IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELALTE JURISDICTION

**WRIT PETITION NO.2048 OF 1997**

Shri Deepak Ganpat Tari ... Petitioner

v/s.

New Excelsior Theatre Pvt. Ltd. & Ors. ... Respondents

Mr.Ashok D. Shetty with Ritu Joshi for Petitioner

Mr.R.S. Pai with Pallavi Dedia i/b Sanjay for Respondent

CORAM: **SMT.NISHITA MHATRE, J**

JUDGEMENT RESERVED ON: **AUGUST 12, 2008**
JUDGEMENT PRONOUNCED ON: **SEPTEMBER 30, 2008**

**JUDGEMENT:**

1. The petition challenges the award in Reference (IDA) No.396 of 1992 passed by the 6th Labour Court, Maharashtra, Mumbai dated 25.10.1996. By this award, the Labour Court has directed the respondent employer to pay Rs.40,000/- as compensation to the Petitioner after concluding that the Petitioner's services were illegally terminated. He has also held that the respondent company did not prove that the Petitioner had abandoned his service.

2. The facts giving rise to the present petition are as follows:

The Petitioner who was employed with the respondent company was instrumental in formation of a union of the workers employed by the Company in 1980. A charter of demands was served on the Company in

1981. The services of 2 members of the Union committee were terminated soon thereafter. A strike was declared and the workmen demanded that the termination orders issued against the 2 employees and other temporary workmen be withdrawn. The strike was declared illegal by the Labour Court on 19.5.1981. The Respondent Company called upon the workmen to report for work. Accordingly, all the workmen reported for work on 20.5.1981. However, the 2 employees who had been removed and the 7 temporary workmen who were also removed, were not allowed to resume work. All the workmen therefore insisted that that the aforesaid workmen should be permitted to work. The workmen were informed that if they did not report for work within 48 hours from 27.5.1981, the Company would treat them as having abandoned the service. An advertisement was issued in the Times of India calling upon the workmen to report for work, else the Company would treat them as having abandoned their services. On 15.6.1981, it appears that the Company treated the petitioner as having abandoned his service. A complaint was filed on behalf of the workmen being complaint (ULP) no.482 of 1981 contending that the Company had effected a lock out by not permitting the workmen to resume work. Another complaint (ULP) No.135 of 1981 was also filed seeking certain other reliefs. Both the complaints were disposed of by a common order on 3.6.1983.

3. The Petitioner raised an industrial dispute on 25.7.1983 u/s 2A r/w 10(1)(d) of the Industrial Disputes Act. The Conciliation officer did not

intervene in the matter as required under the provisions of the I.D. Act and, therefore, the Petitioner was constrained to file Writ Petition No.2541 of 1984. This Court by an order dated 24.9.1984 set aside the order of the Conciliation Officer dated 27.4.1984 refusing to admit the matter into conciliation. The Government was directed to refer the dispute for adjudication to the Labour Court. Aggrieved by this order, an appeal was filed by the Respondent Company being Appeal No.1382 of 1987. This appeal was withdrawn by the Company in 1991. The Petitioner again approached the conciliation officer for obtaining a reference. Ultimately a Reference was made on 8.6.1992. The parties filed their pleadings before the Court. Documents were also filed by both the Petitioner and the Respondent Company. An application for payment of wages by way interim relief was filed by the Petitioner. The application was allowed on 14.10.1994. As the Presiding Officer was transferred, the petitioner obtained an order from the President of the Industrial Court transferring his Reference to another Court. Accordingly, the mater was transferred to the VI Labour Court on 6.12.1995.

4. Evidence was led by the Petitioner on merits of his case. The Respondent Company led evidence in rebuttal. Although the matter was closed for passing final award after arguments were heard on 29.2.1996, no award was passed till 17.5.1996. On this day, the Labour Court allowed the application made by the Respondent Company for cross-examining the Petitioner further. On the next date of hearing instead of

cross-examining the Petitioner, the Company filed additional documents and an application for issuance of witness summons to Digvijay Industrial Estate, Thane was also made and granted. Ultimately, the witness on behalf of the aforesaid Company appeared before the Court and his evidence was recorded on behalf of the Respondent Company. The Company then once again sought permission to adduce further evidence to prove the unverified documents which had been filed by it on 24.5.1996. This application though opposed was granted by the Labour Court. The Respondent Company then led evidence of a detective agency. Ultimately, an award was made on 25.10.1996 granting the petitioner Rs.40,000/- in lieu of reinstatement.

5. Mr.Shetty appearing for the Petitioner submits that the Labour Court has erred in granting only compensation to the workmen when it had concluded that the termination of service of the petitioner was illegal. He submits that the Labour Court has held that the workman had not abandoned his service and that his services had been illegally terminated as no domestic enquiry was held preceding the termination of service. Despite this, submits the learned counsel, the Labour Court has held that the termination was justified. He submits that if it was the case of the management that it was a termination of service on account of misconduct then it was for management to prove that misconduct before the Court and the Labour Court could not have on his own decided that the termination was justified. He submits that the workman had no knowledge that this

issue would be considered by the Labour Court when it was not one of the issues framed by it. The learned counsel also submits that there is no pleading in the written statement that the services of the workman were terminated by way of misconduct. In fact a contrary plea had been raised by the Respondent, that the workman had abandoned the services and therefore, the question of the company proving misconduct before the Court did not arise. He draws my attention to the fact that all throughout in the written statement, the Company has pleaded that letters were issued to the workmen and an advertisement in the Times of India was published calling upon them to report for duty or else they would be treated as having abandoned their services, despite which the Petitioner continued to remain absent willfully and intentionally. The learned counsel submits that the Respondent has contended that there was no termination of service by the employer and instead the severance of the contract of employment was at the instance of the workman i.e. the petitioner herein.

6. Per contra, Mr.Pai, appearing for the respondent, submits that the evidence on record was sufficient to demonstrate that the workman did not deserve to be reinstated in service. He submits that the workman continued to stay away from work although the strike declared by the workmen had been held to be illegal by the Labour Court. He points out that an advertisement had been issued in local newspapers exhorting the workmen to return on duty but the Petitioner did not heed the request made by the employer. The Respondent Company has led evidence of a

detective agency to establish that the Petitioner owned premises where he was carrying out job work. The learned advocate submits that the report of the detective agency was one given by an independent agency and, therefore, the Labour Court has rightly accepted the same. He draws my attention to the observations of the Labour Court that despite several opportunities given to the Petitioner to report for duty, he did not do so. The learned advocate submits that the Respondent Company has led sufficient evidence which has been accepted by the Labour Court to establish that the services of the workman had been terminated for participating in an illegal strike and failure to resume duties after the strike had been declared illegal. The learned advocate also points out that the workman is not is not entitled to any backwages as he was found to be gainfully employed by running a workshop of his own.

7. The question therefore is whether once the Labour Court has arrived at the conclusion that the termination of service of a workman is illegal, it can hold that the termination was justified although the management did not seek permission to prove the misconduct before the Court. The evidence on record was scanned by the Labour Court and it has concluded that there is no abandonment of service on the part of the petitioner. He has recorded that the workman had proved that his services had been terminated. No enquiry preceded the termination of service and, therefore, the Labour Court has concluded that the termination of service was illegal. Could the Labour Court in such circumstances, rely on the

evidence before it and conclude that the workman had committed a misconduct and that his services have been justifiably terminated? In my opinion, the answer is in the negative. Once the Labour Court decides that the termination of service is illegal and the respondent employer has not sought any permission to prove the misconduct, the Labour Court cannot decide suo motu whether there is a misconduct committed by the petitioner workman, especially when no issue is framed. The workman cannot be taken by surprise as the thrust of the evidence led by him would be to prove that he had not abandoned his service. The workman was not informed that he was required to defend the charge of misconduct as there is no pleading to that effect in the written statement. Besides, no chargesheet had been issued to the workman for him to be conscious of the charge levelled against him. In *Shambhunath Goyal* **(1983) 4 SCC 491**, the Supreme Court had held thus:

> The rights which the employer has in law to adduce additional evidence in a proceeding before the Labour Court or the Industrial tribunal either u/s 10 or section 33 of the Industrial Disputes Act questioning the legality of the order terminating the service must be availed by the employer by making a proper request at the time when it files its statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken.

8. This judgment in the case of *Shambhunath Goyal (supra)*, has

been approved in the judgment of the Constitutional Bench in the case of *Karnataka State Road Transport Corporation v/s. Lakshmi Devamma & Anr (supra)* by the Constitutional Bench of the Supreme Court. Justice Hegde speaking for himself and Justice Bharucha, J. (as he then was) has observed after taking into consideration the judgment in the case of *Shankar Chakravarthy v/s. Britannia Biscuits,* **(1979) 3 SCC 371** and the earlier judgments of the Supreme Court on this issue, has held that the right of a management to lead evidence before the Labour Court or the Industrial tribunal in justification of its action under consideration by such Tribunal or Court, is not a statutory right. It is a procedure laid down by the Supreme Court to avoid delay and multiplicity of proceedings. It has been observed that the direction issued in Shambhunath Goyal case (supra) that the employer can be provided an opportunity to adduce evidence before the Tribunal/Labour Court to prove the misconduct of a workman must be availed by the employer at the time when the written statement is filed. The court has observed that the procedure eliminates the delay which is likely to be caused in making a belated application which could prolong the proceedings before the Labour court/Tribunal. Justice Shivraj Patil speaking for himself and Justice Khare have concurred with this view. However, with a caveat that merely because the management has to seek leave from the Court/Tribunal to lead additional evidence in its written statement itself it should not be understood as placing fetters on the powers of the Tribunal allowing parties to lead additional evidence. Thus, the ratio in the case of Shambhunath Goyal (supra) has been reiterated in

the case of Karnataka State Road Transport Corporation (supra) which holds the field today. The learned counsel for the Respondent relied on the judgment in the case of *Divyash Pandit v/s. Management of NCCBM,* **(2005) 2 SCC 684** to contend that even if no prayer was made in the written statement for permission to lead evidence it did not place a fetter on the powers of the tribunal to permit parties to lead additional evidence including production of documents at any stage of the proceedings. However, this judgment is of no relevance to the facts and circumstances in this case as no permission at all was sought by the employer to lead evidence to prove that the Petitioner had committed a misconduct. In Divyash Pandit (supra), the employer had held an enquiry pursuant to which the workman's services were terminated. The enquiry was held to be vitiated and the management had sought permission to lead evidence to prove the charges against the workman, belatedly. It is in these circumstances that the Supreme Court has held that if the management applies to the Industrial Tribunal/Labour Court for permission to lead evidence then such permission can be granted even though it may be applied at a belated stage depending on the facts and circumstances.

9. In the present case, admittedly no permission was sought by the employer to lead evidence to prove the misconduct. This is because it was always the employer's case that the petitioner had abandoned his service and therefore, the question of seeking permission to lead evidence to prove the misconduct did not arise. The employer has led evidence in

rebuttal in the present case after the workman had stepped into the witness box to demonstrate that his services had been illegally terminated. This evidence in rebuttal is with respect to the so called misconduct committed by the workman. The witness for the Respondent Company has stated in his evidence that it was because the Petitioner had struck work that his services were terminated. The witness has also admitted that no enquiry was held against the workman nor was any retrenchment compensation or notice pay paid to the workman. In my view, the Labour Court could not have relied on such evidence without there being anything on record to indicate that the workman was made aware of the charge against him and that the employer was leading evidence to prove the misconduct against him. Therefore, the reliance placed by the Tribunal on this evidence is untenable. In the case Maharashtra State Seeds *Corporation v/s. Vilas,* **(2005) 12 SCC 422**, the Supreme Court has held that once an employer takes a specific plea that the employee had been dismissed after a domestic enquiry, it cannot raise an alternate plea that it was a termination simplicitor. Similarly, in the present case, the employer could not raise two diametrically opposite pleas: that the workman had voluntarily abandoned his service, and in the alternative, that his services had been dismissed for misconduct.

10. Several judgments have been cited by both the learned advocates in support of their contentions regarding payment of backwages. Mr.Pai has relied on the judgment in *Hombe Gowda Education Trust & anr. V/s.*

*S.C. Sharma* **2005 II LLJ 153** besides other judgments of the Supreme Court to buttress his submission that the workman had not proved that he was unemployed after his services were terminated by the Respondent Company. On the other hand, Mr.Shetty has relied on the judgment in the case of *Hindustan Tin Works Ltd. vs. Its Employees,* **1978 II LLJ 474** and others in support of his submission that it is for the employer to prove that there were sufficient reasons to deny the workman backwages. The Labour Court has held that there is a possibility that the workman was employed gainfully during his period of unemployment for 15 years. However, it is obvious from the impugned order that the Labour Court has not accepted the report of the detective agency relied on by the Respondent Company. Therefore, it is surprising that the Labour Court has held that the workman was gainfully employed. The workman in his evidence has stated that he was unemployed after 15.6.1981. He has stated that his parents have been supporting him. He has also denied that he owns a workshop or that he had any connection with the workshop shown in the photograph produced.

11. In my opinion, the Petitioner must succeed in the petition and will be entitled to reinstatement with continuity of service and consequential benefits. However, as regards the backwages payable to the workman, the matter is remanded to the Labour Court. The Labour Court will permit the

parties to lead evidence on this issue and will dispose of the Reference within a period of three months from today.

12. Rule made absolute accordingly. No costs.

13. The learned advocate for the Respondents seeks stay of the order. Stay refused.