
(2001) 12 BOM CK 0072

In the Bombay High Court

Case No : L.P.A. No. 150 of 1995 in Writ Petition No. 6425 of 1987

Uttam Manohar Nakate

APPELLANT

Vs

Bharat Forge Company Ltd., Pune and Others

RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

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

Citation : (2002) 2 ALLMR 329 : (2002) 1 BomCR 401 : (2002) 93 FLR 293 : (2002) 2 MhLj 395

Hon'ble Judges : R.M. Lodha, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : S.J. Deshmukh and N.M. Ganguli, for the Appellant; P.K. Rele, Senior Advocate and Vinod Tayade, for S.S. Pakale, for the Respondent

Judgement

This Judgment has been overruled by : Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, AIR 2005 SC 947 : (2005) 104 FLR 812 : (2005) 1 JT 303 : (2005) 1 LLJ 738 : (2005) 2 SCC 489 : (2005) SCC(L&S) 298 : (2005) 1 SCR 545 : (2005) 2 SLJ 286

R.M. Lodha, J.—The learned Single Judge, by his judgment dated 9th February, 1995, affirmed the judgment of the Industrial Court dated 12th June, 1987, whereby the appellant's dismissal from service was held to be proper. In this Letters Patent Appeal, the said judgment of the learned Single Judge is under challenge.

2. For the sake of brevity and convenience, we shall refer to the appellant as "employee" and the first respondent as "employer". The employee who was working as a helper in the service of the employer, at about 11.40 a.m., on 26th August, 1983, in the first shift, was found lying fast asleep, on an iron plate in the corner of the department. The security officer of the security department, then, had to shake him vigorously to wake him up from his slumber. On the next date, i.e. 27th August, 1983, the employee was chargesheeted for the

misconduct of an act subversive of discipline within the meaning of Standing Order 24(1). The enquiry officer was appointed and he proceeded with enquiry. The employee "alleged that the enquiry officer proceeded with the enquiry hastily. The enquiry officer ultimately submitted his report ex pane holding the employee guilty of misconduct. Upon the receipt of the finding of the enquiry officer, the employer, by order dated January 17, 1984, dismissed the employee from the service with effect from 17th January, 1984. The employee filed a complaint of an unfair labour practice under Item 1(a), (b), (d), (f) and (g) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "MRTU & PULP Act") before the Labour Court for declaring that the employer had engaged in an unfair labour practice and accordingly they be directed to reinstate the employee in service in his original position with continuity of service and full backwages. The complaint was contested by the employer and on the basis of the pleadings of the parties, the Labour Court framed two issues, viz.(i) Whether the enquiry was proper and (ii) is the finding recorded by the enquiry officer perverse. The concerned Labour Court, by order dated 21st May, 1985, held that the enquiry was proper and the finding recorded by the enquiry officer was not perverse. Thereafter the enquiry officer proceeded with the case on merits. By order dated 31st July, 1985, the second Labour Court, Pune, held that the punishment of dismissal imposed upon the employee was harsh and disproportionate and no reasonable employer could impose such punishment for the proved misconduct and, thus, directed the employer to reinstate the employee on his original post with continuity of service and to pay him 50 percent of the backwages for the period from 23rd December, 1983 till the date of his reinstatement. Aggrieved by the order passed by the second Labour Court, both, the employee as well as the employer preferred separate revision applications before the Industrial Court. Both the revision applications, though, were heard together but disposed of by separate orders of even date, i.e. 12th June, 1987. While the revision application of the employer was allowed and the order of the Labour Court directing the employer to reinstate the employee in his original post with continuity of service and to pay him half backwages from 23rd December, 1983 till reinstatement, was set aside, the revision application filed by the employee was rejected. Aggrieved by the order of the Labour Court dated 12th June, 1987, the employee filed the writ petition before this Court which, as indicated above, came to be dismissed on 9th February, 1995, giving rise to the present Letters Patent Appeal.

3. Mr. S.J. Deshmukh, learned counsel appearing for the employee, strenuously urged that the act of sleeping in the factory, by itself, is not a misconduct under the Standing Orders and as the said act of sleeping did not result, nor could have resulted, in disturbing orderly functioning on the premises of the factory, such act of sleeping cannot be said to be an act subversive of discipline on the factory premises. In support of this submission, Mr. Deshmukh relied upon the judgment of the Apex Court in *Mulchandani Electrical and Radio Industries Ltd. Vs. The Workmen*, . The learned counsel urged that insofar as the judgment of the

Gujarat High Court in Manekchowk and Ahmedabad Manufacturing Company, Ltd. Vs. Industrial Court (I.G. Thakore, President) and Another, is concerned, it turned on its own facts and is not applicable to the present case. He submitted that to understand the exact law laid down in the decision, the judgment has to be read as a whole and the propositions and the observations contained in the judgment are restricted to the facts of each case, though the words in which such propositions and observations are made, it may appear that they are applicable to a wider field. In this connection, Mr. Deshmukh referred to the judgment of the Apex Court in the The State of Orissa Vs. Sudhansu Sekhar Misra and Others, wherein the Apex Court, while stating that a decision is only an authority for what it actually decides referred to *Quinn v. Leathern*, 1901 AC 495. The learned counsel for the employee submitted that even if it is assumed that the employee was guilty of misconduct, the punishment awarded by the employer was grossly and shockingly disproportionate and that being an act of legal victimisation, the employer was engaged in an unfair labour practice. The learned counsel sought to draw support from the judgment of the Apex Court in *Colour-Chem Ltd. v. Alaspurkar A.L. and Ors.*, 1998 (I) LLJ 694 .

4. Mr. P. K. Rele, the learned Senior Counsel appearing for the employer on the other hand, justified the view of the learned Single Judge. The learned Senior Counsel by referring to the order of the Second Labour Court, submitted that the said court having found that the charge regarding sleeping during deity hours was grave and serious deserved to be curbed with heavy hands, without any justifiable reason, held that the punishment of dismissal inflicted upon the employee was harsh and disproportionate and, therefore, the revisional Court rightly interfered with the order of the Labour Court. He further submitted that the learned Single Judge as well as the Industrial Court having held that the punishment inflicted upon the employee for proved charge of misconduct was not shockingly disproportionate, the view of the employer dismissing the employee from service was a reasonable view and it cannot be said that the employer was guilty of unfair labour practice under Item (a) of Schedule IV of Maharashtra Recognitions of Trade Unions and Prevention of Unfair Labour Practices Act. Mr. Rele heavily relied upon the judgment of Gujarat High Court in Manekchowk and Ahmedabad Manufacturing Company Ltd. (cited supra) and submitted that the act of sleeping during duty hours at work place is an act subversive of discipline and being a major misconduct and in the light of the past record of the employee, the view of the Industrial Court affirmed by the learned Single Judge, does not call for any interference.

5. We have reflected over the rival submissions made by the learned counsel and perused the judgments of the learned Single Judge, Industrial Court and the Labour Court. We also considered various authorities cited at bar.

6. The employee was charged of misconduct that on 26th August, 1983 at about 11.40 a.m. in the first shift while on duty was found lying fast asleep on an iron sheet in the department. The Security Officer of the security department then

had to shake him vigorously to wake him up from his slumber. Such an act of sleeping during duty hours at work place, according to employer, was subversive of discipline within the meaning of Standing Order 24(1). The relevant Standing Order 24(1) reads thus :

"24. The following acts and commissions on the part of a workman shall amount to misconduct:

(1) commission of any act subversive of discipline or good behaviour on the premises of the establishment;....."

7. The question is whether an act of sleeping during duty hours on the premises of the factory or establishment can be said to be misconduct, as contemplated under Standing Order 24(1) and covered by the expression "any act subversive of discipline on the premises or the establishment". The employee on duty is required to do the work assigned to him. If during duty hours, such employee indulges in sleep and needs to be woken up by somebody, such conduct of an employee is definitely destructive of discipline at the work place, be it the factory premises or establishment or office. Such act of sleeping cannot be said to be not subversive of discipline. It is not necessary as suggested by the learned counsel for the employee that an act to be subversive of discipline must result in disturbing orderly functioning of the establishment or the factory. The very fact that the employee is fast asleep during duty hours would lead others to believe that the discipline at the work place has been thrown overboard. The word "any" preceding the expression "act subversive of discipline" in model standing order 24(1) in contradistinction to "an" shows that intention is to cover wide and large number of acts which may include sleeping during duty hours in factory or office subversive of discipline. In *Manekchowk and Ahmedabad Manufacturing Company Ltd.*, the Division Bench of the Gujarat High Court, while dealing with the question whether sleeping in office is subversive of discipline and amounts to misconduct, observed thus :

In fact, the words "any act subversive of discipline" are wide enough to cover such an act of sleeping in office during his working hours, in the manner he was found. An employee goes to the office not for sleeping. He was required to work for which he is being paid. Sleeping in office, therefore, was subversive of discipline for it is an elementary rule of discipline that a person had to do his duty while in office and not indulge in sleep as is found to have been done by Narsinhbhai. Nor do we subscribe to the view that there should be more than one act subversive of discipline so as to amount to misconduct punishable under standing order 13 of the standing orders. One single act may well be enough to amount to misconduct as contemplated under Standing Order 12."

8. The judgment of the Apex Court in *Mulchandani Electrical and Radio Industries Ltd.*(supra), upon which strong reliance was placed by the learned counsel for the petitioner, is of no help in resolution of the problem posed before us. In the said case, one operator employed in a company committed assault outside the

factory and the question was whether under Standing Order 24(1) the said employee was guilty of commission of act subversive of discipline. The -Apex court in para 6 of the report held thus :

"6. On the question of misconduct the relevant Standing Order is Standing Order 24(1) which is in these terms :

"24. The following acts and omissions on the part of a workman shall amount to misconduct:--

xxxxx (1) Commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment;

xxxxx"

It was not disputed before us that the allegation of assault, if proved, would be an act subversive of discipline; what was contended on behalf of the respondent was that the alleged assault having taken place in the train between Thana and Mulund which was obviously outside the premises or precincts of the establishment, was not covered by Standing Order 24(1). The Labour Court also found that the alleged assault did not amount to misconduct under Standing Order 24(1) which, it was held, was restricted to acts and omissions inside the premises of the establishment. In our opinion, on a plain reading of the clause, the words "within the premises or precincts of the establishment" refer not to the place where the act which is subversive of discipline or good behavior is committed but where the consequence of such an act manifests itself. In other words, an act wherever committed, if it has the one effect of subverting discipline or good behavior within the premises or precincts of the establishment, will amount to misconduct under Standing Order 24(1). We are unable to agree that Standing Order 24(1) leaves out of its scope an act committed outside though it may result in subversion of discipline or good behaviour within the premises or precincts of the establishment in question. Such a construction in our view would be quite unreasonable."

The Apex Court, thus, while construing the words "within the premises or precincts of the establishment", held that the said words refer not to the place where the act which is subversive of discipline or good behaviour is committed but where the consequence of such an act manifests itself. The Apex Court in other words held that an act wherever committed, if it has the one effect of subverting discipline or good behaviour within the premises or precincts of the establishment, will amount to misconduct under Standing Order 24(1). In our view, the said judgment of the Apex Court does not help the contention of Mr. Deshmukh, put forth before us that to be an act subversive of discipline, it must result in disturbing orderly functioning.

9. The view taken by the Labour Court as well as by the Industrial Court and the Learned Single Judge to the extent that the charge regarding sleeping during duty hours is a grave and serious charge and constitutes major misconduct, does

not call for any interference. As the charge proved against the employee is a major misconduct, obviously, the employer cannot be held to be guilty of having engaged in an unfair labour practice under Clause (g) of Item 1 of Schedule IV of the Maharashtra Recognitions of Trade Unions and Prevention of Unfair Labour Practices Act. This view finds support from the judgment of the Apex Court in Colour-Chem Ltd. (cited supra).

10. However, the question arises whether for the proved misconduct, the punishment awarded by the employer to the employee is grossly disproportionate and would it be an unfair labour practice being an instance of legal victimisation under Clause (a) Item (1) of Schedule IV of the Maharashtra Recognitions of Trade Unions and Prevention of Unfair Labour Practices Act. Since this question can be answered directly on the basis of the judgment of the Apex Court in Colour-Chem Ltd., we do not intend to burden the judgment with various decisions. We straightway refer to the decision of the Apex Court in Colour-Chem Ltd. In Colour-Chem Ltd. the facts were : on the night between May 5/6, 1982 at about 3.30 a.m., two plant operators, 10 mazdoors and one shift supervisor were found sleeping on a surprise visit made by the plant in-charge, though the machine was kept working. The shift supervisor was found sleeping in the cabin while plant operators and 10 mazdoors were found sleeping on the terrace of the factory. The mazdoors were let off by warning but two plant operators were chargesheeted of the misconduct and after conclusion of the domestic enquiry were dismissed from service. Aggrieved workmen filed complaints under Item I of Schedule IV of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, alleging that employer committed diverse unfair labour practices. The Labour Court held that the complainants were guilty of misconduct and though they failed to prove that the employer committed unfair labour practice covered by Clauses (a), (b), (d) and (f) of Item 1 of Schedule IV, the punishment of dismissal being grossly disproportionate amounted to unfair labour practice on the part of the employer as covered by Clause (g) and, accordingly, the Labour Court passed an order of reinstatement with appropriate backwages. The complainants as well as the employer were aggrieved by the order of the Labour Court and preferred two revision applications before the Industrial Court. The Industrial Court dismissed both the revision applications and confirmed the order of the Labour Court. The matter was taken to the High Court and the writ petition came to be dismissed. The matter was then carried to the Supreme Court. Before the Apex Court, three questions arose for consideration: viz. (1) Whether Clause (g) of Item 1 of Schedule IV of the Act is applicable to the facts of the case; (2) If not, whether the employer can be said to have been guilty of having committed unfair labour practice as per Clause (a) of Item 1 of Schedule IV of the Act on the basis of which the order of the Labour Court as confirmed by the higher Courts can be supported and (3) Whether the order of reinstatement with back wages as passed by the Labour Court and confirmed by the higher Courts is justified, in the facts and circumstances of the case.

11. While resolving the controversy in respect of first point, the Apex Court held that where the workman is found guilty of major misconduct, Clause (g) of Item 1 of Schedule IV shall not be attracted as one and only subject matter of Clause (g) is the misconduct of minor or technical character. On point No. 2 as to whether the employer can be said to have been guilty of having committed unfair labour practice as per Clause (a) of Item 1 of Schedule IV, the Apex Court observed that imposition of such shockingly disproportionate punishment is squarely covered by Clause (a) of Item 1 of Schedule IV being legal victimisation. The Apex Court held thus :

"... ...Imposition of such shockingly disproportionate punishment by itself, therefore, has to be treated as legal victimisation apart from not being factual victimisation as on the latter aspect the Labour Court has held against the respondent-workmen and that finding has also remained well sustained on record. Thus it must be held that the management even though not guilty of factual victimisation was guilty of legal victimisation in the light of the proved facts which squarely attracted the ratio of the decisions of this court in Hind Construction (supra) and Bharat Iron Works (supra). It is easy to visualise that no reasonable management could have punished a delinquent workman who in the late hours of the night shift by about 3.30 a.m. had gone to sleep keeping the machine in a working condition especially in the absence of any gross misconduct reflected by the past service record, with the extreme penalty of dismissal. It is also interesting to note that this was a peculiar case in which the Plant In-charge found during his surprise visit at 3.30 a.m. in the early hours of the dawn entire work force of 10 mazdoors and 2 operators like the respondents and the supervisor all sleep. It is also pertinent to note that so far as 10 mazdoors were concerned they were let off for this very misconduct by mere warning while the respondents were dismissed from service. It is of course true that the respondents were assigned more responsible duty as compared to mazdoors, but in the background of surrounding circumstances and especially in the light of their past service record there is no escape from the conclusion that the punishment of dismissal imposed on them for such misconduct was grossly and shockingly disproportionate, as rightly held by the Labour Court and as confirmed by the revision court and the High Court. By imposing such grossly disproportionate punishment on the respondents the appellant-management had tried to kill the fly with a sledge hammer. Consequently it must be held that the appellant was guilty of unfair labour practice. Such an act was squarely covered by Clause (a) of Item 1 of schedule IV of the Act being legal victimisation, if not factual victimisation."

12. The legal position, thus, seems to be well established that for the proved misconduct, if the punishment of dismissal or discharge is found to be grossly disproportionate in the light of the nature of misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in such circumstance, imposing of such punishment could be treated as legal victimisation itself and, therefore, the employer could

be held to have engaged in unfair labour practice under Clause (a) of Item 1 of Schedule IV.

13. Turning now to the facts of the present case, it may be noticed that the Labour Court after holding that the employee was guilty of major misconduct, after taking into consideration the past record of the employee, held that because of length of service of the employee for longer period of ten years and for one lapse of this nature, it is not proper to remove him from the service. The Labour Court was of the view that the punishment of removal imposed upon the employee by the employer was absolutely harsh and disproportionate and no reasonable employer could impose such punishment in such circumstance. The revisional Court, however, interfered with the view of the Labour Court and observed that the misconduct by itself being serious could be punished with dismissal, as the employee was found asleep while on duty and had to be awakened. The Industrial Court went on to observe that in these circumstances the fact that an employee had put in 10 years service and that previous misconducts were not serious, did not make the punishment shockingly disproportionate. The "learned Single Judge affirmed the view of the Industrial Court. The question that arises for our consideration is whether looking to the nature of the proved charge that the employee was found sleeping during duty hours and was awakened by the security officer, can it be said that the punishment of dismissal is shockingly or grossly disproportionate. If the answer is in affirmative obviously, such punishment could be treated as legal victimisation and employer would be guilty of having engaged in an unfair labour practice under Clause (a) of Item 1 of Schedule IV. The charge which has been proved against the employee has already been referred to by us above. As regards the past record, be it noted, that the employee joined the employer in the year 1969. The present incident took place in the year 1986. During this period of service, the service record of the employee shows that on 12th January, 1971 he was served with show cause notice having been found with a napkin of the company at the gate while going home. The employee tendered apology in writing and on that count the employer issued him warning. In the year 1977, the employee is said to have been chargesheeted for passing time leisurely and on that count also he was issued warning and suspended for a day. Then in the year 1982 the employee is said to have been warned by the employer while condoning his absence. We find that looking to the nature of the charge, i.e. the employee was found sleeping during duty hours, the employee could not have been inflicted with the punishment of dismissal. The past record which has been referred to hereinabove and the misconduct proved did not justify the punishment of dismissal as no reasonable employer would ever impose the punishment of dismissal in such circumstances. Thus, it seems to us that inflicting of punishment upon the employee in the facts and circumstances of the present case is a legal victimisation covered under Clause (a) of Item 1 of Schedule IV. Though Mr. Rele, learned Senior Counsel appearing for the employer, strenuously urged that the view taken by the employer in - dismissing

the employee for the proved misconduct, has been affirmed by the Industrial Court as well as learned Single Judge of this Court and, therefore, it cannot be said that no reasonable employer could have taken such view, we find ourselves unable to accept the said submission of Mr. Rele. If an act of employer is unfair labour practice and found to be so by the higher Court, merely because the Industrial Court or for that matter the learned Single Judge affirmed that view, could not lead to an inference that the view taken by the employer was reasonable. Look at the case of Colour-Chem (supra) where two plant operators, 10 mazdoors and one shift supervisor were found sleeping though the machine was kept working. The mazdoors were let off by the employer by warning them but for the same misconduct the plant operators were dismissed from service by the employer. The Apex Court held that it is true that the plant operators were assigned more responsible duties as compared to mazdoors but in the background of surrounding circumstances and in the light of the past record, there is no escape from the conclusion that the punishment of dismissal imposed on them for such misconduct was grossly and shockingly disproportionate. We have no hesitation, therefore, in holding that on the facts of the present case, in the light of misconduct proved against the employee and the past service record, the punishment imposed on the employee by the employer was shockingly and grossly disproportionate and the Labour Court was justified in holding so and the Industrial Court erred in interfering with the order of the Labour Court and the learned Single Judge also erred in not setting aside the order of the Industrial Court. Heavy reliance placed by the learned Single Judge on the judgment of the Gujarat High Court in Manekchowk and Ahmedabad Manufacturing Co. Ltd. while affirming the judgment of the Industrial Court, in the facts of the present case was not proper. In Manekchowk and Ahmedabad Manufacturing Co. Ltd., the Division Bench of Gujarat High Court did not interfere with the order of the Industrial Court by observing thus :

"In the first place, as we have pointed out hereabove, he was fast asleep even at 11.40 a.m. in the office, i.e. soon after his having come to the office. Several other persons must be working there and in all that atmosphere, he finds it comfortable to have sound sleep so much so that he had outstretched his legs on the gadi and wakes up only shouted by the cashier working in the office. He did not wake up when the manager had passed through that office at that time. It was subversive of all discipline expected of clerks working in such mills and would create very bad example on others if he were to be let off lightly by fining him Rs. 5 or Rs. 6 or suspending him for four days. Not only that, but he tried to put up a false excuse or an excuse which could not be believed by the manager and that he was found committing such an act over again as before he had come to be dismissed and clemency was shown to him later at the instance of Majoor Mahajan. If, in such circumstances, the manager took a serious view of the matter and dismissed him from service after giving him a fair enquiry, it is not possible to say that interference is in any way justifiable by saying that lesser sentence should have been enough or that it was severe or harsh. Could it be

said that no other person in the given instances would have awarded any such punishment at all? We think not. Could it be said that the order lacked propriety as it was shockingly disproportionate to the nature of the act committed by him?"

The case of Manekchowk and Ahmedabad Manufacturing Co. Ltd. would be of no help to the employer in defending the punishment of dismissal for the reasons which we have already indicated above.

14. Having held that the punishment of dismissal inflicted upon the employee for the proved misconduct is shockingly and grossly disproportionate and that the employer, by doing so, had engaged himself in an unfair labour practice under Clause (a) of Item 1 of Schedule IV of the Maharashtra Recognitions of Trade Unions and Prevention of Unfair Labour Practices Act, obviously, the reinstatement would be the normal rule and we, at the first blush thought of restoring the order of the Labour Court whereby the Labour Court ordered reinstatement of the employee and payment, of 50 percent of back wages from the date of dismissal till his reinstatement. But on a deeper thought, particularly in view of the fact that for more than 15 years the employee is out of job and hardly 5-6 years service is left, we thought that this would not be a fit case for granting reinstatement at this stage. The employee was working as helper with the employer and taking overall facts into consideration of the case, direction to the employer to pay a lump sum of Rs. 2,50,000/- shall meet the ends of justice.

15. We accordingly dispose of the Letters Patent Appeal by the following order:

(i) The judgment of the learned Single Judge dated 9th February, 1995 and the order of the Industrial Court dated 12th June, 1987 are quashed and set aside.

(ii) The order passed by the second Labour Court dated 31st July, 1985 is modified by directing the employer to pay a sum of Rs. 2,50,000/- to the employee within one month from today. In the event of failure to pay the said amount to the employee within one month from today, the employer shall be liable to pay interest at the rate of 9 per cent per annum -from today till such payment is made.

(iii) Parties to bear their own costs.

(iv) Certified copy of the order expedited.