

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of decision: 3<sup>rd</sup> February, 2011**

**+**

**W.P.(C) No.12218/2004**

**% MANAGEMENT OF HOTEL CONNAUGHT .... Petitioner**

**Through: Mr. Amit Seth, Advocate**

**Versus**

**OM PARKASH & ANR.**

**..... Respondents**

**Through: Mr. Gulshan Chawla, Advocate**

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

- |    |                                                                       |    |
|----|-----------------------------------------------------------------------|----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not?                                | No |
| 3. | Whether the judgment should be reported in the Digest?                | No |

**RAJIV SAHAI ENDLAW, J.**

1. The petitioner employer by this writ petition impugns the order dated 18<sup>th</sup> August, 2003 of the Industrial Tribunal holding the domestic inquiry into the misconduct of the respondent No.1 workman to be violative of the principles of natural justice and the order dated 28<sup>th</sup> May,

2004 holding the petitioner employer to have failed to, on the basis of the evidence led before the Industrial Tribunal, establish misconduct against the respondent No.1 workman and consequently dismissing the application under Section 33(2)(b) of the Industrial Disputes Act, 1947 preferred by the petitioner employer.

2. Notice of the petition was issued and operation of the orders stayed on deposit of ₹5,000/- by the petitioner employer as litigation expenses. An application under Section 17B of the I.D. Act was filed by the respondent No.1 workman which was allowed vide order dated 31<sup>st</sup> October, 2006. Rule was issued in the writ petition on 8<sup>th</sup> December, 2006. The petitioner employer preferred an intra court appeal being LPA No.11/2007 against the order under Section 17B of the I.D. Act. The same was dismissed. The petitioner employer preferred SLP(C) No.18512/2007 which was also dismissed on 13<sup>th</sup> August, 2010 with a direction for expeditious disposal of the writ petition. The counsels for the parties have been heard.

3. It was at the outset enquired as to what was the pending proceeding owing whereto the application under Section 33(2)(b) was necessitated – whether it was between the petitioner employer and the respondent No.1 workman only or a general dispute between the petitioner employer and all its workmen; it was also enquired as to how many workmen the petitioner employer employs. It is informed that the petitioner employer employs over 200 workmen; that the pending dispute necessitating application under Section 33(2)(b) was not with the respondent No.1 workman only but a general dispute between the petitioner employer and all its workmen. It is also informed that the said dispute has since been decided in favour of the petitioner employer owing to the workmen having failed to lead any evidence. It was next enquired as to whether the respondent No.1 workman was / is any office bearer in the Union. The answer is again in the negative. The said questions are found to be relevant considering the nature of inquiry under Section 33(2)(b). The Industrial Adjudicator under Section 33(2)(b) is only to oversee the dismissal to ensure that no unfair labour practice or victimization has been practiced. If the procedure of hearing has been observed and a *prima facie* case of dismissal is made out,

approval has to be granted. The jurisdiction of the Industrial Adjudicator under Section 33(2)(b) cannot be wider than this. The proceeding under Section 33(2)(b) is not a substitute for an industrial dispute under Section 10 of the Act. I have recently in ***Delhi Transport Corporation Vs. Shyam Lal*** ILR (2010) V Delhi 431 dealt in detail with the said aspect and need is thus not felt to discuss the same in detail herein.

4. The Industrial Tribunal in order dated 18<sup>th</sup> August, 2003 held the domestic inquiry to be violative of the principles of natural justice for the reason that on 5<sup>th</sup> March, 1999 the inquiry was adjourned to 6<sup>th</sup> March, 1999 and the respondent No.1 workman asked to come prepared for cross examination and was warned that no further date shall be given; the respondent No.1 workman failed to appear on 6<sup>th</sup> March, 1999 and was proceeded against *ex parte* and the inquiry officer also proceeded to record the statement of two other witnesses for whose cross examination the inquiry was adjourned to 6<sup>th</sup> March, 1999; the Industrial Tribunal held that the action of the inquiry officer of recording the entire evidence on the

same day without further waiting for the respondent No.1 workman who had earlier been regularly appearing in the inquiry, to be violative of principles of natural justice. Accordingly, it was held that the inquiry officer had acted in haste, inquiry proceedings vitiated and the report perverse.

5. The counsel for the petitioner employer has with respect to the order dated 18<sup>th</sup> August, 2003 contended that the finding of the inquiry officer having acted in haste is not made out. The order records that the inquiry commenced on 29<sup>th</sup> June, 1998 and subsequent proceedings held on 9<sup>th</sup> July, 1998, 18<sup>th</sup> July, 1998, 20<sup>th</sup> July, 1998, 23<sup>rd</sup> July, 1998, 27<sup>th</sup> July, 1998, 3<sup>rd</sup> August, 1998, 20<sup>th</sup> August, 1998, 4<sup>th</sup> September, 1998, 10<sup>th</sup> September, 1998, 5<sup>th</sup> October, 1998, 15<sup>th</sup> October, 1998, 24<sup>th</sup> November, 1998, 7<sup>th</sup> December, 1998, 25<sup>th</sup> January, 1999, 11<sup>th</sup> February, 1999, 22<sup>nd</sup> February, 1999 & 5<sup>th</sup> March, 1999.

6. From the inquiry report, the proceedings on different dates and the latitude given to the respondent No.1 workman is demonstrated. It is shown that the statement of the first witness of the petitioner employer was

recorded on 24<sup>th</sup> November, 1998 when the respondent No.1 workman refused to cross examine the said witness and sought time; the matter was adjourned to 7<sup>th</sup> December, 1998; on 7<sup>th</sup> December, 1998, the respondent No.1 workman neither appeared nor sent any request but the proceedings were adjourned to 25<sup>th</sup> January, 1999 when the respondent No.1 workman again failed to appear; the proceedings were again adjourned to 11<sup>th</sup> February, 1999 when the respondent No.1 workman appeared but the proceedings were adjourned for other reasons to 22<sup>nd</sup> February, 1999 and thereafter to 5<sup>th</sup> March, 1999. It is thus contended that latitude for cross examination was being given to the respondent No.1 workman since 24<sup>th</sup> November, 1998 and thus it was not as if on non appearance of the respondent No.1 workman on one date only, the respondent No.1 workman was proceeded against *ex parte*.

7. It is also forcibly argued that it is not the case of the respondent No.1 workman that he at any time after 6<sup>th</sup> March, 1999 and till the date of submission of the report on 5<sup>th</sup> April, 1999 or even thereafter approached for participation in the inquiry. It is urged that the same shows that the

respondent No.1 workman had intentionally stopped participating in the inquiry and thus the reasoning given by the Industrial Tribunal of the inquiry officer having acted hastily or the inquiry being vitiated cannot be sustained. Reliance in this regard is placed on:

- (i) ***Biecco Lawrie Ltd. Vs. State of West Bengal*** AIR 2010 SC 142 observing that where the inquiry officer had sent due notice and postponed the date of hearing various times with an intention to allow the workman to present his case and the workman nevertheless did not present himself and ultimately the inquiry conducted *ex parte*, it could not be said that the workman was not afforded a chance. It was held that in these circumstances, it seemed to be a case where the workman has waived his right to cross examine by absenting himself from the inquiry. This judgment is also cited on the aspect of bias.
- (ii) ***State Bank of Patiala Vs. S.K. Sharma*** (1996) 3 SCC 364 on the objective being to ensure a fair hearing and a fair deal to the person whose rights are going to be affected and the

requirement of violation of the principles of natural justice being of a substantive rather than a procedural character.

(iii) ***ITDC Vs. S.K. Roy*** 140 (2007) DLT 336 on the scope of interference in the findings of the Domestic Tribunal and being called for only when the material placed on record and evaluated by the inquiry officer is found to be scanty, irrelevant or extraneous.

(iv) ***Pepsu Road Transport Corporation Vs. Rawel Singh*** (2008) 4 SCC 42 where the action of the inquiry officer of proceeding *ex parte* on a single default by the delinquent employee was upheld by the Apex Court and the inquiry report held not liable to be quashed on the said ground.

(v) ***Cholan Roadways Ltd. Vs. G. Thirugnanasambandam*** (2005) 3 SCC 241 on the scope of inquiry under Section 33(2)(b) being only to see whether a *prima facie* case has been made out as regards the validity or otherwise of the domestic

inquiry keeping in view the fact that if the permission or approval is granted, the order of dismissal which may be passed against the delinquent employee would be liable to be challenged in an appropriate proceeding before the Industrial Tribunal.

(vi) ***Tata Oil Mills Co. Ltd. Vs. Its Workmen*** AIR 1965 SC 155

laying down that it is unreasonable to suggest that in a domestic inquiry, it is the right of the charge-sheeted employee to ask for as many adjournments as he likes.

(vii) ***The Punjab National Bank Ltd. Vs. Its Workmen*** 1960 (1)

SCR 806 laying down that if the employer has held a proper inquiry into the alleged misconduct of the employee and if it does not appear that the proposed dismissal of the employee amounts to victimization or unfair labour practice, the Industrial Tribunal has to limit its inquiry only to the question as to whether a *prima facie* case has been made out or not and it is not open to the Tribunal in proceedings under Section

33(2)(b) to consider whether the order proposed to be passed by the employer is proper or adequate or whether it errs on the side of excessive severity.

8. The respondent No.1 workman was employed with the petitioner employer as Assistant Steward. He was charged with being rude, uncivil, impertinent and abusive to his department head Mr. Rajiv Issar when asked about his absence from duty and sleeping in the Locker Room and having left the place of work without authorization and having also manhandled the department head and having lodged a false complaint against the department head with the Police. The inquiry officer on the basis of the statements of the department head Mr. Rajiv Issar and two other witnesses viz. Mr. Ajay Ridla and Mr. Albert Tookey and the documents produced by them held all the charges to have been fully established against the respondent No.1 workman.

9. The Industrial Tribunal vide order dated 18<sup>th</sup> August, 2003 (supra) having held the domestic inquiry to be vitiated, the petitioner opted to lead evidence of misconduct before the Industrial Tribunal and examined

Mr. Albert Tookey aforesaid and Mr. Pradeep Khanna before the Industrial Tribunal. The respondent No.1 workman examined himself. The Industrial Tribunal in the order dated 28<sup>th</sup> May, 2004 found inconsistency in the statements of Mr. Albert Tookey and Mr. Pradeep Khanna inasmuch as one gave the time of incident as 9:00 a.m., the other gave it as 9:30 a.m.; it was also held that the petitioner employer had failed to examine Mr. Rajiv Issar; accordingly, it was held that the petitioner employer had failed to establish misconduct and the application under Section 33(2)(b) was dismissed. It was however held that the petitioner employer had remitted full one month's wages to the respondent No.1 workman at the time of dismissal.

10. From the aforesaid, it would appear that though the application under Section 33(2)(b) was dismissed but without a finding or even a whisper of the dismissal being by way of victimization or by way of unfair labour practices. In my view, the orders of the Industrial Tribunal are liable to be set aside on this ground alone.

11. I am also in agreement with the counsel for the petitioner that the order dated 18<sup>th</sup> August, 2003 holding the inquiry to be vitiated is untenable in law. The inquiry proceedings were held on as many as 17 dates and sufficient opportunity is found to have been granted to the respondent No.1 workman. There is also merit in the contention of the counsel for the petitioner employer that the conduct of the respondent No.1 workman, even if for any reason being not able to appear before the inquiry officer on 6<sup>th</sup> March, 1999, in not making any application or appearing subsequently at any time shows that the respondent No.1 workman after 17 hearings did not intend to participate in the inquiry. If that be so, then the question of the respondent No.1 workman having been deprived of hearing does not arise. Moreover, after having granted so many hearings, the inquiry officer cannot be said to have acted in haste. The inquiry officer is not expected to wait indefinitely for the employee. If the principles were to be so understood, it would allow any delinquent employee to frustrate the inquiry by absenting therefrom.

12. The counsel for the respondent No.1 workman has contended that the inquiry is vitiated for the reason of the inquiry officer being the prosecutor. The principle that Judge cannot be the prosecutor is sought to be invoked. Attention is invited to the cross examination before the Industrial Tribunal of the inquiry officer where he has admitted that he was practicing in Labour Laws and had been representing the petitioner employer before Labour Courts and had charged his professional fee for acting as the inquiry officer in the present case also.

13. The Supreme Court in *Saran Motors Private Ltd. Vs. Vishwanath* (1964) 2 LLJ 139 rejected the argument that just because a person is sometimes employed by the employer as a lawyer he becomes incompetent to hold a domestic inquiry and reiterated that the requirement only was that the inquiry must be fairly conducted and if not found to have been fairly conducted is liable to be set aside and an inquiry is not bad just because it is conducted by an officer of the employer. It was further held that if the inquiry held by an officer of the employer was not bad, an inquiry by a lawyer of such employer also could not be bad.

14. A single Judge of this Court in *Narendra Pratap Vs. Jagmohan Bharti* FLR 1976 (32) 218, in the absence of any proof of personal ill will or of a conspiracy between the management and the inquiry officer, reversed the order of the Tribunal holding the inquiry to be vitiated. It was further held that merely because the inquiry officer was connected with the Law Firm which was the legal advisor to the management could not lead to the conclusion that the inquiry officer has deliberately and willfully held against the workmen. It was further held that bias has to be personal to the inquiry officer and must be clearly proved.

15. A Division Bench of this Court in *Indian Refrigeration Industries Vs. Ram Rattan Sharma* 128 (2006) DLT 503 though holding that there is no absolute bar to an Advocate or an officer of the company being an inquiry officer, in the facts of that case finding the inquiry officer to be the advocate in the proceedings against the same employee under Section 33(2)(b) as well as the industrial dispute, set aside the inquiry report.

16. I may notice that even in *Biecco Lawrie Ltd.* (supra) the enquiry officer was also the company lawyer and the enquiry report was upheld.

17. I have also in judgment dated 14<sup>th</sup> May, 2010 in W.P.(C) No.2221/2000 titled *Taj Mahal Hotel Vs. Industrial Tribunal-I* dealt with the said aspect. In that case, it was found that the law firm to which the inquiry officer belonged was also representing the employer in the domestic inquiry as well as before the Industrial Tribunal. In these facts, it was held that the inquiry officer as part of the law firm under whose advice action was initiated against the workman would be interested in supporting the advice given to the employer of successfully terminating the services of the workman and thus the enquiry was set aside.

18. However, in the present case, it is not shown that the inquiry officer though advising the petitioner employer in labour matters had advised the petitioner employer in the matter of termination of employment of the respondent No.1 workman or was also part of the proceedings against the respondent No.1 workman. In the absence thereof, the judgments aforesaid

would apply and no case of bias on the said ground can be said to have been made out.

19. The counsel for the respondent No.1 workman has next contended that the inquiry officer erred in not giving any opportunity to the respondent No.1 workman to cross examine the other two witnesses. It is argued that on 5<sup>th</sup> March, 1999, the proceedings were adjourned for 6<sup>th</sup> March, 1999 only for cross examination of Mr. Rajiv Issar whose statement only had been recorded till then. It is urged that the respondent No.1 workman ought to have been notified of the statements of the other two witnesses having been recorded and given an opportunity to cross examine them and without the same their statements could not have been relied upon.

20. I am unable to agree. Once a party chooses to be proceeded against *ex parte*, it cannot be repeatedly given notice of each subsequent date in the proceeding or date of hearing. If that were to be so, it would virtually stall the proceedings. It is not the case of the respondent workman that he was not in the know that the other two witnesses were to be examined.

Rather from the proceedings before the inquiry officer, it transpires that the respondent workman at one stage insisted that statements of all the witnesses be recorded before he was called upon to cross examine any of them.

21. The respondent workman was thus aware that upon his being *ex parte* the statements of the other witnesses would also be recorded.

22. Though the counsel for the respondent No.1 workman has also drawn attention to para 14 of ***Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas Vs. Shri Ram Gopal Sharma*** JT 2002 (1) SC 182 but the reference thereto is not apposite in the aforesaid facts. The counsel for the petitioner employer in rejoinder has also informed that Mr. Rajiv Issar had left the employment of the petitioner employer by the time the matter matured for evidence and his whereabouts were not known to the petitioner employer and thus he could not be examined before the Industrial Tribunal. I may also notice that the Industrial Tribunal has not returned any finding of bias of the inquiry officer against the respondent No.1 workman.

23. On the basis of the report of the inquiry officer, a *prima facie* case of misconduct on the part of the respondent No.1 workman is made out. As aforesaid, the question of proportionality of the punishment is not to be gone into at this stage. No case of victimization or unfair labour practice has been pleaded or proved. The petition therefore succeeds. The petitioner employer is found entitled to the approval under Section 33(2)(b) of the I.D. Act. The same is granted / allowed to the petitioner employer. It is however clarified that the respondent No.1 workman shall be entitled to raise an industrial dispute and none of the observations made hereinabove shall come in the way of adjudication of the said dispute.

No order as to costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**FEBRUARY 03, 2011**

‘gsr’