

(2010) 08 BOM CK 0018

In the Bombay High Court

Case No : Writ Petition No. 5790 of 1997

Gajraj Babunandan Varma and Another

APPELLANT

Vs

Igloo Cold Storage and Others

RESPONDENT

Date of Decision : 12-08-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 25FFF, 25G, 25N

Citation : (2010) 127 FLR 327 : (2011) 1 LLJ 72

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : Yogendra M. Pendse, for the Appellant; K.S. Bapat, instructed by Desai and Desai Associates, for the Respondent

Judgement

Nishita Mhatre, J.—The petition has been filed against the order of the Industrial Court dated 30.9.1997 in Revision Application (ULP) No. 33 of 1996. The revision application filed by the respondent No. 1 hereinafter referred to as the respondent, has been allowed and the order of the Labour Court in Complaint (ULP) No. 635 of 1988 has been set aside.

2. It appears that this petition was heard finally on 20.1.2009 when this Court recorded that the petition was not being pressed at the instance of petitioner No. 2 who apparently had settled the dues with the 1st respondent. The petition was allowed in the absence of the respondents and hence an L.P.A. was filed by the respondent. On 16.7.2009 that L.P.A. was allowed with certain directions and the writ petition was restored to the file of this Court. Therefore, the petition is being considered only in respect of petitioner No. 1 - Gajraj Babunandan Verma (hereinafter referred to as "the petitioner").

3. A complaint was filed by the Dyes & Chemical Workers Union under Items 1(a), (b), (d) and (f) of Schedule IV of the M.R.T.U. & P.U.L.P. Act, 1971. The complaint was filed on behalf of 8 workers who were illegally terminated from service with effect from 16.12.1988. According to the union, a settlement was arrived at between the respondent and the union on 23.9.1988 with respect to

the general demands. Three months later, the respondent displayed a notice of closure of one of its two divisions i.e. the Ice Manufacturing Division with immediate effect. The activities of the other division i.e. of the Cold Storage Division, continued. The union filed the complaint on behalf of 8 employees whose services were terminated on account of the closure of the Ice Manufacturing Division, contending that the respondent had violated the provisions of Section 25G of the Industrial Disputes Act, 1947 (in short, the I.D. Act). The union had also contended that the partial closure was illegal as it was not effected in accordance with the provisions of the I.D. Act. The union contended that besides 19 permanent employees, there were 140 employees who were employed through a contractor. Thus, according to the union, the number of workers was more than 100, requiring the respondent to comply with the provisions of Section 25N as well. The union contended that the termination of the employees from service was not in good faith but in colourable exercise of the employer's rights.

4. The complaint was opposed by the respondent by filing its written statement. It was pleaded in the written statement that the respondent Company had two divisions, namely, (1) the Cold Storage Division and (2) the Ice Manufacturing Division. According to the respondent, it found that it was not viable and uneconomical to run the Ice Manufacturing Division and, therefore, had displayed a notice of closure dated 16.12.1988. Eight permanent employees who were attached to the Ice Manufacturing Division who were also doing incidental work, were found to be redundant and, therefore, their services were terminated with effect from 16.12.1988 on account of the closure. The legal dues were offered to the workmen including the notice pay and closure compensation. The respondent contended that the complainant could not challenge the closure and/or retrenchment under the provisions of the M.R.T.U. & P.U.L.P. Act. The petitioner was one of the workers whose services were terminated due to the closure of the Ice Manufacturing Division.

5. Evidence was led by the union by examining the petitioner in support of the complaint. The petitioner deposed that he was working as an electrician in both the divisions i.e. Ice Manufacturing Division as well as the Cold Storage Division. He has stated that an electrician was still required in the Company even after the partial closure. However, the work which he was performing was entrusted to a person junior to him, namely, Ram Achal Rai. He has also deposed that the Company recruited new employees after terminating his services along with seven other employees. In his cross-examination, the petitioner admitted that the notice of closure was displayed on the wall of the factory on 16.12.1988. He has deposed that he and the other workers affected by the closure were working in both the divisions. He has further admitted that the description of the work done by Ram Achal Rai and that performed by him which was mentioned in the settlement of 1981, was correct. He has also admitted in his cross-examination that Ram Achal Rai was working both, as a boiler attendant as well as the wireman, whereas he was working as an electrician. He has further stated on

oath that he was the only electrician working in the Company. Evidence of the Assistant Manager of the Company was led on behalf of the respondent. This witness has stated that the termination of service of the petitioner and another workmen was effected because of the closure of the Ice Manufacturing Division due to which they were rendered redundant.

6. The Labour Court by its judgment dated 19.5.1996 considered the evidence on record and allowed the complaint. It was held that the termination of service effected on 16.12.1988 was illegal. The Labour Court, therefore awarded reinstatement with continuity of service and full back wages to six employees. Two others had settled their dues with the respondent Company. The Labour Court accepted the factum of closure of the Ice Manufacturing Division. It then considered the propriety of the action of the respondent in terminating the services of the employees when one of the divisions was still running. The Labour Court then considered the fact that the settlement of September, 1988 classified the employees in three grades. It concluded that the respondent's approach in terminating the services of the employees was not fair as juniors were retained in service. The Labour Court was of the view that though the closure was proved, the workers who were terminated from service as a consequence, were singled out for the action. The Labour Court then concluded that the respondent had not proved that those workers were working exclusively in the Ice Manufacturing Division and that therefore on its closure it was necessary to terminate their services.

7. Being aggrieved by the decision of the Labour Court, the respondent preferred Revision Application (ULP) No. 33 of 1996 before the Industrial Court. The Industrial Court reversed the findings of the Labour Court by concluding that the factum of closure of the Ice Manufacturing Division had been admitted by the union and the workers. The Court then observed that when a part of an undertaking is closed down, the termination of service of the workers affected due to such partial closure, does not amount to retrenchment. The Court held that the findings of the Labour Court that the termination of service effected as a consequence of the closure amounted to retrenchment was contrary to law and, therefore, set aside the order of the Labour Court. In so far as the petitioner's services are concerned, the Industrial Court observed that he was the only electrician working, prior to the closure. Therefore, the question of retaining him in service did not arise although others junior to him continued in service. The Industrial Court observed that the retention of Ram Achal Rai in service instead of the petitioner although he was junior to the latter, was not in violation of Section 25G of the I.D. Act. The Industrial Court, therefore, allowed the revision application and set aside the order of the Labour Court.

8. Mr. Pendse, the learned advocate appearing for the petitioner submits that although the factum of closure cannot be challenged, the termination of service effected by the respondent amounted to unfair labour practices under Item 1 (a), (b) and (f) of Schedule IV of the M.R.T.U. & P.U.L.P. Act. He points out that the

Industrial Court has erred in concluding that merely because the factum of closure has been accepted and its genuineness could not be examined, the termination of service as a consequence of the closure should not be questioned. He submits that, admittedly, the petitioner was working as an electrician in both the divisions. Therefore, the closure of one division could not have led to the termination of his service as the other division was still functioning. According to him, therefore, the petitioner could not have been terminated from service while juniors were retained. He submits that the very fact that the juniors had been retained in service would indicate that the termination of service was not in good faith but in colourable exercise of the employer's rights. The learned advocate further submits that the notice of closure dated 16.12.1988 showed the name of the petitioner at Sr. No. 6. He points out that the list of workers displayed on 1.10.1988 arranging them category-wise with their revised salaries and grades in accordance with the settlement of 23.9.1988, shows that both Ram Achal Rai and Gajraj Babunandan Verma i.e. the petitioner were working in Refrigeration Plant. Only five workers were shown to be employees in Ice Manufacturing Division, all of whom belong to Grade III. He points out that although he was classified in Grade I and Ram Achal Rai in Grade II, the services of Ram Achal Rai were retained but petitioner's services were terminated. According to the learned advocate, the date of appointment of Ram Achal Rai was 1.2.1980, whereas that of the petitioner was 12.7.1978. He, therefore, submits that a perusal of this list which was displayed on the notice board by the respondent indicates that the petitioner ought to have been retained in service. He submits that the Labour Court has rightly held that the petitioner was victimized as he was an activist of the union. He urges that the order of the Labour Court be upheld.

9. Per contra, Mr. Bapat, the learned advocate appearing for the respondent urges that the petition should be dismissed. He submits that it is the prerogative of the employer to decide how to organize his business. He submits that the petitioner was the only electrician in the category of electricians and, therefore, the question of any person junior to him in that category being retained did not arise. He submits that when a closure is effected, what is relevant to be considered while examining whether the termination of service of the employees effected by the closure is legal that, the Court must ascertain whether the employees have been paid closure compensation in accordance with Section 25FFF of the I.D. Act. He points out that the respondent used its discretion while deciding to retain Ram Achal Rai's services and to terminate the petitioner from service. He points out that the work of an electrician was being done by Ram Achal Rai in addition to his work as a boiler attendant- cum-wireman. He submits that the respondent in its business wisdom had decided that it would be appropriate to retain the services of a person who would do both the jobs rather than one who was exclusively employed as an electrician. According to the learned advocate, the Industrial Court has committed no error in concluding that the closure effected by the respondent had resulted in the termination of service

of the petitioner. He points out that there is no dispute that the closure compensation was offered to the petitioner which he did not accept. According to him, once the factory is closed, as a matter of fact, the Labour Court could not have considered the motive of the employer to do so. He urges that the Labour Court could not probe into the relations between the workers and the respondent to ascertain whether they were strained, which had in fact led to the closure. He relies on the judgment of the Supreme Court in the case of *Indian Hume Pipe Co. Ltd. Vs. Their Workmen*, .

10. The complaint has been filed under Item 1(a), (b), (d), and (f) of Schedule IV of the M.R.T.U. & P.U.L.P. Act. The termination from service has occurred as a consequence of the closure of the Ice Manufacturing Division. Besides the contention of the petitioner that he was an active member of the Union, there is nothing on record to indicate that he was singled out because he was an active member of the union. Other members who were active in the trade union activities were retained in service even after the closure. Therefore, the case of the petitioner that he was victimized has not been made out.

11. It would be necessary now to examine whether the termination of service was effected "not in good faith but in colourable exercise of employer's rights". According to Mr. Pendse, the learned advocate appearing for the petitioner, it is necessary to ascertain the justifiability of the termination of service of the petitioner as a consequence of the closure. It is only if this issue is examined that an answer can be provided as to whether the termination of service was not in good faith. He submits that the propriety of the action of the respondent will have to be considered while examining this issue. Mr. Bapat, on the other hand, has submitted that, once the action has been found to be legal, under the M.R.T.U. & P.U.L.P. Act, the Labour Court cannot consider the justifiability of the action. The Labour Court must ensure that the action was legal. The propriety of such action cannot be examined by the Labour Court, according to the learned advocate.

12. The term "good faith" has been defined in the Concise Oxford Dictionary, 11th Edition Revised, as "honesty or sincerity of intention". The Black's Law Dictionary, 8th Edition, defines "good faith" thus - "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage". The submission of Mr. Bapat that the Court cannot examine the propriety of the action of the employer to terminate the services of the employee under the M.R.T.U. & P.U.L.P. Act, is unsustainable. Whether an employer has acted in good faith or not must be determined on the basis of whether he had an honest intention or an honest belief or purpose. It is necessary to examine whether there was any intent to defraud or to seek unconscionable advantage. All these questions are a state of mind. Therefore, unless the issue as to whether the employer has acted in good faith is examined so as to ascertain the intention

of the employer, the words "not in good faith" contained in Item 1(b) of Schedule IV of the M.R.T.U. & P.U.L.P. Act, would render otiose. If an action is taken in good faith, it would not only be legal but proper. However, an action which is not taken in good faith but in colourable exercise of the employer's rights may be legal and not proper. Had the legislature intended that the Labour Court should ascertain only the legality of the action of the employer while terminating the services of an employee, it would not have included Item 1 (b) as an unfair labour practice on the part of an employer. If the submission of Mr. Bapat is to be accepted, this item will be rendered nugatory.

13. In the present case, the retention of Ram Achal Rai instead of the petitioner is obviously not in good faith but in colourable exercise of the employer's rights. There is evidence on record to establish the fact that the petitioner was working in both the divisions. In fact, the list of employees displayed by the respondent on 1.10.1988 indicating their salaries, grades, etc. in terms of the settlement of 23.9.1988 shows that both Ram Achal Rai and Gajraj Babunandan Varma i.e. the petitioner herein, were working in the Refrigeration Plant as opposed to the Ice Plant. The persons working in the Ice Plant have been mentioned at Sr. Nos. 15 to 19. The Ice Plant was closed by the notice of closure dated 16.12.1988. The Refrigeration Plant i.e. the Cold Storage division continued to work despite which the services of the petitioner were terminated. If it is the case of the respondent that the services of the petitioner were terminated on account of the closure of the Ice Manufacturing Division, then the aforesaid list prepared by the respondent does not bear this out as the petitioner was not working in the Ice Manufacturing Division. To say that the petitioner was terminated from service on account of the closure as there was the only electrician, would also not be correct. This submission of Mr. Bapat could have been accepted had the petitioner been working only in the Ice Manufacturing Division. However, it is the respondent's own case that he was working in the Refrigeration Plant as an electrician in Grade-I. Admittedly, there was no closure of the Refrigeration Plant as mentioned in the notice of closure. Therefore, to suggest that the termination of the petitioner was effected only because of closure of the Ice Manufacturing Division is not correct. The petitioner has stated on oath that he was working in both the divisions. It is obvious that his termination from service is not in good faith but in colourable exercise of the employer's rights.

14. Section 25G provides for retrenchment of workmen on the principle of "last come, first go". The case of the respondent is not that the petitioner was retrenched but that he was terminated from service on account of closure. The notice dated 16.12.1988 clearly mentions that it is a notice of closure of a division. It does not in any manner convey that the workmen were being retrenched while the unit was still running. The emphasis of Mr. Bapat on the contention that the petitioner was the only electrician and, therefore, has rightly been retrenched is again not borne out by the facts on record. The termination is due to the closure, according to the respondent. The evidence on record indicates that the petitioner was working in both divisions. Therefore, the

question of terminating his services on account of closure of the Ice Manufacturing Division does not arise. The termination of services of the petitioner is for patently false reasons.

15. Reliance has been placed by Mr. Bapat on the decision of the Supreme Court in the case of *M/s. Indian Hume Pipe (supra)*, wherein the Court has held that the motive of the employer for closing an undertaking cannot be ascertained, once the factum of closure is established. This judgment, in my opinion, has no application to the facts in the present case. The closure is not being questioned. It is only the termination of service of the petitioner which is being examined. It is always open for the Labour Court for deciding the complaint under Item 1 of Schedule IV of the M.R.T.U. & P.U.L.P. Act to ascertain the motive behind the discharge or dismissal. It need not confine itself only to the legality of the action taken by the employer. This is because the Items require the Court to consider the intention of the employer while terminating the services of an employee. Therefore, the justification of such termination can always be examined.

16. The contention of Mr. Bapat is that the employer can always reorganize his business in the manner he desires and it is not for the Tribunal to question that decision. This submission is correct. However, when the reorganization leads to a termination of service of the workmen, it is always open for the Labour Court to consider whether it is effected not in good faith but in colourable exercise of the employer's rights or for patently false reasons.

17. In my opinion, therefore, the judgment of the Industrial Court is erroneous. The Labour Court has committed no error in allowing the complaint. The Labour Court has granted the petitioner reinstatement with continuity of service and full back wages. Mr. Bapat for the respondent has submitted that the petitioner has led no evidence to establish that he was not gainfully employed during the period of his unemployment with the respondent. He submits that, in these circumstances, the award of back wages by the Labour Court is contrary to several decisions of the Supreme Court and the High Courts as back wages cannot be awarded as a natural consequence of reinstatement being granted. He submits that the witness for the respondent has stated that the petitioner was earning by obtaining electrical contracts in various Ice Plant and Cold Storage companies and, therefore, there was no need to grant him back wages. Besides this vague statement, there is nothing on record to indicate that in fact the petitioner was obtaining work in Ice Plant or Cold Storage companies. However, the petitioner in his evidence has stated that he had made attempts to seek work in the M.I.D.C. area by applying in response to advertisements issued for electricians. In my opinion, while considering the aspect of back wages payable, the Labour Court has not examined the issue as to whether the petitioner was gainfully employed during the period of his unemployment with the respondent in its proper perspective. Therefore, it would be necessary to remand the matter to the Labour Court only to decide the issue of back wages payable to the workman.

18. The writ petition is therefore allowed partly. The order of the Industrial Court

is set aside.

19. The petitioner is entitled to reinstatement with continuity of service.

20. Complaint (ULP) No. 635 of 1988 is remanded to the First Labour Court, Thane, to decide whether the petitioner is entitled to back wages from 16.12.1988 till he is reinstated in service.

21. Parties shall appear before the Labour Court on 30.8.2010 at 11.00 a.m.

22. Parties are at liberty to produce such additional evidence both oral and documentary, as is necessary, before the Labour Court.

23. Mr. Bapat, the learned advocate for respondent No. 1 seeks a stay of this order. Stay refused.