IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 255 OF 2001

Swan Mills Limited, 15, Tokersey Juvraj Road, Sewri, Mumbai 400 014. ... Petitioner

Vs.

1. Shri. Sakharam Dhondu Panchal, Shinde Wadi No. 2, Dr. Ambedkar Road, Mumbai 400 013.

2. Shri. S.K. Salgaonkar, Presiding Officer, 11th Labour Court, Bandra (E), Mumbai 400 051. ... Respondents

WITH

WRIT PETITION NO. 256 OF 2001

Swan Mills Limited, 15, Tokersey Jivraj Road, Sewri, Mumbai 400 015. ...Petitioner

Vs.

1. Shri. Sakharam Dhondu Panchal, Shinde Wadi No. 2, Dr. Ambedkar Road, Mumbai 400 013.

2. Shri. S.K. Salgaonakr, Presiding Officer, 11th Labour Court, Bandra (East), Mumbai 400 051.

3. Appellate Authority Under the Payment of Gratuity Act, 1972, Commerce Centre, Tardeo, Mumbai 400 034.

Mr. V.P. Vaidya for Petitioner.

Mr. Arshad Shaikh with Mr. M. Londhe i/by Sanjay

Udeshi & Co. for Respondents.

WITH

WRIT PETITION NO. 2053 OF 2002

Mr. Sakharam Dhondu Panchal, Shinde Wadi, No. 2, Dr. Ambedkar Road, Mumbai 400 014. ... Petitioner

Vs.

M/s. Swan Mills Limited, 15, Tokersy Jivraj Road, Sewree, Mumbai 400 015. ... Respondent

Mr. Arshad Shikh with Mr. M. Londhe i/by Sanjay Udeshi & Co. for Petitioner.

Mr. V.P. Vaidya for Respondent.

CORAM : F.I. REBELLO,J.
DATED : JULY 30, 2004

ORAL JUDGEMENT :

1. All these petitions are being disposed of by common order as they involve financial benefits to be paid to the Respondents, consequent to the order passed in his favour by the Appellate Authority under the provisions of the Bombay Industrial Relations Act on 12.10.1985.

2. Writ Petition No. 255 of 2001 is by the Employer challenging the order of the Appellate Authority passed in Application IDA No. 646 of 1996 dated 30.10.2000. That order came to be

passed in proceedings under Section 33(c)(2) taken out by the Respondents in terms of the order of the Appellate Authority allowing his application for setting aside the order of dismissal and consequential benefits. By the impugned order, the learned Labour Court has been pleased to direct the petitioners to deposit sum of Rs.2,47,224/- which was payment of full back wages within a month from the date of the order failing which the said amount would carry interest at the rate of 9% p.a. whichever is earlier.

3. Writ Petition No. 256 of 2001 is by the Employer challenging the order made by the Appellate Authority dated 10.10.2000 whereby appeals preferred by the Petitioner as also by Respondent No. 1 against the order dated 10.4.2000 of the Controlling Authority under the Payment of Gratuity Act were dismissed. The Controlling Authority by his order dated 10.4.2000 allowed the application by the Respondent No. 1 herein for gratuity and directed that the sum of Rs.43,230/- be paid along with interest at the rate of 15% from 28.6.1996 till the date of actual payment of gratuity to the applicant.

. Writ Petition No. 2053 of 2002 is by the workman impugning the order of the Appellate Authority dismissing his appeal against the order of the Controlling Authority dated 10.4.2000. The Petitioner workman had sought interest at the rate of 15% p.a. on the agreed amount from January, 1990 till June, 1996. The Controlling Authority had only ordered interest at the rate of 15% from 28.6.1996. The appeal preferred by the Petitioner workman was dismissed. Hence, the present petition.

. From the above narration of facts, therefore, what will be material in these two writ petitions is the order of the Appellate Authority under the Payment of Gratuity Act dated 12.10.1985.

4. A few facts now may be set out. It was the case of the workman that he joined respondent employer in the year 1960-61 and was employed as carpenter in Weaving Department. The workman was chargesheeted for misconduct on 23.5.1976 in terms of the standing orders applicable to him. The workman filed application to the Labour Court challenging the said termination. The Labour Court

by order dated 7.11.1983 was pleased to hold that the enquiry held was fair and proper, and by order of 30.11.1984 was pleased to dismiss the application by the workman. Aggrieved, the workman preferred an appeal before the Industrial Court which by the order of 12.10.1995 allowed the appeal. During the pendency of the appeal, the erstwhile management of the petitioners declared suspension of operations. On 5.2.1991 Memorandum of Understanding (M.O.U.) was singed between the present promoter, the Petitioner employer and the Union, representing the workman.

. As the Petitioner employer did not pay the amount in terms of the order of the Appellate Authority, the workman preferred an application under Section 33(c)(2) of the Industrial Disputes Act, 1947 on 28.6.1986. That came to be allowed by order of 31.10.2000 which is the subject matter of the challenge in Writ Petition No. 255 of 2001.

5. We shall first deal with Writ Petition No. 255 of 2001. At the hearing of the Petition, on behalf of the Petitioner, their learned counsel formulated grounds for challenge as under :

(1) It is submitted that the order of the Appellate Authority did not order reinstatement to the workmen and consequently even if the workmen was claiming under the MOU there can be no award of back wages. It is submitted that the contract of employment was severed by the order of dismissal. It is submitted that with denial of reinstatement the contract of the employment is not restored. As the continuity of the employment was not granted, a conclusion of deemed employment cannot be drawn warranting awarding of wages or increments during the intervening period. If the contract of employment is not restored, then there is no question of wages or back wages from 1976 or from any other period of time. A reading of the order of the Appellate Authority would make it clear that the claim for back wages was not granted by the Industrial Court and consequently the application for recovery of back wages based on the order of Industrial Court was not tenable as no back wages granted. It is further submitted that the Industrial Court envisages payments of monetary benefits as per MOU dated 5.2.1991. The MOU is applicable to the employees in the Mill as on the date of MOU. The MOU envisages payments under

Clause 5 and 7 only. Clause 5 does not envisage payment of wages especially back wages. It is therefore, clear that earned wages referred to can only be in relation to wages of 27 days of January 1989 when the workers had worked and that becomes clear on a reading of Clause 10 which does not envisage payment after 27.1.1989 till the employees are taken in employment.

. It is therefore submitted that the application under Section 33(c)(2) is not tenable based on the order of Industrial Court as there is no existing right to receive benefit which can be computed, is made out on reading of the order of the Industrial Court. It is further submitted that presumption of grant of back wages or continuity of service cannot be implied in the order of the Industrial Court. In the absence of specific grant of relief, relief must be deemed to have been denied.

(ii). It is then submitted that in proceedings under Section 33(c)(2) of the Act, investigation into the determination of Applicant's right and the liability of the employer is outside the ambit of the execution proceedings as in the instant case. The order of the Industrial Court does not confer

right of back wages nor a monetary claim in the nature of back wags is conferred by the MOU. Granting such a claim is clearly outside the jurisdiction of a Tribunal in proceedings under Section 33(c)(2).

(iii). It is then submitted that any rate, it was beyond the jurisdiction of the Labour Court under section 33(c)(2) to direct payment of interest and consequently that part of the order is liable to be set aside.

(iv). It is lastly submitted that on perusal of Para 69 of the order of the Labour Court, it appears that the Labour Court has awarded backwages till 29.12.1995, even though department was closed on 25.1.1990.

6. In answer to these contention, on behalf of the respondent their larned counsel submits that on reading of the order of the appellate authority it will be clear that what the appellate authority has awarded are backwages. The learned Appellate Authority after holding that the order of dismissal is liable to be set aside and considering the closure of the department, it was not open to the

appellate authority to award reinstatement and consequently what has been awarded are back wages. The order, it is submitted, must be construed harmoniously with the findings in the judgement. It will be clear on such reading that what the appellate authority has done is to set aside the order of dismissal with a direction to pay back wages to be computed in terms of MOU entered into between the employer and the recognised union. It is then submitted once that be the case, application Under Section 33(c)(2) was maintainable as it was only determination of the amount due under the order of the appellate court. In so far as interest is concerned, it is pointed out that what the learned court has done is to award interest on failure to pay the amount ordered after the passage of one month. This it is submitted was open to the Labour Court. Dealing with the contention that the wages have been awarded upto 29.12.1995 and which cannot be awarded after closure on 25.1.1990, it is submitted that what the workman has claimed was awarded only upto the closure period and not thereafter. Merely because there is some language in the order holding that the calculation is upto 29.12.1995, is not a correct reading of the order. The calculation in

fact is based on what the workman applied for and that is upto 25.1.1990. It is therefore, submitted that the contention also must be rejected.

7. The order of the court has to be construed considering the judgement in those cases where the order is not percise or clear. In this context, we may consider the judgement and order of the Appellate Authority namely the Industrial Court. While dealing with the appeal, this is what the Industrial court set out in its reasoning in Para 26 and 27 of the order which we may gainfully reproduce :

"26. Thus, more the more we consider the controversy from various angles, we can not avoid landing upon the conclusion that the impugned order passed by the Labour Court is liable to be set aside. Consequently, the Appeal will have to be allowed, and the application filed by the workman, i.e. Shri. Sakharam Dhondu Panchal, in the Labour Court under Section 42(4) and 79 of the B.I.R. Act, in the matter of his wrongful and illegal dismissal from service, will have to be allowed.

27. Even if the Appeal is being allowed, and the

Application filed by the workman in the Labour Court is being allowed, still the crucial question that arises for consideration is as to whether the relief of reinstatement with full back wags, as prayed for, can be granted."

. The relief prayed for is set out in Paragraph 6 which reads as under :

"6. Thereafter the proceedings filed by the workman vide Application No. 24 of 1977, under Section 42(4) read with Section 79 of the B.I.R. Act was proceeded with. Both the parties have been elaborately heard. The learned Labour Court has framed various points for determination. After appreciating the submissions, evidence, documents, circumstance, necessary provisions of law, the learned Labour Court has come to the conclusion that the Application was not barred by limitation, and the findings of the Trying Officer were not perverse. In the opinion of the Labour Court, the punishment of dismissal from service was also not shockingly disproportionate as such. Consequent upon such findings arrived at by the learned Labour Court,the Application filed under Section 78 and 79 for reinstatement, and for setting aside the

dismissal order, has been rejected."

. The operative part of the order reads as under :

"Appeal is allowed.

Impugned order passed by the Labour Court is set aside. The prayer made by the appellant for reinstatement is hereby rejected. Appeal to that effect is also dismissed in view of the closure of the department in which the appellant was working.

However, the appellant is entitled to all monetary benefits till the date of closure of his department, as per M.O.U. dated 5.2.1991 entered into with the representative Union, and approved by the B.I.F.R. Authority, subject to permission and consent granted by the B.I.F.R. authority as contemplated by the Sick Industrial Companies Act (Special Provisions) 1985."

8. A conjoint reading of these paragraphs with the operative order will make it clear that the order of dismissal has been set aside and the application is allowed. In the application, the workman had prayed for setting aside the order of dismissal and

consequently had sought reinstated. In view of the closure of the department, admittedly no reinstatement could be ordered, as recorded in the finding by the Industrial Court in Paragraph 28 of the Judgment. It is true that the operative part of the order is not happily worded. However, that does not mean that it is not open to the court executing the order or under proceedings under Section 33(c)(2) to properly construe the order and give effect to the order considering the judgement of the court. A reading of the said judgment and the order results in the following consequences :

(1) Order of dismissal is set aside;

(2) The workman normally would have been entitled to be reinstated with back wages.

(3) In view of the closure of the department on 25.1.1990, it was not possible to order reinstatement.

(4) By reference to the MOU, what the Industrial court has done is to direct that the benefits which the workman is entitled to consequent the order of dismissal being set aside, should be calculated in

terms of MOU to the extent that they can be granted.

9. We may now consider the MOU and the relevant clauses. In so far as we are concerned for the purpose of discussion what is relevant are Clauses 5 and 7 which read as under :

"5. After the reopening of the mill the employer shall pay within the period of one month from the date of receipt of resignation from the employees in Swan Process House and Weaving Division of Seweree and Kurla Units who are willing to retire, the 15 days average pay/wages for each year of continuous service of any part thereof in excess of six months as ex-gratia payment equivalent to Retrenchment Compensation and all other legal dues including Gratuity under the Payment of Gratuity Act, Bonus, Earned Wages, Leave with Wages etc. This condition shall also be applicable to employees to the extent rendered surplus as a result of reduced working surplus as a result of reduced working in the departments covered by Clause 1 and 2 of this Agreement. .....

7. Those employees who have been superannuated or

have resigned on or before 26th January, 1989 shall be paid Gratuity and other unpaid dues such as Bonus, Earned Wages, Leave with Wags etc. if any."

. The workman in the instant case, though the order of the Industrial Court is of 12.10.1995 and though the closure of the department on 20.1.1990, acting in terms of the MOU sent letter of resignation. A letter of resignation could only have been sent by a person in service and not by a person who could not be reinstated in service. The order of the Industrial Court was by way of incorporating the monetory benefits in terms of the MOU in the Award. In other words, benefits which the workman was entitled to ought to be computed in terms of the MOU and there was no requirement that to get the benefits the workman had to resign. By way of abundant caution, it appears that the workman had sent his letter of resignation which was accepted by the company as can be seen from their pleadings. The argument advanced on behalf of the Petitioners that the MOU does not provide for wages other than for the period 1.1.89 to 27.1.89 is belied by the language of Clause 7 which speaks of earned wages even before 26.1.1989. What the Industrial Court meant was that the workman

would be entitled to wages consequent upon the order of dismissal being set aside which would include the period 1.1.89 to 27.1.89.

15. Having considered the judgement and the MOU, the contention as advanced on behalf of the Petitioner employer that there was no direction for payment of back wages and that the MOU did not provide for backwages will have to be rejected. The Court under Section 33(c)(2) has understood the order as meaning awarding of back wages. The order and MOU read together clearly leads to that conclusion. It is probably the only conclusion which could be drawn. In other words, it cannot be said that the order of the Labour Court is perverse and or disclose an error of law apparent on the face of record and or is without jurisdiction. The learned counsel placed reliance on the judgment of the Apex Court in the case of Sate Bank of India Vs. Ram Chandra Dubey and Ors. 2001 1 CLR 290 to contend that the back wages cannot be implied if the relief of reinstatement is ordered. The Apex Court in Paragraph 8 of the Judgment observed as under :

"8. The principles enunciated in the decision

referred by either side can be summed up as follows

:

"Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit, can approach Labour Court under Section 33(c)(2) of the Act. The benefit sought to be enforced under Section 33C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered, just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence, that relief must be deemed to have been denied, for what is claimed but not granted, necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question

arises as to the adjudication of a claim for back wags all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state, that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to that extent, therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

. In the instant case, as we have earlier explained, the order of the Industrial Court did provide for back wages as reinstatement could not be ordered. The ratio of the judgement of the Apex Court in the case of State Bank of India (supra) would not be applicable.

. In the light of that the first contention has to be rejected.

10. We may now consider the second contention namely the jurisdiction of the Labour Court under Section 33C(2) of the Industrial Disputes Act. The learned counsel has placed reliance on the judgement in the case of Central Inland Water Transport Vs. The Workmen and another, 1974 LAB I.C. 1018 to contend that there must be an existing right to impugn the order of benefit and that as the proceedings under Section 33C(2) are in the nature of Execution Proceedings, it is not open to the tribunal to find out and investigate as to whether the parties are entitled to any relief and to work out the liability. The jurisdiction is limited to compute the benefit in terms of the order. There can be no dispute with legal proposition as submitted on behalf of the employer as the position in law on that aspect is settled. The question is whether on the facts of the present case, the Labour Court had no jurisdiction or was barred from granting the relief as prayed for. In the earlier part of the discussion, while dealing with the first contention, what the order of

Appellate Court really meant has been discussed. The Labour Court in the exercise of its jurisdiction under Section 33(c)(2), has merely awarded the amounts as awarded by the Appellate court under the B.I.R. Act on a reading of the MOU. By allowing the application the Labour Court allowed the earned wages which were due and payable consequent to setting aside the order of dismissal on the date of closure. That was based on a pre-existing right. The application therefore, under Section 33C(2) was clearly maintainable and the Labour court acted within jurisdiction in granting the reliefs as prayed for.

11. The next issue is awarding of interest. In the instant case, no interest has been awarded on the amount of wages awarded. What the Labour Court has done is merely to award interest subsequent to the orders in the event, the employer fails to pay the amount determined. It is therefore, not a case of awarding interest but merely awarding an interest on the amount awarded on failure to pay the amount already quantified. The learned counsel has placed reliance in the judgement of Payal Electronics Vs. Arun Vasant Pawar and anr. 2002 III CLR 328 to contend that the Labour Court has no

jurisdiction and power to grant any interest on the determined amount as due from the employer. In that case, interest at the rate of 15% p.a. was ordered to be paid on unpaid over time wages. The learned Single Judge of this Court proceeded to hold that there was no existing right to get the interest on the amount of dues and as the Executing Court, the labour court cannot add anything more than the amount of money due. There can be no dispute with the proposition in the said judgement. As an Executing Court what the court can do is to execute the awards/order and not grant anything beyond the said order. In the instant case also no interest has been awarded on the unpaid amount. It is only on failure to pay the amount that interest has been awarded from a future date. Though the principles of Section 34 of the C.P.C. cannot be said to be conferred on the Labour Court, still it will be open to a Civil Court and the Labour Court is a civil court to award the interest on the amount already computed and not paid from the date of this order in terms of Section 34 of C.P.C. That is what the Labour Court has done. It therefore, cannot be said that the same is without jurisdiction. That contention must therefore, be rejected.

12. The last submission has been that the amounts have been calculated as and upto 12th October, 1995, whereas the closure was on 20.1.1990. On a prima facie reading of the order, the learned court is right but ultimately one has to see the application moved by the workman. What is awarded is in terms of the application. The workman did not claim for any amount beyond the date of the closure i.e. 20.1.1990. So that contention must also be rejected.

13. With that, we may now deal with the issues in Writ Petition No. 256 of 2001 filed by the Employer and Writ Petition No. 2053 of 2002 filed by the workmen. On behalf of the employer the contention is two fold. Firstly it is contended that there is no order directing reinstatement and consequently last drawn wages can only be wages at the time of termination in the year 1976. The workman was not reinstated. Consequently it is contended that as the workman has neither been granted reinstatement or continued in service, there was no question of payment of gratuity for the period after 1976 nor is there any order granting continuity of services. It is then

submitted the gratuity become payable in the year 2000. Till that date, the employer was willing to pay gratuity on the basis of last drawn salary but no form 1 was filled till filing of the claim and consequently the direction to pay interest at the rate of 15% is illegal and bad in law.

. It is not necessary to set out once again the facts. The last drawn wages on construction of order of the Labour Court would be wages due and payable as on 20.1.1990. The argument further is that there is no order of reinstatement. As can be seen from the earlier discussion no reinstatement was ordered because of closure. Therefore, the entire period upto 20.1.1990 would be the period to which the workman would be entitled to gratuity. The contention that the employer was willing to pay the gratuity but could not be paid as no form No. 1 was filled has again to be rejected. It could have been understood, if the gratuity was immediately deposited on the application being moved before the Controlling Authority. That was not done and in these circumstances, it was open to the Controlling authority to award interest at the rate of 15% in terms of the statutory provision at least from the date of the application. It cannot

therefore, be said that the order suffers for want of jurisdiction. That contention must therefore, to be rejected.

. Dealing with the petition of the workman namely Writ Petition No. 2053 of 2002, relief is limited to awarding of interest from the back date i.e. from January, 1990 to June, 1996. The order of the Appellate Authority itself is of 12.10.1995. The payment of gratuity payable is in terms of the order of the Industrial court dated 12.10.1995. There was no question of the workman claiming the gratuity from January, 1990. The workman filed an application in June, 1996. The Labour Court has restricted the interest therefore, upto the date of the application. It cannot be said that the decision of the Appellate Authority is without jurisdiction. Hence, that contention must be rejected.

14. For all the aforesaid reasons, rule discharged in all the three petitions. In the circumstances of the case, there shall be no order as to costs.

. The learned counsel seeks stay of the order. In my opinion, considering the discussion in the

judgement, this is not a fit case for stay.

Application for stay rejected.

(F.I. REBELLO,J.)