(2004) 04 CAL CK 0013

Calcutta High Court

Case No: Writ Petition No. 3453 of 1994 and G.A. No. 797 of 1996

Tushar Kanti Ray		APPELLANT
	Vs	
Second Industrial Tribunal and Others		RESPONDENT

Date of Decision: April 1, 2004

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10, 33(2)

Citation: (2004) 1 ILR (Cal) 478 : (2004) 3 LLJ 1065

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Bikash Ranjan Bhattacharya, for the Appellant; P.K. Mullick and Amaresh Chakraborty, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Kalyan Jyoti Sengupta, J.
At the instance of the workman, Shri Tushar Kanti Ray, the present application has been filed, challenging two orders dated September 20, 1993 and June 9, 1994 passed in Case No. 18/85/33(2)(b) by the learned II Industrial Tribunal, West Bengal, being the respondent No. 1, in favour of the second respondent, the Calcutta Electric Supply Corporation Ltd., being the predecessor in interest of the CESC Ltd. By the first order dated September 20, 1993 the first respondent had approved the order of dismissal u/s 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act), made by the respondent company. The second] mentioned order was passed on an application for review of the first mentioned order, whereby and whereunder the application for review was rejected.

2. The short facts giving rise to the present" writ petition are stated hereunder:

The writ petitioner being a workman was served with a show cause notice dated June 3, 1985, alleging misconduct on his part; committed by demanding a sum of Rs. 100/- from a consumer of the said Company to settle up a matter with the authorities. It is alleged in the said show cause notice that on May 25, 1985 the petitioner called on one Shri Gopal; Chandra Nath at Kasthadanga Road, Burabazar, Sarsuna, L.P. No. 211/2 Cal. 61 on an inspection job issued to him by the Special Compliant Enquiry Cell. It is further alleged that on his inability to pay the aforesaid sum at; the spot he had asked him to visit him with the money on May 27, 1985 at his office. In the said show cause notice punishment inflicted upon him in connection with his past misconduct was also referred and was made as, one of the incidents of misconduct. The petitioner replied to the said show cause notice and he had set up a plea of alibi and explained what incident had happened while conducting Inspection. From the tenor of his reply it appears that the allegations of demand of Rs. 100/- or for that matter any other amount was denied by necessary implication. He stated amongst others that to his utter surprise he received the show cause notice having not a bit of involvement in the allegations levelled against him. He demanded a fair investigation to unearth the truth, which would prove his innocence.

3. Not being satisfied with the explanation the petitioner was served with a charge-sheet dated June 15, 1985 and the Company decided to hold enquiry. It is on record, no reply to the said charge-sheet was asked to be given nor the petitioner demanded to allow him to file formal reply to the said charge-sheet. Thereafter, as per provision of Certified Standing Order, the ''Enquiry committee was constituted consisting of 4 members, two of them were nominated from the side of the employer and the remaining two were nominated from the side of the workmen. Admittedly, the petitioner had participated in this Enquiry proceeding and witnesses were produced on behalf of the Company, the Enquiry proceedings were held on June 26, 1985 and July 4, 1985 respectively. On July 4, 1985 one of the nominees of the company was absent, however, the Enquiry was concluded with the remaining three members.

4. The, Chairman of the Committee held ;the petitioner "guilty" of the alleged charges, whereas the other members from the side of the workmen held "not guilty" and recommended for exoneration from the charges on the benefit of doubt. These three opinions and reports were placed before the punishing authority who after having analyzed the evidence and considering the opinion and findings accepted the report of the Chairman and imposed punishment of dismissal from services. The petitioner preferred an appeal against this order of punishment to the departmental appellate authority who in his turn upheld and affirmed the order of punishment.

5. It is noteworthy that the petitioner did not challenge the said order of punishment by making separate reference u/s 10 of the said Act, however, the

Company made an application u/s 33(2)(b) of the said Act to the first respondent.

6. The said application was duly challenged by the writ petitioner by filing a written objection and prayed for disapproval of the said order of punishment taking various pleas, namely non-compliance of natural justice, by not allowing to file reply to the charge-sheet, the report of the enquiry committee was wrongfully furnished by the inappropriate committee as one of the members was absent, reasonable opportunity of cross-examining the witness of the Company was not given; and further he was not given opportunity to adduce his own evidence.

7. The respondent No. 1 then presided over by one Sri T.P. Chatterjee after taking down evidence of both the parties by an order dated February 22, 1989 held that domestic enquiry conducted against the writ petitioner had not been held validly and properly. During pendency of this matter and before the aforesaid order was passed the Company had made an application dated August 28, 1987 with alternative prayer for allowing it to hold enquiry de novo before the respondent No. 1 and further to adduce evidence to prove its case or to pass such other order or orders. In view of this application the learned Tribunal perhaps, after holding as above, wanted to decide the matter finally on merit meaning thereby the petitioner was allowed to adduce evidence and for causing Enquiry de novo to be made by the Tribunal. It appears from the record, thereafter the learned Tribunal then presided over by Shri Chatterjee examined witnesses brought on behalf of the company to prove charges and also examined the writ petitioner herein. Thereafter, Shri A. K. Bhunia took charge the office of the respondent No. 1 and had passed the first impugned order and he upon analysing all evidence had held that the Company had been able to prove beyond all doubts that the employee (writ petitioner) had demanded illegal gratification from the said Gopal Chandra Nath one of the consumers, as such he accorded approval to the order of punishment. The writ petitioner thereafter made an application for review of the said first impugned order and this application was rejected by the learned Tribunal holding the same is not maintainable and this time this was passed by Shri A.K. Chatterjee the then Presiding Officer of the learned Tribunal.

8. Mr. Bikash Ranjan Bhattacharya learned Senior counsel appearing in support of the writ petitioner contends that the learned Tribunal had accorded approval wrongly to the order of punishment, which was passed without having any evidence whatsoever. The learned Tribunal ought not to have granted approval and this should have been reversed on the review application. He further contends that in this case it was not open for the learned Tribunal after holding that the petitioner was not given opportunity to cross-examine the witnesses and further report was furnished by the improperly constituted committee and by ,not considering the report of all the Enquiry Officers before deciding to hold de novo Enquiry. Even in the de novo enquiry there was no material to prove the alleged charges. He contends that the complainant namely Gopal Chandra Nath was not examined by

the learned Tribunal. He further submits that the past record of inflicting punishment cannot be a ground for misconduct after enquired into along with alleged present misconduct. The .past misconduct had culminated into minor punishment so this could not have been linked up with the present alleged misconduct. While according approval to the order of punishment the learned Tribunal had done wrong in law. This act on the part of the learned Tribunal is in excess of jurisdiction. In support of his contention he had relied on the following decisions: The Punjab National Bank Ltd. Vs. Its Workmen, ; Associated Cement Co. Ltd. v. Workmen 1963-II-LU-396 (SC); Karnataka State Road Transport Corpn. Vs. Smt. Lakshmidevamma and Another, .

9. Mr. P.K. Mullick learned senior counsel with Mr. Amaresh Chakraborty learned Advocate appearing for the respondent Company contends that the writ petition is not maintainable as the petitioner has alternative remedy. The scope and jurisdiction of Section 32(2)(b) of the said Act is merely a ministerial jurisdiction. He contends that while dealing with an application for seeking approval to the- order of punishment the learned Tribunal does not decide anything on merit. The Tribunal can take decision only on being satisfied with the prima facie materials. This order of approval can be challenged later, by the workman by raising industrial dispute u/s 10 of the said Act. Once it is done the Tribunal shall re-examine all the aspects, as the findings and observation of the learned Tribunal while exercising jurisdiction u/s 33 of the said Act does not reach finality nor the same operate as resjudicata. In view of this situation this Court will not entertain the writ petition, as being premature. He then urges that the Tribunal can make de novo enquiry when it finds the enquiry has not been conducted properly holding without any or legal evidence, and once the employer makes a written request. He contends further that admittedly a request in writing by filing a petition dated August 28, 1987 was made. So, even after holding the enquiry proceeding being invalid, the learned Tribunal justly and lawfully conducted Enquiry, examined witness of both the sides and came to the prima facie findings that the punishment on the facts and circumstances was justified. The writ petitioner was given full opportunity and indeed he availed himself thereof. After participating in the enquiry he cannot be allowed to say at the subsequent stage of the proceedings on merit is illegal and invalid.
10. In support of his contention he has relied on the following decisions:

Dharampal Vs. National Engg. Inds. Ltd. and Another, ; General Electric Company of India Ltd. v. Fifth Industrial Tribunal 1986-IMJLJ-27 (Cal) Fort William Company. Ltd. v. Ram Das Ram 1978 LIC 891 : 1978-I-LU-507; Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, and Management of Dehing Tea Estate v. Presiding Officer, Industrial Tribunal, Dibrugarh) 1971 Lab IC 1252 (Assam).

11. Mr. Mullick further submits that allegation of violation of principle of natural justice has to be tested on the touchstone of prejudice. The petitioner is not prejudiced, as he is not left with remediless. In support of this submission he has

referred to a decision of the Supreme Court reported in State Bank of Patiala and others Vs. S.K. Sharma, .

12. Having considered the respective rival contention of the learned counsel in this case the issue involved is whether the learned Tribunal was justified in giving approval to the order of punishment after having inquired into by itself discarding the findings of the Enquiry officers and the punishing authority. The scope of Section 33(l)(b) of the said Act in relation to jurisdiction of Tribunal was questioned by the litigant and was examined by the Courts on several occasions. A Full Bench judgment of this Court has held in case of General Electric Company v. Fifth Industrial Tribunal (supra), after considering large number of Supreme Court decisions as well as those of this Court has held amongst others as follows:

"There are certain pre-requisites to be satisfied before permission or approval is , accorded to the employer for discharging or dismissing a workman during the pendency of the proceeding before the concerned authority. In according or withholding approval to the dismissal or discharge of a workman on the application of the employer, the Tribunal has to consider, firstly, whether a proper domestic enquiry in accordance with the relevant rules, standing orders, and the principles of natural justice has been complied with. Secondly, whether there is legal evidence to sustain the misconduct warranting the dismissal of the workman, and thirdly, whether the dismissal of the workman amounts to unfair labour practice and is intended to victimise the workman. Upon such considerations, the Tribunal either accords or withholds the approval to the dismissal or discharge of the workman concerned.

The expression, prima facie means at the first sight or on the first appearance or on the face of it, or so far as it can be judged from the first disclosure. Prima facie case means that the evidence brought on record would reasonably allow the conclusion that the plaintiff seeks. The prima facie case would mean that a case which has proceeded upon sufficient proof to that stage where it would support the finding, if evidence to the contrary to be disregarded."

13. It is now well settled by a larger Bench of the Supreme Court in case of Karnataka State Road Transport Corporation v. Lakshmidevamma, (supra), by its majority'' decision that it would be open for the Tribunal, once a request by way of application is made by the employer to receive additional evidence in the event evidences are lacking to prove fair and proper enquiry proceedings has been held or not. It has been further held, that though ;here is no expressed empowerment by the statute to do so this procedure has actually been said down by the Supreme Court to avoid delay and multiplicity of the proceedings in the disposal of disputes between the management and the workmen. The aforesaid decision came :to be rendered on reference being made by mother Bench of the Supreme Court observing :hat there was conflict between the two'' decisions rendered in case of Shambhu Nath Goyal Vs. Bank of Baroda and Others, and of Rajendra Jha Vs.

Presiding Officer, Labour Court, Bokaro Steel City, District Dhanbad and Another, . Their Lordships in this case observed that there was no conflict between the two decisions.

14. In the context as above the argument of Mr. Mullick that the present petition is premature and it would be open for him to challenge the order approving the order of punishment by raising industrial dispute u/s 10 of the said Act is to be examined. From the decision I find, as rightly argued by Mr. Mullick that findings and decisions u/s 33(1)(b) of the said Act while according approval or withholding approval of the Tribunal do not operate as resjudicata as it does not decide the question finally rather it holds prima facie.

15. I think in my view this argument may not have universal application as it depends upon each and every individual fact and circumstances of the case. The scope of the aforesaid Section in my view obliges the Tribunal to apply its mind to find prima facie as to whether the disciplinary enquiry by the employer has been done in accordance with rules of natural justice or not and further punishment imposed based on lawful findings, meaning thereby the same reached with the support of legal evidence. If it is found that the ;learned Tribunal granting approval, ignored this infirmity then certainly the writ Court has power to examine the same and for this purpose the workmen need not wait for reference u/s 10 of the said Act. The larger Bench of the Supreme Court in the case KSRTC v. Lakshmidevamma (supra) has observed amongst others in paragraph 17 that at pp. 203 &204ofLLJ:

"17. Keeping in mind the object of providing an opportunity to the management to adduce evidence before the Tribunal/Labour Court, we are of the opinion that the directions issued by this Court in Shambhu Nath Goyal Vs. Bank of Baroda and Others, need not be varied being just and fair. There be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic enquiry. At the same time, it is also of advantage to the workmen in as much as they will be put to notice of the fact that the management is nicely to produce fresh evidence. Hence, they can keep their rebuttal or other evidence ready. This procedure also eliminates the likely delay in permitting the management to make belated application whereby the proceedings before the Labour Court/Tribunal could get prolonged. In our opinion, the procedure laid down in Shambhu Nath Goyal case is just and fair."

16. Therefore, if it is found at least prima facie, that the Tribunal itself has committed an error or failed to discharge its statutory obligation by not following the proper] procedure conforming to the principle of natural justice, the workman can very well :some with the writ petition though he can raise in industrial dispute u/s 10 of the ;aid Act. In my view this will be his option, he; may come at the first instance, or may reserve us right for taking action u/s 10 of he said Act. This can be done in rare case, when it is noticed that the learned Tribunal granted approval on

perverse findings reached; :by the employer, or on the strength of its own finding, having no basis of legal evidence or of any evidence. The power of the Writ Court is to: see that there shall not be miscarriage of justice at any stage of the proceedings.

17. Mr. Bhattacharya has rightly pointed out that in this case the order of punishment has been approved on the basis of its own findings by the Tribunal, which is perverse patently as being without any legal evidence.

18. The learned Tribunal at the stage of preliminary finding and decision by its order dated February 22, 1989 observed that the rules of natural justice required that charge-sheeted, workman must be given opportunity to :cross-examine the witness of the employer and also to produce his own witness in support of his case. It is found from the proceeding of the domestic enquiry of the present case that the, said enquiry against the opposite party had been conducted in an arbitrary manner. It is true legally the departmental enquiry not being judicial proceeding is not subjected to the rule of evidence, this does not mean that it can be conducted in an arbitrary manner. The records of the proceedings show that Sri. P. Gupta, sri. S. Das, Sri R.R. Basu, and the consumer Sri G.C. Nath who made complaint against the opposite party, were examined as witnesses of the Company in the domestic enquiry, but the opposite party was not afforded with any opportunity to cross-examine them. Not only that, before the entire evidence of the witnesses of the company became complete, the opposite party (the workman) was asked by Sri. Santanu Chatterjee, P.W. 1, as to whether he had anything to say and also to state before the enquiry committee what discussion had been held between him and the complainant, Sri G.C. Nath. The said complainant gave his statement before enquiry committee on July 9, 1985. It appears that on that date after his statement was over he had been requested to leave the committee and thereafter the opposite party was asked by Santanu Chatterjee P. W. 1 as to what he had to say in the matter. It is a basic right of a person against whom anything is deposed by any witness, to cross-examine that witness with reference to his credibility and veracity, if that right is denied grave prejudice would not only occur to him but this would also amount to grievous non-application of the rules of natural justice.

19. Therefore, the learned Tribunal prima facie found that enquiry committee did not properly record evidence adduced before it. He found further that there was also grave violation of principle of natural justice, therefore, the [findings of the enquiry committee, punishing authority, were set aside and the Tribunal decided to find it afresh by itself.

20. Naturally, it was incumbent upon the company, to prove charges based on a complaint made by the consumer G.C. Nath who was called as a witness to depose before the enquiry committee and rightly so, but the Tribunal found that the writ petitioner/delinquent was not afforded any opportunity to cross examine the above witnesses. The evidences of the other witnesses are wholly irrelevant in this case and this cannot be of any worth, in absence of the testimony of the complainant,

because charges are based on this allegation of demanding bribe of Rs. 100/- by the petitioner. these allegations can be proved by this person alone who was asked to bribe, not by any hearsay evidence. It is true, that the strict rule of evidence is not applicable in the domestic proceeding but then there must be some evidence of worth to prove by preponderance of probability.

21. It appears in the de novo enquiry held by the Tribunal at the request of the employer no1 attempt was made to call the said complainant as a witness. Therefore, it is difficult to accept the finding of the Tribunal that the charges have been proved to the hilt.

22. The learned Tribunal instead of calling for legal evidence and direct proof has gone by inference and implication. He has wrongly applied the principle of non-traversal of pleadings applicable mostly in a civil action in the domestic enquiry, as there was no specific denial in the reply of the allegation made in the show cause. He had not read the reply of the delinquent petitioner carefully. Had he done so he could have found that he had not admitted the charges of demanding illegal gratification. He has missed one very important thing that respondent company decided to enquire into the charges on receipt of his reply, so it was an obligation of the employer to prove it either before the enquiry officer or before the Tribunal, with cogent and legal evidence.

23. It seems to me the past incident of misconduct of the petitioner followed by punishment has prompted the learned Tribunal to hold the petitioner guilty of charges. I think the approach of the Tribunal in this context is not lawful, as the past incident of misconduct has already been dealt with and has culminated in a minor punishment. The factum of inflicting punishment in the past incident cannot be a piece of evidence to prove the subsequent misconduct. Each and every allegation of misconduct, if required to be enquired into must have legal proof of its own. The earlier factum of punishment may be a factor for inflicting of punishment in a subsequent action. It is settled position of rule of evidence that bad character or reputation of any person cannot be a relevant factor for the proof of subsequent incidents. It appears that the learned Tribunal has relied on evidence of only one witness of the Company who had no personal knowledge about the demand of illegal gratification of a sum of Rs. 100/- from the consumer. I fail to understand how Sri R.R. Basu P. W. 1 could be a competent witness for the allegations of demanding illegal gratification.

24. Accordingly, I hold that the findings of the learned Tribunal holding the petitioner guilty of alleged misconduct is perverse and having no evidentiary basis, not to speak of any legal evidence. In my opinion no reasonable person could come to any prima facie satisfaction on the given material that the allegations made in the charge-sheet have been proved. As settled by the judicial pronouncement the Tribunal has to reach prima facie satisfaction that the findings of the enquiry officer or for that matter of Tribunal are not perverse. The decision cited by Dharampal Vs.

National Engg. Inds. Ltd. and Another, has no application in this case factually, as I have held that there is no evidence to reach prima facie satisfaction.

25. Under the circumstances as aforesaid I set aside the order and findings of the learned Tribunal dated September 20, 1993. The learned Tribunal in the application made u/s 11 and read with Rule 27 of the West Bengal Industrial Disputes Rules could have considered the glaring infirmity and illegality and called for further evidence in this matter. He ought to have called the complainant Sri. G.C. Nath, consumer, as a witness as he was called as a witness in the departmental enquiry. So the order passed on review application is not sustainable and the same is hereby set aside. 10 26.1 think a chance should be given to the Company to prove the case with legal evidence. So I remit this matter back to the Tribunal who shall call the said consumer if available, as a witness to prove the same if not then this 15 proceeding shall be dropped. It is true that the matter is very old but this should not be left here. Because of the oldness this shall be concluded by the Tribunal within a period of 3 months from the date of receipt of the copy of this judgment and order and it shall reach to its findings in totality.

27. It is submitted by both the learned counsel appearing today that the petitioner would have retired on December 31, 1998 had he not been dismissed from the services by the impugned order of punishment. Since I have not upheld the order of the learned Tribunal nor the order of the respondent company, the petitioner shall be reinstated notionally as he has attained the age of retirement as on today and he shall be paid 50 per cent of his salary: from the date of dismissal up to the date of retirement i.e. December 31, 1998. His retirement benefit if due any and not quantified shall abide by the fresh decision as might be taken by the learned Tribunal. It would be open | for the company to proceed before the learned Tribunal who shall come to a fresh fact finding as per direction given by me. The de novo hearing before the Tribunal in this case is necessary as the disciplinary proceeding was initiated when the petitioner had been in employment, though by passage of time he had retired.

28. There will be no order as to costs.

29. Let xerox certified copy of this judgment and order be made available to the parties on urgent basis, if applied for.