

(2001) 07 BOM CK 0085

In the Bombay High Court

Case No : Writ Petition No. 1661 of 1997

Maharashtra General Kamgar Union, Mumbai

APPELLANT

Vs

U.S.V. Limited and Another

RESPONDENT

Date of Decision : 02-07-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 11A
Model Standing Orders — Order 24, Order 24(1)

Citation : (2001) 4 BomCR 659 : (2002) 92 FLR 438 : (2002) 4 LLJ 963 :
(2002) 1 MhLj 168

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; P.K. Rele, for the Respondent

Final Decision : Allowed

Judgement

1. By an award dated 1st April, 1997 the Labour Court has answered the reference to adjudication made to the Court in the negative, upholding in the process the dismissal from service of four workmen. A chargesheet was issued to four workmen, namely, Shri B. G. Shirke, Shri V. V. Mhatre, Smt. P. D. Ghogle and Smt. S. P. Chavan. The allegations in the chargesheet were thus :--

"You have been employed in the Capsule Department as worker. On 15-2-1984, you were in General Shift. At about 9.40 a.m. you and your colleagues left the work place leaving the production unattended and when asked by the Supervisors to go to the Department, you flatly refused to do. You along with your colleagues viz. M/s P. V. Mahddalkar, V. V. Mhatre, B. A. Bavkar, Mrs. S. P. Chavan and Mrs. P. D. Ghogle, forced the supervisors viz. M/s A. V. Kutumbe and H. G. Shirwaikar under threat to accompany you to the Administrative Wing to see the Plant Manager. You entered the Plant Manager's cabin along with your said colleagues and asked the said Supervisors to follow you in the cabin under threat and dire consequences. You also forced the supervisors to agree to your

shouting before the Plant Manager to the effect that the worker including yourself obey Supervisor"s, instructions. You also said referring to Notice on Notice Board that you have wilfully gone on a go-slow to the extent of 50% as per the Union"s stand and have not refused Supervisor"s orders."

2. On the aforesaid allegations of misconduct a disciplinary enquiry was convened for a breach of Model Standing Orders 24(a), 24(c), 24(k) and 24(1) which are as follows :--

"24(a). Wilful insubordination or disobedience whether or not in combination with another of any lawful and reasonable order of superior;

24(c) Wilful slowing down in performance of work or abatement or instigation thereof,

24(k) riotous, disorderly or indecent behaviour on the premises of the establishment by giving threats to superiors and inciting and instigating others to indulge in unlawful activities;

24(1) Commission of any act subversive of discipline or good behaviour on the premises of the establishment."

3. The workmen denied the allegation of misconduct against them. Before the Enquiry Officer evidence was adduced by the employer of two witnesses, Shri R. K. Sharma and H. G. Shirwaikar. On 8th April, 1985 the employer closed its evidence. The evidence on behalf of the defence commenced from 14th April 1985. The evidence of Shri B. G. Shirke, Shri V. V. Mhatre and Mrs. S. P. Chavan, three of the four workmen came to be recorded. The workmen were duly cross-examined. On 29th June, 1985 the statement of the fourth workman Smt. P. D. Ghogle was recorded and was continued until 10th July 1985. During the course of cross-examination the defence representative objected to a particular question, Question No. 95. The Enquiry Officer disallowed the objection and permitted the question in the course of cross-examination. At that stage, the defence representative boycotted the enquiry. After the defence boycotted the enquiry three witnesses of the employer were examined on 11th July, 1985 and 14th July, 1985, namely, Shri B. S. More, Shri S. L. Rajkondawar and Shri H. G. Shirwaikar. Certain documents inter-alia consisting of the Optical Testing Record, the production slipbook, 34 production reports and the packing record book were taken on record by the Enquiry Officer, who concluded the enquiry on 14th July 1985. After the enquiry was concluded, the Enquiry Officer arrived at a finding of misconduct upon which the four workmen were dismissed by an order dated 18th October, 1985.

4. On a reference to adjudication made u/s 10 of the Industrial Disputes Act, 1947, the Labour Court in an Award dated 3rd February, 1984 considered the preliminary question as to whether the enquiry was fair and proper. By its Part-I Award the Labour Court came to the conclusion that the enquiry was vitiated by a failure to comply with the principles of natural justice. The Labour Court held

that a workman who boycotts a disciplinary enquiry cannot thereafter be heard to complain that the enquiry was conducted ex-parte. In the present case, the evidence of the witnesses for the employer was concluded before the workmen boycotted the enquiry. The Management witnesses had been duly cross-examined. The Labour Court concluded that after the workmen boycotted the enquiry it was not thereafter permissible for the employer to reopen the evidence of the witnesses, who had deposed on its behalf and to adduce additional documentary evidence without notice to the charge sheeted workmen. For this reason, the enquiry was held to be vitiated by a non compliance with the principles of the natural justice.

5. The Part-I Award of the Labour Court was challenged by the employer in a Writ Petition under Article 226, Writ Petition No. 1426 of 1994, which was rejected by an order dated 22nd June 1994 of a Learned Single Judge Mr. Justice S. H. Kapadia. In an appeal filed by the employer against the order of the Learned Single Judge a Division Bench of this Court by an order dated 6th April 1995 passed in terms of minutes disposed of the appeal with the following directions :

"(1) By consent the order of the learned Single Judge dated 22-6-1994, is set aside.

(2) The Appellant shall lead evidence before the Labour Court in Ref. (IDA) No. 536/1986 to justify the action taken against the concerned workmen.

(3) All the contentions of the parties are kept expressly open. If the Part-II Award is against the Appellant, it shall be open to the Appellant to challenge the Part-I Award dt. 3-2-1994 on the same grounds urged in the present Appeal.

(4) It shall be open for the Appellant to urge before the Labour Court that the Appellant shall rely on the enquiry held against the concerned workmen upto 10-7-1985 to justify its action against the concerned workmen which shall be considered by the Labour Court after hearing the 1st Respondent.

(5) Appeal to stand disposed of in terms of the above.

(6) There shall be no order as to costs."

6. The Division Bench by its order dated 6th April, 1995, thus expressly permitted the employer to lead evidence before the Labour Court in justification of the action which had been taken against the four workmen. This is in accordance with the well settled position of law that it is open to the employer, even if an enquiry is held to be defective upon a failure to comply with the principles of natural justice or where no enquiry has been held to justify its action by leading evidence before the Labour Court in support of the Charge of misconduct. The order passed by the Division Bench permitted the employer to urge before the Labour Court that the employer shall rely on the enquiry which had been conducted against the workmen upto 10th July 1985 to justify its action and the contention of the employer was to be considered by the Labour

Court after hearing the union which was espousing the cause of the workmen.

7. Before the Labour Court the employer sought to adduce the evidence of Shri Satish Laxman Rajkondawar, who was working with the employer between 1982 and 1986 in his capacity as Deputy Plant Manager. The witness deposed to the fact that these four workmen were known to him since they were working in the factory under his control. Besides setting out the names of the departments where the workmen were working, the witness stated that it was a practice in the Company to work for half a day in the Optical inspection section of the injection Department and in some other area for half a day. The witness stated that a Register was maintained by the Company which was written by the operators themselves. The witness stated that the operators would write the relevant information relating to production in the Register and that would be signed and checked by the Supervisor at the end of the Shift, The aforesaid evidence recorded on 19th March, 1996 concluded with a note in parenthesis to the effect that the Optical Inspection Record Register i.e. Exh. Z-26 in the enquiry proceedings was not traceable. The recording of evidence was thereafter adjourned on 19th March, 1996 to 19th June, 1996 for further examination-in-chief. On 19th June, 1996 when the matter came up before the Labour Court for recording the evidence of the witness for the Management, the Court was informed that the Management did not intend to carry out any further examination-in-chief of the witness. Thereafter the witness was cross-examined and he stated that he had no document to show what was the exact production of the said four workmen during the relevant time.

8. The recording of evidence on behalf of the Management in support of the charge of misconduct ended there. A bare perusal of the evidence of the sole witness for the Management would establish beyond any doubt that absolutely no evidence was forthcoming on the charge of misconduct before the Labour Court. No oral evidence was adduced before the Labour Court in-regard to what had transpired on 15-2-1984 or for that matter on the alleged go-slow. Thereafter, each of the four workmen came to be examined in support of their defence and these four workmen were cross examined on behalf of the employer.

9. The Labour Court delivered its Part-II Award on 1st April 1987. In paragraph 7 of its Award the Labour Court noted that "as per the minutes of the order in Appeal before the Honourable High Court I have also gone through the Enquiry proceedings upto 10-7-1985". Similarly in paragraph 10 of its Award the Labour Court set out the scope of its enquiry as follows :--

"10. Now I have to see the said action of the Management is justified or not on the basis of evidence recorded by the enquiry officer upto 10-7-1985 and evidence adduced by both the parties before the Court."

The Labour Court thereupon proceeded to consider the evidence which had been recorded before the enquiry officer as well as the evidence of the sole witness, who had deposed on behalf of the management before the Court. After

considering the evidence the Labour Court came to the conclusion that the charge of misconduct was proved and that the penalty of dismissal from service was justified.

10. In assailing the correctness of the Award of the Labour Court the learned counsel appearing on behalf of the petitioner-Union submitted that once an enquiry has been held not be fair and proper the evidence which was recorded before the Enquiry Officer has to be necessarily disregarded. u/s 11A of the Industrial Disputes Act, 1947, the employer is then given an opportunity to sustain the charge of misconduct by leading evidence in support of the charge before the Labour Court. In the present case, the employer had completely failed to do so, since a bare perusal of the deposition of the sole witness on behalf of the employer, who deposed before the Labour Court would show, that the charge of misconduct could not be established. In the circumstances it was submitted that the Labour Court was not justified in looking at the evidence recorded by the Enquiry Officer and in arriving at a finding of misconduct.

11. On the other hand, the Learned Counsel appearing on behalf of the employer sought to submit that while it is true, as a general principle of law, that it is for the employer after an enquiry is held not to be fair and proper to justify the misconduct by leading evidence before the Labour Court, the order passed by the Division Bench in the present case had granted liberty to employer to urge before the Labour Court that the evidence recorded in the enquiry upto 10th July 1985 should be considered. The Learned Counsel appearing on behalf of the employer submitted that the evidence which was recorded in the enquiry came to be read and considered by the Labour Court by consent of parties and that in these circumstances having regard to the peculiar facts of the present case, the Labour Court was justified in relying upon the evidence recorded by the Enquiry Officer though the enquiry was held to be vitiated.

12. In considering the correctness of the submission which has been urged on behalf of the union and employer regard must be had to the well established position in law. That position is to the effect that if the Labour Court comes to the conclusion that a domestic enquiry conducted by the employer is vitiated by a non compliance with the principles of the natural justice or by grave irregularities which have affected the validity of the enquiry, it is open to the employer to sustain the charge of misconduct by adducing evidence before the Labour Court. The Labour Court must grant to the employer an opportunity, if such an opportunity is sought by the employer, of leading evidence before it in support of the charge of misconduct. This well settled position in law emerges from several Judgments of the Supreme Court, amongst them; *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, ; *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another*, ; and *Bharat Forge Company Ltd. Vs. A.B. Zodge and another*, . A case where a domestic enquiry has not been held and one where the Labour Court comes to the conclusion that the enquiry which was held was not fair and proper, would stand

on the same footing and the employer has to be permitted an opportunity of leading fresh evidence in support of the charge of misconduct. The question as to whether the charge of misconduct is established has to be then considered on the basis of the evidence which has been adduced before the Labour Court.

13. In *Neeta Kaplish v. Presiding Officer, Labour Court and Anr.*, (1999) 1 LLJ 95 a Bench consisting of two Learned Judges of the Supreme Court considered the question as to whether the evidence which was recorded before the Enquiry Officer in a disciplinary enquiry can be relied upon once before the Labour Court once the enquiry has been held to be vitiated. The Supreme Court held that once the enquiry has been held to be defective or in a case where no enquiry has been held, it is on the basis of the fresh evidence which is laid by the employer before the Labour Court, that the Court has to decide as to whether the charge of misconduct has been established. In the case before the Supreme Court the Labour Court had come to the conclusion that the enquiry had not been fairly and properly held. Thereupon, the Labour Court had called upon the Management to lead evidence on merits. No evidence was adduced by the management. Since the Management did not produce any evidence on merits, the workman also did not produce any evidence. The Labour Court dismissed the claim of the workman and a Writ Petition filed by the workman was also rejected by the High Court. The Supreme Court held that the evidence produced in the domestic enquiry could not have been relied upon before the Labour Court once the enquiry was held to be vitiated. In paragraphs 24 and 27 of its judgment the Supreme Court held thus:--

"24..... If the management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the Tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If however, the opportunity is availed of and the evidence is adduced by the management, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidence.

27. The record pertaining to the domestic enquiry would not constitute "fresh evidence" as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute "material on record", as contended by the counsel for the respondents, within the meaning of Section 11-A as the enquiry proceedings, on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry, could be, and, were, in fact, relied upon the management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and, that full opportunity of hearing was given to her in consonance with the principles of natural justice. This contention has not been accepted by the Labour Court and the enquiry has been held to be bad. In view of the nature of objections raised by the appellant, the record of enquiry held by the management ceased to be "material on record" within the meaning of Section 11-

A of the Act and the only course open to the management was to justify its action by leading fresh evidence as required by the Labour Court, if such evidence has not been led, the management has to suffer the consequences."

In the circumstances, the Supreme Court remanded the matter back to the Labour Court to decide the case afresh after requiring parties to lead fresh evidence on merits.

14. The same view has been taken by a Division Bench of this Court in Vinayak Bhagwan Shetye Vs. M/s Kismet Pvt. Ltd. and another, . The Division Bench consisting of Mr. Justice M. N. Chandurkar and Mr. Justice S. P. Kurdukar (as the Learned Judges then they were) held thus :

"Now it is difficult for us to see how the learned Judge of the Labour Court having positively discarded the enquiry proceedings on the ground that the enquiry was not fair and having found that even before the Labour Court the misconduct with which the petitioner was charged was not proved, could have proceeded to make out an entirely new case for respondent No. 1. At this stage Mr. John wanted to refer to the enquiry papers and the statements recorded during the course of the enquiry by the Enquiry Officer, Such a course was clearly impermissible because the enquiry has been rejected as not fair and once the enquiry has been rejected and the employer has been given the opportunity to prove the misconduct by adducing independent evidence before the Labour Court, the matter before the Labour Court would have to be judged on the basis" of such evidence as was adduced before the Labour Court. It is important to remember that the finding recorded by the Labour Court that the enquiry was vitiated was not and indeed could not have been challenged by the employer because it is obvious that the employee, who had asked for the adjournment, was denied the adjournment and the enquiry had proceeded ex parte. It does not appear on record that the reason for asking for the adjournment was not genuine. We shall, therefore, have to ignore the statements made during the enquiry proceedings."

15. In the circumstances of the present case, therefore, what emerges is that the enquiry was held to have been vitiated by the Part-I Award. The employer was thereupon permitted to prove the misconduct by leading evidence on the allegations contained in the chargesheet issued to the workmen. The Part-I Award was confirmed by the Learned Single Judge of this Court who dismissed the Writ Petition filed by the employer. The Division Bench in Appeal expressly provided that the employer shall have an opportunity before the Labour Court to lead evidence to sustain the charge of misconduct. At the same time, the employer was permitted to urge before the Labour Court that the enquiry which had been conducted upto 10th July 1995 can be relied upon and the Labour Court was to consider that submission after hearing the Union. The employer attempted to lead evidence before the Labour Court but that attempt was of no consequence since as already noted earlier after a brief recording of the examination-in-chief of one witness on 19th March, 1996 the examination was closed. The witness for the employer stated in the course of the examination-in-

chief that he had no document to show what was the exact production of the said four workmen during the relevant time. This answer is significant because the whole case that there was a go slow could not be established in the absence of the documentary evidence reflecting the figures for production. No oral evidence to sustain the charges was forthcoming before the Labour Court.

16. The Labour Court has in these circumstances, erred in relying upon the evidence recorded in the domestic enquiry once it was held to be vitiated. The Division Bench had permitted the employer to urge before the Labour Court that he should be allowed to rely upon the evidence recorded upto 10th July 1985. The Division Bench which passed an order in terms of Minutes did not decide upon the question as to whether the evidence recorded in the enquiry could be relied upon since that question was left open for decision by the Labour Court. The Labour Court has to decide as to whether that evidence could at all be relied upon. The Labour Court has evidently not discussed or determined the question of law but seems to have proceeded on the basis that it was entitled to rely upon the evidence recorded until 10th July, 1985 in the disciplinary enquiry.

17. The learned counsel appearing on behalf of the employer however, submitted that if the written submissions which were filed on behalf of the workmen before the Labour Court are considered it would appear that the evidence recorded before the enquiry officer came to be read by consent. The written submissions before the Labour Court filed by the Union have been annexed to the affidavit in reply by the employer. In these written submissions, Clause (4) of the minutes of order before the Division Bench of this Court, have been extracted. The Union in its written submissions advanced submissions in respect of the enquiry conducted against the four workmen, upto 10th July 1985 and in respect of the enquiry which was conducted thereafter, on 11th and 14th July 1985 separately. Ultimately it has been sought to be submitted that the allegations against the workmen have not been established either in the enquiry which was conducted until 10th July 1985 or on the basis of the evidence which was adduced before the Labour Court. In my view the written submissions filed by the Union cannot be stretched so as to lead to an inference that the evidence which was adduced before the Enquiry Officer was relied upon by the Labour Court by the consent of parties. There was no order or direction to that effect by the Labour Court either in the Roznama or in the ultimate Award of the Court. The law on the point is well settled. Once the enquiry is held to be vitiated or defective it is for the employer to lead fresh evidence to sustain the charge of misconduct. The burden to do so is clearly on the employer. The employer clearly failed to discharge its burden in the present case.

18. The error in the approach of the Labour Court would be more than apparent if its finding on the question of the go slow is perused. As already noted earlier the witness for the employer had in the course of his deposition before the Labour Court stated that the Optical Inspection Record Register was not traceable and that he had no document to show what was the exact production

of the four workmen during the relevant time. Despite this in paragraph 23 of its Award the Labour Court relied upon that part of the record before the enquiry officer in which one of the workmen Mrs. Ghogle was questioned in cross-examination with reference to the Optical Testing Record. The Court noted that the record was not traceable. The Labour Court proceeded to accept the figure of a decline in production which was sought to be relied upon by the management in the question which was posed to one of the workmen, Mrs. Ghogle in the course of cross-examination before the Enquiry Officer. On this basis the Labour Court concluded by holding that the charge of go slow was established. It was in my view an error on the part of the Labour Court to hold that the charge of go slow was proved on the basis of the evidence led before the enquiry officer when the employer was clearly unable to do so in the course of the opportunity which he availed of before the Labour Court of leading evidence.

19. In the circumstances of the case, I am of the view that the Award is clearly unsustainable. The next issue to be considered is as regards the grant of relief. Shri P. K. Rele, the learned Senior Advocate appearing on behalf of the employer fairly informed the Court that after the lapse of time which has taken place after the alleged incident, the employer would not be in a position to lead evidence afresh before the Labour Court to sustain the charge of misconduct. Therefore, there is now no question of granting an opportunity to the employer of leading fresh evidence before the Labour Court by remanding the matter. The learned counsel has not also challenged the Part I award. The employer has filed his affidavits dated 3rd March, 2000 and 9th August 2000 stating that the only plant of the Company in which the workmen concerned were employed at Gowandi, Mumbai has been closed. The employer has denied that it has a factory at New Bombay as alleged. In the circumstances, and particularly having regard to all the facts and circumstances of case, I am of the view that it would not be appropriate to grant reinstatement. In view of the principles enunciated in the Judgments of the Supreme Court in O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, , Workmen Vs. Bharat Fritz Werner (P) Ltd. and Another, , V.B. Rao Vs. Steel Authority of India Ltd., , it would be appropriate to grant to the four workmen concerned compensation in lieu of reinstatement. The learned counsel appearing on behalf of the employer has tendered a statement computing the amount on the basis of three years of the last drawn wages. In addition the Learned Counsel has also made available a statement of other retirement benefits due and payable to each workman. According to the said statement the four workmen would be entitled to the following payments :

Length of service Last drawn pay 36 months. Pay Terminal dues TOTAL

1. Mr. B. O. Shirke 17 Yrs. 5 months 1445 52020 16665 68,685
2. Mr. V. V. Mhatre 10 Yrs. 10 months 1406 50616 17767 68,383
3. Mrs. S. P. Chavan 15 Yrs. 2 months 1388 49968 20762 70,730
4. Mrs. P. D. Ghogle 14 Yrs. 6 months 1397 50292 21451 71,743

20, The workmen had worked with the employer in excess of a decade, each. In the statement submitted by the employer, it is admitted that B. G. Shirke had worked for 17 years, V. M. Mhatre for 10 years, Mrs. P. D. Ghogle for 14 years and Mrs. S. P. Chavan for 15 years. The compensation calculated by the employer is inclusive of the terminal dues and has been computed on the basis of the last drawn salaries of these workmen which were Rs. 1448, Rs. 1406, Rs. 1388 and Rs. 1397 respectively. The workmen were dismissed from service on 18th October, 1985. The dismissal from service has been held in the course of this judgment not to be justified. In the event that they were to be reinstated in service, these workmen would have been entitled to back wages and to the benefit of the enhancement in wages over the last 16 years. As held by the Supreme Court in V.B. Rao Vs. Steel Authority of India Ltd., , the entitlement of the workmen to backwages cannot be completely denied to the workmen while determining the compensation payable in lieu of reinstatement. All the four workmen have stated in evidence that they have been unemployed since termination and were unable to find jobs. B. G. Shinde and V. M. Mhatre stated that they have returned to their villages to till small agricultural holdings. Both Mrs. Ghogle and Mrs. Chavan stated that they have been unable to secure employment. In the circumstances, I am of the view that the ends of justice would be met if each one of the aforesaid workmen is awarded an amount of Rs. 1,50,000/- as compensation in lieu of reinstatement. In the circumstances, the impugned award of the Industrial Court is quashed and set aside. The Respondent-employer shall make the payment to the concerned workmen within a period of eight weeks from today. The Writ Petition is allowed in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.

21. Writ petition allowed.