

Dusane

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

WRIT PETITION NO.2932 OF 2021

Abdulla R. Khan ...Petitioner

V/s.

Construction & Engineering Equipments ...Respondents
& Ors.

Mr. Mahesh Shukla i/by Niraj Prajapati for
Petitioner.

Mr. Jayesh K. Desai i/by M/s Desai & Desai for
Respondents.

CORAM : N.J. JAMADAR, J.

RESERVED ON : 27th MARCH 2023

PRONOUNCED ON : 5TH JUNE 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the parties, heard finally.

2. By this Petition under Article 226 of the Constitution of India, the Petitioner takes exception to a judgment and order dated 11th September 2019 passed by learned Member, Industrial Court at Mumbai in Complaint (ULP) No. 421 of 2015 whereby while making a declaration that the Respondent-employer indulged in unfair labour practice under

Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("The Act, 1971"), the learned Member directed payment of back-wages from the date of illegal termination till the alleged closure of the Company on 6th December 2012 and closure compensation, when the Petitioner had alleged unfair labour practice in not implementing the award dated 27th March 2015 passed in Reference (IDA) No. 443 of 2010.

3. Construction & Engineering Equipments, the Respondent No.1, was engaged in the business of manufacturing of concrete machines. Gamzen Plast Private Limited, the Respondent No.2 is a sister concern of Respondent No.1. Both the concerns are owned and managed by Respondent No.3. Petitioner was employed as a Turner with Respondent No.1 since the year 2003. On 7th November 2008, the Petitioner was restrained from resuming his duty. Respondent thus abruptly terminated the services of the Petitioner verbally.

4. Upon an industrial dispute being raised by the Petitioner, the Deputy Commissioner of Labour made a Reference under Section 10(1) and 12(5) of the Industrial Disputes Act, 1947 ("I.D. Act 1947") to the Labour Court, Mumbai being Reference (IDA) No.443 of 2010. Petitioner and Respondent-

employer led evidence in the said reference. After appraisal of the evidence and material on record, the learned Judge, Labour Court was persuaded to return a finding that the Petitioner had proved that his services were illegally terminated by the employer. Labour Court thus partly allowed the Reference declaring that the Petitioner was entitled to be reinstated in service with 50% back-wages and continuity of service.

5. As the said award was not implemented by the employer, the Petitioner lodged a complaint being Complaint (ULP) No. 421 of 2015 before the Industrial Court alleging that the employer indulged in unfair labour practice in not implementing the aforesaid award though it had attained finality. Petitioner claimed to have addressed letters to the Respondents to ensure compliance of the award and also personally approached the Respondents to allow him to resume duty on 28th July 2015. However, the Petitioner was not allowed to enter into the Company premises. Thus, the Petitioner was constrained to lodge complaint under Section 28 of the Act, 1971 for unfair labour practice under Item 9 of Schedule IV of the Act, 1971.

6. The Respondents resisted the complaint by filing written statement. It was denied that the Respondents indulged in any unfair labour practice. A categorical stand was taken by the Respondents that the Respondent No.1-Company had closed down its operations at Mumbai in April 2010 itself. Consequent to the closure of the manufacturing activity, all the workmen of the Respondent No.1 had parted with by accepting compensation. The order of reinstatement, in the backdrop of the closure of Respondent No.1, could not be implemented. Therefore, the complaint was liable to be dismissed as there was no unfair labour practice, contended the Respondents.

7. The learned Member Industrial Court recorded the evidence of the Petitioner-Complainant. No evidence in rebuttal was led by the Respondents. After evaluation of the evidence and material on record, the learned Member was persuaded to allow the complaint declaring that the Respondents indulged in unfair labour practice under Item 9 of Schedule IV of the Act, 1971, commanded Respondents to cease and desist therefrom and directed the Respondents to pay 50% back-wages from the date of illegal termination till the closure of the Company on 6th December 2012 and also

closure compensation at par with the similarly placed employees.

8. The learned Member, Industrial Court was persuaded to limit the entitlement to back-wages till the date of closure of Respondent No.1-Company on the premise that the closure of Respondent No.1-Company in the year 2012 was an admitted fact.

9. Being aggrieved, the Petitioner has invoked the writ jurisdiction.

10. I have heard Mr. Mahesh Shukla, the learned Counsel for the Petitioner, and Mr. Jayesh K. Desai, the learned Counsel for the Respondents, at some length. With the assistance of the learned Counsel for the parties, I have also perused the pleadings and material on record, including the award dated 27th March 2015 passed by the Labour Court in Reference (I.D.A.) No. 443 of 2010 and the impugned judgment and order.

11. Mr. Shukla, the learned Counsel for the Petitioner would submit that the learned Member completely mis-directed himself in restricting the entitlement of the Petitioner to 50% back-wages till the alleged date of closure. Amplifying the submission, Mr. Shukla urged with tenacity that the learned

Member, Industrial Court lost sight of the fact that he was not sitting in appeal over the award passed by the Labour Court in Reference (IDA) No. 443 of 2010, and the said award had attained finality. The learned Member, Industrial Court, according to Mr. Shukla, could not have ventured into the reliefs to be awarded to the Petitioner while adjudicating the question as to whether the Respondent-employer indulged in unfair labour practice under Item 9 by failure to implement the award passed by the Labour Court.

12. Mr. Shukla further submitted that the aspect of alleged closure of Respondent No.1 was already agitated before, and effectually repelled by, the Labour Court and thus it was not open to the Industrial Court to again delve into the aspect of closure of Respondent No.1 so as to deprive the Petitioner benefit of back-wages till the date of reinstatement and continuity of service.

13. In opposition to this, Mr. Desai, the learned Counsel for the Respondents, supported the impugned judgment and order. Mr. Desai would urge that the fact that the Respondent No.1-Company was closed in the year 2012 was squarely admitted by the Petitioner. In addition, there were documents of un-impeachable character to show that there was a closure

of Respondent No.1- Company. In the face of such unequivocal admission and material, the reinstatement of the Petitioner was not at all possible. In the circumstances, the learned Member, Industrial Court was justified in taking note of the subsequent development and moulding the relief. In any event, according to Mr. Desai, reinstatement with full back-wages cannot be automatic and de hors the attendant facts of the case.

14. I have given anxious consideration to the rival submissions.

15. The moot question that crops up for consideration is whether the learned Member, Industrial Court, having found that the Respondent indulged in unfair labour practice in not implementing the award passed by the Labour Court, could have directed payment of back-wages only upto the point of the closure of the Respondent No.1 and closure compensation, though the Labour Court had passed award of reinstatement in service alongwith continuity of service, in addition to 50% back-wages from the date of termination till the date of reinstatement?

16. Before exploring an answer to the aforesaid contentious issue, it may be apposite to note that the award dated 27th

March 2015 directing the employer to reinstate the Petitioner in service, attained finality. It is not the case of the Respondents that the said award was assailed by the Respondents in any proceeding. Instead, the stand of the Respondent before the Labour Court as well, was that the Respondent No.1-Factory had been closed down in the year 2010 itself. To lend support to the said claim, the Respondents had relied on the documents evidencing cancellation of excise registration (Exhibit C-8 and C-9) and a leave and licence agreement (Exhibit C-10) to show that the premises of Respondent No.1 was let out post closure. The learned Judge, Labour Court was, however, of the view that closure of the Respondent No. 1 was not in conformity with the prescribed procedure and in the absence thereof, the claim of the Respondent did not deserve acceptance.

17. In the impugned order, the learned Member, Industrial Court has observed that the fact that the Respondent No.1's operations were closed in the year 2012 was an admitted fact. In view of the aforesaid observation, the Petitioner was called upon to tender the copies of the evidence of the Petitioner and Respondents' witness in Complaint (ULP) 421 of 2015 as well as Reference (IDA) No.443 of 2010. I have perused the

depositions.

18. Mr. Zuzer Petiwala, Respondents' witness, in Reference (IDA) No. 443 of 2010 deposed to the fact that the manufacturing activity at Respondent No. 1's Kurla factory was shifted to Uttarakhand in April 2010. Thereafter the factory premises at Kurla was leased out. In the cross-examination, Mr. Petiwala conceded that though all manufacturing activities were shifted to Uttarakhand, some activity was going on at Mumbai till 2013. He further conceded that the Respondents had a small administrative office in Mumbai.

19. The Petitioner, in his cross-examination in the Reference expressed his inability to state as to whether the Respondent No.1-Company had been closed from April 2010. However, it is imperative to note, during the course of cross-examination in Complaint (ULP) No. 421 of 2015, the Petitioner while denying that the Respondent No.1-Company was closed in the year 2010, conceded that the Company was closed in the year 2012. He feigned ignorance as to whether the Respondent No.1 had given the premises on leave and licence on 6th December 2012.

20. On the basis of the aforesaid admission, coupled with the material on record, the learned Member, Industrial Court, it seems, arrived at the conclusion that the closure of the Respondent No.1 in the year 2012 was rather undisputed. The aforesaid finding cannot be said to be perverse. Nor finding can be said to be based on a stray admission elicited from a witness in an unguarded moment. The Respondents had tendered material even before the Labour Court to demonstrate that the Respondent No.1 had closed its operations at Mumbai.

21. In the light of the aforesaid facts, the nature of the order which can be passed by the Court in the event it arrives at the finding that the Respondent had indulged in unfair labour practice, deserves to be noted. Section 30(1) of the Act 1971 reads as under:

"30. POWERS OF INDUSTRIAL AND LABOUR COURTS. –(1) Where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order -

(a) declare that an unfair practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair

labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;

(c) where a recognised union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all of any or its rights under sub- section (1) of section 20 or its right under section 23 shall be suspended."

22. A plain reading of the aforesaid provision would indicate that the Industrial or Labour Court, after it arrives at a finding that the person against whom the complaint is made has engaged in, or is engaging in, any unfair labour practice, is empowered to make a declaration to that effect. As a consequence, the Court is further empowered to direct the person indulging in unfair labour practice to cease and desist from such unfair labour practice. The Court is vested with jurisdiction to also order such person to take such affirmative action as the circumstances of the case may warrant including payment of compensation, reinstatement of the employee, with or without back-wages, as in the opinion of the Court may be necessary to effectuate the policy of the Act.

23. In the case at hand, the unfair labour practice was of non-implementation of the award dated 27th March 2015. In addition to declaring that the Respondents indulged in unfair

labour practice in not implementing the award, the Industrial Court could have directed the Respondents to make amends either by giving effect to the order of reinstatement, in full measure, or by awarding reasonable compensation. The learned Member, in the circumstances of the case, was of the view that having regard to the undisputed closure of Respondent No.1, the Petitioner was entitled to back-wages at the rate of 50% from the date of termination till closure and closure compensation only. Whether this approach is justifiable?

24. It is trite that when the termination is set aside as illegal, ordinarily the employee is entitled to be reinstated in service. Ordinarily, a workman whose service has been illegally terminated would be entitled to reinstatement with full back-wages except to the extent he was gainfully employed during the enforced idleness. However, there can be a departure from this normal rule, in the circumstance of a given case.

25. There might be circumstances which render an order of reinstatement impossible to be implemented or wholly inequitable. In such situation, reinstatement cannot be automatic and as a matter of course. Over a period of time,

the circumstances which bear upon the right to be reinstated with full back-wages have been examined by the Courts and a more pragmatic view is being taken to award compensation in lieu of reinstatement with or without back-wages, where reinstatement would not be justifiable.

26. A three Judge Bench of the Supreme Court in the case of **M/s Hindustan Tin Works Pvt. Ltd. Vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd. And Ors.**¹, expounded the criterion for grant of back-wages when a termination has been held to be illegal and the nature of the discretion to be exercised by the Court or Tribunal as under:

11. In the very nature of things there cannot be a straight-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice? according to law and not humor. It is not to be arbitrary, vague and fanciful but legal and regular (See Susannah Sharp v. Wakefield (1891) AC 173, 179".

(emphasis supplied)

1 (1979) 2 Supreme Court Cases 80

27. Another three Judge Bench of the Supreme Court in the case of **Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-cum-Labour Court, New Delhi and Another²**, enunciated the legal position as under:

"Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums: the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the Court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

(emphasis supplied)

28. In P.V.K. Distillery Limited Vs. Mahendra Ram³,
the Supreme Court after adverting to the previous

² (1980) 4 Supreme Court Cases 443

³ (2009) 5 Supreme Court Cases, 705

pronouncements expounded the law as under:

Copy para 18, 20 and 28:

"18. Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

20. In deciding the question, as to whether the employee should be recompensed with full back wages and other benefits until the date of reinstatement, the tribunals and the courts have to be realistic albeit the ordinary rule of full back wages on reinstatement. [[Western India Match Co. Ltd. v. Industrial Tribunal](#), 1978 Lab IC 179 (SC).]

28. The notice was issued with a view that the appellant's factory has been taken over by a new management altogether and by asking the appellant to pay full back wages for the long interregnum would be unfair and unjust. The workman has not entered appearance to justify the award passed by the Labour Court. Therefore, in our view, it would be unreasonable to put a huge burden on the appellant by directing it to reinstate the respondent with continuity of service and with full back wages, because the appellant's factory had been declared sick and remained closed for many years and has been assigned to a new management led by its Chief Executive Director, Sri M.K. Pilania in order to rehabilitate/reconstruct it."

(emphasis supplied)

29. On the aforesaid touchstone, reverting to the facts of the case, it is pertinent to note that there is material to show that the Respondent No.1-Company has closed down its

operation in Mumbai. The manufacturing activity was shifted to Uttarakhand. The submission on behalf of the Petitioner that the manufacturing activity was partially going on till 2013 or that the administrative office of the Respondent No. 1-Company still operates from Mumbai, does not advance the cause of the Petitioner. Instead, these contentions lend credence to the claim of the Respondents that the manufacturing activity has ceased at Mumbai. The closure of the Respondent No.1-factory is thus a significant circumstance which deserved to be taken into account while passing order under Section 30(1), (b) of the Act, 1971.

30. From the aforesaid standpoint, in my view, the learned Member, Industrial Court was within his rights in moulding the final relief after recording a finding that the Respondent indulged in unfair labour practice. The said exercise cannot be assailed on the ground that it amounted to interference with the award passed by the Labour Court. Such moulding of reliefs squarely falls within the province of the authority vested in the Court under Section 30(1)(b) of the Act, 1971.

31. The pivotal question that crops up for consideration is whether the learned Member Industrial Court exercised jurisdiction under Section 30 of the Act, 1971 in a justifiable

manner. Evidently, the fact that the establishment was closed by December 2012 weighed with the learned Member. In the circumstances, enforcement of the order for reinstatement with 50% back-wages, as ordered by the Labour Court in the award in Reference (IDA) No. 443 of 2010, may not have been practicable. However, the learned Member, Industrial Court could have redressed the grievance of the Petitioner by directing payment of reasonable compensation.

32. It is imperative to note that it was not the case of the Respondent- employer that the procedure as envisaged by Section 25-O of the Industrial Disputes Act, 1947 for closure of the establishment was followed. Nor any material could be placed on record to show the quantum of closure compensation paid by the employer to the similarly placed employees, whose services came to be terminated on account of the closure of the establishment. In such circumstances, the direction in the impugned order that 50% back-wages be paid from the date of termination till the closure of the Company on 6th December 2012 and also the closure compensation at par with similarly placed employees errs on the point of inadequate redressal of the Petitioner's grievances and also leaves room for contestation on the aspect of the

closure compensation in the absence of any material to show the amount of closure compensation paid to other employees.

33. It would be contextually relevant to note that when the Petitioner affirmed the affidavit in Complaint (ULP) No. 421 of 2015, on 18th December 2018, the Petitioner was shown to have completed 62 years of age. This factor also justifies an order of compensation in lieu of a direction for reinstatement in service.

34. In the totality of the circumstances, the dictates of the command of justice would be met if the Respondents-employer are directed to pay compensation in addition to the 50% back-wages from the date of termination till the closure of the Company i.e. 6th December 2012 and the closure compensation in accordance with the provisions of the Industrial Disputes Act, 1957. Having regard to the tenure of over 6 years for which the Petitioner rendered the services, a compensation of Rs. 70,000/- in addition to 50% back-wages and the closure compensation, for indulging in unfair labour practice in not implementing the award passed by the Labour Court in Reference (IDA) No. 443 of 2010 would be just and reasonable.

35. I am therefore persuaded to partly allow the petition.

Hence, the following order

ORDER

- (1) The Petition stands partly allowed.
- (2) The impugned order stands modified as under:
 - (a) The declaration made by the learned Member, Industrial Court that the Respondents have indulged in unfair labour practice under Item 9 of Schedule IV of the Act, 1971 stands affirmed.
 - (b) The Respondents do pay 50% back-wages to the Petitioner from the date of termination till the closure of the Company i.e. 6th December 2012.
 - (c) The Respondents shall also pay closure compensation to the Petitioner in accordance with the provisions of Industrial Disputes Act, 1947.
 - (d) In addition, the Respondents do pay a sum of Rs.70,000/- by way of compensation to the Petitioner for indulging in unfair labour practice in not implementing the award passed by the

Labour Court in Reference (IDA) No. 443 of 2010.

(e) The Respondents shall pay the aforesaid amounts within a period of two months from today. In the event of default, the entire amount shall carry interest at the rate of Rs.9% per annum from the date of this order till payment and/or realisation.

3. Rule made absolute to the aforesaid extent.
4. In the circumstances of the case, there shall be no order as to costs.

BHALCHANDRA
GOPAL DUSANE

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Date: 2023.06.05
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(N.J. JAMADAR, J.)