

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

Date of decision: 10th January, 2012.

+ **W.P.(C) 8365-66/2006**

% **M/S. MAHATTA & CO. & ANR.** Petitioners
Through: Mr.Vinay Sabharwal, Advocate.

Versus

MUNNA LAL SHUKLA & ANR. Respondents
Through: Mr. Arun Birbal, Adv., Amicus
Curiae.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the award dated 21st April, 2005 of the Industrial Adjudicator on the following reference:-

“Whether dismissal of services of Sh. Munna Lal Shukla by the management is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

and holding the petitioner employer to have failed to prove that any inquiry in accordance with law was held prior to the dismissal of the services of the respondent workman and also having failed to prove before the Industrial Adjudicator any grounds for dismissal of respondent workman

from service and consequently directing the petitioner employer to reinstate the respondent workman w.e.f. 1991 with 40% of back wages “immediately as he is a skilled employee”.

2. Notice of the petition was issued and vide *ex parte* order dated 15th May, 2006 which was made absolute on 28th September, 2010, the operation of the award stayed. The respondent workman filed a counter affidavit and an application under Section 17B of the Industrial Disputes Act, 1947; however on 7th January, 2009 the said application was withdrawn with liberty to file a fresh application. *Rule* in the petition was issued on 7th January, 2009. Another application under Section 17B of the Act was filed which was allowed vide order dated 4th February, 2010. However none has been appearing thereafter for the respondent workman since 7th July, 2010.

3. The counsel for the petitioner employer was heard on 22nd February, 2011 and 24th February, 2011 and the record of the Industrial Adjudicator perused. It was the case of the respondent workman in his statement of claim dated 10th October, 2000 before the Industrial Adjudicator that he had been in employment of the petitioner employer as a Printer since 1st November, 1971 and his last drawn wages were of ₹3,150/- per month; that he went on sanctioned leave from 25th May, 1998 to 13th June, 1998 but could not join duty till 31st August, 1998 owing to illness and intimation whereof was sent to the petitioner employer by post; that however when he reported for duty on 1st September, 1998, he was not taken back; that during the conciliation

proceedings however the petitioner employer produced a letter which showed the services to have been suspended w.e.f. 2nd September, 1998 and under cover of letter dated 18th December, 1998 he was served with a charge sheet dated 2nd September, 1998; that he replied to the charge sheet on 6th January, 1999; that the petitioner employer appointed Shri D.C. Gandhi as Inquiry Officer but who was not independent and partial; that no opportunity was given to him to participate and he was also not paid any suspension allowance; that on 30th July, 1999 the respondent workman had been served with a show cause notice along with the report of the Inquiry Officer; that though the respondent workman replied to the show cause notice but he was dismissed from service w.e.f. 6th September, 1999; that he was out of employment since then.

4. The petitioner employer in its reply/written statement before the Industrial Adjudicator pleaded that the last drawn wages of the respondent workman were ₹2,930/- per month; that the respondent workman was a habitual absentee; particulars of the days between January, 1997 and May, 1998 when he was unauthorizedly absent were furnished; it was further pleaded that the respondent workman had been absent from duty from 13th June, 1998 till he was served with a charge sheet dated 2nd September, 1998 in respect of unauthorized absence; that the respondent workman did not give any reply to the same; that though in the absence of any reply the petitioner employer was entitled to dismiss the respondent workman but Shri D.C. Gandhi, Advocate was appointed as an Inquiry Officer who conducted

an inquiry in accordance with the principles of natural justice; that the respondent workman did not appear in the inquiry despite repeated notices and publication in the newspaper Veer Arjun of 24th May, 1999; that the Inquiry Officer thus proceeded *ex parte* against the respondent workman and after recording the evidence of the petitioner employer, submitted a report dated 28th July, 1999 holding the respondent workman to be guilty of all the charges; a second show cause notice dated 30th July, 1999 was issued to the respondent workman proposing the punishment of dismissal; the respondent workman furnished a reply dated 17th August, 1999 thereto which was not found satisfactory and accordingly order dated 6th September, 1999 of dismissal was made.

5. The petitioner employer in the reply/written statement (*supra*) also pleaded that the Industrial Adjudicator may try and decide the issue with regard to validity of domestic inquiry first and in case inquiry was found to be defective and/or set aside, sought opportunity to adduce evidence before the Industrial Adjudicator to prove the charges against the respondent workman.

6. A rejoinder was filed by the respondent workman before the Industrial Adjudicator controverting the reply/written statement of the petitioner employer.

7. Though the respondent workman filed list of documents with documents before the Industrial Adjudicator but the petitioner employer failed to file any document whatsoever, not even the record of the domestic inquiry conducted.

8. The Industrial Adjudicator on 18th February, 2002 framed the following issues:-

- “1. Whether a fair and proper enquiry was not conducted in accordance with principles of natural justice?*
- 2. As per terms of reference.”*

and listed the matter for evidence of the respondent workman. The respondent workman filed an affidavit by way of evidence on the same lines as the claim petition and vide order dated 24th March, 2003 the matter was adjourned for cross examination of the respondent workman by the petitioner employer and the petitioner employer was also directed to file the inquiry report. Vide order dated 21st March, 2005 the Industrial Adjudicator, noticing that the petitioner employer had neither cross examined the respondent workman inspite of opportunity nor filed the inquiry report, closed the right of the petitioner employer to cross examine the respondent workman and listed the matter for evidence of the petitioner employer. The petitioner employer however instead of producing any evidence filed an application stating that as per the issues, the parties were required to adduce evidence only on the issue of validity of domestic inquiry and not on merits

of the charges or merits of the term of reference; however the respondent workman in his affidavit by way of evidence had also deposed on merits which was not permitted by law. The petitioner employer thus contended that the affidavit by way of evidence of the respondent workman in so far as on the merits, be struck down.

9. The Industrial Adjudicator vide order dated 21st April, 2005 dismissed the said application of the respondent workman as frivolous, closed the evidence of the petitioner employer and announced the award impugned in the petition.

10. During the hearing before this Court on 24th February, 2011, it was noticed that the petitioner employer has not produced the record of the inquiry claimed to have been conducted, before this Court also. It was the contention of the counsel for the petitioner employer on that date that in accordance with the law as laid down in ***Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd. v. Management*** (1973) 3 SCR 587 and ***Cooper Engineering Ltd. v. P.P. Mundhe*** 1975 II L.L.J 379 (SC), the Industrial Adjudicator is mandatorily required to treat the issue of validity of domestic inquiry as a preliminary issue and to first record evidence thereon only and at that stage does not even have jurisdiction to record evidence on the aspect of misconduct.

11. Myself, *prima facie* being of the view that splitting up of the proceedings before the Industrial Adjudicator into two stages leads to

unusual delays and the same witnesses being examined twice over and often being not available when the occasion for examination at the second stage arises, observed in the order dated 24th February, 2011 that the petitioner employer ought not to be permitted to contend as a matter of right or routine that the proceedings before the Industrial Adjudicator should be so spilt up into two stages. Since the respondent workman was unrepresented and finding the question to be otherwise of importance in a large number of cases, Mr. Arun Birbal, Advocate was vide order dated 24th February, 2011 requested to and appointed as Amicus Curiae to assist the Court on the aforesaid legal question.

12. The learned Amicus Curiae has supported the legal contention of the counsel for the petitioner employer that the Industrial Adjudicator in a dispute as to termination of employment and where the employer relies on a domestic inquiry preceding the termination, is mandatorily required to first adjudicate the question of validity of the inquiry and gets jurisdiction to adjudicate the validity of the termination order only after the domestic inquiry conducted has been held to be vitiated. He has in this regard invited attention to:-

- A. ***Delhi Cloth & General Mills Co. v. Ludh Budh Singh*** (1972) 3 SCR 29 laying down that in a proceeding before the Industrial Adjudicator, either on a reference under Section 10 or by way of an application under Section 33 of the Act, the jurisdiction of the Industrial Adjudicator is as follows:-

- (a) If no domestic inquiry had been held by the management or if the management makes it clear that it does not rely upon any domestic inquiry that may have been held by it, it is entitled straightaway to adduce evidence before the Tribunal and justify its action. The Tribunal is bound to consider that evidence on merits, and, in such a case it is not necessary for the Tribunal to consider the validity of the domestic inquiry.
- (b) If a domestic inquiry had been held, it is open to the management to rely upon it in the first instance, and alternatively, and without prejudice to its plea that the inquiry was proper, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management had, given up the enquiry conducted by it; and it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management were valid and proper. If the Tribunal is satisfied that the enquiry was properly held the question of considering the evidence adduced before it on merits does not arise. If the Tribunal holds that the enquiry was not properly held then it has jurisdiction to consider the evidence adduced before it by the management. (emphasis added)
- (c) When a domestic inquiry has been held by the management and the management relies on it, the management may request the Tribunal to try the validity of the domestic inquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the

Tribunal if the finding on the preliminary issue is against the management. In such a case if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to adduce additional evidence and also give a similar opportunity to the employee to lead evidence contra. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of before the proceedings were closed, the employer can make no grievance that the Tribunal did not provide for such an opportunity.

- (d) If the employer relies only on the domestic inquiry and does not simultaneously lead additional evidence, or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic inquiry and the finding recorded therein and decide the matter. It is not its function to suo moto give an opportunity to the management to adduce evidence before it to justify the action taken;

B. *M/s Lakshmi Rattan Cotton Mills Co. Ltd. v. Its Workmen*
AIR 1975 SC 1689 - only on the aspect of the right of the employer to establish misconduct of the workman before the Industrial Adjudicator even if the domestic inquiry is found to be vitiated;

- C. ***Shankar Chakravarti v. Britannia Biscuit Co. Ltd.*** (1979) 3 SCC 371 – laying down that there is no obligatory duty of the Industrial Adjudicator to call upon the employer to adduce additional evidence if it so chooses after recording a specific finding on the preliminary issue whether there was no inquiry or the one held was defective. It was held that it is for the employer to seek an opportunity for the said purpose.
- D. ***Shambhu Nath Goyal v. Bank of Baroda*** (1983) 4 SCC 491 – laying down that if the employer chooses to exercise its right to establish misconduct of the workman before the Industrial Adjudicator, such right must be exercised at the earliest.
- E. ***Bharat Forge Co. Ltd. v. A.B. Zodge*** (1996) 4 SCC 374 – laying down that the request as aforesaid to prove misconduct can be made by the employer before the closure of the proceedings before the Industrial Adjudicator.
- F. ***Karnataka State Road Transport Corporation v. Lakshmiddevamma*** (2001) 5 SCC 433 observing that the Apex Court in ***Cooper Engineering Ltd*** (supra) case has held that when the Industrial Adjudicator is called upon to decide the validity of the domestic inquiry, the same has to be tried as a preliminary issue and thereafter if necessary the employer has

to be given an option to adduce fresh evidence. It was further held that the employer is to seek permission to lead evidence to prove misconduct, in the event of failing in the issue of inquiry, before the Industrial Adjudicator returns a finding on the domestic inquiry.

13. At this stage, ***Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd.*** (supra) & ***Cooper Engineering Ltd.***, referred to by the learned Amicus Curiae also may be noticed. While in ***Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd.*** it was held that the mere fact that no inquiry or defective inquiry has been held by the employer does not by itself render the dismissal of workman illegal and the right of the employer to adduce evidence justifying action for the first time in such a case is not taken away by the proviso to Section 11-A of the ID Act, in ***Cooper Engineering Ltd.*** it was held that the Industrial Adjudicator “should first decide as a preliminary issue whether the domestic inquiry has violated the principles of natural justice” and the question of validity of the inquiry “must be decided as a preliminary issue”.

14. Though the language used in the judgments aforesaid undoubtedly supports the two-stage procedure before the Industrial Adjudicator and I am told that the same has been the practice in vogue before the Industrial Adjudicators but what continues to haunt me is the inherent delays in the same. The matter does not appear to have been approached in any of the

judgments aforesaid from the said perspective. I have thus enquired from the counsel for the petitioner employer as to what is the prejudice if any which would be suffered by the petitioner employer if evidence is directed to be led on the issue of inquiry as also if the employer chooses to establish the misconduct of the workman before the Industrial Adjudicator, in one go only rather than in two stages as aforesaid.

15. The counsel for the petitioner has cited two reasons; firstly that as per the judgments aforesaid the Industrial Adjudicator gets no jurisdiction to even record the evidence of misconduct till holds the domestic inquiry to be vitiated and secondly that if the employer before the Industrial Adjudicator is not able to establish the misconduct alleged even though established in the inquiry, the same is likely to colour the finding of the Industrial Adjudicator on the validity of the inquiry also and the likelihood of the Industrial Adjudicator and this Court in exercising power of judicial review in such cases, holding the inquiry to be vitiated would be much more.

16. I am unable to accept either of the aforesaid two contentions. Neither can it be said that the Industrial Adjudicator gets jurisdiction to record evidence on the aspect of misconduct only after holding the inquiry to be vitiated nor can it be said that the Industrial Adjudicator and the Courts are incapable of sifting the evidence of the inquiry from that on the misconduct or that the decision on one issue would be coloured by the evidence on

record on the other. Such a narrow & biased vision/appraisal cannot be attributed to the Industrial Adjudicators and the Courts.

17. The Supreme Court in ***Ludh Budh Singh*** (supra) did envisage a situation, of the employer without prejudice to its plea that the inquiry was proper, “simultaneously” adducing additional evidence before the Tribunal justifying its action. It was further observed that in such a case no inference can be drawn that the management had given up the inquiry conducted by it and it is the duty of the Tribunal to, in the first instance consider whether the inquiry proceedings were valid or proper and if the Industrial Adjudicator is satisfied that the inquiry was properly held, the question of considering the evidence adduced before it on merits does not arise. Only if the Tribunal holds that the inquiry was not properly held, would it have jurisdiction to consider the evidence on misconduct adduced before it by the management. The said passages in ***Ludh Budh Singh*** have not been dissented with in any of the subsequent judgments. Once the said option is held to be available, the question of Industrial Adjudicator having no jurisdiction to record evidence on misconduct till holding the inquiry to be vitiated does not arise. In fact I find the question to have been squarely addressed in the concurring judgment of Shivaraj Patil, J. speaking also for Khare, J. in ***Karnataka SRTC*** (supra). It was held that the question as to at what stage the management/employer should seek leave of the Industrial Adjudicator to lead evidence justifying its action does not affect the power of the Industrial Adjudicator requiring or directing the parties to produce evidence if deemed

fit in a case having regard to the facts and circumstances of that case. It was held that as per Section 11 (1) of the ID Act, the Industrial Adjudicator can follow the procedure which it thinks fit and in accordance with the principles of natural justice; that under Section 11(3), the Industrial Adjudicator has the same powers as are vested in the Civil Court under Civil Procedure Code. It was yet further held that strict rules of evidence are not applicable to the proceedings before Industrial Adjudicator and the Industrial Adjudicators have the powers to call for evidence at any stage of the proceedings if the facts and circumstances of the case demand the same to meet the ends of justice. It was yet further held that there are no fetters on the powers of the Industrial Adjudicator requiring or directing parties to lead evidence to avoid unnecessary delay and multiplicity. The opinion of the majority in the same judgment also records that the management/employer has no right to lead evidence to establish misconduct before the Industrial Adjudicator and the same is permitted only by way of procedure laid down by the Courts to avoid delay and multiplicity. Moreover, the question of jurisdiction of the Industrial Adjudicator to adjudicate on the merits of the disputes is identical to the jurisdiction of a Civil Court where an objection as to the territorial jurisdiction is taken but which objection cannot be decided without evidence. It is the settled principle of law that in such cases the evidence is not to be bifurcated in two stages and evidence on all issues to has to be led together.

18. The only question which thus arises is whether such choice can be left to the employer or the Industrial Adjudicator has a role to play in it. In my view, once the Apex Court has held that such a course of action is permissible, the question of leaving a choice to one of the parties to the *lis* does not arise and the Industrial Adjudicator/the Court would definitely have jurisdiction in the matter. It cannot be lost sight of that the employer, after dismissing the workman from employment, is in no hurry. There is no provision as contained in Section 17B of the ID Act during the pendency of proceedings before this Court, applicable to the pendency of proceedings before the Industrial Adjudicator. Thus during the pendency of the proceedings before the Industrial Adjudicator, while the workman is without wages, the employer has no reason to expedite the matter. Owing to the two stage procedure being followed, it is found that disputes remain pending before the Industrial Adjudicator for tens of years with some witnesses being examined twice over. In a number of cases, it is found that the witnesses who had appeared at the stage of evidence on preliminary issue are not even traceable/available at the stage of adducing evidence on the misconduct.

19. I find Deshpande, J. in ***Toshniwal Brothers P. Ltd. v. Bir Singh*** ILR 1973(1) Delhi 319 to have also observed that the Industrial Adjudicator may find it convenient to record the evidence on misconduct first and then hear the arguments on the whole case and if it finds that the domestic inquiry was valid then the evidence adduced to establish misconduct would not have to be considered at all and would be rendered superfluous; if the Industrial

Adjudicator concludes the domestic inquiry to be invalid then it would consider the evidence adduced to establish misconduct and give the final decision.

20. The practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Supreme Court in ***Union of India v. Raghubir Singh*** (1989) 2 SCC 754 emphasized the need for adapting the law to new urges in society and quoted with approval the Holmesian aphorism that the "life of the law has not been logic, it has been experience". It was further held that in a developing society such as India, law does not assume its true function when it follows a groove chased amidst a context which has long since crumbled. Similarly in ***State of Punjab v. Devans Modern Breweries Ltd.*** (2004) 11 SCC 26 it was held that a decision although neither reversed nor overruled may cease to be law owing to changed conditions and changed law, as reflected by the principle "*cessante ratione legis cessat ipsa lex*". Recently in ***Bhuwalka Steel Industries Ltd. v Bombay Iron and Steel Labour Board*** (2010) 2 SCC 273 it was reiterated that the trend of judicial opinion is that *stare decisis* is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate

with the demands of changing times dictated by social needs, State policy and judicial conscience.

21. The Supreme Court in *National Council for Cement & Building Materials v. State of Haryana* (1996) 3 SCC 206 commented on the appalling situation created by such preliminary issues which take long years to settle. The Supreme Court in *Cooper Engineering Ltd.* itself has expressed anguish over such delays and held that the challenge if any to the finding of the Industrial Adjudicator on the validity of the inquiry ought to await the final award if the employer also intends to prove the misconduct before the Industrial Adjudicator. The Constitution Bench of the Supreme Court in *Karnataka SRTC* also held that the opportunity of leading evidence to prove misconduct in alternative ought to be exercised before the decision on the validity of the inquiry. I have had occasion to discuss the said aspect in detail in *Glaxo Smithkline Consumer Healthcare Ltd. v. P.O. Labour Court-IX* 2010 V AD (Del) 832 and need is not felt to reiterate the same.

22. I am therefore of the opinion, that the Industrial Adjudicator upon completion of pleadings is required to proceed in the following manner:

- (a). To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

- (b). If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on the same.
- (c). However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.
- (d). If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.
- (e). To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

- (f). To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether misconduct has been established or not.
- (g). The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only.

23. Coming back to the facts of the present case, I find that though the Industrial Adjudicator while framing the issues and/or listing the matter for evidence did not specify as to whether the issue as to validity of the inquiry was to be treated as a preliminary issue and as to whether the evidence on all the issues was to be led together or in two stages but the petitioner employer having failed to produce the record of the domestic inquiry, the question of

evidence on that aspect only being required to be recorded did not arise. There was thus no reason for the petitioner employer to complain that the issue of validity of the inquiry ought to have been treated as a preliminary issue and/or evidence on that only being led first. The petitioner employer clearly failed to avail the opportunity to cross examine and/or to lead its own evidence and cannot be heard to make any grievance on the same.

24. No error can thus be found with the award.

25. However the respondent workman having not appeared before this Court and having also not enforced the order under Section 17B of the ID Act, the possibility of his being engaged/employed elsewhere is writ large. In the circumstances, it is deemed necessary to modify the award from that of reinstatement with 40% back wages to that of compensation in lieu of reinstatement and back wages.

26. The respondent workman in his affidavit on 25th March, 2010 before this Court pleaded a sum of ₹2,59,390/- to be due in terms of the order under Section 17B of the ID Act. For the period from 1999 till the award in 2005 i.e. for approximately six years a sum approximately of ₹2 lacs would be due towards back wages and of which 40% only were awarded by the Industrial Adjudicator. In the circumstances, this Court is of the opinion that compensation of ₹3.25 lacs in lieu of reinstatement, back wages and amounts due under Section 17B of the ID Act would be appropriate.

27. The petition is therefore partly allowed. While upholding the award on merits, the direction for reinstatement with 40% of the back wages is substituted with a direction for payment of compensation in lieu of reinstatement, back wages and Section 17B wages of ₹3.25 lacs. The same will also incur interest @10% per annum for the delay if any beyond 30 days in payment after demand thereof by the respondent workman from the petitioner employer. Costs of litigation have already been directed/paid.

28. Before parting with the case, I would also like to express my appreciation and gratitude for the invaluable assistance rendered by Mr. Arun Birbal, Advocate who on the request of this Court, and to the prejudice of his otherwise precious time, has rendered exemplary assistance to this Court in deciding the question involved.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JANUARY 10, 2012

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