

(1992) 03 BOM CK 0086

In the Bombay High Court

Case No : A. No. 952 of 1989 in Writ Petition No. 2286 of 1989

Ashok Vishnu Kate and Others

APPELLANT

Vs

M.R. Bhope and Another

RESPONDENT

Date of Decision : 06-03-1992

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28, 30

Citation : (1992) 3 BomCR 352 : (1992) 94 BOMLR 185 : (1993) 3 LLJ 304

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Advocate : S.J. Deshmukh and N.M. Ganguli, for the Appellant; M.H. Doshi, instructed by Salgaonkar for R.2, for the Respondent

Final Decision : Allowed

Judgement

Pendse, J.—The question which falls for determination in this appeal is whether the Labour Court can entertain complaint of an employee under Item 1 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to "as the Act") before the employer had discharged or dismissed the employee. The question requires critical evaluation as the issue arises in large number of complaints pending before the Labour Courts. The facts which gave rise to filing of the appeal are required to be briefly stated to appreciate the circumstances in which the issue arises.

2. Appellant No. 1 is employed by Respondent No. 2 Company and the appellant is a member of the Maharashtra General Kamgar Union. The Company served charge-sheet upon Appellant No. 1 to show cause why the appellant should not be dismissed from employment for certain misconduct. Appellant No. 1 instituted Complaint (ULP) No. 90 of 1989 before the Presiding Officer, 1st Labour Court at Bombay alleging that Respondent No. 2 is engaged in commission of unfair labour practice under Item No. 1 of Schedule IV of the Act. Appellant No. 1

complained that in pursuance of the show cause notice inquiry is conducted in utter disregard to the principles of natural justice. Appellant No. 1 claimed that the proceedings for dismissal are commenced by the Company not only against Appellant No. 1 but against 40 other members of the Union and the action amounts to victimisation. Appellant No. 1 claimed that the Company is out to victimise the employees on account of their loyalty to the Union and for refusal to join another union which is sponsored by the management. Appellant No. 1 apprehended that his service would be terminated and therefore complaint in accordance with Section 28(1) of the Act. Appellant No. 1 also sought Interim relief in accordance with Sub-section (2) of Section 30 the Act restricting the management from continuing with the unfair labour practice complained of. Similar complaints were also filed by Appellants No. 2 to 9 before the Labour Court.

The Management filed written statement and resisted the complaint, by claiming that the complaint is not maintainable and the jurisdiction of the Labour Court cannot be invoked under Item No. 1 of Schedule IV of the Act as long as the proceedings commenced by the management are not terminated by an order of discharge or dismissal of the employee. The management also resisted the complaint on merits. The Labour Court by order dated August 10, 1989 upheld the preliminary objection about the maintainability of the complaint holding that the 5 complaint under Item No. 1 of Schedule IV of the Act cannot be entertained by the Labour Court until the management has passed order of discharge or dismissal against the employee. The Labour Court proceeded to uphold the preliminary objection in view of the decision of a single Judge sitting at Nagpur and reported in 1989 2 CLR 132, Divisional Commissioner, M.S.R.T.C., Wardha v. Presiding Officer, Industrial Court of Maharashtra, Nagpur and Anr. The complaints filed by the other appellants also met with the same fate. The appellants thereupon preferred Writ Petition No. 2286 of 1989 on the Original Side of this Court under Article 226 of the Constitution of India, but the petition was summarily dismissed by the learned single Judge on August 21, 1989 in view of the decision referred hereinabove. The order of summary rejection has given rise to filing of the present appeal.

3. Before advertng to the relevant provisions of the Act and the contentions raised during hearing, it is necessary to refer to the circumstances which led to passing of the Act. The Government of Maharashtra recognised that the development of strong, independent and responsible unions and an orderly, rational environment free from unfair labour practices are the two pre-requisites of effective collective bargaining. There was no effective legislation providing for recognition of representative trade unions as exclusive bargaining agent except the Bombay Industrial Relations Act, 1946, which applied only to a few industries. There was also no systematic law to determine and penalise unfair labour practices. The Government of Maharashtra therefore in February 1968 appointed a Tripartite Committee under the Chairmanship of the President, Industrial Court, Bombay, for defining the activities on the part of the employers

and workers and their organisations which should be treated as unfair labour practice and for suggesting action which should be taken against employers or workers or, as the case may be, their organisations for engaging in such unfair labour practices. The Committee after detailed deliberations submitted an unanimous report to the State Government. The Committee noticed that the concept of unfair labour practice arose after a long drawn out struggle waged by the trade unions in the West For establishing and establishing the practice of collective bargaining. The emergency of the practice of collective bargaining marks a distinct mile-stone in the progress of the trade union movement. The rise of the practice of collective bargaining has played an extremely important role in the history of industrial relations. In United States of America after great economic depression of nineteen thirties, the need for specific legislative protection was felt and this need was translated into definite and clear-cut legislative provisions. The provisions intended to remove the hurdles in the way of collective bargaining were summed up in the phrase "unfair labour practices". Unfair Labour Practices were spot-lighted and the United States Congress proceeded to pass a comprehensive enactment known as National Labour Relations Act, 1935, which is popularly known as "the Wagner Act". Subsequently the Congress passed a legislation known as "Labour Management Relations Act, 1947", popularly called the "Taft-Hartley Act". This legislation made detailed provisions listing the unfair labour practices. Since Independence the Government of India is playing an important role in the shaping of industrial relations in the country. Though several legislations dealing with the Industrial disputes were enacted, these legislations did not deal with the issue of unfair labour practice. Certain general principles of discipline in the industry were agreed upon by the participants at the 15th Indian Labour Conference and a Tripartite Sub-committee was created to study additional questions and develop the materials in the form of a Code. This effort also did not succeed because the Code was merely based on moral sanctions and lacked legislative teeth. The Committee noticed that in India the system of designating a representative union as a sole bargaining agent has not been legally accepted, existing in some State legislations, notably the Bombay Industrial Relations Act. The expression "unfair labour practice" has not been used in this country to mean certain activities connected with collective bargaining and in particular, activities calculated to hinder the smooth passage of discovering the collective bargaining agent. The expression is loosely used in decisions of the Industrial Tribunals, Labour Appellate Tribunals, High Courts and the Supreme Court, and refers to unjust, dismissals unmerited promotions, partiality towards one" set of workers and every form of victimization. The Committee defined which activities on the part of the employers and the workers and their organisations should be treated as unfair labour practice by furnishing separate lists. The Committee was conscious "that it is difficult to define the expression unfair labour practice" and the list could not be exhaustive. The law relating to unfair labour practice in India as gathered from the decisions of the Tribunals and Courts, indicates that it has grown out of the exigencies of the situation and circumstances in specific cases.

The Committee felt that to systematic the law relating to unfair labour practice is necessary in the context of the conditions prevailing in this country. Though the expression "unfair labour practice" could not be defined with logical precision for the simple reason that it covers a large category of cases under its umbrella, the Committee felt that a workable description of the expression is necessary.

4. The Government of Maharashtra after taking into consideration the report of the Committee decided to provide for the recognition of trade unions for facilitating collective bargaining for certain undertakings and to provide for prevention for certain unfair labour practices. The Government also considered it necessary to constitute an independent machinery For fulfilling the dual purpose of according recognition to unions and of enforcing provisions relating to the unfair labour practices. Accordingly, the State Legislature passed an Act which came into force from February 1, 1972.

The Preamble to the Act sets out that the legislation was passed to provide for the recognition of trade unions for facilitating collective bargaining and to define and provide for the prevention of certain unfair labour practices. The preamble further sets out that the legislation is also to provide for Constitution of Courts as independent machinery for enforcing the provisions relating to unfair practice and to provide matters connected with the purposes aforesaid. Section 3(16) of the Act prescribes that "unfair labour practices" means unfair labour practices as defined in Section 26. Section 26 provides that "unfair labour practices" mean any of the practices listed in Schedules II, III and IV of the Act. Schedule II sets out unfair labour practices on the part of the employers and various items under this Schedule have reference to practices which have relation to the Union activities. Schedule III deals with unfair labour practice on the part of the trade unions, while Schedule IV sets out general unfair labour practices on the part of employers. Item No. 1 of Schedule IV reads as under-

"1. To discharge or dismiss employees-

(a) by way of victimisation;

(b) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;

(c) for patently false reasons;

(d) on untrue or trumped up allegations of absence without leave;

(e) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste.

(f) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment".

The Legislature was conscious that the unfair labour practice set out in Schedules II, III and IV may not be an exhaustive list and from time to time a person may

resort to practices which are unfair labour practices and therefore conferred power upon the State Government to add or alter the items in the Schedule after obtaining the opinion of the Industrial Court. Regulation 147 framed by the Industrial Court in exercise of powers conferred u/s 33 of the Act requires the Members of Industrial Court to submit a report upon any unscheduled unfair labour practice which comes to the notice of the President of the Industrial Court to the State Government and on receipt of such report the State Government is entitled to take action u/s 53 of the Act.

Section 27 of the Act issues a fiat that no employer or union and no employees shall engage in any unfair labour practice. Section 28 sets out the procedure for dealing with the complaints relating to unfair labour practices and Sub-section (1) inter alia provides that where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer may file a complaint before the Court competent to deal with such complaint, Section 5 of the Act prescribes that the Industrial Court shall decide the complaints relating to unfair labour practices except the practices falling in Item 1 of Schedule IV. The practices falling under Item 1 of Schedule IV are dealt with by the Labour Court in accordance with provisions of Section 7 of the Act. Section 30 of the Act sets out the powers of Industrial and Labour Courts, while deciding the complaints and Sub-section (1) provides that where a Court decides that any person has engaged in or engaging in any unfair labour practice, then the Court may (a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, and (b) direct all such persons to cease and desist from such unfair labour practice and take such affirmative action as may in the opinion of the Court is necessary to effectuate the policy of the Act. Sub-section (2) of Section 30 confers power upon the Court to pass interim order, including a temporary relief or restraining order as it deems just and proper, including directions to withdraw temporarily the practice complained of pending final decision. The failure to comply with the order of the Court is made punishable by conviction with imprisonment which may extend to three months or with fine which may extend to Rs. 5000/- by provisions of Section 48 of the Act.

5. With this background of the legislative provisions, which is obviously a beneficial legislation enacted with a view to prevent unfair labour practices to ensure industrial peace and to ensure that the employees are not deprived of their source of income by wrongful discharge or dismissal, it is necessary to examine the contentions urged at the Bar in support of the rival claims. On behalf of the management it was claimed that the Labour Court can entertain the complaint of unfair labour practices on the part of the employer under Item 1 of Schedule IV of the Act only where the employee is discharged or dismissed from service, while the employees claimed that the Labour Court can entertain complaint of unfair labour practices even before the employer passed order of discharge or dismissal of the employee from service. In cases where it is established that the employer is in a process of or is engaged in discharging or dismissing the employee by way of victimization, by falsely implicating the

employee in a criminal case, for patently false reasons or on untrue or trumped up allegations of absence without leave, in utter disregard of the principles of natural justice in the conduct of domestic enquiry for misconduct of minor or technical character. In view of the rival submissions, the first question which requires determination is whether the Act enables the employee to approach the Labour Court by filing complaint of commission of unfair labour practices on the part of the employer under Item 1 of Schedule IV of the Act before the employment is terminated either by discharge or dismissal.

6. The claim of the management that unfair labour practices as set out in Item 1 of Schedule IV of the Act come into existence only on discharge or dismissal of an employee cannot be accepted. It is not every discharge or dismissal of employee which amounts to unfair labour practice, but a discharge or dismissal is unfair labour practice if it is arrived at by resorting to the methods which are set out by Item 1(a) to (f). The unfair labour practices contemplated by Item 1 are not mere discharge or dismissal, but discharge or dismissal by adopting the practices which are set out in the item. It is therefore clear that the unfair labour practices on the part of the employer precedes the actual order of discharge or dismissal of the employee. The order of discharge or dismissal is merely the culmination of the unfair labour practice indulged in by the employer. The provisions of the Act were enacted not only merely to provide for remedy or to penalise the employer for indulging in unfair labour practices but also to provide machinery for prevention of unfair labour practice. To accede to the submission of the management that the unfair labour practice comes into existence only when an employee is discharged or dismissed from employment would lead to very unusual results. An employer may openly claim that he would indulge in unfair labour practice like conducting a departmental enquiry by falsely implicating an employee in a criminal case on false or concocted evidence or for patently false reasons or on untrue or trumped up allegations or in utter disregard of principles of natural justice and in spite of this unfair practice the employee will have no remedy unless and until the employer decides to discharge or dismiss the employee. The employee cannot be made to wait for seeking relief till the order of discharge or dismissal is passed. An employee on discharge or dismissal would lose the employment and the source of livelihood and the employee may subsequently get relief after passage of several years. The Legislature enacted the provisions of the Act with a view to ensure that the employer is not permitted to indulge in unfair labour practice which leads to discharge or dismissal and the Labour Court can certainly prevent the employer from undertaking unfair labour practice which will lead to discharge or dismissal of the employee. The employee is certainly entitled to approach Labour Court and the Labour Court has jurisdiction to entertain the complaint when the employee alleges that the employer is indulging in unfair labour practice set out in Item 1 of Schedule IV with a view to discharge or dismiss the employee.

7. The contention urged on behalf of the employees that the expression "engaged in or engaging in any unfair labour practice" in Sub-section (1) of

Section 28 is of wide ambit and would cover cases where an employer is engaging in practice which will lead to dismissal is of considerable merit. The Legislature very wisely did not use the expression "where any person has committed unfair labour practice" and the expression "engaged in or is engaging in" clearly indicates that once the employer engages in unfair labour practice, then the employee can approach the Labour Court and it is not that the cause of action for complaint under Item 1 of Schedule IV accrues only when the unfair labour practice of the employer ends with the order of discharge or dismissal. It cannot be overlooked that the expression used in Item I of Schedule IV is "to discharge or dismiss employees" and the word "to" gives a clear indication that in case the employer indulges in unfair labour practice which leads to discharge or dismissal, then the employee can approach the Labour Court for redressal even before the order of discharge or dismissal is passed. The legislature has used the word "to", an infinitive instead of using the words "discharge or dismissal of employees" and that indicates that the Legislature never intended that the right of the employee to file complaint would arise only after the final order of dismissal or discharge is passed. Use of the word "to" in Item I of Schedule IV is an indicator that the Legislature was desirous that the employee can have a redress by approaching the Labour Court even when the employer proposes or intends to discharge or dismiss an employee by resort to unfair labour practice. The use of infinitive shows that the action of dismissal or discharge is not yet complete. In our judgment, the construction on Item No. 1 of Schedule IV should be harmonious to achieve the object of the legislation and the construction suggested by the management would lead to drastic consequences for the employee. The employee would be left without employment and the source of earning in spite of the fact that the dismissal or discharge was clearly by resort to unfair labour practice. Such a construction would lead to defeat the object of the Act and could have never been intended by the Legislature. It is well settled rule of interpretation that Court should be extremely slow in holding that the jurisdiction of the Court is ousted. Any construction which ousts the jurisdiction of the Labour Court to entertain the complaint of unfair labour practice should be avoided. Once an employee establishes that the employer has indulged in unfair labour practice which would lead to the discharge or dismissal from the employment, then the Courts cannot close the doors and the interpretation that though there is wrong committed by the employer the remedy is not available till the wrong reaches its ultimate in the order dismissal cannot be accepted. In no civilised set up and more so in industrial disputes the employee can be told that you must suffer at the hands of the employer and the remedy is available only when the wrong is completed. It is necessary to reasonably construe the provisions of the Act, so as to provide remedy and redress as soon as a wrong is practised by the employer. The unfair labour practice commences as soon as the employer starts proceedings against the employee and which proceedings fall within the mischief of Item No. 1(a) to (f) of Schedule IV of the Act. It is then no answer for the employer to claim that wait till the mischief results into a drastic order of discharge or dismissal and the Labour Court is entitled to entertain the

complaint and prevent the drastic consequences to the employee arising out of the resort to unfair labour practice by the employer. The Legislature enacted the provisions of the Act as it was found that the Industrial Disputes Act did not contain provisions to prevent unfair labour practices which would lead to drastic consequences and while construing the provisions of the Act, a construction should be employed which would prevent such drastic consequences. The Industrial Disputes Act has now introduced a Schedule which sets out unfair labour practices, but does not provide for grant of interim relief preventing the person from engaging in or continuing to engage in the unfair labour practice. The provisions of Section 30 of the Act enables the Court to direct person indulging in unfair labour practice to cease and desist from such practice and it is open for the Court under Sub-section (2) of Section 30 of the Act to pass interim order pending final decision. The Labour Court therefore is entitled not only to entertain the complaint of unfair labour practices on the part of the employer, and which will lead to order of discharge or dismissal, but is also entitled to direct the employer to cease and desist from such practice pending the decision of the complaint.

8. Before examining the decision of the learned single Judge reported in 1989 2 CLR 132, Divisional Commissioner, M.S.R.T.C., Wardha v. Presiding Officer, Industrial Court of Maharashtra, Nagpur and Anr., it is necessary to state that right from the inception of the Act in the year 1972 the Industrial Court and the Labour Courts have consistently taken the view that the Labour Courts had jurisdiction to entertain a complaint under Item 1 of Schedule IV even prior to passing of the order of discharge or dismissal of an employee. The Full Bench of the Industrial Court taking into account various provisions of the Act concluded that even intended, proposed or apprehended discharge or dismissal gives cause of action to the employee to lodge a complaint and the Labour Court has jurisdiction to entertain the same. The learned single judge held that commission of unfair labour practices alone gives entitlement in favour of the aggrieved person to invoke Section 28 and such entitlement cannot be derived as against the proposed contemplated, anticipated or apprehended unfair labour practice. The learned Judge observed that Section 28 does not contemplate unfair labour practices which are in the womb, and the term "is engaging in unfair labour practice" does not mean likely to engage" or going to engage". The learned Judge felt that unfair labour practices are specifically demarcated and as the Act is semi-penal in nature, the entries in the Schedule and the provisions cannot be construed liberally. We are afraid we cannot share the view of the learned Judge. It was not pointed out to the learned Judge that the unfair labour practices commence as soon as the employer resorts to any mode set out in Item 1 (a) to (f) of Schedule IV of the Act and the remedy for such unfair labour practice need not be postponed till the actual order of discharge or dismissal is passed. The unfair labour practices are specifically demarcated but it is not correct to suggest that the unfair labour practice comes into existence only on passing of the order of discharge or dismissal. The attention of the learned Judge was not invited to

the fact that every discharge or dismissal does not necessarily gives cause of action to file complaint under Item No. I of Schedule IV but only those dismissals or discharges which are preceded by unfair labour practices set out under Item 1. In other words the cause of action for lodgment of a complaint arises on employer resorting to unfair labour practices and the cause of action for seeking redressal is not postponed till the practice culminates into the drastic consequences. The observation of the learned Judge that the Act is semi-penal is also not accurate. The resort to unfair labour practice by itself is not made an offence but refusal to carry out the orders passed by the Court u/s 30 are made punishable u/s 48 of the Act. The learned Judge felt that Item 1 (a) of Schedule II refers to threatening employees with discharge or dismissal, and as the words "threatening employees with discharge or dismissal" are not employed in Item 1 of Schedule IV, the Legislature felt that the employee can file complaint and the Labour Court can entertain the complaint only after termination of the employment. We are unable to agree with the view of the learned single judge. The right to seek relief is not postponed till proceedings reach the finality culminating imposition of punishment. The employee cannot be driven to long drawn litigation even though the punishment is imposed by resort to unfair labour practice. In our judgment, in view taken by the learned single Judge is clearly unsustainable and we overrule the same.

The other decisions recorded by the learned single Judges following the decision recorded at Nagpur and reported in Dalal Engineering Pvt. Ltd. Vs. Ramrao Bhaurao Sawant and others, and 1991 LIC 2140, Indian Hotels Co. Ltd. v. D.T. Pandey and Anr., are also overruled,

9. Though the employee is entitled to approach the Labour Court complaining about unfair labour practices under Item T of Schedule IV of the Act even prior to passing of the order of discharge or dismissal, it is necessary to sound a note of caution about exercise of powers granting interim relief under Sub-section (2) of Section 30 of the Act. The Labour Court is undoubtedly entitled to pass order directing the employer to cease and desist from unfair labour practices or even to take affirmative action as may be in the opinion of the Court necessary to effectuate the policy of the Act. The Labour Court is also entitled to pass interim orders, including any restrictive order directing the employer to withdraw temporarily the practice complained of pending final disposal. The powers conferred on the Labour Court or the Industrial Court, as the case may be, are of considerable importance and the Court exercising the power should be very vigilant in ensuring that interim orders do not result in stifling the inquiry proceedings, Merely because an employee complains about the unfair labour practices by the employer during the inquiry, the Labour Court need not straightway proceed to pass interim orders which would result in postponing the inquiry. The management has a right to conduct an inquiry which may lead to discharge or dismissal and that right should not Be curtailed or restricted without substantial proof that the employer is indulging in unfair labour practice as set out under Item 1 (a) to (f), while conducting the proceedings. It is not in every

case that the Court should proceed to pass interim order on lodgment of a complaint, but care should be taken to ascertain whether the employee has made out a strong prima facie case indicating that the grievance about unfair labour practice is substantial. The Court should realise that unnecessary postponement of an inquiry may cause serious hardship both to the employer and the employee and therefore application for the interim orders should be examined with a critical scrutiny. We do not wish to make any observations as to how the judicial powers should be exercised by the Court, but we hope and trust that the powers would be exercised with care and caution so as not to cause hardship either to the employer or the employee.

10. Accordingly, appeal is allowed and order dated August 21,1989 passed by the learned single Judge dismissing Writ Petition No. 2286 of 1989 is set aside. The order dated August 10,1989 passed by the Presiding Officer, 1st Labour Court, Bombay on Complaint (ULP) No. 90 of 1989 is also set aside and the proceedings are remitted back to the 1st Labour Court, Bombay for disposal of the complaint on merits. It hardly requires to be stated that ad-interim order passed by the Labour Court pending the complaint stands revived.

In the circumstances of the case, there will be no order as to costs.