

(2001) 12 BOM CK 0057

In the Bombay High Court

Case No : Writ Petition No's. 6443 and 6473 of 1995

Godrej and Boyce Mfg. Co. Ltd.

APPELLANT

Vs

Jaikrishna Jan Bahadur Singh and Another

RESPONDENT

Date of Decision : 20-12-2001

Acts Referred:

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

Citation : (2002) 2 ALLMR 147 : (2002) 3 BomCR 622 : (2002) 92 FLR 1100

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : J.P. Cama, instructed by K.P. Anilkumar, for the Appellant; Ravindra Nair and I.R. Kulkarni, for the Respondent

Judgement

Nishita Mhatre, J.—Writ Petition No. 6443 of 1995 is filed by the petitioner employer challenging the order dated 20th October, 1995 passed by the Industrial Court in Complaint (U.L.P.) No. 648 of 1992 filed by the first respondent workman under Items 5, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the "said Act"). Writ Petition No. 6473 of 1995 has also been filed by the petitioner employer challenging the order dated 20th October, 1995 passed by the Industrial Court in Complaint (U.L.P.) No. 982 of 1993 filed by the same workman.

2. Facts in both the petitions are briefly set out as under:---

The petitioner employer suspended the first respondent workman on 13th October, 1990 for assaulting a co-worker and using vulgar and abusive language as also for threatening him with dire consequences. This suspension was to remain in force pending the preparation of the charge-sheet and until the time of the final disposal of the inquiry and its decision was communicated to the first respondent. It appears that the workman who was allegedly assaulted by the first respondent lodged a police complaint on the same day. The first respondent

filed a cross-complaint on 25th October, 1990 against his co-worker. On 20th December, 1990 the petitioner issued a charge-sheet calling upon the first respondent to submit his written explanation. The first respondent replied to the charge-sheet by stating that he was not in a position to reply to the same in detail as the matter involved in the charge-sheet was subjudice before the Metropolitan Magistrate's Court and by replying to the charges levelled against him by the petitioner, he would be revealing his defence. The first respondent also requested the petitioner not to conduct an inquiry against him as this would prejudicially affect him in the criminal case pending before the Metropolitan Magistrate's Court. The petitioner acceded to this demand of the first respondent and the no enquiry was instituted against him. As the first respondent was under suspension, he was paid subsistence allowance in accordance with the provisions of law. The first respondent was paid full wages as subsistence allowance after six months of his suspension which he continued to draw during the pendency of the case. It appears that on 7th December, 1992 a settlement was signed between the petitioner and the Union representing the workmen employed whereby wages were increased. These wages were linked to the production given by each employee.

3. The first respondent filed Complaint (U.L.P.) No. 648 of 1992 under Items 5, 9 and 10 of Schedule IV of the said Act contending, inter alia, that the petitioner had shown favouritism by providing legal aid to his co-workman by allowing some of the workmen who were similarly suspended and charge-sheeted to resume duty. It was also contended that by keeping the first respondent on suspension pending an inquiry since 1990, the petitioner had committed an unfair labour practice under Item 9 of Schedule IV of the said Act. The contention raised by the first respondent was that the power vested in the petitioner to suspend him emanated from the Certified Standing Orders and Standing Order 23 under which he was suspended did not permit the employer to suspend an employee without any charge was framed against him.

4. Another complaint being Complaint (U.L.P.) No. 982 of 1983 was filed by the first respondent under Items 9 and 10 of Schedule IV of the said Act complaining that the petitioner had failed to implement the settlement dated 7th December, 1992 and had thereby committed an unfair labour practice under Item 9 of Schedule IV of the said Act.

5. Written statement was filed by the petitioner in both the complaints. The petitioner resisted the complaints on the ground that it was the first respondent who had assaulted one lad due to which the first respondent was suspended from work pending an inquiry against him. It was also contended that it was at the instance of the first respondent that the inquiry against him was not conducted by the petitioner and it would not be open for the first respondent to contend that keeping him under suspension pending an inquiry was violative of Item 9 of Schedule IV of the said Act. It was pleaded that the employees referred to in the complaint had been permitted to resume duty on account of their tendering an

apology. The first respondent not having tendered such an apology, he was not permitted to resume duty. It is, therefore, submitted that the provisions of Item 5 of the Schedule IV of the said Act were not attracted. As regards Item 9 of Schedule IV, it was contended that the petitioner had merely exercised the power under Standing Order 23 of the certified standing orders and, therefore, it could not be said that they had violated provisions of Item 9 of Schedule IV. In the second complaint filed by the first respondent, the petitioner contended in its written statement that the benefits flowing from the settlement dated 7th December, 1992 would not be available to the first respondent since he had not worked in order to entitle to the benefits of that settlement. It was pleaded that under Clause 12 of the said settlement, it was only if there was an increase of 10% of production/productivity that the workmen would be entitled to the enhanced wages. In view of the fact that the first respondent had not worked at all since his suspension from 13th October, 1990, the question of giving him wages at the enhanced rate under the settlement did not arise.

6. The Industrial Court heard both the complaints together. Common evidence was recorded of either side and by an order dated 20th October, 1995 held that the petitioner was guilty of unfair labour practice under Items 5 and 9 of Schedule IV of the said Act in Complaint (U.L.P.) No. 648 of 1992. The petitioner employer was directed to withdraw the order of suspension and to permit the first respondent to work. The petitioner was further directed to pay to the first respondent leave travel allowance for the year 1990-91 and for the years thereafter during the pendency of the complaint. The Industrial Court also gave liberty to the petitioner to proceed with the departmental inquiry in accordance with the Rules applicable. In the second complaint, namely, Complaint (U.L.P.) No. 982 of 1993, the Industrial Court by an order dated 20th October, 1995 held that the petitioner had committed unfair labour practice under Items 5 and 9 of Schedule IV of the said Act (although the complaint was only filed under Item 9). The petitioner employer was directed to pay to the first respondent workman wages, allowances and other benefits in accordance with the settlement dated 7th December, 1992 as if he was in service. The petitioner was also directed to permit the first respondent to actually perform the terms and conditions of the settlement dated 7th December, 1992. Aggrieved by both these orders, the petitioner employer has filed the present writ petitions.

7. The main contention raised by Mr. J.P. Cama learned Counsel for the petitioner, is that the Industrial Court has wholly erred in allowing the complaints when it could not be said that an unfair labour practice had been committed by the petitioner. He submits that to attract the provisions of Item 5, the workman must be similarly situated as the other workmen and it is only then if favouritism is shown by the employer that the provisions would be attracted. In the present case, he submits that the workmen who were allowed to resume work had tendered an apology and, therefore, they could not be considered on par with the first respondent who had at no point of time apologised for the act of assault. He further submits that action has been taken to suspend the first respondent under

the Certified Standing Orders under which there is a power vested in the employer to suspend an employee pending inquiry. He submits that having done so, it was not open for the Industrial Court to question the action of the employer or to impute motives to the employer. He further submits that it was at the instance of the first respondent that the inquiry was kept in abeyance as he thought that it would prejudice his defence in the criminal trial. Having done so, Mr. Cama submits that it would not be open for the first respondent to claim that the suspension pending inquiry was invalid or that the suspension for such a long period of time amounted to an unfair labour practice. He further submits that throughout the period of suspension i.e. from 1990 till today he has been paid full wages after the initial three months wherein 50% wages were paid and three months thereafter when 75% of his wages were paid as subsistence allowance. He, therefore, submits that the Industrial Court has committed a grave error which is required to be corrected under Articles 226 and 227 of the Constitution of India. As regards the payment of wages in accordance with the settlement dated 7th December, 1992, the learned Counsel for the petitioner submits that this settlement would be applicable only if a workman worked physically in the premises of the factory and not to a person who was under suspension. He placed reliance on Clause 12 of the settlement wherein the consideration for increase of wages is that the workman would contribute towards achieving the 10% increase in production. He submits that the first respondent not having worked, he was not entitled to the benefits of the settlement dated 7th December, 1992.

8. As against this, Mr. Nair, learned Advocate for the first respondent workman, submits that at no point of time had the petitioner produced the letters of apology on record before the Industrial Court and, therefore, the version of the petitioner that the workmen were permitted to resume on account of the apologies should not be believed. He further submits that the certified standing orders only permitted the employer to suspend an employee when the charge against the employee was crystallised in a charge-sheet and not prior to the issuance of the charge-sheet itself. He submits that the suspension order of 13th October, 1990 did not in any manner disclose the charges levelled against the first respondent and, therefore, it could not be said that the action of suspension was an action pending the inquiry. He further submits that although it was true that it was at the instance of the first respondent that the inquiry was stayed during the pendency of the criminal trial, immediately after the order of the Industrial Court the first respondent had offered to appear before the Inquiry Officer. Mr. Nair submits that the petitioner not having held the inquiry even after the order of the Industrial Court cannot be permitted to take undue advantage of the initial responses of the first respondent and urges that the action of the petitioner in prolonging the suspension for an unjustifiably long period of time would amount to an unfair labour practice. He further submits that assuming the suspension is valid, there is no evidence on record to show why it was necessary in the first place. He submits that it is not necessary that every inquiry should be

preceded by the suspension of a workman and as the petitioner has not shown any justifiable reason for suspending the employee the petitioner has committed an unfair labour practice. He further submits that the suspension is to be used as a last resort and not as a sword hanging over the head of the workmen to be used at any time against him. Mr. Nair further urges that in view of the fact that the first respondent has retired from service in 1997, the charge-sheet itself has lapsed as a consequence of which the suspension is invalid and the first respondent would be entitled to the wages during the entire period of suspension. He submits that the first respondent was always ready and willing to perform his part of the contract and the petitioner having kept him out of work could not take advantage of this fact and refuse to implement the settlement of 7th December, 1992.

9. As regards the submission made by Mr. Cama with respect to Item 5 of schedule of the said Act, what was to be considered is whether the workmen who were permitted to resume duty and the first respondent herein were placed on the same footing. Could it be said that they were placed in identical circumstances and the employer had shown favouritism to one set of workmen? Despite Mr. Nair's strenuous effort to show that the employer had committed unfair labour practice under Item 5 by rendering legal aid to Lad and not giving any assistance to the first respondent as also the fact that some workmen were permitted to resume duty, I am unimpressed. Apologies were tendered by the workmen and this is a material factor which distinguishes their case from the case of the first respondent. At no point of time had the first respondent shown any inclination to tender an apology or shown any demur for the action of assaulting his co-worker. It could, therefore, not be said that the first respondent and his co-workmen were in an identical situation. The argument of discrimination made by Mr. Nair, learned Advocate for the first respondent, therefore, cannot be countenanced.

10. The next question to be considered is whether the Standing Orders permit an employer to suspend a workman pending issuance of a charge-sheet. The relevant Standing Order reads as under:---

"23. Misconduct, Inquiries, Procedure and Punishment.---(1) A workman against whom any action is proposed to be taken for misconduct may be suspended pending the inquiry or for the period, if any, allowed to him for giving his explanation. The order of suspension may take effect immediately on its communication to the workman.

xxx xxx xxx xxx."

The submission of Mr. Nair that "action proposed to be taken for misconduct" against a workman must be such that it crystallises in a charge-sheet which is given to him and it is only then that the order of suspension can be issued to him pending inquiry, is not acceptable. The words "action is proposed to be taken" if given their true import would, in my view, demonstrate that once an employer

decides to take action against the workman for misconduct, he may suspend the workman. Suspension pending inquiry cannot mean only at the stage of issuance of a charge-sheet. The suspension which is envisaged in Standing Order 23(1) can be effected even when the employer proposes to take action for any misconduct. The employer, under the relevant Standing Order, need not wait before suspending the workman concerned till the charge-sheet is served on him. Therefore the contention of Mr. Nair that Item 9 of Schedule IV has been breached on account of the first respondent being suspended pending issuance of the charge-sheet cannot be accepted.

11. Mr. Nair's reliance on the judgment of the Kerala High Court in the case of Lakshmanan Nambiar v. State of Kerala, 1991 (2) C.L.R. 23, is also misplaced. In fact, in that case the Rules for issuing the charge-sheet were different from the present case and, therefore, there is no similarity between the circumstances in the two cases.

12. Mr. Nair's next submission that assuming the suspension is correct, there is no evidence to show why it was necessary nor was there any reason given to the Industrial Court for effecting the suspension. He places reliance on the judgment of the Supreme Court in the case of State of Haryana v. Hari Ram Yadav and others, 1994 (1) C.L.R. 298. Reliance on this judgment also is wholly misplaced. The Apex Court in that judgment was concerned with a situation where the Rule required that if the disciplinary proceedings were contemplated, it was necessary for the Government to be satisfied that it was desirable or necessary to place an employee under suspension. The judgment in that case was based on the facts and circumstances of that case and has no application to the present case.

13. Mr. Nair then contended that the suspension was wholly unjustified and unwarranted. He submitted that since suspension is to be effected only as a last resort, there was no need to place the first respondent under suspension. He places reliance on the judgment of the Division Bench of this Court in Dr. Tukaram Yeshwant Pawar v. Bhagwantrao Gaikwad and others, 1998 (2) L.L.N. 700. The case before the Division Bench was one in which the petitioner was the Head of the Department as Director of Horticulture and had been placed under suspension pending the departmental inquiry. This Court took the view that in order to prevent waste of public money and to avoid torment to the employee concerned, it would be advisable for the employer to refrain from effecting suspension for a long period of time. The Division Bench was influenced by the fact that no witness had been examined before the Inquiry Officer and the petitioner had been kept under suspension over six months. In the present case, the first respondent has been placed under suspension for an unusually long time because it was he who requested the petitioner employer to stay the inquiry pending the criminal trial against him. It will thus not be open to the first respondent to say that the unfair labour practice has been committed under Item 9 of Schedule IV of the said Act. Moreover, the first respondent has been paid full wages from the expiry of six months of his suspension. In any event, an unfair

labour practice can be said to have been committed if the action of the employer is illegal. Justifiability of the action cannot be considered in a case dealing with unfair labour practice. This is the view taken by this Court in the case of *Modistone Limited Vs. Modistone Employeers' Union and Another*, , this Court has clearly taken a view that while considering whether an unfair labour practice has been committed, the power of the Industrial Court is limited to the extent so as to determine whether there is an illegality committed and not whether there is any justification for the same. In the present case, as I have already held it was well within the powers of the petitioner to suspend the first respondent pending an inquiry i.e. including pending issuance of a charge-sheet, it could not be said that the provisions of Item 9 of Schedule IV of the MRTU & PULP Act are attracted.

14. The next contention of Mr. Nair is that on account of the retirement of the first respondent, the charge-sheet itself lapsed and no action can be taken by the petitioner employer against the first respondent in pursuance of the charge-sheet. He bases his arguments on the judgment of the Delhi High Court in the case of *S.P. Jain v. Punjab National Bank and others*, 1993 (1) C.L.R. 884, wherein the Delhi High Court has considered the effect of suspension on a suspended employee. In that case, the learned Judge considered the submissions made on behalf of the employee that he was permitted to retire by the employer without any objection and since the relationship of master and servant between them ceased to exist, the earlier order of suspension passed by the employer necessarily lapses. Mr. Nair also relied on the judgment of the Apex Court in the case of *Bhagirathi Jena v. Board of Directors, O.S.F.C. and others*, 1999 (1) C.L.R. 1074. In this case, the Apex Court was dealing with a situation where there was no provision for conducting an inquiry after retirement of the employee nor was there any provision stating that in case a misconduct is established, deductions would be made from his retiral benefits. The Apex Court held that as there was no authority vested in the employer for continuing the departmental inquiry after retirement, the only consequence of retirement during pendency of the inquiry would be that the inquiry lapsed and the employee is entitled to full retiral benefits. He also placed reliance on the judgment of the Rajasthan High Court in the case of *Rasik Behari Nigam v. State of Rajasthan and another*, 1991 (2) L.L.N. 1044, wherein disciplinary proceedings were dropped against an employee and he was retired compulsorily. The Court held that the natural consequence of this would be that the employee would be entitled to full salary as if he was never suspended nor charge-sheeted. Mr. Nair also relied on the judgment of the Karnataka High Court in the case of *State of Karnataka and others v. R.S. Naik*, 1984 L.I.C. 813, wherein on the basis of the Rule which governs the service conditions of the employees, the High Court came to the conclusion that on retirement of Government servant placed under suspension, the period of suspension is to be treated as on duty regulating benefits accrued from his service.

15. Mr. Nair's reliance on these aforesaid cases would not take this case further.

In all these cases, the retirement was effected without any objection from the employer. In the present situation, the inquiry which was pending against the first respondent was kept in abeyance only on account of his request and it was not as if he was permitted to retire without demur by the petitioner employer. The petitioner employer was always ready and willing to hold the inquiry against the first respondent. However, with a view to enable him to defend himself at the pending criminal trial in an appropriate manner, the petitioner employer did not hold the inquiry on the request of the first respondent itself. It would, therefore, be not appropriate to penalise the employer for such an action on the part of the first respondent. It is true that the charge-sheet may lapse on account of retirement of the first respondent. However, this does not entitle him to full wages during the first six months period that he was on suspension. In any event, in the present case, the first respondent has been paid full wages thereafter in accordance with the certified standing orders. Initially for a period of three months, he was paid 50% of his wages. For the next three months, he was paid 75% of wages and thereafter he has been drawing full salary from the petitioner employer. Therefore, these judgments, in my opinion, do not take the first respondent's case any further.

16. Mr. Nair, learned Counsel for the first respondent also relied on the judgment of the Apex Court in the case of Regional Director, Employees' State Insurance Corporation v. M/s. Popular Automobiles etc., 1997 (2) C.L.R. 1003, wherein it has been held that where the employee has offered to perform his part of the contract of service, and is prevented from so doing by the employer, he is entitled to wages for that period. The Apex Court took the view that it is axiomatic to say that during the suspension period pending inquiry the employer-employee relation does not come to an end. This being so, the two consequences which flow are, firstly, that the employee will be prohibited from actually offering his services and discharging his duties as the employer does not want him to do so and, secondly, during the period of suspension pending an inquiry, the remunerations payable to the employee will get curtailed and will be treated as subsistence allowance as legally permissible under the Rules. It has further been held that in case of a suspended employee, he gets lesser amount by way of subsistence allowance. However, the employee would be entitled to full remuneration because he was ready and willing to perform his part of the contract but it was the employer who prohibited him from performing his duties. The remuneration paid to the employee during the period of suspension is regulated and is paid by way of subsistence allowance and, therefore, subsistence allowance forms part of wages u/s 2(22) of the Employees' State Insurance Act, 1948. This judgment, in my view, has no relevance to the present case. It is true that the Employees State Insurance is to be deducted from the subsistence wages payable to an employee, but this does not necessarily mean that merely because the employee was ready and willing to work and he was kept under suspension, he is entitled to full wages during the suspension period unless the Rules governing the suspension period so provide. In my view,

therefore, there can be no automatic revocation of the suspension order merely because the charge-sheet lapsed nor can it be said that the first respondent can be treated as on duty for the entire period of time during which he was under suspension. As stated earlier, the first respondent has been paid full wages from April 1990.

17. Mr. Cama, learned Counsel for the petitioner employer, relied on the judgment of the Apex Court in Secretary to Government and another Vs. K. Munniappan, . In that case, the Apex Court was dealing with Rule 17(e)(1) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules. This Rule read as under:---

"(e)(1) A member of a service may be placed under suspension from service, where

(i) an enquiry into grave charge against him is contemplated, or is pending; or

(ii) a complaint against him of any criminal offence is under investigation of trial and if such suspension is necessary in the public interest."

The Apex Court observed that the Tribunal while considering the aforesaid Rule erroneously proceeded on the premise that the Government has no power to keep an employee under suspension pending inquiry or investigation. The Rule itself contemplates that an officer can be kept under suspension where inquiry into grave charges is contemplated. Under these circumstances, the Apex Court held that actual pendency of the inquiry is not a pre-condition to suspension of an officer. In the present case, the Standing Order 23 is similarly worded and, therefore, I see no reason why an employee cannot be suspended pending an inquiry i.e. even before issuance of a charge-sheet.

18. In any event, in the present case, the first respondent workman has been paid full wages six months after he was suspended. The first respondent was also paid wages under the settlement of 7th December, 1992 since 19th February, 1997 till he retired by virtue of an order passed in Civil Application No. 5679 of 1996 taken out in Writ Petition No. 6443 of 1995. In view of this, the first respondent has been amply compensated during the period of his suspension.

19. Mr. Cama, learned Counsel for the petitioner employer, submits that the illegality, if any, caused due to the suspension of the first respondent ceased to exist once the charge-sheet was issued on 28th December, 1990. He submits that, in any event, after this order, the petitioner had every right to suspend the first respondent and, therefore, it could not be said that the petitioner has committed any unfair labour practice. As I have already held that the petitioner had the right to suspend under Standing Order 23 pending issuance of a charge-sheet, this argument of Mr. Cama need not be considered.

20. Taking into consideration the circumstances of the case, I find that the Industrial Court has erred in allowing the complaints. All monies paid to the first respondent by the petitioner shall not be recovered by them.

21. In view of the aforesaid, Rules made absolute in both the petitions. No order as to costs.

22. The amounts deposited in this Court by the petitioner may be withdrawn by them after a period of eight weeks from today.

23. Issuance of certified copy expedited.