

(2000) 02 BOM CK 0013
In the Bombay High Court
Case No : Writ Petition No. 2547 of 1998

Air India Limited

APPELLANT

Vs

P.K. Upadhyay and Another

RESPONDENT

Date of Decision : 24-02-2000

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(2)

Citation : (2000) 3 ALLMR 72 : (2000) 85 FLR 827 : (2000) 2 LLJ 267 : (2000) 2 MhLj 771

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : E.P. Bharucha and Z.B. Kamdin, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; A.D. Shetty, for the Respondent

Judgement

F.I. Rebello, J.—The petitioner-Air India Limited, has filed the present petition to impugn the order dated November 20, 1998 passed by the National Industrial Tribunal, Mumbai. By the said order the Tribunal, refused permission to the petitioners for the action of dismissal imposed on the respondent pursuant to the domestic inquiry. The Tribunal whilst refusing to grant approval held that the inquiries were conducted in violation of the principles of natural justice and fair play and secondly that the respondent No. 1 was not paid subsistence wages in accordance with the practice prevailing in the petitioner's management as set out in letter dated October 22, 1991 from the Industrial Section to Assistant Accounts Officer.

2. Before I proceed to dispose of the petition and consider the contentions as advanced on behalf of the petitioners, it would be gainful to refer to some relevant facts to the extent that they are necessary for the purpose of disposal of the present Petition. Two enquiries were initiated in so far as the respondent No. 1 is concerned.

3. In so far as the 1st inquiry is concerned a charge sheet was issued to the respondent No. 1 on May 15, 1990 on the ground that he had sold staff

concessional air tickets as full fare tickets. The respondent No. 1 replied to the same on June 6, 1990. An Inquiry Committee was constituted on May 17, 1991 and reconstituted on June 26, 1992. The Inquiry Committee held various sittings. Evidence was recorded on December 1, 1993. The respondent No. 1 was called upon to lead defence evidence if he so desired. The respondent No. 1 informed the inquiry committee that he had no defence witnesses, but he would like to examine himself. This request was rejected by the inquiry committee as absurd, as can be seen from the proceedings sheet. This also finds reflection in the report submitted by the Inquiry Committee in para 3 where it is recorded as under :-

4. Hence even after concluding the enquiry he was given one more chance to produce his witnesses but he could not produce any. So he himself wanted to present as witness which Enquiry Committee considered absurd and advised him to state whatever he wanted to say in his final mission.

5. The workman submitted his final statement on December 9, 1993.

6. The second charge sheet against the respondent No. 1 was issued on December 17, 1992. By the second Charge Sheet the Respondent No. 1 was charge sheeted for assisting a passenger Mr. Billoo Joginder Singh in arranging for boarding card on presentation of forged travel documents. The respondent No. 1 gave his explanation on January 18, 1993. On February 2, 1993 the Enquiry Committee was constituted. Thereafter there were various sittings of the Committee. I do not wish to refer to those, except of February 7, 1994 which was the 8th sitting where the respondent No. 1 was shown as not present and the inquiry was adjourned to February 8, 1994 and on February 8, 1994 where also it is set out that the respondent No. 1 did not attend, the statement of Mr. Kamath was recorded on 8th. One of the salient features of the said inquiry is that the Enquiry Committee at its sitting held on April 6, 1993 before any evidence was led on behalf of the petitioners called on respondent No. 1 whether he would like to give any statement pertaining to the particular incident and his statement was recorded on that day. Based on this evidence amongst others the enquiry committee found the respondent No. 1 guilty of all the charges levelled against him.

7. Based on findings of both the enquiries, by order dated March 30, 1995 petitioner imposed punishment of dismissal from service from the date of communication of the order:

The said order was forwarded to the petitioner along with wages for a period of one month. The petitioners also applied to the Industrial Tribunal for permission u/s 33(2)(b) as there were pending Industrial References. That is how the matter came to be (sic) considered by the Industrial Tribunal.

8. At the hearing of the petition on behalf of the petitioners their learned Counsel contended that the order of Industrial Tribunal refusing permission is liable to be set aside. It is contended that the Tribunal exceeded jurisdiction in not granting permission. It is pointed out that the respondent No. 1 was given full opportunity

in respect of both the charges. It is further contended that insofar as the first charge sheet is concerned, the record shows that the request of the respondent No. 1 for adducing his personal evidence was rejected. Nevertheless he was given an opportunity of filing his statement. This, it is contended, would be sufficient compliance with the requirements of the principles of natural justice and fair play, in as much as the respondent No. 1 had an opportunity of putting up his case. Once such an opportunity was given, the mere fact that the respondent No. 1 was not allowed to examine himself cannot vitiate the inquiry. It is secondly contended that insofar as the second charge sheet is concerned, merely because the respondent No. 1 was asked whether he wishes to make statement, it could not be said that there was any violation of principles of natural justice and fair play. It is contended that in a domestic inquiry the formal procedural requirements or the provisions of the Evidence Act would not apply. For that purpose reliance is placed on the judgment of the Apex Court in the case of Union of India (UOI) Vs. T.R. Varma, . It is also contended that from the finding of the Tribunal it is apparent that the inquiry was adjourned on various dates as the Enquiry Committee found that the evidence could not be recorded due to the absence of the workman. The record even otherwise indicates that the respondent No. 1 was given full opportunity of leading his evidence. Insofar as the evidence of Shri Kamath, which was recorded on February 8, 1994, it is contended that it cannot be said that the evidence was recorded without giving or intimating to the respondent No. 1 the date of hearing. It is further contended that the petitioners have fully complied with the principles of natural justice and fair play and as such the Tribunal erred and/or exceeded its jurisdiction in holding that there was violation of the principles of natural justice and fair play.

9. Insofar as the contention about subsistence wages, it is contended that merely because there were some deductions it cannot be said that the same would vitiate the inquiry. It is contended that nowhere did the respondent No. 1 complain that on account of failure to pay the subsistence wages he was prevented from participating in the inquiry proceedings. In these circumstances it is contended that the mere fact that there were deductions made in the subsistence allowance, by itself, cannot vitiate the inquiry. Apart from that it is contended that there is a reference pending before the Industrial Tribunal regarding the dismissal of the workman and once a reference is made the issue of fairness of the enquiry and punishment imposed are open to be considered in the reference.

10. On the other hand on behalf of the respondent No. 1 their learned Counsel contends that this Court should not interfere with the finding of fact recorded by the Tribunal on the decision in holding that there had been violation of the principles of natural justice and fair play and/or that inquiries stood vitiated on failure to pay subsistence allowance. It is pointed out that this Court exercising its extraordinary jurisdiction would not interfere unless the findings recorded are perverse and/or are based on no record at all. In the instant case it is pointed out that the material on record would show that the inquiry was not conducted in

a fair manner and consequently the order must be upheld. It is contended that in so far as the application of Section 33(2)(b) for granting approval, it is a well settled proposition that the Tribunal must consider whether the inquiry was fair and proper in as much as whether it was held in conformity with the Standing Orders and/or in compliance with the principles of natural justice and fair play. When the Tribunal comes to the conclusion that the inquiry was not fair and proper for not following the principles of natural justice and fair play or the Standing Orders, inquiry is liable to be set aside. If such an inquiry is set aside the employer has no opportunity of leading evidence before the Tribunal. In the present case the employee did not choose to lead the evidence. It is, therefore, contended that on settled principles once the inquiry was set aside, the consequences would be (hat the order of dismissal is non est and consequently the dismissal of the respondent No. 1 being non est and/or the workman is liable to be reinstated with full back wages and continuity of service.

11. In so far as subsistence allowance is concerned, it is contended that in terms of the Model Standing Orders applicable to the petitioners the petitioners were bound to pay subsistence allowance. It is further contended that the petitioners themselves have held out in so far as subsistence allowance is concerned, that no deductions would be made. Reliance is placed on the Circular issued by the Petitioners. It is pointed out that insofar as the findings given by the Tribunal are concerned it is apparent that on occasions, the respondent No. 1 was not paid any subsistence allowance on account of deductions and at times meagre amounts. It is contended that once the petitioners have violated the Model Standing Orders and/or on their instructions it must be held that the inquiry is vitiated. Reliance is placed on various judgments, which would be referred to in the course of discussion. For the aforesaid reasons it is contended that this Court should not interfere with the findings recorded by the Tribunal and its ultimate conclusions and consequently the order must be upheld.

12. At the outset let me consider what is the law pertaining to granting of approval by an Industrial Tribunal before whom an application is made for permission, u/s 33(2)(b) of the Industrial Disputes Act. The issue is no longer res Integra as the same has been concluded by various Judgments of the Apex Court pronounced from time to time. In the case of The Punjab National Bank Ltd. Vs. Its Workmen, while considering the case for permission u/s 33 of the said judgment the Apex Court has set out that the Tribunal considering an application for permission must consider, whether the management has been guilty of a basic error or violation of the principle of natural justice in holding the enquiry. In the case of Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, , the Apex Court while considering the power of the Tribunal in granting approval observed as under :-

"The position that emerges from the above quoted decisions of this Court may be stated thus: In proceedings u/s 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic

enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held: (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decision of this Court in *Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others*, : *Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar* 1961 I LLJ 511: *Hind Construction and Engineering Co. Ltd. Vs. Their Workmen*, : *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, and *Management of Eastern Electric and Trading Co. Vs. Baldev Lal*, that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an interference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

13. In the case of *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, the Apex Court held that where the Tribunal entertains an application for approval u/s 33(2)(b) on merits, it applies its mind and considers whether the dismissal of the workman amounts to victimization or unfair labour practice and whether a prima facie case has been made out by the employer for the dismissal of the workman. If the Tribunal finds that either no prima facie case has been made out or there is victimization or unfair labour practice, it would refuse to grant approval and reject the application on merits. Then of course, the dismissal of the workman would be void and inoperative, but that would be because the Tribunal having held no prima facie case has been made out by the employer or there is victimization or unfair labour practice, it has refused to lift, the ban.

14. Learned Counsel for the respondent No. 1 has drawn my attention to the judgment in the case of *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Anr.* 1995 I LLJ 897 to point out (sic) that the view taken in *Punjab Beverages Pvt. Ltd. v. Suresh Chand and Anr.* (supra) has been considered by another Division Bench of the Apex Court which has taken the view that the Judgment is in conflict with the earlier judgments of the Apex Court and referred the matter to a larger Constitutional Bench. In my opinion that need not detain us as what was in issue in the case of *Punjab Beverages Pvt. Ltd.* (supra) was a case where the application for permission was withdrawn before the matter was decided on merits and not a case where the application for permission was considered on merits. The reference is on another respect. The

reference is to observations made in the case of an application which was withdrawn before being decided on merits and the consequences thereon.

15. Having said so the facts in the present case may be considered on the touchstone of violation of the principles of natural justice and fair play. This is so because the Industrial Tribunal has refused to grant permission, on the basis that the inquiries held were not fair and proper.

16. Insofar as the first inquiry is concerned, the admitted position borne out from the record is the respondent No. 1 though he wanted to lead evidence was not so permitted. I have earlier reproduced that part of the observations in the minutes of the proceedings as also the report of the Enquiry Committee. The only explanation given for not permitting the workmen to examine himself is that the respondent No. 1 was given an opportunity of putting his written statement and that opportunity having been given, the question of the respondent No. 1 having been denied opportunity of leading his evidence is immaterial. It is also pointed out that the respondent No. 1 was given an opportunity of leading evidence of his witness which he declined to do. Considering that it is contended that it ought not to be held that there is a violation of principles of natural justice and fair play. The management for the purpose of proving the charge against the workman led evidence of their witnesses. Once that being the case when the respondent No. 1 had sought an opportunity of leading his own evidence that opportunity could not have been denied to him. It is no answer to the petitioners to say that he was given an opportunity of filing his written statement. The veracity of his statement could have been tested if his evidence was appreciated on the touch stone of his cross examination or admission or explanation. In the instant case such an opportunity was denied to the respondent No. 1. The Enquiry Committee, therefore, would have had no opportunity of considering, whether, if the respondent No. 1 had availed of the opportunity, his evidence recorded would be credit worthy of being considered. Once such an opportunity was denied the said inquiry must suffer from the violation of the basic requirement of denial of opportunity. Once there is denial of opportunity the inquiry must stand vitiated.

17. We may now consider the second inquiry. The parties have produced before me the records of the inquiry which was available to the 2nd Respondent. Insofar as the evidence of Mr. Kamath is concerned the evidence was admittedly recorded on the day when the respondent No. 1 was absent. There was some dispute as to whether the respondent No. 1 was given due notice of the said hearing. The Enquiry Committee on January 17, 1994 after recording the statement of Mr. Sharma concluded the proceedings for the day. The date of the next hearing was not fixed. There is nothing on record to indicate whether the respondent No. 1 was intimated of the next date of hearing. The next date of hearing was on February 7, 1994, on which date the Enquiry Committee met. The respondent No. 1 was not present and the inquiry was adjourned to February 8, 1994. On February 8, 1994 the record indicates that the respondent No. 1 did

not attend even on the 2nd day of enquiry. The respondent No. 1 thereafter attended the inquiry on March 15, 1994. The proceedings of the inquiry on February 7, 1994 and February 8, 1994 were given to him on March 15, 1994. In the affidavit filed before the National Industrial Tribunal in para 8 the respondent No. 1 had clearly stated that though the inquiry committee met on February 7, 1994 and February 8, 1994 the inquiry was held without his knowledge, as on January 17, 1994 the inquiry was adjourned without fixing any date. No material was produced to contradict the said averment. In other words Kamath's evidence was recorded without giving an opportunity to the workmen to cross examine Kamath on the point. The workman could not remain present because the dates of the enquiry on February 7 and 8, 1994 were not communicated to him. Secondly, a strange procedure was followed in the Departmental inquiry. In a case, of domestic inquiry where a delinquent employee is sought to be charge sheeted it is incumbent on the employer to lead evidence insofar as the charges are concerned. In the instant case it was the respondent No. 1 who was called upon to first give his statement. It is true that the question was whether the respondent No. 1 wanted to give his statement. Therefore, not a command that he must first lead evidence. The fact, however, remains that it is only in the event the employer had led evidence and in support of the charges, would the delinquent workman be duty bound to lead evidence or to show that the charges against him were not proved. To my mind, therefore, the second inquiry must also fail, not for the reasons given by the Tribunal, but on the basis that in the inquiry held on February 8, 1994 evidence of a witness was recorded behind the back of the respondent No. 1 and for the procedure followed in first asking the delinquent workman to give his statement. For both these reasons the ultimate conclusion of the Tribunal in holding that the inquiry was vitiated must be upheld.

18. That leaves us with the next contention regarding subsistence allowance. The admitted facts on record as brought out are that the respondent No. 1 was not being paid the full subsistence allowance. From the subsistence allowance, various deductions were made. The petitioners are governed by the Model Standing Orders. This is the position based on the stand taken by the petitioners themselves in Writ Petition No. 1621 of 1999 between Air India Ltd. v. J. V. Gurusahani which was disposed of by the learned single Judge of this Court on February 4, 2000. In para 4 of the said judgment the statement on behalf of the petitioners has been recorded that they are governed by the Model Standing Orders (Central). Even otherwise once the provisions of the Industrial Standing Orders are applicable, in the absence of the certified Standing Orders, the Model Standing Orders would apply. In the instant case the petitioner would be an Establishment to which the Model Standing Orders would apply and consequently the Model Standing Orders would be applicable in the absence of Certified Standing Orders. Apart from that, as pointed out earlier, the petitioners themselves had issued the Circular/Letter whereby no deductions were to be made from the subsistence allowance. It was, however, contended on behalf of the petitioners, that the petitioners have paid to the respondent No. 1 in terms of

the Model Standing Orders. It is further contended that the respondent No. 1 must show that on account of failure to pay the subsistence allowance he was incapacitated or prevented from attending or participating in the inquiry proceedings. In the absence of that it is contended it cannot be said that the inquiry stands vitiated merely because there were some deductions in the subsistence allowance by the petitioners herein. Learned Counsel for the respondent No. 1 first relied on the judgment of the Apex Court in the case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, . It was his contention that the Apex Court in the said judgment has taken the view that on failure to pay the subsistence allowance the inquiry must stand vitiated. I have gone through the judgment and more specifically para 33. There is no such proposition laid down in the said judgment. What the Apex Court held in that case was that on account of the penury occasioned by nonpayment of subsistence allowance, the workman could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer at such proceedings which were held ex-parte, stand vitiated. To my mind that judgment would be of no assistance insofar as the proposition sought to be canvassed by the respondent No. 1 in the present case.

19. It is next contended that similar proposition is found in the case of Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another, . That was a case u/s 33(3) of the I.D. Act, regarding a protected workman, whose services were sought to be dismissed. The Apex Court was considering the language of Sub-section (3). Therefore, that judgment would be of no assistance in so far as the facts of the present case are concerned. The next judgment relied upon is the judgment of this Court in the case of Bharat Petroleum Corporation Ltd. Vs. Ramnath Jagdish Tiwari and Others, . A learned single Judge of this Court has taken the view that if subsistence wages are not paid in terms of the Model Standing Orders the inquiry must stand vitiated. On behalf of the petitioners it is contended that a perusal of the said judgment would show that in that case the workmen had demanded payment of subsistence allowance which had not been paid. It is contended, therefore, that the ratio of that judgment must be considered on the touchstone of the demand being made by the employer thereof and refusal by the petitioner. It is true that in the said judgment though the learned single Judge has taken a view that there has to be a compliance with the Model Standing Order yet the fact remains on record in that case before the Court there was material to show that the workmen had demanded payment of subsistence, allowance and that had been denied. Another judgment relied on is of the Division Bench of the Rajasthan High Court in the case of Rajasthan State Road Transport Corporation v. Sohan Lal and Anr. 1996 (74) FLR 2532 to contend that for the purpose of computation of subsistence allowance even the wages payable under subsequent settlements has to be considered for computing subsistence allowance. I need not address myself to that issue as that was not the stand of the respondent No. 1 before the Industrial Tribunal.

20. The fact, however, remains that the petitioners are a public body. They Had

issued specific instructions that no deductions Would be made from the subsistence allowance. It is termed subsistence allowance as during the period of suspension, the contract of employment is suspended and, therefore, no wages are payable. To mitigate personal suffering, a subsistence allowance is payable during the period. A public authority when it so holds out, must follow its own circulars. It cannot thereafter reply and contend that the said instructions would not have the effect of amending the Model Standing Orders. Once the petitioners themselves had taken the stand that there should be no deductions from the subsistence wages, the action in deducting would have the result of not paying the subsistence allowance which was to be computed in terms of their Circular. Therefore, subsistence allowance in terms of the Model Standing Orders would be subsistence allowance without the deduction pursuant to the Circular. What has been paid to the respondent was, therefore, not subsistence allowance in terms of the Model Standing Orders. There is, therefore, infraction by the petitioners of the Standing Orders. It is true that no material has been placed before this Court to show that the respondent No. 1 was prevented from attending the proceedings on account of nonpayment of subsistence allowance. The fact, however, remains that subsistence allowance was not paid in terms to be computed and, therefore, there is infraction of the Model Standing Orders. I, however, do not propose to decide whether this would vitiate the enquiry as in my opinion both the enquiries as held earlier were in violation of the principles of natural justice and fair play.

21. Considering what has been stated earlier the findings of the Tribunal have to be upheld on the ground that the inquiries were held in violation of the principles of natural justice and fair play. Applying the test as laid down by the Apex Court in the case of Lalla Ram v. Management of D.C.M. Chemicals Works Ltd. (supra) the Tribunal was right in holding that no approval could have been granted in the present case.

22. It was lastly statement on behalf of the respondent that once a reference is made all these questions will be at large before the Industrial Tribunal. The petitioner and respondents could lead their evidence in so far as the charges levelled against the respondent No. 1 are concerned. That is one way of looking at things. However, considering the ratio laid down by the Apex Court in the case of Lalla Ram (supra) once it is held that the inquiry was not fair and proper or in violation of the principles of natural justice and fair play then the Tribunal could not have granted permission, it was bound to refuse the permission. Once the permission was refused the action of dismissal is non est. The mere fact that a reference has been made during the pendency of the petition before the Court to my mind would be of no assistance. It is always open to the petitioners if they are so inclined to conduct a fresh inquiry and pass appropriate orders. Having said so, the following order:-

(i) Rule discharged Interim order stands vacated. Costs by the Petitioners.

(ii) At this stage learned counsel for the petitioners seeks continuation of the

interim order passed. In the instant case the Industrial Court has held in favour of the respondent No. 1. I have upheld the finding of the Industrial Court. Considering the said circumstances to my mind this would not be a proper case where the stay as prayed for should be granted. In that light of the matter application for stay rejected.