
(2000) 08 BOM CK 0038
In the Bombay High Court
Case No : O.O.C.J. W.P. No. 1584 of 2000

Brihanmumbai Municipal Corporation

APPELLANT

Vs

Jagnarayan M. Kahar

RESPONDENT

Date of Decision : 09-08-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 1 BomCR 705 : (2002) 4 LLJ 422

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule, returnable forthwith. Respondents waive service. By consent, taken up for final hearing,

2. By this petition under Article 226 of the Constitution, an order of the Industrial Court at Mumbai dated March 28, 2000 is sought to be challenged.

3. The Respondent was a Bus Conductor, having joined the services of the Bombay Electric Supply and Transport Undertaking on May 15, 1982. It is alleged that on November 8, 1986 the Respondent was on duty on Bus. No. 3578 which was plying on route 260. A 7 year old passenger by the name of Ramlalan Pandey was amongst the passengers who travelled by that Bus. The Respondent is said to have approached the passenger and to have asked him for a ticket. The passenger stated that he had already purchased a ticket and started searching for it in the pockets of his trouser. The Respondent, it is alleged, got annoyed at this and by the time the passenger took out the ticket, the Respondent is alleged to have assaulted the passenger three or four times on his head with a metallic ticket punch. The passenger sustained injury and started bleeding profusely. Thereafter, it is alleged that the passenger continued to sit in the bus and did not disembark. The return journey of the Bus was from Jogeshwari Station to Goregaon Depot. The passenger did not alight from the Bus at this stop. It is

alleged that when the Bus entered the Goregaon Depot, four conductors and Drivers approached the passenger and told him to leave the bus. One Shri T.D. Mane, Bus Inspector 316, arrived at the scene. On seeing the passenger bleeding profusely from his head, he took the passenger and the Respondent to the D.N. Nagar Police Station in a rickshaw. The Police Inspector is stated to have instructed the Bus Inspector to first take the passenger to the hospital for treatment and then to lodge his complaint. The Respondent on his part alleged that it was the passenger who had assaulted him as a result of which he sustained an injury on his right hand. T.D. Mane, Bus Inspector 316, took the passenger to Cooper Hospital along with the Respondent and one Police Constable. At the hospital, the passenger received eight stitches on the part of the head on which he had sustained an injury. Thereafter, the group of persons who had gone to the hospital returned to the Police Station and the statements of the passenger as well as of the Respondent were recorded by the police. In the meantime, it is alleged that on receiving an intimation from Bus Inspector 316, Shri T.D. Mane, two other Accident Inspectors Shri S. Panicker and Shri M. Siddique of the Undertaking also went to the D.N. Nagar Police Station. After the complaints were recorded by the Duty Officer at the Police Station, the Respondent was released on bail in the amount of Rs. 950/-. It is alleged that reports of the incident were submitted by Shri Mane, Bus Inspector 316, Accident Inspector Shri Siddique and Accident Inspector Shri Panicker. Shri Panicker noted down in his report the version of Ramlalan Pandey. It is alleged that one other witness Ghanshyam Pandey had also informed Shri Panicker that he was seated behind Ramlalan Pandey and had witnessed the Respondent assaulting the passenger with a ticket punch.

4. On December 24, 1986, the Respondent was charge sheeted for having committed a misconduct under Standing Order 20(1) and 20 (r) which inter alia, are as follows:

"20(1) - Drunkenness or riotous, disorderly, insolent or indecent behaviour or any act subversive of discipline, on the premises of the Undertaking or at the place of employment or in the performance of the Undertaking's duties or while wearing the uniform and/or the badge of the Undertaking";

20(r) - While on duty or wearing the Undertaking's uniform, assaulting or intimidating or being deliberately indecent to the Undertaking passengers or intending passengers."

5. A Departmental Enquiry was, thereafter, conducted into these allegations of misconduct. Initially the Respondent was represented by an advocate though it appears that the Standing Orders provided that permission to represent a charge sheeted employee in a Departmental Enquiry could only be allowed to a union representative or to a co-worker of his choice.

6. On March 24, 1987, at one of the hearings of the Departmental Enquiry, the advocate appearing on behalf of the Respondent was informed by a letter that in

view of the Standing Orders an Office Bearer of the Union and under the Bombay Industrial Relations Act, an employee of the undertaking alone could represent a charge sheeted officer. Consequently, it was stated that the employee could be permitted to be defended only by an employee of the undertaking of his choice or an Office Bearer of the Union. In view of the aforesaid letter, the Respondent sought an adjournment of the case as he was unable to obtain a letter of authority from the Union concerned. The hearing of the enquiry was thereafter adjourned and posted to March 26, 1987. What transpired at the hearing on March 26, 1987 is set out in the minutes of the meeting, a copy whereof is annexed at page 95 of the paper book. Before referring to the minutes or the meeting on March 26, 1987, it must be stated that on March 24, 1987 when the hearing of the enquiry was adjourned, passenger Rarmlalan Pandey who was alleged to have been assaulted in the course of the incident which led to the convening of the departmental enquiry was present before the Enquiry Officer. On March 26, 1987, the passenger was once again present since his evidence had to be recorded. On March 26, 1987, an application was presented by the Respondent to the effect that his advocate could appear on his behalf. The minutes drawn up by the Enquiry Officer, however, stated that the Respondent had failed to submit any document to show that the learned advocate was an Office Bearer of the Union and had also failed to bring a representative who v/as an employee of the undertaking. Since however the passenger has remained present for the enquiry and he may not be in a position to attend the enquiry again, it was necessary, according to the Enquiry Officer, to record his statement. The Respondent was informed that the statement of the passenger would be recorded in his presence and if he so desires the case could be postponed for the cross examination of the witness, by or on behalf of the Respondent. The Respondent, however, refused to participate in the enquiry. The statement of the passenger was thereupon recorded on March 26, 1987. After recording of the statement of the injured passenger, the enquiry was once again adjourned in order to furnish a suitable, opportunity to the Respondent to cross examine the injured passenger. The enquiry was adjourned to April 16, 1987. On April 16, 1987 the passenger was once again present. On that date, a colleague bus conductor of the Respondent produced a letter from the Respondent together with a medical certificate stating that he was not well. The enquiry was subsequently postponed. Thereafter the next hearing took place on May 12, 1987. On that date, the brother of the injured passenger attended the Goregaon Traffic Office of the undertaking and stated that the injured passenger was out of Bombay and would come to Bombay only in the 1st week of July 1987. On May 12, 1987, a Union Representative, Shri P.S. Sawant, was present at the enquiry to" represent the Respondent and submitted that a particular witness, Shri Panicker may be produced for cross examination. The request was granted. Thereafter, it appears that during the course of the enquiry the evidence of Accident Inspector Shri Panicker, Bus Inspector 316 Shri Mane and the concerned bus driver was recorded. These witnesses were duly cross examined on behalf of the Respondent. These evidence of two defence witnesses was also recorded and

the Respondent also gave his statement in defence. Copies of the depositions of the witnesses together with cross examinations are annexed to the paper book of the proceedings before this Court.

7. Thereafter, at the hearing of the enquiry on August 18, 1987 the statements of four witnesses on behalf of the undertaking came to be recorded. In their brief statements, these four witnesses deposed to the fact that they had individually made attempts to secure the presence of the injured passenger Ramlalan Pandey. Shri S.N. Singh, the Enquiry Inspector attached to Goregaon Depot, stated that he had visited the residence of the passenger on June 30, 1987 but found that his tenement was locked. The witness was informed by neighbours that the passenger had gone away out of Bombay and it was not known as to when he would return. A further attempt was made by another employee R.R. Pathak, A.O., ACS (WS) of the undertaking on July 15, 1987 by Shri G.V. Sarfare ARO-61 on July 26, 1987 and by Shri P. Peter, Accident and Claims Officer (Suburbs) on August 3, 1987. These statements are at pages 219 to 221 of the paper book. On August 26, 1987 the representative of the union who was appearing on behalf of the Respondent stated that he did not wish to cross examine the four witnesses who had thus deposed on August 18, 1987. Though the statement of the injured passenger had been recorded, he could not be produced for cross examination since the attempts made to secure his presence were futile. The passenger, it is stated, was out of Bombay and had not returned.

8. The Enquiry Officer upon the conclusion of the enquiry submitted his report. The Enquiry Officer came to the conclusion that the charge of misconduct against the Respondent stood proved. In so far as the past record of the Respondent was concerned, the Enquiry Officer recorded that the Respondent had been reported for indecent behaviour and assaulted on June 14, 1983 and was suspended for two days. Again on August 9, 1986 he had been reported by a passenger for indecent behaviour and assault and was suspended for three days. On April 20, 1985 the Respondent was censured for indecent behaviour. Similarly, on March 20, 1986 he had been reported by a passenger for not stopping the bus and was suspended for four days and on April 8, 1986 on a report by a clerk of the undertaking, the Respondent had been suspended for seven days for rude behaviour. Having regard to the charges of misconduct and the past record, the Respondent came to be dismissed from the service of the undertaking with effect from September 11, 1987.

9. The Respondent challenged the order of dismissal by filing an Application, (BIR) No. 223 of 1988, before the 12th Labour Court, Mumbai. On February 6, 1999, the 12th Labour Court, Mumbai held that the enquiry conducted against the Respondent was not fair and proper but, in the circumstances, the Petitioner undertaking was given an opportunity to lead oral evidence to justify its action against the Respondent. Broadly speaking, the Labour Court found that there were three infirmities in the Departmental Enquiry as a result of which it stood vitiated; (i) there was no Presenting Officer at the enquiry and the Enquiry

Officer who had issued the charge sheet had also posed questions to the Respondent; (ii) adequate steps had not been taken to secure the presence of the injured passenger Ramlalan Pandey, since none of the witnesses had deposed that they had attempted to find out the address of the passenger in U.P. where he was alleged to have gone; (iii) the four management witnesses who had deposed in regard to the efforts made to secure the presence of the injured passenger, had given their evidence after the defence witnesses were examined. The Labour Court held that this recording of evidence in what was called, a "zig zag manner" was not in accordance with the principles of natural justice.

10. The decision of the Labour Court was challenged by the Petitioner undertaking in Revision before the Industrial Court. In so far as the 3rd aspect noted above was concerned, the Industrial Court in Revision in para 5 of its order held that the recording of the evidence of the four management witnesses after the evidence of the defence witnesses was over did not constitute a violation of the principles of natural justice. The Industrial Court recorded that in fact the four management witnesses were offered for cross examination by the Respondent but the Union Representative who was representing the Respondent expressly declined to cross examine the witnesses since they were not considered to be of much importance. However, the Industrial Court was of the view that there was a violation of the principles of natural justice, in that the injured passenger Ramlalan Pandey had not been offered for cross examination and it was evident from the material on the record that the statement of Ramlalan Pandey had, in fact, been considered by the Enquiry Officer,

11. In assailing the correctness of the view taken by the Industrial Court, learned counsel appearing on behalf of the Petitioner submitted that the first issue as to whether the enquiry was vitiated in the absence of the undertaking being represented by a Presenting Officer, is concluded by a Division Bench Judgment of this Court rendered in the *Municipal Corporation of Greater Bombay v. Vishnu Sakharam Pingle* in Writ Petition No. 2554 of 1993 decided on June 27, 1996. In the case which was decided by the Division Bench of this Court one of the submissions was that the Enquiry Officer had acted more as a Prosecutor than as a Judge because he had cross examined the undertaking's witnesses. The Division Bench of this Court relying on the Judgment of the Supreme Court in *Workmen in The Workmen Employed in B and C Mills, Madras Vs. The Management of B and C Mills, Madras*, and *Mulchandani Electrical and Radio Industries Ltd. Vs. The Workmen*, held as follows:

"It may also be pointed out that there is no bar on an Enquiry Officer seeking clarification from witnesses as long as he permits the cross examination of witnesses from whom clarification has been sought. This proposition finds support in the Judgment of *Mulchandani Electrical and Radio Industries Ltd.* (supra). Similarly, the Supreme Court in the case of *Workmen in Buckingham and Carnatic Mills, Madras* (supra) has laid down that merely because in a domestic enquiry the management was not represented by any Officer separately

did not prevent the Enquiry Officer from putting questions to the delinquent worker and the witnesses and such a conduct on the part of the Enquiry Officer would not vitiate the domestic enquiry."

In view of the decision of the Division Bench of this Court in the aforesaid case, the infirmity which was found by the Labour Court on the ground that there was no Presenting Officer and that the Enquiry Officer had himself conducted the enquiry is without substance. A similar view has also been taken by this Court in *Sukhadeo Vishwanath Garaje Vs. M/s Food Corporation of India and others*, wherein it was also held as follows at pp. 283, 284:

"13. Very often there is no separate management representative to conduct enquiry proceedings on behalf of the management and only the witnesses are sent to the Enquiry Officer to depose regarding the incident. In such cases, the questions to 2 such witnesses are put by the Enquiry Officer. This procedure does not violate the principles of natural justice. If the Enquiry Officer examines the witnesses without the assistance of the management's representative, then it does not show that he himself was a Prosecutor when the record shows that a bona fide enquiry was held. When the Enquiry Officer himself examined and questioned the witnesses, it is not objectionable so long as due opportunity is given to the delinquent to cross examine them. It is competent for the Enquiry Officer to put questions to the witnesses to ascertain the real incident."

The Judgment in *Prem Prakash v. U.P. State Road Transport Corporation* reported in 1994 L.I.C.1331 also supports the same view.

12. That leads us to the main question as to whether the enquiry was vitiated in view of the fact that the injured passenger Ramlalan Pandey was not produced for cross examination. A few admitted facts may, now, be adverted to. The passenger Ramlalan Pandey was present before the Enquiry Officer on March 24, 1987. He was thereafter present before the Enquiry Officer on March 26, 1987, when his statement as and by way of Examination-in-Chief came to be recorded. The passenger was once again present on the adjourned date of hearing, viz. April 16, 1987. On April 16, 1987 an adjournment was sought on behalf of the Respondent. The matter was thereafter adjourned to May 12, 1987 when the brother of the passenger stated before the Enquiry Officer that his brother, the witness, had gone to his village in U.P. Efforts were made on June 30, July 15, July 26 and August 3, 1987 to secure the presence of the witness but it appears that he had not returned from his place of origin and was, therefore, not available to give evidence. In these circumstances, this is not a case where after tendering of the Examination-in-chief, an effort was made by the management to suppress the witness by not offering him for cross examination. Prima facie, at least, it appears that efforts were made to secure the presence of the witness but, he was not available. The Labour Court, however, found fault with the management, the Petitioner undertaking herein, by holding that the Petitioner had made no effort to obtain the address of the witness in the State of U.P. or to secure his presence from there. Whether, this is or is not a correct view to take,

has not been gone into by the Industrial Court at all. In fact, reading the order passed by the Industrial Court in Revision, there is no reference at all to the fact that Ramlalan Pandey was present on three dates of hearing and to the efforts which were made between the months of June and August 1987 to secure his presence.

13. Having regard to the fact that the case could not be cross examined for the reason of his absence away from Bombay, his evidence could not have been relied upon consistently with the principles of natural justice. The learned counsel appearing on behalf of the Petitioner, however, submitted that even if the evidence of the witness Ramlalan Pandey were to be ignored, there was sufficient material on the record which would establish the misconduct of the Respondent and in that view of the matter the ignoring of the evidence of the injured witness would make no difference to the finding of misconduct. One other relevant consideration is the fact that between the date of the occurrence and the present, almost 13 years have elapsed. That being the position, it Would, in my view, meet the interests of justice if before directing the Management to lead evidence in pursuance of the impugned orders passed by the Labour and Industrial Courts, the Labour Court is directed to consider whether the finding of misconduct could be sustainable with reference to the material collected in the enquiry if the evidence which was tendered by Ramlalan Pandey is ignored. Mr. Talsania, the learned counsel appearing for the Petitioner, sought to place reliance upon a Judgment of the Supreme Court in *State of Haryana and Another Vs. Rattan Singh*, and *J.D. Jain Vs. Management of State Bank of India and another*, in support of his submission that the domestic enquiry is not bound by the strict rules of evidence which govern a trial before the Court and there was sufficient material on the record of the Enquiry Officer to sustain the finding of misconduct even if the evidence of witness Ramlalan Pandey is ignored. Beyond recording these submissions of the learned counsel, I do not propose to go into the question on merits since in my view, this is a matter which will have to be dealt with by the Labour Court. In fairness, it must be stated that it was the submission of the learned counsel for the Respondent that if the evidence of the witness Pandey is to be ignored, there is little or no trustworthy evidence on the basis of which a finding of misconduct could be sustained. In my view, these rival submissions should be directed to be dealt with by the Labour Court by remanding the matter to it for further consideration. I make it clear that if the Labour Court comes to the conclusion that there was no material de hors the evidence of the injured witness to sustain the finding of misconduct, the management, the Petitioner herein, would be at liberty to lead evidence in support of the charge of misconduct as directed by the Labour Court. This opportunity has to be given in view of the law laid down by the Supreme Court in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, and which has been reiterated in *Bharat Forge Company Ltd. Vs. A.B. Zodge and another*, . It is true, as submitted by the learned counsel for the Respondent, that ordinarily this Court would not be

inclined to interfere with a finding of fact recorded in a Part-I Award. In the present case, in view of the facts and circumstances which have been narrated earlier, particularly having regard to the nature of the charge, the circumstances in which the cross examination of the witness could not take place, it would be in the interests of justice to direct the Labour Court to reconsider the issue at the stage of the Part-I Award whether the enquiry was fair and proper. The Labour Court shall also consider whether, if the evidence of witness Ramlalan Pandey is excluded from consideration there was other evidence to sustain the finding of misconduct in the Departmental Enquiry.

14. In the circumstance, the Petition is allowed. The impugned orders dated February 6, 1999 and March 28, 2000 passed by the Labour Court and the Industrial Court respectively are quashed and set aside and the matter is remitted back for consideration by the Labour Court in the light of the observations made earlier in this Judgment.

15. The observations in this Judgment shall not come in the way of a determination of the merits of the case by the Labour Court and all the rights and contentions of the parties are kept open. In view of the long pendency of the matter, the Labour Court is directed to proceed with the matter and complete its determination within a period of three months from today.

16. This petition is made absolute in the aforesaid terms. In the circumstances, there shall be no order as to costs.

17. Certified copy of the order is expedited. An ordinary copy of this order duly authenticated by the Personal Secretary may be made available to the parties.