

(1988) 09 CAL CK 0007
In the Calcutta High Court
Case No : Matter No. 357 of 1986

Braithwaite and Co. Ltd.

APPELLANT

Vs

Second Industrial Tribunal and Others

RESPONDENT

Date of Decision : 15-09-1988

Acts Referred:

Industrial Disputes Act, 1947 — Section 10

West Bengal Factories (Welfare Officers) Rules, 1971 — Rule 9(3)

Citation : (1989) 2 CALLT 8

Hon'ble Judges : Monoranjan Mallick, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Monoranjan Mallick, J.—In this writ petition the Order No. 97, dated 10.12.1985 passed by Second Industrial Tribunal, West Bengal in Case No. VIII-174/79 vide G.O. No. 3363-12, dated 7.8.1979 in Braithwaite and Company v. Their Workmen has been challenged as illegal and a writ in the nature of Mandamus has been prayed for, for cancelling and/or withdrawing the impugned order and for a writ of Prohibition commending the respondents to forbear from giving effect to the impugned Order. A writ of Certiorari has also been prayed for.

2. The facts giving in the writ petition may be briefly stated as follows :

The petitioner is a public sector undertaking employing about 4400 employees. The service condition of the employees are governed by the Standing Order/ Service Rules. In or about the middle of December 1972 on receipt of Bank statement for the period from January to August 1972 and on comparison and on reconciliation with the cash books, it was noticed that certain items listed as lodgement have not been included/credited in the monthly Bank Statements which amounted to Rs. 1,00,736.84/-. The said amount was shown outstanding items month after month without being cleared. After checking the records in the Bank Accounts it was found that there was no mistake in the bank statement. It was further discovered that certain pages of the memorandum book recording

the movement of cash from Provident Fund Institutions to Company's Cash Section for deposit were torn out. It was also found that some relevant Bank paying slips were missing. As the amount involved was considerable Dhirendra Chandra Pal and Shri Narayan Chandra Sahani who were attached to Provident Fund Section of the Company and some employees of Cash Section were charged sheeted on 15th December 1972 read with amendments issued on 18th and 19th December, 1972. After the explanations were submitted they were found not satisfactory and the petitioner ordered a domestic enquiry appointing N. C. Chakraborty, Labour Officer as the Enquiring Officer. The Enquiring Officer held the enquiry for several employees jointly and submitted a joint enquiry report. The Enquiry Officer found the said Dhirendra Chandra Pal and Shri Narayan Chandra Sahani guilty of the charge No. (b), i.e., gross negligence in the performance of duties and exonerated them of the Clauses (a) and (c).

3. As the said employees were found guilty of the major disdemeanour under the relevant Clauses on the Service Rules/Standing Orders of the petitioner Company governing their employment, the petitioner dismissed the workmen from service by the Order, dated 20th December, 1975.

4. Thereafter an Industrial Dispute was raised by the Respondent No. 3 Bhraitwaite Mazdoor Karmachari Union on behalf of the concerned workmen and the Government of West Bengal, Labour Department by its Order No. 3363-IR, dated 7th August 1979 referred the following issue for adjudications, namely,

Issue

Is the dismissal of Sarva Shree Dhirendra Chandra Pal and Narayan Chandra Sahani justified? To what relief, if any, they are entitled?

5. The Respondent No. 1 the Second Industrial Tribunal West Bengal initiated the proceedings and the petitioner and the Respondent No. 3 filed written statements.

6. In the written statement the petitioner raised jurisdiction point regarding maintainability and urged that the said issue be decided first as the petitioner intends to rely upon the domestic enquiry. The Respondent No. 1 after disposing of the jurisdictional point, took up the issue of the validity of the domestic enquiry as a preliminary issue. The petitioners examined two witnesses and of the workmen only Dhirendra Chandra Pal was examined. By the Order No. 97, dated 10th December 1985 the Respondent Tribunal directed the case of Shri Narayan Chandra Sahani to be left out of consideration on this ground stated in the Order. However, considering the validity of the domestic enquiry so far as Dhirendra Chandra Pal is concerned the Respondent No. 1 found that the Enquiry Officer being a Labour Welfare Officer was forbidden under the West Bengal Factory (Welfare Officers) Rules, 1971 to be appointed as an Enquiry Officer and consequently the domestic enquiry was vitiated. He also held that enquiry was also vitiated by the violation of principles of natural justice for non-production of relevant documents and non-examination of vital witnesses. He, however extended to given opportunity to the Company to prove its case on merits and

for that purpose fixed on 24.1.1986 for hearing the case on merits.

7. Being aggrieved the petitioner has moved this writ Court for appropriate relief.

8. The petitioner makes the following contentions in this writ petition:

(1) The Respondent No. 1 ignoring the materials on record came to a perverse conclusion that the Enquiry Officer was the Labour Welfare Officer of the relevant time.

(2) Even assuming that the Enquiry Officer was a Labour Welfare Officer, no prejudice has been caused to the concerned workmen as in the back ground of the duty of the Labour Welfare Officer, the Labour Welfare Officer cannot be deemed to be a biased Officer.

(3) The finding of the Respondent No. 1 that the petitioner Company should have produced the relevant documents and papers and should have examined the material witnesses without considering as to which of the documents will be relevant and which of the witnesses were material and non-production of the said documents or non-examination of the said witnesses in the domestic enquiry has caused prejudice to the workman is entirely unsustainable in law.

(4) The Respondent No. 1 ignored the proceedings of the enquiry and the evidence on record and prosecution given in defence and came to a perverse conclusion that principles of natural justice were not observed.

(5) For the purpose of holding the concerned workman guilty of gross negligence of duty the purported documents and purported witnesses were not at all required.

(6) There is no evidence that the concerned workman ever made any applications praying for production of the document or for examination, Mr. J. B. Mullen and Mr. S. N. Chakraborty.

(7) The finding that the workman was not given opportunity of hearing and that the domestic enquiry was vitiated by violation of principles of natural justice is perverse and is liable to be set aside.

9. The Respondent No. 3 filed an Affidavit-in-opposition challenging the maintainability of the writ petition. It was contended that the Order of the Respondent No. 1 is quite valid and proper and the Respondent No. 1 did not commit any illegality in directing the petitioner to prove its case on merits by producing relevant evidence.

10. The petitioner has filed an Affidavit-in-reply to that Affidavit-in-opposition. However, at the time of hearing none of the Respondents has appeared to contest the writ petition.

11. The Learned Industrial Tribunal in a reference u/s 10 of the Industrial Disputes Act whether the dismissal of the two workmen working under M/s. Braithwaite and Company Ltd. was justified or not decided to hear the parties on

the validity of the domestic enquiry of a preliminary point that the Tribunal has such jurisdiction to decide the validity of the enquiry and deciding such preliminary issue has been, recognised in several decisions even prior to insertion of Section 11A of the Industrial Disputes Act. After the enactment of Section 11A the question also arose as to whether the Section 11A has forbidden the hearing of such preliminary issue as to whether the domestic enquiry was valid or not. But the Supreme Court in the *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, has reiterated that it is still open to the Tribunal to deal with the validity of the domestic enquiry as a preliminary issue and if its finding on the subject is in favour of the management then there will be no occasion for evidence being led before the Tribunal to decide as to whether the dismissal is justified. If the finding is against the management, the Tribunal will have to give the employer an opportunity to adduce evidence to justify its action. It has further been observed that even if the Tribunal found the enquiry to be defective it cannot simply set aside the Order of dismissal only on the ground that the enquiry was invalid. However, the employer has got the right to ask for opportunity to adduce evidence in respect of the Order of dismissal and if such opportunity is asked for, the same has to be given because the decision of the preliminary issue does not decide the reference fully. It has, however, been held in several decisions that the Court has got no power to give such opportunity to the employer suo moto and the employer who wants to avail himself of the opportunity of adducing evidence before the Tribunal to justify his action should ask for it at the appropriate stage.

12. In the above decision the Supreme Court has observed that prior to insertion of Section 11A of the Industrial Disputes Act, the Tribunal while deciding as to whether the Order of dismissal was valid or not has to follow the dictum of Supreme Court in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, and that the Industrial Tribunal could interfere with the disciplinary action taken by the employer only in way of the following circumstances, namely-

- (i) When there is lack of good faith;
- (ii) When there was victimisation or unfair labour practice.
- (iii) When the management had been guilty of a basic error or violation of the principles of natural justice; or
- (iv) When on the materials the finding was completely baseless or perverse.

13. However, in *Workmen of Firestone and Rubber Co. Pvt. Ltd. v. Management* referred to in the above on the Supreme Court has observed that in view of the insertion of Section 11A the position has now been changed considerably and the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by the employer established the misconduct alleged against the workmen. It has also been observed that the Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by the Enquiry Officer is correct but also to

differ from the said finding if an appropriate case is made out and what was once largely in the realm of the satisfaction of the employer, is ceased to be so and now it is the satisfaction of the Tribunal that decides the matter.

14. It is, therefore, clear that even when it is found by the Tribunal in deciding the preliminary issue that there has been a proper enquiry, the Tribunal will still have the jurisdiction to reappraise the evidence produced in the domestic enquiry and satisfy itself whether the evidence relied on by the Enquiry Officer establishes the misconduct alleged against the workmen. This is also the view of the Division Bench of the Calcutta High Court in *Graphite India Ltd. v. State of West Bengal* 1979 L.I.C.1279. In *Sanatak Singh v. 9th Industrial Tribunal*, Amitava Dutta, J. of our High Court has also observed that in a proper case even where it is found that there has been a proper enquiry and the enquiry is not defective the Tribunal can differ from the finding of misconduct recorded by the Enquiry Officer and hold that no misconduct is proved and even if it holds that the misconduct is proved, it may still hold that the punishment is not justified because the misconduct alleged and proved is such that it does not warrant the punishment of discharge or dismissal and, where necessary, set aside the Order of discharge or dismissal and direct reinstatement with or without any terms or conditions as it thinks fit or give any such relief including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may warrant.

15. Bearing the above principles in mind, I would now decide as to whether the Learned Industrial Tribunal committed any illegality in holding the departmental enquiry is vitiated by violation of the principles of natural justice and deciding to give the management opportunity to lead evidence in support of dismissal.

16. The competency of the Enquiry Officer to hold the enquiry was challenged before the Learned Tribunal and the Learned Tribunal on considering the evidence adduced before him on the point upheld such objection. He has observed that the Enquiry Officer was at about the material point of time the Labour Welfare Officer appointed by the management and that the management was in the know of such appointment and notified his appointment to the Chief Inspector of Factories and having such knowledge they should not have appointed him as Enquiry Officer to conduct the domestic enquiry against the workmen as the Labour Welfare Officer is prohibited in terms of Rule 9(3)(a) of the West Bengal Factories (Welfare Officers) Rules 1971 to act as Enquiry Officer. I have considered the evidence adduced before the Tribunal on the point Sri Narayan Chandra Chakraborty, the Enquiry Officer has been examined as P.W.2. In his cross-examination he has stated that in 1972 he was acting as Labour Officer under the Company. He also denied that he became the Labour Welfare Officer in 1974 but he admitted that in 1972 his name was sent for acting as Labour Welfare Officer. He has further stated that he filed a case claiming himself as a Labour Welfare Officer in 1978 before Sri A. K. Roy, Assistant Labour Commissioner and that a letter designating himself as a Labour Welfare Officer

was submitted before the Inspector of Factories by the Company. He, however, denied that he was not competent to hold the enquiry as he was Labour Welfare Officer of the Company. Shri Dhirendra Nath Pal, a dismissed workman in his evidence has stated that Sri N. C. Chakraborty, Labour Welfare Officer conducted the domestic enquiry. There is no doubt that the Order appointing Shri N. C. Chakraborty as Enquiry Officer in this domestic enquiry shows that he was described as Labour Officer and not Labour Welfare Officer. If he really were the Labour Welfare Officer the management could not designate him as Labour Officer and Shri N.C. Chakravorty would not accept such position. Therefore, even though steps were taken by the Authority concerned to designate Shri N.C. Chakravorty as Labour Welfare Officer but he had not been actually appointed when he was appointed to hold up the domestic enquiry. There is nothing to show that the dismissed workmen ever raised any objection against the appointment of Sri N. C. Chakraborty on the ground that he was a Labour Welfare Officer and was forbidden by the relevant Rules to be appointed as Enquiry Officer. So the fact that Shri N.C. Chakra vorty was Labour Officer at that relevant time was accepted by them. It is only for the first time before the Tribunal such a point was raised. There was no satisfactory evidence before the Learned Tribunal to hold that the management appointed him as Labour Welfare Officer at any point of time prior to the date of holding the enquiry. On the contrary, Mr. Chakraborty has clearly stated that in 1974 he was Labour Officer. It may be that his name was forwarded for appointment as Labour Welfare, Officer but he was not actually appointed. Therefore, if the Enquiry Officer who was appointed to hold the domestic enquiry was not the Labour Welfare Officer but the Labour Officer and when there was no satisfactory evidence before the Learned Tribunal that he was appointed as Labour Welfare Officer at about the time when he was holding the enquiry then the Learned Tribunal was not justified in holding that the enquiry was vitiated because it was conducted by one who was working as Labour Welfare Officer. Therefore, this finding of the Learned Tribunal cannot be upheld. I would come to the other illegalities noticed by the Learned Tribunal. The following irregularities were found by the Learned Tribunal which according to him clearly indicated that there were violation of the principles of natural justice. They are as follows :

- (i) Mr. Mulen and Mr. S. N. Chakraborty who were vital witnesses for enquiry were not examined as witnesses in the enquiry proceeding.
- (ii) Exhibits B, C, O and E of the enquiry proceedings which were the books and documents relating to accounts were not produced in the enquiry.

17. The Learned Tribunal has observed that the non-examination of those two important witnesses and the non-production of those vital documents which have now been produced before the Tribunal indicates serious irregularities. He has observed that it is for the employer to do fairness and to show fairness to the delinquent workmen but in the present case the show of fairness is absent because the relevant documents and the material witnesses had not been

examined and had been withheld. The Learned Tribunal has also observed that there is no explanation as to the delay in holding the enquiry at an interval of two years after the submission of the charge-sheet.

18. All these findings of the Learned Tribunal have been seriously challenged by the writ petitioner. It is submitted by Dr. Debi Pal the Learned Counsel for the petitioner that it is within the jurisdiction of the Tribunal while deciding the preliminary issue to see as to whether the holding of enquiry is proper, namely if the proper opportunity had been given to the workmen concerned in respect of their defence. It has also been observed that the workmen concerned participated in the enquiry and signed the proceedings day to day and never raised any objection that the management did not produce either Mr. Mulen or Mr. S. N. Chakraborty. It is also urged that the documents which were seized by the police in connection with the criminal case could not be produced before the enquiry officer as these were lying with the police and that the workmen concerned never insisted on the enquiry officer proceeding them before him during enquiry. It is also submitted that the charge which was found to have been proved by the Enquiry Officer is the charge of gross negligence of duty of the workmen concerned who were working in the Provident Fund Section of the Company and Mr. R.K. Das who was the Competent Officer to depose as against the charge in question had been examined and the management did not have the obligation to produce all the witnesses and only because Mr. Mulen and Mr. S.N. Chakraborty who at about the time had already left the service of the Company could not be examined their non-examination could not be held to be fatal for the enquiry and the management could not be held guilty of not showing fair play to the workmen concerned. It is also indicated in the writ petition that Mr. Mulen is now dead and there is no possibility of Mr. Mulen being examined.

19. I would now presently consider effect of non-examination of two witnesses and non-production of documents. First to the non-production of documents. Exhibits B.C.D. and E being the relevant books of accounts for the period in question were seized by the Police no doubt. But there is also no doubt that the management did not take any steps to bring them and/or produce them before the Enquiry Officer. This is now being produced before the Tribunal but the Tribunal cannot look into those documents for the purpose of this reference if he holds that the enquiry has been properly held. If the Tribunal decides the preliminary enquiry in favour of the management that the enquiry that has been held is a proper enquiry then in view of the decision of the Supreme Court in the case of Firestone Tyre and Rubber Company of India Pvt. Ltd. he has to decide the reference on the evidence and other documents produced before the Enquiry Officer as to whether the Order of dismissal is justified or not. But the management itself has produced those documents before the Tribunal so that the Tribunal can peruse them to justify the action of the management. If these documents were not vital documents for the domestic enquiry and for deciding the question whether the dismissal is justified or not the management would not have produced them before the Tribunal. The Enquiry Officer could not consider

them. That was a serious defect in the enquiry. Now to the non-examination of witnesses, Mr. Mullen was first Officer of the Company to initiate the enquiry and submitted the report Ex. A. On the basis of that report the explanation was called. Charge-sheet submitted and enquiry started. It is not known as to whether at the time when the enquiry was held, Mr. Mullen had already died. If Mr. Mullen were available then in order to show its bona fide, management should have examined that very important witnesses. So far as the S. N. Chakraborty is concerned, he was the Chief Cashier of the Provident Fund Section and it was he who for the first time brought to the notice of Mr. Mullen about the irregularity and on the basis of such complaint Mr. Mullen held enquiry and submitted the report. In holding enquiry, the management was to act bona fide. The charge against the workmen concerned was really grave. The two other charges which were not proved against the workmen concerned were also very grave charges. It is true that the Enquiry Officer found the charge (b) to have been proved and two other charges could not be proved. But domestic enquiry was held for all the three charges. In such circumstances, it was proper for the management to produce all the evidence available before the Enquiry Officer. There could have been no difficulty to produce Mr. Mullen and Mr. S.N. Chakraborty if available. If in spite of their attempt to produce them, they did not come to give evidence before the Enquiry Officer, the question would have been otherwise. The report of Sri Mullen has been produced before the Tribunal and marked exhibit "A". So the management also concedes that the said report was a vital document. Therefore, the examination of Mr. Mullen before the Enquiry Officer if he was available was very much necessary. Mr. S.N. Chakraborty the Chief Cashier was also not examined, it was suggested to the Enquiry Officer that at about the time when the charge was submitted Shri S.N. Chakraborty was in service and after his retirement the enquiry was started after about two years from the submission of the charge-sheet. Even if the Enquiry Officer has denied their suggestion, yet, there is no sufficient explanation for the management as to why the two years after the submission of the charge-sheet the domestic enquiry was started and that too after Sri S. N. Chakraborty had retired. Mr. Chakraborty being the Chief Cashier at about the relevant time knew the respective duties of the employees working in the Section. So what the duties of the workmen concerned at about the material point of time were could only be proved satisfactorily through him. In order to prove the charge of misconduct on the ground of gross negligence of duty it was necessary for the management to prove what the respective duties of those concerned employees were and in what way they were negligent and how has such negligence amounted to gross-negligence. In order to prove such charge, evidence of Shri S.N. Chakraborty was very much vital. Therefore, even though there is no satisfactory evidence that the concerned workmen asked in writing that Mr. Mullen and Shri S.N. Chakraborty would be examined, I am in full agreement with the observation of the Learned Tribunal that in order to show fair play Mr. Mullen and Shri S. N. Chakraborty should have been examined. Therefore, the finding of the Learned Tribunal that the enquiry is vitiated for non-production of the documents Exhibit

B,C,D and E before the Enquiry Officer and non-examination of Mr. Mullen and Mr. S. N. Chakraborty by the Enquiry Officer and such non-production of vital documents and non-examination of important witnesses amounted to violation of the principles of natural justice does not appear to be such a perverse finding for the Writ Court to interfere.

20. Mr. R.K. Das Accounts Officer of the company produced the report of Mr. Mullen, dated 15.12.1972 and also stated before the Enquiry Officer that Mr. Mullen held the enquiry on the verbal report of Mr. S.N. Chakraborty, In *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen*, the Supreme Court held that when the finding of the enquiry was based on report given by the Superior Officers, and such report is not made available to the concerned workman nor one of the Officers available for cross-examination the enquiry would not be fair and proper. Though in this case the workmen did not complain that the copy of the report was not given to them but the fact remains that neither Mr. Mullen nor Mr. S.N. Chakraborty has been tendered for cross-examination before the concerned workmen.

21. I have already indicated that the management has produced before the Tribunal Exhibits, B,C,D, & E as evidence. So the management intends the Tribunal to consider other evidence to justify the action of dismissal.

22. In the result, the impugned Order cannot be interfered with. Relying on the Supreme Court decision already mentioned above I am of the view that the Learned Tribunal after holding the enquiry to be defective was justified in giving an opportunity to the management to prove the misconduct by leading evidence. The management may seek such opportunity and if it does not wish to seek such opportunity, the Tribunal may pass an appropriate Order in accordance with the provisions of Section 11A of the Industrial Disputes Act. However, if the management intends to avail itself of the opportunity by making a formal prayer to examine and to produce evidence in support of the Order of dismissal then the Tribunal shall also give the workmen concerned to produce contra evidence and on considering such evidence, the Tribunal shall decide the reference in accordance with law.

In the result, the writ petition be dismissed.

There will be no Order as to costs.