
(1996) 10 BOM CK 0058
In the Bombay High Court
Case No : L.P.A. No. 7 of 1994

Hindustan Ciba-Geigy Ltd.

APPELLANT

Vs

Suresh A. Kerkar and Others

RESPONDENT

Date of Decision : 05-10-1996

Acts Referred:

Citation : (1997) 4 ALLMR 61 : (1997) 75 FLR 837 : (1998) 3 LLJ 919

Hon'ble Judges : R.M.S. Khandeparkar, J; R.K. Batta, J

Bench : Division Bench

Advocate : C.V. Pawaskar and S. Tamba, for the Appellant; S.K. Kakodkar and R.V. Kamat, for the Respondent

Final Decision : Partly Allowed

Judgement

Batta, J.—The Respondent No. 1 was working as security guard/watchman in appellant company from April 1972 and he was charge-sheeted for misconduct under Standing Order 33(1) vide charge-sheet dated September 15, 1983. The appellants' case is that Respondent No. 1 was involved in a case of theft wherein he was arrested by the police and he was in police custody from August 27, 1983 to September 1, 1983. On August, 29, 1983 Respondent No. 1 submitted an application to the appellants that he was on privilege leave from August 16, 1983 to August 30, 1983; that he was suffering from Typhoid from August, 25, 1983, he has been advised by the doctor to take complete bed rest for 20 days and as such privilege leave be extended from August 31, 1983 to September 14, 1983. The appellants directed the Respondent No. 1 to submit a medical certificate in support of 1 the said application and Respondent No. 1 filed a certificate dated September 3, 1983 of Dr. G.B. Chodankar wherein it was certified that Respondent No. 1 was under his treatment from August 29, 1983 to date and he was suffering from Jaundice and vomiting and was advised to take rest for 2 weeks. The appellants have further alleged that this certificate was in fact handed over by the Respondent No. 1 himself at the factory gate. The appellants were not satisfied with the said medical certificate and as such company doctor,

namely, Dr. G.K. Salelkar was requested to examine Respondent No. 1. Dr. Salelkar examined Respondent No. 1 on September 12, 1983 and on clinical examination found that: Respondent No. 1 had neither fever nor Jaundice nor abnormality of liver or of any other system and he certified him to be fit for work. The appellants called for explanation of Respondent No. 1 and being not satisfied with the explanation, directed inquiry against Respondent No. 1 vide letter dated September 15, 1983. The sum and substance of the said letter/charge-sheet is that Respondent No. 1 had sought extension of leave on pretext of illness; that newspapers "Navprabha" dated August 30, 1983 and "Navhind Times" dated August 31, 1983 had reported the involvement of Respondent No. 1 in a theft case; that Respondent No. 1 had misrepresented vide letter dated August 29, 1983 that he was suffering from Typhoid and doctor had advised him complete bed rest for 20 days; that the factual position relating to involvement of theft was never reported by Respondent No. 1; that Respondent No. 1 was not under any medical treatment during the period he was in police custody and had misrepresented that he was suffering from Jaundice and vomiting by personally handing over the medical certificate; that Dr. Salelkar found that he was not suffering from Jaundice in the recent past. On the basis of the abovementioned facts the Respondent No. 1 was charge-sheeted under Standing Order 33(1) for: (1) concealing material and factual material from the company; (2) attempting to obtain leave of absence on false pretexts of illness; and (3) obtaining and producing a medical certificate on false representation to the doctor about his illness from which he was in fact not suffering.

2. Standing Order 33 enumerates instances of misconduct. The Respondent No. 1 was charged under Standing Order 33(1) which reads as :

"Commission of any act subversive of discipline or good behaviour on the premises....".

3. In the inquiry before the Inquiry Officer evidence was recorded on either side. Dr. Salelkar and Dr. Chodankar were also examined in the said inquiry. Though delinquent officer Respondent No. 1 had not presented himself for examination in his defence, yet, the Inquiry Officer permitted the Presenting Officer to cross-examine him. The Inquiry Officer not only relied upon the cross-examination of Respondent No. 1 but he disbelieved Dr. Chodankar in view of the testimony of Dr. Salelkar. The Inquiry Officer then found him guilty of the charges. After the report of the Inquiry Officer, appellants gave show cause notice to the Respondent No. 1 as to why he should not be discharged and after considering the reply filed by Respondent No. 1, the services of Respondent No. 1 were terminated.

4. This Order of the Inquiry Officer was subject matter of reference before the Industrial Tribunal. The reference was made by Government of Goa u/s (sic) of the Industrial Disputes Act, 1947 and the term of reference was as under:

"Whether the action of the management, M/s. Hindustan Ciba-Geigy Limited,

Corlim, Ilhas, Goa in terminating the services of Shri Suresh A. Kerkar, watchman with effect from February 7, 1984 is legal and justified? If not, to what relief the workman is entitled to?"

5. The Presiding Officer of the Industrial Tribunal framed following issues:

"1. Do the employer/Party No. II prove that a fair and impartial enquiry was held against the workman?

2. If so, whether the employer further proves the action was taken against the workman, having regard to the allegation proved and that it had lost confidence in the workman.

3. Whether the workman/Party No. 1 proves that the enquiry was not proper and was against the principles of natural justice?

4. Whether the action of the management of M/s. Hindustan Ciba Geigy Ltd., Corlim, Ilhas, Goa in terminating the services of Shri Suresh A. Kerkar is just and proper and whether the same calls for any interference?

5. What relief if any is the workman Suresh A. Kerkar entitled to?"

6. In the written statement of the appellants, before the Presiding Officer of the Industrial Tribunal, it was submitted that in the unlikely event of the Tribunal holding that the inquiry is not proper, the company should be permitted to lead evidence de novo. The Presiding Officer of the Industrial Tribunal first examined Respondent No. 1 and Respondent No. 1 did not lead any further evidence on the preliminary issue about the fairness of domestic inquiry. Thereafter the Presiding Officer examined two witnesses produced on behalf of the appellants in the matter. The Presiding Officer vide impugned order dated August 10, 1988 found that the inquiry was proper and accepted the findings of the Inquiry Officer and answered the reference accordingly.

7. Respondent No. 1 successfully challenged: this order of the Industrial Tribunal before the Learned Single Judge in Writ Petition No. 406 of 1988 and it is this order which is challenged before us in Letters Patent Appeal. The learned single Judge quashed the Award of the Industrial Tribunal and directed the company to forthwith reinstate Respondent No. 1 with full back wages and all the accrued additional benefits mentioned in the said Judgment.

8. The matter was argued at length before us and on either side a number of authorities were relied upon. In the course of arguments learned senior advocate Shri S.K. Kakodkar made a submission that in view of enumeration of various instances of misconduct in Standing Order 33 in Clauses (a) to (k) and (m) to (z), Clause (1) is unconstitutional since it gives unrestricted power to the Disciplinary Authorities to take action against the workman even without mentioning as to what are the instances of misconduct which would fall within the scope and ambit of Standing Order 33(1). In fact, learned senior advocate Shri Kakodkar had raised the same challenge before the learned single Judge but

the learned single Judge repelled the argument of constitutionality raised by Shri Kakodkar. We are in respectful agreement with the findings of the learned Single Judge. We do not find any reason whatsoever to interfere with the said findings. The main plank of the argument advanced by senior advocate Shri Kakodkar before us is that Standing Order 33, Clause (1) is like a damocles sword hanging on the workman in the garb of which the Disciplinary Authority can take action against the workman on any misconduct which is not even otherwise specifically defined and in that sense the workman is caught unaware and cannot guard against any such unspecified instance of misconduct which might be covered under Standing Order 33(1). In support of his submission he relied upon two rulings of the Apex Court in Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut and Others, and in Rasiklal Vaghajibhai Patel Vs. Ahmedabad Municipal Corporation and Another, On the basis of the said authorities Shri Kakodkar pointed out that it is obligatory on the part of the appellants to draw up those acts of omission and commission which in the industrial establishment constitute misconduct and the workman must know in advance which act or omission would constitute misconduct which will be subject to penalty. According to him, acts of omission and commission amounting to misconduct have to be prescribed with precision in Standing Orders. It was further pointed out that the workman should know the pitfall he has to guard against and it should not be left to the unbridled discretion of the employer to dub any conduct as misconduct and that the workman sought to be charged for misconduct must have adequate advance notice of what action or what conduct would constitute misconduct.

9. As against the above authorities of the Apex Court, learned Advocate Shri Pawaskar placed reliance on a ruling of the Apex Court in Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, which has laid down that the Standing Order of the company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit; that even though a given conduct may not come within the specific terms of misconduct described in the Standing Order, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. It was pointed out that ordinarily, the Standing Order may limit the concept but not invariably so.

10. The learned Single Judge in the Judgment dated August 17, 1994 had dealt with this aspect in greater detail and after analysing various Clauses had come to the conclusion that Clause (1) was like a residuary Clause which allows the employer to punish a workman who has chosen not to follow the accepted rules of conduct and social behaviour to which everyone is expected to strictly adhere in the discharge of his professional duties. Learned senior advocate Shri Kakodkar himself submitted that gross instances of misconduct like riot, assault etc., which may not be otherwise covered under the Standing Order, may fall under Clause (1) but an instance of the nature with which the Respondent No. 1

is charged, would certainly not come within the scope and ambit of Standing Order 33(1).

11. At this stage, we would like to refer to Standing Order 17, which enjoins on the workman applying for S.L. for more than a day to produce a medical certificate, in support of his application, from a registered medical practitioner. The management of the appellants could under Standing Order 17 ask the Respondent No. 1 to produce a medical certificate and, in fact, the appellants did ask Respondent No. 1 to produce a medical certificate in support of his application. Standing Order 17 further empowers the appellants to get the workman examined by a Medical Officer of the company and such eventuality may arise where the company is not prima facie satisfied with the certificate produced by the workman. In this case admittedly Respondent No. 1 was in police custody from August 27, 1983 to September 1, 1983 and, prima facie, the appellants were justified in calling upon the Respondent No. 1 to produce a medical certificate. The appellants got the Respondent No. 1 examined by the company doctor who found that the Respondent No. 1 was fit and he had no traces of any ailment. In case the appellants are able to establish that the certificate produced by Respondent No. 1 in support of his application for leave was false, it would be certainly an act of misconduct under the circumstances and may amount to an act subversive of discipline, which may, prima facie, fall under Standing Order 33(1). In the given circumstances and specially in view of the purpose with which Standing Order 17 has been made, we find it difficult to sustain the contention advanced by learned senior advocate Shri Kakodkar that Standing Order 33(1) suffers from the vice of unconstitutionality. In fact, Standing Order 33(1) does not give any arbitrary latitude to the appellants to haul up the workman for any type of misconduct, but, the misconduct which is covered under Standing Order 33(1) is such misconduct which is subversive of discipline. Prima facie, if a workman produce a false medical certificate in support of his leave application, it may amount to an act subversive/volatile of discipline which is expected from the employee. In the facts and circumstances of this case, therefore, we do not find any substance in the contention of Senior Advocate Shri Kakodkar in so far as challenge to the Standing Order 33(1) is concerned on the basis of its constitutionality.

12. Advocates for the parties have placed before us a number of rulings on the scope of the jurisdiction under Article 226 in matters pertaining to inquiries under the Industrial Disputes Act. It is not necessary to quote the said rulings since the law on this aspect is now settled. Suffice it to say that the jurisdiction under Article 226 is supervisory jurisdiction; the writ Court does not sit as an appellate Court to reassess evidence unless, of course, the reasoning adopted for coming to the conclusion is so perverse, arbitrary or capricious that no reasonable person could have ever arrived at such conclusion. Advocate Shri Pawaskar has strenuously argued before us that the learned Single Judge was not authorised to reappraise the evidence and come to a conclusion different than what was arrived at by the Industrial Tribunal, since the conclusions arrived

at by the Industrial Tribunal, were based upon evidence and it cannot be said that the said conclusions are based upon no evidence at all. According to Shri Kakodkar adequacy or sufficiency or otherwise cannot be examined by the writ Court and the writ Court cannot substitute its own view for the view of the Industrial Tribunal.

13. It is in the light of the settled principles that we have to examine whether the learned Single Judge had erred in coming to a different conclusion when setting aside the order passed by the Industrial Tribunal. The Learned single Judge was conscious of the settled position of law as can be seen from paragraph 15 of the Judgment of the 1 learned single Judge. According to Shri Pawaskar the misconduct under Standing Order 33(1) had been duly established by the employer which finding was upheld by the Industrial Tribunal. In this connection learned counsel for the respondent has submitted before us that filing of a false certificate does not affect discipline and does not affect the working. According to him, the allegations contained in letter/charge-sheet dated September 15, 1983 do not at all fall within the ambit of Standing Order 33(1) since there is no duty cast on the workman to disclose the arrest and that the charge as framed has not been substantiated. Non disclosure of the fact of arrest may not prima facie be covered by any Standing Order and may not amount to misconduct but we cannot prima facie accept the contention that filing of a false certificate does not affect discipline.

14. The substantial charge which was framed against Respondent No. 1 was that he had attempted, to obtain leave of absence on false pretexts of illness and he had obtained and produced a medical certificate on false representation to the doctor; without any illness. In this connection evidence of Dr. Chodankar, who had issued the medical certificate in question, was recorded and also that of Dr. Salelkar, who had been instructed by the company to examine Respondent No. 1. The Inquiry Officer had discarded the testimony of Dr. Chodankar mainly on the ground that when the workman was examined by Dr. Salelkar, he did not find on clinical examination that Respondent No. 1 had neither fever or jaundice or abnormality of liver or other systems. The workman was examined by Dr. Salelkar on September 9, 1983 in respect of an illness which was complained by the workman Respondent No. 1 during the last fortnight of August 1983. Simply, on the basis of the clinical examination of Dr. Salelkar, which was carried out after more than a fortnight of the illness complained by Respondent No. 1, the evidence of Dr. Chodankar could not be rejected specially when Respondent No. 1 had produced a report dated August 19, 1983 from the Central Clinical Laboratory in respect of the blood test disclosing Sorum Bilirubin as 1.8 mgs% indicating liver function abnormality. Dr. Chodankar had stated in his deposition that he had referred Respondent No. 1 to Dr. S.K. Kamat for conducting the said test. It is no doubt true that Dr. Kamat was not examined, but, in fact, the charge is not that Dr. Chodankar had issued a false certificate but the charge is that Respondent No. 1 had obtained a medical certificate from Dr. Chodankar on false representation of illness.

15. It was submitted by learned Advocate Shri Pawaskar that the entire story of the Respondent No. 1 of his being examined by Dr. Chodankar while he was in police custody could not be believed since there is no evidence to show that Respondent No. 1 was taken for examination to Dr. Chodankar during the police custody period. The case of Respondent No. 1 is that while he was being taken to Belgaum, on the way he was taken to Dr. Chodankar, who examined him and prescribed medicines and he produced the receipts of purchase of medicines. The Investigating Officer who had taken Respondent No. 1 to Belgaum was not examined.

16. In the light of the above, the findings arrived at by the Inquiry Officer disbelieving the evidence of Dr. Chodankar altogether were rightly not accepted by the learned single Judge. Another material aspect which has to be borne in mind to come to the conclusion that the findings of the Inquiry Officer are perverse is that Respondent No. 1 had never volunteered to examine himself in his defence. From record dated November 28, 1983 of the Inquiry Officer, which is found at page 273 of this petition, it can be seen that Respondent No. 1 after examining witnesses had categorically stated that he had no more witnesses to be examined. The Inquiry Officer then asked the Respondent No. 1 if he had anything to say pertaining to the charge-sheet issued by the company in support of his case and the Respondent No. 1-in unmistakable terms stated that he had no statement to make. In spite of this the Inquiry Officer asked the Presenting Officer whether he would like to cross-examine the Respondent No. 1 and permitted the Presenting Officer to cross-examine the Respondent No. 1. This is against all canons of justice and violates the constitutional mandate that no person shall be compelled to be a witness against himself. This is what exactly happened before the Inquiry officer. The Respondent No. 1 had not only stated that he did not want to examine any more witnesses but in unmistakable terms submitted that he did not want to make any statement but in spite of that the Inquiry Officer permitted the Presenting Officer to cross-examine Respondent No. 1. Matter does not end there. The Inquiry Officer has, in fact, relied upon the cross-examination of the Respondent No. 1 in coming to adverse conclusions against the Respondent No. 1.

17. In these circumstances, the learned single Judge was perfectly justified in coming to the conclusion that the findings of the Inquiry Officer were perverse. The Industrial Tribunal had adopted the said findings of the Inquiry Officer.

18. We, therefore, do not find any error committed by the Single Judge in referring to the evidence on record in order to demonstrate that findings recorded by the Inquiry Officers as well as the Industrial Tribunal were perverse. It is apparent on the face of record that the Single Judge was fully conscious that in exercise of writ jurisdiction it was not open for the Court to expropriate the evidence. However, that does not prohibit reference to the evidence on record with a view to demonstrate how perverse findings have been recorded by the concerned authorities.

19. The next question which was canvassed before us by learned Advocate Shri Pawaskar is that once the learned Single Judge had come to the conclusion that the findings were perverse, it was incumbent upon him to remand the matter to the Industrial Tribunal so that an opportunity could be afforded to the appellants to prove its case before the Industrial Tribunal. In this connection it was submitted by him that the appellants had in clear terms sought such an opportunity. That since the Industrial Tribunal found that the inquiry proceedings were just and proper, no such opportunity to lead evidence could have been granted to the appellants. Shri Pawaskar pointed out that in paragraph 10 of the written statement filed before the Industrial Tribunal it was submitted that in the unlikely event of the Court holding that the enquiry was not proper, the Company should be permitted to lead evidence de novo. In support of his submission advocate Shri Pawaskar has placed reliance in the decision of the Apex Court in the case of Bharat Forge Company Ltd. Vs. A.B. Zodge and another, . In that case the employer had expressed its desire to lead evidence before the Industrial Tribunal, which was refused by the Industrial Tribunal. The Apex Court held that the employer was entitled to adduce evidence for the first time before the Tribunal even if the employer had held no inquiry or the inquiry held by the employer was found to be perverse. It was pointed out by the Apex Court that the domestic enquiry may be vitiated either for non-compliance of rules of natural justice or for perversity. Any disciplinary action taken on the basis of a vitiated inquiry does not stand on a better footing than a disciplinary action with no inquiry and the right of the employer to adduce evidence in both the situations is well recognised. The Apex Court also indicated the stage at which the employer should ask for permission to adduce additional evidence to justify the disciplinary action on merits. It was pointed out that the Tribunal must frame preliminary issue and proceed to see the validity or otherwise of the inquiry and then serve a fresh notice on the employer by calling him to adduce further evidence to sustain the charges to do so. In the said case before the Apex Court prayer for adducing evidence had been made by the employer before the closure of the proceedings before the Tribunal.

20. In the case before us right in the beginning itself the appellants had in fact sought permission to lead evidence in the event it was found that the inquiry was not proper. In this respect the learned counsel for the respondent has vehemently objected to remand of the proceedings on the ground that the matter has even lingering for the last over 12 years and the appellants cannot be allowed a second innings in order to lead evidence. He also pointed out that what is challenged before this Court are the findings of the Industrial Tribunal and not that of the Inquiry Officer. In our opinion the same does not make any difference whatsoever. In fact, as we have already pointed out earlier the Industrial Tribunal had in fact framed two issues relating to whether the inquiry was fair and impartial or it was not proper and was against the principles of natural justice? The Industrial Tribunal found that the inquiry was proper and there was no violation of principles of natural justice and in such eventuality there was no

question of the appellants being afforded another opportunity to lead evidence though some sort of opportunity appears to have been given technically but in substance no opportunity was afforded to the appellants to lead evidence to prove charges against Respondent No. 1. This opportunity could and should have been afforded by the Industrial Tribunal in case the Industrial Tribunal had come to the conclusion that the inquiry was not proper and violated the principles of natural justice but the Industrial Tribunal found that the inquiry was not vitiated. Therefore, question of affording such Opportunity did not arise before the Industrial Tribunal. Accordingly, the learned advocate for the appellant had sought remand of the matter before the learned Single Judge after the Learned Single Judge had come to the conclusion that the conclusions arrived at, upon the basis of evidence recorded before the Inquiry Officer, were perverse. Therefore, unless there was sufficient justification to the contrary, the course adopted should have been to remand the matter to the Industrial Tribunal for affording an opportunity to the appellants to lead evidence before the Industrial Tribunal in order to sustain the charges against Respondent No. 1. The inquiry before the Industrial Tribunal, is, therefore, necessary. This conclusion is fortified by the Judgment of the Apex Court in Bharat Forge Company Ltd. (supra). It is no doubt true that the matter has been pending for considerable time, but that, by itself would not be sufficient to dispense with the inquiry which is legally required. In this behalf directions can be given to the Industrial Tribunal to record evidence led by the parties within a given time frame and dispose of the matter in accordance with law.

21. For the aforesaid reasons, while upholding the findings of the learned single Judge that the conclusions arrived at by the Inquiry Officer are perverse, we direct that the matter be remanded to the Industrial Tribunal for giving an opportunity to the parties to lead evidence before it on the charges against Respondent No. 1. The quashing of the Award of the Industrial Tribunal dated August 10, 1988 is hereby upheld but the direction to the appellants to forthwith reinstate the Respondent No. 1 with full back wages and all the accrued additional benefits is being set aside in view of our directions to remand the matter to the Industrial Tribunal.

22. For the aforesaid reasons, the Appeal partly succeeds. The Industrial Tribunal is directed to record evidence which may be adduced by both the parties before April 30, 1997 and to dispose of the matter by June 30, 1997. It is expected that the parties will co-operate with the Industrial Tribunal so that the time schedule fixed is adhered to.