

(2002) 02 BOM CK 0124

Bombay High Court

Case No: Writ Petition No. 2860 of 2001

Pepsico India
Holdings Pvt. Ltd.,
Chembur, Bombay

APPELLANT

Vs

Noshir Elavia and
Another

RESPONDENT

Date of Decision: Feb. 6, 2002

Citation: (2002) 3 ALLMR 75 : (2002) 3 BomCR 512 : (2002) 93 FLR 591 : (2002) 2 MhLj 744

Hon'ble Judges: Nishita Mhatre, J

Bench: Single Bench

Advocate: J.P. Cama and Sunil Gangan, instructed by RMG Law Associates, for the
Appellant; V.A. Pai, for the Respondent

Judgement

Nishita Mhatre, J.

Through this writ petition, the petitioner has impugned the order of the Industrial Court passed in a complaint filed under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.

2. A few facts of the case in brief are as follows :--

The respondent-workman joined Duke and Sons in 1983. He was appointed as an Assistant in Sales Department. He was later working as a Sales Co-ordinator. In 1994, the petitioner-company took over the business of Duke and Sons. Some persons employed with the petitioner accepted the Voluntary Retirement Scheme offered to them. The respondent was also offered this scheme, but did not accept the same. The respondent received salary inclusive of Dearness Allowance and other allowances. Sometime in December, 1994, the respondent availed of leave of 15 days i.e., 5 days in January, 1994 and 10 days in February, 1995. The respondent was issued a show-cause notice and he informed the petitioner that he had to attend to his ailing mother and, therefore, was unable to attend to duty. His leave of absence was then adjusted and the respondent received full wages for the months of

December, 1994 and January, 1995. Thereafter on 29-3-1995, the respondent was issued a letter of termination.

3. The respondent, therefore, filed a complaint under Item 9 of Schedule IV 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. The allegation in the complaint is that the petitioner had committed an unfair labour practice under Item 9 of Schedule IV of the Act by terminating the services of the respondent without issuing any chargesheet and without conducting any enquiry. The respondent prayed that the petitioner should be directed to withdraw and cancel the termination order dated 29-3-1995. An application for interim relief was also made and the interim relief sought was for reinstatement in service or payment of monthly salary on the 7th of each month.

4. The complaint was resisted by the petitioner who pleaded that the respondent was not an "employee" within the meaning and definition contained in Section 3 Sub-section (5) of the Act as he was not a workman under the Industrial Disputes Act (hereinafter referred to as "I.D. Act"), but a sales executive in-charge of sales promotional work for South Bombay region. The petitioner then filed an application for amendment to the written statement which was allowed. By this amendment, the petitioner raised a plea that the complaint was not maintainable before the Industrial Court as the relief of reinstatement with continuity of service and full back-wages fell within the mischief of Item 1 of Schedule IV of the Act and not under Item 9 of Schedule IV of the Act.

5. It appears that an application was made by the petitioner to hear the preliminary issue regarding maintainability of the complaint in the first instance. This application was rejected by the Industrial Court and, therefore, a writ petition came to be filed by the petitioner. This petition was withdrawn and the Industrial Court heard the issue regarding the maintainability along with the merits of the complaint,

6. Evidence of the petitioner was led by examining One Mukesh Dilip Dutt, who was working as a Customer Coordinator. The respondent examined himself in support of his case. On the basis of the evidence led before it, the Industrial Court held that the petitioner had indulged in unfair labour practice under Item 9 of Schedule IV of the Act and directed them to withdraw and cancel the termination letter dated 29-3-1995. The Industrial Court came to the conclusion that the complaint was maintainable under Item 9 of Schedule IV of the Act since the respondent had only asked for the withdrawal or cancellation of the termination letter and not for reinstatement or any other consequential reliefs. As regards the issue as to whether the respondent was a workman within the meaning of Section 2(s) of the I. D. Act, the Industrial Court concluded that the respondent used to oversee the work of some workmen while actually performing the work along with them and, therefore, was a workman within the meaning of definition contained in Section 2(s) of the I.D. Act.

7. Mr. Cama, learned counsel for the petitioner, submits that the complaint under Item 9 of Schedule IV of the Act challenging the order of termination of services is not maintainable as this would lie within the exclusive jurisdiction of the Labour Court. He submits that the Labour Court is the proper Forum as under Item 1 of Schedule IV of the Act, an employee can file a complaint alleging unfair labour practice on the part of the employer while discharging or dismissing any employee on the grounds mentioned under Item 1 of Schedule IV of the Act. Item 9 of Schedule IV of the Act, according to the learned Counsel, falls within the domain of the Industrial Court and when the relief which the employee is entitled to is of reinstatement with back-wages and continuity of service, the Industrial Court has no jurisdiction to grant such relief under Item 9 of Schedule IV of the Act if the complaint is only regarding wrongful termination.

8. For this proposition, he relies on the judgments of this Court in the case of Dilip s/o Indrabhanji Wawande v. Industrial Court, Nagpur and Ors., reported in 7995 2 CLR 897 A-Z (INDL) Premises Co-op. Society Ltd. v. A. T. Utekar and Ors. reported in 1997 H CLR 1033 [Supertex \(India\) Corporation and Another Vs. Radheshyam K. Pandey and Another](#), and the case of R. P. Sawant and Ors., v. Bajaj Auto Ltd. and Anr. reported in 2001 2 CLR 982.

9. As against this, Mr. Pai, learned Counsel for Respondent No. 1, submits that any infringement or breach or violation of a law would amount to an unfair labour practice which could be decided by the Industrial Court as it would attract the provisions of Item 9 of Schedule IV of the Act. He submits that the termination letter was issued to the workman on 29-3-1995 in breach of the provisions of the Standing Orders applicable to the establishment. The Standing Orders which are framed on the basis of Industrial Employment (Standing Orders) Act, 1946 have a force of law, a breach of which would amount to a failure to implement settlement or agreement, according to the learned Counsel. He submits that the standing orders formed part of the Contractor's Service between the petitioner and the respondent and, therefore, a breach of the Standing orders would attract the provisions of Item 9 of Schedule IV of the Act as no enquiry was held nor was any chargesheet issued prior to the order of termination being issued to the workman.

10. Mr. Pai relies on the judgment of the Apex Court in the case of [S.G. Chemicals and Dyes Trading Employees' Union Vs. S.G. Chemicals and Dyes Trading Limited and Another](#), wherein the Apex Court had held while overruling a judgment of this Court in Maharashtra General Kamgar Union v. Glass Containers Pvt. Ltd. and Anr., that a breach of statutory provisions of law would amount to failure to implement settlement and, therefore, would attract the provisions of Item 9 of Schedule IV of the Act.

11. I have considered the judgments cited above. It is true that the Apex Court has held in the case of S. G. Chemicals (supra) that breach of the statutory provisions of a law would attract the provisions of Item 9 of Schedule IV of the MRTU and PULP

Act. The Apex Court has held that it is an implied condition of every agreement including a settlement that performance thereof will be in conformity with law. If the services of the workman are terminated in violation of any provisions of the Industrial Disputes Act, such a termination is unlawful and ineffective and the workman would ordinarily be entitled to reinstatement with continuity of service and full back-wages. These observations have been made on the facts in that case where the company had closed down one of its divisions in breach of a settlement governing the parties and in violation of the provisions of Section 25-O of I.D. Act without making any application for permission to close down u/s 25-O. The Apex Court held that as there was a breach of the settlement and provisions of Section 25-O, the closure was deemed to be illegal. The workman as a consequence of such a declaration were entitled to benefits under law including their wages which had not been paid to the workman.

12. However, this judgment cannot be interpreted to mean that the Apex Court had given a go-by to the provisions of Item 1 of Schedule IV. The provisions of Item 1 of Schedule IV are attracted when the employer discharges or dismisses an employee by way of victimisation, not in good faith and in colourable exercise of the employer's right, for patently false reasons or by falsely implicating an employee in a criminal action for or trumped up allegations of absence without leave or in utter disregard of the principles of natural justice in the conduct of domestic enquiry with undue haste or for misconduct of a minor or technical nature by imposing punishment which is shockingly disproportionate.

13. Mr. Pai, further relies on the judgment of this Court in the case of Premier Automobiles Ltd. v. Engineering Mazdoor Sabha reported in 1976 ICR 206 wherein this Court considered the effect of a complaint under Item 9 of Schedule IV of the Act when lay-off was effected in an establishment in breach of the standing orders. The Division Bench took the view that standing orders which were either settled between the parties and certified under the Industrial Employment (Standing Orders) Act or the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act including the terms of service whether express or implied amounted to an agreement between the parties. It was held that the lay-off which was effected in an establishment in breach of the Standing Orders would amount to failure to implement an agreement between the parties and, therefore, amounted to unfair labour practice under Item 9 of Schedule IV of the Act.

14. However, in the present case, although there may have been a breach of the standing orders applicable to the establishment, the result is that there has been a termination of service of the employee. Consequently, the reliefs which can be claimed is of reinstatement with continuity of service with full back-wages. This is a relief which can be granted by the Labour Court under Item 1 of Schedule IV of the Act. In fact, u/s 7 of the Act, all complaints relating to unfair labour practices described in Item 1 of Schedule IV of the Act are to be tried exclusively by the

Labour Court. In the instant case, the action of petitioner in terminating the services of the respondent has resulted in the petitioner's claim for reinstatement which is the final relief that can be granted to the respondent.

15. This relief is within the scope and the ambit of the jurisdiction of the Labour Court and, therefore, it was necessary for the respondent to file a complaint under Item 1 of Schedule IV of the Act. This is the view taken by this Court in the case of Bajaj Auto Ltd. (supra) after considering the judgment in the cases of Supertext (India) Corporation (supra) and A-Z (INDL) Premises Co-op. Society Ltd. (supra). The Division Bench of this Court has considered these judgments and has held thus :--

"A conjoint reading of Sections 5, 7 and 32 of the 1971 Act would make it clear that, though, for the purpose of exercising initial jurisdiction into a substantive Complaint, the jurisdictions have been compartmentalized inasmuch as the Labour Court has no jurisdiction to entertain complaints other than Complaints falling under Item 1 of Schedule IV of the 1971 Act and conversely, the Industrial Court has been given powers to entertain complaints in all other matters, it does not mean that the Industrial Court, while exercising jurisdiction within the sphere legitimately assigned to it, cannot pass an order which is required to be done in the interest of justice. It cannot be forgotten that Section 32 starts with a non-obstante clause "notwithstanding anything contained in this Act" and provides that the Court trying the matter shall have the power to decide "all matters arising out of any Application or Complaint referred to it for the decision under any of the provisions of this Act." In our judgment, the decision in National General Mazdoor Union (supra) does not recognise and give full effect to the amplitude of the non-obstante clause in Section 32. In our judgment, the enumeration of the respective jurisdictional limits of the Industrial Court and Labour Court, provided in Sections 5 and 7 of the 1971 Act, when read with the non-obstante provision in Section 32 of the 1971 Act, means this : A substantive Complaint can be entertained by the Court (Labour Court or Industrial Court) only with regard to the matters provided in Section 5 or 7. If a complaint is substantively made to the Industrial Court, then by reason of Section 5(b), it has no jurisdiction to entertain a Complaint relating to unfair labour practices falling under Item I of Schedule IV of the 1971 Act; conversely, a Complaint of unfair labour practice falling only under Item 1 of Schedule IV can be entertained by the Labour Court, but not any other complaint. This does not, however, mean that while trying a substantive Complaint legitimately falling within its jurisdictional purview, the Labour Court or Industrial Court is precluded from moulding the relief as required by the facts of the case."

In the present case, the initial jurisdiction in the substantive complaint filed by the respondent can be entertained by the Labour Court only. The Industrial Court has no jurisdiction to try a complaint in which the only grievance is wrongful termination. A substantive complaint can be entertained only by the Labour Court as it relates to a matter provided in Item 1 of Schedule IV of the Act and, therefore, the

complaint filed under Item 9 of Schedule IV of the Act is not maintainable.

16. In view of this, it is not necessary for me to consider as to whether the respondent is an employee within the meaning of the Act and whether the Industrial Court had correctly held that the services of the respondent had been wrongfully terminated.

17. Rule, accordingly made absolute with no order as to costs.