

(2000) 02 BOM CK 0100
In the Bombay High Court
Case No : Writ Petition No. 115 of 2000

Chandrikaprasad Mishra

APPELLANT

Vs

Shree Babulnath Mandir Charities and another

RESPONDENT

Date of Decision : 02-02-2000

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 10, 28, 33, 44

Citation : (2000) 3 ALLMR 161 : (2000) 3 BomCR 414 : (2000) 85 FLR 793 : (2000) 2 LLJ 729 : (2000) 3 MhLj 73

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : P.M. Mokashi, for the Appellant; M.M. Verma and Rajesh Gehani, for the Respondent

Judgement

R.M. Lodha, J.—Rule. Returnable forthwith, Mr. Verma waives service for respondent No. 1. Service on respondent No. 2 is dispensed with.

2. By consent, writ petition is heard finally at this stage.

3. The petitioner herein is original complainant in Complaint (ULP) No. 284 of 1992. It is the case of the petitioner that he was working as a watchman with the 1st respondent herein, namely Shree Babulnath Mandir Charities (for short "employer") since 1980 and his last drawn salary was Rs. 1425.50 per month. Somewhere in the month of November 1991 the workmen employed by the employer became the members of Kamgar Utkarsha Sabha, a trade union, by resigning their membership from the earlier union, namely, Bombay Labour Union. The petitioner was instrumental in the said change of membership. After the majority of workmen had joined the Kamgar Utkarsha Sabha, the said union filed a complaint of unfair labour practices being Complaint (ULP) No. 1637 of 1991 in the Industrial Court at Mumbai against the employer. The employer was annoyed due to the said action of the petitioner and the union Kamgar Utkarsha Sabha and started victimising and harassing the active members of the union

Kamgar Utkarsha Sabha including the petitioner. On 2-1-1992 the petitioner was charge sheeted on the ground of his misconduct and the incident that took place on 2-10-1991. The charges levelled against the petitioner included riotous, disorderly and indecent behaviour, assaulting co-workman and commission of act subversive of discipline and good behaviour on the premises of the employer. The Enquiry Officer was appointed by the employer who was not independent. The Enquiry Officer proceeded with the enquiry in utter disregard of the principles of natural justice and in predetermined manner. The report was submitted by the Enquiry Officer holding the petitioner guilty of the misconduct of the charges levelled against him. By the order dated 15-7-92 the petitioner's services were dismissed by the employer. Upon receipt of the dismissal order, the petitioner filed a complaint under Items I(a), 1(b), 1(c), 1(d), 1(f), 1(g) of Schedule IV the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short M.R.T.U & P.U.L.P. Act, 1971). The said complaint was contested by the employer by filing written statement. The Labour Court after recording the evidence, by his order dated 20-2-95 allowed the complaint after holding that the employer has indulged in unfair labour practices and directed the employer to reinstate the complainant with full back wages and continuity of service with consequential benefits. It would be pertinent to note that the concerned Labour Court held that though the enquiry conducted by the enquiry officer was fair and proper but the findings of the enquiry officer were not legal and valid and rather perverse. Dissatisfied with the order passed by the 7th Labour Court on 20-2-95, the employer went in revision before the Industrial Court u/s 44 of the M.R.T.U. & P.U.L.P. Act, 1971. During the course of arguments it appears that a plea was raised by the employer that when the concerned Labour Court held that the findings recorded by the enquiry officer were perverse, the opportunity ought to have been given to the employer to justify the misconduct before the Court and since no opportunity was given, the order passed by the Labour Court cannot be sustained. The Industrial Court was persuaded by the said argument and allowed the revision application partly, remanded back the matter to the Labour Court for deciding the issue of perversity of findings after hearing on merits on that point and directing the Labour Court to dispose of the matter expeditiously and preferably within six months from the date of the order passed by the Industrial Court. The employer was directed to pay the wages to the petitioner (original complainant) from the date of its order till the matter was decided by the Labour Court. The order passed by the Industrial Court, Mumbai on 30-11-99 is impugned in the present petition.

4. The contention of the learned Counsel for the petitioner is that at no stage of the proceedings pending before the Labour Court, the employer prayed for leading evidence on merits to prove the charges levelled against the petitioner if the enquiry was held to be not fair and proper or the finding were held to be perverse. The learned Counsel for the petitioner therefore submitted that it was not open to the Industrial Court to remand the matter back to the Labour Court

by directing the employer to prove misconduct when the Labour Court found that the findings recorded by Enquiry Officer were perverse.

5. On the other hand, Mr. Verma, the learned Counsel appearing for the employer strenuously urged that the order passed by the Industrial Court remanding the matter back to Labour Court is just and proper and no prejudice can be said to have been caused to the petitioner by remand since the Industrial Court has directed the employer to pay wages to petitioner (original complainant) from the date of passing of the order till the disposal of original complaint. He heavily relied upon the judgment of the Apex Court in *Cooper Engineering Limited v. P.M. Mundhe* 1975(11) L.L.J. 379

6. I have given my considered thought to the contentions raised by the learned Counsel for the parties.

7. In response to the complaint filed by the petitioner- complainant, the employer filed written statement before the concerned Labour Court. Though various pleas were set up in the written statement including that the enquiry conducted to go into the charges levelled against the complainant was fair, sufficient and in accordance with the principles of natural justice and that the findings recorded by Enquiry Officer do not suffer from any infirmity, in the entire written statement which runs in almost 17 typed pages, not a whisper is raised that in case the Court finds that enquiry held against the petitioner was not fair and proper or that the findings recorded by the enquiry officer are held to be not legal or valid or are considered to be perverse, an opportunity be granted to the employer to prove the misconduct before the Court. Not only that, the employer on the basis of the pleadings of the parties submitted the draft issues which read thus:-

" 1. Whether the complainant proves that the respondent is an Industry?

2. Whether the complainant prove that the respondents have committed unfair labour practices as alleged by him in the above complaint?

3. Whether the complainant is entitled for any relief under the provisions of M.R.T.U. & P.U.L.P. Act, 1971."

In the aforesaid draft issues also the employer did not propose that the concerned Labour Court should first decide the question of fairness of enquiry or the legality Or correctness or perversity of the findings recorded by the Enquiry Officer as a preliminary issue. On the other hand, the petitioner-complainant submitted the following issues for decision of the concerned Labour Court:-

"1) Whether the respondents prove that they are Hot a industry:

2) Whether the respondents prove that the enquiry conducted by them is fair and proper:

3) Whether the respondents prove that the action taken by them is justified:

4) Whether the respondents justified that the punishment awarded to the complainant is proportionate to the act of alleged misconduct."

8. The concerned Labour Court, however, framed the following issues: -

"1. Whether the trust is a Industry?

2. Does the complaint prove that the respondents had indulged in unfair labour practices as alleged?

3. Does he prove that he is entitled to relief as prayed for?

4. Whether the enquiry is fair and proper?

5. What order?"

9. After the evidence was led by the parties, the Labour Court recorded its findings on the issues framed by it and held that the enquiry was fair and proper but held that the findings recorded by the Enquiry Officer were perverse. Even during the course of arguments before the Labour Court no argument was advanced by the employer before the concerned Labour Court that in case the Labour Court holds that the enquiry was not fair and proper or the findings recorded by the Labour Court were not legal and valid or held to be perverse, an opportunity be given to the employer to lead evidence to prove the misconduct. The learned Counsel for the respondent could not demonstrate that at any stage right from the appearance of the employer till the proceedings were closed by concerned Labour Court by passing the order on 20-2-1995, at any stage any request was made by the employer before the said Labour Court permitting them to lead evidence in the event the Court held that enquiry was not fair or proper or that the findings were perverse.

10. In Delhi Cloth and General Mills Co. Ltd. v. Ludh Budh Singh 1972(1) L.L. J. 180 (S.C.) the Apex Court held that prayer for adducing evidence by the management must be made when the proceedings are pending and if any application is made after the proceedings have come to an end for adducing evidence, rejection of such application cannot be faulted. The Apex Court held thus:-

61. From the above decisions the following principles broadly emerge:

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by its in the first instance, and alternatively and

without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal; without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the tribunal in the first instance, to consider whether the enquiry proceedings conducted by the management are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be under such circumstances, it is open to the Tribunal to deal with, in the first instance as a preliminary issue, the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But if the finding on the preliminary issue is against the management, the tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the tribunal, the position, under such circumstances, will be that the management is deprived of the benefit of having the finding of the domestic tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right of attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail

itself of the said opportunity by making a suitable request to the tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the tribunal did not provide such an opportunity. The tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the tribunal, which have come before it either on a reference u/s 10 or by way of an application u/s 33 of the Act."

11. In Cooper Engineering Limited cited supra upon which strong reliance has been placed by the learned Counsel for the employer, the Apex Court was concerned with the question whether, when a domestic enquiry conducted by the employer is found by the Labour Court to be defective, is any duty cast upon the Labour Court to give an opportunity to the employer to adduce evidence before it and whether failure to do so will vitiate the award. The Apex Court considered large number of authorities including Delhi Cloth and General Mills Co. Ltd. (supra) and other judgments which were referred to in that case and in paragraph 19 of the report held thus :-

"19. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

12. In its recent judgment, the Apex Court in *Bharat Forge Company Ltd., v. A.B. Zodge & another* AIR (2) 1996 C.L.R. 345 has again considered the large number of decisions including its judgment in *Delhi Cloth and General Mills (supra)*, *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, , Cooper Engineering Limited (supra)* and held thus:-

"7. A domestic enquiry may be vitiated either for non-compliance of rules of natural justice or for perversity. Disciplinary action taken on the basis of a vitiated enquiry does not stand on a better footing than a disciplinary action with no enquiry. The right of the employer to adduce evidence in both the situations is well-recognised. In this connection, reference may be made to the decisions of this Court in *Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory*, *State Bank of India Vs. R.K. Jain and Others*, *Delhi Cloth General Mill Co. Ltd. v. Ludh Budh Singh*, 1972(1) L.L.J. 180(S.C.) and *Firestone Tyre Co.'s case (supra)*. The stage at which the employer should ask for permission to adduce additional evidence to justify the disciplinary action on merits was indicated by this Court in *Delhi Cloth and General Mill's case (supra)*. In *Shankar Chakrabarty's case (supra)*, the contention that in every case of disciplinary action coming before the tribunal, the tribunal as a matter of law must frame preliminary issue and proceed to see the validity or otherwise of the enquiry and then serve a fresh notice of the employer by calling him to adduce further evidence to sustain the charges. If the employer chooses to do so, by relying on the decision of this Court in the case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, has not been accepted. The view expressed in *Delhi Cloth Mill's case (supra)* that before the proceedings are closed an opportunity to adduce evidence would be given if a suitable request for such opportunity is made by the employer to the tribunal, has been reiterated in *Shankar Chakrabarty's case* after observing that on the question as to the stage as to when leave to adduce further evidence is to be sought for, the decision of this Court in *Cooper Engineering Ltd.* has not overruled the decision of this Court in *Delhi Cloth Mill's case*. There is no dispute in the present case that before the closure of the proceedings before the tribunal, prayer was made by the employer to lead evidence in support of the impugned order of dismissal. Hence, denial of the opportunity to the employer to lead evidence before the tribunal in support of the order of dismissal cannot be justified."

13. The Apex Court has thus held that the employer has right to adduce evidence either when the domestic enquiry is held to be vitiated for non-compliance of rules of natural justice or the perversity of the findings recorded by it. The said right, of course, has to be exercised before the proceedings are closed. The Apex Court ruled that an opportunity to adduce evidence would be given to the employer if a suitable request for such opportunity is made by the employer to the tribunal before the proceedings are closed. Thus, in *Bharat Forge case* the Apex Court has reiterated the law laid down by it in *Delhi Cloth and General Mills case (supra)* that the employer should ask for permission to adduce evidence to justify the disciplinary action on merits before the proceedings are closed.

14. In the present case, admittedly, no request was made by the employer before the concerned Labour Court for adducing evidence to justify the disciplinary action taken against the employee if the Court held that the enquiry proceedings against the employee were not fair and proper or the findings recorded by the Enquiry Officer were perverse.

15. Mr. Verma, the learned Counsel for the respondent employer urged that the issue regarding the fairness and legality of the enquiry or the correctness of the findings recorded by the Enquiry Officer were not decided as preliminary issue and, therefore, the employer had no opportunity to make such request. I am unable to accept the contention of Mr. Verma. Firstly, in the written statement filed by the employer no such plea was raised in the alternative that in case the enquiry held against the employee is held to be not fair and proper or is held to be perverse, the employer be given an opportunity to prove the charges against the employee. Even when issues were framed after the parties had tendered draft issues, the employer never pressed that the issue regarding fairness of the enquiry or the correctness of the findings recorded by the Enquiry Officer should be tried as preliminary issue. Not only that even during the course of arguments no request was made that if the Court holds that enquiry against the employee was not fair and proper or the findings recorded by the Enquiry Officer were perverse, the employer should be given opportunity to lead evidence. Having sat on the fence and allowed the proceedings to complete, it was not open to the employer, after the proceedings were closed before the Labour Court and judgment was delivered, to raise the contention during the course of hearing of revision application for the first time even in the absence of any ground in memo of revision that Labour Court ought to have asked employer to lead evidence to prove the misconduct on merits before the Labour Court. The Industrial Court, thus, committed serious error in remanding the matter back to the Labour Court for deciding the question of misconduct on merits.

16. Accordingly, the writ petition is allowed. The order passed by the Industrial Court on 30-11-1999 is quashed and set aside. The Revision Application (U.L.P.) No. 70 of 1995 is restored to file of the said industrial Court and he is directed to hear and decide the said revision application in accordance with law.

17. The parties to appear before the industrial Court on 21-2-2000. The Industrial Court is directed to hear and decide the revision application expeditiously since it relates to the year 1995.

18. Certified copy expedited.

19. Petition allowed.