

(1998) 02 BOM CK 0054
In the Bombay High Court
Case No : O.O.C.J. W.P. No. 1711 of 1997

Dalal Project Services Pvt. Ltd.

APPELLANT

Vs

Akaram Shankar Chaukekar and Another

RESPONDENT

Date of Decision : 18-02-1998

Acts Referred:

Citation : (1998) 79 FLR 187 : (1999) 1 LLJ 48

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

Bench : Single Bench

Advocate : P.K. Rele and Piyush Shah, for the Appellant; Snadeep Chaubal, for the Respondent

Judgement

R.M. Lodha, J.—Heard.

2. During the course of arguments, Mr. Rele, the learned counsel for the petitioner invited my attention to the recent judgment of the Apex Court delivered in Civil Appeal No. 518 of 1992 Colour-Chem Limited v. A.L. Alaspurkar and Ors. decided on February 5, 1998. The Apex Court in Colour Chem Limited considered the scope of provisions of Clause (g) of item I of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short the Act) at great length and ruled the subject matter of Clause (g) is the misconduct of minor or technical character only and the remaining parts of the clause do not indicate any separate subject-matter like the major misconduct. The Apex Court ruled thus:

"For resolving the controversy centering round this point it is necessary to have a look at the relevant statutory provisions of the Act. The Act was passed by the Maharashtra Legislature in 1971 as Act No. 1 of 1972. Amongst its diverse objects and reasons one of the reasons for enacting the said Act was for defining and providing for prevention of certain unfair labour practices, to constitute courts (as independent machinery) for carrying out the purposes mentioned therein one of which being enforcing provisions relating to unfair labour

practices. Unfair labour practice is defined by Section 3 Sub-section (16) of the Act to mean, unfair labour practices as defined in Section 26. Section 26 of the Act lays down that, unless, the context requires otherwise, unfair labour practices mean any of the practices listed in Schedules II, III and IV. We are not concerned with Schedules II and III which deal with unfair labour practices on the part of the employer and trade unions. We are directly concerned with Schedule IV which deals with general unfair labour practices on the part of the employers. The relevant provisions of item 1 of the Schedule IV of the Act read as under:

"1. To discharge or dismiss employees.

(a) by way of victimisation;

(b)

(c)

(d)

(e)

(f)

(g) 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 the shockingly disproportionate punishment."

So far as the aforesaid Clause (g) is concerned the Labour Court has held that the misconduct alleged against the respondents and held proved before it was not a misconduct of minor or technical character as they were found sleeping on duty and were also guilty of negligence in keeping the machine in working state without putting necessary raw material therein. As the aforesaid finding of the Labour Court about the nature of misconduct of respondent Nos. 3 and 4 was confirmed by the revisional Court and as that finding was not challenged by the respondents before the High Court we shall proceed for the present discussion on the basis that respondent Nos. 3 and 4 were guilty of major misconduct. The moot question, therefore, which falls for consideration is whether on the express language of Clause (g) the said provision gets attracted or not. A conjoint reading of different sub-parts of the aforesaid provision, in our view, leaves no room for doubt that it deals with an unfair labour practice said to have been committed by an employer who discharges or dismisses an employee for misconduct of a minor or technical character and while doing so no regard is kept to the nature of the misconduct alleged and proved against the delinquent or without having regard to the past service record of the employees so that under these circumstance the ultimate punishment imposed on the delinquent would be found by the Court to be a shockingly disproportionate punishment. It is not possible to agree with the contention of learned senior counsel for the respondent-workmen that the said clause would also cover even major

misconducts if for such misconducts the orders of discharge or dismissal are passed by the employer without having regard to the nature of the particular misconduct or the past record of the employees and if under these circumstances, it is found by the court that the punishment imposed is shockingly disproportionate one. It is true that after the words for misconduct of a minor or technical character there is found a comma in Clause (g), but if the contention of learned senior counsel is to be accepted the comma will have to be replaced by "or". That cannot be done in the context and settings of the said clause as the said exercise apart from being impermissible would not make a harmonious reading of the provision. Even that apart, in the said Clause (g) the Legislature has used the word "or" while dealing with the topic of non-consideration by the employer while imposing the punishment the relevant factors to be considered, namely, either the non-consideration of the nature of the particular misconduct or the past record of service of the employee which would make the punishment appear to be shockingly disproportionate to the charge of misconduct held proved against the delinquent. Thus the term, "or" as employed by the Legislature in the said clause refers to the same topic, namely, non consideration of relevant aspects by the employer while imposing the punishment. Consequently it cannot be said to have any reference to the nature of misconduct, whether minor or major. It must, therefore, be held that the comma as found in the clause after providing for the nature of the misconduct only indicates how the same nature of the misconduct referred to in the first part of the clause results in a shockingly disproportionate punishment if certain relevant factors as mentioned in the subsequent part of the clause are not considered by the employer. If the contention of learned senior counsel for the respondents was right all the sub-parts of Clause (g) have to be read disjunctively and not conjunctively. That would result in a very anomalous situation. In such an eventuality the discharge or dismissal of an employee in case of a major misconduct without regard to the nature of the particular misconduct or past record of service may by itself amount to shockingly disproportionate punishment. Consequently for a proved major misconduct, if past service record is not seen, the punishment of discharge or dismissal by itself may amount to a shockingly disproportionate punishment. Such an incongruous result is not contemplated by Clause (g) of Item 1 of Schedule IV of the Act. Such type of truncated operation of the said provision is contra-indicated by the very texture and settings of the said clause. Once the said clause deals with the topic of misconduct of a minor or technical character it is difficult to appreciate how the said clause can be construed as covering also major misconducts for which there is not even a whisper in the said clause. On a harmonious construction of the said clause with all its sub-parts, therefore, it must be held that the Legislature had contemplated, while enacting the said clause punishment of discharge or dismissal for misconduct, of minor or technical character which, when seen in the light of the nature of the particular minor or technical misconduct or the past record of the employee, would amount to inflicting of shockingly disproportionate punishment. In this connection we may

mention that the same learned Judge B.N. Srikrishna, J., in a latter decision in the case of Pandurang Kashinath Wani Vs. Divisional Controller, M.S.R.T.C., Dhule and Others, has taken the view that Clause (g) of Item 1 of Schedule IV of the Act refers to minor or technical misconducts only. The same view was also taken by another learned Judge Jahagirdar, J., in the case of Maharashtra State Road Transport Corporation Vs. Niranjan Shridhar Gade and Another, . So far as this Court is concerned the same Act came for consideration in the case of Hindustan Lever Ltd. Vs. Ashok Vishnu Kate and others, . It is, of course, true that the question with which this Court was concerned was a different one, namely, whether before any final discharge or dismissal order is passed, a complaint could be filed under the Act on the ground that the employer was contemplating to commit such unfair labour practice, if ultimately the departmental proceedings were likely to result into final orders of dismissal or discharge attracting any of the clauses of item 1 of Schedule IV of the Act. However while considering the scheme of the Act especially the very same Item 1 of Schedule IV of the Act a Bench of this Court consisting of G.N. Ray J., and one of us S.B. Majmudar, J. in paragraph 26 of the Report assumed that the said clause would cover minor misconducts.

Learned senior counsel for the respondents was right when she contended that this being a labour welfare legislation liberal construction should be placed on relevant provisions of the Act. She rightly invited our attention to paragraph 41 of the Report of the aforesaid case in this connection. She also invited our attention to a decision of this Court in the case of The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, especially the observations made in paragraph 35 of the Report. It has been observed therein that if two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employee, has to be preferred. But it is further observed in the very said paragraph that there is another canon of interpretation that a statute or for that matter even a particular section has to be interpreted according to its plain words and without doing violence to the language used by the legislature. In our view, Clause (g) of Item 1 of Schedule IV of the Act is not reasonably capable of two constructions. Only one reasonable construction is possible on the express language of Clause (g) namely, that it seeks to cover only those types of unfair labour practices where minor misconducts or technical misconducts have resulted in dismissal or discharge of delinquent workmen and such punishment in the light of the nature of misconduct or past record of the delinquent is found to be shockingly disproportionate to the charges of minor misconduct or charges of technical misconduct held proved against the delinquent. One and only subject-matter of Clause (g) is the misconduct of minor or technical character. The remaining parts of the clause do not indicate any separate subject matter like the major misconduct. But they are all adjuncts or corollaries or appendages of the original subject, namely, minor or technical misconduct which in given set of cases may

amount to resulting in shockingly disproportionate punishment if they are followed by discharge or dismissal of the delinquent."

3. The Apex Court in *Colour-Chem Limited* (supra) also considered the question: In the case where the proved misconduct is major and not minor or technical and where Clause (g) of Item 1 of Schedule IV of MRTU and PULP Act is not attracted, still whether looking to the nature of the charges levelled against the delinquent and in the light of the past records of such misconduct where the delinquent was not liable to be dismissed from service and such punishment patently appears to be grossly disproportionate to the nature of the charges held proved against the delinquent would such act on the part of the employer be covered by Clause (a) of Item I of Schedule IV, namely to discharge or dismiss employees by way of victimisation? The Apex Court rule as the term "victimisation "occurring in Clause(a) is of comprehensive import including victimisation in fact or in law and therefore looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past service record of the employee or is such that no reasonable employer can ever impose in the like circumstances, inflicting of such punishment itself could be termed as legal victimisation and, therefore, an unfair labour practice under the MRTU & PULP Act. The Apex Court in this regard held thus at p. 700 :

"Even on the basis that it was a major misconduct which was alleged and proved, looking to the past record of the service of the delinquent no reasonable employer could have imposed punishment of dismissal. This past record was to the effect that respondent No. 3 was once found allegedly gambling in the factory premises but was in fact found to be playing cards on a Diwali day which was a public holiday, while the only past misconduct alleged against respondent No. 4 was that on one occasion he was warned for negligent discharge of duty. Looking to the nature of the charges levelled against them, therefore, and even in the light of their past service record it could not be said that for such misconducts they were liable to be dismissed from service. Such punishments patently appear to be grossly disproportionate to the nature of the charges held proved against them. That finding reached by the Labour Court on facts remains unassailable. Once that conclusion is reached even apart from non-application of Clause (g) of Item 1 of Schedule IV of the Act, Clause (a) of Item 1 of the said Schedule of the Act gets squarely attracted as it would amount to victimisation on the part of the management which can be said to have imposed a most unreasonable punishment on these employees. In this connection learned senior counsel for the respondent workmen has rightly pressed in service a decision of a Bench of three learned Judges of this Court in the case of *Hind Construction and Engineering Co. Ltd. Vs. Their Workmen*, . In that case this Court was considering the jurisdiction and power of the Industrial Court during the time when Section 11-A of the Industrial Disputes Act, 1947 was not on the Statute

Book. Considering the nature of the punishment imposed on the workmen, who had gone on strike, because they had not reported for duty on a day which otherwise was a holiday but which was declared by the management to be a working day, this Court speaking through Hidayatullah J., made the following pertinent observation at page 88 of the Report:

".... But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record is such as no reasonable employer would ever impose in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice..."

It has to be kept in view that these observations were made by this Court at a time when unfair labour practices were not codified either by the Industrial Disputes Act or even by the present Act. The present Act tried to codify unfair labour practices on the part of the employer by enacting the Act in 1972 and even the Industrial Disputes Act being the Central Act also followed the Maharashtra Act and taking a leaf from the book of Maharashtra Legislature, Parliament introduced the concept of unfair labour practices by inserting Chapter V-C by Act No. 46 of 1982 w.e.f. August 21, 1984. Sections 25-T and 25-U of the Industrial Disputes Act deal with "Prohibition of unfair labour practice" and "Penalty for committing unfair labour practices" respectively. The term unfair labour practice was defined by the Industrial Disputes Act by inserting Section 2(ra) with effect from the very same date i.e., August 21, 1984 by the very same Act i.e., Act No. 46 of 1982 to mean, "any of the practices specified in the Fifth Schedule. The Fifth Schedule of the Industrial Disputes Act, which saw the light of the day pursuant to the very same Amending Act, deals with unfair labour practices which are a mirror image and a replica of the unfair labour practices contemplated and codified by the present Maharashtra Act. But apart from these subsequent statutory provisions which tried to codify unfair labour practices on the part of the employers, the basic concept of victimisation as laid down by this Court in Hind Construction's case (supra) holds the field and is not whittled down by any subsequent statutory enactments. Not only it is not given a go-by but it is reiterated by the present Act by enacting Clause (a) of Item 1 of Schedule IV of the Act meaning thereby any discharge or dismissal of an employee by way of victimisation would be unfair labour practice.

The term "victimisation" is not defined by the present Act. Sub-section (18) of Section 3 of the Act which is the Definition Section lays down that, words and expressions used in this Act and not defined therein, but defined in the Bombay Act, shall, in relation to an industry to which the provisions of the Bombay Act apply, have the meanings assigned to them by the Bombay Act, and in any other case, shall have the meanings assigned to them by the Central Act". Bombay Act is the Bombay Industrial Relations Act, 1946 and the Central Act is the Industrial Disputes Act, 1947 as laid down by Definition Sections 3(1) and 3(2) of the Act. The term "victimisation" is defined neither by the Central Act nor by the Bombay Act. Therefore, the term "victimisation" has to be given general dictionary

meaning. In Concise Oxford Dictionary, 7th Edn. the term "victimisation" is defined at page 1197 as follows:

"make a victim; cheat, make suffer by dismissal or other exceptional treatment."

Thus if a person is made to suffer by some exceptional treatment it would amount to victimisation. The term "victimisation" is of comprehensive import. It may be victimisation in fact or in law. Factual victimisation may consist of diverse acts of employers who are out to drive out and punish an employee for no real reason and for extraneous reasons. As for example a militant trade union leader who is a thorn in the side of the management may be discharged or dismissed for that very reason camouflaged by another ostensibly different reason. Such instances amount to unfair labour practices on account of factual victimisation. Once that happens Clause (a) of Item 1 of Schedule IV of the Act would get attracted, even apart from the very same act being covered by unfair labour practices envisaged by Clauses (b), (c), (d) and (e) of the very same Item 1 of Schedule IV. But, it cannot be said that Clause (a) of Item 1 which deals with victimisation covers only factual victimisation. There can be in addition legal victimisation and it is this type of victimisation which is contemplated by the decision of this Court in *Hind Construction* (supra). It must, therefore, be held that if the punishment of dismissal or discharge is found shockingly disproportionate by the Court regard being had to the particular major misconduct and the past service record of the delinquent or is such as no reasonable employer could ever impose in like circumstances, it would be unfair labour practice by itself being an instance of victimisation in law or legal victimisation independent of factual victimisation, if any. Such an unfair labour practice is covered by the present Act by enactment of Clause (a) of Item 1 of Schedule IV of the Act as it would be an act of victimisation in law as clearly ruled by this Court in the aforesaid decision. On the same lines is a later decision of this Court in the case of *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, wherein a Bench of three learned Judges speaking through Goswami. J. laid down the parameters of the term "victimisation" as understood in labour laws and as contemplated by industrial jurisprudence. It has been observed that ordinarily a person is victimised if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own. If actual fault or guilt meriting punishment is established, such action will be rid of the taint of victimisation. The aforesaid observations obviously refer to factual victimisation. But then follows further elucidation of the term "victimisation" to the following effect:

"Victimisation may partake of various types, as for example, pressurising an employee to leave the union or union activities, treating an employee in a discriminatory manner or inflicting a grossly monstrous punishment which no rational person would impose upon an employee and the like..."

The aforesaid observations in this decision fall in like with the observations in the earlier decision of this Court in *Hind Construction* (supra). Consequently it must

be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstance, inflicting of such punishment itself could be treated as legal victimisation. On the facts of the present case there is a clear finding reached by the Labour Court and as confirmed by the Industrial Court that the charges levelled against the respondent delinquents which were held proved even though reflecting major misconducts, were not such in the light of their past service record as would merit imposition of punishment of dismissal. This factual finding would obviously attract the conclusion that by imposing such punishment the appellant-management had victimised the respondent-delinquents. Imposition of such shockingly disproportionate punishment by itself, therefore, has to be treated as legal victimisation apart from not being factual victimisation as on the latter aspect of the Labour Court has held against the respondent-workmen and that finding has also remained well sustained on record. Thus it must be held that the management even though not guilty of factual victimisation was guilty of legal victimisation in the light of the proved facts which squarely attracted the ratio of the decisions of this Court in Hind Construction (supra) and Bharat Iron Works (supra). It is easy to visualise that no reasonable management could have punished a delinquent workman who in the late hours of the night shift by about 03.30 a.m. had gone to sleep keeping the machine in a working condition especially in the absence of any gross misconduct reflected by the past service record, with the extreme penalty of dismissal. It is also interesting to note that this was a peculiar case in which the Plant In charge found during his surprise visit at 03.30 a.m. in the early hours of the dawn entire work force of 10 mazdoors and 2 operators like the respondents and the supervisor all asleep. It is also pertinent to note that so far as 10 mazdoors were concerned they were let off for this very misconduct by mere warning while the respondents were dismissed from service. It is, of course, true that the respondents were assigned more responsible duty as compared to mazdoors, but in the background of surrounding circumstances and especially in the light of their past service records there is no escape from the conclusion that the punishment of dismissal imposed on them for such misconduct was grossly and shockingly disproportionate, as rightly held by the Labour Court and as confirmed by the revisional Court and the High Court. By imposing such grossly disproportionate punishment on the respondents the appellant-management had tried to kill the fly with a sledge hammer. Consequently it must be held that the appellant was guilty of unfair labour practice. Such an act was squarely covered by Clause (a) of Item 1 of Schedule IV of the Act being legal victimisation if not factual victimisation."

4. In view of the aforesaid legal position stated by the Apex Court in unequivocal terms, the learned counsel for the parties fairly agreed that the Part II judgment of the Labour Court dated March 10, 1997 and the judgment in revision by the

Industrial Court dated August 26, 1997 cannot be legally sustained and interest of justice would be served if the aforesaid judgments delivered by the Labour Court and the Industrial Court respectively are quashed and set aside and the matter is sent back to the Labour Court for fresh decision in accordance with law on Issue Nos. 2 and 3 as framed by the Labour Court, namely (a) Does the complainant prove that the respondents have engaged in any unfair labour practice as alleged in the Complaint? and (b) Does the Complainant further prove that he is entitled for relief as prayed?

5. Accordingly, Part II judgment passed by the 12th Labour Court, Mumbai on March 10, 1997 and the judgment passed by the Industrial Court, Mumbai, in Revision on August 26, 1997 are quashed and set aside and the matter is sent back to the concerned Labour Court for fresh decision of the aforesaid two issues in accordance with law keeping in view the principles laid down by Apex Court in Colour-Chem Limited (supra). For the sake of clarification it is observed that parties have no dispute regarding findings already recorded by the Labour Court on issue No. 1 and 1A which have been affirmed in revision and the said issues would not be subject matter of fresh decision. Parties are directed to appear before the concerned Labour Court on March 9, 1998. The concerned Labour Court is expected to hear and decide the matter on the available material on record without recording any fresh evidence in accordance with law as expeditiously as possible and preferably within 3 months from the appearance of the parties.