(1996) 03 BOM CK 0055

Bombay High Court

Case No: Writ Petition No. 1411 of 1993

Blue Star Ltd.		APPELLANT
	Vs	
Blue Star Workers'' Union and Others		RESPONDENT

Date of Decision: March 2, 1996

Acts Referred:

- Trade Unions Act, 1926 - Section 28(1)

Citation: (1996) 3 BomCR 480 : (1996) 2 LLJ 1032 : (1996) 2 MhLj 593

Hon'ble Judges: G.R. Majithia, J; Devkant Trivedi, J

Bench: Division Bench

Judgement

G.R. Majithia, J.

The petitioner, Blue Star Ltd., has challenged order dated June 14, 1993 passed in Complaint (ULP) No. 1419 of 1989 by the Industrial Court, Maharashtra, Bombay, in this writ petition under Article 226 of the Constitution of India.

2. Respondent No. 1 Blue Star Workers'' Union, filed a complaint against the petitioner, its Vice-President, Personnel, and its Manager AC & R Sales, complaining unfair labour practice u/s 28(1) read with Item 9 of Schedule IV and Item 4(a) of Schedule II of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short "the Act"), stating therein that the petitioner was not paying salary to Shri N. Vasudevan and that the petitioner violated the existing settlement dated November 1, 1985.

3. The petitioner appointed Shri Vasudevan as a Stenographer from October 26, 1964 vide its appointment letter of the same date on the terms and conditions mentioned therein, inter alia, that his appointment was otherwise subject to the standard rules and regulations of the company with regard to leave, Provident Fund, exclusive employment while serving the company. He accepted the same and joined the service. He was elected as General Secretary of the 1st respondent and

thereafter he become its Vice-President in the year 1981, after he was elected as General Secretary of the all India Blue Start Employees'' Federation. He was allowed to solely do the union work by the company since 1983. Since then he was not assigned any company work. He has been carrying on union activities during office working hours. Shri R.M. Nadkarni, Manager, AC & R Sales, of the petitioner company, who was arraigned as respondent No. 2 in the original complaint. He issued an official communication dated October 31, 1989 to Shri Vasudevan stating that the latter had refused to take up the company''s sales work despite repeated instructions in that behalf and that in case he failed to take up the work, the company will have no alternative but to take such action as deemed fit and to stop payment of salary/wages with effect from October 25, 1989. The communication reads thus :-

"On 25-10-1989, you had a meeting with the undersigned and Mr. A.K. Nandi and you were instructed to take up the sales work from the undersigned, since there was plenty of backlog of quotations and correspondence.

You categorically refused to take up any work from the undersigned and said that you had no time to do anything else other than the union activities.

You are once again instructed to start work of the dept. Please note in case you do not start work immediately, we will have no alternative but to take such action as we deem fit.

In the meantime since you have decided to keep yourself idle, you will not be paid salary/wages from October 25, 1989 onwards, which please note".

This communication furnished the causes of action to the 1st respondent to file the complaint alleging unfair labour practice. The communication is alleged to have been issued in violation of the settlement dated November 1, 1985 under which a practice is alleged to have come into existence, namely that Shri Vasudevan could not be assigned any company work and he has to be allowed to do union work during office working hours.

4. The petitioner denied that the Settlement dated November 1, 1985 envisages what is alleged. It also denied that any practice had come into existence under which an employee can engage himself in union activities to the detriment of the company''s work.

5. The Industrial Court, on the evidence brought on record, came to the conclusion that the petitioner had committed unfair labour practice under Item 9 of Schedule IV of the Act and it directed the petitioner to withdraw the letter dated October 31, 1989 and to allow Shri Vasudevan to continue to do the union work while on duty and to receive wages/salaries at the rates stipulated under the Agreement dated November 1, 1985.

6. The Industrial Court relied upon the oral evidence and the Agreement dated November 1, 1985 to come to the conclusion that the petitioner had committed unfair labour practice as alleged. It was not disputed by the 1st respondent that there was no document on record to establish that Shri Vasudevan was entitled to carry on union work during company''s working hours and he was to be treated on duty to entitle him to claim full wages as permissible to other employees. However, the Industrial Court concluded that the concession given by the petitioner had resulted in an implied agreement between the petitioner and the 1st respondent entitling Shri Vasudevan to all the wages permissible to the other regular employees.

7. Item 4(a) of Schedule II of the Act, which is allegedly violated, reads thus :-

"4. To encourage or discourage membership in any union by discriminating against any employee, that is to say -

(a) discharging or punishing an employee because he argued other employees to join or organise a union".

Item 9 of Schedule IV of the Act refers to failure to implement award, settlement or agreement. An employer is thus under an obligation to implement an agreement even if it does not amount to settlement. The precise question which arises for determination is whether any implied agreement has come into existence between the petitioner and the 1st respondent as alleged.

8. The Industrial Court, in paras 5 and 6 of its order, observed thus :-

"5. Undisputedly there is no direct written agreement, settlement or award of which the non-implementation is complained of, by the union.

x x x x

x x x x

6. Undisputedly Shri Menon could not lay his finger on any particular document reciting therein that Shri Vasudevan will be entitled for full wages and salary from the company as its employee, but for working for the union for whole time of the day. However, Shri Menon in his persuasive tongue has drawn my attention to various attending circumstances, admissions on the part of the witnesses, and conduct on the part of the management in support of his argument that the long standing practice and concession in this regard has been elevated to the status of an implied agreement in between the management and the union, and breach thereof amounts to an unfair labour practice.

x x x".

9. Shri Vasudevan filed his affidavit in lieu of his examination-in-chief and submitted himself for cross-examination. In is cross-examination he stated thus :

"22. .....From the year 1983 I did not work as a Stenographer till date. I am looking after the trade union activities during working hours since the year 1983. I had taken the permission for doing the trade union work during working hours from Shri R.D. Nalani, and Shri C.V. Advani - Chairman and Vice President of the company respectively. They are not in the employment of the company nowadays. Shri Nalani left the company in the year 1986 or 1987. I did not obtain permission from anybody after these people have left the company. I now see the settlement dated 1-11-1985. It is at Ex. C-7..... There is no specific mention in the settlement Ex. C-7 that the trade union activities can be done during the office hours without the permission of the superior.

10. Shri Shyam Ramakrishna Maheshwari is another witness examined by respondent No. 1. In this affidavit in lieu of examination-in-chief he stated :-

"5..... I say that the fact remains that the Respondent Company was aware that Mr. Vasudevan was carrying out only union activities during working hours and this right was by mutual agreement....."

In cross-examination he admitted that he had referred to the agreement in clause 8 of his affidavit which was oral agreement and the same has to be read in conjunction with the settlement dated November 1, 1985 and what he had stated in the affidavit was inference drawn by him from the clauses of the Settlement.

11. Shri Haresh Shivdasani is the next witness examined by respondent No. 1. He also filed affidavit in lieu of examination-in-chief. He started that Shri Vasudevan had been doing only trade union work during office hours and he was paid full salary till November 1, 1989. In his cross-examination he stated that -

"..... I was not present at the time of negotiations referred to in para 6 of my affidavit. I do not have the personal knowledge about the negotiations".

12. The Industrial Court referred to the Settlements arrived at in 1978, 1981 and 1985 to conclude that the company was aware that some workmen were doing union work during office hours. It also observed that even from the Charter of Demand made by the company it can be inferred that the company was interested in imposing restriction on the activities of certain persons doing union work. In para 19 of its Award, the Court observed thus :-

"Suffice to state that a plain reading of the management''s charter of demands, commencing from 1977 onwards, would show that the company was aware that the workmen were doing union work during office hours. The company was interested in restricting these activities to certain persons and certain timing, as per management''s charter of demands. By virtue of settlements all these demands were withdrawn as package deal".

This inference is not deducible from the Minutes of the Settlement referred to in the body of the Award. It was never agreed upon that office-bearers of the union or an

office-bearer of the union will carry on union work as a matter of right during company working hours. In fact, in some of the settlements it is specifically stated that if an officer-bearer of the union wants to do union work during hours, he or they will seek the permission of the Manager.

13. The approach of the Industrial Court is not only illegal but perverse too. A practice is a succession of acts of a similar kind or in a like employment (Webster''s Dictionary). Practice may be more or less common but it does not become a custom unless it is consciously accepted having the force of law. In the present case, Shri Vasudevan had admitted that he has been carrying on the union activities with the permission of the then Chairman and Vice-President of the Company. Except this statement no other evidence is led that in like employment, the employer has permitted his employee to carry on whole-time union activities during working hours and the employee was exempted from doing company work. In other words, there was no other instance where an employer has permitted his employee to carry on union activities at the cost of the employer. A practice can only be deemed to be established if similar acts have been followed in succession. This is neither pleaded nor proved.

14. The demand put by the management was not accepted. Non-accepted of the demand will not lead to an inference that an implied agreement has resulted between the management and the employee that an employee can carry on whole-time union work during working hours.

15. From the material on record, the maximum that can be said is that Shri Vasudevan was given a concession by the petitioner to carry on union work during company working hours and he was not asked to do company''s work for practically 5 years. The withdrawal of the concession will not amount to unfair labour practice. The matter is no more res integra. In between Workmen of Indian Bank v. Indian Bank, reported in 1985 L.L.N. 184, the question arose in the following circumstances :

A Code of Discipline was evolved with reference to the rights and obligations of the employees and the management of the Indian Bank and one of the terms was that the office-bearers of the employees'' Union would be released for union work as under :-

Two office-bearers of the Federation of the Indian Bank Employees'' Union on all working days.

This concession was withdrawn by the Bank. The action of the management was challenged in Writ Petition in the Madras High Court and the contention of the Union that grant of the concession constituted a service condition of the employees and could not be withdrawn, was negatived, observing thus :-

"9. After a careful assessment of the rival contentions, I find that the contentions of the management have to be sustained. Clearly, the activities of the Union cannot be termed or treated as activities of the bank or as duties integrally or inseparably connected with banking operations. All the employees of the bank have been selected and appointed only to perform duties connected with the banking operations carried on by the bank. Their appointment to various categories of posts in the bank is for the performance of duties attached to the respective posts. The salaries are fixed with reference to the qualifications of the employees and the nature of duties to be performed by them. On the other hand, trade union activities performed by the office-bearers of the union are solely for the benefit and welfare of the workmen of the bank and not connected with the banking institution itself or the members of the public, whose interest the banks are intended to serve. It will, therefore, be a fundamental mistake to allow confusion to prevail and deem the duties rendered by the office-bearers to the union as part of the duties rendered to the bank. Once this basic factor is recognised the fallacy contained in the contentions of the union can be clearly seen. The bank can function without the union; but the union cannot function without the bank. It, therefore, follows that the prima duty of the employees is to serve the bank and then only the union. No doubt trade union activity has won universal recognition and it has a twin objective, viz., safeguarding the interests of the workers and ushering in industrial peace. Even so, its secondary role or character cannot get effaced. For whatever reason the management may have deemed it fit or conducive to grant duty relief at an anterior point of time, the legal status of that act is only that of a concession and not a matter pertaining to the condition of service. The very fact that the benefit has not been conferred on all the office-bearers of the union, but only on some and that too in different degrees, viz., some to have full duty relief and some to have partial duty relief, will go to show that the management had only extended a concession and had not granted recognition of any inherent right in office-bearers to claim duty relief. I am in respectful agreement with the observations of Mohan, J., in Writ Petition No. 5699 of 1979, reported in 1985 I LLJ 149 that the appointment of an employee in an industrial concern is not for his full-time participation in trade union activities on salary paid by the establishment, but for his performance of duties at his respective post in the industrial institution".

16. In between Secretary of Tamilnadu Electricity Board Accounts Subordinate Union Vs. Tamilnadu Electricity Board and Others, , a learned single Judge of the Madras High Court, in somewhat identical situation, held thus :-

"Trade Unionism is recognised all over the world but that does not mean that an office-bearer of the union can claim, as of right, that he can do union work during office hours. When the workmen were given a concession, dictated by the then prevailing circumstances, it should not be considered an inviolable right. May be, the Electricity Board granted a concession, which was extended periodically; but even then it cannot fall within Item 8 of Schedule IV of the I.D. Act. The Labour Court

was right in finding it was a mere concession and it is not a part of the service condition. If that is so, the procedure under S. 9A does not require to be satisfied."

This judgment was affirmed by the Letters Patent Bench and the judgment is reported as between Secretary T.N.E.B. Accounts Subordinate Union Vs. Tamil Nadu Electricity Board, . The Bench observed thus :-

"3..... Learned counsel for the appellant only wanted to bring the matter within the ambit of ''customary concession or privilege'' within the meaning of Item 8 of Schedule IV to the Act. That item reads as follows :

Withdrawal of any customary concession or privilege or change is usage. Section 9A of the Act itself speaks about the change in the condition of service. The customary concession or privilege spoken to in Item 8 of Schedule IV to the Act must have a nexus to the condition of service because that is the caption under which Schedule IV also enumerates the items. To say that a workman, on the simple ground that he happens to be an office-bearer of the union, must be totally absolved from the obligation to do any service to the employer throughout, while he happens to be such an office-bearer will certainly bring an anomaly with regard to the concept of the condition of service and change in the condition of service. Any customary concession or privilege must be conceived and accepted only from the angle and axis of rendering of service, and not total absolving from service. The concept of ''privilege'' is an advantage conferred over and above ordinary law. A privilege is some advantage to an individual or group of individuals. ''Privilege'' is a ''right, advantage or immunity granted to or enjoyed by a person, or class of persons, beyond the common advantage of others''. Concession is a grant and here the statute speaks about a customary concession. That means, the concession must have the backing of a custom.
It cannot be pleaded that absolving the office-bearers of the unions, though they are workmen, from the normal rendering of service to the employer is a customary concession. Such concepts would be anathema to the basic idea behind employer-employee relationship, which will take in the rendering of service by the employee and the honouring of corresponding obligations by the employer, like compensating for services rendered, etc. If a workman should do no service at all to the employer on the simple ground that he is an office bearer of the union, that would nullify the very concept of workman and further his condition of service. We do not think that we should subscribe our support to such a theory by annexing an unwieldy connotation to ''customary concession or privilege''. That would be totally unwarranted and would shatter the very basis of what has been the foundation behind the relevant provisions in the Act. It is one thing to say that the workmen should have the recognition of their trade union and another thing to say that the office-bearers of trade unions though workmen must be totally absolved from doing their duty and service to the employer on the simple ground that they are office-bearers of the unions. As rightly pointed out by the learned single Judge it is

not claimed by the appellants that the workmen who happened to function as office-bearers of the union were prevented or being prevented from carrying on their union activities. We are not able to persuade ourselves to bring what has happened in the present case as the withdrawal of any "customary concession or privilege" within the meaning of Item 8 of Schedule IV to the Act, to which and alone was the endeavour made by Mr. G. Venkataraman, learned counsel for the appellant. Concurring with the decision of the learned single Judge, we dismiss the Writ Appeal.

17. Similar question again arose for consideration in Workmen of the India Bank rep. by Workmen of Indian Bank Vs. Indian, . In that case, the petitioner-union challenged the action of the Indian Bank withdrawing the duty relief granted to certain office-bearers of the Federation to fully attend to trade union activities without doing their work in the bank as its employees. The contention of the employees was negatived by the learned single Judge of the Madras High Court, observing thus :-

"9..... Capacity of a member of the Union or capacity of an Executive or office-bearer of the Union, brings no change in the capacity or status of the worker as an employee of the Establishment or undertaking concerned. His relationship in the Establishment or Undertaking where he works with the Management, is governed by the contract of service of by such statutory rules, regulations or other statutes, which determine the conditions of service of the employees of such establishments or undertaking. Viewed thus, no member of the petitioner Federation/Union is entitled to claim as a condition of service freedom in indulge in trade union activities. Fundamental freedom of association is recognised in the case of the workers and as a trade union gives to them the freedom to become members of the Union and take up such activities, which are not unlawful and which are in the interests of the workers and the public at large. Their indulging in such activities, however, cannot be at the cost of the work for which they are engaged and for which alone they are paid their respective emoluments by the employer, i.e., the Management. What they do as members of the trade Unions and what they do as employees in the business or the work of the Management, are totally different activities.

10. The concession that the respondent thus had extended to the office-bearers of the recognised unions of the petitioner was not as a part of the conditions of service. It was something granted by the respondent to the petitioner as a concession, which is not found sanctioned by any law except some sort of an agreement entered into between the petitioner/Federation and the respondent/Management, which evidently was not a part of the contract of work. No writ in the nature of mandamus can, therefore, issue for the enforcement of such a condition that the respondent/Management must treat some of the office-bearers of the recognised Unions as employees, who have the freedom from

work, but are protected for the benefits of the contract of service or work. A writ in the nature of certiorari thus for quashing the communication, under which the respondent has asked its employees to report for work and not to take any advantage of any circular, whereunder they are given the freedom from work, cannot issue. The obvious reason for this is, as a consequence of the interference with the said order, the office-bearers of the Federation of the petitioner shall not report for work and say that they have the freedom under some agreement with the Management of the respondent not to report for duty. It is a fit case, in my opinion, in which, this Court should not exercise its extraordinary jurisdiction and interfere with the impugned notice.

18. Learned counsel for the 1st respondent relied on the Apex Court decision in Rohtas Industries Ltd. Vs. Brijnandan Pandey, , to impress upon us that we should infer that a binding contract had come into existence pursuant to which Shri Vasudevan could carry on union work as alleged. He particularly relied on the following observations :-

"A court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An industrial tribunal is not so fettered and may create new obligations or modify contractors in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair labour practice or victimisation. We cannot, however, accept the extreme position canvassed before us that an industrial tribunal can ignore altogether an existing agreement or existing obligations for no rhyme or reason whatsoever".

The above quoted observations have to be examined in the context in which they were made. The Apex Court was laying down the distinction between commercial and industrial arbitrations and it was in that context that the above observations were made. The Apex Court''s observations have to be read in the context of the dispute before it.

19. The Learned counsel also relied on the decision in Workmen, Hindustan Lever Ltd. v. Hindustan Lever Ltd. 1984 LIC 1573, more particularly the observations in para 11 to the following effect :-

"11..... the expression ''terms of conditions of employment'' would ordinarily include not only the contractual terms and conditions but those terms which are understood and applied by the parties to practice or habitually or by common consent without ever being incorporated in the contract". These observations were made in the context that promotion is connected with the terms of conditions of employment. This judgment also has no bearing to the facts of the instant case.

20. For the reasons stated above, the Writ Petition succeeds. Rule is made absolute in terms of prayer clause (a) of the petition. No order as to costs.