

(2002) 11 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No's. 878, 879, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908 909, 911, 912, 913, 914, 915, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927 of 200

The Divisional Controller, Maharashtra State Road Transport Corporation, Dhule Division

APPELLANT

Vs

Hemant Vikram Wagh

RESPONDENT

Date of Decision : 01-11-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 227

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28, 29, 44

Citation : (2002) 11 BOM CK 0008

Hon'ble Judges : A.P. Deshpande, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.P. Deshpande, J.—Heard learned Counsel for the parties.

2. Rule made returnable forthwith by consent of the parties.

3. As identical issues are involved in these 46 petitions, they are heard together and are being disposed of by this common judgment.

4. Maharashtra State Road Transport Corporation is a State Government Undertaking. The Corporation is engaged in the business of transportation of passengers within the State of Maharashtra as well as outside the State. The Corporation is having its divisional offices in all the Districts of the State of Maharashtra and the said offices are set up for smooth administration. One of its divisional offices is at Dhule which is under the administrative control of the Divisional Controller. The respondents in all these petitions were appointed as Drivers, pursuant to an advertisement and after undergoing the process of selection and interview, besides successful completion of training which is a

condition precedent for appointment. The respondents after their appointment worked for about seven months regularly and were also paid salary in the prescribed scale, of pay. All of a sudden, all the respondents were prevented from performing their duties and thereby an abrupt end was brought to the service career of the respondents.

5. The respondents moved the Labour Court by filing separate complaints u/s 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred as "the Act" for the sake of brevity). It was contended by the respondents before the Labour Court that the present petitioner/employer is guilty of commission of unfair labour practice covered by Item 1(a), (b), (c), (d), (e), (f) and (g) of Schedule IV of the Act. The Labour Court, after issuing notices to the petitioner and after recording evidence, allowed the complaints by judgment dated 25th July, 2001 by holding that the employer has indulged in an unfair labour practice under Item 1(a), (b) and (f) of Schedule IV of the Act. Being aggrieved by the judgment and order dated 25.7.2001 passed by the Labour Court, the employer filed revision applications u/s 44 of the Act by moving the Industrial Court. The Industrial Court concurred with the view taken by the Labour Court and dismissed the revision applications by judgment and order dated 8th February, 2002.

6. The thrust of the case of the petitioner employer is that it is for the Central Office of the Corporation, meaning thereby the Board of Directors, to decide as to how many persons are to be appointed at a given point of time in the available posts in the employment of the Corporation. As per the petitioner, by the Circular Order dated 22.4.1999, the petitioner had informed all its Divisional Controllers regarding recruitment of Drivers and in the District of Dhule, the Divisional Controller was permitted to appoint and fill in 211 posts of Drivers including the candidates from reserved categories. The petitioner submits that the said direction though binding on all the officers of the Corporation, the Regional Manager and the Divisional Controller exceeded the limit by appointing 290 candidates instead of 211 as permitted in the Circular Order and thereby 79 excess candidates came to be appointed. The respondents in these petitions are from and out of the said 79 additional appointments made by the Divisional Controller at Dhule. It is the case of the petitioners that as the Regional Manager and the Divisional Controller violated the direction issued by the Central Office to appoint 211 persons in the posts of Drivers, instead appointed 290 and hence they were proceeded against for the said breach of directions. An affidavit is placed on record of this Court during pendency of the petitions, explaining that the Regional Manager who is guilty of the said act of appointing excess candidates having been found guilty in the departmental enquiry, is meted out with punishment of reduction of basic pay by three stages. It is admittedly a minor punishment. The enquiry appears to have been initiated against the Regional Manager and the Divisional Controller for non-implementation of the instructions of the Central Office of the Corporation. It seems that as no motives were attributed to the act of appointing 290 employees instead of 211, the

officers are dealt with by imposition of minor punishment. Be it as it may, a reference is made to the said circumstance with a view to ascertain as to whether the said action on the part of the Regional Manager and the Divisional Controller could be said to be tainted with malice and/or an attempt to provide a back door entry for the respondents. It does not appear to be so from the record. It is further the case of the petitioner that it took about seven months time to the Central Office to realise that the appointments of the respondents are in excess of the number sanctioned by the Central Office and the moment the Central Office realised the mistake committed by the Regional Manager and the Divisional Controller, it informed the respective offices to discontinue the services of the respondents and this is how the respondents are removed from service, which in the submission of the petitioner, cannot be termed as unfair labour practice.

7. As against the said case of the petitioners, the respondents have submitted that an advertisement was issued in the year 1997 wherein only 165 posts were advertised. All the respondents along with others had applied pursuant to the advertisement for the post of Driver. Thereafter, preliminary scrutiny followed by an interview was held. The respondents were selected along with others and a select list was published wherein the names of the respondents find place. After selection, the respondents were sent for training, which is compulsory, before a regular assignment could be given to the drivers. The respondents successfully completed the training and thereafter they were issued orders of appointment. The respondents submit that, though initially only 165 posts were advertised as there was delay in the process of selection, which took place in the year 1999, the requirement had gone up. It is the respondents' case that the requirement of number of Drivers is dependent upon the number of work schedules. The retirement of Driver is to be worked out by multiplying the number of work schedules by a constant of 2.4. This criteria to work out the requirement of number of Drivers is not disputed by the petitioner. According to the respondents, in April-May, 1999 the requirement was found to be of 1517 Drivers in Dhule District, which could only be attained by appointing the number, in excess of 290. It is submitted by the respondents that a Committee comprising of five persons is constituted to make selection of Drivers which includes the Regional Manager, besides a nominee from the Central Office. It is an admitted position that the Committee was properly constituted and it had a representative from the Central Office as well, which proceeded to conduct, the interviews and select the candidates. In other words, the respondents claim that the appointments are made as approved and desired by the Central Office, by the Selection Committee and that the appointments of the respondents are not in excess of the number desired to be appointed by the Central Office. According to the respondents, directions were issued by the Central Office to appoint a given number of employees (drivers) which is commensurate with the need/requirement and which number is to be ascertained by multiplying the work schedule by a constant of 2.4 and if so calculated, the appointments were not at

all in excess of the requirement. It is submitted by the respondents that Corporation is still very much short of the required strength of the Drivers. It is then contended that at any rate the respondents are not responsible for the mistake and/or irregularity committed by the Corporation and/or its Officers and as such their career ought not to be ruined for no fault on their part. It is also emphatically contended that about 5 years time has elapsed since the date of issuance of advertisement and the respondents have been appointed after following due procedure prescribed under the rules and after their selection and satisfactory completion of the training. It is also an admitted position that the respondents were regularly paid their salary for seven months after effecting statutory deductions. The salary fund is maintained and controlled by the Central Office, so the Central Office should be presumed to be in know of the appointments. What is relevant to note is that no material has been placed on record either before the Labour Court or before this Court to indicate that the appointments of the respondents are in excess of the sanctioned number of posts. Even the number of sanctioned posts of Drivers in Dhule Division is nowhere reflected and as such it is not the case of the petitioner that the appointments of the respondents are in excess of the sanctioned number of posts. The grievance of the petitioner is only to the extent that at the relevant point of time the Central Office had instructed the Regional Office and the Divisional Controller to appoint 211 Drivers but instead 290 Drivers were appointed.

8. In the aforesaid factual backdrop the learned Counsel for the respondents has contended that if the respondents were appointed after following due procedure, pursuant to an advertisement issued and as the respondents had worked for 7 months regularly, the minimum that could be expected from the petitioner is a show cause notice before effecting their discharge from service and granting of an opportunity to explain as to why the services be not terminated. It is then submitted that at any rate the respondents were entitled to have an order of termination and/or discharge being served on them. As their appointments were made in accordance with the procedure and the petitioner being a Government undertaking cannot legally resort to a high-handed action in the nature of preventing the employees from performing their duties by oral directions. The respondents as such contend that the discharge of the respondents from service has to be held, on the face of the record, as a discharge "with undue haste". In the above facts by placing reliance on the oral evidence, the Labour Court, and the Industrial Court have concurrently found that the discharge of the respondents from service being with an undue haste the same amounts to an unfair labour practice under item 1(1) of Schedule IV of the Act. It is also a finding recorded by the Courts below that the discharge of the employees is not in good faith but in colourable exercise of employer's rights and by way of victimisation.

9. It appears that before the Courts below it was sought to be argued on behalf of the petitioner that the Regional Manager and the Controller were in collusion

with the respondents and as such the appointments were brought into existence illegally and mala fide. The Courts below have specifically answered the said question against the petitioner/employer. The observations of the Industrial Court are very clinching. The Industrial Court in para 10 of its judgment has observed thus:

I am not at all impressed with the arguments advanced by the learned Counsel for the applicant corporation that there was collusion between officers of the applicant corporation and the opponent-complainants. It cannot be believed on the basis of material on record that the opponent-complainants, who are from different places, even remote villages could have acted in collusion with the Regional Manager and the Regional Personnel Manager of the applicant-corporation, as submitted by the learned Counsel. There is nothing on record in support thereof. It is hard to believe that the opponent complainants had any knowledge of recruitment of excess staff by the officers of the applicant corporation, as alleged. Apart from that it is also pertinent to note that even it is not the case of the applicant corporation in defence.

Having realised that both the Courts below have concurrently found that there is no collusion between the officers of the Corporation and the respondents/employees, the learned Counsel for the petitioner has not even canvassed the case of collusion between the officers of the Corporation and the respondents employees before me. It is contended by the learned Counsel that the officers of the Corporation have committed a mistake and/or irregularity in appointing the respondents and as such the Corporation was justified in doing a way with respondents' services. As against the above referred submission of the petitioners, the learned Counsel for the respondents has contended that no case for interference in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India is made out. He submits that unless and until patent illegality or perversity is pointed out, in the view taken by the Courts below, no interference is called for.

10. The learned Counsel appearing for the petitioner has submitted that on the basis of the averments made in the complaint no case of unfair labour practice is made out so far as Clause (a) and (b) of Item 1 of Schedule IV is concerned. In regard to the finding of unfair labour practice covered by Clause (f) of Item 1 of Schedule IV is concerned it is contended that, unfair labour practice in terms of Clause (f) is necessarily a penal action and if the action is not penal but is discharge simpliciter, the same cannot fall within the compass of Clause (f). I proceed to deal with the last submission first.

11. Perusal of Clause (f) of Item 1 of Schedule IV of the act reads thus:

To discharge or dismiss employees -

...

(f) in utter disregard of the principles of natural justice in the conduct of

domestic enquiry or with undue haste.

The petitioner has submitted that the term "discharge or dismiss" convey the same meaning viz. penal action and if the said result is obtained as a result of utter disregard of principles of natural justice in the conduct of domestic enquiry, then alone it would amount to an unfair labour practice covered by Clause (f) and not otherwise. In regard to the second part of Clause (f) it is contended that discharge or dismissal of the employee, if penal, made with undue haste, would alone attract the provisions contained in Clause (f). Relying on the language used in Clause (f) it is contended by the learned Counsel for the petitioner that utter disregard of principles of natural justice has to be in the conduct of domestic enquiry and as in the present case no enquiry is held, the first part of Clause. (f) is not attracted. It is also submitted that as no penal action is taken against the respondents and as their discharge is a simpliciter discharge even though made with undue haste, will not attract the second part of Clause (i). As against this submission of the petitioner, learned Counsel for the respondents has contended that the term "to discharge or dismiss employees" used in Item 1 is exhaustive in nature and covers not only cases of penal order viz, orders of dismissal but also brings within its compass the orders of discharge simpliciter. The learned Counsel has submitted that if discharge or dismissal of employee is in utter disregard of principles of natural justice in the conduct, of domestic enquiry it constitutes an unfair labour practice, obviously a case where no enquiry is held would also fall in the first part of Clause (f) itself and if not, at any rate the same would fall in the second part of Clause (I), i.e. discharge or dismiss employees with undue haste. In his submission, any interpretation of Clause (f) would bring the abrupt termination of services of the respondents within the four corners of situation covered by Clause (1).

12. The learned Counsel for the respondents had placed reliance on the judgment of the Apex Court in the case of M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad, , to point out that Item 1 of Schedule IV is not limited only to discharge or dismissals that, are punitive but also covers the case of discharge simpliciter. In para 39 the Apex Court has interpreted Item 1 of Schedule IV.

When we have a close look at Clause (a) to (g) of Item No. 1 of Schedule IV, we find that, the word "discharge" is not intended by the Legislature to have the same or analogous meaning as the word "dismiss". The reason is obvious. The word "dismiss" necessarily connotes an action of the employer who seeks to impose punishment on his misconducting employee. Such a punishment cannot be imposed without following the principles of natural justice and the relevant applicable rules of domestic inquiry. But the word "discharge" is not necessarily confined to orders of termination by way of penalty only. The word "discharge" has wider connotations. A misconducting employee facing charges in a domestic inquiry may be punished by way of imposing on him an order of dismissal which may make him ineligible for any other employment but ff it is found that the charges which are proved are not that serious but the employee would not

deserve to be continued in service then an order of discharge by way of lesser penalty can be imposed on him. Such an order would remain a punitive discharge. Thereby the employer wants to punish the employee for his misconduct but does not want him to become ineligible for employment elsewhere considering less serious nature of proved charges of misconduct against him in domestic inquiry. But that is not the end of the matter. In service jurisprudence the term "discharge" has assumed a wider connotation and may include in its fold not only punitive discharge orders but also simpliciter discharge orders where the employer seeks to snap the relationship of employer and employee but without any intention to penalise the employee. He does so because of exigencies of service and employment conditions which may require him to say good-bye to the employee but without, any intention to punish him.

In dealing with Clause (f), the Apex Court proceeded to observe as follows :

So far as Clause (f) is concerned, the first part squarely covers a case of dismissal or discharge by way of penalty as it deals with such orders passed after conducting domestic inquiry about the alleged misconduct of the employee but in utter disregard of the principles of natural justice but so far as the second part of Clause (f) of Item No. 1 is concerned, if an employee is dismissed with undue haste it may be by way of penalty as in domestic inquiry apart from following the principles of natural justice, sufficient and reasonable opportunity to defend may be denied to the employee and with undue haste the dismissal order may be passed. That, would obviously be a penal order but so far as discharge order is concerned, it. may also be passed by way of penalty with undue haste but the said part of Clause (f) may equally cover those discharge orders which are simpliciter discharge orders not by way of penalty but still being passed with undue haste on the part of the employer who may not be wishing to punish the employee but wishing to say good-bye to the employee on the ground that he is otherwise an unwanted person. Such discharge orders passed with undue haste may not necessarily be penal and still may amount to "unfair labour practice" if they are passed with undue haste.

13. After taking a resume of various clauses in Item 1 of" Schedule IV of the Act, the Apex Court has held thus :

...when the Legislature used the words "discharge" or "dismissal" of the employees under circumstances enumerated in Clause (a) to (g) in Item No. 1 of Schedule IV it contemplated dismissal orders which obviously are penal in nature but it. also contemplated discharge orders which may either be penal or non-penal in nature and still if any of the relevant clauses of Kern No. 1 got attracted in connection with such discharge orders they would make the employer, author of such discharge orders answerable for the alleged "unfair labour practice" permitting the passing of such simpliciter discharge orders.

Reading Clause (f) of Item 1 of Schedule IV of the Act in the light of the law laid down by the Apex Court in the above referred judgment it is clear that, even

order of simpliciter discharge and/or termination which are passed in utter disregard of principles of natural justice or with undue haste would constitute an unfair labour practice in Clause (f). In the facts of the present case it is undisputed that no enquiry was held before effecting discharge, no show cause notice was issued to the respondents, giving them a reasonable opportunity to explain as to why their services be not terminated and not only that, even termination orders are not served on the respondents but their employment is abruptly brought to an end by preventing them from performing their duties by oral orders. Both the Courts below have categorically recorded a finding that the discharge of the employees, though not penal, constitute an unfair labour practice covered by Clause (f) of Item 1 of Schedule, IV inasmuch as, the said discharge was in utter disregard of "principles of natural justice and "with undue haste". I see no reason to interfere with the said finding, as it is based on evidence and obviously it is a possible view not requiring any interference in exercise of Jurisdiction under Article 227.

14. In regard to the unfair labour practice covered by Clause (a) and (b) of Item 1 of Schedule IV of the Act, the learned Counsel for the petitioner submits that unless and until mens rea or motive is established a finding cannot be reached that the employer has indulged in an unfair labour practice. A bare perusal of Items in the Schedule shows that it is not necessary in each and every case of unfair labour practice, that motive has to be established. If the impugned action attracts any of the items, that by itself would be sufficient to constitute an unfair labour practice irrespective of motive. The petitioner had no good reason to discharge the respondents, who were selected in accordance with the procedure and who had worked for a continuous period of seven months, by an abrupt action. It appears that as the Central Office thought that the Regional Manager and the Divisional Controller have acted in subordination of the authority of the Board it has proceeded to discharge the respondents from service. If that be so, no fault can be found with the finding reached by the Courts below that the order of discharge was not in good faith but in colourable exercise of employer's right.

15. In regard to the victimisation, the learned Counsel for the petitioner has submitted that to constitute an act of victimisation, the services need to be put to an end for extraneous reasons. In the facts of the present, case both the Courts below have found that, for the alleged mistake or irregularity committed by two of the officers of the Corporation, the services of the respondents came to be terminated and/or they came to be discharged in utter disregard of the principles of natural justice and with undue haste. If for an error or mistake committed by the officers of the Corporation, the services of the respondents are brought to an abrupt end, it could be said that the said discharge was for extraneous reasons. Having regard to the totality of the facts and circumstances I am of the opinion that no case for interference in writ jurisdiction is made out and that the view taken by the Courts below is based on possible conclusions reached, on concurrent findings of fact and on material on record, to substantiate the said conclusions.

16. In support of the submission that principles of natural justice are not attracted in the facts of the present case, the learned Counsel for the petitioner has placed reliance on the judgment of the Apex Court in *Union of India and Others Vs. O. Chakradhar*, . In the said case appointments were made by the Railway Recruitment Board in the post of Clerk-cum-Typist. It was noticed thereafter that candidates were not subjected to typewriting tests which was an essential requirement and that there were also certain other irregularities in the conduct of the examination, a CB1 enquiry was made and after taking consideration the report of the CBI, having regard to the serious nature of irregularities. Railway Board took a decision to cancel the entire panel and to termination the services of the candidates concerned. The Apex Court in the facts of the said case held thus:

The nature and the extent of illegalities and irregularities committed in conducting a selection have to be scrutinised in each case so as to come to a conclusion about future course of action to be adopted in the matter. If the mischief played is so widespread and all pervasive, affecting the results, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notices to each selectee, The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance.

In my opinion, there was no mischief played in making appointments of the respondents and there was no motive whatsoever on the part of the officers of the Corporation to provide any back door entry to the present respondents. In the present case all that is contended is that the Central Office wanted 211 persons to be appointed as Drivers, whereas by mistake or irregularity, 79 more persons came to be appointed. In this view of the matter, the ratio laid down in the judgment referred to hereinabove has no application to the facts of the present case.

17. So far as exclusion of principle of natural justice is concerned, the next judgment relied upon by the learned Counsel for the petitioner is in *M.C. Mehta Vs. Union of India (UOI) and Others*, . In the said case, the Apex Court held that if on the admitted and indisputable facts, the only one conclusion is possible and permissible then the Court need not issue a writ merely because there has been a violation of principle of natural justice. In the said case as a result of recall of the earlier order passed by the Apex Court it became mandatory to restore the status quo ante prevailing on the date of the first order. As restitution was a must, in the facts of the said case, the Supreme Court found that what is permissible and what is possible is a single view and the case in hand comes squarely within the exception laid down in *S.L. Kapoor's* case, such is not the position in the instant petition. Reliance is also placed on the judgment of the Apex Court in *State of M.P. and Others Vs. Shyama Pardhi etc. etc.*, . In the said case persons not possessing the pre-requisite qualifications prescribed by the

statutory rules were wrongly selected and appointed as Auxiliary Nurse-cum-Midwife. The Supreme Court held that as the selection itself was per se illegal, termination of their appointment, did not attract principles of natural justice. In the instant petition all the respondents were very much eligible and qualified for being appointed and they were appointed in adherence to the procedure prescribed and hence the ratio laid down by the Apex Court in the said judgment is not applicable. The last judgment on which reliance is placed is in Dr Abdul Hameed Fazli and Another Vs. Adam Malik Khan and Others, . In the said case the Selection Committee appointed by Aligarh Muslim University while selecting a candidate for duly advertised permanent post of lecturer, selected few more candidates and keeping them in the reserved list, the persons from the reserved list came to be appointed in vacancies arising subsequently, in disregard of the procedure contained in the provisions of the Aligarh Muslim University Act, 1920. The Apex Court held that the procedure adopted by the University was in violation of Section 29(2)(a) of the said Act. The law laid down by the Apex Court in the said judgment also has no application to the facts of the present case as no provision of law or Rule is violated while appointing the respondents.

18. As against the above judgments referred to by the learned Counsel for the petitioner to contend that adherence to principles of natural justice was not necessary, the learned Counsel for the respondents has placed reliance on the following judgments to contend otherwise. The first judgment is in the case of Shrawan Kumar Jha and others Vs. State of Bihar and others, In the said case the Apex Court has held that while cancelling the appointment, holder of appointment order is entitled to opportunity of hearing before cancelling his appointment and cancellation orders issued without complying with the rules of natural justice would be liable to be set aside. The second judgment is in the case of Basudeo Tiwary Vs. Sido Kanhu University and Others, . In the said judgment the Supreme Court has held that non arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. Natural justice in turn is an antithesis of arbitrariness. It therefore follows that audi alteram partem, which is a facet of natural justice, is a requirement of Article 14. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis of fair, just and reasonable treatment. The learned Counsel for the respondents has also placed reliance on some more judgments wherein it is laid down that an administrative action, taken in breach of principles of natural justice, which adversely affects civil rights of the parties, would be bad in law.

19. After taking into consideration the law laid down in the above judgments I am of the view that in the present case, the petitioner employer has not acted reasonably, fairly and in a Just manner in abruptly terminating the services of the respondents by oral orders. Both the Courts below have concurrently found that there was absolutely no collusion between the officers of the petitioner

Corporation and the respondents/appointees. The only reason for termination was that more number of Drivers were appointed when the Central Office directed to appoint specified number. It is not the case of the petitioner that there were no sanctioned posts in existence and/or there is any infirmity in the appointments of the respondents, barring a mistake or irregularity committed by its officers and hence the Courts below cannot be faulted for holding that the petitioner has committed unfair labour practice covered by Clause (a), (b) and (f) of Item 1 of Schedule IV of the Act.

20. As the view taken by the Courts below is a possible view, no interference is called for. Therefore, writ petitions are dismissed. Rule is discharged. In the facts of the case there shall be no order as to costs.

21. At this stage, Shri P.K. Joshi, learned Counsel for the petitioner, prays for grant of stay for a period of six weeks to enable it to challenge the judgment and order. The judgment and order shall remain stayed for a period of said six weeks.