

(1988) 02 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No's. 1115 and 1116 of 1983

K. Ramachandra Nair

APPELLANT

Vs

The Bombay Gymkhana Ltd. and Others

RESPONDENT

Date of Decision : 03-02-1988

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1)(C), 12(5)

Citation : (1988) 2 BomCR 318 : (1988) 90 BOMLR 76 : (1995) 3 LLJ 574

Hon'ble Judges : H.H. Kantharia, J

Bench : Single Bench

Advocate : Rajendra V. Pai, for the Appellant; C.J. Sawant, for R-1, for the Respondent

Final Decision : Allowed

Judgement

H.H. Kantharia, J.—As common questions of facts and law are involved in these two writ petitions under Article 226 of the Constitution of India, they are heard together and are being disposed of by this common judgment.

2. Petitioner K. Ramchandra Nair in writ petition No. 1115 of 1983 was in the employment of the first respondent, the Bombay Gymkhana Limited, from 22nd June, 1964. Petitioner-Abdul Q. Bakali was in the employment of the said Gymkhana from 31st May, 1971. At the relevant time both of them were working as Clerks.

3. The relevant facts giving rise to these writ petitions are as under:

It appears that every year on the 20th of December there always used to be an annual day celebrations in the Gymkhana. On that day, as a matter of practice, some ex-gratia payments were made to the workmen of the Gymkhana. In the year 1977, some dispute arose between all the workmen on one hand and the management of the Gymkhana on the other on the issue of usual ex-gratia payment. On 19th December, 1977 all the workmen went on en masse strike. The said strike continued till 20th February, 1978. On 20th February, 1978, all

the workmen resumed duty unconditionally. At that time five out of all the workmen were told that their services were terminated and they were no longer required in the employment of the Gymkhana. The present petitioners are the two out of those five workmen. It is the case of the Gymkhana that during the strike period on 16th January, 1978 the services of the petitioners were terminated along with three others by way of discharge simpliciter. The petitioners complained to the Government Labour Officer about their wrongful discharge. The matters were admitted in conciliation but conciliation proceedings having failed, references were made by the Deputy Commissioner of Labour (Administration), Bombay, u/s 10(1)(c) read with Section 12(5) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") in the matter of demands of the petitioners for their reinstatement with full back wages and continuity of services, to the Sixth Labour Court, Bombay, presided over by the second respondent.

4. At the hearing of Reference (IDA) No. 394 of 1978 in the case of K. Ramchandra Nair and Reference (IDA) No. 395 in case of Abdul Q. Bakali, parties filed their pleadings and adduced both oral as well as documentary evidence. On appreciation of the evidence adduced before him, the second respondent Labour Judge by his separate judgments and orders dated 21st August, 1982 rejected the demands of the petitioners for reinstatement and full back wages with continuity of services and thus dismissed the references. The said award made by the learned Labour Judge presiding over the Sixth Labour Court, Bombay, are impugned in these petitions by the petitioners-workmen.

5. Now, admittedly no domestic enquiry had preceded the prejudicial orders of discharge passed against the petitioners. In that case, the employer-Gymkhana was entitled to adduce evidence before the Labour Court to justify their action of discharge simpliciter taken against the petitioners. That exactly was done in this case. The point that arises for my consideration, therefore, is to find out whether the Gymkhana adduced sufficient and satisfactory evidence before the Labour Court to justify their action of passing orders of discharge simpliciter against the petitioners and further whether the awards made by the learned Labour Judge are sustainable in law.

6. The case of the Gymkhana, as can be seen from their written statement, is that the service of the present petitioners were terminated by way of simple discharge on payment of one month's salary in lieu of notice. They contended that the service record of the petitioners was not satisfactory. According to them, the petitioners were warned for misbehaving in a rude manner with the Head Clerk of Gymkhana by name R. Suresh. They were also severely warned for such misconduct although they deserved severe punishment on account of such misconduct. Further, it was contended by the Gymkhana that the petitioners had participated in an illegal strike from 19th December, 1977 and had taken a leading part and acted in furtherance of such illegal and unjustified strike by committing various overt acts along with others. It is their case that the strike

that commenced from 19th December 1977 was without any notice and the Children's Day which was celebrated then was sabotaged by the workmen on account of which there was considerable frustration and dissatisfaction among the children of the members of the Gymkhana who were looking forward to a great occasion of the Children's Day and enormous quantity of snacks, ice creams etc. had to be thrown away. The grievance of the Gymkhana was that the strike continued even during the Christmas period and the festive occasion of the Christmas eve and the New Year eve were also spoilt and lost to the members of the Gymkhana. It was alleged by the Gymkhana that during the strike period, the electric power supply of the Gymkhana was repeatedly cut off amasing the food stored in cold storage, resulting inconsiderable loss of about Rs. 33,000/-. It was further alleged that during the aforesaid strike period the willing workmen were physically prevented from entering the Gymkhana premises and they all were abused and assaulted and particularly the Head Clerk R. Suresh was given fist blows. Even on 20th December, 1977 the said Suresh was threatened by some of the employees who were on strike and was assaulted with fist blows by the employees of the Gymkhana, and few others. The Gymkhana, therefore, submitted that considering the unsatisfactory service record of the petitioners, it was decided that it was not desirable and in the interest of the Gymkhana to continue them in the employment and, therefore, their services were terminated with effect from 16th January 1978 by an order of discharge simpliciter.

7. Let us see whether the employer-Gymkhana has, by sufficient and satisfactory evidence, established the charges of misconduct levelled against the petitioners and ; whether, from the evidence on record, their action of discharging the petitioners can be said to be justified. Thus, the first important documentary evidence in this regard is a complaint made to the Inspector of Azad Maidan Police Station on 20th December, 1977 by the Gymkhana (Exh.E). A perusal of this complaint shows that five employees of the Gymkhana viz. (1) Taraporewalla, (2) Diego Fernandes, (3) Maniam, (4) Peon Salvi and (5) Sidhartan Sudkya were named in the complaint as the assailants of Head Clerk Suresh. There was neither an averment against the present petitioners nor were they named in me said complaint. This goes to : show that at the first available opportunity the petitioners were not in mind of the Gymkhana as the persons who had assaulted R. Suresh. The complaint under reference was lodged soon after the incidents of 19th and 20th December, 1977 and it was reasonable to expect the complainant-Gymkhana to have named the petitioners in this complaint, had they really assaulted Head. Clerk Suresh. This piece of documentary evidence, therefore, completely proves the innocence of the petitioners as having taken part in the assault on Suresh. I am told at the Bar that this complaint was not further pursued by the Gymknana either with the Police or by filing a private prosecution in the appropriate Court of a Magistrate which further goes to show that in all probability the story of assault on Suresh was either imaginary or the incident was so much, insignificant that it was to be ignored. If the incident was really serious, one expects the Gymkhana to proceed

further in the matter with a view to book the real culprits who indulged in assaulting Head Clerk Suresh. Assuming, for the sake of argument, that some incidents of assault on Suresh had really taken place, the same must be so slight and negligible that the Gymkhana thought it wise not to take much notice of it and completely ignored it after lodging a formal complaint with the Inspector of Azad Maidan Police Station. From such facts and circumstances, the only irresistible conclusion that can be drawn is that the present petitioners were not involved in an incident of assault on Suresh. Such a possibility at any rate cannot be altogether ruled out.

8. But that apart, the oral evidence adduced by the Gymkhana is also not convincing to bring home the charge of misconduct alleged against the petitioners. The Secretary of the Gymkhana H.A. Menezes in his evidence deposed that the petitioners took leading part in the strike and prevented others from coming to Gymkhana. He further deposed that electric supply during the strike period was also cut off on three occasions by the striking employees but he has no specific allegation against the petitioners in that regard. As regards the assault on Suresh, his evidence only shows that when he (Suresh) tried to enter the Gymkhana premises, he was assaulted by some workers who were on strike. Therefore, the evidence of the Secretary of the Gymkhana does not involve the petitioners in the incident of: assault on Suresh. All that has been brought out on record in his evidence is that the petitioners took a leading part in the strike and prevented others from coming to the Gymkhana. But that by itself would not be a misconduct on the part of any workman warranting discharge or dismissal. It appears that the management of the Gymkhana adopted a revengeful attitude against the petitioners and victimised them for having taken a leading part in the strike. That is clear from further evidence of Henry Menezes which shows that the services of the petitioners were terminated because they took a leading part in the strike and acted in furtherance of the strike and obstructed the willing workers. This sort of an attitude on the part of any employer cannot be appreciated. If the management of the Gymkhana terminated the services of the petitioners merely because they took part may be a leading part, in the strike, it not only amounts to victimisation but also an unfair labour practice. To put it differently, the action of the management of the Gymkhana in terminating the services of the petitioners was full of mala fides. It is also pertinent to note that the strike was an action of all the workmen collectively put together. It was not an individual action of one or the other individual workman or the petitioners. The very fact that the present petit were singled out for being punished on account of their taking part in the collective activity of strike also points to the mala fide intention of the employer-Gymkhana. In other words, the discharge simpliciter of the petitioners was not a bona fide act on the part of the employer here.

9. The next witness examined by the Gymkhana was Head Clerk R. Suresh. His evidence shows that on 19th December, 1977 some employees viz. Ferdandes, Tarapore-wala and the present two petitioners and some others assaulted him

and on 20th December, 1977 also some employees obstructed and assaulted him. This evidence given by Suresh after a lapse of five years of period loses its importance in view of the fact that in the complaint lodged immediately after the incidents on 20th December, 1977 to the Inspector of Azad Maidan Police Station, it was not alleged that the present petitioners were also his assailants along with other workmen. It is quite possible that Suresh might have been belaboured by some employees and in the crowd the petitioners might also be present. I say so because Suresh deposed in terms that some employees obstructed and assaulted him. It is important to bear in mind that bold allegations of assault like the one made here could be easily made against anybody but it is very difficult to refute them. Except the bare word of Suresh in this regard there is no other evidence adduced by the employer-Gymkhana to corroborate the testimony of Suresh. Suresh himself deposed that when he was assaulted, the police saved him and took him to the Police Station. In other words, at the time of the alleged incident police were present at the spot. Nothing prevented the Gymkhana from examining one of the Police Officers to corroborate the evidence of Suresh and it could never be that Suresh was the only person nearabout the premises of the Gymkhana when he was assaulted. The incident must have been definitely seen by others. In the ordinary course, therefore, it was expected of the Gymkhana to have examined someone else also to corroborate the testimony of Suresh. And what is more surprising is that no medical evidence was brought on the record to show the extent of injury caused to Suresh on account of assault committed on him by not less than four persons. Therefore, the evidence of Suresh cannot be easily accepted and at any rate the same cannot be said to be sufficient and satisfactory to prove the charge of misconduct of assault on him by the petitioners.

10. The petitioners examined themselves in the lower Court. They denied allegations made against them that they had assaulted, abused and obstructed Suresh. They also deposed that they were the Union leaders and when the employees went on strike in December, 1977, they had taken active part in organising the strike and also made efforts to see that the strike was successful. In other words, here were the active trade union workers who were interested in seeing the strike being successful and if they are sought to be victimised by making allegation of assault on one of the Officers of the Gymkhana, the attempt on the part of the employer should not only to be discouraged but also be condemned. Strike, it may be noted, is a very powerful tool in the hands of the employees to force the employer to see their point of view in the matter of their demands as lock-out is an equally strong instrument in the hands of the employers. Therefore, any attempt on the part of any employer to victimise any employee : just because he/she participates in the strike is not a healthy sign in the industrial and labour field. It appears that the management of the Gymkhana was interested in getting rid of the present petitioners as can be seen : from the evidence of the Secretary of the Gymkhana H.A. Menezes was stated in clear terms that while giving evidence in another "Reference (IDA) No. 395 of 1978 he

may have stated that the management wanted : to get rid of the five workmen. If that is so, it is really unfortunate.

11. In these facts and circumstances, the irresistible conclusion is that the employer here not only failed to prove the charge of misconduct against the petitioners as alleged against them but also could not justify their action of terminating the services of the petitioners by an order of discharge simpliciter. As stated earlier, the alleged incident of assault on Suresh seems to be so insignificant that the management of the Gymkhana did not think it wise to pursue it further with the police but magnified it solely with a view to get rid of the petitioners because they took active part in the strike. There was no justification, therefore, on the part of the employer- Gymkhana to terminate the services of the petitioners by way of discharge simpliciter.

12. Assuming, for the sake of argument, that there was some involvement of the petitioners in the assault committed on Suresh, the facts and circumstances of the case do not warrant a drastic punishment of economic death of terminating the services of the petitioners. The petitioners could have been visited with some mild punishment short of loss of job. For an incident like the one as alleged here, they could have been warned, they could have been censured, their increment could have been stopped, some of the concessions given to the workmen would have been withheld or withdrawn but they could certainly not have been visited with a severe and drastic punishment of removal from employment.

13. In the facts and circumstances of the case, therefore, I am more than convinced that the employer here not only failed to bring home the charge of misconduct alleged against the petitioners but also failed to justify their action of discharging the petitioners from services. The learned Labour Judge was, therefore, wrong in rejecting the demands of the petitioners for their reinstatement with full back wages and continuity of services. It would not be out of place to say here that the impugned awards passed by the learned Labour Judge are perverse inasmuch as he gave judgments contrary to the evidence on record. The evidence on record is not such that any reasonable person would take a view of the matter as was taken by the learned Labour Judge. His impugned awards have, therefore, to be quashed and set aside.

14. In this view of the matter, the writ petitions succeed and they are allowed. The impugned awards passed by the second respondent-Labour Judge are quashed and set aside. The first respondent-employer Gymkhana is hereby directed to reinstate both the petitioners in their original positions with continuity of services and pay them full back wages. They are directed to reinstate the petitioners immediately. So long as the back wages are concerned, they are directed to pay up the entire amount due to the petitioners on 1st March 1988, along with the salary of the petitioners for the number of days that they would be working in the month of February, 1988, failing which the first respondent-Gymkhana shall be liable to pay interest at the rate of 15% per annum on the amounts due to the petitioners on account of their full back wages.

15. Rule in each of the petitions is accordingly made absolute with no order as to costs.