

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO.345 OF 2012
IN
WRIT PETITION NO.5986 OF 2010 (D)

Sudha w/o Khushal Khobragade
Aged about Major, Occ. Service
R/o Buddha Nagar, Near Chandramani
Pali Vihar, Nagpur. Thr. Power of Attorney
Akash K. Khobrtagade, Nagpur ... Appellant

-vs-

M/s Hotel Darshan Tower,
O/o 60, Central Avenue Road,
Gandhibag, Nagpur
Thr. Its Manager ... Respondent

Shri Akash K. Khobragade, Power of Attorney holder of the appellant.
Shri S. D. Shukla, Advocate for respondent.

CORAM : A. S. CHANDURKAR AND G. A. SANAP JJ.
DATE : October 08, 2021

Judgment : (Per A. S. Chandurkar, J.)

The appellant being aggrieved by the judgment of learned Single Judge dated 29/06/2011 in Writ Petition 5986/2010 has preferred this appeal under Clause 15 of Letters Patent. By the said judgment the award passed by the first Labour Court, Nagpur directing reinstatement of the appellant along with full back-wages and continuity in service has been partly set aside to the extent of the direction to pay full back-wages.

2. The facts in brief are thus :

It is the case of the appellant that she was engaged as a room maid/sweeper on salary of Rs.1500/- per month with the respondent. On 27/12/2005 during the course of her engagement she had a fall which resulted in a fracture to her right leg. After taking medical treatment for her injuries and obtaining a fitness certificate she reported for duties on 24/09/2006. She was however not allowed to re-join her duties and hence she issued a notice to the respondent on 12/12/2006. Since that request was not accepted, the appellant approached the Conciliation Officer. On a failure report being submitted, the Additional Commissioner of Labour referred the dispute to the Labour Court for determining as to whether the appellant was entitled to be re-instated in service with full back-wages and continuity of service from 24/09/2006. The respondent opposed the submission of claim as made and submitted that on account of her injury the appellant was on leave from 24/09/2006 to 17/01/2007 without submitting any leave application. She had resumed her duties on 18/01/2007 but again stopped attending duties from 12/02/2007. It was denied that her services were terminated on 24/09/2006.

The learned Judge of the Labour Court after considering the material on record accepted the case of the appellant by disbelieving the attendance-cum-wage register that was produced by the respondent. The Labour Court therefore directed reinstatement of the appellant in service with

continuity and full back-wages.

3. The respondent being aggrieved by the aforesaid award challenged the same in Writ Petition No.5986/2010. The learned Single Judge found that the appellant had admitted in her deposition that from January 2007 to 04/03/2007 she had discharged duties with the respondent. Requests were also made by the respondent to the appellant to re-join duties but that were not accepted. On this count it was held that the appellant was not entitled to the back-wages. To that extent the award passed by the Labour Court was set aside. Being aggrieved the appellant has challenged the said judgment in the present Letters Patent Appeal.

4. Shri Khobragade, the Power of Attorney holder of the appellant submitted that the learned Judge erred in setting aside the direction to pay back-wages to the appellant. According to him the award passed by the Labour Court having become final by virtue of provisions of Section 17(2) of the Industrial Disputes Act, 1947 (for short, the Act of 1947), a challenge to the same was not permissible. On publication of the award the respondent ought to have complied with the same. He further submitted that there was no material on record to show that the appellant was not interested in discharging duties. The fact that on 18/01/2007 the appellant had re-joined duties was disbelieved by the Labour Court and there was no reason to take a

different view of the matter. He referred to further proceedings filed under provisions of Section 33(c)(ii) of the Act of 1947 to substantiate his contention that the appellant was entitled to relief that was granted by the Labour Court. The respondent had sought to mislead the Court by taking a stand that it intended to permit the appellant to re-join her duties when infact the actions of the respondent were otherwise. Moreover the writ petition was decided in absence of counsel for the appellant and for this reason also the impugned judgment was liable to be set aside. In support of his submissions the reliance was placed on the decisions in *Mukesh Singh s/o Hindu Singh vs. Union of India and anr. 2004 III CLR 706, Maharashtra State Other Backward Class Finance And Development Corporation Ltd. Mumbai vs. Gopal Laxmanrao Yedake 2011 (4) Mh.L.J. 490* and *State of Maharashtra vs. Vijay Gangaram Kamble 2011 (5) Mh.L.J. 57*. It was thus submitted that the judgment of learned Single Judge was liable to be set aside by restoring the award passed by the Labour Court.

5. On the other hand Shri S. D. Shukla, learned counsel for the respondent at the outset submitted that since the adjudication by the learned Single Judge was under Article 227 of the Constitution of India, the Letters Patent Appeal was not maintainable. Without prejudice to the aforesaid it was submitted that from 24/09/2006 the appellant did not report for duty. She remained absent without submitting a leave application. On

18/01/2007 she was permitted to re-join duties which fact was specifically admitted by the appellant's witness in his cross-examination. According to him since inception it was the stand of the respondent that the services of the appellant were never terminated and that she was free to resume her duties with the respondent. Despite that the appellant did not turn up for joining duties. It was his further submission that in absence of any evidence whatsoever to show that the appellant was not gainfully employed after 24/09/2006, there was no basis for awarding back-wages. He therefore submitted that there was no reason to interfere with the impugned judgment.

6. We have heard the Power of Attorney holder for the appellant and the learned counsel for the respondent. We have given due consideration to their contentions. At the outset we may note that the writ petition as filed was under Articles 226 and 227 of the Constitution of India. One of the grounds raised in the writ petition was that the material on record had not been considered by the Labour Court while passing the award and thus the findings recorded were not based on legal and acceptable evidence. The award passed by the Labour Court was also challenged as being perverse. Considering the grounds as raised in the writ petition and the adjudication by learned Single Judge we find that the Letters Patent Appeal is maintainable. It would be sufficient for the present purpose to refer to a recent decision of the Honourable Supreme Court in *General Manager, Electrical Rengali Hydro*

Electric Project, Orissa and ors. vs. Giridhari Sahu and ors. (2019) 10 SCC 695

wherein in paragraph 28 it has been observed as under :

“ 28. An error of law which becomes vulnerable to judicial scrutiny by way of certiorari must also be one which is apparent on the face of the record. As held by this Court in Hari Vishnu Kamath vs. Ahmad Ishaque AIR 1955 SC 233, as to what constitutes an error apparent on the fact of the record, is a matter to be decided by the Court on the facts of each case. A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ Court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decision amenable to certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down in Parry & Co. Ltd. vs. P.C. Pal, AIR 1970 SC 1334.” (emphasis supplied by us).

The decision in ***Maharashtra State Other Backward Class Finance And Development Corporation Ltd. Mumbai*** (supra) supports the contention of the representative of the appellant as regards maintainability of the Letter Patent Appeal.

7. Perusal of the statement of claim as made by the appellant indicates that on 24/09/2006 when the appellant sought to re-join duties along with fitness certificate, she was not permitted to do so. In reply it was submitted by the respondent that from 28/12/2005 the appellant proceeded on leave on account of the injury suffered by her but without any leave application. She re-joined duties on 18/01/2007 and discharged duties till

11/02/2007. It was specifically pleaded that the services of the appellant were never terminated. In the cross-examination of the representative of the appellant it has been admitted in paragraph 15 that his mother was taken back in service on 18/01/2007 as per the settlement before the Conciliation Officer. She worked from 18/01/2007 to 31/01/2007 but no salary was paid to her for that period. His mother had not gone to the respondent to collect salary for that period but she had received Money Order of Rs.767/- towards wages in January 2009. In the cross-examination of the respondent he stated in paragraph 10 that he was ready to take the appellant in service provided she was fit to work. He further stated that the appellant was allowed to work whenever she came to the hotel and she received wages for the same.

In the aforesaid context the learned Single Judge has held that the appellant was permitted to join duties in January 2007 and she worked on that post till 04/03/2007. Hence her alleged termination dated 24/09/2006 was of no consequence. We find that this conclusion is based on the deposition of the parties and the admission in the cross-examination of the representative of the appellant. The said finding therefore does not require any interference.

8. In so far the aspect of back-wages is concerned it is to be noted that in the affidavit filed by the respondent before the Labour Court the

following submissions were made in paragraph 5 :

“ The deponent states that before the Conciliation Officer, the party no.1 has submitted that the party no.2 herself left the job w.e.f. 12/02/2007 and she can even resume her duties with the party no.1. However, no heed was taken by the party no.2 in respect of joining her duties.”

9. In the submission filed on behalf of the respondent in the Letters Patent Appeal it has been stated in paragraph 6 as under :

“ 06. The present respondent submits that even today the respondent has not terminated her services and she can join her duty. It is respectfully submitted that even after passing of award dated 27/07/2010, the present respondent has issued letters dated 13/09/2010, 05/10/2010 and 19/01/2011 to the present appellant directing her to join her duty... ”

In additional submissions dated 16/04/2013 the respondent in paragraph 4 has stated as under :

“ 04.... The respondent states that the respondent never refused or restrained the appellant from joining her duties. Even today she can resume her work....”

10. From the aforesaid it can be seen that it has been the consistent stand of the respondent that the services of the appellant were never terminated and on the contrary she was permitted to resume duties on 18/01/2007. Thereafter it is the stand of the respondent that the appellant

could at any point of time join her duties and resume discharge of the same. There is no counter affidavit to the aforesaid assertions made by the respondent. In this regard reference can be made to the decision in ***Sonal Garments vs. Trimbak Shankar Karve 2002 III CLR 488*** wherein in paragraph 4 it has been observed as under :

“ 4. ... Whenever the employer offers to reinstate the workman at any stage of the dispute or proceeding and if the workman does not accept the offer even without prejudice to his rights and contentions he will not be entitled to continue his claim for reinstatement in the proceedings and he will also be not entitled to claim any back-wages from the date of such offer, conditional or unconditional. He must first accept the offer and get reinstated in employment and therefore continue to contest for the relief of back-wages, if any.”

11. In the light of the unequivocal stand taken by the respondent on oath we find that the respondent was all along ready to permit the appellant to discharge her duties but the offer as made was not accepted by the appellant. It is on that premise that she is dis-entitled to claim back-wages for the reason that she herself did not attend duty from 24/09/2006 to 17/01/2007 and there after from 05/02/2007 onwards. No fault therefore can be found with the said findings recorded by the learned Single Judge.

12. As regards the contention that the award passed by the Labour Court attained finality in view of provisions of Section 17(2) of the Act of

1947, such finality as prescribed is for the purposes of the Act of 1947 and the challenge to the award under Articles 226 and 227 of the Constitution of India by the party aggrieved is not foreclosed. Said submission therefore cannot be accepted. The decisions in *Mukesh Singh* and *Vijay Gangaram Kamble* (supra) do not support the contentions of the appellant. We therefore do not find any case made out to interfere with the judgment of the learned Single Judge. Consequently the Letters Patent Appeal stands dismissed with no order as to costs.

JUDGE

JUDGE