
(2012) 08 DEL CK 0344

In the Delhi High Court

Case No : Writ Petition (C) No. 20000 of 2004

Hotel Corporation of India

APPELLANT

Vs

Sudesh Kumar Julka and Others

RESPONDENT

Date of Decision : 07-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, 10A, 33(2)(b)

Citation : (2012) 192 DLT 493 : (2012) 4 LLJ 88 : (2013) 1 SLJ 165

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : Akshat Kulshreshtha, Ms. Meenakshi Sood and Mr. Mukesh Kumar, for the Appellant; Sanjay Ghose, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bhasin, J

1. The petitioner has filed this writ petition under Article 226 of the Constitution of India to challenge the orders dated 20.12.2003, 4.02.2004 and 20.03.2004 passed by the Industrial Tribunal-I in O.P. No. 27 of 1991 which was filed by the petitioner-management u/s 33-(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") seeking approval of its decision taken to dismiss the respondent-workman from its services vide order dated 25.09.1991. By order dated 20th December, 2003 the Industrial Tribunal had decided the preliminary issue of validity of the enquiry held against the respondent-workman before dismissing him from service was decided against the petitioner-management. By order dated 4th February, 2004 the Industrial Tribunal had rejected the petitioner's application filed after the decision of the issue of enquiry for allowing it to adduce evidence before the tribunal for establishing the misconducts of the respondent-workman and vide final order dated 20th March, 2004 passed in the approval application the Tribunal had refused to accord approval to the petitioner's decision to dismiss the respondent-

workman. The brief facts of this case are that the respondent workman was working with petitioner Company as a Supervisor in flight order Department of its Unit by the name of Chefair Flight Catering. On 01.11.1985 a surprise check was carried out by the audit team of the petitioner at the Snack Counter of Chefair Flight Catering at the Indira Gandhi International Airport, New Delhi where the respondent was on duty. As a result of that checking by the audit staff certain irregularities were noticed. A charge sheet was then issued to respondent-workman on 13.01.1986 containing the allegations that a sum of Rs. 97/- was found short in the accounted cash sale figure in the cash box; an excess amount of Rs. 154/- was deposited against recorded cash proceeds; different rates for various products were charged as against the actual rates of those products; the Corporation was deprived of the extra revenue by procuring the items from outside and selling them at the counter; a loss of sum of Rs. 17.64/- was found to have been caused due to shortages found in the stock sheet; the respondent-workman had kept the sale proceeds in his pocket instead of keeping the same in the cash box. In the explanation given by the respondent-workman, copy of which is Annexure P-6 to this petition, some of the allegations were admitted and the respondent-workman had regretted also for some acts and other allegations were denied but since the reply was found to be unsatisfactory by the petitioner-management it was decided to hold a domestic enquiry which was conducted and in that enquiry all the charges except the last one regarding his keeping sale proceeds in his pocket instead of cash box were found to have been established. Accepting the enquiry officer's report the management imposed upon the respondent-workman punishment of his dismissal from service on 25.09.1991.

2. The petitioner thereafter filed an application before the Industrial Tribunal u/s 33(2)(b) of the Act praying for approval of the dismissal of the respondent-workman since at that time some industrial dispute between the management and its workmen, in which the respondent-workman was also interested, was pending adjudication before the tribunal. The respondent-workman had resisted the grant of approval to his dismissal inter alia on the ground that the enquiry against him was not conducted fairly and properly. The Tribunal framed a preliminary issue regarding the validity of the enquiry and after considering the evidence adduced by the parties including the record of enquiry decided the preliminary issue against the petitioner-management vide order dated 20.12.2003, which is under challenge in this writ petition.

3. The petitioner-management then filed an application seeking permission of the tribunal to adduce evidence to prove charges against the respondent-workman before the tribunal itself but that request was declined by the tribunal vide its order dated 04.02.2004 which is also under challenge now at the instance of the petitioner-management and finally the approval application was dismissed by the Tribunal and the correctness of that final order has also been assailed by the petitioner-management.

4. The petitioner-management then filed this writ petition for quashing and

setting aside of the three impugned orders and grant of approval to the dismissal of the respondent-workman.

5. The learned counsel for the petitioner-management mainly argued that the tribunal had exceeded its jurisdiction to a great extent while deciding the approval application by going too deep into the evidence adduced in the enquiry where the strict rules of evidence do not apply and the standard of proof required to prove the charges of misconduct is also not the same as is required in a criminal trial. The learned counsel stated that the learned tribunal had wrongly refused to place reliance upon the report of the audit team on the ground that the members of the audit team, who were no more in the employment of the petitioner-management, had not been examined during the enquiry and particularly when the respondent-workman had not disputed that the audit staff had checked the counter where he was on duty and had made the report, exhibited as Ex.MW-1/5 during the enquiry, about the irregularities noticed by them and the same had been duly proved and the charges were corroborated also by other evidence adduced in the enquiry. Counsel further contended that most of the charges of misconduct were in fact admitted also by the respondent-workman in his explanation dated 29.01.1986 and for that reason also the enquiry could not have been held to be vitiated. It was also argued by the learned counsel that the tribunal exercising jurisdiction u/s 33-(2) (b) of the Act is required only to take a prima facie view of the matter and if the enquiry is shown to have been held properly and unlike in a reference case u/s 10 of the Act the tribunal cannot act as an appellate authority to reappraise the evidence and if there is no evidence of victimization of the workman concerned it is bound to grant approval sought for by the employer and thereafter the workman can have recourse to his remedy of getting the dispute about his dismissal adjudicated from the industrial adjudicator either by getting a reference made from the appropriate Government or even by approaching the industrial adjudicator directly which is also permissible in law.

6. The learned counsel for the respondent-workman, on the other hand, supported the impugned orders and submitted that this Court in exercise of limited jurisdiction in such like matters should not interfere in the decision of the tribunal.

7. On a perusal of the Tribunal's orders under challenge and after giving due consideration to the submissions made from both the sides I have no hesitation in accepting the submission of the learned counsel for the petitioner-management that the tribunal had exceeded its jurisdiction u/s 33-(2)(b) of the Act while declining to accord its approval to the dismissal of the respondent-workman. It is evident from the enquiry proceedings that full opportunity was granted to the respondent-workman to defend himself and to cross-examine the management's witnesses. He also led his own evidence in defence. It also cannot be said to be a case of no evidence as was also sought to be urged on behalf of the respondent-workman. As noticed already, some of the allegations

were in fact admitted by the respondent-workman himself in his reply to the charge-sheet and, therefore, the tribunal could not have refused to accept the enquiry officer's conclusions on the ground that the members of the audit team had not been examined in the enquiry. Their report was proved by the management's witness who had dealt with the case on receipt of the audit team's report and the respondent-workman had never disputed also that that report was not prepared by the audit team. The case was to be decided on prima facie grounds by the Tribunal u/s 33-(2)(b) of the Act and not on meticulous appreciation of evidence which is done only by an appellate authority and the tribunal while examining the enquiry officer's findings in domestic enquiry does not act as an appellate authority as has been done by the tribunal in the present case.

8. The scope of jurisdiction of the tribunal while dealing with applications u/s 33-(2)(b) of the Act came up for consideration recently before a Single Judge Bench of this Court in the case of "Delhi Transport Corporation vs. Shyam Lal"; W.P.(C) No. 3633/2004 decided on 1st July, 2010 and after considering the entire case law on the point it was held as under:

11. The scope of jurisdiction of the Industrial Adjudicator u/s 33(2)(b), is only to oversee the dismissal to ensure that no unfair labour practice or victimization has been practiced. If the procedure of fair hearing has been observed and a prima-facie case for dismissal is made out; approval has to be granted. The jurisdiction of the Industrial Adjudicator u/s 33(2)(b) cannot be wider than this. Reference in this regard may be made to Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, and Cholan Roadways Limited Vs. Cholan Roadways Limited Vs. G. Thirugnanasambandam, . The proceeding u/s 33(2)(b) is not a substitute for an industrial dispute referred for adjudication u/s 10. It is for this reason only that the decision on the application u/s 33(2)(b) does not close the right of the respondent workman to raise an industrial dispute u/s 10 of the ID Act. 12. However, the distinction between adjudication of an industrial dispute referred u/s 10 and an approval application u/s 33(2)(b) in practice is found to have been blurred. Applications u/s 33(2)(b) are being treated and tried in the same manner and following the same procedure as an industrial dispute. This has led to a situation, where decision of applications u/s 33(2)(b) is held up for years and/or takes the same time as decision of an industrial dispute u/s 10. Often, it is also found to result in parallel proceedings or duplicate proceedings in both of which witnesses are examined and on same facts and evidence, inconsistent findings returned in two proceedings, in ignorance of other proceeding.

13. If the object of Section 33(2)(b) is only to prevent victimization of an employee in dispute with the management/employer, the scope of inquiry by the Industrial Adjudicator while dealing with and deciding such application cannot possibly be the same as while dealing with and deciding an industrial dispute. If an application u/s 33(2)(b) is to be dealt with and scope of inquiry therein so

limited, the disposal thereof should not take long. The findings returned by the Industrial Adjudicator on an application u/s 33(2)(b) are "prima-facie" and not "final" and not binding in a subsequent industrial dispute. The findings can be "prima-facie" only if returned on the basis of "summary" examination and not if returned on the basis of "detailed examination" as in adjudication of industrial disputes. 14. However, it is found that the Industrial Adjudicators, after completion of pleadings in an application u/s 33(2)(b), frame a preliminary issue qua validity of domestic inquiry, allow examination of witnesses on such preliminary issues and if decide preliminary issues against the management/ employer and if the management/employer has exercised the option to prove misconduct before the Industrial Adjudicator, frame issues thereon, again allow evidence and then adjudicate. Very often, the reply to the application u/s 33(2) (b) not even found to contain defence of victimization or found to contain vague and general pleas qua victimization; the pleas as relevant in an industrial dispute are raised and adjudicated. In a large number of cases, the complete inquiry proceedings/reports are not even found on the file of Industrial Adjudicator.

15. In my view, the Industrial Adjudicators should insist on the complete record/report of domestic inquiry and the disciplinary authority to be produced along with an application u/s 33(2)(b). Thereafter, the pleadings should be perused minutely to see whether any case of victimization is made out. If the workman has not pleaded a case of victimization owing to pendency of an earlier dispute or has not made out a case of action of which approval is sought having been taken against him to settle scores with him in the earlier dispute or to derive unfair advantage in the earlier dispute, or if the pleadings in this respect are vague and without particulars, no further inquiry by the Industrial Adjudicators is needed and the application u/s 33(2)(b) should be allowed immediately. Even if pleas are taken by the workman of the domestic inquiry having been conducted in violation of the Standing Orders/Rules or the principles of natural justice, but the same is not attributable to victimization as aforesaid, such pleas ought not to be adjudicated in Section 33(2)(b) proceedings but should be left to be adjudicated in the industrial dispute if raised u/s 10 of the Act. The earlier industrial dispute owing where to Section 33(2)(b) application is necessitated, in a large number of cases is not of the individual workman against whom application u/s 33(2)(b) is filed but has been raised by all workmen of the establishment or their union and with respect to their general service conditions. In such cases, the management/employer generally cannot be said to have taken the action of which approval u/s 33(2)(b) is sought, by way of victimization, unless it is shown that such workman was responsible for initiating/instigating or pursuing the earlier dispute.

16. If the workman in his reply to Section 33(2)(b) application or otherwise does make out a case of victimization, the industrial adjudicator should then proceed to see by examination of domestic inquiry proceedings whether the same is borne out therefrom. However, such examination should again be limited to whether, to ensure dismissal of workman, he has been as a matter of design,

deprived of or prevented from proper opportunity or from proving his case. Such examination has to be narrower than examination of validity of domestic inquiry in an industrial dispute u/s 10. For instance, while an inadvertent breach of prescribed procedure of inquiry may entitle the industrial adjudicator in a Section 10 proceeding to hold the domestic inquiry to be vitiated but unless such breach is found to be intended to prevent the workman from placing his version before the Inquiry Officer, so as to ensure finding against him, the same may not constitute a ground in a Section 33(2)(b) proceeding to hold the domestic inquiry to be vitiated.

17. Once (in a Section 33(2)(b) proceeding) the domestic inquiry is held to be vitiated for the reason of victimization, the Industrial Adjudicator should weigh, if victimization is quite evident, need may not arise to give opportunity to the management/employer to prove misconduct before the Industrial Adjudicator; however if evidence of victimization in domestic inquiry is not so strong, the Industrial Adjudicator may proceed to determine whether charge of misconduct is false by way of victimization or not. If the workman is prima facie found guilty of misconduct, approval should still be granted by allowing the application u/s 33(2)(b) and leaving the workman to raise other pleas in the industrial dispute u/s 10. For the said limited aspect, the Industrial Adjudicator may record evidence but within the confines aforesaid and without expanding the scope of inquiry. 18. It is hoped that by following the aforesaid procedure, Section 33(2)(b) proceedings will be disposed of expeditiously, as they were intended to be and shall not languish for years, as has been happening. 19. The Industrial Tribunal in the present case has totally misconstrued the scope of Section 33(2)(b). The application u/s 33(2)(b) has been dealt with as a labour dispute and the termination found illegal by placing the onus, as in a labour dispute, on the petitioner DTC.

9. In the present case the respondent-workman had not pleaded in reply to the approval application that he was being victimised by the management for some reasons. Since the respondent-workman had not pressed into service any other point before the tribunal except that the enquiry held against him was not fair and proper and even before this Court also only that point was pressed by his learned counsel I am of the view that the tribunal should not have refused to accord its approval to the dismissal of the respondent-workman. This writ petition is, therefore, allowed and consequently the petitioner's application u/s 33(2)(b) of the Act stands allowed. It is however made clear that this order shall not be a bar to the respondent-workman raising an industrial dispute even now in respect of his dismissal and he shall be at liberty to approach the industrial court directly also u/s 10A of the Act instead of approaching the labour authorities for making a reference to the labour Court which is a long drawn process and there is least possibility of any amicable settlement between the parties. In case the respondent-workman shall approach the Court directly within three months his case shall be entertained and dealt with in accordance law uninfluenced by the present order since it has been passed only on a prima facie

view of the matter and without taking into consideration the delay on his part in raising the industrial dispute. Such liberty was also given by the Single Judge Bench of this Court in the case of "Delhi Transport Corporation Vs ShyamLal"(supra).