

**(1993) 02 MAD CK 0065**

**In the Madras High Court**

**Case No : Writ Petition No. 8850 of 1984**

Cholan Roadways Corporation Ltd.

APPELLANT

Vs

Industrial Tribunal, Madras and Another

RESPONDENT

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**Date of Decision :** 19-02-1993

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 10, 31(3), 33, 33(2)

**Citation :** (1994) 1 LLJ 1076 : (1993) 2 MLJ 655

**Hon'ble Judges :** Somasundaram, J

**Bench :** Single Bench

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## **Judgement**

Somasundaram, J.—This writ petition has been filed for the issue of a writ of certiorari to quash the order stated 30.7.1984 made in Application No. 80 of 1984 in I. D. No. 62 of 1982 on the file of the Industrial Tribunal, Madras the first respondent herein.

2. In the month of October, 1983 it came to light that colossal misappropriation of funds belonging to the petitioner-Corporation to the extent of nearly 50 lakhs had been perpetrated. An investigation was conducted into the matter and a special team of auditors were appointed to scrutinise the accounts. It came to light from the said investigation and scrutiny that one Mr. M. Rajagopalan who was employed as cashier in the head office of the petitioner-Corporation at Kumbakonam had misused his position and perpetrated the said misappropriation. It further came to light that a certain other officials in the head office who had dealing with the accounts had also to be proceeded against for their part in enabling such a fraud to be committed. The second respondent was employed as a senior superintendent in the head office of the petitioner-Corporation. According to the petitioner, the duties entrusted to him include the responsibility for the completion of the statutory audit as well as Accountant General's audit. Pursuant to the investigation and scrutiny of the accounts, the second respondent as well as three others were individually charge sheeted for the acts of misconduct alleged against them. The charge sheet dated 30.11.1983

was issued to the 2nd respondent herein the course of which it was alleged that he had failed to reconcile the accounts particularly with reference to a sum of Rs. 21 lakhs and odd which were shown as cash in transit as on 31.3.1983. It was also alleged that the second respondent had not checked the fundamental records and was negligent in the discharge of his duties. It was further alleged in the charge memo that he helped the said Rajagopalan by allowing him to operate bank account in his name. The 2nd respondent submitted an explanation dated 2.12.1983. The explanation offered by the second respondent not being satisfactory, a domestic enquiry was directed to be conducted into the charges leveled against him in the charge memo. Shri K. P. Madhavachariya, retired First Class Magistrate was appointed an Enquiry Officer. The enquiry was conducted against the 2nd respondent and three others who were all working in the Accounts Department of the petitioner-Corporation. On the basis of the evidence recorded in the domestic enquiry, the enquiry officer submitted a report in which he held that the charges levelled against 2nd respondent have been proved. Accepting the said findings and on the basis of the findings recorded by the enquiry officer, the petitioner-Corporation terminated the employment of the second respondent by the order dated 5.3.1984. Since I. D. No. 63 of 1982 pursuant to the demand for bonus for the year 1982-83 was pending before the first respondent, an application was filed under Sec. 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") in Petition No. 80 of 1984 for approval of the action of dismissal taken against the 2nd respondent. After enquiry the 1st respondent passed the order dated 30.7.1984 in Petition No. 80 of 1984 in and by which he has refused the approval asked for and dismissed the Petition No. 80 of 1984. Aggrieved by the order of the first respondent dismissing the petition No. 80 of 1984, the petitioner has filed the present writ petition to quash the said order.

3. Mr. S. Ravi, the learned counsel appearing for the petitioner contended as follows : While dealing with the application for approval under Sec. 33(2)(b) of the Act, the first respondent tribunal is exercising only a very limited jurisdiction and that he has to see only whether the principles of natural justice have been observed and whether there is a prima facie case for the action taken by the management. In an enquiry under Sec. 33(2)(b) of the Act, the sufficiency of the tribunal, because, the tribunal exercising jurisdiction under Sec. 33(2)(b) of the Act does not act as a Appellate Court. In a domestic enquiry the strict rules of evidence under the Evidence Act will not apply. In the present case, a prima facie case has been made out based on legal evidence against the 2nd respondent and therefore, the first respondent ought to have accorded approval to the action of dismissal taken by the petitioner against the second respondent under Sec. 33(2)(b) of the Act; the first respondent while disposing of the application filed under Sec. 33(2)(b) of the Act has not only converted himself into a Court of Appeal, but also has gone into the question of sufficiency or adequacy of evidence for deciding the question under Sec. 33(2)(b) of the Act and therefore, the order of the tribunal is illegal and liable to be set aside.

4. Per contra, Mr. Ilamvaluthi, the learned counsel for the second respondent contended that the tribunal exercising jurisdiction under Sec. 33(2)(b) of the Act is entitled to go into the evidence let in, in the domestic enquiry to find out whether the findings of the enquiry officer are based on legal evidence, that in the present case, the findings of the enquiry officer with regard to the charges framed against the 2nd respondent are not based on any legal evidence and therefore, the tribunal rightly refused to accord approval under Sec. 33(2)(b) of the Act. The learned counsel for the 2nd respondent further contended that the tribunal was correct in holding that P. W. 1, the Chief Accounts Officer, himself being the delinquent officer in the misappropriation case, has to be treated as an accomplice and that his evidence as an accomplice cannot be given due weight unless corroborated by other witnesses or records. In support of this contention, the learned counsel relied on the decision in Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, . The learned counsel for the second respondent also brought to my notice the order of this Court in T. Neethivilangan v. The Managing Director, Cholan Roadways Corporation Ltd., Kumbakonam and another, W. P. No. 3318 of 1984, batch wherein this Court has confirmed the order of the tribunal refusing to approve the orders of dismissal passed by the petitioner against three other employees of the petitioner-Corporation who were also tried along the 2nd respondent by the enquiry officer for the charges framed against them.

5. Let me first examine the position of Law as settled by the various decisions of the Supreme Court with regard to the scope of enquiry before the tribunal, when it is moved under Sec. 33(2)(b) of the Act and on what principles the tribunal should act in granting or refusing approval, before going into the factual details and rival contentions of the counsel for the parties in the present case. In The Punjab National Bank Ltd. Vs. Its Workmen, , the Apex Court while dealing with the scope of enquiry before the tribunal under Sec. 33(2)(b) of the Act has held as follows :

"Where an application is made by the employer for the requisite permission under Sec. 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."

In *Punjab Beverages v. Suresh Chand*, (1978) 2 L. L. J. 1, the Supreme Court while dealing with the same question after referring to the passage extracted above from the decision in *The Punjab National Bank Ltd. Vs. Its Workmen*, observe thus :

"It will be seen that the only scope of the enquiry officer before the tribunal exercising jurisdiction under Sec. 33 is to decide whether the ban imposed on the employer by this section should be lifted or maintained by granting or refusing the permission or approval asked for by the employer. If the permission or approval is refused by the tribunal, the employer would be precluded from discharging or punishing the workman by way of dismissal and the action of discharge or dismissal already taken would be void. But the reversed is not true for even if the permission or approval is granted that would not validate the action of discharge or punishment by way of dismissal taken by the employer. The permission or approval would merely remove the ban so as to enable the employer to make an order of discharge or dismissal and thus avoid incurring the penalty under Sec. 31(3), but the validity of the order of discharge or dismissal would still be liable to be tested in a reference at the instance of the workmen under Sec. 10. Vide *Artherton West and Co.*'s case and the *The Punjab National Bank Ltd. Vs. Its Workmen*, . The workmen would be entitled to raise an industrial dispute in regard to the order of discharge or dismissal and have it referred for adjudication under Sec. 10 and the tribunal in such reference would be entitled to interfere with the order of discharge or dismissal within the limits laid down by this Court in several decisions commencing from *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, .

6. In *Lalla Ram v. DCM Chemical Works Ltd.* (1978) 1 L. L. J. 507, the Apex Court laid down the following principles which the tribunal should follow in granting or refusing approval under Sec. 33(2)(b) of the Act :

"In proceedings under Sec. 33(2)(b) of the Act, the jurisdiction of the industrial tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/standing order and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decision of this Court in *Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others*, , *Titaghur Paper Mills Company Limited v. Ram Naresh Kumar*, (1961) 1 L. L. J. 511. *Hind Construction and Engineering Co. Ltd. Vs. Their Workmen*, , *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, and *Eastern Electric and Trading Co. v. Baldev Lal* 1975 L.I.C. 1435, that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive nor too

severe to an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee, and (v) whether the employer has simultaneously or within such reasonably short time as to from part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If, however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidenced adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him".

7. In *Martin Burn Ltd. Vs. R.N. Banerjee*, , the Apex Court dealing with the question when a prima facie case is said to have been made out by the employer against an employee has held as follows :

"The Labour Appellate Tribunal had to determine on these materials whether a prima facie case had been made out by the appellant for the termination of the respondent's service. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was only conclusion which could be arrived at on that evidence. It may be that the tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record".

8. In *The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. Vs. B. Dasappa, M. T.* represented by the Binny Mills Labour Association, , the Supreme Court after pointing out that a prima facie case does not mean a case proved to the hilt, but a case which can be said to be established if the evidence which is led in support of the same were believed, observes thus :

"In every case therefore, it would be proper for the tribunal to address itself to the question, after ascertaining that the principles of natural justice have not been violated, whether the materials on which the management has reached a conclusion adverse to the workman, a reasonable person could reach such a conclusion".

9. In *Lord Krishna Textile Mills v. Its Workmen*, (1961) 2 S. C.J. 300, the Apex Court has ruled 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 Court is limited as under Sec. 33(2)(b) of the Industrial Disputes Act.

10. The position of law that emerges from the above quoted decisions may be stated thus. The Tribunal exercising jurisdiction under Sec. 33(2)(b) of the Industrial Disputes Act is not sitting as a Court of appeal weighing or reappraising evidence. For the purpose of granting or refusing approval under Sec. 33(2)(b) of the Act, the tribunal only examines the findings of the enquiry officer in order to find out whether there is a prima facie case or whether the findings of the enquiry officer are perverse. A prima facie case is not a case proved to the hilt. If the employer has held a proper enquiry into the alleged misconduct of the employee following the principles of natural justice and if it does not appear that the proposed dismissal of the employee amounts to victimisation or an unfair labour practice, the other ground on which the tribunal can interfere is only when there is not legal evidence at all recorded in the domestic enquiry as if no reasonable person can arrive at a conclusion of guilt on the evidence recorded in the domestic enquiry. In other words, if there was a proper enquiry into the misconduct and no victimisation or unfair labour practice is involved, the tribunal has to limit its enquiry under Sec. 33(2)(b) only to the extent as to whether a prima facie case has been made out or not. It must be remembered that the jurisdiction is only to decide whether the ban imposed on the employer by Sec. 33 is to be lifted or maintained by granting or refusing the approval. If the approval is refused by the tribunal, the employer would be precluded from discharging or punishing the workmen. However, if permission or approval is granted, that could not validate the action of discharge or dismissal. Permission or approval would merely remove the ban out the validity of the order would still be liable to be decided in a reference at the instance of the workmen under Sec. 10 or 2-A of the Act.

11. Now let us examine the correctness of the impugned order in the light of the principles laid down by the decisions of the Supreme Court referred to above. By the charge memo dated 30.11.1983, the following 4 charges were framed against the second respondent :

"1. Though you were overall in charge of accounts wing as per office order dated 22.11.1982 and though you were vested with the finalisation of accounts for audit work, you have not reconciled the various accounts in the General Ledger with subsidiary books of ascertain the correctness. Further, you have not also reconciled the sum of Rs. 21,63,678 shown as cash in transit as on 31.3.1983 by proper verification with reference to physical amount. The above clearly reveals your carelessness and gross negligence in the discharge of your duties thereby the defalcation committed by Thiru M. Rajagopalan was not found out by you.

2. You had not been vigilant and alert enough in checking the various registers and reconciling the same and the above nefarious act of Thiru Rajagopalan could have been brought to light well earlier. Your above act has not only damaged the reputation of the Corporation but also caused loss to the Corporation to a great extent.

3. You had helped Thiru Rajagopalan in his various activities like income tax affairs and thus allowed Thiru Rajagopalan in doing the misappropriation easily.

4. You have allowed Thiru Rajagopalan to operate Bank account in your name and thus allowed Thiru Rajagopalan to misappropriate the Corporation money".

The substantive charge against the second respondent in the domestic enquiry was that he did not reconcile the various accounts in the General Ledger with subsidiary books to ascertain the correctness and that he had not reconciled the sum of Rs. 21,63,678 shown as cash in transit as on 31.3.1983 by proper verification with reference to amount actually available. The second respondent as Senior Superintendent, Account Section of the Petitioner-Corporation has been allotted duties as mentioned in the Office Order dated 22.12.1982 marked as Ex. P-7 in the domestic enquiry. According to the Office Order dated 22.12.1982, the second respondent as Senior Superintendent (Accounts) has been allotted the duties of preparing performance report, capital expenditure, etc. budget, cash-flow statement, compilation of annual account verification of purchase order, payment of all types of bills and he is responsible for all statutory audit and A. G's Audit and overall supervision of the work relating to the Accounts Section of the Petitioner-Corporation. It is the evidence of P. W. 1, the Chief Accounts Officer that even prior to the office order dated 22.12.1982 the second respondent had been entrusted with the work of P. F. Accounts, Stores Account and processing of annual audit and A. G's Audit. It is seen from the evidence of P. W. 1 that according to the annual report balance sheet marked as Ex. P-8 in the domestic enquiry as on the closing date of 31.3.1983 cash in transit has been shown as Rs. 21,63,678 and the said cash in transit should be inclusive of the amount said to have been misappropriated by Thiru Rajagopalan. The further evidence of P. W. 1 is that the second respondent has failed to verify and reconcile the said cash in transit and if the second respondent had verified the same, the amount misappropriated by the said Rajagopalan must have come to light. The further evidence of P. W. 1 is that as the second respondent failed to tally the accounts, register and records handled by Thiru Rajagopalan, the monthly performance report also did not tally. Admittedly, the second respondent had failed to verify and reconcile the cash in transit of Rs. 21,61,678 referred above. In his statement before the enquiry officer, the second respondent has also not disputed the fact that the amount of Rs. 21,63,678 was not properly reconciled and the only explanation offered by the second respondent is that he could not verify and reconcile the cash in transit of Rs. 21,63,678 on account of the oral instructions of the officers to complete the work before the General Body Meeting fixed on 22.9.1983. The second respondent has also admitted in his

explanation to the charge memo that he permitted Mr. Rajagopalan to operate Bank Accounts in his name. On the basis of the materials available on record, particularly the evidence of P. W. 1 of the office order dated 22.12.1982 marked as Ex. P-7 in the domestic enquiry and the admission of the second respondent before the enquiry officer, I am inclined to hold that the petitioner-Corporation has made out a prima facie case for dismissing the second respondent. On a perusal of the finding of the enquiry officer. I am satisfied that the view taken by the enquiry officer and the management that the charges framed against the second respondent have been proved, is a possible view on the basis of the evidence available on record. I am also inclined to hold that on the basis of the evidence available on record in the present case against the second respondent, a reasonable man can come to the conclusion arrived at by the enquiry officer and the management.

12. However, the Tribunal gives the following reasons for coming to the conclusion that the findings of the enquiry officer are not based on legal evidence and consequently for refusing to grant approval under Sec. 33(2)(b) of the Act :

(a) Inasmuch as P. W. 1, the Chief Accounts Officers has been placed under suspension in connection with the defalcation made by the said Thiru Rajagopalan, his evidence can be accepted only if it is clinching and has got corroboration from the records, and that there is no other evidence against the second respondent except the evidence of P. W. 1.

(b) It has not been proved that the second respondent has actual control or scope of physical verification of the register written and maintained by Thiru M. Rajagopalan and that the stand of the second respondent that all those registers and other records maintained by Thiru Rajagopalan were directly under the control of Deputy Manager (Accounts) and the cheques written by him were merely signed by the Deputy Manager (Accounts), Chief Accounts Officer and the Managing Director had not been refused.

(c) There is no clear cut evidence that the second respondent was not merely theoretically enjoined with the checking up of the registers maintained by the cashier, but in actual practice it has been done by the second respondent. With regard to the charge Nos. 3 and 4 framed against the second respondent that the second respondent allowed Thiru Rajagopalan to maintain the bank account in his name, the tribunal found that though the evidence makes it clear that the second respondent allowed the bank account of Thiru Rajagopalan in his name, there is not material to hold that this particular lapse on the part of the second respondent has contributed to the defalcation committed by Thiru M. Rajagopalan in respect of the funds of the petitioner-Corporation.

13. On a careful examination of the order of the tribunal and the reasons given by the tribunal for dismissing the petition filed under Sec. 33(2)(b) of the Act, I am inclined to hold that the impugned order of the tribunal suffers from the following infirmities :

(a) The tribunal has not at all considered the question whether the petitioner-Corporation had made out a prima facie case, on the basis of the evidence available on record, for dismissing the second respondent and whether the view taken by the enquiry officer and the management of the petitioner-Corporation for dismissing the second respondent from service is a possible view, though on the evidence, the tribunal may come to a different conclusion.

(b) The Tribunal in the present case was proceeding as if it is sitting in appeal and that seems to be the reason why he reappraised the evidence of P. W. 1 and Ex. P-7 and came to the different conclusion that there is no clear cut evidence to show that the second respondent was not merely theoretically enjoined with the checking up of the registers maintained by the cashier, but in actual practice it has been done by the second respondent. Thus the Tribunal has clearly exceeded its jurisdiction vested under Sec. 33(2)(b) of the Act.

(c) The tribunal in refusing to place reliance on the evidence of the Chief Accounts Officer who examined as P. W. 1 in the domestic enquiry on the ground that P. W. 1 was placed under suspension in connection with the defalcation made by Thiru Rajagopalan, failed to take note of the fact that the strict rules of evidence under the Evidence Act are not applicable to a domestic enquiry and that the standards of proof required in a domestic enquiry is only preponderance of probabilities.

(d) The tribunal in holding that from the fact that the second respondent allowed the bank account of Rajagopalan in his name one cannot come to the conclusion that the second respondent had contributed to the defalcation committed by the said Rajagopalan, failed to take note of the position that it is not necessary that there should be direct evidence and that circumstantial evidence satisfying the test of preponderance of probabilities will be sufficient for the purpose of arriving at a conclusion in a domestic enquiry.

In view of the above infirmities in the order of the tribunal challenged in this writ petition and in view of the fact that the first respondent had exceeded its jurisdiction vested under Sec. 33(2)(b) of the Act, the impugned order is liable to be set aside. I have already pointed out that the petitioner on the basis of the materials available on record has made out a prima facie case for terminating the services of the second respondent and therefore, the petitioner is entitled to the relief claimed by it in petition No. 80 of 1984 on the file of the 1st respondent.

14. The principles laid down in Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, , relied on by the learned counsel for the second respondent, are not relevant for the purpose of deciding the question involved in this writ petition. The order of this Court T. Neethivilangan v. The Managing Director, Cholan Roadways Corporation Ltd., Kumbakonam & Anr. W. P. No. 3318 of 1984, batch is also not helpful to the second respondent because the charges framed against the employees by the petitioner-Corporation in those cases and the evidence let in against those employees in the domestic enquiry are totally

different.

15. For all the reasons stated above, the writ petition allowed, the order of the 1st respondent in Petition No. 80 of 1984 is set aside and the Petition No. 80 of 1984 on the file of the 1st respondent shall stand allowed. No costs.