(1988) 07 BOM CK 0075

Bombay High Court

Case No: Writ Petition No. 1353 of 1980

Vaman Maruty Gharat and others		APPELLANT
	Vs	
M.P. Apte and others		RESPONDENT

Date of Decision: July 6, 1988

Acts Referred:

- Bombay High Court (Appellate Side) Rules, 1960 - Rule 15
- Bombay Industrial Relations Act, 1946 - Section 3(17), 78(1)A, 85, 98(1)
- Civil Procedure Code, 1908 (CPC) - Section 98
- Constitution of India, 1950 - Article 226, 227

Citation: (1989) 1 LLJ 134

Hon'ble Judges: R.A. Jahagirdar, J

Bench: Single Bench

Judgement

1. This petition under Articles 226 and 227 of the Constitution of India has been placed before me for final hearing in accordance with Rule 15 of Chapter 17 of the Bombay High Court Appellate Side Rules, 1960. There is a difference of opinion between the two Judges who constituted the Division Bench which originally heard this petition. Hence resort to the above mentioned provisions of the Appellate Side Rules.

2. The petition was filed by the two petitioners, who were members of a trade union known as Association of Chemical Workers and who were working at the relevant time in the factory of the 3rd respondent, hereinafter referred to as "the respondent". The respondent is a dyeing unit covered by the provisions of the Bombay Industrial Relations Act. The facts leading to this petition ought to be necessarily stated, atleast briefly, before proceeding to consider the point that has arisen in this petition.

3. On or about 2nd of May 1978, there was a strike which was resorted to by the employees of the respondent. The strike was, on an application made by the respondent, declared illegal by an order of the Labour Court on 3rd of May 1978. That decision was given in Application No. 39 of 1978. Thereafter, the respondent gave a public notice in local newspapers on 5th of May 1978, by which the respondent called upon all the employees to return to work on or before 8th May 1978 but by giving an undertaking, the text of which was reproduced in that advertisement. It was made clear to the employees that they would be allowed to resume work only on their giving an undertaking as mentioned in the advertisement.

4. On 7th of May 1978, the Union wrote a letter to the respondent, informing the latter that the employees would report for work, but they would not give an undertaking as demanded by the respondent. On 8th of May 1978, about 200 employees gave an undertaking and resumed work, but almost an equal number, namely 178 of them, did not sign the undertaking and admittedly they were not given employment on that ground. Not stopping at this, the respondent, by letters addressed to the individual employees, informed each of them that since he had not given the undertaking as required by the management, the management had lost confidence in him and, therefore, his services stood terminated. In this petition, however, we are not concerned with this termination order.

5. On 24th of May 1978, the petitioners made an application to the Labour Court, the same Labour Court which had earlier declared the strike illegal, for a decision u/s 78(1)A(c) of the Bombay Industrial Relations, Act. This, in effect, was to pray that the Labour Court should declare what the petitioners described as lock-out illegal. They called it a lock-out because the respondent did not give work to the petitioners and other similarly situated employees.

6. The Labour Court, by its judgment and order dated 8th of September 1978, allowed the application and declared that the respondent''s action of refusing employment to the employees unwilling to give the undertaking, commencing from 11th of May 1978 and continued thereafter day to day was illegal lockout within the meaning of Section 98(1)(a) and (b) of the Bombay Industrial Relations Act.

7. It must be noted at this stage that the respondent did not examine any witness on its behalf. The respondent filed a purshis saying that the record of the proceedings in Application No. 39 of 1978 should be brought on record in the proceedings in this case. This was stoutly opposed by the petitioners'' union. The Labour Court passed an order saying that the copy of the judgment was already on record and, if necessary, the other documents would be called. The employees were examined on their own behalf. They have given evidence that there was no warrant for the respondent to insist upon the undertaking that they would not indulge in any violent or destructive activity. They said, not only in their examination-in-chief but also in their cross examination, that they had not indulged in any violent activity

which could have provoked the respondent for insisting upon an undertaking of the type which the respondent had asked.

8. The respondent preferred a revision application u/s 85 of the Bombay Industrial Relations Act. That was Revision Application (IC) No. 1 of 1978. The Industrial Court, by its judgment and order dated 30th of April 1979, allowed the revision application by holding :-

"In view of this background of the previous application for declaration of strike illegal, the management was perfectly justified, in asking the workers to give the assurance in explicit terms which was indeed an implicit term in the contract of services as already discussed above."

It is this order of the Industrial Court which has been challenged by the petitioners in this petition.

The petition was heard by a Division Bench consisting of Sawant and Vaze, JJ. Sawant, J. held that the Industrial Court had exceeded the jurisdiction vested in it by law because it had disturbed the finding of fact recorded by the Court of first instance. Sawant, J. also proceeded to hold that the insistence upon the undertaking in the circumstances of this case by the respondent was wholly unwarranted and the refusal of the respondent to give work to those employees who did not give the undertaking amounted to a lock-out and if it was a lock-out, it was an illegal lock-out.

Vaze, J., however, disagreed with this part of the judgment of Sawant, J., though Vaze, J., had not said anything about the exercise of the jurisdiction of the Industrial Court, Vaze J., held that the respondent''s insistence upon the employees to give an undertaking to do an act which they are in law bound to do did not amount to any compulsion and, therefore, it was not a lock-out and the question of declaring it as an illegal lock-out did not arise. In a picturesque sentence so typical of Vaze, J., he has asked following question in paragraph 8 of his judgment :-

"Cannot I, as a Managing Director of an industrial company upon hearing reliable reports about the integrity of my body-guard, insist that the body-guard should give me an undertaking of loyalty and his duty to protect my person ?"

He would be a foolish body-guard, entertaining a desire to kill his master, not to give an undertaking of the type mentioned by Vaze, J. If he refuse to give an undertaking, he would be the first person suspected of a plot to do away with the life of his master. That apart, in any case Vaze, J., disagreed with Sawant, J., on this question.

10. Rule 15 of Chapter 17 of the Bombay High Court Appellate Side Rules mentions that in case of difference of opinion between the Judges composing the Division Court, the point of difference shall be decided in accordance with the procedure laid down in Section 98 of the Code of Civil Procedure. Section 98 itself states that where

an appeal is heard by a Bench consisting of two or other even number of Judges and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority of the Judges who have heard the appeal, including those who first heard it. Unfortunately, the learned Judges who heard this writ petition did not formulate the point of law on which they have differed. The only order which was passed per curiam was that in view of the difference of opinion between the learned Judges, the matter be placed before the learned Chief Justice for being referred to a third Judge. However, I do not intend to return the petition for the formulation of the point for atleast one reason, namely, Vaze, J., has ceased to be a Judge of the High Court. In such a case, the matter will go back to a Bench of which the learned Judge who is the sitting judge will be a member and the other Judge may be designated by the learned Chief Justice in that regard.

11. The narration of facts, which I have attempted above, shows that the point of difference between Sawant and Vaze, JJ was whether the refusal by the respondent to give work to the employees who did not give the undertaking as required by the respondent to give work to the employees who did not give the undertaking as required by the respondent is a lock-out or not. If it is a lock-out, it would be necessarily an illegal lock-out because the procedure prescribed by law for declaring lockout has not, admittedly, been followed in this case. I have, with the assistance of the learned Counsel, gone through the judgments of Sawant and Vaze, JJ., and with great respect. I must say that Sawant, J. has given very elaborate and convincing reasons in holding that the action of the respondent amounted to an illegal lock-out. Though Sawant, J., has also held that the Industrial Court exceeded the jurisdiction vested in it by law, Vaze, J. has not said anything upon this aspect of the case at all. Since both the learned Judges has discussed the merits of the case and since both of them have differed on the merits of the case, I am taking the opportunity of proceeding on the basis that there is only a difference of opinion between them on the question as to whether the refusal of the respondent to give work to its employees on the ground that the latter are not singing the undertaking is an illegal lock-out or not.

12. Mr. Damania, the learned Advocate appearing for the petitioners, has taken me through both the judgments. I have also gone through the relevant provisions of law. I have also, with the assistance of Mr. Damania, gone through certain authorities which were cited by him. Initially, I was not sure whether any undertaking could be insisted upon by the employer while giving employment to a person. My own reaction was that this is unthinkable, but in view of several decisions which are in the field, one must proceed on the basis that in given circumstances, the undertaking may be justified. But one must also bear the caution in mind that the employer''s right, if any, of asking for an undertaking is also capable of being abused. This was the caution which was uttered by a Division

Bench of this Court in Industrial Tubes Manufacturing Co. Ltd. Vs. S.R. Samant, Judge, Industrial Court and others, .

13. That was a case under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. But it makes no difference to the question as to whether a particular act of the employer is a lock-out and if it is a lock-out whether it is an illegal lock-out. After surveying the law upto that date and the facts of the case before them, the Division Bench held that in the circumstances appearing on the record, the employers were justified in insisting on such good conduct bond from the employees as condition precedent to joining the work because the Division Bench proceeded "on the basis that the allegations made by the employers in the said complaint as also in the affidavit filed in reply to the present complaint, of the workmen, out of which this writ application arises, are prima facie true." The allegations were that the employees in the case before the Division Bench had taken up an attitude of naked defiance of law and the go-slow tactics, acts of assaults and acts of violence had been indulged in by the employees in that case. After holding, on the facts of that case, that the insistence of the undertaking was justified, the Division Bench proceeded to give the following caution :-

"This must, however, be borne in mind that the dividing line between justified and unjustified insistence on such bond is very thin. The Court has to scrupulously guard against the danger of this being abused making it just a pretext for coercing workmen to give up their just struggle with legitimate means."

14. What are the facts in the case before me today ? That the strike which had been indulged in by the employees of the respondent was declared illegal is an admitted position. It is also an admitted position that the respondent published a notice in local newspapers requiring the employees to report to work and to attend duty after signing an undertaking in the form prescribed by the respondent. There was some doubt raised before me as to whether the undertaking reproduced in the judgment of Sawant, J., was correct one or not. It must be said that after going through the same, Mr. Ramaswami has admitted that this is a correct form of the undertaking which was insisted upon by the respondent. Nevertheless, I have taken another copy which contains the Marathi version of the undertaking which has been given by Mr. Ramaswami, on record and marked it as "HG" for the sake of identification. This undertaking required an employee who wanted to join work to state that he was calling off the illegal strike, strike that he commenced with all the other employees with effect from 2nd of April 1978. It also required the employee to assure the respondent that after entering the factory, he would discharge his duties properly and would not cause any damage to the property, machinery and any material in the factory. After saying this, he must express willingness to resume his normal duties. Was this form of the undertaking justified and was the respondent justified in refusing to give work to those employees who did not sign this

undertaking ? In my opinion, the answer is ''no'' and that is the answer given by Sawant, J. In addition to the reasons which Sawant, J., has already given in his judgment, I wish to say something more on the subject.

15. I have already mentioned earlier that in the Labour Court, the respondent did not care to lead any evidence. The respondent only filed a note saying that the record in the earlier case relating to the legality of the strike should be taken on record. The Union rightly objected to this because the record by itself cannot be relevant in a subsequent proceeding between the parties. What was relevant, if at all, was the fact that there was an application by the respondent for declaring the strike indulged in by the petitioners and other fellow employees as illegal and the said strike was held to be illegal by the Labour Court in the earlier proceeding. This is undoubtedly a relevant fact in issue between the parties in the present proceedings. If this is so, one cannot appreciate the refusal of the respondent to lead evidence to show that the form of the undertaking was justified on the facts and in the circumstances of this case. What was relied upon by the respondent in the Courts below and in this Court was a copy of judgment. In which no finding has been given as to whether during the strike which was declared ultimately illegal, the employees indulged in any acts of violence or acts of indiscipline. It is true, as Mr. Ramaswami has pointed out, that there is in the judgment a summary by the Labour Court of the evidence given by one Mr. Fotedar who was examined on behalf of the respondent in those proceedings. Thereafter, the Labour Court has stated that the evidence of Mr. Fotedar has not been contradicted. It is from this that Mr. Ramaswami wants me to infer that the Labour Court accepted as a fact that there were acts of indiscipline on the part of the employees during the strike, which was declared illegal.

16. In the first place there was no issue before the Labour Court in the earlier proceedings as to whether there were acts of violence or whether there were acts of indiscipline on the part of the employees. The only question was whether the strike was legal or illegal. In fact, the question as to whether the employees had indulged in acts of violence or acts of indiscipline was totally irrelevant to the question as to whether the strike was legal or illegal. Therefore, no point was framed for determination by the Labour Court in the earlier proceedings on this aspect. Can it be said that the Labour Court did give a finding that the employees indulged in acts of violence and acts of indiscipline when the Labour Court mentioned that the deposition of Mr. Fotedar on this point was not challenged in the cross-examination ? In my opinion, this inference cannot be drawn. Since the Labour Court''s attention was necessarily focused on the question as to whether the strike was legal or illegal and the evidence on that question alone was relevant in the proceedings before the Labour Court, the Labour Court could have, at best, accepted the testimony of Mr. Fotedar in so far as it related to the legality or illegality of the strike. To that extent, the Labour Court can be deemed to have accepted the fact that the employees resorted to a strike which in law was illegal. There is nothing on record and nothing

was brought on record by the respondent, in these proceedings to show that there were acts of violence and acts of indiscipline which made the respondent to insist upon the undertaking of the type involved in this case. In the total absence of evidence in this regard. Sawant, J., naturally came to the conclusion, with which conclusion I must respectfully agree, that the Industrial Court has given its finding without any evidence in that regard. It may be true, as Mr. Ramaswami suggested, that the Labour Court in the present proceedings did not apply itself to this aspect of the question, namely the necessity of the undertaking which was prompted by violent activities of the employees. The Industrial Court was justified in analysing this question and giving a finding in that regard. If this is so, is can be said reasonably that the Industrial Court did not exceed its jurisdiction.

17. The fact that the Industrial Court did not exceed the jurisdiction vested in it does not necessarily make the finding given by it legal or valid. If that finding is unsupportable by the evidence on record, then that finding itself becomes vulnerable and can be interfered with in this petition under Articles 226 and 227 of the Constitution of India. That is what has been done by Sawant, J., and with whom, as I have mentioned above, respectfully agree. It was repeatedly suggested by Mr. Ramaswami that the material which was already on the record in Application No. 39 of 1978 could be legitimately looked into and if from the entire material on record an inference is justified, then that inference, if drawn by the Industrial Court, should not be interfered with by this Court under Articles 226 and 227 of the Constitution of India.

18. Mr. Ramaswami is right in so far as he suggests that the writ of certiorari can be issued only when the finding given by the Court below is insupportable by any evidence on record and not when it is supportable even by one piece of evidence. In the instant case, I have held, and Sawant, J. has already held, that the finding given by the Industrial Court is unsupportable by any material on record. The material on record in Application No. 39 of 1978 can be evidence neither in Application No. 138 of 1979 nor in Revision Application (IC) No. 1 of 1978. I am saying that it is irrelevant in Revision Application (IC) No. 1 of 1978, because at some stage Mr. Ramaswami pointed out that in an application which was made for staying the declaration given by the Labour Court, the respondent had brought on record an affidavit which made the allegations regarding acts of violence and acts of indiscipline. I have no hesitation in rejecting this argument because what has been said in the affidavit in support of an application for stay cannot be said to be substantial evidence either in the Court of first instance or in the Court of revision.

If, therefore, one comes to the conclusion that the Industrial Court proceeded to give the finding on the basis of the evidence which was totally non-existent, then naturally the order of the Industrial Court is liable to be set aside.

19. That apart, even considering the material which is on record in these proceedings, it is impossible to come to the conclusion that the undertaking insisted

upon by the respondent is justified either in law or on facts and in the circumstances of this case. The undertaking which was insisted upon by the respondent consists of two parts. The first part requires the employee to state that he is calling off the illegal strike that he commenced with all the other employees with effect from 2nd of April 1978. Was this justified on the facts and circumstances of this case ? It has been argued by Mr. Ramaswami that it is fully justified because the strike itself had been declared illegal and the decision has not been challenged by the employees. To this Mr. Damania on behalf of the petitioners has replied that the employees were free to challenge the said finding in a revision u/s 85 of the Bombay Industrial Relations Act. It is true that subsequently such a revision has not been preferred, but to insist on 5th of May 1978 that the employee must confess that the strike was illegal or must acquiesce in the finding given by the Labour Court is wholly unjustified. If the undertaking required the employee to merely say that he was calling off the strike which had been held to be illegal, one would not have complained, but the first part of the undertaking insists upon the confession on two grounds. The first ground is that the strike was an illegal strike and that the concerned employee did commence it with all the other employees with effect from 2nd of April 1978. In my opinion, the employees would have been prevented from agitating about the correctness of the finding given by the Labour Court in Application No. 39 of 1978.

20. Even if one leaves aside this part of the undertaking, the second part of the undertaking insisted upon by the respondent is also objectionable. In the second part of the undertaking, the employee was required to give an assurance that after entering the factory, he would not cause any damage to property, machinery and any material in the factory. Was the insistence upon this part of the undertaking justified ? The answer, in my opinion, is in the negative because there is, as I have repeatedly pointed out earlier, no evidence on record at all to show that at any time any particular employee or employees have indulged in causing any damage to the property, machinery and any material in the factory. If there was material on record, may be on the basis of the present law, the employer might have been justified in asking for and undertaking of this type. In the instant case, there is no material at all to justify this part of undertaking.

21. Mr. Ramaswami argued, I am not quite sure whether it was wholeheartedly or half-heartedly, that the insistence upon an undertaking of this type did not constitute an industrial dispute because the undertaking did not constitute an industrial matter. "Industrial matter" has been defined in Section 3(18) of the Bombay Industrial Relations Act to mean any matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees, or the mode, terms and conditions of employment, apart from other inclusive matters. I do not see how, when an employer asks an employee to give an undertaking of good conduct, it does not amount to a matter relating to an employment. It definitely relates to employment. It definitely relates to work. It also relates to duties of the

employers and employees. Looked at from any point of view, this dispute was relating to industrial matter and, therefore, this dispute was an industrial dispute within the meaning of Sections 3(17) of the Bombay Industrial Relations Act.

22. I, therefore, agree with Sawant, J., when he says that the refusal of the respondent to give work to its employees on the ground that the latter did not give an undertaking of the type insisted upon, the respondent indulged in lock-out which lock-out was not in accordance with the law and therefore, it was illegal.

23. The petition will now go back to the Division Bench for pronouncement of the final judgment in accordance with Rule 15 of Chapter 17 of the Bombay High Court Appellate Side Rules.