

(2001) 06 CAL CK 0010
In the Calcutta High Court
Case No : A.P.O. No. 540 of 1998

Tapan Kumar Bhattacharyya

APPELLANT

Vs

M/s. Hindustan Motors Limited

RESPONDENT

Date of Decision : 26-06-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 10, 10(2A), 11(1), 2, 32

Citation : (2001) 2 CALLT 403 : (2001) 3 CHN 539 : (2001) 91 FLR 74 : (2001) 2 LLJ 1259

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Ashok Kumar Ganguly, J

Bench : Division Bench

Advocate : Mr. Bidyut Banerjee and Mr. K.K. Bhattacharjee, for the Appellant; Mr. A. Chowdhury and Mr. S. Pal, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—This appeal has been filed by the workman impugning a judgment dated 12th March, 1998 passed by a learned Single Judge of this Court whereby His Lordship was pleased to quash an award dated 3rd October, 1991 which was passed in favour of the appellant.

2. The basic facts of the case are noted below.

3. The appellant was employed as a Mazdoor in Production Control Department [Car Press Shop] of the respondent M/s, Hindusthan Motors Limited [hereinafter referred to as said company]. It is alleged that while the appellant was working as a Mazdoor in the Car Press Shop section, it was reported that on 13th February, 1980 at about 10.40 p.m. the appellant allegedly assaulted one Sri Ramagya Jadav, General Supervisor of the Department with fists and blows and as a result of which the said supervisor became unconscious and had to be hospitalized. It was also alleged that by doing so the appellant had committed major misconduct under item numbers 1, 17 & 19 of the appendix "D" of the Certified Standing Orders of the said company. The appellant was asked to

explain in writing within 48 hours why disciplinary action should not be taken against him. The appellant was immediately placed under suspension.

4. The case of the said company is that a departmental inquiry was started on the aforesaid allegation on 9th June, 1980 in which the appellant was found guilty. Thereafter, the management of the said company informed the appellant that he was liable to be dismissed in terms of the provision of the Standing Orders of the said company and the appellant was informed by a communication dated 1st August, 1980 that he stood dismissed and the order of dismissal would come into effect retrospectively from 15th February, 1980.

5. Thereafter, the said company filed an application u/s 33(2)(b) of Industrial Disputes Act thereafter called the said Act) before the Fourth Industrial Tribunal, West Bengal for the approval of the dismissal order. The said Tribunal by an order dated 12th July, 1982 approved the order of dismissal of the appellant. Then the appellant made various representations by raising disputes against the said order of dismissal. Ultimately there was a reference by Government of West Bengal, Labour Department under sub-section 2(A) of section 10 of the said Act for adjudication of the following issue:

"Is the dismissal of Sri Tapan Kr. Bhattacharyya from the service justified? What relief, if any, is he entitled to?"

6. Adjudication in connection with the said reference took place before fifth Industrial Tribunal. West Bengal. Finally by an award dated 3rd October, 1991, the Tribunal held that the charges which were framed against the appellant were not proved by any cogent and reliable evidence and that the service of the appellant could not be terminated and as such the Tribunal directed reinstatement of the appellant.

7. The said award of the Tribunal was challenged by the said company by filing a writ petition, numbered as matter number 212 of 1992. The said writ petition came to be heard and disposed of finally by a judgment and order dated 12th March, 1998 by a learned Single Judge of this Court inter alia setting aside the said award as mentioned above.

8. Hence, this appeal has been filed by the appellant workman challenging the said Judgment of the learned Judge of the First Court.

9. One aspect of the case may be clarified here and now. Possibly it cannot be disputed that from the mere fact that the order of dismissal of the petitioner was approved by the tribunal on the petition filed by the said Company u/s 33(2)(b) of the said Act, the said dismissal order has become either sacrosanct or valid.

10. The object of section 33 of the said Act is to ensure that proceedings in connection with Industrial disputes, already pending, should be brought to an end in a peaceful atmosphere and no employers should, during the pendency of the proceedings, take any action of the kind mentioned in the section which may give rise to fresh dispute. In the event of fresh disputes there is the likelihood of

further worsening of the strained relationship between the employer and the workman. To achieve this object, the ban has been imposed upon the right of the employer under the contract of employment. The purpose of an enquiry under this section is merely to determine whether the ban should be removed or not. Therefore, while exercising jurisdiction u/s 33(2)(b) of the said Act the authorities are not called upon to undertake an adjudication of the dispute on merits. So by grant of approval to an order of dismissal passed by the authority a stamp of validity on the same is not put by the Tribunal.

11. From the award, which has been passed in this case in favour of the appellant, it appears that after receipt of the reference notices were served on the parties and thereafter the parties filed their written statements along with list of documents. It also appears that both the workman and the management adduced evidence and witnesses were examined and cross-examined.

12. The tribunal considered the evidence adduced by the respective parties including the case made out by them. The tribunal also recorded that in the written statement filed by the appellant the stand taken is that the charge sheet against him was baseless and concocted and framed with an Intention to throw-out the appellant from his Job. It is also the stand of the appellant that the enquiry which was held was neither fair nor proper and the same was conducted against all norms of natural justice and fair play and the appellant was not allowed to cross examine the witnesses. The stand of the appellant was that he raised an objection that the records of enquiry proceedings which, were produced by the management at the time of obtaining approval u/s 33(2)(b) of the said Act were manufactured. The tribunal has also recorded the stand of the said Company in the written statement filed before It. After recording the case of the said Company in the written statement the tribunal came to the following findings:

(a) The existence of relationship between the management of the said company and the appellant workman was not disputed.

(b) On the alleged night of occurrence, the appellant and Sri Yadav were present in the office and there was a hot exchange of words between the said Yadav and the appellant.

(c) An alleged departmental enquiry was held before the dismissal of the workman.

(d) The appellant workman was dismissed from service during the pendency of the reference before the tribunal and as such approval was obtained as required u/s 33(2)(b) of the said Act.

(e) The tribunal also came to the finding that if the charges alleged against the appellant workman are proved in a departmental enquiry, in that case, there is no alternative but to dismiss the workman from the service.

13. After recording those findings, the tribunal rightly formed the opinion that

the vital question is to find out whether the charges were proved by the management.

14. In coming to the said finding, the tribunal considered the charge-sheet and the explanation given by the workman, the representation by the workman, the letter of refusal given by the management, the proceedings before the Assistant Labour Commissioner at the conciliation stage and all other relevant materials.

15. After going through all these materials on record, the tribunal found it difficult to accept the evidence of the said Ramagya Yadav since it suffered from various contradictions. The tribunal also noted those contradictions in its findings. The tribunal found that the version of the said Sri Yadav could not be accepted inasmuch as according to Sri Yadav two other witnesses namely K.P. Tewari and R.C. Singh saved him from the assault of the appellant workman. The tribunal wanted to look into their evidence for corroboration. Both these witnesses namely K.P. Tewari and R.C. Singh were examined by the management before the Enquiry Authority but none of them corroborated Sri Yadav on the point of attack by the workman and the alleged assault on him. The tribunal noted that the evidence of those two workers is that there is no attack in any manner by the appellant workman on Sri Yadav. The tribunal also examined these two witnesses. But they did not say anything about the alleged incident of attack on Sri Yadav by the appellant workman.

16. On the aforesaid state of evidence, the tribunal came to the finding that the charges against the appellant workman was not proved by any cogent and reliable evidence and as such, set aside the dismissal order passed against the appellant workman and directed his reinstatement.

17. The question is whether such an award, which has been passed after consideration of the materials and evidence on record, can be interfered with by the writ Court under Article 226. The learned Judge of the First Court has held that the tribunal, by taking fresh evidence and examining witnesses from both sides, has embarked upon a fresh enquiry and thereby the tribunal "has exceeded his jurisdiction". The learned Judge has also held that this is not permissible in view of provision u/s 11A of the said Act and specially having regard to the proviso u/s 11A.

18. It also appears that the learned Judge has interfered with the appraisal of the evidence by the tribunal and the learned Judge also held that the tribunal by allowing evidence to be adduced before him acted "on the basis of misconception of law". The learned Judge further held that "In a domestic proceeding, standard of proof is not beyond reasonable doubt rather preponderance of probability". After recording the aforesaid observations the learned Judge held that the company has been able to prove the charges against the delinquent employee on the standard of preponderance of probability.

19. The learned Judge also held that the tribunal could not substitute Its own appraisal of evidence in place of the appraisal of the evidence by the Enquiry

Officer. The learned Judge also came to a finding that there is no serious challenge to the legality and validity of the domestic proceeding. The learned Judge relied on the decision in the case of *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, . The learned Judge has, however, held against the contention of the learned counsel for the appellant company on one aspect by observing that the tribunal acting u/s 11A of Industrial Disputes Act has sufficient power to grant any relief in a fit case but since for the reasons mentioned above, the award could not be sustained and the same was set aside and the writ petition was allowed.

20. This Court cannot uphold the judgment of the learned Single Judge. This Court finds that when a complain is made before the tribunal that the domestic enquiry was not properly held, it is open to the tribunal to take evidence by giving opportunities to both the sides. In the instant case, such a complain was made before the tribunal. As it appears from the written statement filed by the appellant workman, the aforesaid objection was squarely pleaded.

21. In para 4 of the written statement. It was specifically averred that the domestic enquiry which was held was neither fair nor was it held by a competent person and was conducted in violation of principle of natural justice, in para 10 also it was stated that the said departmental proceeding was initiated against the appellant workman to victimize him for his trade union activities. In the aforesaid state affairs, the tribunal was very much within its jurisdiction to record evidence from both the sides and held a fresh enquiry.

22. This position in law is well settled as would appear from the decision in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, .

23. The apex Court, after discussing the case law of the point, laid down the certain propositions on this aspect. Those propositions laid down by the Hon"ble Supreme Court about the jurisdiction of the tribunals in adjudicating disputes relating to dismissal or discharge of workmen are still holding the fields. Those propositions laid down in para 32 of the report are set out below:

"From those decisions, the following principles broadly emerge:

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in Judgment over the decision

of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimization, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets Jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognized that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by Tribunal except in cases where the punishment is so harsh as to suggest victimization.

(10) in a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate v. The Workmen*, within the judicial decision of a Labour Court or Tribunal."

24. From the aforesaid principles set out above. It is clear that this case is covered by the proposition laid down as against the Item No. 5.

25. Therefore, when the complain is one of not holding a proper enquiry as in the instant case, it is open to the Tribunal to direct evidence to be adduced before it and then come to its own finding. By following the aforesaid procedure, the Tribunal has not at all committed any error. The learned Judge also come to an erroneous finding by holding that in view of the proviso to section 11A of the said Act, the Tribunal cannot take any fresh evidence. Similar argument was made in the case of Firestone Tyre (supra) in para 47 of the report. The said para 47 where the aforesaid submission was made is set out below:

"47. We will now pass on to consider the proviso to section 11A. Mr. Deshmukh relied on the terms of the proviso in support of his contention that it is now obligatory to hold a proper domestic enquiry and the Tribunal can only take into account the materials placed at that enquiry. The counsel emphasized that the proviso places an obligation on the Tribunal "to rely only on the materials on record" and it also prohibits the Tribunal from taking "any fresh evidence in relation to the matter". According to him, the expression "materials on record" refers to the materials available before the management at the domestic enquiry and the expression "fresh evidence" refers to the evidence that was being adduced by an employer for the first time before the Tribunal. From the wording of the proviso he wants us to infer that the right of an employer to adduce evidence for the first time has been taken away, as the Tribunal is obliged to confine its scrutiny only to the materials available at the domestic enquiry."

26. The learned Judges of the Hon'ble Supreme Court did not accept the contention made on behalf of the management and negated the same in para 48 and 49 of the report which are set out below:

"48-49. We are not inclined to accept the above contention of Mr. Deshmukh. The proviso specifies matters which the Tribunal shall take into account as also matters which it shall not. The expression "materials on record", occurring in the proviso, in our opinion, cannot be confined only to the materials which were available at the domestic enquiry. On the other hand, the "materials on record" in the proviso must be held to refer to materials on record before the Tribunal. They take in:

- (1) the evidence taken by the management at the enquiry and the proceedings of the enquiry, or
- (2) the above evidence and in addition, any further evidence led before the Tribunal, or
- (3) evidence placed before the Tribunal for the first time in support of the action taken by an employer as well as the evidence adduced by the workmen contra.

The above items by and large should be considered to be the "materials on record" as specified in the proviso. We are not inclined to limit that expression as meaning only that material that has been placed in a domestic enquiry. The proviso only confines the Tribunal to the materials on record before it as specified

above, when considering the justification or otherwise of the order of discharge or dismissal. It is only on the basis of these materials that the Tribunal is obliged to consider whether the misconduct is proved and the further question whether the proved misconduct Justifies the punishment of dismissal or discharge. It also prohibits the Tribunal from taking any fresh evidence either for satisfying itself regarding the misconduct or for altering the punishment. From the Proviso it is not certainly possible to come to the conclusion that when once it is held that an enquiry has not been held or is found to be defective, an order reinstating the workman will have to be made by the Tribunal. Nor does it follow that the proviso deprives an employer of his right to adduce evidence for the first time before the Tribunal. Expression "fresh evidence" has to be read in the context in which it appears namely, as distinguished from the expression "materials on record". If so read, the proviso does not present any difficulty at all."

27. From a combined reading of paragraphs 47, 48 & 49 of Firestone Tyre (supra) there can be no doubt that learned Judge was erroneous in his appreciation of the legal provision u/s 11A of the said Act.

28. The learned Judge also came to a finding that the Tribunal has come to its own satisfaction about the alleged misconduct of the appellant workman and thereby committed an error by substituting the view of the management in this aspect and therefore, the order of the Tribunal has to be set aside.

29. This Court is not able to accept the said finding of the learned Single Judge. It may be noted that after incorporation of section 11A in the said Act, way back in 1971, the Tribunal is now entitled to hold that even if the misconduct is proved nevertheless, the punishment of discharge and dismissal is not justified. Therefore, the Tribunal is given the power to substitute the view taken by the management. This appears from a combined reading of paragraphs 41 and 41-A of the said judgment in Firestone Tyre (supra). These paragraphs are set out below:

"41. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference u/s 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why, according to us, section 11A now gives full power to the Tribunal to go into the evidence and satisfy on both these points. Now the jurisdiction of the Tribunal to re-appraise the evidence and come to its conclusion ensures to 11 when it has to adjudicate upon the dispute referred to it in which an employer relies on the

findings recorded by him in a domestic enquiry. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognized in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by section 11A" "41-A. Another change that has been effected by section 11A is the power conferred on a Tribunal to alter the punishment imposed by an employer. If the Tribunal comes to the conclusion that the misconduct is established, either by the domestic enquiry accepted by it or by the evidence adduced before it for the first time, the Tribunal originally had no power to interfere with the punishment imposed by the management. Once the misconduct is proved, the Tribunal had to sustain the order of punishment unless it was harsh indicating victimization. u/s 11A, though the Tribunal may hold that the misconduct is proved, nevertheless it may be of the opinion that the order of the discharge or dismissal for the said misconduct is not justified. In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman only lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by section 11A."

30. In this connection reference may be made to the decision in the case of Jitendra Singh Rathor Vs. Shri Baidyanath Ayurved Bhawan Ltd. and Another, . While delivering the judgment for the Court, Justice Ranganath Misra, as His Lordship then was, dealing with the scope of power u/s 11A of the said Act held in paragraph 4 that -advisedly wide discretion has been vested in the Tribunal in the matter of awarding relief according to the circumstance of the case". His Lordship further held that the High Court under Article 227 of the Constitution of India "does not enjoy such power as a superior Court. Its power is one of superintendence". His Lordship, however, held that in an appropriate case the High Court can scrutinize that order of the Tribunal within well accepted limitations, and it can quash the Award and thereupon remit the matter for fresh decision in accordance with law and with necessary directions but the High Court is not entitled to exercise the powers of the Tribunal and substitute the Award in place of the one made by the Tribunal. [Underlined for emphasis]

31. The Supreme Court in the case of Sadhu Ram Vs. Delhi Transport Corporation, has echoed the same principle about Interference by the High Court under Article 226 of the Constitution of India in the matters relating to decisions by the Tribunal under a Special legislation. In that case the Supreme Court has laid down the principle of Interference by the High Court against the order of the Industrial Tribunal. Elaborating the principle in para 3 the learned Judges of the apex Court have laid down the law as follows:-

"We are afraid, the High Court misdirected itself. The jurisdiction under Article 226 of the Constitution of India is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate Court over Tribunals constituted under special legislation

to resolve the disputes of a kind qualitatively different from ordinary civil disputes and to re-adjudicate upon question of fact decided by those Tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdiction at facts which the Tribunal is well competent to decide. Where the circumstances indicated that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is, therefore, impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court."

32. In view of the aforesaid position in law, this Court is of the view that in the Instant case, the learned single Judge, unfortunately committed an error by Interfering with the finding of the Tribunal when the Tribunal acted within its jurisdiction and in accordance with the principles laid down u/s 11A of the industrial Disputes Act. With great respect to the learned Single Judge, this Court is unable to uphold the judgment under appeal. The judgment of the learned single Judge is, therefore, set aside.

33. The respondent company is directed to reinstate the petitioner forthwith and definitely within a period of fortnight from the date of service of the judgment upon the said respondent. Such reinstatement must be made and the back wages should be paid to the appellant workman within a period of two months from the date of reinstatement. In default it must be paid alongwith an interest at the rate of 12% per annum from the date of expiry of the said period of two months till the date of actual payment.

34. The seniority and continuity of the appellant workman in the service should be maintained. It is however, recorded that after dismissal, if the management of the said company had made any Interim payment to the workman that should be deducted from the amount of backwages.

The appeal, is, therefore, allowed, the judgment of the learned judge is set aside. There will be order as to costs.

P.K. Chattopadhyay, J.

35. I agree.

Later

36. Prayer for stay is considered and rejected.

37. Xerox certified copy of the order, if applied for, be given on the usual undertaking.

38. Appeal allowed