(2007) 01 BOM CK 0114

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 2356 of 1994

Motilal Ramakant Mujumdar		APPELLANT
	Vs	
Purohit and Company Ltd. and Another		RESPONDENT

Date of Decision: Jan. 25, 2007

Acts Referred:

- Constitution of India, 1950 - Article 311(1)
- Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 - Section 44

Citation: (2007) 2 BomCR 679 : (2007) 3 MhLj 184

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: B.M. Khan, for the Appellant; M.G. Bhangde and R.M. Bhangde, for the Respondent

Judgement

B.P. Dharmadhikari, J.

By this writ petition, the petitioner - employee has challenged the concurrent orders delivered by the Labour Court and Industrial Court. The Labour Court has on 20-8-1991 dismissed his ULP Complaint challenging the termination after departmental enquiry. The said order of Labour Court was challenged by him by filing Revision u/s 44 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, (hereinafter referred to as the Act), before the Industrial Court and Industrial Court has dismissed that revision on 28-9-1992.

2. The petitioner was given a memo on 4-9-1980 in relation to incidents which transpired on that date and his explanation was called by the General Manager of respondents. The petitioner states that thereafter statement of one Shri K.G. Shende was recorded in relation to said incident. He submitted his reply to this memo dated

4-9-1980 on 7-9-1980 and thereafter on 25-9-1980, a communication informing him that Enquiry Officer has been appointed and enquiry proceedings would be conducted against him was served upon him. The said communication also contained a statement that if charge-sheet was required by him, it would also be sent to him. On the basis of this, departmental enquiry was conducted against him and ultimately by order dated 1-7-1981 issued by the partner of respondent No. 1-Company, he was dismissed from service with effect from 2-7-1981. He questioned that dismissal by filing ULP Complaint No. 162 of 1981 before First Labour Court. The complaint was filed under Item 1 of Schedule IV. The Labour Court found enquiry held against the petitioner to be not fair and valid and hence it permitted the respondents to lead evidence to prove misconduct before it. Accordingly, the respondents led evidence before the Labour Court. They examined K.G. Shende and one Raju '' Rajendra Purohit in support of their charge. The Labour Court has appreciated this evidence and found that misconduct was proved. It, therefore, by its order mentioned above, dismissed the complaint. This dismissal was then challenged by the petitioner by filing Revision u/s 44 of the Act before the Industrial Court which came to be registered as Revision ULP No. 328 of 1991 and Industrial Court dismissed it on 28-9-1992.

3. I have heard Shri B. M. Khan, learned Counsel for the petitioner and Shri M. G. Bhangde, learned Senior Advocate with Shri R.M. Bhangde, Advocate for the respondents.

4. Shri Khan, learned Counsel has contended that the provisions of Model Standing Orders framed under provisions of Bombay Industrial Relations Act are applicable to the industry of respondent No. 1 and there was no charge-sheet issued to the petitioner at any point of time. He contends that though Labour Court has held that misconduct is proved, as there was no definite charge-sheet served upon the petitioner, he was not in a position to understand the gravity of misconduct and therefore the nature of punishment which it would attract. He contends that this has caused serious prejudice to the petitioner while prosecuting the defence in departmental enquiry and thereafter before the Labour Court. It is his next argument that in any case on the basis of evidence adduced on record; the charges are not established. He invites attention to finding recorded by the Industrial Court that managing partner of respondent saw petitioner sleeping and he contends that this person i.e. Managing Partner has not at all been examined either before the Labour Court or in departmental enquiry. He contends that in these circumstances, the finding of Industrial Court is perverse and unsustainable. He thereafter pleads that evidence of Shri Shende also could not have been relied upon because Shri Shende was Helper of the petitioner and because of statement given by him against the petitioner, the respondents have favoured him by giving him two promotions shortly. He argues that thus, Shri Shende was not an independent and impartial witness. His next grievance is that removal of the petitioner was by incompetent authority. He points out statements made in the complaint to show that the

petitioner was appointed early by Managing partner. He contends that the memo dated 4-9-1980 on the basis of which enquiry has been conducted was issued by General Manager while the punishment order dated 1-7-1981 has been issued by the partner. He contends that it has not been established that Managing Partner at any point of time delegated his authority to proceed against the petitioner either in disciplinary matters or in imposing appropriate punishment upon the petitioner to General Manager or partner. He, therefore, contends that the initiation of departmental enquiry and punishment is by the incompetent authority. He argues that the petitioner was actively associated with Trade Union of workers and he also filed certain proceedings against the respondent before the Labour Court which was not liked by the management. He contends that the petitioner was also Secretary of Employees'' Co-operative Society and when elections of said Co-operative Society were due, in order to throw petitioner out of those elections and in order to teach lesson to other employees for taking stance against the management, the petitioner has been victimised. He argues that looking to the misconduct allegedly conducted by the petitioner, the punishment of dismissal from service is shockingly disproportionate and looking to the misconduct it can be described as a minor or technical in nature. He argues that this punishment has been imposed without looking to the past service record of the petitioner. He states that past record of the petitioner is absolute clean and unblemished and there is no misconduct recorded at any time in it. He contends that such severe punishment is inflicted with a view to victimise the petitioner. He further argues that all this clearly goes to show that the respondents were out to terminate the services of the petitioner and therefore they have fabricated a false story. He lastly clarifies that his contention about gravity of misconduct or about non consideration of past record and about the quantum of punishment are without prejudice to his basic contention that the charges are not established at all. In support of his contentions, he has invited attention of this Court to various judgments, reference to which will be made by me at the end of judgment.

5. The learned Senior Advocate for the respondents has contended that the challenge to alleged non-issuance of charge-sheet or removal by incompetent authority and allied challenges in this respect are now not open because enquiry was found to be vitiated by the Labour Court. He contends that in view of the liberty reserved by the respondents, Labour Court permitted the respondents to prove misconduct and the respondents accordingly led evidence to prove misconduct. He contends that no objection was raised by the petitioner at that time and the petitioner participated in the matter. He further argues that after recording of evidence, Labour Court found that misconduct is established. He contends that the moment it is shown that misconduct was there, the order of Labour Court substituted the order of punishment passed by the respondents and hence all above objections are not legally tenable. He further contends that the petitioner has not raised plea of victimisation before the Industrial Court at all. He invites attention of

the Court to the order delivered by the Industrial Court in this respect to point out that the Industrial Court has not recorded any finding about victimisation. He contends that thus, the issue of victimisation was given up by the petitioner and he further states that if it was not so given up, it was necessary for the petitioner to plead in his petition that he argued the point of victimisation before the Industrial Court and Industrial Court has ignored those arguments. It is his argument that in the absence of such specific plea in petition, it is not open to this Court to examine question of victimisation at this juncture. He further states that, in any case, victimisation is not established at all on record. He further argues that as misconduct proved is of grave and serious nature as has been observed by the Labour Court, the punishment is not shockingly disproportionate. He points out the responsibilities cast upon the petitioner because of his duties and further states the consequence which could have ensued because of negligence shown by the petitioner. He further argues that in such circumstances, selection of punishment is the domain of employer and this Court should not interfere in the matter. He further argues that consideration of past service record is, therefore, also not necessary. In relation to argument of Shri Khan that there was no entries of any past misconduct prior to incident on 4-9-1980 at all, he argues that such facts and circumstances cannot be taken into consideration while considering the quantum of punishment. He therefore justifies the punishment of dismissal as inflicted. The learned Senior Advocate has also invited attention to all cases on which the respondent has placed reliance in an attempt to distinguish the same.

6. It is to be noticed that the challenge to the competency of authority to initiate departmental enquiry or to pass punishment order goes to the root of the disciplinary enquiry and has the effect of vitiating the same if enquiry is not initiated by the competent authority or punishment order is not passed by the competent authority. In the facts of present case, it is an admitted position that the departmental enquiry was found to be vitiated by the Labour Court and therefore the Labour Court has permitted the employer to prove misconduct. In these circumstances, the question of competency of particular authority to initiate departmental enquiry or then the competency to impose punishment does not arise at all in the matter. Once the Labour Court finds that there was material with the employer to prove a misconduct warranting punishment of dismissal, the order of Labour Court replaces the order passed by the employer and in view of the doctrine of relation back, it becomes operative from the date on which the employer has passed the order of dismissal. It is, therefore, clear that all the arguments of Shri Khan, learned Counsel for the petitioner about competency of authorities are not relevant and available at this juncture. Further, when the employer served upon him a memo pointing out that departmental enquiry would be conducted in the matter, the employer also expressly offered to him a charge-sheet if needed by him. The employee, therefore, was very well given an opportunity to ask for formal charge-sheet but that has not been availed by the employee. Not only this, when on

the basis of misconduct mentioned in the memo dated 4-9-1980, the employer sought to prove said misconduct before the Labour Court, again it was open to the petitioner employee to seek formal charge-sheet but that right or opportunity was not utilized by him. He has faced the proceedings before the Labour Court, he has cross examined the witnesses examined by the respondents-employer and thereafter such a grievance is being made after Labour Court passed an adverse order. I, therefore, find no substance in said grievance.

7. Insofar as the issue of relevancy of evidence before the Labour Court enabling it to hold that misconduct is proved, it is to be noted that only material shown to this Court to show that said finding is perverse is a sentence appearing in paragraph 6 of the order of Industrial Court on record at page 30. The said sentence reads "Managing Partner himself found the complainant sleeping and it was also reported that complainant was found talking". It is a contention of Shri Khan, learned Counsel that the Managing Partner ought to have been examined before Labour Court. However, I have perused the entire records with the assistance of Shri Khan and Shri Bhangde and I find that said observation of Industrial Court is itself incorrect and it appears to be an inadvertent error. The story is son (by name Raju '' Rajendra) of Managing Partner himself found complainant sleeping. It is apparent that these two words "son of are inadvertently not mentioned in the said line. This brings me to consider the objection to evidence of Shri Shende. The evidence of Shri Shende cannot be disregarded only on the ground that Shri Shende has been shortly given two promotions by the respondents. Giving of two promotions itself would not mean that Shri Shende has told a lie before the Labour Court. From the record it is apparent that statement of Shri Shende was initially recorded by the management and it was made available to the petitioner for use in departmental enquiry. The statement of Shri Shende was recorded in departmental enquiry and then the petitioner cross-examined him. Thereafter the statement of Shri Shende was recorded in Labour Court in order to prove misconduct and the petitioner was permitted to cross-examine. It was, therefore, open to the petitioner to demonstrate to Labour Court that Shri Shende was telling a lie. After having utilised that opportunity and after having failed in it, it cannot be accepted that merely because the employer promoted Shri Shende later on, it should be inferred that Shri Shende is not a responsible and creditworthy witness. The story of victimisation is that because the petitioner happened to be a Secretary of Employees Co-operative Society and an influential leader of Trade Union, the employer has victimised him. The petitioner has invited attention to written statement filed by the present respondents before the Labour Court in this respect. In said written statement, the respondents have stated that the management noticed that the present petitioner and one another person by name Shri Jambhulkar, a worker of Communist Party were instigating the workers of Tin factory to adopt go slow tactics. In view of fall in production, management declared its intention by notice dated 20-8-1980 to lock out the undertaking with effect from 4-9-1980. This statement by itself is again not

sufficient to infer victimisation. The case is considered by the Labour Court in its order in paragraph 15 and Labour Court has found that the petitioner has failed to substantiate his stand that he was a Treasurer of Mazdoor Union. The Labour Court has also found that he could not substantiate his stand that Union filed number of cases against the management and it found that only one case i.e. Complaint (U.L.P.A.) No. 30 of 1980 was filed by said Union against the management. It also noticed that there were 13 employees involved in that complaint and the complainant before it was only one of them. It also noticed that even in that case, the complainant was not described as Treasurer of Union. In this background, it has drawn an inference that the employee/petitioner did not appear to be an influential or active worker of Trade Union. The case of the petitioner that he happened to be a Secretary of Co-operative Credit Society was accepted by the respondents - employer. However, Labour Court found that one Bhishikar was President of that society and said Bhishikar was General Manager of the factory. The employee/present petitioner admitted that he had no dispute with Shri Bhishikar and vice versa insofar as the affairs of the society were concerned. The Labour Court, therefore, found that position of the petitioner as Secretary of that society was not relevant at all for the purposes of dispute before it. It further found that elections of society were in fact held on 20-8-1980 itself and in those elections, the petitioner was already defeated. In these circumstances, the Labour Court has found that case of victimisation was not at all made out.

8. These findings of Labour Court are not disturbed by the Industrial Court and in any case are not shown to be perverse. Though it is argued by the respondents that the point of victimisation was not raised before the Labour Court, I find that victimisation as a ground has been raised by the petitioner in the present petition. In view of this, I have examined the issue even on merits. As has been held by the Hon''ble Apex Court in the case of Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others, , the proved misconduct is antithesis of victimisation. Here, as misconduct has been held to be proved by the Courts below, I find that victimisation or plea of victimisation is not available. In any case, it has not been substantiated.

9. The learned Counsel for the petitioner has invited attention to provisions of Clause 25 of Model Standing Orders particularly Sub-clause (6) thereof which stipulates that in awarding punishment, the manager has to take into account the gravity of misconduct and past record and other extenuating circumstances that may exist. In the facts of present case, the nature of work and responsibilities entrusted to the petitioner are considered by the Labour Court and Labour Court has found that he was guilty of grave negligence of duties which is enumerated as misconduct under Standing Order No. 24(m). The Labour Court has noticed that he was working as a Cell Room Operator and it has also referred to evidence of General Manager Shri Bhishikar, who explained in his evidence the functions of the Cell Room. It found that in the working of respondents, the separate gases are collected and stored under very high pressure and the petitioner was entrusted with the

responsibility to see that there was no leakage of any kind. If there is any leakage, the Labour Court found that there was possibility of explosion. The Labour Court also noticed that the operator has to be therefore vigilant and he has to keep watch on electric connections, temperature, water level in the cells, leakage in the pipes and other similar things. It has noticed that of all the sections, this section is most important and requires constant vigilance. It has also found that Operator working in such a sensitive section if found sleeping, it would certainly amount to gross negligence in duty. These observations of Labour Court are not shown to be perverse and are also not disturbed by the Industrial Court. These observations sufficiently describe the trust or responsibility which the respondents have to repose in the petitioner. Negligence there jeopardizes safety of Industry itself. In these circumstances, it cannot be said that merely because past record was not seen, the punishment stands vitiated. The contention of the petitioner that there is no adverse past record has not been objected to by the respondent. It is, therefore, clear that there was no past record to be considered and hence for proved misconduct of this nature, the punishment has been inflicted. The standard of discipline to be maintained is the province of the employer and for proved misconduct of grave nature, the employer has imposed the punishment of dismissal from service. It is to be noted that the negligence or sleeping while on duty in said section may have resulted in serious accident and merely because there was no accident, it cannot be said that it is an extenuating circumstance. Therefore, I find that no case is made out to uphold argument of shockingly disproportionate punishment also.

10. The first judgment sought to be relied on by the learned Counsel for the petitioner is in the case of C.V. George v. Union of India and Ors. 2001(2) CLR 191, which shows that there the employee was not charge-sheeted of misconduct of breach of trust and dishonesty and therefore he had no occasion to meet that charge. In the facts of present case, such an inference is not possible. Here, the memo which was served upon the petitioner clearly reveal the nature of misconduct and as already observed above, said misconduct has been proved before the Labour Court.

11. In the case of Jeeva Transport Corporation Ltd. v. Labour Court, Salem and Anr. reported at 2001(2) CLR 567, the learned Single Judge of Madras High Court has found that the factual allegations levelled against the employee did not meet requirements of Standing Order Clause 15(c) so as to constitute misconduct under it. Here, as already observed above, a memo in relation to misconduct was very much served upon the petitioner and it has not been shown that said incident did not constitute any misconduct under Model Standing Orders.

12. In Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others, , and also Electronics Corporation of India v. G. Muralidhar reported at 2001(2) CLR 29 (SC), the punishment orders were passed by the superior authority which was in fact appellate authority under the relevant Discipline and Appeal Rules.

In view of this position, the Hon''ble Apex Court has held that the delinquent employee there was denied right of appeal. In the facts of present case, no such challenge has been and can be made out. The petitioner has not stated that he had any right of appeal against the order of Managing Partner or Partner. In view of the fact that misconduct is proved before the Labour Court and Labour Court has found the order of punishment to be justified, doctrine of Relation back applies here and hence these cases have no application.

13. In the case of Bhagwandas v. State of M.P., reported at 1985 L. I.C. 1379, the learned Single Judge of Madhya Pradesh High Court has considered the controversy in the light of requirements of Article 311(1) of Constitution of India. It has been found that employee - Bhagwandas was appointed by Inspector General of Police and his dismissal from service by authority subordinate to I.G.P. was not legal. Again for the reasons recorded above, this case is not relevant.

14. The judgments of the Hon''ble Apex Court in the case of Colour-Chem Limited v. A.L. Alaspurkar reported at 1998 Lab. I.C. 974 and Bharat Forge Co. Ltd. v. Uttam Manohar Nakate reported at 2005 Lab. I.C. 854, are sought to be relied by the petitioner to contend that the punishment is shockingly disproportionate. The case of Colour-Chem has been heavily relied upon to state that as the misconduct was of minor or technical nature, the punishment of dismissal was shockingly disproportionate. In case of Colour-Chem Limited, the Hon''ble Apex Court has also considered its earlier judgment in the case of Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, , and has found that where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimisation of unfair labour practice. The Hon''ble Apex Court also noticed that in addition to the fact of victimisation, there can thus be a legal victimisation also. However, as this case has been considered even in later reported judgment on which Shri Khan, learned Counsel has placed reliance, I find that reference to later judgment is more befitting. In later judgment in Bharat Forge Co. Ltd. v. Uttam Manohar Nakate (supra), the employee was found fast asleep at his working place and therefore disciplinary proceedings were initiated against him and he was dismissed from service. The employee thereafter filed complaint before the Labour Court and Labour Court held that the punishment was harsh and disproportionate and no reasonable employer would have imposed such punishment for proved misconduct. The Labour Court has, therefore, granted him reinstatement with 50% backwages. This was challenged in revision before the Industrial Court and Industrial Court allowed that Revision and restored the punishment of dismissal. The Revision filed by the employee was dismissed by the Industrial Court. The employee thereafter filed Writ Petition in this High Court and on 9-2-1995, the learned Single Judge dismissed that writ petition. Letters Patent Appeal was then filed by the employee and it came to be allowed by the Division Bench and instead

of granting employee relief of reinstatement with 50% backwages, the Division Bench ordered employer to pay him compensation of Rs. 2,50,000/-. This order of Division Bench was challenged before the Hon''ble Apex Court. While considering this controversy, the Hon''ble Apex Court in paragraph 14 has noticed that no sufficient or cogent reason was assigned by the Labour Court as to why lenient view should be taken. The Hon''ble Apex Court also reproduced the findings reached by the learned Single Judge and found that sleeping on duty is a serious misconduct, which ought not to be overlooked and showing leniency in such a matter was likely to have a deleterious effect on discipline in the factory. The Hon''ble Apex Court noticed in paragraph 16 that it was major misconduct but proceeded to examine the question as to whether despite such proved misconduct, the punishment awarded by the employer was grossly disproportionate and would be unfair labour practice being an instance of legal victimisation under Clause (1) of Item 1 of Schedule IV of the Act. Thereafter the Hon''ble Apex Court reproduced observations of Division Bench wherein the Division Bench found that the punishment of dismissal was shockingly disproportionate. In paragraph 19, the Hon''ble Apex Court then makes reference to earlier judgment in the case of Colour-Chem Ltd. and declares in paragraph 21 that Colour-Chem Ltd. was rendered in the fact and situation obtaining therein and said judgment is not an authority for proposition that in case where an employee is found to be sleeping during working hours, imposition of punishment of dismissal, despite his past bad records must be held to be disproportionate to the act of misconduct. In paragraph 22, it has noticed that though ground of victimisation was raised by the employee (respondent before it), no factual foundation therefore was laid and thereafter it has found that in Colour-Chem case, the respondent therein was punished although 10 other Mazdoors who were also found to be sleeping were let off. The Hon''ble Apex Court in the case of Colour-Chem Ltd. noticed that respondents therein were assigned more responsible duty as compared to Mazdoors, but in the background of surrounding circumstances and especially in the light of their past service record, there was no escape from the conclusion that the punishment of dismissal imposed on them for such misconduct was grossly and shockingly disproportionate. In view of this discussion, the Hon''ble Apex Court in the case of Bharat Forge Co. Ltd. quashed and set aside the order of Division Bench and allowed the appeal.

15. From the discussion above, it is apparent that even in the facts of present case, when misconduct has been established and the responsibilities cast upon the petitioner are also proved, it cannot be said that no reasonable employer would have inflicted similar punishment upon his employee in similar circumstances. I, therefore, find that no case is made out for interference in writ petition. Writ Petition is accordingly dismissed. Rule is discharged. However, in the facts of present case, there shall be no order as to costs.