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Court : Mumbai Aurangabad

Decided On : Dec-09-2015

Judge : Ravindra V. Ghuge

Appeal No. : Writ Petition No. 5426 of 2015

Appellant : Pralhad

Respondent : The General Manager, The Jalna District Central Co. op. Bank Ltd.

Judgement :

Oral Judgment:

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. While issuing notice to the respondent on 14/10/2015, I had recorded the contentions of the petitioner in paragraph Nos. 1, 2 and 3 as under:

1. The petitioner was working as a Banking Inspector? at Talani Branch. He had initially joined as a Clerk on 20/05/1985. He was charged with having indulged in misappropriation and after conducting a domestic enquiry, he has been dismissed from service on 23/03/2009.

2. He preferred Complaint (ULP) No.1/2011 before the Labour Court. He was held to be a workman. By the impugned judgment and order dated 20/03/2012, the complaint was dismissed. He preferred Revision (ULP) No.38/2012 before the Industrial Court, which was dismissed by the impugned judgment dated 06/09/2014.

3. It is submitted that though the enquiry and the findings of the Enquiry Officer have been challenged, the Labour Court has not framed the first two issues in relation thereto.?

3. In the light of the submissions of the petitioner, as recorded above, the judgment of this Court in the MSRTC, Beed Vs. Syed Saheblal Syed Nijam, 2014(4) Mh.L.J. 687 became applicable.

4. Mr.Shinde, learned Advocate strenuously submits that in a case of disciplinary proceeding, the two issues as regards (a) fairness of the enquiry and (b) the findings of the Enquiry Officer should be cast by the Labour Court. If the order of dismissal is based on an enquiry, challenge to the dismissal obliges the Labour Court to frame the said two issues.

5. He further submits that the said two issues were not framed. The Industrial Court also did not look into the perversity in the judgment of the Labour Court. The revision petition of the petitioner has been mechanically dismissed by the Industrial Court.

6. He further submits that though the charge of misappropriation of Rs.13,76,298/- was levelled upon the petitioner, he had no role to play and was not responsible for the said misappropriation. Even if double payment was made to an account holder, the extra payment could be recovered and it does not mean that the petitioner has committed misappropriation.

7. He further submits that an enquiry was conducted by the Assistant Registrar Cooperative Societies and the petitioner is exonerated. The dismissal of the petitioner dated 23/03/2009 is on the basis of a domestic enquiry conducted by a practicing advocate. When the Assistant Registrar, Co-operative Societies had

exonerated the petitioner, no enquiry was required to be conducted by the employer.

8. He adds that no loss has been caused to the Bank and the petitioner need not be held responsible for any act which has not caused any harm or loss to the Bank.

9. He further states that the respondent had reserved its right to conduct a denovo enquiry in its written statement which indicates that the Labour Court should frame two issues as contended above. He, therefore, prays that this petition deserves to be allowed.

10. Mr.Nimbalkar, learned Advocate appearing on behalf of the respondent, points out the observations of this Court in paragraph No.31 and 32 of the MSRTC Beed judgment (supra). 11. He submits that this Court has noted that a workman ought to challenge the domestic enquiry as being unfair and must also challenge the findings of the Enquiry Officer and therefore set out the pleadings as well as the prayers in the memo of the complaint. He further points out that the complainant must plead that the domestic enquiry deserves to be vitiated on account of non observance of the principles of natural justice or that the findings be branded as perverse.

12. In the light of the law as above, Mr.Nimbalkar draws my attention to the memo of the complaint filed by the petitioner before the Labour Court. Both, Mr.Shinde and Mr.Nimbalkar have read the entire complaint.

13. Though Mr.Shinde refutes the submissions of Mr.Nimbalkar, I find from the complaint that there is no pleading even remotely to state that the enquiry be declared as vitiated and the findings of the Enquiry Officer be discarded as being perverse. The Apex Court in the matter of Bharat Forge Co.Ltd., Vs. A.B.Zodge, 1996(73) FLR 1754 = AIR 1996 SC 1556 (paragraph No.7) has held that an enquiry can be vitiated for any reason, be it for non observance of the principles of natural justice or on account of the findings being perverse.

14. Paragraph No.27 to 32 of the MSRTC judgment (supra) are as under:

27. The Hon™ble Supreme Court in the case of Delhi Cloth and General Mills Company Limited Vs. Ludh Budh Singh; reported in 1972 (1) SCC 595, concluded in paragraph Nos. 19, 20, 21, 22 and 24, which read as under:

19. In support of his first contention Mr. Anand urged that the appreciation of the evidence adduced in a domestic enquiry as well as the weight to be given to that evidence are all matters falling primarily within the jurisdiction of the Enquiry Officer over which the Industrial tribunal has no right to sit in appeal. The counsel further urged that the conclusion arrived at by the Enquiry Officer is a possible view which could be taken on the evidence on record. The Industrial tribunal has no jurisdiction to consider whether the evidence available before the Enquiry Officer was adequate or sufficient or of a satisfactory character. Mr. Anand pointed out that these are matters that an appellate court may be entitled to consider, but not an Industrial tribunal, whose jurisdiction is very limited. He further pointed out that the findings recorded by the Enquiry Officer cannot be considered to the perverse, as characterised by the Industrial Tribunal, in the sense that it is not justified by any legal evidence.?

20. The counsel further contended that the jurisdiction of the Tribunal, as laid down by this Court in several decisions, was only to satisfy itself whether a prima facie case has been made out by the employer and that the employer has not acted mala fide and that the enquiry has been held in accordance with the principles of natural justice and the procedure indicated in the Standing Orders, if any. If once the tribunal comes to the conclusion that the management has not acted mala fide and that there has been a proper enquiry and that the conclusion arrived at by the Enquiry Officer is a possible one on the evidence led before it, the tribunal cannot substitute its own judgment for the judgment of the Enquiry Officer, though it may have come to a different conclusion.?

21. We do agree, as abstract propositions of law, the contentions of the learned counsel regarding the scope of tribunals jurisdiction, in such matters, are correct. But the question for consideration by us is whether the Industrial tribunal, when it declined to grant the permission asked for by the appellant, has in any manner acted contrary to the principles referred to by Mr. Anand and set out above.?

22. Before we proceed to deal with the contentions of Mr. Anand, it is necessary to state the law regarding the nature of the jurisdiction exercised by a tribunal in dealing with an application under S. 33 of the Act. We had occasion to deal with a similar aspect in Delhi Cloth and General Mills Co. V. Ganesh Dutt and Others it was observed therein:

The nature of the jurisdiction exercised by an Industrial tribunal in such circumstances is a very limited one and it has been laid down by several decisions of this Court. The legal position is that where a proper enquiry has been held by the management, the tribunal has to accept the finding arrived at in that enquiry unless it is perverse or unreasonable and should give the permission asked for unless it has reason to believe that the management is guilty of victimisation or has been guilty of unfair practice or is acting mala fide. Vide Punjab National Bank Ltd. V. Its Workmen, Bharat Sugar Mills Ltd. V. Jai Singh, Management of Ritz Theatre (P)V. Its Workmen, and Mysore Steel Works V. Jitender Chandra Kar and others.?

23. In Martin Burn Ltd. V. R. JV. Banerjee, it has been laid down that once an Industrial tribunal is satisfied that the conclusion arrived at by the Enquiry Officer, on the evidence led before it, is a possible one, the tribunal has no jurisdiction to substitute its own judgment for the judgment of the Enquiry Officer, though the tribunal may itself have arrived at a different conclusion on the same materials.?

24. It has been further laid down in the Lord Krishna Textile Mills V. Its Workmen as follows:

It is well known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is entitled to consider facts; but these considerations are irrelevant where the jurisdiction of the court is limited as under S. 33(2) (b). It is conceivable that even in holding an enquiry under S. 33(2) (b) if the authority is satisfied that the finding recorded at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to consider whether approval should be accorded to the employer or not; but it is essential to bear in mind the difference between a

finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient or adequate or satisfactory evidence.?

28. The Hon™ble Supreme Court in the case of Shambhu Nath Goyal Vs. Bank of Baroda; reported at 1984 (4) SCC 491, has held as under:

2. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the labour court should first decide as preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the labour court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue.?

Relying on this statement of law in Cooper Engineering Ltd. case, it was contended in Shankar Chakravartis case that it is the obligatory duty of the Labour Court / Industrial tribunal to frame a preliminary issue whether the domestic enquiry is valid or vitiated? After answering the issue, one way or the other, if it is held that the domestic enquiry was vitiated, the employer has to be given an opportunity to lead evidence to substantiate the charge of misconduct. And that is how the extracted passage was interpreted by the Division Bench of the Calcutta High Court in Shankar Chakravartis case (Britannia Biscuit Co. Case?) (1976 Lab IC 1358). It was further contended that it is the obligatory duty of the Labour Court / Industrial Tribunal after deciding the preliminary issue in favour of the workman and against the management to call upon the employer to lead his evidence to substantiate the charge of misconduct. It is in this context that this Court observed that the employer must plead in the statement of defence filed before the Labour Court / Industrial Tribunal that in the event domestic enquiry which led to the termination of service is held to be vitiated or invalid, he must be given opportunity to lead evidence to substantiate the charge of misconduct. Explaining how the pleading can be raised this Court observed that if such a relief is claimed in the

statement of claim, application for approval of its action or written statement of defence, the Labour Court/ Industrial Tribunal must give such an opportunity. The Court further observed that if the request is made before the proceedings are concluded, the Labour Court/ Industrial Tribunal should ordinarily grant the opportunity to adduce evidence. It was further observed that if such a pleading is raised in an opportunity is sought, it is to be given, but if there is no such pleading either in the original application or in the statement of claim or written statement or by way of an application during the pendency of the proceedings, there is no duty cast in law or by the rules of justice, reason and fair play that a quasi-judicial Tribunal like the Industrial Tribunal or the Labour Court should adopt an advisory role by informing the employer of its rights. The statement that if an application is made during the pendency of the proceedings does not mean that some.....?

29. This Court in the case of A.H. Wadia Charity Trust and others Vs. Neville Jathan and Others; reported in 2002 (Supp.) Bom.C.R. 773,has held as under:

6. The learned members of the Industrial Court by order dated 06-06-2001 in his well written and reasoned order confirmed the order of the Labour Court. In principle he agreed with the contention of the trust that when enquiry is set aside the employer should be given an opportunity to prove the misconducts and justify the act of dismissal/termination before the Labour Court by adducing fresh evidence/material on record of the Labour Court. The Industrial Court however has approved the course adopted by the Labour Court of not giving any opportunity of adducing any evidence before the Labour Court to prove the misconduct and to justify the action of dismissal on the ground that the charge of late coming was not disputed or denied by the employee but was admitted by him in his replies to the Memos served upon him by the trust. In these circumstances the Industrial Court agreed with the order of the Labour Court to interfere with the punishment of dismissal and granting the employee reinstatement without backwages for a period of about 6 years. The Industrial Court has considered the prayer of remand to the Labour Court made on behalf of the trust. The learned member of the Industrial Court has rightly considered the remand of the complaint absolutely unnecessary as the result would be the same. There could have been no further evidence in respect of the late coming of the employee. The trust had clearly

mentioned in its Memos that in the month of September, October and December and April and May how many days the employee was late in attending the office. In reply to the said Memos and the show cause notice the employee has agreed to the said charge and had admitted that he was late and that his attendance was not exemplary on account of his travel by train which were always late and that it was a daily affair. According to me, even if the petitioners were not to hold any formal enquiry the order of punishment would not have suffered from any infirmity as they were acting on the admissions of guilty or charge by the employee. Merely because a formal enquiry was held in spite of clear admissions and acceptance of the charges levelled against the employee it can be said to be a redundant and unnecessary exercise of enquiry. If such an enquiry is held to be unfair and improper it makes hardly any difference and it would be sheer waste of time requiring the parties to undergo the ordeal of enquiry before the Court as the charges which are required to be proved before the Labour Court were already admitted by the employee and nothing was left to be proved in the given circumstances. What more is required to be proved in a formal domestic enquiry? And even if such a formal enquiry is held by the employer and if such a formal enquiry is quashed and set aside by the Labour Court in such circumstances what employer would prove before the Labour Court? In my opinion both the Labour Court and the Industrial Court have acted properly and have taken a pragmatic view of the matter and both rightly did not enter into time wasting procedure of proving the so called misconduct before the Labour Court which was already admitted by the delinquent respondent employee.?

7. There is one more crucial aspect in respect of the grievance made by Shri Singh for the petitioner that the Labour Court ought to have granted the petitioners to lead evidence before the Labour Court to prove the misconduct and to justify its action of dismissal of the employee. He has also made similar grievance against the order of the Industrial Court. Though Shri singh was vociferous as usual against the lower Courts on this issue. I find absolutely no substance in his submissions even on this issue. Firstly, as I have already held that it was not all necessary to give a so-called opportunity to lead evidence before the Labour Court in view of clear and unambiguous admission of late coming by the employee. Secondly, no such opportunity could be given as the petitioners did not pray for

such opportunity at the first earliest point of time to pray for such opportunity which was when they filed their affidavit in reply in July/August, 1994 to the affidavit filed by the employee in support of his application for interim relief application. The petitioners had not filed any written statement or reply to the main complaint filed by the employee. They appear to have wholly relied on the said affidavit in reply to the interim relief application and their reply is in detail dealing with the merits of the main complaint also. In this reply the petitioners have not prayed for such opportunity to lead evidence before the Labour Court in case the enquiry was held to be not fair and proper. This was the first and the earliest point of time available to the petitioners. By another application dated 25-08-1995 they had prayed for framing of an additional issue about their being not an industry?. Even in this application no permission was sought by the petitioners to prove the misconduct and to justify the dismissal. They have made such an application as late on 26-07-1999, at the fag end of the proceedings as the final order of the Labour Court is dated 29-11-1999. Even in normal circumstances such an application could not have been entertained in view of the latest judgment of the Supreme Court in the case of (Karnataka State Road Transport Corporation Vs. Laxmidevamma and another) 1, 2001 (3) Bom.C.R. (S.C.) 623 : A.I.R. 2001 S.C.W.1981. After considering the entire case law the Supreme Court has observed as under:

16. While considering the decision in (Shambhu Nath Goyal V. Bank Boroda) 2, 1985, Bank J. 30 (S.C.) : A.I.R. 1984 S.C. 289 : 1983 Lab. I.C. 1697, we should bear in mind that the judgment of Vardarajan J., therein does not refer to the case of (Cooper Engineering V. P.P Mundhe)3, A.I.R. 1975 S.C. 1900 : 1975 Lab. I.C. 1441. However, the concurring judgment of D.A. Desai, J., specifically considers this case. By the judgment in Goyals case the management was given the right to adduce evidence to justify its domestic enquiry on if it had reserved its right to do so in the application that the management had to file to the reference made under section 10 of the Act, meaning thereby the management had to exercise its right of leading fresh evidence at the first available opportunity and not at any time thereafter during the proceedings before the Tribunal/ Labour Court.?

18. There is no other reason why we should accept the procedure laid down by this Court in Shambhu Nath Goyals case. It it to be noted that this judgment was

delivered on 27th of September, 1986. It has taken note of almost all the earlier judgments of this Court and has laid down the procedure for exercising the right of leading evidence by the management which we have held in neither oppressive nor contrary to the object and scheme of the Act. This judgment having held the field for nearly 18 years, in our opinion, the doctrine to stare decisis require us to approve the said judgment to see that a long standing decision is not unsettled without strong cause.

30. The Hon™ble Supreme Court in the case of Bharat Forge Company Ltd., Vs. A.B. Zodge and another; reported in AIR 1996 SC, 1556, has held (in paragraph No. 7) as under:

A domestic enquiry may be vitiated either for non-compliance of rules of natural justice or for perversity. Disciplinary action taken on the basis of a vitiated enquiry does not stand on a better footing than a disciplinary action with no enquiry. The right of the employer to adduce evidence in both the situations is well-recognised. In this connection, reference may be made to the decisions of this Court in Workmen of Motipur Sugar Factory (p) Ltd. V. Motipur Sugar Factor (p) Ltd., (1965) 2 Lab LJ 162 : (AIR 1965 sC 1803), State Bank of India V. R.K. Jain (1971) 2 Lab LJ 599: (AIR 1972 SC 136), Delhi Cloth and General Mill Co. Ltd. V. Ludh Budh Singh (1972) I Lab LJ 180: (AIR 1972 SC 1031) and Firestone Type Co.™s case (AIR 1973 SC 1227) (supra). The stage at which the employer should ask for permission to adduce additional evidence to justify the disciplinary action on merits was indicated by this Court in Delhi Cloth and General Mills (supra). In Shankar Chakrabarty™s case (AIR 1979 SC 1652) (supra), the contention that in every case of disciplinary action coming before the Tribunal, the Tribunal as a matter of law must frame preliminary issue and proceed to see the validity or other wise of the enquiry and then serve a fresh notice on the employer by calling him to adduce further evidence to sustain the charges, if the employer chooses to do so. By relying on the decision of the Court in the case of Cooper Engineering Ltd. (1975) 2 Lab LJ 379: (AIR 1975 SC 1900), has not been accepted. The view expressed in Delhi Cloth Mill™s case (supra) that before the proceeding are closed, an opportunity to adduce evidence would be given if a suitable request for such opportunity is made by the employer to the Tribunal has been reiterated in

Shankar Chakrabarty™s case after observing that on the question as to the stage as to when leave to adduce further evidence is to be sought for, the decision of this Court in Cooper Engineering Ltd. has not overruled the decision of this Court in Delhi Cloth Mill™s case. There is no dispute in the present case before closure of the proceedings before the Tribunal, prayer was made by the employer to lead evidence in support of the impugned order of dismissal. Hence denial of the opportunity to the employer to lead evidence before the Tribunal in support of the order of dismissal cannot be justified.?

31. In the light of the observations of the Apex Court and this Court in the above referred cases, it is, therefore, settled that when a workman challenges the domestic enquiry as being unfair and vitiated and attempts to brand the findings of the EO as being perverse, there ought to be pleadings as well as prayers praying for such declaration in the memo of the complaint under the ULP Act, 1971 or in the statement of claim under the Industrial Disputes Act, 1947 (hereinafter referred to as IDA, 1947?). The pleadings are complete with the filing of the written statement by the employer and by reserving the right to conduct a denovo enquiry. The Hon™ble Apex Court in the case of K.S.R.T.C. Vs. Lakshmidevamma and another, 2001 (II) CLR 640 has held that when an employer reserve such right to conduct a denovo enquiry, it does not amount to an admission on his part that the enquiry is bad in law or the findings are perverse.

32. It is therefore crystallised that when the right to conduct a denovo enquiry is reserved in the written statement, and the Labour Court or Tribunal has framed the two issues referred above, in relation to the enquiry, the said issues are to be decided as preliminary issues, before taking up other issues. It is an anathema to decide the first two issues together with the other issues. Whenever, in proceedings under the MRTU and PULP Act, 1971 or the IDA, 1947, a domestic/departmental enquiry is under challenge with pleadings and substantive prayers seeking the quashing of the domestic enquiry on the ground of either non-observance of the principles of natural justice or findings being perverse, the Court or Tribunal has to frame a preliminary issue and try the same pre-emptorily.?

(Emphasis is supplied)

15. This Court in the matter of Permanent Magnets Vs. Vinod Vishnu Wani and others, reported at 2002(93) FLR, 32 = 2002 (3) Mh.L.J. 413 has concluded in paragraph Nos. 12, 13 and 14 as under:

12. The contention sought to be raised by the respondent in this regard is that the prayer to frame issue is restricted to the validity and legality of the Domestic Enquiry and, therefore, right reserved by the petitioner to lead evidence was only in case the enquiry is held to be not in accordance with the principles of natural justice. It cannot be disputed that strict interpretation of the pleadings would disclose a prayer to frame issue in relation to validity and legality of the Domestic Enquiry. The pleadings do not disclose a specific prayer for framing of any other issue. However, it is always to be remembered that framing of issue is primarily the function of the Court and it is not for the party to make prayer in that regard. The issues are to be framed based on the pleadings of the parties. Merely, because the party does not pray for framing of an issue, the Court is not absolved of its duty of framing the issues, which otherwise arise from the pleadings of the parties. This does not mean that the parties are forbidden from rendering necessary assistance to the Court in framing of issues. However, it is primarily the duty of the Court to frame issues, based on the pleadings. Viewed from this angle, mere absence of the prayer to frame issue cannot result in any prejudice to the petitioner. The Apex Court in Makhan Lal Bangal v. Manas Bhunia and others reported in 2001 AIR SCW 90, has ruled that an obligation is cast on the Court to read the plaint/ petition and written statement/ counter, if any, and then determine with the assistance of the learned counsel for the parties the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the Court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the Court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues.

13. The pleadings of the petitioner in the written statement quoted above, disclose that the petitioner had specifically stated that in case enquiry is held to be affected by breach of any principle of law either relating to natural justice or otherwise, the petitioner would lead evidence to substantiate charges of misconduct and to justify

the final action against the complainants/respondents herein. The petitioner's statement therein is clear to the effect that it craved leave to substantiate the charges of misconduct and justify the final action against the complainants by leading evidence in case the enquiry is held to be in breach of any principles of law either relating to natural justice or otherwise. It cannot be disputed that the pleadings in question do not expressly use the phraseology like "the employer reserve its right to lead evidence in case the Labour Court holds the findings arrived at by the Enquiry Officer to be perverse". But, at the same time, it has stated that in case the enquiry is held to be not in accordance with the law applicable thereto, and the same is held to be not in compliance with the principles of natural justice or otherwise, the employer would lead necessary evidence to prove the charges and for justification of punishment imposed. In interpreting the pleadings, as has been held by the Apex Court in Ram Sarup v. Bishun Narain reported in AIR 1987 SC 1242 no pedantic approach should be adopted to defeat justice on hair splitting technicalities and it is the duty of the Court to ascertain the substance of the pleadings. At this stage, it is also necessary to consider the contention of the learned Advocate for the petitioner that the question of opportunity of leading the evidence in support of justification of the charges of misconduct and action thereupon by the employer could arise only in case where the findings of the Enquiry Officer are held to be perverse and not otherwise. To put in exact words of the learned Advocate "the right to lead evidence to the employer is borne (read born) only on the finding of the Labour Court that the findings of the Enquiry Officer are perverse." It cannot be disputed that once it is held that the Domestic Enquiry has been conducted in fair and proper manner and in accordance with the principles of natural justice, that by itself would not lead to conclusion that the findings arrived at by the Enquiry Officer were also perverse. Much to the contrary, the finding to that effect would be specifically required by the Labour Court. Once it is stated by the petitioner in the written statement that he craves leave to substantiate the charges of misconduct by leading proper evidence and to justify the final action, in case enquiry is to be held vitiated for non compliance of principles of natural justice or otherwise and considering the law laid down by the Apex Court regarding the reading and understanding of the pleadings. It is to be held that the petitioner had conveyed its intention to the

Labour Court to lead evidence in case the Labour court comes to the conclusion that the inquiry was vitiated either on account of non compliance of the procedure or for violating the principles of natural justice or the findings arrived at by the Enquiry Officer being held to be perverse. On this count, therefore, the contentions of the learned Advocate for the respondent that the pleadings do not disclose reservation of right of the employer to lead evidence, in case of findings of Enquiry Officer being held as perverse, cannot be accepted.

(Emphasis supplied)

Referring to the decision of the learned Single Judge in Chandrikaprasad's case, it was strenuously argued by the learned Advocate for the respondent that there was not even an attempt on the part of the petitioner in the course of argument to submit that the petitioner would lead evidence in support of the charges of misconduct, in case the Labour Court holds the findings of the Enquiry Officer to be perverse. Indeed, in Chandrikaprasad's case, the learned Single Judge while considering the point of failure on the part of the Labour Court to allow the employer to adduce evidence pursuant to the finding that the domestic enquiry was not fair and proper and the findings recorded by the Enquiry Officer were perverse. It was observed that in the written statement filed by the employer, no plea was raised in the alternative that in case the enquiry held against the employee is not fair and proper or is held to be perverse, the employer be given an opportunity to prove the charges against the employee and even when issues were framed after the parties had tendered draft issues, the employer had never pressed that the issue regarding fairness of the enquiry or the correctness of the findings recorded by the Enquiry Officer should be tried as preliminary issue. Not only that when during the course of arguments no request was made that if the Court holds that enquiry against the employee was not fair and proper or the findings recorded by the Enquiry Officer were perverse, the employer should be given opportunity to lead evidence. Having sat on the fence and allowed the proceedings to complete, it was not open to the employer, after the proceedings were closed before the Labour Court and judgment was delivered, to raise the contention, during the course of hearing of revision application for the first time even in absence of any ground in memo of revision that Labour Court ought to

have asked employer to lead evidence to prove the misconduct on merits before the Labour Court. According to the learned Advocate for the petitioner, the facts of the case in hand are similar to those of Chandrikaprasad's case inasmuch as, there was no request made by the petitioner in the course of arguments for allowing the petitioner to lead evidence in case the Labour Court holds that the findings of the Enquiry officer to be perverse nor, the issue in that regard was requested to be tried as preliminary issue. It cannot be disputed that the petitioner could have certainly drawn attention of the Labour Court at the time of framing issues that the issue in relation to whether the findings of the Enquiry Officer to be perverse, ought to have been tried as preliminary issue. It is also a matter of record that on completion of the evidence led by the petitioner in answer to the evidence, led by the respondent, the petitioner had filed purshis closing its evidence. The impugned order also does not disclose any request having been made by the petitioner to the Labour Court in the course of arguments for reserving its right to lead evidence in support of the charges of misconduct and punishment imposed, in case the Labour Court holds the findings of the Enquiry Officer to be perverse. However, as rightly submitted by the learned Advocate for the petitioner, in spite of these facts, the point which is required to be considered is whether the employer was afforded or not an opportunity to exercise his right to adduce evidence once the tribunal holds that the findings of the Enquiry Officer are perverse. Undisputedly, the decision of the Labour Court that the findings of the Enquiry Officer in the Domestic Enquiry were perverse was arrived in the judgment and order dated 6th April, 1999 itself and not prior to the delivery of the said judgment and order and, thereafter, there was no opportunity made available to the petitioner to lead any evidence in support of the charges against the respondent in spite of the fact that the pleadings in that regard disclose the required alternative plea. Undisputedly, in Chandrikaprasad's case, there was no such plea raised in the written statement. Basically, therefore, the employer had not disclosed any willingness on its part to lead evidence in support of the charges and punishment imposed by the management in case the Labour Court comes to the conclusion that the findings arrived at by the Enquiry Officer were perverse. Considering the law laid down by the Apex Court in Bharat Forge Company Limited's case and Karnataka State Road Transport Corporation's case, it being

the matter of right of the employer on necessary alternative plea being made in the written statement, it was necessary for the Labour Court to afford an opportunity to the employer to lead evidence in support of the charges and punishment imposed once, the Labour Court has held that the findings arrived at by the Enquiry Officer were perverse. In this connection, it was sought to be contended by the learned Advocate for the respondent that there is no procedure prescribed whereby the parties are entitled to lead evidence in piecemeal on every issue. There can be no quarrel about the proposition canvassed by the learned Advocate for the respondent. However, the fact remains that it was necessary for the Labour Court to frame issue as to whether the findings of the Enquiry Officer being perverse along with the issue regarding the Domestic Enquiry to be in accordance with the principles of natural justice or not. For the lapse on the part of the Labour Court, the parties cannot be blamed in that regard. No doubt, the parties also could have assisted the Labour Court by bringing the said fact to the notice of the Labour Court at the time of holding of the enquiry in relation to the point as to whether the Domestic Enquiry was in accordance with the principles of natural justice or not. But, having not done so, apparently, the right of the employer to lead evidence in support of the charges and punishment imposed, once the Labour Court comes to the conclusion that the findings of the Enquiry Officer were perverse, cannot be denied to the employer, and more particularly, when denial of such right has resulted in prejudice to the petitioner.?

16. It is, therefore, trite law that the issues have to be cast based on the pleadings set out in the complaint and in the written statement. In the absence of a challenge to the Enquiry and the findings of the Enquiry Officer, no issue is required to be cast in relation thereto, merely because the employer has reserved its right to conduct a denovo enquiry. As held by the Apex Court in the Bharat Forge judgment (supra), the complainant must specifically plead that the enquiry be declared as vitiated and the findings of the Enquiry Officer be set aside for being perverse. It is only after the Labour Court vitiates the enquiry for any of these reasons, that the employer can conduct a denovo enquiry.

17. Though the petitioner has contended that the findings of the Enquiry Officer and the enquiry was challenged, I do not find any pleading even remotely touching

the fairness of the enquiry and the findings of the Enquiry Officer in the complaint. As such, the Labour Court has rightly not framed any issue and the Industrial Court has therefore not interfered in the conclusions of the Labour Court.

18. In the above backdrop, the challenge to the order of dismissal can then be entertained only to the extent of proportionality of the punishment. If the enquiry is not challenged and if the findings of the Enquiry Officer are not sought to be branded as perverse, it leads to an inference that the employee has accepted the findings.

19. In the instant case, an allegation of misappropriation of more than Rs.13,00,000/- was levelled upon the petitioner. Enquiry Officer has held the petitioner guilty. An enquiry conducted by the Assistant Registrar, Co-operative Societies is not a part of disciplinary proceedings and the same cannot be equated with an enquiry being initiated by an employer under its standing orders or its service conditions. The result of the enquiry conducted by the Assistant Registrar, Co-operative Societies will therefore not be of any significance. The right of the employer to initiate disciplinary proceedings can neither be curtailed nor can any embargo be created by an enquiry conducted by the Assistant Registrar.

20. To the extent of the charges proved against the petitioner, grievance is that the petitioner was not responsible for any disbursement, much less double payment. This aspect however is not open for scrutiny since the enquiry and the findings of the Enquiry Officer have been deemed to be accepted by the petitioner as concluded above.

21. The Apex Court in the case of Janatha Bazar (South Kanara Central Co-operative Whole Sale Stores Limited) Etc. Vs. The Secretary, Sahakari Noukarana Sangha Etc. [2000 AIR SCW 3439 = AIR 2000 SC 3129], in paragraphs 3, 6 and 8 observed as under:

3. The question involved in these appeals is -- Whether High Court was justified in confirming the order passed by the Labour Court reinstating the respondents-workmen with 25% back wages inspite of specific finding of fact that the charges of breach of trust and misappropriation of goods for the value given in the said

charges had been clearly established. Apparently, it would bean unjustified direction to reinstate an employee against whom charge of misappropriation is established. A proved act of misappropriation cannot be taken lightly even though number of such misappropriation cases remain undisclosed and such employees or others amass wealth by such means. In any case, misappropriation cannot be rewarded or legalised by reinstatement in service with full or part of back wages.

6. As stated above, the learned Single Judge and the Division Bench in writ appeals confirmed the findings given by the Labour Court that charges against the workmen for breach of trust and misappropriation of funds entrusted to them for the value mentioned in the chargesheet had been established. After giving the said findings, in our view, the Labour Court materially erred in setting aside the order passed by the Management removing the workmen from the service and reinstating them with 25% back wages. Once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service. Law on this point is well settled. [Re.: Municipal Committee, Bahadurgarh v. Krishnan Behari and Ors. [1996] 2 SCR 827]. In U.P. State Road Transport Corporation v. Basudeo Chaudhary and Anr. : (1997)11 SCC 370 this Court set aside the judgment passed by the High Court in a case where a conductor serving with the U.P. State Road Transport Corporation was removed from service on the ground that alleged misconduct of the conductor was attempt to cause loss of Rs. 65/- to the Corporation by issuing tickets to 23 passengers for a sum of Rs. 2.35 but recovering @ Rs. 5.35 per head and also by making entry in the way bill as having received the amount of Rs. 2.35, which figure was subsequently altered to Rs. 2.85. The Court held that it8. In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases.? (Emphasis supplied). Was not possible to say that Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in Punjab Diary Development Corporation Ltd. and Anr. v. Kala Singh and Ors. : (1997) IILLJ 1041 SC, this Court considered the case of a workman who was working as a Diary Helper-cum-Cleaner for collecting the milk from various centers

and was charged for the misconduct that he inflated the quantum of milk supplies in milk centers and also inflated the quality of fat contents where there were less fat contents. The Court held that "in view of proof of misconduct a necessary consequence will be that Management has lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11A of the I.D. Act to grant relief with minor penalty".

8. In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases.? (Emphasis supplied).

22. The Division Bench of this Court has also considered the aspect of misappropriation in the matter of P.R.Shele Vs. Union of India and others [2008 (2) Mh.L.J. 33] and has held in paragraph Nos.9, 10 and 15 as under:

9. We may also refer to yet another judgment of the Supreme Court in Union of India and Ors. v. Upendra Singh (1994) ILLJ 808 SC. The relevant observations of the Supreme Court may be quoted:

In the case of charges framed in a disciplinary inquiry the tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to Court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution. Therefore, the principles, norms and the constraints which apply to the said jurisdiction apply equally to the Tribunal. If the original application

of the respondent were to be filed in the High Court it would have been termed, properly speaking, as a writ of prohibition. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view.

10. We may also refer to the judgment of this Court in Ramchandra Govindrao Gaidhani v. Union of India and Anr. delivered on 18-9-2006 in Writ Petition No. 6211 of 1999, to which one of us (Smt. Ranjana Desai, J.) is a party. Similar view has been taken by this Court in that case. Examined in the light of the above judgments, we cannot fault the Tribunal for having refused to examine the correctness, the truth or otherwise of the charges. We cannot lose sight of the fact that the petitioner did not challenge the Disciplinary Authority's order or the Appellate Authority's order. The first submission of learned Counsel for the petitioner must, therefore, fail.

15. We may also refer to another judgment of the Supreme Court in Managing Director, North-East Karnataka Road Transport Corporation v. K. Murti . The relevant paragraph of the judgment may be quoted:

The learned Counsel for the appellant, at the time of hearing, placed strong reliance on the two decisions of this Court, one in Regional Manager, Rajasthan SRTC v. Ghanshyam Sharma which was also a case of bus conductor carrying passengers without issuing tickets. This Court, in the above case, held that carrying the passengers without tickets amounts to dishonesty or grave negligence and for such misconduct punishment of removal from service is justified. This Court also further observed that the Labour Court was not justified in directing the reinstatement with continuity of service but without backwages. This Court has also relied upon a judgment in Karnataka SRTC v. B.S. Hullikatti. In the said judgment, this Court has held that in such cases where the bus conductors carry passengers without ticket or issue tickets at a rate less than the proper rate, the said acts would inter alia amount to either being a case of dishonesty or of gross negligence and such conductors were not fit to be retained in service because

such inaction or action on the part of the conductors results in financial loss to the Road Transport Corporation. This Court has also observed that in cases like the present, orders of dismissal should not be set aside. The learned Counsel for the appellant also cited Divisional Controller, N.E.K.R.T.C. v. H. Amaresh. In this case, this Court was considering the case of misappropriation of a small amount of State Road Transport Corporation's fund by a conductor and held it a grave act of misconduct, which resulted in financial loss to the Corporation. This Court also held that punishment of dismissal from service awarded by the disciplinary authority did not call for any interference by the Labour Court or the High Court and hence the order of reinstatement passed by the High Court was set aside. This Court also in a catena of decisions held that the Tribunal should not sit in appeal over the decision of any employer unless there exists a statutory provision in this behalf. This Court also observed that the High Court gets jurisdiction to interfere with the punishment in the exercise of its jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed is shockingly disproportionate to the charges proved.?

23. In the light of the above, since the issue of proportionality of the punishment alone was to be considered, I do not find that the Labour Court or the Industrial Court has committed any error in dismissing the complaint and the revision petition. The punishment awarded is proportionate.

24. This petition, being devoid of merit, is therefore dismissed. Rule is discharged.

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