
(1976) 08 BOM CK 0032

In the Bombay High Court

Case No : Special Civil Application No. 291 of 1975

Siddhanath Krishnaji Kadam

APPELLANT

Vs

Dadajee Dhachjee and Co. Private Limited

RESPONDENT

Date of Decision : 06-08-1976

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 33

Citation : (1978) 80 BOMLR 614

Hon'ble Judges : Joshi, J;Deshpande, J

Bench : Division Bench

Judgement

Deshpande, J.—The petitioner in this Special Civil Application was an employee of respondent No. 1 for about twenty-three years. On September 30, 1969 he was discharged from service. The petitioner challenged this order of discharge, and the dispute was referred, in due course to the third Labour Court, Bombay, at the instance of the Union. In his written-statement, the petitioner claimed that the discharge, being punitive in essence, was, legally bad, mala fide and an act of victimization. The employer, on the other hand, among other details, pleaded that it had received some complaints about, the petitioner's unhealthy activities and, doing some outside motor repairing work privately for consideration. The Assistant Engineer of the Company, relevant submitted a report on September 19, 1969 saying that the employee was found by him working at a Dadar garage of some one else on September 16, 1969, though he had left the office on the pretext of going to Repairing Board for personal work. The employer tried to defend the order on the ground that it had lost confidence in the employee due to the above. According to the employer, no enquiry was necessary for an order of discharge simpliciter, it not being punitive.

2. At the trial, in addition to examining Rane, who was at the relevant time, the General Manager of the Company, the employer examined Assistant Engineer relevant. The petitioner examined himself only on the limited question of his having remained unemployed during all this period.

3. The Labour Court accepted the evidence led by the employer and held that, employee's working in other's garage privately after leaving the office on false pretext could justify the discharge. According to the Labour Court, the discharge was bona fide and there was no trace of victimisation in evidence. All terminal benefits having been offered, the discharge cannot be said to be punitive. The Labour Court also held that even in cases of misconduct, it was open for the employer either to hold enquiry and dismiss the employee by way of punishment or discharge him and pay all retrenchment benefits. He relied on *Jabalpur Elec. Supply Co. v. Sambhu Prasad Srivastava* [1962] 2 L.L.J. 216 and *Tata Engng. & Locomotive Co. v. Prasad* [1969] 2 L.L.J. 799, in support of this proposition and negated the plea of the employee that such process involves any colourable exercise of powers. Legality of this order is challenged in this Special Civil Application under Articles 226 and 227 of the Constitution.

4. Mr. Deshmukh, the learned advocate for the petitioner, contends that once the basis of the discharge is found to be, some act or omission of the employee amounting to misconduct, the discharge cannot but be punitive. The employer cannot remove the employee without proving the same by holding enquiry as per Rules. His reluctance to do so and resorting to an easy course of discharge simpliciter amounts to colourable exercise of power. Strong reliance is placed by Mr. Deshmukh in this behalf on the judgment of the Supreme Court in *L. Michael and Another Vs. Johnson Pumps Ltd.*, and the passage from another judgment of the Supreme Court in *Murugan Mills Ltd. v. Industrial Tribunal* AIR [1945] S.C. 1496, quoted in para. 14 of the former case.

5. We are unable to see any support to any such proposition, in these passages even on the assumption that the alleged acts constitute misconduct. On the other hand, since the decision of the Supreme Court in the leading case of *The Chartered Bank, Bombay Vs. The Chartered Bank Employees' Union*, law on the employer's powers as to the discharge simpliciter and the limitations thereon can be said to have been well-settled. The chief cashier of the Bank in that case reported acts of disobedience of the cashier under him, and declined to stand surety for him any further in terms of the system then in force, which was indispensable for cashier's retention in service. Rather than hold enquiry and dismiss the cashier by way of punishment for his misconduct, the Bank preferred to discharge him, The Tribunal quashed this order of the discharge, holding that the Bank could not resort to discharge when act amounted to misconduct and inquiry was indispensable. The Supreme Court disapproved of this view and held that even in such a case discharge was permissible if it did not happen to be in colourable exercise of power. The Supreme Court could not find the Bank in the circumstances to have acted in colourable exercise of the power as good reasons were found to exist for it to so act. The Supreme Court approved of the law laid down by the Labour Appellate Tribunal in this behalf in the following words (p. 922):

In *Buckingham and Carnatic Co. Ltd. v. Workers of the Company* [1952] L.A.C.

490, the Labour Appellate Tribunal had occasion to consider this matter relating to discharge by notice or in lieu thereof by payment of wages for a certain period without assigning any reason. It was of opinion that even in a case of this kind the requirement of bona fides is essential and if the termination or service is a colourable exercise of the power or as a result of victimisation or unfair labour practice the industrial tribunal would have the jurisdiction to intervene and set aside such termination. Further it held that where the termination of service is capricious, arbitrary or unnecessarily harsh on the part of the employer, judged by normal standards of a reasonable man that may be cogent evidence of victimisation or unfair labour practice. We are of opinion that this correctly lays down the scope of the power of the tribunal to interfere where service is terminated simpliciter under the provisions of a contract or of standing orders or of some award like the Bank Award.

6. The Court then emphasised how Court can go behind the form of the order to find out truth of the matter. In terms of this ratio.

(1) The employer can discharge his employee in accordance with the relevant rules under variety of circumstances including the cases of misconduct.

(2) This is, however, not an unfettered right.

(3) It should not be an act of victimisation or of unfair labour practice.

(4) An arbitrary or capricious discharge may itself afford evidence of such victimization or lack of bona fides.

(5) The form of the order is not decisive and the Court can go behind the order when it is challenged. All this obviously is aimed at ensuring that protection and the security of service afforded to the employee under the industrial legislation is not subverted by making a pretence of discharge being innocent.

7. L. Michael's case rather than depart from the above rule of law, in. terms goes to affirm it. The employee in L. Michael" case was discharged in the year 1970. without indication or any reason. When challenged in Court, the employer pleaded loss of confidence in him, on account of his having passed on secrets to the outsiders in the year 1967. It was, however, found that the employer had given two extra increments to the employee in 1968. The Supreme Court found this conduct of the employer to be inconsistent with alleged discovery of any such disloyal communication of the employee in 1967. Thus the order of discharge was found to be in colourable exercise of power, because of the failure of the employer to prove the allegations set up, and not because of its failure to hold inquiry before discharge. In Murugan Mills" case also the employer failed to prove that the employee was guilty of go slow tactics, which plea was set up in defence of the order of discharge in the Court. The case arose out of an application of the employer for approval of discharge of the employee, u/s 33 of the Industrial Disputes Act, necessitated by the then pending dispute in the Court. The failure to prove go slow tactics and pay the dues, etc. in compliance

with the requirements of the proviso to Section 33(b) of the Act resulted in rejecting the application for approval. True import of the second passage from Murugan Mills case quoted in para. 14 of the judgment in L. Michael's case, cannot be grasped if not read with these facts. Such failure to prove the allegations also can raise an inference of the discharge having been resorted to merely as a cover for unmerited removal. In the case of Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory, , the Bench, consisting also of the same learned Judges who decided Murugan Mills" case, observed that the employer can justify the dismissal or discharge orders in Court, when challenged, by leading evidence to support its case even when enquiry held was defective or no enquiry whatsoever was held. The cases of discharge and dismissal on the one hand and cases of "no enquiry" or "defective inquiry" on the other hand, according to the Supreme Court, stood on the same footing. The underlying principle behind the ratio of these cases appears to be simply this, that what is decisive of the discharge being bona fide and made in exercise of the power possessed or mala fide and made in colourable exercise thereof, is the finding by the Court on evidence at the trial and not the form of the order or mere allegations of either side. Accepting the contention of Mr. Deshmukh will result in virtual punishment of the employer for preferring lenient course of discharge as against the punitive action of dismissal, even on proof of misconduct. It is difficult to see any basis or logic therein.

8. It is true that in the first case relied on by the Labour Court, in spite of proof of misconduct in an enquiry, lenient action of discharge was preferred by the employer to punitive act of dismissal. While in the second case, enquiry and punitive action was dispensed with to avoid parallel enquiry with the criminal case then pending in the Sessions Court. These aspects do not make any difference to the proposition that the employer has a choice to adopt either of the courses, provided action is bona fide. The question of mala fides or acting in colourable exercise of power, cannot arise unless allegations set up are unfound-" ed, and imaginary, and the action is motivated by some ulterior purpose. The first contention of Mr. Deshmukh is thus untenable.

9. Mr. Deshmukh then contends that, now, no employer can discharge the employee on the facile ground of having lost confidence in him as in the case of L. Michael the Supreme Court has disapproved of this doctrine, invariably resorted to by the employers to get rid of the unwanted employees. The impugned order of discharge, contends Mr. Deshmukh, being essentially of the same nature, is liable to be quashed. The Labour Court in the present case has not itself referred to any such doctrine while upholding the order of discharge. However, this is what the employer claimed by reference to the report of the Assistant Engineer dated September 19, 1975, and several cases, including those relied on by the Labour Court, have chosen to describe such discharge as being for "loss of confidence", particularly when acts complained fall short of misconduct. We are unable to see any error in such description and we see no reason why the employer should not claim to have lost confidence in the

petitioner due to the facts alleged against him and found by the Court to be true. As discussed earlier, the Supreme Court found, the allegations, made against Michael about divulging of the secrets, to be baseless. The plea of "the loss of confidence" set up by the employer therein was thus a mere pretence. The employer was driven to rely on a few observations from the judgment of the Air India Corporation V.A. Rebello [1972] AIR S.C. The Supreme Court distinguished the Air India Corporation's case and other cases on facts, where the employees were found unsuitable to the jobs held by them, in view of the well-grounded suspicions against them. According to the Supreme Court, L. Michael's case posed a question whether mere ipse dixit of the employer without any indication of objective dependable facts, could be enough to uphold such a plea and whether the doctrine of "the colourable exercise of power" is given a go by in favour of such doctrine of "loss of confidence". The Supreme Court in answer referred to a few earlier cases including the one of Chartered Bank and observed (p. 666):

The above study of the chain of rulings brings out the futility of the contention that subsequent to Murugan Mills" case, colourable exercise of power has lost validity and loss of confidence has gained ground.

After emphasising how the Court has to x-ray the order to discover its true nature and how the order is liable to be set aside on finding its being merely a cover for inability to establish any such case, the Court observed (p. 666):

...Loss of confidence is no new armour for the management; otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of this Court, can be subverted by this neo-formula. Loss of confidence in the Law will be the consequence of the Loss of Confidence doctrine.

10. L. Michael's case thus only registers a warning against accepting the plea of loss of confidence when it is unsupportable by any material and proves to be a mere pretence for getting rid of an unwanted employee. The attack is directed not against the doctrine of "loss of confidence" itself but against the indiscriminate use thereof, without investigation if the same is a cover for capricious, arbitrary and fanciful "hire and fire" strategy and without regard to whether it is a colourable exercise of the power. In other words, the plea of loss of confidence is not liable to be rejected under this authority, when the same is based on good grounds and dependable material, as is found to be in the present case. The contention of Mr. Deshmukh that L. Michael's case rules out altogether the discharge of an employee on the ground "of loss of confidence, is thus untenable.

11. It was then argued that the question of loss of confidence can arise only in cases where employee holds some position of confidence such as in Air India Corpn.'s case. Post of a motor mechanic, held by the petitioner, contends Mr. Deshmukh cannot be said to be such post to warrant the application of this doctrine. We are unable to subscribe to any such proposition. It is difficult to

trace any basis or warrant for assumption that "loss of confidence" plea can be confined only to the employees holding confidential posts and not to others. Every contract of employment implies trust and confidence as its indispensable ingredients. Some posts, no doubt, happen to be of highly confidential nature. That does not mean that confidence in the employee is a dispensable element in other posts. L. Michael's case itself makes a distinction in para. 22 between the "employee, particularly one holding a position of confidence", and the one who does not so hold such position, and emphasises how, suspicion of the employer in the former case as to the betrayal of his confidence, and his belief to that effect in the latter case "should not be a mere whim or fancy". The employee Dubey in Tata Engng. & Locomotive Co. case does not appear to have held any such position of confidence. It is not possible to under-estimate the element of such confidence in the harmonious, smooth and effective working of any undertaking. The Court has, however, to ensure that any such claim of loss of confidence is genuine and is based on objective facts, lest the protection afforded to the workmen become illusory. Well-founded suspicion against the employees holding posts of highly confidential nature may be considered enough for loss of confidence. In other instances, such as the petitioner, the proof of his having worked privately after leaving the office on false pretext should be held enough for the employer's loss of confidence in him.

12. The contention of Mr. Deshmukh, that the respondent has not given details as to in what respects the employee was found by him to be unreliable, and how his business was liable to be affected adversely or how any loss was caused to him, is devoid of substance. These are matters of rational inferences and prudent calculations, of the employer from the facts discovered and cannot be the matters of pleading and evidence. The petitioner did not even care to cross-examine the General Manager on this point, when he was in the witness-box to demonstrate the hollowness of his claim as to the loss of confidence.

13. It will thus be seen that there is no ambiguity in law on this highly sensitive question of "discharge". The employer may have right to discharge his employee under the contract or rules. But existence of good reason based on objective facts is indispensable for discharge. There can be myriad reasons for such discharge including the act or omission amounting to misconduct. The employer is not bound to hold inquiry and visit the employee with penal action, even if such reason happens to be misconduct of the employee. It is only the absence of such reason, and not mere failure to hold enquiry, that would render such discharge mala fide or an act in colourable exercise of power raising an inference of victimization. Not the law but its application to the facts of each case presents the real difficulty. The possibilities of the employer seeking to eliminate the thorn of an active trade union worker, or the employee's seeking to cover his misconduct under his trade union activity, always exist. Assessment of evidence becomes difficult when guilty employee happens also to be an active trade union worker and the employer makes recourse to discharge simpliciter rather than to long winding, and dilatory course of enquiry and punitive action. The dividing line

between the motive for and the basis of the order becomes very thin in such cases. The law also is liable to be misapplied, when a few observations in a judgment intended to emphasise some peculiar features of any particular case are misread or misunderstood by tearing them from their context.

14. Mr. Deshmukh lastly contends that there is no evidence to support the allegations" beyond what Mr. relevant claims to have noticed at a fleeting glance, while going in a car. We are unable to entertain this contention. Disinterestedness of relevant, his contemporaneous report, absence of evidence of any trade union activity of the petitioner or any particular bias of the employer, and failure of the petitioner to refute the case in examination-in-chief, could weigh with any fact finding Court. This is what has led the Labour Court to record a finding of fact against the petitioner in this case.

15. We do not thus see any merit in this Special Civil Application.

16. Rule is accordingly discharged.

17. In the circumstances of the case, there will be no order as to costs.