(2004) 12 CAL CK 0017

Calcutta High Court

Case No: C.R. No. 9326 (W) of 1989

Jay Engineering Works Ltd. (Unit of Usha Sewing Machine Works)		APPELLANT
	Vs	
Second Industrial Tribunal and Others		RESPONDENT

Date of Decision: Dec. 2, 2004

Acts Referred:

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

Citation: (2005) 2 CHN 21

Hon'ble Judges: Jayanta Kumar Biswas, J

Bench: Single Bench

Advocate: Dipak Kumar Ghosh and Ranjay De, for the Appellant; Jayanta Dasgupta, for the third respondent, for the Respondent

Final Decision: Allowed

Judgement

Jayanta Kumar Biswas, J.
This is a writ petition against an order of the Second Industrial Tribunal, West Bengal, dated June 27th, 1989 refusing approval to the employer company under the Industrial Disputes Act, 1947 Section 33(2)(b).

2. The third respondent workman was proceeded against departmentally. In the chargesheet dated March 22nd, 1983 it was alleged that having been caught red handed in the act of theft by the security guard, he confessed his guilt and sought permission to resign.

3. The disciplinary authority agreed with the findings of guilt recorded by the enquiry officer, and after giving opportunity to show cause, passed the order dated September 23rd, 1983, the relevant portions of which read:

"Your explanation to the second show cause notice has been considered. We do not find any reason/justification to review our proposed decision which we conveyed to you in our notice, dated 5 July, 1983. You have been rightly found guilty of theft and what you did also amounted to dishonesty in connection with company''s business. In the circumstances, you cannot enjoy our faith and confidence any more.

The above act of commission is a grave misdemeanour warranting your dismissal from service, in terms of Clause 27(ii) of the model Standing Orders.

There are no extenuating circumstances to take lenient view of the matter.

In these circumstances, you are hereby dismissed from the service of the company with immediate effect."

4. The Tribunal refused approval on the ground that though the enquiry was valid, the punishment awarded without considering the workman''s previous record amounted to violation of the model standing orders [framed under the Industrial Employment (Standing Orders) Rules, 1946], para 28(6), which is :

"(6) In awarding punishment under this paragraph the Manager or the employer shall take into account the gravity of the misconduct, the previous record, if any, of the workmen and any other extenuating or aggravating circumstances that may exist. A copy of the under passed by the Manager or the employer shall be supplied to the workman concerned."

5. Counsel for the employer argues, and it seems to me quite rightly, that the decision of the Tribunal is based on a hypertechnical interpretation of Clause (6) of para 28 of the model standing orders. I am minded to agree with him that the dismissal order shows that the workman''s previous record was considered by the authority for ascertaining extenuating circumstances, if any. To my mind, counsel for the workman is not correct in saying, as was said also by the Tribunal, that Clause (6) required specific mention of consideration of the workman''s previous record in the order.

6. I am referred to Borosil Glass Works Limited Vs. M.G. Chitale and Richard M. D''souza, and B. Subbiah Vs. Andhra Handloom Weavers'' Co-op Society Ltd. and Others, by the workman''s counsel, who points out that the Tribunal relied on these authorities for holding that consideration of previous record is a mandatory requirement under Clause (6) of para 28 of the model standing orders.

7. I agree with him and I say that the interpretation of the nature of the requirement that it is mandatory is correct. But, for the reasons I am going to state, I find no scope to say that the two authorities are of any assistance in this case.

8. Clause (6) of para 28 tells the authority what he must consider at the time of taking the decision to award punishment. It clearly requires consideration of two things:-- (1) gravity of the misconduct; and (2) extenuating or aggravating

circumstances. Previous record of the workman, if any, is to be considered for the second purpose, for which consideration of information available from other sources is also permissible.

9. As a result, even when the proven misconduct is very grave the punishment of dismissal may not be awarded in view of extenuating circumstances, which may appear either from the workman''s previous record or from any other thing. Similarly, for a proven misconduct not so grave, the punishment of dismissal may be awarded because of aggravating circumstances appearing from the workman''s previous record or from any other thing.

10. I think, the question I am to decide is what evidence is sufficient for the employer to show that at the Clause (6) stage of para 28 of the model standing orders the workman''s previous record was considered by him.

11. To my mind, oral evidence adduced by the parties, as the one in this case referred to by counsel for the workman, is of little relevance and assistance for determining the question. The workman''s claim and evidence that his previous record was not considered is bound to be based on his speculation and reading of the order.

12. Again, by adducing oral evidence, even of the person who took the decision, and for which a belated opportunity was sought by the employer in this case, the contravention, if any, of the standing orders regarding the requirement of consideration of the workman''s previous record cannot be neutralized by the employer. The oral evidence of the person cannot be used for filing the lacuna in his order, if it failed to show the fact of such consideration.

13. So, to my mind, decision on such a question of fact is to be arrived at on the basis of documentary evidence adduced by the parties; the order of the employer being the best evidence for the purpose.

14. If the employer records in the order awarding punishment, as was done in this case, that there are no extenuating circumstances for taking a lenient view, I do not see any reason why an inference should be drawn that the workman''s previous record remained unconsidered. I am unable to detect exactly what purpose of justice will be served if the employer instead records that there are no extenuating circumstances appearing from the workman''s previous record or from any other thing.

15. I venture to say that such a ritualistic approach to the observance of the requirement of the standing orders in a Section 33(2)(b) proceeding is bound to result in grave injustice to the employer. Purpose of labour laws is not to do justice only to the workman; the employer is equally entitled to get it. In the zeal to do justice to the workman the Tribunals and Courts are not to dissect word by word the final decision taken by the employer in the departmental proceeding, when the

employer seeks approval under Section-33(2)(b).

16. I have therefore no hesitation in holding that if the employer records in the order that it did not get any extenuating circumstances to take a lenient view, it will definitely imply that the workman''s previous record, if any, received due consideration for the purpose.

17. It is altogether another thing to say, as is said by counsel for the workman, that the previous record of the workman being unblemished the punishment awarded is harsh. I say it is another thing, because the employer''s action in such a case cannot be stamped as one taken in violation of the standing orders; and the situation hence cannot be a ground to refuse an approval u/s 33(2)(b).

18. Counsel for the workman argues that consideration of the workman''s previous record must be a real one evidenced by the order, and that a casual vague reference to absence of any extenuating circumstances for not taking a lenient view is a gross violation of the mandatory requirement of para 28(6) of the model standing orders. 19. I feel sorry that I am unable to agree with him. To my mind, the nature of the consideration is totally irrelevant in a Section 33(2)(b) proceeding in which proportionality of the quantum of punishment cannot be examined by the Tribunal. The punishment awarded may be grossly disproportionate to the gravity of the misconduct, but that is not a ground to hold that the employer acted in violation of the standing orders. So, in my view, the Tribunal cannot refuse to approve the employer''s action on the ground that his decision failed to show effective consideration of the workman''s previous record.

20. Counsel for the workman then argues that since the provisions of para 28(6) of the model standing orders admit of more than one interpretation, I should accept the one that benefits his client, i.e. the weaker of the two parties. I appreciate his endeavour made on the strength of the decisions in The K.C.P. Employees'' Association, Madras Vs. The Management of K.C.P. Ltd., Madras and Others, , and State Bank of India and Ors. v. Amal Kr. Sen and Ors. 1988 Lab IC 1585 (Cal)(DB); but I regret that I do not read and understand the provisions to find any ambiguity in them, and hence I am not in a position to give the workman any benefits of either of the authorities, which command great respect.

21. For these reasons I am minded to allow the writ petition; and accordingly, I allow it. The order of the Tribunal dated June 27th, 1989 is hereby set aside. The Section 33(2)(b) application filed by the employer is hereby allowed.

22. There will be no order for costs in the writ petition.

23. Urgent certified xerox copy of this judgment and order shall be supplied to the parties, if applied for.