(1999) 10 CAL CK 0022

Calcutta High Court

Case No: C.O. No. 23216 (W) of 1995 with F.M.A. No. 204 of 1997

Nirmalendu Roy		APPELLANT
	Vs	
Steel Authority of India and Another		RESPONDENT

Date of Decision: Oct. 8, 1999

Acts Referred:

- Industrial Disputes Act, 1947 - Section 2A

Citation: (2002) 4 LLJ 253

Hon'ble Judges: Satyabrata Sinha, Acting C.J.; M.H.S. Ansari, J

Bench: Division Bench

Judgement

Satya Brata Sinha, A.C.J.

1. This appeal and writ application were directed to Be heard together, in view of the order passed by one of us (S.B. sINHA, J.) sitting singly dated November 12, 1998. The fact of the matter lies in a narrow compass.

The petitioner/appellant is an employee of the Steel Authority of India Limited. He was dismissed from his services in terms of the standing orders framed by the respondents under the provisions of the Industrial Employment (Standing Orders) Act, 1946. The said order of dismissal was the subject-matter of C.R. No. 3819(W) of 1982. By a judgment and order dated March 4, 1994, the learned single Judge had, inter alia, directed:

"Regard being had to the materials on record, the writ petition and the Rule are disposed of by quashing the impugned order of termination of the service of the petitioner. This judgment will not prevent the respondents from initiating any proceeding on the ground of alleged absence of the petitioner as contemplated by giving all opportunities of defence. Had he been given opportunity he would have been able to defend his case in accordance with law?

Such proceedings should be initiated within a period of six weeks from the date of communication of this order and the enquiry, if any, should be completed within a period of three months from the date of issuance of the notice to the petitioner and the petitioner will co-operate fully with the authority without asking any unnecessary adjournment. In default to maintain time schedule the petitioner will be entitled to join and receive financial benefits.

The petitioner will not, however, be entitled to join till the disposal of the enquiry. The interim order as made at the time of issuance of the Rule will, however, continue."

2. As against the said order, the petitioner preferred an appeal which was marked as F.M.A. No. 204 of 1997 and by an interim order dated August 4, 1994, a Division Bench of this Court directed as under:

"After hearing the learned advocates appearing for the parties we dispose of the stay application by directing that in view of the order passed by the learned Trial Judge setting aside the order of dismissal of the petitioner, the petitioner shall be allowed by the respondent to join service by August 10, 1994 but the proceeding will continue in accordance with law. The question of back wages will be decided in appeal. The joining of the petitioner will be without prejudice to the rights and contentions of the respondents in the appeal."

The fact of the matter in the aforementioned backdrop may be noticed.

3. The appellant/petitioner was appointed as a Junior Operator Grade-Ill and thereafter had been working as Shipper H.T. and B.B.F. Department of Alloy Steel Plant, Durgapur. He allegedly sought for ''Casual Leave'' for 11 days w.e.f. January 28, 1982 to February 7, 1982 and further sought for extension of such leave by his letter dated February 6, 1982 from February 8, 1982 to February 22, 1982. He further allegedly extended his leave by a letter dated February 20, 1982 w.e.f. February 23, 1982 to March 4, 1982, and also he again allegedly sought for extension of leave by a letter dated March 2, 1982 w.e.f. March 5, 1982 without pay for 90 days only. The appellant/petitioner was, however, directed to report for duty by February 22, 1982 failing which it was to be presumed that he had abandoned his service.

4. The appellant/petitioner had received another letter from respondent on February 25, 1982 whereby he was intimated that his services had been terminated. A writ application was moved questioning the said order of termination before this Hon''ble Court which was marked as C.R. No. 3812(W) of 1982.

5. Pursuant to the order of the Division Bench as noticed hereinbelow, a notice was issued directing the petitioner to show cause why suitable disciplinary action should not be initiated against him. The petitioner allegedly sought for inspection of certain documents.

6. The petitioner was allowed to join his duties on or about August 17, 1994. Petitioner made a representation before the Enquiry Officer in terms whereof the petitioner sought for an inspection of the documents, according to the petitioner such inspection was directed in a biased manner, which contention has been denied and disputed by the appellant.

7. The enquiry proceeding was completed within the time granted by this Court.

8. The petitioner, thereafter, served with an order of removal dated January 16, 1995. The said order of removal is the subject matter of the writ application marked as C.O. No. 23216(W) of 1995 wherein the petitioner had sought for the following reliefs:

"(a)A writ of and/or in the nature of Mandamus should now be issued directing the respondents from giving any effect and/or further effect to and/or taking any step and/or further steps on the basis of the purported order of removal dated January 16, 1995 served on your petitioner on January 17, 1995 at 2.30 p.m. issued by the Senior Manager (In-Charge), H.T.F. Department, Alloy Steel Plant, Durgapur, being Annexure "5" to this petition in any manner whatsoever;

(b) Why a writ of Mandamus should not be issued directing the respondents each one of them, their servants, agents and/or subordinates to withdraw, rescind and/or cancel the purported order of removal dated January 16, 1995 served on your petitioner on January 17, 1995 at 2.30 p.m., issued by the Senior Manager (In-Charge), H.T.F. Department, Alloy Steel Plant, Durgapur, being Annexure "D" to this petition;

(c) Why a writ of Certiorari should not be issued commanding the respondents to transmit the entire records of the case forming the basis of the issuance of the purported charge sheet being Annexure "E " and the purported ..... of enquiry including all the records forming the basis of the issuance of the purported order of removal dated January 16, 1995 served on your petitioner on January 17, 1995 at 2.20 p.m. issued by the Senior Manager (In-Charge), H.T.F. Department, Alloy Steel Plant, Durgapur, being Annexure "5" to this petition, to this Hon''ble Court and to certify them and on being so certified, quash the same and the respondents be directed to reinstate your petitioner with full back wages;

(d) Why a writ of and/or in the nature of prohibition should not be issued prohibiting the respondents from taking any step and/or further steps and/or giving any effect or further effect to the purported order of removal dated January 16, 1995 served on your petitioner on January 17, 1995 at 2.30 p.m. issued by the Senior Manager (In-Charge), H.T.F. Department, Alloy Steel Plant, Durgapur, being Annexure ''S'' to this petition."

9. The learned counsel appearing on behalf of the respondent, raised a preliminary question as regard maintainability of the writ petition on the ground of existence of

alternate remedy in view of the provision of the Industrial Disputes Act, 1947, such remedy according to the learned counsel for the respondent is an efficacious one.

10. Mr. Chakrabarty, the learned counsel appearing on behalf of the writ petitioner/appellant submitted that the petitioner''s service had been terminated as far back as on March 4, 1982 and he should not now be asked to avail the alternative remedy. The learned counsel also submitted that existence of an alternative remedy cannot be said to be an absolute bar for maintaining the writ application and in support of the aforementioned contention strong reliance had been placed on (1) Arindam Chatterjee v. Coal India Limited and Ors. 1996 Lab IC 416 (2) Sri Swapan Ray Vs. Indian Airlines Ltd. and Others, .

11. It has further been submitted that in view of the fact that the enquiry proceeding had not been conducted in accordance with law, the writ petition is maintainable. In support of the said contention reliance has been placed in 1982 (1) SCC 216. The learned counsel urged that this Court in a case of this nature, where there has been gross violation of principle of natural justice, should not ask the petitioner to avail the alternative remedy, particularly in view of the fact that the documents sought for by him from the management had not been supplied. Reliance in this connection had been placed on decision reported in Committee of Management, Kisan Degree College Vs. Shambhu Saran Pandey and Others, . The learned counsel also relied on the decision Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,

12. There cannot be any doubt that the order of dismissal dated February 25, 1982 received by the petitioner on March 4, 1982 was wholly illegal. It is now a well-settled principle of law, in view of the several decisions of the Apex Court that only because a person has availed unauthorised leave, his service cannot be terminated without complying with the principle of natural justice. Such a provision in the standing order which is statutory in nature has been declared ultra vires by the Apex Court in D.K. Yadav Vs. J.M.A. Industries Ltd., . This aspect of the matter has also been considered by the Supreme Court in Uptron India Limited Vs. Shammi Bhan and Another, . As the said order was illegal, in that view of the matter, interim order was rightly passed by this Court on March 4, 1994, directing that the writ petitioner was entitled to be reinstated in service with full back wages.

13. However, the main question which has arisen for consideration in this matter is as to whether the writ petition should be entertained by this Court. There cannot be any doubt whatsoever that existence of alternative remedy is not an absolute bar in entertaining the writ application. This Court, however, normally does not exercise its discretion by way of self-restraint and asks the petitioner to avail the other remedies available to him at the first instance if such remedy is speedy and efficacious one.

14. The respondent/Company is a ''State'' within the meaning of Article 12 of the Constitution of India. It is, thus, required to act fairly and not arbitrarily. The exercise of its discretion must be sound in law and based on materials. In the instant case,

the discretion has been exercised by the General Manager on wholly irrelevant and extraneous consideration. He had also failed to consider the relevant facts. He had failed to pose the right questions so as to enable him to acquaint himself with the relevant facts and having failed to do so, he misdirected himself in law. The petitioner also questioned the vires of the relevant provisions of the standing order in this regard.

15. The first writ application was, therefore, rightly entertained. In Arindam Chatterjee v. Coal India Limited 1996 Lab IC 416 one of us (S.B. sINHA, J.) has held :

"It is true that the petitioner is a workman under the Industrial Disputes Act but before an Industrial Tribunal, the petitioner could not have raised the question of vires of Clause (6) of the offer of appointment. It is true that normally this Court would not exercise its jurisdiction under Article 226 of the Constitution of India where there exists an alternative remedy. The order sheet dated June 27, 1995 would however, show that the matter was entertained by this Court as a question arose as to whether Clause (6) of the condition of appointment is ultra vires Article 14 of the Constitution of India or not. The matter was heard in part by me on the request of the learned counsel for the parties on that date itself. Having heard the learned counsel for the parties at such great length and having considered their respective submissions, I am of the view that it is not a fit case where the provisions of the Industrial Disputes Act should be directed to be availed. It is also not a case where the respondent could have adduced any evidence other than what has been stated in the affidavit-in-opposition. In fact as no enquiry was held, the question of adducing any independent evidence before the Industrial Tribunal does not arise. It is not the case of the respondents that the services of the petitioner were terminated on the ground that he committed any misconduct. In that view of the matter in the instant case, according to the respondents themselves, Section 11-A of the Industrial Disputes Act, 1947 will have no application."

16. It has, however, to be borne in mind that prior to coming into force of Industrial Disputes Act, 1947, the relationship between the employer and the employee used to be governed by the contract of service entered into by the parties.

17. The Industrial Disputes Act, 1947 conferred certain rights and benefits upon the workmen. In terms of the provisions of the said Act, services of industrial workmen could not have been dispensed with save and except in accordance with the provisions contained therein. Section 11-A of the said Act reads thus:

"Section 11-A: Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen:- Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it

may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require;

Provided that in any proceeding under this Section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely on the materials on record and shall not take any fresh evidence in relation to the matter."

18. In view of the several decisions of the Apex Court interpreting the aforementioned provisions it has been held that when no enquiry has been held or a defective enquiry had been held by the employer, he may file an application before the Labour Court or Industrial Tribunal, as the case may be, that the said issue be determined as a preliminary issue and in the event, the same is decided against the employer and in favour of the workmen, employer may be permitted to adduce evidence before the Tribunal and/or before the Court as the case may be to prove the charges levelled against the workmen. Such a right which has been given to the employer, cannot be availed of by him in a writ proceeding.

19. In Arindam Chatterjee v. Coal India Limited (supra), this Court was considering a case involving different fact situation and thus, the said decision cannot be said to have any application.

20. In Sri Swapan Ray Vs. Indian Airlines Ltd. and Others, the question as regard the exhaustion of the alternative remedy had not been taken as it was found that the Enquiry Officer was biased and the entire proceeding had been conducted in a manner which was mala fide. In fact, it was held that even there had been no semblance of compliance of the principle of natural justice. In that factual background, this Court did not ask the writ petitioner to avail the alternative remedy. However, the aforementioned question has been considered in Thakur Majhi and Another Vs. Chairman-cum-Managing Director, Eastern Coalfields Ltd. and Others, where it was held at p. 96:

"Moreover, the Industrial Disputes Act, 1947, is a self-contained Code. The rights of a workman arise under the said Act. The said Act also provides fora for adjudicating upon the disputes, inter alia, in relation to dismissal, discharge or removal from service. In view of several decisions of the Supreme Court of India, it is now well known that even if an order of dismissal passed by the employer is found to be illegal, invalid, having been passed in violation of the provisions of the Certified Standing Orders, or without complying with the principles of natural justice, or by an authority having no jurisdiction in such matters, a preliminary issue can be raised at the instance of the employer and a prayer can also be made by him to the effect that he may be permitted to adduce evidence in support of the charges levelled as against the workman. This Court in exercise of its jurisdiction under Article 226 of

the Constitution of India cannot give such an opportunity to the employer. Moreover, it is well known that this Court cannot convert itself into an Industrial Court.

In Tapas Mondal and Others Vs. Eastern Coalfields Ltd., it was held at pp. 1066 & 1067 of LLJ:

"The terms and conditions of service of the petitioners are governed by the Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946. It is now well known that a departmental enquiry by the employer has to be held in terms of the provisions of the Certified Standing Orders. However, if any order of punishment is imposed upon the petitioners without following the provisions of the Certified Standing Orders, the remedy of the petitioners would be to raise an industrial dispute. It is now well known in view of several decisions of the Supreme Court of India that Industrial Disputes Act, 1947, is a self-contained Code. By reason of the provisions of the said Act, not only rights have been conferred upon the workman, but fora have also been created for enforcement thereof. When there exists a more efficacious remedy, this Court . normally does not exercise its writ jurisdiction under Article 226 of the Constitution of India. It is now also well settled in view of several decisions of the Supreme Court of India that if and when a dispute is raised, the employer may file an appropriate application for adjudicating upon the legality and/or validly of the domestic enquiry as a preliminary issue and pray therein that in the event such a preliminary issue is decided against the employer, they may be permitted to adduce evidence independently before the Tribunal to prove the charges levelled as against the concerned workman. The aforementioned remedy is, therefore, available to the employer if a reference is made by the appropriate Government in exercise of its jurisdiction u/s 10 of the Industrial Disputes Act. Such a remedy is not available to the employer in a proceeding under Article 226 of the Constitution of India. Moreover, Section 11-A of the Industrial Disputes Act, conferred an extraordinary power upon the Tribunal in terms whereof Tribunal is not only empowered to set aside an order of dismissal, but also is entitled to consider as to whether the punishment imposed upon the workman is disproportionate to the charges levelled against the workman. This Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot exercise such power.

For the reasons aforementioned, in my opinion, although the petitioners may be entitled to the copies of the enquiry reports, non-supply thereof, ex facie, would not mean that this Court may exercise its jurisdiction under Article 226 of the Constitution of India. Moreover, it is well known that a Writ Court cannot be converted into an Industrial Court. Reference in this connection be made in the case of Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others, and in the case of Mohini v. G.M. Syndicate Bank, 1969 FLR 1061."

22. In Aditya Translink Pvt. Ltd. v. Kamal Singh Dugar and Anr. 1998 (2) CLJ 101 the Division Bench of this Court upon taking into consideration several decisions of the Apex Court as also the decision of the Full Bench of the Allahabad High Court in Chandrama Singh v. Managing Director, U.P. Co-operative Union and Ors. 1991 (63) FLR 478 (All-FB) held:

"Ordinarily, remedy of reference, envisaged under the Industrial Disputes Act, is an adequate and efficacious remedy available to a person aggrieved by an illegal retrenchment of course, the aggrieved person can always prove that, on the facts and circumstances of his case, the remedy is neither adequate nor efficacious. But, unless he discharges the onus of proving that the remedy of reference is either inadequate or inefficacious he should pursue the remedy of reference under the Industrial Disputes Act. At this juncture, it would be pertinent to emphasise that it would not be enough for the person pleading inadequacy or inefficacy of the relief of reference under the Industrial Disputes Act to make merely a bald statement that remedy of reference is either inadequate or inefficacious. It is imperative for him to clearly plead, demonstrate and prove as to how and in what manner the remedy or reference is inadequate or inefficacious, and in the absence of requisite pleading and material in support thereof it would not be permissible for him to raise the plea of inadequacy or inefficacy of the remedy of reference under the Industrial Disputes Act."

23. Keeping in view the aforesaid decisions, it must be held that where the petitioner is a workman within the meaning of the Industrial Disputes Act and the order impugned is one relating to dismissal or discharge the appropriate remedy is not by invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India but u/s 2-A of the Industrial Disputes Act.

24. In the instant case, we are, however, not inclined to relegate the petitioner to avail of the said efficacious remedy under the Industrial Disputes Act, 1947 and are of the considered view that the matter should be remitted back to the disciplinary authority for the reasons set out hereinafter.

25. In the instant case, the impugned order of dismissal has been preceded by an enquiry conducted by an Enquiry Officer. The petitioner was not supplied with a copy of the said Enquiry Officer''s report nor was afforded an opportunity to make his representation with regard thereto before the impugned order dated January 16, 1995 was passed whereby the petitioner was removed from service.

26. In Managing Director, E.C.I.L., Hyderabad v. B. Karunakaran (supra), the Supreme Court held that when the Enquiry Officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the Enquiry Officer''s report before the disciplinary authority arrives at a conclusion with regard to the guilt or innocence of the employee with reference to the charges levelled against him. That right is a part of the employee''s right to defend himself from being punished. A

denial of the Enquiry Officer''s report before the disciplinary authority takes its decision on the charges is denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice. Also, it was held by the Supreme Court that in such view the matter has to be remitted back to the disciplinary authority for affording the delinquent employee an opportunity of making his representation with respect to the Enquiry Officer''s report for which purpose a copy of the Enquiry Officer''s report is required to be furnished to such employee.

27. Keeping in view, the assertions made by the writ petitioner to the effect that he had not been supplied relevant documents, we are satisfied that the writ petitioner has been prejudiced by reason of non-supplying of any of the said reports.

28. In the light of the above, the instant writ application is disposed of with a direction to the respondent to furnish a copy of the Enquiry Officer''s report to the petitioner and afford him an opportunity of not less than two weeks from the date of receipt of such report to make his representation in writing and thereafter to dispose of the representation after affording an opportunity of hearing given to the petitioner. Till final orders are passed by the superior authority, petitioner shall be deemed to be under suspension which shall abide by the result of the order that may be passed by the disciplinary authority. It need only be clarified that if the petitioner is aggrieved by any order that may be passed by the disciplinary authority, it shall be open to him to avail of such remedies as are open to him in law before the authorities under the Industrial Disputes Act, 1947.

29. Although the parties have argued before us on merit but keeping in view our aforesaid findings, we have not made any observations as regards the merit of the matter.

30. However, in so far as the appeal preferred by the petitioner is concerned, there cannot be any doubt that the appellant shall be entitled to entire back wages from the date of first order of dismissal till August 10, 1994, i.e., till he joined the services pursuant to the order of the Appeal Court.

31. The appeal and the writ application, are accordingly disposed of with the aforementioned directions. However, in the j facts and circumstances of the case, there will be no order as to costs.

M.H.S. Ansari, J.

32. I agree.

33. Xerox certified copy of the judgment delivered today, if applied for, be supplied on priority basis.

April 24, 2000

34. Office is directed to carry out correction in terms of the Court''s order dated March 8, 2000.

35. Let urgenty certified copy of the Judgment dated October 8, 1999 be supplied on priority basis.