

(2002) 10 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 4007 of 1995

Prabhakar Engineers Pvt. Ltd.

APPELLANT

Vs

Ramchandra Baburao Mohite and Another

RESPONDENT

Date of Decision : 18-10-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 59

Citation : (2003) 3 ALLMR 596 : (2003) 4 BomCR 412 : (2003) 2 MhLj 823

Hon'ble Judges : S. Radhakrishnan, J

Bench : Single Bench

Advocate : J.P. Cama, instructed by K.P. Anilkumar, for the Appellant; N.A. Kulkarni and Kiran Bapat, for the Respondent

Judgement

S. Radhakrishna, J.—By this petition the petitioner employer is challenging part I of the Award dated 29-6-1994 and part II of the Award dated 23-2-1995 passed by the II Labour Court, Pune in the Reference (IDA) No. 219 of 1987.

2. By the aforesaid Part I Award, the II Labour Court has given a finding that the enquiry held by the petitioner employer qua the respondent workman was not fair, proper and legal. Subsequent thereto, by part II of the Award, the learned Presiding Officer of the II Labour Court, Pune has partly allowed the Reference and the dismissal order issued to the workman was set aside and the petitioner employer was directed to re-instate the respondent workman with continuity of service with 40% backwages from the date of termination till the date of reinstatement.

3. Being aggrieved by both the Awards, mentioned hereinabove, viz. Part I Award as well as Part II Award, present petition has been filed by the petitioner employer contending that both the Parts of the Award suffered from patent errors apparent on the face of the record and that both the parts of the Award are perverse and are not sustainable in law.

4. The brief facts are that the concerned workman along with other workmen had resorted to an illegal strike on 13th June, 1986. It is the contention of the learned Counsel for the petitioner employer that the respondent workman had not only refused to work but had used very abusive language and had even threatened the superiors that they also should not work. The learned Counsel for the petitioner employer has contended that the respondent workman and the other workmen had instigated, incited the others not to work and prevented all the workmen from working and they were continuously abusing the superiors and had created a terrorised situation in the workplace. It appears that on 18th June, 1986, the concerned Supervisor supervising the work of the respondent-workman had also submitted a report to the Managing Director regarding the aforesaid illegal strike. In that behalf, the petitioner employer had moved the I Labour Court, Pune in Reference (ULP) No. 21 of 1986 for seeking a declaration that the strike commenced on 13th June, 1986 and continued thereafter, be declared illegal under the provisions of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the MRTU & PULP Act, 1971).

5. On 30th June, 1986 the petitioner employer had issued a show cause notice to the respondent workman to show cause as to why the disciplinary action should not be initiated for instigating, inciting and going on illegal strike.

6. Subsequent to the aforesaid show cause notice, the petitioner employer had issued a chargesheet on 9th July, 1986 to the respondent workman pointing out the various illegalities committed right from 13th June, 1986, especially using of ugly and filthy slogans and creating an atmosphere of fear and terror amongst the employees in the complex and finally by the said chargesheet the following four charges were leveled

1. Disobedience of the lawful and legitimate orders of the superiors whether in connivance with others or not.
2. Resorting to an illegal strike or aiding the same, instigating, inciting or to act in furtherance thereof:
3. Disorderly and indecent behaviour in the premises of the establishment:
4. Act subversive of discipline and good behaviour in the premises of the establishment.

7. On 19th July, 1986 the departmental proceedings commenced. The enquiry officer proceeded with the disciplinary enquiry against the respondent workman. It appears that various documents were produced during the enquiry before the enquiry officer and on behalf of the management three witnesses were also produced. However, the respondent workman chose not to remain present and take part in the enquiry proceedings though the appropriate notices were duly served on the respondent workman. The enquiry officer has recorded in his enquiry report that on various occasions the respondent workman was not

present and that on each time the next date of enquiry was duly informed by the petitioner employer to the respondent employee, by a registered letter. The enquiry commenced on 19th July, 1986 on which date the respondent workman was not present. Thereafter, the petitioner employer, on the instructions of the Enquiry Officer, had duly informed the respondent workman that the enquiry was fixed on 25th July, 1986 and accordingly a registered letter was duly served on the respondent workman. Again on 25th July, 1986 the respondent workman did not remain present. Thereafter, it appears that the Enquiry Officer had requested Mr. Joshi on behalf of the petitioner employer to request the respondent workman to appear and participate in the enquiry proceedings. However, it appears that the respondent workman had declined to appear before the enquiry officer and participate in the said enquiry. Thereafter, the enquiry was postponed to- 1st August, 1986. Again by another registered letter, due notice was given to the respondent workman. On 1st August, 1986 also the respondent workman was not present during the enquiry proceedings. It appears that the respondent workman had merely sent a letter requesting the extension of the enquiry contending that there was an atmosphere of strike and as such, he would not be able to take part in the enquiry proceedings. The enquiry officer, after appreciating the evidence tendered by the Management, finally gave the finding that the said respondent workman was guilty of the following misconducts.

- a) Refusal to carry on and obey reasonable and fair orders of superiors, whether in combination with others or not.
- b) To participate in an illegal strike, act in furtherance of illegal strike and actively support the illegal strike.
- c) To create atmosphere of chaos and confusion in the factory premises, and
- d) To behave in a manner of indiscipline and against the norms of good behaviour.

8. Based on such a report of the Enquiry Officer the petitioner employer issued a letter on 13th August, 1986 to the respondent workman, stating therein that in view of seriousness and gravity of charges levelled against the respondent workman and that they being proved during the enquiries, the management found that there were no extenuating circumstances to take a lenient view of the charges, and therefore, had decided to dismiss the respondent workman from the services of the Company with immediate effect.

9. It appears that the concerned Trade Union viz. Sarva Shramik Sanghatana, Pune, had filed the complaint (ULP) No. 266 of 1986 before the Industrial Court at Pune contending that the petitioner employer should be directed not to dismiss or discharge any of the members of the said complainant-union, who were the employees of the petitioner Company. This complaint was filed by the said Union on 20th August, 1986. In this complaint the petitioner employer had filed a detailed reply pointing out that the respondent workman's services were already terminated on 13th August, 1986 and had also pointed out that a full-fledged enquiry was conducted by way of disciplinary proceedings in which the

respondent workman had chosen not to remain present though he was provided with ample opportunities to appear. The petitioner employer had also pointed out that the respondent workman had suppressed the fact that his services along with two others were terminated on the very same day i.e. on 13th August, 1986. Hence the petitioner employer had pointed out that the ad-interim injunction granted by the Industrial Court on 22nd August, 1986, restraining the petitioner employer from terminating the services of the respondent workman ought to be vacated and the complaint also ought to be dismissed.

10. During the pendency of the complaint (ULP) No. 266 of 1986 mentioned hereinabove which was moved by the Trade Union on behalf of the respondent workman and others, the respondent workman had also moved the III Labour Court at Pune by way of Reference (IDA) No. 219 of 1987 seeking relief of reinstatement with full back-wages with continuity of service and other consequential benefits. In the meanwhile, I Labour Court, Pune, passed an order on 29th August, 1986 in the Reference (ULP) No. 21 of 1986, holding the strike commenced and continued by the respondent workman and others on 13th June, 1986 at 8.00 a.m. to be illegal.

11. The Industrial Court, after being informed by the petitioner employer that the respondent workman had suppressed the fact of being dismissed on 13th August, 1986 and had obtained the ad-interim injunction on 22nd August, 1986 restraining the petitioner employer from terminating the services of the respondent workman, the Industrial Court by its order dated 17th November, 1986 after appreciating all the facts and circumstances and especially in view of the fact that the respondent employee had falsely made the representation and had obtained the ad-interim relief without disclosing the dismissal dated 13th August, 1986, vacated the said ad-interim order granted on 22nd August, 1986 and rejected the interim application of the respondent employee. Subsequent thereto, it appears that the Dy. Commissioner of Labour, Pune, had referred the dispute being the Reference (IDA) No. 219 of 1987 to the III Labour Court for adjudication under the Industrial Disputes Act, 1947. After the aforesaid reference was made referring the dispute with regard to dismissal of respondent employee, seeking reinstatement with full backwages with continuity of service and other consequential benefits, the concerned Trade Union had filed an application on 6th January, 1988 before the Industrial Court at Pune seeking to withdraw the complaint (ULP) No. 266 of 1986.

12. It appears that before the III Labour Court Pune, the petitioner employer had filed an application on 10th January, 1989, contending that the said reference (IDA) No. 219 of 1987 seeking reinstatement with continuity of service and back-wages and other consequential reliefs, would be barred and not-maintainable in view of Section 59 of the MRTU & PULP Act, 1971. In the said application, the Labour Court came to the conclusion that the subsequent reference was not barred and ordered the subsequent reference was not barred and ordered the said reference to proceed by its Award dated 29th July, 1992. This award of 29th

July, 1992 holding that the reference was not barred u/s 59 of the MRTU & PULP Act was challenged in this Court by way of a writ Petition No. 5206 of 1992, wherein the learned Single Judge found no ground to interfere. However, the learned Judge made it clear that after the final award was passed, the very same contention with regard to the bar u/s 59 of the MRTU & PULP Act could be again re-agitated if the award were to be against the petitioner employer.

13. Aggrieved thereby, the present petitioner employer had filed a Letters Patent Appeal No. 14 of 1994 before the Division Bench" of the High Court wherein the Division Bench had declined to interfere with the order passed by the learned Single Judge and had also noted that if at all the Award were to go against the petitioner employer, the petitioner employer shall be at liberty to raise the very same contention with regard to the bar u/s 59 of the MRTU & PULP Act.

14. Before the Labour Court, the petitioner employer alone had led evidence on the issue whether the enquiry was fair, proper and legal. At that stage, the respondent employee chose not to lead any evidence and ultimately, the II Labour Court, Pune, on 29th June, 1994 passed Part I Award holding the said enquiry conducted to be not fair, proper and legal, being Part -1 Award.

15. Subsequent thereto, both the petitioner employer and the respondent employee had led their respective evidence on merits with regard to the dismissal of the respondent employee, before the said II Labour Court, and finally the II Labour Court, Pune, passed Part II Award on 23rd February, 1995. The II Labour Court had held that the workman had committed misconduct of indecent and disorderly behaviour on the premises of the Company which amounted to commission of act subversive of discipline and good behaviour on the premises, however, taking into consideration the circumstances under which the acts were committed, the II Labour Court was of the view that the punishment imposed of the workman that of dismissal could not be termed as proper and reasonable and held the said dismissal to be serious and grave in nature. By the said award it was also held by the II Labour Court that the petitioner employer had failed to prove that the respondent workman had instigated or incited and had gone on an illegal strike. Under these circumstances, the said Labour Court passed part II award whereby the respondent employee was directed to be reinstated with continuity of service with 40% backwages from the date of termination till the date of reinstatement.

16. By this petition, as pointed out hereinabove, petitioner employer has challenged both the parts viz. Part I and Part II Awards. Mr. Cama, the learned Counsel appearing on behalf of the petitioner employer has stated that he would first deal with part II Award. According to him the part II Award holding the respondent employee guilty only of two charges is totally perverse. According to him the relief granted by the Part II Award thereby directing the respondent employee to be reinstated with 40% backwages and continuity of service is totally perverse and there are various errors apparent on the face of the record. Hence, the learned Counsel for the petitioner employer contends that the said

Part II Award cannot be sustained and the same is liable to be quashed and set aside.

17. Mr. Cama took me through the evidence recorded before the Labour Court and also pointed out that the punishment inflicted in the instant case by the petitioner employer is "not a shockingly disproportionate punishment". In that context, Mr. Cama pointed out Schedule IV Item 1(g) of the MRTU & PULP Act, which contemplates that to discharge or dismiss an employee under Schedule IV Item 1(g), if the misconduct were to be of a minor or technical character, and without having any regard to the nature of the particular misconduct or the past record of the service of the employee, so as to amount to a shockingly disproportionate punishment. Therefore, it is contended by Mr. Cama that in the instant case, it is not a minor or technical misconduct. The concerned respondent employee was involved in a serious grave charge of instigating, inciting and threatening the employees to go on an illegal strike. In addition, the respondent employee had prevented other workmen from working. Over and above, he had also used very filthy and abusive language. The learned Counsel Mr. Cama emphasised that these acts of misconduct continued for a number of days.

18. According to him, participating in an illegal strike by itself is a misconduct as per the Industrial Employment (Standing Orders) Act, 1946. In that context, Mr. Cama referred to and relied upon the judgment of the Hon'ble Supreme Court in U.P. State Road Transport Corporation Vs. Subhash Chandra Sharma and Others, , wherein the Hon'ble Supreme Court has held that u/s 11A of the Industrial Disputes Act, 1947, the power is conferred on Industrial Tribunal/Labour Court to apply its mind on the question of proportion of punishment or penalty. Even the High Court under Article 226 of the Constitution of India should interfere only when the punishment/penalty is shockingly disproportionate. In the said judgment, in paragraph No. 9, the Supreme Court has observed as under :-

"..... Rather we find that the discretion exercised by the Labour Court in the circumstances of the present case was capricious and arbitrary and certainly not justified. It could not be said that the punishment awarded to the respondent was in any way "shockingly disproportionate" to the nature of the charge found proved against him. In our opinion, the High Court failed to exercise its jurisdiction under Article 226 of the Constitution and did not correct the erroneous order of the Labour Court which, if allowed to stand, would certainly result in a miscarriage of justice."

19. Mr. Cama, the learned Counsel for the petitioner employer further contended that even in the present case, this Court ought to interfere with the wrongful, arbitrary and capricious exercise of discretion by the Labour Court in holding that the respondent employee is entitled to the reinstatement with 40% back-wages and continuity of service. The learned Counsel Mr. Cama thereafter referred to and relied upon the judgment of the High Court in Life Insurance Corporation of India v. Tukaram Marathe Ganpat Marathe and Ors. 1999 1 CLR 697 of the said

judgment would be relevant, which read as under:--

"16. An unruly behaviour by itself is repugnant to the discipline and will have impact on rest of the staff members also. If this behaviour was to be confined to quarrelling employees only outside the office premises or even in the office premises worked in a remote corner, there is possibility of it not even being noticed by other employees. Obviously in that case, the impact will not be felt by their co-workers. If that be so, the seriousness of the incident will certainly be reduced considerably." "17. In the instant case, the disciplinary authority have taken action, taking in its entirety the incident and especially when it had an impact on other employees working in that very place where the incident occurred, they have chosen to impose the aforesaid penalty. The authorities, on the one hand have to maintain discipline among the employees and to see that the moral of the other employees is kept up and on the other while taking disciplinary action, signals should not be sent out to the effect that any unruly behaviour having wider impact, will be dealt with leniently. As noted above, one has to go back to the time span, during which the incident occurred. During its continuation, the atmosphere that was created and that prevailed on account of continuation of the incident also has to be borne in mind. The witnesses have clearly stated that because of the said behaviour of the employee and the assault, the atmosphere in the office had become very tense and the employees working in the area were feeling threatened. In this background, if the said charge of the employee, having used the saw is taken into consideration, as noted by the enquiry officer, the assault is certainly proved and the impact of shirt having been turned because of the employee having saw in his hand will play its own part in creating the said atmosphere of tenseness and threat.

"18. With regard to the overall question of imposing discipline, keeping up moral and maintaining the atmosphere of security for other employees to work is concerned, it is quite clear that the behaviour of the said employee was detrimental to it. The conclusion, therefore, that the charges is established, in my opinion is, therefore, correct and cannot be said to be perverse."

"20. The imposition of punishment is truly to be left to the disciplinary authority. Only in a case where the punishment is shockingly disproportionate then only either the Tribunal or the Court should interfere it. In the instant case, in the background of the said history, which has placed sufficient reasons on answering the claim of clear and unblemished record, if the question of interfering with the punishment is to be examined, to my mind there is no case whatsoever for the same."

20. Mr. Cama, also referred to another judgment of our High Court in *Bharatiya Arogya Nidhi Vs. Bombay Labour Union and Another*, wherein, this Court has rejected the contention that participating in an illegal strike would amount to a misconduct, need not necessarily mean that there ought to be the judicial pronouncement on the legality of the said strike. In fact, the Model Standing Order under the Industrial Employment (Standing Order) Act, 1946 clearly states

that it will be a misconduct if any-one were to go on an illegal strike or abet, instigate or act in furtherance thereof.

21. Mr. Cama, thereafter pointed out that in the instant case there is a declaration of the Labour Court holding the strike which commenced on 13th June, 1986 to be illegal, and ex-facie therefore the conduct of the respondent employee would amount to a misconduct as mentioned hereinabove, Mr. Cama, the learned Counsel brought to my notice that in the reasoning, the learned Judge of the II Labour Court in paragraph No. 4 of the Part II Award has clearly stated that the respondent workman did not perform any work on 13th June, 1986 along with others though had reported on duty. It is also mentioned that the same type of conduct continued from 13th June, 1986 to 21st June, 1986. The learned Judge has also referred to the deposition of the Supervisor regarding the refusal of the respondent workman and other workmen from obeying the instructions and carrying out any work. Mr. Cama pointed out that in paragraph No. 5 of the Part II Award the learned Judge has clearly observed that so far as going on an illegal strike was concerned, that had been admitted by the respondent employee, and that there was no dispute about going on strike by the respondent employee. The learned Judge has also held that the said strike was an illegal strike on the basis of record, which had been declared illegal by the Labour Court. Mr. Cama has pointed out from the evidence led before the Labour Court, that it is clear that the respondent employees was guilty of all the four charges as mentioned hereinabove and not only of the two charges. Hence, the learned Counsel contended that the part II Award passed by the Labour Court suffers from patent errors apparent on the face of the record, the said Award is also perverse and hence the same is liable to be quashed and set aside.

22. Mr. Cama, the learned Counsel for the petitioner employer thereafter contended that as far as Part I Award is concerned, the enquiry conducted by the enquiry officer was fair, proper and legal, inasmuch as, as indicated hereinabove, sufficient opportunity was afforded to the respondent employee to participate in the said disciplinary enquiry. However, for the reasons best known to the respondent employee chose not to remain present in spite of repeatedly being asked to take part in the said disciplinary proceedings. Mr. Cama, thereafter contended that, from the Part I Award itself it is clear that the ample opportunity was afforded to the respondent employee and in spite of the same, the respondent employee chose not to remain present and take part in the said enquiry proceedings. Mr. Cama emphasised that in such type of enquiries, what is needed is only to afford opportunity to the employees and no employee can be forced to appear. According to him, in the instant case, the respondent employee had wilfully chosen not to appear before the disciplinary authority and therefore, such an enquiry cannot be held to be not fair, proper and legal. He also emphasised that during the proceedings in the Labour Court, when Part I Award was passed, i.e. pertaining to the issue whether the disciplinary enquiry was fair, proper and legal, the respondent employee chooses not to enter in the witness box and did not remain present in the enquiry proceedings. In that context, Mr.

Cama, the learned Counsel for the petitioner employer referred to and relied upon the judgment of the Division Bench of our High Court in *Narang Latex and Dispersions Pvt. Ltd. v. S. V. Suvarna (Mrs.)* and Anr. 1994 2 CLR 51. In the said judgment, the Division Bench has clearly held that it would be for a workman to lead the evidence first, in order to show that the enquiry was not fair and proper and therefore the order of dismissal was wrongful. Hence, the learned Counsel Mr. Cama, submits that in the instant case, when the respondent employee had contended before the Labour Court that the enquiry was not fair, proper and legal, then the burden was on the employee to establish the same. However, the respondent employee chose not even to enter the witness box and depose to the fact that there was no fair, proper and legal enquiry held by the employer. Mr. Cama, the learned Counsel for the petitioner employer pointed out that the respondent employee in his evidence before the II Labour Court at the time of Part II Award has clearly stated in paragraph No. 9 of evidence that the respondent employee had received letters regarding the enquiry at his residence, and that the said respondent employee had also stated that it was correct that he had not participated in the said enquiry.

23. Mr. Cama took me through the enquiry officer's report which also categorically states that a number of opportunities were given to the respondent employee to remain present and as to how on each of the occasions notices were sent to the respondent employee by Registered Post Acknowledgment Due, and in spite of such repeated opportunities the respondent employee chose to remain absent. Under these circumstances, the learned Counsel for the petitioner employer contends that the Labour Court in its Part I Award has not properly construed the evidence on record and committed the perversity, inasmuch, the errors are apparent on the face of the record. To put in other words, the learned Counsel contends that there is no dispute that the respondent employee was afforded various opportunities to appear before the disciplinary authority. However, the said respondent employee chose to remain absent wilfully and did not avail of the opportunities afforded to him. Therefore, according to the learned Counsel for the petitioner employer, it cannot be held that the enquiry was not fair, proper and legal. Mr. Cama pointed out that the record is explicitly clear that the respondent was afforded various such opportunities and that the respondent employee did not take part knowingly. Apart from the same, even before the Labour Court, the respondent employee did not enter the witness box and depose against the petitioner employer so as to show as to how the enquiry was not fair, proper and legal. In that context, Mr. Cama, referred to and relied upon the judgment of the Division Bench of the High Court in *Mulji Mangal of Bombay v. The India Water Proofing Company and Ors.* 1988 1 CLR 78 wherein, the Division Bench has held that the Labour Court was perfectly right in concluding that the employee did not have enough ground to remain absent, and that the enquiry held was just, proper and legal. Hence, the learned Counsel for the petitioner employer contends that in the instant case, from the record it is very clear that the ample opportunities were afforded to the respondent employee to

take part in the disciplinary enquiry, however, the respondent employee had deliberately and wilfully remained absent, and therefore, according to Mr. Cama, it cannot be said that the enquiry was not fair, proper and legal. Mr. Cama therefore, contends that Part I Award is also liable to be quashed and set aside.

24. Mr. Cama, the learned Counsel for the petitioner employer also contended that in view of Section 59 of the MRTU & PULP Act, 1971, the Labour Court could not have entertained and passed the Award holding the enquiry to be not fair, proper and legal, and also holding that the respondent employee is liable to be reinstated with 40% backwages with continuity of service. In that context, it would be relevant to note the provisions of Section 59 of the MRTU & PULP Act, 1971, which reads as under :--

"Section 59. Bar of Proceedings under the Bombay or Central Act.--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 proceeding shall at any time be entertained by the Industrial or the Labour Court under this Act."

25. In that context, Mr. Cama, the learned Counsel for the petitioner employer also brought to my notice Schedule II Item 4(f) of the MRTU & PULP Act, 1971, which read as under :-

"Schedule II - Unfair Labour Practices on the Part of the Employers .--4. To encourage or discourage membership in any Union by discriminating against any employee, that is to say-

(a)

(b)

(c)

(d)

(e)

(f) discharging office bearers of active union members on account of their union activities.

26. It is the contention of Mr. Cama, the learned counsel for the petitioner employer, that in view of the fact that the aforesaid complaint (ULP) No. 266 of 1986 was very much pending before the Industrial Court, Pune, wherein, after the ad-interim relief granted in favour of the respondent employee was vacated by the said Industrial Court, the respondent employee could very well have amended the said complaint and pleaded for the relief of reinstatement invoking the said Schedule II Item 4(f) of the MRTU & PULP Act. Instead, the said

complaint was allowed to continue before the Industrial Court and the respondent employee approaches the Dy. Commissioner of Labour and seeks a Reference (IDA) No. 219 of 1987 before the III Labour Court, Pune. Therefore, it is contended by Mr. Cama, the learned counsel for the petitioner employer that during the pendency of such a complaint before the Industrial Court viz. the complaint (ULP) No. 266 of 1986, the respondent employee could not have invoked the remedy by way of Reference before the II Labour Court for reinstatement and backwages. Mr. Cama pointed out that though the said complaint (ULP) No. 266 of 1986 filed before the Industrial Court was withdrawn subsequently, but before such withdrawal, the aforesaid Reference (IDA) No. 219 of 1987 was already initiated before the II Labour Court, Pune. Therefore, the proceedings before the II Labour Court, Pune, was not sustainable in law in view of the aforesaid clear statutory bar as per Section 59. Mr. Cama pointed out that the Reference was made before the II Labour Court, Pune, on 13th November, 1987 whereas the complaint (ULP) was withdrawn by the respondent employee on 6th January, 1988 i.e. subsequent to the Reference being made. In that context, Mr. Cama, the learned Counsel for the petitioner employer referred to and relied upon the Full Bench Judgment of our High Court in C.S. Dixit Vs. Bajaj Tempo Ltd., wherein, in Paragraphs No. 20 and 21 the Full Bench has stated as under:--

"20. In our opinion, therefore, mere filing of a complaint under the said Act without anything done in the matter will not attract the bar of Section 59. If the statute of limitation is successfully invoked in a matter before the Industrial Court under the said Act, the bar will not apply. About the new cause of action, also as noted above, there is no question of invoking the bar at all."

"21. We are further of the opinion that if before any effective steps are taken by the Industrial Court under the said Act when the matter is withdrawn then also the bar would not apply. As to what could be the effective steps, the question is to be decided as to the facts and circumstances of the case. It is obviously not possible to enumerate all possible set of circumstances, which in a given case, will induce us to conclude that the effective steps are not taken. At the same time, if effective steps are taken, bar u/s 59 would certainly apply. No party can be permitted to either shop the forum or avoid outcome of its own action on the ground of exigency of convenience."

27. In the instant case, Mr. Cama, the learned Counsel for the petitioner employer, has pointed out that the respondent employee had not merely sought the Reference but had actively pursued the same. Under these circumstances, it is contended by Mr. Cama that the bar u/s 59 of the MRTU & PULP Act, 1971 very much come into play and as such, the Labour Court ought not to have entertained the said Reference. Mr. Cama contended that the statutory bar is very clear and in the instant case, subsequent withdrawal of the complaint before the Industrial Court is of no consequence, inasmuch as on the date when the Reference was initiated before the Labour Court on 13th November, 1987, the

complaint before the Industrial Court was very much pending and the same was withdrawn only on 6th January, 1988, and hence, Mr. Cama contends that on the date when the Reference was initiated before the Labour Court on 13th November, 1987, the bar could immediately come into play and therefore, the Labour Court could not have proceeded further as the proceedings itself was barred and the subsequent withdrawal of the complaint before the Industrial Court would be of no consequence. Hence, the learned Counsel has submitted that the Labour Court had lacked jurisdiction to pass both: Part I Award and Part II Award. Under these circumstances, the learned Counsel for the petitioner employer has prayed that the impugned Awards passed by the Labour Court by way of Part I Award and Part II Award, be quashed and set aside.

28. Mr. Kulkarni, the learned Counsel for the respondent employee does not dispute that the respondent employee did not take part in the disciplinary enquiry and he was very much aware of the disciplinary enquiry, however, according to Mr. Kulkarni, the respondent employee had sought time on the ground of the atmosphere of strike. Mr. Kulkarni also does not dispute that the respondent employee during the proceedings before the Labour Court with regard to Part I Award did not enter the witness box and lead any evidence so as to show that the enquiry was not fair, proper and legal. Mr. Kulkarni however contended that it was for the Labour Court on its own to find out whether the enquiry was proper, fair and legal and there was no obligation on the part of the respondent employee to lead any evidence to show that the enquiry was not fair, proper and legal. Mr. Kulkarni contended that as far as the enquiry is concerned, the petitioner employer ought not to have hurried with the enquiry and concluded in such a manner. Mr. Kulkarni further submitted that the sufficient time ought to have been granted to the respondent employee to appear before the disciplinary authority since there was an atmosphere of strike. Mr. Kulkarni therefore contended that there was no error apparent on the face of the record with regard to the Part I of the Award holding that the enquiry was not fair, proper and legal. Mr. Kulkarni further contended that the Labour Court has given proper reasoning holding the enquiry to be not fair, proper and legal and hence, this Court ought not to interfere exercising the jurisdiction under Article 226 of the Constitution of India.

29. Mr. Kulkarni, the learned Counsel for the respondent employee while dealing with the part II Award contended that the Labour Court has rightly granted the relief of reinstatement with 40% back-wages with continuity of service and other consequential benefits. Mr. Kulkarni contended that merely taking part in an illegal strike by itself would not amount to a grave misconduct and the same cannot be construed as necessitating the punishment of dismissal. In that context, Mr. Kulkarni referred to and relied upon the judgment of a learned Single Judge of our High Court in *K. Ramchandra Nair v. The Bombay Gymkhana Ltd. and Ors.* 1988 (56) FLR 420 wherein this Court has held that the action of the management of the Gymkhana in terminating the services of the workmen merely because they took a leading part in the strike and acted in furtherance of

the strike and obstructed the willing workers from working, would amount to victimisation and unfair labour practice on the part of the employer. To put it differently, this Court has held that the action of the management of the Gymkhana in terminating the services of the workmen was full of mala fides, and hence, directed the reinstatement of the said workmen.

30. Mr. Kulkarni, the learned Counsel for the respondent employee has contended that in the instant case also merely because the respondent employee had taken part in the strike would not necessarily mean that the respondent employee's services ought to be terminated. Mr. Kulkarni also referred to and relied upon another judgment of the Division Bench of our High Court in Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, . In the above judgment, the learned Counsel pointed out that the Court has distinguished the active participation in illegal strike and mere spectator in the illegal strike. Therefore the contention of Mr. Kulkarni is that merely because the respondent employee had taken part in the illegal strike need not necessarily would amount to a serious misconduct necessitating dismissal from service.

31. Mr. Kulkarni thereafter referred to and relied upon the judgment of the Hon'ble Supreme Court in Colour-Chem Ltd. v. Alaspurkar A. L. and Ors. 1998 I LLJ 84 to contend that in the instant case the dismissal would be shockingly disproportionate punishment, inasmuch as the respondent employee had only taken part in an illegal strike which by itself should not result in such a shockingly disproportionate punishment of dismissal. Mr. Kulkarni also emphasised on the Division Bench judgment of our High Court in Girni Kamgar Sena and Ors. v. S. D. Rane and Ors. 1995 I CLR 851 wherein, this Court has held that the dismissal from service would be a shockingly disproportionate punishment for participating in the strike. Hence, the learned Counsel for the respondent employee contended that in the instant case, this Court ought not to interfere under Article 226 of the Constitution of India with regard to Part I Award as well as Part II Award, as there are no errors apparent on the face of the record and that the impugned Award are not perverse. Mr. Kulkarni, the learned Counsel for the respondent employee referred to and relied upon an unreported judgment of the learned Single Judge in Writ Petition No. 6275 of 2001, Pune District Central Co-op. Bank Limited v. Ashok Shankarrao Kale and Anr., dated 23rd July, 2002, wherein, this Court has held that two causes of action cannot be considered to be the same and the "matter" in both the proceedings was different, and accordingly it was construed that the bar u/s 59 of the Act will not come into play.

32. Mr. Kulkarni, also referred to and relied upon the Full Bench judgment in the case of C.S. Dixit Vs. Bajaj Tempo Ltd., to contend that in the instant case there was nothing wrong on the part of the respondent employee in seeking the Reference and thereafter withdrawing the complaint before the Industrial Court. Mr. Kulkarni thereafter contended that as the respondent employee had already withdrawn the complaint before the Industrial Court, the Labour Court was not

precluded from passing the aforesaid Award u/s 59 of the MRTU & PULP Act, 1971. Mr. Kulkarni therefore contended that from the record it is clear that there is no palpable error apparent on the face of the record, and that the punishment of dismissal for merely participating in an illegal strike would be grossly disproportionate, and in view thereof, the Labour Court was fully justified to direct the petitioner employer to reinstate the respondent employee. According to him, no full backwages were awarded by the Labour Court and only 40% of the backwages were awarded as the same would be fair and just. Therefore, the learned Counsel Mr. Kulkarni contended that this Court ought not interfere and should dismiss the petition.

33. After having heard both the learned Counsel for the parties at length, and after having perused both the parts of the Award i.e. Part I Award as well as Part II Award and also the material on record including the evidence and various judgments cited hereinabove, I deal with the first issue viz. whether the Part II Award was justified or not.

34. As far as Part II Award is concerned, the record clearly indicates that the strike had commenced on 13th June, 1986 and in fact the said strike was declared to be illegal by the I Labour Court, Pune by its order dated 29th August, 1986. If one were to look at the chargesheet issued to respondent employee it is clear that the charges levelled against the respondent employee was not only for taking part in an illegal strike, but also for various other serious and grave misconducts. The charges were that the respondent employee had disobeyed the lawful and legitimate orders of the superiors and had resorted to an illegal strike, had aided, abetted, instigated and incited the others in furtherance thereto, behaved in a disorderly and indecent manner in the premises of the establishment, and the acts were subversive of discipline and good behavior in the premises of the establishment.

35. In the disciplinary proceedings before the enquiry officer, there was no dispute that the respondent employee did not take part into the enquiry proceedings in spite of repeatedly being called to take part, and the only excuse was that in view of the "atmosphere of strike", the respondent employee did not attend the enquiry proceedings. The evidence which was recorded before the enquiry officer on behalf of the management, clearly indicates that the respondent employee along with others had gone on an illegal strike from 13th June, 1986. It also appears from the record that the respondent employee and others had forced even the contract labourers to stop the work. The enquiry report also shows that the respondent employee along with others had displayed red ribbons on the fore-head, had shouted slogans and used a very filthy and abusive language. It also indicates that they had even threatened the superiors and had created a terrorised situation in the premises. The management had examined three witnesses who have corroborated the aforesaid high-handed behaviour by the respondent employee. Under these circumstances, the enquiry officer, after recording the evidence of the management witnesses has clearly

come to the conclusion that the respondent employee was guilty of all the four charges mentioned hereinabove. Under the aforesaid facts and circumstances, the management by its letter dated 13th August, 1986, especially in view of the seriousness and gravity of the charges levelled against the respondent employee had stated that there were no extenuating circumstances to take a lenient view of the charges levelled against the respondent employee and accordingly terminated the services of the respondent employee. If one were to look at the evidence led before the Labour Court during the Part II Award stage, it is clear that the respondent employee had taken an active role in the said illegal strike and had used very filthy and abusive language and had threatened even the superiors that they should not work and had prevented the others from working. The Labour Court, after appreciating the evidence on record, has come to the conclusion that the respondent employee had acted in an indecent and disorderly manner which amounted to commission of an act subversive of discipline and good behaviour on the premises of the establishment.

36. The Labour Court in part II Award has found the respondent employee to be guilty of two charges viz. guilty of 3rd and 4th charges which read as under:--

"3. Disorderly and indecent behaviour in the premises of establishment."

"4. Act subversive of discipline and good behaviour in the premises of the establishment."

37. However, the Labour Court in Part II Award did not find the respondent employee to be guilty of 1st and 2nd Charges, which read as under:--

"1. Disobedience of the lawful and legitimate orders of the superiors whether in connivance with others or not."

"2. Resorting to an illegal strike or aiding the same, instigating, inciting or to act in furtherance thereof."

38. In fact if one were to look at the evidence, on record, it is clear that the respondent employee himself has admitted that he had taken part in the illegal strike and that such a strike was in fact declared illegal by an order of the Labour Court. Over and above, there is an ample evidence on record to indicate that the respondent employee had instigated and incited the others to go on strike and had prevented the others from working and had used abusive and filthy language against the superiors and did not obey the orders of the superiors as clearly borne out in the evidence. Therefore the errors are patent and apparent from the face of the record, inasmuch as the Labour Court has totally ignored the admitted fact that the respondent employee had taken part in an illegal strike and has also ignored the clear evidence indicating the instigation and incitement in furtherance of the strike and the use of a very filthy and abusive language by the respondent employee. The Labour Court has also ignored the clear disobedience of lawful orders of the superiors by the respondent employee. The Labour Court has clearly ignored the said part of the evidence and has

committed an illegality amounting to perversity. The record clearly indicates that all the four charges are proved.

39. As far as first part of the Award is concerned, there is no dispute that the respondent employee did not take part in the enquiry before the disciplinary authority in spite of several opportunities being afforded to the respondent employee. There is also no dispute that the respondent employee did not even enter the witness box to depose that the enquiry was not fair, proper and legal. As rightly contended by Mr. Cama, the learned Counsel for the petitioner employer, and as has been held by the Division Bench of our High Court in *Narang Latex and Dispersions Pvt. Ltd. v. S. V. Sumna (Mrs.) and Anr.*, 1994 11 CLR 51 it is clear that the onus is always on the workman to establish that the enquiry was not fair, proper and legal and once this onus is discharged, then, it is for the employer to show that the enquiry was fair, proper and legal. In the instant case, admittedly, the respondent employee did not even enter in the witness box so as to depose that the enquiry was not just, fair, proper and legal. The record clearly indicates that the respondent employee was afforded various opportunities to appear before the disciplinary authority, however, the respondent employee wilfully chose to remain absent, contending that he would appear only after the atmosphere of strike was over. This explanation is not at all justifiable: The respondent employee ought to have taken part in the disciplinary proceedings. The employee also chooses not to depose before the Court. Therefore, one cannot say that the enquiry was not fair, proper and legal. Both the Awards: Part I Award as well as Part II Award are patently erroneous and hence the same cannot be sustained.

40. As far as the strike is concerned, it is clear that the respondent employee along with others had gone on strike from 13th June, 1986 and the said strike was also declared to be illegal by the Labour Court by its order dated 29th August, 1986. It is clear that the participation in an illegal strike by itself amounts to a misconduct under the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946. There is ample evidence on record to indicate that it was not a strike for few hours but the same continued for many days and that the instigation and incitement also continued for a number of days. The evidence on record also indicated that others were not allowed to work, and a very filthy and abusive language was used by the respondent employee. Threats were also given to the superiors. Under these circumstances, one cannot say that the punishment inflicted on the delinquent respondent employee to be shockingly disproportionate.

41. As far as issue of bar u/s 59 of the MRTU & PULP Act, 1971 is concerned, it is clear that the respondent employee had adopted appropriate proceedings before the Industrial Court complaining of unfair labour practice and had also obtained an ad-interim relief restraining the petitioner employer from terminating the services of the respondent employee. The said complaint was on the file even on the day when the Reference was made before the Labour Court on 13th

November, 1987. The said complaint before the Industrial Court was withdrawn only on 6th January, 1988. When the respondent employee could very well have sought the relief of reinstatement before the Industrial Court invoking Schedule II Item 4(f) or even could have invoked Item 4(b). However, instead of invoking the said reliefs in the pending proceedings before the Industrial Court, the respondent employee chose to raise an industrial dispute seeking a Reference before the Labour Court. The said Reference was made before the Labour Court on 13th November, 1987 and subsequent thereto on 6th January, 1988 the complaint before the Industrial Court was withdrawn. Mere reading of Section 59 of the MRTU & PULP Act, 1971 makes it abundantly clear that if already any proceedings are pending before the Industrial Court or the Labour Court under the aforesaid Act, another parallel proceedings cannot be initiated. Hence, even on this ground I am in agreement with Mr. Cama's submissions that there was a clear statutory bar u/s 59 of the MRTU & PULP Act, 1971 on the Labour Court from continuing with the Reference which was made on 13th November, 1987.

42. If both; Part I Award and Part II Award are not set aside, the same would result in miscarriage of justice.

43. For the reasons stated hereinabove, the impugned Awards; Part I Award as well as Part II Award stand quashed and set aside. Rule is accordingly made absolute in terms of the above.

44. Parties to act on an ordinary copy of this order duly authenticated by the Associate/Section Officer.