
(2015) 09 CAL CK 0049
In the Calcutta High Court
Case No : WP No. 312 of 2013

ICI India Ltd.

APPELLANT

Vs

First Industrial Tribunal and Others

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 311
Industrial Disputes Act, 1947 — Section 11A

Citation : (2015) 147 FLR 742 : (2016) 1 LLN 351

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : D.K. Ghosh and R. De, for the Appellant; A. Ghosh, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Soumen Sen, J—The award passed by the first industrial tribunal on 14th December, 2012 in reference case No. VIII-221/2001 is the subject matter of the challenge in this writ petition.

2. Once Sri Prabal Chakraborty was in the employment of M/s. ICI Ltd. on and from 25th May, 1992. He was the executive committee member of the trade union namely, Sangrami Shramik Karmachari Union of ICI India Ltd., Rishra works (hereinafter refer to as "SSK Union"). On 28th April, 2000 four unions including SSK Union were holding gate demonstration outside gate No. 14 of the Rishra factory since morning. According to the workman four unions along with the members and employees of SSK Union were holding gate demonstration in view of the failure on the part of the management to resolve long pending issues. The management contended that on the relevant date on 28th April, 2000 around 7.20 a.m. the said workman along with a group of employees and outsiders wrongfully detained Sri S. Choubey, Site and Services Manager of Rishra Works of the Company and also detained three other managers, namely, Sri S Mukherjee, Sri P.K. Lakshman and Sri P.K. Ghosh near gate No. 14 of the

factory and thereby prevented them from entering their factory to discharge their duties in general shift. The said employees were travelling in two Maruti cars and they were detained outside the gate for more than ten hours. On the same day at about 4.40 p.m. it is alleged that Sri Prabal Chakraborty incited and led the crowd to physically assault Sri S. Choubey by first hitting him with blows and the same action was thereafter followed by the other men who also started assaulting Sri Choubey with blows, stones and bricks. The women demonstrators alleged to have assaulted Sri Choubey with broomsticks. The workman along with the other agitators hurled abusive language and threatened Sri Choubey with dire consequences. Ultimately, three of them were rescued by the police and thereafter the company lodged an FIR on the same day. Sri Choubey attended the medical center of the company where he was treated by the doctor.

3. On the aforesaid allegation on 2nd May, 2000 a charge-sheet was issued by the company.

4. The concerned workman was placed under suspension. The workman gave reply to the charge sheet and on purported consideration a domestic enquiry was held. Sri Chakraborty participated in the proceedings along with his representative. The enquiry officer has submitted his report on 6th December, 2000 holding that the workman was guilty of the charges and the Disciplinary authority after considering the report and materials on record dismissed Sri Chakraborty from the service by issuing a letter of dismissal dated 18th December, 2000.

5. This has resulted in an industrial dispute being raised by the workman.

6. The validity of the domestic enquiry was adjudged as a preliminary issue and by an order No. 103 dated 27th February, 2009 the then presiding judge of the Tribunal held that the enquiry conducted by the management was fair and proper. This order however, was not challenged by the workman.

7. The Tribunal thereafter proceeds to hear the matter on merits in order to find out if the quantum of punishment awarded by the management was justified.

8. The Tribunal was of the view that it has been conferred with the wide discretion under Section 11A to appraise the materials on record and substituted its own finding. The Tribunal has relied upon the decision of the Hon'ble Supreme Court in *Mavji C. Lakum Vs. Central Bank of India*, (2008) 119 FLR 96 : (2008) 5 JT 546 : (2008) 3 LLJ 1 : (2008) 7 SCALE 32 : (2008) 12 SCC 726 : (2009) 1 SCC(L&S) 254 : (2008) AIRSCW 3460 and *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, AIR 1973 SC 1227 : (1973) 26 FLR 359 : (1973) 1 LLJ 278 : (1973) 1 SCC 813 : (1973) 3 SCR 587 .

9. The Tribunal was of the view that in view of the decisions of the Hon'ble Supreme Court in *Mavji* (Supra) and *Firestone* (Supra) even if the enquiry is found to be fair, the findings arrived at by such domestic tribunal may not be the

correct findings and the Industrial Tribunal can independently assess the findings and come to a conclusion that the findings could not be supported on the basis of the evidence given or further comes to the conclusion that the punishment given is shockingly disproportionate. The Tribunal is not precluded in re-appreciating the evidence and/or interfere with the quantum of punishment. The Tribunal has also referred to the decision of the Hon''ble Supreme Court in *Workmen of Balmadies Estates Vs. Management Balmadies Estate and Others*, (2008) 3 CLT 12 : (2009) 2 CTC 746 : (2008) 116 FLR 731 : (2008) 1 JT 587 : (2008) 1 LLJ 673 : (2008) 1 SCALE 517 : (2008) 4 SCC 517 : (2008) AIRSCW 927 : (2008) 1 Supreme 405 and held that in the said decision the Hon''ble Supreme Court held that under Section 11A the Tribunal can, in an appropriate case, consider the evidence which has been considered by the Domestic Tribunal and on such consideration can arrive at a conclusion different from one arrived at the Domestic Tribunal. The Tribunal appears to have interfered with the findings of the Domestic Tribunal on a finding being arrived at that from the materials on record it cannot be said that the charges as leveled against the workmen were proved in its entirety.

10. In the charge-sheet the management stated that Sri Probal Chakraborty had incited and led the crowd to physically assault Mr. Choubey and the manner of assault was clarified by using the words "by hitting him first with blows, followed by other men with blows, stones and bricks and women with broom stick." The Tribunal has referred to Exhibit H being the FIR dated 28th April, 2000 in which it was stated that the said workman along with 16 other persons illegally detained the said officers and holding them to ransom demanding withdrawal of charge cum suspension order issued to Sri Prabir Kumar Das. It was further stated that such illegal detention continued for about ten hours and at around 5 p.m. when police once again tried to persuade them and asked them to move away some of them turned violent and Sri Probal Chakraborty, Sri Chandranath Dey (both company''s employees) and Sri Nihar Nath, Sri Shib Shankar Das (both contractor''s labours), and Sri Harjinder Singh Mulla (an outsider) started hitting Sri Shrikant Choubey, and Service Manager by blows and they were joined by some women who hit him with broomstick. Some of the above named persons attacked Sri Shrikant Choubey with stones and bricks which badly damaged one of the cars. With great difficulties Sri Shrikant Choubey and other managers were rescued by the police. The Tribunal found the evidences on Exhibit "H" to be inconsistent and on appreciation of evidence held that Mr. Choubey and other managers did not come with clean hand since they deposed in the same tone that only Sri Prabal Chakraborty assaulted Mr. Choubey which Mr. Choubey noticed after moving his neck after being assaulted while the FIR said otherwise. In his evidence MW-1 nowhere said that Sri Chandra Nath & Ors. as named in the FIR also assaulted Mr. Choubey with blows. The MW-2 also nowhere utter the name of the co-workers of the Chandra Nath and the contractor''s labours Sri Nihar Nath and Sri Shib Shankar who were named in the FIR. The MW-3 did not say that Sri Prabal Chakraborty assaulted Mr. Choubey by fists and blows.

However, the said witness deposed that he saw Sri Prabal Chakraborty taking active role in creating commotion and noticed him trying to pull out Srikant Choubey from his car through the front left window of the car. The Tribunal also found serious discrepancies in the medical report. The medical report which was marked by the enquiry officer as Exhibit D was not placed before the Tribunal. One copy of the medical report was annexed to the FIR being Exhibit H but the same was found to be not the copy of that particular medical report which was marked as Exhibit D by the enquiry officer. From the enquiry proceeding it appears that four documents were marked by enquiry officer such as charge-sheet, reply to the charge-sheet, one letter dated 5th May, 2000 written by H.C. Bijilwan, production manager and medical report as Exhibits A, B, C and D. There is a clear finding that neither Exhibit C nor Exhibit D were part of the enquiry proceeding. Medical report marked as Exhibit D in the enquiry proceeding relied upon and considered by the enquiry officer has not been produced either along with the enquiry proceedings (Exhibit C), or to the workman. The Tribunal on the aforesaid basis held that since from the list of documents submitted by the management there was no mention about medical report and also in view of the fact that one copy of the medical report to the FIR Exhibit H filed on behalf of the management is not the copy of that particular medical report which was marked by the Enquiry Officer as Exhibit D. It would be just and proper to look into the said medical report. On perusal of the copy of the medical report annexed to Exhibit H it was found that in the narration of assault the name of Sri Prabal Chakraborty did not find place. It was noted therein that at about 4.45 p.m. some of the people surrounding the car of Mr. Choubey hit him with fists and blows while he was sitting inside the car and some tried to drag him out of the car.

11. The Tribunal on the basis of the evidence held that there are convincing and overwhelming evidence/materials on record wherefrom it has been substantiated that on 28th April, 2000 since morning around 7.15/20 a.m. Mr. Choubey (Site and Services Manager) and three other managers were wrongfully detained by the agitators and the said detention continued near about ten hours. There were also evidence to prove that after 3 p.m. when the police tried to disperse the agitators and asked Mr. Choubey to start his car but as soon as Mr. Choubey started the engine of the car then and there the agitators including women attacked Mr. Choubey with broom stick, chappal etc. It has also further come to light from the evidence on record that situation became so aggravated that SDPO had to come to the spot and to intervene and even police personnel had to use batons to disperse the agitators. The agitation for fulfilment of their demands continue for long and the said officers were detained for ten hours. The Tribunal also come to a finding that at least after 11 a.m. Sri Prabal Chakraborty became involved in the mischief of wrongful detention of Mr. Choubey and others. As far as physical assault is concerned the Tribunal on the basis of the evidence held that the evidence as regards direct assault by Sri Chakraborty upon Mr. Choubey is not sufficient. The Tribunal on consideration of the evidence of MW-5 and

MW-6 and relying on their deposition that they have not seen Mr. Chakraborty directly assaulting Mr. Choubey and, in fact, MW-5 in a suggestion put to him reply in the negative was of the opinion that the workman is entitled to a benefit of doubt.

12. The evidence of MW6 would show that Shri Chakraborty was present in crowd but he did not depose positively to the fact that he had seen Mr. Chakraborty directly assault to Mr. Choubey. It is further stated that as soon as Mr. Choubey attempted to start his car some people along with some women jumped upon his car and hit by broom stick and chappals and as the window of the car was open, some people assaulted Mr. Choubey with broom stick and chappals and in the said crowd he saw Mr. Chakraborty. The Tribunal held that even if direct physical assaults upon Mr. Choubey is not proved by sufficient evidence but at least it has been proved that amongst the crowd Sri Prabal Chakraborty was also one of them who were trying to take out Mr. Choubey from the car. Mr. Chakraborty replied to the charge-sheet has also admitted that he joined the agitation activity at 11 AM. He has categorically stated in the reply that he has been falsely charge-sheeted and suspended because he at different time was present in the department as well as in the factory in protest against the illegal activities of the management that are detrimental to the interest of the workmen. The Tribunal held that from the conduct of Mr. Chakraborty it can be reasonably inferred that he would not remain totally aloof on the relevant date in spite of being present at the scene and accordingly came to the conclusion that involvement of Shri Chakraborty in the activities of wrongful detention after 11 AM on 20th April 2000 and also being one of the members of the crowd who were instrumental in dragging out of Mr. Choubey out of the car is a clear act of misconduct and which by no means is negligible.

13. The Tribunal however pleaded much on the Symantec of the word first used in the charge-sheet. In order to find out whether Mr. Chakraborty has been singled out although there are other members who are present in the crowd and participated in the said demonstration.

14. The Tribunal held that the management was required to give satisfactory explanation as to why the co-worker Mr. C.N. Dey in spite of committing same mischief, rather being involved in the Act of detention of Mr. Choubey since morning was totally let off. The Tribunal held that such discriminatory attitude on the part of the management would be a relevant consideration in interfering with the order of the dismissal passed by the management.

15. The Tribunal further interfered with the quantum of punishment on the ground that it has been proved that there has been a discrimination and/or unequal treatment on the part of the management as the action was taken only against Shri Prabal Chakraborty and he has been singled out.

16. The Tribunal also set aside the order of the dismissal on the ground that no opportunity of hearing was given to Shri Chakraborty by issuance of the second

show cause notice prior to the termination of the service. This conduct of management was found to be in violation of the principles of natural justice to some extent.

17. The argument on behalf of the management that the concerned workmen has to establish prejudiced by reason of non - supply of the findings and the report of the Enquiry Officer upon the delinquent without communicating the proposed punishment by the Disciplinary Authority was however, negated by the Tribunal on the ground that the punishment imposed by the Disciplinary Authority namely dismissal from the service is shockingly disproportionate. The Tribunal held that on appreciation the entire materials on record and assessment thereof that is to say on totality of the matter in which there has been a discrimination and deviation on the part of the management from the normal procedure of serving the report of the Enquiry Officer and second show-cause notice upon the delinquent the order of the dismissal cannot be sustained.

18. The Tribunal accordingly directed reinstatement with 25% of his back wages from the date of termination till reinstatement.

19. On consideration of the award passed by the Tribunal it appears that the said award suffers from inherent contradictions. The Tribunal while considering the evidence of the workman at one stage held that it can be unhesitatingly said that it has been proved from the evidence that in order to create pressure upon the management so that they agree to sit for a discussion mainly over the suspension of one Sri Prabir Das, demonstration or stay-in-agitation programme was taken by the Unions of the employees of Rishra Works in which Mr. Chakraborty was present and he participated in such activities after 11 AM inasmuch as he became involved in the mischief and wrongful detention of Mr. Choubey and others and was also instrumental in dragging out Mr. Choubey out of the car which establishes that his misconduct is not at all negligible at the same breadth, the Tribunal observed that Mr. Chakraborty's involvement in the said incident is not proved.

20. The Tribunal seems to have emphasized on the expression "assault" mentioned in the charge-sheet and was of the opinion that since it has not been proved beyond the reasonable doubt that Mr. Chakraborty was involved in assaulting Mr. Choubey, the punishment handed out to Mr. Chakraborty is shocking disproportionately.

21. On the aspect of non-supply of enquiry report before awarding the punishment by the disciplinary authority the Tribunal was of the opinion that considering whether non-supply of the enquiry report before awarding punishment by the disciplinary authority would cause prejudice or not the said issue has to be judged and considered on the basis of the back ground of the petitioner, his financial capability and educational qualification that is to say how much he is aware of the consequence of non-supply of such an important document. If a person is not aware of his right and is not given the opportunities

it cannot be presumed that he has waived his right. For plea of a worker to succeed it has to be established that he has consciously relinquished his known right. The workman must know what the word "prejudice" would mean if he did not question the report of the enquiry report. Whether the failure on the part of the disciplinary authority to issue a second show-cause notice before awarding punishment could be a ground for setting aside the punishment awarded by the disciplinary authority has to be judged in the said back ground and each case much depend upon its own fact. Ignorance of law although may not be an excuse for an elite commercial educated litigants but could be a defence for a person who is completely illiterate and unaware of the implications of not challenging the report. A person having no knowledge of law at all cannot be equated with an educated qualified person. There cannot be any doubt that in a departmental proceeding of this nature the management is much more well-equipped than that of the workmen and the concept of prejudice cannot be interpreted in a manner which would cause injustice to a workman belonging to the weaker section of the society. Moreover, if the case for which the workman was fighting appears to be legitimate and a part of the collective bargaining process protected under the Trade Union Act, the consideration certainly could be different. It is true that militant trade unionism and indiscipline cannot be indulged in any manner whatsoever. However, in the instant case the tribunal could not come to a definite finding that the petitioner, in fact, has assaulted Mr. Choubey. The concept of proportion finally has been introduced in service jurisprudence in order to find out whether for the act of proved misconduct the punishment awarded is proportionate to the offence committed since an order of dismissal in service jurisprudence would mean a civil death. While much debate is on with regard to the awarding of capital punishment as part of criminal jurisprudence. I feel that a time has also come to revisit the issue of dismissal from service in service jurisprudence as it is akin to civil death and may vitally affect the right to life enshrined in Article 21 of the Constitution of India.

22. Let us take an example. A workman is working without any wages for hundred days. He has his family and dependent parents. All of them were starving. The managerial staffs were totally unconcerned about the plight of the workman and they are enjoying Five-Star luxury. The aggrieved workman in desperation went to the quarter of manager and demand his due share of wages. The demand was rudely turned down and he was asked to leave the premises. In retaliation he used abusive language and tried to assault the Manager. A disciplinary proceeding followed and he was found to be guilty. He was awarded punishment of dismissal from service. On consideration of such facts would it be prudent to arrive at a conclusion that dismissal from service was just and fair. What I want to emphasize is that the authority concerned is required to take into consideration if there are provocations for such acts and justification, if any, for what he has done. The quality of mercy is not strained. A workman cannot be asked to plough for the Lords who lay them low.

23. It would be purely academic at this stage to discuss this matter any further

since I propose to set aside the order of the Tribunal because of the inherent contradiction with regard to the misconduct of the workman. The Tribunal has proceeded on the basis of that the workman has not been served with the second show cause notice which the learned Counsel on behalf of the petitioner would argue is not necessary in view of the judgment of the Supreme Court in Associated Cement Companies Ltd. Vs. T.C. Shrivastava and Others, AIR 1984 SC 1227 : (1984) 49 FLR 102 : (1984) LabIC 864 : (1984) 2 LLJ 105 : (1984) 1 SCALE 596 : (1984) 1 SCC 87 Supp : (1984) SCC 87 Supp : (1984) 3 SCR 361 : (1984) 1 SLJ 657 : (1984) 16 UJ 627 .

24. Learned Counsel has further submitted that in absence of any prejudice being pleaded before the Tribunal and in view of the ratio laid down by the Hon"ble Supreme Court in Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, (2008) 118 FLR 700 : (2008) 8 JT 70 : (2008) 3 LLJ 897 : (2008) 10 SCALE 101 : (2008) 9 SCC 31 : (2008) 2 SCC(L&S) 789 : (2009) 1 SLJ 37 on the order passed by the disciplinary authority should be sustained. I am however, unable to agree with the submission in view of the discussion made in the preceding paragraph.

25. Although Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., AIR 1994 SC 1074 : (1993) 6 JT 1 : (1994) 1 LLJ 162 : (1993) 3 SCALE 952 : (1993) 4 SCC 727 : (1993) 2 SCR 576 Supp : (1993) 3 SLJ 193 was rendered in relation to Article 311 of the Constitution of India, but I feel that the principle laid down in the said decision is in conformity with the principles of natural justice as I find that the furnishing of the report would have made a difference and the disciplinary authority before awarding punishment could have taken an informed decision. The very existence of the disciplinary authority is simply not to put a rubber stamp on the award and a mechanical affirmation thereof. It is more so having regard to the fact that the decision of the disciplinary authority is amenable to challenge before the Industrial Tribunal constituted under the Industrial Disputes Act, 1947. The Tribunal would be groping in the dark to find out for the reasons for dismissal. A decision without a reason renders the said decision a nullity in law. The Tribunal, in our view, is entitled to know the reasons on the basis of which a delinquent is dismissed from service. That was the purpose for which there is a requirement of serving a second show cause notice so that the Tribunal clearly knows how the disciplinary authority had applied its mind to the facts of the case not being swayed by the enquiry report which would remain unchallenged till it reaches the Tribunal. Moreover, the background of the workman has to be taken into consideration in order to appreciate whether any prejudice has been caused to the workman by reason of non-supply of the enquiry report.

26. The Tribunal appears to have reduced the punishment after taking into consideration that the three persons who apparently were present during the agitation were let off without any punishment. Two wrongs cannot make one right. However, whether this consideration should at all be a relevant

consideration in a service jurisprudence and whether there are mitigating circumstances even if the Tribunal arrives at a finding of misconduct against the workman is left to the discretion of the Tribunal to be decided by the Tribunal after giving an opportunity to the workman to challenge the finding of the disciplinary authority in addition to the defence already taken in the said proceeding. The parties shall be at liberty to adduce evidence only in the event the applicant files additional pleading with regard to the findings of the disciplinary authority and any pleading or evidence shall be only restricted to such finding. The Tribunal on consideration of such additional pleading will decide the matter afresh. The award passed by the Tribunal is set aside.

27. The workman shall file such additional pleading within a period of three weeks from date. In the event such additional pleading is filed, the company shall file its response to such additional pleading within the time to be stipulated by the Tribunal. However, it is made clear that in the event no additional pleading is filed the Tribunal shall proceed on the basis of the existing pleadings, evidence and materials on record and pass a final award. The entire exercise shall be completed within a period of six months from the date of communication of this order.

28. This application, accordingly, stands disposed of.

29. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.