

(1996) 03 CAL CK 0021
In the Calcutta High Court
Case No : C.O. No. 15517 (W) of 1992

Swapratik Mukherjee

APPELLANT

Vs

Third Industrial Tribunal and Others

RESPONDENT

Date of Decision : 22-03-1996

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11A

Citation : (1996) 2 CALLT 427 : (1997) 75 FLR 429 : (1997) 3 LLJ 847

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : Swadesh Bhushan Bhuniya, for the Appellant; Debayan Bera, for the Respondent

Final Decision : Allowed

Judgement

Shyamal Kumar Sen, J.—In the instant application the writ petitioner has challenged the award dated November 11, 1991 passed by Third Industrial Tribunal, Calcutta upon a reference u/s 10 of the Industrial Disputes Act.

2. The facts involved in this writ petition inter alia are that the petitioner was appointed as a Peon under West Bengal State Electricity Board. The petitioner was suspended on August 5, 1980 and ultimately a departmental proceeding was initiated against the petitioner for alleged rude and disorderly behaviour insolence shown to Superior and for committing breach of discipline. The charge sheet was issued on August 5, 1980. A departmental enquiry was held.

3. During the pendency of the Disciplinary proceeding an industrial dispute was pending before the 8th Industrial Tribunal. After the enquiry proceeding second show-cause notice was issued. Thereafter final order was passed on December 23, 1980 in the disciplinary proceeding dismissing the petitioner from service. Since an industrial dispute was pending at that time an application u/s 33(2)(b) of the Industrial Dispute Act was made by the Employer for approval of the action taken and the petitioner was offered one month's salary in accordance

with provision of Section 33(2)(b) of the Industrial Disputes Act. Thereafter the petitioner raised a fresh Industrial dispute for reference u/s 10 of the Industrial Disputes Act challenging the order of dismissal. Upon the same the State Government by order dated October 8, 1986 referred the matter to Third Industrial Tribunal, Calcutta for adjudication of the dispute u/s 10 of the Industrial Disputes Act on following issue:--

(a) Whether the dismissal of the petitioner from service is justified.

(b) To what relief, if any, the workman is entitled? (Order-Annexure "D" page 25 of the writ petition).

4. Thereafter the matter was heard by the Industrial Tribunal and upon consideration of the documents and evidences and record, the Third Industrial Tribunal Calcutta by order dated November 4, 1991 held that the dismissal of the petitioner was justified (Award : page 28-33 of the writ petition).

5. In the instant case it appears from records which were brought to this Court pursuant to direction made on September 7, 1995 and September 14, 1995 that Tribunal found that domestic enquiry is invalid (at page 29 of the Writ petition). The said finding of the Tribunal is set out herein below :

"During the proceedings of this reference the validity of domestic enquiry was heard as a preliminary point. My learned predecessor held that the domestic enquiry as invalid and allowed an opportunity to the Board to produce all witnesses before this Tribunal to prove the charges against the workman. Accordingly the Board adduced independent evidences to prove the charges against the workman. The workman cross examined all the witnesses and also examined himself in defence. Now we are to decide on the basis of these evidence whether the charges against the workman have been proved or not."

6. The question arises if there is already a finding on the preliminary point that the domestic enquiry was invalid can the Tribunal u/s 11-A still make an enquiry on its own and making a finding against workman and hold (sic.) the dismissal as valid and justified. Section 11-A was inserted by Industrial Disputes Amendment Act, 1971 with effect from December 15, 1971. In course of hearing since the writ Petitioner was appearing in person, I requested Mr. Swadesh Bhushan Bhunia, a senior advocate of this Court to act as amicus curiae. It has been submitted by Mr. Bhunia that Section 11-A provides that if the Tribunal is satisfied that the order of discharge is not justified, Tribunal by its award can set aside order of dismissal.

7. Proviso to Section 11-A provides that the Tribunal shall not take any fresh evidence in relation to the matter.

8. In the instant case, it has been submitted by, Mr. Bhunia, that Tribunal found that domestic enquiry is invalid (vide page 29 of the writ petition). The Tribunal is bound u/s 11-A to set aside the dismissal order.

9. It has been further submitted by Mr. Bhunia that contrary to the proviso to Section 11-A, the Tribunal allowed the employer to adduce fresh evidence. Accordingly the award is bad and liable to be quashed. In support of his contention Mr. Bhunia has relied upon the judgment and decision in the case of *Sankar Chakravatri v. Britannia Biscuit* reported in (1979-II-LLJ-194) (SC).

10. Mr. Bhunia has further submitted that there is no prior approval and even in the final award dated November 4, 1991 there is no whisper of any approval of the application filed u/s 33(2)(b), of the Industrial Disputes Act dated November 23, 1980.

11. Mr. Bhunia has further relied upon the judgment and decision of the Supreme Court in the case of *Tata Iron and Steel Co. Ltd. Vs. S.N. Modak*, He has further contended relying upon the said decision that a proceeding u/s 33(2)(b) is a separate proceeding and does not end with the final award, if there is no approval of the application of the employer u/s 33(2)(b). Accordingly the order of termination dated December 23, 1980 is also bad and liable to be quashed.

12. The contention of Mr. Bhunia is that the prayer in the writ petition should be allowed and the award should be quashed and the writ petitioner should be reinstated forthwith with back wages and all service benefits.

13. It has been contended by learned Advocate for the respondent, on the other hand, that u/s 11-A of the Industrial Disputes Act, 1947 the Tribunal has ample power to take fresh evidence and also to decide as a preliminary issue whether the domestic enquiry was fair and just. The Tribunal can also hold that domestic enquiry is invalid and thereafter can decide the issue after taking fresh evidence from the respective parties.

14. It has been accordingly contended u/s 11-A of the Industrial Disputes Act the Tribunal will take fresh evidence to decide whether the order of dismissal was justified or not.

15. It has been further submitted on behalf of the respondent Board that in the instant case domestic enquiry was held as per provision of the West Bengal State Electricity Board Employees' Service Regulation. After the preliminary issue was determined holding domestic enquiry as invalid the Tribunal took fresh evidence and analysing the documents and evidence on record, the Tribunal held that the charges against the writ petitioner were proved and accordingly held that the order of dismissal was justified.

16. It has been further contended by learned Advocate for the respondent Board that since the domestic enquiry was held invalid the order of dismissal may be taken as simple dismissal without any proceeding. Since the reference was made to the Tribunal under the Industrial Disputes Act, the Tribunal will enquire into the matter after taking evidence of the parties and will decide the validity of the order of dismissal.

17. It has further been submitted that in the written statement filed on behalf of

the respondent Board it was specifically pleaded that enquiry was fair and proper.

18. It was further pleaded in the written statement by the Board that in case Tribunal found that domestic enquiry was invalid, the Board should be given an opportunity to adduce evidence before the Tribunal. On this pleading the preliminary issue was framed by the Tribunal to decide whether the domestic enquiry was fair and valid. The said issue was decided against the Board holding that domestic enquiry was invalid. It is admitted, however, that thereafter fresh evidence was taken by the Tribunal. According to the learned Advocates for the respondent Board there is no illegality in it.

19. The learned Advocate for the respondent Board has further submitted that after the decision on preliminary issue the Tribunal is entitled to take fresh evidence. In support of his contention he has relied upon the judgment and decision in the case of *The Workmen of Firestone Tyre and Rubber Co. India (Pvt.) Ltd. v. The Management and Others* reported in (1973 I LLJ 278) (SC).

20. The learned Advocate has further submitted that there is no question of non-compliance of the provision of Section 33(2)(b) of The Industrial Disputes Act and there is no obligation that prior approval from the Industrial Tribunal is to be taken before the order of dismissal is passed.

21. The contention of the learned Advocate for the respondent Board is that an order of dismissal has to be passed first and thereafter application for approval is to be filed and at the same time one month's salary is to be offered. Both the aforesaid conditions are satisfied in the instant case. In support of his contention he has relied upon the judgment and decision in the case of *Strawboard Manufacturing Co. Vs. Gobind,*

22. It has further been contended that in case of challenge of non compliance and/or violation of Section 33(2)(b), the remedy is to file an application before the same Tribunal u/s 33-A of the Industrial Disputes Act and this Court has no jurisdiction under Article 226 to test the non-compliance and/or violation of the provision of Section 33(2)(b) of Industrial Disputes Act.

23. Mr. Bera, learned Advocate for the Board has further submitted that it is an admitted position although violation of provision of Section 33(2)(b) of Industrial Disputes Act has been alleged but the petitioner did not approach the Tribunal u/s 33-A of the Industrial Disputes Act to challenge the alleged violation.

24. It is also the contention of the learned Advocate for the Board that the Power of High Court under Article 226 to test the validity of the award passed by Industrial Tribunal is very limited. The Court under Article 226 not Court of appeal over the award and is not entitled to correct the finding of fact arrived at by the Tribunal and also a finding of fact based on appraisal of evidence on record and cannot reappraise the evidence while exercising writ jurisdiction. In this connection, he has relied upon the judgment and decision of this Court in the case of *Indian Aluminium Co. Ltd. v. Third Industrial Tribunal of West Bengal*

Government reported in 93 CWN 825.

25. The further contention of Mr. Bera learned Advocate for the Board is that there is a clear finding by the Tribunal that the petitioner is guilty of all the charges. This Court should not interfere with the award. Accordingly he has submitted that the writ petition should be dismissed.

26. I have considered the respective submissions of the learned Advocates for the parties and the decisions cited by them. The undisputed position is that the Tribunal itself made a preliminary finding that the domestic enquiry is invalid and in view of that said finding, the dismissal order pursuant to the domestic enquiry becomes bad.

27. The contention of the learned Advocate for the Board however, is that u/s 11-A of the Industrial Disputes Act the Tribunal is competent to take evidence and pass a fresh decision on the question of dismissal after the preliminary issue is decided. For the purpose of ascertaining the correct position, it is necessary to consider the scope of Section 11-A of the Industrial Disputes Act. Section 11-A provides as follows :

"11-A -- Power of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen. Where an industrial dispute relating to the discharge or dismissal of a workman Tribunal has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, 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 workmen 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.

Provided that in any proceeding under this Section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

28. In my view, the learned Advocate for the respondent Board has not construed the provision of Section 11-A of the Act in proper perspective.

29. The Supreme Court in the case of Workmen of Firestone Tyre and Rubber Co. India (Pvt.) Ltd. v. The Management and Ors. (supra) has interpreted and also explained the scope of Section 11-A. In this connection, paragraphs 10 and 11 of the said judgment at page 286 are set out here in below :

"10" "Originally limitations had been placed by Judicial decisions in respect of the jurisdiction of the Labour Tribunal when considering the action of an employer in the matter of discharge or dismissal of a workman. If a domestic enquiry had been held by an employer on the basis of which a workman is dismissed or discharged, the Labour Courts can interfere with the decision of the management

only if the domestic enquiry is vitiated by the circumstances mentioned by this Court in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, Once the Tribunal held that the domestic enquiry has been conducted properly and the action of an employer is bonafide and the conclusions arrived at therein are plausible, they had no jurisdiction to substitute their own judgment. In cases where the misconduct is found to be proved by a valid and proper domestic enquiry, the Tribunal had no power to alter the punishment imposed by an employer even in cases where the domestic enquiry is held to be defective or even if no domestic enquiry had been conducted by an employer before passing an order of termination or discharge, the employer was given an opportunity to adduce evidence before the Tribunal to justify his action. Once the Tribunal accepts that evidence and holds that the misconduct is proved, it had no power to interfere with the discretion of the management regarding the quantum of punishment."

"11" "The above position has been completely changed by Section 11-A. It is now obligatory on an employer to hold a proper domestic enquiry in which all material evidence will have to be adduced. When a dispute is referred for adjudication and it is found that the domestic enquiry conducted by the management is defective or if it is found that no domestic enquiry at all had been conducted, the order of discharge or termination passed by the employer becomes, without anything more, unjustified and the Labour Tribunals have no option but to direct the reinstatement of the workman concerned, as his discharge or dismissal is illegal. Even in cases where a domestic enquiry has been held and finding of misconduct recorded, the Labour Tribunals have now full power and jurisdiction to reappraise the evidence and to satisfy themselves whether the evidence justifies the finding of misconduct. Even if the enquiry proceedings are held to be proper and the finding of misconduct is also accepted the Tribunal has now power to consider whether the punishment of dismissal or discharge was necessary for the type of misconduct of which the workman is found guilty. In such circumstances, the Tribunal can also give any other relief to the workman, including the imposing of a lesser punishment. In cases where an employer had not conducted any enquiry or when the enquiry conducted by him is held to be defective, the employer will not be given any opportunity to adduce evidence before the Labour Tribunal for justifying his action. Various decisions of this Court have emphasised that there is an obligation on the part of an employer to hold a proper enquiry before dismissing or discharging a workman. And it has also been stated that the enquiry should conform to certain well defined principles and that it should not be an empty formality. If the management, being fully aware of this position in law, does not conduct an enquiry or conducts a defective enquiry, the order passed by it is illegal and it cannot take advantage of such illegality or wrong committed by it and seek a further opportunity before the Tribunal of adducing evidence for the first time. Generally, the Standing Orders also provide for the conduct of an enquiry before imposing a punishment. The Standing Orders have been held to be statutory

terms of conditions of service. If an employer does not conform to the provisions of the Standing Orders, he commits an illegality and an order passed, which is illegal, has only to be straightaway set aside by the Tribunal. Decisions of this Court, while recognising that an opportunity has to be given to an employer to adduce evidence before the Tribunal for the first time, have not given due importance to the effect of a breach of a statutory obligation committed by the Standing Orders. This anomaly has now been removed by the Legislature."

30. In the Instant case, the Tribunal considered the preliminary point as to validity of the domestic enquiry after having decided the said preliminary point that the domestic enquiry was improper. There is no scope for taking further evidence.

31. The judgment and decision in Workmen of Firestone's case (supra) only lays down the principle that u/s 11-A if the enquiry was not properly conducted by the employer, it will be open to the employee to lead further evidence before the Tribunal to establish that the domestic enquiry is invalid. Since in the instant case, the Tribunal itself came to the finding that the domestic enquiry was not properly conducted, there is no question of taking further evidence by the Tribunal itself. The Tribunal was therefore not justified in allowing fresh evidence to be adduced by the employer when there is already a finding by the Tribunal after consideration of evidence that the domestic enquiry was invalid. If the domestic enquiry is found to be invalid by the Tribunal then the dismissal also becomes bad on the basis of the said finding of the domestic enquiry.

32. The judgment and decision in the case of Sankar Chakravarti v. Britannia Biscuit Co. Ltd (supra) has also been relied upon by Mr. Bhunia, in support of his contention that there was no obligation on the Tribunal to make fresh enquiry and to take fresh evidence as was done in the instant case.

33. The Judgment and decision in the case of The Straw Board Manufacturing Co. Ltd., Saharanpur v. Govind (supra) has also been relied upon by the learned Advocate for the respondent Board cannot be of any assistance to him. In the aforesaid decision it was held by the Supreme Court that employer may pass an order of dismissal or discharge before obtaining the approval of the action taken by him of the authority concerned. If on subsequent application the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fail 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). Accordingly this principle laid down in the aforesaid decision does not support the case of Respondent No. 2

34. The Supreme Court in the case of Tata Iron & Steel Co. Ltd. v. S.N. Modak (supra) at pages 131-132 held and observed as follows :

"A reading of the two sub-sections of Section 33 makes it clear that its provisions are intended to be applied during the pendency of any proceeding either in the nature of conciliation proceeding or in the nature of proceeding by way of reference made u/s 10. The pendency of the relevant proceeding is thus one of the conditions prescribed for the application of Section 33. Section 33(1) also shows that the provisions of the said sub-section protect workmen concerned in the main dispute which is pending conciliation or adjudication. The effect of Sub-section (1) is that where the conditions precedent prescribed by it are satisfied, the employer is prohibited from taking any action in regard to matters specified by Clauses (a) and (b) against employees concerned in such dispute without the previous express permission in writing of the authority before which the proceeding is pending. In other words, in cases falling under Sub-section (1) before any action can be taken by the employer to which reference is made by Clauses (a) and (b) he must obtain the express permission of the specified authority. Section 33(2) proceeds to lay down a similar provision and the condition precedent prescribed by it are the same as those contained in Section 33(1). The proviso to Section 33(2) is important for our purpose. This proviso shows that where action is intended to be taken by an employer against any of his employees which falls within the scope of Clause (b), he can do so, subject to the requirements of the proviso. If the employee is intended to be discharged or dismissed, an order can be passed by the employer against him, provided he has paid such employees the wages for one month, and he has made an application to the authority before which the proceeding is pending for approval of the action taken by him. The requirements of the proviso have been frequently considered by Industrial Tribunals and have been the subject-matter of decisions of this Court as well. It is now well-settled that the requirements of the proviso have to be satisfied by the employer on the basis that they form part of the same transaction; and stated generally the employer must either pay or offer the salary for one month to the employee before passing an order of his discharge or dismissal, and must apply to the specified authority for approval of his action at the same time, or within such reasonably short time thereafter as to form part of the same transaction. It is also settled that if approval is granted it takes effect from the date of the order passed by the employer for which approval was sought. If approval is not granted, the order of dismissal or discharge passed by the employer is wholly invalid or inoperative, and the employee can legitimately claim to continue to be in the employment of the employer notwithstanding the order passed by him dismissing or discharging him. In other words, approval by the prescribed authority makes the order of discharge or dismissal effective; in the absence of approval such an order is invalid and inoperative in law.

35. Sub-sections (3) and (4) of Section 33 deal with cases of protected workmen, but with the provisions contained in these two sub-sections we are not concerned in the present appeal. Section 33(5) also implies consideration in this

connection. This sub-section requires that where an application is made under the proviso to Sub-section (2), the specified authority has to dispose of the application without delay; and indeed, it expressly prescribes that the said proceedings must be dealt with as expeditiously as possible. This sub-section is naturally limited to cases falling under sub-section (2). In regard to cases falling under Sub-section (1), the employer can act only with the previous express sanction of the prescribed authority, and, therefore, there is no need to make any provision in regard to an application which the employer may make under Sub-section (1) requiring that the said application should be dealt with expeditiously. That is the general scheme of Section 33.

36. It is quite clear that Section 33 imposes a ban on the employer exercising his common-law, statutory, or contractual right to terminate the services of his employees according to the contract or the provisions of law governing such service. In all cases where industrial disputes are pending between the employers and their employees, it was thought necessary that such dispute should be adjudicated upon by the Tribunal in a peaceful atmosphere, undisturbed by any subsequent cause for bitterness or unpleasantness. It was, however, realised that if the adjudication of such disputes takes long, the employers cannot be prevented absolutely from taking action which is the subject-matter of Section 33(1) and (2). The legislature, therefore, devised a formula for reconciling the need of the employer to have liberty to take action against his employees, and the necessity for keeping the atmosphere calm and peaceful pending adjudication of industrial disputes. In regard to actions covered by Section 33(1), previous permission has to be obtained by the employer, while in regard to actions falling u/s 33(2), he has to obtain subsequent approval subject to the conditions which we have already considered. In that sense, it would be correct to say that the pendency of an industrial dispute is in the nature of a condition precedent for the applicability of Section 33(1) and (2). It would, *prima facie*, seem to follow that as soon as the said condition precedent ceases to exist, Section 33(1) and (2) should also cease to apply; and the learned Solicitor-General for the appellant has naturally laid considerable emphasis on this basic aspect of the matter.

37. It is also true that having regard to the conditions precedent prescribed by Section 33(1) and (2), it may be possible to describe the application made by the employer either u/s 33(1) or u/s 33(2) as incidental to the main industrial dispute pending between the parties. We have noticed that such applications have to be made before the specified authority which is dealing with the main industrial dispute and so, the argument is that an incidental or an interlocutory application which arises from the pendency of the main industrial dispute, cannot survive the decision of the main dispute itself. That is another aspect of the matter on which the learned Solicitor-General relies. He urges that it is during the pendency of the main industrial dispute that Section 33 applies that it applies in relation to workmen concerned with such main dispute, and that the power conferred by it has to be exercised by the authority before which the main

dispute is pending. These broad features of Section 33 impress upon the applications made u/s 33(1) and (2) the character of interlocutory proceedings, and thus considered, interlocutory proceedings must be deemed to come to an end as soon as the main dispute has been finally determined.

It does not appear from the award that there is any approval of the action of the employee dismissing the petitioner at any stage either prior to the order of dismissal or subsequent therefore and as such.

Considering the facts and circumstances of the case, in my view, the Tribunal was not correct in passing the said award dismissing the workman. The said award is accordingly quashed and set aside.

There will be no order as to costs.

Learned Advocate for the respondent West Bengal State Electricity Board prays for stay of operation of this order which is refused.

Let a plain copy of the operative part of the judgment duly counter-signed by the Assistant Registrar (Court) be supplied to the learned Advocate for the parties as also to the petitioner appearing in person, on usual undertaking to apply for and obtain certified copy of the same.