(1995) 04 BOM CK 0049

Bombay High Court

Case No: Writ Petition No. 4886 of 1989

General Employees Union		APPELLANT
	Vs	
Ambassador Sky Chef and Another		RESPONDENT

Date of Decision: April 18, 1995

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10(1), 11A, 12(5), 2(s), 25F

Citation: (1995) 4 BomCR 596 : (1995) 71 FLR 602 : (1996) 3 LLJ 610

Hon'ble Judges: B.N. Srikrishna, J

Bench: Single Bench

Judgement

1. This Writ Petition under Article 227 of the Constitution of India is directed against an Award dated December 17, 1988 made by the 1st Labour Court, Bombay, in Reference (IDA) No. 376 of 1983 u/s 10(1) read with Section 12(5) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act").

2. The first Respondent is a division of a limited company known as "Narang International Hotel Pvt. Ltd.," which exclusively carries on the business of catering for airlines. The Petitioner is a registered trade union, which represents the workmen employed by the first Respondent. The Petitioner has filed the present Writ Petition on behalf of one Salvador Vaz, an ex-employee of the First Respondent (who shall hereinafter be referred to as "the workman").

3. The workman joined the service of the Respondent on 1st January, 1978 as a Hamal in the Washing Department of the First Respondent. The main work carried out in the Washing Department is the washing and cleaning of utensils and cutlery used in the catering work. Some time in 1981, the workman came to be promoted as Head Hamal of the Washing Department. As Head Hamal, apart from doing work as a Hamal, he was also required to get the work done from his co-workmen. His last drawn wages were Rs. 906/- per month. On March 18, 1982, the service of the

workman was terminated by a written order, which reads :

"The Management regrets to inform you that your services as Head Hamal (supervisor) are no longer required by the Company and hence it has been terminated with immediate effect with one month''s salary in lieu of notice."

The workman was given one month''s salary and his service was terminated. He raised an industrial dispute for reinstatement, which came to be referred to the Labour Court vide Reference (IDA) No. 376 of 1983. The Labour Court has, by the impugned Award, held that the order of termination of service of the workman was illegal, declined to grant any relief to the workman by way of reinstatement, but directed payment of months'' full wages as compensation in lieu of reinstatement and 9 months'' wages as compensation in lieu of back-wages, in all, 18 months'' wages in lieu of both reliefs. Being aggrieved by the impugned Award, the Petitioner has by the present Writ Petition challenged the impugned Award on behalf of the workman.

4. It may be mentioned, en passant, that the Reference was in respect of two workmen, Salvador Vaz and Rajbir Singh, but I am informed at the Bar that the Petitioner-union has not challenged the Award in respect of Rajbir Singh, but has only challenged the Award on behalf of Salvador Vaz.

5. Dr. Kulkarni, learned Counsel appearing for the Petitioner, contends that the Labour Court wholly erred in law in refusing the normal relief of reinstatement with full back-wages, when there was a clear finding that the order of termination of service dated March 18, 1982 was illegal. He contends that the reasons given for declining the relief are contrary to the principles laid down by a catena of judgments of several High Courts, including this High Court, and judgments of the Supreme Court.

6. Mr. Singh learned Counsel appearing for the First Respondent, however, rejoins that the law on the subject is well-settled and, although the normal rule, when an order of termination of service is found illegal, is one of reinstatement with full back-wages, there may be exceptional circumstances justifying the refusal to grant the relief of reinstatement and also the refusal of full back-wages. In the submission of the learned Counsel, the present case is one where there are exceptional circumstances justifying the Award of the Labour Court, by which the relief of reinstatement was rejected and substituted by a direction for payment of compensation and full back wages have been refused and substituted by compensation equivalent to 9 months'' back-wages. Mr. Singh contends that, according to the First Respondent, at the material time the workman was working as Head Hamal, and, therefore, he was exercising supervisory functions. Since his salary was admittedly more than the cut-off limit u/s 2(s) of the Act, he was not a ''workman'' within the meaning of Section 2(s) of the Act. Consequently, the First Respondent treated him as part of the management staff and dealt with him as

such. He contends that, once the First Respondent appointed the workman as Head Hamal, it reposed confidence in him to carry out effectively the work of supervising the work done by the other Hamals in the Washing Department. However, in utter breach of this confidence reposed in him, the workman was found instigating the Hamals working under him to resort to ''go-slow'' on March 11, 1982, while on work in the night shift. Apart from that, there was also a joint complaint against him by about 37 workmen made on November 2, 1981, making serious complaint against his working. According to the learned Counsel, these were the reasons which induced the First Respondent to lose confidence in the workman and impelled the First Respondent to terminate his service by the Order of Discharge dated March 18, 1982. It is further contended that, though the First Respondent would have been justified in putting on record all the reasons which had impelled it to terminate the services of the workman, it did not do so only with a view to ensure that the workman''s future career was not marred by adverse imputations. It is pointed out that during the trial before the Labour Court, evidence had been recorded and, upon appreciation of the evidence, the Labour Court had come to the conclusion that the incident of March 11, 1982, during which the workman had instigated the other Hamals in the department to go slow, had been proved and that the termination of the service of the workman was due to the incident of March 10/11, 1982. In these circumstances. Shri Singh contends that there was more than ample justification for the First Respondent to lose confidence in the workman and, therefore, the order of March 18, 1982 terminating the supervisory service of the workman was both legal and just. The argument, at first blush, appears extremely attractive, but its worth needs to be critically appraised.

7. It is admitted that the services of the workmen of the first Respondent are governed by Model Standing Orders. Under the Model Standing Orders, the employer had been given the option either of dismissing a workman for a proved act of misconduct or of discharging him simpliciter. If the employer choose the former option, he is obliged to follow the procedure of serving a charge-sheet containing the charges alleged against the workman, holding an inquiry and, if the inquiry officer finds the workman guilty of the charges, the penalty of dismissal may be imposed, after considering all attenuating and aggravating circumstances including the past record of the workman. In the latter option the employer may resort to simpliciter termination of the workman''s service, without imputation of any misconduct or anything adverse to him. Shri Singh contends that it was this latter option that the First Respondent has chosen that too for good reasons, and, therefore, the order of termination of service of the workman was fully justified.

8. It is true that Model Standing Order 23 gives the latter option to the employer. In fact, such an option is very much necessary as there may be myriad circumstances under which holding of an inquiry may be impracticable, unfeasible or counter-productive. However, to ensure that this power of simpliciter termination conferred upon the employer is not abused and does not degenerate into one of

''hire and fire''. the Model Standing Order has certain in-built safety provisions. To fully appreciate its features, it is necessary to reproduce Model Standing Order 23, which reads as under :-

"23(1) Subject to the provisions of the Industrial Disputes Act, 1947 the employment of a permanent workman employed on rates other than the monthly rate of wages may be terminated by giving him fourteen days'' notice or by payment of thirteen days'' wages (including all admissible allowances) in lieu of notice.

"(2) Save as otherwise provided in these Standing Orders a permanent workman employed on rates other than the monthly rate of wages desirous of leaving the service may do so by giving the Manager fourteen days notice in writing.

"(3) Where the employment of a workman is terminated under sub-rule (1) or where a workman leaves the service under sub-rule (2) and such workman draws wages on piece rate basis, wages shall be computed on the average daily earnings of such workman for the days he actually worked during the previous wage period.

(4) The employment of a permanent workman employed on the monthly rates of wages may be terminated by giving him one month''s notice or on payment of one month''s wages (including all admissible allowances) in lieu of notice.

"(4-A) The reasons for the termination of service of a permanent workman shall be recorded in writing and communicated to him, if he so desires, at the time of discharge, unless such communication, in the opinion of the Manger, is likely, directly or indirectly, to lay any person open to civil or criminal proceedings at the instance of the workman.

"(5) Save as otherwise provided in these Standing Orders, a permanent workman employed on the monthly rates of wages, desirous of leaving the service shall give in writing one month''s notice to the Manager of his intention to do so.

"(6) If a permanent workman leaves the service without giving notice no deduction on that account shall be made from his wages, but he shall be liable to be sued for damages.

"(7) All classes of workmen other than those appointed on a permanent basis may leave their service or their service may be terminated without notice or pay in lieu of notice; provide that the services of a temporary workman shall not be terminated as a punishment unless he has been given an opportunity of explaining the charges of misconduct alleged against him in the manner prescribed in the Standing Order 25.

"(8) When the employment of any workman is terminated, the wages earned by him shall be paid to him before the expiry of the second working day from the day on which his employment is terminated. In the case of workman leaving the service, the payment of the wages earned by him shall be made within seven days from the date on which he leaves the service. All other sums due to a workman shall be paid

before the expiry of one month from the date of termination of his service or, as the case may be, from the date he left service.

"(9) An order of termination of service shall be in writing and shall be signed by the Manger and copy whereof shall be supplied to the workman concerned. In cases of general retrenchment, closing down of departments or termination of service as a result of a strike, no such order shall be given."

One in-built safety provision in this Model Standing Order is the requirement under clause (4-A), viz., that the reasons for the termination of service of a permanent workman shall be contemporaneously recorded and communicated to the workman, if he so desires, at the time of discharge. The rationale for this requirements is not far to seek. This requirement ensures that the reasons which impelled the employer to resort to the softer option of discharge simpliciter are contemporaneously placed on record and supplied to the workman, if he so desires, making it difficult for such reasons to be cooked up later on. In the instant case, it appears that, apart from the bald words used in the order of termination, already reproduced hereinabove, there was no contemporaneous record made of the reasons for the termination of service. At any rate, no such contemporaneously recorded reasons were produced before the Labour Court during the trial of the Reference. Shri Singh, however, urged that the reasons which impelled the employer to terminate the service of the workman were the very reasons which the Labour Court has accepted, viz, a joint complaint dated 2nd November, 1981 made against the workman and his act of instigating his co-workmen to go slow; which took place during the night of March 10/11, 1982. In my view, the conduct of an employer who fails to comply with the mandatory requirement of Clause (4-A) of Model Standing Order 23 is suspect, when subsequently during the trial of the Industrial Dispute, he comes reasons alleged to be the foundation of the out wit order of discharge simpliciter. Since it was vehemently contended by Shri Singh that the two reasons accepted by the Labour Court were the very reasons which impelled the employer to terminate the services of the workman simpliciter, greater in depth scrutiny of the case, with reference to the pleadings at several earlier stages, was called for to ascertain this fact. The scrutiny, however, throws up startling facts and belies the contention, as seen presently.

9. To start with, the First Respondent made no contemporaneous record of the reasons for termination of service of the workman. The first written statement was filed by the First Respondent before the Labour Court on April 26, 1984. One would have expected that, after pleading his case that the workman was not a ''workman'' within the meaning of Section 2(s) of the Act, the First Respondent would have honestly disclosed in its Written Statement the reasons motivating it to terminate the service of the workman. With the help of the learned Counsel, I have perused the Written Statement, and I am reproducing the material portion from paragraph 2(f), wherein it was pleaded thus :

"2(f) Without prejudice to the contentions and averments and the grounds urged in the foregoing paragraphs, the company says and submits that the termination of services of the said Vaz was one of termination simpliciter as per the contract of service, which the employer is entitled to do and hence on this ground also this Hon''ble Court will have no jurisdiction to adjudicate upon the pending reference in the absence of any cause of action/in the absence of any industrial disputes; "

Again in paragraphs 8 and 9, the First Respondent pleads :-

"8. In reply to para 4, it is denied that the termination of services of the said Vaz is illegal and inoperative in law. It is denied that the termination of service of the said Vaz amounts to retrenchment and the provisions of Section 25F of the Industrial Disputes Act, 1947 are applicable to his case as alleged and hence the question of offering and paying retrenchment compensation and notice pay to the said Vaz does not arise. The company once again says and submits that during the relevant period as the said Vaz was not a workman within the meaning of this Act, the provisions of the Act are not applicable to him. The company craves leave to advance additional arguments on this point at the time of hearing.

"9. In reply to para 5, it is denied that the termination of services of the said Vaz amounts to an Unfair Labour Practice and vindictive as alleged. It is denied that the services of the said Vaz were terminated as he was an active trade union worker. It is denied that his services were ii terminated because of his trade union activities as alleged. The company says and submits that the services of the said Vaz were terminated as per the contract of service and there is no integrality nor any nexus between the termination of his services as per the contract of services and the alleged trade union activities or he being an active trade union worker as alleged. The company submits that the services of the said Vaz have been terminated as a simple termination as per the contract of services in bona fide exercise of Management functions in the ordinary course of business and hence the termination is bona fide, legal, just, enforceable at law and shall be binding on all parties."

These are the only material averments touching the reasons for which the order of discharge simpliciter was passed. It is hence clear that, as on April 26, 1984, it was not even the case of the First Respondent that the petitioner''s service was required to be terminated on account of the joint Complaint dated November 2, 1981 or on account of the incident of instigation of ''go-slow''.

10. The Labour Court had made on Order dated May 4, 1987 overruling the preliminary contention that the workman was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act and holding that the Reference was maintainable. This order was challenged by, the First Respondent before this Court vide its Writ Petition No. 3282 of 1990, on the Appellate Side. This petition came to be rejected by an order made by a learned Judge (Kantharia, J.) on November 27,

1990, who took the view that the Order had not been challenged by the First Respondent for more than three years. Interestingly, even in Writ Petition No. 3282 of 1990. there is not a whisper as to the circumstances leading to the termination of service of the workman.

11. The First Respondent filed an Application dated August 21, 1987 before the Labour Court requesting an opportunity to led evidence "in support of its case." Even in this application, the only averment in paragraph 2 is :

"The employer company states that in its Written Statement at sub-paragraph (f) of paragraph 2 on page 2, the employer company has pleaded that ''without prejudice to the contentions and submissions and the grounds urged in the foregoing paragraphs, the Company says and submits that the termination of service of the said Vaz was one of termination simpliciter as per the contract of service which the employer company is entitled to do and hence on this ground also this Hon''ble Court will have no jurisdiction to adjudicate upon the pending Reference in the absence of any cause of action/in the absence of any industrial dispute. The employer company submits that the services of the said Vaz have been terminated by way of termination simpliciter for loss of confidence and the employer company has enough material in its possession to support its action. The employer company, therefore, prays that this Hon''ble Court be pleased to afford reasonable opportunity to the employer to lead evidence in support of its case that the services of the said Vaz have been terminated by way of termination simpliciter for loss of confidence."

The absence of mention of any reasons is significant. One would have assumed that, at least at that stage, the First Respondent would have disclosed to the Labour Court the reasons which impelled it to discharge the workman from service, when requesting permission to lead evidence to prove those reasons. Inscrutably, this was not done. If, in these circumstances, evidence was led to prove such reasons for the first time before the Labour Court, without any pleading whatsoever as to the real reasons, the Labour Court ought to have been very circumspect in accepting such reasons as genuinely forming the basis for the termination of service of the workman. In my view, the Labour Court seems to have paid scant attention to this aspect of the matter. Basic rule of appreciation of evidence is that anything, which ought to have been stated at the earliest opportunity, if not stated, should be treated as an after-thought. Courts are slow to accept after-thoughts as genuine or believable. In my view, the entire evidence led on the two factors, viz., the joint Complaint dated November 2, 1981 and the so-called incident of instigation of ''go-slow'', were both clearly after-thoughts and the Labour Court ought to have been very slow to accept those factors as really forming the foundation of the discharge simpliciter. Incidentally, at my instance, Dr. Kulkarni has produced the joint complaint, which seems to have impressed the Labour Court. It makes interesting reading. The joint complaint reads :-

"This is to say that Mr. Vaz Salvador is not required in the Washing Department and to say that I have not beaten him. I have not shown him the stick, also, that the both are lie. (sic). And the workers from Washing Department also are they saying Vaz don''t require in the Washing Department (sic).

Yours faithfully
(M. Elisha Rao)"

The tenor of this complaint shows that there was a complaint made by the workman that he had been beaten with a stick by M. Elisha Rao and this is an explanation given by the said M. Elisha Rao - albeit supported by 37 other persons - to exculpate himself. In my view this complaint per se, could not have formed the basis for loss of of confidence by any reasonable employer. Even the Labour Court has correctly, concluded that the said joint complaint was not the reasons for termination of service of the workman.

12. No doubt, upon appreciation of the evidence, the Labour Court has concluded that an incident as alleged did take place during the night of March 10/11, 1982, during which the workman was found to be instigating the co-workmen to ''go-slow'' and further that the service of the workman had been terminated due to the said incident. What is interesting is that the facts relating to the incident of the night of March 10/11, 1982 were all capable of objective determination. There was nothing covert about it, nor were there any other circumstances which made it impracticable or impossible to hold a domestic enquiry, nor were there any other circumstances which render it imperative to resort to the option of discharge simpliciter. Yet, such a course was chosen by the First Respondent. Again, the reasons were such as could have been disclosed to the Labour Court from the very beginning so that the parties could have gone to trial on the said basis. For unfathomable reasons, this was not done. In the circumstances, I am of the view that the stand of the First Respondent that the discharge order was based on the incident of March 10/11, 1982, is itself highly suspect and it is not possible to accept such a stand which appears to be a desperate attempt to supply reasons for the discharge based on after-thoughts.

13. There is yet another aspect of the Award, a which has been rightly criticized by Dr. Kulkarni. Even assuming the highest in favour of the First Respondent, if the case was one of dismissal for misconduct without holding an enquiry, the Labour Court seems to have totally lost sight of its enhanced power u/s 11A of the Act. It is now settled be, the judgment of the Supreme Court in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, that the Section 11-A was brought on the statute book specifically, to give two additional powers to the Industrial Adjudicator. First is virtually a power of appeal against finding of facts made by Enquiry Officer in his report with regard to the adequacy of the evidence and the conclusion on facts. The second, and the far more important, is the power of reappraisal of the quantum of punishment. In the instant case, considering that

evidence was being let in for the first time before the Labour Court, the Labour Court was fully clothed with the power u/s 11A to reappraise the quantum of punishment. This, it has singularly failed to do. As the observations of the Labour Court in paragraph 47 of the impugned Award indicate, the Labour Court has misdirected itself as to its jurisdiction and assumed that it could interfere only if the punishment of dismissal was ''shockingly disproportionate''. Unfortunately, the Labour Court, failed to notice that Section 11A empowers the Labour Court to interfere with an order of dismissal if it is satisfied that the order of dismissal "was not justified." There seems to be no application of mind to this vital aspect of the matter in the impugned Award. Here was a case of the workman working from 1978, against whom there does not seem to be anything serious, at least no material has been placed on record, from which it could be concluded that his service record was bad. Assuming the worst against the workman, that he did instigate his co-workmen to resort to ''go-slow'' on the fateful night of March 10/11, 1982, in my opinion, the order of dismissal from service, in such summary fashion, was hardly justified in the circumstances of the case.

14. Shri Singh contended that, because the workman was an efficient workman, he had been promoted from Hamal to Head Hamal. That certainly is a factor in favour of the workman, and not against him. It is also the case of the First Respondent that, because the workman was efficient and found fit for promotion, a special post of Head Hamal was created to which he was promoted. The discussion in paragraph 47 of the impugned Award with regard to the justifiability of the order of dismissal shows a misdirection in law on the part of the Labour Court, inasmuch as there is non-application of mind to the parameters of exercise of such power u/s 11A of the Act.

15. Shri Singh invited my attention to the judgments of the Supreme Court in Assam Oil Company Vs. Its Workmen, , Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, , Ruby General Insurance Co. Ltd. Vs. Shri P.P. Chopra, , Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, , M/s. Francis Klein and Co. (P) Ltd. v. Their Workmen and Another 1971 (23) FLR 241, The Binny Limited Vs. Their Workmen, , Anil Kumar Chakraborty and Another Vs. Saraswatipur Tea Company Limited and Others, , Chandu Lal Vs. Management of Pan American World Airways Inc., , and Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, . He contends that these cases, without doubt, lay down the principle that, under justifiable circumstances, the relief of reinstatement can be declined and, instead of reinstatement, compensation be awarded. An analysis of these decisions would show one factor common to all these cases. The Supreme Court in all these cases came to the conclusion that the employee concerned held a position of trust and confidence or was guilty of something which was serious and objectionable which would make smooth running of the employer''s business impossible vide Air India Corporation (supra), or Anil Kumar Chakraborty (supra) or Assam Oil Co. Ltd. (supra) or Kamal Kishore Lakshman (supra). In all these cases,

there were overriding considerations for taking the view that, even though the order of termination of service was unlawful, the workmen ought not be foisted on the employer. In my view, there are no such overriding considerations in the present case. Even assuming everything alleged by the First Respondent to be true, all that happened was, on one solitary instance, the workman was found preaching ''go-slow'' to his co-workmen; he was not holding any post of confidence nor was the continuation of his service fraught with serious and grave risk to the business operations of the First Respondent. Despite the fancy appellation given to him, the workman was a glorified Hamal, and nothing more, as even found by the Labour Court. In these circumstances, in my view, this is not one of those exceptional, rare cases where relief of reinstatement needs to be refused.

16. Thus, I am of the view that the impugned Award of the Labour Court needs to be interfered with.

17. This, then, takes me to the relief that should be granted to the workman. There is a finding that the order of termination of service was illegal and at one place, the Labour Court also says that it is justified. Reinstatement must follow, except exceptional circumstances.

18. Tuning to the other relief of back-wages, here again, the normal rule is one of full back-wages though for reasons such as gainful employment of the workman during the interregnum or his misbehavior contributing to the calamity of dismissal and the like, Courts have declined to grant full back-wages. Shri Singh forcefully contends that the misconduct proved against the workman-whether it was the subject-matter of the order of discharge or not-was the heinous misconduct of ''go-slow'', which has been clearly deprecated by the Supreme Court in a number of judgments resting with the judgment in Bank of India Vs. T.S. Kelawala and Others, , and, therefore, the relief of back-wages should be totally denied or, in the alternative, 18 months'' wages, directed to be paid, should be the only relief in lieu of back-wages. This contention has some merit, though not full. My judicial conscience does not permit me to direct payment of full back-wages to the employee, who is admittedly found preaching the gospel of ''go-slow'' to his co-workmen, in spite of being entrusted with the charge of extracting work from his co-workmen. It would be necessary to ensure that he is sufficiently stung so as not to repeat such n conduct in future. After considering all circumstances, I am of the view that back-wages should be permitted only to the extent of 1/3rd, out of which also, the amount of 18 months, wages, already paid, should be set off. That would be condign, in the circumstances.

19. In the result, the Writ Petition is partly allowed and the impugned Award dated December 17, 1988 made by the Labour Court in Reference (IDA) No. 376 of 1983, insofar as it relates to the workman Salvador Vaz, is hereby quashed and set aside. The First Respondent is directed to reinstate the said workman, Salvador Vaz, in service with continuity and pay him 1/3rd of the back-wages from March 18, 1982 till

the date of reinstatement after deducting therefrom a sum equivalent to 18 months'' wages already paid to him. Rule is, accordingly made absolute with no order as to costs.