

(1960) 08 GAU CK 0002
In the Gauhati High Court

Bengal United Tea Company Ltd.

APPELLANT

Vs

Ram Labhaya and Others

RESPONDENT

Date of Decision : 28-08-1960

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 18, 2, 33, 33A

Citation : AIR 1962 Guw 30 : (1962) 2 LLJ 37

Hon'ble Judges : C.P. Sinha, C.J;G. Mehrotra, J

Bench : Division Bench

Judgement

G. Mehrotra, J.—The petitioner, the Bengal United Tea Company, Ltd., is the owner of a tea estate known as "Aenakhal Tea Estate" Annada Charan Das, respondent 2, was employed as an assistant medical officer at Old Singalla Division of the Aenakhal Tea Estate. He was dismissed by an order of the petitioner on or about 28 January 1959. On 9 January 1959 it is alleged by the petitioner that respondent 2 absented himself from his duties without leave from 3 p.m. to 4-30 p.m. A preliminary inquiry was held by one O. Carruthera, the manager of the said tea estate, on 12 January 1959, and the respondent 2 is alleged to have shouted at the manager and one V.K. Nanda, assistant manager.

2. Thus he was guilty of gross insubordination to the manager. On 13 January 1959 the respondent 2 was asked by the manager to explain in writing within seventy-two hours why disciplinary action should not be taken against him for the charges contained in the letter of that date. The respondent 2 however submitted his explanation on 23 January 1959. On the same date, that is, 23 January 1959, the manager according to the petitioner, held an inquiry into the said charges and came to the conclusion that the respondent 2 was guilty of the charges against him. In the course of inquiry, however, the manager gave him an opportunity to admit his guilt, but the respondent 2 declined.

3. On this the manager dismissed him with effect from 28 January 1959 by a letter dated 27 January 1959. At that time when this order of dismissal was

passed an industrial dispute was pending between the petitioner and its workmen before the industrial tribunal who has been impleaded as respondent 1 to the present petition. On 22 May 1969 respondent 2 made an application u/s 33A of the Industrial Disputes Act, 1947 (hereinafter called "the Act"), before the industrial tribunal, Assam, praying that the order of dismissal be set aside and that he should be reinstated. Before the application was made u/s 33A of the Act conciliation proceedings were taken by the labour officer without any results and the respondent 2 was advised to make a complaint u/s 33A.

4. The respondent 2 had made the complaint before the industrial tribunal that his dismissal was in violation of the provisions of Section 33 of the Act and further that the order of dismissal was wrong on the merits. The tribunal gave its award and held that the respondent was a "workman" within the meaning of the expression as defined in the Act. The tribunal further held that he was not on duty between 3 p.m. and 4-30 p.m. on 9 January 1959 and that the management failed to comply with the requirement of Section 33 of the Act but there was no proof of mala fide against the management.

5. Lastly the tribunal held that the punishment awarded was not justified in the circumstances of the case and therefore quashed the order of dismissal directing the reinstatement of the respondent 2 within fifteen days from the date of publication of the award. In view of the circumstances of the case the tribunal directed that respondent will be paid half his salary from the date of dismissal to the date of his reinstatement. The award was duly published in the gazette. It is this award which has been assailed by means of the present petition under Article 226 of the Constitution.

6. Mr. Choudhuri who appears for the petitioner has assailed the award on the following three grounds:

(1) That respondent 2 is not a "workman" within the meaning of the word as defined in the Act.

(2) That there has been no violation of the provision of Section 33 of the Act inasmuch as the respondent was not interested in the dispute which was pending before the tribunal. In this case it was pointed out that the dispute which was before the tribunal was with regard to the bonus of the period during which the respondent 2 admittedly was not a workman and was not entitled to get any bonus for that period.

(3) That the tribunal having found that the respondent 2 was absent from duty without leave between 3 p.m. and 4-30 p.m. on 9 January 1959 could not interfere with the punishment awarded by the management. The severity or otherwise of the punishment could not be considered by the tribunal. It could only adjudicate upon the validity of the order of dismissal. In this connexion it was further urged that there were two charges, made against the respondent 2

(1) that he absented himself from duty without leave from 3 p.m. to 4-30 p.m.,

and

(2) that on the date of preliminary inquiry he shouted at the manager and thus committed an act of insubordination.

7. The tribunal relying upon the statement of the manager that no inquiry was made with regard to the second charge, did not take that into consideration and the grievance of the petitioner is that no inquiry having been made in respect of that charge, the question was still at large and the tribunal, on the evidence before it, could not decide if the charge was established. If on consideration of the evidence before it the tribunal was of opinion that the charge was established, the order of dismissal should have been upheld.

8. The word "workman" has been defined u/s 2(s) of the Act as meaning any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged, or retrenched in connexion with or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person enumerated in Clause (i) to (iv) thereafter. This sub-section was substituted by Section 3(g) of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1955, for the following original Sub-section (s):

(s) "workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Government.

The substituted section adds to the category of "workmen" supervisory and technical staff also. It is not disputed that the amended definition will govern the present case. The contention of the petitioner is that a medical doctor does not come within the definition of "technical staff" The assistant medical officer also cannot be regarded as a member of the supervisory staff. The respondent 2, therefore, was not a workman within the meaning of the Act and was not competent to make a complaint u/s 33A of the Act. Section 33A reads as follows:

33A. Where an employer contravenes the provisions of Section 33 during the pendency of proceedings before a labour court, tribunal or national tribunal, any employee aggrieved by such contravention may make a complaint in writing, in the prescribed manner to such labour court, tribunal or national tribunal, and on receipt of such Complaint the labour court, tribunal or national tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply

accordingly.

This section given a right to an employee aggrieved by the contravention of the provisions of Section 33 by an employer to make a complaint. The right to make a complaint u/s 33A is thus in terms not confined to a workman. But Section 33 enjoins upon the employer, If any dispute is pending before the tribunal, to dismiss a workman only after obtaining permission from the tribunal. There could be no contravention of Section 33 in dismissing the respondent 2 if he is not a workman.

9. It is therefore necessary to examine the contention of the petitioner that the respondent % is not a workman within the meaning of the Act. Prior to the amending Act of 1956, under the old definition of the word "workman" it was held that a medical practitioner is not a workman. But under the new definition the tribunal has held that the respondent 2 is covered by the word "technical" and is thus a workman within the meaning: of the word. Mr. Choudhuri contends that the word "technical" in its popular meaning means an engineer or other technician but does not include a medical doctor.

10. The dictionary meaning of the expression "technical" is something pertaining to art particularly useful art or applied science, belonging to, or in the language of, a particular art, department or knowledge or skills profession. As to the person, it means skilled in or practically conversant with some particular art or subject. As pointed out by the tribunal, a doctor has to possess the knowledge of human anatomy. They spend years acquiring this knowledge.

11. Their function includes diagnosis and prognosis. It is a work of highly technical nature. A layman cannot perform these duties. They have to possess a knowledge of specialized character. It cannot, therefore, be said that a medical officer does not come within the meaning of the word "technical" and his work is not of a technical character. Reference was made to the case of Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate, The Question arose in that case about the dismissal of a doctor employed in a tea estate.

12. In that case, however, it was conceded by both the parties and there was a finding of the tribunal that a doctor does not come within the definition of the word "workman" and the question before their lordships of the Supreme Court was whether the dispute regarding the dismissal of a doctor who had no connexion with the workmen could be regarded as an industrial dispute. Moreover, as I have pointed out earlier, the words "supervisory and technical" were added to the new definition of the word "workman." Even in this case it was observed at p. 513 of the report as follows:

In the case before us, Dr. K.P. Banerjee was not a workman. He belonged to the medical or technical staff a different category altogether from workmen. The appellants had no direct, nor substantial interest in his employment or non-employment and even assuming that; ha was a member of the same trade

union, it cannot be said, on the tests laid down by us, that the dispute regarding his termination of service was an industrial dispute within the meaning of Section 2(k) of the Act.

In this passage also a medical practitioner has been regarded as a member of the technical staff. Having regard to the dictionary meaning of the word, the function discharged by the medical officer and the passage in the judgment of their lordships of the Supreme Court referred to above, there can be no doubt that respondent 2 was a workman under the new definition of the word and on this point we do not think that the award of the tribunal is erroneous.

13. In order to appreciate the second point raised by the counsel for the petitioner, it will be necessary to set out Section 33 of the Act, which runs as follows:

33. (1) During the pendency of any conciliation proceeding before a conciliation officer or a board or of any proceeding before a labour court or tribunal or national tribunal in respect of an industrial dispute, no employer shall

(a) In regard to any matter connected with the dispute alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding ; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute

save with the express permission in writing of the authority before which the proceeding is pending.

(2) 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

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding ; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that 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.

(3) Notwithstanding anything contained in Sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such

proceedings ; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workmen save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.-For the purposes of this sub-section, a "protected workman" in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment, is recognized as such in accordance with the rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of Sub-section (3) shall be one per cent of the total number of workmen employed therein subject, to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

(5) Where an employer makes an application to a conciliation officer, board, labour court, tribunal or national tribunal under the proviso to Sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deemed fit.

The other relevant section is Section 33A which I have already referred to earlier. The tribunal has held that there has been violation of Section 33(2)(b). Sub-section (2)(b) of Section 33 requires that 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, dismiss or discharge that workman for any misconduct not connected with the dispute provided such workman 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. No application was made u/s 33(2) by the employer for the approval of the action taken in pursuance of the standing order for dismissal of the workman concerned. It can also not be disputed that the workman could be, in accordance with the terms of the standing order, dismissed or discharged for misconduct not connected with the dispute provided sanction was taken.

14. In support of his contention, Sri Choudhuri has advanced twofold contention. Firstly he has urged that respondent 2 not being a workman Section 33 did not apply and secondly he is not a workman concerned with the dispute pending before the tribunal and thus Section 33(2)(b) will not be attracted. Emphasizing the words "no such workman" in the proviso to Sub-section (2) of Section 33, he contends that such workman refers to the workman contemplated in the opening sentence of Sub-section (2) of Section 33, that is, a workman concerned in such

dispute. The argument is that as the respondent 2 was not a workman during the period for which the workmen have claimed boons in the dispute pending before the industrial tribunal, he would not be affected at all by that adjudication and thus he cannot be said to be interested in the dispute.

15. I do not think that this is a correct interpretation. The entire machinery of the Act is based on the concept of collective bargaining and viewing in this light the entire scheme of the Act, it can be said that every workman is interested in the dispute between the other workmen and the employer, even though he as such may not derive any direct benefit. Take the case of a discharge. If a particular workman is discharged, primarily it is he alone who is concerned in the dispute between the management and the workmen as the dispute relates to his employment and non-employment, and ultimately if he is reinstated he will derive benefit out of the award. But this does not mean that other workmen cannot be said to be concerned in dispute

16. If, therefore, on the date when the order of dismissal was passed the respondent 2 was a workman, he was concerned in the dispute and merely because he may not get any bonus for that period it cannot be said that he is not concerned in the dispute. The definition of the expression "industrial dispute" in Section 2(k) means a dispute between employers and workmen and it is well settled that before any dispute between the employer and his employee can be said to be an industrial dispute it has to be sponsored by a number of workmen.

17. It must be a dispute between the employer on the one hand and his employees acting collectively on the other. Section 18(3) of the Act provides inter alia that an award of a tribunal which has become enforceable shall be binding on

(a) all parties to the industrial dispute,

(b) all other parties summoned to appear in the proceedings as parties to the dispute unless the tribunal records the opinion that they were so summoned without proper cause, and

(d) where a party referred to in Clause (a) or Clause (b) is composed of workmen all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute, and all persons who subsequently become employed in that establishment or part.

18. Thus even persons who are subsequently employed will be bound by the award. The whole object of enacting Section 33 is to maintain peace and harmony during the period of adjudication and if the management is given power to discharge any other workmen during the pendency of the dispute before a tribunal, it is likely to interfere with the peace and harmony of the industry and thus defeat the very object of Section 33.

19. The expression "workman concerned" in Section 33(2) even as a matter of construction does not mean any workman directly or immediately concerned in

such dispute. Reference in this connexion may be made to the unreported decision of their lordships of the Supreme Court in the case of New Delhi Motors, Ltd. New Delhi v. K.T. Morris C.A. No. 124 of 1959 decided on 22 March 1960 since reported in New India Motors (P) Ltd. New Delhi Vs. K.T. Morris, wherein it was held that the expression "workmen concerned in such dispute" in Section 33(1) cannot be limited only to such of the workmen who are directly concerned with the dispute in question and that the expression includes all workmen on whose behalf the dispute has been raised as well as those who would be bound by the award which may be made in the said dispute. Moreover this point does not seem to have been canvassed before the tribunal.

20. If it had been canvassed before the tribunal, the tribunal might have looked into the scope of the dispute pending before it and come to its own conclusion as to whether the respondent can or cannot be said to be concerned in the dispute. It cannot therefore, be said that the decision of the tribunal in holding that there has been non-compliance with the provision of Section 33 was manifestly erroneous.

21. As regards the last contention Sri Choudhuri has very strongly contended that the tribunal should have gone into the question of insubordination by the respondent 2 even though the manager had conceded that no inquiry was held on the charged. The tribunal has remarked that though the charge was under two heads, the manager has admitted in his statement that the inquiry was confined only to the first charge. The second head of the charge was not the subject-matter of the inquiry. The letter of the 13 January 1959, which is annexure A to the petition, sets out the following charges on which the explanation was asked for:

(1) On 9 January 1959 you did absent yourself without leave from 3 p.m. to 4-30 p.m.

(2) On 12 January at 6 p.m. you were grossly insubordinate to your superiors, in that you did shout at the estate manager and assistant estate manager and did strike the estate managers's table violently and did generally behave in an offensive and insulting manner.

On this an explanation was given by the respondent 2 on 23 January 1959 and he in his explanation has stated as follows:

As for the second charge, I may say that I was speaking calmly at your office. What I spoke in reference to assistant manager was I do not find fault with anybody when it was said that I went twice to Lukcy-nagar on 9 instant. I was thunderstruck, I could not even dream of such a quite false allegation against me. The shock was more than what I could bear. As a result my hand might have touched your table. I have never been disobedient to previous assistant managers and estate managers during the last fourteen years, not to speak of insulting the estate manager at present. My voice was probably not as low as my normal speaking. However, I did not wish to give you any cause for your slightest

annoyance. It was entirely unintentional. In view of the above explanation I may be excused for the charges.

In the order of dismissal there was no reference to this charge. The manager, as pointed out by the tribunal, has admitted that no inquiry was held. It may be that in view of the explanation given by the respondent 2 that he never intended to be disobedient and that it was only a matter of inference to be drawn from his conduct, the manager abandoned his particular charge and made no inquiry about it. It cannot therefore be said that the tribunal should now investigate into that question and try to find out if this charge had or has not been substantiated. If the tribunal under these circumstances did not go into that question, it cannot be said that the decision of the tribunal is manifestly erroneous.

22. A number of authorities were cited by Sri Choudhuri and particularly the case of The Punjab National Bank Ltd. Vs. Its Workmen, to show that if no inquiry is held then the managerial authority has not been exercised at all and the matter is at large before the tribunal to decide whether the case against the employee has or has not been established. Reference was made to the following observation in this case at p. 682 of the report:

But it follows that if no enquiry has in fact been held by the employer, the issue about the merits of the impugned order of dismissal is at large before the tribunal and on the evidence adduced before it, the tribunal has to decide for itself whether the misconduct alleged is proved, and if yes, what will be proper order to make. In such a case the point about the exercise of managerial functions does not arise at all.

This case is distinguishable on the facts. In cases where no inquiry has been held the question may be at large before the tribunal. But where two charges have been framed against the employee and one of them is abandoned during the inquiry, the tribunal in my opinion will not be justified in reopening the question again and examining the charge abandoned in the light of the evidence before him.

23. The next point in this connexion raised by Sri Choudhuri is that the tribunal having found that charge of being absent from duty without leave is established, could not interfere with the quantum of punishment. It was within the exclusive jurisdiction of the management to give any punishment which they considered fit and proper in the circumstances of the case. It is urged that in view of the decision of their lordships of the Supreme Court in the case of Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen, the tribunal could interfere with the decision and the management on four grounds, namely

- (i) when there is a want of good faith
- (ii) when there is victimization or unfair labour practice
- (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and

(iv) when on the materials, the finding is completely baseless or perverse

and none of these grounds exists in the present case. Reference is made to the following passage in the award:

It would have been better if he had Bought forgiveness, but as things are, I feel that the punishment awarded is not proportionate to the gravity of the misconduct proved. It is extremely severe

In the operative portion of the award also it is stated that the punishment awarded was not Justified in the circumstances of the case. The tribunal has also referred to the manager's statement where he is said to have conceded that mere absence from duty for about an hour and a half was not so serious offence or omission as to merit dismissal. It is true that the tribunal can interfere with the order of dismissal passed by the management only on grounds as laid down by their lordships of the Supreme Court in the decision referred to above. I am also of opinion that the tribunal has jurisdiction to adjudicate on the validity of the order of discharge, but it cannot go into the question of the quantum of punishment. But in my opinion what the tribunal meant was that under the standing orders, for absence from duty on one occasion the order of dismissal could not have been passed.

24. The standing orders have been filed as annexure A to the affidavit-in-opposition filed by Ananda Charan Das, respondent 2. Paragraph 9, proviso (c), of the standing order lays down that the manager may dismiss without notice any worker who la guilty of gross misconduct but such worker must be informed in writing of the alleged misconduct and be given an opportunity to explain the circumstances alleged against him. Paragraph 10 of the standing orders enumerates the acts or omissions which constitute misconduct. Sub-paragraph (a) of Para. 10 days down the acts and omissions which shall constitute gross misconduct and Clause (4), Sub-para. (a), of Para. 10 mentions habitual absenteeism without leave and Clause (5) about habitual late attendance as gross misconduct. Sub-paragraph (b) of Para. 10 enumerates the acts or omissions which constitute misconduct and Clause (4), Sub-para. (b), of Para. 10 mentions late attendance or absenteeism without leave as an act or omission which constitutes misconduct.

25. It will thus appear that if a person is habitually absent without leave or is late, his act constitutes gross misconduct but if he is late only once or is absent from duty without leave once, it constitutes a misconduct. Paragraph 9 gives power to the management to dismiss a workman after giving him an opportunity to explain the circumstances in the case of gross misconduct. In the present case the charge as set out in the letter of 13 January 1959 is that the respondent was absent without leave on the 9 January 1959 from 3 p.m. to 4-30 p.m. No charge of habitual absenteeism without leave was made against respondent 2. The management, therefore, even on the finding arrived at by the manager and affirmed by the tribunal, could not dismiss the respondent 2.

26. It was also faintly urged by Sri Choudhuri for the petitioner that there was sufficient evidence on the record to show that on previous occasions also the respondent had absented himself without leave. But in view of the charge and the finding of the tribunal, this Court will not examine for itself the evidence. In this view of the matter also it cannot be said that the tribunal exceeded its powers in holding that the order of dismissal was illegal and should be set aside. In the result therefore we see no force in this petition and it is rejected but in the circumstances of the case the parties will bear their own costs.