

(2002) 02 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 193 of 2001

B. Umanna Gowda

APPELLANT

Vs

The Divisional Controller, KSRTC, Bellary Division

RESPONDENT

Date of Decision : 11-02-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 11 A, 33 (2) (b), 33 A
K.S.R.T.C. (Cadre and Recruitment) Regulations, 1982 — Regulation 18, 25, 3

Citation : (2002) 2 KCCR 1281

Hon'ble Judges : V. Gopala Gowda, J

Bench : Single Bench

Advocate : S.B. Mukkannappa, for the Appellant; H.R. Renuka, for the Respondent

Final Decision : Allowed

Judgement

V. Gopala Gowda, J.—The Petitioner-workman filed this writ petition and sought for issuance of a writ of certiorari questioning the legality and validity of the impugned award dated 30.6.2000 passed by the Industrial Tribunal at Bangalore in Complaint Application No. 3 of 1998 filed in ID No. 32 of 1976 and further sought for issuance of a writ of mandamus directing the Respondent to reinstate him with continuity of service and all other consequential benefits including full back wages from the date of dismissal till the date of his reinstatement urging various legal contentions.

2. The necessary facts are stated to consider the rival contentions urged by the learned Counsel on behalf of the parties. The case of the workman is that he was a permanent employee of the Respondent-Corporation (for short "Corporation"), working as a Conductor in Davanagere Depot of Bellary Division. The disciplinary proceedings were initiated against him by issuing an articles of charges dated 25.6.1990 by the Disciplinary Authority of the Corporation alleging that he remained unauthorisedly absent from attending to his duties for certain period in the year 1989. He has further stated that he had neither intentionally nor

deliberately absented himself from attending to his duties. Further, he has submitted a leave application to the Depot Manager for sanction of leave on medical grounds, which was at his credit. The disciplinary authority not accepting his explanation proceeded to conduct an enquiry as the workman denied charges in his explanation submitted to the charge sheet to the memorandum of Articles of charges. The Enquiry Officer submitted a report holding that the mis-conduct of unauthorised absence of the workman was proved. Based on the report of the Enquiry Officer, the Disciplinary Authority after accepting the report passed an order of dismissal dated 2.3.1991 dismissing the workman from his services. The order of dismissal is the subject matter of the complaint before the Industrial Tribunal in ID No. 32 of 1976 contending that the Corporation contravened the provisions of Section 33 of the Industrial Disputes Act (in short "ID Act") as the Corporation has not filed an application as required u/s 33(2)(b) of the said Act seeking approval of the order of dismissal passed against workman, which is mandatory in law and therefore the complaint was filed by the Petitioner-workman before the Industrial Tribunal, which was registered. The Corporation has filed its statement of objections after service of notice by the Industrial Tribunal in the proceedings justifying its order of dismissal, Corporation inter alia, contended that the workman without prior sanction of leave has remained absent himself, which action of the workman constitute an act of mis-conduct under Regulation 3 of the K.S.R.T.C. Servants (C & D) Regulations (for short "Regulation") conducted an enquiry after affording a reasonable opportunity to the workman, the enquiry report was submitted against him holding the misconduct of unauthorised absence was proved by the Enquiry Officer which report was accepted in toto by the Disciplinary Authority and passed an order of dismissal in exercise of its power under Regulation 18 of the Regulations. Corporation has placed reliance upon the domestic enquiry conducted by it in its Counter Statement relying upon the judgment of the Apex Court reported in 1972 (I) LLJ 136 in the case of Delhi Cloth Mills v. Ludh Budh Singh. The Industrial Tribunal on the basis of the pleadings of the parties framed four issues at paragraph 3 of the impugned award. The first two issues are in relation to the maintainability of the complaint filed u/s 33 of the Industrial Disputes Act by the workman. The first issue is as to whether the workman-complainant proved that the Corporation has contravened the provisions of Section 33 of the Act for non-filing of approval application u/s 33(2)(b) of the Industrial Disputes Act seeking approval of the order of dismissal and th complaint is maintainable? and the second issue was in relation to the validity of the Domestic Enquiry conducted by it prior to passing an order of dismissal.

3. In support of their respective case before the Tribunal, the workman was examined himself as CW-1 as a witness and produced documents Ex.O-1 to O-17 and on behalf of the Corporation, no witness was examined in justification of the Domestic Enquiry. The Tribunal on the basis of the material evidence on record has answered the issue No. 1 regarding the maintainability of complaint at paragraph 5 of the impugned award for the reasons recorded by it holding that

the Corporation has contravened with the provisions u/s 33 of the Industrial Disputes Act for non filing of an application u/s 33(2)(b) of the Industrial Disputes Act before the Industrial Tribunal seeking approval of the order of dismissal passed against workman. The findings recorded on this issue is on proper appreciation of evidence of the workman-CW1 but that Corporation did not adduce evidence in this regard by examining competent officer as a witness to show that it has not contravened the provision u/s 33 of the Industrial Disputes Act. Therefore, it has rightly held that the complaint filed by the workman u/s 33-A is maintainable in law.

4. At paragraphs 5 and 6 of the impugned award the Industrial Tribunal with reference to the second preliminary issue regarding the validity of the domestic enquiry is answered the issue on the basis of the evidence of CW-1 and held that the enquiry held by the Disciplinary Authority proceeding the order of dismissal is legal and valid.

5. On the issue No. 2, the Industrial Tribunal on the basis of the evidence on record has held that the workman was categorically stated that the enquiry officer in the enquiry proceedings after receipt of the enquiry notice issued by him that the enquiry officer did not ask him as to whether he has got cross examination to the management witnesses or not and he had signed the enquiry proceedings and he did not receive the enquiry proceeding copies with reference to the above evidence the findings are recorded on the said issue in favour of the Corporation. Further, it is held that in the cross examination of the workman CW-1 has admitted that he has signed the enquiry proceedings and received the enquiry proceeding copies. The enquiry officer was not examined before the Tribunal to prove the enquiry proceedings. The Tribunal on perusal of Ex. O.15 the enquiry proceedings, the finding is recorded by the Tribunal holding that the enquiry officer has explained the procedure of conducting an enquiry against the workman and further held that the workman did not want to take the assistance of co-worker to defend him in the enquiry proceedings. The Enquiry Officer permitted the workman-complainant to cross-examine the Corporation witnesses, who were examined in the enquiry proceedings. The Enquiry Officer has asked certain clarifications from the said witnesses and the workman was fully participated in the enquiry proceedings, after availing the opportunity as provided under the Regulations and in compliance with the principles of natural justice. Therefore, it is held by the Tribunal that the workman's contentions that the enquiry was not held in accordance with the Regulations and in compliance with the principles of natural justice by the enquiry is rejected and answered the second preliminary issue in favour of the Corporation holding that the enquiry held against the workman by the Disciplinary Authority is legal and valid. After having answered the said second preliminary issue in favour of the Corporation. The Industrial Tribunal has followed the procedure contemplated u/s 11-A of the Industrial Disputes Act, keeping in view of the law laid down by the Supreme Court in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, , it has re-appreciated the evidence

on record and has proceeded to record its findings on merits regarding the misconduct, at paragraphs 11, 12, 13 and 14 of the impugned Award with reference to Ex.O-14 at paragraph 12 stating that the enquiry officer considered the documentary and oral evidence placed on record before him, and by appreciating the same, he has recorded his findings on facts holding that the complainant is guilty of charges levelled against him with regard to the alleged act of misconduct of unauthorised absence from his duties and therefore it is held that the misconduct is proved. The Industrial Tribunal after perusal of the evidence on record it has opined that findings recorded by the Enquiry Officer are not perverse. The findings recorded by the Industrial Tribunal on merits of the case is erroneous in law for the reason that it is required to re-appreciate the evidence on record in view of the law laid down by the Apex Court in the case referred to supra, even-though the enquiry is held to be valid in law. The Learned presiding officer of the Tribunal except making a reference to the evidence on record and recording a finding against the workman stating that the findings of the Enquiry Officer are not perverse, it has not referred to the evidence on record discussed and appreciated the same while recording its findings on merits with valid reasons. Therefore, the findings recorded in the award by the Tribunal are not supported with valid and cogent reasons. Therefore, it is not only erroneous in law, but also suffers from error in law.

6. The Industrial Tribunal after having recorded its findings on the second preliminary issue regarding the validity of enquiry by accepting, the findings of the Enquiry officer in its entirety by recording its findings at Paragraphs 13 and 14 of the impugned award, he has proceeded to examine the proportionality of the punishment imposed by the Corporation upon the workman to find out whether it commensurate with the proved act of mis-conduct as he has admitted that he was absented himself from his duties with effect from January 1989 to December 1989 and further stated that he was suffering from Typhoid and Blood pressure and submitted leave application along with the Medical Certificates to the Management. He has also stated that he was taking treatment from one Dr. Ramanna for his ailment of Typhoid and the said Doctor is still alive. He has not produced any document to show that he has given the leave letter to the Management and the workman has not examined the Doctor. Therefore, Ex. O-1 discloses the particulars of the absentism of the workman and Ex. O-16 is the explanation given by the workman to the Articles of Charges dated 25.6.1990, wherein the workman has admitted that he went on leave and he has got all kinds of leave and eligible for the said leave from 1.5.1989 to 31.5.1989 the leave has been sanctioned and further considering the evidence of the workman, wherein, the findings are recorded stating that he has submitted the leave letter to the management and on perusal of the documents produced by the Corporation, it is clear that he went on leave without prior sanction of leave or permission for the period of in question. Therefore, the Tribunal has held that the Disciplinary Authority properly imposed the punishment upon the workman passing an order of dismissal terminating him from services with effect from

2.3.1991 is legal and valid. The Tribunal has recorded the above said finding without examining the Leave Rules of 1964 and not looking into the leave record of the workman to find out and satisfy itself as to whether, the workman is entitled for leave or not and further it should have examined and considered and recorded its findings regarding the leave Rules applicable to the workman was considered by the Corporation before passing the order of dismissal. This Court had an occasion to deal with this aspect of the matter regarding unauthorised absenteeism in Writ Petition No. 40496 of 2001 (L) dated 17.1.2002 and this Court has recorded its finding holding the order of dismissal without verifying the leave at credit of the workman under the Rules is held to be bad in law. It is an undisputed fact that the leave record of the workman is not available before the Tribunal and further the Tribunal failed to exercise its discretionary power u/s 11-A of the Industrial Disputes Act though the act of misconduct is held to be proved. The Tribunal has not recorded a categorical finding on the basis of evidence on record that the mis-conduct is proved except making a reference in the award. The Enquiry record produced by the Corporation does not disclose that whether the workman had leave at his credit as per the Leave Rules and it was sanctioned to him for the period in question. However, the Tribunal has mis-directed itself in not taking the said relevant and important aspect of the matter namely, Regulation 25 of the Regulations which casts mandatory duty upon the disciplinary authority before exercising its power under Regulation 18 of the Regulations, it should have considered the past service record of the workman before imposing the major penalty of dismissal. This question has been intensively dealt with by this Court in the case of B. Nagaraju Vs. Karnataka State Road Transport Corporation and another, . The non-consideration of the past service record of the workman by the Disciplinary Authority at the time of imposing major penalty of dismissal in exercise of power by the Employer is bad in law. Therefore, it is a clear case of failure to discharge the statutory duties by the Disciplinary Authority in passing the order of dismissal, this aspect also not considered by the Industrial Tribunal. Therefore, the Tribunal should have considered its power u/s 11-A of the Industrial Disputes Act and the law laid down by the Division Bench of this Court. Therefore, the finding recorded by the Industrial Tribunal without examining the Regulation 25 of the Regulations that the punishment of dismissal imposed upon the workman is held to be proper and it had not exercised its power properly keeping in view the object of conferment of such power upon it. The Industrial Tribunal has failed to discharge its statutory duty without considering the ILO Resolution of 1963, is the object and intentment for the Parliament in inserting Section 11-A to the Industrial Disputes Act by way of amendment to find out by it as a neutral person as to whether the punishment imposed upon the workman is in consonance with the principle of "Doctrine of Proportionality", this important aspect of matter is not considered in this case. Therefore, the award passed by the Industrial Tribunal suffers from error in law as it has failed to exercise its discretionary power conferred u/s 11-A of the Industrial Disputes Act, which is mandatory on its part. Though the Tribunal has not recorded categorical finding that the act of mis-conduct is not

proved against the workman, therefore, this Court has to accept the case of the workman and grant the relief having regard to the nature of misconduct alleged against him and the Disciplinary Authority has not recorded as to whether the workman has got the leave at his credit as per the Leave Rules.

7. The Supreme Court had an occasion to deal with the cases of unauthorised absentism of the Government Employees in catena of cases, wherein, it has been held that the dismissal of an employee from his services for unauthorised absentism is not held to be valid in law. For this reason also, the order of dismissal is not justified by the Corporation. On this ground, the workman is entitled for the relief as prayed in the writ petition.

8. The learned Counsel appearing on behalf of the Corporation Smt. H.R. Renuka, has vehemently contended that the matter requires remand back to the Industrial Tribunal and to permit the Corporation to adduce evidence to show that the complaint itself is not maintainable u/s 33-A of the Industrial Disputes Act. This plea cannot be entertained by this Court at this stage having regard to the judgment of the Supreme Court reported in Neeta Kaplish Vs. Presiding Officer, Labour Court and Another, at paragraphs 14 and 18 sub-paras 6 and 7 reads as follows:

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference u/s 10 or by way of an application u/s 33 of the Act.

These principles were adopted in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, , which was decided after the introduction of Section 11-A in the Act. In The Cooper Engineering Limited Vs. Shri P.P. Mundhe, , in which M/s. Firestone Tyre and Rubber Company of India Private Limited v. The Management (supra) was followed, the Court observed:

In our considered opinion it will be most unnatural and unpractical to expect a party to take a definite stand when a decision of jurisdictional fact has first to be reached by the Labour Court prior to embarking upon an enquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal.

The Court further observed:

We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the Labour Court should first decide as preliminary issue; whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer; there will be no difficulty. But when the matter is in controversy between the parties, that question must be decided as a preliminary issue. On that decision being pronounced, it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue.

The Corporation in its statement of counter has contended that the complaint of the Petitioner is not maintainable and therefore the Tribunal has rightly framed the issue regarding the maintainability of the complaint. The said issue was answered against the Corporation along with other issues together. The Corporation did not ask for an opportunity before the Tribunal to adduce evidence regarding the maintainability of the Complaint. Therefore, it is not proper for the learned Counsel for the Corporation to make a request before this Court to remand the case to enable it to adduce evidence on that issue. Further, it has not produced any material evidence before this Court to show that the finding recorded on preliminary issue No. 1 by the Industrial Tribunal is erroneous in law. Therefore, the Respondent-Corporation is not entitled for remand of this case to the Tribunal.

9. The preliminary issue No. 2 regarding the validity of Domestic Enquiry was answered in favour of the Corporation as it has placed reliance upon the same in justification of its order of dismissal. In view of the law laid down by the Apex Court in the case of Delhi Cloth Mills v. Ludh Budh Singh reported in 1972 (I) LLJ 136, the said issue was framed as a preliminary issue and answered in the positive. The Industrial Tribunal on the basis of evidence on record has answered the issue No. 3 in favour of the Corporation holding that the misconduct is proved since the finding recorded on mis-conduct is reversed by this Court. There is no need to remand the matter.

10. For the reasons stated supra, the workman is entitled for the relief as prayed in this writ petition and therefore the Petitioner must succeed.

11. Accordingly, writ petition is allowed. Impugned Award is hereby quashed. The order of dismissal is not justified and the Corporation is directed to reinstate the workman in his original post with continuity of service and other consequential benefits.

12. So far as backwages is concerned, the Corporation has not produced any material either before the Tribunal or this Court to show that the workman is gainfully employed and therefore he is not entitled for backwages. Once the order of dismissal is set aside, normally to award of full backwages has to be granted. But, having regard to the facts of the case and the Corporation being a

public sector undertaking it would be just and reasonable for this Court to award 50% backwages from 1989 till this date.