

(2009) 02 CAL CK 0008

In the Calcutta High Court

Case No : A.P.O. No. 199 of 2006 and W.P. No. 1819 of 2002

Khaitan (India) Limited

APPELLANT

Vs

Learned Judge, Eighth Industrial Tribunal

RESPONDENT

Date of Decision : 20-02-2009

Acts Referred:

Constitution of India, 1950 — Article 20(3)

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 378

Citation : (2009) 02 CAL CK 0008

Hon'ble Judges : Prasenjit Mandal, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Judgement

1. This appeal is arising out of a judgment and order of dismissal of writ petition of the learned Single Judge dated 24th March. 2006. The short fact of the case leading to preferring this appeal is set out hereunder.

2. One Aijuddin Sheikh, since deceased, being predecessor-in-interest of the respondent Nos.3 (a, b, c & d) was an employee in the capacity of Tractor Driver of the appellant. While he was in duty he was chargesheeted on or about 21st June, 1996 alleging against him having committed theft of 3 kgs. of brush dust belonging to appellant and at the same time he was asked to show cause as to why he should not be terminated from his services. On service of the said chargesheet he was placed under suspension from his service. Thereafter he had shown cause in writing explaining the entire incident and pleaded not guilty and denied the allegations of misconduct.

3. The management/appellant however, having not been satisfied with the explanation conducted a domestic/internal enquiry by appointing if Labour Officer as Enquiry Officer to hold enquiry. Thereafter enquiry was held on notice being served upon the said deceased employee. It appears in course of enquiry proceeding the said Labour Welfare Officer was replaced by another officer to continue with enquiry. The Enquiry Officer submitted report holding him guilty of

charges. The appellant company had accepted the report. By an order dated 13th September, 1996 the deceased employee was dismissed from services by the appellant company on acceptance of report. On receipt of the said order of dismissal the said deceased employee raised industrial dispute and the same was referred to the Assistant Labour Commissioner, Krishnanagar, Nadia for intervention and taking necessary steps. Conciliation proceeding was initiated by the said Commissioner, however, it was proved to be futile exercise as there was no settlement. Finally the appropriate Government referred the following dispute to the first respondent, the learned Judge VIII Industrial Tribunal:

(i) Whether the management is justified in terminating the employment of Aijuddin Sheikh.

(ii) The relief, if any, is he entitled to.

4. The learned Tribunal on receipt of the written submission of the workman and counter-statement of the said company and having examined witnesses came to fact finding that by an order dated 19th December, 2000, the enquiry proceeding held by the management company was not in accordance with law and the same is conducted in complete breach of principle of natural justice, as such the report of the Enquiry Officer was set aside. However, by the same very judgment and order the learned Tribunal decided to hear out the matter on merit upon giving chance to the management company to prove the charges levelled against the workman by adducing evidence by witness action. The company, cited three witnesses to prove the charges of theft levelled against the said deceased employee. After analysing evidence and going through the facts and circumstances of the case made out by both the parties the Tribunal held that proof of theft was missing and as such the said deceased employee was given benefit of doubt consequently he was not found guilty of the allegations levelled against him. Naturally order of dismissal was set aside and direction was given to reinstate the deceased employee in services of the company with full back wages.

5. The company thereafter filed the said writ petition challenging the said award of the learned 8th Industrial Tribunal. During pendency of the above writ petition the said workman died intestate and by an order dated 22nd April, 2003 the learned Trial Judge recorded the death of the said deceased employee and the present respondent Nos. 3(a), (b), (c) and (d) were brought on record. The learned Trial Judge dismissed the writ petition by the impugned judgment and order dated 24th March, 2006 upheld the said award and dismissed the writ petition.

6. Mr. Arunava Ghosh, the Learned Counsel appearing for the appellant while assailing the impugned judgment and order of the learned Single Judge submits that learned Trial Judge failed to consider that the order of the learned Tribunal is bad and erroneous in the eye of law. The learned Trial Judge has failed to take note of his submission which is summarised below.

7. Learned Tribunal ought not to have held de novo enquiry as deceased

employee was chargesheeted with specific allegation of committing theft of the company material and he was caught red handed with the stolen materials. The allegations contained in the said chargesheet was replied to and the appellant not being satisfied with the explanation appointed Enquiry Officer. On the complaint of biasedness the Enquiry Officer was subsequently replaced. On receipt of evidence both oral and documentary, the Enquiry Officer has concluded that he had committed theft. This finding has been accepted by the management and he was accordingly awarded appropriate punishment. When this fact has been established by evidence that the learned Tribunal has no jurisdiction to interfere with the order of dismissal by reopening the issue and holding de novo enquiry. He further submits that simply learned Tribunal capriciously and arbitrarily set aside the order of punishment which is the culmination of lawful domestic enquiry. According to him it is well-settled principle of law that the learned Tribunal has no jurisdiction to interfere with award if the domestic proceeding is held following principle of natural justice and the findings of Enquiry Officer are supported by evidence. The learned Tribunal and for that matter the Court of Law cannot substitute its own finding of appreciation of evidence which has exactly been done by the learned Tribunal.

8. While challenging the finding of the award of the learned Tribunal he contends that the learned Tribunal has proceeded totally on the erroneous proposition of law as the standard of proof in case of the theft in a domestic proceeding cannot be equated with that of criminal trial. In case of latter the standard of proof is beyond reasonable doubt whereas in case of former the same is of preponderance of probability. If the evidence adduced on behalf of the management of the learned Tribunal is read carefully one can come to conclusion that the case of theft has been proved with required standard. Unfortunately, the learned Tribunal has misapplied the proposition of law in order to quash chargesheet and proceeding.

9. He further contends that the learned Tribunal as well as the learned Trial Judge has committed grave error in law while passing an order of reinstatement in favour of the deceased employee with full back wages. According to him full back wages can not be allowed as a matter of course and automatically under law. Such order of payment of full back wages is not sustainable in law. In support of his submission he has relied on the following decisions reported in J.D. Jain Vs. Management of State Bank of India and another, , Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Others, and U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, .

10. None appears for respondent Nos. 1 & 2.

11. Mrs. Shukla Sinha (Kabir) appearing for the respondent Nos.3(a), (b), (c), (d) being the heirs and legal representatives of the deceased employee submits that the chargesheet itself is illegal as it has been issued with pre-judged mind. She further submits that there is no evidence to record findings of theft under any circumstances. There has been no proof that the deceased employee had

taken possession of the companies property from the lawful possession of any person. She has explained the situation as to how the deceased got the materials. The evidence suggests that he found two packets of brush dust lying within the factory precincts of the appellant company and while having discovered the same he was approaching to make over the same to the security guard. She further submits neither before the Enquiry Officer nor before the Tribunal the case of theft has been proved by any standard. It is nothing but a case of illegal victimisation. She contends that the learned Tribunal as well as the learned Trial Judge having considered factual and legal aspect held order of dismissal is unjustified and illegal, hence no interference by this Court is called for. In support of her submission she relied on a decision reported in 2003 SCC (LS) 769. She further submits that as the employee died no disciplinary measure is required to be taken. According to her the order of payment of full back wages is not at all illegal. It was a case of absolutely illegal victimisation. The payment of back wages is just and appropriate.

12. Having heard the Learned Counsel for the parties and having gone through the papers before us the point for consideration in this case is whether the learned Trial Judge has rightly upheld the award of reinstatement of the deceased employee passed by the learned Tribunal or not.

13. The controversy in this matter started with the issuance of the chargesheet dated 21st January, 1996. It is an admitted position that this chargesheet was replied to and domestic enquiry was held and on fact finding, the Enquiry Officer held him guilty, thereafter the order of punishment was passed by accepting the report. It cannot be said, therefore, that no opportunity of being heard was given. However, the learned Tribunal found at the first instance the same was done in violation of principle of natural justice and as such the learned Tribunal conducted enquiry by itself to find whether order of punishment was justified or not. Both the sides adduced evidence, both documentary and oral. The learned Tribunal on fact found that there has been no evidence to prove the alleged misconduct of theft. We have gone through with great care the findings of the learned Tribunal. We do not see that the findings of the learned Tribunal is perverse or without any evidence. The learned Trial Judge has rightly followed the established principle of law that fact finding of the subordinate Tribunal should not be interfered with by the Writ Courts substituting its own finding. On careful reading of the chargesheet it appears to us that though it is urged before us for the first orally as it is point of law on admitted fact, the chargesheet has been issued with the prejudged mind. We therefore, quote the language of the chargesheet:

It has been reported to the undersigned that at 8.30 a.m. on 18.01.1996 when you are passing the Mill gate, and being challenged by the security personnel's like Rabindranath Sarkar, Gullu Rahaman, Santosh Biswas, Habul Roy & Iddris Sk. found some brass dust, about 3 kgs. inside your two pockets, it is a pure case of theft and management feel you are not fit for employment on this

organisation.

14. Thus the language above clearly suggest that before enquiry is held the disciplinary authority concluded theft is committed and only task remaining was to impose punishment of termination. The alleged confessional statement was also obtained by the same very person who has lodged complaint as has been found by the learned Tribunal. Therefore, such alleged confessional statement cannot be treated to be part of the evidence as correctly observed by the learned Tribunal inasmuch as use of such statement as evidence tantamount to testimonial compulsion of delinquent which is Constitutionally prohibited. According to us safeguard against testimonial compulsion as provided in Article 20(3) is equally applicable in domestic proceedings also, more so when charge is of criminal nature. The admitted fact as recorded by the learned Tribunal and the learned Trial Judge and also noted by us clearly depicts a case of unauthorised possession of brush dust belonging to the company. According to us in order to maintain a charge of theft it has to be alleged the following ingredients:

(i) Any movable property has to be taken from the possession of any person without his consent.

(ii) There must be intention to take the same dishonestly out of possession in order take such property for his own gain.

15. We do not find any standing order to ascertain the definition of theft in case of disciplinary proceedings. The misconduct of theft must have its origin from the definition of theft as it is in the Indian Penal Code. While expression "theft" in Indian Penal Code cannot be applicable strictly but then we do not find any other source to get the definition of theft except in Indian Penal Code. The definition of theft in the Indian Penal Code u/s 378 is as follows:

Whoever intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

16. In the charge sheet we do not find any allegation has been made that the brush dust was lying in the custody of any officials or person, nor there is allegation that he brought out without permission of any person or authority from his custody. The allegation as disclosed by the management shows that he was found to have possessed in his pocket two packets of brush dust and it could be discovered at the gate of the factory by security upon fleeing. According to us the ingredient of allegations of theft prima facie are not made out by the charge. Rather the management in the chargesheet concluded that there has been theft even before holding enquiry taking into consideration of the facts and circumstances of the case. It will further appear from the fact and circumstances that two motives of the deceased employee could be possible. Unauthorised possession of management's materials could be labeled against deceased employee.

17. He might have intention to take these materials out of the factory premises for his own gain or it might be after having found the packets lying within the factory precincts he wanted to contact security people for depositing. The learned Tribunal has found that case of theft could not be proved. The learned Trial Judge has correctly accepted this finding. We think that in case of this nature question of proving theft does not arise as allegations of theft in the chargesheet has not been made out. We have carefully read the findings and reasons of the learned Trial Judge and His Lordship has correctly followed while upholding the award! It is settled position of law that unless there has been perversity or the findings are based on no evidence the Writ Court cannot upset the same.

18. Mr. Ghosh submits that the judgment of the learned Trial Judge and that of the learned Tribunal is based on presumption and/or assumption. We are unable to accept this contention as we have ourselves read both the award and impugned judgment and order of the learned Tribunal and we find that the findings of both the forums are based on evidence produced before them and conclusion arrived at is having direct link with evidence as such there is no scope for any presumption or assumption. We find, on the contrary, that allegations of theft based on presumption and as a matter of fact there was no allegation of theft in the chargesheet rather findings of theft before enquiry were held. No standing order has been placed to charge that in the event unauthorised possession of any company materials would constitute case of theft. The decisions cited by Mr. Ghosh in this connection do not support his submission in the facts and circumstances of this case, as discussed below.

19. The decision of Supreme Court in the J.D. Jain Vs. Management of State Bank of India and another, , laid down the proposition of law in paragraph 7 thereof as to when the High Court can interfere with the award of the learned Tribunal.

20. To our mind the learned Trial Judge has done what the Apex Court in that case has ruled. According to us the learned Tribunal has also followed the same principle of law while upsetting the domestic enquiry as it was found factually domestic enquiry was held in violation of principle of natural justice.

21. The Supreme Court in the case of Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Others, has expounded in paragraph 37 thereof, standard of proof in case of domestic proceedings and civil suit is not beyond reasonable doubt, but preponderances of probabilities. We find in this case the learned Tribunal while passing award has followed the above principle.

22. We are of the opinion in a fit case benefit of doubt in case of domestic proceeding can be given, particularly when there is no proof of the standard of preponderance of probabilities.

23. However, we found substance in the argument of Mr. Ghosh that learned Tribunal ought not to have granted full back wages of the employee as this has

been observed in the decision of the Supreme Court reported in U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, that order of full back wages in case of reinstatement is not automatic and it can only be granted when it is proved that during period of suspension when the disciplinary proceedings was pending the employee concerned was not gainfully engaged in somewhere else. In this case there was no evidence either before the learned Tribunal or before the learned Trial Judge that the deceased employee was not gainfully engaged during the period of suspension as burden of proof lies u/s 106 of Evidence Act laid with him as the same is within his special knowledge. As such we are of the view this award needs to be modified to the extent that back wages should not be paid fully. The employee passed away during pendency of the writ petition. Having regard to facts and circumstances of this case he should be paid 60 per cent back wages adjusting the amount of subsistence allowance, if paid during the period of his suspension till the date of passing award. But the deceased employee was entitled to all the benefits including full salary from the date of award and judgment of the learned Tribunal till his death, if he had not attained retirement age, if so, upto the date of retirement age. Therefore, we uphold the judgment and order of the learned Trial Judge and the award of the learned Tribunal with the aforesaid modification. This appeal is disposed of accordingly.

24. The respondent shall pay cost of the proceedings to the respondents assessed at Rs. 7,000/- to the respondent Nos.3(a), (b), (c) and (d). All payment shall be made within four weeks from the date of receipt of this judgment and order. So all the dues as above shall be paid to the respondents except that a sum of Rs. 31,962/- which was paid on account of provident fund dues during pendency of the appeal.