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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on: 6th February, 2015*

+ **W.P.(C) 6311/2014 & CM. No.15240/2014**

MOTHER DAIRY
(NOW KNOWN AS FRUIT & VEGETABLE PVT. LTD.).. Petitioner

Represented by: Mr. Lalit Bhasin,
Ms. Ratna S. Dhingra and
Ms. Bhavna Dhami,
Advocates.

Versus

ARVIND KUMAR ARORA Respondent
Represented by: Mr. Jitin Sahni and
Mr. Vikas Yadav,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

W.P.(C) 6311/2014

1. The present petition is directed against the award dated 07.07.2014 passed by the Labour Court in ID No. 216/2010 (old ID No.03/2005), whereby the learned Labour Court held that dismissal of

the workman is not justified as the same is excessive punishment. Accordingly, while setting aside the order of dismissal of workman from service, the learned Labour Court directed the petitioner to reinstate the respondent in service without any back wages.

2. The petitioner has also assailed the order dated 21.08.2008, whereby the Labour Court held that the respondent claimant is 'workman', as defined under Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter to be referred as 'the Act').

3. Firstly, I will take up the second issue whether respondent falls within the ambit of Section 2(s) of the Act as disposal of the same is *sine qua non* to decide the first issue, which will be taken up subsequently.

4. Case of the petitioner is that the respondent-claimant was not a 'workman', as defined under Section 2(s) of the Act. He was working as Senior Superintendent (Marketing) and his job was to select site for installation of insulated milk containers. At the time of allotment of containers, respondent used to sign the agreements executed between

the parties as a witness of the petitioner Management. His duties were administrative, managerial and supervisory in nature, thus, he is not entitled to protection of the Industrial Disputes Act.

5. To substantiate its contentions, the Management has mainly relied upon the nomenclature given to the post of claimant as 'Senior Superintendent (Marketing)'.

6. To supplement it, Mr.R..T.Wadhwa, Assistant Manager, was examined as MW2. However, during his cross-examination, it is established that the said witness did not have any knowledge about nature of actual duties being performed by the claimant. He could not say whether the claimant only used to go to verify the address given by the applicants in their applications for allotment of booths. He pleaded ignorance when asked whether in the agreements/contracts signed between the Mother Dairy and the allottees, the claimant had any role or not. However, admitted that the claimant used to sign only as a witness on those contracts and anyone else present at that time could have signed the said contracts as a witness.

7. On the other hand, the respondent/claimant has proved on record copies of his appointment letters starting from 1984 posting him as a Marketing Assistant to 1998 designating him as Senior Superintendent (Marketing). As per Clause 8 of the last letter, issued in 1998, it is clear that though the claimant was promoted as Senior Superintendent (Marketing), but at the same time, he was required to continue to perform the same nature of duties as were being performed by him earlier as Marketing Assistant. The petitioner has not brought on record any evidence to rebut this vital document nor there is anything to show that the claimant, on promotion was given power to appoint, supervise, sanction leaves, order disciplinary action etc. of any subordinate staff.

8. As per Section 2(s) of the Act, any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward is a workman unless and until he is employed in managerial, administrative or supervisory capacity and drawing wages more than the prescribed limit.

9. Moreover, in catena of judgments, the Apex Court has held that to determine whether a person is a workman or not, the Court has to principally see the main or substantial work for which he is employed. Neither designation nor any incidental work done by him will get him outside the purview of this Act.

10. In the present case, though the respondent was promoted to the post of Senior Superintendent (Marketing) but as per clause 8 of the appointment letter issued by the Management designating him as Senior Superintendent (Marketing), he was required to continue to perform the same nature of duties as were being performed by him earlier as Marketing Assistant.

11. Therefore, in view of the facts recorded above, it is established that the petitioner Management has miserably failed to show that the respondent/claimant falls in the managerial, administrative or supervisory category.

12. Accordingly, I find no discrepancy in the order dated 21.08.2008 passed by the Labour Court qua the issue noted above.

13. As regards the first issue, Mr. Lalit Bhasin, learned counsel appearing on behalf of the petitioner Management, submitted that the Labour Court vide order dated 21.08.2008 held that the enquiry was fair and proper. Being aggrieved, the respondent/workman filed WP(C) No.168/2013, which was dismissed by this Court vide order dated 11.01.2013. Thus, the enquiry, being conducted fairly and properly, was upheld against the respondent and the same has attained finality too. Therefore, there was no occasion for the Labour Court to reinstate the respondent in service vide impugned order dated 07.07.2014.

14. Brief facts of the case are that the respondent/workman was working with the petitioner Management since 1984. The respondent/workman had opened a current Account No.2738 with Indian Bank, Nehru Place Branch, New Delhi, on or about 05.09.1994 in fictitious/pseudonymous name of Arun Kumar and signed against the column of signature as 'Arun' (in Hindi). He had given his photograph also in connection with opening of the said Bank Account. He also executed the agreements dated 07.09.1998 and 07.09.1999 by

signing therein as 'Arun' (in Hindi) with Mother Dairy in connection with insulated container No.1069 and was operating the said Bank Account No. 2738 in the name of 'Arun Kumar' by signing as 'Arun' (in Hindi) for the purpose of payment by way of cheques to the petitioner Management in connection with the aforesaid container.

15. For the above misconduct, the respondent/workman was suspended on 19.11.1999 and accordingly, vide chargesheet dated 27.11.1999, he was charged as under:-

“(a) opening of current account with the bank in the fictitious/pseudonymous name of Arun Kumar and having dealings with the dairy for pecuniary benefits/personal gain.

(b) Signing of two agreements and issuance of two cheques by workman in the name of 'Arun' in Hindi which is an act of falsification of record.

(c) by signing the two agreements as witness in connection with the said insulated container no.1069, he thereby committed grave act of bad faith towards his employer i.e. the management.

(d) by signing two agreements, issuing of two cheques towards the sale price of milk and opening of bank account, the claimant caused

dishonesty and fraud in dealing with dairy's business i.e. the management."

16. Accordingly, the enquiry was initiated against him in which respondent/workman participated and the Enquiry Officer submitted his findings on 15.04.2003, whereby held that all the four charges were proved against him. Consequently, the Disciplinary Authority decided to impose the punishment of dismissal from service and accordingly issued a show-cause notice dated 17.04.2003 against the respondent/workman, who submitted his reply. Finally, the petitioner Management dismissed the respondent from service vide order dated 22.07.2003.

17. Learned counsel appearing on behalf of the petitioner submitted that the Labour Court vide its order dated 21.08.2008 held that enquiry was fair and proper and same has been affirmed by this Court vide order dated 11.01.2013, therefore, there was no occasion before the Labour Court to direct the petitioner to reinstate the workman in service. Thus, misconduct of the workman was proved and the same cannot be re-agitated just because subsequently he has been acquitted by the Criminal Court.

18. Learned counsel further submitted that acquittal in a criminal case has no bearing in the domestic enquiry because the standards of proof in domestic enquiry and the criminal case are different as principle of proving beyond reasonable doubt is followed in the criminal case whereas in the domestic enquiry, the standard of proof is only preponderance of probabilities.

19. Learned counsel for the petitioner submitted that the Labour Court has relied upon the case of ***G.M. Tank Vs. State of Gujrat, (2006) 5 SCC 446***, which has been distinguished by the High Court of Calcutta in the case of ***Airports Authority of India & Ors. Vs. Pradip Kumar Banerjee & Ors., 2007 (4) CH N 77***, wherein held as under:-

“23. In the case of G.M. Tank (supra) (the two Judges’ Bench) the Supreme Court has observed as follows :-

“20. It is thus seen that this is a case of no evidence. There is no iota of evidence against the appellant to hold that the appellant is guilty of having illegally accumulated excess income by way of gratification. The respondent failed to prove the charges leveled against the appellant. It is not in dispute that the appellant being a public servant used to submit his yearly property return relating to his movable and immoveable property and the appellant has also submitted his return in

the year 1975 showing his entire movable and immovable assets. No query whatsoever was ever raised about the movable and immovable assets of the appellant. In fact, the respondent did not produce any evidence in support of and/or about the alleged charges leveled against the appellant. Likewise, the criminal proceedings were initiated against the appellant for the alleged charges punishable under the provisions of the PC Act on the same set of facts and evidence. It was submitted that the departmental proceedings and the criminal case are based on identical and similar (verbatim) set of facts and evidence. The appellant has been honourably acquitted by the competent court on the same set of facts, evidence and witness and, therefore, the dismissal order based on the same set of facts and evidence on the departmental side is liable to be set aside in the interest of justice.

30. *The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same.*

In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon the statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand."

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44. *It is noteworthy that while considering the representation made by the petitioner for reinstatement, the judgment of the Appellate Court was scrutinized by the Disciplinary Authority. On examination of the judgment the competent authority has come to the conclusion that prima facie the respondent has not been completely exonerated by the High Court in the judgment rendered in Criminal Appeal No.393 of 1999. The respondents has been merely given a benefit of doubt and acquitted. In view of the conclusion*

reached, by the disciplinary authority, in order to satisfy ourselves of the correctness thereof, we have examined the judgments of the Trial Court, and the Appellate Court. On perusal of the judgments we are unable to hold that the petitioner has been declared to be innocent. Learned counsel for the respondent No.1 had placed strong reliance on the judgment of the Supreme Court in the case of G.M. Tank (supra). The aforesaid observations, have to be considered on the facts of that case. The Supreme Court in that case was clearly dealing with a case of "No Evidence". It is categorically observed that "It is thus seen that this is a case of no evidence. There is no iota of evidence against the appellant to hold that the appellant is guilty of having illegally accumulated excess income by way of gratification. The respondent failed to prove the charges leveled against the appellant. It is not in dispute that the appellant being a public servant used to submit his yearly property return relating to his movable and immoveable property and the appellant has also submitted his return in the year 1975 showing his entire movable and immovable assets. No query whatsoever was ever raised about the movable and immovable assets of the appellant. In fact, the respondent did not produce any evidence in support of and/or about the alleged charges leveled against the appellant. Likewise, the criminal proceedings were initiated against the appellant for the alleged charges punishable under the provisions of the PC Act on the same set of facts and evidence. It was submitted that the departmental proceedings and the criminal case are based on identical and similar (verbatim) set of facts and evidence. The appellant has been honourably acquitted by the

competent court on the same set of facts, evidence and witness and, therefore, the dismissal order based on the same set of facts and evidence on the departmental side is liable to be set aside in the interest of justice.” Such is not a situation in the present case. In our opinion the present is not a case of no evidence; it is a case of not sufficient evidence. There is a clear distinction between the two situations. Therefore, in our opinion, the observations in G.M. Tank’s case (supra) would not be applicable in the facts and circumstances of the present case. In this case, before concluding that it is necessary to hold a departmental enquiry, the Disciplinary Authority has also considered the observations made by the Appeal Court to the effect that due to non-mentioning of arrangement to keep the flush door open in the pre-trap memo, it could hardly be accepted that such arrangement was made for keeping the door partly open. The Disciplinary Authority was certainly aware of the entire reasoning of the Appellate Court. The Disciplinary Authority was aware of the conclusion of the Appellate Court that “hardly, I find any material to place reliance on such evidence so as to hold that really some sort of shady transaction as has been alleged from the side of prosecution was going on between the petitioner and P.W.-1.” The Disciplinary Authority also notices that, in conclusion it is observed by the Court of Appeal that present case casts “serious doubt” on the allegation. On a very close scrutiny of the entire matter the disciplinary authority has concluded that it would not amount to an honourable acquittal. We are inclined to accept the reasons of the Disciplinary Authority, as we are also of the opinion that this acquittal can

hardly be equated with the declaration of innocence of the respondent. In view of the above, we hold that the appellants are justified in issuing charge-sheet to the respondent.”

20. On the other hand, learned counsel appearing on behalf of the respondent/workman submitted that Section 11(A) of the Act provides power to the Labour Court that if it is satisfied that the order of discharge or dismissal is not justified, it may set aside the said order and direct reinstatement of the workman. The duty cast upon the Tribunal is that whether order of dismissal of workman from service is justified or not.

21. Learned counsel has relied upon the order dated 08.05.2013 passed by the learned Chief Metropolitan Magistrate (East), Karkardooma Courts (for short ‘CMM’) in case bearing FIR No.149/2000, P.S. Mandawali, under Sections 419/420/468/471 IPC, whereby the respondent has been acquitted in the criminal case registered against him by the petitioner Management.

22. Learned counsel further submitted that the said case had been got registered by the Management on the same allegations on the basis of which respondent/workman was chargesheeted for misconduct and

consequently his services were terminated after domestic enquiry. Since after considering the evidence led by the workman, the said criminal case has been decided in his favour, therefore, it is clearly proved that the respondent/workman had not committed any misconduct.

23. I have heard the learned counsel for the parties.

24. It is settled law that mere acquittal in criminal case does not *ipso facto* results into setting aside the findings of domestic enquiry because standards of proof in criminal case and domestic enquiry are different. In the criminal case, the standard of proof is ‘beyond reasonable doubt’, whereas in the domestic enquiry it is ‘preponderance of probabilities’. However, where facts of both, i.e., the domestic enquiry and the criminal case are same, akin to the present case, in that eventuality, the Court can take into consideration the verdict given in the criminal case as well.

25. The learned CMM in its judgment dated 08.05.2013, while acquitting the respondent/workman has given reason that DW1 Arun Kumar, cousin of respondent/workman, resembles with the workman

to the extent that both of them can be termed as 'identical twin' and it is very difficult for a stranger to say who is Arvind (the respondent herein) and who is Arun. Hence, the allegations against the workman that he represented in the Bank as Arun and pasted his photograph as of Arun are sluiced because Arun is not a fictitious person and in fact an existing person, who was running the dairy himself.

26. I note, the Labour Court in the impugned award dated 07.07.2014 though considered the findings recorded by the Criminal Court, however, opined that the main charge against the workman in the chargesheet was that he engaged in private work for pecuniary benefits. Admittedly, he had not committed forgery in any documents of the Management and whatever alleged forgery has been done, the same was with respect to Bank documents as workman allegedly opened the Bank account in the name of fictitious person and accordingly, held that admittedly, no pecuniary loss had been caused to the petitioner Management.

27. So far as the forgery to the Bank is concerned, the learned CMM has held that since handwriting expert report being inconclusive with

regard to signatures of the respondent/workman on documents opening account and other Bank documents purported to have been written by the respondent/workman, is in favour of the respondent and rather proves that the same were not written by the respondent.

28. In view of the facts recorded above, it is clear that the learned CMM has not acquitted the respondent/workman by giving him benefit of doubt or for lack of evidence, but has honourably acquitted the respondent/workman as he had produced the real Arun, who was allotted the alleged milk insulated container.

29. Having regard to the aforesaid discussion, I have no hesitation to say that while passing the impugned order dated 07.07.2014, the Labour Court was under the influence of the order dated 21.08.2008 passed by his Predecessor and which has been upheld by this Court vide order dated 11.01.2013.

30. However, the fact remains that when the order dated 21.08.2008 was passed by the Labour Court which has been affirmed by this Court vide aforesaid order dated 11.01.2013, the judgment of acquittal dated 08.05.2013 passed by the Criminal Court after considering the

documents and evidence led by the parties, was not before them, therefore, both the Courts mentioned above did not have the opportunity to consider the view taken by the learned CMM in the criminal case.

31. Keeping in view the facts and circumstances of the case and above discussion, I find no merit in the instant petition. The same is dismissed accordingly with no order as to costs.

CM. No.15240/2014 (for stay)

With the dismissal of the petition itself, the instant application has become *infructuous*. The same is dismissed accordingly.

**SURESH KAIT
(JUDGE)**

FEBRUARY 06, 2015
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