
(2016) 11 GAU CK 0004
In the Gauhati High Court
Case No : Writ Appeal No. 37 of 2014

Shri Ranjit Bhowmik

APPELLANT

Vs

Hindustan Paper Corporation Limited

RESPONDENT

Date of Decision : 10-11-2016

Acts Referred:

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

Citation : (2017) 1 CLR 368 : (2017) 152 FLR 161 : (2017) 1 GauLT 384 :
(2017) 1 LLN 395 : (2016) 5 NEJ 501

Hon'ble Judges : Mr. Hrishikesh Roy and Mr. L.S. Jamir, JJ.

Bench : Division Bench

Advocate : Mr. N. Dhar, Mr. B. Malakar, Mr. T.U. Laskar, Advocates, for the Appellant; Ms. M. Hazarika, Senior Advocate and Ms. A. Medhi, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Hrishikesh Roy, J.(Oral) - Heard Mr. N. Dhar, the learned counsel appearing for the appellant. The respondents are represented by the learned Sr. counsel Ms. M. Hazarika.

2. The appellant (hereinafter referred to as the "employee") while serving as Technical (Fitter-III) in the Panchgram Paper Mill of the Hindustan Paper Corporation (hereinafter referred to as the "HPC") was charged with misconduct under Clause 28(10) of the Certified Standing Orders, applicable to the HPC. It was alleged that the employee is a habitual absentee and has remained absent for 104 days on 41 different occasions, during 01.01.1997 - 15.12.1997. The employee failed to submit any reply to the charges and accordingly Mr. J. Debnath, Executive (P&A) was appointed on 11.02.1998 to enquire into the misconduct. The finding given on 17.04.1998 discloses that the employee, in course of the enquiry, admitted to the charge levelled against him and thus the Enquiry Officer opined that the charge is established. When the enquiry finding was furnished to the employee, in his reply of 18.05.1998, the employee

mentioned about his personal difficulties and health problem. The employee also mentioned that although he undertook to produce the medical certificate for his bronchial and gastric ulcer problem before the Enquiry Officer, he failed to do so.

3. In furtherance to the above proceeding, the disciplinary authority of the HPC considered the charge, the finding of the Enquiry Officer and the response of the employee and applied his mind on the appropriate penalty. After due consideration, the disciplinary authority ordered for removal of the employee, through the order dated 10.02.1999. Accordingly one month wages was offered to the employee and approval was sought for the disciplinary action from the Industrial Forum, under Section 33(2)(b) of the Industrial Disputes Act, 1947.

4. The application of the HPC under Section 33(2)(b) of the Industrial Disputes Act was registered as the Misc. Case No.4/1999 where the details of the disciplinary proceedings was indicated and prayer was made, for approval of the action taken by the management, against the errant employee.

5. In the first round, the Presiding Officer of the Industrial Tribunal, Silchar in the Misc. Case No.4/1999 observed that absence from duty may not be a serious misconduct. The failure of the management to pull up the employee earlier, for his unauthorized absence was held against the management, as it was a case of absence, on 41 different occasions. The management's want of action at the appropriate stage was considered to be an important factor and on this basis, the reinstatement of the employee with all back wages, was ordered by the Industrial Tribunal on 23.08.2001 (Annexure-8).

6. Aggrieved by the above decision of the Industrial Tribunal, the management filed the WP(C) No.1077/2003 and this case was disposed of on 07.03.2003, wherein the High Court observed that the Presiding Officer erroneously entered into the merits of the case instead of confining his consideration to the scope of Section 33(2)(b) application. Accordingly the matter was remitted back for a fresh decision of the Tribunal after setting aside the earlier decision.

7. After remand of the matter by the High Court, the Industrial Tribunal again considered the application filed under Section 33(2)(b) of the Industrial Disputes Act. This time, the learned Tribunal referred to Clause 30(ii)(a) of the Standing Orders and observed that the enquiry was conducted by an unauthorized officer, as he is a subordinate staff of the disciplinary authority. The inaction of the management to act against the errant employee at the early stage was again held against them. It was also observed that the charge of habitual absence is not proved. According to the Tribunal, the gravity of the misconduct and the past record of the employee were not taken into account. With such consideration, the Presiding Officer found that approval cannot be granted to the management's application and the same was accordingly rejected, through the order dated 22.08.2003.

8. Aggrieved again by the decision of the Industrial Tribunal, the management re-approached the High Court through the WP(C) No.2255/2004. The learned Judge

observed that requirement of Clause 30 of the Standing Orders is that the enquiry should not be conducted by an officer directly subordinate to the disciplinary authority and it was found that the Enquiry Officer, does not fall in this category. The Court further found that the employee had not filed any reply to the charge-memo and in fact, no such reply was found in the relevant case record of the Enquiry Officer. The Court noted that the employee was provided with due opportunity to defend the charges. Then advertent to the application under Section 33(2)(b) and how it is handled by the Industrial Tribunal, the Court observed that the Presiding Officer mistakenly construed that the employee had filed the reply to the charge-sheet. Moreover whether leave was sanctioned for the absence days was not taken into account. That apart, defence assistance was never sought during enquiry. Most importantly, the drawl of adverse inference against the management for its failure to pull up the employee for his absence at the early days, was found to be improper. Thus it was held that the order passed by the Tribunal on 22.08.2003 is not sustainable and consequently it was declared that the approval to the management's application, stands granted.

9.1 The learned counsel Mr. N. Dhar questions the legality of the impugned verdict by pointing out that neither the Enquiry Officer nor the Industrial Tribunal considered whether the employee was will fully absent from duty. The counsel submits that the employee was suffering from bronchial and gastric ulcer problem and that is why, he could not attend to his duties on many occasions, but the management should have considered whether the absence was will full or on account of factors, beyond the control of the employee.

9.2 The appellant submits that the enquiry was conducted by one J. Debnath, an executive cadre officer of the HPC and this officer is subordinate to the Deputy General Manager, who was the disciplinary authority. Accordingly, Mr. Dhar argues that the enquiry conducted by the subordinate officer stand vitiated, on account of Clause 30(ii)(a) of the Standing Orders.

9.3 Adverting to the admission of guilt recorded by the Enquiry Officer, the appellant's lawyer submits that while it was admitted by the employee that he was absent on the days mentioned in the charge-sheet, unless the absence is declared to be will full, disciplinary action would not be justified for misconduct envisaged under Clause 28(10) of the Standing Orders.

10.1 On the other hand, Ms. M. Hazarika, the learned Sr. counsel submits that the scope of scrutiny in a proceeding under Section 33(2)(b) of the Industrial Disputes Act is limited and in order to indicate how the Industrial Tribunal should deal with application under Section 33(2)(b), the counsel cites *Lalla Ram v. Management of D.C.M. Chemical Works Ltd.* reported in (1978)3 SCC 1. According to her, the Tribunal went beyond its jurisdictional domain in finding fault with the disciplinary action of the management.

10.2 The learned Sr. counsel for the HPC submits that when the charge of

absence on 41 different occasion is admitted by the employee and the misconduct is referable to Clause 28(10) of the Standing Orders, which speaks off habitual absence without leave, the admission of the employee is sufficient and the Enquiry Officer need not give a further finding on whether the absence was wilful or not, particular when, no leave was applied or sanctioned for, the unauthorized absence.

10.3 According to the employer's lawyer, even if an employee is unwell, he is required to obtain leave of absence and sickness of an employee may not alter the character of absence from that of will full category to one of condonable category particularly when, leave was neither sought nor sanctioned.

11.1 Before proceeding further with the case, it would be appropriate now to extract the Clause 28(10) of the Certified Standing Orders under which, the employee was charged. The clause relates to habitual absence and reads as:-

"28. Acts of Misconduct

Without prejudice to the general meaning of the term "Misconduct" the following act and omissions on the part of a workman shall be treated as misconduct:- ?????????..

10) Habitual late attendance and or habitual absence from duty without leave or without sufficient cause. ??????????."

11.2 It may also be appropriate to extract Clause 30(ii)(a), which deals with the Enquiry Officer:

"30. Procedure for dealing with cases of Misconduct

ii) Procedure for imposition of major penalty:

a) Where a workman is charged with an offence which may lead to the imposition of major penalty, he shall be informed in writing of the allegations against him and shall be given an opportunity to make representation within a period of not less than ten days. On receipt of the workman's explanation, where the allegations are denied by him, an enquiry shall be held by an officer or officer nominated by the Management. Such inquiry will be conducted by an officer other than the officer who has made the allegations or is directly subordinate to him. At the enquiry, the workman concerned shall be afforded a reasonable opportunity of explaining and defending his case with the assistance of a fellow workman. Where such enquiry relates to the alleged misconduct of several workmen, the enquiry may be held for all the workmen together."

12. As can be seen from Clause 30(ii)(a), only such officer who is directly subordinate to the disciplinary authority, is incapacitated from acting as the Enquiry Officer. But Mr. J. Debnath who conducted the enquiry was not directly subordinate to the disciplinary authority and therefore in our considered opinion, the finding given against Mr. Debnath by the Tribunal was rightly found to be erroneous by the writ court, on account of the requirement specified under

Clause 30(ii)(a) of the Standing Orders.

13.1 The Supreme Court in *Lalla Ram* (supra) had examined how the Tribunal should consider applications under Section 33(2)(b) of the Industrial Disputes Act. The Court opined that the Tribunal is required to consider or deny approval to the application by determining whether the conditions prescribed by the Section and the proviso are satisfied by the management, before disciplinary action is taken against an employee. The Tribunal can also take into account whether the Standing Orders justify the dismissal or whether an enquiry as required by the Standing Orders was conducted. The payment of a month's wages can also be a factor to be taken into account by the Tribunal.

13.2 After discussing the earlier judgments, the Supreme Court specified the following for Industrial Tribunal for considering applications under Section 33(2) (b) of the Industrial Disputes Act:

"?????????.

12. ??????????. In proceedings under section 33(2)(b) of the Act, the jurisdiction of the industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee ?????????that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. ??????????????"

14. From the above ratio it is clear enough that the Tribunal in dealing with the management's application under Section 33(2)(b) of the Industrial Disputes Act, will have to confine itself within the circumference of the above procedure and cannot therefore be bothered with extraneous matters. The Tribunal can certainly determine whether the enquiry was conducted under the relevant Standing Orders with due adherence to the principles of natural justice, whether a prima facie case for dismissal is made out on legal evidence and whether the employee has come to a bona fide conclusion on the guilt and whether it is a case of unfair labour practise intended to victimise the employee but other issues are outside the scope of the permitted procedure. Moreover the legality of the disciplinary proceeding can be scrutinised more elaborately as an industrial dispute, on a reference made under Section 10 of the Industrial Disputes Act, but stage for this will be another proceeding.

15. In the present case, what is discernible is that the employee had admitted to the charges before the Enquiry Officer. Although it is argued by the appellant's lawyer that the absence of the employee was on account of medical exigencies, we cannot ignore that the employee himself in his letter dated 18.05.1998 had admitted that he failed to produce any medical certificate before the Enquiry Officer. When the unauthorized absence is on 41 different occasions, the absence cannot be brushed aside lightly on medical exigencies without leave being applied and sanctioned, for those days.

16. We have already found that the Enquiry Officer Mr. J. Debnath was not incapacitated under Clause 30(ii)(a) of the Standing Orders from conducting the enquiry since, he was not in the directly subordinate category and therefore, when the employee had admitted to the charge, we see no error in the guilt finding recorded against the errant employee, by the Enquiry Officer.

17. It must also be recorded here that the Exbt.-A referred to by the learned counsel Mr. N. Dhar, was not found in the records of enquiry and therefore it cannot be said that the employee had furnished any reply to the charges. In fact just the contrary finding is recorded against the employee and therefore the purported reply, i.e. Exbt.-A which was admitted under protest, should not in our opinion, influence the decision in the present case.

18. Here the disciplinary action against the appellant was taken for his habitual and multiple absence on 41 occasions in a single year (1997) and this litigation has continued now for nearly 2 decades. The Industrial Tribunal on two occasions examined the Section 33(2)(b) application and same was the case for the writ court, when challenges were made by the management. The power to grant or refuse approval for disciplinary action undoubtedly vests on the Tribunal but when the writ court quashed the Tribunal's order a second time, and found many deficiencies in the approach and reasoning of the Tribunal, the recording of approval to the management's application is only consequential and this according to us was only to bring about a finality, to the proceeding continuing for many years.

19. In view of the above discussion, the interference with the decision of the Industrial Tribunal was rightly made by the writ court as the Tribunal erred and went beyond its jurisdiction in dealing with the application under Section 33(2) (b) of the Industrial Disputes Act. It was not the business of the Tribunal to find fault with the management for its alleged lapses in not acting immediately against the errant employee and then to decide the Section 33(2)(b) application, inter-alia, on this point. Moreover, the finding recorded by the Tribunal on the status of the Enquiry Officer vis-a-vis Clause 30(ii)(a) was a perverse conclusion as the Enquiry Officer was not in the category of a direct subordinate of the disciplinary authority. For these and the other reasons discussed earlier, we do not find merit in this appeal and the same is therefore dismissed. However we leave to parties to bear their respective cost.