him by placing either any dismissal or termination order before the Labour Court. He states that since this was not done by the respondent/workman, he failed to discharge the onus placed upon him in this regard and, therefore, the learned Labour Court ought not

to have directed his reinstatement with continuity of service along with 50% back wages and all other benefits.

3. The petitioner claims that it employed the respondent/workman as a clerk in September, 1995 in terms of his letter of appointment, his services were transferable from one place to another. On 21.10.1999, the respondent/workman was transferred by the petitioner to its Guwahati establishment but he refused to receive the transfer letter and also failed to join duties at Guwahati. Nor did he come to the Delhi office thereafter. After about two months of this refusal, the respondent sent a demand notice alleging that his services were arbitrarily and illegally terminated from 22.10.1999. This allegation is stated to be totally baseless.

4. The dispute that was referred for adjudication between the parties to the Labour court was in the following terms:-

“Whether the services of Shri Ram Avtar has abandoned the job by not reporting at place of his transfer or his services have been terminated illegally and/or unjustifiably by the Management and if so to what relief are he entitled and what directions are necessary in this respect?”

5. It appears that to begin with, because of its non-appearance, the management was proceeded ex parte and an ex parte award came to be passed against the petitioner. Thereafter, on 27.7.2002, on the petitioner's application, the ex parte award was set aside and the petitioner filed its written statement. There, the petitioner/management has taken the defence that the workman started absenting himself from duty w.e.f. 22.10.1999 without any leave or intimation. It was also stated that the petitioner has written several letters to the workman to report for duty, but to no avail. The

petitioner claimed that therefore it was obvious that the respondent/workman had abandoned the employment by absenting himself from duty without leave or proper intimation or even bothering to submit any explanation whatsoever with regard to such absence. In addition, while denying that the services of the respondent/workman were terminated on 22.10.1999, the petitioner claimed that in fact the workman had refused to receive letter dated 22.10.1999, which was tendered by the Company Secretary, Mr. Rajesh Aggarwal in the presence of the personnel officer of the company. Consequently, the petitioner was compelled to post the said letter on 21.10.1999 to the respondent at his residential address. Petitioner states that in fact the management never refused work to the respondent/workman at any point of time and that the main reason for the respondent/workman in abandoning his employment was the fact of his aforesaid transfer to Guwahati. Petitioner also claimed that the transfer order, which the petitioner was compelled to send through post, was also received back with the remarks that despite repeated visits, the workman's residence was always found locked. While admitting that the respondent/workman had been in the employment of the petitioner ever since 5.6.1983, the petitioner also took position that in terms of the appointment letter given to the workman, his job was a transferable one. The respondent/workman also filed a rejoinder denying all the allegations of the petitioner.

6. The following issues were framed by the Labour Court :

“1. Whether the workman/claimant abandoned the job at his own accord by remaining absent from duties without any intimation with effect from 22.10.1999, as alleged in P.O. No.1 of WS, if so, to what effect?

2. To what relief, if any, is the Workman entitled against the Management in terms of this reference?"

7. It appears that thereafter, although the workman appeared in the witness box in support of his allegations, the petitioner failed to lead any evidence. The learned Labour Court initially listed the case for the petitioner's evidence on 3.5.2005. Thereafter as many seven opportunities were granted to the petitioner to lead its evidence but the petitioner failed to do so and ultimately, the petitioner's evidence was closed by the Labour Court on 28.7.2005. Faced with this situation, the learned Labour Court has proceeded to conclude that in view of the fact that the petitioner has not bothered to even reply to the demand notice dated 15.12.1999 sent by the respondent/workman, and since no evidence has been led by the petitioner to show that the transfer order was issued to the workman and that the respondent/workman had refused to accept the same; it had no option but to decide the matter against the petitioner. The contents of the envelope in which the transfer order was allegedly sent to the respondent/workman were also not proved. Similarly, the petitioner/management failed to discharge its onus of proving continuous absence from duty on the part of the respondent/workman as claimed by it since it had failed to prove any of the letters allegedly written to the respondent calling upon him to report for duty. I find that the learned Labour Court has also noted the fact that no attendance register has been produced by the management nor has any officer of the petitioner company been examined in support of its case. At the same time, the

respondent/workman has proved on the record that he had in fact sent the demand notice dated 15.12.1999 to which no reply was given. The evidence of the workman also proved that his services were terminated by the petitioner w.e.f. 22.10.1999 without any notice, charge sheet, compensation etc. It was further proved on the record by the respondent/workman that he had already rendered continuous service for the period of 240 days with the petitioner and that after termination of his service he could not get any alternative job in spite of his best efforts and he had not been gainfully employed. All these facts proved by the workman in his evidence are unrebutted.

8. In the case of ***Shiv Dayal Soin & Sons vs., The Presiding Officer, Labour Court*** in LPA 801/2002 decided on 20.12.2007, the Division Bench of this Court has held in para 11 thereof which is as follows:-

“However, it is pertinent to note that a mere accusation that the Workers had abandoned their jobs is not enough to accept the said imputation, degree of proof required to establish abandonment of service, is rather strict and the management in this case has failed miserably to discharge the said burden of proof. Observation of the Supreme Court in the Case of G.T.Lad v. Chemical and Fibres of India Ltd., reported in (1979) 1 SCC 590 throws great deal of light on this aspect, The Court noted as under: “5a. Re Question 1: In the Act, we do not find any definition of the expression 'abandonment of service.' In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word 'abandon' has been explained as meaning 'to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something'. According to the Dictionary of English Law by Earl Jowitt (1959 Edn.) 'abandonment' means 'relinquishment of an interest of claim'.

According to Black's Law Dictionary 'abandonment' when used in relation to an office means 'voluntary relinquishment.' It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an 'abandonment of office'."

9. In the same judgment while deciding that question this Court in ***Shiv Dayal Soin & Sons*** (*supra*) also relied upon in ***Buckingham and Carnatic Co. vs. Venkatiah*** AIR 1964 SC 1272 for the proposition that, "abandoning or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf and thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case".

10. Similarly, in the case of ***Nicks (India) Tools vs. Ram Surat & Anr.*** (2004) 8 SCC 222 decided by the Supreme Court it has been held that since the respondent was in the service of management, the burden of proving that he voluntarily left the service then falls on the management, in that case also it was duly noted that although the management did take this stand that the workman had left the services of the management voluntarily, however the workman was not confronted with the document on which the management was relying. Consequently, it was not considered by the Court. The appeal preferred by the management was dismissed. During the course of hearing, counsel for the petitioner also tried to say that the evidence could not be led by his

clients because of some administrative difficulties and change of personnel during that period. I am afraid this is merely an argument of despair. The petitioner can get no sustenance from the same at this stage.

11. It is noteworthy that in para 1 of the preliminary objection taken by the petitioner in its written statement filed before the Labour Court; the petitioner has stated thus, "hence, the applicant abandoned the employment by way of absenting from duty." The plea is categoric and unambiguous. It, therefore, follows that the petitioner's contention raised in ground (I) of the writ petition to the effect that the petitioner has not treated the respondent as having abandoned its service, as well as the stand taken by the petitioner in ground (K) to the effect that, "the petitioner had earlier only presumed but not finally concluded that the respondent has abandoned its service.....". What is now sought to be urged before this Court in writ jurisdiction is therefore merely an attempt to resile from the plea of abandonment to enable it to avoid the onus of proving the same at trial in terms of maxim ***"El incumbit probatio qui dicit, non qui negat"*** - the onus of proof lies upon him who affirms, not upon him who denies. This cannot be permitted. I might add that it is elementary that any plea of abandonment of service by the management contains within it an implicit admission that the concerned workman is no longer in its service. This admission coupled with the workman's unrebutted testimony that his services were illegally terminated; is sufficient to warrant a conclusion to that effect.

12. A perusal of the impugned award shows that the learned Labour Court has proceeded in a rational and logical manner and has

arrived at a reasonable conclusion. In view of the fact that the petitioner has completely neglected to prove any of the facts alleged by it in its written statement, there was no option available before the Labour Court.

13. Finally, counsel for the petitioner has sought to urge before me that the award of 50% back wages by the Labour Court, under the circumstances, is too harsh. An examination of the impugned award shows that the workman's plea that he was employed with the petitioner ever since 5.6.1983 has not been believed by the Labour Court because the appointment letter proved by the workman is dated 26.9.1995. In this regard, it only remains to be noticed that as decided by the Supreme Court in the case of **UP, SRTC vs. S.P.Misra (2006) 4 SCC 733** as also the **UP State Brassware Corporation Ltd. vs. Udyan Narayan Pandey (2006) 1 SCC 479 & G.M.Haryana Roadways vs. Rudhan Singh (2005) 5 SCC 591**. There is no precise formula applicable in cases where back wages are claimed and that this is a discretionary power where a flexible and realistic approach is required to be adopted by the Tribunal and the Court. In this case, after finding that the workman's services were illegally terminated in addition to reinstatement, the further relief that the Labour Court could have granted ranged from full back wages, to no back wages at all. Since nothing whatever was proved by the management against the workman, I don't see how the management can say that a direction to pay only 50% of the back wages for the period during which the workman was kept out of service by the management itself, is grossly unfair or disproportionate. It certainly cannot be termed as something shocking

to the conscience of this Court or a manifest error resulting in a failure of justice warranting interference in writ jurisdiction.

14. Consequently, no ground is made out for interference with the impugned award in the exercise of writ jurisdiction by this Court.

15. The writ petition is dismissed.

Sudershan Kumar Misra, J

February 21, 2008
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