IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7026 OF 2012

Mahindra & Mahindra Limited .... Petitioner

Vs.

Vishwanath Jaynarayan Dhoot .... Respondent

Mr. K.M. Naik, Senior Counsel alongwith Mr. Sujeet Salkar and Mr. Hemant Telkar i/by M/s Haresh Mehta & Co. for the Petitioner.

Mr. G.S. Walia and Mr. Rahul Walia, Advocates for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.
Date : 31st March, 2016.

P.C.

1 The petitioner-employer has filed this petition to challenge the final award dtd. 28th February, 2012 passed by the Labour Court in Reference (IDA) No.33 of 1995.

2 The respondent was working as a “Machine Operator” with the petitioner in it's Cam and Crank Department. On 6th August, 1992, the office bearers of the Union functioning

in the petitioner's establishment complained to the petitioner in writing about the incident dtd.4th August, 1992, that took place in Cam and Crank Department. On the date and time of the incident, the respondent abused another workman one Mr. K.R. Kukreti and threatened to assault him after the shift. Kukreti felt scared and tried to leave department but the respondent prevented him from doing so. Then Kukreti complained to Mr. Satish Sharma and Mr. P.K. Ghuge, the office bearers of the Union. Both visited the Cam and Crank Department to sort out the differences. While they were talking to Mr. S.R. Kharde, the delegate from the department, the respondent came there and started abusing office bearers of the Union. Then on seeing Kukreti coming to the place, the respondent again abused him by referring to his mother and sister and rushed at him leading to a scuffle. Mr. Ghuge and Mr. Sharma separated the two, but not before the respondent abused the management and the Union in similar bad words.

3 On the next day, i.e. on 7th August, 1992, the petitioner suspended the respondent from service and served him with charge-sheet on 28th August, 1992 charging him with acts of drunkenness, riotous, disorderly or indecent behaviour on the premises of the establishment and commission of act subversive of discipline or good behaviour on the premises of

the establishment amounting to misconduct under Clauses 24(k) and 24(l) of Model Standing Orders applicable to the establishment. Enquiry was conducted into the charges by one Mr. R.S. Bhalekar, Advocate, an independent person. An office bearer of the Union of which the respondent was the member represented him in the enquiry. On conclusion of the enquiry, the Enquiry Officer found the respondent guilty of the misconducts alleged against him. The report of the Enquiry Officer was accepted by the petitioner. It considered his past record of having received warning memos thrice and discharged him from service on 11th October, 1993 by paying one month's wages in lieu of notice in terms of Clause 23(1) of Model Standing Orders.

4 Being aggrieved by the discharge, the respondent took the matter into conciliation and upon failure of conciliation proceedings, the matter came to be referred to the Labour Court, Nasik under Reference (IDA) No.33 of 1995 for adjudication. After the evidence was led on the issue of fairness of the enquiry, the Labour Court, by it's order dtd. 17th March, 2008 held that the enquiry against the respondent was against the principles of natural justice and allowed the petitioner to lead evidence. Thereafter, evidence was led in the Reference and the Labour Court, by it's final award dtd. 28th February, 2012, impugned in

the present petition, quashed and set aside discharge of the respondent and directed the petitioner to reinstate him in service with full back-wages and continuity of service w.e.f. 11th October, 1993. While challenging to the final award, the petitioner has also challenged Part-I award dtd 1st August, 2008.

5 In his reply to the charge-sheet, the respondent had claimed that there was dispute over the election of member for Ganesh festival committee from Cam and Crank Department, over which there was quarrel between him and Mr. Kukreti. Finally Mr. Sharma and Mr. Ghuge came alongwith Mr. Kukreti and after protracted discussion, the respondent gave up the dispute and the matter was closed. However, Security Officer, Mr. Vishwanathan obtained signatures of the respondent on two statements stating that the same were required for keeping a record of the incident. Some more signatures of the respondent were taken at the Police Station.

6 The petitioner did not lead any oral evidence in the enquiry proceedings but produced only documentary evidence. The respondent examined himself. It was contended on behalf of the petitioner before the Enquiry Officer that the contents of the documents marked as Exhibit '28' and Exhibit '30' by the Enquiry Officer were sufficient to establish the charges against

the respondent. The respondent had contended in reply that the documents could not be read in evidence as the authors of the documents were not examined and the opportunity to cross-examine was denied to him. The Enquiry Officer held that the two documents can be considered as the documentary evidence of the petitioner in the proceedings.

7 The document at Exhibit '28' is part of the document of the enquiry proceedings in respect of the enquiry conducted against other workmen i.e. Mr. Sharma, Mr. Kukreti and Mr. Ghuge concerning the same incident. In that enquiry, the respondent was the witness of the petitioner and had been cross-examined by the defence representative, Mr. Mokashi, who is defence representative of the respondent herein also. The document of deposition, Exhibit '28' of the respondent was signed by the respondent, Mr. Mokashi and the Enquiry Officer, who was also same in both the enquiries. The Enquiry Officer held that since the document had been signed by the three persons who are concerned with the present enquiry also there was no question of proving the document by examining any of the signatories. In his opinion, the document would not harm anybody or prejudice the respondent.

8 The document at Exhibit '30' was also part of the documents of the other enquiry. It was the deposition of Mr. Kukreti as the defence witness. He was cross-examined on behalf of the petitioner. The Enquiry Officer gave a strange reasoning for admitting the document in evidence. He noted that Mr. Kukreti has since resigned from services of the petitioner and was not available as a witness. His evidence was recorded through Mr. Mokashi, the same defence representative. Therefore according to the Enquiry Officer, Mr. Mokashi could not assail the same. He observed that by appearing in both the enquiries Mr. Mokashi had taken “onerous responsibilities” upon himself and that his role invited criticism. The next reason set out was “even otherwise Mr. Dhoot had opportunity to call Mr. Kukreti or any other person as defence witness, which he deliberately avoided to do so”.

9 Solely by reading Exhibit '28' i.e. deposition of the respondent and Exhibit '30' deposition of Mr. Kukreti recorded in the enquiry proceedings against Mr. Kukreti and with no reference to the deposition of the respondent in the present proceedings the Enquiry Officer found that “the contents of complaint dtd. 6.8.92 stand substantially and effectively proved in the enquiry against Mr. Dhoot and thereby the allegations levelled against Mr. Dhoot in the chargesheet dtd.28.8.92 stand

sufficiently proved as the complaint dtd. 6.8.92 made by the Union is based on the incident between Mr. Dhoot and Mr. Kukreti which had taken place on 4.8.92 in the Company premises during the working hours as mentioned above" Resultantly the charges under clauses 24(k) and 24(l) of the Model Standing Order were held to be proved.

10 Before the Labour Court, the respondent filed his affidavit of examination-in-chief and was cross-examined by the petitioner. Then, the petitioner examined the Enquiry Officer and filed the enquiry proceedings. On appreciation of the material before it, the Labour Court, by its order dated 1st August, 2007 held that when two separate counter enquiries were held against the respondent and against Mr. Kukreti, the evidence recorded in one enquiry cannot be used in another enquiry, both the enquiries being based on the same incidents with allegations against each other. Further, in his evidence in Kukreti enquiry, the respondent has obviously not stated anything which shows that he was guilty of misconduct. He had deposed as the petitioner's witness against Kukreti. The defence statement of Mr. Kukreti in the enquiry against him was to save himself from the allegations of misconduct and therefore whatever stated by him in that enquiry cannot be used against the respondent, unless he is given an opportunity to cross-

examine Mr. Kukreti. Since this opportunity was not given to the respondent, the petitioner could not use the statement of Kukreti against the respondent. The Labour Court, opined that the evidence of Mr. Kukreti relied upon by the Enquiry Officer without giving an opportunity to cross-examine Mr. Kukreti is against the principles of natural justice. Besides, the petitioner had not examined the other persons who are said to be the eye-witnesses of the incident i.e. Mr.Kharde, Mr. Ghuge and Mr. Sharma. For these reasons, the Labour Court set aside the enquiry held by the petitioner against the respondent and granted an opportunity to the petitioner to lead evidence to prove the charges leveled against the respondent. The Labour Court was also of the opinion that in the two enquiries the defence representative could not have been the same.

11 As already mentioned hereinabove, in the present petition while challenging the final Award, the petitioner has also challenged Part-I Award. Mr. Naik, the learned Senior Counsel appearing for the petitioner, submits that the Labour Court erred in holding the enquiry as unfair because the defence representative in the two enquiries was same. According to him, since the defence representative was representing the two parties who were opposed to each other, in fact, the representative of the petitioner had pointed out the fact to the

defence representative so that he could consider whether to participate in the second enquiry. Despite this caution, he had appeared for the respondents in the second enquiry and therefore the enquiry cannot be vitiated for that reason. I find some substance in the submission. Since the defence representative would essentially be a matter of choice of the delinquent, the selection of defence representative by itself cannot vitiate the enquiry. It, at the highest, can be one of the circumstances to be taken into consideration depending upon the facts of the case.

12 As regards the opportunity of cross-examination to be given to the respondent, Mr. Naik argues that the respondent was examined as the Management witness in the counter enquiry against Mr. Kukreti, Mr. Sharma and Mr. Ghuge. In that enquiry, Mr. Kukreti had examined himself as the defence witness. Therefore, there could be no question of giving opportunity to the respondent, a mere witness, to cross-examine Mr. Kukreti. Mr. Naik, is right in his submission to this extent. However, in that case, the petitioner could not have used the evidence of Mr. Kukreti recorded in the enquiry against him as the evidence of the petitioner in the enquiry held against the respondent. If the petitioner desired to use the evidence, it ought to have presented Mr. Kukreti for cross-examination by

the respondent. The petitioner was unable to do so because Mr. Kukreti had, by then, resigned from the service of the petitioner. In the circumstances, I find no infirmity whatsoever with Part-I of the Award holding that the enquiry conducted by the petitioner against the respondent is against the principles of natural justice and hence vitiated.

13 After passing of Part-I of the Award, the petitioner had led evidence before the Labour Court to prove charges against the respondent. It examined two witnesses, namely Vijay Maruti Thorat and Shivaji Nathu Malunjkar who were duly cross-examined on behalf of the respondent. Thereafter, the respondent examined himself on the merits of the matter by filing his affidavit of examination-in-chief and then cross-examined by the petitioner. On appreciation of the evidence, the Labour Court held that the petitioner had failed to prove the charges against the respondent and therefore his dismissal from service was illegal and unjustified. With this finding, it passed the order of reinstatement of the respondent with continuity of service and full backwages w.e.f. 11th October, 1993.

14 The two witnesses examined by the petitioner before the Labour Court i.e. Mr. Vijay Thorat and Mr. Shivaji Malgundkar are the office bearers of the Workers Union. They

were working as Machine Operators in the same factory. They had signed the complaint dated 6th August, 1992. However, undisputedly none of them had seen the alleged incident dated 4th August, 1992. The witness, Vijay Thorat deposed that the incident had taken place in the second shift on 4th August, 1992 when he was not present on the spot. He, alongwith the other Union members was present when the complaint was scribed. This witness has patently not thrown any light whatsoever on the incident that had taken place on 4th August, 1992. Therefore, his evidence was of no use to prove the charges against the respondent. The second witness, Shivaji Malgundkar was also working in the first shift on the date of the incident. He deposed that, after being released from his shift, he had gone home and was not present at the time of the incident. He admitted in the cross-examination that, he does not know as to who was the perpetrator in the incident, whether the respondent or Mr. Kukreti. He further admitted that, Mr. Kukreti had not signed the complaint dated 6th August, 1992 against the respondent.

15 The Labour Court in its Part-II Award, observed that, there is nothing on record to indicate as to how, the two witnesses examined by the petitioner got knowledge of the incident. Apparently, they being the office bearers of the Union

were informed about it. Therefore, the entire evidence of the two witnesses was hearsay evidence. It also noted that, the petitioner has failed to give any explanation as to why the persons who were allegedly abused or assaulted by the respondent were not examined either in the domestic enquiry or in the Court and mere presence of the two witnesses at the time of drafting of the complaint is not credible evidence to hold occurrence of the alleged incident.

16 Mr. Naik submits that, the view expressed by the Labour Court that the petitioner ought to have examined eye witnesses on the occurrence of the incidence is erroneous. By taking support from the two decisions of the Apex Court in (i) **State of Haryana and Another and Rattan Singh reported in (1982) 1 LLJ page 46** and (ii) **Cholan Roadways Ltd. Vs. G. Thiruganasambandam reported in 2005 I CLR page 524,** he submits that, in domestic enquiry, the strict and sophisticated rules of evidence under the Indian Evidence Act do not apply and the material which is logically probative for a prudent mind is permissible. Therefore, evidence of the two witnesses examined by the petitioner could not be discarded as hearsay evidence. The facts of the decision in *Rattan Singh's* case involved domestic enquiry against a bus conductor by Haryana Roadways State Transport Undertaking. The allegations against

the Conductor were that, he was collecting fare from the passengers without issuing tickets to them. The Flying Squad of the Haryana Roadways on its surprise-check had stopped the bus on which Rattan Singh was the Conductor. In that surprise-check, it was discovered that, four passengers had alighted at a bus stop without tickets and eleven passengers in the bus were travelling without tickets. All the persons claimed to have given the fare to the petitioner. The question arose, whether non-examination of the eleven passengers in the domestic enquiry was fatal when the Inspector of the Flying Squad was examined. The Apex Court held that, it is well settled that, in a domestic enquiry the strict and sophisticated rules under the Indian Evidence Act may not apply. All materials which are legally probative for a prudent mind is not permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and creditability. Of course, fair-play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiates the conclusions reached, such finding, even if a domestic Tribunal cannot be held good. It found that, the evidence of the Inspector of the Flying Squad is the evidence which has relevance to the charge levelled against the bus conductor and that was found sufficient in the facts of that case. Thus, it was the case of some evidence which was relevant and material evidence. The facts of the decision cited are completely

different from the facts of the present case. In the facts before the Apex Court, there was some evidence relevant for misconduct of the employee. In the facts of the present case, there is no evidence on the misconduct of the respondent, except for drafting of a complaint by persons who had not seen the incident.

17 In *Cholan Roadways* case (supra), the employee was a bus driver who drove the bus rashly and negligently as a result of which accident took place in which seven passengers died. In the disciplinary enquiry initiated against him, he was held guilty and dismissed from service. The Industrial Tribunal declined to grant approval to the dismissal on the ground that during the enquiry the passengers were not examined and thereby principles of natural justice were violated. The Apex Court reiterated its view that principles of Evidence Act have no application in a domestic enquiry though undoubtedly the principles of natural justice are required to be complied with. It held that, the very fact of nature of the impact upon the vehicle clearly demonstrated that the vehicle was driven rashly and negligently. There is no such intrinsic evidence available in the facts of the present case.

18 Considering the evidence produced on record by the petitioner, there could be no other inference drawn by the Labour Court than that drawn by it. There was virtually no evidence to establish occurrence of the incident involving the respondent attributing the acts of misconduct to him. Therefore, the Part-II Award, i.e. the final Award has also been correctly passed by the Labour Court and the respondent has been correctly directed to be reinstated with continuity of service.

19 As regards the backwages, the Labour Court has considered the evidence of the respondent in the cross-examination that, he had tried to get alternate employment after his dismissal but was unable to find any work. He and his family could survive because his wife was doing labour work. The Labour Court found nothing to discredit the respondent on this evidence. It also observed that, there was no evidence on the part of the petitioner to prove any subsequent alternate employment by the respondent.

20 It is well established position in law that in case of wrongful termination of service, reinstatement with full back-wages is a normal rule. For that purpose, the employee has to plead and and depose to that effect. The employee having done that the onus shifts on the employer that the employee was

gainfully employed and hence disentitled to back-wages. Mr. Naik submits relying upon the decision of this court in **Navin Surti vs. Modi Rubber Limited and Another**, reported in 2004 II CLR, page 46 submits that it was necessary for respondent to disclose the efforts made by him to get some job or other during the relevant period. Mere silence on his part in that regard cannot in any manner, emerge to his benefit to justify the claim for back-wages in entirety. In my considered opinion, there could not have been any more evidence on the part of the respondent, than given by him. Hence, there can be no infirmity with this part of the order also.

21 For the above reasons, the petition is dismissed with costs quantified at Rs.25,000/-.

(Smt. R.P. SondurBaldota, J.)