

(1984) 09 BOM CK 0060**Bombay High Court****Case No:** Writ Petition No. 196 of 1981Municipal Corporation of Greater
Bombay

APPELLANT

Vs

Best Workers" Union and others

RESPONDENT

Date of Decision: Sept. 26, 1984**Acts Referred:**

- Bombay Industrial Relations Act, 1946 - Section 78, 79

Citation: (1984) 49 FLR 323 : (1985) 1 LLJ 327**Hon'ble Judges:** M.S. Jamdar, J**Bench:** Single Bench

Judgement

1. The only dispute that survives in this petition is about the back wages awarded by the Industrial Court and granting reinstatement to the workmen on whose behalf the 1st Respondent, the Representative Union of the employees of the BEST Undertaking filed an application under Ss. 78 & 79 of the Bombay Industrial Relations Act challenging the action of the petitioner is dismissing one Banshi Bhajanram for misconduct under Standing Order 20(1) for rash and negligent driving.

2. Banshi Bhajanram was proceeded against by the Management for the aforesaid misconduct for causing an accident by driving Special Bus No. 833 in rash negligent manner and causing in that process injuries to seven members of the staff, who were travelling in the said bus. On the report of the Inquiry Officer Banshi Bhajanram was dismissed on 24th August, 1976. He filed two appeals to the General Manager and after his second appeal was dismissed on 12th November, 1976 the 1st Respondent gave a notice to the management calling upon it to withdraw the illegal charge. As the Petitioner did not respond the Union preferred the aforesaid application to the Labour Court for quashing the order of dismissal and for reinstatement with back wages of the concerned employee.

3. The Labour Court held that the inquiry was fair, legal and proper and that the action of the management in dismissing the employee was legal, but converted the punishment of dismissal from service into discharge on the ground that the punishment was unduly harsh. As the reinstatement was not granted, the first respondent preferred an appeal to the Industrial Court. The learned President of the Industrial Court set aside the order of the Labour Court on the ground that the finding recorded by the Inquiry Officer was patently perverse, declared that the order of dismissal was bad and directed the petitioner to reinstate the workmen with back wages within one month from the date of the order, which was passed on 7th November, 1980. Being aggrieved by this order the Petitioner filed this petition but Rule was granted only so far as back wages are concerned and on the question of reinstatement the petition was rejected in limine by the order passed by the Court on 2nd March, 1981.

4. The order relating to back wages is sought to be challenged on two grounds. Firstly, it is contended that as no issue about back wages was framed either by the Labour Court or by the Industrial Court, the award relating to back wages stands vitiated. Shri. Shetye, learned Advocate for the Petitioner also urged that as the relief of back wages involves consideration of several question of facts. such as gainful employment of the workmen during pendency of the dispute delay in making the claim, delay in completing the proceedings etc., it was incumbent on the Industrial Court either to hold an inquiry into all these relevant aspects of the matter or to have remitted the matter back to the Labour Court for inquiry.

5. In support of the first submission Shri. Shetye sought to place reliance on the Division Bench decision of this Court in the case between [Sadanand Patamkar Vs. New Prabhat Silk Mills](#), In that case the Labour Court upheld the order of dismissal passed by the management but in appeal preferred by the workmen to the Industrial Court the said order was set aside and the workman was awarded relief of reinstatement but without back wages. The Management preferred a Writ Petition to this Court challenging the order of reinstatement, while the workmen preferred Cross-petition claiming back wages for the period between the date of dismissal and the date of the order of the Industrial Court. The Industrial Court refused to grant back wages on the ground that the workman failed to discharge the burden of proving that he was in gainful employment during that period. In that context the learned Judges of this Court held that it was the duty of the Industrial Adjudicator himself to frame necessary points for determination in each and every case and allow the parties to lead evidence with regard to it and to contest the same as in the case of other points of adjudication. Observing that it was unfair either to insist or to expect that the employee should raise relevant points, Sawant, J., who spoke for the Court observed further as follows in Para. 27 of the judgment. [Sadanand Patamkar Vs. New Prabhat Silk Mills](#),

"A failure to do so will, according to us, be tantamount to failure to exercise jurisdiction and an order either granting or refusing back wages in the absence of such determination will be void being an improper exercise of jurisdiction."

6. In the case between [Shambhu Nath Goyal Vs. Bank of Baroda and Others](#), the Supreme Court was not prepared to blame the Tribunal alone for not framing an issue on the question whether or not the workman was gainfully employed in the intervening period. In that case while opposing the prayer for back wages the management had contended in its written statement of defence before the Tribunal to whom the dispute was referred that it is a well established rule that the workman should do his best for minimising damages by seeking service elsewhere and as there was nothing in the workman's claims statement to suggest that he remained unemployed during the intervening period the workman's demand for back wages cannot be considered by the Tribunal. The Tribunal held that the dismissal was not justified and the workman was ordered to be reinstated with full back wages. In the writ petition filed by the Management the learned single Judge of the High Court quashed the award and remitted the matter back to the Tribunal inter-alia holding that the Tribunal should have framed an issue on the basis of the contentions raised by the management in respect of the claim for back wages.

7. In an appeal preferred by the management their Lordships observed as follows, on the question of failure of the Tribunal to frame an issue about back wages, in para. 13 of the judgment referred to in [Shambhu Nath Goyal Vs. Bank of Baroda and Others](#),

"The blame for not framing an issue on the question whether or not the workman was gainfully employed in the intervening period cannot be laid on the Tribunal alone. It was equally the duty of the management to have got that issue framed by the Tribunal and adduce the necessary evidence unless the object was to take up that question at some later stage to the disadvantage of the workman as in fact it has been done. The management appears to have come forward with the grievance for the first time only in the High Court. There is no material on record to show that the workman was gainfully employed anywhere. The management has not furnished any particulars in this regard even before this Court after such a long lapse of time. The workman would have been asked to furnish the necessary information at the earlier stage. The Management has not resorted to this course. The workman was not expected to prove the negative."

In the present case also, the grievance about not framing an issue about back wages was made for the first time in this Court and that too at the time of argument without taking any specific contention in that behalf in the petition itself. Apart from that, no question of framing an issue about back wages arose because the management did not seek either in the Labour Court or before the Industrial Court, to oppose the claim for back wages on any ground whatsoever. The only contention urged was that as the employee was not entitled to reinstatement, he was not

entitled to back wages also. There is, therefore, no substance in the contention that the Industrial Court was wrong in awarding back wages on the basis of a strait-jacket formula. It is well settled that full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. Ordinarily, therefore, the workman, whose service has been illegally terminated, would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. It is pertinent to note that the petitioner did not contend in its written statement filed before the Labour Court that the workman was gainfully employed. There is nothing to show that such a contention was taken before the Industrial Court. No affidavit is filed on behalf of the petitioner even till this date that the workman was gainfully employed any time during the relevant period. It was for the petitioner to allege and prove this circumstance. The workman was not expected to aver and prove the negative.

8. It was sought to be urged on behalf of the petitioner that there was inordinate delay in challenging the order of dismissal and hence the workmen would not be entitled to get back wages. On the facts of this case, this contention is nothing but frivolous. The dismissal order was passed on 25th August, 1976. The workman thereafter preferred two appeals to the General Manager and the Second appeal was dismissed on 12th November, 1976. The approach notice was given on 15th February, 1977 and the application was filed in the Labour Court on 28th March, 1977. There was thus no delay, much less, inordinate, in challenging the order of dismissal.

9. It was next urged by Shri. Shetye for the petitioner that as seven staff members were injured in the accident, there was no justification in awarding the back wages to the workmen who was responsible for the accident. It is, however, pertinent to note that the Industrial Court, while allowing the appeal filed by the Respondent - Union, has held and quite rightly that the finding of the Inquiry Officer that the workman Bansi Bhajanram was responsible for the accident, was perverse. The Industrial Court also held that the workman was not at all responsible for the accident. Moreover, as observed above the Management never contended that the workman was not entitled to back wages on account of delay in making the claim or in view of the injuries sustained by seven members of the staff. There is, therefore, no scope for departing from the normal rule that the back wages must follow reinstatement. The petition, therefore, fails and deserves to be dismissed.

10. Petition dismissed with costs. Rule discharged.