
(1995) 04 BOM CK 0001
In the Bombay High Court
Case No : Writ Petition No. 608 of 1989

Best Workers Union, Bombay	Vs	APPELLANT
Best Undertaking and Others		RESPONDENT

Date of Decision : 04-04-1995

Acts Referred:

Employees State Insurance Act, 1948 — Section 73, 73(1)
Industrial Disputes Act, 1947 — Section 2, 25F

Citation : (1996) 3 LLJ 696

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Judgement

1. This writ petition under Article 227 of the Constitution of India is directed against an order of the Industrial Court, Bombay, dated June 23, 1988, made in Appeal (IC) No. 79 of 1986 under the provisions of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act").

2. The Petitioner is a registered and representative Union of the employees working in the Transport Section of the First Respondent, which is an Undertaking of the Bombay Municipal Corporation doing business of transporting of passengers by bus and supply of electricity within Greater Bombay. The Industrial establishments of the First Respondent are covered by the provisions of the Act.

3. Subhash Shah was employed as Assistant Fitter in the service of the First Respondent in the Transportation Engineering Department and his services were terminated under Standing Order 26(1) (i) for the reason that the workman was absent for 184 days and on leave without pay for 232-1/4 days during the period January 1, 1979 to December 12, 1981. The First Respondent was of the view that the concerned employee used to remain away from work on various grounds as a result of which his service was not available to the First Respondent Undertaking for long periods. During the period 1976 to 1981, the employee was away from work for 193 days, 134-3/4 days, 246 days, 351-3/4 days, 269 days

and 242 days, respectively, in each year.

4. The Petitioner Union took up the case of the employee Subhash Shah by moving Application (LCB) No. 304 of 1982 before the Labour Court, Bombay, under Sections 78 and 79 of the Act. The Labour Court tried the Application and by its order dated August 5, 1986 held that the termination of service of the concerned employee was not contrary to the provisions of Section 73 of the Employees' State Insurance Act read with Regulation 98 of the General Regulations framed under the said Act. It also held that the termination of service did not amount to retrenchment and that it was not invalid. In this view of the matter, the Labour Court refused all reliefs and dismissed the Application.

5. The Petitioner Union challenged the said order of the Labour Court by Appeal (IC) No. 79 of 1986 before the Industrial Court u/s 84 of the Act. The Industrial Court was of the view that the First Respondent was not justified in invoking the Standing Order 26(1) against the concerned employee, but that it may have invoked its powers under Standing Order 26(2) after proper medical advice. The Industrial Court also took the view that the termination of service of the employee was illegal, though it was also of the view that the facts and circumstances showed that the termination of service did not amount to retrenchment within the meaning of section 2(oo) and section 25F of the Industrial Disputes Act, since it was for continued ill - health of the employee. Though the Industrial Court held that the order of termination was illegal, the Industrial Court directed reinstatement of the employee but granted only 10 per cent of the backwages for the interregnum between the date of termination of service to the date of reinstatement. Being aggrieved thereby, the petitioner Union is before this Court by this writ petition.

6. I have been taken through the judgments of the two Courts below by learned Counsel on either side. Mr. Saiyed, learned Advocate for the Petitioner, at the very out set, urged that this petition was not on the legalities of the case but was for invoking the sympathy of the Court; yet, he did contend that, consequent upon the finding that the order was illegal, the Industrial Court erred in not granting full backwages.

7. A perusal of the order of the Labour Court dated August 5, 1986 shows that the only contentions urged before it were that the order of termination of service was illegal as it contravened Section 73 of the Employees' State Insurance Act and Section 25F of the Industrial Disputes Act. Both contentions were rightly rejected by the learned Judge of the Labour Court for reasons detailed in the order. When the matter was argued before the Industrial Court, the contentions urged before the Industrial Court not only included the earlier contentions, but also an additional ground, namely, that such an order could not have been passed under Standing Order 26(1) and could have been passed only under Standing Order 26(2). With regard to the contentions based on contravention of Section 73(1) of the Employees' State Insurance Act and Section 25F of the Industrial Disputes Act, the Industrial Court has agreed with and confirmed the

findings of the Labour Court. It is only the contention based on Standing Order 26(1) which appealed to the Industrial Court for taking the view that the order of termination of service of the employee concerned was illegal.

8. At my request, Mr. Saiyed pointed out the text of the Standing Order 26 as contained in a booklet published by the First Respondent Undertaking. Standing Order 26 reads as under :

"26. (1) Service with the Undertaking, will be terminated as follows :

Notice, if given by the Undertaking, shall be signed by the Competent Authority :

Provided :-

(i) That the reason for such termination of employment shall be given in writing to the employee concerned except in cases where by doing so the management will render themselves liable to civil or criminal actions;

(ii) That such termination of employment shall be subject within fourteen days of the receipt of such notice, to an appeal to the General Manager;

(iii) That no individual notices shall be necessary in cases of general retrenchment, closing down, strike or lock-out;

(iv) Save that in cases covered by Leave Regulation II, no notice shall be necessary in the case of an employee who absents himself from work without permission for a continuous period of more than one month and such an employee shall be deemed to have abandoned his employment.

I. Permanent Employees :

By one calendar month's written notice or pay including allowances admissible, in lieu thereof given by the Undertaking or by one calendar month's notice given by the employee.

II. Probationers, Temporary Employees, Apprentices, Badli and Trade Learners of less than two years service :-

By 24 hours' within notice on either side :

Provided that notice given by an employee who is under suspension pending enquiry and/or is reported to have committed serious acts of misconducts viz., (i) riotous or disorderly conduct or any other act of violence : and (ii) act which constitutes an offence involving moral turpitude, shall have no effect unless it is specifically accepted by the General Manager or any other officer duly authorised by him and notified.

(2) If the General Manager or other officer duly authorised by him and notified is satisfied on the report of a medical practitioner nominated by him that the employee is unfit or incapacitated by reason of ill-health to discharge his duties either permanently or for a considerable time, he may after granting whatever

leave may be due or the emoluments in lieu thereof according to the Leave Regulations contained in the Appendix, terminate the service of such employee by giving the usual notice prescribed in these Standing Orders, provided what the General Manager or any other officer duly authorised by him and notified may at his discretion and shall at the request of the representative of the employee take a second opinion, provided further that such second opinion is asked for within fourteen days of the date of the receipt of the notice of termination".

There is a foot-note at the end of Standing order contained in the Booklet which says :

"(This Standing Order will be deemed to have come into force with effect from March 3, 1989 in terms of Section 35(4) of the BIR Act, 1946) "

9. The foot-note to Standing Order 26 apparently escaped the attention of the learned Judge of the Industrial Court. The termination of service took place on February 20, 1982, more than seven years prior to coming into force of Clause (2) of Standing Order 26. Invoking this clause, which was not in operation at the material time when the service of the employee Subhash Shah was terminated, was clearly erroneous on the part of the Industrial Court. The case had to be dealt with only under Standing Order 26(1) as it stood at the material time. Mr. Saiyed, learned Advocate appearing for the petitioner, did not dispute this position, but wanted to contend that Standing Order 26(1) was violative of the fundamental rights of the Petitioner under Article 14 and that, therefore, it should be declared for inconsistency with the fundamental rights of the Petitioner under Article 14 of the Constitution of India. Such a contention has not been raised at any time earlier. If at all the Petitioner wanted to raise such a contention, he could have raised it at any time in 1982, or till today, by taking out independent proceedings for impugning the validity of Standing Order 26(1). Such a petition would have to be taken out under Article 226 of the Constitution before the Division Bench of this Court as in the present petition we are only concerned with the correctness or otherwise of the order of the Industrial Court impugned in the petition. I have, therefore, not permitted the new contention to be advanced at the Bar since it would merely mean further adjournment of the present proceeding. I shall confine myself to decide the validity of the order passed by the Industrial Court under the provisions of the Act.

10. The Irregularisesourt was of the view that as the employee concerned had produced certificates from the E. S. I. Panel Doctor, it meant that he was on sanctioned leave on health ground and that grant of sick leave prayed for and secured even subsequently regularizes the sick leave availed of. According to the Industrial Court, remaining away from duty on such ground would not be ground for termination of service under Standing Order 26 of the Certified Standing Orders. It was precisely for this reason that the First Respondent Undertaking did not charge the concerned employee with misconduct of remaining absent from duty. The First Respondent merely stated that his record discloses that he was

not available for work for greater part of the year and this the first Respondent considered as sufficient reason for termination of his service under Clause (1) of Standing Order 26. The procedure prescribed for termination of employment of a permanent employee under Standing Order 26(1) is that a notice has to be given under a signature of the Competent Authority, the reason for termination of employment is required to be given in writing to the employee concerned and that it is subject to an appeal to the General Manager. This procedure is complied with.

11. In my view, the reason which appealed to the Industrial Court for interfering with the order is quite erroneous. There may be a case where, acting bona fide, an Employer might feel that continuation of the employee in service might be prejudicial to his business interest. It may even happen that the reason why the employer feels so may not amount to a misconduct under the Standing Orders. In such a case, to say that the Employer must either dismiss the employee for a proven misconduct or must carry the burden of the dead wood is to ignore the realities of business. Particularly in the case of a Public Undertaking such as the First Respondent, run for the benefit of the public at large and not for filling the coffers of private individuals, greater latitude must be conceded in favour of managerial decisions of such nature, as long as they are not tainted with mala fide motives. In the instant case, the terms of Standing Orders have been meticulously fulfilled by the order of the dismissal of the concerned employee. To say that it was illegal by relying on a Standing Order non-existent at the material time is the error into which the Industrial Court fell. Even then, the Industrial Court, after examination of all facts on record, was of the view that the conduct of the concerned employee in frequently remaining away from work on various grounds did not deserve relief of full backwages. Fortunately for the Petitioner, the order of the Industrial Court holding that the order of dismissal passed against the concerned employee is illegal, has not been challenged by the First Respondent Undertaking and, therefore, I need not go into the correctness of the said finding. I shall, therefore, proceed to consider the correctness of the refusal of full relief on the footing that the order of termination of service issued to the concerned employee was illegal, for whatever reason.

12. Merely because the Industrial Court held that the order of termination of service was illegal and liable to be interfered with, and reinstated the employee in service, it does not follow that full backwages ought to be granted to the employee, if there are other overriding circumstances which preclude such relief being granted. In order to satisfy my judicial conscience I called upon Mr. Sawant, learned Counsel appearing for the First Respondent, to make available the original leave record of the concerned employee. An appraisal of the original record indicates without any manner of doubt, that the employee was more away from work than on work. A scrutiny of his leave record for the period of 1976 to 1981 shows that the workman was absent from the service for 193 days, 134-3/4 days, 246 days, 351-3/4 days, 269 days and 242 days, respectively, during the said period.

Thus the workman's services were repeatedly not available to the Undertaking for long periods. I am informed that, on an average, the number of working days in a year is 300. Thus, during the above period, the workman has worked for 123 days during the year 1978, 121 days in the year 1979, 54-1/2 days in the year 1980, 68 days in the year 1979 out of 300 working days and for the rest of the days, he was absent on sick leave. *Res ipsa loquitur*. That the concerned employee has obtained an order of reinstatement with 10% of backwages in his favour is purely fortuitous and, for lack of challenge to the order of reinstatement from the First Respondent, I shall not disturb the said order. However, that by the present writ petition the Petitioner wants the workman to be granted the rest of the backwages denied to him is something which cannot be countenanced in the purely discretionary remedy in writ jurisdiction. Even if the Industrial Court committed an error in denying the 90% of the backwages to the concerned employee, (though I am of the view that the Industrial Court did not commit such an error), I am of the considered view that this is not a fit case where I should exercise the extraordinary constitutional powers vested in me for coming to the help of the person whose conduct indicates that he does not deserve it.

13. Mr. Saiyed made a grievance that despite the fact the E. S. I. Doctor certified him to be fit to resume work, the procedure required was that he has to be examined by the Medical Officer of the First Respondent Undertaking and the Medical Officer has, at least on two occasions, certified the concerned employee to be unfit for work. Two certificates were shown to me which actually pertain to the period subsequent to his reinstatement by the First Respondent Undertaking. It is high time that the First Respondent tightened up its administration and took serious notice of such irregularities. The First Respondent should cause to be made appropriate inquiries and get to the bottom of the anomalies pointed out by Mr. Saived, which, of course, do not affect the order passed by the Industrial Court, as they were much later in point of time.

14. In the result, I am not inclined to exercise my discretion in favour of the Petitioner nor am I inclined to interfere with the order passed by the Industrial Court. Hence, the writ petition is dismissed. Rule discharged. However, there shall be no order as to costs.