2009 eGLR_HC 10005839

Before the Hon'ble MR K M THAKER, JUSTICE

RAJKOT DISTRICT COOPERATIVE MILK PRODUCERS UNION LTD. Vs. GOVINDBHAI P MAKWANA - RESPONDENT(S)

SPECIAL CIVIL APPLICATION No: 6374 of 2000 , Decided On: 17/06/2009

Nanavati Associates, Subramaniam Iyer

MR.JUSTICE K.M.THAKER

1. The petitioner has challenged an award dated 28.3.2000 passed by the labour Court, Rajkot in reference (LCR) No. 1559 of 1986 whereby the labour Court has directed the petitioner to reinstate the respondent with continuity of service, however without relief/benefit of backwages. Aggrieved by the said direction the petitioner is before this Court.

2. The factual background giving rise to present petition, as urged by the petitioner, is as follows:-

2.1 The petitioner has claimed that the respondent was appointed on probation, initially for period of three months, as Dairy Supervisor. The probation of three months was to come to an end on 23.10.1972 since respondent joined his duty with effect from 24.7.1992 pursuant to the appointment order dated 12.7.1992, however in view of unsatisfactory performance the probation period was extended for further period of one year (i.e. until 23.10.1973). During the said extended period of probation various instances of negligence in duty by respondent were, as per the claim of the petitioner, reported against the respondent. Consequently warning notices were issued. The petitioner has mentioned several instances of respondents negligence, poor performance and/or conduct which, according to the petitioner were unbecoming of an employee. The instances mentioned by the petitioner include the incidents alleged to have occurred on 9.5.1973, 29.11.1973, 5.1.1974, 19.7.1974, 6.11.1974, 7.3.1977, 1.6.1977, 28.7.1977 etc. It is also claimed by the petitioner that in view of his such conduct the respondent was, from time to time, warned and even suspended and in respect of certain conduct which amounted to misconducts chargesheets were also issued. The petitioner has claimed that despite such notices and actions etc. conduct of the respondent did not improve. It is also claimed by the petitioner that at one stage the respondent was reverted from his post of Dairy Supervisor to Dispatch Clerk and at the relevant time he was working as Dispatch Clerk. The petitioner has claimed that on 20.9.1978 a chargesheet had to be

issued in view of the reported misconduct by the respondent which, according to the petitioner, was of serious nature. The incident for which the said chargesheet was issued included the charge of attempt to commit theft of companys property. It is claimed that even Criminal Complaint was lodged against the respondent, however upon conclusion of the proceedings of the Criminal Case No. 858 of 1980, the respondent was acquitted. Ultimately the petitioner terminated the service of respondent with effect from 31.8.1972.

2.2 The respondent, on the allegation that though the chargesheet dated 20.9.1978 was issued, no inquiry was actually conducted and his service was terminated illegally without conducting any inquiry and without affording any opportunity of hearing and without following any procedure prescribed by law with effect from 13.8.1979. The respondent has also claimed that while he was terminated in such a manner, employees junior to him were continued and he was not even paid any compensation and therefore the petitioner committed breach of Section 25(F) and Section 25(G) of the I.D. Act while terminating his service. On the premise of such allegations the respondent raised an industrial dispute which culminated in Reference (LCR) No. 1559 of 1986.

3. At this stage it deserves to be mentioned that the respondent raised industrial dispute after delay of almost seven years inasmuch as though his service was terminated with effect from 13.8.1979 he made grievance against termination and raised industrial dispute as late as in 1986 and vide order of reference dated 18.6.1986 it came to be referred for adjudication to labour Court, Rajkot. During the proceeding of the said reference the respondent filed his written statement of claim making, inter alia, the allegations as aforesaid and on that basis claimed the relief of reinstatement with all benefit.

4. The reference was contested by petitioner by filing written statement (Exhibit 7). It was claimed that in view of the conduct of the respondent it had become impossible to continue the respondent in employment and that therefore his service was terminated, however with a view to ensuring that his future carrier may not be adversely affected and his tenure may not be stigmatised, he was not dismissed but was relieved by way of discharge simplicitor.

4.1 In the written statement the petitioner claimed that if however the Court comes to the conclusion that the departmental inquiry ought to have been conducted then the permission to conduct the inquiry before the Court may be granted.

4.2 The petitioner claimed before the Court that the termination of the respondent would not amount to retrenchment however, the petitioner had offered to make

payment of compensation and other legally payable dues and such amounts were forwarded to the respondent by money order.

4.3 The petitioner in its written statement also claimed that the respondent was, after his termination, gainfully employed.

4.4 On such premise of defence the petitioner urged that the reference may be dismissed. During the proceedings both the side produced various documents on record of the Court. Deposition of the respondent was recorded below Exhibit 58 and on behalf of the petitioner, one Mr. G.J. Vasavada was examined as its witness and his deposition was recorded below Exhibit 69.

4.5 After considering the oral and documentary evidence available on record and the submissions on behalf of the contesting parties, the labour Court, in the impugned award, came to the conclusion that the service record of the respondent was tainted and full of adverse remarks relating to his conduct, performance etc. and that none of the orders and/or actions of the employer were ever challenged by the respondent.

5. The labour Court, thus on the basis of the record, concluded that the past service record of the respondent was absolutely unsatisfactory.

The labour Court, however, observed in the impugned award that in its view the action of the petitioner of discharging the respondent, although by way of discharge simplicitor, was slightly harsh. The labour Court, without recording sufficient and legally sustainable reasons to justify its conclusion that the employers action was "slightly harsh", exercised discretionary jurisdiction under Section 11-A of the Act and in exercise of such power the labour Court has directed the petitioner to reinstate the respondent on his original post with continuity of service, however without backwages. The petitioner is aggrieved by both directions i.e. directing reinstatement as well as grant of benefit of continuity of service.

6. Mr. M.T. Pathak learned advocate for M/s Nanavati Associates has appeared and submitted that the award impugned in present petition does not give any reasons to support and justify the observations and/or conclusion of the labour Court as well as the final direction. He submitted that the labour Court has believed that past record of the respondent was tainted and absolutely unsatisfactory. He also submitted that the labour Court has not come to the conclusion that the charges levelled against respondent were not proved. The labour Court has also not recorded that the petitioner action of discharging respondent was illegal and yet only on the premise that

in its view the action was slightly harsh, the order of discharge simplicitor has been set aside and the respondent is directed to be reinstated with continuity of service. The learned advocate for the petitioner submitted that the impugned award is unsustainable in law and the Court has exercised the discretionary jurisdiction under Section 11-A of the Act arbitrarily.

7. Mr. S.H. Pathan learned advocate has appeared for Mr. Iyer learned advocate for the respondent. Except submitting that the award is proper and just and does not deserve to be set aside as prayed for by the petitioner no other submission on behalf of the respondent has been made. The learned advocate for the respondent however supplemented his aforesaid solitary submission by stating that the respondent has already crossed the age of superannuation and that therefore there would not be any need of actually reinstating the respondent and that therefore appropriate order with regard to the intervening period i.e. from the date of respondents termination and/or from the date of award until date on which the respondent crossed the superannuation age, may be passed.

8. On perusal of the award it comes out that before terminating the service of the respondent he was visited with the chargesheet which, inter alia, contained serious allegations of attempt to commit theft of companys property. It also comes out from the record that before issuing and serving the said chargesheet various notices and chargesheets were issued against the respondent and orders imposing penalty of suspension/reversion/degradation etc. were also passed and yet, according to the case of the petitioner and also as per the record which does not appear to have been disproved or even controverted by respondent, there was no improvement in the conduct of the respondent and then came the incident for which the chargesheet came to be issued in September 1978. It is not disputed by the petitioner that service of the respondent was preceded by a chargesheet and yet any formal departmental inquiry was not conducted. The petitioner has claimed that only with a view to ensuring that respondents service may not be stigmatised that his service was terminated by way of discharge simplicitor and all legally payable dues were forwarded to him by money order. With such explanation and defence the petitioner, at the outset and initial stage itself in its written statement requested for permission to conduct departmental inquiry in the Court.

9. In this context what is relevant and vital is the fact that though such request for permission to conduct inquiry in the Court, so as to justify the action of termination of service and so as to establish the charges mentioned in the chargesheet, was made at the initial stage i.e. in the written statement itself which met with the requirement laid down by the judgment of the Honble Apex Court in case between Shankar Chakravarti vs. Britannia Biscuit Co. Ltd. and another reported in AIR 1979 SC 1652 wherein it is held in para 34 at page 1666 that:-

"34. Having given our most anxious consideration to the question raised before us, and minutely examining the decision in Cooper Engineering Ltd. case (1975

Lab IC 1441) (SC) to ascertain the ratio as well as the question raised both on precedent and on principle, it is undeniable that there is no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under Section 10 or under Section 33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman. Cooper Engineering Ltd. case merely specifies the stage at which such opportunity is to be given, if sought. It is both the right and abligation of the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to avail of such opportunity by a specific pleading or by specific request. If such an opportunity is sought in the course of the proceeding the Industrial Tribunal or the Labour Court, as the case may be, should grant the opportunity to lead additional evidence to substantiate the charges. But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the employer to adduce additional evidence to substantiate the charges." (emphasis supplied) and thereafter in the matter between Shambhunath Goyal vs. Bank of Baroda and others reported in 1983(4) SCC 491, the Apex Court held that:

16....The management is made aware of the workmans contention regarding the defect in the domestic enquiry by the written statement of defence filed by him in the application filed by the management under Section 33 of the Act.

Then, if the management chooses to exercise its right it must make up its mind at the earliest stage and file the application for that purpose without any unreasonable delay. But when the question arises in a reference under Section 10 of the Act after the workman had been punished pursuant to a finding of guilt recorded against him in the domestic enquiry there is no question of the management filing any application for permission to lead further evidence in support of the charge or charges framed against the workman, for the defect in the domestic enquiry is pointed out by the workman in his written claim statement filed in the Labour Court or Industrial Tribunal after the reference had been received and the management has the opportunity to look into that statement before it files its written statement of defence in the enquiry before the Labour Court or Industrial Tribunal and could make the request for the opportunity in the written statement itself. If it does not choose to do so at that stage it cannot be allowed to do it at any later stage of the proceedings by filing any application for the purpose which may result in delay which may lead to wrecking the morale of the workman and compel him to surrender which he may not otherwise do." and yet the labour Court did not grant such permission to the petitioner on the spacious ground that the matter had become very old and such permission would not serve any purpose in view of the passage of time since respondents termination. Such reason can hardly be considered as legally justifiable and sustainable reason for not affording opportunity to establish the charges before the Court.

10.It is also necessary to mention that subsequently this issue was considered by the larger bench of the Apex Court in the case between Karnataka State Road Transport Corporation vs. Lakshmidevamma (Smt) and another reported in 2001 (5) SCC 433 and the Apex Court, per majority, held that:
"17. Keeping in mind the object of providing an opportunity to the management to adduce evidence before the Tribunal/Labour Court, we are of the opinion that the directions issued by this Court in Shambhu Nath Goyal case need not be varied, being just and fair. There can be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic inquiry. At the same time, it is also of advantage to the workmen inasmuch as they will be put to notice of the fact that the management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready. This procedure also eliminates the likely delay in permitting the management to make belated application whereby the proceedings before the Labour Court/Tribunal could get prolonged. In our opinion, the procedure laid down in Shambhu Nath Goyal case is just and fair."

11.Earlier in the case between the Workmen of M/s Firestone Tyre & Rubber Co. Of India P. Ltd reported in AIR 1973 SC 1227 the Honble Apex Court held that:
Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra. (emphasis supplied)

12.In the aforesaid judgments the Honble Apex Court has held that if the employer requests for permission to prove the charges before the Court and such request is made at the outset i.e. in the written statement itself then such request should be granted. Despite such being the position of law the labour Court has, as aforesaid, declined such permission to the petitioner merely on the ground that though the request for permission to prove the charges in the Court appeared reasonable and justified, however since the matter was of 1986, and since the respondent had not disputed the first charge levelled against him, the permission was not granted. The said reasoning of the labour Court for not granting permission is not sustainable. Further, after having denied such permission the labour Court proceeded in the matter and, as mentioned above, though it came to the conclusion that the service record of the respondent was absolutely tainted and unsatisfactory, and though even in the view of the labour Court the charges levelled against the respondent did have substance, and although the Court also noticed that the respondent had raised the industrial dispute after lapse of almost 7 years which, even in view of the labour Court, demonstrated his negligence and insincerity for seeking reinstatement, however merely because in its view the penalty was "slightly" harsh and upon considering that respondents termination would result into penalty to his family members, the labour Court exercised jurisdiction under Section 11-A of the Act. No other reason in support of or in justification of such exercise

has been recorded by labour Court. The decision of the labour Court of exercising discretionary jurisdiction under Section 11-A of the Act in such a manner and interfering with the order passed by the employer of discharging the respondent from the service, does not appeal to this Court. Therefore, on overall consideration of the matter, it appears that the impugned award is unsustainable and deserves to be set aside.

13.Hence, impugned award is set aside. The petition is allowed to the aforesaid extent. Rule made absolute to the aforesaid extent. No costs.

Appeal allowed