

(1964) 05 OHC CK 0013
In the Orissa High Court
Case No : O.J.C. No. 382 of 1963

Superintendent, Mines and Quarries, Bisra Stone Lime Co. Ltd. APPELLANT

Vs

Presiding Officer, Industrial Tribunal and Another RESPONDENT

Date of Decision : 05-05-1964

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311

Citation : (1965) 31 CLT 157

Hon'ble Judges : Narasimham, C.J; Misra, J

Bench : Division Bench

Advocate : S. Mohanty, for the Appellant; A.G. for Opp. Parties No. 1 and Srinibas Misra, for Opp. Parties No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—This is an application under Articles 226 and 227 of the Constitution wherein the Petitioner prays for issuing a writ of Certiorari to quash the order of the Industrial Tribunal dated 27-9-1963 refusing to approve the order of dismissal passed by the Petitioner against opposite party No. 2, and to approve the order of dismissal which was given effect on 21-11-1962. The facts leading to this application are as follows:

On 3-7-1962 Government of India referred certain dispute between Bisra Stone Lime Co. Ltd., Biramitrapur and its workmen to the Industrial Tribunal, Orissa, u/s 10 of the Industrial Disputes Act, 1947 (hereinafter to be referred to as the Act). The questions referred to in the dispute were:

(1) whether the management of M/s. Bisra Stone Lime Co. Ltd. is justified in not granting 2nd October (Mahatma Gandhi's birthday) as an additional paid holiday to its workmen;

(2) If not, to what relief the workers of Bisra StoneLime Co. Ltd. are entitled?

The dispute was registered as Industrial Dispute Case No. 4 of 1962. On 7-11-1962 at about 10 p.m., opposite party No. 2 was returning back to the garage in a Dumper, Leyland No. 15, in which he had gone to a place known as Patpahar by driving the vehicle himself in the absence of an authorised driver of the Company to drive such vehicle, to attend to some work there. While returning back, he picked up P.C. Mohanti, an Auto-Electrician, and some other employees of the Company who had failed to catch the Company bus. Opposite party No. 2 was driving the vehicle recklessly. P.C. Mohanti and other occupants asked opposite party No. 2 to drive the vehicle slowly. Some quarrel ensued between opposite party No. 2 and P.C. Mohanti. The former hit Mohanti with a spanner, caught him by his hair and gave a blow on his face as a result of which one of his teeth was loosened. Some hairs also came out of the head of Mohanti. On the complaint of Mohanti, the following charge was framed against opposite party No. 2.

It has been reported that you did assault Auto. Electrician P. C. Mohanti on the night duty of 7-11-1962. This is your misconduct under the Company's order No. 20 Sub-sections 8 and 25.

Opposite party No. 2 showed cause. He however expressed regret for his action and prayed to be excused. The matter was enquired into by one T.C. Patnaik, the Chief Personal Officer and on 20-11-1962 he recorded his finding to the following effect:

From the statement of the witnesses it is evident that Shri Dasgupta was driving the Leyland in a manner that caused discomfort to those who were sitting in its body including Shri Mohanti. If Shri Mohanti repeatedly asked him to drive slowly or threw a little quantity of dust (which did not fall on him) there was no such provocation for Dasgupta to get up into the body of the truck and assault him with a spanner and pull his hair. As a result of this Shri Mohanti was badly hurt. Shri Dasgupta is, therefore, found guilty of misconduct under the Company's Standing Order 20(8) for fighting and disorderly behaviour inside the Company's vehicle. Exemplary punishment of discharge from service is recommended.

The Petitioner, who is the Superintendent of the Mines and Quarries, Bisra Stone Lime Co. Ltd. passed the following order on that very date. "He is undoubtedly guilty of assault, and what is more was driving without permission as well as driving in a reckless fashion. This offence was most serious. He is to be dismissed."

The order of dismissal was intimated to opposite party No. 2 on 21-11-1962. He was paid a sum of Rs. 217.47 nP. on 22-11-1962 as his salary for a month in lieu of discharge notice. On 30-11-1962 he was paid Rs. 272-17 nP. towards his other dues.

It is to be noted that this punishment for misconduct was unconnected with the dispute pending before the Industrial Tribunal in Industrial Dispute Case No. 4 of 1962. Accordingly, an application was filed on 28-11-1962 under the proviso to

Section 33(2)(b) of the Act, and this application was registered as Misc. Case No. 26 of 1962. On 8-12-1962 the Tribunal rendered the award in Industrial Dispute Case No. 4 of 1962. The award was published in the Government of India Gazette on 22-12-1962 u/s 17 of the Act. On 22-1-1963 the award became final u/s 17-A of the Act after expiry of 30 days from the date of publication. The impugned order in Misc. Case No. 26 of 1962 was passed by the Tribunal on 27-9-1963 refusing to approve the dismissal order. The Tribunal refused to give approval as the charge was only for assault, but ultimately dismissal order was passed on the two other charges of reckless driving and driving without permission which were considered to be more serious by the dismissing authority. The writ application is filed against this order.

2. Mr. Mohanty for the Petitioner substantially raised two contentions:

(1) The Tribunal's order dated 27-9-1963 refusing to approve the dismissal order was passed long after the award became enforceable when the Tribunal was functus officio, and the Tribunal had no further jurisdiction u/s 33(5) to deal with the application filed under the proviso to Section 33(2)(b).

(2) The Tribunal acted in excess of jurisdiction in refusing to give approval on the footing that it was an appellate authority. It misconstrued the order of dismissal passed on the Petitioner to mean that the punishment was given for offences other than the one for which opposite party No. 2 had been charged. Driving the vehicle in reckless fashion and driving without permission were not independent acts of misconduct for which separate punishment was called for, and the Petitioner mentioned these acts as aggravating circumstances for awarding the maximum punishment provided for in the act of misconduct with which opposite party No. 2 has been charged.

3. To appreciate the first contention, certain sections relevant to the question in issue may be examined. u/s 17 every award of a Tribunal shall be published within a period of 30 days from the date of its receipt by the appropriate Government and the award, subject to the provisions of Section 17-A, shall become enforceable after the expiry of 30 days under the latter section. By Section 20, Sub-section (3), the proceedings before the Tribunal shall be deemed to have concluded on the date on which the award becomes enforceable u/s 17-A. Section 33, Sub-section (2), Sub-clause (b) proviso is as follows:

33.

....

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a work. man concerned in such dispute,

....

(b) for any misconduct not connected with the dispute, discharge or punish

whether by dismissal or otherwise, the workman

Provided that no such workman shall be discharged, or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

Section 33, Sub-section (5) lays down that where an employer makes an application to the Tribunal under the proviso to Sub-section (2) for approval for the action taken by him, the authority concerned shall without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit.

The gist of Mr. Mohanty's contention is that u/s 33(5) the authority concerned refers to the Tribunal before which the industrial dispute is pending, and that once the award becomes enforceable and final, the Tribunal becomes functus officio and has no jurisdiction to deal with the interlocutory application presented to it under the proviso to Section 33(2)(b). On a plain statutory construction this contention does not appeal to me. Section 33(5) enjoins upon the Tribunal to hear the application without delay and pass the relevant order as expeditiously as possible. If the construction relied upon by Mr. Mohanty is accepted, the Tribunal is vested with the jurisdiction of frustrating the disposal of that application and making the sub-section nugatory without hearing the matter at all by rendering the award before disposal of the application. If that was the intention of the legislature, express language ousting jurisdiction could have been used. There can be no dispute that the "authority concerned" referred to in Sub-section (5) means the Tribunal, but it does not lead to the further inference that it must relate to the authority before whom the industrial dispute was pending. It is true that at the time when the application under the proviso to Section 33(2)(b) is to be made, the industrial dispute must be pending. But it does not necessarily follow that the industrial dispute must still continue to be pending before the disposal of such application. In the absence of clear words it is difficult to accept such a contention and oust the jurisdiction of the Tribunal. The analogy of orders relating to interlocutory injunction passed in a suit comes to an end with the disposal of the suit. The injunction order is wholly subsidiary or ancillary to the matter in dispute in suit and directly connected with this subject matter of the suit. But the interlocutory application filed under the proviso to Section 33(2)(b) is not subsidiary or ancillary to the industrial dispute in the analogical sense and by express words used in Sub-clause (b) an application under the proviso is to be filed in respect of misconduct unconnected with the dispute. The industrial dispute relates to a completely different subject. To illustrate with reference to the facts of this case, the industrial dispute is regarding granting of 2nd October as an additional paid holiday and the application under the proviso relates to an assault by opposite party No. 2. Both are wholly unconnected unlike an order of injunction granted with reference to the subject-matter of dispute in a suit. The object of the proviso is prevention of

victimisation of the workmen and maintenance of an atmosphere of peace during the pendency of the industrial dispute. The termination of the proceeding with regard to the industrial dispute does not necessarily therefore lead to the termination of the application asking for approval under the proviso.

6. In *Strawboard Manufacturing Co. Vs. Gobind*, , their Lordships examined the meaning of the proviso to Section 33(2)(b). The relevant observation in para 8 which has bearing in the case may be noticed.

If the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer. In such a case no specific provision as to reinstatement is necessary and by the very fact of the Tribunal not approving the action of the employer, the dismissal or discharge of the workman would be of no effect and the workman concerned would continue to be in service as if there never was any dismissal or discharge by the employer. In that sense the order of discharge or dismissal passed by the employer does not become final and conclusive until it is approved by the Tribunal u/s 33(2).

This observation was doubtless made in relation to a case where no approval is given. But the principle would equally apply to a case where the Tribunal has become functus officio before the disposal of the application under the proviso. The order of dismissal prior to the approval is final in the sense that it would operate immediately without waiting for the order of approval. But it is not final in another sense that if ultimately the approval is refused the dismissal order automatically becomes ineffective and inoperative. It would be difficult to accept the contention that the original order of dismissal under the proviso not final in the latter sense would become final merely because the Tribunal is functus officio so far as the main industrial dispute is concerned.

Between *Mettur industries Ltd. and Sundara Naidu and Anr.* 1963 (2) L.L.J. 303, a decision of the Madras High Court, and *Between Shah (T.A.) and Shah T.A. Vs. State of Mysore and Others*, , a decision of the Mysore High Court, support Mr. Mohanty's contention. On the contrary, *Between Om Prakash Sharma and industrial Tribunal, Punjab and Anr.* 1962 (2) L.L.J 272, a decision of the Punjab High Court and *Kanan Devan Hills Produce Co. Ltd., Munnar Vs. Industrial Tribunal, Ernakulam and Others*, , support the contention of Mr. Misra, that the Tribunal does not cease, to have jurisdiction to dispose of the application under the proviso after the award becomes enforceable. With respect, I am inclined to accept the latter decisions as laying down the correct law. The first contention of Mr. Mohanty has no force and must be rejected.

4. The second contention of Mr. Mohanty necessitates an examination of the scope of the enquiry u/s 33(2)(b) and the proviso. The nature and ambit of the enquiry permissible under that sub-section is no longer in doubt and has been fully explained by the Supreme Court in *The Lord Krishna Textile Mills Vs. Its*

Workmen, . Under the proviso in dealing with an employer's application for according approval, the Tribunal is to see whether a prima facie case has been made out. If before dismissing an employee, the employer had held a proper domestic enquiry and had proceeded to pass the impugned order as a result of the said enquiry, the Tribunal is only to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. The Supreme Court laid down that the following four questions must be answered in that regard.

- (1) Do the standing orders justify the order of dismissal?
- (2) Has an enquiry been held as provided by the standing order?
- (3) Have the wages for the month been paid as required by the proviso?
- (4) Has an application been made as prescribed by the proviso?

There is no dispute that the employer fulfilled the third and the fourth conditions. Under Standing Order 20(8), "assault" is a misconduct and the employee is liable to be dismissed if he is guilty of misconduct under Standing Order 21(a). Standing Order 20(8) lays down that without prejudice to the general meaning of the term "misconduct", it shall be deemed to mean and include drunkenness, fighting, riotous, disorderly or indecent behaviour. Standing Order 21(a) prescribes that an employee shall be liable to be dismissed if he has been guilty of misconduct. Thus the first condition is also fulfilled in this case.

The controversy centres round the fulfillment or otherwise of the second condition, that is, whether an enquiry has, been held as provided by the Standing Order. Standing Order 22 runs as follows:

22. If misconduct is alleged against an employee, the Manager before taking action against the employee will give a charge-sheet in writing and will then hold an enquiry by an officer or officers appointed for the purpose. The employee charged with misconduct will be given a fair and reasonable opportunity of explaining and defending his action.

It embodies the principle of natural justice which is to follow in enquiries under the Industrial Disputes Act. In *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen*, , their Lordships laid down that an enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined ordinarily in the presence of the employee-in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the enquiry officer records his findings with reasons for the same in his report.

The reasons why the Tribunal refused to accord approval under the proviso are that the ultimate order of dismissal was a composite sentence based on the three

charges of (1) assault, (2) driving without permission, and (3) driving in reckless manner, and that according to the dismissing authority the latter two charges were offences of serious nature. Under standing Order 20(25) any breach of Indian Mines Act or any other Act, or any rules or bye-laws there under or of standing orders amounts to misconduct. Driving in reckless manner and driving without permission are offences under the Indian Penal Code and under the Motor Vehicles Act, and by themselves constitute misconduct within the meaning of Standing Order 20(25) for which opposite party No. 2 could be dismissed from service. As a matter of fact the authority considered these two charges to be more serious than the original charge of assault for which enquiry had been made and the order of dismissal had been recommended by the domestic enquiring officer. In this context it will be difficult to accept the contention of Mr. Mohanty that the facts alleged in the second and the third charges were Merely aggravating circumstances for awarding the maximum punishment and not independent acts of misconduct.

In the context of the aforesaid facts it cannot be said that the Tribunal acted in excess of jurisdiction in refusing to accord approval to the composite dismissal order based on the second and the third charges also for which there was absolutely no notice and no enquiry. In AIR 1963 S.O. 1914, their Lordships observed in paragraph 5 of the Judgment.

It is difficult to understand how the charge being for causing damage to property and the enquiry officer's report being in respect of the same, the dismissal order was made for something else. That itself would be a sufficient ground for setting aside the order of dismissal.

Doubtless, this was not a case u/s 33(2)(b) and the proviso, but the principle laid down therein applies with full force to all cases of this nature wherein the punishment is awarded with reference to a charge of which no notice is given and for which no enquiry has been made. The domestic Tribunal, Shri T.C. Patnaik, in this case did not make an enquiry into charges of driving in reckless manner and driving without permission and did not recommend any punishment for those charges. Merely because a punishment of dismissal could have been awarded for the misconduct of assault, the Tribunal cannot be said to have exercised in excess of jurisdiction in refusing to accord approval as it is open to the dismissing authority to give a lesser punishment even for the same misconduct. Standing Order 21(b) prescribes that the Company may at its discretion give the employee the following punishment in lieu of dismissal (i) A censure or warning, (ii) Suspend him (without pay) for a period not exceeding 10 days in the case of weeklies and not exceeding 30 days in the case of other employees, or (iii) Withhold his scale increment, reduce his pay, or demote him. In the opinion of the Petitioner who was the dismissing authority the charge of assault was not serious and he could have awarded in his discretion punishment of the nature prescribed in Standing Order 21(b) if he would not have been influenced by the existence of serious charges like driving in reckless manner and

driving without permission. We are aware of the observations of the Supreme Court in *State of Orissa v. Bidyabhusans* where their Lordships had held with reference to an enquiry under Article 311:

Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction if the findings of the enquiry officer or the Tribunal *prima facie* make out a case of misdemeanour, to direct the authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice.

In view of the discussion already made by me that the dismissing authority considered the second and the third charges to be more serious, this case is distinguishable. I am satisfied that the principles laid down by the Supreme Court in *The Lord Krishna Textile Mills Vs. Its Workmen*, and *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen*, , apply to the facts of this case and the Tribunal was justified in refusing to accord approval. The second contention of Mr. Mohanty has no force and is to be rejected.

5. In the result, the application fails and is dismissed with costs. Hearing fee of Rs. 100/-.

Narasimham. C.J.

6. I agree.