

(1978) 08 CAL CK 0007

In the Calcutta High Court

Case No : Appeal from Original Order No. 177 of 1977

Hind Galvanising and Engineering Company Pvt. Ltd.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 31-08-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 342

Evidence Act, 1872 — Section 30

Industrial Disputes Act, 1947 — Section 33(2), 33A

Citation : (1978) 2 ILR (Cal) 282

Hon'ble Judges : B.C. Chakrabarti, J; Anil K. Sen, J

Bench : Division Bench

Advocate : Chunilal Ganguly and Sunit Krishna Datta, for the Appellant; N.D. Manna and Subodh Kr. Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—This appeal under Clause 15 of the Letters Patent is directed against the judgment and order dated February 18, 1974, passed by a learned Single Judge of this Court dismissing a writ petition which was registered as Civil Rule No. 6434(W) of 1969. The principal point that arises for consideration in this appeal is, where two persons had faced a joint disciplinary enquiry, whether use of the statement of one for corroboration of evidence against the other constitutes breach of the principles of natural justice. It would be necessary to refer to the facts which may be set out shortly as follows:

2. Respondent No. 3, Deoraj Rai with his helper Sitaram was working on a shearing machine at the Appellant's works on January 5, 1968. It is alleged that owing to their gross negligence and carelessness in the performance of their duties they wrongly sheared 28 pieces which were totally rejected and as a result the Appellant company suffered financial losses. The matter was also not reported to the department-in-charge or any other superior authority by Deoraj, Respondent No. 3 but was detected by the foreman after 6 p.m. on a report by

Sitaram. On those allegations Deoraj was served with a charge sheet for a major misdemeanor dated January 9, 1968, on charges of (i) gross negligence of work, (ii) wilful and serious defect in workmanship, (iii) irresponsible action resulting in damage to the goods and (iv) failure to report at once to the foreman or supervisor or manager any defect noticed. On January 10, 1968, Deoraj submitted an explanation denying the charges. He took the defence that on January 5, 1968, while working on the shearing machine he reported defects to the supervisor who rectified the same and adjusted the gauge and after that he carried on the work of shearing on the gauge so adjusted. It was further pleaded that the charges were mala fide and were drawn up with an ulterior motive to victimise him. There is no dispute that similar charges were framed against his helper Sitaram and both faced a joint disciplinary enquiry which was directed by the Appellant when the Appellant was not satisfied with the explanations furnished. One Mr. H. Pal, not associated with the Appellant-company in any manner, was appointed the enquiry officer.

3. The enquiry was held on January 27, 1968, obviously in the presence of both Deoraj and Sitaram. Two of the supervisors on duty at the works upto 6 p.m. on January 5, 1968, namely, M. R. Talukdar and Satyajit Mazumdar were examined along with the foreman B.N. Rai on behalf of the Appellant in support of the charges. These three witnesses on their own evidence fully established the charges including the charge of gross neglect resulting in wrong shearing of 28 pieces and their rejection. Such evidence and in particular the evidence of the foreman disproved the defence of Deoraj that wrong shearing was due to any defect in the machine. It would appear further from the evidence of this foreman B.N. Rai that when asked by him Deoraj failed to furnish any explanation for the wrong shearing at that time while Sitaram in furnishing the reason stated in the presence of Deoraj that he was asked by Deoraj to complete the scheduled work quickly so that they could take more rest afterwards in spite of the fact that Sitaram pointed out that may lead to mistakes.

4. The minutes of the domestic enquiry show that though offered for cross-examination none of these witnesses was cross-examined either by Deoraj or by Sitaram. On that very date both Deoraj and Sitaram were examined by the enquiry officer. Sitaram in his statement made the same statement as he had earlier made to the foreman and he further stated that Deoraj did not inform about such wrong shearing to anybody including the supervisors present. Deoraj in his statement on the other hand reaffirmed his own defence, namely, that he noticed the defects during the operation and reported the matter to the supervisors who came and adjusted the gauge and that he proceeded with the shearing job on the gauge so adjusted. Neither of the two delinquents, however, adduced any evidence to substantiate their respective defences.

5. Deoraj made a representation to the manager of the Appellant on the very date, namely, January 27, 1968 and obviously after the conclusion of the enquiry, complaining that the enquiry held was mala fide, unfair and against the

principles of natural justice. The ground for such objection was that all the Appellant's witnesses were present at the enquiry when the witnesses were being examined in chief and that the company's labour officer tampered with company's witnesses in presence of the enquiry officer. Such objections, however, were not raised before the enquiry officer and the minutes of the enquiry do not support any such complaint. The Appellant in a letter dated February 6, 1968, strongly controverted those allegations made by Deoraj. It was pointed out that the labour officer in presenting the case of the company presented the witnesses one by one and it is not correct that all the witnesses were present when they were being examined. It was further pointed out that Deoraj himself refused to cross-examine any of those witnesses individually though opportunity was given to him for the said purpose. But Deoraj reiterated his previous complaint in a letter dated February 9, 1968. The Appellant in their reply dated February 12, 1968, strongly controverted the allegations so repeated by Deoraj and further made a fair offer that if Deoraj felt it necessary they may hold another enquiry. That offer, however, was rejected by Deoraj by his letter dated February 15, 1968. But, even then the Appellant by their letter dated February 22, 1968, offered to hold a fresh enquiry on March 9, 1968, in case Deoraj wishes to avail that opportunity. This offer also was not accepted when the letter was returned as "refused".

6. In the background of such circumstances, the enquiry officer submitted his report. He found that the charges levelled against both the delinquents had been established at the enquiry on the evidence led by the Appellant. The report read as a whole goes to show that the enquiry officer based his findings on the substantive evidence of the three witnesses though he used the statement of Sitaram made at the enquiry for corroborating the evidence of those three witnesses.

7. Agreeing with and accepting the findings of the enquiry officer, the Appellant dismissed Deoraj from service by an order dated April 5, 1968. There is no dispute that at the time when Deoraj was so dismissed an adjudication proceeding between the Appellant and its workmen was pending before the tribunal and in spite of such pending proceeding the Appellant had not fulfilled the requirements of the proviso to Section 33(2)(b). Respondent No. 3, Deoraj, thereupon lodged a complaint with the tribunal u/s 33A seeking reinstatement with back wages. In this application it was claimed that he had been dismissed vindictively and mala fide and that the enquiry that was held as an eye-wash since there was gross violation of principles of natural justice.

8. The Appellant contested the said proceeding by filing a written statement denying all the allegations made in the complaint lodged by the Respondent No. 3, Deoraj.

9. The tribunal held that there was no fair and proper enquiry. According to the tribunal the enquiry officer infringed the rules of natural justice by using the statement of Sitaram against Deoraj when that statement was neither read over

and explained to Deoraj nor was he given any opportunity to cross-examine Sitaram. On this ground alone, the tribunal rejected the domestic enquiry and then proceeded to observe that when the Appellant had not proved the charges against Deoraj before the tribunal by adducing independent evidence, the dismissal must be held to be not justified. The tribunal, therefore, directed Deoraj to be reinstated with back wages.

10. The award of the tribunal so made was challenged by the Appellant in the writ petition out of which the present appeal arises. In the writ petition, the Appellant sought to make out a case that the award of the tribunal suffers an error apparent on the face of the record when it was held that use of the statement of Sitaram as made at the domestic enquiry constitutes any breach of the rules of natural justice. The learned Judge in disposing of the writ petition, however, overruled the said plea of the Appellant and for the same reasons as given by the tribunal upheld the award. The writ petition was accordingly dismissed and the Rule issued thereon was discharged. Feeling aggrieved, the Appellant has preferred the present appeal.

11 Mr. Ganguli, appearing in support of this appeal has raised two points. In the first place according to Mr. Ganguli, the enquiry officer had rightly used the statement of Sitaram for corroborating the substantive evidence on which rests the findings and such user of the statement of Sitaram does in no way infringe the principles of natural justice. According to Mr. Ganguli when Respondent No. 3 himself had rejected the offer of a fresh enquiry, there can be no case of any such infringement and the tribunal is in error on the face of the record in arriving at a finding to the contrary. Secondly, it has been contended by Mr. Ganguli that even if the domestic enquiry fails on that ground, the tribunal should have allowed the Appellant an opportunity to adduce independent evidence to prove the charges levelled against Respondent No. 3 Deoraj to the satisfaction of the tribunal; the tribunal could not have held the dismissal to be unjustified only because the Appellant at the initial stage had not adduced independent evidence in proof of the charges levelled against Respondent No. 3, Deoraj. According to Mr. Ganguli, the learned trial Judge failed to appreciate these apparent infirmities in the award of the tribunal in dismissing the writ petition.

12. Mr. Manna appearing on behalf of the Respondent No. 3 has contested both the points raised by Mr. Ganguli. According to Mr. Manna, Sitaram was a co-delinquent and the tribunal could not have used his statement made at the enquiry as against Deoraj when such a statement was neither read over and explained to Deoraj nor was he called upon to cross-examine him on the statement so made. According to Mr. Manna, therefore, the tribunal had rightly held that the enquiry officer went wrong in relying upon such statement of Sitaram as evidence, against Deoraj and the same constitutes breach of the fundamental principles of natural justice. In answer to the second point raised by Mr. Ganguli, Mr. Manna has contended that the Appellant is not entitled in law to be given any second opportunity to adduce independent evidence in proof of the

charges against Deoraj to the satisfaction of the tribunal. According to Mr. Manna, the Appellant should have adduced such evidence at the initial stage if they are to fall back upon the alternative defence of supporting the dismissal on merits before the tribunal. Strong reliance is placed by Mr. Manna on the earlier decision of the Supreme Court in the case of Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory, .

13. We have carefully considered the rival contentions put forward before us. In the present case Respondent No. 3, Deoraj was dismissed by the Appellant at a time when an industrial dispute between the Appellant and its workmen was pending adjudication before the tribunal. Such dismissal undoubtedly was in contravention of Section 33(2)(b) when the Appellant had neither paid to the Respondent No. 3 wages for a month nor had obtained the necessary approval--the application for approval filed before the tribunal being withdrawn. The Supreme Court in its latest decision in the case of Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, has settled the legal consequences of such contravention. It has been held that such contravention does not render the order of dismissal void or inoperative. It only furnishes an additional privilege to the workman of himself raising a dispute over the validity of such dismissal before the tribunal by lodging a complaint u/s 33A apart from the other remedy under 9. 10 of the Act. Respondent No. 3, Deoraj in the present case availed of this remedy u/s 33A when he lodged the complaint before the tribunal.

14. In adjudging the complaint so made, the tribunal is to decide as to whether the order of dismissal can be sustained in law. The order would not fail solely on the ground that it had been made in contravention of Section 33(2)(b). The tribunal is to find out whether the order had been passed on the basis of a fair disciplinary enquiry and whether it is otherwise bona fide and in accordance with Standing Order or not. In the present case Respondent No. 3 challenged the order on the ground that there had been no fair enquiry when the enquiry officer infringed the basic principles of natural justice in holding the enquiry. The tribunal upheld the said objection when it held that the enquiry officer infringed such principles by using the statement of Sitaram as evidence against Deoraj, the Respondent No. 3 though (1) the statement of Sitaram was not read over to Deoraj and (2) Deoraj was afforded no opportunity to cross-examine Sitaram. The learned Judge in the trial Court in disposing of the writ petition took the same view. We are, however, unable to accept the view so taken. In our view what the principles of natural justice enjoin are not matters of technicality. One is to adjudge with reference to the substance as to whether there has been any real violation of such principles. Requirement of those principles being to give the delinquent a fair opportunity to meet what is being used against him and make out his own defence, we are only to see whether such an opportunity was in substance furnished or not. The statement of Sitaram which on our findings made hereinbefore was used by the enquiry officer for the purpose of corroborating the substantive evidence led by the three witnesses examined on behalf of the Appellant would not be inadmissible as against the co-delinquent

solely on the ground that Sitaram himself was a co-delinquent. It is settled law that domestic tribunals like enquiry officers are not bound by the technical rules of evidence contained in the Evidence Act. Even that Act u/s 30 makes confession of a co-accused admissible as against others and some decisions have gone to the extent of expressing the view that even statements u/s 342 of the Code of Criminal Procedure made by a co-accused can be so used as against the others though there is some divergence in judicial opinion on the point. Be that as it may when the enquiry officer was not bound by the strict rules of the Evidence Act, it was certainly open to him to use the statement of Sitaram as against the co-delinquent Deoraj and only thing to be considered is whether by such use Deoraj had in any manner been prejudiced. Such was the view taken by the Madras High Court in the case of Parry's Confectionary Ltd. v. Industrial Tribunal (1974) 45 F.J.R. 329 and Associated Cement Company v. Labour Court (1976) 33 Ind FLR 381. In our view, the report of the enquiry officer clearly shows that the charges against Deoraj were all independently established by the substantive evidence of the three witnesses examined on behalf of the Appellant. The enquiry officer made a correct approach when he used the statement of Sitaram only for the purpose of finding corroboration. For the two reasons referred to hereinbefore, the tribunal was of the view that the statement of Sitaram could not have been used even for the purpose of corroboration. The objection that this statement had not been read over and explained to Deoraj appears to be hyper-technical. There was a joint enquiry conducted in presence of both. Both appear to be knowing Hindi and obviously the statement that was made by Sitaram in presence of Deoraj was in Hindi. Moreover, the minutes recorded by the enquiry officer shows that the recorded statement itself was read over and explained in Hindi to Sitaram. Obviously that was done in presence of the co-delinquent Deoraj and mere omission to record that it was read over and explained to Deoraj also makes no difference whatsoever. The other objection is that Deoraj was not asked to cross-examine Sitaram on the statements made by him. Here again, we find that the statement made by Sitaram at the enquiry is substantially the same as he is alleged to have made to the foreman on the date of the incident and as spoken of by the foreman B.N. Roy. There is no dispute that Deoraj was called upon to cross-examine B.N. Roy on the evidence given by him in his examination-in-chief including his statement as to what Sitaram had told him about the matter on the date of the incident. Such an offer, however, was declined and as a matter of fact Deoraj had declined to cross-examine any of the witnesses examined on behalf of the Appellant. He had not even adduced any evidence to support his own defence. Moreover at no point of time during the enquiry or even thereafter did he make any grievance that. Sitaram should have been offered for cross-examination. In such circumstances, in our view, mere failure on the part of the enquiry officer to call upon Deoraj to cross-examine Sitaram had not resulted in any material prejudice. More so, in view of the subsequent events which unmistakably go to show that the Appellant offered to hold a fresh enquiry giving all such opportunities as the Respondent No. 3, Deoraj may demand. Such opportunity

was expressly declined. Therefore, we are unable to sustain the objection that there was any violation of the principles of natural justice by the enquiry officer or that there was no fair enquiry on the charges levelled against the said Respondent. It is clear, therefore, that there is an error apparent on the face of the award in so far as the tribunal held that use of the statement of Sitaram by the enquiry officer for the purpose of corroborating the substantive evidence, which by itself proves the charges, constitutes infringement of the principles of natural justice. The first point raised by Mr. Ganguli, therefore, succeeds.

15. Though on the conclusion as aforesaid the second point raised by Mr. Ganguli becomes redundant, yet it must be said that the said point too is now concluded in favour of the Appellant by the decision of the Supreme Court. It is now well settled that if in the view of the tribunal the domestic enquiry must fail, then in that event it would still be open to the employer to substantiate the charges on which action has been taken by him to the satisfaction of the tribunal on independent evidence led before it. It has been strongly contended by Mr. Manna that though the Appellant had such a right, yet they were not entitled to any second opportunity to adduce such evidence when they failed to do so at the initial stage. According to Mr. Ganguli on the other hand, the validity of the domestic enquiry should be decided as a preliminary issue and once the tribunal finds that such enquiry must fail, that the employer should be given an opportunity to adduce independent evidence to substantiate the charges before the tribunal. This procedure should have been followed in the present case. Contention of Mr. Ganguli on the point is well supported by the decision of the Supreme Court in the case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, where the Supreme Court reviewed all the previous decisions on the point including the decision in the case of *Motipur Sugar Factory Supra* relied on by Mr. Manna. On such review it has been held that in the event of a dispute being raised as to the validity of the domestic enquiry the tribunal is first to consider that issue as a preliminary issue for deciding whether the enquiry must fail on some valid ground or not and only when according to the tribunal such an enquiry would fail that the management should be given an opportunity to bring home the charges to the satisfaction of the tribunal by adducing independent evidence in support thereof. Such being the legal position, Mr. Ganguli is fully justified in objecting to the procedure adopted by the tribunal in the present case. The tribunal never decided the issue as to whether the domestic enquiry could be sustained in law or not as a preliminary issue though the same was a matter of controversy between the parties. On the other hand, the tribunal proceeded on the view that when the Appellant had not adduced independent evidence even at the initial stage in support of the alternative defence on merits it must be held that the charges had not been proved at all. Though the view so taken by the tribunal has found favour which the learned trial Judge in our view it is contrary to the above decision of the Supreme Court in the case of *Cooper Engineering Ltd. Supra* Such being the position had we upheld the finding of the tribunal that there had been a failure of the domestic-enquiry, we would have

remanded the proceeding to the tribunal for re-adjudication on merits after giving the Appellant an opportunity to adduce independent evidence in support of their charges against the delinquent Deoraj, Respondent No. 3.

16. In the result, the appeal succeeds. The judgment and order of the learned trial Judge are set aside. The writ petition of the Appellant succeeds and the Rule is made absolute. The award passed by the tribunal is set aside. Parties are directed to bear their costs throughout.

17. Let an appropriate writ do issue accordingly.

B.C. Chakrabarti, J.

18. I agree.