
(1982) 01 KL CK 0022
In the High Court Of Kerala

Western India Plywoods Ltd.	Vs	APPELLANT
Industrial Tribunal and Others		RESPONDENT

Date of Decision : 15-01-1982

Acts Referred:

Constitution of India, 1950 — Article 39A, 41, 42
Industrial Disputes Act, 1947 — Section 10, 11A, 33

Citation : (1982) 2 KLT 113

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Judgement

U.L. Bhat, J.—The two writ petitions arise out of the same industrial dispute, I.D. No. 50 of 1976 of the Industrial Tribunal. Calicut. O.P. No. 2017 of 1980 is filed by the employer for a writ of certiorari to quash Ext. P4 preliminary order and Ext. P6 award, to the extent it relates to one of the employees, the 2nd respondent therein. O.P. No. 2502 of 1980 is filed by the Mercantile Employees Association, Calicut for a similar relief to quash the award in so far as it relates to another employee.

2. The employer is the Western India Plywoods Ltd., Baliapatam- Towards the end of July, 1975 the executive Director of the company noticed alterations, corrections and erasures in certain local purchase bills submitted for his sanction. He suspected fraud and called for all local purchase bills and connected records of the previous 2 years and along with the General Manager, subjected the same to scrutiny. They found alterations, corrections and erasures, all unauthorised, in a number of bills relating to local purchase from a local merchant Sri C.P. Mamoo, from whose shop the company used to purchase certain items of hardware, etc. These alterations had not existed in the bills when the Executive Director passed the bills. The bills had been tampered with after sanction but before payment with the result that the company was made to pay amounts in excess of what were actually due and thereby the company sustained loss. It was also found that the indents were tampered while the vouchers have not been so tampered. The company initiated disciplinary proceedings against four

employees, namely, T.P. Varghese (the person whose cause is championed in O.P. No. 2502 of 1980) T. Vijaya Chandran, both of the Accounts Department of the company who had prepared vouchers and allocated various amounts of bills to the appropriate Heads of account, and also against P. Jathavedan Namboodiri (2nd respondent in O.P. 2017 of 1980), the Head of the Local Purchase Section of the company and K. Mustafa, a clerk in the purchase section who was assisting the 2nd respondent in local purchase. Their explanations were called for on 31-7-1975, in answer to charge of gross negligence and dereliction of duty. All of them submitted explanations on 1-8-75. On finding them unacceptable, the company ordered domestic enquiry and served formal memo of charges on 14-8-1975 and directed them to appear before advocate late Sri K.P. Balakrishnan Nair of Tellicherry Bar who had agreed to conduct the domestic enquiry. All the four employees appeared and submitted explanations in the middle of August, 1975. The General Manager assisted the company and another employee of the company who was also an office bearer of the Trade Union assisted the employees in the domestic enquiry. Evidence was recorded between 22-8-1975 and 27-9-1975. The enquiry officer submitted Ext. P1 report holding the employees guilty of the misconduct alleged. On the basis of the report company dismissed all the employees and the same was approved u/s 33(2)(b) of the Industrial Disputes Act, reserving the right of the employees to raise an Industrial Dispute. The 2nd respondent personally raised an industrial dispute while the Association raised the dispute on behalf of the three others. The dispute was referred to the Industrial Tribunal, Calicut for adjudication u/s 10(1) (d) of the Industrial Disputes Act. It was taken to file as I.D. No. 50 of 1976. Mean while, the dispute between the Company and two of the employees, namely, T. Vijayachandran and K. Mustafa, was settled. The Tribunal preliminarily held that the domestic enquiry held by the enquiry officer was not proper. The parties were allowed to adduce evidence before the Tribunal. The Tribunal passed Ext. P6 award holding that the 2nd respondent was innocent of the charges against him and ordered his reinstatement with back wages and without break of service and also held T.P. Varghese guilty of the misconduct alleged and rejected his claim. The award has been notified in Gazette No. 19 dated 13-5-1980. The company is aggrieved by the preliminary finding Ext. P4 and the award in so far as it relates to 2nd respondent. The Trade Union is aggrieved by the award-in so far as it relates to Sri T.P. Varghese.

3. The company would contend that the preliminary finding Ext. P4 to the effect that the domestic enquiry was not proper is vitiated by errors of law apparent on the face of the record. One of the questions which arose before the enquiry officer as well as the Tribunal was whether the 2nd respondent was actually in charge of the Local Purchase Section. To prove his contention that he was not so in charge, he filed Ext. P2 application before the enquiry officer on 1-9-1975 calling upon the company to produce five items of records including various indents and bills as also an order putting Sri K.R.C. Menon in charge of the Purchase Department. The General Manager of the company submitted Ext. P3

statement on 3-9-1975 stating that the indents and bills were irrelevant for the purpose of enquiry and that their production is impracticable. He also stated there was no order putting Sri K.R.C. Menon in charge of the Purchase Department. The enquiry officer did not pass any order on the application nor did he call for an affidavit on behalf of the company. In the enquiry report dated 24-10-1975 he made an observation that it was represented by D3 (Jathavedan Namboodiri) that he did not wish to press the points in his application in view of Ext. P3 statement except point No. 5. Even regarding item No. 5 no affidavit was filed. The Tribunal did not accept this statement and held that the employee was seriously prejudiced by the failure of the enquiry officer to deal with Ext. P2 according to law. This conclusion is seriously challenged by learned Counsel for the company. The Tribunal noticed that in regard to certain other applications, whenever an applicant did not wish to press the same, the enquiry officer was careful to make endorsement but he did not take an endorsement on Ext. P1 application. It could also be seen that the production of the bills would be certainly relevant to see whether the 2nd respondent had affixed his signature or initials in them. That would have been necessary to find whether he was really functioning as person in charge of the Purchase Department. It is argued by learned Counsel for the company that the 2nd respondent had no case at any stage that he did not press Ext. P2 application. This does not appear to be correct. In his rejoinder he specifically asserted that production of the records was unreasonably refused by the company. In his evidence (Ext. P5) he has stated that he had repeatedly stressed that the document should be got produced. These statements would imply that it was not correct to say that he did not press Ext. P2 application. Unfortunately the enquiry officer was dead by the time the Tribunal took up the matter for enquiry. The General Manager who acted as an observer for the Company in the domestic enquiry also did not support the statement in the enquiry report. These circumstances coupled with the important fact that no endorsement had been taken would support the conclusion of the Tribunal that the enquiry officer committed an error in proceeding on the basis that the employee had not pressed Ext. P2. The non-production of the documents had certainly prejudiced the employee in the domestic enquiry,

4. The other reason accepted by the Tribunal to hold that the domestic enquiry was not properly conducted was that the presence of the General Manager during the enquiry had an inhibiting effect on the conduct of the case by the employee. There was a case for the employees that they had been threatened not to cross examine the Executive Director, But this was not accepted by the Tribunal. The Executive Director gave elaborate evidence during his chief-examination. In fact bulk of the chief-examination was by way of an affidavit. The General Manager examined as M.W. 1 frankly conceded that the cross-examination lasted only a few minutes. It has to be remembered that the chief-examination contained very important aspects which required cross-examination. From these circumstances, the Tribunal drew inference that circumstances existed which inhibited a proper

cross-examination. It is possible that another authority might take a different view in the matter. But that is no reason to upset the conclusion of the Tribunal. It cannot be said that the inference drawn by the Tribunal was perverse. From the two circumstances mentioned above the Tribunal came to the conclusion that the domestic enquiry was not properly conducted. I am not satisfied that this finding is vitiated by any error of law apparent on the record. The challenge against Ext. P4, therefore, fails.

5. The finding of the Tribunal holding the 2nd respondent innocent of the charge against him is also challenged as vitiated by an error of law apparent on the face of the record. The charge memo states that as the person in charge of the purchase section, he failed to exercise due and proper control for the purchase of items on local purchase indents, their proper receipt by local purchase clerk and proper control in handling connected bills and their orderly transmission to the respective authorities for sanction of payment whereby such important documents were allowed to be handled by unauthorised outsiders, namely, messenger of Sri C.P. Mamoo, leading to erasures, corrections and inflations of amounts there by causing a loss of Rs. 2,006.45 to the company. The General Manager in his evidence has conceded that frequently these papers were being taken from one section to another section by suppliers of articles or by messengers. In fact he conceded that even bills, while they were being presented before him for approval, were being brought by such messengers. 2nd respondent cannot therefore be held responsible for such state of affairs. The Tribunal was satisfied that the 2nd respondent was in charge of local purchase Section. However, on the basis that the disputed bills were admittedly not signed or initialled by the 2nd respondent and because the messenger or the supplier had free access to all parts of the establishment and could even approach the Executive Director and the fact that the bills had not been tampered with when they were presented for payment, the Tribunal held that the 2nd respondent was not guilty of misconduct.

6. It is the admitted case on all hands that as a matter of fact in the instances mentioned by the company, bills, indents have been tampered with and excess amounts have been disbursed thereby causing loss to the company. It is the evidence of M.W. 1 that when he signed the bills, the bills had not been tampered with. There is no case for the company that after sanction, the bills would go to the purchase section where the 2nd respondent was working. In the normal course, the 2nd respondent could not be held in any way responsible, either by malfeasance, misfeasance or dereliction of duty for the bills being tampered with and excess amounts being paid.

7. Learned Counsel for the petitioner submitted that the negligence of the 2nd respondent can be made out inasmuch as the indents which were in his custody were also tampered. There is no dispute that the relevant indents were subjected to alterations, corrections and erasures. M.W. 2 has deposed that the indents go back to the purchase section. The 2nd respondent would, however, deny this. If

indents had remained in the custody of the 2nd respondent, the possibility of his negligence leading to some persons tampering with the indents would certainly arise. But at no stage was he required to answer such a charge. The memo of charges refers only to his negligence leading to tampering with bills and not to indents. In the absence of such a case having been put forward at any stage against him, it cannot be said that he had any opportunity to rebut such a charge. The circumstances now placed before me were never the subject-matter of the enquiry either before the enquiry officer or before the Tribunal. It is true that the Industrial Tribunal did not refer to the aspect of the indents having been tampered and 2nd respondent's negligence having a bearing on that question. That was because that was outside the scope of the charge memo. The Tribunal has not committed any error of law in not advertng to this aspect. The finding of the Tribunal in favour of the 2nd respondent is not liable to be interfered with.

8. Sri T.P. Varghese had to face four charges, of which he has been held to be innocent of the 4th charge of collusion with the messenger of the supplier. Sri Mamoo in preparation of vouchers and tampering bills, etc. But he has been held guilty of misconduct alleged in charges (1) to (3). Charge (I) is that he prepared vouchers relating to bills received from the supplier on the dates given in the appended schedule, that the bills were tampered whereby larger amounts were caused to be paid to the supplier and this was caused by the gross negligence on his part. Charge (2) is that he failed to bring immediately to the notice of his superior officers the tampering of bills. The charge (3; is that because of his negligence, irresponsibility and failure to bring these matters to the notice of his superiors, the company was compelled to pay Rs. 1,813-35 in excess of the correct amount payable and thereby the company had to suffer a loss. It has to be noticed that admittedly the relevant indents and bills contained unauthorised erasures, corrections and overwritings and nobody had initialled or authorised these things. At the same time, there is no dispute that the vouchers were not tampered in any way since the vouchers were prepared for higher amounts in the tampered bills and not for the lower amount shown in the original bills. In so far as vouchers marked as Exts. M19, M21, M23 to M27 during enquiry are concerned, there is no dispute that they were prepared by Sri T.P. Varghese. The corresponding bills are Exts. M.19 series, M20 series, M21 series, M22 series, M23 series, M24 series, M25 series, M26 series and M27a. The discovery was made by the Executive Director on perusing Ext. M28 voucher along with Ext. M28 series bills. The indents were marked by the enquiry officer as Exts. M24h, M38a, M40a etc. Sri T.P. Varghese, when examined before the Tribunal, admitted that the indents as well as bills came to him for preparation of vouchers. He scrutinised the bills and indents which contained corrections, etc. and since- the bills had been approved by the sanctioning authority, payments were made, He made specific reference to one transaction, namely, Ext. M24c, M28a, M24e, M38a and M38b. He admitted that the indent and the bill contained unauthorised corrections and the correction of the quantum was in a , different ink. There is also the evidence of the Executive Director that when he made the sanction the

bills did not have any such overwritings or corrections. The Tribunal on a consideration of all these circumstances accepted the case of the management that the corrections were made after sanction. It was the duty of the person in charge of preparing vouchers, to scrutinise the bills, etc. This is accepted by Sri T.P. Varghese, He claims that he had so scrutinised them. A mere scrutiny would have shown that the corrections and overwritings were unauthorised in as much as admittedly they did not bear any initials. This would have put him on bisguard. In such circumstances he had normally a duty to check up the matter and also bring the matter to the notice of the superiors. A verification of the stock would normally have shown the exact quantity of articles purchased. Had this been done, ho would have very well come to know that the bills had been unlawfully tampered. From these circumstances, the Tribunal concluded that charges Nos. 1 to 3 against him have been established.

8. It is contended by the learned Counsel for the Trade Union that Sri Varghese was not aware that anything was wrong with the bills till he received show cause notice and as the bills had been sanctioned by the Executive Director, he had no reason to make further scrutiny or enquiry and he accepted the bills at their face value on seeing the signature of the Executive Director. I have already referred to the fact that the Executive Director has deposed that at the time of sanction the overwritings and corrections did not exist. This evidence is reasonable also as otherwise such corrections relating to quantity of articles and the amount to be paid would certainly have been initialled by him. Nobody has a case that the corrections bear any authorisation. The fact that at some places in a bill the Executive Director put his initial could not normally have persuaded an employee like Sri Varghese to believe that all the corrections are authorised. He was clearly and grossly negligent in the discharge of his duties. It was his duty to subject the suspicious records to a closer scrutiny and verification and also bring the matter to the notice of his superiors. I am unable to find any error of law in the finding entered by the Tribunal against Sri T.P. Varghese.

9. Learned Counsel for the company contends that in the case of the 2nd respondent the Tribunal was not justified in ordering reinstatement and that in so doing, the Tribunal has not kept in mind the well-established principles of law. According to him this was a fit case for the Tribunal to award compensation u/s 11A of the Act- The Tribunal has referred to this aspect of the case in para. 19 of the award. It referred to the statement of the company that they have lost confidence in the employee and found that there were no sufficient materials to warrant conclusion of unreliability. It was represented that there was a criminal case pending against the employee in regard to certain acts committed by him in the discharge of his duties. The Tribunal felt that it was an irrelevant circumstance as the criminal case has not yet been disposed of and has nothing to do with the enquiry. The Tribunal did not refer to any other circumstance having a bearing on this question. The law on this point has been dealt with in a line of decisions: *Western Indian Automobile Association v. Industrial Tribunal, Bombay* 1949 LLJ 245 , *The Punjab National Bank Ltd. Vs. Its Workmen*, ; *Assam*

Oil Company Vs. Its Workmen, ; Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, ; The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, ; Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, ; Ruby General Insurance Co. Ltd. Vs. Shri P.P. Chopra, and L. Michael and Another Vs. Johnson Pumps Ltd.,

10. The right of an employer to dismiss or discharge an employee is no longer absolute. The common law principle that contract of personal service cannot be specifically enforced and relief, if at all can be only in the nature of damages is no longer valid. The matter has to be approached in a broader perspective. Article 39-A of the Constitution lays down that the State shall particularly direct its policy towards securing that the citizens have the right to an adequate means of livelihood. Article 41 lays down that the State shall make provision for securing right to work. According to Article 42 the State shall make provision for securing just and humane conditions of work. The question will have to be approached in the light of this background.

11. Section 11A of the Industrial Disputes Act states that if the Tribunal 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 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.

12. Judicial thinking in India on this aspect has been undergoing changes during the last several years. It was originally thought that the decision is entirely within the discretion of the Tribunal and no principle can be laid down so as to fetter the discretion in any way as the Tribunal has to act solely in the interest of industrial harmony and peace. This position underwent change. It was subsequently held that there is no hard and fast rule in such matters and the Tribunal has to consider each case on its own merits and attempt to reconcile conflicting interest of the employer and the employee, the interest of the employee being entitled to security of employment and protection against wrongful dismissal. Normally there should be an order of reinstatement. However, in exceptional cases where it is not expedient to grant reinstatement, proper relief would be compensation so as to meet the ends of justice. The order has to be based on promotion of twin objectives, namely, security of employment and protection against wrongful dismissal or discharge on the one hand and harmony and peace of the industry on the other. The Tribunal has to take a decision in a spirit of fairness and justice, following rules of justice and reason and after careful examination of the relevant circumstances and balancing of facts. There could be no legalistic or doctrinaire approach in this matter.

13. The normal rule as pointed out is one of reinstatement. However, there may be special circumstances which would persuade the Tribunal to award only a lesser punishment. The employer and the employee may have been under

strained relationship for a long period. The post held by the employee may be a sensitive one involving trust and confidence. Also relevant are other considerations such as the past record and service of the employee, nature of the alleged misconduct, and the ground on which the order is set aside. It may be that the employee has secured a proper alternative job. All these and other circumstances have to be looked into.

14. In a case where the employer states that he has lost confidence in the employee, the matter has to be weighed properly. The mere assertion of the employer that he has lost confidence cannot compel the Tribunal to refrain from passing an order of reinstatement. The Tribunal will have to consider whether the employer genuinely feels that it is risky to retain an employee in future or that it is hazardous or prejudicial to the interest of the industry to do so or is it a mere allegation made to send the employee out of employment.

15. The above principles of law have not been borne in mind by the Tribunal. The relevant facts have not been carefully looked into. It is submitted on behalf of the employer that the post held by the 2nd respondent is one of a sensitive nature involving trust and confidence, that his conduct has not been satisfactory, that he has been running a typewriting institute; and that the relationship between the parties is strained. The service book was before the Tribunal and it has not been considered. Most of these matters have not even been adverted to by the Tribunal. It is clear that the discretion vested in the Tribunal has not been legally exercised. Therefore, it is necessary that this matter be considered afresh by the Tribunal.

16. Sri T.P. Varghese was held guilty by the Tribunal and the order of dismissal, so to say, has been confirmed, learned Counsel for the Trade Union contended that the mere fact that misconduct alleged has been proved need not necessarily lead to an order of dismissal from service, that there are other alternatives for consideration by the Tribunal which has erred in not considering the same.

17. It is true that normally it is for the employer to determine what punishment has to be imposed. It was originally thought that it did not fall within the jurisdiction of the Tribunal to decide whether the punishment was justified except in rare cases where a punishment was so grossly out of proportion as to suggest mala fides. However, this position has been changed by Section 11A of the Act. Section 11A of the Act contemplates a situation where the "order of dismissal or discharge is held to be unjustified". Such an order can be unjustified for two reasons. It may be unjustified because the misconduct alleged is not proved. It may also be unjustified because though the misconduct alleged is proved, the punishment is out of proportion when compared with the degree of culpability. The Tribunal has jurisdiction to decide both these aspects u/s 11A. Where the Tribunal comes to the conclusion that the misconduct alleged is proved but that the punishment imposed is not justified, it is within the jurisdiction of the Tribunal to set aside the order of dismissal and pass an order of discharge, or set aside the order of dismissal or discharge and award lesser punishment in lieu

thereof. This jurisdiction of the Tribunal u/s 11A is of prime importance in the new and emerging industrial jurisprudence. This approach has been accepted by the Supreme Court in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*,

18. The Tribunal has not considered this aspect of the matter at all even though the trade union raised a contention that the punishment imposed was extremely harsh and out of proportion to the gravity of the misconduct. It has to be noticed that by an order of dismissal, the employee loses all benefits such as the right to claim gratuity, etc. An order of discharge may not involve such consequences. It was the duty of the Tribunal to have weighed all these aspects before coming to the conclusion regarding punishment. It did not consider any of these matters. The Tribunal's was apparently not conscious of its jurisdiction in the matter of punishment. This matter also will have to be considered afresh by the Tribunal.

19. I do not find any grounds to interfere with the findings of the Tribunal regarding the innocence of the 2nd respondent and the guilt of Sri T.P. Varghese. However, the direction to reinstate the 2nd respondent and the confirmation of the order of dismissal of Sri Varghese are set aside. The Tribunal is directed to consider whether the 2nd respondent is to be reinstated or whether there are exceptional circumstances warranting exercise of discretion for the grant of compensation. The Tribunal it also directed to decide whether the dismissal of Sri T.P. Varghese is justified or whether imposition of a lesser punishment would serve the ends of justice.

20. The Original Petitions are disposed of in this manner. In the circumstances of the case the parties in both cases are directed to bear their costs.