2017 (152) FLR 669

GUJARAT HIGH COURT

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

Glaxosmithkline Pharmaceuticals Limited Versus S.B.Yadav

Special Civil Application No. 17317 of 2007 ; *J.Date :- OCTOBER 7, 2016

- INDUSTRIAL DISPUTES ACT, 1947 Section - 18(3)

Service and Labour - Industrial Disputes Act, 1947 - S. 18(3) - implementation of award - Labour Court directed that claimant should be reinstated on his original post with 50% back wages - challenged - held, when allegation and charge against respondent are not proved, as found by Labour Court, termination cannot be sustained - Labour Court's decision to set aside order terminating service of respondent cannot be faulted - so far as the direction to jointly and severally implement the award is concerned, in view of the provisions u/S. 18(3) of the Industrial Disputes Act, the said direction cannot be faulted - petitioner company is not closed or it has not merged with any other company - only a part of its asset, i.e. manufacturing facility is sold - when the company has other manufacturing facility (factory) and the existence of the company has not come to an end coupled with the fact that the purchaser company is not aggrieved by award and has not challenged award and/or direction, petitioner's objection on ground that purchaser company was not heard, cannot be sustained - petition dismissed.

Imp.Para: [23] [24]

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JUDGMENT :-
K.M.Thaker, J.

1 Heard Mr.Kunal Nanavati, learned advocate for the petitioner company and Mr.Vasavada, learned advocate for the respondent workman.

2 In present petition, the petitioner has challenged award dated 9.3.2007 passed by the learned Labour Court at Bharuch in Reference (LCB) No.279 of 1998 whereby the learned Labour Court directed that the claimant should be reinstated on his original post with 50% back wages.

3 So far as the factual background involved in present petition is concerned, it has emerged from the record and also from the award and the submissions by learned advocates for the petitioner company and the respondent workman that present respondent was employed by the petitioner company at its manufacturing facility/factory situate at Ankleshwar as Helper/Attendant (Grade-III) in Store Department with effect from 14.10.1985.

3.1 While he was in service, the respondent was visited with charge-sheet dated 5.9.1997, wherein it was alleged that the respondent workman was allegedly involved in theft.

3.2 With the said allegation, it was also alleged that the reported conduct of the respondent employee amounted to misconduct under clauses 24(d) and 24(1), i.e. theft, fraud or dishonest in connection with the business of the employer of committing act subversive of discipline and good behaviour.

3.3 In pursuance of the said charge-sheet, an Enquiry Officer was appointed to conduct domestic enquiry. The Enquiry Officer conducted enquiry.

3.4 During the said enquiry, the respondent did not participate on the ground that he does not know and does not understand English language and since the charge-sheet was in English language, he could not understand the charge and therefore, it was not possible for him to effectively defend his case because Hindi translation was not supplied, despite demand.

3.5 The Enquiry Officer proceeded ex parte and concluded the enquiry.

3.6 After completing the enquiry, the Enquiry Officer submitted its report/finding dated 12.1.1998 holding that the charge against the employee is proved.

3.7 According to the petitioner's case, upon receipt of the report/finding of the Enquiry Officer, second show cause notice was issued in March 1998 and thereafter the company terminated service of present respondent with effect from 4.4.1998.

3.8 Feeling aggrieved by the said termination order, the respondent raised industrial dispute. The industrial dispute came to be referred for adjudication to the learned Labour Court. The dispute was registered as Reference (LCB) No.279 of 1998.

3.9 In his statement of claim, the claimant alleged that though he was not involved in the alleged theft, incorrect and fabricated allegations were levelled against him only on the basis of statement allegedly given by the Driver of the tanker. He also claimed that the allegations were incorrect and though the charge was not proved, the Enquiry Officer submitted his report that the allegations are proved and on that basis, the company arbitrarily terminated his service. According to the claimant, the decision and action of the company of terminating his service with effect from April 1998 is unjust and arbitrary and the decision of the company is based on presumptions, inferences and surmises and there is no evidence against him.

3.10 The company, on the other hand, claimed that the respondent workman was, reportedly, involved in theft. Therefore, charge-sheet was issued and thereafter a domestic enquiry was conducted in accordance with the applicable rules and principles of natural justice. The company also claimed that the Enquiry Officer submitted his report/finding that the charge and allegations are proved. The company claimed that in view of such report by the Enquiry Officer with which the Disciplinary Authority concurred, the company considered it appropriate to terminate service of the claimant and therefore, the order dated 4.4.1998 terminating his service came to be passed. With such defence, the company justified and defended its action.

3.11 The learned Labour Court examined legality and propriety of the enquiry. Upon such examination, the learned Labour Court reached to the finding that the departmental enquiry was not conducted in legal and fair manner. Therefore, the learned Labour Court declared that the domestic enquiry was defective.

3.12 Having declared the domestic enquiry defective, the learned Labour Court granted opportunity to the company to lead evidence and to prove the charge before the learned Labour Court. The company thereafter led evidence. During deposition before the learned Labour Court, the claimant reiterated the said allegation and contention and that the he was not involved in the alleged theft and that without any proof or his service is arbitrarily terminated, though the allegation is not proved.

3.13 The learned Labour Court considered the evidence and reached to the conclusion that the company failed to prove the allegations and charge against the respondent and therefore, the learned Labour Court set aside the termination and directed the company to reinstate the workman.

4 At this stage, it is necessary to take note of another fact which is mentioned at the time of hearing of this petition. Learned advocate for the petitioner company claimed that while proceeding before the learned Labour Court were pending, the assets and properties of the company at Ankleshwar, i.e. manufacturing facility/factory came to be sold to another company and that the said fact was placed before the learned Labour Court. He also submitted that the learned Labour Court has even recorded the said fact in the award. Learned advocate for the petitioner claimed that though the said fact was before the learned Labour Court, neither the claimant nor the learned Labour Court took any steps to implead the company who purchased the assets and properties/factory of the company and without impleading the said purchaser as party to the proceedings and without granting any opportunity of hearing to the said purchaser company, the learned Labour Court passed the award with direction that the obligation to implement the award would be joint and several i.e. on the petitioner company and the said purchaser company.

5 In this context, it is also relevant and necessary to note that such allegation is raised by the seller company, i.e. petitioner company, whereas the purchaser company who purchased the assets and properties, i.e. manufacturing facility (factory) of the petitioner company, has not raised such grievance or objection and the said company has not even challenged the award during this interregnum, i.e. from 2007 to 2016.

6 During the hearing of this petition, learned advocate for the petitioner company submitted that the company had led evidence before the learned Labour Court to prove the allegation. He accepted the fact that neither before the Enquiry Officer nor before the learned Labour Court, the Driver of the vehicle in question was examined as witness.

7 Learned advocate for the petitioner company, however, submitted that the award passed by the learned Labour Court is defective on two grounds viz. that the learned Labour Court proceeded on the premise that though the learned Labour Court has accepted that in the matter of domestic enquiry, strict proof is not necessary and the Court however proceeded to hold that since the termination was effected on ground of theft strict proof was necessary. According to learned advocate for the petitioner, the decision of the learned Labour Court to demand strict proof in the matter of domestic enquiry and termination of service by an employer is erroneous and unjustified

and the final conclusion by the learned Labour Court that the allegation is not proved, is erroneous and unsustainable. Learned advocate for the petitioner company submitted that the second ground on which the learned Labour Court has held that the order of termination and the conclusion with regard to misconduct are unsustainable is that the company did not examine the Driver and that ground is also erroneous inasmuch as the Store Officer of the company was examined who had made enquiry with the Drivers and on that basis he had given deposition and that, therefore, the learned Labour Court ought not to have held that in absence of evidence by the Driver, the company's conclusion that the charge is proved, is unjustified and unsustainable. Learned advocate for the petitioner submitted that the learned Labour Court erred in holding that the charge and allegation are not proved and the learned Labour Court also erred in directing that the respondent workman should be reinstated in service and the learned Labour Court also erred in granting 50% back wages.

8 Per contra, Mr. Vasavada, learned advocate for the respondent workman submitted that the award passed by the learned Labour Court does not suffer from any infirmity and does not warrant any interference. He submitted that the domestic enquiry is held defective and the said order has attained finality. He further submitted that the company was granted opportunity to lead evidence and prove allegation before the learned Labour Court, however, before the Court also the company failed to lead any evidence which would prove the charge and allegation against the respondent and that, therefore, the learned Labour Court's finding and conclusion are not erroneous or unjustified. He further submitted that there is no error in the decision of the learned Labour Court that the charge of theft is not proved. He also submitted that the learned Labour Court has not committed any error in holding that since the Driver is not examined, the charge cannot be said to have been proved. He submitted that when the very basis of the termination order is not established, direction to reinstate the workman and to pay back wages cannot be disputed. He submitted that the learned Labour Court has awarded only 50% back wages, instead of 100%. However, the workman has not challenged that part of decision of the learned Labour Court. According to learned advocate for the respondent workman, the order passed by the learned Labour Court is neither erroneous nor justified nor arbitrary and the finding recorded by the learned Labour Court cannot be said to be perverse.

9 I have considered the submissions by learned advocates for the contesting parties and I have also examined the material on record including the agreement between the petitioner company and the subsequent purchaser who purchased the manufacturing facility/factory of the company and also the deposition of the respondent and other witnesses.

10 At the outset, it is relevant and necessary to mention that the entire petitioner company is not sold and entire ownership or even entire management of petitioner company is not sold/transferred and there is no merger of petitioner company with some other company and the existence of the company has not come to an end. The petitioner company survives and exists and only part of its manufacturing facility (a factory) which was situate at Ankleshwar, is sold. Undisputedly, the company has other manufacturing facilities (factories) at different places in the State / in the country. Further, the purchaser company has not challenged the award. In this view of the matter final direction which cast the obligation on joint and several liability basis, cannot be faulted and does not deserve to be disturbed.

11 In this background and with the aforesaid clarification, the petitioner's challenge against the award is required to be considered.

12 So as to examine the petitioner's challenge against the award, it is necessary to take into account the charge-sheet so that the allegations against the workman can be appreciated. The charge-sheet dated 5.9.1997 reads thus:

"It is alleged against you as under:

On 01.09.97 at about 1700 hrs, a tanker being No.MH04/ P 6624 of Acetone Solvent from M/s. Pioneer Chemical Industries reached the factory. As per the practise you had gone with the Driver of the Tanker one Mr.Girijashankar Yadav, for weightment of the tanker to Public Weigh Bridge at Asian Paint Crossing. The weighment dated 01.09.97 showed a gross weight of the tanker 16695 kgs. Thereafter, the tanker was brought back to the Company.

Next day, on 02.09.97, a sample was drawn at around 1500 hrs by Q.A. Chemist for checking quality of the material supplied. As the quality of the material was found unsatisfactory, the same was rejected on 03.09.97 and it was decided to return the material to the supplier. The tanker was therefore again sent for weighment at around 1800 hrs to the same Public Weigh Bridge, Near Asian Paint Crossing. The tanker showed gross weight of 16290 kgs. slip dated 03.09.97. Thus there was a shortage of 405 kgs of Acetone Solvent as was evident from Public Weigh Bridge Slips dated 01.09.97 and 03.09.97 from the said tanker. As we suspected theft of the material the Driver of tanker Mr.Girijashankar Yadav was questioned immediately about loss of 405 kgs of Acetone Solvent.

It has been reported that you and the driver of the tanker Mr.Girijashankar Yadav after weighment of the tanker on 01.09.97, took it at a place adjacent to M/s.Ganesh Industries, Plot No.317/78. You and tanker's driver Mr.Girijashankar Yadav removed around 405 kgs of Acetone Solvent from the tanker unauthorisedly and sold it to some unidentified person and thereafter brought the tanker to the company. Having come to know about the theft of said 405 kgs of Acetone Solvent, from the said tanker by you along with tanker driver Mr.Girijashankar Yadav, an FIR No.I 124/97 was lodged at the Police Station, GIDC, Ankleshwar on 03.09.97. The police authorities, based on the complaint, arrested the said driver Mr.yadav as also yourself on 03.09.97 at 6.00 p.m. for interrogation, we now understand, from police that they have recovered two drums containing Acetone Solvent by you and the driver earlier.

13 In pursuance of the said charge-sheet, domestic enquiry was conducted and on conclusion of the domestic enquiry, the Enquiry officer submitted his report/finding, the company accepted the finding and conclusion of the Enquiry officer and on the premise that the allegations are proved, the Disciplinary Authority passed the termination order and dismissed the respondent from service vide order dated 4.4.1998.

14 During the proceedings before the learned Labour Court, the respondent challenged legality and propriety of the enquiry. The learned Labour Court examined the said issue and declared that the enquiry was defective and was not conducted in legal and fair manner.

15 Undisputedly the said decision has attained finality.

16 The learned Labour Court granted opportunity to the company to lead evidence. In that view of the matter, the deposition by the workman - claimant as well as the witnesses of the company came to be recorded by the learned Labour Court. The claimant's deposition was recorded at Exh.16. The company's witness (Store Officer) filed his affidavit in lieu of examination-in-chief which was accepted on record at Exh.33. The said witness of the company (Store Officer) was subjected to cross-examination by the respondent-claimant.

16.1 The learned Labour Court took into account the said evidence and other documents which were placed on record by the claimant and the company and upon appreciation of evidence, the learned Labour Court reached to above mentioned conclusions.

17 True it is that in the matter of domestic enquiry and/or in the matter of the conclusion by the employer with regard to misconduct of an employee and in the matter of disciplinary action against the workman, strict proof beyond doubt is not necessary and the principle of preponderance of probability would be applicable in case of departmental action against an employee.

17.1 However, that principle cannot be stretched to contend that direct and primary evidence would not be necessary and merely remote and secondary evidence which is, at the most, mere hearsay can serve the purpose for taking any disciplinary action against an employee who is charged with allegation about theft of property. The said principle also cannot be stretched, by any imagination, to contend or hold that hearsay evidence of no consequence also can be relied on and the disciplinary action against an employee on serious allegation of theft can be taken. When service of an employee is terminated on the ground of criminal offence viz. theft, then the allegation must be proved with sufficient cogent evidence and merely on the basis of hearsay and surmises and conjectures and in absence of any cogent evidence conclusion with regard to allegation of theft should and cannot be reached and such conclusion cannot be sustained, even in matter of domestic enquiry. Merely on the statement of first accused/Co-accused and in absence of any evidence - corroborating evidence cannot lead to final conclusion against the employee and on such basis penalty order cannot be sustained or justified.

18 While it is true that strict proof of evidence will not be required in the matter of disciplinary action and the charge and allegation may not be proved beyond doubt, however, there must be some semblance of evidence to indicate that misconduct was committed by delinquent and that in the alleged misconduct, the delinquent employee was involved.

19 In present case, it has emerged that the respondent came to be visited with the charge-sheet only on the ground that the Store Officer reported that the Driver of the vehicle had informed him that the respondent was his partner in the crime of theft.

19.1 It is pertinent that the Driver was not examined before the Enquiry Officer. The Driver was not examined before the learned Labour Court also. So-called statement of the Driver is also not placed on record and merely on oral allegation and claim by an officer of the company that the Driver (who is main culprit and first accused in the theft) claimed that the respondent was his partner in the incident.

19.2 There is no corroborating evidence and yet merely on such statement by Store Officer, charge-sheet came to be issued against the respondent and the respondent is even held guilty, though said driver is not examined.

19.3 It is also undisputed fact that muddamal (stolen material) is not recovered from the respondent's possession.

19.4 Any material to connect the respondent with theft of the material was not placed before the Enquiry Officer and was not placed before the learned Labour Court also.

20 When the Driver - first and principal accused and main culprit - was not examined before Enquiry Officer and before the learned Labour Court and when muddamal was not recovered from the respondent and when any material or corroborating evidence to connect the respondent with alleged theft was not placed on record, the learned Labour Court's decision cannot be faulted.

21 In substance, there was no material worth the name, except oral claim-rather allegation-of the officer that the Driver had told him that the respondent was his partner in the theft, to establish that the respondent was involved in the theft and he was partner in the crime.

22 In this background and in this view of the matter, when the learned Labour Court reached to the conclusion that the charge is not proved, the said conclusion cannot be faulted.

23 When the allegation and charge against the respondent are not proved, as found by the learned Labour Court, the termination cannot be sustained. The learned Labour Court's decision to set aside the order terminating service of the respondent cannot be faulted.

24 So far as the direction to jointly and severally implement the award is concerned, in view of the provisions under section 18(3) of the Industrial Disputes Act, the said direction cannot be faulted. It is also pertinent that the petitioner company is not closed or it has not merged with any other company. Only a part of its asset, i.e. manufacturing facility (one of the factories at Ankleshwar) is sold. When the company has other manufacturing facility (factory) and the existence of the company has not come to an end coupled with the fact that the purchaser company is not aggrieved by the award and has not challenged the award and/or direction, the petitioner's objection on the ground that the purchaser company was not heard, cannot be sustained. Therefore, the said contention is hereby rejected. In the result, the petition fails and deserves to be rejected and is accordingly rejected. Rule is discharged.