

(1980) 10 KL CK 0007
In the High Court Of Kerala
Case No : O.P. No. 631 of 1978H

Govindan Unnithan

APPELLANT

Vs

The Industrial Tribunal and Others

RESPONDENT

Date of Decision : 15-10-1980

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 33, 33(1), 35

Citation : (1980) 10 KL CK 0007

Hon'ble Judges : Kochu Thommen, J

Bench : Single Bench

Advocate : M.M. Cherian and Mathew Zacharia, for the Appellant; Government Pleader for Respondent Nos. 1 and 2 and Radhakrishnan, for the Respondent

Judgement

Kochu Thommen, J.—The Petitioner was an employee of the 3rd Respondent-co-operative society. On the basis of a charge that the Petitioner misappropriated a sum of Rs. 3,459-74 he was dismissed by the society by its order, dated 7th October 1971. The dispute which arose as a result of the dismissal was referred u/s 10(1) of the Industrial Disputes Act, 1947, to the Industrial Tribunal, Alleppey. The Tribunal by its award, dated 24th September 1977 in I.D. No. 2 of 1975 (Ext. P-1) found that the management did not conduct a domestic enquiry before passing the order of dismissal. On the basis of the evidence adduced before it by both sides, the Tribunal however concluded that the charge was proved and the order of dismissal was justified. The Tribunal did not pronounce upon the right of the employee to receive back wages for the period between the date of the order of dismissal and the date of the award-The Petitioner challenges the award.

2. The Petitioner's counsel Shri M.M. Cherian submits firstly that the award is not reasonably supported by evidence. Secondly he says that the Tribunal ought to have posted the case for evidence on the merits of the charge after it came to a finding on the preliminary issue regarding the validity of the domestic enquiry. The composite order made by the Tribunal has resulted in denial of natural

justice to the employee. Thirdly he submits that the award is vitiated by reason of the fact that the Tribunal, having found that no domestic enquiry was held before passing the order of dismissal, relied upon the evidence adduced by the management on the merits of the case, although the management had not specifically asked the Tribunal for permission to adduce such evidence. This, counsel says, was wrong in the light of the decision of the Supreme Court in *Shankar Chakravarti v. Britannia Biscuit Co.* 1979 (2) LL.J. 194. Fourthly counsel contends that the Tribunal ought to have awarded back wages for the period between the date of the order of dismissal i.e. 7th October 1971 and the date of the award i.e. 24th September 1977, in view of the fact that, as found by the Tribunal, the order of dismissal was not preceded by an enquiry.

3. I see no merit in the contention that the award is not reasonably based on evidence. On the basis of oral as well as documentary evidence, the Tribunal came to the conclusion that a sum of Rs. 3,459-74 was not accounted for by the employee and that he had misappropriated the said amount. This finding of fact which is based on cogent evidence is not liable to be interfered within the present proceedings.

4. The management admittedly did not hold an oral enquiry. There was no opportunity for the employee to cross-examine witnesses or to adduce evidence on his behalf. All that the management did was to call upon the employee to controvert certain allegations without giving him an opportunity to be heard orally. The Tribunal therefore found that no enquiry was conducted by the management.

5. Nevertheless, the management placed before the Tribunal evidence at length on the merits of the charge. M.Ws. 1 to 3 testified on the side of the management and produced Exts. M-1 to M-14. These witnesses were cross-examined at length on merits on behalf of the employee. He himself testified as W.W.-1 and produced Exts. W. 1 to W. 3. The entire case was thus placed before the Tribunal. Neither the management nor the employee can therefore legitimately complain that full opportunity was not given by the Tribunal to urge the respective contentions on the merits of the case. The question is whether the Tribunal was in the circumstances justified in making a composite award by which it was found that there was no domestic enquiry, but the order of dismissal was justified.

6. In *Cherpu Service Co-operative Bank Ltd. v. Industrial Tribunal* ILR 1979 (2) Ker 6, Kerala the Tribunal made a composite award holding that the domestic enquiry was invalid and the charges against the employees were not proved. That award was challenged by the management on the ground that the Tribunal did not observe the principle laid down by the Supreme Court in *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, in so far as it failed to give an opportunity to the management to lead further evidence before it after the Tribunal came to a finding that the domestic enquiry was invalid. In that case both sides had, as in the present case, adduced evidence before the Tribunal etc

the preliminary as well as the main issues. In those circumstances this Court rejected the management's contention that a composite award was not justified and that they ought to have been allowed an opportunity to adduce further evidence. This Court stated:

9. ...Is such a contention justified in the light of what is stated by the Supreme Court in *Cooper Engineering Limited v. P.P. Mundhe* 1975 (2) LL.J. 379, I do not think so. What the Supreme Court stated in that case was that there was no duty on the part of the management at the commencement of proceedings before the Tribunal to lead evidence on the merits, for it was not easy for a party to decide at that stage whether evidence was to be let in on the merits, and it could not visualise what the decision of the Tribunal would be on the preliminary question.... The Supreme Court did not, however, say that even in cases where the management had full opportunity to lead evidence on the merits before the Tribunal came to a finding on the preliminary issue, they could still insist upon a further opportunity to adduce evidence on the merits. Any such contention was not raised before the Supreme Court. And I have no doubt that any such interpretation is not warranted by the rule in *Cooper Engineering Ltd.*

The same reasoning holds good on the facts of the present case. In my view the Tribunal was justified in the circumstances of this case to make a composite order.

7. The question however is, whether in the light of the recent decision of the Supreme Court in *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another*, , can it be said that the Tribunal ought not to have relied upon evidence adduced by the management on the merits of the charges without specifically seeking the permission of the Tribunal to do so. Does the observation of the Supreme Court warrant any such extreme view in my opinion, No All that the Supreme Court stated in that case was a reaffirmation of the views expressed in *State Bank of India Vs. R.K. Jain and Others*, , *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, and similar cases. In *Delhi Cloth and General Mills Co.* (Supra) the Supreme Court had stated:

If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the tendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(emphasis supplied)

It is open to the employer to adduce evidence on the main issues touching the merits of the charges simultaneously with that on the preliminary question concerning the validity of the domestic enquiry or he may ask the Tribunal for an opportunity to adduce evidence on merits at a later stage during the pendency of the proceedings. Re-affirming that principle, this is what the Court says in

Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, , in paragraph 31:

But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the employer to adduce additional evidence to substantiate the charges.

(emphasis supplied)

Stating that the Tribunal had no responsibility to advise the parties as regards their rights, the Court stated that all that was laid down in *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, was to indicate the stage at which an opportunity should be given to the management provided the management asked for it. The management had to seek the opportunity by a proper plea and by leading evidence soon after the adverse decision on the preliminary question as to the validity of the domestic enquiry was recorded, and in any case before the proceedings came to an end. The question which was considered by the Supreme Court was whether the Tribunal had any obligation to suo motu call upon the management to lead evidence. The Court said, "no". If the management did not avail itself of the opportunity to lead evidence at the appropriate stage by making a request for the same, it could not later on complain that due opportunity was not given to it by the Tribunal. The Supreme Court did not however say that evidence placed before the Tribunal by the management on the merits of the charges, without specifically seeking and obtaining the permission of the Tribunal to do so, had to be disregarded by it. Any contention to that effect is, in my view, an attempt to read into the decision more than what was stated by the Court. In the circumstances this extreme contention has no merit. In my view, the principle in *Cherpu Service Co-operative Bank Ltd. v. Industrial Tribunal* ILR 1979 2 KeR, holds good in such situations.

8. Now I come to the more important contention as regards the back wages claimed for the period between the date of the order of dismissal and the date of the award. As I stated earlier, there was no domestic enquiry to support the order of dismissal. But the society succeeded in justifying the order before the Tribunal. The question is whether such order of dismissal is effective from the date of that order or only from the date of the award. In other words does the award of the Tribunal relate back to the date of the order of the management.

9. In *Sasa Musa Sugar works (P) Ltd. v. Shobrati Khan* AIR 1959 S.C. 1756, the Supreme Court stated:

...as the management held no inquiry after suspending the workmen and proceedings u/s 35 were practically converted into the inquiry which normally the management should have held before applying to the Industries Tribunal, the management it is bound to pay the wages of the workman till a case for dismissal was made out in the proceedings u/s 33.

(emphasis supplied)

Referring to the above observation the Supreme Court stated in P.H. Kalyani Vs. Air France Calcutta, :

We are of opinion that those observations cannot be taken advantage of by the Appellant. That was a case where an application had been made u/s 33(1) of the Act for permission to dismiss the employees and such permission was asked for though no inquiry whatsoever had been held by the employer and no decision taken that the employees be dismissed. It was in those circumstances that a case for dismissal was made out only in the proceedings u/s 33(1) and therefore the employees were held entitled to their wages till the decision of the application u/s 33. The matter would have been different if in that case an enquiry had been held and the employer had come to the conclusion that dismissal was the proper punishment and then had applied u/s 33(1) for the permission to dismiss. In those circumstances the permission would have related back to the date when the employer came to the conclusion after an enquiry that dismissal was the proper punishment and had applied for removal of the ban by an application u/s 33(1).

(emphasis supplied)

The Court further observed:

The present is a case where the employer has held an inquiry though it was defective and has passed an order of dismissal and seeks approval of that order. If the enquiry is not defective, the Labor Court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter on coming to the conclusion that the employer had bona fide come to the conclusion that the employee was guilty i.e., there was no unfair labour practice and no victimisation, the Labour Court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made.

(emphasis supplied)

The effect of the observations in Sasa Musa Sugar Works (P) Ltd. Vs. Shobrati Khan and Others, and P.H. Kalyani v. Air France (J) (supra) is that where no domestic enquiry was conducted and no punishment was imposed by the management the order of the Tribunal u/s 33 granting permission to the management to dismiss the workman was effective only from the date of the Tribunal's order, and the management was bound to pay the workman his wages till then; whereas, if a domestic enquiry was held, or the enquiry held was defective, and an order of dismissal was passed by the management, the

subsequent approval granted by the Tribunal would relate back to the date of the management's order of dismissal. Although these observations were made in the context of proceedings u/s 33 of the Industrial Disputes Act, they were held to be applicable to proceedings similar to those initiated on a reference u/s 10(1) as well. Referring to P.H. Kalyani Vs. Air France Calcutta, the Supreme Court in D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others, , stated as follows:

These observations directly cover the case before us because though the labor court, in the instant case, found that the injury was defective as it infringed the principles of natural justice, it came to the conclusion after considering the evidence adduced before it, that the dismissal was justified. The award of the labour court must therefore relate back to the date when the order of dismissal was passed on the termination of the domestic inquiry.

(Emphasis supplied)

This was a case which arose u/s 31 of the Madhya Pradesh Industrial Relations Act, which, in substance, related to proceedings similar to those initiated on a reference u/s 10(1) of the Industrial Disputes Act, 1947, insofar as the former provision enabled the workmen to approach the Labour Court by means of an application challenging the validity of the domestic enquiry and the order of punishment and praying for reinstatement with back wages.

10. The above observation of the Supreme Court in D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others, is relied on by the society's counsel Sri Radhakrishnan in his extremely well prepared and persuasive arguments. Counsel says that, assuming no proper enquiry was conducted by the management, an enquiry was in fact conducted, although it is now found to be defective for the reason that the employee was not orally-heard and was thus denied an opportunity to cross-examine the Management's witnesses or examine witnesses on his behalf. That, counsel says, was a failure to observe the rules of natural justice which amounted to a defect. Absence of an oral hearing, counsel says, is no more than a defect, perhaps a serious defect, amounting to failure of natural justice and thus vitiating the enquiry; but not so serious as to make the enquiry absolutely void in the sense of a nullity. Such breach of natural justice, counsel points out, did not make the enquiry non est in D.C. Roy (supra) and the award in that case was held to relate back to the date of the order of dismissal. So it must, according to counsel, on the facts of the present case, which, he says, comes within the ratio of D.C. Roy. The argument is on the face of it indeed interesting and ingenious, but on deeper consideration it is, in my view, unsound. The present is not a case where an enquiry was vitiated by reason of a fundamental error of procedure, such as failure of natural justice. Here there was no enquiry at all in the eye of industrial law; for, the only enquiry that can validly lead to an order of dismissal of workmen is an oral enquiry. No such enquiry was held by the society. As stated by the Supreme Court on a number of occasions (See Phulbari Tea Estate Vs. Its Workmen, and

cases reported in 1963 11 LL.J. 392, 396 and 452) a domestic enquiry) preceding an order of dismissal must be based on an oral hearing at which the workmen should have sufficient opportunity to controvert the allegations by cross-examining witnesses who testified on behalf of the management and by examining his own witnesses. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. Where the workmen had no opportunity to be heard orally and cross-examine witnesses who testified against him or examine his own witnesses, can it be said that the order of dismissal was preceded by a proceeding which could be characterised as a domestic enquiry? I think not. It is not a question of the proceeding said to have been conducted by the management being a defective enquiry, but it was a proceeding that was no enquiry at all as understood in industrial law. Whatever be the place of an enquiry other wise than by an oral hearing in administrative law (See *Abraham v. Additional Collector of Customs* 1976 KLT 660, the only enquiry that is known to industrial law for the purpose of making an order of dismissal or discharge is an enquiry which affords the workmen full opportunity of being heard orally. Any other proceeding is non est or at best a mere pretence of an enquiry.

11. I am not unmindful of the distinction in administrative law between void and avoidable orders; nor of the fact that an order made in violation of natural justice is void, *Anosmatic Ltd. v. Foreign Compensation Commission* 1969 (2) A.C. 147 and that such order although void is ordinarily a shade less than absolutely void and therefore not a nullity and remains for many purposes effective and operative until it is challenged and its invalidity is declared by a competent body or court [*Calvin v. Carr* 1979 (2) A.E.R. 144: see also *Indo Marine Agencies v. Sales Tax Officer Bombay* ILR 1980(1) Ker 506 and the cases cited therein]. Void and voidable are concepts "borrowed from the language of contract or status; and are not easily fitted to the requirements of administrative law". Such language, though sometimes useful, is likely to mislead "in so far as it may be supposed to present a court with the necessity of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments": per Lord Hailsham of St. Marylebone L.C, in *London and Clydeside Estates Ltd. v. Aberdeen District Council* (1980) 1 W.L.R. 182, 189, 190, Lord Keith of Kinkel says that the use of these expressions "which have a recognised significance and importance in certain fields of the law of contract" is to be avoided in the field of administrative law "as inappropriate and apt to confuse": *ibid* at p. 203. [See also *Indo Marine Agencies* (supra) and the cases cited therein on the point, and, *Mohammed Haji v. Unni Moyi* 1976 K.L.T 106, Speaking of the legal consequence of non-compliance with statutory requirements, Lord Hailsham of St. Marylebone L.C. continues:

It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and

flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequence upon himself in such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedures simply as a shield or defense without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory", "directory", "void", "voidable", "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to lit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procretes invented by lawyers for the purposes of convenient exposition. ...I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.

(op. cit. P. 189--190)

To what extent these rigid legal classifications like "voidable", "void", "nullity" etc., are less misleading and inappropriate in industrial law, I pause not to consider, as such consideration is not warranted by the facts of this case. Whether failure to observe rules of natural justice in a particular case will make the domestic enquiry so void as to be a nullity will depend upon the facts of that case. At what end of the spectrum do the facts of the case fall? Has there been such a flagrant and outrageous defiance of legal precepts, such as rules of natural justice? That is the question.

12. Significantly, the Supreme Court refers to this aspect in paragraph 13 of the judgment in D.C. Roy (*supra*) as follows:

...We would, however, like to add that the decision in P.H. Kalyam's case is not to be construed as a charter for employers to dismiss employees after the pretence of an enquiry. The enquiry in the instant case does not suffer from defects so serious or fundamental as to make it non est.

(emphasis supplied)

So saying the Court cautioned in the following words:

On an appropriate occasion, it may become necessary to carve an exception to the ratio of Kalyani's case so as to exclude from its operation at least that class of cases in which under the facade of a domestic inquiry, the employer passes an order gravely detrimental to the employee's interest like an order of dismissal. An inquiry blatantly and, consciously violating the principles of natural justice may well be equated with the total absence of an enquiry so as to exclude the application of the "relation-back" doctrine. But we will not pursue the point beyond this as the facts before us do not warrant a closer consideration thereof.

(emphasis supplied)

This aspect was again referred to by the Supreme Court in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, at 650, in the following words:

A void dismissal is just void and does not exist. If the Tribunal, for the first time," passes an order recording a finding of misconduct and thus breathes life into the dead shell of the Management's order-pre-dating of the nativity does not arise.

(emphasis supplied)

13. That in industrial law there exists a distinction between cases where domestic enquiry which was held bona fide became vitiated by reason of failure to observe rules of natural justice on the one hand and on the other cases where such rules were "blatantly and consciously" violated is now recognised by the Supreme Court: [D.C. Roy (supra)]. While in the former it is only a defect in the enquiry, in the latter the enquiry is a nullity. The principles behind this distinction, as I see it, is that such blatant and conscious infringement of the rules of natural justice is an outrageous and flagrant defiance of fundamental legal precepts, and public interest demands nullification of any legal consequence which would otherwise flow from such acts. An employer cannot with absolute impunity dismiss his employee without a bona fide enquiry.

14. If an employer has bona fide held an enquiry, although by some honest mistake or error of judgment he has failed to observe rules of natural justice, but succeeds in justifying the punishment before the Tribunal, the award will relate back to the date of his order. On the other hand, deliberate and blatant defiance of natural justice by a callous employer who holds no enquiry or holds a mere pretence of an enquiry will burden him with the liability to pay wages till the date of the award, even when he has succeeded in justifying the punishment. These considerations govern the facts if the present case where no domestic enquiry at all preceded the punishment.

15. Shri Radhakrishnan relies upon the decision of the Orissa High Court in Hatakishore Sahu v. Presiding Officer Industrial Tribunal Orissa 1976 Lab. I.C. 599, where the Court said that, although there was no domestic enquiry, wages were not payable subsequent to the date of the order of termination. With great

respect, I am of the view that such conclusion is inconsistent with the decision of the Supreme Court in D.C. Roy, (supra). Counsel also relies upon the decision of a Division Bench of this Court in Workman, Premier Tyres Ltd. v. Premier Tyres Ltd. ILR 1976 2 Ker 194 , where this Court took the view that the principle in Kalyani's case (supra) was confined to proceedings u/s 33 of the Industrial Disputes Act. With great respect, that was how the law stood at the time of that decision. The ratio in Kalyani's case has since been by necessary implication extended by the Supreme Court in its recent decision in D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others, , to cases initiated u/s 10(1) of the Act as well.

16. In the circumstances I hold that the facts of this case fall within the exception to the ratio of Kalyani's case. Consequently the award of the Industrial Tribunal does not relate back to the date of the order of dismissal. The order of dismissal becomes effective only from the date of the award. The employee is therefore entitled to back wages till the date of the award.

17. This amount has to be computed after deducting any amount paid by the society to the employee in terms of the interim order of the Tribunal. The right of the employee is so declared. Subject to this, the challenge against the award fails.

The Original Petition is disposed of accordingly. No costs.