

(2022) 07 GUJ CK 0015

In the Gujarat High Court

Case No : R/Special Civil Application No.4519 Of 2022

Divisional Controller, Gujarat State Road Transport Corporation

APPELLANT

Vs

Kamlesh Bhanushankar Dave

RESPONDENT

Date of Decision : 08-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 311(2)
Government Of India Act, 1935 — Section 240, 31(1), 33
Industrial Disputes Act, 1947 — Section 10, 10(1)(c), 10(1)(d), 11A, 22, 31(1), 33(2), 33(2)(b)

Citation : (2022) 07 GUJ CK 0015

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : Hamesh C Naidu, Hemal K Acharya

Final Decision : Dismissed

Judgement

Biren Vaishnav, J

1. By way of this petition, under Article 226 of the Constitution of India, the Gujarat State Road Transport Corporation, Mehsana has challenged the order passed below Exh.28 in Approval Application (I.T.) No.190 of 2014 as well as the final order dated 26.4.2019 by the Industrial Tribunal, Ahmedabad, whereby, the Approval Application preferred by the petitioner – Corporation came to be rejected.

2. The facts in brief would indicate that the respondent was working as a Conductor with the Corporation. On 20.6.2010, when he was on duty on Bhavnagar Veraval route, the bus was checked and it was found that though an amount of Rs.228/-was taken from four passengers, they were not issued tickets for the route of Una – Veraval. Several other omissions were found. A show cause notice was issued on 10-12-2020 and after a departmental inquiry, an inquiry report was submitted. On 3.12.2014 an order of removal from service

was passed. Since a reference of a general nature namely; a Reference (I.T.) No.178 of 2011 was pending before Industrial Tribunal, Ahmedabad, petitioner preferred Approval Application under Section 33-2(b) of the Act. The Approval Application was numbered as Approval Application (I.T.) No.190 of 2014.

3. By an order below Exh.28 and the final order impugned in this petition, the Industrial Court rejected the Approval Application of the Corporation holding that the Departmental Inquiry was in violation of principles of natural justice as the Inquiry Officer had acted as a prosecutor.

4. Mr. Hamesh C. Naidu, learned counsel for the petitioner challenging the orders passed by the Industrial Tribunal made the following submissions:

4.1. That the orders of the Tribunal are bad as it is against the provisions of Section 33-2(b) of the Act. The Tribunal has gone into merits of the inquiry, which the Tribunal cannot.

4.2. The Tribunal was only required to see that conditions as stipulated under the Section have been fulfilled or not. It was only to ensure that one month notice pay has been paid. The Tribunal has gone into merits, which it cannot. It is only under Section 10 of the Act that when the challenge is to the order of dismissal on merits, can the Tribunal go into inquiry proceedings.

4.3. The finding of the Tribunal is completely contrary to the facts. The inquiry was in consonance with principles of natural justice, the reporter was cross examined by the co-worker and, therefore, there was no breach of principles of natural justice.

4.4. The respondent had in the past committed 31 misconducts which has not been considered by the Tribunal.

4.5. In support his submissions, Mr. Naidu relied on a decision dated 1.8.2016 passed in LPA No.420 of 2016 of this Court in the case of (1) Ishwarbhai Shankarbhai Parmar V. Divisional Controller - GSRTC paras 10 to 14 thereof to submit that the Division Bench after referring to the decision of the Hon'ble Supreme Court in the case of Cholan Roadways Limited v. Thirugnanaasambandam reported in 2005 (3) SCC 241 had held that it was not open for the Tribunal to go into the legality of inquiry. He also relied on a decision dated 8.2.2017 passed in Special Civil Application No.9510 of 2015 of this Court in the case of (2) Divisional Controller v. Sanjaykumar Shyamjibhai Parmar to submit that the adjudicatory proceedings under Section 33(2) of the Act are not the same as one under Section 10 of the same Act. Reliance was also placed on a decision dated 5.2.2003 passed in Special Civil Application No.11349 of 2002 of this Court in the case of (3) Gujarat State Road Transport Corporation v. Ishwarbhai Madhabhai Patel to submit that the Tribunal's order was wrong, inasmuch as, when the Inquiry Officer has not cross examined, he has not played a role of prosecutor.

5. Mr. Hemal K. Acharya, learned counsel for the respondent would submit that

the order of the Tribunal below Exh.28 dated 7.2.2017 was never challenged nor was an inquiry conducted in accordance with the directions and the Tribunal rightly considering the decision of the Gujarat High Court has held that the Inquiry Officer acted as a prosecutor. He would submit that in light of the decision of the Hon'ble Supreme Court in the case of John D'Souza v. Karnataka State Road Transport reported in 2019 (18) SCC, 47, though the proceedings under Section 33(2) are summary in nature, it is open for the Tribunal to go into the inquiry and rejected the approval.

6. Considering the submissions made by the learned advocates for the respective parties, perusal of the orders dated 7.2.2017 and 26.4.2019 would indicate that the Tribunal has observed referring to the decision of the Hon'ble Supreme Court in the case of Lalla Ram v. D.C.M. Chemical Works Ltd. Reported in 1978 (3) SCC 1 that it is open for the Tribunal to consider whether a proper domestic inquiry in accordance with principles of natural justice has been held.

7. Even in the case of John D'Souza (Supra), the Hon'ble Supreme Court considered the decision in the case of Cholan Roadways Limited (Supra). It held that Section 33(2)(b) though summary in nature, in the very nature of things can opine whether a proper domestic inquiry has been held. Retracing the precedents of the Supreme Court, the Supreme Court held that in the case of Cholan Roadways Limited (Supra), the decision of Lalla Ram (Supra) was not cited. It observed that under Section 33(2)(b) of the Act, the Tribunal in its scope of inquiry can do so in two phases. In the first phase, it will consider as to whether or not a prima facie case for discharge or dismissal is made out on the basis of the domestic inquiry if such inquiry does not suffer from any defect. The second stage comes when the labour Court or Tribunal finds that the domestic inquiry suffers from one or the other legal ailment. In that case, the labour Court / Tribunal shall permit the parties to adduce their respective evidence and on appraisal thereof the Labour Court / Tribunal shall conclude its inquiry whether the discharge of any other punishment including dismissal had justified. Relevant paragraph Nos.23 to 34 of John D'Souza (Supra) read as under:

"23. Section 33(2)(b) of the Act, thus, in the very nature of things contemplates an enquiry by way of summary proceedings as to whether a proper domestic enquiry has been held to prove the misconduct so attributed to the workmen and whether he has been afforded reasonable opportunity to defend himself in consonance with the principles of natural justice. As a natural corollary thereto, the Labour Court or the Forum concerned will lift the veil to find out that there is no hidden motive to punish the workman or an abortive attempt to punish him for a non-existent misconduct.

24. The Labour Court/Tribunal, nevertheless, while holding enquiry under Section 33(2)(b), would remember that such like summary proceedings are not akin and at par with its jurisdiction to adjudicate an 'industrial dispute' under Section 10(1)(c) and (d) of the Act, nor the former provision clothe it with the power to peep into the quantum of punishment for which it has to revert back to Section

11A of the Act. Where the Labour Court/Tribunal, thus, do not find the domestic enquiry defective and the principles of fair and just play have been adhered to, they will accord the necessary approval to the action taken by the employer, albeit without prejudice to the right of the workman to raise an 'industrial dispute' referable for adjudication under Section 10(1)(c) or (d), as the case may be. It needs pertinent mention that an order of approval granted under Section 33(2)(b) has no binding effect in the proceedings under Section 10(1)(c) and (d) which shall be decided independently while weighing the material adduced by the parties before the Labour Court/Tribunal.

25. The scope of enquiry vested in a Labour Court or Tribunal under Section 33(2) (b) has been the subject matter of a catena of decisions by this Court. In *Martin Burn Ltd. v. R.N.Bangerjee*¹, a Three-Judge Bench of this Court considered the scope of enquiry under Section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 whereunder also permission to discharge a workman was required to be obtained in the manner which was somewhat similar to 1. 1958 SCR 514 Section 33 (2)(b) of the 1947 Act. This Court, thus, held:-

. "27. 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 the 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." [Emphasis by us]

26. A Three-Judge Bench of this Court in *Punjab National Bank Ltd. v. Workmen*², considered and interpreted the scope of Section 33 to lay down that the jurisdiction of the Tribunal in dealing with such applications is limited. It was held that:-

. "24. Where an application is made by the employer for the requisite permission under Section 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 2. (1960) 1 SCR 806 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.

. 25. But it is significant that even if the requisite permission is granted to the employer under Section 33 that would not be the end of the matter. It is not as if the permission granted under Section 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 under Section 33 has to face the scrutiny of the tribunal." [Emphasis applied]

27. In Punjab National Bank (supra), this Court relied upon Automobile Products of India Ltd. v. Rukmaji Bala, and further opined that:-

. "In Automobile Products of India Ltd. v. Rukmaji Bala, this Court was dealing with a similar problem posed by the provisions of Section 22 of Act 48 of 1950, and Section 33 of the Act. Dealing with the effect of these sections this Court held that the object of Section 33 was to protect the workmen against the victimisation by the employer and to ensure the termination of the proceedings in connection with the industrial disputes in a peaceful atmosphere. That being so, all that the tribunal, exercising its jurisdiction under Section 33, is required to do is to grant or withhold the permission, that is to say, either to lift or to maintain the ban. This section does not confer any power on the tribunal to adjudicate upon any other dispute or to impose conditions as a prerequisite for granting the permission asked for by the employer. The same view has been expressed in Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup."

28. Another Three-Judge Bench of this Court in Mysore Steel Works Pvt. Ltd. v. Jitendra Chandra Kar and Others³, held an indepth scrutiny in the scope of jurisdiction vested in an Industrial Tribunal under Section 33(2) (b) of the Act and ruled as follows:-

. "10. The question as to the scope of the power of an Industrial Tribunal in an enquiry under Section 33(2) of the Industrial Disputes Act has by now been considered by this Court in a number of decisions and is no longer in dispute. If the Tribunal comes to the conclusion that the domestic enquiry was not

defective, that is, it was not in violation of the principles of natural justice, it has only to see if there was a prima facie case for dismissal, and whether the employer had come to a bona fide conclusion that the employee was guilty of misconduct. In other words, there was no unfair labour practice and no victimisation. It will then grant its approval. If the Tribunal, on the other hand, finds that the enquiry is defective for any reason, it would have to consider for itself on the evidence adduced before it whether the dismissal was justified. If it comes to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified it would give its approval to the order of dismissal made by the employer in a domestic enquiry. (See *P.H. Kalyani v. Air France* [1964 (2) SCR 104 at 112]) where, therefore the domestic enquiry is conducted in violation of the principles of natural justice evidence must be adduced before the Tribunal by the employer to obtain its approval. Such evidence must be adduced in the manner evidence is normally adduced before the Tribunal, that is, witnesses must be examined and not by merely tendering the evidence laid before the domestic enquiry, unless the parties agree and the tribunal given its assent to such a procedure. (See *K.N. Barmab v. Management of Badla Beta Tea Estate* [CA No. 1017 of 1968, decided on 9th March, 1967]). It is clear, therefore, that the jurisdiction of a tribunal under Section 33(2) is of a limited character. Where the domestic enquiry is not defective by reason of violation of principles of natural justice or its findings being perverse or by reason of any unfair labour practice, the tribunal has only to be satisfied that there is a prima facie case for dismissal. The tribunal in such cases does not sit as an appellate Court and come to its own finding of fact." [Emphasis is ours]

29. The view taken in *Mysore Steel Works Pvt. Ltd.* (supra) was reiterated in *Lalla Ram v. D.C.M. Works Ltd.* 4, where this Court analysed Section 33(2)(b) of the Act and held as follows:-

. "12. The position that emerges from the abovequoted decisions of this Court may be stated thus: In proceedings under Section 33(2) (b) of the 4. (1978) 3 SCC 1 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 Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before 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 decisions of this Court in *Bengal Bhatdee Coal Co. v. Ram Prabesh Singh*[AIR 1964 SC 486 : (1964) 1 SCR 709 : (1963) 1 LLJ 291 : 24 FJR 406] , *Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar* [(1961) 1 LLJ 511 : (1960- 61) 19 FJR 15] , *Hind Construction & Engineering Co. Ltd. v. Their Workmen* [AIR 1965 SC 917 : (1965) 2 SCR 85 : (1965) 1 LLJ 462 : 27 FJR 232] , *Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management* [(1973) 1 SCC 813 : 1973 SCC (L&S) 341 : AIR 1973 SC 1227 : (1973) 3 SCR 587] and *Eastern Electric & Trading Co. v. Baldev*

Lal[(1975) 4 SCC 684 : 1975 SCC (L&S) 382 : 1975 Lab IC 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 or too severe yet 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 form 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 evidence 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.” [Emphasis supplied]

30. This Court in the above cited decisions has, in no uncertain terms, divided the scope of enquiry by the Labour Court/Tribunal while exercising jurisdiction under Section 33(2)(b) in two phases. Firstly, the Labour Court/Tribunal will consider as to whether or not a prima facie case for discharge or dismissal is made out on the basis of the domestic enquiry if such enquiry does not suffer from any defect, namely, it has not been held in violation of principles of natural justice and the conclusion arrived at by the employer is bona fide or that there was no unfair labour practice or victimisation of the workman. This entire exercise has to be undertaken by the Labour Court/Tribunal on examination of the record of enquiry and nothing more. In the event where no defect is detected, the approval must follow. The second stage comes when the Labour Court/Tribunal finds that the domestic enquiry suffers from one or the other legal ailment. In that case, the Labour Court/Tribunal shall permit the parties to adduce their respective evidence and on appraisal thereof the Labour Court/Tribunal shall conclude its enquiry whether the discharge or any other punishment including dismissal was justified. That is the precise ratio – decendi of the decisions of this Court in (i) Punjab National Bank, (ii) Mysore Steel Works Pvt. Ltd. and (iii) Lalla Ram’s cases (supra).

31. A Division Bench of this Court in Cholan Roadways Ltd. v. G. Thirugnanasambandam⁵, also went into the issue of jurisdiction exercisable under Section 33(2)(b) of the Act and relying upon the Martin Burn Ltd. (supra), it has opined as follows:-

. "18. The jurisdiction of the Tribunal while considering an application for grant of approval has succinctly been stated by this Court in *Martin Burn Ltd. v. R.N. Banerjee* [AIR 1958 SC 79 : 1958 SCR 514]. While exercising jurisdiction under Section 33(2)(b) of the Act, the Industrial Tribunal is required to see as to whether a prima facie case has been made out as regards the validity or otherwise of the domestic enquiry held against the delinquent, keeping in view the fact that if the permission or approval is granted, the order of discharge or dismissal which may be passed against the delinquent employee would be liable to be challenged in an appropriate proceeding 5. (2005) 3 SCC 241 before the Industrial Tribunal in terms of the provision of the Industrial Disputes Act." [Emphasis applied] The Court then observed that:

. "19. It is further trite that the standard of proof required in a domestic enquiry vis-a-vis a criminal trial is absolutely different. Whereas in the former "preponderance of probability" would suffice; in the latter, "proof beyond all reasonable doubt" is imperative.

. 20. The Tribunal while exercising its jurisdiction under Section 33(2)(b) of the Industrial Disputes Act was required to bear in mind the aforementioned legal principles. Furthermore, in a case of this nature the probative value of the evidence showing the extensive damages caused to the entire left side of the bus; the fact that the bus first hit the branches of a tamarind tree and then stopped at a distance of 81 ft therefrom even after colliding with another bus coming from the front deserved serious consideration at the hands of the Tribunal. The nature of impact clearly demonstrates that the vehicle was being driven rashly or negligently."

32. The Three-Judge bench decisions of this Court in *Punjab National Bank and Mysore Steel Works Pvt. Ltd.* (supra), as well as the Division Bench judgment in *Lalla Ram* (supra) were unfortunately not cited before this Court in *Cholan Roadways Ltd.* There is yet no conflict of opinion as in *Cholan Roadways Ltd.* (supra) also this Court reiterated the past consistent view that while exercising jurisdiction under Section 33(2)(b) of the Act, the Industrial Tribunal is required to see only whether a prima facie case has been made out as regard to the requirement of domestic enquiry. *Cholan Roadways* nonetheless deals with only 1st phase of the jurisdiction exercisable under Section 33(2)(b) and it falls short to elucidate as to whether, in the event of a defective domestic enquiry, the Labour Court/Tribunal can also the parties to adduce evidence. The 2nd phase of Jurisdiction exercisable under Section 33(2)(b) was not debated in *Cholan Roadways* (supra) apparently for the reason that on facts this Court was satisfied that the delinquent workman was guilty of the misconduct attributed and proved against him in the domestic enquiry. On the other hand, *Mysore Steel Works Pvt. Ltd.* and *Lalla Ram* have gone a step ahead to hold that the Tribunal can permit the parties to adduce evidence if it finds that the domestic enquiry suffers from any defect or was violative of the principles of natural justice or was marred by unfair labour practice, it may then independently examine the evidence led

before it to embark upon the question whether or not the punitive action deserves to be accorded approval.

33. It, thus, stands out that though the Labour Court or the Tribunal while exercising their jurisdiction under Section 33(2)(b) are empowered to permit the parties to lead evidence in respect of the legality and propriety of the domestic enquiry held into the misconduct of a workman, such evidence would be taken into consideration by the Labour Court or the Tribunal only if it is found that the domestic enquiry conducted by the Management on the scale that the standard of proof required therein can be 'preponderance of probability' and not a 'proof beyond all reasonable doubts' suffers from inherent defects or is violative of principles of natural justice. In other words, the Labour Court or the Tribunal cannot without first examining the material led in the domestic enquiry jump to a conclusion and mechanically permit the parties to lead evidence as if it is an essential procedural part of the enquiry to be held under Section 33(2)(b) of the Act.

34. If the awards/orders of the Labour Court or the judgments passed by Learned Single Judge(s) and the Division Benches of the High Court are evaluated on these principles, it appears to us that all of them went partly wrong and their respective orders suffer from one or the other legal infirmity. While the Labour Court and the Learned Single Judge(s) have erroneously presumed that no enquiry can be held under Section 33(2)(b) without asking the parties to lead their evidence, the Learned Division Benches of the High Court have proceeded on the premise that in a prima facie fact finding enquiry under Section 33(2)(b) no evidence can be adduced or considered by the Labour Court except what is on the record of domestic enquiry. Both the views do not go hand in hand with the law laid down by this Court in Punjab National Bank, Mysore Steel Works Pvt. Ltd. and Lalla Ram's cases (supra). The Division Bench of the High Court solely depended upon Martin Burn Ltd. and Cholan Roadways Ltd. (supra) to hold that the scope of enquiry under Section 33(2)(b) being limited to see that prima facie the enquiry is just and proper, the Labour Court is precluded from asking the parties to lead any other evidence. Such a view is not in conformity with the exposition of law in Punjab National Bank, Mysore Steel Works Pvt. Ltd. and Lalla Ram's cases, cited above. The Labour Court did not exceed its jurisdiction in permitting the parties to adduce the evidence before it though it erred in relying upon the same without holding that the enquiry was defective or the punitive action was vitiated for want of bona-fides. The finding on issue No. 1 that the domestic enquiry was held in a proper and fair manner also acquires significance here. Still further, the scope and object of Section 33(2)(b) cannot be expanded to an extent that the very scheme of adjudication of an 'industrial dispute' under Sections 10(1)(c) and (d) read with Section 11A of the Act becomes superfluous."

8. For the aforesaid reasons, the petition stands dismissed. No order as to costs.