

(1988) 02 GAU CK 0007
In the Gauhati High Court
Case No : Civil Rule No. 393 of 1975

Md.Anwar Azim Borah

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 24-02-1988

Acts Referred:

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

Citation : (1988) 1 GLJ 432

Hon'ble Judges : K.N.Saikia, C.J. and S.Haque, J

Bench : Division Bench

Advocate : J.P.Bhattacharjee, J.N.Sharma, A.Sharma, U.Das, Advocates
appearing for Parties

Judgement

Saikia, C. J.

1. The petitioner challenges the award dated 1.6.74 passed by the Presiding Officer, Labour Court, Dibrugarh in Reference No. 4 of 1971.

2. The petitioner was the second store Clerk of Napuk Tea Estate. Suffry till 14.9.64 on which date he was dismissed by the management sequel to a departmental proceeding finding him guilty of gross misconduct in that he was responsible for giving orders to labourers of the Tea Estate for the removal from the company's stocks of three pipes which were transferred to the petitioner's quarter without any official order from the management violating the Standing Orders" Section 10 (a) (2). For approval of the order of dismissal the management filed an application under Section 33 (2) (b) of the Industrial Tribunal, for short, the Tribunal, which was registered as Case No. 35 (I)/64. The petitioner filed written statement and an additional written statement denying the charge and alleging motive. The Tribunal allowed the management's application vide order dated 27.12.66 approving the dismissal holding, inter alia, that the domestic enquiry held by the management was proper and that a prima facie case was established in the impugned enquiry. The petitioner did not challenge this order.

3. Later an industrial dispute having been raised the State of Assam under Notification dated 25.5.71 referred the dispute for adjudication to the Labour Court which registered it as Reference No. 4 of 1971. The Union representing the petitioner filed their written statement dated 5.8.71. The management filed their written statement dated 10.8.71.

4. Hearing the parties on the preliminary point of jurisdiction at the instance of the management the Labour Court passed the impugned award dated 1.6.74 holding that earlier considering the evidence adduced before it the Tribunal having decided that the case under Section 33 (2) (b) of the Act on merit and that order having remained unchallenged the Labour Court had no jurisdiction to adjudicate the issues referred to it. Hence this petition.

5. Mr. A. Sarma, learned counsel for the petitioner, submits, inter alia, that the Labour Court erred in law and fact in holding that the Tribunal by its order dated 27.12.66 in the application under Section 33 (2) (b) of the Act decided the case on merit and that order having gone unchallenged it had no jurisdiction to decide the issues in the reference inasmuch as under Section 33 (2) (b) the Tribunal only considered the prima facie case which did not amount to final adjudication on merit and there could not have been res judicata in the Labour Court in the matter ; that even assuming that the Tribunal's order under Section 33 (2) (b) passed on merit of the case would be res judicata in the Labour Court on the same issue, in the instant case there was no disposal by the Tribunal on merit and the Labour Court erred in holding that it was disposed of on merit.

6. Mr. J. P. Bhattacharjee, learned counsel for the management counters submitting, inter alia, that the law on the question having been settled by a series of decisions, the Labour Court rightly held that it had no jurisdiction to try the issues in the reference ; and that the Labour Court rightly held that the Tribunal decided the case under Section 33 (2) (b) finally on merit and did not find only a prima facie.

7. The two questions to be decided in this petition, therefore, "are(i) (a) whether the order of the Tribunal under Section 33 (2) (b) was rendered on merits of the case and not on the examination of the prima facie case only ; (b) it not whether that would be res judicata for the Labour Court to decide the same issues in the reference under Section 10 of the Act on its merit ? (2) Assuming that the order of the Tribunal dated 27.12.66 under Section 33 (2)(b) was a decision on the merit of the case, whether that would be res judicata for the Labour Court's trying the issues in the reference under Section 10 of the Act ?

8. As regards the question I(a), on perusal of the order dated 27.12.66 in Case No. 35(I)/64 we find that at the domestic enquiry held on 11.9.64 the petitioner was given opportunity to produce his witnesses and also to cross-examine the witnesses examined by the management. Three members of the garden staff were present at the enquiry. The Tribunal carefully examined the records of the case including the statements of the witnesses produced by the Manager on

9.9.64 and also at the domestic enquiry on 11.9.64. It also perused the statements ,made by the petitioner before the Manager in the morning of 9.9.64 and held that there was a prima facie case against the petitioner. The Tribunal also found that the petitioner himself in his explanation maintained that the pipes in question were actually found in his compound on 9.9.64 while he went to the latrine, but maintained that there was some foul play and that he reported the matter to the Manager. In his evidence before the Tribunal he wanted to maintain that there was a theft of some pipes from a certain school, previous to 9.9.64 and the pipes found in his compound might have been those pipes of that school planted in his compound. He also said that he wanted to go to police but the Manager did not allow. The petitioner also examined witnesses before the Tribunal and from their evidence the Tribunal found that he was bent upon concocting a new story. The Tribunal accordingly concluded :

"In short I am satisfied that there was a proper domestic enquiry into the matter and that the same was held in presence of the opposite party himself (who admitted the same before me on the date of hearing). As such, I should think that there is a prima facie case against the opposite party, as already observed..?

The management's application was accordingly allowed. Thus, The Tribunal clearly said that there was a prima facie case against the petitioner. The Tribunal did not expressly conclude that the charges were proved.

9. The Labour Court in the impugned award in Refeance No. 4 of 1971 observed that from the order of the Tribunal it appeared to it that although the Tribunal found that there was a proper domestic enquiry, it also considered the evidence adduced before it and decided the case on merit as it appeared to the Labour Court that the Tribunal considered the evidence adduced before it. It is true that witnesses were examined before the Tribunal but in face of the Tribunal's own observation that there was a prima facie case the Labour Court could not have held that the case was considered on merit. The answer to the question 1 (a) has; therefore, to be in the negative.

10. For answering question I(b) we may refer to the decisions on the point. In M/ S. G. Mckenize & Co vs. Its Workmen and others, AIR 1959 SC 389 it has been clearly held that Section 33 of the Industrial Disputes Act. 1947, shortly "the Act", does not confer any Jurisdiction on the Tribunal to adjudicate on a dispute but it merely empowers the Tribunal to give or withhold permission to the employer during the pendency of an industrial dispute to discharge or punish a workman concerned in the industrial dispute. In deciding whether to give permission or not the Industrial Tribunal is not to act as a reviewing tribunal against the decision of the management but to see that before it lifts the ban against the discharge or punishment of the workmen the employer makes out a prima facie case. The principles governing the giving of the permission in such cases are that the employer is not acting malafide, is not resorting to any unfair labour practice, intimidation or victimisation and there is no basic error or contravention of the principles of natural justice. Therefore, when the Tribunal

gives or refuses permission it is not adjudicating an industrial dispute, its function is to prevent victimisation of a workman for having raised an industrial dispute. The nature and scope of proceedings under section 33 shows that removing or refusing to remove the ban on punishment or dismissal of workmen does not bar the raising of an industrial dispute when as a result of the permission of the Industrial Tribunal the employer dismisses or punishes the workmen. In paragraph 18 of the judgment it has been said :

"As the purpose of Section 23 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding under Section 33 would not operate as *resjudicata* and bar the raising of an industrial dispute..."

11. Similarly in paragraphs 24 and 25 of the judgment in *Punjab National Bank Ltd. vs. A.I.P.N.B.E Federation*. AIR 1960 SC 160, it has been ruled that where an application is made by the employer for the requisite permission under section 33 the jurisdiction of the Tribunal in dealing with such an application is limited. It has to consider whether a *prima facie* case has been made out by the employer for the dismissal of the employee in question. If the employer has held a proper enquiry into the alleged misconduct of the employee, and if it does not appear that the proposed dismissal of the employee amounts to victimisation or an unfair labour practice, the tribunal has to limit its enquiry only to the question as to whether a *prima facie* case... has been made out or not. In these proceedings it is not open to the tribunal to consider whether the order proposed to be passed by the employer is proper or adequate or whether it errs on the side of excessive severity ; nor can the tribunal grant permission, subject to certain conditions, which it may deem to be fair. It has merely to consider the *prima facie* aspect of the matter and either grant the permission or refuse it according as it holds that a *prima facie* case is or is not made out by the employer. Even if the requisite permission is granted under section 33 that would not be the end of the matter. "It is not as if the permission granted under Section 33 validates the order of dismissal. It merely removes the ban ; and so the validity of the order of dismissal still can be, and often is, challenged by the Union by raising an industrial dispute in that behalf. The removal of the ban under Section 33 merely enables the employer to make an order of dismissal and thus avoid incurring the penalty imposed by Section 31(1). But if an industrial dispute is raised, on such a dismissal, the order of dismissal passed even with the requisite permission obtained under Section 33 has to face the scrutiny of the tribunal.

12. In *Messrs Steel worth Private Ltd. vs. The State of Assam & Ors.*, 1973 ALR 196, the workman on a domestic enquiry was found guilty and the management passed the order of dismissal on 28.11.63 and made an application under section 33 (2) (b) of the Act and the tribunal held that the management was justified in passing the order of dismissal and, therefore, accorded its approval. The workman challenged it in a petition under Article 226 of the Constitution and the High Court quashed the Tribunal's order. The management appealed and the Supreme Court allowed the appeal, set aside the order of the High Court and

restored the order of approval passed by the Tribunal, the Government subsequently referred the dispute for adjudication under section 10 of the Act. The question before the High Court was whether the order of approval on merits under section 33 (2) (b) bars a subsequent reference under Section 10 and whether with the order of approval on merits, the industrial dispute over the dismissal ceases to exist and whether the principles of res judicata apply. The Division Bench of this Court held that when the Supreme Court has held that the question of dismissal of the workman concerned was at large before the Tribunal after the domestic enquiry was found to be vitiated and the Tribunal having considered the evidence before it decided on merits that the order of dismissal was justified, the same industrial dispute no longer existed or was apprehended on the date of the impugned reference for making further reference of the same dispute. In that case the dispute regarding the dismissal of the workman I was adjudicated on merits in an application under Section 33 (2) (b) and hence the reference was found to be without jurisdiction as on the date of the impugned reference there did not exist any industrial dispute, nor was it apprehended by the State Government. Their Lordships observed that when the Supreme Court had held that the question of dismissal of the concerned workman in the I case was decided on merits by the Tribunal in an application under I section 33 (2) (b) of the Act, if that very matter was again referred to the Tribunal or Labour court for adjudication, the general principles of res judicata will attracted in the proceedings before the Tribunal or the Labour Court to which the matter has again been referred. It may be noted that in the instant case the Tribunal did not adjudicate on merit, and in this respect the instant case is distinguishable from Steels worth (supra).

13. In Burn & Co. vs. Their Employees, AIR 1957 SC 38, where it was held that Section 11, C. P. C. was no doubt, in terms inapplicable to the industrial disputes, but the principles underlying it, expressed, in the maxim "interest rei publica out sit finis litium,?" is founded on sound public policy and is of universal application and that there are good reasons why this principle should be applicable to decisions of Industrial Tribunal also. In Steels worth (supra) their Lordships also held that it is settled law that in an application under section 33 (2) (b) of the Act, the Tribunal or the Labour Court has first to consider whether there was any domestic enquiry or not. If there was a domestic enquiry the Tribunal's first duty is to see whether the domestic enquiry is vitiated by violation of the principles of natural justice or for any unfair labour practice or victimisation or for the reason that the findings of the domestic enquiry are perverse. If the domestic enquiry is found to be defective on account of any of the grounds stated above, the jurisdiction of the tribunal is not limited to the question of finding out a prima facie case but it has to consider the evidence on record and give its finding on merits as to the justifiability or otherwise of the action of the management. This observation was made relying on (1972) 1 SCC 595=AIR 1972 SC 1031, Delhi Cloth and General Mills Co. vs. Ludh Budh Singh, where the nature and extent of jurisdiction exercised by the Industrial Tribunal under section 33 (1) (b) and

Section 10 were outlined. There, an application was filed under Section 33 (1) (b) of the Act requesting the Tribunal to grant permission to dismiss the workman. The management filed an application before the Tribunal praying that in case the Tribunal held that the enquiry conducted by it was defective. It should be allowed to adduce evidence before the Tribunal to justify the action proposed to be taken against the workman. Neither party examined any witness. The Tribunal held that the enquiry proceedings had not been conducted in accordance with the principles of natural justice and that the findings of misconduct were not in accordance with the evidence adduced before it and accordingly it held that the enquiry proceedings suffered from very serious defects. The Supreme Court held that the Tribunal had committed an error in not dealing (with and allowing the application filed by the management for giving an opportunity of adducing evidence to justify the action taken by it. In *State Bank of India vs. R. K. Jain & Ors.*, C. A. No. 992 of 1967 decided on 17.9.1971, the Supreme Court held that it was open to a management to rely upon the domestic enquiry conducted by it and satisfy the Tribunal that there was no infirmity attached to the same. It has also been held that the management had a right to adduce independent evidence before the Tribunal to justify the action taken or proposed to be taken and that it was for the management to avail itself of the said opportunity. In *M/s. Bharat Sugar Mills Ltd. vs. Shri Jai Singh & Ors.* (1902)3 SCR 684. the Supreme Court rejected the contention that once the Industrial Tribunal held the domestic enquiry to be defective, it had no jurisdiction to allow the management to adduce evidence before it to justify the action taken or proposed to be taken, observing that the proper way for performing this duty where there has not been a proper enquiry by the management is for the Tribunal to take evidence of both sides in respect of the alleged misconduct. When such evidence is adduced before the Tribunal the management is deprived of the benefit of having the findings of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct unless the finding is perverse and has to prove to the satisfaction of the Tribunal itself that the workman was guilty of the alleged misconduct. Their Lordships did not think it either just to the management or indeed even fair to the workman himself that in such a case the Industrial Tribunal should refuse to take evidence and thereby drive the management to make a further application for permission after holding a proper enquiry and deprive the workman of the benefit of the Tribunal itself being satisfied on evidence adduced before it that he was guilty of the alleged misconduct.

14. In *Messrs. Steels worth* (supra) reliance was placed on *Mysore Steel Works vs. Jitendra Chandra Kar & Ors.* (1971) 1LLJ (SC) 543. In that case pursuant to a domestic enquiry the workman was dismissed and the management filed application for grant of approval of the action taken under Sec. 33 (2) (b) and the Tribunal allowed the employer to let in evidence and held the dismissal to have been justified. The workman filed a writ petition in the High Court challenging the validity of the Tribunal's order and the High Court quashed the order on the ground that on the finding given by the Tribunal that the enquiry

held by the management was not vitiated by a breach of the principles of natural justice or by findings of that enquiry being perverse or on the ground of any unfair labour practice or victimisation, the Tribunal exceeded its jurisdiction in recording evidence and in considering that evidence while deciding whether a prima facie case for dismissal had been made out. But the High Court itself went into the question whether the enquiry suffered from violation of the principles of natural justice and held that it was in fact so vitiated and on that ground also set aside the Tribunal's order. The Supreme Court set aside the order of the High Court and restored the order of approval passed by the Tribunal for the reasons given in paragraphs 9 to 13 and 15. In *Ludh Budh Singh's case* (supra) at paragraph 61 out of the six principles culled out, Principle No. 4, the Management's right to adduce evidence has been included. The Principle No. 7 says :

"The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act."

From this, in *Messrs. Steels worth* (supra) it has been held that after the Tribunal allowed the management to adduce evidence and decided the application under Section 33 (2) (o) approving the action taken or proposed to be taken, the question of dismissal had been finally settled and hence there was no further scope for referring the dispute under Section 10(1) of the Act. In *M/s. Western India Match Co. Workers' Union*, (1970) 2 LLJ. 256, it was held that no reference was contemplated by Section 10 (1) of the Act when the dispute was not an industrial dispute, or even if it was so, it no longer existed or was not apprehended, for instance, where it was already adjudicated or in respect of which there was an agreement or a settlement between the parties or where the industry in question was no longer in existence.

15. It is stated at the bar by Mr. Bhattacharjee that special leave petition against the judgment in 1973 ALR 196 (*Messrs Steels worth*) was rejected by the Supreme Court. What then would be the effect of such a dismissal In the *Workmen of Cochin Port Trust vs. The Board of Trustees*, AIR 1978 SC 1283 the Supreme Court observed that dismissal of a special leave petition under Article 136 need not necessarily bar the entertainment of a writ petition under Article 226 on the same grounds. Where the award of the Industrial Tribunal is challenged in the special leave petition before the Supreme Court on almost all ground which are in the subsequent writ proceeding agitated in the High Court, the principles of constructive res judicata would apply. However, from the order dismissing the special leave petition in limine it cannot be inferred that all the matters agitated in the said writ petition were either explicitly or implicitly decided. The technical rule of res judicata, although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issue must have been decided. It is not safe to extend the principle of res judicata to such

an extent so as to found it on mere guesswork.

16. In *Remington Rand of India Ltd. vs. Thiru R. Jambulingam*, AIR 1976 SC 1915, the Supreme Court speaking through P.K.Goswami, J., observed :

"While even an order of approval is passed under Section 33 (2) of the I. D. Act, an industrial dispute can be raised by either party and an appropriate reference can be later made by the Government under Section 10 of the I. D. Act."

Distinguishing *Messrs. Steels worth* (supra) mainly because there the domestic enquiry was found defective while in the instant case it was found proper and because in the instant only a prima facie case was found we hold that there would be no res judicata in this case and the Labour Court erred in law in holding to the contrary.

17. As regards the question No, 2, in view of our answer the question No. 1 (b) this question does not arise. Even assuming that it arises our answer would be in the negative. In support of the contention that the order of the Tribunal dated 27.12.66 on the application under Section 33 (b) approving the action of the management having not been challenged it was final, Mr. Bhattacharjee argues that after that order no industrial dispute at all survived and after about 5 years thereof the State Government had no jurisdiction to refer the dispute on 25.7.71. Counsel also contends that the Labour Court having found that the decision under Section 33 (2) (b) was on merits and that having been based on examination of two witnesses the principle of res judicata would clearly apply. It is further contended that the Labour Court having held that earlier decision under Section 33 (2) (b) was on merit, Section 11A would not also be attracted. In other words the submission is that when the Tribunal despite domestic enquiry being found to be good went into merits and gave decision than the principle of res judicata would apply, it was for this reason the special leave petition was rejected against 1973 ALR 196. The decision in *Ludh Budh Singh's* case (supra) the Principle 4 has, according to him, been decried by subsequent decision of the Supreme Court and Clause (7) itself states that it applies to both under Section 10 and under Section 33 of the Act. It applies to the proceedings before the Tribunal which have come before it either on reference under Section 10 or by way of an application under Section 33 (2) (b) of the Act and no contrary Supreme Court view has been produced by the petitioner and the decision in 1973 ALR 196 is squarely applicable to the facts of this case inasmuch as this is the final pronouncement. This Court's judgment after considering the decisions and all aspects of the matter, Mr. Bhattacharjee submits, will be binding, unless it is reconsidered by a larger Bench as there is no decision of the Supreme Court having rejected the special leave the law laid down has squarely been settled. AIR 1978 SC 1283 has been distinguished saying that special leave petition was directly against the Tribunal's order and the writ proceedings under Article 226 was still open and as such that case is not applicable to the facts of this case. Section 11A also, according to him, has no application. Distinguishing 1979 Lab.I.C. 1279 it is submitted that it did not decide the point which was decided

by our High Court in 1973ALR196. There the question was whether a proper enquiry was ? held. Similarly 1975 Lab.I.C. 879 is distinguished on the ground that in this case the Tribunal considered the entire matter under Section 33 (2) (b) and the decision was rendered on merit. The petitioner according to Mr. Bhattacharjee, has not challenged that the decision was rendered on merits and hence principle of res judicata would apply in the instant case.

18. In reply Mr. Sarma, however, submits that the Supreme Court nowhere laid down that when there is a decision on merit no dispute .can be referred nor was it the ratio decidendi of 1973 ALR 196. Wherein, Mr. Sarma submits, the High Court did not consider AIR 1962 SC ,83, AIR 1959 SC 389, AIR 1960 SC 160 and AIR 1974 . SC 1915. The question, therefore, arises as to whether 1973 ALR 196 require are consideration by a larger Bench. In Jaisri Sanu vs. Rajdewan Dubey, AIR 1962 SC 83 at para 9 it was ruled that when a Bench of the High Court gives a decision on a question of "law, it should, in general be followed by other Benches unless they have reasons to differ from it, in which case the proper course to adopt would be to refer the question for the decision of a Full Bench. Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is, therefore, desirable that in case of difference of opinion, the question should be authoritatively settled It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. When two such conflicting decisions are placed before a later Bench, correct procedure to follow in such a case would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether should follow the one Bench" decision for the other,

19. The decision in 1973 ALR 196 is also contrary to that in L. K. Textile Mills vs. Its Workmen, AIR 1961 SC 860 where it was reiterated that the jurisdiction of the appropriate industrial authority in holding an enquiry under section 33 (2) (b) cannot be wider and is, if at all, more limited, than that permitted under Sec. 33 (1). In view of the limited nature and extent of the enquiry permissible under Sec. 33 (2) (b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. Under Sec. 33 (2) (b) the approving authority has to consider only (a) whether the standing orders justify the order of dismissal; (b) whether an enquiry has been held as provided by the standing order ; (c) whether the wages for the month have been paid as required by the proviso ; and (d) whether an application has been made as prescribed by the proviso. And when all these conditions have been fulfilled by the employer the tribunal is not justified in refusing to accord approval to the action, taken by the employer. Nor is it justified while holding the enquiry to assume powers of an appellate Court which alone is entitled to go into all questions of fact. The question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is

entitled to consider facts: but these considerations are irrelevant where the jurisdiction of the Court is limited as under Sec. 33 (2) (b). And if the Tribunal assumes jurisdiction not vested in it by law, and consequently refuses to accord approval to the action taken by the employer its order is patently erroneous in law.

20. There is no denying the principle as was held in *Bombay Gas Co; Ltd. Vs. Jagannath Pandurang & Ors.* (1975) 4 SCC 690 that the doctrine of *res judicata* is a wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations. It proceeds on the principle that there should be no unnecessary litigation and whatever claims and defences are open to parties should all be put forward at the same time provided no confusion is likely to arise by so putting forward all such claims.

21. A Division Bench of Delhi High Court in *Management, Delhi Transport Corporation vs. Rare Kumar*, 1982 Lab.I.C.1378 relying on AIR 1953 SC 241, AIR 1955 SC 258, AIR 1957 SC 82, AIR 1959 SC 389 and 1973 Lab.I.G.851 (SG) held that Sec. 33 (2) (b) only imposes ban on the employer in the matter of dismissal of a workman without approval of the Tribunal. Even when a workman is dismissed after obtaining the approval under Sec. 33 (2) (b), the workman is not debarred from raising a dispute under Sec. 10 regarding his dismissal and the finding under Sec. 33 (2) (b) would not operate as *res judicata* in the adjudication of the dispute by the Labour Court on a reference under Sec. 10. This was also the view taken by our High Court in *Management of Muttuck Tea Estate vs. Presiding Officer, Labour Court, Dibrugarh* (1984) 1 GLR 479. The permission granted under Sec.33 does not have the effect of validating the order of dismissal. Compliance to provisions of Sec. 33 merely removes the ban to enable the employer to make an order of dismissal and to avoid incurring the penalty imposed by Sec. 31 (1) of the Act.

22. *Rajendra Jha vs. Presiding Officer, Labour Court, Dhanbad* AIR 1984 SC 1696 = 1984 Lab.I.C. 1583 clearly ruled that in a proceeding under Sec. 33 (2) (b) for approval of the order of dismissal or discharge it is open to the employer to lead evidence to justify the order passed against the employee, and the right of an employer to lead evidence is governed by certain conditions. Under the facts of that case it was held that it could not be said that the Labour Court acted on its own initiative in allowing the employer to lead evidence. It was held that if an erroneous decision on a question of law is rendered by a court by assuming jurisdiction which it does not possess, it may be possible to argue that the decision cannot operate as *res judicata* even between the same parties. But in that case the Labour Court had the jurisdiction to decide whether to allow the employers to lead evidence or not. It may have acted irregularly in the exercise of that jurisdiction but that is to be distinguished from cases in which the Court inherently lacks the jurisdiction to entertain a proceeding or to pass a particular order. Where the Labour Court held that the departmental enquiry was vitiated but that the employer should be allowed to lead evidence to justify the order of

dismissal in passing the order allowing the employer to lead evidence, the Labour Court could not be said to have acted without jurisdiction. In the instant case the Tribunal no doubt allowed the management to examine witnesses to prove validity of the domestic enquiry but found that the domestic enquiry was proper and that there was a prima facie case. The Tribunal, therefore, could not be said to have acted without jurisdiction in allowing witnesses to be examined.

23. A Division Bench of Calcutta High Court in *M/s. Graphite India Limited vs. State of West Bengal*, 1979 Lab. I. C. 1279 also held that finding of Labour Tribunal in proceeding under Sec. 33 (2) as to the validity of enquiry against employee was not res judicata in proceeding on reference under Sec. 10.

24. From the foregoing decisions it may be taken to be settled law that the nature, extent and purposes of the jurisdiction under Sec. 33 (b) and Sec. 10 of the Act are distinct and different. While under the former the Tribunal is to approve the action of management if it is satisfied that there is a prima facie case and it does not suffer from the vices laid down by law, without finally adjudicating the dispute, under the latter there is final adjudication of the dispute itself. The fact that the Tribunal under both the cases have to follow similar or same procedure would not obliterate the differences between the two sections. Sec. 33 provides that the conditions of service, etc to remain unchanged under certain circumstances during pendency of proceedings unless approval is taken by the employer to any action effecting change. Sec. 10 provides for reference of disputes to Boards, Courts or Tribunals for adjudication. A decision on an application under Sec. 33 (2) (b) even if rendered on merit would not, therefore, ipso facto be res judicata in a reference under Sec. 10 of the Act. Whether any issue has been finally decided or not by the Tribunal under Sec. 33 (2) (b) would, of course be a different matter.

25. For the foregoing the decision in 1973 ALR 196 may require a fresh look in an appropriate case. It need not be done in the instant case as it is distinguishable on facts.

26. In the result we set aside the impugned award of the Labour Court dated 1.6.74 in Reference No. 4 of 1971, restore the status quo ante as on the date of the award and remand the Reference to the Labour Court for disposal after notice and hearing in accordance with law. The Rule is made absolute and the petition is allowed with costs which we assess at Rs.500/ (Rupees Five hundred). Send down the records forthwith.