
(1979) 06 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No's. 2843 and 3052 of 1976

Secretary, Cochin Dock Labour Board Co-operative Stores Ltd.

APPELLANT

Vs

P.V. Antony and Another

RESPONDENT

Date of Decision : 04-06-1979

Acts Referred:

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

Citation : (1979) 06 KL CK 0007

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Advocate : E.R. Venkiteswaran, for Menon and Pai, in O.P. 2843/76 and P.F. Thomas, V.T. Joy and K.L. Joseph, in O.P. 3052/76, for the Appellant; A.B. Abdul Salam, Government Pleader for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

George Vadakkal, J.—Both these petitions impugn the same award passed by the Industrial Tribunal, Calicut, and marked in both cases as Ext.P-1. By that award the said Industrial Tribunal, held that the dismissal of the Petitioner in O.P. 3052 of 1976 (he is the 1st Respondent in the other O.P.) by the Petitioner in O.P. 2843 of 1976 was not justified, and ordered the latter to pay to the former one year's salary as back wages and two months' wages for each completed year of service as compensation for non-employment without justification. The employer seeks to have Ext.P-1 award quashed, and the employee prays for an order of reinstatement.

2. P.V. Antony, the employee, was the Sales Manager of the Cochin Dock Labour Board Employees' Consumers' Co-operative Stores Ltd., who through its Secretary has filed O.P. No. 2843 of 1976. On June 1, 1972 the management appears to have detected some deficiency in the stock on stock-verification, whereupon the management called for the explanation of Antony, the Sales Manager and two others, V.V. Thomas and K.A. Pareed, weighing-men. By Ext.P-3 (in O.P. 2843 of 1976) joint statement dated 7th June 1972 they

admitted that there is a deficiency of stock worth Rs. 5417.28 and explained the shortage as caused by reason of and at the time of retail sales to customers. They therein stated that they are responsible for the stock and agreed to have the loss recovered from their pay after deducting 11/4 per cent as done in previous years. By order dated 26th July 1972 marked Ext.M-5 in the proceedings before the tribunal, after deducting allowable shortage, the management apportioned the liability of the three employees. Antony was held liable to pay Rs. 805.40. This, as submitted at the bar, was on the basis that after deducting the allowable shortage the loss was to the extent of Rs. 4,944.82. There was another stock-verification on 1st July 1972 for the year ending 30th June 1972 and the same shortage was found then also. At this stock-verification, according to the management, a test check was conducted on the transactions and the stock thereon of some selected countable items such as Horlicks, Dalda, Cutticura Powder, etc., for the months of January, March and April 1972. Specific shortage in countable items were detected. Stating these facts and detailing the shortage in countable items the management issued Ext P-2 (in O.P. 2843 of 1976) notice to the three employees levelling charges of the misconduct of: (1) "Dishonesty in carrying out the work entrusted to" each of them and (2) "Misappropriation of articles from" the stores of the employer, and requiring them to show cause as to why disciplinary action as contemplated by the bye-laws should not be taken against them. They were also directed to appear on 25th September 1972 before the Sub-Committee constituted under the bye-laws for domestic enquiry. This Committee, as seen from their Ext.P-5 (in O.P. 2843 of 1976) report met on 26th September 1972, 28th September 1972, 9th October 1972, 10th October 1972 and 11th October 1972. Antony did not participate in the proceedings before the Sub Committee. He however sent Ext.W-3 explanation (mentioned in Ext.P-1 award) dated 22nd September 1972 denying the charges and asking whether the proposed enquiry is a domestic enquiry and whether he should produce his own witnesses. It appears that no reply was given to this. However as seen from Ext.P-5 report, further memos were sent to him asking him to participate in the enquiry proceedings on 27th September 1972 and 3rd October 1972, enclosing with the 2nd mentioned memo a true copy of the proceedings in full till then conducted by the Committee. The sub committee found that all the three employees are guilty on both counts, and dismissed them from service.

3. The dispute regarding dismissal of Antony was referred by the Government for adjudication to the Industrial Tribunal, Calicut, who is the 2nd Respondent in O.P. 2843 of 1976 and the 3rd Respondent in the other as per an order dated 27th June 1973. By Ext.P-1 award dated 3rd February 1976 the Tribunal held as already indicated, that the finding in Ext.P-5 that the worker was guilty of misconduct was not justified "on the facts available". The facts relied on by the Tribunal appear to be: (i) even prior to the framing of charges and levelling them against the employee as per Ext.P-2 notice, the management constituted a sub committee for domestic enquiry, and without waiting for any reply to Ext.P-2

show cause notice, by that notice itself, the employee was directed to appear before that enquiry committee; (ii) in view of the above fact, according to the Tribunal, the workman justifiably apprehended that the domestic enquiry would be biased and that therefore, his non-participation in the domestic enquiry proceedings also was justified; (iii) no material other than the Secretary's oral testimony is available in support of the test checking; (iv) the charges have been levelled against all the three employees conjointly without any precise and specific allegation against any one of them; (v) the questions put by the enquiry officers would suggest that they imported their personal knowledge into the enquiry and sought clarification from the Secretary; and (vi) the subsequent domestic enquiry, after an order apportioning the liability of the three employees would to a certain extent be biased. For these reasons the Tribunal found that the domestic enquiry was not proper.

4. The Tribunal then proceeded to consider on merits as to whether there is sufficient evidence to substantiate the charges of misconduct and held that there is none. Consequently the Tribunal held that the finding by the domestic enquiry officers that the workman is guilty cannot be sustained, and granted the reliefs adverted to in the beginning of this judgment.

5. The learned Counsel for the management raised before me two points, i.e., (i) there is no reason to hold that the domestic enquiry was in any manner defective; and (ii) the Tribunal, at any rate, failed to enter a preliminary finding on the 1st point wherefore, the management was deprived of an opportunity to justify the dismissal on merits by evidence adduced before the Tribunal.

6. The gravamen of the reasoning that led the Tribunal to hold that the domestic enquiry was not proper is that the domestic-enquiry-Tribunal was prejudiced and biased against the employees in that the management had already prejudged the issue as seen, according to the Tribunal, from Ext.P-2 show-cause-notice by which their explanations were called for in respect of the charges levelled against the employees and at the same time, they were asked to appear before the domestic-enquiry-committee, without waiting for the explanation; and that the finding of guilt is perverse in that there was no material on which it could be established. As regards the first of the two abovementioned grounds, I am afraid that the Tribunal took too-technical-a-view as regards proceedings before a domestic-enquiry-Tribunal. The management contemplating disciplinary proceedings, framed charges and called for the employees' defence-statement as per Ext.P-2 notice and required them to appear before the domestic-enquiry-Tribunal. There is no violation of any of the rules of natural justice or of fair play in such a procedure. It should be remembered that in domestic enquiries the prosecutor and judge can be the same person, namely, the employer. Nor can it be said that the fastening of civil liability for the loss occasioned by the shortage of stock on the employees would stand in the way of initiating disciplinary proceedings in so far as it is one thing to say that one is responsible for the loss, and another to say that he is guilty of dishonesty and misappropriation and that

therefore the employer has lost his confidence in the employee. The Tribunal in this connection has also relied on the fact that the enquiry officers sought for clarifications from the Secretary as regards certain matters which were not put to the employees, and this would suggest that they imported their personal knowledge as regards those matters without affording an opportunity to the employees to controvert or explain the same. This, though may amount to violation of rules of fair play and may vitiate the enquiry proceedings, perhaps, could have been avoided had the employee participated in the proceedings and objected to such questions. I do not also think that Ext.P-2 charges axe vague for the reason that there is no specific allegations against each of the three employees as regards how he was guilty of being dishonest in his duties and of misappropriating the articles, in so far as all the three, according to the management, were jointly guilty of those misconducts.

7. Ext. P-2 notice itself states that disciplinary action is contemplated under Clause 13 of the special bye-laws relating to the service conditions of the employees and that the employees would be permitted to produce witnesses in their defence. Clause 13 of the special bye-laws (Ext.P-4 in O.P. 2843 of 1976) provides for domestic enquiry. In view of these facts stated in Ext.P-2 notice, it is of no consequence that the management ignored to answer the questions as to whether the proposed enquiry is a domestic enquiry and whether the workman should produce his witnesses raised in Ext.W-3 mentioned in Ext.P-1 award.

8. In view of what is stated above I am not prepared to subscribe to the view expressed by the Tribunal that the employees' non-participation in the domestic enquiry was on justifiable grounds.

9. However, it appears to me, that the Tribunal rightly said that there was no material which will establish that Antony was guilty of dishonesty in his work or that he misappropriated articles in the stores of the employer. The domestic-enquiry-Tribunal seems to have proceeded on the basis that since the liability for the loss on account of shortage has been admitted by him, he is guilty of dishonesty and misappropriation. No other reason has been stated by that Tribunal in its Ext.P-5 report to come to the conclusion that Antony is guilty on these two counts. That as admitted by him in Ext.P-3, he was responsible for the stock and that therefore he is liable to make good the loss, would not lead to the inference that he was dishonest in his work or that he misappropriated the employers' articles. This finding entered by the domestic-enquiry-Tribunal is therefore unsupported by any material and is therefore as pointed out by the Industrial Tribunal arbitrary and perverse. For this reason, the finding entered by the Tribunal that the domestic enquiry was not proper and is defective has to be upheld and I do so.

10. The above discussion takes me to the 2nd point urged before me. This aspect of the case has to be considered with reference to Section 11A of the Industrial Disputes Act, 1947 and its scope. This provision was introduced into the statute on 15th December 1971, and deals with one category of industrial disputes,

namely, industrial disputes relating to the discharge or dismissal of a workman. Under this provision, if in the course of adjudication proceedings of such a dispute that is referred to it, a Labour Court, Tribunal or National Tribunal" is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require".

11. Prior to the introduction of Section 11A, as enunciated by a series of decisions bearing on this point, it was the well-settled rule that a Labour Court or Industrial Tribunal cannot, function as an appellate court, and that it cannot come to a different conclusion on merits as to whether the discharge or dismissal was justified, unless there was no domestic enquiry at all or the domestic enquiry was defective in the sense it is vitiated by want of bona fides, or it is a case of victimisation or unfair labour practice or violation of the principles of natural justice, or there is a basic error of facts or there has been a perverse finding on the materials. The result was that where the discharge or dismissal was preceded by a domestic enquiry, it was incumbent upon the Labour Court or Industrial Tribunal, to decide firstly as to whether the domestic enquiry was defective in any manner before it embarks upon an enquiry on merits u/s 11 of the Act in order to adjudicate upon a dispute regarding discharge or dismissal of a workman referred to its adjudication, and find that the domestic enquiry was defective. Otherwise, that is, if the domestic enquiry was not defective, the Tribunal was not competent to go into the merits of the dispute u/s 11; nor even to decide the question whether the discharge or dismissal was justified and called for on the materials and the evidence relied on by the domestic-enquiry-Tribunal, -for these were considered to be managerial functions.

12. At this stage it would be useful to advert to the statement of objects and reasons for enacting Section 11A. I will read the same as extracted in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, .

In *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, , the Supreme Court while considering the Tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, has observed that in case of dismissal on misconduct, the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc., on the part of the management.

The International Labour Organisation, in its recommendation (No. 119) concerning termination of employment at the initiative of the employer, adopted in June 1963, has recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination among others, to a neutral body such as an arbitrator, a Court, an arbitration committee

or a similar body and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination. The International Labour Organisation has further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned, unless reinstated with unpaid wages should be paid adequate compensation or afforded some other relief.

In accordance with these recommendations, it is considered that the Tribunal's power in an adjudication proceeding relating to discharge or dismissal of a workman should not be limited and that the Tribunal should have the power in cases wherever necessary, to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. For this purpose, a new Section 11A is proposed to be inserted in the Industrial Disputes Act, 1947....

13. I have hereinbefore adverted to the body of Section 11A. There is a proviso to this section as per which while exercising its power under this section, the Labour Court, the Tribunal and the National Tribunal, as the case may be is required to "rely only on the materials on record" and not to "take any fresh evidence in relation to the matter". The power conferred by this section is the power to set aside the order of discharge or dismissal and to direct reinstatement of the workman on such terms and conditions, if any as it thinks fit or to give such other relief to him including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require, on the Labour Court or the Tribunal or the National Tribunal, as the case may be, being satisfied, in the course of adjudication proceedings, that the order of discharge or dismissal was not justified. Thus, this section confers power on the Labour Court, Tribunal and the National Tribunal to decide the question whether the discharge or dismissal of a workman was justified and called for on the materials and evidence relied on by the domestic-enquiry-tribunal and to pass consequential award directing reinstatement and/or giving such other relief to the workman as it thinks fit, whether such domestic enquiry was vitiated or not, but however, without in any way restricting their power already recognized by courts to go into the merits of the dispute by taking evidence u/s 11 in such cases as where no domestic enquiry was held at all or where, though a domestic enquiry was held, the same was defective and vitiated. Still, so far as the power of taking evidence and of deciding on such evidence the merits of the dispute is concerned, the Tribunal gets it only where there was no domestic enquiry at all or where it finds that the domestic enquiry was vitiated. Where the domestic enquiry is upheld as properly conducted, the only question that will arise u/s 11A is as to the quantum of punishment, and normally it may not be necessary to adduce any fresh additional evidence before the Tribunal to justify the action of the

management. At any rate, in such cases as where the Tribunal comes to the conclusion that domestic enquiry was proper and not vitiated by defects its duty is "to satisfy itself whether there was legally acceptable evidence before the enquiry officer to sustain the conclusion reached by him". See *Surendran v. Industrial Tribunal* 1978 KLT 54 (Case No. 124). In order that each party should be in a position to lead evidence before the Tribunal to substantiate his case, it is necessary that both parties should know that the Tribunal, on the ground that the domestic enquiry was defective, intends to decide the dispute on merits on the basis of evidence adduced before it, and this they could know only if the Tribunal enters a preliminary finding that the domestic enquiry was defective. This was, as it ought to be, so recognized before the introduction of Section 11A and should, obviously continue to be so even after Section 11A came into the statute.

14. *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, laid down the following propositions with reference to the contention raised therein that the Tribunal committed an error in law in not permitting the Appellant-management to adduce evidence before it to justify the action proposed to be taken against the Respondent. Here, the management filed an application u/s 33(1)(b) of the Act for permission to dismiss the workman on the basis of the report of the domestic-enquiry-officer. Holding that the domestic enquiry was not in accordance with the principles of natural justice and that the findings of the domestic-enquiry-officer were not in accordance with the evidence adduced, the Tribunal refused permission. The management had filed an application before the Tribunal seeking permission to adduce evidence before it. The Tribunal dismissed this petition as well. The propositions laid down in paragraph 61 (at 198-99) are: (1) If no domestic enquiry had been held or if the management makes it clear that it does not rely upon any domestic enquiry, it is entitled to straightaway adduce evidence before the Tribunal justifying its action; (2) it is open to the management to rely upon the domestic enquiry in the first instance and alternatively and without prejudice to that contention, to adduce additional evidence before the Tribunal simultaneously on which it may fall back and rely on in the second instance; (3) in No. (2) "it is the duty of the Tribunal, in the first instance to consider whether the enquiry proceedings conducted by the management are valid and proper" and if it is so satisfied, "the question of considering the evidence adduced before it on merits no longer survives"; (4) it is also open to the management to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue with permission to adduce evidence before it after the preliminary finding is entered thereon, if the same turns out to be against the management, and it is open to the Tribunal to accede to such a request -- in such a case, if the preliminary finding is in favour of the management, no additional evidence need be cited; (5) the management has a light to sustain its order by adducing independent evidence before the Tribunal but it "should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed"; and (6) if the management does

not simultaneously lead additional evidence before the Tribunal and does not ask for an opportunity during the pendency of the proceedings to adduce such evidence, the Tribunal need consider only the validity of the domestic enquiry and if that question is decided against the management, it is not the Tribunal's function to invite suo motu the employer to adduce evidence before it to justify the action taken by it". This decision rendered on 11th January 1972 after Section 11A was introduced into the Act on 15th December 1971 did not consider Section 11A and its impact on proceedings of the nature discussed therein.

15. Section 11A was considered by the Supreme Court in a subsequent decision, *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . The questions considered were: (1) the proper interpretation of Section 11A; and (2) whether this section applied to industrial disputes which have already been referred to for adjudication and were pending as on 15th December 1971. On the second question the Supreme Court held that Section 11A applies only to disputes which are referred for adjudication on or after 15th December 1971 and has no application to disputes referred prior to that date which have to be dealt with according to the principles evolved by that court. (Para 62 and at 303). In discussing the first point the Supreme Court said that Section 11A does not in any way affect the right of the employer to adduce evidence before the Tribunal to justify the dismissal or discharge of the workman. That court said (at 296):

There is no indication in the section that the said right has been abrogated. If the intention of the Legislature was to do away with such a right, which has been recognised over a long period of years, as will be noticed by the decisions referred to earlier, the section would have been differently worded. Admittedly there are no express words to that effect and there is no indication that the section has impliedly changed the law in that respect. Therefore, the position is that even now the employer is entitled to adduce evidence for the first time before the Tribunal even if he had held no enquiry or the enquiry held by him is found to be defective, of course an opportunity will have to be given to the workman to lead evidence contra. The stage at which the employer has to ask for such an opportunity, has been pointed out by this Court in *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, -- Paragraph 34.

Note that *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, casts no obligation on the Tribunal to invite suo motu the employer to adduce evidence by entering a preliminary finding as to whether the domestic enquiry was proper or not. However, this decision lays down that the rule as regards the right of the employer to adduce evidence before the Tribunal justifying his action is the same as before the introduction of Section 11A.

16. The question that arises for consideration, therefore, is as to prior to the introduction of Section 11A what rule governed the employer's right to adduce evidence before the Tribunal to justify the action of the discharge or dismissal of a workman pursuant to a domestic enquiry. This question was considered by a

still subsequent decision of a larger Bench of the Supreme Court, *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, The question formulated for consideration in this case was "whether after the Labour Court comes to a decision about the inquiry being defective, it has any duty to announce its decision in that behalf to enable the employer an opportunity to adduce evidence before it to justify the order in the charge levelled against a workman". (See para 5). The question as aforesaid was answered in para 19 (at 385) as follows:

We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication.

The principle enunciated to the contra in *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, and *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, at 284 was not approved by the larger Bench.

17. In *General Secretary, Mc Dowell Employees' Association v. Mc Dowell and Co.* ILR 1975 Ker 666 which was decided very shortly after the decision of the Supreme Court case discussed above, even without noticing that decision presumably because by then it has not come in the Reports, my learned brother, Narendran, J., held that when the workman contend that there was no proper and valid enquiry and the management takes up the stand that the enquiry conducted was not defective, then, the proper course for the Tribunal would be to deal with the validity of the domestic enquiry as a preliminary issue. In view of the above Supreme Court decision, in such cases as where parties join issue as to whether the domestic enquiry was proper or defective, it is no more a matter of discretion with the Tribunal to deal with the question of validity of the domestic enquiry as a preliminary issue, but a matter of duty and obligation. In *Surendran v. Industrial Tribunal* 1978 KLT 54 (Case No. 124) my learned brother Bhaskaran, J., held that "even before the relevant amendment, it was for the Tribunal to consider, as a preliminary point, as to whether the enquiry was conducted properly, and to record a finding thereon". The same view has been

taken by a Division Bench of the Madras High Court in *Madurai-Devakottai Transport Ltd. v. Lab. Court* (1975) 48 F.J.R. 443 relying on the *Cooper Engineering Ltd. case* (1975) LL.J. 379.

18. In view of the above discussion, it is necessary to uphold the second contention of the Petitioner. As already noticed, the Tribunal, after holding that the domestic enquiry was not proper proceeded to consider the dispute on merits without affording an opportunity to the management to justify its action by adducing additional evidence before it (the Tribunal). This is an error of law apparent on the face of the record.

19. I therefore, upholding the Tribunal's finding that there was no proper domestic enquiry, set aside its award so far as it deals with the dispute on merits as also the reliefs granted by the Tribunal to the workman, and direct it to continue the adjudication proceedings treating its finding as regards the domestic enquiry as a preliminary finding and affording to both parties opportunity to adduce evidence before it, if they so choose. O.P. No. 2843 of 1976 is allowed to this extent.

20. In view of the decision in O.P. No. 2843 of 1976 as above, it is not necessary, at this stage to deal with the claim of the workman raised in O.P. No. 3052 of 1975 that he is entitled to be reinstated. That is a matter, now, to be agitated before the Tribunal. In that view, that writ petition is dismissed without prejudice to any of the contentions raised therein by the workman.

There will be no orders as regards costs in these cases.