

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.436 OF 2005

Arthur Viegas,
H.No. 589/A-1, Bandfoll,
Chinchinim, Salcete, Goa. Petitioner.

Versus

1. MRF India Limited,
P.B. No.1, Usgao, Ponda, Goa.

2. Michael Gracias,
General Manager,
MRF India Limited,
P.B. No.1, Usgao, Ponda, Goa. Respondents.

Mr. Valmiki Menezes, with Mr. A. Shirodkar, Advocates for the
Petitioner.

Mr. Girish Sardesai, with Ms. S. Bangera and Ms. N. Gaonkar,
Advocates for the Respondents.

Coram: M.S. Sonak, J.

Dated: 25th February, 2021.

ORAL JUDGEMENT:

Heard Mr. Valmiki Menezes, who appears along with Mr.
A. Shirodkar for the Petitioner and Mr. Girish Sardesai, who
appears along with Ms. S. Bangera for the Respondents.

2. The challenge in this Petition is to the Award dated 13th
October 1992 (Part I Award) and 27th March 1995 (Part-II Award)

made by the Industrial Tribunal, Goa in Reference (IT) No.25 of 1989, holding that the domestic inquiry held against the Petitioner was fair and proper and the action of the Respondents in terminating the services of the Petitioner, was legal and justified.

3. Mr. Menezes, the learned Counsel for the Petitioner submitted that the charge against the Petitioner was that the Petitioner was a part of an unlawful assembly, armed with deadly weapons, and on 13.3.1987, the Petitioner, as a part of this assembly, assaulted the Supervisors of the Respondent Company. As a result of this assault, some of the Supervisors were seriously injured and one of them even succumbed to the injuries and died.

4. Mr. Menezes submitted that on this identical charge, criminal proceedings were launched against the Petitioner and other workmen for the offences punishable under Sections 143, 147, 148, 452, 302, 325, read with 149 of the Indian Penal Code (IPC). Provisions of Section 34 of the IPC were also invoked. Mr. Menezes submitted that this Court, vide its Judgment and Order dated 12th November 1997, *inter alia*, in Criminal Appeals No.38/1996, awarded honorable acquittal to the Petitioner. In doing so, this Court took into account the evidence of the very same witnesses whom the Management examined in the course of the domestic inquiry. He submits that this acquittal was subsequently upheld by the Hon'ble

Supreme Court in its Judgment and Order dated 15th October 2004 in Criminal Appeal Nos. 1197-1203 of 1998.

5. Mr. Menezes, based on the aforesaid, submits that since the Petitioner was honorably acquitted in the criminal trial based on the identical charge and upon appreciating the evidence of the very same witnesses, it will be unjust, unfair, and oppressive to require the Petitioner to suffer a dismissal based on the findings recorded in the domestic inquiry. He submitted that such a course of action is held to be not proper by the Hon'ble Supreme Court in *Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd.*¹ and *G.M. Tank vs. State of Gujrat and others*². He also relies on *State Bank of Hyderabad and another vs. P. Kata Rao*³ in support of the proposition advanced by him.

6. Mr. Menezes pointed out that in the present case, even the inquiry held against the Petitioner was not fair or proper. He submitted that the Petitioner was not permitted to be represented by his co-workers despite the standard orders permitting representation through co-workers. He submits that there was a failure of natural justice since the album which contained photographs of several workmen of the company, was not produced during the inquiry and despite its non-production, the Enquiry Officer placed reliance on

¹ (1999) 3 SCC 679

² (2006) 5 SCC 446

³ (2008) 15 SCC 657

the same. Mr. Menezes submitted that these were sufficient reasons to hold that the inquiry was neither just, nor proper and based on these reasons, the Part I Award dated 13th October 1990 deserves to be set aside. Mr. Menezes submits that in any case, the Part II Award dated 27th March 1995 deserves to be set aside because at the time when the same was made, criminal prosecution was only pending against the Petitioner. After Part II Award was made, this Court honorably acquitted the Petitioner. Such acquittal was upheld by the Hon'ble Supreme Court, as well. Therefore, relying on the aforesaid decisions, Mr. Menezes reiterated that the dismissal of the Petitioner, based on the findings in the domestic inquiry, is unjust, unfair, and oppressive.

7. Mr. Menezes submits that the Petitioner, since his dismissal was unemployed and, therefore, is entitled to reinstatement, with all consequential benefits, including back wages, etc.

8. Mr. Girish Sardesai, the learned Counsel for the Respondents has defended the Award made by the Tribunal based on the reasoning reflected therein. He submitted that the standards of proof in criminal proceedings and a domestic inquiry are not the same. He submits that the Sessions Court had convicted the Petitioner and the acquittal recorded by this Court was only extending a benefit of doubt to the Petitioner. He submits that the

acquittal, in the facts and circumstances of the present case, can hardly be regarded as an honorable acquittal.

9. Mr. Sardesai submits that in this case, the original album was produced in the course of evidence in the domestic inquiry and there was no breach of the principles of natural justice. He submits that the Petitioner had taken a specific defence that he was in his house at the time of the incident. But the Petitioner failed to himself step into the witness box or examine any witnesses to make good his plea of *alibi*. He submits that there is overwhelming evidence on record of the Enquiry Officer to sustain the findings recorded by the Enquiry Officer. He submits that the decisions relied upon by the Petitioner are distinguishable on facts. Mr. Sardesai submits that for all these reasons, this Petition may be dismissed.

10. The rival contentions now fall for my determination.

11. On the aspect of the fairness of the inquiry, the Petitioner had raised three grounds, out of which, the ground that an advocate could not have been appointed as an Enquiry Officer has not been pressed before this Court.

12. As regards the first ground about the Petitioner not being permitted to avail the services of his co-workers to represent him in

the inquiry proceedings, there is no evidence on record to suggest that such permission was ever applied for by the Petitioner and that the same was refused. Besides, the Tribunal has noted that the Petitioner had himself pleaded that he used always be in the forefront of the Union activities and, therefore, this is not a case where it could be inferred that the Petitioner was incapable of handling his defence. The Enquiry Officer, who was examined as a witness before the Tribunal, stoutly denied the suggestion that the Petitioner had orally requested him for leave to be represented by the office bearers of the Union. In these circumstances, neither the evidence nor the reasoning of the Tribunal in this issue can be faulted.

13. On the second aspect *i.e.* failure of natural justice arising out of the Enquiry Officer, placing reliance on the album, again, the material on record does not support the case of the Petitioner. This aspect has been considered by the Tribunal in paragraph 10 of the Part I Award and the findings recorded do not suffer from any perversity. The Tribunal has also referred to the testimony of some witnesses who had identified the Petitioner participating in the incident which gave rise to the charge. The Tribunal has also noted that the photographs in the album were clearly shown to the Petitioner in the course of the inquiry proceedings and this means that full opportunity was granted to the Petitioner to contest or cross-examine on this aspect.

14. Besides, the record indicates that the Petitioner fully participated in the inquiry, without any demur. This is not a case where the Petitioner, in the course of the inquiry, protested that there was any breach of the principles of natural justice or fair play. Mere technical breaches of natural justice are never sufficient. The Petitioner had to demonstrate some prejudice which the Petitioner failed to demonstrate.

15. For all the aforesaid reasons, I do not think that any case has been made out to interfere with the Part I Award dated 13th October 1992. In this case, therefore, it will have to be held that the inquiry was fair and proper and the Petitioner was granted the full opportunity in the matter of his defence.

16. Now, coming to the next and important contention raised by Mr. Menezes, at the outset, reference is necessary to some observations from *Capt. M. Paul Anthony* (supra), and *G.M. Tank* (supra), since these two decisions were relied upon by Mr. Menezes in support of his contentions.

17. In *M. Paul Anthony* (supra), this is what the Hon'ble Apex Court has observed in paragraph 34 :

“There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal

case as also the departmental proceedings were based on identical set of facts, namely, “the raid conducted at the appellant’s residence and recovery of incriminating articles therefrom”. The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the “raid and recovery” at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the *ex parte* departmental proceedings to stand.”

18. Similarly, in *G.M. Tank* (supra), this is what the Hon'ble Supreme Court has observed at paragraphs 30 and 31.

“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 case 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 their 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.

31. *In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken*

note of and the decision in Paul Anthony case (supra) will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed.”

19. *M. Paul Anthony* (supra) was a case where the inquiry held against the workmen was *ex parte*, primarily because no subsisting allowance had been paid to the workman, as a result, the workman was deprived of an opportunity to participate in the inquiry.

20. The aforesaid distinguishing feature was noted by the Hon'ble Supreme Court itself in the case of ***Krishnakali Tea Estate vs. Akhil Bharatiya Chah Mazdoor Sangh***⁴. This distinguishing feature was also noted in the *State Bank of Hyderabad* (supra).

21. The decision in *G.M. Tank* (supra), was also noted in the *State Bank of Hyderabad* (supra) and the Hon'ble Supreme Court held that there is no absolute rule which can be followed in such matters and each case will have to be determined on its facts.

22. In the facts of the present case, the Sessions Court had convicted the Petitioner for the offences punishable under Sections 143, 147, 148, 452, and 325, read with 149 of the IPC. This conviction was, however, reversed by this Court mainly on the ground that the witnesses had not identified the accused persons, including the Petitioner herein.

⁴ (2004) 8 SCC 200

23. This Court, in its order acquitting the Petitioner and other accused persons, had noted that the witnesses *i.e.* the Supervisors were mostly from Madras and had arrived in Goa hardly about a month before this incident. This Court noted that it would not be safe to rely upon the testimony of such witnesses based on a fleeting glance of the incident. This Court also held that the album, based on which identification was sought to be made, was never produced in evidence. Only some xerox copies of photos were tendered in evidence and it is doubtful whether the xerox copies were even formally admitted in evidence. Based on this, the conviction of the Petitioner and others was reversed by this Court.

24. The Hon'ble Supreme Court also held that the view taken by this Court was plausible and, therefore, no interference was warranted with the order of acquittal.

25. Now, if the Judgment and Order of this Court are perused, it is difficult to agree with Mr. Menezes that this was a case of honorable acquittal. This was more a case where this Court felt it unsafe to act on the testimony of the witnesses since the charge in a criminal case has to be established beyond reasonable doubt and not merely by the test of preponderance of probabilities. Further, the acquittal was based on the premise that there was no legal evidence in

the form of the original album produced by the Prosecution on record. The acquittal was also based on the circumstance that no identification parade was held by the Prosecution. Therefore, the acquittal was on the premise that the Prosecution which was required to establish the case against the accused persons beyond a reasonable doubt, had failed to attain the standard of proof that was expected from the Prosecution in criminal proceedings. The fact situation in the cases of *M. Paul Anthony* (supra), nor *G.M. Tank* (supra) was quite different. One was a case of ex parte inquiry in breach of natural justice and the other was a case of honorable acquittal on an appreciation of the evidence of the very same witnesses. In the present case, a full opportunity was granted to the petitioner in the inquiry and the acquittal was mainly on the ground that only xerox copies of photographs were produced by the prosecution without bothering to produce the original album or holding an identification parade.

26. Besides the standard of proof in a criminal proceeding is proof beyond a reasonable doubt. In contrast, the charges in a domestic inquiry can be sustained by adopting the test of preponderance of probabilities. There is no requirement of proof beyond reasonable doubt as in a criminal case. There is material on record that establishes that the album, based upon which the identification was made, was produced. Even the production of xerox copies of the photographs is not an anathema to the domestic inquiry

where the strict rules of evidence are not applicable. Full opportunity was extended to the Petitioner to cross-examine the employer's witnesses and to contest the evidence in form of the photo album.

27. The Tribunal, in this case, has adverted to the evidence of Ravindranathan and Sowrirajan, both Supervisors, who were present at the time of the incident and who had also suffered injuries in the incident. These witnesses, including others, not only identified the Petitioner from the photograph in the album shown to them but they further stated that their identification was because they had seen the Petitioner on several occasions near the gate of the factory at Usgaon when they were entering or leaving the factory. These witnesses deposed that they had seen the Petitioner in the hall of the guest house and at the place of the assault when they came out of their rooms, after hearing the noise and shouts in the hall. They have also deposed to the assaults suffered by them on the date of the incident.

28. The Tribunal has noted that there was hardly any cross-examination in so far as these two material witnesses are concerned. Mr. Menezes contended that because the Petitioner was deprived of the opportunity of availing representation by the Union office bearers or the co-workers, no much cross-examination was possible. As noted earlier, there is no material on record to suggest that the Petitioner had ever applied leave to be represented by the Union office bearer

and that such leave was rejected. Rather, the Petitioner has himself pleaded that he was in the forefront of the Union activities.

29. The Petitioner, in this case, had specifically, raised the defence of *alibi* by stating that he was at his house at the time of the incident. However, neither did the Petitioner step into the witness box nor did he examine any witness in support of his plea of *alibi*.

30. In *S.K. Awasthy vs. M.S. Bhope*⁵, this Court has held that in a criminal trial no adverse inference can be drawn against the accused for his not entering into the witness box. However, no such principle is applicable either in civil proceedings or in a domestic inquiry or in proceedings before a Labour Court, Industrial Court or Industrial Tribunal where the Management discharges initial onus to prove the allegations and the workman fails to discharge the shifted onus, the case of the workman must suffer.

31. In the facts of the present case, the Respondents can certainly be said to have discharged the onus of proving that the Petitioner was the one from amongst the group of 15 workmen who, by forming an unlawful assembly, assaulted the Supervisors from Madras. There is evidence on record that the Petitioner, as well as other workmen, were disgruntled on account of the Supervisors being brought from Madras. Now, since the Petitioner took up the specific

⁵ (1994) 1 CLR 254

defence that he was not present at the time of the incident or that he was at his home at the time of the incident, nothing prevented the Petitioner from stepping into the witness box and deposing to this fact. Further, nothing prevented the Petitioner from examining any witnesses in support of his plea of *alibi*. This is an added circumstance to sustain the findings in the inquiry.

32. The jurisdiction of this Court to interfere with the findings of fact is quite limited. Unless it is demonstrated that the findings are vitiated by perversity, normally it is not for this Court to review the findings of fact. The contention-based upon the acquittal by this Court, was no doubt formidable and that is the reason why acquittal orders were taken into account by me having regard to the principles laid down in *M. Paul Anthony* (supra), or *G.M. Tank* (supra). Further, as noted earlier, such matters have to be decided on their peculiar facts, and in the facts of the present, it cannot be said that dismissal of the Petitioner was unfair, unjust, or oppressive. Ultimately, the object of criminal proceedings and domestic inquiries is quite different. That is the reason why the standard to be applied in criminal proceedings is that of proof beyond reasonable doubt and the standard to be applied in domestic inquiries is only that of a preponderance of probabilities.

33. For all the aforesaid reasons, this Petition will have to be

dismissed and, is hereby, dismissed. However, in the facts of the present case, there shall be no order as to costs.

M.S. Sonak, J.

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