

(2015) 08 BOM CK 0176
In the Bombay High Court
Case No : Writ Petition No. 2347 of 2014

Shivaji Daulat Dadar

APPELLANT

Vs

The Divisional Controller and Others

RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 11A

Citation : (2015) 6 ABR 384 : (2016) 1 ALLMR 83 : (2015) 3 LLJ 749 : (2015) LLR 1161 : (2016) 2 MhLj 87

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : R.P. Bhumkar, for the Appellant; B.S. Deshmukh, Advocates for the Respondent

Final Decision : Dismissed

Judgement

R.V. Ghuge, J—Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The Petitioner seeks to challenge the judgment and order dated 10.04.2012 delivered by the Labour Court on the point of proportionality of punishment in Complaint (ULP) No. 88/2001 filed by the Petitioner for challenging his dismissal from service. The Petitioner further challenges the judgment of the Industrial Court dated 14.08.2013 in Revision (ULP) No. 41/2012 preferred by the Petitioner.

3. Issue for my determination is whether, a Part-I Award or order on the two preliminary issues regarding fairness of the enquiry and the findings of the Enquiry Officer, could be said to be an interlocutory order which would merge in the final judgment.

4. The Petitioner claims to be working with the Respondent/ MSRTC as a Bus Conductor from 1989. On 13.05.2000, the bus on which the Petitioner was on

duty was checked on the route Jamkhed to Mumbai. The Petitioner was found to have not issued tickets to certain passengers and some tickets issued were of lesser fare than the one prescribed.

5. He was charge sheeted for misappropriation. Departmental enquiry was conducted. He was issued with a second show cause notice dated 13.07.2001 after conducting a full fledged domestic enquiry, thereby calling upon him to explain as to why the punishment of dismissal from service should not be awarded to him. It is stated that he was dismissed on 18.07.2001.

6. The Petitioner preferred Complaint (ULP) No. 88/2001 challenging the fairness of the enquiry, the findings of the Enquiry Officer and the proportionality of punishment.

7. By Part-I order dated 08.02.2007, the Labour Court concluded that the enquiry is fair and proper. The Industrial Court in Revision (ULP) No. 63/2007 concluded in it's order dated 05.03.2012 that the findings of the Enquiry Officer are not perverse.

8. By the impugned judgment dated 10.04.2012 delivered by the Labour Court on the issue of proportionality of punishment, the complaint was dismissed by concluding that the punishment awarded to the Petitioner was commensurate to the seriousness and gravity of the misconduct.

9. The Petitioner preferred Revision (ULP) No. 41/2012. The impugned judgment dated 10.04.2012 was assailed. The Industrial Court considered the material on record and concluded that the judgment of the Labour Court does not call for any interference and the punishment meted out to the Petitioner is sustainable.

10. Shri Bhumkar, learned Advocate on behalf of the Petitioner, has criticized the impugned judgments of the Labour Court as well as the Industrial Court. He submits that the Part-I order delivered by the Labour Court dated 08.02.2007 merges in the final judgment dated 10.04.2012. He, therefore, submits that even if the said part-1 judgment dated 08.02.2007 is not questioned in this petition, since it merges into the final judgment, this Court may reopen the issue of fairness of the enquiry and the findings of the Enquiry Officer.

11. Shri Bhumkar further submits that the proved misconduct is only to the extent of misappropriating Rs. 44/-. The Petitioner has put in 11 years of service and the past record is clean and unblemished. He, therefore, submits that even if it is presumed that the charge of misappropriation is proved, the same is for a meager amount of Rs. 44/- and hence, the clean past service record of the Petitioner should operate as a mitigating factor to reduce the seriousness and gravity of the misconduct at issue. Hence, he prayed for allowing this petition.

12. Shri Deshmukh, learned Advocate appearing for the Respondent/ MSRTC, has supported the impugned judgments.

13. The first contention of the Petitioner that the Part-1 order delivered on the

issue of fairness of the enquiry and the findings of the Enquiry Officer, is an interlocutory order and hence, it merges into the final judgment of the Labour Court delivered on the complaint, is an unsustainable submission.

14. This Court has dealt with a challenge to the part-I judgment of the Labour Court and the judgment of the Revisional Court in *Mahindra and Mahindra Vs. Suryabahn Avhad*, (2007) 4 BomCR 118 : (2007) 6 MhLj 436 . The law as is laid down by the Apex Court has been considered and this Court dealt with the Part-I judgment of the Labour Court on it's merits thereby, indicating that the order of the Labour Court on the first two issues is not an interlocutory order.

15. This Court in the matter of *Maharashtra General Kamgar Union, Mumbai Vs. U.S.V. Limited and Another*, (2001) 4 BomCR 659 : (2002) 92 FLR 438 : (2002) 4 LLJ 963 : (2002) 1 MhLj 168 , has laid down the law that once a departmental/ domestic enquiry is held to be vitiated, the evidence recorded in such an enquiry cannot be used by any party even by consent of the parties.

16. Similarly, it is now settled law that once the departmental enquiry is upheld and the enquiry is sustained as being fair and proper, the charges stand proved against the delinquent, then, the Labour Court thereafter, is only to proceed to decide the proportionality of the punishment.

17. It is thus, high time that this misconception needs to be cleared. Part-1 order delivered by the Labour Court on the first two issues is not an interlocutory order. It is in fact a final judicial pronouncement on the said two issues which cannot be reopened before the same Court even while the complaint is being decided finally on the rest of the issues, for the reason that once the first two issues are decided thereby, upholding the enquiry and the findings of the Enquiry Officer, the Labour Court loses it's jurisdiction to deal with the said two issues while deciding the issue pertaining to the proportionality of the punishment. Part-1 order of the Labour Court or a similar order of the Industrial Court, as the case may be, needs to be challenged before a superior court and it is only the superior court which can reopen the said issues to scrutinize, whether, the part-1 judgment of the Labour Court or the Industrial Court, is perverse or not.

18. This Court has recently considered the law on this issue in *Maharashtra State Co-operative Cotton Growers Marketing Federation Ltd., Registered Office, Cotton Complex and Maharashtra State Co-operative Cotton Growers Marketing Federation Ltd., Zonal Office, Workshop Corner Vs. Vasant Ambadas Deshpande*, (2014) 4 ABR 71 : (2014) 2 ALLMR 682 : (2014) 141 FLR 669 : (2014) 1 LLJ 604 : (2014) 3 MhLj 339 and in the case of *Maharashtra State Road Transport Corporation Vs. Syed Saheblal Syed Nijam*, (2014) 4 ABR 294 : (2014) 5 ALLMR 104 : (2014) 4 LLJ 267 : (2014) 4 MhLj 687 . I am, therefore, rejecting the first contention of the petitioner that the part-1 order amounts to an interlocutory order.

19. The Apex Court in the case of *Janatha Bazar (South Kanara Central Co-operative Whole Sale Stores Limited) Etc. Vs. The Secretary, Sahakari Noukarara*

Sangha Etc., AIR 2000 SC 3129 : (2000) 87 FLR 483 : (2000) 10 JT 589 : (2000) 2 LLJ 1395 : (2000) 6 SCALE 446 : (2000) 7 SCC 517 : (2000) SCC(L&S) 958 : (2000) 3 SCR 367 Supp : (2000) AIRSCW 3439 : (2000) 6 Supreme 339 has held that misappropriation either of a small amount or a big amount is insignificant. Misappropriation in itself is a grave and serious misconduct. The Apex Court has in fact concluded that once the charge of misappropriation is proved, the Employer as well as the Courts should not even consider the clean past service record of the Employee since it cannot mitigate the seriousness and gravity of the charge of misappropriation. The said observations in paragraph Nos. 3, 6 and 8 are as under:-

"3. The question involved in these appeals is -whether the High Court was justified in confirming the order passed by the Labour Court reinstating the respondents-workmen with 25% back wages inspite of specific finding of fact that the charges of breach of trust and misappropriation of goods for the value given in the said charges had been clearly established. Apparently, it would be an unjustified direction to reinstate an employee against whom charge of misappropriation is established. A proved act of misappropriation cannot be taken lightly even though number of such misappropriation cases remain undisclosed and such employees or others amass wealth by such means. In any case, misappropriation cannot be rewarded or legalised by reinstatement in service with full or part of back wages.

6. As stated above, the learned Single Judge and the Division Bench in writ appeals confirmed the findings given by the Labour Court that charges against the workmen for breach of trust and misappropriation of funds entrusted to them for the value mentioned in the charge-sheet had been established. After giving the said findings, in our view, the Labour Court materially erred in setting aside the order passed by the Management removing the workmen from the service and reinstating them with 25% back wages. Once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service. Law on this point is well settled. [Re.: Municipal Committee, Bahadurgarh Vs. Krishan Behari and others, (1996) 3 AD 34 : AIR 1996 SC 1249 : (1996) 73 FLR 1429 : (1996) 3 JT 96 : (1996) LabIC 1056 : (1996) 2 SCALE 698 : (1996) 2 SCC 714 : (1996) 2 SCR 827 : (1996) 1 UJ 799 . In U.P. State Road Transport Corporation v. Basudeo Chaudhary and another [(1997) 11 SCC 370] this Court set aside the judgment passed by the High Court in a case where a conductor serving with the U.P. State Road Transport Corporation was removed from service on the ground that alleged misconduct of the conductor was attempt to cause loss of Rs. 65/- to the Corporation by issuing tickets to 23 passengers for a sum of Rs. 2.35 but recovering @ Rs. 5.35 per head and also by making entry in the waybill as having received the amount of Rs. 2.35, which figure was subsequently altered to Rs. 2.85. The Court held that it was not possible to say that Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in Punjab Dairy Development

Corporation Limited and another, etc. Vs. Kala Singh, etc., AIR 1997 SC 2661 : (1997) 5 JT 604 : (1997) 2 LLJ 1041 : (1997) 4 SCALE 324 : (1997) 6 SCC 159 : (1997) SCC(L&S) 1434 : (1997) 1 SCR 235 Supp : (1997) 2 UJ 125 : (1997) AIRSCW 2625 : (1997) 6 Supreme 126 , this Court considered the case of a workman who was working as a Dairy Helper-cum-Cleaner for collecting the milk from various centres and was charged for the misconduct that he inflated the quantum of milk supplies in milk centres and also inflated the quality of fat contents where there were less fat contents. The Court held that in view of proof of misconduct a necessary consequence will be that Management has lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11A of the I.D. Act to grant relief with minor penalty.

8. In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases."

20. The Division Bench of this Court in the case of P.R. Shele Vs. Union of India (UOI) and Others, (2008) 3 ALLMR 83 : (2008) 2 BomCR 213 : (2008) 2 MhLj 33 , dealing with the issue of misappropriation, has concluded that the quantum of misappropriation is not a matter of consideration. The amount is not material. It was held in paragraphs 14, 15 and 16 as follows:-

"14. That takes us to the last submission of learned counsel for the petitioner as regards the alleged disproportionate punishment. In this connection our attention is drawn by Mr. Suresh Kumar, learned counsel appearing for the respondent, to the judgment of the Supreme Court in Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2004) 8 JT 103 : (2004) 3 LLJ 1074 : (2004) 8 SCALE 308 : (2005) 3 SCC 254 : (2005) SCC(L&S) 407 : (2005) 1 SLJ 227 where the employee had misappropriated the funds of the appellant Corporation. The employee was removed from service. The High Court directed reinstatement with full back wages and continuity of service. The Supreme Court observed that while dealing with the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. The Supreme Court further observed that when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal. The Supreme Court restored the dismissal order passed by the Disciplinary Authority.

15. We may also refer to another judgment of the Supreme Court in The Managing Director The North East Karnataka Road Transport Corporation Vs. K. Maruti, (2007) 112 FLR 466 : (2006) 12 SCALE 377 : (2006) 9 SCR 150 Supp . The relevant paragraph of the judgment may be quoted:-

"The learned counsel for the appellant, at the time of hearing, placed strong reliance on the two decisions of this court, one in Regional Manager, Rajasthan SRTC v. Ghanshyam Sharma which was also a case of bus conductor carrying passengers without issuing tickets. This court, in the above case, held that carrying the passengers without tickets amounts to dishonesty or grave negligence and for such misconduct punishment of removal from service is justified. This court also further observed that the Labour Court was not justified in directing the reinstatement with continuity of service but without back wages. This Court has also relied upon a judgment in Karnataka SRTC v. B.S. Hullikatti. In the said judgment, this Court has held that in such cases where the bus conductors carry passengers without ticket or issue tickets at a rate less than the proper rate, the said acts would inter alia amount to either being a case of dishonesty or of gross negligence and such conductors were not fit to be retained in service because such inaction or action on the part of the conductors results in financial loss to the Road Transport Corporation. This Court has also observed that in cases like the present, orders of dismissal should not be set aside. The learned counsel for the appellant also cited Divisional Controller, N.E.K.R.T.C. v. H.Amaresh. In this case, this Court was considering the case of misappropriation of a small amount of State Road Transport Corporation's fund by a conductor and held it a grave act of misconduct, which resulted in financial loss to the Corporation. This Court also held that punishment of dismissal from service awarded by the disciplinary authority did not call for any interference by the Labour Court or the High Court and hence the order of reinstatement passed by the High Court was set aside. This Court also in a catena of decisions held that the Tribunal should not sit in appeal over the decision of any employer unless there exists a statutory provision in this behalf. This Court also observed that the High Court gets jurisdiction to interfere with the punishment in the exercise of its jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed is shockingly disproportionate to the charges proved."

16. In this case the Divisional Authority, the Appellate Authority as well as the Revisional Authority have held the petitioner guilty. It is observed that the special cancellations were made by the terminal manned by the petitioner. The privilege of special cancellation can only be accessed, if the appropriate user ID and password are entered. The password being confidential is known to the concerned Enquiry Reservation Supervisor who enters his User ID and password. It is observed that the concerned Enquiry Reservation Officer at the relevant time was the petitioner. Conduct of the petitioner is despicable. It shows dishonesty. As said by the Supreme Court, the amount involved is immaterial. It is the conduct and its effect which needs to be seen. If the respondents feel that such a person should not be allowed to work in railways which is a service essentially meant for general public their action of removing him from service cannot be faulted."

21. Though the Petitioner in this case submits that the misappropriation was only of Rs. 44/- and he has a clean and unblemished service record, I do not find that

the submissions are factually correct. The charge levelled upon him was to the extent of Rs. 111/-. Moreover, the Petitioner is said to have joined service with the Respondent in 1989. He has, therefore, put in 11 years of service before he was charged with the misconduct at issue. The default card of the Petitioner indicates that he has been punished earlier on 09 occasions. Hence, his past record is an aggravating factor.

22. In the light of the law as is crystallized, I do not find that the impugned punishment imposed on the Petitioner could be termed as being shockingly disproportionate. It needs mention that merely because the punishment may appear to be disproportionate is not enough. The punishment must be shockingly disproportionate and in a sense it must appear that any prudent employer would not have imposed such punishment on the employee.

23. The Petitioner has relied upon the circular dated 03.12.2005 issued by the Respondent/ MSRTC under the Discipline and Appeal Rules stating that Clause 7(1)(a) permits the Employer to impose a fine 50 times of the amount of misappropriation, minimum being Rs. 5000/-on the first instance of misappropriation. Clause 7(1)(b) provides for imposition of fine of 75 times of the amount misappropriated or a minimum of Rs. 10,000/-whichever is more at the second instance. He submits that the petitioner be given benefit of this circular.

24. The said circular was introduced on 03.12.2005 and was withdrawn by the Respondent within six months thereafter. Hence, it can be of no assistance to the Petitioner.

25. In the light of the above, this Writ Petition is devoid of merit and is, therefore, dismissed. Rule is discharged.

26. At this stage, Shri Bhumkar requests that the remedies available to the Petitioner with regard to unpaid provident fund and gratuity, are not to be foreclosed as a result of this punishment.

27. Shri Deshmukh submits that the provident fund accumulations are indeed payable and must have been paid by now. If the same are unpaid, there shall be no difficulty for the Petitioner to receive the said provident fund accumulations. To the extent of gratuity, he submits that since the charge of misappropriation was proved amounting to moral turpitude, the gratuity may not be paid.

28. Nevertheless, the Petitioner is at liberty to make a representation, provided that such representation is sustainable in law and the Respondent may decide the same in accordance with law.