

(2004) 09 CAL CK 0052
Calcutta High Court
Case No: Writ Petition No. 2138 of 2002

Sri Sarjug @ Sarjoo
Paswan

APPELLANT

Vs

Coal India Ltd. and
Others

RESPONDENT

Date of Decision: Sept. 3, 2004

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 21, 226
- Industrial Disputes Act, 1947 - Section 10, 11A

Citation: (2005) 3 CHN 213 : (2005) 2 ESC 1190

Hon'ble Judges: Arun Kumar Mitra, J

Bench: Single Bench

Advocate: Subrata Ganguly, for the Appellant; Bijoy Kumar, for the Respondent

Judgement

Arun Kumar Mitra, J.

Challenge in this writ has been made by the petitioner to the charge-sheet dated 14.3.1997 (Annexure-A) issued against the petitioner, the proceedings thereof and the order of dismissal issued against the petitioner dated 17.6.1997 (Annexure-C to the writ petition). The ground of challenge of the writ petition is that no charge-sheet was served on him, the alleged inquiry was conducted ex parte without giving him any opportunity of hearing and the order of dismissal was also passed ex parte without giving the petitioner any opportunity of hearing. Again the charge-sheet is biased, the entire proceeding is malafide, order of dismissal is illegal and everything has been done behind the petitioner with a view to victimise him. The petitioner was ill and was absent from his service for only 37 days and on this charge capital punishment has been imposed on the petitioner. The petitioner, however, subsequently, procured the copies of charge-sheet, inquiry report and the order of dismissal.

2. The petitioner on 14.8.1997 made an appeal before the appellate authority claiming justice against such illegal order of dismissal and for withdrawal of the order of dismissal and also praying for reinstatement in his service.
3. On behalf of the respondent, an affidavit-in-opposition was filed which was affirmed on 23rd April, 2003 by one Bakul Das, the Personal Manager of Eastern Coalfields Ltd. In the opposition in Paragraph 4 at the outset, on behalf of the respondents a point was taken regarding maintainability of the writ petition. In Paragraph 4 of the opposition it has been stated that the petitioner is a workman and is governed by Industrial Disputes Act and the writ petition is not maintainable since the alternative forum or remedy lies in the industrial proceeding. In this affidavit-in-opposition in paragraph 10 it has been stated that the petitioner has submitted an application on 23.4.1997 which was addressed to the Personnel Officer/Medical Officer of Parascole Colliery and he was under treatment at Adjoy II Colliery Dispensary w.e.f. 6.2.1997 to 9.3.1997 and the petitioner was issued fitness certificate by the doctor on 20.2.1997. The respondents in this paragraph denied the allegations made by the petitioner and stated that as per office record it is incorrect that the petitioner even fallen sick and his treatment was continued from 24.2.1997 till 10.3.1997. The respondents stated that it is also incorrect that the petitioner was given permission to join duty w.e.f. 10.3.1997.
4. The respondents denied the allegations made by the petitioner.
5. On behalf of the respondents subsequently a supplementary affidavit-in-opposition was filed. In the supplementary affidavit-in-opposition the respondents annexed certain documents. In the initial affidavit-in-opposition the respondents did not annexed any document but in the supplementary affidavit-in-opposition affirmed by same Bakul Das on 6th June, 2003 some documents were annexed. In the supplementary affidavit-in-opposition a copy of the charge-sheet has been annexed and has been marked as Annexure R-1. A warning letter issued by the Manager of Parascole Colliery on 7.6.1991 has also been annexed. Another charge-sheet dated 14.3.1997 has been annexed and copies of notice of inquiry has been annexed, copies of inquiry proceeding has been annexed and lastly dismissal order dated 19.6.1997 has been annexed.
6. The petitioner submitted affidavit-in-reply to the affidavit-in-opposition filed on behalf of the respondents. Heard the learned Counsel for the petitioner as well as the learned Counsel for the respondents.
7. The learned Counsel for the petitioner summarises his submission in the manner as follows :
 - (i) The petitioner was not served with any charge-sheet. The charge-sheet annexed to the supplementary affidavit-in-opposition on the face of it shows that no list of documents was annexed to the charge-sheet and no list of witness was also annexed to the said charge-sheet.

(ii) The alleged inquiry was conducted ex parte and the petitioner was not allowed reasonable opportunity to defend his case neither he was allowed to cross-examine the witnesses adduced on behalf of the authority (if at all any evidence has been adduced).

(iii) The inquiry authority completed the inquiry ex parte and in violation of principles of natural justice.

(iv) The Presenting Officer was not an independent person.

(v) The medical certificate and the leave application filed by the petitioner was not at all considered.

(vi) He was dismissed from service illegally and mainly relying on past records of the petitioner.

(vii) The appellate authority also did not consider his appeal against the order of dismissal and acted in violation of the principles of natural justice.

Lastly the learned Counsel for the petitioner submitted that alternative remedy is not a bar in moving the writ petition.

The learned Counsel for the respondent submitted that the petitioner is habitual absentee. In the year 1995 he was present for 130 days, in 1996 137 days and in 1997 15 days.

8. The learned Counsel for the respondent submitted that he was issued a warning letter for his absenteeism, on 21/23.8.1996. The Chief Mining Engineer issued charge-sheet for his absenteeism on 14.3.1997 finding him absent from 5.2.1997. On 12.3.1997 the petitioner requested the authority concerned for allowing duty to the petitioner as he was sick from 6.2.1997 to 8.3.1997. Again the petitioner made the same prayer on 15.3.1997. The petitioner again requested the authority on 23.4.1997 for allowing him to perform duty as the petitioner was unable to join duty on 10.3.1997 and stated that he met an accident and informed the management about his accident.

9. The learned Counsel for" the respondent relying on their affidavit submitted that the competent authority due to unsatisfactory communication appointed the inquiry officer and the presenting officer. The inquiry officer sent three notices to the permanent address mentioned in service record Under Certificate of Posting on 3.4.1997, 10.5.1997 and 21.5.1997. All the three notices were also pasted on the Notice Board of the Parascole Colliery. The petitioner did not appear in the departmental proceeding.

10. In the supplementary affidavit-in-opposition the Xerox copies of notice and the Xerox copies of Under Certificate of Posting documents have been made Annexure R-4 to the said supplementary affidavit filed on behalf of the opposition.

11. In the reply the petitioner reiterated his statements made out in the writ petition.

12. On behalf of the respondents, the learned Counsel relied on an unreported judgment delivered by the Hon"ble Division Bench of this High Court being Appeal No. 410 of 1996 (Eastern Coalfields Ltd. v. Bagia Nayak and Ors.).

13. The learned Counsel for the respondents relying on this judgment said that the Hon"ble Division Bench in this judgment observed that in terms of the provisions of Section 11-A of the Industrial Disputes Act, 1947 even if disciplinary proceedings become vitiated by reason of non-observance of the principles of natural justice or for any other reason, the employee can always file an application at the threshold to decide such an issue as a preliminary issue.

14. The learned Counsel submitted that in view of this judgment an employee having remedy or recourse before the Industrial Tribunal should approach the tribunal first.

15. The learned Counsel for the petitioner relied on a judgment passed in M.A.T. No. 46 of 2000 (General Manager, Eastern Coalfields Ltd. and Anr. v. Rajendra Singh and Ors.), by Hon"ble Division Bench of this High Court and submitted that in this judgment the Division Bench observed that alternative statutory forum is not a bar in moving a person for approaching the writ Court for judicial review, if fundamental right is violated. In this regard the learned Counsel for the petitioner relied on Paragraphs 14, 15 and 16 which are quoted hereinbelow :

"14. We are first taking up the contention regarding alternative remedy. The position of law, as it stands, is that availability of alternative remedy for a cause of action is not an absolute bar to the writ Court's entertaining a petition based thereon. Generally, the writ Court declines to exercise its extraordinary discretionary power when an equally efficacious alternative remedy is provided by a statute. There can be no dispute that remedy provided to an aggrieved workman by the Industrial Disputes Act, 1947, is an efficacious remedy provided by a special statute. In the absence of compelling and extraordinary circumstances, the writ Court should not allow a workman who has suffered a punishment in a disciplinary proceeding to bypass the fora established under the said statute, because an adjudicatory system functioning under a legislation is never pushed to the back seat by it. There is no axiomatic proposition that by alleging violation of Articles 14 and 21 a workman within the meaning of the said statute becomes entitled to challenge straightway in the writ Court the steps and decisions taken in the disciplinary proceedings, and bypass the regular forum. For the same purpose a workman whose employer is a "State" within the meaning of Article 12 does not stand on a different footing, although for the purpose indicated by the apex Court in the case of [Bombay Telephone Canteen Employees" Association, Prabhadevi Telephone Exchange Vs. Union of India and another](#), seeking judicial review of his employer's

decision he can move the writ Court without first, approaching the forum set up under the said statute. The writ Court's power under Article 226 is not system destructive or supererogatory. A power of secondary judicial review is exercised by the writ Court in cases of above mentioned nature, while the power of primary judicial review is vested in the fora established under the Industrial Disputes Act, 1947".

"15. Our considered opinion on the question being as above we are unable to agree with the learned Judge that by merely alleging infringement of fundamental rights a workman (whose employer is a "State" within the meaning of Article 12), instead of approaching the forum set up under the Industrial Disputes Act, 1947 where he is supposed to go in ordinary course, is entitled to approach the writ Court straightway for challenging a punishment, inflicted on him by his employer by holding an inquiry in a disciplinary proceeding. We do not say that the writ Court does not have the power to entertain a petition for the same, but what we say is, it is not a right of the workman so long he does not exhaust the statutory forum ; his right to seek judicial review by the writ Court accrues only thereafter. Hence, the writ petition of the respondent No. 1 should not have been entertained at all, as there was no pleading regarding the compelling and extraordinary circumstances justifying his invoking the writ Court's extraordinary jurisdiction, and pay passing the regular forum."

"16. But, in the instant case, we are not inclined to hold in favour of the appellants on the question of availability of alternative remedy. The writ petition was entertained in the year 1995, and at this distance of time throwing out the writ petition on the ground of availability of alternative remedy to the respondent No. 1 will amount to sheer injustice. Since the existence of statutory alternative remedy does not altogether oust the writ Court's jurisdiction to entertain a petition, it is always for the respondent in such petition to agitate, at the earliest opportunity, the question of availability of statutory alternative remedy. If the respondent chooses not to agitate the question with the due diligence, and allows the writ petition to remain pending for years, in such case the respondent in the writ petition should not be allowed to take the plea at the stage of final hearing of the case. On this question, the decision in Syndicate Bank's case (supra) cited by the learned advocate for the appellant's does not appear to us to be of any relevance. In that case the award of the Tribunal was challenged by the bank in the writ Court. Nothing touching the question of alternative remedy vis-a-vis maintainability of the writ petition had arisen in that case. Accordingly, we hold that, on the facts, the writ petition is not to be dismissed on the ground of availability of alternative remedy."

16. The learned Counsel for the petitioner in this regard also relied on a judgment of this Court passed in W.P. No. 699 of 2002(Sri Ram Brich Muchi v. Coal India Ltd. and Ors.).

17. The learned Counsel for the petitioner relied on the observations made by this Court regarding existence of alternative remedy which is quoted hereinbelow :

"At the outset the learned Counsel for the respondent Coal India Ltd. raised a point of maintainability of the writ petition before the writ Court. According to the learned Counsel the issue involved is an industrial dispute and the alternative forum is already there and when a statutory forum is there, the writ petition is not maintainable. Before coming to the merit of the case let me now decide the said question regarding the maintainability of the writ petition. The learned Counsel for the petitioner has submitted that the writ petition is very much maintainable and in support of his contention he has cited so many decisions."

18. Let me now consider as to whether the writ petition is maintainable assumingly and/or admittedly industrial forum is the statutory alternative forum and that stands as a bar in moving a writ petition. Before dealing with this proposition it is to be noted that the term "statutory bar" and the term "without jurisdiction" are two different connotations. As such, Industrial Disputes Act nowhere says that no writ petition will be maintainable in such a circumstance, therefore, let me see whether the entertainment of the writ petition is within the jurisdiction of this Court or not. Let me start with a decision *State Ex Rel Hamilton v. Guninothe*, 156 MO 513 : 57 SW 281, observes "to be a bar, other remedy must be adequate. Adequate remedy is one which is equally beneficial speedy and sufficient: not merely one which at sometimes in the future will bring about relief."

19. Reference may be made to the decision of the Hon'ble Apex Court in [Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar](#), The observations of the Hon'ble apex Court made in paragraph 3 of this judgment is important and relevant which is quoted hereinbelow :

"3. It is a well-established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But as observed by this Court in [Rashid Ahmed Vs. The Municipal Board, Kairana](#), "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ thereof. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may, therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In *State of Uttar Pradesh v. Mohammad Nooh* AIR 1958 SC 86, S.R. Das, C.J., speaking for the Court observed :

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3rd Ed. Vol. II, p. 130 and the case cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where writ of certiorari has been issued in spite of the fact that the aggrieved party had other legal remedies. In the *King v. Postmaster-General Ex. parte Carmichael* 1928 (1) KB 291, a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of *Rex v. Wandsworth Justices Ex parte Read*, 1942(1) KB 281, is an authority in point. In that case a man had been convicted in a Court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction."

There is at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. [See the decision of this Court in [Carl Still G.M.B.H. and Another Vs. The State of Bihar and Others](#), and [The Bengal Immunity Company Limited Vs. The State of Bihar and Others](#), . In the second place, the doctrine has no application in case where the impugned order has been made in violation of the principles of natural justice." [See 1958 SCR 595 : AIR 1958 SC 86, 93].

20. Then again another decision of the Hon"ble apex Court in [Dr \(Smt.\) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur \(U.P.\) and Others](#), In this judgment the Hon"ble Apex Court in paragraph 12 has observed in the manner as follows :

"12. The next question that falls for our consideration is whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability

of an alternative remedy, it is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor u/s 68 of the U.P. State Universities Act. It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case, the Vice-Chancellor had no power to review and the exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity; such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant u/s 68 of the U.P. State Universities Act."

21. Then again reliance may be placed on the decision in [Assistant Collector of Central Excise Vs. Jainson Hosiery Industries](#), . In this judgment the Hon"ble Apex Court has observed that unless High Court is satisfied that the normal statutory remedy is likely too dilatory or difficult to give reasonably quick relief which should be loach to act under Article 226.

22. In another decision in Bhunwar v. R.T.C.. 1985 (50) FLR 327. The Hon"ble Apex Court observed that it is well settled that as per Section 10 of the Industrial Disputes Act, 1947 through a reference the employee never gets really adequate and efficacious remedy, in other words if reference is made u/s 10 of the Industrial Disputes Act, the employee/workman will not really get adequate and efficacious remedy. The same decision in [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others](#), The Hon"ble Apex Court has observed in the manner as follows :

"20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the Tribunal".

23. In this judgment relying on Regional Manager, SBI Hyderabad v. S. Mohammad Gaffar MR 2001 SC 3036, this Court, observed that nothing more is there which can be termed as shockingly disproportionate when an employee is dismissed from

service on the ground of unauthorised absence (here for a period of 37 days).

24. The learned Counsel on the question of maintainability relied on another decision of this Court passed in three writ petition heard analogously being W.P. No. 8842(W) of 2008, Bishnu Lohar v. Eastern Coalfields Ltd., W.P. No. 8843 (W) of 2003, Ram Sankar Upadhyay v. Coal India Ltd. and W.P. No. 8444 (W) of 2003, Sri Arun Kumar v. Eastern Coalfields Ltd.

25. The learned Counsel further submitted that the order of dismissal must be speaking order and in this regard he relied on a judgment [Nand Kishore Prasad Vs. State of Bihar and Others](#),

26. The learned Counsel also relied on a decision of this High Court where it has been observed departmental inquiry, if it is defective, the order is invalid. In this judgment it has also been observed that an alternative remedy is not an absolute bar to the making of order under Article 226 of the Constitution. [K.R.S. Chowdhury v. Union of India and Ors. AIR 1958 Cal 622].

27. The learned Counsel further submitted that in a similar circumstance Hon"ble Division Bench in an unreported judgment passed in A.P.O. No. 66 of 2000 observed that "from the inquiry report we found that the inquiry was held on 4.5.1999 in which the statement of one management's representative was recorded." The statement of the management's representative merely reiterated the recitals in the charge-sheet. Then the statement of the writ petitioner was recorded. Nothing else was recorded in the inquiry proceeding. From the inquiry report we find that finding which was arrived by the Inquiry Officer, the truth of the explanation given by the petitioner was not disbelieved. The finding of the Inquiry Officer was not that the petitioner was not suffering from such disease or that his explanation was false. As such the Court does not understand how could in spite of the aforesaid factual position the Inquiry Officer held that absence is without sufficient cause."

28. The learned Counsel for the petitioner placed further reliance on a judgment in Pradip Kr. Hazra v. Managing Director, Durgapur State Transport, Corporation 1998 (2) CLT 359 (HC).

29. In this judgment one of the Hon"ble Judge of this High Court in similar circumstances found the inquiry bad and vitiated.

30. The learned Counsel on other point relied on a judgment of this High Court (unreported) in Matter No. 899 of 1995, Surendra Pratap Narayan Singha v. Coal India Ltd. and Ors..

31. In this judgment one of the learned Judges of this High Court observed that it is now a settled principle of law that like Inquiry Officer, the Presenting Officer should also be an independent person. But in the instant case the Presenting Officer was not an independent person.

32. The learned Counsel lastly relied on a judgment in [Union of India \(UOI\) Vs. Madhusudan Prasad,](#)

33. The Hon'ble Apex Court, in this judgment observed that where the dismissal order was passed in contravention of principles of natural justice, the employee is entitled to back wages from the date of dismissal from service.

34. Neither the question was raised regarding one guideline on control of absenteeism which was produced by the learned Counsel for the respondents and submitted that if an employee is absent for more than three months, disciplinary action should be immediately taken against him.

35. The guideline is no doubt a reality but it is also a fact that no guideline can prescribe an inquiry or any disciplinary proceeding in violation of the principles of natural justice and this guideline also does not say so.

36. In view of the discussions made above and in view of the facts considered above, in the light of the judgments of different Courts, it appears that the inquiry, which was made ex parte was biased and the punishment was imposed on the employee on the basis of old record and he was not given any opportunity of hearing and ultimately principles of natural justice was grossly violated and in such a case alternative forum does not stand as a bar.

37. The dismissal order being Annexure-C to the writ petition consequent upon the charge-sheet and the ex parte inquiry is set aside.

38. The inquiry is vitiated for violation of the principles of natural justice.

29. The respondents are therefore, fddirected to reinstate the petitioner in his service within a period of fortnight from the date of communication of this order.

40. The respondents will pay the petitioner his entire back wages and will go on paying his salaries month by month.

In the circumstances there will be no order as to costs.