IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.1226 OF 2002

Bombay Hospital Trust. ...Petitioner.
Vs.
Miss Rita Minwani & Anr. ...Respondents.
....
Mr. C. U. Singh with Mr. Sanjay Udeshi for the Petitioner.
Mr. J. P. Cama with Mr.C. V. Lad for Respondent No.1.
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CORAM : DR.D.Y.CHANDRACHUD, J.

March 30, 2005.

ORAL JUDGMENT :

The First Respondent was working as a Receptionist-cum-Clerk at the Bombay Hospital. On 28th May 1994, a chargesheet was issued to her alleging that on 20th April 1994 she was on duty in the first shift between 7 a.m. and 3 p.m. Mr.M. G. Joshi, an employee who was handling cash at the counter was on his lunch break between 12 noon and 1 p.m., during which period the First Respondent was stated to be handling cash at the counter. When Joshi returned, the First Respondent is stated to have handed over five receipts of indoor patients with an amount

of Rs.35,500/-. However, when Joshi checked the counter statement, he found that during the time when the First Respondent was working at the cash counter, she had received cash from six indoor patients amounting to Rs.45,500/- and that she had in fact, handed over only five receipts to him. On being asked to produce cash in the amount of Rs.10,000/- and the sixth receipt which had been issued to an indoor patient, the First Respondent was unable to do so. The chargesheet against the First Respondent was of theft, fraud or dishonesty in connection with the property of the Hospital and a commission of an act subversive of discipline.

2. A disciplinary proceeding was then convened. Parties led evidence and the Enquiry Officer came to the conclusion that the charge of misconduct was established. The First Respondent was dismissed from service by an order dated 14th November 1994. A reference to adjudication was thereupon made to the Labour Court. The Labour Court by an award dated 29th April 2000 came to the conclusion that the enquiry was not fair and

proper. Thereupon, evidence was adduced by the management in support of the charge of misconduct. Evidence was also adduced by the First Respondent. By the impugned award dated 14th January 2002, the Labour Court has allowed the reference and directed that the First Respondent be reinstated in service with full back wages and continuity in service with effect from 11th April 1994.

3. The submission that has been urged on behalf of the Petitioner is that the entire approach of the Labour Court is misconceived and contrary to law laid down by the Supreme Court. The Labour Court by its Part-I award has come to the conclusion that the enquiry was not fair and proper. The management had availed of an opportunity to lead evidence to prove the substantive charge of misconduct. The Labour Court, it is submitted, was required to consider whether the charge of misconduct stood established on the basis of the evidence which was adduced before the Court. Counsel submitted that the Labour Court has had regard to the material before the Enquiry Officer and has then

come to the conclusion both on the basis of that material as well as the evidence led before it that the charge is not established. The submission was that the material before the Enquiry Officer could not possibly have been relied upon under Section 11A of the Industrial Disputes Act, 1947, once the enquiry has been held not to be fair and proper.

4. On the other hand, on behalf of the Petitioner, it was sought to be urged that the judgment of the Labour Court would show that the finding that the misconduct has not been established is also arrived at independent of the record before the Enquiry Officer and that, therefore, the award is sustainable.

5. In order to consider the submissions which have been urged before the Court, it would, at the outset, be appropriate to advert to the well settled position in law. In the event that a disciplinary enquiry that has been held by the management is held to be vitiated, as in the present case on account of a breach of the principles of natural justice, or if no enquiry is held, it is open to the

management to justify the action which has been taken against the workman by leading evidence to show that the misconduct has been established. In **Neeta Kaplish vs. Presiding Officer, Labour Court,** (1999) 1 SCC 517, the Supreme Court held that if an opportunity is availed of by the management and evidence is adduced on its behalf, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidence. The Supreme Court held that the record pertaining to the domestic enquiry would not constitute "fresh evidence" as those proceedings have already been found by the Labour Court to be defective. Such record, it was held, "would not constitute material on record within the meaning of Section 11-A as the enquiry proceedings on being found to be bad, have to be ignored altogether". The circumstances in the present case and the award of the Labour Court have to be scrutinized in the background of this settled position.

6. After the enquiry was held to be vitiated due to a breach of the principles of natural justice, the management led evidence of

three witnesses. The first witness was M.G. Joshi, who was working as an Admission Clerk-cum- Cashier and during whose absence for lunch on 20th April 1994, the charegesheeted workman had manned the cash counter. The second witness was a Supervisor who was also on duty while the third witness was on duty on the material date at the admission counter. The First Respondent stepped into the witness box and deposed on her behalf. In the course of the Part-II award, the Labour Court framed the following issues :

"1. Whether the enquiry is fair and proper?

2. Whether the findings submitted by the enquiry officer are based on sufficient evidence?

3. Whether the punishment awarded against the employee is shockingly disproportionate in the gravity of misconduct commensurate to alleged against her?

4. Does the workman prove that she is entitled for the relief as prayed for?

5. What award?"

7. Really speaking, the first and the second issues did not arise before the Labour Court at that stage - the first because the enquiry was already held not to be fair and proper and the second, since the question as to whether the findings of the Enquiry Officer were based on sufficient evidence did not remain for consideration any longer since the enquiry had been held not to be fair and proper. The question as to whether the findings submitted by the Enquiry Officer were based on sufficient evidence could have arisen only if the enquiry was held to be fair and proper which is not the case here. The Labour Court had to consider at the Part-II stage whether the management had substantiated the charge of misconduct by the evidence which it led before the Court. Not even an issue was framed in that regard.

8. Now, if the judgment of the Labour Court is perused, it would show that initially Issue No.2 was taken up for consideration. The entire material before the Enquiry Officer was scrutinized in paragraphs 11 and 12 and the answer to Issue No.2 was given in the affirmative. The finding in the affirmative, appears to be an

obvious error, but, be that as it may, the Labour Court has thereafter in paragraph 13 once again adverted to the record of the disciplinary enquiry. That is also analysed again in paragraph 16 of the judgment. In paragraph 16, the Labour Court held that if the First Respondent was guilty of fraud and dishonesty, there was no reason for the Hospital to show any leniency for misappropriation and that it ought to have filed a criminal complaint. Despite the fact that there was absolutely no evidence of victimization, the Labour Court entered a finding that the First Respondent has been victimized. Thereupon, it was held that the findings of the Enquiry Officer were not based on sufficient evidence and that there was a perversity in the findings. Finally, in paragraph 17, the Court held that the punishment was shockingly disproportionate and that the First Respondent was entitled to the benefit of doubt. That the Labour Court was of the view that a benefit of doubt should be given to the First Respondent would also appear from its analysis of the evidence of M.G.Joshi in para 16.

9. There is, in my view, a complete misdirection in law on

the part of the Labour Court. In a disciplinary matter, the jurisdiction of the Labour Court is to consider as to whether the charge of misconduct is sustainable on a preponderance of probabilities. If it is, the charge stands proved. The charge does not have to be proved beyond reasonable doubt as in a criminal trial. The evidence of the Supervisor and of a co-workman who was on duty, has been discarded on the ground that it is hearsay in nature. Apart from the fact that the strict rules of evidence do not apply to a disciplinary enquiry, the Supervisor in the course of her evidence stated that she had immediately proceeded to the Counter and had asked both Mr.Joshi as well as the First Respondent to check the cash and that the First Respondent stated that she did not know anything about it. The evidence of the Supervisor who was present at the spot cannot, therefore, be regarded as hearsay in nature.

10. In these circumstances, I am of the view that the entire approach of the Labour Court is in the teeth of the settled position governing the provisions of Section 11-A of the Industrial Disputes

Act, 1947. The Labour Court despite finding that the enquiry was defective, relied upon the record of the enquiry. This could not have been done after the management availed of an opportunity of leading substantive evidence before the Labour Court. The Labour Court should have considered the charge of misconduct on the basis of the evidence before the Court. Not even an issue in that regard was framed. The Labour Court has misdirected itself by not applying the test of a preponderance of probabilities which governs disciplinary proceedings.

11. In these circumstances, I am inclined to accept the submission of Counsel for the Petitioner that this is a fit case for a remand back to the Labour Court for a fresh determination in accordance with law. Counsel appearing on behalf of the First Respondent drew the attention of the Court to the evidence on the record and submitted that the finding of the Labour Court can be sustained even independently on the basis of the evidence which has emerged. I am of the view that it would not be appropriate for this Court to carry out this exercise since principally, the

jurisdiction under Section 11A is for the Labour Court to exercise in accordance with law. That apart, on the basis of the judgment of the Labour Court as it stands, it is impossible to isolate the references to the record of the Enquiry Officer or to hold that independent of that record, the Labour Court would have come to the same conclusion, had it applied the correct test in law.

12. For these reasons, I am of the view that it would be appropriate to remand the case. The award of the Labour Court dated 14th January 2002 is accordingly quashed and set aside. The Labour Court shall frame appropriate issues for determination at the Part-II stage upon remand and shall endeavour an early disposal of the reference on the basis of the evidence as it stands. Parties shall appear before the Labour Court for directions on 11th April 2005 and the Labour Court is requested to expedite the disposal of the case preferably by 31st July 2005. For the period until 31st July 2005 by which date the Labour Court is to dispose of the reference, the interim relief granted to the First Respondent under Section 17B of the Industrial Disputes Act, 1947 shall

continue to operate.

13. The Petition is disposed of in the aforesaid terms. No order as to costs.

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