

(2016) 06 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 3207 of 1995

Manager, Central Workshop, Maharashtra State Road
Transport Corporation, Aurangabad

APPELLANT

Vs

Ashok Sambhaji Phalke

RESPONDENT

Date of Decision : 21-06-2016

Acts Referred:

Citation : (2017) 2 ALLMR 354 : (2016) 4 BCR 846 : (2016) 3 CLR 368 : (2017) 152 FLR 789 : (2016) 151 FLR 277 : (2016) LabLR 1091 : (2016) LabLR 875 : (2016) 3 LLJ 297 : (2016) 5 MhLJ 734

Hon'ble Judges : Mr. P.R. Bora, J.

Bench : Single Bench

Advocate : Mr. M.K. Goyanka, Advocate, for the Appellant; Mr. Rajaram B. Mule, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. P.R. Bora, J.—The present petition has been filed against the judgment and award dated 2nd February, 1995 passed by the Labour Court at Aurangabad in Reference (IDA) No.128 of 1990 whereby the present Petitioner was directed to reinstate the present Respondent with continuity of service and back-wages from 7th September, 1990.

2. Facts relevant for decision of the present petition are thus:

Respondent was working as a Helper with the Petitioner from the year 1987. In the year 1988, he was served with a charge-sheet containing an allegation that he remained absent from duty from 28th October, 1988 upto 9th January, 1989 without giving any prior intimation or application for leave and thus has caused adverse effect on the working of the Petitioner. In the Departmental Enquiry held against the Respondent, he was held guilty and punishment of dismissal from service was imposed on him. Respondent challenged the said order of dismissal by raising a dispute before the Deputy Commissioner of Labour, Aurangabad,

whereupon the Deputy Commissioner of Labour, Aurangabad made a reference under Sections 10 and 12 of the Industrial Disputes Act to the Labour Court, Aurangabad.

3. It was the contention of the present Petitioner before the Labour Court that a proper Domestic Enquiry was conducted against the Respondent and since he was found guilty of the charges levelled against him in the said Departmental Enquiry, punishment of dismissal from service was imposed on him. It was the further contention of the Petitioner that in case the Court comes to the conclusion that the enquiry held against the Respondent was illegal, an opportunity may be given to the Petitioner to lead evidence before the Court to prove the charges levelled against the Respondent. As against it, it was contended by Respondent that the enquiry shown to have been conducted against him was in fact a farce of an enquiry. It was further contended by him that during the relevant period, he was lodged in a prison in one criminal case against him for an offence under Section 302 of the Indian Penal Code. It was his further contention that the entire enquiry was conducted against him when he was so lodged in jail and thus, the enquiry conducted against him was an ex-parte enquiry without giving any opportunity of hearing to him.

4. The learned Labour Court after assessing the oral and documentary evidence brought before it, allowed the reference and directed reinstatement of present Respondent in service with continuity and back-wages from 7th September, 1990. Aggrieved by the same, the Petitioner has preferred the present petition.

5. Shri M. K. Goyanka, learned counsel appearing for the Petitioner submitted that the impugned judgment and award is liable to be set aside on the count alone that no opportunity was given to the Petitioner to prove the charges levelled against the Respondent by adducing evidence before the said Court after the Court had recorded a finding that the Domestic Enquiry against the second party i.e. present Respondent was not fair and proper and that the findings recorded against the Respondent in the said Domestic Enquiry were perverse. The learned counsel further submitted that in fact the learned Labour Court must have decided the issue of legality of Departmental Enquiry first as a preliminary issue. The learned counsel further argued that in the written statement filed by the Petitioner before the Labour Court, a specific prayer was made that if the Court comes to the conclusion that the enquiry held against the Respondent was illegal, the first party i.e. Corporation may be allowed to lead the evidence to prove the charges levelled against the Respondent. The learned counsel submitted that in such circumstances, if the Labour Court had reached to the conclusion that the enquiry held against the Respondent was illegal, the Petitioner must have been given an opportunity to prove the charges against Respondent by adducing evidence before the Labour Court. The learned counsel submitted that bypassing the settled procedure, the Labour Court in one stroke has branded findings of the Enquiry Officer as perverse and without giving any opportunity to the Petitioner to lead evidence so as to prove the misconduct of

the Respondent, has delivered its final judgment. The learned counsel therefore, prayed for setting aside the impugned judgment and award and to remit back the matter to the Labour Court with a direction to allow the Petitioner to adduce necessary evidence to prove the charges levelled against the Respondent in the charge-sheet served upon him. In support of his argument, the learned counsel placed reliance on the judgment of this Court in the case of Maharashtra State Co-operative Cotton Growers Marketing Federation Ltd. and another v. Vasant Ambadas Deshpande, reported in, [2014 (3) Mh. L. J. 339].

6. Shri R. B. Mule, learned counsel appearing for the Respondent supported the impugned judgment. The learned counsel submitted that since at no stage principles of natural justice were followed and not only that charge-sheet was served upon the Respondent when he was lodged in the prison, but the entire enquiry was conducted in his absence when he was in jail. The learned counsel submitted that the only charge against the Respondent was that he remained absent from duty since 28th October, 1988 upto 9th January, 1989 without giving any prior intimation or application for leave and thus caused adverse effect on the working of the Petitioner. The learned counsel submitted that the reason because of which Respondent could not attend his duties was beyond his control. The learned counsel further submitted that in the above circumstances, the Respondent could not have been held guilty for the charge levelled against him. The learned counsel submitted that the finding recorded by the Disciplinary Authority was apparently perverse and has been rightly set aside by the Labour Court. The learned counsel further submitted that having regard to the facts involved in the present case, there was no necessity of giving any opportunity to the Petitioner to adduce any evidence to prove the charges levelled against the Respondent. The learned counsel therefore, prayed for dismissal of the petition.

7. I have carefully considered the submissions advanced by the learned counsel appearing for the respective parties. I have perused the impugned judgment and the material placed on record by the parties. It is true that the Labour Court has not decided the issue as regards to fairness and legality of Domestic Enquiry conducted against the Respondent as a preliminary issue. The Labour Court has decided all the issues simultaneously and in one stroke. It is also true that the Petitioner in its written statement filed before the Labour Court has prayed for an opportunity to lead evidence to prove the charges levelled against the Respondent in case it is held that the Domestic Enquiry conducted against the Respondent was illegal. Admittedly, such procedure has not been followed by the learned Labour Court. As has been observed by this Court in the case of Maharashtra State Co-operative Cotton Growers Marketing Federation Ltd. and another v. Vasant Ambadas Deshpande (supra), it is the settled procedure that if the Departmental Enquiry is set aside holding the same to be illegal or not in conformity with the law, the employer has to be given an opportunity to prove the charges levelled by him against the employee by leading necessary evidence before the Court.

8. In the instant matter, though the Labour Court has recorded a finding that the enquiry held against the Respondent was illegal, has admittedly not given an opportunity to the Petitioner to lead evidence to prove the charges levelled against the Respondent though it was specifically prayed for by the Petitioner. However, after having carefully considered the facts involved in the present case, I do not see any substance in the contention raised on behalf of the Petitioner that the impugned judgment needs to be set aside on the aforesaid count alone and the matter needs to be remitted back to the Labour Court with a direction to allow the Petitioner to adduce necessary evidence to prove the charges levelled against the Respondent.

9. The only charge against the Respondent was that he remained absent from duty from 28th October, 1988 upto 9th January, 1989 without giving any prior intimation or application for leave and thus caused adverse effect on the working of the Petitioner. From the material on record, it is quite clear that during the aforesaid entire period i.e. from 28th October, 1988 upto 9th January, 1989, the Respondent was in jail in a criminal case (Sessions Case No.65 of 1989) against him for an offence under Section 302 of the Indian Penal Code. The material on record further shows that initially offence was registered against the Respondent under Section 307 of the Indian Penal Code alleging that he poured kerosene on the person of his wife and set her on fire. In the said offence, he was arrested on 29th October, 1988 and was lodged in jail after he was remanded to magisterial custody. In the meanwhile, his wife succumbed to burn injuries and consequently the offence under Section 307 registered against the Respondent was converted into an offence under Section 302 of the Indian Penal Code. The material on record further shows that the Respondent was lodged in Central Jail at Harsool upto 20th July, 1989. The material on record further shows that the charge-sheet on the basis of which Domestic Enquiry is said to have been conducted against the Respondent was served on him on 13th January, 1989 in the Central Jail at Harsool. The material on record further shows that from the jail itself, the Respondent replied the said charge-sheet on 19th January, 1989. The material on record further shows that the Enquiry Officer concluded the enquiry against the Respondent and based on the findings so recorded by the Enquiry Officer, punishment of dismissal from service was imposed on the Respondent vide order passed by the competent authority of Petitioner on 28th February, 1989. It is thus quite evident that during the period in which the Domestic Enquiry was conducted against him and the punishment of dismissal from service was imposed on him, Respondent was in Central Jail at Harsool in a criminal case registered against him under Section 302 of the Indian Penal Code.

10. From the facts as aforesaid, it is discernible that the Respondent had not remained absent from duty voluntarily but for the reasons beyond his control. Since an offence under Section 307, which was subsequently converted into an offence under Section 302 of the Indian Penal Code, was registered against the Respondent, he was arrested in the said offence on 29th October, 1988 and since then he was in jail upto 20th July, 1989. It is not disputed that during the entire

aforesaid period, Respondent was in the Central Jail at Harsool.

11. It was sought to be canvassed by the learned counsel appearing for the Petitioner that the Respondent ought to have informed to the Petitioner about his arrest in the criminal case filed against him and since no such information was provided by the Respondent, no fault can be attributed on the part of the Petitioner for holding the enquiry against the Respondent on the charge of absenteeism. The submission so made is liable to be rejected at the threshold in view of the material on record. When the charge-sheet was served on the Respondent in the jail itself in fact sufficient information can be said to have reached to the Petitioner about the date of arrest of Respondent and the cause for his arrest. Moreover, as has been observed by the learned Labour Court, the Security Officer of the Petitioner had on 3rd December, 1988 submitted confidential report to the Manager of the Petitioner informing that the Respondent was in jail in connection with an offence registered against him under Section 307 subsequently converted into 302 of the Indian Penal Code. The report submitted by the Security Officer is the part of the enquiry papers pertaining to the Departmental Enquiry held against the Respondent. It is thus evident that on 3rd December, 1988 the Petitioner was in knowledge of the fact that the Respondent has been arrested by the Police in connection with an offence registered against him and is lodged in the Central Jail at Harsool. In spite of having knowledge of the aforesaid fact, charge-sheet came to be issued against the Respondent and the same was served on him on 13th January, 1989 in the Central Jail at Harsool.

12. In the premise of the fact as aforesaid, the Labour Court has held that the Domestic Enquiry held against the Respondent was not fair and proper and further that the findings recorded by the Enquiry Officer are perverse.

13. The further question arises, whether in the peculiar circumstances of the present case, was it necessary for the Labour Court to give an opportunity to the Petitioner to lead evidence before it to prove the charges against the Respondent. After having considered the entire material on record, it does not appear to me that any such opportunity was necessary to be given to the Petitioner. As mentioned earlier, the only charge against the Respondent was his absence during the period from 28th October, 1988 upto 9th January, 1989. The Respondent himself has admitted that he was absent during the said period. Thus, nothing was to be proved in that regard.

14. Facts on record are so glaring that nothing more is required to hold that the Departmental Enquiry conducted against the Respondent was not fair and proper and that the finding recorded by the Enquiry Officer in the aforesaid enquiry is perverse. The Petitioner, undisputedly had the knowledge of the confidential report submitted by its Security Officer on 3rd December, 1988 informing that the Respondent was lodged in Harsool jail because of a criminal case instituted against him. In spite of that, a charge-sheet was prepared alleging that he was absent from duty without giving any prior intimation or application for leave. As

mentioned earlier, charge-sheet was served upon the Respondent while he was lodged in Harsool jail and having full knowledge that the Respondent is not released from jail, in his absence enquiry was conducted against him. In no case, such an enquiry can be held to be fair. This fact has been precisely noted by the learned Labour Court in clear words that though the first party i.e. present Petitioner was having knowledge of arrest of second party i.e. the present Respondent, the Petitioner issued notice for appearance of the Respondent in the enquiry and subsequently conducted enquiry ex-parte in absence of the Respondent. The violation of the principles of natural justice is thus apparent on the face of record. Such an enquiry cannot be said to be an enquiry and consequently, the finding arrived at by the Enquiry Officer in such an enquiry, can only be said to be perverse.

15. From the discussion made above, it is quite clear that, nothing was required to be proved by the Petitioner requiring an opportunity to lead evidence before the Labour Court. The fact that, the respondent was absent from duty from 28.10.1988 upto 09.01.1989, without giving any prior intimation, or application for leave was not disputed by the Respondent and as such was not required to be proved by the Petitioner. The question was whether the petitioner had remained absent voluntarily and without any valid reason. The answer is "no". Since a criminal case was filed against the respondent and he was arrested and lodged in the prison, it was impossible for him to attend the duties. The reason for which the respondent remained absent in the relevant period was beyond his control and as such no blame can be attributed on his part and no charge of absenteeism could have been levelled against him. A person can be charged on the allegation of absenteeism if the absence of the said person is voluntarily, without any cogent and sufficient reason and without any prior intimation or application for leave. In the instant matter, no prior intimation could have been given by the Respondent in respect of his alleged absence since he himself was not knowing that any such incident giving rise for a criminal prosecution against him would occur and that he will be arrested in the said case. Neither the respondent could have applied for leave on the ground that he is in jail because of a criminal case registered against him. At the most, it can be said that either the respondent or any of his relative should have intimated the petitioner about the arrest of the respondent. However, no weightage can be attached to the fact that the respondent did not intimate about his arrest, in view of the fact that before issuance of the charge-sheet, the Security Officer of the petitioner had furnished an information to the competent authority that the respondent was lodged in jail in a criminal case registered against him. In the circumstances, no charge of absenteeism could have been raised against the Respondent. The Petitioner, however, not only issued a charge sheet in that regard to the Respondent but knowing well that the respondent may not be able to attend the enquiry proceedings conducted and concluded the departmental enquiry in his absence when he was imprisoned. The enquiry conducted against the Respondent was, thus, per se illegal. The trial Court has, therefore, rightly set

aside the said enquiry by holding it to be not fair and proper and branding the finding recorded in the said enquiry to be perverse. For the reasons recorded above, it also does not appear to me that any opportunity was required to be given to the petitioner to adduce evidence before the Labour Court in order to prove the misconduct alleged against the Respondent.

16. The Labour Court has not committed any error in setting aside the punishment of dismissal and consequently directing reinstatement of the Respondent. Similarly, for the reasons discussed above, no fault can be found with the impugned judgment and award on the ground that the Labour Court did not give an opportunity to the Petitioner to lead evidence in order to prove the charges against the Respondent.

17. Ordinarily the employer must be allowed to prove the charges raised against an employee by adducing necessary evidence before the Court, in the event the enquiry conducted against the said employee is vitiated by the Court on any count. However, such permission cannot be granted as a rule of thumb merely on asking such permission by the employer. In certain matters alike the present one, to grant such an opportunity may be proved to be a futile exercise. Whether any such case is made out by the employer so as to permit him to adduce evidence before the Court to enable him to prove the charges levelled against an employee, would depend upon facts and circumstances of that particular case. If, from the material on record it is noticed by the Court that, no evidence is required to be adduced by the employer and giving such an opportunity will be an exercise in futility, the Court may refuse such permission.

18. It was sought to be canvassed by the learned counsel appearing for the Petitioner that even if the order of reinstatement is maintained by this Court, in no case the order passed by the Labour Court granting full back-wages to the Respondent from 7th September, 1990 can be sustained and at least to that extent the writ petition may be allowed and the order passed by the Labour Court so far as it relates to grant of back-wages may be quashed and set aside, in view of the fact that in the relevant period, the Respondent has admittedly not rendered services. This submission also must be rejected in view of the finding recorded by the Court below as well as by this Court that the action of Management was wholly arbitrary and vitiated due to violation of rules of natural justice. Having regard to the fact involved in the present case, denial of back-wages would amount to indirectly punishing the Respondent and rewarding the Petitioner by relieving it of the obligation to pay the back-wages.

19. The Honourable Apex Court in the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya ((D.ED) and others*, reported in, [(2013) 10 Supreme Court Cases 324] has observed thus:

"The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action

taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial / quasi-judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

20. In the instant case also, the specific contention was raised by the Respondent before the Labour Court that he is not gainfully employed anywhere. The fact so stated by the Respondent has not been controverted by the Petitioner. In the aforesaid circumstances and more particularly in view of the law laid down as above by the Honourable Apex Court, I do not see any reason to cause any interference in the order passed by the Labour Court awarding reinstatement and back-wages with effect from 7th September, 1990. The writ petition is devoid of any substance. Hence the following order ?

ORDER

1. The Writ Petition is dismissed with costs. Rule discharged.