(2004) 08 CAL CK 0006

Calcutta High Court

Case No: Writ Petition No. 1331 of 2004

Mousumi Banerjee		APPELLANT
	Vs	
First Industrial Tribunal and Another		RESPONDENT

Date of Decision: Aug. 31, 2004

Acts Referred:

- Industrial Disputes Act, 1947 - Section 11A

Citation: (2005) 1 ESC 763

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Soumya Majumder and Sumit Kumar Basu, for the Appellant; Partha Bhanja Chowdhury and Sujit Sharma, for the Respondent

Judgement

Amitava Lala, J.
A very important point has been raised hereunder:

It appears to this Court that originally two issues are available under the order of reference: (a) whether the dismissal from service of Smt. Mousumi Banerjee w.e.f. 3.1.2000 is justified? (b) what relief, if any, is she entitled to?

2. During the course of hearing the management has taken a preliminary point whether the domestic enquiry is valid or not. Ultimately, by way of an interim order the learned Judge of the First Industrial Tribunal passed a final order by holding that the domestic enquiry, held by the Enquiry Officer, against the delinquent workman was valid, fair and proper. Although several judgments were cited by both the learned Counsel but I find the very important judgment in this arena is the judgment in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, . Here the Supreme Court decided a very pertinent question in respect of insertion of Section 11A of the Industrial Disputes Act. In doing so, the Supreme Court held what are the previous views in paragraph 27 of

the said judgment. One of such views is that, (1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified; (2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality; (3) When a proper enquiry has been held by an employer, and the finding of misconduct is plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide; (4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employees to adduce evidence contra; (5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry; (6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective; (7) It has never been recognised that the Tribunal should straightway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective; (8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to Justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity is asked for the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct; (9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation; (10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The The Management of Panitole Tea Estate Vs. The Workmen, , within the judicial decision

of a Labour Court or Tribunal.

3. Thereafter, Supreme Court held that question is whether Section 11A has been made and changes in the legal position mentioned above and if so, to what extent. Ultimately, the Supreme Court held that the Labour Court/Tribunal will first consider the cases where an employer has held a proper and valid domestic enquiry before passing an order of punishment. I have no hesitation in my mind in respect of applicability of ratio of such judgment but first consideration cannot be detachable issue from the main issues under order of reference. Therefore such issue has to be placed before deciding the issues on merit as a mixed question of fact and law to come to a conclusion about the question of natural justice and perversity. If such issue is taken separately as a preliminary issue and decided in the form of interim order finally, the order cannot be said to be an interim order to prevent the Writ Court from interfering it because it is a final order in the garb of an interim order. If this issue is said to be resolved by an interim order then except determination of quantum of punishment no other issue will be open to the workman.

4. Learned Counsel, appearing for the petitioner/workman, contended before this Court that factually the self-same person is the complainant, show-cause issuing authority, Presenting Officer and the witness. The charge-sheet issuing authority is also a witness. Charge-sheet was issued on the complaint of Managing Director. The disciplinary authority is subordinate to the complainant. Therefore, the domestic enquiry cannot be free from biasness.

5. According to the learned Counsel, appearing for the Management, no such point was ever taken by the workman before the Enquiry Officer at the time of enquiry proceeding. The point which has been agitated, the same is relating to the natural justice and perversity. The Tribunal although held on the question of natural justice but no explanation has been given as regards the points agitated before this Court. Therefore, there is no factual finding in respect of such natural justice. Moreso, at the time of determining the question as regards Section 11A and the principles laid down by the Supreme Court, it has followed the old principle that the Tribunal has no jurisdiction to substitute its own judgment for the Judgment of the Enquiry Officer though the Tribunal may itself has had different conclusion on the same material. The Tribunal is to accept the findings arrived at in the enquiry unless the same is perverse. The Tribunal is also not supposed to examine the evidence on record to come to a better finding regarding the guilt of the delinquent workman. Hence Court relied upon a Judgment of the Supreme Court reported in 60 (II) LLJ 39 in re: Bangalore Woollen Cotton and Silk Mills Company etc. It is to be remembered that after insertion of Section 11A and the decision of the Supreme Court in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, , the earlier position has been changed. Therefore, by not following the ratio of such judgment the Tribunal has committed a mistake in law and resolved the issue finally in the preliminary form. Therefore, if this order is allowed to be

sustained, it will not cause benefit to either of the parties. Hence such order stands set aside. However, the issue which has been taken by the Management will be considered to be a preliminary issue before hearing the main issues on the basis of the evidence to be led by the parties on that account.

6. Therefore, disposing of the writ petition by treating the same as ''For Orders'' in the day''s list, I express my view that the learned Judge of the First Industrial Tribunal may proceed with this matter as expeditiously as possible and decide all questions at the earliest, preferably within three months from the date of communication of this order.

7. No order is passed as to costs.

Let xeroxed Certified Copy of this judgment be supplied to the parties by the department within seven days from the date of putting in requisition for drawing up and completion of the order as well as the Certified Copy thereof.