
(1991) 09 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No's. 180 and 310 of 1991

Goa Bottling Company Private Limited

APPELLANT

Vs

Pradeep Sardesai and Another

RESPONDENT

Date of Decision : 06-09-1991

Acts Referred:

Industrial Disputes (Central) Rules, 1957 — Rule 46
Industrial Disputes Act, 1947 — Section 25G

Citation : (1992) 1 BomCR 297 : (1992) 65 FLR 279 : (1995) 3 LLJ 280

Hon'ble Judges : K. Sukumaran, J;E.S. Da'Silva, J

Bench : Division Bench

Advocate : S.K Kakodkar, R.V. Kamat, in W.P. 310 and M.S. Usgaodkar and S. Kantak, in WP 180/91, for the Appellant; S.K Kakodkar, R.V. Kamat, in W.P. No. 180/91 and M.S. Usgaonkar, S.S. Kantak Advs. for R2 in W.P. 310, for the Respondent

Final Decision : Allowed

Judgement

K. Sukumaran, J

1. An award passed by the Industrial Tribunal is complained against both by the management and by the workman. They have come to this Court seeking relief under Article 226 of the Constitution. Writ Petition No. 180 of 1991 is by the management and Writ Petition No. 310 of 1991 is by the workman.

2. The dispute was in relation to the termination of services of the workman Pradeep Sardesai. The workman contended that the termination was for a misconduct, but without conducting an enquiry as mandated by law. He claimed reinstatement in service with back wages, right from the date of termination of his services on 16.5.1978. According to the management he was surplus to the requirements of the Company having regard to the attenuated nature of its activities which surfaced even as early as in 1975. According to it, the petitioner was junior most in the category of salesmen. He was being accommodated essentially on humanitarian grounds. When his conduct, however, indicated a

defiant attitude, it had exercised its right to retrench the workman. The workman could not be granted any relief in those circumstances.

3. The Industrial Tribunal ultimately came to the conclusion that the action amounted to retrenchment. There was non-compliance with Section 25-G of the Industrial Disputes Act and Rule 46 of the Industrial Disputes Rules and consequently the workman was entitled to the relief. The Tribunal declined the relief of reinstatement, and granted monetary relief in the sum of rupees one lac.

4. In the scheme of things, it is necessary to deal with the writ petition filed by the workman initially, for basic issue is involved in that writ petition: Whether the termination of the services of the workman was really by way of punishment or only a retrenchment simpliciter?

5. The abundance of documentary evidence available in the case, has entrapped the management in a cage built by itself and with strong bars. The immediate event leading to the termination, may, in that context, be alluded to. They started with the communication dated 11.5.1978 addressed to the workman to undertake a tour from the very next day, and at 7.00 a.m. The tour programme details all the places covered from 12.5.1978 to 26.5.1978. (See Annexure-B). The workman replied the letter by his communication dated 12.5.1978. Therein he complained that the letter of the management directing him to start the tour on 12.5.1978 at 7.00 a.m. was received by him only at 10.30 a.m. on 12.5.1978. The letter details the difficulties which, according to him, had rendered compliance with the directions of the management altogether impossible. Suffice it to say that they cover grievances such as his total experience in undertaking the working of a sales supervisor, having never been outside Goa earlier. Even the inadequacy of clothing and personal effects required for the journey had been put forward as a ground for the impossibility in complying with the directives of the management to undertake the sales tour. The management had in the meantime issued a communication (Annexure-C) suspending the workman from services and directing him to show-cause against the misconduct alleged against him. The receipt of that communication at 5.30 p.m. on 12.5.1978 is also referred to in the workman's letter dated 12.5.1978.

6. The letter dated 12.5.1978 throws much light about the nature of the action taken by the management. The workman was charged with refusal to obey the orders and carry out instructions given by sectional heads and superiors...."; and that refusal was described as amounting to "gross misconduct". The workman was asked to submit his written explanation within 48 hours, showing cause as to why disciplinary action should not be taken against him. If there be any lingering doubt about the real character of the action of the management that is dispelled by the order (Annexure-E) passed on 16.5.1978. It makes a reference to the explanation of the workman dated 12.5.1978, submitted in response to the show cause memo issued to him for disobeying the orders of superiors to carry out a particular duty entrusted thereby constituting a gross misconduct of willful disobedience of the order of superiors. In the succeeding paragraph, the

management expressed its view that the explanation is unsatisfactory and without any substance. It concludes with the sentence: "At the most, your explanation can be treated as attempted to cover up your misconduct. In paragraph 4 there is a reference to yet another misconduct committed by the workman. Paragraphs 6 and 7 refer to several complaints received about the workman, and a conclusion about his unsuitability for any of the posts and his being shifted to sales department in November 1977. In other words, there is a clear finding of the management as regards the misconduct alleged against him, a finding that his explanation was unsatisfactory, and an order that his services had been dispensed within that background. Towards the concluding portion, the communication proceeds to term the termination as "by way of retrenchment". Consequential directions in conformity with the purported retrenchment have also been given.

7. There is no controversy that before coming to a conclusion that the explanation of the workman was unacceptable, the management had not conducted any enquiry whatever. If, therefore, the termination was in truth and substance one by way of disciplinary action, that has to be invalidated for a confessed non-conformity with the requirements of law as regards the conduct of due and proper enquiry. Confronted with such a situation, Mr Usgaonkar attempted to persuade us to take the view that the order was essentially only one of retrenchment, and that an indulgence shown by the management of accommodating the petitioner in its various departments on sympathetic considerations, would not make the termination one by way of disciplinary action. Reliance was placed on the communication (Exhibit M-14) dated 8.4.1975 addressed to the Secretary of the Goa National Commercial and General Employees' Sangh, wherein reference was made to decision to retrench surplus workmen in two stages on account of continuous falling demand for soft drinks. The workman figures in the administrative department. His services have been described as having a duration of ten months. This according to Counsel indicated that he was, therefore, liable to be retrenched, he being one of the 13 workmen to be retrenched with effect from 15.6.1975. The notice published on 13.5.1978 giving the staff seniority list, indicating the workman as the juniormost among the category of clerks having joined only on 1.6.1974, was also relied on in that context. Counsel was, however, fair to admit that notice of seniority was issued long after the proposal for termination as contained in Exhibit M-14 and as a matter of fact even subsequent to the termination order passed on 12.5.1978. We have, therefore, not attached any weight or importance to this communication. There is no satisfactory material available to establish that in pursuance of the communication dated 8.4.1975 (Exhibit M-14), retrenchment as a matter of fact had been effected. The proposal for retrenchment as indicated in Exhibit M-16, dated 9.2.1978, also cannot carry conviction about the real intention of the management as one of retrenchment of the workmen, when no follow up action by which retrenchment is actually effected in relation to any specified workman or categories of workmen had been

made out. In the above situation, we are unable to accept the contention of the management that the termination of services of the workman was only a logical, even if delayed, culmination of a proposal for retrenchment thought about many years back. The changes in the sales organisation and the commercial prospects referred to, with particular reference to the sales agency agreements and other communications, also would not help the management to establish a case of real retrenchment, when there is no pointed or convincing material about a drastic cut in its activities or a serious crisis in its commercial existence necessitating retrenchment of surplus staff. The exit of a competitor like Coco Cola, if at all, could only open up new areas for commercial exploitation of the management. Counsel submitted that there were other competitors. Here again, materials are wanting to assure us that a situation had really arisen for effecting retrenchment and that retrenchment in respect of other categories of workmen had been effected, in the manner known to law, with its attendant publicity. We have, therefore, no hesitation in holding that the action of the management does not answer the harmless act of retrenchment, which becomes an avoidable situation which even the management may not at time be able to avert.

8. Even assuming that the situation was such as to make retrenchment an inevitable sour step, the materials do indicate that re-course was not made by the management to that alternative. It was confronted with a situation where, what according to it was a serious misdemeanours, had been committed by the workman. It was open to it to proceed against the workman with all seriousness. In that event, it has necessarily to go by elementary and fundamental principles of industrial jurisprudence which mandate the holding of an enquiry into such a misconduct.

9. If on the other hand, it wanted to avail of the power to retrench a surplus workman, that course could be adopted, without giving room for a legitimate complaint by the workman about a stigma cast on him by attributing a grave misconduct. It is unnecessary to traverse what was once a difficult and confusing terrain in service jurisprudence inasmuch as academic discussions and judicial discussions have by now illuminated the path considerably. It is unnecessary to load this judgment with the citations of the various authorities of the Apex Court and of the other High Courts, which have discussed the problem. It would suffice if a reference is made to a recent decision of the Supreme Court in *Om Prakash Goel v. The Himachal Pradesh Tourism Development Corporation Ltd.* 1992 I Lab LJ 469 . Therein, it was a case of a person against whom a charge-sheet was issued alleging misconduct involving an abetment of embezzlement and the like. The said person was ultimately served with an order terminating his services simpliciter. After referring to the earlier decisions in *Anoop Jaiswal Vs. Government of India and Another*, , *Nepal Singh Vs. State of U.P. and Others*, , *Jarnail Singh and Others Vs. State of Punjab and Others*, the principles were enunciated in paragraph 4 and were applied to the facts of case in paragraph 5. The conclusion was in the following terms:

"Having gone through the various records: We are satisfied that the termination order though appears to be innocuous, only intended to punish the petitioner for his misconduct. In respect of the allegations which are mentioned in the charges that were served on him. Therefore, it is not difficult to see that the form of the termination order is only a cloak for an order of punishment."

10. The right of the Court to go behind the order, and to find out whether what was really a punishment was to be under "the guise of an ex facie innocuous termination order, and to "lift the veil and see whether the order was made on the ground of misconduct, inefficiency or not., has now been well recognised. In the present case is unnecessary to lift any veil, for the robes display penal pattern in garish colours.

11. The above discussion makes it unnecessary for us to consider whether the action if treated as one of retrenchment, was in violation of Section 25-G and Rule 46, and to mould the relief on that basis. We are, however, of the view that even if the action by way of retrenchment was justified, the Tribunal was right in its conclusion that the statutory provisions referred to above, had not been observed, rendering the action as denuded of any legal effect.

12. In the light of the conclusion reached above, the relief to be granted to the petitioner has necessarily to be discussed. As an illegal and arbitrary action, the dismissal of the workman by the management, will have to be declared as totally ineffective for all purposes. The normal relief which a workman is entitled to in such circumstances is reinstatement with the entirety of backwages. There will be exceptional circumstances where the management is relieved of an obligation to take on a workman against whom disciplinary action had been pursued although ineffectively and illegally. Here again a clear distinction has to be drawn from cases where the acts of misconduct are of a serious nature and grossly subversive of discipline. Threatening the highest executive with dire consequences and wrongfully confining him in his room to withdraw a notice, could be illustrated as an instance where reinstatement could be justifiably denied. It has been so held by the Supreme Court in *Workmen of Bharat Fritz Warner (P). Ltd, v. Bharat Fritz Werner (P) Ltd.* and Anr. 1990 II Lab LJ 226 . Some relevant factors are the past record of the employee, and the nature of the alleged lapse, and the ground on which the order of the management had been set aside. These guidelines have been given almost four decades back. See *The Punjab National Bank Ltd. Vs. Its Workmen*, . An employee occupying a position of trust and confidence, found guilty of any activities subversive or prejudicial to the interests of the industry, could in like manner be denied the relief of reinstatement. See *Hindustan Steel Ltd. v. A.K. Roy* AIR 1969 SC 1238. It is unnecessary to multiply decisions dealing with the same aspect. In the present case, the workman was appointed as a clerk, and at the time of the termination of his services, was to perform the duties of a salesman. The post is not one of sensitive confidence. The misconduct alleged is not in relation to a violent act, or subversive of the interest of the very industry. It is difficult to foresee totally

calamitous results befalling the industry if the sales promotion programme the basis of alleged disobedience is postponed by a day or two. Again, the misconduct alleged is not one invoking a high handed action on the part of the workman. It did not have the effect of shocking the morale of the managerial personnel. Scanning through the relevant records we do find substance in the plea of the workman that he could not undertake a trip to a far off place when the direction in that behalf was received by him 5 1/2 hours later than the scheduled time of departure. The direction was impossible of performance in such a situation. He was to be away from home for a fairly long period. This would entail making arrangements and adjustments even in relation to his domestic matters. There was hardly any time for attending to any one of those details. The management has a case that they had orally apprised the workman about the necessity for him to move out on sales promotion, somewhere earlier in time. There is, however, absolutely no reference to any such oral instructions in the communication dated 12th May 1978. In the absence of other materials, we cannot, therefore, accept the belated plea of oral information as put forward by the management. The dominance of innocence on the part of the workman and a mass suspicion about the conduct of the management, emerge in that situation. These and other factors, persuade us to hold that the relief of reinstatement cannot be withheld from the workman. We accordingly hold that the workman will be entitled to reinstatement in service.

13. The workman was paid comparatively low at the termination of his services. His services were terminated throwing him and his family to the winds, as it were, one of the elementary and substantial principles of industrial jurisprudence in relation to disciplinary action. No management could ordinarily be permitted to shunt to starvation a workman without performing the elementary duty of conducting an enquiry. Ordinarily it will be a shattering shock for the workman and his family. When the management does mix up matters in messy manner as it had done here, the action may even smack of lack of good faith and also of the existence of an oblique motive. The workman would be eminently entitled to backwages in such a situation. The Tribunal observed that his present age was about 45. The prime of his youth was spent in disconcerting unpredictability, and distress arising out of non-employment and the consequent depression. The entirety of the back wages would then normally be due to the workman. There is, however, evidence which has been accepted by the Tribunal about an alternate employment which the workman had during the period of 1982 to 1986. Counsel for the workman rightly and fairly submitted that back wages for the above period could be excluded in the computation of the arrears of back wages. We hold that the workman is entitled to the full back wages during the period he has been kept out of service except for the period 1982 to 1986 during which he had been employee in another establishment.

14. This takes us to the somewhat difficult task of determining the arrears of wages for the period involved. It has to be observed in this connection that in the computation of the backwages in the case of a reinstated workman, the benefit

of revised wages or salary arising out of a revision of pay scales, as also yearly increments and revised dearness allowance should also enter the calculation of arrears of backwages. Leave encashment and bonus, if other workmen in the same category have been paid the same would also be his dues. Interest at 12% per annum from the date the amount became due, is also held to be one of such entitlement of a workman in such a situation. See *Gammon India Limited Vs. Niranjan Dass*, .

15. The Industrial Tribunal noted that the salary of the workman at the time of termination of his services was Rs. 377.60. It was contended before the Tribunal that there were two to three revisions of pay-scales and the wages of the workman had been enormously increased. However, on this aspect, there was no clear evidence. Exhibit 19 before the Tribunal was, however, a helpful material. That was a settlement which furnishes figures of the revised scales of the workmen, A revision ranging from Rs. 200/- to Rs. 400/- per month had been noticed by the Tribunal. The workman had a contention that a person in the clerical grade was receiving somewhere about Rs. 3000/- per month at the time when the matter was argued before the Tribunal. This was obviously not accepted by the Tribunal in the absence of supportive evidence. The long span of twelve years, however, would justify an inference about revisions of scales of pay during that period. The Court has necessarily to attempt the computation of the backwages, in as satisfactory a manner with the above constraints. In doing so, as noted above, the interest at 12% on amounts becoming due would also enter the reckoning. Even if it is assumed that by 1986, the salary would have been about Rs. 1000/-(as against the claim of the workman that it was Rs. 3000/-), the total amount for the entirety of the period may aggregate to about Rs. 80,000/-, with addition of interest. Similarly, the salary for the period prior to 1982 would work out to about Rs. 20,000/-. Interest at 12% will have to be added to the salary payable as and when it becomes due. The total figure thus worked out, even on a conservative basis may, far exceed rupees one lac. We have modulated the figure in favour of the management. On a total evaluation of all the circumstances, we feel that the arrears of wages payable to the workman could be fixed in the sum of rupees one lac.

16. The management has already deposited a sum of Rs. 50,000/ in pursuance of an interim order passed by this Court. The workman will be entitled to withdraw the same immediately. The balance amount shall be payable within a period of one month from today.

17. In the light of the above discussions. Writ Petition No. 180 of 1991 by the management will stand dismissed, and Writ Petition No. 310 of 1991 by the workman will stand allowed in the manner indicated above.

18. Ordinarily, the successful workman should have been awarded costs in both the cases. We, however, decline to make any orders as to costs in the hope and trust that more cordial and co-operative relationship would emerge in the wake of his Judgment.