

(2016) 02 GUJ CK 0053

In the Gujarat High Court

Case No : Special Civil Application No. 18190 of 2006

Regional Manager

APPELLANT

Vs

Devjibhai M. Parmar

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A

Citation : (2016) LIC 2275

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : G.M. Joshi, Advocate, for the Appellant; T.R. Mishra, Advocate, for the Respondent

Final Decision : Allowed

Judgement

K.M. Thaker, J.—1. Heard Mr. Joshi, learned advocate for the petitioner bank, and Mr. Mishra, learned advocate for the respondent.

2. The petitioner bank is aggrieved by an award dated 12.12.2005 passed by the learned Central Government Industrial Tribunal-Cum-Labour Court, Ahmedabad in Industrial Dispute (Reference CGITA) No. 926 of 2004 (Old (ITC) No. 1 of 1990 whereby the learned Tribunal has set aside the order passed by the petitioner bank against the respondent and directed the petitioner bank to reinstate the respondent with continuity of service and to pay 25% backwages.

3. So far as factual background is concerned, it has emerged from the record that upon being dismissed from service on the ground that the allegations and charge levelled against him vide charge sheet dated 4.9.1986 and additional charge sheet dated 19.1.1987 are proved in the domestic inquiry, the respondent raised an industrial dispute which was referred for adjudication to the learned Tribunal. In the statement of claim filed by the respondent, he claimed that at the relevant time, he was working as godown keeper at the petitioner's bank's Vaniyavadi Branch, Rajkot. He claimed that he was visited with a charge sheet

dated 4.9.1986 and subsequently, another/additional charge sheet dated 19.1.1987 was served and in pursuance of the said charge sheets, domestic inquiry was conducted. He also alleged that upon conclusion of the domestic inquiry and after inviting his explanation as to the proposed penalty and after inviting his response with regard to the findings of the inquiry officer passed order dated 31.5.1988 and discharged him from the service of the bank. He also claimed that an appeal before the departmental appellate authority failed. The respondent challenged the petitioner's action before the learned Tribunal. The petitioner bank opposed the reference and the respondent's claim. The bank claimed that the charge and allegations against the respondent including the charge of misappropriation of amount of bank's customers and of engaging in business while in service with the bank are proved and according to the applicable rules, the said allegations and charge amount to major misconduct. Therefore, the service of the respondent was terminated. The bank relied on the proceedings of the domestic inquiry and the report submitted by the inquiry officer.

3.1 During the proceedings before the learned Tribunal, evidence was recorded and after considering the evidence on record and the submissions by learned counsel for the contesting parties, learned Tribunal passed the impugned award dated 12.12.2005 with above mentioned directions.

4. Mr. Joshi, learned advocate for the petitioner, raised following contentions:--

"[a] The respondent had admitted the legality and propriety of the domestic inquiry as well as findings and had restricted his challenge only with regard to the quantum of penalty and his claim for backwages and that therefore, it was not open to the learned Tribunal to enter into the findings recorded by the inquiry officer and to decide the issue as to whether the charge levelled against the respondent are proved or not.

[b] Having regard to the fact that the charge levelled against the respondent are proved, it was not open for the learned Tribunal to decide justification and propriety with regard to quantum of penalty.

[c] When the learned Tribunal found from the evidence on record and when the learned Tribunal also recorded findings that the respondent had entered into partnership/business while in service, the learned Tribunal misdirected itself by accepting the respondent's submission that actually the said business venture had not entered into any transaction and the venture had actually not materialized and any business activity were not undertaken and that therefore, the respondent cannot be said to have committed any misconduct.

[d] Without prejudice to the contention that the learned Tribunal could not have entered into the process of examining the issue as to whether the charge is proved or not, the petitioner contended that the learned Tribunal erred in holding that the charge and allegation with regard to misappropriation of Rs. 1,000/- is not proved."

5. Per contra, Mr. Mishra, learned advocate for the respondent, supported the impugned award and submitted that the learned Tribunal has not committed any error in recording the conclusions and in directing the petitioner bank to reinstate the respondent. He relied on the observations and findings recorded by the learned Tribunal in paragraph No. 9 of the impugned award. He submitted that the action of the petitioner of considering the respondent's action of having entered into partnership as misconduct despite the fact that any business activity was not transacted, is unjust and arbitrary and the learned Tribunal rightly interfered with the said decision and action of the petitioner bank and the learned Tribunal rightly held that the said charge cannot be considered as proved. He also submitted that the learned Tribunal rightly held that the charge of misappropriation of Rs. 1,000/- is not proved. With regard to the pursis dated 29.4.2002, Mr. Mishra, learned advocate for the respondent, submitted that the respondent had challenged the punishment and that therefore, it was permissible to the learned Tribunal to examine as to whether the charge can be said to be proved or not because the aspect of punishment can be examined in light of the conclusion with regard to the charge and allegations.

6. I have considered the submissions by learned counsel for the contesting parties and I have also examined the material on record, including the charge sheet, additional charge sheet and the impugned award.

7. So as to consider and decide the challenge against the impugned award, it would be necessary to take into account the charge and allegations against the respondent in light of which and on account of which the service of the respondent came to be terminated. The charge sheet and additional charge sheet issued by the bank against the respondent are placed on record. The petitioner bank, vide charge sheet dated 4.9.1986 levelled below quoted charge and allegations against the respondent:--

"1) You had made a credit entry of Rs. 1000/- as on 10.7.1986 in the Saving Bank Pass Book relating to SB A/c. No. 6105 of one Sri Harish Dalpatray Bhatti, without actually remitting the amount the credit of the above SB A/c. No. 6105 in the bank.

2) You had misappropriated the above amount of Rs. 1000/- relating to the imputation No. 1, for yourself.

The above charges, if established in an enquiry, will render you guilty of gross misconduct under para 17.5(d) and 17.5(j) of the Bipartite settlement between the Bank and its workmen dated 14.12.1966 as amended upto date which is read as under

17.5(d) willful damage or attempt to cause damage to the property of the bank or any of its customers.

17.5(J) doing any act prejudicial to the interests of the bank, or gross negligence involving or likely to involve the bank in serious loss."

7.1 In the said charge sheet, the respondent was called upon to offer his explanation/reply.

7.2 While the proceedings with regard to the above mentioned charge sheet dated 4.9.1986 were pending, additional charge sheet dated 19.1.1987 came to be issued. In the said additional charge sheet, the bank levelled below quoted charge against the respondent:--

"1) It is reported that you had entered into a partnership on 10/02/1986 with one Shri Ramaben Devjibhai Parmar and again on 21/07/1986 with four others namely 1) Ramaben Devjibhai Parmar 2) Jalabhai Keshabhai Zala 3) Rambhaben Lilaben Zala 4) Bharabhai Anandabhai Zala and engaged in business/trade in the name and style of M/s. Vihot Industries, without the written permission of the bank.

2) You had got purchased on 14/07/1986 at our Ashram Road (Ahmedabad) branch a self cheque bearing No. 049732 dated 14/07/1986 for Rs. 200/- (Two Hundred Only) drawn on your SB A/c. No. 5566 at our Vaniawadi branch without keeping sufficient funds in your SB A/c. No. 5566 with our Vaniawadi branch to honour the instrument.

The above acts, if established in an enquiry, will render you guilty of gross misconduct under para 17.5(a) and 17.5(j) of the Bipartite Settlement between the Bank and its workmen dated 14/12/1966 as amended upto date which reads as under:--

12.5(a) engaging in any trade or business outside the scope of his duties except with written permission of the bank;

17.5(j) doing any act prejudicial to the interests of the bank, or gross negligence involving or likely to involve the bank in serious loss;"

8. In pursuance of the said charge sheet, the domestic inquiry in accordance with the rules applicable to the petitioner bank was conducted. Upon conclusion of the inquiry, the inquiry officer submitted inquiry report holding, inter alia, that the charge levelled against the workman are proved. The disciplinary authority examined the report of the inquiry officer. The disciplinary authority agreed with the findings of the inquiry officer and called for the respondent's response. After considering the response by the respondent workman and the material available on record of the inquiry, the disciplinary authority considered it appropriate to discharge the respondent and that therefore, the termination order dated 31.5.1988 came to be passed. The departmental appeal against the said order failed. Against the said concurrent orders, the respondent approached the learned Tribunal.

9. By an application/pursis dated 29.4.2002, the respondent declared and stipulated that he restricts the challenge against the order only qua punishment and his claim for backwages.

9.1 In light of the said pursis, learned advocate for the petitioner submitted that the respondent workman had dropped the challenge against the procedural aspect of the domestic inquiry as well as finding reached and recorded by the inquiry officer inasmuch as the respondent declared and stipulated that he restricts the challenge only against the punishment.

9.2 Mr. Mishra, learned advocate for the respondent, would contend that since the respondent workman has not expressly mentioned that he does not challenge the findings of the inquiry officer, such stipulation may not be read into the said pursis.

10. In this background, the conclusions by the learned Tribunal are required to be examined.

10.1 On this count, it is relevant to take into account the observations by the learned Tribunal in paragraph Nos. 7 and 9 of the award dated 12.12.2005.

"7. Under section 11A of the I.D. Act when there is a dispute relating to discharge or dismissal of a workman the adjudicator. If he is satisfied that the order of discharge or dismissal was not justified. It may by it's award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions as he thinks fit. Or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstance of the case may required. For that purpose the Tribunal shall rely only on the material on record and shall not take fresh evidence in relation to the matter. Looking to this provisions the Tribunal has power to give relief to the workman in case of discharge or dismissal. Thus when the management takes responsibility to level the charges of mis-conduct, there must be material in support of such charge where there is no such material the action and the charge would be vitiated by basic error or perversity. In workman of Fire, Stone Rubber, Company India Private Ltd. v. Management , 1973 1 LLJ page No. 278 S.C. It was held that under Section 11A the Tribunal has power to differ both on finding of mis-conduct arrived at by an employer as well as the punishment imposed by him. It is not necessary for the workman to plead section 11A. The adjudicator himself has to apply the provisions of this section irrespective of the fact, whether the workman has mentioned it in his pleadings and claimed relief there under or not. Thus the adjudicator has power regarding of finding of mis-conduct as well as punishment imposed by employer. If we peruse the inquiry proceedings against the concerned workman (Ex. 82 page Nos. 1 to 29) management witness No. 3 Shri Harishbhai Dalpatbhai Bhatti has deposed to the inquiry officer that he did not meet manager on 05/08/1986 the day on which he came to withdraw the cash from the S.B. Account. It is also clear that he met the officer from the bank during the month of October 1986, while the charge sheet was given to the concerned workmen on 04/09/1986. He also says that he is not agree with the letter which he has written on 10/10/1986. And it was his misunderstanding regarding the entry of Rs. 1000/-. He admitted that Shri D.M. Parmar has given the amount to him on the same

day that it is on 02/07/1986. He replied that he did not give any money to Mr. D.M. Parmar. Regarding his letter, he made sufficient explanation in the inquiry. Thus the evidence of M.W.3 is clear admission that the letter, he has written to the officer from Bombay was as per his request and not the facts. This evidence is clear to disapprove the charges against the concerned workman regarding the credit entry of Rs. 1000/- on 10/07/1986 in the saving bank passbook of S.B.A/ c. No. 6105. The charge of misappropriation of Rs. 1000/- relating to the above entry is not proved. Thus the guilt of the concerned workman is not established by the evidence in the inquiry. Thus the charges under para 17.5(a), 17.5(J) is not established against the concerned workman.

9. Looking to the charge-sheet dated 19/01/1987. The first charge is of engaging in to the partnership of M/s. Vihot Industries. Looking to the inquiry papers it is established that the unit is on paper and yet to take particular shape. There is no evidence that there was any trade/business undertaken by M/s. Vihot Industries. The only evidence is of a bank account and G.S.F.C. letter. But no person was examined from Bank of India at Rajkot, regarding the account. Thus without proper evidence and without any material on record it can not be established that M/s. Vihot Industries has done any trade/business. The workman applied for loan to G.S.F.C. with a clear understanding that after resignation loan can be sanctioned. Thus there is no document to show that the concerned workman was a partner of M/s. Vihot Industries and that unit was materialized and has done any trade/business. The charges against the concerned workman that he is a partner of M/s. Vihot Industries is also not, clearly established. The only charge proved against the concerned workman is of purchasing a cheque of Rs. 200/- and for that he had submitted reasonable explanation of the circumstances for the purchase. The letter dated 23/10/1986 from G.S.F.C. does not establish that M/s. Vihot Industries has carried out any trade/business. It was a merely paper arrangement which was never materialized. Looking to the letter of the bank also the account of M/s. Vihot Industries was closed on 20/12/1986. The account does not show that any/business was materialized during the period from 28/03/1986 to 22/12/1986. Thus there is no evidence to show that M/s. Vihot Industries is a real entity and that firm has done any trade/business. Thus the charges against the concerned workman being a partner of Vihot Industries did not established. However, the charges of purchasing a cheque of Rs. 200/- from Ashram Road Branch is proved, but for that a sufficient explanation has been given by the concerned workman. He also narrated the circumstances for which it was purchased. Not only that the concerned workman has repaid the amount and charge of Rs. 8/- is also recovered from him. Thus it is not a grave misconduct on the part of the concerned workman, so that he shall be discharged from the services. Thus the charges under para 17.5(a) is not established as well as under para 17.5(J) is also not established because there is no loss to the bank for purchasing a cheque of Rs. 200/-."

10.2 Under the charge sheet dated 4.9.1986, the petitioner bank alleged that the respondent workman had misappropriated sum of Rs. 1,000/- relating to saving

bank account No. 6105 of one Shri H.D. Bhatti.

11. Now, so far as said charge is concerned, as mentioned in the chargesheet, the said charge, if proved, amounts to major misconduct.

12. The inquiry officer reached to the conclusion, on the basis of the material on record of the domestic inquiry that the bank proved the charge.

12.1 In this context, it is necessary to note and mention that since the respondent workman did not challenge the legality and propriety of the inquiry and restricted his challenge to the punishment, learned tribunal relied on the same material and evidence which was available on record of the domestic inquiry.

12.2 Any additional/fresh evidence was not placed before the learned tribunal during the proceedings.

12.3 With regard to the said charge, learned tribunal has recorded, inter alia, that:--

"8. Looking to the deposition of M.W.3 the findings of the inquiry officer for the above charges are not supported by the evidence. Not only that if it is an act of misappropriation, the bank has not filed any criminal case against the concerned workman. Thus the so called factious entry of Rs. 1000/- in the pass book of Shri Harishbhai D. Bhatti after taking money from him has not been proved. It may be error on the part of employee but certainly not a mis-appropriation on the part of the workman."

12.4 Learned tribunal also took into account the evidence of the concerned customer i.e. Mr. Bhatti who during his statement before the inquiry officer stated that:--

"He admitted that Shri D.M. Parmar has given the amount to him on the same day that it is on 02/07/1986. He replied that he did not give any money to Mr. D.M. Parmar. Regarding his letter, he made sufficient explanation in the inquiry."

12.5 After taking into account the said statement of the customer the learned tribunal construed the said evidence to mean that:--

"Thus the evidence of M.W.3 is clear admission that the letter he has written to the officer from Bombay was as per his request and not the facts. This evidence is clear to disapprove the charges against the concern workman regarding the credit entry of Rs. 1000/- on 10/07/1986 in the saving bank passbook of S.B. A/ c. 6105."

12.6 It comes out that the learned tribunal failed to take into account that in his statement before the inquiry officer the witness mentioned that the delinquent/ chargesheeted employee had "given amount to him on the same day".

12.7 Learned tribunal also failed to appreciate that the charge against the respondent workman was that the delinquent, without actually remitting the

amount, had merely made credit entry in the saving bank account No. 6105 of the customer Mr. Bhatti.

12.8 The fact that the delinquent had paid the amount to the customer was sufficient to support and prove the charge mentioned in the chargesheet dated 4.9.1986.

13. The petitioner claims that it was neither open or necessary nor appropriate for the learned tribunal to enter into the examination of the proof related to the charge and to decide as to whether the charge was proved and findings by the inquiry officer are correct or not.

14. However, Mr. Mishra, learned advocate for the respondent would contend that since the challenge against the findings of the inquiry is not expressly waived it was proper for the learned tribunal to examine said aspect.

15. If the Court proceeds in the matter by accepting the submissions by Mr. Mishra, learned advocate for the respondent then also, from the foregoing discussion it comes out that learned tribunal has not examined the evidence of the witness/customer in light of the charge levelled against the respondent and the Court has also not taken into account the statement by the witness that the delinquent had given him amount and the credit entry was made actual remitting amount then there was no need for the delinquent to pay amount to the respondent.

The conclusion by learned labour Court that the charge cannot be said to proved is not sustainable.

16. So far as other charge levelled against the respondent are concerned one of the two allegations relate to the conduct of the respondent viz. entering into partnership for business activity with other persons, while he was in service with the bank.

16.1 According to the petitioner the bank's regulation do not permit its employees to enter into partnership and/or any business activity while in service.

16.2 Dispute such provision the respondent entered into partnership with other person for the purpose of business activity in name and style of M/s. Vihot Industries.

17. During the hearing of present petition Mr. Mishra, learned advocate for the respondent workman could not dispute, and has fairly accepted, that the registration of the establishment in the name and stay of M/s. Vihot Industries was completed when the chargesheet was issued. It is pertinent to note that learned tribunal, as can be seen from the observation in paragraph No. 9, has permitted itself to proceed on the premise that though the respondent had entered into partnership for carrying on trade/business activity in name and style of M/s. Vihot Industries, however, the said act cannot be construed as misconduct because there is no evidence to show that M/s. Vihot Industries had

done any trading/business transaction.

18. Learned Court proceeded on the premise that since the firm had actually not transacted in business and actually had not commenced any activity, the action of the respondent workman of entering into partnership cannot be said to be misconduct.

19. On this count it is necessary to note that learned tribunal itself has recorded in the impugned award that "the workman applied for loan to G.S.F.C. with clear understanding that after resignation loan can be sanctioned".

19.1 Thus, even learned tribunal had noticed the fact that an application for loan in name of partnership establishment i.e. M/s. Vihot Industries, was submitted to G.S.F.C. and that such application was submitted while the respondent was in service.

19.2 When these aspects are established before the learned tribunal then learned tribunal could not have proceeded on the premise that since any transaction was not entered into and executed by the said M/s. Vihot Industries, the action of entering into partnership with other person cannot be considered misconduct.

19.3 Learned tribunal ignored the fact that the respondent workman had made an application for loan to G.S.F.C. for the trade/business activity of the said partnership establishment. Merely because it was not established that the said M/s. Vihot Industries had carried out any trade/business activity, it did not wipe out the action of the respondent of entering into partnership with other person. At the very moment when partnership was finalized, entered into, the misconduct was committed.

19.4 Actual transaction by partnership firm could not have been considered as pre-requisite for holding that the misconduct of entering into trade/business while in service was committed by the respondent.

19.5 Learned tribunal by proceeding on the premise that there was no evidence to show that M/s. Vihot Industries had actually did not in trade or business, permitted itself to be misdirected and under such misdirection learned tribunal reached to wrong destination and conclusion.

19.6 As mentioned earlier the moment the respondent workman, while in service entered into partnership with other person, for carrying on trade/business, he committed misconduct.

19.7 Merely on the ground that actual trade/business activity or transaction was not transacted or entered into or carried out, the learned Tribunal could not have held that the charge and allegation is not proved. The said finding by the learned tribunal is not correct.

20. So far as the charge with regard to purchase of cheque of Rs. 200 is concerned, it is held that the charge is proved.

20.1 However, on the ground that the respondent workman had offered explanation, learned tribunal has considered that the said explanation ought to have been accepted by the Inquiry Officer and the respondent could not have been visited with any penalty for the said charge/allegation.

20.2 The learned tribunal has observed in paragraph No. 10 of the impugned award that the respondent workman was not paid subsistence allowance.

20.3 On this count learned advocate for the petitioner would contend that before final conclusion of the inquiry proceedings and from the date of termination order the subsistence allowance was paid to the respondent workman.

20.4 The said submission by Mr. Joshi, learned advocate for the petitioner admits the fact that subsistence allowance was not paid every month to the respondent workman during the period when the domestic inquiry was pending/in progress.

21. So far as the said issue is concerned, it is necessary and appropriate to note that during the period of domestic inquiry the respondent workman was posted at the branch at Rajkot. He was staying at Rajkot and the inquiry was also conducted at Rajkot.

21.1 In light of the said fact, Mr. Joshi, learned advocate for the petitioner bank submitted that actual prejudice was not caused to the respondent workman in effectively defending himself during the proceedings in domestic inquiry.

22. Mr. Joshi, learned advocate for the petitioner bank emphasized the fact that the delinquent i.e. the respondent workman had even participated in the proceedings of the domestic inquiry which fact also establishes that the respondent workman was not actually prejudiced on account of delay in payment of subsistence allowance.

23. Mr. Mishra learned advocate for the respondent relied on the decision in case of Jagdamba Prasad Shukla v. State of U.P. , (2000) 7 SCC 90 to support the contention that failure to pay subsistence allowance every month amounted to violation of principles of natural justice.

23.1 Mr. Mishra, learned advocate for the respondent workman however, did not dispute the said submission by Mr. Joshi learned Counsel for the petitioner bank that the subsistence allowance was paid to the respondent workman before final conclusion of the domestic inquiry/date of termination order.

23.2 In light of the said facts, it is appropriate to refer to the decision in cases of Indra Bhanu Gaur v. Committee, Management of M.M. Degree , (2004) 1 SCC 281.

24. In the decision in case of Indra Bhanu Gaur (supra) Hon''ble Apex Court observed, inter alia, that:--

"7. From the judgment of the High Court, in the writ petition it appears that there is no reference to the alleged infirmity on account of subsistence allowance

having not been paid. There was also no specific finding recorded for the question of bias as alleged presently. We find that there was total lack of cooperation from the appellant as the factual background highlighted above would go to show. Ample opportunity was granted to the appellant to place his case. He did not choose to do so. It is only a person who was ready and willing to avail of opportunity given can make a grievance about denial of any opportunity and not a person like the appellant who despite repeated opportunities given and indulgence shown, exhibited defiance and total indifference in extending cooperation. Therefore, on that score the appellant cannot have any grievance. So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken that because of non payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. The appellant could not plead or substantiate also that the non payment was either deliberate or to spite him and not due to his own fault. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non receipt of subsistence allowance. Unless that is done, it cannot be held as absolute proposal in law that non payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings."

24.1 In present case important distinction is relevant viz. this is not a case of non-payment of subsistence allowance, it is a case of delay in payment and neither prejudice is pleaded nor proved. It is not claimed, much less proved, as to how he was handicapped. In fact above mentioned facts give out that he was not and could not have been handicapped and/or prejudicially affected on account of delay in payment.

24.2 In view of the observations by Hon"ble Apex Court in case of Indra Bhanu Gaur (supra) to the effect that "unless prejudice is shown and established non payment of subsistence allowance cannot be effected...." it is necessary and appropriate to recall the facts of present petition viz. (a) the respondent workman was posted at Rajkot (b) the respondent's residence was at Rajkot (c) inquiry was conducted at Rajkot and (d) he had participated in the proceedings and (e) though not every month but before final conclusion of the inquiry/before the termination order the amount was paid to the workman.

25. In present case the respondent has not established actual prejudice and that therefore it would not proper to set aside the action of the petitioner bank on ground of non payment of subsistence allowance more so when the respondent has not established actual prejudice and when above mentioned 3 charge/ allegations against the respondent are proved and by any standard 2 out of these 3 charge amount to major and gross misconduct, more particularly for an employee with a bank.

26. In cases where the legality and propriety of the inquiry is not challenged and when the charge/allegation against the workman are proved, the learned tribunal would not sit in appeal over the decision regarding quantum of penalty decided by the employer.

26.1 Even otherwise the learned tribunal or learned labour Court would not interfere with penalty determined by the employer unless the Court finds that the quantum of penalty is so excessive that it would tantamount to victimization or the quantum of penalty is grossly disproportionate to the gravity of misconduct that any reasonable and prudent person would not impose having regard to the gravity or misconduct.

26.2 In other cases the decision with regard to the quantum of penalty would be within realm of employer's discretion in cases where legality and propriety of the inquiry is proved or it is not challenged and where the charge are proved.

26.3 In present case learned tribunal has not recorded that quantum of penalty is so excessive that it means victimization and without reaching to such conclusion learned tribunal could not have entered into decision with regard to quantum of penalty.

26.4 Assuming that the learned tribunal could have undertaken examination to find out whether charge are proved or not because the respondent workman had reserved the challenge against the punishment, it has emerged from the record that the conclusion reached by learned tribunal that the charge are not proved, are not supported by evidence on record.

26.5 The conclusion by learned tribunal that charge with regard to misappropriation of Rs. 1,000/- and charge related to the respondent's misconduct of entering into partnership are not proved, are not sustainable and are hereby set aside.

26.6 In that view of the matter the award dated 12.12.2005 passed by the learned Central Government Industrial Tribunal-Cum-Labour Court, Ahmedabad in Industrial Dispute (Reference CGITA) No. 926 of 2004 (Old (ITC) No. 1 of 1990 cannot be sustained and deserves to be set aside and accordingly the same is hereby set aside.

The petition deserves to be accepted and is accordingly accepted and granted. Rule is made absolute to the aforesaid extent.