

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1025 OF 2024**

Bhushan Industries,
Gala No. 6-M, Laxmi Industrial
Estate, New Link Road,
Andheri (West),
Mumbai - 400 053,

.. Petitioner

Versus

Lohasingh Ramavadh Yadav,
Gulab Yadav Chawl,
Shastri Nagar, Near Hill Park
A-2 Tower, Jogeshwari (W),
Mumbai - 400 102.

.. Respondent

...

Mr. Mahesh Shukla a/w Mr. Niraj Prajapati, for Petitioner.

Mr. Jane Cox i/b Mr. Ghanashyam R. Thombare, for Respondent.

...

CORAM	: SANDEEP V. MARNE J.
RESERVED ON	: 11 MARCH 2024.
PRONOUNCED ON	: 20 MARCH 2024.

JUDGMENT :-

1) ***Rule.*** Rule made returnable forthwith. With the consent of the learned counsel appearing for parties, Petition is taken up for hearing.

2) By this Petition, Petitioner-Employer challenges the Impugned Award dated 4 October 2022 passed by the Presiding Officer, First Labour Court, Mumbai in Reference (IDA) No. 184 of 2018. The Labour Court has answered the Reference in the affirmative and has directed Petitioner to reinstate Respondent with continuity of service and full backwages with effect from 9 April 2013.

3) In a nutshell, facts of the case are that Petitioner is a partnership firm engaged in the business of manufacturing of hair pins. Respondent joined services of Petitioner in April 1999 on the post of Painter. It is the case of Respondent that on 8 April 2013, he sought to borrow Rs.2,000/- from Mr. Nileshwar Bhushan, Partner of Petitioner-firm for his daughter's treatment. That the partner refused to lend the amount. That he was not paid salary for the month of March 2013 and April 2013 and from 9 April 2013, Partner of the Petitioner-firm did not permit him to join the services. This is how, according to the Respondent, his services were terminated on 9 April 2013.

4) Respondent wrote to the Petitioner on 13 April 2013 requesting permission to resume his duty. However, the partner of the Petitioner sent a reply to Respondent on 13 April 2013 accusing Respondent of not reporting to duty. Some correspondence took place and Respondent made a complaint with the Deputy Labour Commissioner and filed Statement of Justification on 18 July 2013. Ultimately the dispute landed before Labour Court on account of reference made by the appropriate Government with regard to termination of the Petitioner. The Labour Court has proceeded to answer the reference in the affirmative by directing Petitioner to reinstate Respondent in service with continuity and full backwages with effect from 9 April 2013. Aggrieved by the decision by the Labour Court, Petitioner has filed a present Petition.

5) Mr. Shukla, the learned counsel appearing for the Petitioner would submit that the Labour Court has erred in directing in reinstatement of Respondent without appreciating fact that Respondent was never interested in working with Petitioner. That repeated offers were given to the Respondent to join the duties and Respondent failed to do so. That Respondent abandoned services and there was no occasion for Petitioner to terminate him. That in any case, he did not complete 240 days of service in any of the years, as he consistently absented himself every year for more than 90 days.

6) Mr. Shukla would further submit that the Petitioner establishment is closed since 20 March 2020 and that therefore there is no question of reinstating the Respondent. That the Labour Court has erroneously rejected the defence of closure of the establishment. That the partners of the Petitioner are old and are incapable of running the business. Mr. Shukla would further submit that the direction for payment of backwages is contrary to the evidence on record where the Respondent admitted that he is employee and was doing work of a Painter. That he failed to offer himself for work for unduly long period of time during September 2013 to December 2018.

7) Lastly, Mr. Shukla would invite my attention to proceedings filed by other employees of Petitioner-establishment challenging the closure Order in the form of Complaint (ULP) No. 10 of 2021. He would submit that Petitioner deposited total amount of Rs.5,91,000/- towards final settlement in respect of the remaining employees, including amounts towards notice pay, closure compensation, bonus and ex-gratia payment. That all other employees have accepted the amount handed over to them and Complaint (ULP) No. 10 of 2021 is dismissed. That therefore there is no question of

either reinstatement of the Respondent or payment of any monetary benefit. He would pray for dismissal of the Petition.

8) Ms. Cox, the learned counsel appearing for Respondent would oppose the Petition and support the Award passed by the Labour Court. She would submit that the Petition suffers from delay and laches. That the Petition was filed only after recovery certificate was issued for enforcing the Award. That otherwise, Petitioner did not challenge the Award for about a year. She would submit that the Petition deserves to be dismissed on the ground of delay.

9) Ms. Cox would further submit that Respondent repeatedly approached Petitioner to join services and that he was not permitted to resume his duty. She would take me through the events recorded by the Labour Court in Para 3 of the Order. Additionally, she would rely upon compilation of documents to show various correspondence that ensued between the parties to demonstrate that Petitioner deliberately went on making false correspondence with Respondent and did not actually permit him to resume duties.

10) Ms. Cox would submit that the termination of the Respondent is founded on misconduct and that therefore conduct of enquiry was mandatory. She would submit that even otherwise abandonment of service is a question of fact which can be determined only after holding enquiry. In support of her contentions, she would rely upon Judgments of this Court in **Noble Paints Private Limited Vs. Ashok Tukaram Shinde¹**, **Gangaram K. Medekar Vs. Zenith Safe Manufacturing Company and Others²** and

¹ 2004 (1) Mh.L.J. 420

² 1996 (1) L.L.N. 703

Gaurishankar Vishwakarma Vs. Eagle Spring Industries (Private), Ltd. and Others³.

11) Ms. Cox would further submit that even if it was to be proved that Respondent did not complete 240 days of service, the same could not be a reason for termination without holding enquiry. She would submit that there is no perversity in the findings recorded by the Labour Court. That the defence of closure taken by Respondent is false as there is no closure notice in the present case. Without prejudice, she would submit that even if closure is established, the relief granted by the Labour Court can at the highest be molded by directing payment of backwages till the date of closure in addition to closure compensation and gratuity. She would pray for dismissal of the Petition.

12) Rival contentions of the parties now fall for my consideration.

13) Petitioner took a defence before the Labour Court that Respondent abandoned the employment on and from 8 April 2013. It further raised a plea that Respondent refused to join duties despite being repeatedly offered the job.

14) I have considered the sequence of events recorded by the Labour Court in para 3 of its Order and have also gone through the relevant correspondence placed on record by Ms. Cox. After going through the said sequence of events and correspondence, it is difficult to hold that Respondent refused to report for duty. In fact, various correspondence made by the Petitioner with Respondent appears to have been made only for the purpose of painting a picture as if Petitioner was ready to offer job to

³ 1988 (1) L.L.N. 259

Respondent. In reality, Petitioner never wanted Respondent to join duties. The Labour Court has considered the entire correspondence on record as well as evidence led by parties and has come to the conclusion that Respondent never refused to join duties when genuinely offered. I do not find any reason to interfere in the said finding of fact recorded by the Labour Court.

15) The Petitioner has taken a plea of abandonment of employment by Respondent. It has been repeatedly held by this Court that abandonment of service is a question of fact that needs to be established by conduct of enquiry. In this regard reliance by Ms. Cox on judgment of this Court in ***Noble Paints Private Limited, Gangaram K. Medekar and Gaurishankar Vishvkarma*** (supra) is apposite. If indeed Petitioner believed that Respondent had abandoned the service, atleast a show cause notice ought to have been issued to him. It is only after Respondent raised the issue of termination that Petitioner levelled allegations against him. Since correspondence was going on between the parties, Petitioner could have conducted domestic enquiry by accusing Respondent of absconding from duties. This is not a case where the whereabouts of Respondent was unknown to Petitioner. Therefore, conduct of domestic enquiry was possible in the facts and circumstance of the present case. I am therefore of the view that the plea of abandonment of employment cannot be accepted in the facts and circumstances of the present case.

16) The Petitioner has effected termination of services of Respondent under the guise of abandonment of employment. The termination is rightly held to be invalid by the Labour Court. I do not see any perversity in the findings recorded by the Labour Court.

17) So far as the issue of closure is concerned, the Labour Court has refused to accept the same on the ground that Respondent failed to produce any material on record except the interim Order passed by Industrial Court in Complaint (ULP) No. 10 of 2021. It appears that by Interim Order dated 23 December 2021, the Industrial Court had recorded deposit of amount in respect of four employees towards one month notice pay, closure compensation, bonus, leave wages and *ex-gratia* payment. Para 16 of the Interim Order dated 23 December 2021 reads thus:

"16) It is further pertinent to mention here that respondent alongwith Exh.C-4 filed detailed full and final settlement amount in respect of concerned employees namely Ramesh Arapurkar amount of Rs.1,99,845/- including one month notice pay, closure compensation, bonus at the rate of 8.33% October 2019 to March 2020, leave with wages, ex-gratia paid in April 2020 and in which the amount of loan deducted and total amount is deposited of Rs.1,31,923/-. Likewise, the full and final settlement amount of Shri. Rafik Islam Shaikh, total Payment of Rs.1,21,568/- Santosh Harishchandra Niwate total payment of Rs.2,11,195/-. Sachin Deepak Chavan Total payable amount of Rs.1,26,508/-. Total amount of Rs.5,91,194/- deposited in this Court by way of cheque dated 15.02.2021."

18) Thereafter para 17 of the Order recorded *prima facie* finding that Petitioner establishment is closed. Though the Labour Court has proceeded to discard the Interim Order dated 23 December 2021 of the Industrial Court accepting the theory of closure. It appears that subsequently Complaint (ULP) No. 10 of 2021 was dismissed for default on 29 November 2023 recording that the amount of compensation was disbursed amongst the said four employees. Para 4 of the Order dated 29 November 2023 reads thus:

"4) Today on behalf of complainant Ld. Advocate Shri. D. H. Patil fairly submitted that, respondents had deposited amount of compensation amounting to Rs.5,91,194/- in this Court. He further submitted that, vide order dated 23-12-2021 passed below Exh. U-2 this Court directed to disburse the amount of compensation deposited in this Court in the name of concerned employees. After receiving the amount from the court complainant as well as the employees in spite of giving repeated intimation to attend the court to lead the evidence neither complainant union nor the concerned employees approached and given the material instruction to proceed with the matter. In this circumstances Ld. Advocate Shri. D. H. Patil prayed to pass appropriate Order."

19) Thus all other employees working in Petitioner establishment have accepted the amounts offered to them and did not pursue the complaint filed by them before Industrial Court. It can therefore be safely presumed that the Petitioner establishment is closed. Such closure has taken place with effect from 20 March 2020. Therefore, there is no question of granting any backwages to Respondent after 20 March 2020.

20) Having arrived at a conclusion that Respondent's termination with effect from 9 April 2013 was invalid and that the establishment is closed with effect from 20 March 2020, the issue is about the nature of relief that can be granted to the Respondent. Since the establishment is closed, there is no question of Respondent's reinstatement. Without prejudice to the rights of the Petitioner, Mr. Shukla has placed on record the amount that Petitioner would be entitled to, towards retrenchment compensation, gratuity, one month notice pay. As per that statement, the amount of retrenchment compensation in respect of period from April 1999 till date of closure on 20 March 2020 would be Rs.1,03,950/-. The amount of amount ex-gratia calculated on basis of formula of gratuity (gratuity is not statutorily payable) would be Rs.1,03,950/-. One month notice pay would be Rs.8,580/-. This is how total amount of Rs.2,16,480/- is offered of which an amount of Rs.54,000/- is sought to be deducted towards advance availed by Respondent. This is how Petitioner has showed willingness to pay amount of Rs.1,62,480/- to Respondent without prejudice to its rights and contentions.

21) Ms. Cox would raise an objection to the said amount submitting that Labour Court has awarded full backwages to Respondent which are not factored in while making various computations. Also, as per Recovery Certificate issued by Assistant Commissioner of Labour, the backwages upto 3 January 2024 were assessed at Rs.11,42,350/-.

22) Mr. Shukla has also sought to raise the issue about Respondent's gainful employment during intervening period. He has taken me through some of admissions given by Respondent in his cross examination where he admitted that he went to his native place for job and used to do occasional job as Painter. Ms. Cox is quick enough to point out that doing occasional job as a Painter did not mean Respondent was in a gainful employment. Though Petitioner did not prove continuous gainful employment of Respondent, it appears that he did earn some wages on account of skills acquired by him as a painter. Mr. Shukla has relied upon judgment of the Apex Court in **P.V.K. Distillery Limited Vs. Mahendra Ram**⁴ and of this Court in **Abdulla R. Khan Vs. Construction & Engineering Equipments and ors.**⁵ in support of his contention that award of backwages cannot be granted in each and every case especially where the establishment has been closed. Considering the ratio of those judgments as well as the peculiar facts and circumstances of the present case, in my view, ends of justice would meet if Respondent is awarded lumpsum compensation of Rs.4,00,000/- towards full and final settlement in lieu of reinstatement and backwages.

23) I accordingly proceed to pass the following Order:

ORDER

- i) The Award dated 4 October 2022 passed by Labour Court is modified to the extent that Petitioner shall pay to Respondent lumpsum compensation Rs.4,00, 000/- towards full and final settlement within a period of six weeks.

⁴ 2009 (5) SCC 705

⁵ Writ Petition No. 2932 of 2021 decided on 5 June 2023.

- ii) Beyond the amount of lumpsum compensation so awarded, Respondent shall not be entitled to any further amounts from Petitioner.

24) With the above directions, the Writ Petition is disposed of. Rule is partly made absolute.

[SANDEEP V. MARNE J.]