

(1983) 03 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 2066 of 1982

Vinayak Bhagwan Shetye

APPELLANT

Vs

M/s Kismet Pvt. Ltd. and another

RESPONDENT

Date of Decision : 08-03-1983

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A

Citation : (1982) 135 ITR 49(1) : (1984) 1 LLJ 203

Hon'ble Judges : S.P. Kurdukar, J;M.N. Chandurkar, J

Bench : Division Bench

Judgement

Chandurkar, J.—The petitioner was in the employment of respondent No. 1 company as a watchman. He was charged with misconduct on the ground that at about 12.40 a.m. on 6th July, 1976, while he was working in the third shift, he along with another security guard assaulted a canteen boy after having come near the gate of Parle Beverages Private Limited factory. This misconduct, according to the employer, would fall under the Standing Orders which refer to "drunkenness, riotous, disorderly or indecent behaviour on the premises of the establishment" and "commission of any act subversive of discipline or good behaviour on the premises of the establishment". On the ground that as a result of the enquiry the misconduct was proved, the enquiry the misconduct was proved, the petitioner was dismissed on 30th November, 1976. The Union raised an industrial dispute arising out of this dismissal of the employee and another watchman and this dispute was referred to the Labour Court. One of the grounds on which the dismissal was challenged was that the enquiry was conducted in violation of the principles of natural justice. Allegation of victimization was also made. The employer had contended before the Labour Court that the enquiry was properly held and there was no victimization.

2. The Labour Court held that enquiry was vitiated because the Enquiry Officer had declined to adjourn the enquiry as the representative of the employees was not present. It may be stated that the enquiry had proceeded ex parte after the

request for adjournment made by the employees was rejected and the employees declined to take part in the enquiry.

3. Having held that the enquiry was vitiated the Labour Court gave an opportunity to the employer to prove the misconduct by adducing evidence before the Labour Court. The Labour Court found that no evidence was adduced before it to prove the misconduct and that the only witness Mr. Daruwala, who was examined, did not have any personal knowledge about the misconduct. The Labour Court, therefore, recorded a finding that the charges of misconduct had not been proved against the watchman. He preferred this finding by using the word "technically". Obviously the use was intended to indicate that there is no evidence to prove the misconduct.

4. Now, in spite of the finding that the misconduct was not proved before the Labour Court took the view that it did not necessarily lead to the necessary consequence that the workmen must be reinstated. The Labour Court found that one such case in which the consequence of reinstatement need not follow was a case where the employer has lost all trust and confidence in the workmen. The Labour Court referred to the statement made by the petitioner in reply to the chargesheet, in which he had stated that he happened to go to the factory gate in order to catch a canteen boy who was trying to escape after committing a theft. The Labour Court took the view that the evidence of the workman showed that he had gone to catch the canteen boy who had committed theft of a piece of used Lifebuoy soap from the factory of Parle Company. He also found that the factory of respondent No. 1 and Parle Company's factory are sister concerns and that the boy was caught at the Parle Company's gate. Thus, according to the Labour Court, the petitioner had left the gate of the factory and that the Company had taken action against the workman after being satisfied that he had left the place of work and gone to the gate of Parle Company. The Labour Court held that the company's action in discharging the two watchmen was bona fide and the Labour Court declined to make an order for reinstatement. The Labour Court, therefore, rejected the reference but directed the Company to pay to the workmen compensation at the rate of one month's wages for every completed year of his past service. This order is now challenged by the petitioner in this petition.

5. Mr. Kochar appearing on behalf of the petitioner has contended that on the finding that no misconduct was proved, the petitioner was entitled to an order for reinstatement. It is further argued that there was never a plea of loss of confidence taken by the employer and the Labour Court could not sustain the order of dismissal on the ground that it was a loss of confidence by the employer.

6. Mr. John appearing on behalf of the Company has argued that it was not possible for the employer to adduce proper evidence before the Labour Court with regard to the misconduct because the only evidence possible was that of one Kripalsingh who was no longer in the employment of respondent No. 1. The learned counsel further contended that the workman having left the place where

he was supposed to do duty, the employer would be justified in discharging him on the ground of loss of confidence and that is what the Labour Court has done. It was, therefore, contended that the order passed by the Labour Court should not be interfered with.

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

8. The only witness examined the Labour Court was one Daruwala who admittedly had no personal knowledge about the incident out of which the charge-sheet arose. The Labour Court was, therefore, clearly justified in holding that there was no evidence to prove the misconduct.

9. Now, it is difficult for us to sustain the view taken by the Labour Court that the employee was not entitled to reinstatement because the action in discharging the employee was not vindictive. Assuming for a moment that it is not established that the action taken was vindictive, that would be wholly irrelevant because the moment the misconduct is not proved and the penal action is found to be unjustified and unsustainable, the termination must cease to be a bona fide termination. But for the misconduct, which the employer had taken as proved, there could not have been any order of dismissal. If the foundation of this action for dismissal disappears, namely, the proof of misconduct, the order of dismissal must also stand vacated.

10. It is true that while in one part of the order, the Labour Court has referred to loss of trust and confidence as a result of which the Court need not set aside an order of dismissal, the further discussion in the order of the Labour Court is really based on determining whether the termination was vindictive or bona fide.

11. It is difficult to see how the learned Judge could have entered into the question as to whether there was any loss of confidence in the employee because such was never the case of the employer. The action taken against the employee

was clearly penal in nature. The order of dismissal was one by way of punishment. Such an order cannot be sustained on the ground that the employment was liable to be discharged from employment on the ground of loss of confidence. Such a course would mean that the basis on which the employer has taken the action is being substituted by the Court by another ground of termination which, in our opinion, is wholly impermissible to be done.

12. Mr. John has referred us to the decision of the Calcutta High Court in *Ludhlow Jute Co. Ltd. Vs. Nanda Kumar Singh and Others*, . In that case, it was found that although the Company did not specifically plead about the loss of confidence in the Darwan, it should be considered from the facts and circumstances of the case as to whether or not the loss of confidence is implicit in the punishment of dismissal. It is no doubt true that in that case, the Tribunal was directed to consider the question of reinstatement, but it is important to point out that the Darwan had admittedly failed to perform his duties as Darwan and the findings recorded in the domestic enquiry were found to be not perverse. As already pointed out, in the instant case, there is no evidence whatsoever to show that the petitioner had been guilty of any misconduct as a result of any wilful conduct on his part.

13. Mr. Kochar has referred us to a decision of the Supreme Court in *The Management of Panitole Tea Estate Vs. The Workmen*, , in which the Supreme Court has taken the view that a plea of loss of confidence in the integrity of the employee concerned should be substantiated before the Labour Court. In that case, the Supreme Court has held that if a workman is entitled as a general rule to be reinstated after his wrongful dismissal is set aside and on the facts it is not possible to find cogent material on which the establishment can genuinely be considered to have lost confidence in the integrity of the workman, he is entitled to reinstatement.

14. The learned Counsel for the petitioner then contended that the matter must be remanded back to the Tribunal for a consideration as to whether in view of the provisions of S. 11A of the Industrial Disputes Act, 1947, the petitioner could be granted any relief other than reinstatement, including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. We fail to see how any such prayer for remand can be made in the situation in which the employer finds himself in this case. The punishment could be only for misconduct. The misconduct itself has not been established, even according to the Labour Court. There was, therefore, no question of giving any lesser punishment. His termination was never the result of any loss of confidence. There was thus no question of depriving the employee of the natural consequential relief of reinstatement to which he was entitled to in this case. The learned Judge of the Labour Court was, in our view, clearly in error in substituting an entirely new ground in support of the termination of the employment of the petitioner.

15. Now, so far as the back wages are concerned, it appears from the order of

the Labour Court that the matter before the Labour Court has been delayed mainly on account of the time taken by the Union for filing the statement and the absence of the workman on several dates. The employee cannot be allowed to take advantage of the delay caused by his own conduct and claim back wages for that period. Having regard to the facts of the case, in our view, the employee will be sufficiently compensated if he is paid 50% of the back wages due to him.

16. Accordingly, the order of Labour Court is set aside. The petitioner will be entitled to reinstatement with 50% of back wages from the date of his order of dismissal. The petitioner to get the costs of this petition. Rule absolute.