

(1999) 08 DEL CK 0069
In the Delhi High Court
Case No : CWP. NO. 3470 of 1990

UCO Bank

APPELLANT

Vs

Presiding Officer and Another

RESPONDENT

Date of Decision : 30-08-1999

Acts Referred:

Citation : (1999) 5 AD 514 : (1999) 81 DLT 696 : (1999) ILR Delhi 331 : (2000) 1 LLJ 1187

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. S.L. Gupta, for the Appellant;

Judgement

A.K. Sikri, J.—The petitioner UCO Bank which has filed this writ petition challenging the order dated 5.9.1990 of Respondent No.1, namely, Central Government Industrial Tribunal (hereinafter referred to as "CGIT", for short) whereby petitioner Bank is asked to lead the evidence first in the Industrial Dispute raised by Respondent No. 2/Workman and pending before CGIT. Before advertng to the controversy, it would be appropriate to recapitulate the facts in brief.

2. Respondent No.2 was working as Assistant Cashier at Naraina Branch of the petitioner Bank. On 19.10.1983 chargesheet was issued to him alleging that he had fraudulently altered payment of Rs.1,200/- in token book to Rs.4,200/-. Enquiry was held. Enquiry Officer submitted his report dated 8.4.1985 holding that charges against the workmen as per chargesheet dated 19.10.1983 were proved. Disciplinary Authority issued show cause notice dated 6.2.1985 proposing the punishment of dismissal of workman from service. Workman submitted his representation. However, Disciplinary Authority passed order dated 21.10.85 imposing the punishment of dismissal from service. His appeal before the Appellate Authority also failed thereafter. Workman raised industrial dispute against his dismissal from service, which was referred by the Government of India, Ministry of Labour vide Reference No.L-12012/526/86-D II (A) of 1987. On

receiving the reference, notices were issued by the CGIT to the Parties. Workman filed his statement of claim to which petitioner Bank filed its reply and thereafter workman filed his rejoinder. Parties filed their respective documents, which were admitted and denied and thereafter following issues were framed by CGIT:

1. Whether the enquiry held by the management is fair and proper.
2. As in the terms of reference.
4. After framing the aforesaid issues, CGIT directed the petitioner Bank to lead its evidence first.
5. The petitioner Bank submitted before CGIT that issue regarding legality and validity of the domestic enquiry be decided first before calling the petitioner to lead evidence. However, this request of the petitioner was turned down. In these circumstances, petitioner filed CWP. No. 1288/89 in this Court against order dated 28.3.1989. The said writ petition was disposed of by this Court vide order dated 13.3.1990, which is reproduced below:

"It is stated in para (xi) of the writ petition that the petitioner has filed an application requesting the Tribunal to take the evidence of the employee first and thereafter the petitioner may be asked to lead evidence. The averment is that the Tribunal has refused to accept it. Thereafter a copy of the application was sent by registered post to the Tribunal. We direct that the petitioner shall file a fresh application on the same lines before the Tribunal giving an advance copy of the same to the counsel for the employee. The Tribunal after giving an opportunity to both the parties will pass an appropriate order.

The writ petition is disposed of. Parties will appear before the Tribunal on 16th April, 1990."

6. Pursuant to the aforesaid order petitioner Bank moved two applications before CGIT. After hearing these applications CGIT vide impugned order dated 5.9.1990 dismissed these applications petitioner has filed this writ petition against order dated 5.9.1990.

7. Notice to show cause was issued in this writ petition on 15.11.1990 and interim order was passed staying the proceedings before CGIT. On 27.11.91 Rule was issued in the petition. After the issue of Rule workman could not be served in a normal process. On 13.8.1998 Court passed the order of service on workman by publication in one issue of the "Statesman" (Delhi Edition), which was duly published in the aforesaid newspaper on 18.9.1998. Inspire of the said publication workman did not appear. Accordingly, the matter was taken up for arguments on its turn and counsel for the petitioner was heard.

8. Counsel for the petitioner contended that the petitioner Bank had served chargesheet on the workman and had conducted the enquiry in which workman was given an opportunity to defend himself. After the conclusion of the enquiry, Enquiry Officer had given its finding holding the charges to be proved on the

basis of which the workman was dismissed from service. It is the workman who raised Industrial Dispute challenging his dismissal and , Therefore, it was for the workman to prove as to how and in what manner the enquiry conducted against him was not valid or fair. Therefore, burden to prove this was on the workman and accordingly, it is the workman who should have been asked to lead his evidence first. It was further contended that order of CGIT was violative of Section 11A of Industrial Disputes Act. It was also submitted that CGIT failed to appreciate that issue regarding legality and validity of domestic enquiry was to be treated as preliminary issue because in case enquiry is found to be legal and valid, there would be no occasion to lead any further evidence and, Therefore, such an issue had to be treated as preliminary issue. Insofar as Bank is concerned, it had filed all the records of the proceedings and all the enquiries before CGIT and documents had been admitted and denied by the parties. If the workman was contending that the enquiry was defective or illegal, it was for the workman to show as to on what grounds the same was defective or illegal and, Therefore, it was for the workman to lead evidence first. There was no occasion for the petitioner Bank to lead the evidence first or at this stage as it is only when CGIT holds that enquiry held is illegal and defective that the petitioner Bank would be called upon to lead its evidence to justify the dismissal by proving the charges before the Tribunal itself in view of the provisions of Section-11A of the Industrial Disputes Act. The petitioner Bank also relied upon following judgments in support of his submission:

1. V.K. Raj Industries, Aligarh Vs. The Labour Court (1) U.P. at Kanpur and others 1982 Lab. I.C. 551.
2. Canara Bank, Lucknow Vs. Union of India and others 1998 Lab. I.C. 2923.
3. Airtech Private Ltd. Vs. State of U.P. and others 1984 (49) FLR 38.
4. M/s. Glaxo Laboratories (India) Ltd. Vs. State of U.P. and others 1997 Lab. I.C. 794.

The following two questions need determination in this case:

1. Whether the issue of validity of enquiry against the petitioner should be decided as preliminary issue.
 2. Who should lead the evidence first, workman or the management?
9. Reverting to the first issue, it may be mentioned that after the insertion of Section- 11A of the Industrial Disputes Act by way of amendment by the Act of 1971, the Labour Court or Industrial Tribunal is given power to give proper relief in case of discharge or dismissal of workman. This Section- 11A reads as under:

"Section- 11A: Power of Labour Court, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman.

Where an industrial dispute relating to the discharge or dismissal of a workman 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 rein- statement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

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

10. The aforesaid Section came up for interpretation before the Supreme Court immediately after its introduction, in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . Summing up the law on the point, the Supreme Court laid down certain guidelines and the relevant portions to the present context are reproduced below:

"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.

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.

When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion following 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 victimisation, unfair labour practice or mala fides.

It has never been recognised that the Tribunal should straight- away, 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.

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 the Tribunal except in cases where the punishment is so harsh as to suggest victimisation"

11. The effect of the aforesaid judgment is that in those cases where the punishment is imposed after holding the enquiry, the Labour Court/Industrial Tribunal is to first see whether the employer has conducted a proper enquiry and it is not an empty formality. If it is held that the enquiry conducted is proper then the court is expected to see whether the findings of misconduct is a plausible

conclusion flowing from the evidence adduced at the enquiry. It has no jurisdiction to sit on Judgment over the decision of the employer as an appellate body. It can interfere with the findings only if the said findings are perverse or the management is guilty of victimisation, unfair labour practice or mala fides. Once the misconduct is proved, punishment imposed will not be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation. If the enquiry is held to be improper then management can prove the charges by leading the evidence before the Tribunal itself. If it has asked at appropriate stage that it wants to avail himself of the opportunity of adducing evidence to justify its action.

12. The necessary consequence of the aforesaid discussion is that the Labour Court/Tribunal has to first examine as to whether enquiry conducted is proper and valid. Only when this issue is decided that Tribunal will have to decide as to what further course of action has to be taken which would be determined upon the outcome on the issue regarding validity of the enquiry. Therefore, it is but proper for the Tribunal to deal with the validity of the domestic enquiry as a preliminary issue. If its finding on the subject is in favor of management then there will be no occasion for additional evidence being produced by the management. A priori where the domestic enquiry is found to have been properly held neither the employer nor the employee shall have right to produce further evidence before the Tribunal to support or demolish the finding of guilt recorded nor to sustain the quantum of punishment imposed as a result of the domestic enquiry. Therefore, in all such cases where the punishment imposed by the workman is impugned by the workman as a result of departmental/domestic enquiry conducted against the workman and an issue is framed whether such departmental enquiry is valid, fair and proper, such an issue should be decided as preliminary issue. It should be more so when management, like in the instant case, specifically requested for same. Accordingly, I hold that the CGIT should have treated issue No.1 as preliminary issue.

13. Now I shall deal with the second issue relating to burden of proof:- Principles regarding burden of proof are stipulated in Chapter-VII of Indian Evidence Act, 1872 (Sections 101 to 114A). General Principal, which is laid down in these Sections, particularly Sections 101 and 102 is that he who asserts must prove i.e. burden of proof is the obligation to adduce evidence to the satisfaction of the Tribunal or Court in order to establish the existence or non-existence of a fact contended to by a party. Burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof. Dealing with aforesaid Principles contained in Indian Evidence Act, Mr. O.P. Malhotra in his book entitled " The Law of Industrial Disputes", Fifth Edition (Volume-1) Page-842 states as under:-

"The expression `burden of proof' has two distinct and often blurred meanings viz. (i) the burden of proof as a matter of law and pleadings. This, burden, as it

has been called, for establishing a case, whether by preponderance of evidence or beyond a reasonable doubt, and (ii) the burden of proof in the sense of introducing evidence. In the Indian Evidence Act, Sec. 101 uses the expression in the former sense while Sec. 102 uses it in the latter sense. The former type of onus viz. the burden of proof of the facts in issue is usually known as the general burden of proof or the burden of proof on pleadings. This type of burden of proof has been called by jurists, the 'legal burden'. The legal or persuasive burden is the burden borne by the party who will lose the issue unless he satisfies the Tribunal of the facts to the appropriate degree of conviction and it is aptly termed the "Risk of Non Persuasion" by Wigmore. The phrase "legal burden" was coined by Lord Denning while the phrase 'persuasive burden' was used by Dr. Glanville Williams. Other jurists have referred to it as the "burden of proof on the pleadings". This burden is entitled to be called the legal burden because its incident is determined by the substantive law, and the adjective persuasive gives some indication of its real nature. The pleadings do not always indicate which party bears the burden, and the answer to a somewhat controversial question is assumed if it is said to be "fixed", for the epithet is designed to emphasize the fact that this burden does not shift in the course of a trial a matter of words about which there is room for two views in the case of issues to which certain rebuttable presumptions of law are applicable. The latter type of onus is called the professional or the tactical burden. The burden of proof in the first sense is fixed at the beginning of the trial by the state of pleadings and it is settled as a question of law, remaining unchanged, through out the trial exactly where the pleadings place it and never shifts in any circumstances whatsoever. The burden of proof in the second sense, however, constantly shifts, as one scale of evidence or the other preponderates".

14. The point for consideration is as to whether these rules of evidence would be applicable even in adjudication proceedings under the Industrial Law. This question was decided by Supreme Court in the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, wherein Supreme Court observed that though the Adjudicatory Authorities under the Act have all the trappings of a court, they are not hide-bound by the statutory provisions of the Evidence Act. Section-11(3) of the Industrial Disputes Act confers on them powers of a Civil Court under the CPC only in respect of matters specified therein. Such Authorities are created for adjudication of Industrial Disputes between the parties arrayed before them. Their function being of a quasi-judicial nature, they have to adjudicate such disputes on the basis of pleadings of the parties and the evidence adduced before them in accordance with Rules of Natural Justice. Therefore, any party appearing before anyone of such Authorities must make a claim or demur the claim of the other side. When there is a burden upon the party to establish a fact so as to invite a decision in its favour, it has to lead the evidence. The obligation to lead evidence to establish an averment made by a party is on the party making the averment. The test would be who would fail if no evidence is led. Such party, Therefore, must seek opportunity to lead

evidence.

15. Relying upon the aforesaid judgment of the Supreme Court, Allahabad High Court in the case of Airtech Pvt. Ltd. Vs. State of U.P. (Supra) in which the question involved was identical as in the present case, held that the decision of Labour Court insisting the employer to lead evidence first was not proper. In that case Labour Court held that in view of the phraseology employed by the State Government in the reference made to it, the legality or the justifiability of the termination of services of the work-man had to be established by the employer and Therefore, and burden of proof lay on the employers. The Allahabad High Court held that Labour Court patently erred in holding so. It would be apt to quote following observations:

"The matter can be looked at from another angle, which party will fail if the evidence is not led before the Labour Court in proceedings in a reference made to it for adjudication by the State Government? The obvious answer is that the workman will fail. Here the reference was made by the State Government at the instance of the workmen and for the benefit of the workman. In the absence of any evidence led by or on behalf of the workman the reference is bound to be answered by the Court against the workmen. In such a situation it is not necessary for the employers to lead any evidence at all. This matter was dealt with by the Supreme Court in Shankar Chaudhary Vs. Britannia Biscuits Co. Ltd. (1). In paragraph 30th Court held that the Labour Court or the Industrial Tribunal have all the trappings of a court. In paragraph 31 it held that any party appearing before a Labour Court or Industrial Tribunal "Must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be, who would fail if no evidence is led. It must seek an opportunity to lead evidence. Similar view has been taken by a Division Bench of this Court in the case V.K. Raj Industries Vs. Labour Court and others.(2).

As a result of the foregoing decision it is apparent that the impugned order of the Labour Court cannot be allowed to stand."

16. In V.K. Raj Industries Vs. The Labour Court and others, a Division Bench of Allahabad High Court held the same view. K.N. Singh, J, (as he then was who delivered the judgment on behalf of the Bench held that although Evidence Act did not apply to the proceedings before the Industrial Court, the principles underlying it apply. It was, Therefore, for the workman challenging the validity of the termination of a service to produce evidence to prove its illegality. Following observations may be worth quoting:

"The Labour Court committed manifest error of law in placing burden of proof on the employer to prove that the services of respondent workman were terminated in a proper and legal manner. We find merit in the petitioners contention. The

employer had terminated the services of respondent workman. Validity of the termination order was challenged by the workman by raising industrial dispute. The State Government at the instance of the workman referred the dispute for adjudication to the Labour Court. It was thus incumbent for the workman to have appeared and substantiated his allegation that the termination was not valid or legal. The proceedings before the industrial court are judicial in nature even though the Indian Evidence Act does not apply to the proceedings but the principle underlying the said Act is applicable to the proceedings before the Industrial Court."

17. Other authorities referred to by the petitioner are also to the same effect.

18. In the present case petitioner Bank has held the enquiry conducted against workman on the basis of which workman has been dismissed from service. It is the workman who has raised dispute against his dismissal. He has filed statement of claim contending that enquiry conducted against him is not proper and that there is violation of principles of natural justice. Therefore, normally it is for him to prove as to how enquiry conducted against him is illegal or invalid.

19. As stated above, this issue is to be treated as preliminary issue. Only if this preliminary issue is decided against the employers and it is held that the enquiry conducted is not valid, then the burden would shift and squarely lie upon the employer to show by adducing evidence on merits that the action taken against the workman was justified and for this Bank will have to lead evidence to establish that the charges leveled against the workman were proved. Insofar as question of validity of the enquiry is concerned, initial burden lies upon the workmen to prove that the enquiry conducted against him was not fair or proper.

20. In view of my aforesaid discussion, I hold that the impugned order dated 5th September, 1990 passed by CGIT directing the petitioner Bank to first lead its evidence is not valid and it warrants to be set-aside. This writ petition is, accordingly, allowed. Rule is made absolute. The Tribunal is directed to treat issue No.1 relating to validity of the enquiry as preliminary issue and direct workman to lead his evidence first on this issue.

21. There shall be no orders as to costs.