

(1977) 12 GUJ CK 0008
In the Gujarat High Court
Case No : Appeal (IC) No. 43 of 1977

Ahmedabad Advance Mills Co. Ltd.

APPELLANT

Vs

Sundarbhai Budhabhai

RESPONDENT

Date of Decision : 07-12-1977

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 35, 35(1), 84

Citation : (1978) 1 LLJ 460

Hon'ble Judges : M.U. Shah, J

Bench : Single Bench

Judgement

1. This is an employer's appeal made under S. 84 of the Bombay Industrial Relations Act, 1946, (Bombay Act No. XI of 1947), against the

decision, dated 19th October, 1977, made by Shri R. S. Shukla, learned Judge of the Second Labour Court at Ahmedabad, in Original

Application No. 696 of 1976 of his Court. The application was made by the employee named, Shri Sundarbhai Budhabhai, seeking a declaration

that the act of the mill-company in deleting his name from the muster roll and thereby terminating his services was illegal, unjust, improper and

asking for an order of reinstatement in original service with full back wages.

2. It appears that the applicant-employee was serving in the mill-company in S. No. 11 in the third shift of the weaving department since the year

1967 and was a permanent operative. He was working on looms No. 835 to 838. He had got his privilege leave from 8th October, 1975 to 12th

October, 1975 and the mill-company had accordingly granted him leave pass (Exhibit 10) for the said period. He was to report for duty at the mill

gate on 13th October, 1975. However, on 13th October, 1975, he was arrested by the police on the charge of murder and was detained in

Sabarmati jail, for a trial on the murder charge. He was acquitted of the charge and was released from the jail. After his released from the jail, he reported for duty at the mill gate on 26th March, 1976, and saw the acting manager, Shri Joshi, at the suggestion of the concerned offer of the mill, but he was told that no earned leave could be sanctioned by the mill-company in respect of any workmen for going to the jail. He was told that his name was struck off the muster roll for his absence. These facts are not in dispute. It is common ground that the employee was on earned leave which was sanctioned and could not report for duty on the expiry of his leave, because he was confined to Sabarmati jail on a charge of murder and had to remain in jail till he was acquitted of the charge and released from the jail custody. It is also common ground that he was marked absent in the muster roll of the mill-company and his name was struck off the roll by the mill-company on 25th March, 1976. It is not disputed that he had reported for work after his release, although the date of reporting, according to the employee, was 26th March, 1976, and, according to the acting manager, Shri Madhusudan Joshi, (Exhibit 16), the employee had not seen him before April, 1976, and had seen him in April, 1976. It is not material whether the employee had reported for duty on 26th March, 1976, or in early April, 1976, because, even according to the company the employee's name was struck off the muster roll on 25th March, 1976. The mill-company had produced the muster roll for the relevant period which shows the name of the employee at serial No. 165 and it shows that he was marked absent till 24th of March, 1976, and his name was then cancelled. But as this muster roll was produced after the arguments on behalf of the employee were over in the lower Court and as Shri Jyotikar appearing for the employee had objected to its being exhibited, the muster roll has not been exhibited and I am not, therefore, taking the entries therein into consideration for the purpose of deciding this appeal. But, the fact remains that according to the mill management, the name of the employee was struck off the muster role on 25th March, 1976, and the mill-management did not hold any enquiry before striking off the name. The learned Labour Judge has taken the view that it was necessary for the employer to hold some sort of enquiry before acting against operative under Standing Order No. 11(4) of the Standing Order as finally settled for operatives in cotton textile mills (Ahmedabad), which have come into force

on and from the 1st day of August, 1973, vide "'A Hand Book of Standing Orders, complied by Vakil and Rana at p. 137). He has held that no enquiry was held. In his opinion, in the matter of overstaying of leave, the employer was not entitled to justify its action by leading evidence before the Court. Even otherwise, according to him, no purpose would have been served by giving any opportunity to the mill-company, as there was no show-cause notice issued or discharge order given in writing. He had thus not granted permission to the mill-company to lead evidence before the Court to justify that act of striking off the name of the employee from the muster roll and thus, terminating his services. In this view of the matter, the learned Labour Judge has in the penultimate para of his judgment (para 30) held that the sanction of the mill company in striking off the name of the employee from the muster roll and thereby terminating his services orally, was illegal, improper and unjust. The learned Judge has directed the mill-company to reinstate the employee on his original post with full back wages from the date of striking off the name of the employee from the muster roll till the date of his reinstatement. It is against this decision that the present appeal is directed.

3. Shri D. C. Gandhi, learned advocate appearing on behalf of the appellant has contended before me that the action of the mill-company in striking off the name of the respondent-employee from the muster roll, was not an act of termination of service, nor was it an act of discharge or dismissal, and no written order was required and Standing Order 25, which required a written order to be passed, was, therefore, not attracted. He contended that the act of striking off the name of the employee from the muster roll, was because of the overstaying of leave by the employee, who had remained absent beyond the period of leave originally granted to him and because he did not report for work for a period of 3 months from the date of leave originally granted to him and, therefore, as provided by clause (4)(a) of the Standing Order 11, the employee was deemed to have left services voluntarily. In Shri Gandhi's submission, it was a simple act of the employee having left the services voluntarily by virtue of operation of clause (4)(a) of Standing Order 11, which reads;

If the operative remains absent beyond the period of leave originally granted to him or subsequently extended and does not report for work for a

period of 3 months from the date of leave originally granted to him or subsequently extended, he shall be deemed to have left services voluntarily"".

Shri Gandhi contended that this was not a case of misconduct on the part of the employee and clause (f) of Standing Order No. 21, which

provided that absence without leave for more than 14 consecutive days, shall be treated as misconduct, was not attracted in the case, Shri

Gandhi's anxiety was to see that the mill-company is not saddled with the responsibility of an act of overstayal of leave by an employee although it

might have been necessitated by an involuntary act of an employee.

4. Shri Timothy Jyotikar appearing for the respondent-employee, supported the judgment of the trial Court and contended that the employee was

absent for reasons beyond his control and that before striking off the name of the employee from the muster roll, the employer should have

instituted a sort of enquiry in the matter and as this was not done, the order striking off the name of the employee from the muster roll, was illegal.

He contended that the words ""shall be"" occurring in clause (4)(a) of the Standing Order 11, which provides that in the stated contingency,

..... he shall be deemed to have left services voluntarily"", must mean, ""may"" and there was no absolute right of the employer to delete or

strike off the name of the employee from the muster roll without holding some sort of enquiry, and the management had a discretion to exercise, as

was held by the Division Bench of the High Court in Special Civil Application No. 8 of 1976, decided on 5th February, 1976, while interpreting

Standing Order No. 13(4), which bore analogy to Standing Order No. 12(6) and which is referred to in para (3) of my judgment in Appeal (IC)

No. 41 of 1976, (decision published in 1976, Gujarat Government Gazette, Part I-L, pp. 4447 to 4454, Remarks at 4453), Shri Jyotikar further

contended that the Standing Order No. 11(4) of the 1973 Standing Orders, is ultra vires of the powers of the competent authority to frame and

certify the Standing Orders, having regard to S. 35(1) of the Act, read with Schedule I, Item No. 6, as amended by G.N., D.D. No. 1237/46,

dated 23rd October, 1952. He, lastly, contended that, in any event, the employee was entitled to be kept on the badli list as provided by the

original Standing Order No. 11, which applied to Ahmedabad and others (vide Shri P. D. Patwari's Bombay Industrial Relations Act, Vol. II, pp.

410 to 411).

5. Now, as aforesaid, the relevant facts are not in dispute. The respondent (employee) was a permanent operative in the appellant-mill-company

and was working on looms Nos. 835 to 838 in Section 11 in the third shift of the weaving department since the year 1967. He was granted

privilege leave from 8th October, 1975, to 12th October, 1975 and leave pass (Exhibit 10) was issued by the departmental head for the purpose.

He was to report for duty on 13th October, 1975, but he was taken in police custody on 13th October, 1975, on an alleged charge of murder and

was confined in jail custody in the Sabarmati jail in Ahmedabad ever since. He was acquitted of the charge of murder and was released from jail in

March, 1976. He was marked absent in the muster roll of the mill-company till 24th March, 1976, and his name which was at Serial No. 165 in

the register, was struck off the muster roll on 25th March, 1976. He had reported for duty after his release from the jail may be on the 26th March,

1976, as stated by the employee or may be in early April, 1976 as stated by the acting manager of the mill, who is not very sure about the date.

Thus, whatever be the date of his reporting for duty, his name was struck off the roll on 25th March, 1976, and he had reported for duty

immediately after his release from the jail.

6. The parties are governed by the standing orders as finally settled for operatives in cotton textile mills (in Ahmedabad) which have come into

force on and from the 1st day of August, 1973. The mill-company has invoked clause (4) of Standing Order No. 11 in support of the mill's action

in striking off the name of the employee from the mill's register and for not allowing him to join duty on his release from jail. Now, Standing Order

No. 11(4) consists of three cls. (a), (b) and (c). The Standing Order reads :

.....

(4) (a) If the operative remains absent beyond the period of leave originally granted to him or subsequently extended and does not report for work

for a period of 3 months from the date of the leave originally granted to him or subsequently extended, he shall be deemed to have left services

voluntarily".

(b) If the operative remains absent beyond the period of leave originally granted to him or subsequently extended but returns within 30 days thereof

and gives an explanation to the satisfaction of the authorities granting leave of his inability to return before the expiry of leave and the period of his

subsequent absence, he shall be entitled to be put back on his original post with continuous service.

(c) An operative who remains absent beyond the period of leave originally granted to him or subsequently extended returns within 30 days but

does not give an explanation to the satisfaction of the authority granting leave of his inability to return before the expiry of leave and the subsequent

period of his absence or an operative who does not return within 30 days beyond the period of leave originally granted to him or subsequently

extended, but returns within three months thereof, shall only be entitled to be put on the badli list in accordance with his original seniority after the

senior-most badli is entitled to be made permanent in his vacant post. His services will be treated as continuous"".

7. Assuming for the present purpose of deciding this appeal that Standing Order No. 11(4) is intra vires of the powers of the certifying authority

which has certified the standing order for the present purpose, it is clear that the said clause (4) of the standing order makes provisions for an

operative overstaying his leave period, and not reporting for work for a period of 3 months. Clause (4)(a) provides that the employee who has

been granted leave, or whose leave is subsequently extended, remains absent beyond the period of such leave, and does not report for work for a

period of 3 months from such leave, he shall be deemed to have left services voluntarily. Clause (4)(a) thus, deals with a case of an employee who

has been granted leave and does not report for work for a period of three months and thus remains absent voluntarily. Even in such a case, there

must be a sort of an enquiry held for absence may be for a reason which can be sufficiently explained and which may be for a sufficient cause. As

held by a Division Bench of the High Court of Gujarat, while dealing with Standing Order No. 13(4) the question was of discretion to be exercised

by the management and some sort of inquiry was implicit as part of the discretion conferred by the standing order. Standing Order 13(4), which

was considered by the High Court bore analogy to the Standing Order 12(6), which governed the relations between the Petlad Tulshidas Mills Co.

Ltd., Petlad and the operatives of the mill, which provided that :

..... An operative not reporting for duty within twenty-one days of the expiry of his leave shall be treated as having left service from the date on which he was due to return to work"" (p. 4451).

The standing order has been set out in my decision in Appeal (IC) No. 41 of 1976 published in 1976 Gujarat Government Gazette, Part I-L, p.

4447 at pp. 4450 and 4451. Standing Order 13(4) which was the subject-matter of interpretation before the High Court of Gujarat in the Special

Civil Application No. 8 of 1976, which is to be found in para (3) of the decision of the High Court, reads as under :

13(4). A workman remaining absent beyond the period of leave originally granted or subsequently extended shall be liable to lose his lien on his

appointment unless he returns within eight days of the expiry of the sanctioned leave and explains to the satisfaction of the authority granting leave

his ability to resume his duty immediately on expiry of his leave. A workman who loses his lien under the provisions of this standing order but

report for duty within fifteen days of the expiry of leave (1) shall be kept as badli if he so desires, and his name shall thereupon be entered in the

badli register, and (ii) if no badlies are employed, his name shall be kept on a waiting list of person to be given preference for employment as and

when suitable vacancies occur"".

The High Court has therein observed as under in para (6) :

..... When this standing order in question has been framed with a view to confer some sort of benefit on an erring workman, it would be

wholly out of tune with the spirit behind industrial law to hold that the standing order in spite of use of the word "liable" is intended to bring about

an automatic loss of lien on the appointment that is, an automatic termination of service. It is, therefore, not possible to agree with the submission

that the standing order in question brings about an automatic termination of service Having found that the wording of Standing Order

No. 13(4) does not create an absolute liability and vests a sort of discretion in the employer to enforce the liability in a given case, the next question

which we must consider is whether some sort of enquiry in such a case in which the concerned workman would be able to explain the reason for

his inability to return to duty after the expiry of the leave, if contemplated for the purpose of exercise of the discretion to terminate the lien under the

standing order in question. Now, if the liability of loss of lien has to be enforced by some overt act, as observed above, the matter falls within the discretion of the employer; and it is obvious that this discretion has to be exercised honestly and in a genuine manner and not capriciously or arbitrarily. In the nature of things, therefore, some sort of enquiry which would give the concerned workman an opportunity to explain the reason for his inability to resume his duty after the expiry of the prescribed period of 8 days and to substantiate the same, is implicit in the provisions of this standing order. The inquiry may not be a detailed or a regular enquiry which would be resorted to for the purpose of inflicting a punishment of dismissal or discharge from service. All the same, fairness, principles of natural justice and industrial peace all required that the workman must have an opportunity to explain to the employer his inability to return on duty within the prescribed period and to substantiate the explanation by whatever evidence is available to him. When this opportunity is given to the workman, the employer will have material before him including the material which may be available in his files on the basis of which he can exercise his discretion honestly and in a genuine manner as every good employer should. We hold that such sort of enquiry after giving notice to the workman is implicit as part of the discretion conferred by Standing Order No. 13(4) on the employer".

8. Considering the scheme of Standing Order 11(4), in cls. (a), (b) and (c) as a whole, it is clear that although the words, "liable to lose service", are not inserted in the standing order, the meaning is the same and the word "shall", occurring in clause (a) of Standing Order 11(4) in the last line, must be read as, "may", because the liability of the employee to be considered as having left service, has to be considered on an application of mind by the employer to the relevant facts. Even according to Shri Gandhi the act of the employee in not reporting for duty within 3 months, was an over act. Thus, the question of over act was to be considered and decided by the mill-management before striking off the name of the employee from the muster roll and this would involve the question of liability.

9. Now, if an enquiry had been made in the instant case, it would have revealed that the absence of the employee during the period prior to his reporting for duty was not with an intention to leave service voluntarily. But, it

was an enforced absence for reasons beyond his control as he was a prisoner detained in Sabarmati jail on an alleged charge of murder which he was subsequently acquitted. It was not culpable negligence or absenteeism without any justifying case and repelled the presumption, if any of having left service voluntarily. That is the reason why a sort of an enquiry ought to have been held before striking off his name from the muster roll. Absence of any enquiry before striking off the name from the rolls which act amounts to termination of service, thus vitiated the act as being against principles of natural justice and against the requirement of a show-cause notice and holding of a domestic inquiry before termination of service. The act of striking off the name of the employee from the muster roll must, therefore, be struck down as being illegal. As aforesaid, it has been revealed during the course of the proceedings in the lower Court that indisputably his absence was an enforced absence and did not amount to an intention to leave service voluntarily and was not overstay of leave. Thus, no useful purpose would be served by remanding the matter to the trial Court to enable the mills-company to justify the ex facie, there is no justification.

10. The absence of the employee did not amount to his intention to leave service voluntarily and thus Standing Order 11(4) was not attracted. The enforced absence would not even amount to absence without leave for more than 14 consecutive days which is a misconduct within the purview of clause (e) of Standing Order 21. It is not the case of the mills-company either that it was an act of misconduct. However, assuming it to be so, an enquiry was necessary before terminating the service and in such a view also, the mills-company's act of striking of name of the employee from the muster roll was illegal. As aforesaid, no justification is now possible and no opportunity was required to be given to the mills-company in the matter. A sort of enquiry was thus required to be held even when an employee remained absent beyond the period of leave granted or extended and did not report for work for a period of 3 months from the date of such leave. It was a question to be decided on the facts of the case whether by such absence the employee was deemed to have left services voluntarily. As held by the High Court of Gujarat, some sort of enquiry was necessary.

11. Even if a view is taken that the presumption in a case is envisaged under clause (a) of Standing Order 11(4) arises, namely, that the employee had left the service voluntarily, the presumption is in the nature of "may presume" and not "shall presume". The presumption is rebuttable. There may be good reason justifying the absence beyond the period of 3 months and this may lead to an inference that the employee had not left the service voluntarily. An involuntary act of an employee or abstention beyond the period of leave and failure to report for work within a period of 3 months, does not necessarily call for an act on the part of the mill-company to strike off the name of the employee from the muster roll. The mill-company was not justified in raising an irrebutable presumption in this case. It had to examine the case and before striking off the name of the employee from the muster roll, it should have held a sort of enquiry and called for an explanation from the employee in the matter. No such procedure having been followed, the impugned act of striking off the name of the employee from the muster roll, must be held to have been illegal and the order cannot be sustained. It may be argued that in a given case the mill-management can justify the action by leading evidence and the management should be given an opportunity to justify its action, as is the view taken by the Supreme Court in *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, . It is true that in the instant case the mill-company had asked for such an opportunity before the trial Court. In the event of the Court taking the view that the impugned action of the mill was illegal. But that would have been an empty formality for the simple reason that there was no justification at all and, moreover, because the facts were not in dispute. The facts were that the absence of the employee for a period beyond his sanctioned leave and beyond the period of 3 months was not a voluntary act. Indisputably, the employee was in jail custody under a charge of alleged murder, of which he was acquitted in March, 1976, and thereafter he had reported for duty. There was thus no justification for striking off the name of the employee and the learned trial Judge was right in taking such a view.

12. It may here be stated that even in cases of overstay of leave, the liability on the employee is that his application should be received by the management well in advance of the expiry of the period of leave, so that the management may be able to take a decision whether the extension

should be granted or not and also be in a position to communicate to the employee before his leave expires, so that he may be able to join his duty

in time. There is also a corresponding liability to dispose of all such applications of leave expeditiously. The overstayal of leave does not involve the

same degree of culpability. In case of overstay, the employee has to explain why he did not apply and whether the reasons for his absence were

compelling. If he had failed to apply for leave, that is irregular on his part. However, when there are compelling reasons for his absence, the failure

to apply is technically a misconduct involving breach of the rules of service, but it may not deserve a serious punishment of dismissal.

13. Again, in my opinion, this was not a case of overstayal of leave. The employee was on earned leave and his absence from work from the

beginning after the expiry of the period of leave, was an enforced absence an involuntary act on the part of the employee. As aforesaid, he was

taken to jail custody on 13th October, 1975, the day on which he was to report on duty in the mills and was confined in jail till March, 1976. The

absence of the employee from the duty was thus not voluntary, but was an enforced absence, or absence for reasons beyond his control. This

could not be said to be overstayal of leave. Overstayal presuppose a voluntary act may before justifying reason of the employee for remaining

absent for a period beyond the sanctioned leave. An enforced absence for reasons beyond the control of the employee, cannot be considered to

be overstayal of leave. In his view of the matter also clause (4) of Standing Order No. 11, cannot be attracted. Now, the order striking off the

name of the employee from the muster roll by the management, is termination of his service, as held by the Supreme Court in Delhi Cloth and

General Mills Ltd. v. Shambhu Nath Mukherjee and others, decided on 3rd October, 1977, in Civil Appeal No. 1903 of 1970 (per Goswami, J.)

(to be found in ""The unreported judgment) (Supreme Court), 1977 published by The unreported judgment, High Court Road, Jodhpur (Raj), in

the issue of November 10, 1977, at pp. 673 to 677 Remarks at p. 677), wherein the Supreme Court has observed as under :

Striking off the name of the workman from the rolls by the management is a termination of his service. Such termination of service is retrenchment

within the meaning of S. 2(OO) of the Act. There is nothing to show that the provisions of Ss. 25F (a) and (b) were complied with by the

management in this case. The provisions of S. 25F(a), the proviso apart, and (b) are mandatory and any order of retrenchment, in violation of

these two peremptory conditions precedent, is invalid"" (para 15, p. 677)

In this view of the matter also, the impugned action of the mill-management in striking off the name of the employee from the muster roll, must be

held to be illegal. This is irrespective of the fact whether a written order is required to be made, as provided in Standing Order 25, as was sought

to be contended by Shri Jyotikar. As observed by me earlier, there was no question of giving an opportunity to the management to justify the

action, as that would have been an empty formality, having regard to the indisputable fact that the absence of the employee was an enforced or an

involuntary act.

14. The result would be that the employee must be deemed to have continued in service, although he would not be entitled to any wages for the

period of his enforced leave, because that was not occasioned by any involuntary act of mill-management. His detention in the prison was not or

any act connected with the mill-management. The ultimate order of the trial Court directing reinstatement of the employee with continuity of service

and back wages from the date of striking of the name of the employee from the muster roll, is thus liable to be upheld even on the considerations

made in this para of the judgment.

15. This takes me to the last and alternative contention urged by Shri Jyotikar on behalf of the respondent-employee. He raised a neat and

substantial question of law, although for the first time in this appeal and the question raised was that Standing Order 11(4) was ultra vires the

powers conferred on the competent authority under S. 35 of the Act, read with Schedule I and Item No. 6 of the Bombay Industrial Relations Act,

1946. In Shri Jyotikar's submission the standing order can be framed only for providing procedure and authority to grant leave and could not

provide conditions for leave, having regard to the amended Item No. 6 in Schedule I. Shri Gandhi for the appellant-mill had disputed the

proposition and contended that the expression, ""Procedure and authority to grant leave"", which is Item No. 6 of Schedule I, to be read with S. 35

of the Act, included question of overstayal of leave and the conditions of being continued in service. He contended that as the employee had

remained absent for more than 3 months, he was deemed to have voluntarily left the service. In Shri Gandhi's submission, it was remaining absent for more than 3 months, and not reporting for duty as provided in Standing Order (4)(a) that was an overt act of the employee entitling the mill-company to draw a conclusive presumption that the employee had left the service voluntarily. Having regard to the view which I am inclined to take in this appeal that the impugned order of the mill-management in striking off the name of the employee from the muster roll was illegal, and that he is entitled to be treated as being continued in service he is entitled to an order of reinstatement with back wages, as stated. I do not consider it necessary for me to go into the merits of the rival contentions about the vires of Item No. 6 of Schedule I, read with S. 35 of the Bombay Industrial Relations Act, 1946.

16. In my opinion, this was not a case of overstayal of leave. It was a case of enforced absence of an employee from duty, for reasons beyond his control. The absence was justifiable. The mill-management should have taken this fact into consideration. In absence of any such consideration, it has no reason to draw a conclusive presumption of the employee having voluntarily left his service. In the instant case, there was no question of granting any opportunity to the mill-management to justify its action of striking off the name of the employee from the muster roll and thus terminating his service, for the simple reason that it was common ground that his absence from duty was an enforced one because of his confinement in Sabarmati jail on a charge of alleged murder of which he was subsequently acquitted and that on his release he had reported for duty before the mill-management. Even apart from the position of law whether some sort of enquiry was necessary to be gone into, I must hold that the action of the mill-management in striking off the name of the employee from the muster roll, was illegal, arbitrary and not bona fide. The resultant effect is that the employee is entitled to be considered as continuing in service all throughout, but he would not be entitled to draw the wages for the period of his enforced absence.

17. In the result, I must uphold the ultimate order passed by the learned trial Judge, directing reinstatement of the employee with continuity of service and with back wages from the date on which his name was struck off

from the muster roll by the mill-company.

18. The appeal thus fails and is dismissed with costs. The appellant-mill to pay the costs of the respondent which is quantified as Rs. 250 having regard to the fact that the hearing of this appeal has gone on for three days.