

(1981) 05 CAL CK 0002

Calcutta High Court

Case No: None

Ludhlow Jute Co. Ltd.

APPELLANT

Vs

Nanda Kumar Singh and Others

RESPONDENT

Date of Decision: May 15, 1981

Acts Referred:

- Industrial Disputes Act, 1947 - Section 11A

Citation: (1982) 2 LLJ 476

Hon'ble Judges: Ganendra Narayan Ray, J

Bench: Single Bench

Judgement

Ganendra Narayan Ray, J.

This Rule is directed against the award passed by the Seventh Industrial Tribunal, West Bengal, in Case No. VIII 44/75. The award is Annexure "G" to the writ petition. It appears that the respondent No. 1 Sri Nanda Kumar Singh was a durwan of M/s. Ludhlow Jute Co, Ltd. and he was charge sheeted under Sub-clauses (viii) and (ix) of clause 14(c) of the Standing Orders of the company. The said durwan submitted his written explanation, but the management not being satisfied with the explanation held a domestic enquiry. The said Sri Singh, however, did not examine any witness and/or cross-examine any of the witnesses examined by the company. The enquiring officer found the said Sri Singh guilty of the charges and submitted a report. The said report was accepted by the management of the company and Sri Singh was dismissed from service. An industrial dispute was thereafter raised by the union and a reference was made by the Government of West Bengal to the Seventh, Industrial Tribunal, West Bengal, for deciding the issue to the following effect:

Whether the termination of service of Sri Nanda Kumar Singh, T. No. 98-117, is justified ? To what relief, if any, is he entitled.

It appears that before passing the award the Tribunal decided the preliminary issue as to whether or not the domestic enquiry was conducted properly and the Tribunal

after considering the materials on record came to the finding that this domestic enquiry was held properly and the findings of the enquiring officer were not perverse and the said finding were also based on evidence. The Tribunal also came to the finding that the enquiry was not only fair and proper, but the findings of the enquiring officer were unassailable. After the said preliminary finding, the reference was set down for further hearing on merits. It was contended by the petitioner company that the Tribunal having held that the domestic enquiry was properly made and the findings of the domestic enquiry were also just and proper the reference must be answered in favour of the company and the concerned employee was not entitled to any relief whatsoever. It appears that the Tribunal although accepted the finding made in the domestic enquiry as just and reasonable, the Tribunal was of the view that the punishment given to the concerned employee was harsh and disproportionate. Therefore, in exercise of the power conferred by Section 11A of the Industrial Disputes Act, the Tribunal held that instead of an order of dismissal it would be an adequate punishment if the workman was treated as under suspension from the date of the order of dismissal till the publication of the award in the official gazette. It was further held that during the said period the concerned workman would receive no wages and he would not be entitled to any suspension allowances. He would also not be entitled to any increment for the said period. It was further directed that the management would be at liberty to deduct a sum of Rs. 100 from his wages as the cost of two drums which were found missing. It was, however, provided for in the award that there would be no break of service of the said Sri Singh. The said adjudication and award are under challenge in the instant rule.

2. Mr. Dutta, the learned Counsel appearing for the petitioner, company, contends that after the amendment of the Industrial Disputes Act by incorporation of Section 11A, the Tribunal has the authority to re-assess the evidence adduced before the domestic Tribunal and/or before the Industrial Tribunal and on such re-assessment, the Tribunal can decide as to whether or not an order of dismissal was justified. The Tribunal has also power to give an award imposing lesser punishment if the Tribunal is satisfied from the facts and circumstances of the case that the punishment was harsh and disproportionate to the guilt committed by the concerned employee, Mr. Dutta, however, contends that although the Tribunal has such power to minimise the punishment in certain circumstances, it has a duty to consider the evidences and materials on record objectively and to give cogent reasons as to why the Tribunal is inclined to give lesser punishment to the concerned employee. Mr. Dutta contends that in the instant case, the Tribunal on consideration of the materials on record and evidences adduced in the domestic enquiry; came to the finding that there was no victimisation of the concerned employee and the domestic enquiry was conducted properly and all reasonable opportunities of being heard were given to the said employee. Mr. Datta submits that having held that the domestic enquiry was quite fair and reasonable, the Tribunal should not have passed the award by changing the

punishment of dismissal without giving proper reasons. He contends that the Tribunal mechanically came to the finding that punishment was oppressive and harsh and as such lesser punishment should be awarded to the employee. In this connection. Mr. Dutta refers to a decision made in the case of [Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others](#). It has been held in the said decision that if the Tribunal mechanically exercises its discretion without weighing the circumstances, then there was no exercise of discretion. If a statutory Tribunal exercises its discretion on the basis of incorrect consideration and without regard to relevant consideration, a writ of certiorari may be issued properly to quash the order. Mr. Dutta contends that the concerned employee being a durwan was required to discharge his duties and functions properly and the dereliction of duty since found by the domestic Tribunal warranted a punishment of dismissal because a person who had been entrusted with the responsibility of keeping watch on the company's property could not be permitted to misuse the trust and the responsibility imposed upon him. Mr. Dutta contends that the nature of dereliction of duty in the instant case reasonably permitted the company to dismiss the employee and it was not proper on the part of the Tribunal to allow reinstatement of the petitioner by imposing a lesser punishment. He contends that the discretionary power u/s 11A of the Industrial Disputes Act was exercised by the Tribunal without weighing the circumstances and such mechanical exercise of discretion amounted to a gross failure of justice. In this connection Mr. Datta refers to a decision of the Supreme Court made in the case of Francis Kleid & Co. (P) Ltd. v. Their Workmen 1971 II L.L.J. 613. In the said case, the durwan of the company was dismissed on the allegation that he failed to give assistances when called upon to do so when somebody was stealing the company's property. The Supreme Court has held that where an employer has lost confidence in his employee particularly in respect of a person who was discharging an office of trust and confidence, there could be no justification for directing his reinstatement. The importance of the post of durwan was noted by the Supreme Court in the said decision and it was held that the post of a durwan in the industrial concern where valuable property, both manufactured goods and assets, required to be guarded, was a post where trust and confidence of the company were to be maintained and if a durwan had failed to give assistance in apprehending a thief, the refusal by the durwan was certainly an act which had justified the employer in losing confidence in him. Mr. Dutta submits that the Tribunal in the instant case erred in proceeding on the footing that the loss suffered by the company for the dereliction of duty of the concerned employee was only to the tune of Rs. 100. He contends that the quantum of loss had no bearing. He submits that the Tribunal having upheld the findings of the domestic enquiry that the durwan had failed to discharge his duties and functions for which the company had lost two barrels the Tribunal should not have directed for reinstatement of the durwan, thereby compelling the company to take back a durwan who admittedly failed to perform his duties and functions and on whom the company had lost confidence. Mr. Dutta also in this connection refers to another decision of the

Supreme Court made in the case of [The Workmen of Firestone Tyre and Rubber Co. of India \(Pvt.\) Ltd. Vs. The Management and Others](#), . In para graph 50 of the said decision, it was observed by the Supreme Court that the Supreme Court was not laying down in the said decision any proposition that there would be no obligation whatsoever on the part of an employer to hold an enquiry before passing an order of discharge or dismissal. It was pointed out that the Supreme Court had consistently held that an employer was expected to hold a proper enquiry according to the Standing Orders and principle of natural justice and such enquiry should not also be an empty formality. The Supreme Court held in the said decision that if a proper enquiry was conducted and a correct finding was arrived at regarding the misconduct, the Tribunal, even though it had power to differ from the conclusions arrived at by the management under the provisions of Sections 11A of the Industrial Disputes Act, was required to give every cogent reason for not accepting the view of the employer. If the employer had held a proper enquiry the employer would also escape the charge of having acted arbitrarily or mala fide. Further, it would also enable the employer to persuade the Tribunal to accept the enquiry as proper and the finding also as correct. Referring tot he said decision. Mr. Dutta contends that having held proper domestic enquiry, the employer on the basis of the findings made in the domestic enquiry, found the concerned durwan guilty of dereliction of his duties resulting in the loss of property of the company. The company thereafter considered the magnitude of the offence committed by a personnel of watch and ward staff and passed the order of dismissal. Mr. Dutta contends that the Tribunal had also held that the domestic enquiry was held fairly and properly and there was no spirit of victimisation on the part of the employer. Mr. Dutta also contends that the loss of confidence in the durwan is implicit in the facts of the case and the order of punishment of dismissal. In the aforesaid circumstances, it was not proper on the part of the Tribunal to pass an order of reinstatement without considering the special feature of the case, namely, as to whether or not it would be proper to reinstate a durwan who was guilty of dereliction of duty resulting in loss of the property of the company. Mr. Dutta contends that by the said order of reinstatement the company was compelled to take back and reinstate the durwan although the company lost confidence in such a durwan in the proved facts and circumstances of the case.

3. Mr. Chakraborty, the learned Counsel appearing for the respondent No. 1, namely, the said dismissed, durwan however, contends that no case of loss of confidence on the said employee was made out by the company either in the evidence given before the Tribunal or in the written statement and the question of loss of confidence is a question of fact and such question should not be allowed to be canvassed before this Court for the first time. Mr. Chakraborty also contends that the Tribunal in the instant case save reasons as to why punishment of dismissal was not just and proper in the facts of the case. The Tribunal had taken into consideration the materials on record and the evidence adduced by the parties and

on such consideration came to the finding that the punishment imposed on the concerned employee was harsh and severe and it was fit and proper to inflict lesser punishment. Mr. Chakraborty also contends that even assuming that on the facts of the case, some other view could have been taken, but the Tribunal having acted within its jurisdiction there is no occasion to interfere by this Court in the constitutional writ jurisdiction. In this connection. Mr. Chakraborty refers to a decision of the Supreme Court made in the case of [The East India Hotels Vs. Their Workmen and Others](#), The Supreme Court has held in the said decision that within the scope and ambit of the powers conferred u/s 11A of the Industrial Disputes Act, the Tribunal has jurisdiction to consider the justification of the quantum of punishment. Mr. Chakraborty submits that in the instant case the Tribunal did not take any perverse view and as such interference by this Court against the impugned award is unwarranted. Mr. Chakraborty contends that if for dereliction of duty by a durwan, an employer loses confidence in him, the employer may be justified in dismissing such employee, but the factum of losing confidence and consequential order of dismissal are questions of fact and such facts must be pleaded. In this connection, Mr. Chakraborty refers to a decision of the Supreme Court made in the case of [Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another](#), . It has been held by the Supreme Court in the said decision that it is well settled that the allegation which is not pleaded even if there is evidence in support of it cannot be examined because other side has no notice of it and if entertained it will tantamount to granting an unfair advantage to the first mentioned party, He also refers to another decision of the Supreme Court made in the case of [L. Michael and Another Vs. Johnson Pumps Ltd.](#), . It has been held by the Supreme Court in " the said decision that the loss of confidence is often a subjective feeling or individual reaction to an objective set of facts and motivations. The Court is concerned with the latter and not with the former although circumstances may exist which justify a genuine exercise of the power of simple termination. In a reasonable case of a confidential or responsible post being misused or a sensitive or strategic position being abused, it may be high risk to keep the employee, once suspicion has started and a disciplinary enquiry cannot be forced on the matter. There, a termination simpliciter may be bona fide, not colourable, and loss of confidence may be evidentiary of good faith of the employer. Mr. Chakraborty also contends that if on a question of fact or law there is any scope of doubt the benefit of such doubt should go to the weaker section, namely, the labourer. For this contention, Mr. Chakraborty refers to a decision of the Supreme Court made in the case of [Canara Bank and Others Vs. Appellate Authority and Others](#),]

4. After considering the submissions of the learned Counsel appearing for the parties it appears to me that in the facts and circumstances of the case, the Tribunal has not considered properly as to why the order of dismissal passed by the company on the durwan was unjustified. It is true that the Tribunal held that the punishment inflicted on the durwan was oppressive and harsh, but the special

consideration involved in the dereliction of duty of a durwan was not the considered in its proper perspective particularly when the Tribunal held that the company had no vindictive attitude against the durwan and the domestic enquiry was fair and the findings were also not perverse. It should be noted that if the Tribunal mechanically exercises its discretion without weighing the circumstances such act amounts to no exercise of discretion. Although the company did not specifically plead about loss of confidence in the durwan in the instant case as pointed out by Mr. Chakraborty, it should be considered from the facts and circumstances of the case as to whether or not the loss of confidence is implicit in the punishment of dismissal as contended by Mr. Dutta. In my view, the Tribunal should specifically consider the justification of reinstatement of the durwan who had admittedly failed to perform his duties as durwan. Mr. Datta is justified in his contention that the quantum of loss suffered by the company caused by the dereliction of duty by a durwan should not be a guiding factor but the Tribunal should take into consideration as to whether or not even in spite of such dereliction of duty, it would be just and proper to reinstate the durwan in exercise of the discretionary power u/s 11A of the Industrial Disputes Act. It appears to me that the Tribunal has not made proper consideration in this regard. Accordingly, the award passed by the Tribunal is set aside and the Tribunal is directed to consider the case afresh on the question of quantum of punishment on the materials on record. As the matter is pending for a long time, the Tribunal is directed to decide the case as expeditiously as practicable preferably within three months from the date of the receipt of the order of this Court.

5. By way of abundant caution, it is made clear that after considering the facts and circumstances of the case the Tribunal will be quite free to decide as to whether or not the punishment inflicted on the durwan was reasonable or whether or not a lesser punishment is required to be given to the concerned durwan and it is also made clear that this Court has not expressed any opinion on the question of punishment of the concerned employee. The Rule is accordingly disposed of. There will be no order as to costs.