

(2022) 10 BOM CK 0111
In the Bombay High Court
Case No : Writ Petition No. 4601 Of 2022

Jalna District Central Co-Operative

APPELLANT

Vs

Manik S/O Ambadas Toge

RESPONDENT

Date of Decision : 19-10-2022

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11A, 33

Citation : (2022) 10 BOM CK 0111

Hon'ble Judges : Sandeep V.Marne,J

Bench : Single Bench

Advocate : Y.K.Bobade, A.A.Khande

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1 The short issue involved in the present petition is which evidence would prevail for determining correctness of punishment order - the one recorded in domestic enquiry or the one adduced before the labour court ?

2. The issue arises in the backdrop of challenge setup by Petitioner-Bank to the judgment and order passed by the Industrial Tribunal upholding the order of the Labour Court, which set aside the penalty of dismissal from service imposed on respondent.

3. Respondent was working in the services of Petitioner Bank as Agent/Cashier in its Shelgaon branch. He was placed under suspension by order dated 30.03.2015 and was later served with charge-sheet, alleging misappropriation of funds. The charge arose out of financial irregularities, noticed in the audit report of the bank. It was discovered that as against the subsidy of Rs.3,27,53,855/- which was to be disbursed to 4769 members in 9 villages whose crops were destroyed due to hailstorm, amount of Rs. 3,32,00812/-was found to be disbursed to 4458 members. This resulted in extra disbursement of amount of Rs.4,46,957/- and non-disbursal of amount to 311 members. Accordingly, financial irregularity in

respect of total amount of Rs.12,51,591/- was noticed. Petitioner along with Mr. S. U. Godbole, R. R. Jadhav, S. A. Kolte and B.B.Ghodke were held responsible for such financial irregularities and after apportionment of the amount involved in such financial irregularities, it was concluded that Respondent was responsible for the amount of Rs.8,49,741/-. It was also alleged that out of said amount of Rs.8,49,741/-, he repaid amount of Rs.1,00,000/-, on 20.07.2015 and failed to deposit the balance amount of Rs.7,49,741/-.

4. A preliminary enquiry was conducted by Mr. N. L. Shaikh and Mr. B. B. Gadekar, who held Respondent and 4 others responsible for the financial irregularities. A domestic enquiry was conducted in pursuance of the memorandum of charge-sheet by the appointment of Mr. H. T. Kakade as the Enquiry Officer. Mr. N. L. Shaikh and Mr. B. B. Gadekar, who had conducted preliminary enquiry, were examined as witnesses in the domestic enquiry. After recording their evidence, Enquiry Officer submitted report holding respondent guilty of the charge, in pursuance of which petitioner Bank proceeded to issue order dated 04.03.2016, dismissing respondent from service.

5. Respondent filed a Complaint ULP No. 6 of 2016 before the Labour Court, Jalna challenging his dismissal order. The Complaint was resisted by petitioner Bank by filing written statement. The Labour Court framed preliminary issues as to whether respondent is workman and whether the enquiry was conducted in violation of principles of natural justice. By Award-I dated 04.05.2017, the labour Court answered both the issues in affirmative. Petitioner Bank was directed to lead evidence to prove charges before the labour Court.

6. Petitioner Bank challenged the Award-I dated 04.05.2017 by filing Revision ULP No. 37 of 2017 before the Industrial Court, Jalna, which partly allowed the revision, setting aside the finding recorded by the Labour Court on the first issue with regard to respondent being a workman and remanded the matter to the labour Court to decide that issue afresh, after giving an opportunity to both the parties to lead evidence on that issue. The second issue about inquiry being conducted in violation of principles of natural justice remained undisturbed. The Labour Court passed order dated 04.10.2019, once again answering issue about respondent No. 1 being workman in affirmative.

7. In pursuance of the order of the labour Court dated 04.05.2017 directing petitioner Bank to prove charges before the labour Court, petitioner Bank adduced evidence by examining two witnesses Mr. Shaikh N.L. and Mr. B. B. Gadekar before the labour Court. The labour Court delivered Award-II dated 10.10.2021 allowing complaint of respondent holding that petitioner Bank has committed unfair labour practices and it was directed to reinstate respondent on the post from which he was dismissed, along with full back wages and continuity in service. Petitioner Bank challenged judgment and order dated 10.11.2021 passed by the labour Court by filing a Revision ULP No. 11 of 2021 before the Industrial Court, Jalna, which came to be dismissed by the judgment and order dated 25.02.2022. Petitioner bank has challenged both orders of the labour Court

dated 11.10.2021 and that of the Industrial Tribunal dated 25.02.2022 in the present petition.

8. Appearing for petitioner Mr. Bobade, the learned Counsel for petitioner would submit that there was sufficient evidence available on record in the domestic enquiry to prove the misconduct against respondent. He would submit that respondent had committed misconduct of being responsible for financial irregularities of amount of Rs.8,49,741/-, which is deemed to have been admitted by him on account of deposit of amount of Rs. 1,00,000/- out of that sum. He would further submit that the Bank suffered financial losses on account of misconduct committed by respondent. He would further submit that the labour Court erred in ignoring evidence available on record in the domestic enquiry and erroneously concentrated only on the depositions of the witnesses recorded before it. He prays for setting aside the judgments of the labour Court and the industrial Court.

9. Per contra, Mr. A.A. Khande, learned Counsel appearing for respondent supports the orders passed by the labour Court and the Industrial Court. He has taken me through the depositions of both the witnesses recorded before the labour Court in support of the contention that both the witnesses did not support preliminary enquiry reports on the basis of which charge-sheet was issued and the dismissal order was passed. He would submit that once preliminary issue of not holding domestic enquiry properly was decided and petitioner bank adduced evidence to prove the charge before the labour Court, only the evidence adduced before the labour Court is required to be taken into consideration and one recorded during the domestic enquiry needs to be ignored. He would further submit that respondent had not committed any financial irregularities and the mismatch in amount occurred on account of an error in software program. He would submit that action of the petitioner Bank is discriminatory as 3 other officials facing same charge were let off without imposition of any penalty. Respondent was punished because he belongs to backward caste. He would submit that while apportioning the alleged amount of financial irregularities, huge amount of Rs.8,49,741/- was deliberately shown against respondent's name, while other 3 officials were allotted insignificant amounts for letting them off after deposit of those amounts. He would further submit that the amount of Rs. 1,00,000/- was required to be deposited as a precondition for grant of anticipatory bail granted to respondent and that therefore mere deposit of such amount cannot be construed as an admission of guilt by respondent. He prays for dismissal of the petition.

10. In support of his contention Mr. Khande, learned Counsel for respondent relied upon following decisions :

a. Karnataka State Road Transport Corpn. Vs. Lakshmiddevamma (Smt.) and another (2001) 5 Supreme Court Cases 433.

a. Omkar Sitaram Rane Vs. Maharashtra State Khadi and Village Industries Board,

Bombay and Others 2003(1) Mh.L.J. 643.

b. Head Master, Vivek Vardhini Madhyamik Vidyalaya, Malizap Vs. Alka Namdeo Khalekar and Others 2017(1) Mh.L.J. 105.

c. Rohidas s/o Nakaliram Dulgach Vs. Nanded Waghala City Municipal Corporation [2020(2) Mh.L.J. 314].

11. Rival contentions of the parties now fall for my consideration.

12. The labour court had two sets of evidence before it. The evidence adduced in domestic inquiry was perused by it while delivering Award-I and the Bank was directed to lead evidence in support of the charge. Accordingly, the Bank adduced evidence before the labour court. Both the sets of evidence are diametrically opposite, the former points to the guilt of Respondent, while the latter absolves him. The labour court has considered the latter set of evidence for delivering Award-II setting aside dismissal order. Petitioner-Bank wants me to consider the former set of evidence to reverse the verdict.

13. In these circumstances, do I completely discard the evidence of domestic enquiry or appraise it along with the evidence adduced before the labour court?. To solve the conundrum, I called upon the counsels appearing for both the sides to rely upon precedents in support of their respective contentions. While, the counsel for the Petitioner has not relied upon any judgments, the counsel for Respondent has relied upon the aforestated judgments. However, none of the decisions relied upon by Mr. Khande, throw any light on the above question formulated. In Karnataka State Road Transport Corpn. (supra) the issue was about right of employee to lead additional evidence in proceedings under Section 10 of the Industrial Disputes Act. In the present case, the employer has been given an opportunity to lead additional evidence and therefore, judgment is of no assistance to decide the controversy emerging before me. In Omkar (supra) also, the issue was about a right of the employer to lead evidence in Court to prove the misconduct. In Head Master (supra) and Rohidas (supra), the issue was about holding of de-novo enquiry the decisions would provide no assistance for determining the issue involved in the present case.

14. In Delhi Cloth & General Mills Co. v. Ludh Budh Singh (1972) 1 SCC 595, the Apex Court has laid down the principles relating to adducing additional evidence before labour court/tribunal and its consideration:

“(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to con-sider that evidence so adduced before it, on mer-its, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the valid-ity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely

upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more than the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be under such circumstances, it is open to the Tribunal to deal with, in the first instance, as a preliminary issue, the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be that the management is deprived of the benefit of having the finding of the domestic tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing

independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of or asked for by the management before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act."

(emphasis supplied)

15. The issue of establishment of charge of misconduct on the basis of evidence adduced before the Labour Court as against the evidence led in domestic enquiry has been dealt with by the Apex Court in *Neeta Kaplish v. Presiding Officer Labour Court and Anr.* (1999) 1 SCC 517. In that case, the issue was whether the evidence recorded before the Enquiry Officer in domestic enquiry could be relied upon before the labour Court once enquiry was held to be vitiated. The Apex Court held that once the enquiry was held to have been vitiated, only the evidence adduced before the labour Court is required to be considered to decide whether the charge of misconduct has been established or not. In paragraph Nos. 24 and 27 of the judgment the Apex Court held thus :

24 . If the management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the Tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If, however, the opportunity is availed of and the evidence is adduced by the management, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidence.

27. The record pertaining to the domestic enquiry would not constitute "fresh evidence" as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute "material on record", as contended by the counsel for the respondent, within the meaning of Section 11-A as the enquiry proceedings on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry could be, and were in fact,

relied upon by the Management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and that a full opportunity of hearing was given to her in consonance with the principles of natural justice. This contention has not been accepted by the Labour Court and the enquiry has been held to be bad. In view of the nature of objections raised by the appellant, the record of enquiry held by the Management ceased to be "material on record" within the meaning of Section 11-A of the Act and the only course open to the Management was to justify its action by leading fresh evidence as required by the Labour Court. If such evidence has not been led, the Management has to suffer the consequences.

(emphasis supplied)

16. In *Vinayak Bhagwan Shetye vs M/S Kismet Pvt. Ltd.*, 1983 (2) L.L.N. 884 this Court held in paragraph No. 7 as under :

"7. Now, it is difficult for us to see how the learned Judge of the Labour Court having positively discarded the enquiry proceedings on the ground that the enquiry was not fair and having found that even before the Labour Court the misconduct with which the petitioner was charged was not proved, could have proceeded to make out an entirely new case for respondent No. 1 At this stage Mr. John wanted to refer to the enquiry papers and the statements recorded during the course of the enquiry by the Enquiry Officer. Such a course was clearly impermissible because the enquiry has been rejected and the employer has been given the opportunity to prove the misconduct by adducing independent evidence before the Labour Court, the matter before the Labour Court would have to be judged on the basis of such evidence as was adduced before the Labour Court. It is important to remember that the finding recorded by the Labour Court that the enquiry was vitiated was not and indeed could not have been challenged by the employer because it is obvious that the employee, who had asked for the adjournment, was denied the adjournment and the enquiry had proceeded ex-parte. It does not appear on record that the reason for asking for the adjournment was not genuine. We shall, therefore, have to ignore the statements made during the enquiry proceedings."

17. In *Maharashtra General Kamgar Union Vs. U.S.V.Ltd.*, and another 2002 (1) L.L.N. 737 in which this Court has held in paragraph Nos. 15 and 16 as under :

"15. In the circumstances of the present case, therefore, what emerges is that the enquiry was held to have been vitiated by the Part I award. The employer was thereupon permitted to prove the misconduct by leading evidence on the allegations contained in the chargesheet issued to the workmen. The Part I award was confirmed by the learned Single Judge of this Court who dismissed the writ petition filed by the employer. The Division Bench in appeal expressly provided that the employer shall have an opportunity before the Labour Court to lead evidence to sustain the charge of misconduct. At the same time, the employer was permitted to urge before the Labour Court that the enquiry which

had been conducted up to 10 July, 1995 can be relied upon and the Labour Court was to consider that submission after hearing the union. The employer attempted to lead evidence before the Labour Court but that attempt was of no consequence since as already noted earlier after a brief recording of the examination-in-chief of one witness on 19 March 1996 the examination was closed. The witness for the employer stated in the course of the examination-in-chief that he had no document to show what was the exact production of the said four workmen during the relevant time. This answer is significant because the whole case that there was a go slow could not be established in the absence of the documentary evidence reflecting the figures for production. No oral evidence to sustain the charges was forthcoming before the Labour Court.

16. The Labour Court has in these circumstances, erred in relying upon the evidence recorded in the domestic enquiry once it was held to be vitiated.

The Division Bench had permitted the employer to urge before the Labour Court that he should be allowed to rely upon the evidence recorded up to 10th July 1985. The Division Bench which passed an order in terms minutes did not decide, upon the question as to whether the evidence recorded in the enquiry could be relied upon since that question was left open for decision by the Labour Court. The Labour Court had to decide as to whether that evidence could at all be relied upon. The Labour Court has evidently not discussed or determined the question of law but seems to have proceeded on the basis that it was entitled to rely upon the evidence recorded until 10 July, 1985 in the disciplinary enquiry."

(emphasis supplied)

18. From the above decisions, it is clear that once the labour Court renders Award-I holding that the domestic enquiry was held in violation of principles of natural justice and an opportunity is given to the employer to lead evidence before the labour Court, the only evidence that can be taken into consideration for establishing the charge is the evidence adduced before the labour Court. The evidence produced during the domestic enquiry is required to be discarded altogether in such a situation.

19. In the domestic enquiry conducted against respondent, only two witnesses were examined Mr. Shaikh and Mr. Gadekar, who had conducted preliminary enquiry in the matter and held the respondent and four other employees responsible for financial irregularities. They were examined in the domestic enquiry and finding of proof of charge was recorded on the basis of their testimony in the enquiry report. As observed hereinabove by Award-I dated 04.05.2017, the labour Court answered two preliminary issues viz. (i) that respondent is a workman and (ii) the enquiry was held in violation of principles of natural justice. The finding of the labour Court on the issue No. (i) that respondent is a workman was challenged in revision and by order dated 06.11.2017, the Industrial Court remanded the matter for re-decision of that issue. So far as the finding on issue No. (ii) was concerned, the same remained

undisturbed and attained finality. The labour Court later reaffirmed its finding on issue No. (i) that respondent No. 1 is workman by its order dated 04.10.2019 and that finding also attained finality.

20. By its order dated 04.10.2019, while answering issue No. 2 about domestic enquiry being in violation of the principles of natural justice, the labour Court had directed petitioner Bank to prove charges before the Court. Petitioner Bank availed of that opportunity and examined both witnesses namely Mr. Shaikh and Mr. Gadekar before the labour Court, whose evidence was relied upon for dismissing respondent in domestic enquiry. However before labour Court, both Mr. Shaikh and Mr. Gadekar did not support the story put forth by Petitioner Bank. Mr. Shaikh deposed before the labour Court that he and Mr. Gadekar were directed to sign the preliminary report, which they signed without perusal of the same. He further deposed that he himself had not prepared preliminary enquiry report and that he had merely signed it. So far as, Mr. Gadekar is concerned, he deposed before the labour Court that the preliminary report was prepared by the higher officials and he had merely signed the same. He further proceeded to depose that the preliminary report prepared by the Bank was erroneous and the same was filed only as per the directions of the those officials.

21. Thus, before the labour Court evidence of Bank's witnesses Mr. Shaikh and Mr. Gadekar completely demolished petitioner's case and their depositions made it clear that the preliminary enquiry reports, on the basis of which respondent was punished, were erroneously prepared. Both witnesses refused to own contents of those reports. A situation arose before the labour Court that there was zero evidence against respondent in support of charges levelled against him.

22. Faced with this reality, Mr. Bobde, learned Counsel has contended that evidence recorded in the domestic enquiry ought to have been considered by the labour Court. He has taken me through the report of the Enquiry Officer, which is dealt with the depositions of very same witnesses Mr. Shaikh and Mr. Gadekar to demonstrate that there was sufficient evidence available on record to punish respondent. However, perusal of the order passed by the labour Court would indicate that it has proceeded to take into consideration only evidence which was produced before it and it has completely ignored the evidence which was recorded in the domestic enquiry. This is the correct course of action adopted by the labour court.

23. Having held that the evidence adduced before the labour court alone could be considered, I now proceed to determine whether the labour Court and the Industrial Court have any committed an error in passing their respective judgments and orders. As observed earlier, the evidence of Mr. Shaikh and Mr. Gadekar adduced before the labour Court, did not prove the charge levelled against respondent in any manner. Their depositions recorded in domestic enquiry are required to be discarded. Thus, this is the case of 'no evidence' and the finding of guilt recorded against respondent in domestic enquiry suffers from vice of perversity. The labour Court has therefore rightly concluded that the

charge levelled against respondent could not be proved. Once the charge itself is not proved, rest of the issues of discrimination, erroneous apportionment of amount, non deposit of amount etc. becomes meaningless. I, therefore, conclude that there was no evidence in respect of proof of charge levelled against respondent. The labour Court has rightly set aside the order of dismissal from service imposed on him.

24. What remains now is the issue of backwages. The labour Court directed reinstatement of respondent with full back wages and continuity in service. Respondent has been dismissed from service on 04.03.2016 and the order of the labour Court setting aside the dismissal order is passed on 10.11.2021. Even though, it was alleged in the charge that there was financial misappropriation on the part of Respondent, careful perusal of the charge would indicate that the allegations did not involve misappropriation as such. Responsibility is fixed on 5 employees for erroneous disbursement of subsidy to farmers. The amount of Rs.8,49,741/- has not been misappropriated or pocketed by respondent for himself but it was alleged that he was responsible for erroneous disbursal of that amount. It is also a matter of record that out of 5 employees, who were held responsible only respondent and Mr. B .B. Ghodke were dismissed from service. The other employees Mr. S. U. Godbole, R. R. Jadhav and S. A. Kolte were let off and no action was taken against them. This action would indicate that the charge was not of misappropriation or pocketing of any amount and the Bank was willing to condone the misconduct on deposit of erroneously disturbed amounts. It appears that said 3 employees deposited their respective amounts apportioned against their names. As the amount apportioned against the name of respondent was the highest Rs.8,49,741/-, respondent has not been able to repay the same. He has paid Rs. 1,00,000/- to the bank. For recovery of rest of the amount, respondent is facing recovery proceedings, which can be decided on its own merits and without being influenced by any of the observations made in this order. After considering the entire conspectus of the matter, I am of the view that respondent was erroneously kept away from duties by petitioner Bank, during pendency of the proceedings before the labour Court. Petitioner Bank spent time on challenging Award-I, thereby delaying final decision of proceedings. In the process the substantial time from 04.05.2017 to 04.10.2019 was spent in re-deciding that issue. In these circumstances, the order of the labour Court in awarding full back wages and continuity in service in favour of respondent cannot be found fault with.

25. In the result I am of the view that the petition is devoid of any merits. It is dismissed without any orders as to the costs.