

(1994) 02 BOM CK 0049
In the Bombay High Court

G.K. Sengupta

APPELLANT

Vs

Hindustan Construction Co. Ltd. and Another

RESPONDENT

Date of Decision : 10-02-1994

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(2)

Citation : (1994) 4 BomCR 230 : (1994) 68 FLR 1117

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Judgement

B.P. Saraf, J.—By this writ petition, the petitioner workman has challenged the order of the Industrial Tribunal, Bombay dated 9 July, 1991 u/s 33(2)(b) of the Industrial Disputes Act, 1947 (Act) granting approval to the order of discharge of the petitioner G. K. Sengupta from service. The main ground of challenge is that the said order was passed without giving any opportunity of hearing to the petitioner on the merits of the case. The decision will depend on proper appreciation of the nature of the power of the Labour Court u/s 33(2)(b) of the Act and the scope and ambit of the enquiry for that purpose.

2. The petitioner was employed in the establishment of the respondent company as a Junior Clerk on 1 June, 1967. He was promoted as Senior Clerk in 1982. He was working in the Equipment Division. On 21 November 1985 the petitioner was served with a show cause notice. In the said notice it was alleged that on 11 November, 1985 at about 11.30 A.M. the petitioner all of a sudden shouted at the entrance of the office and used abusive and derogatory language against the security personnel and the executive of the company. It was alleged that the behaviour of the petitioner was indecent and that he was trying to whip up regional feelings. It was stated that the petitioner was later pacified by another workman of the company. The petitioner submitted his explanation on 21 November, 1985. The company was not satisfied with the explanation. Hence a chargesheet was issued against the petitioner. The following charges were levelled against him :

(i) Disorderly or indecent behaviour and use of abusive language while on duty at the place of work; (ii) Commission of acts subversive of good behaviour or of the discipline of the establishment. The petitioner submitted his witness explanation. An enquiry was conducted against the petitioner on the above charges and the petitioner was asked to appear in the enquiry. The petitioner, however, refused to attend the enquiry, which according to him, was a tailor-made enquiry. In this letter, he stated : "You are welcome to proceed ex parte. I shall have a chance to refer your findings to the Supreme Court (Managing Director) for review". The enquiry officer thereafter conducted the enquiry ex parte and submitted his report and finding to the company on 14 January 1986. On perusal of the report, the company decided to discharge the petitioner from service. An application was filed before the Industrial Tribunal, Maharashtra for obtaining approval to the discharge of the petitioner as required by Section 33(2)(b) of the Act.

3. The petitioner filed written statement and resisted the application for approval on various grounds. He denied the charges levelled against him and narrated his version of the incident. He challenged the authority of the A. N. N. Swamy to discharge him as also to file the application for approval before the Tribunal. The punishment of discharge was challenged on the ground that it was vindictive, mala fide and extremely disproportionate. The petitioner also filed an application before the Tribunal on 22 June, 1987 alleging perjury against Sri A. N. N. Swamy which was registered as a miscellaneous application. A notice was issued to Sri A. N. N. Swamy in the above application. In reply, Sri Swamy submitted his explanation. The Tribunal fixed hearing of the above application. Written arguments in respect of the miscellaneous application dated 22 June 1987 were submitted by the parties. The Tribunal considered the rival contentions and by its order dated 9 July, 1991 dismissed the miscellaneous application of the petitioner and held that it was not a fit case for taking action against Sri A. N. N. Swamy for the alleged perjury. The Tribunal by another order of the very same date also allowed the application of the company for approval and granted approval to the order of discharge of the petitioner u/s 33(2)(b) of the Act.

4. It is the second order of the Industrial Tribunal granting approval to the order of discharge of the petitioner u/s 33(2)(b) of the Act which has been challenged by the employee in this writ petition.

5. According to the counsel for the petitioner the Tribunal committed manifest error of law in deciding the application for approval u/s 33(2)(b) of the Act simultaneously with the application of the petitioner alleging perjury without hearing the petitioner on the various grounds set out in his written statement. The petitioner submits that at that stage the Tribunal was dealing only with the miscellaneous application of the petitioner alleging perjury against the General Manager of the respondent company and date was fixed for hearing the same. It is in that context that written arguments submitted by both the parties were confined only to the allegation of perjury. According to the learned counsel, after dismissal of the application of the petitioner alleging perjury, it was incumbent on

the part of the Tribunal to proceed with the hearing of the application of the company for approval u/s 33(2)(b) of the Act. But instead of doing so, it straightway passed final order on the application for approval to the order of the discharge ex parte. Such action of the Tribunal, according to the petitioner, being most arbitrary and violative of the principles of natural justice, the impugned order of approval is illegal and void and liable to be set aside.

6. Learned counsel for the respondent employer, on the other hand, submits that there was no necessity of hearing as contended by counsel for the petitioner. According to him, no hearing is necessary in the matter of grant of approval u/s 33(2)(b) of the Act to an order of discharge. In the instant case, according to the counsel, the employee had filed his written statement in the application for approval filed by the employer which was duly considered by the Tribunal. No further hearing was necessary. In support of the above submission reliance is sought to be placed on the decisions of the Supreme Court in *Central Bank of India Ltd. Vs. Prakash Chand Jain*, and *Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another*, .

7. I have carefully considered the rival submissions. Section 33(2) of the Act, so far as relevant, reads :

"S. 33(2) During the pendency of any such proceedings in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman, -

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for none month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer".

There is no dispute in regard to the well-settled legal position that if approval is not granted the order of dismissal or discharge shall not be operative and the employee concerned shall be deemed to be in service. The only question that falls for determination is what is the nature of the power of the Court u/s 33(2) (b) of the Act and the scope and ambit of the enquiry for that purpose. The Supreme Court 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*, explained the jurisdiction and functions of the tribunal u/s 33(2)(b) of the Act. It was held that the settled position in law is that permission should

be refused If the Tribunal is satisfied that the management's action is not bona fide or that the principles of natural justice have been violated or that the material on the basis of which the management came to a certain conclusion could not justify any reasonable person in coming to such a conclusion. It was observed :

"In every case 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".

The duty of the authority dealing with an application for approval u/s 33(2)(b) of the Act was explained by the Supreme Court in *The Lord Krishna Textile Mills Vs. Its Workmen*, , in the following words :

"In view of the limited nature and extend of the enquiry permissible u/s 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as required by the standing order ? Have the wages for the month been paid as required by the proviso ? and, has an application been made as prescribed by the proviso ?"

The Supreme Court considered the above decisions in *Central Bank of India Ltd. Vs. Prakash Chand Jain*, and observed :

"These decisions make it clear that, when an Industrial Tribunal is asked to give its approval to an order of dismissal u/s 33(2)(b) of the Act, it can disregard the findings given by the findings are perverse. The test of perversity that is indicated in these cases is that the findings may not be supported by any legal evidence at all".

8. On a perusal of the above decisions it is apparent that though the nature and extend of the enquiry for the purpose of approval u/s 33(2)(b) is limited, it is an important safeguard to the workman against prima-facie arbitrary and unreasonable orders of dismissal or discharge from service. That being so, the Tribunal has to consider the question of approval even within the limited scope of enquiry most judiciously. It has to follow the principles of natural justice and give reasonable opportunity of hearing to the workman and the employer. It cannot decide the application for approval without hearing the parties.

9. It is well settled that the Tribunal should refuse to accord approval u/s 33(2)(b) of the Act to an order of dismissal or discharge if it appears to it that the employer has acted without any evidence or on a view of facts which could not

be reasonably entertained. It may also refuse to accord approval if the facts found are such that no person acting judicially and properly instructed as to the relevant law could have arrived at a conclusion that the concerned employee deserves dismissal or discharge. Some of the circumstances which might justify refusal to grant approval u/s 33(2)(b) of the Act are :

- (1) If the order of the discharge or dismissal is perverse, not rationally possible or entirely unreasonable;
- (2) If there is no evidence in support of the finding;
- (3) If the finding is inconsistent with the evidence;
- (4) If it rests on conjectures, surmises and suspicion;
- (5) If no person properly instructed as to the relevant law acting judiciously could have come to the conclusion that the concerned employee deserves the punishment of dismissal or discharge.

If any of the above circumstances exist, the Tribunal should refuse to accord approval to the order of dismissal or discharge.

10. The decision of the tribunal u/s 33(2)(b) of the Act to accord approval to the order of dismissal affects the right of the employee to continue in employment. In such a case the employee is entitled to a fair hearing and to an opportunity to satisfy the Tribunal that no approval should be accorded to the order of dismissal. Failure to give a reasonable opportunity of hearing to the person affected would render the decision illegal and void. The nature of reasonable opportunity of hearing will, however, vary according to the nature of the powers and the circumstances of each case.

11. In the instant case the parties were not heard. No opportunity was given to the employee to show that the finding of the domestic enquiry was not supported by any legal material and hence perverse. The order was passed merely on consideration of the application of the employer for approval and the written statement of the employee. The question is whether that can be done. The counsel for the respondent management does not find any infirmity or illegality in doing so. According to him, opportunity to file a written statement amounts to adequate opportunity in such a case and the order passed on consideration of the written statement cannot be held to be violative of principles of natural justice.

12. I have considered the above submission of the counsel for the employer. I am not at all impressed by the same because it completely loses sight of the purpose and contents of a written statement. A written statement is not "written submission". It is only the pleading of the respondent. Under Order VI rule 2 of the C. P. C. every pleading shall "contain and contain only" a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but "not the evidence by which they are to be

proved". The intention of a written statement is to give the other side intimation of the case of the opposite party so that it may be met and to enable the Court to determine what is really at issue between the parties. The inferences of law to be drawn from the facts pleaded need not be set out in the pleadings. Pleading is the first stage in the litigation to be followed by proper hearing. Evidence, legal inferences etc., form part of hearing. It will, therefore, be patently wrong to equate the opportunity to file a written statement with opportunity of hearing. The purpose, scope and ambit of hearing is quite different from that of written statement. It is only in course of hearing that a party can substantiate his pleading and satisfy the Court about the legal inferences that should be drawn in a given case. In a written statement one can plead that a particular finding is perverse. But the evidence and material in support of the above pleading can be placed only at the time of hearing.

13. The petitioner employee in the instant case seriously opposed the application for approval of dismissal u/s 33(2)(b) of the Act. He filled his written statement running into 10 typed pages. He denied all the allegations of the employer and challenged the enquiry against him as illegal, unlawful and void. He pleaded that the findings of the enquiry officer were perverse. All these are relevant considerations which the Tribunal has to take into account while considering an application for approval to an order of dismissal or discharge. The legal position in regard to the nature of jurisdiction of the Industrial tribunal in the matter of according approval to an order of dismissal is no more *res integra*. It was summed up by the Supreme Court in *Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another*, thus :

"In proceedings under S. 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 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. Vs. Ram Prabesh Singh and Others*, , *Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar*, 1961) I LLJ 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 *Management of Eastern Electric and Trading Co. Vs. Baldev Lal*, 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 of 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 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".

Apparently, determination of the above issues is possible only a proper appreciation of all the facts and circumstances of the case in the correct perspective. That is not possible in a summary enquiry conducted ex-parte without giving an opportunity of hearing to the concerned parties. An employee might point out the relevant parts of the evidence and/or documents to show how the finding of the enquiry office is perverse. It is well-nigh impossible for him to do so by setting out facts in the written statement. In fact that is what a party is specifically prohibited to do in the pleadings by rule 2 of order VI which provides that pleading should contain and "contain only" a statement in a concise form of the material facts on which a party pleading relies in support of his claim or defence but "not the evidence by which they are to be proved". Thus a written statement does not contain the evidence in support of perversity of a finding. That is possible only by reading the evidence on the basis of which such a finding has been arrived at. It is on perusal of such evidence, documents etc., that the Tribunal can come to a conclusion whether a particular finding is perverse or not. That the party pleading perversity is expected to do in course of hearing. I find it difficult to accept the contention of counsel for the employer that order of the Tribunal passed on consideration of the claim and written statement without hearing the parties is a proper and legal order. In my opinion, before taking a decision on the application u/s 33(2)(b), the Tribunal is obliged to give a reasonable opportunity of hearing to the parties concerned and only after such a hearing, it can pass appropriate order according or refusing to accord approval.

14. I am, therefore, of the clear opinion that the impugned order of approval passed in this case merely on the basis of the application of the employer and written statement of the employee, without giving any opportunity of hearing to the parties concerned, is violative of principles of natural justice and cannot be sustained. The same is, therefore, set aside. The Tribunal is directed to give an opportunity of hearing to both the parties and to decide the matter afresh. As the matter is very old. The Tribunal is directed to dispose of the same as expeditiously as possible at any rate within four months from today. The Registrar to send this writ forthwith to the Industrial Tribunal concerned.

15. Certified copy expedited.