

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2949 OF 2022

Louis D'Souza and Others

...Petitioners

vs.

Hotel King's Palace and Another

...Respondents

Mr. R.S. Upadhyay, for the Petitioners.

Mr. Kiran Bapat, Senior Advocate a/w. Mr. Gaurav Gawande i/b. Mr. Avinash Fatangare, for the Respondents.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 03, 2023
PRONOUNCED ON : JUNE 5, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the stage of admission.

2. The challenge in this petition is to a judgment and order dated 10th December, 2021 passed by the learned Member, Industrial Court at Mumbai in Complaint (ULP) No. 226 of 2016 whereby the complaint preferred by the petitioners/complainants alleging unfair labour practices under Item 1(a) of Schedule II and Items 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Act, 1971) came to be dismissed.

3. Respondent No. 1 is a company incorporated under the Companies Act, 1956. It is engaged in hotel and hospitality business. Respondent No. 2 is the Director of respondent No. 1. The petitioners were in the employment of respondents holding different positions, for a number of years.

4. The petitioners alleged that as the the respondents were not providing the wages and benefits as per the entitlement of the petitioners, the petitioners joined Bharat Karmachari Union, a registered trade union ("the union"). An intimation was sent to the respondents by the said union on 19th October, 2015 about the petitioners having joined the said union. A charter of demand on behalf of the petitioners was sent to the respondent No. 1 on 3rd November, 2015.

5. The respondents refused to consider the charter of demands. Instead, the respondents threatened to close down the establishment if the petitioners did not tender resignation of the membership of the union. On 10th December, 2015 a meeting was held between the respondent No. 2 and the representative of the employees. In the said meeting, respondent No. 2 assured not to terminate any of the employees. Minutes of meeting were recorded.

6. In breach of the settlement arrived at between the parties, according to the petitioners, the respondent No. 2 coerced the individual employees to put signature on blank papers and accept the cheques for the varying amounts, without disclosing the computation and the purpose for which those cheques were issued. The respondents closed the establishment on 1st January, 2016 and restrained the petitioners from entering into the hotel premises. The petitioners were made to visit Shri T.J. Setpal, the labour law consultant of the respondents, and accept the certificates of experience wherein it was mentioned that the services of the petitioners were terminated for joining Bharat Karmachari Union. Thus, the petitioners filed a complaint alleging unfair labour practices under Item 1(a) of Schedule II and Items 9 and 10 of Schedule IV of the Act, 1971.

7. The respondents resisted the complaint. It was contended that the Industrial Court had no jurisdiction to entertain the complaint as the alleged unfair labour practice was of termination of the services of the petitioners, which would fall within the exclusive jurisdiction of the labour Court. Tenability of the complaint was also assailed on the ground that the petitioners have not disclosed the exact date of the alleged unfair labour practice

indulged in by the respondents and therefore the complaint was barred by limitation. On merits, the respondents contended that all the petitioners had accepted the compensation pursuant to the settlement arrived at between the parties, voluntarily. The petitioners and respondents had mutually and amicably settled the entire dispute and pursuant thereto, the petitioners had resigned and accepted various amounts in full and final settlement of their claims. It was stated that the said agreement amounted to settlement within the meaning of section 2(p) of the Industrial Disputes Act, 1947. In substance, according to the respondents, the acts and conduct attributed to the respondents did not amount to unfair labour practice either under Item 1(a) of Schedule II or Items 9 and 10 of Schedule IV of the Act, 1971.

8. The learned Member, Industrial Court after appraisal of the pleadings and evidence adduced by the parties was persuaded to hold that the Industrial Court had no jurisdiction to entertain, try and decide the complaint and also that the complainant failed to establish that the respondents indulged in unfair labour practices under Item 1(a) of Schedule II and Items 9 and 10 of Schedule IV of the Act, 1971. The learned Member was of the view that the petitioners had accepted the various amounts voluntarily pursuant

to the settlement arrived at between the parties and, without bringing back the said amount, the petitioners were not entitled to agitate the grievance of unfair labour practice, and that the petitioners failed to establish that they were victimized for joining the union.

9. Being aggrieved, the petitioners have preferred this petition.

10. I have heard Mr. R.S. Upadhyay, the learned counsel for the petitioners, and Mr. Kiran Bapat, learned senior advocate for the respondents at some length. With the assistance of the learned counsel for the parties, I have also perused the material on record.

11. Mr. Upadhyay, the learned counsel for the petitioners submitted that the finding recorded by the learned Member, Industrial Court that the petitioners' services were not terminated for joining the union is against the weight of the record. Mr. Upadhyay would urge that not only there is a clear and unequivocal admission in the certificates issued by T.J. Setpal, the labour law consultant of the respondents, that the services of the petitioners were terminated for joining the union but respondent No. 2 also conceded in the cross examination in clear and unequivocal terms

that the employees were removed as they jointed the union. In the face of such material, the learned Member, Industrial Court could not have held that the petitioners' services were not terminated for joining the union.

12. Mr. Upadhyay would further urge that the learned Member was not justified in discarding of the minutes of meeting dated 10th December, 2015 (Exhibit C) which recorded a settlement between the parties that the owner would not terminate any of the employees. The learned Member, Industrial Court, according to Mr. Upadhyay, failed to appreciate that the violation of the statutory provision itself constitutes an unfair labour practice. As the respondents did not dispute that the petitioners were not allowed to join their services, a clear case of unfair labour practice was made out, urged Mr. Upadhyay. A grievance was made that the learned Member, Industrial Court did not consider the binding precedents of this Court in arriving at an erroneous conclusion that there was no unfair labour practice under Item 1(a) of Schedule II and Items 9 and 10 of Schedule IV of the Act, 1971.

13. To bolster up the aforesaid submissions, Mr. Upadhyay placed reliance on the judgments in the cases of:

- 1} Association of Engineering Workers, Mumbai vs. A.T.V. Ltd. Mumbai and Anr.¹.
- 2} Ibrahim Hanif Mulani vs. General Manager, Walchandnagar Industries Ltd. Satara and Anr.²
- 3} Supriya Suresh Ghugre, (Mrs.) vs. R.U. Ingule, Hon'ble Member, Industrial Court, Mumbai and Anr.³
- 4} Dilip Trading Company vs. Vasant Balu Patil⁴
- 5} Doodh Kamgar Sabha vs. Zurisingh Beechusingh & Co., & Anr.⁵
- 6} D.G.P. Windsor (India) Ltd. vs. Pradeep Shivram Thakurdesai and Ors.⁶
- 7} R.K. Shinde and Ors. vs. Shekoba Auto Pvt. Ltd. And Anr.⁷
- 8} Abhimanyu Dattaram Sawant and Ors. vs. Rauko Cine Laboratories and Ors.⁸
- 9} Thomson Press Kamgar Sanghatana vs. Thomson Press (India) Ltd. And Anr.⁹
- 10} Mahavir Steel Industries (P) Ltd., Pune vs. Pune Workers Union, Pune and Anr.¹⁰

1 2002 II CLR 387.

2 2002 II CLR 395.

3 CLR III 2002 82.

4 2002 III CLR 597.

5 2004 III CLR 106.

6 2006 II CLR 835.

7 2008 I CLR 996.

8 2008 I CLR 488.

9 2011 I CLR 387.

10 2011 II CLR 929.

14. Mr. Bapat, learned senior advocate for the respondents countered the submissions on behalf of the petitioners. Mr. Bapat would urge that the learned Member, Industrial Court committed no error in dismissing the complaint. It was submitted that the fact that each of the petitioners had accepted a sumptuous amount as and by way of cessation of the employee-employer relationship could not be disputed. The said agreement pursuant to which the employees accepted various amounts and tendered resignation constitutes a settlement under section 2(p) of the Industrial Disputes Act, 1947.

15. Taking the Court through the deposition of Mr. Ravindrakumar Kamlakant Mishra (UW-1), Mr. Bapat would urge that the fact that the petitioners had accepted various amounts and had not returned the same is rather incontestible. If at all the petitioners wanted to raise grievance of unfair labour practice after having voluntarily accepted the sumptuous amounts, it was incumbent upon the petitioners to return the said amount. The prosecution of the complaint of unfair labour practice while retaining the cessation compensation is legally impermissible, urged Mr. Bapat.

16. A strong reliance was placed by Mr. Bapat on a judgment of the Supreme Court in the case of **Man Singh vs. Maruti Suzuki India Limited and Another**¹¹ wherein, after adverting to the previous pronouncement in the case of **Ramesh Chandra Sankla vs. Vikram Cement**¹², the Supreme Court held that where the allegation was that the employee was made to take voluntary retirement under duress and, in reality, his removal from service was illegal and, unjustified, it was incumbent on such employee to return the amount which was received under the VRS Scheme and the complaint cannot be proceeded with until the said deposit was made.

17. Mr. Bapat, would further urge that from the very intrinsic evidence of the alleged minutes of the meeting (U-20), it becomes abundantly clear that the said document does not command any credence. The learned Member, Industrial Court, was, therefore, within his rights in not giving weight to the said document (U-20). To lend support to this submission, Mr. Bapat took the Court through the cross examination of Mr. Badruddin Sikander Qureshi (UW-2). Emphasis was laid on the fact that Mr. Qureshi (UW-2) also conceded that he had also received a compensation of Rs. 10 lakhs

11 (2011) 14 Supreme Court Cases 662.

12 (2008) 14 SCC 58.

pursuant to the settlement arrived at between the employer and the employees.

18. To begin with the aspect of jurisdiction. Under section 5 of the Act, 1971 it is the duty of the Industrial Court to decide the complaints relating to unfair labour practices except unfair labour practices falling in Item 1 of Schedule IV of the Act, 1971. In turn it is the duty of the Labour Court to decide complaints relating to unfair labour practices described in Item 1 of the Schedule IV and try offences punishable under the Act, 1971. A conjoint reading of the section 5(d) and 7 of the Act, 1971 would make it abundantly clear that if a complaint relating to unfair labour practice falls within the ambit of Item 1 of Schedule IV, the Labour Court will have exclusive jurisdiction and the Industrial Court would not have jurisdiction to examine the unfair labour practice revolving around termination of an employee.

19. In the instant case, the petitioners alleged unfair labour practices under Item 1(a) of Schedule II and Items 9 and 10 of Schedule IV of the Act, 1971 (which clearly fall within the jurisdiction of a Industrial Court). Those items of unfair labour practices read as under:-

Schedule II
Unfair Labour Practices on the part of employers

1. To interfere with, restrain or coerce employees in the exercise of their right to organise, form, join or assist a trade union and to engage in concerned activities for the purposes of collective bargaining or other mutual aid or protection, that is to say,-

- (a) threatening employees with discharge or dismissal, if they join a union;
- (b) threatening a lock-out or closure, if a union should be organised;

Schedule IV
General Unfair Labour Practices on the part of employers

....

9] Failure to implement award, settlement or agreement.

10] To indulge in act of force or violence.

20. In the backdrop of the controversy, it would be contextually relevant to extract the Item 1 of Schedule IV (within the province of the authority of the Labour Court).

Schedule IV
General Unfair Labour Practices on the part of employers

1] To discharge or dismiss employees -

- (a) by way of victimization;
- (b) not in good faith, but in the colourable exercise of the employer's rights.
- (c) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;
- (d) for patently false reasons;
- (e) on untrue or trumped up allegations of absence without leave;
- (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
- (g) for misconduct of a minor or technical

character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment.

21. The learned Member, Industrial Court was of the view that the petitioners failed to establish that the unfair labour practice attributed to the respondents fell within the ambit of Item 1 of Schedule II. Whether this finding of learned Member is justifiable ?

22. From the appraisal of the material on record, it emerges that the formation of the union and affiliation of the petitioners with the union were rather incontrovertible. There is material to show that an intimation was given by the union on 19th October, 2015 to the employer. The reply dated 30th November, 2015 addressed by Mr. T.J. Setpal, labour law consultant, on behalf of the employer, in a sense, seals the issue of said intimation.

23. By the said reply the union was called upon to furnish concrete proof of all the employees of the respondents having been registered as the members of the said union.

24. The petitioners have tendered documents in support of the claim that a charter of demand was served on their behalf by the union on the respondents on 3rd November, 2015 and the

respondents declined to consider the charter of demands. In fact the services of charter of demand and refusal of the respondents to accede to the charter of demands was not at all put in contest.

25. It is imperative to note that the aforesaid developments took place less than a month prior to the alleged termination of the petitioners for joining the union. It is in this context the allegations of unfair labour practices were required to be appreciated.

26. Had it been a case of drawing inference as to whether the employer indulged in unfair labour practices on the basis of the facts, a little latitude could have been given to the appreciation of the evidence by the learned Member, Industrial Court. However, the fact that the petitioners' services were terminated for joining the union was put in black and white. One of the certificates (in respect of petitioner No. 1) is extracted below:-

TO WHOMSOEVER IT MAY CONCERN

This is to certify that Mr. Louis R. D'Souza was working in our establishment since the last 22 years in our unit at Kings Palace Hotel at Khar, Mumbai as a Steward in Room Service.

Since he had joined the union Bharat Karmachari Union, Santacruz, Mumbai 55. His services were terminated.

This certificate is given to him on his request.

Sd/-
T.J. Setpal

Mumbai
Dated 29/01/2016

27. The learned Member, Industrial Court discarded the certificates issued by Mr. T.J. Setpal, the labour law consultant of the respondents, on the ground that there was nothing on record to show that the respondents had authorized Mr. T.J. Setpal to issue those certificates. It was also observed that the complainants did not examine Mr. T.J. Setpal in proof of the contents of these certificates.

28. The learned Member, Industrial Court clearly misdirected himself in appraising both the proof and the evidentiary value of those certificates. It is pertinent to note that in the written statement filed on behalf of the respondents, the averments in the complaint as regards the issue of certificates by Mr. T.J. Setpal, were not controverted. On the contrary, it was submitted that the certificates issued by Mr. T.J. Setpal were self-explanatory and required appropriate evidence. In the cross examination, Mr. T.B. Mansinghani (UW-2) conceded that Mr. T.J. Setpal was his legal advisor and the certificates were signed and issued by Mr. Setpal.

He blamed his memory to state as to whether he had instructed Mr. Setpal to issue those certificates (U-2). In the absence of a clear and categorical denial of the issue of certificates, the learned Member could not have brushed aside the certificates on the ground that those certificates were not proved in evidence.

29. There is another circumstance which establishes the real cause of termination of the employees beyond the pale of controversy. The respondent No. 2 Mr. T.B. Mansinghani (UW-2) conceded in the cross examination in no uncertain terms that the workers were removed as they joined the union.

30. The aforesaid material, in my view, leads to a legitimate inference that the formation of union and the act of petitioners joining the said union was the driving force for the resultant action. It would be difficult to draw an inference that the aforesaid conduct on the part of the respondents would not fall within the ambit of Item 1 of Schedule II.

31. A useful reference in this context can be made to a judgment of a learned single Judge of this Court in the case of **Delux Theatres Pvt. Ltd. vs. Bombay Labour Union**¹³ wherein in somewhat similar

¹³ 1991 SCC OnLine Bom 827.

fact situation this Court has held that it is trite knowledge that the evidence as to unfair labour practice or victimisation is in most of the cases inferential or circumstantial. An Industrial Court trying a complaint of unfair labour practice, can hardly hope to get direct evidence on the issue. It is the duty of the Industrial Court, to look at the totality of the circumstances brought on record by the evidence and raise probable inferences from the cumulative effect of the evidence placed on record.

32. In the case at hand, as indicated above, there are direct admissions documentary as well as evidentiary to the effect that the services of the petitioners were terminated as they jointed the union. Reliance placed by Mr. Upadhyay on the judgment of a learned single Judge of this Court in the case of **Dilip Trading Company** (supra) appears to be well founded. In the said case as well, the services of the employee were terminated as the employee had joined the union. The observations of the Court in paragraph 7 of the said judgment read as under:-

7] The facts and circumstances of the present case are very harsh and hard. The respondent employee joined another Union in April 1991 and this fact is borne out from the record. In the same month he had gone to his native place. He reported for work on 18.6.1991 and he was not allowed to step in the shop to join his duty. On the resumed date his Union wrote a letter to the company. The respondent employee approached the authority also. All these facts are borne out from the

record. The unfair labour practice within the meaning of Item 1(a)(b) has to be inferred from the aforesaid circumstances which are present on record.

33. In the backdrop of the aforesaid facts, I deem it unwarranted to burden the judgment by referring to multiple authorities. There is material on record which leads to an irresistible inference that the petitioners' joining the union was the trigger for the resultant action.

34. Mr. Bapat, learned senior advocate for the respondents urged that the learned Member, Industrial Court has recorded a justifiable finding based on appreciation evidence that each of the petitioners had accepted a sumptuous amount and their claims were fully and finally settled amicably and thus the petitioners are not, entitled to agitate the grievance regarding alleged unfair practices until the petitioners bring back the said amount.

35. The position in law is well recognized. In the case of **Man Singh** (supra) on which reliance was placed by Mr. Bapat, in somewhat identical fact-situation where the employee alleged that retirement under VRS Scheme was brought about by duress, the Supreme Court had upheld the order of the High Court directing the petitioners to deposit the amount which was paid to him by the

employer. The Supreme Court followed a previous pronouncement in the case of **Ramesh Chandra Sankla** (supra) wherein the following observations were made.

100] Even otherwise, according to the workmen, they were compelled to accept the amount and they received such amount under coercion and duress. In our considered opinion, they cannot retain the benefit if they want to prosecute Claim Petitions instituted by them with the Labour Court. Hence, the order passed by the Division Bench of the High Court as to refund of amount cannot be termed unjust, inequitable or improper. Hence, even if it is held that a 'technical' contention raised by the workmen has some force, this Court which again exercises discretionary and equitable jurisdiction under Article 136 of the Constitution, will not interfere with a direction which is in consonance with the doctrine of equity. It has been rightly said that a person "who seeks equity must do equity". Here the workmen claim benefits as workmen of the Company, but they do not want to part with the benefit they have received towards retirement and severance of relationship of master and servant. It simply cannot be permitted. In our judgment, therefore, the final direction issued by the Division Bench needs no interference, particularly when the Company has also approached this Court under Article 136 of the Constitution.

101] For the foregoing reasons, in our opinion, the order passed by the Division Bench of the High Court deserves to be confirmed and is hereby confirmed. The payment which is required to be made as per the said order should be made by the applicants intending to prosecute their claims before the Labour Court, Mandstour. In view of the fact, however, that the said period is by now over, ends of justice would be served if we extend the time so as to enable the applicants to refund the amount. We, therefore, extend the time up to December 31, 2008 to make such payment. We may, however, clarify that Claim Petitions will not be proceeded with till such payment is made. If the payment is not made within the period stipulated above, the Claim Petitions of those applicants will automatically stand dismissed. The Labour Court will take up the claim petitions after 31-12-2008".

36. In the case at hand, none of the petitioners have either repaid the amount to the respondents or volunteered to deposit the amount with the Court. The question that comes to the fore is whether the complainants could be non-suited on the said count without providing an opportunity to bring back the amount which they have received.

37. In the totality of the circumstances, in my view, the complainants deserve an opportunity to agitate the grievance that the respondents indulged in unfair labour practices by coercing them to accept the amount and tender resignation, after they had put in a number of years of service, for the reason that they had jointed the union, after depositing the amount which they had received from the respondents, if they choose to do so. I am persuaded to take this view for the reason that the evidence on record, as noted above, leads to an irresistible inference that the employer took umbrage to the petitioners joining the union.

38. The question as to whether the alleged settlement arrived at between the employer and the employees under which the employees allegedly voluntarily accepted the severance of relationship upon payment of a particular amount, totally

unconnected with the said activity of union formation, and the severance of the employer-employee relationship was not brought about by the act of force or victimization for joining the union are the matters for adjudication. If the Industrial Court comes to the conclusion that de hors the apparent termination of the services for joining the union, there was a voluntary settlement between the petitioners and the employer, a finding may be recorded that there was no unfair labour practice as alleged.

39. For the foregoing reasons, the impugned order is required to be quashed and set aside and the Complaint (ULP) No. 226 of 2016 remitted to the learned Member, Industrial Court for a fresh decision after providing an effective opportunity of hearing to the parties, if the complainants or any of them deposit the amount which was paid to them by the employer at the time of alleged illegal termination within a period of two months from today.

Hence, the following order.

ORDER

- 1] The petition stands partly allowed.
- 2] The impugned order stands quashed and set aside.
- 3] The complaint (ULP) No. 226 of 2016 stands restored to the file

of learned Member, Industrial Court at Mumbai.

4] Whosoever of the petitioners/ complainants, desire to prosecute the complaint shall deposit the amount which was paid to them at the time of alleged termination by the respondent employer, in the Industrial Court, within a period of two months from today.

5] The complaint shall proceed qua those complainants only who deposit the amount and would stand dismissed qua those complainants who fail to deposit the amount within the said period.

6] If none of the complainants deposit the amount within the said period, the complaint would stand dismissed in its entirety at the expiry of the said period.

7] In the event of deposit by all or any of the complainants, the learned Member, Industrial Court shall adjudicate the complaint afresh in accordance with law after providing an effective opportunity of hearing to the parties, including liberty to adduce further evidence, if the parties choose to, as expeditiously as possible.

8] Rule made absolute in the aforesaid terms.

VISHAL
SUBHASH
PAREKAR

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(N. J. JAMADAR, J.)