

(2009) 06 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 6348 of 1997

Shri Maruti Bhanudas Kamble

APPELLANT

Vs

Bajaj Auto Ltd. and Another
 Bajaj Auto Ltd. Vs Shri
Maruti Bhanudas Kamble and Another

RESPONDENT

Date of Decision : 25-06-2009

Acts Referred:

Industrial Disputes Act, 1947 — Section 11, 2, 25F
Penal Code, 1860 (IPC) — Section 380

Citation : (2009) 6 BomCR 247 : (2009) 111 BOMLR 2897 : (2009) 123 FLR 66

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Nitin A. Kulakrni, in Writ Petition No. 6348 of 1997, J.P. Cama, Santosh Kachare and Prachi Mhatre, holding for Bodanwalla and Co. in Writ Petition No. 1874 of 1998, for the Appellant; J.P. Cama, Sr.Counsel, Santosh Kachare, Prachi Mhatre, holding for Bodanwalla and Co. for Respondent No. 1. in Writ Petition No. 6348 of 1997 and Nitin A. Kullarni in Writ Petition No. 1874 of 1998, for the Respondent

Judgement

V.M. Kanade, J.—The petitioners in both these petitions are challenging the judgment and order passed by the Presiding Officer, 3rd Labour Court, Pune, in Reference (IDA) No. 351/1986. Parties in both these petitions are also the same, therefore, both the petitions are being disposed of by a common judgment. Brief facts are as under:

2. Petitioner -Maruti Bhanudas Kamble in Writ Petition No. 6348/97 was appointed as a Helper in the year 1974 in Bajaj Auto Limited (hereinafter for the sake of convenience Maruti Bhanudas Kamble will be referred to as the workman and Bajaj Auto Limited will be referred as the company). The services of the workman were terminated by the company on 24.10.78. The order of termination reads as under:

Since you have deserted your post with effect from 2nd October, 1978, your name has been removed from the companys muster roll with immediate effect.

You should return identity card No. 549-05497 tools etc. if any, issued in your name by the company and collect your dues, if any, from our Accounts Department during office hours after producing clearance certificate.

For Bajaj Auto Limited sd/- Personal Manager

3. The case of the petitioner is that he was on the medical leave with effect from 29.9.78 to 1.10.78 and he had furnished ESI Doctors certificate. According to the workman, he was arrested by the police on 2nd October, 1978 for the offence punishable under Sections 380 of the IPC for committing theft outside the factory premises and he was in police custody upto 13.10.78. According to the workman when he went to the factory on 14.10.78 to resume his duties, he was not allowed to do so. According to him, on 16th October, 1978, he submitted his explanation for absence, however, his services were terminated by letter dated 24.10.78 by the respondents. The workman raised a reference before the Labour Court at Pune, however, it was rejected by judgment and award dated 25.10.85. He, therefore, filed writ petition in this Court being Writ Petition No. 2703/1986 which was allowed by this court and the matter was remanded back to the Labour Court permitting him to amend the date of termination. A statement of claim thereafter was filed by the workman. In the written statement, it was contended by the company that the workman has deserted his employment and therefore, the company has removed his name from the muster roll. It was stated that though the workman presented himself on 16.10.78, he did not produce sufficient evidence to show that he was arrested by the police. It was also contended that the workman had remained absent without leave on earlier occasions also and he was warned for his irregularities. It was also contended that the behaviour of the workman was rude and arrogant towards his superior officers. It was contended that he was also suspended for 2 days in 1975 by way of punishment and he was in the habit of leaving the place of his duties without giving prior intimation or taking permission from the superior officers. It was contended that therefore, the workman had committed misconduct under Clause 24(f) of the Standing Orders and it was, therefore, not necessary to hold inquiry since the action was taken by the company on undisputed facts. The workman examined himself in addition to the evidence which he had given earlier before the Labour Court before the matter was remanded back by this Court. The company relied upon the evidence which was recorded prior to the remission and did not lead any evidence after remission. The company examined Shri Mohanlal Bhajanlal Sharma who was the Personal Manager at the relevant time. The Labour Court by judgment and award dated 4.1.97 partly allowed the award. The Labour Court had framed two issues viz.:

1. Whether the services of second party workman are legally terminated by the first party?
2. To what relief the second party workman is entitled.
4. The Labour Court answered the first issue in the affirmative and came to the

conclusion that since the fact that absenteeism of the workman was undisputed, his services were legally terminated by the company. So far as the second issue is concerned, the Labour Court, however, held that the workman was entitled to get full back wages.

5. The workman being aggrieved by the finding recorded by the Labour Court on the first issue filed Writ Petition No. 6348/97. The company, on the other hand, being aggrieved by the judgment and award passed by the Labour Court awarding full back wages to the workman filed Writ Petition No. 1874/1998.

6. Shri Nitin Kulkarni, learned Counsel appearing on behalf of the workman submitted that the order passed by the Presiding Officer is patently perverse, illegal. He submitted that there was total non- application of mind on the part of the Presiding Officer and the said order was, therefore, liable to be set aside. He submitted that the respondent No. 2 had erred in holding that services of the petitioner were legally terminated by respondent No. 1. He submitted that admittedly no inquiry was held before issuing order of termination and therefore, it ought to have been held that the termination was illegal and void ab initio. He further submitted that the name of the petitioner was struck off from the muster roll and as such, it amounted to retrenchment u/s 2(oo) of the Industrial Disputes Act, 1947 and as such, there was non-compliance of Section 25-F of the Industrial Disputes Act. It was further submitted that the Labour Court had relied on Clause 24(f) of the Model Standing Orders. It was submitted that the Labour Court had failed to take into consideration that the Model Standing Orders framed under the Industrial Employment. (Standing Orders) Act, 1946 was applicable to the employer respondent No. 1 herein and therefore, it was the duty of the employer to frame charge and to hold an inquiry before terminating his services. It was further submitted that the Labour Court had erred in relying on the judgment of the Apex Court in the case Martin Burn Ltd. Vs. R.N. Banerjee, . He submitted that the petitioner was in police custody from 2.10.78 to 13.10.78 and as such, it was beyond his power to attend the factory. He submitted that the Apex Court decision on which reliance was placed by the Labour Court was given in 1958 when the standing orders had not come into effect. He submitted that the said judgment, therefore, had no application to the facts of the present case. He further submitted that the order of termination which was passed on 24.10.78 also was not in consonance with the provisions of the Model Standing Orders. He further submitted that the petitioner has been acquitted by the High Court by its judgment and order dated 17.2.92 in Criminal Revision Application No. 449/1981 and as such, the Tribunal, therefore, should have held that the absenteeism of the petitioner from 2.10.78 to 13.10.78 was not due to his fault and it was beyond his control to remain present during this period on account of his illegal detention by the police. It was, therefore, submitted that to that extent, the order of the Labour Court be modified and the workman may be directed to be reinstated with continuity of service. In support of the said submission, he relied on the judgment of the Allahabad High Court in the case of Afsar Mian v. Labour Court, Bareilly and Ors.

7. Shri Cama, learned Senior Counsel appearing on behalf of the employer, on the other hand, submitted that the Labour Court had committed an error of law apparent on the face of record by giving full back wages to the workman after having held that the order of termination was legal and proper. He submitted that there was no occasion for the Labour Court to have granted full back wages once it had come to the conclusion that the termination is legal and proper. He further submitted that the Labour Court had not framed issue of back wages and as such, was not entitled to award back wages to the workman. He submitted that the finding recorded by the Labour Court on payment of back wages was perverse and therefore, was liable to be set aside. He further submitted that the workman had admitted that he had remained absent on earlier occasions. He, therefore, submitted that being habitually absent, the management was justified in terminating his services under Clause 24(f) of the Model Standing Orders. He submitted that the past conduct of workman was also relevant and ought to have been taken into consideration by the Labour Court while awarding back wages. It was further submitted that in the cross- examination, it was admitted by him that he used to drive auto rickshaw whenever it was available and that he was having a car driving licence since 1976 and also a rickshaw driver badge which was renewed upto 18th February, 1998 and a driving licence since 1976. It was submitted that under these circumstances, the question of payment of full back wages did not arise. In support of the said submissions, Shri Cama, learned Senior Counsel for the respondent-company relied on the following judgments:

1. Siemens Ltd. v. Babulal Ramlal Walmiki reported in 2005III CLR 675,
2. Divisional Controller, N.E.K.R.T.C. v. H. Amaresh reported in 2006 III CLR 11,
3. Bajaj Auto Ltd., Aurangabad v. Kalidas Devram Patil Aurangabad reported in 1999 II CLR 1108,
4. Hindustan Petroleum Corporation Ltd. v. D.N. Vidhate and Anr. reported in 2005 I CLR 1002,
5. Brihanmumbai Municipal Corporation v. Dattatraya B. Sonawane and Anr. reported in 2006 III CLR 848.

8. I have heard both the Counsel at length. In my view, there is much substance in the submission made by Shri Nitin Kulkarni, learned Counsel appearing on behalf of the workman that the Labour Court erred in holding that the order of termination issued by the respondent company was legal and proper. In the present case, it is an admitted position that no inquiry was held by the management before issuing the order of termination of the workman. The order of termination also does not refer to previous absenteeism on the part of the petitioner workman. It is merely stated in the said order of 24.10.78 that since the workman had deserted his post with effect from 2.10.78, his services were terminated. It is further admitted that from 2.10.78 to 13.10.78, the workman was in police custody after his arrest by the police and after he was released on bail on 13.10.78, he had reported for work. However, he was not allowed to

resume his duty. The petitioner workman was acquitted and order of acquittal was confirmed by this Court. According to the respondent company, the services of the workman were terminated on account of his habitual absence and pursuant to Clause 24(f) of the Standing Orders. The said clause reads as under:

Habitual absence without leave or absence without leave for more than 10 consecutive days.

The stand taken by the company was that since the workman had committed misconduct under Clause 24(f) of the Model Standing Orders, the question of holding enquiry did not arise as the facts were not in dispute. The Labour Court has accepted this contention and has relied on the judgment of the Apex Court in the case of Indian Iron Steel Company Ltd. (supra). It is also contended by the respondent company that the workman in his cross-examination had admitted that he was warned for absenteeism in 1975 and he was punished for misconduct and was suspended for 2 days in 1975. He also admitted that he was warned for refusing the reasonable order of his superior in 1977 and he was warned for remaining absent for three days in 1977. He had also admitted that he was warned for remaining absent for 16 days in 1977. Shri Cama, learned Senior Counsel appearing on behalf of the respondent company has, therefore, urged that the past misconduct of the workman also was rightly taken into consideration by the Labour Court.

9. On the other hand, Shri Kulkarni, learned Counsel appearing on behalf of the workman has submitted that the striking off the name of the workman from the muster roll amounted to retrenchment u/s 2(oo) of the Industrial Disputes Act and as such, the company was under an obligation to comply with the provisions of Section 25-F of the Industrial Disputes Act and non-compliance of the said provision, therefore, amounted to breach of the said provision of Section 25-F of the said Act. There is much substance in the submission made by the Counsel appearing on behalf of the workman. Striking off the name of the workman from the muster roll clearly amounts to retrenchment u/s 2(oo) of the Industrial Disputes Act, 1947. Section 2(oo) of the Industrial Disputes Act reads as under:

2(oo) retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein ;or

(c) termination of the service of a workman on the ground of continued ill-health;

10. Perusal of the said Section clearly reveals that striking off the name of the workman is not covered in any of the Section 2(oo) and therefore, it amounts to retrenchment u/s 25-F. In the present case, it is an admitted position that the company had not complied with the provisions of Section 25-F before issuing order of termination. So far as the misconduct under Clause 24(f) of the Standing Orders is concerned, even before issuing an order of termination for habitual absence under Clause 24(f) of the Standing Orders, the company ought to have given the workman an opportunity of defending himself and for the purpose, the Show Cause Notice ought to have been issued to him and thereafter an inquiry was to be held to prove habitual absence. The Labour Court had clearly erred in coming to the conclusion that there was no necessity of holding a departmental enquiry since the fact of absenteeism of workman was undisputed. In my view, the said finding is patently perverse and is liable to be set aside. In the present case, the workman was arrested by the police and was in police custody from 2.10.78 to 13.10.78 and as such, it was beyond his control to work during the said period. Immediately on his release, he had reported to work and had informed his superior officers about his detention. However, without ascertaining whether the said statement is correct or not, his services were terminated. Habitual absence is a misconduct within the meaning of Clause 24(f) of the Standing Orders, however, the said misconduct has to be established and in this case, no opportunity was given to the workman either by issuing a show cause notice or by holding departmental enquiry. The Labour Court, therefore, in my view, clearly committed an error of law which is apparent on the face of record by holding that the misconduct under Clause 24(f) was established and was undisputed and therefore, there was no need to hold the departmental enquiry.

11. The Labour Court had relied on the judgment of the Apex Court in Indian Iron and Steel Company Ltd. (supra). There is much substance in the submission made for the workman that the Labour Court had erred in relying on the ratio of the judgment which was decided in 1958. It is a matter of record that after the said judgment was delivered, the Model Standing Orders came into effect from 15.2.59 after the said judgment of the Apex Court was delivered. In my view, the Labour Court clearly erred in relying on the ratio of the judgment of the Supreme Court in Indian Iron and Steel Company Ltd. (supra) in view of the Standing Orders which came into effect from 15.2.59 since the order of termination was passed thereafter on 24.10.78. I am fortified in my view with judgment of the learned Single Judge of the Allahabad High Court. The learned Single Judge also in the said case has held that the judgment of the Supreme Court in M/s. Indian Iron and Steel Company Ltd. (supra) distinguished the said judgment and pointed out the circumstances under which the said order was passed by the Apex Court. The learned Single Judge further relied on the judgment of the Apex Court in the case of L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, and Mohan Lal Vs. Management of Bharat Electronics Ltd., that if the case is not

covered by any of the exception u/s 2(oo) read with 25-F of the Industrial Disputes Act, striking off the name of a worker from the Rolls is illegal and non-compliance of Section 25-F of the Central Act renders such retrenchment void-abinitio. In my view, the ratio of the said judgment squarely applies to the facts of the present case. The services of the workman which were illegally terminated, therefore, were set aside and it is held that the retrenchment was illegal and void-ab-initio. The finding recorded by the Labour Court that the termination was legal, therefore, will have to be set aside. The termination, therefore, in my view, is illegal and the retrenchment, therefore, is illegal for non-compliance of Section 25-F and is void-ab-initio.

12. The second question is regarding the payment of back wages. The Labour Court has awarded full back wages to the workman. Shri Cama, learned Senior Counsel appearing on behalf of the employer, on the other hand, has submitted that in the first place, the Labour Court had not raised any issue of back wages and as such, could not have, therefore, awarded full back wages to the workman. He further submitted that the Labour Court after having held that the order of termination was legal and proper could not have awarded full back wages to the workman. In support of the said submission, he has relied on four judgments of this Court and one judgment of the Apex Court which have been referred to earlier. He further submitted that the workman was gainfully employed and was working as a rickshaw driver, his children were studying in school, therefore, there was no occasion for the Labour Court to grant full back wages to the workman. There cannot be any dispute about the power of the Labour Court which is to be exercised u/s 11 of the Industrial Disputes Act. The ratio of the said judgments, however, do not apply to the facts of the present case.

13. In my view, though the Labour Court has not framed specifically issue of back wages, both the parties have led evidence on that issue, the workman has been cross-examined in respect of his income and he has admitted that he was having licence and badge to run an auto rickshaw. In my view, merely because a separate issue has not been framed in respect of back wages, no prejudice is caused to the employer. In the complaint, a specific averment has been made in the statement of claim by the workman. In para 11, the following averments had been made:

The workman tried his level best to get or secure alternative employment but could not get and the workman is still unemployed. He was to suffer all the hardships due to his employment.

14. In the written statement, the employer has merely stated that he does not admit the statements made in para 11 of the Statement of Claim. The workman in his evidence recorded on 2.8.95 has stated that even after necessary steps were taken by him, he could not succeed to get another job and that he was unemployed. He has further stated that sometime he used to get the rickshaw driving work. Thus, both the parties have led evidence on the point of back wages and the workman has been cross-examined at length and suggestion is

made that he was earning money by driving an auto rickshaw. No prejudice, therefore, has been caused to the employer. In my view, therefore, merely because an issue is not framed only on that ground, the case need not be remanded back, particularly, when in this case, the workmans services were terminated in 1978. Thirty years have passed since then. Under these circumstances, the submission of Shri Cama, learned Senior Counsel that because the said issue of back wages is not framed, the matter should be remanded back, therefore, cannot be accepted.

15. In my view, however, the Labour Court erred in granting full back wages to the workman. It has come on record that the workman was having a badge and rick driving licence since 1976 and he used to drive rickshaw. Therefore, it cannot be said that the workman was not earning any money during this period. The reply given by him in the cross-examination does indicate that his children are studying in a good school which could not have been possible if the workman was not earning. It, of course, has to be noted that the workman has made specific averment that he was unemployed and reiterated his stand in his evidence. The burden, therefore, was on part of the company to establish that he was gainfully employed. Merely because he was plying an auto rickshaw, could not be that he was gainfully employed. The company has not brought on record any evidence to show that he was working elsewhere after his services were terminated. However, looking at the peculiar facts and circumstances of the case, in my view, ends of justice would be met if the employer is directed to pay lump sum amount to the workman towards full and final settlement of his claim and therefore, instead of directing reinstatement of the workman, the employer should pay a lump sum amount which is quantified at Rupees Eight lakhs.

16. Both the writ petitions are partly allowed in the aforesaid terms. The writ petitions are, accordingly, disposed of.