

(1974) 10 CAL CK 0028
In the Calcutta High Court

Haridas Malakar and Others

APPELLANT

Vs

Jay Engineering Works

RESPONDENT

Date of Decision : 01-10-1974

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 228, 32
Industrial Disputes Act, 1947 — Section 10

Citation : 79 CWN 394 : (1975) 2 LLJ 26

Hon'ble Judges : A.K. Mukherjee, J

Bench : Single Bench

Judgement

A.K. Mukherjee, J.—This Rule is directed against an award made by the Second Industrial Tribunal. West Bengal dated January 31, 1967 whereby the said Tribunal refused to reinstate 21 workmen who were dismissed from service.

2. Respondent No. 1 M/s. Jay Engineering Works Limited is one of the leading companies in India engaged in manufacturing and sale of sewing-machines and electric fans. It employed at the relevant time about five thousand workmen. The workmen of the company are organised under a trade union known as Jay Engineering Workers' Union (hereinafter referred to as the union). On November 24, 1964, the union served a notice of strike on the company and the workmen went on strike on and from December 17, 1963. The said strike was, however, called off on the basis of a tripartite agreement dated May 27, 1964. Under Clause 8 of the aforesaid settlement, domestic enquiries were conducted in respect of 25 workmen listed in the agreement. As a result of the said enquiries, the said workmen were found guilty. The company decided to dismiss 24 workmen and demote one, subject to permission from the Industrial Tribunal, where certain adjudication proceedings were pending at the relevant time. The permission was granted in respect of all the workmen by the Tribunal and accordingly, the management's decisions to dismiss 24 workmen and demote one were confirmed and communicated to the workmen concerned. Thereafter In accordance with the other terms of the said Clause 8 of the agreement, a reference was made u/s 10 of the Industrial Disputes Act, 1947 (hereinafter

referred to as the Act) before the Second Industrial Tribunal for adjudication of the dispute over the dismissal of 24 workmen and demotion of one workman. The Tribunal passed the aforesaid award justifying dismissal of 21 workmen but held that the order of demotion with respect to workman Bimal Ghosh, was not justified. Dismissal of two other workmen, viz., Tushar Banerji and Badal Chatterji had also been set aside by the Tribunal. Against the said award the union preferred a special leave to appeal to the Supreme Court under Article 136 of the Constitution. On 16th October, 1967 the Said application for special leave was dismissed by the Supreme Court. Thereafter on the 12th of February, 1968 the petitioners moved this Court in an application under Article 226 of the Constitution and obtained the present Rule.

3. Mr. Sen, appearing on behalf of the management, raises a preliminary objection. It is contended that the present application is barred by principle of or analogous to the principle of *res judicata*, in view of the fact that the present application is made basically and substantially on the same grounds taken in the application for leave to appeal before the Supreme Court under Article 136 of the Constitution. The fact that the Supreme Court declined to exercise its discretion in favour of the petitioner should be taken into consideration by this Court in exercising its discretion under Article 226 of the Constitution. In support of his contentions Mr. Sen relied upon a Bench decision on the Madras High Court, *Western India Match Co. v. Industrial Tribunal, Madras* and Anr. AIR 1958 Mad. 398 and a single Bench decision of this Court *The Metal Corporation of India Ltd. and Another Vs. Union of India (UOI) and Another*, .

4. In *Daryao and Others Vs. The State of U.P. and Others*, , the Supreme Court held that the rejection of a writ petition by High Court on the ground of laches or an alternative remedy did not constitute *res judicata* for a subsequent petition moved in the Supreme Court under Article 32. It is also held by the Supreme Court in *Kharak Singh Vs. The State of U.P. and Others*, , that existence of an alternative remedy would not be a bar to move the Supreme Court under Article 32 of the Constitution. The Metal Corporation's case (*supra*) referred to by Mr. Sen is a converse case. In that case a petition under Article 32 had been dismissed by the Supreme Court in limine. Thereafter a petition under Article 226 of the Constitution was moved in the High Court. It was argued that the petition was barred by *res judicata* as it raised the same question that had been raised in the earlier petitioner. The order of the Supreme Court was not a speaking one but yet it was argued that the dismissal by it should be treated as being on merits on the ground that no fundamental right of the petitioner was involved. In Metal Corporation's case the principle of *res judicata* had been applied to a petition under Article 226 of the Constitution in the High Court, after dismissal of the petition under Article 32 of the Supreme Court. In all other cases, however, *res judicata* has been invoked to bar a petition before the Supreme Court after dismissal of a petition, by the High Court. Even, when the Supreme Court did not make any speaking order the principle of *resjudicata* had been applied. Although, in *P.D. Sharma Vs. State Bank of India*, , the Supreme Court held that an order

summarily dismissing a writ petition is not a speaking order and does not fall within the rule laid down in Darayo's case (supra), this Court presumed that there could be no other grounds of dismissal of the Supreme Court except the non-existence of a fundamental right. In Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, , the Supreme Court, however, dismissed a writ petition under Article 32 on the ground of laches. So Metal Corporation's case would be of no assistance to the respondent.

5. My attention was particularly drawn to paragraph 15 at page 23 of the report wherein a reference was made to an unreported decision of the Supreme Court Civil Appeal No. 1 of 1964 (S.C.) Khairati Lai v. Life Insurance Corporation of India. In that case the Life Insurance Corporation Tribunal made an order on August 3, 1959. After the order was made an application was made to the Supreme Court for Special leave against that order. That application was dismissed on August 31, 1959. After the order was made execution proceedings had been started and in those proceedings it was urged that the order sought to be executed had been passed by the Tribunal without jurisdiction. That objection was rejected by the Tribunal. Thereafter the appellant again applied to the Supreme Court for special leave, to appeal against the said order of rejection. An objection was taken that the earlier dismissal by the Supreme Court of the application for leave to appeal against the order of the Tribunal passed on August 31, 1959 created a bar of res judicata. against the subsequent application for special leave. It was held by the Supreme Court that the objection was well founded and that as soon as the appellant's application for special leave was dismissed on the earlier occasion, it meant that challenge to the validity of the order of the Tribunal was rejected and that being so, the appellant could not raise that point once more.

6. In my view, that decision of the unreported case of the Supreme Court referred to in Metal Corporation's case, has got no application to the facts and circumstances of the present case. In that case the order against the Life Insurance Corporation's Tribunal was dismissed by the Supreme Court in an application under Article 136. Another application under Article 136 was moved raising an objection challenging the jurisdiction of the Tribunal at the time of the execution of the order of the Tribunal. So, it appears that against the same order at two different stages the aggrieved party preferred applications under Article 136 of the Constitution. Obviously that would create a bar. But a remedy under Article 136 cannot be equated with that of Article 226. A Bench decision of the Madras High Court AIR 1958 Mad. 398, to which reference was made by Mr. Sen, has laid down that right to apply for leave to appeal to the Supreme Court under Article 136, if it could be called a "right" at all. cannot be equated to a right to appeal. Obviously a High Court cannot refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move the Supreme Court under Article 136 of the Constitution. That the Supreme Court declined to exercise its discretion in favour of the petitioner by granting the leave asked for. cannot affect the jurisdiction vested in the High

Court under Article 226 of the Constitution. I respectfully agree with the view of the learned Judges of the Madras High Court.

7. My attention was, however, drawn to page 403 of the report wherein Raja-gopalan, J. observed:

That the Supreme Court declined to exercise its discretion in favour of the petitioner appears to us to be a factor that ought to be taken into account and given due weight, when we are called upon to exercise our discretion in favour of interference with the award of the Tribunal on some of the very grounds specified in the application for leave to appeal that failed. It should be needless to emphasise that had leave been granted and that was the stage for the exercise of the discretion vested in the Supreme Court the scope of the appeal could have been much wider than that permissible in proceedings under Article 228 of the Constitution.

Though not without hesitation we have reached the conclusion, that in the circumstances of this case it. would not be a proper exercise of discretion despite the findings we have recorded earlier, to set aside the award by the issue of a writ of certiorari,, after the Supreme Court had refused the petitioner leave to appeal against that award. In these circumstances, we direct that the Rule nisi be discharged,

8. The aforesaid decision of the Madras High Court has been followed by the Kerala High Court in S.L. Emmatty, Proprietor, Jai Hind Motor Service, Ernakulam Vs. C. Venkitaswami Naidu and Others, . Vaidialmgam, J. however, did not follow the later part of the decision of the Madras High Court where the learned Judge refused to exercise their discretion, under Article 226 of the Constitution, in view of the fact that the Supreme Court, refused leave to appeal under Art, 136 of the Constitution against that particular award.

9. In my view, a discretion cannot be fettered by any decision. Decision is the freedom of judgment. The only limitation of exercising discretion is, that it must be exercised in judicial manner and not arbitrarily. It is impossible to lay down a standard within four corners of which a discretion should be exercised by a Court. So, I am unable to accept the contention of Mr. Sen that in view of the fact that the union preferred an application under Article 136 of the Constitution before the Supreme Court, against the award of the Tribunal, the present application should be dismissed in limine on that ground alone without deciding the case on merits.

10. Mr. Chatterji, appearing on behalf of the petitioner contended that there was a violation of principle of natural justice as the workmen were not allowed to represent before the enquiry officer by a fellow workmen of their choice.

11. The Tribunal held that there was no satisfactory evidence on record to show that the right of representation was a condition of service based on custom. In the instant case the workmen wanted to be represented by a suspended worker.

The offer made by the company in its notice of enquiry in Ext. J (i) allowed the workmen to have the service of a co-worker. But the workmen insisted a suspended worker for their defence. That was refused by the management. The Tribunal observed that suspension means temporary (termination of employment of provisional putting in abeyance of the position of the suspended worker as employee. According to Mr. Chatterji, that proposition of law as enunciated by the Tribunal is illegal and it is an error of law apparent on the face of records.

12. It is true that when an order of suspension is made against a workman pending an enquiry into his conduct, the relationship of master and servant does not come to an end. The order of suspension, is only a direction, forbidding the workman from doing the work which he was required to do under the terms of the contract of service, at the same time keeping in force the relationship of master and servant (vide) H.L. Mehra Vs. Union of India (UOI) and Others, . In Kalindi and Others Vs. Tata Locomotive and Engineering Co. Ltd., , a question arose whether in an enquiry by the management into misconduct of a workman, the workman was entitled to be represented by a representative of the union. The Supreme Court observed that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his union though the employer in its discretion can and may allow his employee to avail himself of such assistance.

13. So, in my view there was no violation of: the principle of natural justice simply because the workman was not allowed to represent his case before the domestic enquiry by a suspended co-workman of his choice.

14. It is next contended by Mr. Chatterji that the Tribunal found with respect to some of the charges that, the findings of the enquiry officer were baseless and perverse. The management inflicted the punishment of dismissal of the workmen on the basis at all the charges with respect to which the enquiry officer found the delinquent workmen guilty. When the Tribunal set aside some of charges, in that case, according to Mr. Chatterji, the Tribunal should have held that enquiry was not fair and proper and as such the decision of the employer could not be upheld.

15. When an order of dismissal is based on more charges than one which are not alternative and one or some of them found to be perverse as there was no evidence, in that case, obviously in absence of any indication that on the basis of which the surviving charges the said order was passed, the order of dismissal in that case should be quashed in its entirety. In the instant case the charges are distinct and separate.

Each of them constitutes a misconduct. In the State of Orissa v. Bidyabhushan 1963 I L.L.J. 639, the Supreme Court observed:

If the order of dismissal was based on the findings on charges i (a) and i (e) alone, the Court would have jurisdiction to declare the order of dismissal illegal but when the findings of the Tribunal relating to the two out of five heads of the first charge and the second charge was found not liable to be interfered with by

the High Court and those findings established that the respondent was prima facie guilty of grave delinquency, in our view, the High Court had no power to direct the Government of Orissa to reconsider the order of dismissal.

16. The same principle has been followed in the industrial matter also in *Burn & Co., Ltd. v. Workman and Anr.* 1970 11 L.L.J. 56.

17. The jurisdiction of the Industrial Tribunal to interfere with the findings of the domestic enquiry is very limited. In *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, , the Supreme Court observed undoubtedly the management of a concern has power to direct its own internal administration and discipline; but the power is not unlimited and when a dispute arises, Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct, the Tribunal does not, however, act as a Court of appeal and substitute its own judgment for that of the management. It will interfere, (i) when there is a want of good faith (ii) when there is victimization or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of principle of natural justice and (iv) when on the materials, the finding is completely baseless or perverse.

18. In the instant case the Tribunal found all the above points in favour of the management. It is true that with respect to some of the charges the Tribunal did not agree with the findings of the enquiry officer. But at the same time the Tribunal observed:

That the charges in the instant case were all grave and serious and constitute a misdemeanour within the meaning of the certified standing order.

19. As I have already said that in the instant case the charges being separate and each of the charges constitutes a misdemeanour, that being so, if one of the charges is proved the delinquent workman can be dismissed by the management.

20. It is contended by Mr. Chatterji that in view of its own findings of the Tribunal that the enquiry officer has considered some extraneous matters and also materials; in parallel cases at the time of consideration of evidence against a particular workman, the Tribunal acted illegally and without jurisdiction in not holding that no reliance can be placed on that report, as such the order of dismissal based on that report was bad and liable to be quashed.

21. It appears that domestic enquiry was held against all these workmen relating to particular incident. Obviously, the charges against these workmen more or less similar. The enquiry officer, however, did not hold any joint trial but he dealt with each and every case of these workmen independently. The enquiry officer unlike Courts can obtain all informations and materials for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedures which govern proceedings in Court. The only obligation which the law cast on him is, that he should not act on any information which he

may receive unless he puts it to the party against whom it is to be used and gives him a fair opportunity to explain it vide *State of Mysore Vs. S.S. Makapur*, . The evidence was taken before the delinquent workmen. It is true that a particular delinquent was not aware that with respect to which evidence given with respect to other co-accused, the enquiry officer would use that evidence against him. In the instant case the Tribunal did not come to any specific finding except in one case that the evidence of S. K. Malhotra before the enquiry officer in Kartic Mandal's case was more thorough than that given by him in other cases on the same incident. But from that, however, it cannot be said that the cases of the other delinquents were not proved. The Tribunal observed that when different enquiries were conducted against different workers over one and the same incident, certain discrepancies of evidence would occur. But the Tribunal also observed, "the said discrepancies instead of disproving the charge-sheet tends to prove it." Therefore, in my view, the consideration of other evidence and some of extraneous materials cannot be said to have vitiated the enquiry. Moreover, it is not the case of the petitioner that the enquiry officer relied upon any document the contents of which were not made known to the petitioner. The enquiry officer relied upon some of pamphlets which according to petitioners are extraneous matter. But the contents of those pamphlets were known to the petitioners because those were published by the union. That being so, it cannot be said that the enquiry was vitiated by Staking into consideration some extraneous matters by the enquiry officer.

22. In the result, all the points raised by the petitioners fail and this Rule is discharged. There will be no order as to costs.