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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2007 OF 1995

The Managing Director,
Parner Taluka Sahakari Sakhar
Karkhana Limited,
Devi Bhoire, Tal.Parner,
District Ahmednagar.

...PETITIONER

-VERSUS-

Popat Mahipati Borkar,
Age : 48 years, Occ : Nil,
R/o Wadzire, Tal.Parner,
District Ahmednagar.

...RESPONDENT

...

Shri R.N.Dhorde, Senior Advocate along with Shri Mobin H. Shaikh,
Advocate for Petitioner.

Shri P.V.Barde holding for Shri T.K.Prabhakaran, Advocate for the
Respondent.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 05th December, 2015

Oral Judgment:

1 This petition was admitted by this Court on 19.07.1995 and
Rule on interim relief was issued. By order dated 20.12.2004, this Court
refused interim relief to the Petitioner.

2 The Petitioner has challenged the judgment and order dated 28.02.1995 by which the Industrial Court, Ahmednagar has allowed Revision (ULP) No.75/1992 preferred by the Respondent/ Employee.

3 The contentions of Shri R.N.Dhorde, learned Senior Advocate appearing for the Petitioner/ Employer, can be summarized, in brief, as follows:-

- (a) The Respondent/ Employee was appointed as a Supervisor in the Petitioner Sugar Factory in 1986.
- (b) On 27.01.1987 he applied for appointment as an Assistant Security Officer since the said post was vacant.
- (c) One Mr.S.B.Supekar was appointed as an Assistant Security Officer.
- (d) The Respondent was aggrieved by the said appointment and therefore, he confronted the Managing Director of the Petitioner Sugar Factory and abused him in foul and filthy language.
- (e) The Respondent was suspended by the order dated 31.01.1987 w.e.f. 01.02.1987.
- (f) Specific charges were levelled upon him and after conducting the domestic enquiry, he was dismissed from service by way of punishment by the order dated 03.08.1987, but made

effective from 31.01.1987.

- (g) The Respondent filed Complaint (ULP) No.53/1987 before the Labour Court for challenging his dismissal.
- (h) Though the prayers indicate that the Respondent sought quashing and setting aside of the order of the dismissal, it was not specifically pleaded that the dismissal order be set aside on the ground that it was made effective with retrospective effect.
- (i) The Labour Court framed an issue on 30.12.1988 with regard to the legality and validity of the domestic enquiry held against the Respondent.
- (j) The order of the Labour Court dated 23.11.1990, which was pronounced in open court, indicates that both the sides gave up their respective contentions about the enquiry and jointly submitted that they have no objection if the enquiry is set aside and the parties are permitted to lead fresh evidence.
- (k) By the judgment and order dated 15.10.1992, the Labour Court dismissed the complaint.
- (l) The Respondent preferred Revision (ULP) No.75/1992 challenging the judgment of the Labour Court.
- (m) By the impugned judgment dated 28.02.1995, the revision was allowed and the judgment and order of the Labour Court

was set aside, thereby granting the relief of reinstatement with continuity of service and 50% back-wages to the Respondent.

- (n) The Industrial Court has relied upon the Medical Certificate produced by the Respondent which was exhibited before the Labour Court indicating that he was admitted for medical treatment on 30.01.1987 and 31.01.1987.
- (o) The Industrial Court erroneously relied upon the said certificate merely because it was exhibited.
- (p) A document being exhibited does not mean that the contents of the same have been proved in the light of the ratio laid down by the Apex Court in the case of *Sait Tarajee Khimchand and others vs. Yelamarti Satyam and others*, **AIR 1971 SC 1865**.
- (q) The Industrial Court has committed another error of concluding that the order of dismissal dated 03.08.1987 has made the dismissal effective from 31.01.1987, which was not canvassed by the Respondent.
- (r) A prayer not specifically made, cannot be granted as has been done by the Industrial Court which is in opposition to the ratio laid down by the Apex Court in the case of *Press Council*

of India vs. Union of India, **2012 (12) SCC 329**.

- (s) In the event this Court is not inclined to allow this petition, liberty is being sought to pass a fresh order of punishment.

4 Shri Barde, learned Advocate for the Respondent/ Employee, submits as under:-

- (a) The order of dismissal dated 03.08.1987 was issued pursuant to the completion of the domestic enquiry.
- (b) This order of dismissal should not have been made effective from the date which is prior to the commencement of the domestic enquiry.
- (c) By the part-1 order dated 23.11.1990, the Labour Court considered the consent given by the parties and set aside the domestic enquiry while answering the issue as regards the fairness of the enquiry.
- (d) Both the parties had led fresh evidence before the Labour Court.
- (e) The alleged victim i.e. Managing Director of the Petitioner Sugar Factory, who claimed that the Respondent has abused him in foul and filthy language, did not step into the witness box and did not support the charges levelled upon the Respondent.

- (f) The Respondent was admitted for medical assistance on 30.01.1987 and 31.01.1987 which was evident from the Medical Certificate exhibited before the Labour. This clearly indicates that the Respondent was admitted for medical assistance and therefore, he was not present in the factory premises either on 30.01.1987 or 31.01.1987.
- (g) The Industrial Court is required to trace out the perversity in the findings of the Labour Court under its revisional jurisdiction under Section 44 of the MRTU & PULP Act, 1971.
- (h) The Industrial Court under its revisional jurisdiction has considered specific submissions of the Respondent that the order of dismissal is issued with retrospective effect.
- (i) The judgment of the Division Bench of this Court in the case of *Assaram Raibhah Dhage vs. Executive Engineer, Sub Divisional, Mula*, **1988 (4) Bom. C.R. 158 : 1987 (2) CLR 231**, lays down the ratio that the termination with retrospective effect is not permissible.
- (j) The Respondent had placed reliance upon the judgment of this Court in the case of Assaram Dhage (supra), which clearly indicates that a specific issue of termination with retrospective effect was raised by the Respondent.
- (k) The Respondent is about 68 years old today and therefore,

liberty sought by the Petitioner to pass a fresh order of punishment, cannot be entertained as the Respondent has attained the age of superannuation more than 08 years ago.

5 Shri Dhorde has placed on record the compilation of documents, namely, the letter dated 19.02.2005 issued to the Petitioner Sugar Factory by RPAD, copy of the RPAD receipt dated 21.02.2005, copy of the envelope which contains the postal remark that the Petitioner has locked it's sugar factory and nobody is available to accept the communication. The said compilation (five pages) is taken on record and collectively marked as Exhibit X for identification.

6 Shri Dhorde further submits that despite the above, he is performing his duty of conducting this matter on it's merits.

7 Shri Barde submits that the Petitioner Sugar Factory has not been closed down and is presently in operation. Recently, few petitions have been filed by the same Petitioner Sugar Factory.

8 I have considered the submissions of the learned Advocates as have been recorded herein above and have gone through the record and proceedings available, with their assistance.

9 The issue as regards whether, the enquiry was conducted in a fair and proper manner and whether, the said enquiry could be said to have been vitiated, has been dealt with by the Labour Court. On 30.12.1988 the following issue was cast by the Labour Court:-

“1. *Does the Complainant prove that the enquiry held against him is illegal, improper and against the principles of natural justice?*”

10 The part-1 order of the Labour Court dated 23.11.1990 placed on record indicates that the learned Advocates for the respective sides consented for setting aside the enquiry. The Respondent had no objection to the setting aside of the enquiry and further he gave his consent for permitting the Petitioner to lead fresh evidence before the Labour Court. As such, the enquiry was set aside and the parties have led fresh evidence before the Labour Court.

11 The Industrial Court in its revisional jurisdiction under Section 44 of the MRTU & PULP Act, 1971 is required to consider whether, the impugned judgment of the Labour Court can be termed to be perverse or erroneous. It is not in dispute that the medical certificate issued by the doctor indicating that the Respondent was admitted in a hospital on 30.01.1987 and 31.01.1987 was exhibited. It merely suggests that the

Respondent was admitted in a hospital on the said two dates.

12 It is, however, noteworthy that the Petitioner did not contradict the contents of the said medical certificate, inasmuch as it is not the case of the Petitioner that the said medical certificate is false or bogus. It is in this backdrop that the Industrial Court has merely read the medical certificate and has concluded that the Respondent cannot be at two different places at the same time. If he was admitted in a dispensary/hospital for two days, he could not have been at the premises of the Petitioner Sugar Factory on the said two dates.

13 There is no dispute that the Respondent is charged of having abused the Managing Director of the Petitioner on 31.01.1987. In this backdrop, the Industrial Court concluded that the Labour Court has lost sight of the fact that the Respondent/ Employee was not available on the premises of the Petitioner Sugar Factory.

14 Since the enquiry was set aside by consent and the parties agreed for a final adjudication, the Industrial Court while dealing with the judgment of the Labour Court was competent to consider the evidence recorded before the Labour Court. In this backdrop, the Industrial Court concluded that the purported victim of the charge i.e. Managing Director,

who claimed that the Respondent abused him, did not step into the witness box and did not support the charges levelled upon the Respondent. It is not the case of the Petitioner that the victim was not available or was not in a condition to depose before the Labour Court. The Industrial Court, therefore, concluded that the victim himself has not led any evidence against the Respondent nor proved the charge that the Respondent abused him.

15 The Petitioner has raised a serious grievance of there being no specific prayer that the order of dismissal be set aside on the ground that it is issued with retrospective effect. It cannot be ignored that the dismissal of the Respondent was on account of proved misconduct. It is trite law that when the charges are levelled upon the Employee, the same have to be proved by following the due procedure of law which is by conducting a domestic enquiry. The order of dismissal is based on the conclusion of the Enquiry Officer.

16 It is only after the Enquiry Officer concludes that the charges are proved against the Employee, that the Employer derives a legitimate right to pass an order of punishment and the quantum of punishment is left to the discretion/ assessment of the Employer, in the light of the 42nd amendment to the Constitution as has been held by the Apex Court in the

case of *Managing Director, ECIL vs. B.Karunakar*, 1993 (4) SCC 727.

17 In the above backdrop, it is beyond comprehension as to how could an order of dismissal, which is pursuant to the proving of charges, be given retrospective effect. The impugned judgment of the Industrial Court indicates that the Respondent had specifically argued this issue in revision and has also relied upon the Division Bench judgment of this Court which clearly covers the issue of termination with retrospective effect in the case of Assaram Dhage (supra).

18 In Assaram Dhage case (supra), the Division Bench of this Court has observed as under:-

- “(1) *The services of an employee, be he permanent or temporary, cannot be terminated with retrospective effect. Such is the ratio of this judgment.*
- (2) *On June 7, 1980 the petitioner, a project displaced person, was appointed as a Mustering Assistant in the Work Charge Establishment at a monthly salary of Rs.200/-. Thereafter he worked continuously without break in service till March, 1986, when by a letter of termination dated March 11, 1986 his services were retrospectively terminated with effect from March 1, 1986. Hence this writ petition.*
- (3) *The petitioner's learned counsel Miss Purohit is perfectly justified in making a grievance that it is unthinkable that an employee's services can be terminated with retrospective effect, as done in the present case. We join learned Counsel in her*

astonishment. For that matter, one of the conditions in the letter of appointment is that if the petitioner desired to resign he was liable to pay one months salary or give one months notice. It is therefore, ironical that on the other hand, the petitioner's services were terminated with retrospective effect.

- (4) However, the respondents' learned Counsel Mr.Bhatkar ventures that the date of termination, namely March 1, 1986 in the letter of termination must be typographical error. This is an ipse dixit, it is purely conjecture and speculative reasoning. Significantly enough, in the affidavit in reply, no such case of a typographical error is even faintly suggested. For that matter, despite the fact that in the petition it has been categorically stated in no uncertain terms that by this letter of termination, the petitioner's services were terminated with retrospective effect from March 1, 1986 not even the whisper of a denial is to be found in the affidavit in reply. Thus, the myth of a typographical error stated across the Bar can safely be ruled out.*
- (5) Mr.Bhatkar now takes refuge that the petitioner's appointment was merely temporary. However, he is unable to say under what provisions of law the petitioner's employment, even if temporary, could be terminated with retrospective effect.*
- (6) In the result, the termination order dated March 11, 1986 is set aside. The petitioner shall be paid his salary as if he had continued to be in employment. The Rule is made absolute accordingly with costs."*

19 In such circumstances, I am unable to accept the submissions of the Petitioner. In addition to this, though the Respondent may not have specifically averred in his complaint that the order of dismissal has been given retrospective effect, he had prayed in his complaint that the dismissal order be quashed and set aside for being illegal. The fact that

the dismissal order is issued with retrospective effect, is proved and there is no dispute about it. The law, therefore, was to be made applicable while considering the validity of such dismissal which is with retrospective effect. I, therefore, find that reliance placed upon the judgments as cited by the Petitioner, would be of no assistance to the Petitioner.

20 In the light of the above, I do not find that the impugned judgment of the Industrial Court could be termed as being perverse or erroneous.

21 The Petitioner has prayed for liberty to pass a fresh order of punishment.

22 Needless to state, such order needs to be passed prospectively and no retrospective effect can be given to the order of termination. The Respondent is said to be 68 years old as on date. Granting liberty to the Petitioner to issue a fresh order of dismissal, would mean that the Respondent is being dismissed after about 08 years of attaining the age of superannuation. I, therefore, find it to be a futile exercise to permit the Petitioner to issue a fresh order of punishment.

23 Shri Dhorde has criticized the grant of 50% back-wages to the

Respondent. I am of the view that once the action of dismissal of the Employer is held to be bad in law and in the absence of any evidence to indicate that the Employee was gainfully employed, the issue of back-wages gains importance.

24 The Apex Court in a recent judgment delivered in the case of *Nicholas Piramal India Limited v/s Hari Singh*, **2015 (2) CLR 468**, has concluded that the grant of relief of 50% back-wages to the Employee could be substantial justice. Having regard to the fact that the Employee is rendered unemployed and in order to soften his hardships and rigours of litigation, 50% back-wages would be a fair relief.

25 On this premise, I do not find any reason to interfere with the order of the Industrial Court which grants 50% back-wages to the Respondent from the date of his dismissal.

26 In the light of the above, this petition being devoid of merit is, therefore, dismissed. Rule is discharged.

27 Needless to state, the grant of back-wages from the date of dismissal till the date of the judgment of the Industrial Court shall not carry any interest if the said amount is paid to the Respondent/ Employee

within EIGHT WEEKS from today. If the same is not paid within EIGHT WEEKS, it shall carry simple interest of 3% per annum from the date of the judgment of the Industrial Court till the date of actual payment.

28 Insofar as the wages of the Respondent/ Employee from the date of the judgment of the Industrial Court are concerned, it cannot be ignored that this Court refused interim relief to the Petitioner Sugar Factory. As such, in the event the Respondent has been reinstated and his monthly wages have been paid, this Court need not pass any order.

29 However, in the event the Respondent has not been reinstated and has also not been paid his monthly wages, the Respondent is at liberty to take recourse to available legal remedies in this regard.

(RAVINDRA V. GHUGE, J.)