

(1968) 08 KL CK 0026

In the High Court Of Kerala

Case No : Original Petition No's. 3715 and 3738 of 1966

P. Muthukrishnan and Another

APPELLANT

Vs

Secretary, Modern Woodcrafts Employees" Union and Others

RESPONDENT

Date of Decision : 26-08-1968

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1969 Ker 288 : (1969) 1 LLJ 208

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : K.C. Sankaran In O.P. 3715/66, E.P. Varghese and T.A. Ramdas, In O.P. 3738/66, for the Appellant; E.P. Varghese, for No. 1 and Govt. Pleader for No. 2 In O.P. 3715/66, K.C. Sankaran, for No. 1 and Govt. Pleader for Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—These Writ Petitions question the validity of an award passed by the Industrial Tribunal, Calicut.

2. The petitioner In O. P. 3738/66, the Secretary, Modern Woodcrafts Employees Union, raised an industrial dispute concerning the wrongful dismissal of one K. Parameswaran Asari, an employee of the management (the 1st respondent in O. P. 3738/66), and the Government of Kerala referred the dispute for adjudication to the 2nd respondent. Before the 2nd respondent the main contention of the management was that Asari was dismissed after a proper domestic enquiry, and therefore, the tribunal should not interfere with the punishment imposed; whereas the Employees" Union contended that Asari was dismissed as a result of victimisation and unfair labour practice. The 2nd respondent passed an award on 6-7-1966 and it was published in the Gazette dated 20th September 1960, Ext. P-I is a copy of the Gazette.

Parameswaran Asari was employed in the Woodcrafts on a daily wage of Rs. 3,50 with effect from 12-4-1961. The 1st respondent wrote to Asari prior to his

employment letters dated 9-3-1961 and 31-3-1961 marked Exits. M2 and M4 before the Tribunal, offering residential facilities and promotion, besides daily wages. Based upon these promises, it is said, Asari requested on 1-11-1961 that the 1st respondent should promote him to a post carrying a monthly salary of Rs. 120/-. This was refused and Asari was posted to the work of "marking" in the carpentry section which carried a monthly allowance of Rs. 10/-. As the allowance was not given to Asari in spite of repeated requests he sent a communication in writing on 24-3-1963 requesting for the same, The 1st respondent not only refused the request, but Asari was depromoted as a carpenter. Thereupon the petitioner-Union filed a complaint before the Assistant Labour Officer, Tellicherry, on 11-7-1963. At the suggestion of the Assistant Labour Officer the 1st respondent re-posted Asari to the "marking" work. By this time Asari was elected as Secretary to the Employees' Union. In that capacity he placed certain demands on behalf of the employees before the 1st respondent on 21-3-1963. He also raised the question of the residential accommodation promised to him by the 1st respondent. It is alleged that the 1st respondent demanded that Asari should withdraw the demands, but that Asari refused to do so. On 5-8-1963 Asari was given notice depromoting him again as a carpenter without any reason. A copy of the notice is filed as Ext. P-11 in this proceeding. The President of the petitioner-Union thereupon complained to the District Labour Officer, Cannanore, stating that Asari was depromoted because Asari had put forward the demands and that it was unfair labour practice. The District Labour Officer registered the complaint as a labour dispute and posted the matter for the statement of the 1st respondent. In the meanwhile the 1st respondent asked Asari by a notice dated 12-8-1963 to explain why he has absented himself from work since the after-noon of 5-8-1963. To this the petitioner-Union sent replies on 14-8-1963 and 30-8-1963. The 1st respondent thereafter conducted an enquiry and found Asari guilty of the charge, and he was dismissed on 23-9-1963. The matter was reported to the Labour Department. As no settlement could be reached, the Government referred the matter for adjudication to the Industrial Tribunal.

3. The questions referred for adjudication were: (1) whether there was a proper domestic enquiry ? (2) whether the reason for the dismissal is true ? and (3) whether the dismissal was the result of unfair labour practice and would amount to victimisation ?

The 2nd respondent in his award said that there was no proper domestic enquiry, that on the evidence adduced before the tribunal, the charge against the workmen has been proved, but that the punishment of dismissal is out of all proportion to the gravity of the delinquency, and that it was evidence of victimisation and unfair labour practice. The tribunal gave Asari compensation of two years' wages from the date of dismissal

4. O. P. No. 3715/66 is filed by the management contending that the tribunal had no jurisdiction to interfere with the punishment imposed at the domestic enquiry,

and so the award must be quashed. The Union has filed O. P. No. 3738/66 contending that Asari ought to have been reinstated when it was found that the domestic enquiry was sham and that the dismissal was result of victimisation and unfair labour practice, and in the alternative that he should have been given wages till, at any rate, the date of the award, and that with the house rent allowance also.

5. In the petition filed by the management the main contention of counsel was that the tribunal had no jurisdiction to interfere with the punishment imposed by the management after finding in the domestic enquiry that the charge against the worker has been proved. The finding of the tribunal is that although an enquiry appears to have been conducted by the management there was no real enquiry at all. The tribunal therefore appreciated the evidence adduced by the management and the Union, and came to the conclusion that the charge against the worker has been proved. But it also came to the conclusion that the punishment of dismissal was out of all proportion to the gravity of the delinquency, and that considering the facts and circumstances of the case the punishment of dismissal was evidence of lack of bona fides on the part of the management, and would amount to victimisation.

6. Counsel submits that it is within the province of the management to decide what is the punishment to be imposed, and that it is not the function of the tribunal to sit in appeal over it. In support of the contention that the tribunal is not an appellate authority on the question of punishment, and that no interference with the punishment imposed by the management after a domestic enquiry is permissible, reliance was placed on the ruling reported in Superintendent, Erumeli Estate Vs. Labour Court, Quilon, . In that case Ansari C. J. said:

"The learned Advocate for the Labour Court has next relied on *Buckingham and Carnatic Mills Ltd. v. Their Workmen* (1951) 2 Lab LJ 314 (LATI Cal FB) where it has been stated that ordinarily the management should have the right of deciding the appropriate punishment in each case, but the decision is liable to revision if it is so unjust that a remedy is called for in the interests of justice. He therefore, argues that the Labour Court can vary the punishment should it be found to be harsh in the circumstances of the case. We find some difficulty in accepting the view aforesaid as correct. The majority of the judicial pronouncements is against vesting the Labour Tribunals with appellate powers and we feel revising sentences on the ground of harshness would mean reviewing the adequacy of the punishment in the circumstance of a particular case which is a form of the appellate power. That apart conferring such a power would be contrary to the accepted principle of the inquiry by such Tribunals being confined to certain well known grounds, in which such a power is not included."

In (1951) 2 Lab LJ 314 at p. 318 (LATI Cal FB) it was held that it is open to an industrial tribunal to consider whether the punishment imposed by the management is too severe, and to infer from the severity of the punishment lack

of bona fides on the part of the management or motive to victimise the worker. The appellate tribunal observed:--

"If after scrutiny on the aforesaid lines it is found by the tribunal that it ought not to interfere with the findings of the management that the charge has been proved, the tribunal must next consider whether it should interfere with the punishment. The management, with the knowledge and experience of the problems which confront it in the day to day work of the concern, ordinarily ought to have the right to decide what the appropriate punishment should be, but its decision is liable to be revised if the tribunal is of opinion that the punishment "is so unjust that remedy is called for in the interest of justice". It must, however, be remembered that it is essential that the matter should not be viewed altogether subjectively from the point of view only of the employer or employee but also objectively in the interest of industry for bringing about a harmony in the relationship between the two."

This would indicate that in appropriate cases where the punishment is too severe judged by ordinary standard of the reasonable man, it is open to the tribunal to interfere with the punishment not because the tribunal has got appellate jurisdiction over the punishment imposed at the domestic enquiry, but because the tribunal has jurisdiction to find from the severity of the punishment that its imposition was actuated by motive to victimise the worker. The expression "unfair labour practice and victimisation" covers;

"All cases... where ... discharge, dismissal or punishment is so unjust that a remedy is called for in the interest of justice between the parties."

The taking of some action prejudicial to the worker on some pretext other than the real reason.

What is considered to be arbitrary In transaction between an employer and an employee.....

When the employer terminates the employment in bad faith with an ulterior motive or commits an encroachment of any natural, contractual, statutory or legal right of the employee." (See 7 J. L L. I. (1965) 38.)

In Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, Hidayatullah J., as he then was, considered the question whether under any circumstance it is open to a tribunal to interfere with the punishment imposed by the management, and he said.

"The next question is whether the tribunal was justified in interfering with the punishment of dismissal after it had come to the conclusion that the workmen had gone on a strike even though the strike was not illegal. Reference is made to a number of cases in which the principles for the guidance of the tribunals in such matters have been laid down by this Court. It is now settled law that the tribunal is not to examine the finding or the quantum of punishment because the whole of the dispute is not really open before the tribunal as it is ordinarily

before a Court of appeal. The tribunal's powers have been stated by this Court in a large number of cases and it has been ruled that the tribunal can only interfere if the conduct of the employer shows lack of bona fides or victimisation of employee or employees or unfair labour practice. The tribunal may in a strong case interfere with a basic error on a point of fact or a perverse finding, but it cannot substitute its own appraisal of the evidence for that of the officer conducting the domestic enquiry though it may interfere where the principles of natural justice or fair play have not been followed or where the enquiry is so perverted in its procedure as to amount to no enquiry at all. In respect of punishment it has been ruled that the award of punishment for misconduct under the standing orders, if any is a matter for the management to decide and if there is any justification for the punishment imposed, the tribunal should not interfere. The tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimisation or unfair labour practice."

In *Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory*, at p. 1808) Wanchoo J. as he then was, said that where an employer has failed to make an enquiry before dismissing or discharging a workman, it is open to him to justify the action before the tribunal by leading all relevant evidence before it. He further said that in such a case the employer would not have the benefit which he had in cases where domestic enquiries have been held, and that the entire matter would be open before the tribunal which will have jurisdiction not only to go into the limited questions open to a tribunal where domestic enquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. He then observed:

"In either case, if the enquiry is defective or if no enquiry has been held as required by standing orders, the entire case would be open before the tribunal and the employer would have to justify on facts as well that its order of dismissal or discharge was proper. *Phulbari Tea Estate case*, (1959) 2 Lab LJ 663 = *Phulbari Tea Estate Vs. Its Workmen*, was on a reference u/s 10 and the same principle was applied there also, the only difference being that in that case there was an inquiry though it was defective. A defective enquiry, in our opinion, stands on the same footing as no enquiry and in either case the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the tribunal that on facts the order of dismissal or discharge was proper."

In *Bengal Bhatdee Coal Company v. Ram Prabesh Singh* (1963) 1 Lab LJ 291 (AIR 1964 SC 486) the Supreme Court said:

"Now there is no doubt that though in a case of proved misconduct, normally the imposition of a penalty may be within the discretion of management, there may

be cases where the punishment of dismissal for the misconduct proved may be so unconscionable or so grossly out of proportion to the nature of the offence that the tribunal may be able to draw an inference of victimisation merely from the punishment inflicted."

In that case the Court was not satisfied that the punishment imposed was out of proportion to the gravity of the offence. The Court said that the inference of victimisation by the tribunal from the mere fact that the workmen were office bearers or active members of the union or that the relation between them and the management was not cordial, was not justified. The Court observed:

"There is practically no other evidence in support of the finding of the tribunal. It is true that the relations between the appellant and the union to which these workmen belonged were not happy. It is also proved that there was another union in existence in this concern. Perhaps the fact that there were two unions would in itself explain why the relations of the appellant with one of the unions to which these workmen belonged were not happy. But the fact that the relations between an employer and the union were not happy and the workmen concerned were office-bearers or active workers of the union would by itself be no evidence to prove victimisation, for if that were so, it would mean that the office-bearers and active workers of a union with which the employer is not on good terms would have a carte blanche to commit any misconduct and get away with it on the ground that relations between the employer and the union were not happy. We are therefore of opinion that the finding of victimisation in this case is based merely on conjectures and surmises."

The totality of circumstances should be taken into consideration in adjudging the question whether there was victimisation on the part of the management or not, See *Bombay Union of Journalists v. "Hindu"*, Bombay, (1961) 2 Lab LJ 204 (sic).

It would appear to be well settled that in appropriate cases where the tribunal is satisfied that the punishment imposed upon a worker is too harsh or severe in that it is out all proportion to the gravity of the delinquency, it is open to the tribunal to interfere with the punishment, not because the tribunal has appellate jurisdiction to sit in judgment over the propriety of the punishment imposed at the domestic enquiry, but because the severity or the harshness of the punishment is cogent evidence of victimisation or unfair labour practice. To say that the nature of punishment in all cases is within the exclusive jurisdiction of the management and that a tribunal can under no circumstance interfere with it may not, therefore, be correct. If the punishment imposed is ostensibly for the charge proved but really for a collateral purpose, designed not for the purpose ostensibly stated, but for ulterior reasons not connected with the charge, then the jurisdiction of the tribunal is attracted, for the reason that the punishment is imposed not bona fide.

7. The next question for consideration is whether in this case there was evidence before the tribunal that the management was actuated by bona fides in imposing

the punishment. As already stated Asari was employed by the management on 12-4-1961, on daily wage. Basing on the promise of the management Asari requested the management on 1-11-1961 that he may be given a post carrying a monthly salary of Rs. 120/- p. m. The management posted him to the "marking" section in the carpentry which generally carried an additional allowance of Rs. 10/- p. m. He worked there for one-and-a half years. On 26-4-1963 he claimed the allowance at the rate of Rs. 10/-, and also house rent allowance. He was then told that he would not only get no allowance but that he should work as a carpenter from 1-7-1963. Against this direction a complaint was filed by the union to the Labour Officer. On the intercession of the Labour Officer Asari was posted to the "marking" section again, but without any reason he was again asked to work as a mere carpenter. In the affidavit accompanying the petition in O. P. 3738/66 it is alleged that on 21-9-1963 Asari was elected secretary of the employees' Union, and he placed Certain demands before the management including his claim for house rent allowance. It was in this background that the tribunal approached the question and found that the order of dismissal was actuated by collateral motives.

The tribunal has stated in the award that there was no domestic enquiry, as the management did not lend any evidence at the so called inquiry. But it was argued on the basis of the ruling in Employers of Firestone Tyre and Rubber Co. Ltd. Vs. Their Workmen, that it was not necessary for the management to have conducted an enquiry, as the worker had admitted that he was absent without leave from 5-8-1963. On 10-8-1963 a notice was issued by the management to Asari stating that Asari should not thereafter absent himself without obtaining leave. Asari's contention was that he attended the office every day, but that he was not assigned any work. That case was not believed by the tribunal. Whether an enquiry was necessary or not in the circumstances of the case, the management adduced evidence before the Tribunal to justify its action and from the facts and circumstances the tribunal found that the punishment imposed was too severe and out of all proportion to the gravity of the delinquency. There were no standing orders at the time in the establishment. Ext. W. 28 marked by the tribunal purports to be the leave rules applicable to the employees. Clause 5 of the said rules lays down that absence for 8 consecutive days would entail dismissal. Ext. W. 28 was put up on the notice board only on 2-10-1963. Ext. W. 29 would show that the union protested against Ext. W. 28. It was argued on behalf of the management that the standing orders of the establishment framed in March 1964 contain a provision for dismissing a worker if he absents himself from work without leave for a continuous period of 8 days; and that two workers were dismissed for the reason that they absented themselves from work without leave, and therefore, there was nothing harsh in imposing the punishment of dismissal upon Asari as the charge proved against was that he absented himself from work without leave. The tribunal found that there was no previous instance of any worker having been dismissed for the reason that he absented himself from work without obtaining leave. From Ext. M18 register produced before the

tribunal, it is clear that one Lexmanan absented himself from duty without applying for leave for 121/2 days on one occasion and 91/2 days on another occasion; and yet no action was taken against him. I am not directly concerned with that question in this proceeding. The real question to be decided is: was the tribunal justified in thinking that in the absence of any standing orders or precedents, and tested by the standard of a reasonable man the punishment of dismissal would smack of unfair labour practice and victimisation, judged in the background of the antecedent relationship between the parties ? Can this Court say that the conclusion of the tribunal that the punishment was too severe that it is cogent evidence of victimisation was without any basis in the evidence adduced before the tribunal? I do not think that I will be justified in interfering with the conclusion of the tribunal in this proceeding. This Court will not interfere in a proceeding under Article 226 if there is some evidence to justify the conclusion of the tribunal. I think that on an assessment of the facts and circumstances, the tribunal was quite within its province in finding that the punishment was too severe and that that is evidence of victimisation.

8. The only question for consideration in O. P. No. 3738/66 is what was the relief which Asari was entitled to on the basis of the finding of the tribunal that the termination of the service was lacking in bona fides and would amount to victimisation. In *Swadesamitran Limited, Madras Vs. Their Workmen*, it was held that ordinarily when a worker is found to be dismissed illegally the tribunal should order his reinstatement. To the same effect is the ruling in *The Punjab National Bank Ltd. Vs. Its Workmen*. Though normally that is the remedy, I do not think, it is an invariable rule that the tribunal should order reinstatement merely because the worker has been illegally dismissed. There is the finding by the Tribunal in this case that since the relationship between the management and Asari is far from cordial it is not expedient to reinstate Asari. Strained feelings between the management and the worker have been held to be sufficient ground for declining reinstatement. In *Trichy Public Transport Ltd. v. Their Workers* (1953) 1 Lab LJ 227 (LATI Mad) it was held that if the relationship between the discharged workman and the employer is strained, the worker should not be reinstated. In *St. Francis Sales Press v. Their Workmen* (1954) 1 Lab LJ 94 (Ind. Tri at Ernakulam) the tribunal awarded only compensation in lieu of reinstatement. In *Suti Mill Mazdoor Union v. Elgin Mills Co, Ltd.* (1958) 1 Lab LJ 100 (LATI at Lucknow) the Labour Appellate Tribunal took a similar view. In *Mangalambika Metal Industries v. Its Workmen*, (1958) 1 Lab LJ 419 (Labour Court Mad) the Labour Court refused to reinstate a workman in circumstances similar to this case, but awarded compensation in lieu of reinstatement. I think that in the circumstances of the case the tribunal was justified in not ordering the reinstatement of, Asari.

9. It was contended on behalf of Asari that he should have been given wages from the date of dismissal upto the date of the award, and that the tribunal went wrong in giving him wages only for two years. The quantum of compensation is primarily a matter with in the discretion of the tribunal. I do not think that in the

exercise of the jurisdiction of this Court under Article 226 of the Constitution, I should interfere with the exercise of that discretion unless it is manifestly perverse, and I see nothing perverse.

I therefore dismiss both the writ petitions, but without any order as to costs.