(1978) 04 BOM CK 0020

Bombay High Court (Nagpur Bench)

Case No: Spl. C. A. No. 670 of 1972

Maharashtra State Road Transport Corporation		APPELLANT
	Vs	
Prabhakar Kashinath Parate and another		RESPONDENT

Date of Decision: April 10, 1978

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10, 31(1), 33, 33(1)(a), 33(1)(b)

Citation: (1978) MhLj 656

Hon'ble Judges: R.D. Tulpule, J; C.S. Dharmadhikari, J

Bench: Division Bench

Advocate: S.V. Golwalkar, for the Appellant;

Final Decision: Allowed

Judgement

R.D. Tulpule, J.
This petition raises a question as to the true scope of an enquiry u/s 33 (2) (b) of the Industrial Disputes Act and the functions of the authorities required to deal with such applications.

2. On 19th July 1971, respondent No. 1 was working as a Conductor on a Bus belonging to the petitioner on its Scheduled trip from Chimur to Wani. The Bus was checked at about 16.10 hours by the checking staff of the petitioner at Khadsingi and it was discovered that five passengers were travelling without tickets in the Bus. Of them, four passengers had paid their fare to respondent No. 1 while the other had not paid any fare.

3. In due course, an enquiry was held against the respondent after serving a charge-sheet upon him and the Enquiry Officer came to the conclusion that the respondent was guilty of misconduct. Inasmuch as conciliation proceedings were pending at that time before the Conciliation Officer in regard to some other dispute

not connected either with the workman or the question in the enquiry, an application was made by the petitioner before the Labour Officer-cum-Conciliation Officer for grant of approval as provided u/s 33 (2) (b) of the Act of the action which it had taken against the respondent, namely, of dismissal from service.

4. By an order passed on the 21st January 1972, the Conciliation Officer rejected the application for approval of the petitioner holding that there was a breach in following the principles of natural justice and the procedure in the Departmental Enquiry which amounted, in his opinion, to a serious infirmity denying to the workman the very principle of natural justice in that one of the witnesses who was examined for the petitioner before the Enquiry Officer, namely, Shri Shukla, was present when the other member of the checking staff Shri Garge was being examined. It is against this order of the Conciliation Officer rejecting the application that the present petition is filed.

5. There is no appearance on behalf of respondent No. 1. There is no return also filed on behalf of the respondent. The facts, therefore, in the petition and to which we have made reference above can be safely taken to be admitted and no more in dispute.

6. We shall first refer to the provisions of section 33 and then the provisions of section 33 (2) (b), the scope and nature of which falls for determination in the present petition. Section 33 (2) (b) is a part of section 33, and in our opinion, has been designed with a special object and purpose. It will be seen upon a reading of section 33 that section 33 operates only where firstly there is a proceeding pending before an Industrial Tribunal or authority in regard to the disputes or where some dispute is pending before the Conciliation Officer or a Board. Section 33 (1) (a) places an embargo upon the right of at employer during the pendency of a dispute to alter to the prejudice of the workman concerned the conditions of service. Sub-section (b) of sub section (1) of section 33 then further places a restriction upon the right of the employer to remove or dismiss a workman "in regard to misconduct connected with the dispute" except with the "express permission in writing of the authority before which the proceeding is pending". We may have occasion to refer to the provisions of section 33 (1) (b) and it would be interesting to compare and contrast the provisions of section 33 (1) (b) to the provisions of section 33(2)(b) with which we shall presently be dealing.

7. Then we have section 33 (2). Sub-section (b) with which we are at present concerned, is in these terms :

"(a) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or, where there are no such standing orders in accordance with the terms of the contract, whether express or implied, between him and the workman.

(b) For any misconduct Dot connected with the dispute, discharge or punish, whether by dismissal or otherwise, the workman:

Provided that no such workman shall be discharged, or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

It would, therefore, be seen that in cases where the misconduct of the workman alleged is unconnected with the dispute before the authority, then such a workman can be removed by the employer, but this power which is continued in the employer has been subjected to some conditions. Those conditions are that the workman shall be paid wages for one month and further that an application will be made by the employer to the authority for approval of the action taken by the employer.

8. We might begin with quoting the observations of the Supreme Court in regard to what is the purpose and object of section 33 of the Act, in M/s Punjab Beverages Pvt. Ltd. v. Shri Suresh Chand and another Civil Appeals Nos. 1375 and 1384 of 1977, decided on 21-2-1978. Therein the Supreme Court observed:

"The object of the Legislature in enacting this section clearly appears to be to protect the workman concerned in the dispute which formed the subject-matter of pending conciliation or adjudication proceedings against victimisation by the employer on account of his having raised the industrial dispute or his continuing the pending proceedings and to ensure that the pending proceedings are brought to an expeditious termination in a peaceful atmosphere, undisturbed by any subsequent cause tending to further exacerbate the already strained relations between the employer and the workman. But at the same time it recognises that occasions may arise when the employer may be justified in discharging or punishing by dismissal his employee and so it allows the employer to take such action subject to the condition that in the one case before doing so, he must obtain the express permission in writing of the Tribunal before which the proceeding is pending and in the other, he must immediately apply to the Tribunal for approval of the action taken by him." In the same decision it is further observed by the Supreme Court:

"It will be seen that the only scope of the inquiry before the Tribunal exercising jurisdiction u/s 33 is to decide whether the ban imposed on the employer by this section should be lifted or maintained by granting or refusing the permission or approval asked for by the employer. If the permission or approval is refused by the Tribunal, the employer would be precluded from discharging or punishing the workman by way of dismissal and the action of discharge or dismissal already taken would be void. But the reverse is not true for even if the permission or approval is granted that would not validate the action of discharge or punishment by way of dismissal taken by the employer. The permission or approval would merely remove the ban so as to enable the employer to make an order of discharge or dismissal

and thus avoid incurring the penalty u/s 31 (1), but the validity of the order of discharge or dismissal would still be liable to be tested in a reference at the instance of the workmen u/s 10. Vide Altherton West & Co.''s case and !he Punjab National Bank''s case. The workman would be entitled to raise an industrial dispute in regard to the order of discharge or dismissal and have it referred for adjudication u/s 10 and the Tribunal in such reference would be entitled to interfere with the order of discharge or dismissal within the limits laid down by this Court in several decisions commencing from Indian Iron and Steel Co. Ltd. v. Their Workmen 1958 S C R 667."

In these two appeals before the Supreme Court, the question was in regard to the nature of a proceeding u/s 33 (2) (b), and more particularly in regard to the proceedings u/s 33-C (2) with which we are not in this petition concerned. It will be seen from the above that section 33 has a definite object and i.e. to place some fetters upon the power and authority of the employer to dismiss or remove his employee during the pendency of a dispute either under conciliation or before a Wage Board or a Tribunal. Where the removal of a workman or his dismissal is connected with the dispute then very stringent provisions are made and more stricter fetters are placed upon the right of the employer, while in the case of removal or dismissal unconnected with the dispute only a condition which has been placed upon the employer is that he must give pay of one month to the employee and make an application to the authority. The difference between the two sub-sections, namely, sections 33 (1) (b) and 33 (2) (b) is that while in the first case he has to obtain prior permission from the Tribunal before any action, like dismissal or removal may be taken, in the second case he can take action of removal or dismissal in the first instance and then apply to the Conciliation Officer or the Tribunal, as the case may be, for approval of the action already taken. We are of the opinion that the employment of different phraseology in the two sub-sections also denotes the difference in the functions of the authority when these two different types of applications are received, as also the nature and scope of the enquiry which would be contemplated or undertaken upon these two applications.

9. As to what is necessary to be considered in an application u/s 33 (2) (b) has been laid down by the Supreme Court in a series of decisions commencing from Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others, , Lakshmi Devi and Punjab National Bank''s case 1960 (l) S C R 806, Lakshmi Devi Sugar Mills Ltd. Vs. Pt. Ram Sarup, . We may only refer to the observations of the Supreme Court in Punjab National Bank v. Its Workmen 1960 (l) SCR 806 at 826 as to the scope and purpose of an application for approval and as to what the authorities have to see. The Court observed in the Punjab National Bank''s case as under:

"……If the employer has held a proper enquiry into the alleged misconduct of the employee, and if it does not appear that the proposed dismissal of the employee amounts to victimisation or an unfair labour practice, the Tribunal has to limit its enquiry only to the question as to whether a prima facie case has been made out or

not."

It emphasised this again by observing :

"It has merely to consider the prima facie aspect of the matter and either grant the permission or refuse it according as it holds that a prima facie case is or is not made out by the employer."

In the decision to which we have already made a reference, namely, Punjab Beverages Ltd. (cit. supra) the Supreme Court pointed out that an action taken by an employer of dismissing or removing of an employee in a case which falls u/s 33 (2) (b) is not void or illegal ab initio where the employer does not make an application as contemplated u/s 33 (2) (b)-proviso. It pointed out "The permission or approval would merely remove the ban so as to enable the employer to make an order of discharge or dismissal and thus avoid incurring the penalty u/s 31 (1)". In the present case, we are not concerned with that aspect of the matter.

10. It will thus be seen that when an application is received by an authority for approval u/s 33 (2) (b) of the action taken by an employer either of dismissal or removal of an employee for a misconduct unconnected with the dispute, the question before it is only whether the employer has fulfilled the conditions, whether the application is made as early as possible, whether the conditions have been followed, namely, payment of wages for one month, and secondly whether the employer''s action of removal is legal and after holding an inquiry. It has to consider before granting approval that the above conditions have been satisfied, and also in regard to the enquiry that the enquiry has been held properly, that there has been no unfair labour practice or victimisation. Where the question is whether a proper enquiry has been held or otherwise, it has necessarily to consider whether the principles of natural justice have been violated. It has not to exercise appellate jurisdiction for deciding for itself either, whether the evidence was sufficient to come to the conclusion which the Enquiry Officer did, nor also as to whether the punishment awarded was either sufficient or excessive considering the misconduct, but only to consider whether upon a prima facie appraisal of the matter, whether there was misconduct committed and whether the action amounted to victimisation or unfair labour practice and whether the enquiry was held and conclusion reached after following a proper procedure or the finding recorded is perverse.

11. As to what are the principles of natural justice and as to the nature of enquiry which would satisfy the requirements of a proper enquiry which a competent authority in dealing with an application u/s 33 (2) (b) has to consider, we may usefully refer to the two Supreme Court decisions reported in K. L. Shinde v. State of Mysore AIR l976 SC 1080 and R.C. Sharma Vs. Union of India (UOI) and Others, . In K. L. Shinde''s case (supra), a departmental enquiry held against the petitioner Police Constable was challenged. It was contended amongst other things that the evidence which was adduced against the appellant before the domestic Tribunal was not

sufficient to justify the punishment of dismissal. The Court held in an appeal from a decree dismissing the suit of the Constable by the High Court, that the Supreme Court would not embark upon the question as to whether there was sufficient evidence or not. It observed:

"It is well settled that whether a delinquent has a reasonable opportunity of effectively defending himself is a question of fact depending upon the circumstances of each case and no hard and fast rule can be laid in that behalf."

The Court pointed out that departmental proceedings do not stand on the same footing as criminal prosecutions in which a high degree of proof is required. Similarly they are also not governed by the strict rules of evidence obtained in a proceeding before a Court. All that is necessary is that the person against whom an enquiry is being held should know what is the evidence which is being given against him, so that he might be in a position to give his explanation. In that case the challenge was to receipt by the enquiry officer the statement of a witness given previously which was tendered and a copy thereof given during the enquiry. The objection was that this was a previous statement and could not be accepted and that it should have been put to the witness again. The Court observed in regard to this contention that that would be "insisting on bare technicalities and rules of natural justice are matters not of form but of substance."

12. To the same effect are the observations in R. C. Sharma v. Union of India. There again the Court emphasised that whether a sufficient opportunity was given to a delinquent in a departmental enquiry to lead his evidence and to be heard is largely a question of fact. The Court went further and pointed out that "it is only when opportunity denied is of such a nature that the denial contravenes a mandatory provision of law or a rule of natural justice that it could vitiate the whole departmental trial. Prejudice to the Government servant resulting from an alleged violation of a rule must be proved." This proceeding also arose out of a suit filed by the employee which came to be dismissed by the High Court of Allahabad.

13. It will be seen from the above that even in the matter of suits wherein the challenge is to the order of dismissal or punishment, as the case may be and where the question as to whether a reasonable opportunity was denied could be demonstrated as also improper reception of evidence, it was held by the Supreme Court that the Court has merely to see whether a reasonable opportunity of effectively defending is given to the delinquent. Where in a case the delinquent complains of such a denial, the denial has to be of such a mandatory provision of law or rule that thereby natural justice must be deemed to have been denied to the delinquent. Further that by reason of such an act of the Enquiry Officer it must be shown that prejudice has been caused to the delinquent. It seems to us that if that is the scope laid down by the Supreme Court in a case of a suit at the instance of a delinquent complaining of a denial of principles of natural justice and want of reasonable opportunity to defend himself, then much less would be the scope in the

case of an application for approval of an action taken by an employer.

14. We may also in this connection refer usefully to the observations of the Supreme Court in regard to what is the function of a Domestic Tribunal holding an enquiry and what is its scope. In State of Mysore Vs. S.S. Makapur, the Supreme Court pointed out that:

""Domestic Tribunals exercising quasi-judicial functions are not courts and therefore, they are not bound to follow the procedure prescribed for trial of actions in courts nor are they bound by strict rules of evidence. They can, unlike courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case....."

(Italics supplied.)

15. These observations have be borne in mind by an authority while deciding an application u/s 33 (2) (b). Four principles of natural justice are recognised universally. They are (1) communication of the material allegations against the person (2) adequate opportunity of defence and explanation, (3) reception of all evidence in the presence of the party and (4) the existence of an impartial Tribunal. An infringement complained of by the delinquent must result in such a prejudice to the delinquent as to amount to a denial of one or the other fundamental principles of natural justice. Whether there is prejudice and whether the principles of natural justice in a given case have been infringed or not, is, as has been pointed out, always a question of fact. The answer to that would depend upon a consideration as to the exact infringement and the manner of that violation and the resultant prejudice caused to the delinquent. Where the infraction or violation is not of such a nature as to amount to a denial of justice, and where the infraction does not cause any prejudice to the delinquent, it would not amount to the denial of the principles of natural justice. "Principles of natural justice" cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. ''Has the person been unfairly dealt with by the authority; has the person affected been hit below the belt? Are all questions of facts''. (See Shrikrishnadas Tikara Vs. State Government of Madhya Pradesh and Others,).

16. To much the same effect are the observations of the Supreme Court in State of Haryana v. Ratan Singh A I R 1977 S C l5l2 = 1977 L & 1 845. This case has a similarity with the facts which are present in this petition, in that it also related to a Conductor who, it was alleged, had allowed certain passengers to travel without tickets and was discovered by the checking staff of the Haryana Roadways. It was held that the

sophisticated rules of evidence under the Evidence Act may not apply to domestic enquiries and such a Tribunal even, will be entitled to receive hearsay evidence.

17. The question then is what has the authority to decide where an application is presented for approval u/s 33 (2) (b). We have already stated what the Supreme Court has laid down as the principles governing such an enquiry. It is no doubt true that an authority while considering those principles has also to find out whether the order passed is otherwise legal, in the sense it is passed in accordance with law applicable to the workman, such as the Standing Orders etc. The real difficulty, however, arises not in the matter of determining what the principles are but their application to the question before it to the given set of facts. It is very often that it is then that the problems arise and the application of the principles runs into the difficulties. An authority while deciding whether a proper enquiry was held and whether the principles of natural justice were violated and were denied, the difficulty which often arises for an authority is to the extent of the scrutiny to which the matter must be subjected. Has the authority, as pointed out by the Supreme Court "merely to consider the prima facie aspect of the matter" or would it be entitled to scrutinise the enquiry and subject it, if not to microscopic examination to X-ray as it were the enquiry in order to find out whether there is or there is no proper enquiry and whether the principles of natural justice have been followed or otherwise. It seems to us that it would not be appropriate in such a case to subject the departmental enquiry to a close scrutiny and then to act as an appellate Court and the authority has to confine itself to the prima facie aspect of the matter. The words in the section do not contemplate enquiry. We have already pointed out that at this stage it is not merely enough to say or show that a particular evidence was received or a particular observance was not made, or that there was any infringement of some other rule of evidence. All such infringements must be of such a character and produce such prejudice to the workman in the matter of an effective opportunity to defend himself so as to amount to a denial of justice to him.

18. It is in this context that the words employed in section 33 (1) (b) and those in section 33 (2) (b) have to be contrasted. In the first case, it has to be a written permission, and in the second it has to be an approval. They cannot be deemed to stand on the same footing and undoubtedly, therefore, the same kind of enquiry is clearly not contemplated At the same time, an approval has not to be a mere formality. The object of granting of an approval and the effect thereof is merely to permit what was otherwise allowed but for the fact that some conciliation or other proceeding was pending before the Tribunal or Authority relating to some dispute between the workman and the employer. The object again of such a requirement in cases where the dismissal is for a misconduct connected with the dispute, is as we pointed out, stringent than the one in case where it is unconnected with the dispute. The prerogative of an employer to discharge or remove his employee is thus obstructed only in these two cases. Where an authority, therefore, is entrusted with the task of granting an approval to the action of the employer, the authority cannot

legitimately constitute itself into an appellate authority, or even for that matter as the custodian of a supervisory jurisdiction. It has only to see whether there has been a victimisation or unfair labour practice and whether the conclusion of the Domestic Tribunal has been reached after allowing a reasonable opportunity to the workman to defend himself. The word "reasonable" cannot be cast in a rigid mould and any limitation or definition as to what is ''reasonable'' and what is not ''reasonable'' if laid down will run into difficulties. That must depend upon the facts of each case. Where the opportunity, on the face of it, appears to be reasonable, merely because a step has been taken or evidence received which would not be properly received in a Court of law, or would not be received in the manner in a Court of law would not vitiate the proceedings and would not result in the breach of principles of natural justice or the denial of justice unless prejudice is shown. The Domestic Tribunal, as has been pointed out by the Supreme Court is unfettered both by technical and strict rules of procedure as well as evidence which govern a Court. Where the order, therefore, passed by the employer is in accordance with law, the authority has only to confine itself to the prima facie aspect of the matter and not subject the enquiry to a close scrutiny in order to find out what defects have crept into the enquiry which, if the enquiry were to be conducted in a Court of law, would not be allowed or would not be permitted.

19. This seems to us so because the workman is not left without any remedy where an approval is given to the action of an employer of dismissal. The remedy of reference and raising an industrial dispute is always open to a workman, and in the matter of industrial dispute the question can be legitimately gone into and the nature of the enquiry examined and it can be found as a matter of fact as to whether there has been victimisation or unfair labour practice effected by the employer, and whether the particular act complained of or the particular infraction of the rule of natural justice complained of, had such a consequence upon the workman so as to deny to him justice by the breach thereof. Where therefore, in a proceeding which can be properly raised, and where such proceedings are available to an aggrieved party in a properly constituted proceeding which is capable of being raised at the instance of the workman, it would be reasonable to think, it seems to us, that an enquiry which is meant merely for the purposes of lifting the ban upon the employer''s right in his capacity as an employer should not be concerned with these detailed aspects of the matter, but only to their prima facie examination. If we apply these considerations to the case before us, it will appear that the complaint apparently was made that the Enquiry Officer allowed one of the witnesses to remain present when the enquiry was going on and while the other witness was being cross-examined. In this connection, it would be seen that what was stated on behalf of the employee during the enquiry when Mr. Garge was being examined was that ''he does not want to ask anything further to Shri Garge'' and that "something has to be asked to Shri Shukla and after that I will say whether I want to ask any question Garge or not."

20 We are informed that on behalf of the petitioner Shukla was not to be examined and that Shukla apparently was there to assist the department in the conduct of the enquiry. It is not in dispute that both Shukla and Garge formed the checking staff who checked the Bus of the respondent No. 1. Merely because, therefore, Shukla was present when Garge was examined and cross-examined, it would not automatically follow that a reasonable opportunity was denied to the respondent No. 1 in defending himself. No prejudice has been shown, or even alleged to have been caused by Shukla being allowed to remain where the enquiry was going on when Garge was being examined and cross-examined. The rule which the Conciliation Officer seems to have applied is the rule which is normally followed as matter of practice in a Civil Court in a witness action. However, in that case also the evidence of witness is not wholly excluded from consideration. Weight to be attached to the evidence is different from its admissibility. But even there, a party would be entitled to remain present during a trial even though that party has to take the witness-box at a later stage. In this case no objection was taken by the employee to the presence of Shukla. Therefore we do not think that the Conciliation Officer was Tight in refusing to grant approval on that count alone. It seems to us that the Conciliation Officer improperly refused to exercise jurisdiction which was vested in him and exercised, by refusing the application, jurisdiction improperly which was vested in him. As a necessary consequence of this, an approval is granted to the action taken by the petitioner as provided u/s 33(2)(b) of the Industrial Disputes Act, 1947.

21. Consequently the order passed by the conciliation officer is set aside. The petition succeeds and is allowed. There will be no order as to costs.