

(2022) 05 BOM CK 0058
In the Bombay High Court
Case No : Writ Petition No. 3580 Of 2021

Shankar M. Gowekar

APPELLANT

Vs

Divisional Transport Officers

RESPONDENT

Date of Decision : 13-05-2022

Acts Referred:

Railway Servants (Discipline & Appeal) Rules, 1968 — Rule 10, 11, 13, 22, 26, 28
Maharashtra Recognition Of Trade Unions Short Title. And Prevention Of Unfair Labour
Practices Act, 1971 — Section 44

Citation : (2022) 05 BOM CK 0058

Hon'ble Judges : Milind N. Jadhav, J

Bench : Single Bench

Advocate : Seema Chopda, T.R. Yadav, Pinky M. Bhansali

Final Decision : Disposed Of

Judgement

Milind N. Jadhav, J

1. By the present petition, the Petitioner has prayed for the following reliefs:-

"(a) Issue Writ of Certiorari and/or Mandamus or any other Writ/Direction/Order in the nature of these Writs or any other Writ/Direction/Order calling for record and proceedings of Revision Application (ULP) No.55 of 2019 (filed by the Respondents) with Revision Application (ULP) No. 103 of 2019 (filed by the Petitioner) and of complaint (ULP) no.6 of 2018 and after going through the legality and propriety of the of the Common Judgment and order dated 14/12/2020 at Exhibit G passed by the Hon'ble Industrial Court, Maharashtra at Thane thereby dismissing the Revision Application of the Petitioner and allowing the Revision Application of the Respondents and remanding the matter on the issue of the quantum of punishment and final order dated 08/07/2019 passed by the Hon'ble Labour Court at Mahad in Complaint (ULP) No. 6 of 2018 at Exhibit F, to The extent of denial of backwages and after hearing the parties to quash and set aside the impugned order dated 14/12/2020 passed by the Ld. Industrial Court at Thane and order dated 08/07/2019 passed by the Ld. Labour Court

Mahad to the extent to denial of back wages once reinstatement is awarded;

(b) To hold and declare that termination of the Petitioner workman is illegal, bad in law and unjustified;

(c) To direct the respondents to reinstate the workman with continuity of service and full back wages with effect from 16/01/2018.

2. Briefly the relevant facts are stated as under:-

2.1. Petitioner was employed as driver at Mangaon depot with Respondent No. 1 Corporation since 2010 as a permanent employee. Services of the Petitioner were terminated on 16.01.2018.

2.2. On 11.08.2017 at around 11.30 a.m., Petitioner approached Kondiba Balu Dadas, Assistant Traffic Inspector ("ATI") in the duty allocation room to seek assignment of duty on Devli - Mumbai route for himself in place of the duty which was allocated to him. Petitioner told the ATI that after completing Devli - Mumbai duty, since there was a national holiday thereafter (15th August), he wanted to take leave in conjunction and go to meet his parents and therefore sought assignment of Devli - Mumbai duty. The ATI told the Petitioner that Devli - Mumbai duty was already allocated to driver Dhaigude and did not accede to his request. It appears from the record that there were certain comments made by the ATI pertaining to compensatory off, double duty etc. against the Petitioner which enraged the Petitioner leading to a physical altercation between the two. At that time Petitioner intended to see the duty allocation register, as according to the Petitioner the request for allocation of Devli - Mumbai duty was made by him to the ATI well in advance; the request was granted and the name of Petitioner was inscribed for the said duty in the register, but was erased later on. The Petitioner was restrained by the ATI to see the duty allocation register, which led to further altercation.

2.3. It is the Petitioner's case that during the altercation, the ATI fell down from his chair and sustained a minor bleeding injury on his right hand because of which he became angry, hence he abused and abused and assaulted the Petitioner.

2.4. It is the Corporation's case that during the altercation Petitioner rushed towards the ATI, abused, threatened and assaulted him by pushing him from his chair forcefully leading to his fall and sustaining the injury on his right hand. The ATI got up and while leaving the duty allocation room to report the matter to his superior was threatened by the Petitioner once again which led to further altercation between the two. Thereafter both of them rushed towards each other and held each other by their shirts and were separated by other employees who were present.

2.5. From the record it appears that when the altercation took place between the two, driver Mahagade, body fitter Dharmendra Jadhav, driver Suresh Shinde and driver Sachin Mohite were standing outside the duty allocation room. On hearing

the commotion they rushed inside the duty allocation room. Driver Suresh Shinde consoled the ATI and took him aside whereas driver Mahagade separated the Petitioner and took him aside.

2.6. The Petitioner immediately went to the office of the Depot Manager Mr. Phopale who was not available in his office, hence, he lodged a police complaint of assault against the ATI. The Petitioner also filed a written complaint of the incident against the ATI with the Corporation.

2.7. The informant of the case is the Depot Manager Mr. Phopale. He recorded the statements of the ATI, Suresh Shinde and Dharmendra Jadhav and prepared a report. On 14.08.2017 the Corporation prepared a chargesheet of the charges framed under Rules 10,11,13,22,26 and 28 of the Discipline & Appeal Rules against the Petitioner in respect of the incident on 11.08.2017 in the duty allocation room and served it on the Petitioner.

2.8. The Petitioner denied the charges and sought enquiry of the incident. On 19.09.2017 enquiry was held by the Inquiry Officer ("I.O.") and completed within one day; the Petitioner was represented by the union representative. In the enquiry held before the I.O., the informant of the incident Mr. Phophale, Depot Managr was examined. In this enquiry, admittedly the ATI or any other employee out of those who were present as eye witnesses at the time of the incident were not examined. The Petitioner examined himself in the enquiry before the I.O. and was also cross-examined. The I.O. prepared a detailed report on the basis of the complaint, the evidence recorded and the documents placed before him during the enquiry. On the basis of the report submitted, on 06.01.2018 a show-cause notice was issued to the Petitioner and he was directed to file his say within 7 days. By order dated 16.01.2018, the Petitioner's services were terminated and he was dismissed from service.

2.9. Petitioner filed a complaint against the order of dismissal dated 16.01.2018 being ULP No. 6 of 2018 under the provisions of Item 1(a), 1(b), 1(d), 1(f) and 1(g) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short "MRTU & PULP Act") in the Labour Court at Mahad challenging the domestic enquiry and order of dismissal from service. The complaint was contested by the Respondent Corporation. In the complaint, Petitioner challenged the domestic enquiry conducted by the I.O. as being unfair, improper and the findings being perverse on the ground that the affected employee who reported the incident against the Petitioner for abuse and assault i.e. the ATI was not examined by the I.O.; that the informant of the complaint i.e. Mr. Pophale, Depot Manager was not an eye witness; that during the incident there was a rush of conductors and drivers in the duty allocation room and none of the said witnesses to the alleged incident were examined by the Corporation in support of the complaint received; that there was violation of the principles of natural justice as the principal complainant i.e. the ATI did not appear in the enquiry before the I.O. and on his behalf, the informant Mr. Phophale who was not present and also not an eye

witness to the incident filed the complaint about the incident merely on the basis of hearsay.

2.10. The Labour court vide judgment under Part-I dated 11.01.2019 held that the enquiry conducted by the Corporation was fair, proper and in accordance with the principles of natural justice, however, the findings of the I.O. were perverse and hence, the Corporation was accorded an opportunity to lead evidence and prove the charges against the Petitioner. The Corporation was given an opportunity to prove the misconduct of the Petitioner. Before the Labour court, the ATI and Mr. Shinde were examined in support of the chargesheet. Both were cross-examined by the Petitioner. The Petitioner also examined himself before the Labour court and was cross-examined by the Corporation. Thereafter after hearing both parties, the learned Labour court vide its final judgment under Part-II dated 08.07.2019 held that the Respondent Corporation had engaged in an unfair labour practice and quashed and set aside the dismissal order dated 16.01.2018 passed by the Corporation against the Petitioner and held that the charges against the Petitioner were not proved. Consequently the Labour court granted reinstatement of the Petitioner with continuity of service and all consequential benefits with effect from 16.01.2018 but without backwages.

2.11. The Corporation filed revision application before the Industrial Court being Revision Application No. 55 of 2019 to challenge the order dated 08.07.2019. Petitioner also filed revision application being Revision Application No. 103 of 2019 being aggrieved due to denial of backwages.

2.12. Both the revision applications were heard together and vide common judgment dated 14.12.2020, the learned Industrial Court dismissed the revision application of the Petitioner and partially allowed the revision application of the Respondent Corporation. By this order, the judgment dated 08.07.2019 of the learned Labour court was set aside with a direction to remand the matter back to the Labour court to determine the issue of quantum of punishment.

2.13. Being aggrieved, Petitioner is thus before this Court.

3. Ms. Seema Chopda, learned counsel appearing for the Petitioner has made the following submissions:-

(i) that the Labour court is a fact finding court; that revisional jurisdiction vested with the Industrial court u/S. 44 of the MRTU & PULP Act is merely a supervisory jurisdiction and it has no power to quash and set aside an order which was supported by cogent and proper reasons by partly allowing the complaint of the Petitioner;

(ii) that the Labour court while deciding the issue of perversity of findings has rightly observed that the allegations levelled against the Petitioner are personal in nature and it was incumbent upon the Corporation to examine the ATI in the domestic enquiry who had filed the complaint against the Petitioner;

(iii) that though the nature of proof required in a domestic enquiry is not as strict

as in a criminal complaint, however personal allegations must be proved by the person levelling such allegations and they cannot be proved by an informant who is not present at the time of the incident and has no personal knowledge about the same as has happened in the present case;

(iv) that there was no denial on the part of the Petitioner about the oral altercation which took place, but the same has been exaggerated by the Respondent and a false chargesheet was issued against the Petitioner;

(v) that the Corporation took cognizance of the ATI's complaint but did not take cognizance of the Petitioner's complaint of the alleged incident failed on the same date and hence the Petitioner stood discriminated;

(vi) that admittedly at the time of the incident there was a rush of employees in the duty allocation room and it was not possible for the Petitioner to have assaulted the ATI in the presence of several employees;

(vii) that the incident being trivial was not of such a grave nature so to warrant the extreme punishment of dismissal which was akin to economic sanction and death of the Petitioner and his family;

(viii) that the order of Labour court of denial of backwages to the Petitioner deserves to be quashed and set aside;

4. PER CONTRA, Ms. Pinky M. Bhansali, learned counsel appearing for the Respondent Corporation has made the following submissions:-

(i) that it is admitted by the Petitioner that there was an altercation with the ATI and the ATI was pushed forcibly by the Petitioner on being denied allocation of the duty roster of his choice;

(ii) that the depot manager Mr. Pophale conducted the enquiry and recorded the statements of the ATI and Mr. Shinde (an eyewitness) and submitted the report to the higher authorities;

(iii) that the Petitioner physically assaulted the ATI and injured him;

(iv) that the Ld. Industrial court has held that the findings of the I.O. were not perverse as the statement of the ATI and Mr. Shinde was on record which could be relied upon to record a finding by the disciplinary authority;

(v) that non-examination of the ATI and Mr. Shinde was not fatal to the departmental enquiry, though the Petitioner denied the incident as reported;

(vi) that the authenticity of the incident as recorded in the statement of the ATI is substantiated by the following:-

(a) the police complaint filed by the ATI immediately after the incident;

(b) the statements on record of the ATI and the eyewitness Mr. Shinde; and

(c) the admission of the Petitioner about the incident in which the ATI fell down

from his chair and sustained an injury.

(vii) that the finding of the Labour court that examination of other witnesses present in the duty allocation room was not warranted is correct as it is held that it was the quality and not the quantity of evidence which was material to be considered;

(viii) that since the order of the Labour court has been set-aside and there is no finding on the proportionality of the punishment, the Industrial Court has rightly remanded the matter back to the Labour court for a fresh decision on the quantum of punishment;

(ix) that the act of indiscipline and abusing superiors needs to be dealt with strictly as the Corporation has about 82,000 workers and such an act of indiscipline undermines the authority of the superiors and if the Appellant is exonerated it will lead to and encourage other employees to indulge in similar acts of indiscipline with impunity and convey a wrong message that such acts of indiscipline are considered as lenient and as a minor misconduct;

(x) that even as per Schedule A- (Acts of Misconduct) of the Discipline & Appeal (D&A) procedure of the

Corporation, following are the acts of major misconducts which cannot be overlooked:-

"

(9) willful insubordination or disobedience, whether individually or jointly, of any lawful and reasonable order(s) of superior;

(10) indiscipline;

.....

(13) assaulting any person inside the premises or vehicles of corporation;

.....

(22) breach of any administrative orders;

.....

(26) riotous or disorderly behavior or intimidation or commission of any act subversive to discipline good behavior;

.....

(28) impertinent, insolent, rude, insubordinate, or uncivilized behavior towards any employee or passenger or when on duty."

(xi) That the D & A procedure specifies the misconduct of the employees as major acts of misconduct as against several other acts which have been described in the said procedure as minor acts of misconduct; the D & A

procedure also prescribe the punishment for such major misconduct; hence it is incumbent that the Petitioner is not shown any leniency and strict action is taken against him as his such act in the present case is a major act of misconduct including an offence.

5. Heard the learned counsel appearing for the Petitioner and the Respondent Corporation. Perused the orders dated 11.01.2019 and 08.07.2019 passed by the Labour Court and the impugned order dated 14.12.2020 passed by the learned Industrial court in revision proceedings with the assistance of the learned counsel. Submissions made by the learned counsel are on pleaded lines.

6. Admittedly, the Petitioner has not denied the incident which occurred on 11.08.2017. From the evidence and statements recorded by the Corporation it is an admitted position that there were several employees i.e. conductors and drivers present in the duty allocation room of the ATI and outside at 11.30 a.m. On 11.08.2017 the Corporation has not examined any of the said witnesses who were present at the time of incident so as to bring on record the deposition of any eye witness. It is seen that before the I.O., the ATI i.e. the affected party was not examined. In fact, the complaint on behalf of the ATI was lodged by the Depot Manager Mr. Phopale who admittedly is not an eye witness to the incident. However before the Labour court, the ATI has deposed; so also the Petitioner and therefore the evidence recorded before the Labour court assumes significance. In the above backdrop, we may now turn to the material evidence on record placed by the respective parties.

7. It is pertinent to note that a specific issue as to whether the findings recorded by the I.O. are perverse was framed by the Labour court. The Labour court in its judgment on Part-I dated 11.01.2019 categorically arrived at the finding that the findings recorded by the I.O. are perverse. In this respect it is significant to note that statements of eye witnesses namely Dharmendra Jadhav and A.S. Mahagade were recorded which supported the contention of the Petitioner that the ATI was also quarreling with the Petitioner; that the oral altercation between the ATI and the Petitioner led to reciprocal hurling of abuses and provocation of both. That apart, the perversity of the findings in the enquiry is borne out from the fact that the report of the I.O. was running into one and half page out of which on the first page the incident and evidence was narrated and on the second page the I.O. returned a finding that from the documents and evidence in the enquiry it was proved that the complainant went into the duty allocation room, abused the ATI and pulled him from the chair. The enquiry report thereafter ends by negating the defence of the Petitioner stating that it is incorrect. In this respect paragraph Nos. 12 and 13 of the judgment dated 11.01.2019 of the Labour court needs to be mentioned and emphasised in order to consider as to whether the affirmative finding given by the Labour court in respect of the aforementioned issue of perversity is justified or otherwise. Paragraph Nos. 12 and 13 of the judgment are quoted as under:-

"12. It is necessary to mention here that report of Inquiry Officer shows that it is

running into one & half page. On first page he narrated the incident & evidence on record. On second page he returned the findings that from the documents, evidence in the Inquiry it is proved that the complainant went in allocation room and abused Shri. Dadas & pulled him from the chair. He then negatived the defence of the complaint saying that it is incorrect.

13. It may be noted that the complainant, in the Inquiry has not disputed that incident was happened. What was his case that when he went in allocation room for inquiry of his duty & requested Shri. Dadas for other duty, then Shri. Dadas started quarrel & abused him. He then deposed that once Shinde tried to console the matter, however, Dadas rushed to beat him & in that process fell down from the chair. Now it may be noted that neither Shri. Dadas nor Shri. Shinde have been examined before the Inquiry Officer. Inquiry Officer has relied on the evidence of the reporter Shri. Phople. It is to be noted that said reporter has not witnesses the incident. Perusal of his evidence shows that he admitted that in the statement of Mahagade it is stated that both Dadas & the complainant rushed towards each other & caught neck of each other. He further admitted that in the statement of Shri. Jadhav it is mentioned that Shri. Mahagade was taking Shri. Dadas to side. It further appeared from the statement of these witness filed in Inquiry papers that they have not stated that the complainant was at fault. In fact, it has come in their statements that both Dadas & complainant caught each other. Then, the finding of Inquiry Officer that defence of the complaint is incorrect, which solely based on evidence of the reporter appears to be not borne from record. The evidence in favour of the complainant is not considered. The complainant, in his evidence before the Inquiry Officer stated that Shri. Shinde tried to console. However, Shri. Shinde is also not examined. Thus, in the facts of the case examination of the witness who seen the incident & Shri. Dadas was necessary. Thus, in the absence of their evidence, in the light of cross examination of the reporter, it appears that the findings of Inquiry Officer are based on the evidence which is thoroughly unreliable and no reasonable person would act upon it. Thus, at any rate there is no evidence with some degree of definiteness, points to the guilt of the delinquent and does not leave the matter in a suspicious state. Therefore, there is no evidence to sustain the charges framed against the complainant. The evidence on record is unreliable since it is not based on any cogent facts. Considering these aspects, the findings of the Inquiry Officer are held to be perverse. Accordingly, issue No. 2 is answered in the affirmative...."

8. As seen the enquiry report prepared by the I.O. admittedly is not a detailed report flowing from the material evidence placed before the I.O. The said report is without analysis of the evidence gathered in the enquiry, discussion and findings. After the narration of the incident, the conclusive findings given in the Report. In such a scenario the conclusion arrived at by the I.O. so as to recommend the case of the Petitioner for dismissal from service is without any analysis and cogent reasons. The Labour court has also categorically referred to the statement of the informant i.e. Mr. Pophale who has given evidence that in

the statement of driver Mahagade it was categorically stated that both the Petitioner and the ATI rushed towards each other and caught the neck / shirt of each other. In this view of the matter, it is clear from the evidence on record that the finding of the I.O. was cursory, inadequate and did not take into account the entire evidence in the form of the statement of the eye witnesses to the incident. It therefore clearly appears that the enquiry conducted by the I.O. was unilateral and with the sole objective of indicting the Appellant. That apart, it is clearly borne out from the evidence that statements of the eye witnesses though recorded were not examined by the Corporation before the I.O. and / or the Labour court and on the contrary, the informant i.e. Mr. Pophale who was not present at the time of the incident was examined. The most material aspect of the evidence was the examination of the ATI i.e. Mr. Dadas. In the absence of examining Mr. Dadas before the I.O., the case of the Corporation cannot be said to have been proved merely on the basis of the evidence of Mr. Phopale, the informant who was not present at the time of the incident. It has come in the statements recorded and evidence that after hearing the fracas and commotion, the employees standing outside the duty allocation room rushed inside and attempted to pacify and separate the Petitioner and the ATI.; some of them consoled and held the two apart; thus it is not clear who were these employees who intervened and were actually present inside the duty allocation room at the time of the incident; that these employees are the real eyewitnesses to the incident. Hence the entire incident as reported by Mr. Pophale, the informant on behalf of the Corporation was admittedly on the basis of hearsay. Therefore the finding returned by the Labour court in its order dated 11.01.2019 that there is no evidence with some degree of definiteness which points to the guilt of the Petitioner so as to sustain the charges framed against the Petitioner deserves to be upheld. It is equally pertinent to note that the Corporation has maintained a stoic silence on the complaint filed by the Petitioner in respect of the incident. The said complaint ought to have been taken to its logical end irrespective of the decision. It is also noted that the enquiry before the I.O. was held on one day and completed on that day itself.

9. The judgment and order dated 08.07.2019 under Part-II delivered by the Labour court has carefully analyzed the evidence of the parties. What is significant is the recording of the cross-examination of Mr. Dadas, the ATI, inter alia, pertaining to the incident. The ATI has stated that there was no personal dispute between the Petitioner and himself, thus ruling out any animosity and prelude to the incident. This itself clearly signifies that the incident was not premeditated or planned. It is seen that due to refusal by the ATI to allot the desired duty, the Petitioner became upset and refused the same leading to the altercation. Mr. Dadas, the ATI has himself stated that there were various persons in the duty allocation room and there was a rush in the said room when the Petitioner entered and the incident had occurred. In this view of the matter, it was incumbent upon the Corporation to have led cogent and proper evidence of the eye witnesses present in the room. Rather it is seen that the Corporation has

led the evidence of the Depot Manager Mr. Pophale before the I.O. and the ATI and Suresh Shinde before the Labour court which has been found to be at variance with each other by the Labour court. The findings of the Labour court of the material evidence being at variance is contained in paragraph No. 13 of its judgment dated 08.07.2019 which reads thus:-

"13. After careful scrutiny of the evidence on record, it is clear that there is variance between the evidence of the R.W. 1 and R.W. 2 Sudesh Shinde. This variance is in respect of words used by the complainant & R.W. 1 K.B. Dadas, torn of his shirt, calling by complainant to Dadas outside the allocation room, threat given there. These are the material aspects of the incident. The complainant himself initially went to meet the Depot Manager and then filed the complainant before the police. There was rush in the allocation room at the time of the incident. However, other persons named in the evidence of Mr. Dadas & any other independent witness has not been examined. Evidence of R.W. 2 has lot of exaggeration and variance with the evidence of Mr. Dadas. Therefore, it cannot be relied upon. In such circumstances, evidence brought on record by the Respondents is not sufficient to prove alleged beating, abusement and threatening by the complainant to Mr. Dadas. Accordingly, the respondents failed to prove misconduct of the complainant. Therefore, issue No. 1 is answered in the negative."

10. In view of the aforesaid finding, it is clear that the finding returned by the Labour court was on the basis of cogent and material evidence on record. In this view of the matter, the finding of the Industrial court in revision proceedings that it was not expected for a party to lead evidence beyond the shadow of reasonable doubt and examine eye witness to corroborate the circumstantial evidence is not a correct finding in the facts and circumstances of the present case. The evidence led by the informant Mr. Pophale cannot be considered as he was not present nor had any first hand knowledge about the incident. Mr. Pophale admittedly is not an eye witness to the incident. This is not a case where there were no eye witnesses present when admittedly it is the case of the Corporation and the evidence of the ATI that there were several employees present when the incident took place.

11. It is seen that it is also not completely denied by the Petitioner that the altercation had taken place leading to the incident. Equally the evidence on record shows that both the ATI and the Petitioner in the heat of the moment had caught hold of each other, abused each other and also threatened each other. The fact that the Petitioner has been out of job and work since 16.01.2018 for his alleged but admitted role in the altercation and the incident is thus an adequate punishment for the Petitioner for his misconduct of insubordination and behaviour. The evidence on record as discussed above and also considered by the Labour court does show the unilateral involvement of the Petitioner in the incident. The reason for denial of backwages by the Labour court thus is an adequate punishment for the Petitioner in respect of the incident.

12. In view of the above discussion and findings, I am of the considered opinion that the common judgment dated 14.12.2020 passed by the Industrial court in revision proceedings filed by both the parties is not sustainable and deserves to be interfered with. Accordingly, the judgment dated 14.12.2020 is quashed and set aside. Consequently, the judgment on Part-I dated 11.01.2019 and the judgment on Part-II dated 08.07.2019 passed by the Labour court in Complaint (ULP No.) 06/2018 partly allowing the complaint are upheld.

13. Writ Petition stands allowed in terms of the judgment dated 8. 07.2019 passed by the Labour court. The dismissal order dated 16. 01.2018 stands quashed and set aside and the Petitioner is entitled to reinstatement with continuity of service and all consequential benefits from 16.01.2018, however, it is made clear that the Petitioner shall not be entitled for any backwages.

14. Writ Petition stands disposed of in the above terms.