
(1996) 03 AHC CK 0066

In the Allahabad High Court

Case No : Civil Miscellaneous W. P. No. 6416 of 1992

Meritee India Ltd.

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 20-03-1996

Acts Referred:

Citation : (1996) 03 AHC CK 0066

Hon'ble Judges : D.K.Seth, J

Final Decision : Allowed

Judgement

D. K. Seth, J.—The respondent No. 3, an employee of the petitioner was subjected to an inquiry pursuant to a chargesheet issued to him. The Enquiry Officer had fixed a date for holding inquiry into the charges, which included threatening and assault. By a letter dated 1921987 the Enquiry Officer informed that he is unable to hold the inquiry because of the threat hurled by the respondent No. 3. By an order dated 1921987 the services of the respondent No. 3 were terminated by the petitioner without holding inquiry, in view of the circumstances mentioned in the said letter. Thereupon an Industrial dispute was raised, which was referred by an order dated 3111989, out of which Adjudication Case No. 300 of 1989 was registered. The workman had filed his written statement on 6121989. The employer had also filed its written statement on 1211990. After the workman had filed his rejoinder statement, the Labour Court directed the respondent No. 3 by an order dated 1651991 to lead evidence. Instead of leading evidence the respondent No. 3 filed an application for direction that the management should lead evidence first and the order directing the workman to lead evidence should be recalled. An objection was also filed by the petitioner on 371991. The Labour court by order dated 30111991 reviewed its earlier order and directed the petitioner to lead evidence in support of its case.

2. Sri Rakesh Tewari, learned counsel for the petitioner contends at the first place that the Labour court has no jurisdiction to review its earlier order. U. P. Industrial Disputes Act does not provide any such jurisdiction. I am unable to

agree with the said contention. Inasmuch as the provisions have been made in the Act and the Rules, framed thereunder, that the order for ex parte hearing can be recalled, if an application is made within thirty days. It has also been held that even the Award can be recalled, if an application is made before the Award becomes final. Therefore, it shows that the power to review or recall its order has been provided in certain cases. Then again the Tribunal has to decide and adopt procedure on its own since no procedure as such is provided for in the said Act. By reason thereof I am unable[^] to accept the contention of Sri Tewari, learned counsel for the petitioner?

3. So far the next contention of the learned counsel for the petitioner is concerned is that in the present case the services of the workman having been terminated without holding any enquiry, thereof, the employer is not required to prove the proceeding of the enquiry. Sri Tewari contends that the test for deciding as to who will lead evidence is that as to default on whose part to lead evidence proceeding should fail. Here in this case if no evidence is lead by and on behalf of the workman in that event proceeding would fail. Since the workman has alleged that his services have wrongly been terminated, therefore, burden is on the workman to prove that his services were wrongly terminated. The burden of proof never shifts. It is onus of proof which shifts. Onus shifts only when burden is discharged. Therefore, according to him in order to discharge the burden it is the workman who has to lead evidence.

4 Learned counsel for the respondents on the other hand contends that reference is coined in the form as to whether termination of the workman is justified. Therefore, it is for the employer to prove that the termination is justified. Therefore the employer has to lead evidence.

5 Both the learned counsel for the parties have relied on various judgments to which I will be referring shortly hereinafter.

6 In the case of *Airtech Private Limited v. State of U. P. and others*, 1984 (49) FIR 38, it has been held :

?Section 5C (1) of the Act provides that subject to any rules that may be made in this behalf, a Labour court shall follow such procedure as it may think fit. It is, therefore clear that the discretion of the Court is not absolute. It is circumscribed by Ruls if any, we have therefore, to look to the U. P. Industrial Disputes Rules of 1957. Rule 12 provide that where the Stats Government refers an industrial dispute for adjudication to a Labour court within two weeks of the date of receipt of the order of reference, the workmen and the employers involved in the dispute shall file before the Labour court a statement of the demands relating to the issues as are included in the order of reference. Subrule (8) provides that the written statement filed by the Union or the workman shall state the grounds upon which the claim of the concerned workmen is used and the written statement shall be accompanied by an affidavit in which the statement contained in the written statement should be sworn to Subrule (9) states that if the

statement accompanied by the affidavit of the Union or the workman is not repudiated by the employer, the Labour court shall peruse the contents of the affidavit to be true and make an award accepting the case stated in the written statement.

From a combined reading of Section 5C (1) and the aforementioned subrules of Rule 12 it is apparent that it is imperative upon a workman to file an affidavit in support of his written statement. This affidavit constitutes the preliminary evidence. If the employer does not care to controvert the averments made in the affidavit nothing further need be proved or done by the workman. The Labour Court is duty bound to accept the averments contained in the affidavit and give its decision or award accepting the averments made in the affidavit as correct. These provisions indicate that the burden of proving the case referred to the Labour Court for adjudication by the State Government lies on the workman. The distinction between a burden to prove and the onus of proof is well known. It is trite that the burden of proof never shifts. It is the onus which keeps shifting from stage to stage. The Labour Court patently erred in holding that keeping in view the terms of the reference made by the State Government the burden of proof lay upon the employer.

The matter can be looked at from another angle, which party will fail if the evidence is not led before the Labour Court in proceedings in a reference made to it for adjudication by the State Government? The obvious answer is that the workman will fail. Here the reference was made by the State Government at instance of the workmen and for the benefit of the workman. In the absence of any evidence led by or on behalf of the workman the reference is bound to be answered by the Court against the workman. In such a situation it is not necessary for the employers to lead any evidence at all. This matter was dealt with by the Supreme Court in *Shanker Chaudhary v. Britannia Biscuits Co. Ltd.*, In paragraph 30 the Court held that the Labour Court or the Industrial Tribunal have all the trappings of a Court. In paragraph 31 it held that any party appearing before a Labour Court or Industrial Tribunal "Must" make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be, who would fail if no evidence is led. It must seek an opportunity to lead evidence. Similar view has been taken by a Division Bench of this Court in the case *V. K. Raj Industries v. Labour Court and others*.

7. In the case of *V. K. Raj Industries v. Labour Court and others*, referred to in the case of *Airtech* (supra) the same view has been taken to the effect :

The proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act does not apply to the proceeding but the principle underlying the said Act is applicable to the proceeding before the Industrial Court. In a judicial proceeding if no evidence is produced the party challenging

the validity of the order must fail. It is well settled that if a party challenges the legality of an order, the burden lies upon him to prove illegality of the order and if no evidence is produced the party invoking jurisdiction of the court must fail. Whenever a workman raises a dispute challenging the validity of the termination of service it is imperative for him to file written statement before the Industrial Court setting out grounds on which the order is challenge and he must also produce evidence to prove his case. If the workman fails to appear or to file written statement or produce evidence the dispute referred by the State Government cannot be answered in favour of the workman and he would not be entitled to any relief.?

8. In the case of *Banker Chakravarti v. Britannia Biscuit Co. Ltd.*, 1937 (39) FLR 70, it was observed :

?When the dispute comes before the Industrial Tribunal by way of a reference under Section 10 it is the aggrieved workman who has sought adjudication of the industrial dispute arising from the termination of his service. When the matter comes before the appropriate authority under Section 33 it is the employer who has moved for permission or approval of its intended action.?

?Where the reference is at the instance of a workman under Section 10 the Tribunal would call upon the workman to file his statement of claim and thereafter the employer would be called upon to file its written statement. Rule 10B of the Industrial Disputes (Central) Rules, 1957 provides that within two weeks of the date of receipt of the order of reference, the party representing workmen and the employer involved in the dispute, shall file with the concerned authority a statement of demands relating only to the issues as are included in the order of reference and shall also forward a copy of such statement to each one of the opposite parties involved in the said dispute. Similarly, when the employer seeks permission for taking the intended action or seeks approval of the action taken by it under Section 33 it has to make an application as provided by Rule 60 in either Form J or K as the case may be. Both the forms require that the necessity for and circumstances in which the proposed action is taken or is intended to be taken must be clearly and specifically set out and either express permission should be sought before taking the intended action or an approval of the already taken action must be sought.?

9. Though the said cases have not specifically dealt with the question as to who will lead evidence but the ratio decidendi in the said cases, as apparent from the observation made in the said judgments that in case the employer does not seek opportunity to adduce evidence, in that event the decision arrived at without opportunity to the employer would not vitiate the order. The said case has indirect support to the observations made in the case of *V. K. Raj Industries*. Learned counsel for the respondents has relied on the decision in the case of *Workmen, Hindustan Lever Limited v. Hindustan Lever Limited*, 1984 (49) FLR 364 wherein raising frivolous preliminary issue and objections at the instance of the employer to delay and defeat to exhaust the workman has been deprecated.

Learned counsel contends that here is also similar case but the fact remained that in this case objection has been raised by the employer. However the said case has not thrown any light on the question involved in the present case.

10. Relying on the decision in the case of *U. P. S. R. T. C. v. Sarfaraj Hussain*, (1995) 1 HVD 100, learned counsel for the respondent submits that it is the employer who has to lead evidence. But the fact of the case is altogether different. The question of burden of proof was considered. In the said case there was domestic inquiry which is absent in the present case. Whether the workman was guilty in the domestic enquiry or not and whether the domestic inquiry was properly held, this was to be proved by the employer and, therefore, it was held that if the employer wants to rely on the domestic enquiry, in that event the burden of proving that the inquiry was correctly held, was on the employer. But here in this case, there was no domestic enquiry. Therefore the burden cannot be on the employer. Admittedly, here the termination was made without any domestic inquiry, which has been challenged by the workman, who had raised the dispute that has been wrongfully terminated. Therefore, the initial burden is on the workman who has to discharge the same and only then the onus would shift on the employer.

11. The case cited by the learned counsel for the respondents being *Workmen of the Motipur Sugar Factory (P) Ltd. v. Motipur Sugar Factory (P) Ltd.*, 1965 (11) FLR 112, is not a pointer to the present question and, therefore, I can not derive any help from the said judgment. Similarly, the decision in the case of the workmen of *M/s. Firestone Tyre Rubber Company of India (P) v. The Management and others*, 1973 SCC (LandS) 341, cited by the learned counsel for the respondents is also not pointer to the present dispute. Therefore I can not fall back on the said decision, for the present purpose.

12. The judgment in the case of *Airtech Industries and M/s v. V. K. Raj Industries*, (supra) has directly decided the question in issue, which applies to the present, facts and circumstances of the case. Relying on the said case, it appears that there having been no domestic inquiry and the workman having challenged that the termination was wrongful and in case he does not lead evidence, in that event or he does not appear, in that event, his case would fail. Therefore it is the workman who has to lead evidence. The Tribunal in recalling the order and directing the employer to lead evidence, has acted contrary to law. In that view of the matter the impugned order is set aside and the matter is sent back to the Tribunal for deciding the same in accordance with law. The workman shall lead evidence first and discharge the burden. But he can not be called upon to prove any negative fact, in case it is so required, the workman may be permitted to lead additional evidence after the employer had led his evidence.

13. Thus this petition stands allowed. The order dated 30/11/1991 passed in Adjudication Case No. 300 of 1989 by the 1st Labour Court, Ghaziabad, is hereby quashed. Let a writ of certiorari do issue accordingly. Learned Labour court is directed to proceed with the said Adjudication case in the light of observations

made above. Let a writ of mandamus do accordingly issue.

14. Since long time has lapsed in between, this Court hopes and trust that the said Adjudication case should be disposed of by the learned labour court as early as possible preferably within a period of six months from the date a certified copy of this order is produced before the learned Labour court.

15. Thus the writ petition stands allowed. There will be however, no order as to costs.