
(2012) 08 DEL CK 0074

In the Delhi High Court

Case No : Writ Petition (C) 6392 of 2007 and CM Application 12029 of 2007

Mohd. Ismail

APPELLANT

Vs

Abul Kalam Azad Islamic Awakening Centre

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11(1), 11(3), 33

Citation : (2012) 08 DEL CK 0074

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Anuj Aggarwal, for the Appellant; M.A. Siddiqui, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. By the present petition the Petitioner challenges the order dated 9th May, 2007 passed by the learned Trial Court whereby the application of the Respondent to lead evidence to establish the charges against the Petitioner was allowed and the Respondent was permitted to adduce evidence to prove the misconduct. The facts in nutshell are that the Petitioner joined the services of the Respondent as an Accountant Clerk. On 9th January, 1993 the Petitioner was issued a charge-sheet, inter alia, for the misconduct that the vouchers for Rs. 22,14,447/- were not entered in the books of accounts, no entry was made relating to Rs. 7,87,000/- in the cash book, payments were not recorded in the account book in favour of M/s. Muzboot Furniture and vouchers relating to payment of Rs. 52,542/- were not signed. The Petitioner submitted his reply to the charge-sheet and an enquiry officer was nominated. According to the Petitioner the enquiry officer concluded the enquiry in a haste in the absence of the Petitioner and held him guilty of having adopted deficient attitude towards the orders passed by the authorities from time to time. A show cause notice was issued to the Petitioner on 10th February, 1993 to which he filed a reply. Finally the Petitioner was dismissed from service on 18th February, 1993. Aggrieved by

the action of the Respondent the Petitioner raised an industrial dispute. The Government sent the following reference to the learned Labour Court for adjudication on 27th April, 1994; "whether the dismissal from service of Shri Mohd. Ismail is illegal and/ or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect". The Petitioner filed his statement of claim to which a written statement was filed by the Respondent on 21st August, 1996. In the said written statement, no opportunity was sought to lead evidence to establish the misconduct before the Industrial Adjudicator. After completion of pleadings, framing of the issues and after the Petitioner's evidence was closed, the Respondent filed an application for amendment of the written statement. Though number of amendments were sought however the dispute only relates to amendment sought in paragraph 6 which is as under:

6(a) That the Management initially relies upon the inquiry held by the Inquiry officer and submits that the said inquiry was legal, valid and justified in all respects. However, in case this Hon'ble Court comes to the conclusion, for any reason whatsoever, that the inquiry held by the Inquiry Officer is liable to be set aside, then an opportunity be given to the Management to lead its evidence to substantiate the charges of misconduct against the Claimant before the Hon'ble Court. Further, the issue relating to the validity and legality of the inquiry be tried as a preliminary issues.

2. This application seeking amendment of the written statement was dismissed by the learned Trial Court on 8th November, 2002 in view of the law laid down in Karnataka State Road Transport Corpn. Vs. Smt. Lakshmiddevamma and Another, on the ground that the plea of the Respondent would add to the misery, suffering and agony of the workman who is stated to be out of job since his illegal termination at the hands of the management. On 27th July, 2005 the Respondent filed an application before the learned Trial Court for recalling/ modification of the order dated 8th November, 2002 and in the alternative sought permission to lead additional evidence in support of its action. This application of the Respondent was kept pending to be decided after the enquiry was decided. Vide its order dated 7th September, 2006 the learned Trial Court held that the enquiry conducted by the Respondent was violative of the principles of natural justice and was therefore set aside. By the impugned order dated 9th May, 2007 on the application of the Respondent, the learned Trial Court permitted the Respondent to lead evidence to establish the charges against the Petitioner. Hence the present writ petition.

3. Learned counsel for the Petitioner strenuously contends that the Industrial Tribunal has no power to review its own order. Relying on Karnataka State Road Transport Corporation (supra) it is contended that the alternate plea of leading evidence has to be taken while filing the written statement and the learned Trial Court's order dated 8th November, 2010 declining the prayer to amend the written statement was perfectly in order and the said order having not been challenged, the Respondent could not have sought recalling of the same.

Reference is made to Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Another, to contend that there is difference between procedural review and a review on merits. In the present case the Respondent is seeking a review on merits which is not permissible in law. Reliance is also placed on Divyash Pandit Vs. Management, N.C.C.B.M., . It is thus prayed that the impugned order be set aside.

4. Learned counsel for the Respondent on the other hand contends that there are serious allegations of financial misconduct against the Petitioner and he wants to wriggle out of the said charges by taking recourse to technicalities. Relying upon Karnataka State Road Transport Corporation (supra) it is contended that the majority judgment upheld the view taken by the Hon'ble Supreme Court in Shambu Nath Goyal's case wherein it was held that the employer has the right in law to adduce additional evidence in a proceeding before the Labour Court or Industrial Tribunal either u/s 10 or 33 of the ID Act which right must be availed by the employer by making a proper request at the time when he files his statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken by it. Thus, the right of the management cannot be defeated on the ground that the alternate plea of adducing additional evidence has been taken belatedly or since the amendment to the written statement was disallowed, the same cannot be now permitted by allowing the application for permission to lead additional evidence. Relying upon Divyash Pandit Vs. Management, N.C.C.B.M., it is contended that the decision in Karnataka State Road Transport Corporation does not place a fetter on the power of the Court or Tribunal to require or permit parties to lead additional evidence, including production of documents at any stage of proceedings before they are concluded. It is further contended that if rights of the parties are conclusively determined then a review may not be permitted, however if the matter is still pending before the Industrial Adjudicator and has not attained finality then the orders passed by the Industrial Adjudicator can be reviewed. Distinguishing Kapra Mazdoor Ekta Union (supra) it is stated that in the said decision the award had been passed and the learned Tribunal therein reviewed the award which had attained finality.

5. I have heard learned counsel for the parties. The short issue in the present petition is whether the order permitting the Respondent to lead additional evidence after disallowing the amendment in the written statement to this effect would amount to review and whether the Industrial Adjudicator is empowered to review its decision. At this stage it would be relevant to reproduce the relevant portion of the decision rendered in Karnataka State Road Transport Corporation on which reliance is placed by both the sides. Their Lordships held:

3. In Shambhu Nath Goyal Vs. Bank of Baroda and Others, this Court held: (SCR Headnote)

The rights which the employer has in law to adduce additional evidence in a proceeding before the Labour Court or Industrial Tribunal either u/s 10 or Section

33 of the Industrial Disputes Act questioning the legality of the order terminating the service must be availed of by the employer by making a proper request at the time when it files its statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken by it.

(emphasis supplied)

4. This decision was rendered by the Court while deciding the stage at which the management is entitled to seek permission to adduce evidence in justification of its decision taken on the basis of a domestic enquiry.

8. Before we proceed to examine this question any further, it will be useful to bear in mind that the right of a management to lead evidence before the Labour Court or the Industrial Tribunal in justification of its decision under consideration by such tribunal or court is not a statutory right. This is actually a procedure laid down by this Court to avoid delay and multiplicity of proceedings in the disposal of disputes between the management and the workman. The genesis of this procedure can be traced by noticing the following observations of this Court in *Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory*,

If it is held that in cases where the employer dismisses his employee without holding an enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim the benefit of the domestic enquiry given. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the Tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the Tribunal may give an opportunity to the employer to prove his case and in doing so the Tribunal tries the merits itself.

16. While considering the decision in *Shambhu Nath Goyal Vs. Bank of Baroda and Others*, we should bear in mind that the judgment of Varadarajan, J. therein does not refer to the case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*. However, the concurring judgment of D.A. Desai, J. specifically considers this case. By the judgment in *Shambhu Nath Goyal Vs. Bank of Baroda and Others*, the management was given the right to adduce evidence to justify its domestic enquiry only if it had reserved its right to do so in the application made by it u/s 33 of the Industrial Disputes Act, 1947 or in the objection that the management had to file to the reference made u/s 10 of the Act, meaning thereby that the management had to exercise its right of leading fresh evidence

at the first available opportunity and not at any time thereafter during the proceedings before the Tribunal/Labour Court.

17. Keeping in mind the object of providing an opportunity to the management to adduce evidence before the Tribunal/Labour Court, we are of the opinion that the directions issued by this Court in Shambhu Nath Goyal Vs. Bank of Baroda and Others, need not be varied, being just and fair. There can be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic enquiry. At the same time, it is also of advantage to the workmen inasmuch as they will be put to notice of the fact that the management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready. This procedure also eliminates the likely delay in permitting the management to make belated application whereby the proceedings before the Labour Court/Tribunal could get prolonged. In our opinion, the procedure laid down in Shambhu Nath Goyal Vs. Bank of Baroda and Others, is just and fair.

44. The question as to at what stage the management should seek leave of the Labour Court/Tribunal to lead evidence/additional evidence justifying its action is considered in the draft judgment of Hegde, J. and not the power of the court/tribunal requiring or directing the parties to produce evidence if deemed fit in a given case having regard to the facts and circumstances of that case. As per Section 11(1) of the Industrial Disputes Act, 1947 (for short "the Act") a court/tribunal can follow the procedure which it thinks fit in the circumstances of the case subject to the provisions of the Act and the rules framed thereunder and in accordance with the principles of natural justice. u/s 11(3), the Labour Court/Tribunal and other authorities mentioned therein have the same powers as are vested in a civil court under the CPC when trying a suit in respect of certain matters which include enforcing the attendance of any person and examining him on oath and compelling the production of documents and material objects.

45. It is consistently held and accepted that strict rules of evidence are not applicable to the proceedings before the Labour Court/Tribunal but essentially the rules of natural justice are to be observed in such proceedings. Labour Courts/Tribunals have the power to call for any evidence at any stage of the proceedings if the facts and circumstances of the case demand the same to meet the ends of justice in a given situation. We reiterate that in order to avoid unnecessary delay and multiplicity of proceedings, the management has to seek leave of the court/tribunal in the written statement itself to lead additional evidence to support its action in the alternative and without prejudice to its rights and contentions. But this should not be understood as placing fetters on the powers of the court/tribunal requiring or directing parties to lead additional evidence including production of documents at any stage of the proceedings before they are concluded if on facts and circumstances of the case it is deemed just and necessary in the interest of justice.

6. In Divyash Pandit Vs. Management, N.C.C.B.M., the Hon"ble Supreme Court observed -

8. The appellant has challenged this decision of the High Court before us. We are of the view that the order of the High Court dated 2-12-2002 as clarified on 3-3-2003 does not need any interference. It is true no doubt that the respondent may not have made any prayer for (sic submitting) additional evidence in its written statement but, as held by this Court in Karnataka State Road Transport Corpn. Vs. Smt. Lakshmiddevamma and Another, this did not place a fetter on the powers of the Court/Tribunal to require or permit parties to lead additional evidence including production of document at any stage of proceedings before they are concluded. Once the Labour Court came to the finding that the enquiry was non est, the facts of the case warranted that the Labour Court should have given one opportunity to the respondent to establish the charges before passing an award in favour of the workman.

7. It would thus seen that the Tribunal while holding the proceedings is bound by the principles of natural justice and in this regard it can permit any evidence to be adduced before the conclusion of the proceeding that is essential for arriving at a just decision and is necessary in the interest of justice.

8. In Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Another, their Lordships were dealing with two issues, that is, whether the Tribunal had become functus officio in view of the award having been passed and whether the Tribunal was conferred with the power of review either expressly or by necessary implication. The Hon"ble Supreme Court held that the Tribunal had not become functus officio as the award though passed and published had not become enforceable and it could entertain the application for recall before the award was made enforceable. As regards the second issue, the Hon"ble Supreme Court laid a distinction between power of procedural review and review on merits. It was held-

18. It was, therefore, submitted before us relying upon Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors. (supra) that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors. (supra) clearly highlighted this distinction when it observed :-

Furthermore, different considerations arise on review. The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no

review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal.

19. Applying these principles it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again.

20. The facts of the instant case are quite different. The recall of the Award of the Tribunal was sought not on the ground that in passing the Award the Tribunal had committed any procedural illegality or mistake of the nature which vitiated the proceeding itself and consequently the Award, but on the ground that some matters which ought to have been considered by the Tribunal were not duly considered. Apparently the recall or review sought was not a procedural review, but a review on merits. Such a review was not permissible in the absence of a provision in the Act conferring the power of review on the Tribunal either expressly or by necessary implication.

9. In the present case, the amendment of the written statement was denied by the learned Tribunal for the reason that the same would delay the proceedings. However, on coming to the conclusion that the domestic enquiry was vitiated, the learned Tribunal committed no error in allowing the application of the Respondent to lead additional evidence as the same was essential for the just decision and in the interest of justice. The review sought to be done by the learned Trial Court is procedural in nature and not a review on merits. As a matter of fact, the evil which the learned Industrial Adjudicator sought to avoid, that is, the delay in proceedings has been caused because of pendency of the present proceedings wherein the proceedings in ID No. 641/06/94 are lying stayed. As held by the Hon"ble Supreme Court, the employer has the right to adduce additional evidence to prove the misconduct of the employee in a proceeding before the Industrial Tribunal either u/s 10 or 33 of the I.D. Act, he cannot be non-suited on the ground that earlier application for amendment of the written statement was dismissed on the ground that the same would cause delay in disposal of the proceedings. I find no merit in the present petition. The petition and application are dismissed.