

(1995) 12 KAR CK 0048

In the Karnataka High Court

Case No : Writ Petition No's. 15900 and 17531 of 1994

Bharat Electronics Ltd.

APPELLANT

Vs

Labour Court and others

RESPONDENT

Date of Decision : 21-12-1995

Acts Referred:

Industrial Disputes Act, 1947 — Section 10 (1), 33 (2) (b)

Citation : (1996) ILR (Kar) 1395 : (1996) 5 KarLJ 94

Hon'ble Judges : V.P. Mohan Kumar, J

Bench : Single Bench

Advocate : A.G. Holla, for the Appellant; K. Subba Rao, for the Respondent

Judgement

1. The validity of the finding on an issue entered by the Labour Court in, reference u/s 10(1) of the Industrial Disputes Act, 1947 (hereinafter

referred to as "the Act"), is questioned in these writ petitions. The facts of the case are that pending adjudication of a dispute before the Labour

Court the services of the workers in question were terminated. As required u/s 33(2)(b) of the Act, the management applied to the Tribunal for

approval of the action taken. The Tribunal examined the question as to whether the approval be granted. In doing so, it examined the question

whether there had been a proper enquiry and whether the charges against the workers had been proved prima facie. The Tribunal found that there

was a proper domestic enquiry and that charges had been proved. It also held that the dismissal was not an act of victimisation. It, therefore,

granted permission to the management to dismiss the workers. Subsequent thereto an industrial dispute was raised by the workers u/s 10 of the

Industrial Disputes Act with reference to the termination of their services and the dispute was referred to the Labour Court. In that reference a

preliminary issue has been (sic.) raised in the following terms :

Whether the domestic enquiry conducted by the second party is fair, reasonable and valid in law ?

The Labour Court, after hearing the respective parties, held that there was no valid domestic enquiry, and that the Enquiry Officer was biased

against the workers. It, therefore, called upon the management to substantiate the charges. It is this finding that has been challenged by the

employer in these writ petitions before this Court.

2. Before we advert to the question of law raised the following factual details may also be noticed. In Writ Petition No. 15900 of 1994, the

allegation was that the worker committed theft and serial Application No. 49 of 1974 was filed for approval to impose the punishment of dismissal.

Annexure ""B"" is the order passed by the Labour Court granting permission. In that proceeding the worker had disputed the fairness of the

domestic enquiry. The main contention was that the Enquiry Officer himself had cross-examined the witness. The contention was adverted to but

overruled by the Labour Court (vide para. 7 of annexure ""B"" order). It further held (at para. 9) that the domestic enquiry held is fair and proper.

Accordingly, serial application was allowed.

3. Likewise, in W.P. No. 17531 of 1994, Annexure-C is the order in serial Application No. 85 of 1975, filed by the management seeking

approval of its decision to dismiss the employee. Therein also the worker disputed the fairness of the domestic enquiry conducted by the employer.

Annexure ""B"" is the order on the question of domestic enquiry in serial Application No. 85 of 1975, upholding the validity of the domestic enquiry.

Similar contentions, namely, that the Enquiry Officer allegedly cross-examined the witnesses, etc., were the ground of attack against the domestic

enquiry. This contention was also overruled by the Labour Court (vide at para. 8 of annexure ""B"" order), while upholding the validity of the

domestic enquiry.

4. The contention raised by Sri A. G. Holla, learned counsel for the petitioner-employer in short, is that in view of the earlier finding by the

Industrial Tribunal to the effect that there has been proper domestic enquiry in the serial application a fresh enquiry on the very same issue is not

called for and the same is barred on the ground of res judicata.

5. On the question of resin judicata, learned counsel, Sri Subba Rao, appearing on behalf of the respondents-workers submits that the said

principle will not apply in the present case and the whole issue has to be examined and decided by the Labour Court afresh. We should notice here

that this question as such has not been raised or argued before the Labour Court by the management. The answer to the dispute raised by the

workers before the Labour Court is not met by the management on the principle of either estoppel or res judicata. This issue was contested

otherwise. But as this question has been raised before the Court and argued at length, I am considering the same.

6. Sri Holla, learned counsel, invited my attention to the observation in the decision of the Supreme Court in *Bengal Bhatdee Coal Co. Ltd. v. Ram*

Probesh Singh AIR 1964 SC 486. At paragraph 6 of the said decision, the Supreme Court states that when a finding has been entered by the

Industrial Tribunal in a proceeding u/s 33(2)(b) on the basis of the domestic enquiry it is not open to the Labour Court to find otherwise while

adjudicating the same question u/s 10(1). There are similar observations of the Supreme Court in the decision in *The Workmen of Firestone Tyre*

and *Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, In particular, the following passage in *Bengal Bhatdee Coal Co. Ltd. v.*

Ram Probesh Singh, (supra) is relied on by learned counsel :

We have already indicated that the Tribunal did not find that there was any basic error or violation of the principles of natural justice in the holding

of the inquiry; nor did it find that the findings of the Inquiry Officer were perverse or baseless. It could hardly do so in the face of its own approval

of the action taken on applications made to it u/s 33(2)(b) of the Act, for if it had found that the inquiry was not proper, it would not have

approved of the action taken against the workmen by the appellant when it was approached u/s 33(2)(b). We must, therefore, proceed on the

assumption that the inquiry was held properly and the Inquiry Officer who held the inquiry was justified on the evidence before him in coming to the

conclusion which he did, namely, that the charges had been proved.

7. Learned counsel submits that this observation stresses that the domestic enquiry is valid and proper.

8. The question whether a finding in a proceeding u/s 33(2)(b) will operate as

res judicata has been considered by several Courts including the Supreme Court. See the following decisions :

1964 II LLJ 626 .

1975 Lab IC 879.

1977 Lab IC 1949 .

1979 Lab IC 1279 .

1981 Lab IC 1525.

1982 Lab IC 1378.

1983 Lab IC 264 .

9. The view of the Supreme Court is that any finding entered in any proceeding u/s 33(2)(b) will not operate as res judicata in a proceeding

initiated either u/s 10 or Section 33A of the Industrial Disputes Act. Apparently the reason for this view seems to be that the enquiry, by the

Labour Court contemplated, in a proceeding u/s 33(2)(b) is a prima facie enquiry and that the Tribunal is merely called upon to consider whether

at the domestic enquiry there has been compliance with the principles of natural justice and whether the act of the management is a case of

victimisation or not. The Tribunal need consider as to whether there is clear evidence to find that the worker is guilty; its enquiry will only evaluate

whether the management is motivated by its intention to victimise the employee.

10. It may be noticed that on the basis of the enquiry the Tribunal has no power to grant any of the reliefs that it can grant in a proceeding u/s 10(1)

of the Act. It cannot pass any enforceable order or award. It can either grant or refuse approval. The enquiry that it conducts is to satisfy for itself

whether it should grant or decline approval. Even if approval is declined and the employer proceeds to impose the punishment, the relief of setting

aside the punishment and granting of reinstatement can be had by the worker by initiating independent proceeding either u/s 33A or Section 10(1)

of the Industrial Disputes Act. Therefore, the enquiry that the Tribunal conducts u/s 33(2)(b) is for its own satisfaction and restricted to ascertain

whether it would be justified in granting the approval for the imposing of the punishment of dismissal. It cannot be assigned a greater validity or

sanctity than what the statute itself envisages.

11. In this case, after examining both sides, the Tribunal held that approval for dismissal of the worker may be granted. In such an enquiry u/s

33(2)(b), the Tribunal is not sitting in appeal over the findings of the Enquiry Officer. As held by the Supreme Court in the decision in *The Lord*

Krishna Textile Mills Vs. Its Workmen, :

It is well known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a Court of facts and

may fall to be considered by an Appellate Court which is entitled to consider facts; but these considerations are irrelevant where the jurisdiction of

the Court is limited as u/s 33(2)(b). It is conceivable that even in holding an enquiry u/s 33(2)(b) if the authority is satisfied that the finding recorded

at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to

consider whether approval should be accorded to the employer or not;

12. The scope of enquiry is limited. It has no similar power as u/s 11-A of the Industrial Disputes Act, and cannot evaluate whether the punishment

proposed is proper or not. It is not the province of the enquiry to find whether on the basis of the particular evidence on record the charges would

stand proved or not. All the same it does not straightaway follow that in all cases where there is no violation of the principles of natural justice, it

has to grant the stamp of approval u/s 33(2)(b). It follows that the finding on the domestic enquiry is collateral finding and cannot be treated as a

finding on an issue directly and substantially in issue. It may still be entitled to sift the evidence tendered to ascertain whether there is prima facie

case made out against the worker. But this enquiry, to repeat at the risk of repetition, is only to find a prima facie case. In other words, the Tribunal

is not expected to examine the question in detail as contemplated in a proceeding u/s 10(1) armed with the powers u/s 11-A of the Act, when it

decides the question as to whether there has been an enquiry conforming to the requirement of natural justice and there is prima facie case made

out against the worker. We may refer to the following passages from the decision of the Supreme Court in *The Punjab National Bank Ltd. Vs. Its*

Workmen, which clearly brings home this aspect :

Where an application is made by the employer for the requisite permission u/s 33 the jurisdiction of the Tribunal in dealing with such an application

is limited. It has to consider whether a prima facie case has been made out by the employer for the dismissal of the employee in question. 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. In these proceedings it is not open to the Tribunal to consider whether the order proposed to be passed by the employer is proper or adequate or whether it errs on the side of excessive severity; nor can the Tribunal grant permission, subject to certain conditions, which it may deem to be fair. 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.

But, it is significant that even if the requisite permission is granted to the employer u/s 33 that would not be the end of the matter. It is not as if the permission granted u/s 33 validates the order of dismissal. It merely removes the ban; and so the validity of the order of dismissal still can be, and often is, challenged by the union by raising an industrial dispute in that behalf. The effect of compliance with the provisions of Section 33 is thus substantially different from the effect of compliance with Section 240 of the Government of India Act, 1935, or Article 311(2) of the Constitution.

In the latter classes of cases, an order of dismissal passed after duly complying with the relevant statutory provisions is final and its validity or propriety is no longer open to dispute; but in the case of Section 33 the removal of the ban merely enables the employer to make an order of dismissal and thus avoid incurring the penalty imposed by Section 31(1). But if an industrial dispute is raised on such a dismissal, the order of dismissal passed even with the requisite permission obtained u/s 33 has to face the scrutiny of the Tribunal.

13. We may again refer to the following passages from the decision in *Lord Krishna Textile Mills v. Its Workmen*, (supra) at PP 215-216 :

It is plain that whereas in cases falling u/s 33(1) no action can be taken by the employer unless he has obtained previously the express permission of the appropriate authority in writing, in cases falling under sub-section (2) the employer is required to satisfy the specified conditions but he need

not necessarily obtain the previous consent in writing before he takes any action. The requirement that he must obtain approval as distinguished

from the requirement that he must obtain previous permission indicates that the ban imposed by Section 33(2) is not as rigid or rigorous as that

imposed by Section 33(1). The jurisdiction to give or withhold permission is prima facie wider than the jurisdiction to give or withhold approval. In

dealing with cases falling u/s 33(2) the industrial authority will be entitled to enquire whether the proposed action is in accordance with the Standing

Orders, whether the employee concerned has been paid wages for one month, and whether an application has been made for approval as

prescribed by the said sub-section. It is obvious that in cases of alteration of conditions of service falling u/s 33(2)(a) no such approval is required

and the right of the employer remains unaffected by any ban. Therefore, putting it negatively the jurisdiction of the appropriate industrial authority in

holding an enquiry u/s 33(2)(b) cannot be wider and is, if at all, more limited, than that permitted u/s 33(1), and in exercising its powers u/s 33(2)

the appropriate authority must bear in mind the departure deliberately made by the Legislature in separating the two classes of cases falling under

the two sub-sections, and in providing for express permission in one case and only approval in the other. It is true that it would be competent to the

authority in a proper case to refuse to give approval, for Section 33(5) expressly empowers the authority to pass such order in relation to the

application made before it under the proviso to Section 33(2)(b) as it may deem fit; it may either approve or refuse to approve; it can, however,

impose no conditions and pass no conditional order"".

14. In view of the limited nature and extent of the enquiry permissible u/s 33(2) (b) all that the authority can do in dealing with an employer's

application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the

employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority

can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. Do the Standing Orders justify the

order of dismissal ? Has an enquiry been held as provided by the Standing Order ? Have the wages for the month been paid as required by the

proviso ? and, has an application been made as prescribed by the proviso ?

15. What is stated earlier is clearly brought by the above decision.

16. Now, what is the dispute that is being resolved in a proceeding u/s 33(2)(b) ? Strictly the issue in such a proceeding is whether the approval

sought for should be granted in the application made by the employer. It does not follow that in such a proceeding an approval would be granted

the moment the management establishes the validity of the domestic enquiry. The Tribunal even then is entitled to examine whether the approval

need be granted even if there was legal evidence at the properly conducted domestic enquiry. It has further to see whether the act, is a case of

victimisation or not. It means that the finding on the domestic enquiry alone will not conclude the proceeding u/s 33(2)(b). The validity of the

domestic enquiry is a ""step-in-aid"" finding for grant of approval u/s 33(2)(b); if so, the said issue cannot be treated as an issue directly and

substantially in issue in a proceeding u/s 33(2)(b). As noticed, a finding on this issue will not affect one way or other the order to be passed in an

approval application u/s 33(2)(b). To repeat a finding on this issue is a step preceding the finding on the issue regarding the validity of the charges

which is the relevant finding to grant or refuse approval u/s 33(2)(b). Perhaps this aspect necessitated a change of approach on the question

regarding the enquiry u/s 33(2)(b). Subsequent judicial decisions conferred enlarged power on the Tribunal to examine the sustainability of the

order of dismissal of the worker on the basis of the evidence tendered. The decision of the Supreme Court in Shankar Chakravarti Vs. Britannia

Biscuit Co. Ltd. and Another, brings out this position clearly. Therein their Lordships stated that in an enquiry u/s 33 of the Industrial Disputes Act,

if the employer is unable to prove the charges with the evidence already on record he should be given an opportunity to lead evidence to sustain

the charges. We may advert to the following passages :

The employer terminates the service of a workman. That termination raises an industrial dispute either by way of an application u/s 33 of the Act

by the employer or by way of a reference by the appropriate Government u/s 10. If an application is made by the employer as it is required to be

made in the prescribed form all facts are required to be pleaded. If a relief is asked for in the alternative that has to be pleaded. In an application

u/s 33 the employer has to plead that a domestic enquiry has been held and it is legal and valid. In the alternative it must plead that if the Labour

Court or Industrial Tribunal comes to the conclusion that either there was no enquiry or the one held was defective, the employer would adduce

evidence to substantiate the charges of misconduct alleged against the workman.

Having given our most anxious consideration to the question raised before us, and minutely examining the decision in *The Cooper Engineering*

Limited Vs. Shri P.P. Mundhe, to ascertain the ratio as well as the question raised both on precedent and on principle, it is undeniable that there is

no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either u/s 10 or u/s

33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after

decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman. *Cooper*

Engineering Ltd.'s case, (*supra*) merely specifies the stage at which such opportunity is to be given, it sought. It is both the right and obligation of

the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to avail of such

opportunity by a specific pleading or by specific request. If such an opportunity is sought in the course of the proceeding, the Industrial Tribunal or

the Labour Court, as the case may be, should grant the opportunity to lead additional evidence to substantiate the charges. But if no such

opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the

employer to adduce additional evidence to substantiate the charges.

17. The Supreme Court, therefore, equated the enquiry with the enquiry u/s 10 of the Industrial Disputes Act. If the enquiry was of *prima facie* in

nature then there was no need to conduct a full-fledged enquiry with liberty to lead evidence. It means, the enquiry u/s 33(2)(b) was given similar

status as that of an enquiry u/s 10(1) of the Act. It means that the full-fledged enquiry in a proceeding u/s 33 is tantamount to the enquiry u/s 10(1)

of the Act. This is a departure from the view earlier stated by the Supreme Court in the reported decision referred to *supra* as the view had been

that the consideration of the validity of the domestic enquiry be a *prima facie*

consideration. It was held that the Tribunal need consider whether there is adherence to the principles of natural justice and the delinquent had fair opportunity to defend. But when we come to the decision in *Shankar Chakravati v. Britannia Biscuit Co. Ltd.*, (supra) referred to above it has been held that a full-fledged enquiry has to be held by the Tribunal before granting approval u/s 33(2)(b) of the Act.

18. As stated and referred to earlier it is reiterated by the Supreme Court and almost all the other High Courts that decisions the findings entered by the Tribunal in a proceeding u/s 33(2)(b) will not operate as res judicata. As we have noticed earlier the question to be decided in the proceeding u/s 33(2)(b) is entirely different from Section 10(1) of the Act. If this be the position what is the validity of any of the findings of the Tribunal in a proceeding u/s 33(2)(b) ? Can the Labour Court rely on that finding in a full-fledged enquiry u/s 10(1) of the Act ? As can be seen from *Shankar Chakravarti v. Britannia Biscuit Co. Ltd.*, (supra) in an enquiry u/s 33(2)(b) of the Act, the management has the right to lead evidence to establish the charges against the worker even if the evidence led before the domestic enquiry by it, is insufficient to establish the charges. If this be the position the question would then arise whether the said finding would operate as res judicata when the very same question is agitated in the subsequent proceeding. It is not in dispute that the management could still dismiss the worker despite the declining of approval u/s 33(2)(b). If so, the enquiry conducted by the Labour Court and a finding entered in his favour u/s 33(2)(b) proceeding does not at all help the worker. If so, should the Tribunal pin down the worker and debar his pleas if the findings are against him when in this enquiry conducted u/s 33(2)(b) of the Act. It cannot be said that such a rule can be adopted by the Labour Court and if adopted it would be against all principles of fair play. To hold that if the findings are in favour of the worker it is of no effect and it can be ignored by the employer and whereas when it is against the worker, the worker is concluded and debarred from reagitating the question is not a correct approach to the question. In other words, if the finding in the Section 33(2)(b) proceedings can be ignored by the employer and despite the finding, a punishment can be imposed against him, then the worker also can ignore the said finding and reagitate the validity of the domestic

enquiry if and when the question has to be examined by the Labour Court. Hence, it is only proper to treat the finding entered by the Tribunal to decide the application u/s 33(2)(b) as purely prima facie intend to deal with the application for approval. An approval granted after a full-fledged enquiry u/s 33(2)(b) will not render it to be immune from attack in a proceeding u/s 10(1) or Section 33-A of the Act. A dismissal of the worker after securing approval u/s 33(2)(b) is on the same pedestal as a dismissal without an approval. Both are liable to be interfered in Section 10(1) or Section 33-A proceeding. It means the finding in the proceeding u/s 33(2)(b) is subject to the right available to the party u/s 10 or Section 33-A of the Act. If so, none of the findings therein can be declared as operating as res judicata in any subsequent proceeding either u/s 10(1) or Section 33-A of the Industrial Disputes Act.

19. In this case the finding is entered by the Labour Court in the present proceedings on the basis of the evidence tendered before it. The finding entered by the Tribunal on the preliminary issue be challenged while challenging the final award in the reference. May be in a given case, the Labour Court may accept the finding on the domestic enquiry entered in the proceeding u/s 33(2)(b). But it cannot be held that whatever be the materials placed before it, the Labour Court should not depart from the finding in Section 33(2)(b) proceeding will be erroneous. Perhaps the management may be able to persuade the Labour Court that the findings entered by the Labour Court in the proceedings u/s 33(2)(b) should be accepted. It is a material piece of evidence which can be relied on by either side. The observation of the Supreme Court in the decision in *Bengal Bhatdee Coal Co. Ltd. v. Ram Probesh Singh* (supra) means only that if the finding u/s 33(2)(b) of the Act is entered by the Tribunal after taking into account all materials on the issue regarding the domestic enquiry, the Labour Court cannot be found fault with if it concurs with that finding in an enquiry in a proceeding u/s 10(1). It can be treated as a material piece of evidence. But, it is not a conclusive piece of evidence. Therefore, the finding entered by the Tribunal in a proceeding u/s 33(2)(b) will not certainly operate as res judicata. The proceedings u/s 10(1) of the Act cannot stand concluded by holding that the rule of res judicata would apply and the findings of the Labour Court u/s 33(2)(b) should be accepted as final.

In this view of the matter I do not find any error committed by the Labour Court in passing the impugned order. I, therefore, dismiss both the writ petitions. However, I make it clear that it is open to the petitioner to challenge the finding in this behalf if and when a final order is passed against them.