

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 398 OF 2014

Ms. Ganga S. Mane Raibagkar,
H.No.527, Kursachi Ghol,
Near GMC, Bambolim- Goa.

... Petitioner/
Original Party
I

versus

M/s. T & A, 10 and 11, Navelkar
Arcade, A.D. Road, Near Hotel Nova
Goa, Panaji, Goa through its Director
Mr. Tablic Veljee
Major of age.

Respondent/
... Original Party
II

Shri L. Raghunandan, Advocate for the petitioner.

Shri D.J. Pangam, Advocate for the respondent.

CORAM : Nutan D. Sardessai, J.

RESERVED ON : 12th March, 2018

PRONOUNCED ON : 22nd March, 2018

JUDGMENT:

1. This petition takes exception to the order dated 12/11/2013 passed by the learned Industrial Tribunal in this petition under Article 227 of the Constitution of India.

2. The petitioner had raised an industrial dispute against the respondent alleging that her services were illegally terminated by the respondent and had sought for reinstatement in service with full back wages. It was her case that she was employed as a salesgirl in the show room M/s. T & A at Panaji, had completed 240 days of service during the period of 12 months prior to her termination and that on 10/11/2004 her services were arbitrarily and without any reason terminated by the respondent without following the conditions under Section 25(F) of the Industrial Disputes Act, 1947, 'Act' for short hereinafter. She was not given a month's notice before her termination as required under Section 25(F) of the Act and hence it was bad in law and illegal. The respondent had also not complied with the provisions of the Section 25(H) of the Act and after terminating her services, had employed other person as salesgirl in their establishment but had not given any opportunity to her or an offer for re-employment. The Tribunal on hearing the case was pleased to frame issues and dismissed the reference holding that she had voluntarily left the service and that her services were not terminated by the

respondent and hence no question arose of the respondent complying with the provisions of Section 25(F) and 25(G) of the Act. The impugned award based on conjunctures and surmises and contrary to the material on record was thus liable to interference with in this petition and as it was an outcome of non application of mind and dehors provisions of the Act.

3. Heard Shri L. Raghunanadan, learned Advocate for the petitioner who contended that the Tribunal had erroneously held that the petitioner had voluntarily abandoned her service and in that context adverted to the impugned judgment. The respondent had neither issued an appointment letter nor a termination letter to her. He referred to the claim statement, the statement in defence apart from the judgment under challenge and submitted that the burden was on the respondent to show that the petitioner had no intention to join duty. The respondent had indulged in an unfair labour practise and caused harassment to her as to compel her to leave the job. He placed reliance in **Nar Singh Pal v/s. Union of India and others** [(2000) 3 SCC 588], adverted to the letter on record confirming

harassment at the instance of the respondent and therefore there was no basis in the plea of voluntary abandonment of service. He placed further reliance in **Mohamadsha Ganishah Patel v/s. Mastanbaug Consumers' Co.Op. Wholesale & Retail Stores Ltd. & Anr.** [1997 (3) All MR 719] and **Gaurishankar Vishwakarma v/s. Eagle Spring Industries Pvt. Ltd. and others** [(1994) III LLJ 689] and pressed for a reversal of the award under challenge.

4. Shri D.J. Pangam, learned Advocate for the respondent submitted that the present petition was one under Article 227 of the Constitution of India and therefore there could be no re-appreciation of the evidence unless there was gross miscarriage of justice in the findings rendered by the Tribunal. The Industrial Tribunal had given a clear finding the petitioner had left the job and there were no attempts by her to resume duty. Therefore, there was no scope for re-appreciation of evidence and to conclude otherwise the petition under Article 227 of the Constitution. The petitioner had also not produced any order of termination of services on record and hence there was no basis in her plea that her services were terminated by the respondent. It was also not

the case of the petitioner that she had attempted to join duty and that she was prevented from joining duty. In the absence of crucial material, there was no basis to urge termination. There was also no force in her contention that she was harassed and compelled to leave her job and in that context he adverted to the claim statement, that in defence apart from the rejoinder to show the falsity in the case of the petitioner that she was virtually harassed to give up the job.

5. It was the further case of Shri Pangam, learned Advocate for the respondent that the dispute had started in 2005 based on her complaint and she had in fact passed a receipt dated 12/04/2007 in full and final settlement of her claim. All claims were settled and there was no relationship of employer and employee between them. Her case of termination was also not tenable or that she was in service as otherwise she would not have made an application for the release of her provident fund. Her entire conduct showed that she had abandoned the job. He read through the impugned judgment and submitted that there was no case made out for interference with the award under challenge. The petitioner who had not set out in a case of harassment in

the claim statement at the instance of the owner and or his brother nor in her affidavit in evidence or in the rejoinder could not expect the Court to go beyond the pleadings. Therefore, there was no basis in her plea now that she was harassed and stopped from reporting to work. He distinguished the judgment in **Nar Singh Pal** (supra), and relied in **Chief Engineer (Construction) v/s. Keshava Rao (Dead) by Lrs.** [(2005) 11 SCC 229] in support of his case while pressing for the dismissal of the petition.

6. I have heard the learned Advocates on behalf of the petitioner and the respondent, considered the judgments and in view thereof proceed to decide the petition in that light appropriately.

7. First and foremost a reference is made to the claim statement filed on behalf of the petitioner particularly in the context of the fact that the plea was canvassed on her behalf that she was subjected to harassment by her employer, that it was a case of unfair labour practise and that she was compelled to leave the job due to such harassment meted by the owner and/ or his brother. A cursory perusal of the claim

statement nowhere reveals that there was any allegation of any harassment meted out to her which was the position even in the rejoinder filed by her after the respondents filed their statement in defence and particularly in the affidavit evidence filed in the course of the proceedings. A reference has been made to this aspect since it is borne out that a frantic effort is made out on behalf of the petitioner to put forth one ground after the other to seek a reversal of the award under challenge. Coming to the award, the learned Tribunal had considered the claim statement of the petitioner, the statement in defence filed by the respondents, the submissions on their behalf and formulated issues for determination. The learned Tribunal for that matter on the basis of the evidence brought on record by the petitioner amply tested on the touchstone of cross-examination had come to a finding that she had failed to produce any documentary evidence on record to substantiate her case that her services were terminated by the respondents w.e.f. 10/11/2004.

8. The learned Tribunal was seized of the fact that she had alleged that she was not paid her legal dues at the time

of termination and that on account of her complaint to the Labour Commissioner, Panaji and on his intervention, she was paid the same in the office of the Labour Commissioner. She was also confronted with the receipt dated 12/04/2007 from which it is apparent that she had received the said amount mentioned therein towards all her legal dues including gratuity, leave wages etc. and that she had no claim of whatsoever nature against the Management nor she owed to the Management. This contention therefore of Shri L. Raghunandan, learned Advocate for the petitioner that this receipt pertained only to her legal dues and that she was terminated from the service does not stand the test of scrutiny. The conclusion is also fortified considering the statement in defence filed by the respondent that she was paid the wages in order to settle the dispute and that she had even issued a receipt in their favour in the presence of the Labour Commissioner and there being no further claim of any nature against the respondent.

9. The learned Tribunal for that matter had considered the complaint made by the petitioner dated 15/12/2008 and held that it was not sound considering her case that her services

had been terminated as early as 10/11/2004. The learned Tribunal had rightly concluded that had her claim of termination been justified, she would not have awaited for a period of four years to make a grievance and would have complained of the illegal termination soon thereafter. The learned Tribunal was equally seized off the fact as borne out from her testimony that she had alleged having made another application to the Labour Commissioner that her termination was illegal and unjustified and to reinstate her with continuity and full back wages. The learned Tribunal had found that had she made such an application prior to her complaint dated 15/12/2008, she would definitely have had a copy thereof and on non production rightly drawn an adverse inference against her. The learned Tribunal also rightly concluded that her complaint dated 15/12/2008 was by way of an afterthought and that she had willingly left the job and it was not a case of termination of her services.

10. The learned Tribunal based on the material on record was seized off the fact that the petitioner had completed 240 days of service and that the advantage of the applicability of Section 25(F) of the Act was available to her only in case

she was successful in establishing that she had been retrenched by the respondent. Rather she had concluded that the petitioner had failed to establish that the respondent had terminated her services w.e.f. 10/11/2004 and quite on the contrary she had voluntarily left the services. The contention therefore of Shri Raghunandan, learned Advocate that the duty lay on the respondent to show that the petitioner had no intention to join the service of the respondent or that there was a duty on them to issue a notice to her to join the services in the circumstances would therefore not arise. For that matter the Tribunal was seized off the fact that the petitioner was shown a copy of the complaint dated 22/02/2005 addressed to the Labour Commissioner allegedly signed by her when she disputed the signature. The Tribunal was seized off the fact that the said complaint could not be read in evidence for want of its proof but nonetheless had on a comparison of the signature with the admitted signature found that she was the author of the said complaint and that her assertion in the complaint that the boss used to harass her to leave the job and she got frustrated and left the job led her to conclude that the petitioner had left the job on her

own and that it was a trumped up case that her services were terminated by the respondents. Even otherwise it was shown from the pleadings of the petitioner and those raised in the rejoinder as also the affidavit in evidence that the petitioner had nowhere set out a case that she was harassed and due to harassment she had left the job.

11. Shri Raghunandan, learned Advocate for the petitioner invited attention to a letter dated 22/02/2005 to canvas a plea that she had left the job due to harassment. However, the same is not in consonance with her case carved in the claim statement, affidavit in rejoinder or even in the affidavit evidence and appears as an afterthought as rightly concluded by the learned Tribunal much after she left the services in November of 2004. Therefore considering the totality of the case, there were clear finding by the Tribunal that the petitioner had left the job and had not made any attempt to resume duties. This finding of the Tribunal does not justify any interference and hence there is no scope for re-appreciation of the evidence and to conclude otherwise in exercise of the power of superintendence under Article 227 of the Constitution of India. There is also force in the contention

of Shri Pangam, learned Advocate for the respondents and as borne out from the records that no attempts were made by the petitioner to join duty or she was prevented from joining duty. Therefore in the absence of any crucial material, there is no basis in the case of the petitioner to urge that she was terminated from service. There is another angle in this issue inasmuch as if at all the petitioner was in service no question would have arisen for the petitioner to make a claim for the release of the provident fund. Her conduct borne from the material on record shows that she had voluntarily abandoned her job and hence there is no basis in her plea that she was either subjected to harassment forcing her to stop reporting for work or that her services were terminated.

12. Nar Singh Pal (supra), held that Nar Singh Pal was a casual labour, acquiring temporary status held that he was inter alia entitled to the constitutional protection envisaged by Article 311 of the Constitution and other Articles dealing with services under the Union of India. He was initially engaged as a casual labour in the Telecom Department and after working continuously for more than 10 years had

acquired temporary status. He was alleged to have assaulted and threatened the gateman and thus by an order dated 20/05/1992 his services were terminated on the ground that in view of such conduct he was not deserved or competent to be retained in service. Nonetheless, he was given a certain amount by cheque as retrenchment benefits and accepted by him. However, before passing that order no regular enquiry was conducted but only a preliminary enquiry was conducted. He was acquitted of the charges in the criminal trial and after unsuccessfully approaching the Departmental authorities and the Courts below, he approached the Hon'ble Apex Court for relief against the termination of his service. The Courts below had refused the relief to him on the ground that he had encashed the cheque through which retrenchment compensation was paid to him and therefore it was no longer open to him to challenge his termination. It is in those facts that while allowing the appeal the Apex Court held that although the appellant was a casual labour, he had acquired a temporary status and became entitled to certain benefits one of which was the constitutional protection envisaged by Article 311 of the Constitution. This judgment

unlike the contention of Shri Raghunandan, learned Advocate is clearly distinguishable and cannot find application to the case of the petitioner on any premise whatsoever. Hence, the respectful departure.

13. Mahamadsha Patel (supra), held that the plea of abandonment of service by an employee cannot be presumed. The employer must give notice to the employee to rejoin duty and/ or order of termination cannot be passed without holding enquiry before the abandonment of service. In the facts of this case the petitioner was employed as mapadi on 14/09/1981. He applied for one month's leave on 12/08/1988 due to his mother's serious ailment which was granted to him but did not report on duty after the expiry of one month. His case that he could not join immediately on the expiry of the leave period and that later he went to the employer and sought to join duty but did not allow him to resume work was a case set out by him. He filed a belated complaint before the Labour Commissioner on 14/09/1989 which was resisted and a defence was set out that he had remained absent on his own, abandoned the service and there was no question of termination of service by the

employer and there was no unfair labour practise.

14. Mahamadsha Patel (supra), the Labour Court held in his favour that he was entitled to reinstatement and continuity in service with full backwages, challenged in revision before the Industrial Court which partly allowed the revision but in so as far as reinstatement was concerned, modified the order regarding backwages and ordered 50% of the backwages. In the said case there were no disciplinary proceedings initiated against him for not joining his duties after expiry of the leave. There was no dispute that the employer had given any notice to him calling upon him to resume duties. In that view of the matter the burden lay on the employer to establish that he had abandoned services. This judgment too is distinguishable on facts where the petitioner had a long service with the respondents from 1981 to 1988 and he had proceeded on leave which was granted to him and he thereafter sought to join service which was declined. In those set of circumstances it was held that a notice had to be issued to him to rejoin duties. In the facts of this case, the petitioner was in employment for barely a year and it was not a case where she had proceeded on leave

but had left the job voluntarily as borne out from the findings recorded by the learned Tribunal and which need no interference in this petition.

15. Gaurishanker Vishwakarma (supra), was working as a miller in the first Respondent-Company's factory for about 6 to 7 years prior to the refusal of work to him on and from 03.04.1980. It appears that the workman worked upto 02.04.1980 and when he went to report for duty as usual on 03.04.1980, he was asked not to resume the duties and was told that he would be intimated later as to when he should resume the duty. He approached for work on two or three occasions thereafter but having failed to get any response from the employer, ultimately, on 08.05.1980, approached the Government Labour Officer. The matter having not been settled at that stage, it was taken in conciliation. The conciliator made his failure report and hence there was a reference of the dispute to the Labour Court. The Labour Court, by its impugned Order, held that it was the workman who had abandoned the service and that it was not a case of termination of service as alleged by him giving rise to the Petition.

16. In **Gaurishanker Vishwakarma** (supra), Their Lordships of this Court found that admittedly the 1st Respondent-Company had not given any notice to the workmen either calling upon him to resume the duty or asking him to show cause as to why his services should not be terminated for his failure to resume his duties. No wonder, therefore, that there was no inquiry held before the termination of his service. In fact, according to the respondent No.1 company, there was no termination of service. Their case was that the petitioner-workman had abandoned the service by refusing to come and to resume the work which it found difficult to accept. It was also well settled that even in the case of the abandonment of service, the employer had to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer had done neither. It was for the employer to prove that the workman had abandoned the service. To prove it, the employer relied solely on two pieces of evidence-one is the so-called report of the Government Labour Officer to which we have made a reference. The

report was not proved by examining the Government Labour Officer. It was not even shown to the workman, much less, was he confronted with it. Thus, no explanation was called for from the workman with regard to the statements made by the Government Labour Officer in his so-called report. Secondly, the report itself was ambiguous with regard to what exactly transpired before the Government Labour Officer and in what circumstances the events stated therein took place, if at all they had occurred as stated therein. It appears from the judgment of the Labour Court that the report was of 27.05.1980 and it states that it was the company which had stated before him (i.e. the Government Labour Officer) that since there was a quarrel of the petitioner-workman with his co-workman, the workman did not want to join the duty. It was also stated there that the company was ready to take the workman back but without back wages. No statements of the workman was recorded by the Government Labour Officer. It was on the basis of this so-called statement of the company, that the Government Labour Officer had noted that it was the petitioner who was not ready to come and join his duties. It may also be pointed

out here that even according to the report the offer of the company was to take the workman back but without back wages. It must be noted that the petitioner-workman at the relevant time was drawing daily wages of about ₹33/-.

17. In **Gaurishanker Vishwakarma** (supra), it was admitted by the respondent company that nothing had happened before 03.04.1980 to create any apprehension in the mind of the workman that he would be "troubled" or that he would be in danger if he joined duty from 03.04.1980. It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It had also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. Since it was the case of the Respondent-Company that the workman had abandoned the

service, it was for the Company to prove that there was such abandonment and in that view of the matter, allowed the Petition and set aside the Order of the Labour Court directing the 1st Respondent to reinstate him in service with full back wages and all other benefits accruing in his favour. This judgment is clearly distinguishable on facts and can find no application to the case of the petitioner.

18. In **Chief Engineer(Construction)** (supra), the respondent was appointed on 16/07/1975 as a casual labourer by the railways. The case was that on 01/11/1977 the respondent abandoned his work and did not report for duty thereafter. Consequently, he was marked absent in the muster roll and being a casual labourer his name was deleted from the muster roll after five weeks continued absence from the alleged date of abandonment. An year and five months later i.e. on 04/04/1979 the respondent served a notice upon the railways alleging that his service had been illegally terminated. He alleged that despite satisfactory service rendered by him he was illegally prevented from joining without assigning any reason which amounted to a wrongful termination and entitling him to reinstatement with full

backwages. The case of the appellant was that he was engaged as an extra labour (Casual Labour) in the category of a Clerical Mate on daily wage basis deputed to work under the Inspector of Works (Doubling), Bangalore City.

19. In **Chief Engineer(Construction)** (supra), he was unauthorisedly absent from duty on his own accord from 01/11/1977 and came on 18.11.1977 to receive his wages upto 31.10.1977. He made a request on 25.11.1977 to be re- engaged and though the Head Clerk (Stores) was willing to engage him as a fresh entrant on daily wage, he declined to accept the engagement and thereafter he never turned up for work. Since he was unauthorisedly absenting himself from duty, under Rule 2505 of the Railway Manual his engagement stood automatically terminated and he had no justifiable claim either for re-engagement or for back wages. The Apex Court while considering the appeal found in the facts that the two crucial findings recorded by the Labour Court namely that he was engaged as casual labourer and that he had abandoned his service and the allegation that he was prevented from joining his duties from 01/11/1977 was not true. The muster roll supported the case of the appellant

that after 01/11/1977 he did not report for duty and that thereafter till 04/04/1979 he did nothing to assert his right. He had also not led any evidence to show that he had made any efforts to seek reinstatement or complained against the action of the Management or anyone. Rather the Apex Court found that the Division Bench fell in error in thinking that the reply given by the appellant to the notice of the respondent justified the order of termination. The learned Judge had misread the reply given by the appellant in which it was clearly asserted that the respondent had abandoned his service and therefore in terms of the Rules his name was deleted from the muster roll and in that view held that the judgment of the High Court was liable to be set aside restoring that of the Tribunal. The Tribunal before whom the dispute was referred had found that the plea of the respondent was not justified, that he had in fact abandoned his service w.e.f. 01/11/1977 and rejected his reference.

20. Thus considering the judgments and the contentions of the learned Counsels, there is no scope for interference with the findings recorded by the learned Tribunal and in view thereof, i pass the following:

ORDER

The writ petition is dismissed with no order as to costs.

Rule is discharged.

NUTAN D. SARDESSAI, J.