

**(2014) 01 OHC CK 0060**

**In the Orissa High Court**

**Case No :** Original Jurisdiction Case No. 14734 of 1998

Essel Mining and Industries Ltd.

APPELLANT

Vs

Barnabas Dang and Another

RESPONDENT

**Date of Decision :** 10-01-2014

**Acts Referred:**

Constitution of India, 1950 — Article 227

Industrial Disputes Act, 1947 — Section 10, 11A

**Citation :** (2015) 120 CLT 1128 : (2014) 141 FLR 244 : (2015) 1 ILR 1016 :  
(2014) 3 LLN 496 : (2014) LLR 583

**Hon'ble Judges :** B.R. Sarangi, J

**Bench :** Single Bench

**Final Decision :** Allowed

## Judgement

Dr. B.R. Sarangi, J.—The Management-petitioner being the first party member before the Court below, has filed this writ application assailing the award dated 29.6.1998 passed by the Presiding Officer, Industrial Tribunal, Rourkela in I.D. Case No. 59/97-C on the ground that the same is contrary to the settled principles of industrial adjudication and the same has been passed in excess of the jurisdiction conferred u/s 11A of the Industrial Disputes Act. The fact of the case in nutshell is that the opposite party Nos. 1 and 2 (opp. party No. 2 has died in the meantime) being the 2nd party workmen were working under the petitioner-management as Choukidars since 1982. In the month of December, 1992 each of them was issued with charge-sheet on the allegation that due to negligence in duty between 10 P.M. of 20.11.1992 and 6 A.M. of 1.12.1992, 4571 pieces of detonators, some copper strips and lightening arrestors were stolen away from the magazine which they were guarding. Subsequently, on enquiry being caused, it was found that on the night of occurrence at 11 P.M. some miscreants caught hold of them and forcibly made them to smell something for which they lost their senses and could not know about the incident. When they intimated this fact to the Manager, he asked them to put their signature/thumb impression on a document written in English, which has not been explained to

them. Being asked by the workmen about the purpose for taking their signature/thumb impression on the document, the Manager told that the matter would be reported to the police to save them. So, on good faith, the opposite party No. 1 put his signature and the deceased-opposite party No. 2 had given his thumb impression on the said document. In course of enquiry; some of the documents had been prepared on which the signature/thumb impression of the workmen-opposite parties had been taken and the said documents were written in Oriya or Hindi, which had not been explained to them. However, on completion of the domestic enquiry, the petitioner-management gave 2nd show-cause notice basing upon which they submitted their explanation separately on 22.3.1993. Without considering the same in proper perspective, the petitioner-management dismissed both the workmen from service with effect from 2.4.1993. As a consequence of dismissal of the 2nd party members from service, industrial dispute was raised before the conciliation authorities and the same having failed, the Government of India in the Ministry of Labour in exercise of powers conferred by clause (d) of subsection (1) and sub-section (2-A) of section 10 of the Industrial Disputes Act, 1947, in short, "the Act", referred the following dispute for adjudication vide letter No. L-26012/5/94IR (Misc.) dated 12.1.1995:

Whether the action of the management of Sarkunda Manganese Mines of M/s. Essel Mining and Industries Ltd. In dismissing Shri Sonika Haro and Sri Barnbas Dang w.e.f. 2.4.1993 is justified?

2. The first party management-petitioner had stated that on the night of occurrence when the workmen were engaged in guarding the magazine of Surkunda Mines because of their negligence some detonators, copper strips and lightening arrestors were stolen away. The management issued charge-sheet against both the workmen separately and in their explanation, it is stated that in the night of occurrence they were awake up to 11 P.M. and thereafter both of them fell asleep. On the next date at about 6 A.M. when they woke up after being called by Kanhu Naik and T.J. Mohanto, they found the door of the magazine in broken state. They also found that some detonators, copper strips and lightening arrestors were missing therefrom. As the explanation submitted by them were not found satisfactory, the management conducted a domestic enquiry to enquire into the charges. On affording due opportunity and by complying the principles of natural justice, the Enquiry Officer submitted his report to the management holding that the charge is established. On receipt of the enquiry report, the management furnished copies to the workmen to facilitate them for making representation, if any. The copies of the enquiry proceedings along with the exhibits were also furnished to them. Thereafter, the workmen submitted their representations. After going through the enquiry report and the representations made by the 2nd party workmen, the Mines Manager of the petitioner-management concurred with the findings of the Enquiry Officer and dismissed the 2nd party workmen from services of the company with effect from 2.4.1993.

3. On the basis of the pleadings of the parties, learned Presiding Officer, Industrial Tribunal, Bhubaneswar framed three issues, which are as follows:

(I) Whether the action of the management in dismissing Sri Sonika Naro and Sri Barnabas Dang w.e.f. 2.4.93 is justified?

(II) If not, to what relief the workmen are entitled?

(III) Whether the domestic enquiry conducted by the management is fair and proper?

4. After going through the evidence available on record, as well as considering the oral and documentary evidence, learned Presiding Officer, Industrial Tribunal came to the finding that natural justice demands that the findings of the enquiry officer must be supported by reasons and on perusal of the enquiry report, it is found that the Enquiry officer has given reasons in the conclusion he arrived at. So, there is no violation of principles of natural justice. It further found that it cannot be said that there is no evidence at all against the 2nd party workmen or evidence is such that no reasonable person could have on its basis come to the conclusion as arrived at by the enquiry officer. The finding is also not otherwise perverse and therefore, the Tribunal held that there is a prima facie case against the 2nd party workmen. After saying so, learned Presiding Officer, Industrial Tribunal has held that the mala fide intention of the employer can be inferred if the punishment inflicted upon the delinquent is shockingly disproportionate to the misconduct and such finding has been arrived at while answering issue No. (III). But while answering issue Nos. I & II, learned Presiding Officer, Industrial Tribunal, has held that it is a recognized principle of jurisprudence that the punishment must be commensurate with the gravity of the offence. In the instant case, the offence committed by the 2nd party workmen is that while on duty they fell asleep after 11 P.M. in the night of occurrence even though as watchman, it was their duty to guard the magazine throughout the night and because of this negligence, the 1st party management sustained loss of Rs. 9539.34 paise. But there is nothing on record available to show that either the 2nd party workmen has committed any misconduct previously. By saying so, learned Presiding Officer, Industrial Tribunal has held that the punishment of dismissal inflicted against them is disproportionately heavy and it would meet the ends of justice, if two increments of each of the 2nd party workmen is stopped with future effect. It is further stated that there is nothing on record showing gainful employment of the 2nd party workmen during their dismissal period, but since more than five years have already elapsed since the termination of services of both the 2nd party workmen, it would meet the ends of justice if 50% of back wages is paid to each of them. Accordingly, the dismissal order passed by the management against the 2nd party workmen has been quashed and direction has been given to the management to reinstate both the 2nd party workmen in service with 50% back wages with stoppage of two increments falling due from the date of termination of service with future effect.

5. Mr. D.P. Nanda, learned Counsel appearing for the management-petitioner strenuously urged that once the Tribunal has come to the finding that there is compliance of principle of natural justice and confirmed the finding arrived at by the Enquiry Officer as the same is not perverse and after holding that there is no mala fide intention of the employer in inflicting the punishment considered to be shockingly disproportionate to the misconduct, the said Tribunal could not have passed an order lessening the punishment to stoppage of two increments with future effect and directed for reinstatement in service with 50% back wages. Therefore, the learned Presiding Officer, Industrial Tribunal has acted in excess of his jurisdiction by substituting the punishment ordered by the authorities in exercise of power u/s 11A of the Industrial Disputes Act. In support of his contention, Mr. Nanda, has relied on a catena of decisions in Depot Manager, APSRTC v. B. Swamy >2008 (2) SCC (L & S) 396, Chairman and Managing Director, v. P.C. Kakkar >2003 (96) FLR 1067 (SC), Director General, R.P.F. and others v. Ch. Sai Babu >2003 (69) FLR 1004 (SC), Bharat Heavy Electricals Ltd. v. M. Chandrasekhar Reddy and others >2005 (104) FLR 806 (SC). The Regional Manager v. Sohan Lal >2004 (103) FLR 425 (SC), U.P. State Road Transport v. Mohan Lal Gupta and others >2000 (87) FLR 231 (SC), Madhya Pradesh Electricity Board v. Jagdish Chandra Sharma >2005 (105) FLR 155 (SC), Bharat Petroleum Corporation v. Barrister Prasad and others >1995 (70) FLR 15 (Bom.), T. Seeralan v. The Presiding Officer >(1986) 2 LLJ 85-Mad., Sivaji M.V. v. Godrej and Boyee Manufacturing >(1999) 1 LLJ 185-Mad., Regional Engg. College v. U. Cheralu >2000 (84) FLR 1001 (SC), Janatha Bazar (South Karnara) v. The Secretary >2000 (87) FLR 498 (SC), and Administrator, Union Territory of Dadra & Nagar Haveli >2010 (125) FLR 880 (SC).

6. Mr. S.C. Samantaray, learned Counsel for the workmen-opposite parties while supporting the findings arrived at by the learned Presiding Officer, Industrial Tribunal stated that the learned Presiding Officer, Industrial Tribunal has acted within the parameters of section 11A of the Act and it can also award lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. In view of such position, the award passed by the learned Industrial Tribunal is well within the purview of law and jurisdiction of the Court and therefore, there is no infirmity or judicial error of the Tribunal warranting interference of this Court under Article 227 of the Constitution of India. In support of his contention, he has relied upon the decisions in B.C. Chaturvedi v. Union of India and others >1996 (72) FLR 316 (SC), Colour-Chem Limited Vs. A.L. Alaspurkar and Others, , wherein the judgments in Hind Construction and Engineering Co. Ltd. v. Their Workmen >1965 (10) FLR 165 (SC), Bharat Iron Works v. Balubhai Patel and others >1976 (32) FLR 72 (SC), and Kailash Nath Gupta v. Enquiry Officer, Allahabad Bank >2003 (97) FLR 556 (SC), have been referred.

7. Now it is to be considered whether the Presiding Officer, Industrial Tribunal is justified in passing award by giving lesser punishment in exercise of powers conferred u/s 11A of the Act?

8. Section 11A of the Act reads as follows:

Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman - Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances on the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

On perusal of the aforesaid provision of the Act, it is clear that where an industrial dispute relating to discharge or dismissal of a workman has been referred to the Labour Court, Tribunal or National Tribunal for adjudication and in course of adjudication of the proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified, it may by its award set aside the order of discharge or dismissal and direct for reinstatement of the workman in such terms and conditions, if any, as it thinks fit or to give such other relief to the workman including the award of lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Therefore, power has been vested with the Industrial Tribunal to award any lesser punishment in lieu of discharge or dismissal in view of the provisions contained in section 11A of the Act. The said provision also makes it clear that if the discharge or dismissal was not justified, the Industrial Tribunal can by its award set aside the order of discharge or dismissal on such terms and conditions as it thinks fit.

9. Applying the above analogy to the present context, the Presiding Officer, Industrial Tribunal has come to a definite finding on the basis of the materials available on record before him that while conducting enquiry, the Enquiry Officer has arrived at the conclusion that there is no violation of principles of natural justice. At the same time his finding is not otherwise perverse and also held that there is prima facie case against the 2nd party workmen. While saying so, learned Presiding Officer, Industrial Tribunal has categorically held that in the case in hand, the punishment inflicted upon the 2nd party workmen can be said as shockingly disproportionate to their misconduct. Having held so, learned Presiding Officer, Industrial Tribunal could not have modified the sentence of imposition of punishment inasmuch as no reasonable explanation has been given while answering issue Nos. 1 and 2 in paragraph 15 of the award in awarding lesser punishment save and except that the loss has been caused to the 1st party management amounting to Rs. 9539.34 paise. At the same time, the

learned Presiding Officer, Industrial Tribunal has categorically stated that while the opposite party workmen were on duty they went asleep after 11 P.M. on the night of occurrence even though as watchmen it was their duty to guard the magazine throughout the night. This being the finding of the learned Presiding Officer, Industrial Tribunal, awarding the lesser punishment in exercise of the power u/s 11A of the Act appears that no cogent reason has been assigned when the Tribunal has admitted on the basis of the materials available before him it come to a definite finding that there is compliance of principle of natural justice inasmuch as there is no error apparent on the face of the record while conducting enquiry, more so, the duty cast on the Choukidar has not been discharged by the opposite party workmen. In one hand, if the Presiding Officer held that there is compliance of the provisions of law, on the other hand in a capricious manner he has awarded lesser punishment which is not permissible in law. The power of section 11A is left to the Tribunal to be exercised with its discretion, which is based upon reasons and the purpose and object of the said provision is to ensure that there is no victimization or unfair treatment to an employee in the hands of the employer and to safeguard against dismissals on flimsy or simple misconduct. In the case of Depot Manager, APSRTC (supra), the Apex Court has held as follows:

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The mere fact that this was the first occasion when the respondent was caught is no ground to hold that it was accidental. What weighed with the learned Judges was the fact that the respondent had not been found to be involved in such irregularities earlier. In our view that is not very material in the facts of this case. A conductor of a bus enjoys the faith reposed in him. He accepts the responsibility of honestly collecting fares from the passengers after issuing proper tickets and is obliged to account for the money so collected. If conductors were to be dishonest in the performance of their duties, it would cause serious pecuniary loss to the employer.

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If he is dishonest in the performance of his duties, he is guilty of serious misconduct and the gravity of the misconduct cannot be minimized by the fact that he was not earlier caught indulging in such dishonest conduct. There is no guarantee that he had not acted dishonestly in the past as well which went undetected. Even one act of dishonesty amounting to breach of faith may invite serious punishment.

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10. In Chairman & Managing Director (supra), the Apex Court has observed as follows:

The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or

suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. >(1948) 1 KB 223, the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put difference unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to certain litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

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Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Pattnaik >1996 (73) FLR 1252 (SC), it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct.

11. In Director General, R.P.F. (supra), the Apex Court has also come to a finding, which reads thus:

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Merely because it was felt that the punishment imposed was extreme was not enough to disturb or modify the punishment imposed on a delinquent officer.

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Normally, the punishment imposed by disciplinary authority should not be disturbed by High Court or Tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed as grossly or shockingly disproportionate, after examining all the relevant factors including nature of charges proved against, the past conduct, penalty imposed earlier, the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of

and discipline required to be maintained, and the department/establishment in which the concerned delinquent person works.

12. In *Bharat Heavy Electricals Ltd. (supra)*, the Apex Court referring to *Air India Corporation, Bombay v. V.A. Rebellow and another* >1972 (25) FLR 319 (SC), has held that once bona fide loss of confidence is affirmed, the impugned order must be considered to be immune from challenge. In *Francis Klein and Company Pvt. Ltd. v. Their Workmen and another* >1971 (23) FLR 241 (SC), the Apex Court has held that when an employer loses confidence in his employee, particularly in respect of a person who is discharging an office of trust and confidence, there can be no justification for directing his reinstatement. So far as exercise of power u/s 11A is concerned, referring to the case of the *Workmen of Firestone Tyre and Rubber Company Ltd. v. The Management and others* >1973 (26) FLR 359 (SC), the Apex Court has held that once the misconduct is proved, the Tribunal has to sustain the order of punishment unless it was harsh indicating victimization. If a proper enquiry is conducted by an employer and a correct finding is arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusion arrived at by the management, will have to give every cogent reasons for not accepting the view of the employer.

13. The scope of judicial review in disciplinary matters has been considered by the Apex Court in *B.C. Chaturvedi (supra)*, wherein it is held that the disciplinary authority and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare case impose appropriate punishment with cogent reasons in support thereof.

14. Mr. S.C. Samantaray, learned Counsel for the opposite parties has also relied upon the very same judgment in *B.C. Chaturvedi (supra)*, and stated that the power u/s 11A is available to be exercised even if there is no victimization or taking recourse to unfair labour practice. Therefore, the Tribunal is empowered u/s 11A of the Industrial Disputes Act to grant lesser punishment and also stated that there is no infirmity or jurisdictional error of the Tribunal warranting interference under Article 227 of the Constitution of India and that the Tribunal is well within its competence and jurisdiction to award lesser punishment. As regards taking into account past misconduct, Mr. Samantaray has relied upon the judgment in *Chem Limited (supra)* wherein it is stated that even on the basis that it was a major misconduct which was alleged and proved, looking to the past record of the service of the delinquents, no reasonable employer could have

imposed punishment of dismissal. Referring to the case of Kailash Nath Gupta (supra), it is stated that there was no occasion in the long past service indicating either irregularity or misconduct of the 2nd party workmen except the charges which were the subject-matter of their removal from service and further stated that since the discretion exercised by the Tribunal is based on cogent reasons, this Court cannot exercise the powers under Article 227 of the Constitution of India.

15. In view of the judgments cited above, while considering judicial review, it is not the duty of the Court or Tribunal to substitute its views on penalty and impose some other penalty. In the event the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court or Tribunal, it would appropriately mould the relief by sending the matter back to the competent authority to reconsider the penalty imposed or to shorten the litigation, it may in exceptional and rare cases impose appropriate punishment with cogent reasons in support thereof. Section 11A cannot be considered as conferring an arbitrary power on the Industrial Tribunal or the Labour Court. The power u/s 11A of the Act has to be exercised judicially and the Industrial Tribunal or the Labour Court is expected to interfere with the decision of the management u/s 11A of the Act only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. The Industrial Tribunal or the Labour Court has to give reasons for its decision.

16. In view of the aforesaid facts and circumstances, in my considered opinion, the judgments referred to by Mr. Nanda, learned Counsel for the petitioner are quite applicable with full force to the facts of the present case. Learned Presiding Officer, Industrial Tribunal having come to the conclusion that there is compliance of principle of natural justice and there is no procedural irregularities in finding the workmen guilty inasmuch as the duty assigned to the workmen being Choukidar and they fell asleep during their working hours, which resulted in loss to the management to the tune of Rs. 9539.34 paise due to the negligence on the part of the workmen. Therefore, in absence of any cogent reason while answering issue Nos. I and II, the Tribunal has committed error in lessening the punishment by exercising the power u/s 11A of the Act, which is not permissible under law. For the reasons stated above, the writ application is allowed and the impugned award to the extent issuing direction for reinstatement of the workmen with 50% back wages is set aside and the order of dismissal of the workmen made by the management pursuant to the enquiry is upheld. No cost.