

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.44 OF 2007

Kohinoor Mills, a Union of
National Textile Corporation (M N) Ltd. Petitioner
Versus
Mr. Rampratap Udayanath Tiwari Respondent

**ALONGWITH
WRIT PETITION NO.123 OF 2007**

Kohinoor Mills, a Union of
National Textile Corporation (M N) Ltd. Petitioner
Versus
Lalbahadur Kashinath Yadav Respondent

**ALONGWITH
WRIT PETITION NO.135 OF 2007**

Kohinoor Mills, a Union of
National Textile Corporation (M N) Ltd. Petitioner
Versus
Asharam Gangaprasad Tiwari Respondent

**ALONGWITH
WRIT PETITION NO.180 OF 2007**

Kohinoor Mills, a Union of
National Textile Corporation (M N) Ltd. Petitioner
Versus
Jayavantibai Pandurang Sakpal
And Others Respondents

**ALONGWITH
WRIT PETITION NO.3120 OF 2006
(NOT ON BOARD)**

Kohinoor Mills, a Union of
National Textile Corporation (M N) Ltd. Petitioner
Versus
Vishnu Bhagwan Nalavade Respondent

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Ms. Meena H. Doshi for the Petitioner in all petitions.

Mr. Makarand Kale I/b M.P. Vashi & Associates for the Respondents in all petitions.

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CORAM : S.C.GUPTE, J.

DATE : 6 JULY 2018

(Judgment)

. Heard learned Counsel for the parties.

2 This petition challenges an order passed by the Labour Court in an application under Sections 78 and 79 of the Bombay Industrial Relations Act, 1946 (“BIR Act”) and the appellate order passed by the Industrial Court at Mumbai dismissing the appeal from that order.

3 The original application under the BIR Act was made by five applicants, four of whom are the respondents in the four petitions which are on board today. The fifth applicant is the respondent in another writ petition, namely, Writ Petition No.3120 of 2016. That petition concerns the same order as in the case of these four petitions. That petition is, however, not on board. By consent of learned Counsel, it is mentioned, called out and heard along with these matters. This common judgment disposes of all five petitions.

4 The case of the applicants under the BIR Act (the respondents to these petitions) was that they were doing work as jamadars in the watch and ward office of the Petitioner-Mill, then known as Kohinoor Mill No.3 (hereinafter called "Mill") and were illegally dismissed. The mill's case against these applicants was that on 9 January 1998, sixty copper rolls were found missing from its store; the store in which the rolls were kept being immediately opposite the watch and ward office, where the applicants were working, the latter were either involved in the theft or at any rate, ought to be held accountable and guilty for the same. The mill, accordingly, lodged a police complaint against the applicants and also initiated a departmental enquiry after issuing charge-sheets. The charges against the applicants were that the robbery took place during their duty period and they were to be held responsible for the same. Accordingly, they were charged under Clauses 21(d), (k) and (l) of the Model Standing Orders. Standing order 21 (d) deals with theft, fraud or dishonesty in connection with the company's business or property, whereas standing orders 21(k) and (l), respectively, deal with riotous or disorderly behavior during working hours on mill premises or any act subversive of discipline and habitual negligence or neglect of work. The Enquiry Officer held all three charges to be proved. The applicants were thereupon dismissed by the mill. The applicants challenged the charge-sheets, the enquiry and the action of the mill in dismissing them, by individual applications under Sections 78 and 79 of the BIR Act (Application (BIR) Nos.62 to 66 of 1998). The Labour Court, in its order on preliminary point of enquiry (in common) dated 17 December 2003, held the enquiry to be legal, fair and proper. By its further order on preliminary point of findings (in common) dated 31 December 2003, the Labour Court held the findings of the

Enquiry Officer as not perverse generally, but held the misconduct under Standing Order 21(d) as not proved and exonerated the applicants from that charge. The Court, however, held the applicants to be guilty of misconduct under clauses 21(k) and (l) of the Standing Orders. Finally, in its judgment (in common) dated 19 March 2004, the Labour Court partly allowed the applications holding the punishments of dismissal as severe, extreme and shockingly disproportionate to the charges proved against the applicants. The Court ordered quashing of the punishment and reinstatement with continuity of service and 50 per cent back wages in case of all applicants. It, however, ordered actual reinstatement only to two applicants (i.e. respondents to Writ Petition Nos.123 of 2007 and 3120 of 2006), since the other applicants had already superannuated by that date having attained the age of 60 years between the years 2000 and 2004. On the question of back wages, the court was of the view that since the charges of commission of an act subversive of discipline and neglect of work were proved against the applicants, they should not be left without any punishment and that depriving them of 50% of their back wages would meet the end of justice. The order of the Labour Court was carried in appeal before the Industrial Court by the mill as well as the applicants. The Industrial Court, in its common judgment dated 6 March 2006, agreed with the conclusion of the Labour Court concerning the charge of theft. The Court held that on the basis of the material on record, the Labour Court was justified in recording such finding. The Industrial Court reiterated that there was no definite material on record to show that the concerned jamadars had indeed actively participated in committing theft of sixty copper rolls. The court was, however, of the view that so far as their claim to back wages was concerned, there was no material on record to

show gainful employment of the applicants during the intervening period and also that they were not entitled to 100 per cent back wages for the simple reason that two heads of charges relating to their misconduct were proved in the domestic enquiry. In the premises, the Industrial Court was of the view that the order of 50 per cent back wages passed by the Labour Court did not merit any interference.

5 Ms. Doshi, learned Counsel appearing for the Petitioners, assails the orders of the Courts, firstly, on the ground that insofar as they hold the charge of theft as not proved, the orders are not legal or proper. Learned Counsel, secondly, submits that unlike an industrial adjudicator acting on a reference made to him under Section 10 of the Industrial Disputes Act, the Labour Court or Industrial Court under the BIR Act has no power to award any lesser punishment in lieu of discharge or dismissal accordingly as the circumstances of the case may require. Learned Counsel submits that this power of the Labour Court, Tribunal or National Tribunal in a reference inheres in Section 11-A of the Industrial Disputes Act; the courts entertaining applications under Sections 78 and 79 of the BIR Act have no such powers. Thirdly, learned Counsel submits that the issue of back wages has not been properly addressed by the courts below. Learned Counsel submits that there was neither plea nor evidence in the present case that the applicants were not gainfully employed during the intervening period, i.e. from the dates of their dismissal till their reinstatement ordered by the courts below.

6 On the question of proof of the charge of theft, orders of the courts below not only reflect a possible view, but a pre-eminently probable view,

or possibly the only view that can be taken on the evidence on record. In the first place, the copper rolls were found missing on 9 January 1998; the last inspection before that date was on 18 December 1996. That means the stock was not checked for over a year and the so-called theft may have taken place at any time during this long period. It is impossible to conclude, or even suggest, for that matter, that the so called theft was committed on any particular day or at any particular time over this period. If the incident itself cannot be located or identified with reference to any particular day or time, it is well nigh impossible to know the identity of the person or persons on duty when the alleged incident occurred. Merely because the store was located opposite the watch and ward office or keys of the store were available with that office, the entire staff on duty in the watch and ward office over the whole period of one year or so cannot be held accountable for the theft, much less guilty of the theft, which occurred at some unknown time during the course of the preceding more than one year. Secondly, no single witness who deposed in the matter suggested occurrence of any theft. What we find is really a general statement that jamadars and watchmen were responsible for missing of sixty copper rolls. The reasoning of the Enquiry Officer was that the documents on record showed that the copper rolls were in the room from 4 July 1996 to 9 January 1998, meaning thereby that the theft took place between 18 December 1996 (i.e. the last inspection which found the rolls in order) and 9 January 1998, when the jamadars and watchmen concerned were around and hence they must be held guilty of the misconduct of theft. This, to say the least, is a clearly perverse conclusion. Both courts below rightly held that there was no material whatsoever on record to show that the applicants were guilty of theft. Both courts below, however, were of the

view that charges of misconduct under clauses 21(k) and (l) of the Standing Orders were proved. It is difficult to see how even these charges could be said to have been proved. Clause 21(k) of the Standing Orders talks of acts subversive of discipline, whereas clause 21(1) speaks of habitual negligence or neglect of work. It is impossible to deduce any subversion of discipline in the incident alleged. At the most, the applicants could be said to be guilty of negligence in work, if such finding were permissible on evidence before the court. It is, however, impossible to deduce that they were habitual in such negligence. Be that as it may, since the orders of the courts below are not challenged at the instance of the applicants, this court is not inclined to go into these aspects. This will, though, have some significance when it comes to the relief of back wages granted to the applicants.

7 Learned Counsel for the Petitioners submits that the Courts under Sections 78 and 79 of the BIR Act do not have power to mould appropriate reliefs unlike the Labour Court, Tribunal or National Tribunal under Section 11A of the Industrial Disputes Act. The only authority cited for this proposition by learned Counsel is the case of **Mohan Sugan Naik Vs. N.T.C. (South Maharashtra) Ltd.**¹ As I have explained below, this case is not an authority for the proposition that under Sections 78 and 79 of the BIR Act the Courts have no power to mould appropriate reliefs. At the most, this case can be cited to contend that the provisions of Section 11A of the Industrial Disputes Act are not available to labour and industrial courts hearing complaints of unfair labour practices under the MRTU & PULP Act, 1971. There is, in other words, no authority shown for the

1 1995 ILLJ 110

proposition canvassed by learned Counsel. Even on principle, the proposition cannot be accepted. On principle, it is impossible to say that courts under BIR Act do not have such powers. Under sections 78 of the BIR Act, when the Labour Court finds an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee to be illegal, it has power to reinstate the employee forthwith and order payment of wages for the period beginning from the date of dismissal, discharge, removal retrenchment, termination of service or suspension, as the case may be, and ending on the date of his reinstatement. If the Labour Court has power to order payment of 100 per cent back wages, there is no reason why it should not have power to order anything less than 100 per cent of back wages. In our case, it ordered 50 per cent back wages, being of the view that the applicants, who were guilty of misconduct under clauses 21(k) and (l) of the standing orders, should not be left without any punishment and 50 per cent back wages would meet the ends of justice. The Industrial Court, in revision, was of the view that there was no evidence of gainful employment on the part of the applicants during the intervening period and also that since two heads of charges of misconduct against them were found to be proved in a domestic enquiry, they were not entitled to 100 per cent back wages and in the premises, 50 per cent back wages granted by the Labour Court ought not be interfered with. This is a perfectly legitimate exercise of power by the courts below and I see no reason to interfere with the same in writ jurisdiction of this court under Articles 226 and 227 of the Constitution of India.

8 Coming now to the judgment of **Mohan Sugan Naik** (supra), that

was a case where argument before the court on behalf of the employer was that the provisions of Section 11A of the Industrial Disputes Act, 1947 were not available to a court hearing a complaint of unfair labour practice under MRTU & PULP Act. The court was of the view that though the provisions of Section 11A of the Industrial Disputes Act were not *per se* available to the Labour Court whilst hearing such complaints, principles analogous to the provisions of Section 11A were always available. The court observed that the Labour Court had given justice to the appellants and it was entirely unnecessary to disturb that order in the exercise of writ jurisdiction. The judgment, thus, does not advance the case of the Petitioner in the present case.

9 On the order of back wages and the submission that there was no plea or evidence on want of gainful employment on the part of the applicants in the present case, it is important to note that the matter pertains to a period where the law on the question of back wages particularly with the reference to the onus to show gainful employment or the lack of it was developing. The judgments in **Allahabad Jal Sansthan Vs. Daya Shankar Rai**² and **Kendriya Vidyalaya Sangathan Vs. S.C. Sharma**³ were yet to be delivered. For a long time before these judgments, the Supreme Court held a view that onus to show gainful employment of the workman was on the employer. The principle of initial burden of the workman, which now firmly holds the field, had not been fully crystallized by then. Anyway, none of the parties here appears to have been alive to the issue of back wages in all earnest, though a lone observation in this behalf is reflected in order of the Industrial Court in appeal. The records of

2 (2005) 5 SCC 124

3 (2005) 2 SCC 363

the case and the orders of the courts below do not indicate that this question of back wages, in particular reference to the onus to show want of gainful employment, was argued before the courts. In the premises, it would not be proper now, after so many years, when the applicants have long superannuated and been waiting for their dues, to interfere with the order of back wages by setting aside that order and remanding the matter to the courts below. Besides, there is one more important reason why, in the context of want of submissions on the part of either sides, the issue cannot be further looked into by this court. As I have noted above, there is actually nothing to indicate that the charges of misconduct under clauses 21(k) and (l) of the Standing Orders were actually made out in the present case. In the first instance, when the order passed by the Labour Court in this behalf was carried in appeal before the Industrial Court, this question was expressly agitated by the applicants before the appellate court. When the courts below refused to interfere with the order of 50 per cent back wages and confirmed the same, the applicants, being satisfied with 50 per cent back wages, did not carry the matter any further in challenge before this court. In other words, they did not challenge the order, since they were getting 50 per cent of back wages. In these circumstances, it would be unjust to hold the applicants to their initial burden of showing want of gainful employment at this point of time. Besides, as far as the appellate order of the Industrial Court is concerned, the court has in fact taken into account the fact of there being no material on record to show gainful employment of the applicants during the intervening period. Anyway, in cases such as this, where no material is available either way, 50 per cent back wages is very often applied as a thumb rule. For all these reasons, there is no need to interfere with the order of back wages.

10 Accordingly, there is no merit in the present petitions. The petitions are dismissed. No order as to costs.

(S.C. GUPTE, J.)

Rajesh
Vasant
Chittewan

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by Rajesh Vasant
Chittewan
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