

(1990) 12 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 2521 of 1989

Indian Hotels Co. Ltd.

APPELLANT

Vs

D.T. Pandey

RESPONDENT

Date of Decision : 05-12-1990

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 10(1), 12(5), 28, 59

Citation : (1991) 2 BomCR 553 : (1991) 62 FLR 164 : (1994) 3 LLJ 1071 : (1991) 1 MhLj 810 : (1991) MhLj 810

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : J.P. Cama, instructed by Gangrat and Co, for the Appellant; Pushpa Menon, for R-1, for the Respondent

Judgement

Dhanuka, J.

1 This petition is directed against order dated 11th April, 1989 passed by Shri M.K.. Bhope, Presiding Officer, First Labour Court, in Reference (IDA) No. 1100 of 1985 made under Sections 10(1) and 12(5) of Industrial Disputes Act, 1947 holding that the said reference was not barred by Section 59 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter referred to as "the 1971 Act". The Labour Court passed the same order in group of seven references heard together for the purpose of consideration of preliminary contention raised on behalf of the employer referred to hereinafter. The only question which arises for my consideration in this writ petition is as to whether the said reference was barred u/s 59 of the 1971 Act. Section 59 of the 1971 Act reads as under:-

"59. If any proceeding in respect of "any matter falling within the purview of this Act" is instituted under this Act, then no proceeding shall at any time be entertained by any authority in respect of that matter under the Central Act or, as the case may be, the Bombay Act; and if any proceeding in respect of any

matter within the purview of this Act is instituted under the Central Act, or as the case may be, the Bombay Act, then no proceedings shall at any time be entertained by the Industrial or Labour Court under this Act".

2. The facts and circumstances leading to the filing of this petition are as under;

3. The petitioner is a company carrying on hoteliering business having its registered office at Apollo Bunder, Bombay. On 29th April, 1983, several workmen of the petitioner are supposed to have indulged in a rampage at the petitioner's hotel premises and caused serious damage to the property and reputation of the petitioner-company. The petitioner employer charge-sheeted the concerned employees and ultimately dismissed them by its order dated 29th April 1985.

4. Prior to the passing of the said dismissal order, the Bharatiya Kamgar Union representing the workmen filed a complaint before the Industrial Court, Maharashtra, Bombay, being Complaint (ULP) No. 1422 of 1984, as it was aggrieved by the manner in which the disciplinary enquiry was being proceeded with. The Industrial Court refused to grant interim relief to the workmen and observed that the said complaint was without jurisdiction and the real remedy of the workmen appeared to the Industrial Court to move the Labour Court and invoke item 1 of Schedule IV appended to the 1971 Act. The said complaint was, therefore, withdrawn by the Union as it was filed in a Court which lacked jurisdiction to entertain the same.

5. Sometime in the month of February 1985. the Union filed a fresh complaint, being Complaint (ULP) No.74 of 1985, before the Labour Court u/s 28 of the 1971 Act complaining that the petitioner employer was already pre-determined to pass an order of dismissal of the workmen as and by way of victimisation etc. By the said complaint, the Union sought a declaration that the petitioner had indulged in unfair labour practice. By the said complaint, the Union sought relief of setting aside the charge-sheet, quashing of the enquiry proceedings, quashing of the suspension orders and an interim relief directing the management not to pass any final order by way of discharge or dismissal or termination of service for whatever reason. Prior to the filing of this complaint, disciplinary enquiry against the workmen concerned was practically completed. It appears that the enquiry was practically completed on 29th November, 1984. However, no order of discharge, dismissal or termination was passed on the day when the said complaint was filed by the Union and it was passed much later i.e. on 29th April 1989.

6. In the said Complaint (ULP) No. 74 of 1985, the Union applied for interim relief, which was declined by the Labour Court by its order dated 15th April, 1985. The Union was seeking as interim relief so as to restrain the management from passing final orders in the disciplinary proceedings pending against the workmen. In paragraph 20 of the said order the Labour Court observed that the disciplinary enquiry was already pending since 22nd November, 1983 and it was

desirable that the enquiry should be allowed to be completed and orders should be allowed to be passed. It was further observed in paragraph 20 of the said order that if the workmen were found guilty, a remedy was then open to the Union. Being aggrieved by the said order refusing to grant interim relief, the Union filed Writ Petition No. 1707 of 1985 in this Court on the Appellate Side. By an order dated 26th April, 1985 the said writ petition was dismissed at the stage of admission.

7. In these circumstances, the Union made an application to the Labour Court on 18th June 1985 stating therein that the petitioner employer had already terminated the services of all the workmen and the Union therefore be permitted to withdraw the said complaint without prejudice to its rights and contentions to challenge the validity and propriety of the orders of dismissal passed by the management. By its written statement dated 24th June 1985 the petitioner contended before the Labour Court that the Union could not be allowed to withdraw the said complaint without prejudice to its rights at that stage. On 24th June 1985, the Labour Court passed the order dismissing the complaint for want of prosecution after recording the contentions of both the parties referred to hereinabove. The text of the order passed on the said application is available and forms part of the record in this case.

8. On 19th December 1985 the Commissioner of Labour passed an order under Sections 10(1) and 12(5) of the Industrial Disputes Act, 1947 referring the disputes between the petitioners and the said workmen for adjudication arising out of the orders of dismissal actually passed on 29th April 1985 in respect of the claim made by the workmen for reinstatement with back wages and continuity of services etc. During the course of the said reference, the workmen concerned filed their Statement of Claim and the petitioner filed its written statement. In the written statement the petitioner contended that the said references were barred by reason of the workmen or the Union having already invoked the provisions of the abovereferred 1971 Act. It was also contended in the written statement that the said references were in respect of "the same matter" in respect whereof the above-referred complaints were filed.

9. The First Labour Court, as a Reference Court, decided upon the preliminary contention of the petitioner. The First Labour Court held in its order that Section 59 of the 1971 Act was not attracted because the subject-matter of the complaints and the subject-matter of the references could not be the same inasmuch as the complaints charging with unfair labour practice were filed when the orders of dismissal, discharge or termination were threatened and the references were made after the passing of orders of dismissal which were now impugned in the said references. The First Labour Court held that the cause of action for the complaints which were filed under the 1971 Act and the cause of action for the references made under Sections 10(1) and 12(5) of the Industrial Disputes Act, 1947 were not the same. In paragraph 12 of its judgment, the First Labour Court also held that the earlier complaint was allowed to be withdrawn by

the Court and order of the Court was clear on the point, as in the order of withdrawal the Court had observed that the complaint had become infructuous in view of dismissal of Writ Petition No. 1707 of 1985 on 24th June 1985. It is not necessary to set out any more facts or to summarise the impugned order of the Labour Court in any more details.

10. The Union had filed its complaint before the Labour Court charging the petitioner employer with unfair labour practice u/s 28 of the 1971 Act read with item 1 of Schedule IV appended to the said Act. Item 1 of Schedule IV reads as under:-

"General Unfair Labour Practices on the part of employers

1. "To discharge or dismiss employees"

(a) by way of victimisation;

(b) not in good faith, but in the colourable exercise of the employer's rights;

(c) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;

(d) for patently false reasons;

(e) on untrue or trumped up allegations of absence without leave;

(f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment."

11. The Full Bench of the Industrial Court had held in its judgment dated 28th September 1984 in the case of Subh Plastics V. Nag Prasad Dubey (1985) 1 CLR 80, that the expression "discharge or dismissal" used in Item I of Schedule IV appended to the 1971 Act took within its sweep proposed discharge or dismissal also. The Full Bench of the Industrial Court had held that the twin phrase "has engaged in" and "is engaging in" appearing in Sections 28 and 38 of the 1971 Act indicated that not only finished, complete or perfect action but also incomplete action could be made the subject-matter of a complaint u/s 28 of the said Act read with Item 1 of Schedule IV. It was held in that case that the expression "to discharge or dismiss employee" means the entire process of discharge or dismissal, including the culminating act of passing final order of discharge or dismissal. It was held in the said case that a complaint of unfair labour practice could be entertained even if there was no order of discharge or dismissal. It is obvious that in view of this judgment having held the field, although erroneously as now held by this Court, the above-referred complaint was filed by the Union before the Labour Court, even though no order of dismissal was passed till then and the enquiry was still incomplete.

12. A directly contrary view is taken by our High Court in the case of The Divisional Commissioner, MSRTC, Wardha Division, Wardha District v. Presiding Officer, Nagpur and Ors. (1989) II C.L.R. 132. It was held in this case by A.A. Desai, J. that no complaint was maintainable u/s 28 of the 1971 Act read with Item I of Schedule IV appended to the said Act unless and until the actual order of discharge or dismissal was passed. It was held that the 1971 Act was a penal statute and no complaint could be filed by the workmen against an employed merely on the ground of contemplated, anticipated or apprehended unfair labour practice. It was also held that Section 28 did not contemplate filing of a complaint in respect of unfair labour practice which was merely in the womb. It was further held that the Labour Court could take cognizance only of such unfair labour practices which were specifically enumerated under Schedule IV appended to the said Act. It was held that the complaint in respect of proposed dismissal as and by way of victimisation was outside the ambit and intent of item 9 of Schedule IV. The judgment of Full Bench of the Industrial Tribunal in the above-referred cases does not lay down the law correctly. It will have to be held that Section 28 and Item I of Schedule IV appended to the 1971 Act always precluded filing of a complaint in respect of contemplated dismissal and the cause of action would accrue only on passing of actual order of dismissal, discharge and termination and not earlier.

13. Section 59 of the 1971 Act is not attracted if the earlier proceedings were not within the purview of the said Act. I am in respectful agreement with the view taken by A.A. Desai, J in the above-referred case. I am also bound by the said judgment. I see no reason to accept the request of Mr. Cama to refer this matter to a Division Bench or adjourn the same sine die. I, therefore hold that the proceedings before the Labour Court complaining of threatened dismissal as and by way of victimisation was beyond the jurisdiction of the Labour Court. I hold that the institution of the said complaint before the Labour Court is liable to be treated as non est. Similarly the earlier proceeding filed by the Union before the industrial Court was totally without jurisdiction and is liable to be treated as non est.

14. Mr. Cama the learned counsel for the petitioner argued that the Labour Court did not lack jurisdiction to entertain the complaint and, in any event, it acquired jurisdiction on passing of order of dismissal by the petitioner on 29th April 1985. It is impossible for me to accept these submissions. If on the date of the filing of the complaint it was without jurisdiction, it could not suddenly become a complaint with jurisdiction on passing of the order of dismissal. Mr. Cama has further argued that the Union is estopped from raising the dispute in respect of jurisdiction as it is the Union which had invoked the jurisdiction of the Labour Court. There can be no estoppel against a statute. It may be that the Union had erroneously invoked the jurisdiction of the Labour Court in view of the decision of the Full Bench of the Industrial Court. It will have to be assumed that the true legal position always was as is declared by the judgment of this Court. There was no change of law merely because of the High Court taking a different view in the

abovereferred judgment of A. A. Desai, J. The law was the same even on the date when the complaint was filed. An erroneous belief of the parties in respect of the jurisdiction of the Labour Court is of no consequence for the purpose of examining the contention in this case as to whether Section 59 of the 1971 Act is attracted or not. There is no question of acquiescence either. In case the complaint would have been pending before the Labour Court on 27th April 1989, the employer could have legitimately contended before the Labour Court that the said complaint was without jurisdiction. Even prior to 27th April, 1989, the employer could so contend.

15. Mr. Cama has then argued that the complaint was surely beyond the ambit of Item I of Schedule IV appended to the 1971 Act and the error of the Labour Court was in relation to exercise of jurisdiction and the case was not of inherent lack of jurisdiction. With respect, I am not convinced with this argument also. The Labour Court lacked jurisdiction. If the complaint was beyond Section 28 of the 1971 Act or beyond the enumerated items in the Schedule, there was inherent lack of jurisdiction. If there was inherent lack of jurisdiction and the complaint was liable to be treated as non est, the bar of Section 59 cannot be invoked. The earlier proceedings and the orders passed thereon are liable to be treated as nullity.

16. Both the learned counsel have cited large number of authorities interpreting Section 59 of the 1971 Act. Since, however, I have taken the view that the complaint itself was beyond the jurisdiction of the Labour Court and the same was not within the purview of the said Act, I do not think it necessary to refer to the various authorities or deal with the other contentions raised.

17. The Labour Court has not correctly summarised the order dated 24th June 1985 passed by the Labour Court on the application dated 18th June 1985 for withdrawal of the said Complaint (ULP) No. 74 of 1985. I, therefore, insisted on the parties filing a certified copy or ordinary copy of the order actually passed on the said complaint. The only order which was passed by the Labour Court while disposing of Complaint (ULP) No.74 of 1985 was that the complaint was dismissed for want of prosecution. This is not a case of withdrawal of the complaint with liberty or on particular grounds. I do not share the reasoning of the Labour Court as set out in paragraph 12 of the impugned order. I have come to the same conclusion regarding non-applicability of Section 59 of the 1971 Act for different reasons which I have set out in the earlier part of this judgment.

18. It was emphatically argued by the learned counsel for the workmen and the Union that the reference was not in respect of the same matter which was the subject-matter of the complaint before the Labour Court in Complaint (ULP) No. 74 of 1985. It was forcefully argued by Mr. Cama for the petitioner that the subject-matter of the two proceedings in substance was the same. It is not necessary for me to examine this aspect at all as I have come to the conclusion that the said complaint was not within the purview of the 1971 Act and the bar of Section 59 cannot, therefore, be invoked.

19. It must be observed that Section 59 of the, 1971 Act creates a bar to the proceeding and it has got to be strictly construed. A party who wants to prevent adjudication of the grievances of the other side on merits must strictly prove all the ingredients set out in the section which creates the bar. I cannot construe Section 59 liberally. The Union had erroneously invoked the jurisdiction of the Industrial Court and Labour Court when the said Courts lacked the jurisdiction to entertain their grievance at that stage,

20. The orders of dismissal were passed on 29th April 1985 and the reference were also made on 19th December 1985. The disputes are pending for several years. It is most unfortunate that the proceedings are still at the threshold and the parties are busy agitating their respective contentions on preliminary aspects.

21. In view of the above discussion, I uphold the order passed by the Labour Court on the question as to the maintainability of the reference and non-application of Section 59 of the 1971 Act, although for different reasons as Indicated above. Rule issued by this Court is accordingly discharged. The Labour Court is directed to dispose of the reference as expeditiously as possible and, as far as possible, within a period of six months from the receipt of the writ of this Court.

22. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

23. In view of my above finding, the chamber summons taken out by the petitioner is also dismissed with no order as to costs.