

(1997) 07 BOM CK 0098

In the Bombay High Court

Case No : Writ Petition No. 1429 of 1995

Viswesvarayya Industrial Research and Development Centre	APPELLANT
Vs	
Dilip Madhavrao Vaidya	RESPONDENT

Date of Decision : 31-07-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1998) 2 LLJ 142

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : P.K. Rele, for the Appellant; Ms. Revati Mohite Dere, for the Respondent

Judgement

1. The concurrent orders passed by the 2nd Labour Court, Bombay on November 24, 1994 and Industrial Court on June 9, 1995 are challenged in the writ petition filed by the petitioner under Articles 226 and 227 of the Constitution of India. The 2nd Labour Court by the order dated November 24, 1994 in the complaint filed by Respondent No. 1 Mr. Dilip Madhavrao Vaidya (employee) against the petitioner M/s. Visvesvarayya Industrial Research and Development Centre (Employer) declared that the employer has committed unfair labour practice under items 1(b) and 1(d) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (MRTU and PULP Act) and directed the employer, to reinstate the employee with continuity of service with effect from November 1, 1988 with full back wages and continuity of service and all other consequential benefits. The 2nd Labour Court thus quashed and set aside the employee's termination dated October 31, 1988. The employer carried the order dated November 24, 1994 passed by the 2nd Labour Court in revision to the Industrial Court but without success and the order passed by the 2nd Labour Court was maintained.

2. Facts, in brief to the extent these are relevant for the disposal of the present writ petition are that the employee was appointed by the employer vide

appointment letter dated December 30, 1987 as Research Associate with effect from December 21, 1987 on the consolidated salary of Rs. 2000 per month on probation period of six months. It was stipulated in the appointment order that the probation period of the employee was six months after which his services may be continued if found satisfactory and probationary period may be extended if deemed necessary. Certain other conditions were also stated in the appointment order which are not material for the present purpose. The employer is a company incorporated under the Companies Act, 1956 and is engaged in scientific research and development. On October 31, 1988, the employer vide termination order intimated the employee that his work was not found satisfactory on the post of Research Associate during the period of probation and therefore the employer was constrained to terminate his services and the employee's services were terminated effective from November 1, 1988. In the termination letter it was stated that the employee is being paid one month's salary in lieu of notice along with 15 days retrenchment compensation in cash and he was advised to contact Accounts Department on any of working day for settlement of his dues, if any. The said termination order was accepted by the employee under protest subject to the course of legal action available to him under law. The employee then filed a complaint on January 30, 1989 against the employer alleging unfair labour practices on their part under Items 1(a), 1(b) and (d) of Schedule IV of the MRTU and PULP Act. It was inter alia averred by the employee in the complaint that his services have been terminated mala fide and with ulterior motives and by way of colourable exercise of employer's rights. According to the employee, though he was appointed on probation for a period of six months, he was automatically confirmed after the expiry of the said period. The employee averred in the complaint that he never received any memorandum, warning or charge-sheet for his unsatisfactory performance and therefore his termination was non est, violative of principles of natural justice against equity and good conscience. The employee further averred in the complaint that the false evidence was sought to be created by the employer in order to victimise him. The real cause of his termination, according to the employee, was some differences on principles between him and some of his superiors and colleagues. The employee reiterated that his termination of service was by way of victimisation for patently false reasons.

3. The employer filed the written statement on October 3, 1989. In the written statement the employer sought to set up the defence that the services of the complainant were found unsatisfactory during the period of probation. It was also replied in the written statement that the employer was engaged in service industry and therefore, pattern of behaviour of employee was highly important and decisive in any kind of transaction with the outsiders. The employer's defence was that the employee was on probation and during the unconfirmed period his work was not satisfactory and therefore his services have rightly been terminated. The employer also stated in the written statement that it would produce such documents as were available with it to substantiate the

unsatisfactory performance or the attitude or intolerance of the employee while handling the job assigned to him. The employer craved leave of the Court about its right to lead evidence as may be necessary in support of its contention about the unsatisfactory performance of the employee.

4. It appears that the employer filed certain documents before the Labour Court on September 7, 1990. Issues were framed by the Labour Court on October 22, 1991. The employee examined himself whereas on behalf of employer one Shri Jayant Pandurang Ghate was examined and he sought to prove certain documents particularly Exhibit C-10, report prepared by the employee, the confidential report dated April 8, 1988 (Exhibit C-11), the confidential report dated September 15, 1988 (Exhibit C-12), copy of the minutes dated May 20, 1988 (Exhibit C-13), copy of memo dated June 24, 1988 (Exhibit C-14), the note dated September 9, 1988 (Exhibit C-15) and communication addressed by Executive Director to Dr. V. V. Kale and J. P. Ghate on October 27, 1988 (Exhibit C-16).

5. The Labour Court as well as the Industrial Court on the basis of the available material found that the employer indulged in unfair labour practices and the termination order was liable to be set aside and accordingly set aside the termination order.

6. Mr. P. K. Rele, the learned counsel appearing for the employer assailed the concurrent orders passed by the Labour Court and the Industrial Court on three grounds, namely (i) that even if no opportunity was given to the employee before the termination order was passed on October 31, 1988 effective from November 1, 1988 to explain his unsatisfactory performance, it was open to the employer to justify the order of termination based on unsatisfactory work of the employee before the Labour Court. According to him, from the oral as well as the documentary evidence led by the employer, unsatisfactory work of the employee was established and therefore, the employer was able to justify his action, (ii) that the action taken by the employer in terminating the services of the employee on the ground of his unsatisfactory work was bona fide and in good faith and therefore, it cannot be said that the employer has indulged in any unfair labour practice, and (iii) alternatively if the termination order is held to be bad in law, the appropriate relief in the facts and circumstances of the case will not be reinstatement of the employee and that this Court should mould the relief by awarding reasonable compensation to the employee instead of reinstatement and full back wages. In support of his aforesaid contentions, Mr. P. K. Rele relied upon the decision of this Court in Prafulla Dattatraya Pore v. J. K. Chemicals Ltd. and others, 1989 (59) FIR 306, Madhukar R. Mahadik v. Indian Express Newspapers Pvt. Ltd., 1993 II LLJ 667, the judgment of the Apex Court in The United Planters Association of Southern India Vs. K.G. Sangameswaran and another, , Workmen Vs. Bharat Fritz Werner (P) Ltd. and Another, , Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, , Sudhir Vishnu Panvalkar Vs. Bank of India, and Workman of Pan American World Airways, K.

Ramachandran Vs. Management of M/s. Pan American World Airways and Another, .

7. The contentions of the learned counsel for the petitioner are stoutly opposed by Ms. Revati P. Mohite-Dere, the learned counsel appearing for Respondent No. 1. She supported the orders passed by the 2nd Labour Court and Industrial Court and urged that both the Courts have disbelieved the evidence led by the employer justifying its action. According to her, the Courts below have not only disbelieved the evidence led by the employer justifying its action, but they seriously doubted the correctness and genuineness of the material produced before the Tribunal to show that the work of the employee was not satisfactory. Ms. Dere, the learned counsel appearing for Respondent No. 1 strenuously argued that at no point of time the employee was informed about his unsatisfactory work or his inefficiency and at no point of time the employee was served with any memorandum, notice or charge-sheet that his work was not satisfactory or upto the mark. According to her, the entire action of the employer was aimed to victimise the employee on the concocted ground of unsatisfactory work though the real ground was otherwise and accordingly the termination of the employee was neither in good faith nor bona fide but was actuated with ulterior motive and was done in colourable exercise of power. Ms. Dere also urged that admittedly the employer was governed by Model Standing Orders, on expiry of period of three months the employee attained permanency and he could not have been terminated without holding enquiry into the alleged misconduct and affording an opportunity to the employee if at all the work of the employee was unsatisfactory to him. She would urge that the employer was not entitled to justify its hopelessly illegal action of termination by leading evidence before the Labour Court when employee was not charge-sheeted and no enquiry was held. She submitted that the impugned orders passed by the Courts below were based on proper appreciation of the evidence on record warranting no interference by this Court in extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. In support of her submissions, the learned counsel for the employee relied upon *Western India Match Company Ltd. Vs. Workmen*, , *M.K. Agarwal Vs. Gurgaon Gramin Bank and Others*, , *D.K. Yadav Vs. J.M.A. Industries Ltd.*, , *Theatre Employees Union and Others v. S. V. Kotnis and others* 1992 (64) FLR 995 and *Wai Taluka Sahakari Kharedi Vikri Sangh Ltd., Satara v. Bajirao Mahadeo Mahadik* 1992 (64) FLR 823.

8. It may be observed right now that Mr. Rele, the learned counsel for the employer did not dispute the legal position that though the employee was granted six months probation period in the appointment letter yet in view of the Model Standing Orders which admittedly are applicable to the employer, on the expiry of three months of the service of the employee, he attained the status of permanent employee. Thus, there is no dispute that on expiry of three months in the service, the employee became permanent under the Model Standing Order even though no order was passed by the employer making the employee permanent. There is also no dispute and rather it is admitted both in the

evidence of Mr. Ghate, the witness produced by the employer and also during the course of arguments of Mr. Rele that at no point of time right from the date when the employee joined his service till his services were terminated by termination letter dated October 31, 1988, any written memorandum or note or warning in writing or anything of that sort was issued to the employee bringing to his notice that his work was not satisfactory or that his performance was not upto the mark or that he was not efficient in the discharge of his duties. Pertinently, in the termination letter also except mentioning that employee's service as probationer on the post of Research Associate has not been found satisfactory during the period of probation, no mention is made of the confidential reports sought to be relied upon by the employer during the trial in evidence before the Labour Court. More importantly, in the written statement filed by the employer almost after eight months except stating that the employer would produce such documents as were available to substantiate the unsatisfactory performance or the attitude or intolerance of the employee while handling the job assigned to him no details of the confidential reports sought to be relied upon during the trial in the evidence were given. There is not even a whisper, much less a mention, of the confidential reports in the written statement which were produced almost after 11 months of filing of the written statement. If the confidential reports were in existence before the termination order was passed, there was no reason why reference of those confidential reports was not made in the written statement even if they were not referred in the termination order. Where was the occasion for the employer to state in the written statement that the employer would produce such documents as were available with it to substantiate the unsatisfactory performance. If the confidential reports relating to unsatisfactory work of the employee were in existence and recorded at the time these were alleged to have been recorded, the said confidential reports obviously were available with the employer and in the written statement those confidential reports could have been referred and mentioned and as a matter of fact ought to have been produced along with the written statement. The fact on the other hand cannot be lost sight of that these documents in the nature of confidential reports were produced before the Labour Court after 11 months of the filing of the written statement. In this background if the Industrial Court doubted the correctness of the confidential reports sought to be relied upon by the employer for justification of its action, cannot be faulted. It would be appropriate here to reproduce the observations of the Industrial Court in this regard which read thus :

"It is no doubt true, that the respondent/petitioner Centre has produced certain documents which are said to be the confidential reports of his superiors at Exhs. C-11 to C-15 and signed by some of the authorities of the petitioner Centre. But it is Pertinent to note that such notice/reports have not been served upon the complainant or that it has not brought this fact to the notice of the complainant by issuing letter etc. It appears that the petitioner Centre has produced copies of the confidential reports of the superiors in respect of the complainant prepared from April 8, 1988 to September 15, 1988 stating that his work was

unsatisfactory and his behaviour, attitude was not proper towards his superiors and colleagues. If at all the petitioner Centre or its officers have observed that the work of complainant/Respondent No. 2 was unsatisfactory and his attitude was unsatisfactory towards his colleagues and superiors since April 8, 1988, what prevented the petitioner Centre to issue order regarding extending the period of probation of the complainant for certain period after June 20, 1988. But the petitioner Centre never issued any letter to the complainant or served the copies of confidential reports to him. Therefore, there is much force in the contention of the complainant employee that such reports are prepared later on."

The Industrial Court further observed in the light of the observations made by the trial Court thus :

"The learned Trial Judge has also considered this aspect at length and there is much force in the contention of the Respondent No. 2 complainant that such documents are prepared later on with an intention to create certain documents. Moreover, unless confidential reports are communicated or served upon the interested person, i.e., complainant, if at all it is prepared and kept in the record, it does not have any evidentiary value. Therefore the Trial Judge has rightly come to the conclusion that such documents are prepared with an intention to victimise the complainant and/or with an intention to show him the patently false reasons and following the management policy with an intention to support the order of termination of the complainant without following any due process of law."

9. The reasons set out by the Industrial Court for doubting the correctness of the confidential reports and the suspicion that the said confidential reports might have been prepared later on cannot be said to be unfounded or conjectural.

10. Even otherwise an independent look at the so called confidential reports relied upon by the employer to justify its action terminating the services of the employee based on unsatisfactory work, creates serious doubts and suspicion about the manner, mode and preparation of these confidential reports. There is no definite pattern of preparation of such so called confidential reports. The employer has not led any evidence to show the consistent manner of preparation of confidential rolls of its employees. The first such confidential report produced before the Labour Court in Exhibit C-11 dated April 8, 1988, is signed by Mr. J. P. Ghatge. It is not countersigned by any other officer. There is no dispute by that time the employee acquired the status of permanent employee. The last paragraph of the said report created serious doubt about its preparation on April 8, 1988 as is sought to be made out to be. The last paragraph of the said report reads thus :

"Further, Mr. Vaidya has been asked to prepare industry/export potential reports on 10 sectors/areas in which we propose inviting trade delegations for our WTCABA 1988 during November 1988, and broad guidelines for preparation of these reports have also been given to him."

11. The trade delegations were to be invited after seven months of the recording

of the so called confidential report dated April 8, 1988 and nothing is recorded in this report that employee has not done anything regarding thereto or done something adversely. Moreover, this confidential report was never communicated to the employee. The employee had no inkling or idea that his work has not been found or is not being found satisfactory by the employer. The second so-called confidential report relied upon by the employer is dated September 15, 1988 and that too suffers from same infirmities which the report dated April 8, 1988 suffers from. This report also was never communicated to the employee. Another report relied upon by the employer is Exhibit C-13 dated May 20, 1988 which is signed by the Executive Director and two others namely Dr. V. V. Kale and J. P. Ghate had admitted in his cross-examination that the document Exhibit C-13 was prepared after they held discussion for confirmation of the employee's appointment. How could such document be used against the employee for his alleged unsatisfactory work which was prepared after the discussion was held by the Executive Director and two senior officers for confirmation of the employee. As a matter of fact, the entire conduct of the employer in terminating the service of the employee on the ground of unsatisfactory work appears to be wanting in good faith and cooked up and rightly held to be so by the Industrial Court that the documents in the nature of confidential reports relied upon by the employer seeking justification of its action appear to have been prepared later on. There cannot be a worse case of victimisation than the case in hand where the employer in order to get rid of employee who has acquired permanency sought to justify its illegal action by taking aid of unfounded ground of unsatisfactory work. These observations have become necessary since Mr. Rele strenuously urged that it was open to the employer to justify the action of termination on the ground of the employee's unsatisfactory work before the Labour Court and that the act of termination was bona fide and in good faith. The first two contentions of Mr. Rele, therefore have no merit.

12. Ms. Dere the learned counsel for the respondent No. 1 relied upon two decisions of this Court in Theatre Employees Union and Others (supra) and Wai Taluka Sahakari Kharedari Vikri Sungh Ltd. (supra) and sought to urge that it was not open to the employer to lead any evidence before the Labour Court to justify its action of termination, since no inquiry was held against the employee nor he was charge-sheeted. This position has been vehemently refuted by Mr. Rele and he submitted that the Apex Court has consistently held that an unfair and improper inquiry held by employer to go into the misconduct of employee is no better than inquiry held not at all and therefore in either eventuality it is open to the employer to lead evidence before Labour Court or Industrial Tribunal, as the case may be to justify its action. In. Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, the Apex Court observed thus at p 110 :

"10 Retrenchment as defined in Section 2(oo) of the Industrial Disputes Act and as held by this Court in several cases means termination of service for any reason whatsoever otherwise than punishment inflicted by way of disciplinary

action and the other exceptions indicated therein. In the present case though no formal domestic inquiry had been held the employer took the stand in the adjudication that termination was grounded upon loss of confidence and substantiate that allegation by leading evidence. The legal position firmly established is that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open to the employer to ask for such opportunity in the course of adjudication. In the facts of the present case, the order of termination grounded upon loss of confidence has been justified before the Labour Court and the Labour Court has come to that conclusion upon assessment of the evidence."

13. The law laid down by the Apex Court and consistently crystallized by the series of judgments of the highest Court leaves no manner of doubts that if there was not appropriate domestic enquiry or no enquiry was held at all by the employer, yet it is open to the employer to seek leave of the Court in adducing evidence in the course of adjudication of industrial dispute and accordingly justify its action. Such course permissible to the employer, as ruled by the Apex Court, with reference to the Industrial Disputes Act, is equally applicable to the proceedings under M.R.T.U. & P.U.L.P. Act. In series of cases, to refer some of these, *Amravati Dist. Central Co-operative Bank Ltd. v. Shamrao*, 1982 MLJ 436, *Sanjiv F. Jathav v. Larsen and Toubro Ltd. and others* 1986 2 CLR 17, *The Cosmos India Rubber Pvt. Ltd. v. Mumbai Mazdoor Sabha and Others* 1989 1 CLR 432, *Ram Naresh Tripathi v. S. D. Rane and others* 1991 2 CLR 454 and *Madhukar R. Mahadik v. Indian Express Newspaper (P) Ltd. (supra)*, this view has been taken. Thus I hold that it was open to the employer to lead evidence before the Labour Court justifying the action of the termination of the employee on the ground of his unsatisfactory work but in the present case the Courts below did not believe the employer's evidence. Any order terminating the services of an employee on the ground that his work is unsatisfactory is on the face of it an order which cast stigma on the employee and is in the nature of punishment and if such illegal order is sought to be justified by creating doubtful documents, the unfair labour practice on the part of the employer is further compounded.

14. Mr. Rele, the learned counsel for the petitioner strongly relied upon the Single Bench judgment of this Court-Prafull Dattatraya Pore v. J. K. Chemicals Ltd. and others (supra) and urged that the case in hand is almost similar and identical to Prafull Dattatraya Pore, and therefore, the impugned orders are liable to be set aside. I am afraid the reliance placed by Mr. Rele on Prafull Dattatraya Pore is not well founded. It will be seen that in Prafull Dattatraya Pore the employee was informed by the employer that he was unsuitable for the job for which he has been appointed and that he would not be confirmed. This Court also found that the employee was given sufficient opportunity to improve but employee's work was not found upto the mark that led to his discharge. Present is a case where right from the date of his joining the duties till the date of his termination not a single memorandum or note was issued to the employee about

his unsatisfactory work. It is trite principle in the service jurisprudence that an uncommunicated adverse remark in the confidential report has no sanctity in law and cannot be used for discharge, dismissal or termination of such employee. How could certain confidential reports which were for the first time produced before the Labour Court and which were not communicated to the employee at any point of time could form the basis and foundation of his termination. Moreover, the Labour Court as well as Industrial Court have doubted the said documents. If person is removed or discharged on the ground of unsatisfactory work obviously a stigma is attached to his character and future prospects of his getting any job becomes dim and almost negligible because the earlier employer had found him inefficient and not suitable for the job. This course definitely amounts to discharging or removing the employee on the ground of misconduct and therefore, the said action on the part of the employer has to be tested on the touch stone of well settled legal principles and when both the Labour Court and the Industrial Court have not found any worth and merit in the justification sought to be placed by the employer, a case for interference under Articles 226 and 227 of the Constitution of India cannot be said to have been made out.

15. In *Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh*, the Apex Court observed that terminating the services of an employee on the ground of unsatisfactory work without any enquiry leads the public to believe that the services of such employee have been terminated on account of inefficiency or misconduct and this does cast a stigma on his character.

16. In *Anoop Jaiswal v. Government of India and another*, AIR 1989 SC 636 the Supreme Court ruled that where the form of the order is merely camouflage by an order of dismissal for misconduct, it is open to the Court to go behind the form and ascertain the true character. In the present case it appears that the termination of the employee on the ground of unsatisfactory work was only camouflage because from the oral and documentary evidence led by the employer it is revealed that it was also based because of erratic and arrogant behaviour of the employee. Mr. J. P. Ghate in his deposition before the Labour Court testified that the attitude of the employee towards the colleagues was not co-operative. His behaviour was incompatible and erratic. However, the employee was never informed of the said misconduct nor was charged for the said misconduct yet the said misconduct was sought to be supplied as defence to justify the order of termination before the Labour Court.

17. It would not be out of place to mention here the observation made by the Apex Court in *Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others*, wherein the Apex Court observed thus :

"5. We must emphasize that in the relationship of master and servant there is a moral obligation to act fairly. An informal if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defects in his work and deficiency in his performance. Defects or deficiencies, indifference or indiscretion may be with the employee by

inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

18. The Apex Court thus ruled that even in the matter of relationship of master and servant, there is a moral obligation to act fairly and the assessment of the work of the employee should be informed formally or informally and he should be made aware of the defect in his work and deficiencies in his performance, timely communication of the assessment of the work would put the employee on the right track and in the absence of any communication the action would be arbitrary. In the present case, the action of the employer in terminating the services of the employee on the ground of unsatisfactory work without informing him or without making him aware is nothing but a clear case of arbitrary exercise of power. Though the employer's witness sought to depose that the employee was informed orally about his unsatisfactory work yet in view of totality of circumstances it is not possible to accept his statement particularly on the face of the conduct of the employer and the finding recorded by the two Courts below that even documents relating to confidential reports seem to have been prepared later on. The fact is and that is not disputed that Exhibit C-10, the report which was initially prepared by the employee was published in the World Trade Review in the name of the employer as well as Mr. J. P. Ghate. The employee was only Research Associate and Mr. J. P. Ghate, admittedly was Senior Research Manager, obviously, the report which was submitted by the employee had to be edited and corrected by the Senior Research Manager particularly when it was to be published in joint name. This Court does not intend to assess the performance but the fact of the matter is that the evidence led by the employer has not been believed by the Labour Court as well as Industrial Court. All in all, the employer failed and miserably, so to say, to justify, its action before the Labour Court whereby the services of the employee were terminated on the ground of unsatisfactory work and the concurrent findings of the two Courts below in not finding the justification reliable, cannot be faulted. The impugned orders do not suffer from any infirmity warranting interference by this Court in extra-ordinary jurisdiction.

19. Before I close, I would like to deal with the last submission of Mr. Rele that even if the order of termination is held to be bad in law, the relief should be molded and compensation should be the adequate relief. I am afraid, for the reasons which I have already recorded and the fact that the employer sought to make out unjustifiable ground of unsatisfactory work of an employee with the sole view to get rid of him, the reinstatement and back wages granted by the Courts below appear to be the proper order and in accordance with the general principle that on setting aside of the termination order, the reinstatement should follow as a matter of course unless an exceptional case is made out. In the present case not only that no exceptional case is made out but in case the consequential order passed by the Courts below is not maintained, it would

amount to putting premium to the attitude of victimisation of the employee and to encourage such employer in indulging in unfair labour practices and exercising its power in colourable manner. I do not find this a fit case where an interference is called for even in the ultimate relief granted by the Courts below. The authorities relied upon by Mr. Rele on this aspect deal with the question of loss of confidence of employer and therefore have no application.

The writ petition accordingly has no merit and is dismissed with costs.

20. The petitioner is directed to comply with the order passed by the Labour Court, confirmed in revision by the Industrial Court immediately and in no case later than four weeks from today.