

(1979) 07 MAD CK 0008
In the Madras High Court

K. Ramaswamy

APPELLANT

Vs

Government of Tamil Nadu and Another

RESPONDENT

Date of Decision : 10-07-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 11A, 12, 33

Citation : (1979) 2 LLJ 304

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Judgement

Padmanabhan, J.—The petitioner has filed this writ petition because the State Government had refused to refer the issue regarding his non-

employment by the second respondent, Ammapet Weavers Co-operative Production and Sales Society Ltd., Ammapettai for adjudication by the

Labour Court. The impugned order of the Government reads as follows:

The Government have examined the conciliation report of the Labour Officer, Salem in regard to the industrial dispute between the workman.

Thiru K. Ramasamy and the Management of Ammapet Handloom Weavers Co-operative Production and Sales Society Limited, Salem over the

issue regarding his non-employment and pass the following orders:

It is clear that the charges against the workman have been proved in the properly conducted enquiry.

The Government do not, therefore, consider it necessary to refer the issue in dispute for adjudication.

2. The petitioner was employed by the second respondent from the year 1959. Between 1.7.1974 and 30.9.1974 the petitioner was working in T.

Nagar branch at Madras. While so, the management found that there was shortage of stock in respect of that period. Therefore, the management, the second respondent issued a charge memo to the petitioner alleging that he failed to furnish sureties in the place of the person who had died and the other who had got himself discharged and that he did not make good half of the stock deficit amount which he agreed to pay and that he absented himself from duty till 17.3.1975. On these charges a domestic enquiry was held and thereafter the petitioner was dismissed from service with effect from 17.3.1975.

3. Mr. Somayaji for the petitioner contended that u/s 12(5) of the Industrial Disputes Act, 1947 the State Government was bound to give reasons for refusing to refer the dispute to the Labour Court for adjudication. The learned counsel submitted that on the face of the order the only reason given by the State Government for refusing to refer the dispute for adjudication to the Labour Court is that the charges against the workman had been proved in the properly conducted enquiry. Section 11A was introduced in the Industrial Disputes Act on 15.12.1971. Under the said section wide powers equivalent to appellate powers have been conferred on Labour Court, Tribunals and National Tribunals. It will be now open to the Labour Court to examine a case on the merits and if it is satisfied that the order of discharge or dismissal was not justified it will be open to the Labour Court to set aside such order and direct reinstatement of the workman on such terms and conditions as it thinks fit or give such other relief to the workman including the award of lesser punishment. In the light of this section Mr. Somayaji urged that the Labour Court has power in a given case to consider the question whether even if the charges against the workman had been proved in a regularly conducted enquiry, the punishment meted out to the workman was just and proper or whether only a lesser punishment was called for. In the submission of the learned counsel, the State Government ought to have applied its mind to the question of punishment and considered whether from the point of view of the punishment there was any necessity to refer the dispute to the Labour Court.

4. Mr. N.R. Chandran, learned Government Pleader and Mr. K. Ramamurthy for the second respondent vehemently contended that this Court has no jurisdiction to sit in appeal over the order of the Government in refusing

to refer a dispute for adjudication to the Labour Court. The

Government have stated that it is clear that the charges against the workman had been proved in a properly conducted enquiry and that in those

circumstances no further reasons are called from the State Government to justify their refusal to refer a dispute to the Labour Court.

5. Section 12(5) of the Industrial Disputes Act reads as follows:

If, on a consideration of the report referred to in Sub-section (4), the appropriate Government is satisfied that there is a case for reference to a

Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a

reference it shall record and communicate to the parties concerned its reasons therefor.

Section 12(5), therefore, imposes a duty on the Government to record and communicate the reasons where the Government decides not to refer a

dispute for adjudication to the Labour Court. It is now settled that the order of the State Government u/s 12(5) referring or refusing to refer a

dispute to the Labour Court for adjudication is an administrative order. It is also equally settled that Courts have no power in exercise of their

power of judicial review to sit in appeal over the order of the Government passed u/s 12(5) of the Act. Nor is it possible for Courts to question the

reasons given by the Government for refusing a reference u/s 12(5) of the Act if the reasons are germane and relevant to the question of reference.

The scope of Section 12(5) of the Act has been considered in *State of Bombay Vs. K.P. Krishnan and Others*, , where Gajendragadkar, J., as he

then was observed as follows:

The order passed by the Government u/s 12(5) may be an administrative order and the reasons recorded by it may not be justifiable in the sense

that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny: in that sense it would be correct to say that the Court

hearing a petition for mandamus is not sitting in appeal over the decision of the Government; nevertheless if the Court is satisfied that the reasons

given by the Government for refusing to make a reference are extraneous and not germane, then the Court can issue, and would be justified in

issuing, a writ of mandamus even in respect of such an administrative order.

The learned Judge has again observed as follows:

The problem which the Government has to consider while acting u/s 12(5) is whether there is a case for reference. This expression means that

Government must first consider whether a prima facie case for reference has been made out on the merits. If the Government comes to the

conclusion that a prima facie case for reference has been made, then it would be open to the Government also to consider whether there are any

other relevant or material facts which would justify its refusal to make a reference. The question as to whether a case for reference has been made

out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of a case as well as on the incidental

question as to whether a reference should nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the

Government by Section 10(1) could be exercised by the Government even in dealing with cases u/s 12(5) provided of course the said discretion is

exercised bona fide, its final decision is based on a consideration of relevant facts and circumstances and the second part of Section 12(5) is

complied with.

From this decision it will be clear that before passing an order u/s 12(5) the State Government should consider the question fairly and reasonably

and take into account all relevant facts and circumstances. Secondly, Government in refusing to make a reference should not take into account

extraneous matters which are not germane to the issue on hand. Further if it is clear that the Government had not applied its mind to all the relevant

facts and circumstances before passing an order refusing to refer a dispute for adjudication or the State Government had not given any reasons at

all as enjoined u/s 12(5) of the Act, the Court will have the power to interfere with the order of the Government.

6. Section 11-A of the Act reads as follows:

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal

for adjudication and in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied

that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement

of the workman on such terms and conditions, if any, as it thinks fit, give such

other relief to the workman including the award of any lesser

punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the

materials on record and shall not take any fresh evidence in relation to the matter.

This section has been interpreted by Vaidialingam, J. in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The*

Management and Others, . In paragraph 47 it is observed as follows:

The Legislature in Section 11A has made a departure in certain respect in the law as laid down by this Court. For the first time, power has been

given to a Tribunal to satisfy itself whether misconduct is proved. This is particularly so, as already pointed out by us, regarding even findings

arrived at by an employer in an enquiry properly held. The Tribunal has also been given power, also for the first time, to interfere with the

punishment imposed by an employer.

Again in paragraph 62 it is observed as follows:

We have already expressed our view regarding the interpretation of Section 11A. We have held that the previous law, according to the decisions

of this Court, in cases where a proper domestic enquiry had been held, was that the Tribunal had no jurisdiction to interfere with the finding of

misconduct except under certain circumstances, The position further was that the Tribunal had no jurisdiction to interfere with the punishment

imposed by an employer both in cases where the misconduct is established in a proper domestic enquiry as also in cases where the Tribunal finds

such misconduct proved on the basis of evidence adduced before it. These limitations on the powers of the Tribunals were recognized by this

Court mainly on the basis that the power to take disciplinary action and impose punishment was part of the managerial functions. That means that

the law, as laid down by this Court over a period of years, had recognised certain managerial rights in an employer. We have pointed out that this

position has now been changed by Section 11A. The section has the effect of altering the law by abridging the rights of the employer inasmuch it

gives power to the Tribunal for the first time to differ both on a finding of

misconduct arrived at by an employer as well as the punishment imposed by him.

In paragraph 38 it is stated thus:

We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference u/s 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also held that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman any lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by Section 11A.

This decision is clear authority on the point that by virtue of the power conferred on it u/s 11A the Labour Court or the Tribunal has got the jurisdiction to go into the question whether the proved misconduct merited punishment by way of discharge or dismissal. If it finds that the proved misconduct did not deserve such a serious punishment as one of discharge or dismissal, it can award to the workman any lesser punishment instead. Section 11A as observed by Vaidialingam, J., confers on the Labour Court or the Industrial Tribunal the power to interfere with the punishment and alter the same.

7. If the true statement of the law as now stands after the introduction of Section 11A is that the Labour Court has not only the power to reappraise the evidence and find out whether the finding of guilt recorded in the domestic enquiry is correct or not, but also to see whether the punishment inflicted is in proportion to the gravity of the proved misconduct or is so severe in relation to the gravamen of the charge that has been

proved that it has to be altered to one of lesser punishment, then clearly the appropriate Government before passing an order u/s 12(5) refusing to

refer a dispute for adjudication will have to apply its mind to the question whether the punishment meted out by the management to the workman is

justified by the proved misconduct. It may be in a particular case the misconduct might have been proved in a regularly conducted domestic

enquiry. At the same time, the punishment meted out by the management must be justified by the gravamen of the charge proved. If in such cases

the Government applies its mind and prima facie finds that the punishment imposed was just and proper in relation to the misconduct proved, the

Government would be in order in refusing to refer the dispute for adjudication. On the other hand, if in a given case, the State Government finds

that the punishment awarded is very severe in relation to the proved misconduct and the situation called for a lesser punishment, then a case would

have been made out for reference u/s 12(5) in view of the fact that Section 11A has conferred a power on the Labour Court to interfere with the

punishment also. No doubt, it depends upon the subjective satisfaction of the Government to form an opinion in a given case whether the

punishment of dismissal or discharge imposed on the workman is in proportion to the severity of the proved misconduct. The Court may not have

jurisdiction to review the opinion formed by the Government as a result of the subjective satisfaction. At the same time, the Court will have the

power to consider whether the Government did apply its mind to the question of the gravity of the punishment inflicted in a given case before

deciding to refuse a dispute for adjudication u/s 12(5). This is so because the question of severity or otherwise of the punishment in a case is a

matter that can be gone into by the Labour Court in adjudication proceedings, on the basis of the power conferred on it by Section 11A.

8. In *Workmen of Cochin Chamber of Commerce Vs. State of Kerala*, the State Government refused to refer the dispute to adjudication. The

reason given by the Government was that the management had taken action in accordance with the canons of natural justice and prima facie the

action of the management was not mala fide. A petition under Article 226 of the Constitution of India was filed before the Kerala High Court

challenging the order passed by the Government u/s 12(5) of the Act. Subramanian Poti, J., observed as follows:

Section 11A of the Act was introduced in the Act by an amendment which came into force on 15 12 1971. That section conferred powers of an

appellate nature in the Labour Courts, Tribunals and National Tribunals. The scope of the power u/s 11A has been considered by the Supreme

Court in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . This section makes a change in

the law by conferring on the Labour Courts, Tribunals and National Tribunals appellate power which enables it to examine a case on the merits

and if satisfied that the order of discharge or dismissal was not justified, set aside such order and direct reinstatement of the workman on such

terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment. Exhibit P3 in

both these cases are passed subsequent to the commencement of operation of Section 11A of the Act and, therefore, Section 11A would have

applied to any enquiry before a Labour Court, or Tribunal in case there had been a reference. It is, therefore, said for the petitioners in this case

that one of the relevant questions to be considered would have been whether evidence recorded at the domestic enquiry would have justified the

conclusion reached by the management and further whether in the circumstances of the case the punishment would be merited. These would have

been open consideration and would have been relevant in the event of a reference. It is also said that apart from the question of mala fides of the

management in dismissing the workmen there may be other pleas available by way of challenge to an order dismissing the workmen. The

Government by saying that since the proceedings have been taken in accordance with the principles of natural justice prima facie it is not mala fide

has made a very irrational approach and its approach has further been quite irrational in saying that since there is no mala fides no reference is to

be made as if that is the sole ground on which reference could be made. It is particularly so when the scope of an enquiry before an Industrial

Tribunal has considerably been enlarged by reason of Section 11A of the Act. I am in agreement with learned Counsel for the petitioners that the

order of the Government shows that the Government has chosen to apply a wrong test and the approach is quite irrational. The reasons stated by it

are not supported by the facts stated in the very order and the reasons do not lead to the conclusion or decision that there need be no reference.

9. The validity of an order refusing to refer a dispute for adjudication was considered by a Bench of the Gujarat High Court in Woollen Mill

Kamdar Sangh, Jamnagar Vs. State of Gujarat and Another, . The petitioner-union in the writ proceedings in the High Court had sponsored the

dispute relating to the discharge of a workman and the State Government had refused to make a reference. Earlier, the management, had sought

approval of the Tribunal u/s 33(2)(b) of the discharge of the workman and it was granted subject to the condition that the workman was free to

seek a reference for adjudication. The Acting Chief Justice speaking for the Bench observed as follows:

The Government has passed its order under a complete misconception of its jurisdiction in these labour matters and has not borne in mind the most

relevant factors in this case especially of this statutory change in law which had been made after the enactment of Section 11A in the Industrial

Disputes Act, 1947 because in case of such industrial disputes relating to discharge or dismissal of a single workman even if the reference was

made and the Tribunal was satisfied that the order of discharge or dismissal was not justified, it can set aside the order of discharge or dismissal

and direct reinstatement of the workman on such terms and conditions, if any, as it thought fit or give such relief to the workman including the lesser

punishment instead of discharge or dismissal as the circumstances of the case might require.

10. The impact of this new provision has been examined in the decision in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd.

Vs. The Management and Others, , by pointing out that Section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself

on both the points as to whether the misconduct is proved or not, and if proved, whether it would warrant the punishment of dismissal or

discharge. Their Lordships pointed out that now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion ensures to it

when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry. Such a

power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognised in a tribunal when it was

deciding a dispute on the basis of evidence adduced before it for the first time. Now the new law has put both the categories on par by Section

11A. The Tribunal could even hold that the proved misconduct did not merit punishment by way of discharge or dismissal and, therefore, could

award to the workman any lesser punishment instead. Therefore, the power was given to interfere with the punishment and alter the same. The

whole ratio of this decision is that the fetters which existed under the old law by limiting the powers of the Tribunal to the limitations evolved in the

Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen, , has been now lifted by this new provision and a wide jurisdiction was given to

the Industrial Tribunal to come to its own decision about the guilt or otherwise of the workman concerned and even to substitute a lesser

punishment. The change in law had been effected to cover these specific cases of individual discharge and dismissal and that is why the State

Government would have now to keep in mind this enlarged scope of the industrial adjudication in the matters of discharge or dismissal even of an

individual workman while making the reference because the original fetters have now been lifted on the Tribunal's jurisdiction.

The learned Acting Chief Justice again observed:

What lies in the ambit of the Government's jurisdiction for not making a reference is to consider whether a prima facie case for reference existed or

not and whether certain grounds as pointed out by their Lordships, it was not expedient to make a reference as for example, when the claim was

patently frivolous clearly belated or due to its adverse impact on the industrial relations in the State. Therefore, it is on these mandatory guidelines

that this statutory discretion has to be exercised by taking into consideration only these relevant guide lines.

The learned Acting Chief Justice further observed as follows:

The other decision in Prem Kakar Vs. State of Haryana and Another, relied upon by Mr. Divecha clearly reiterates this settled legal position.

There the Government had prima facie found that the concerned workman was not a workman within the definition of the relevant section and,

therefore, it was held that that order was not vitiated. That decision could not be pressed in aid in the present case where the Government has

ignored the most relevant facts as to the entire change in law enlarging the powers of the Industrial Tribunal for adjudication of this type of disputes

u/s 11A and the fact that even an Industrial Tribunal had in this very matter

passed a conditional order keeping open this right of the workman.

Besides, in any event, after such an exhaustive challenge of the order of the management on various grounds of the inquiry being not proper and the

order being completely vitiated as contended by the union, it could never be stated that the union had not given any proper ground for seeking this

reference. Whoever has passed this order on behalf of the Government has completely ignored Section 11A from the statute book and, therefore,

such a totally groundless order is no order in the eye of law and must be set aside even in exercise of writ jurisdiction. In this view the learned

Judges set aside the order.

11. It is, therefore, clear that in this case it is not seen from the order that the Government had kept in mind the provisions of Section 11A of the

Industrial Disputes Act. No doubt, in paragraph 2 of the order the Government have stated that it is clear that the charges against the workman

have been proved in the properly conducted enquiry. Even if it is assumed from this statement that the Government was satisfied on a prima facie

appraisal of the evidence that the finding of guilt in the domestic enquiry was correct, the order does not show that the Government considered the

question whether the punishment was justified by the proved misconduct. A perusal of Section 11A makes it clear that the Labour Court could

even hold that the proved misconduct did not merit punishment by way of discharge or dismissal, and therefore could award to the workman any

lesser punishment. The section confers power on the Tribunal to interfere with the punishment imposed in the domestic enquiry and alter the same.

This being the legal position one of the relevant factors which the Government should have borne in mind before refusing to refer the dispute for

adjudication was the question whether the proved misconduct did merit the punishment of discharge or dismissal. In this case, the impugned order,

as I have already stated, does not show that this fact was taken into consideration before the passing of the order.

11A. Mr. N.R. Chandran, realising the impact of Section 11A submitted that in paragraph 5 of the counter-affidavit, the Joint Secretary to

Government, Labour and Employment Department has stated that "when the Government on the basis of the facts placed before them was

satisfied that the punishment was not disproportionate to the offence and that it

did not amount to victimisation, the question of reference to the Labour Court or Industrial Tribunal does not arise." He also referred to the statement in paragraph 3 of the counter-affidavit "the Government have passed orders after considering the conciliation report of the Labour Officer, Salem and taking into account all the facts and circumstances set out therein.

The learned Government Pleader, therefore, submitted that even if it is not apparent from the order, the affidavit filed by the Joint Secretary to Government, Labour and Employment, is clear to show that the Government had in mind the question of the severity or otherwise of the punishment.

12. This contention of the Government Pleader has no merit. It has been held by the Supreme Court and other Courts that when a statutory functionary makes an order based on certain grounds, its validity must be tested by reasons mentioned therein and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise. What was invalid in the beginning cannot become validated by additional grounds later brought out. In *Commissioner of Police, Bombay Vs. Gordhandas Bhanji, Bose, J.* speaking for the Bench stated thus:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officers making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

13. In a Bench decision of the Kerala High Court in *Workmen of J. and P. Coats (India) Pvt. Ltd. Vs. State of Kerala and Others*, . Balakrishna Erady, J., spoke thus for the Court:

Under Section 12(5) of the Act, whenever the appropriate Government takes a decision not to refer a dispute for adjudication there is mandatory duty cast on it to record its reasons in support of the said conclusion and to communicate such reasons to the parties concerned. It is, therefore, obligatory on the part of the Government to set out in the communication issued to the parties, clearly and precisely, the grounds on which the

request for reference was being declined. The Government cannot, therefore, be heard to say that in addition to the reasons mentioned by them in

the order certain other relevant facts or grounds not disclosed in the order had also weighed with them in reaching the conclusion that no reference

need be made.

14. In *Mohinder Singh Gill v. Chief Election Commr.* (1978) 1 S.C.C. 405, Krishna Iyer, J., observed as follows:

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the

reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the

beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

15. On an analysis of the decisions above referred to it is clear that the Government have not based its decision on a consideration of relevant facts

and circumstances. The Government failed to consider a very relevant fact, viz., whether the proved misconduct in the instant case merited a

punishment of dismissal. When once this Court is satisfied that the Government have not applied its mind to the provisions contained in Section

11A of the Industrial Disputes Act, it will be open to this Court to quash the order of the State Government. In the circumstances, the writ petition

is allowed and the impugned order dated 10 3 1977 is quashed. The State Government is directed to dispose of the matter afresh in accordance

with law in the light of the observations contained herein. There will be no order as to costs.