

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7303 OF 2014

DFS India Pvt Ltd,

Petitioner

Vs

Mr.Nandkumar G.Chavan

.. Respondent

Mr.S.K.Talsania, Senior Advocate, i/b Ravindra V. Paranjpe,
Advocate for Petitioner.

Mr.Avinash K. Jalisatgi, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 11/03/2015

PC:

1. Heard Mr.S.K.Talsania, learned senior counsel for the petitioner and Mr. Avinash Jalisatgi, learned counsel for the respondent at length.

2. Rule. Mr. Jalisatgi waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the Judgment and Award dated 12.11.2013 passed by the learned presiding Officer, Central Government Industrial Tribunal-2, Mumbai (for short, "Tribunal") in Reference CGIT-2/222 of 2010. By that order, the Tribunal partly allowed the reference and declared that the dismissal of the respondent, hereinafter referred to as 'second

party', was illegal and was accordingly set aside. The petitioner was directed to reinstate the second party-workman in service along with 60% back wages, continuity in service with all other consequential benefits.

4. In support of this petition, Mr. Talsiani submitted that the Tribunal allowed the reference substantially on the ground that before dismissing the second party from service, no show cause notice was issued to him, no chargesheet was issued to him and no inquiry was also held against the second party. He submitted that the Government of India, Ministry of Labour-Employment, by its order dated 17.2.2010, in exercise of powers conferred by clause (d) of sub-section (1) and sub-section (2-A) of section 10 of the Industrial Disputes Act, 1947 (for short, "Act") referred the following industrial dispute to the Tribunal for adjudication.

“(i) Whether the action of the management of Duty Free Shop (India) Pvt Ltd, Mumbai in terminating Shri Nandakumar G Chavan, Warehouse Assistant from the services w.e.f. 15.5.2009 as contended by the workman concerned is justified and legal?

(ii) To what relief is the workman concerned entitled?”

5. After receipt of the reference, the Tribunal issued notices to the parties. The second party filed his statement of claim at Exhibit-4. The petitioner filed Written Statement cum objections to the maintainability of the reference on or about 20.8.2010. In paragraph 2(e) it was submitted that termination simplicitor of

the second party was legal, proper and justified for the reasons set out earlier resulting into loss of confidence and hence the second party is not entitled to any relief. The petitioner further craved leave to prove the reasons of termination of the second party before the Tribunal as and when required.

6. Mr. Talsania submitted that on the basis of pleadings, the Tribunal framed the necessary issues on 3.11.2010. The second party filed affidavit of Kailash Bhushan working as Vice President in the Joint Venture of partner of the petitioner by way of examination-in-chief on behalf of the petitioner. He submitted that while deciding the reference the Tribunal has not considered the evidence that was adduced before it. The Tribunal allowed the reference mainly on the ground that before dismissing the second party, no show cause notice was issued to him, no chargesheet was issued to him and no inquiry was also held against the second party. He submitted that even if no inquiry was held against the second party, it is settled position in law that the employer can substantiate/ prove the misconduct before the Tribunal. In support of this submission, he relied upon the decision in the case of Workmen Vs. Fire Stone Tyre and Rubber Industries, (1973) 1 SCC 813 and in particular paragraph 37 thereof.

7. On the other hand, Mr. Jalisatgi supported the impugned order. He submitted that before dismissing the second party, no

show cause notice was issued to him, no chargesheet was issued to him and no inquiry was also held against the second party. He submitted that before the Tribunal evidence was led by the parties. From perusal of evidence on record before the Tribunal, it would be evident that no misconduct is committed by the second party. He further submitted that after considering the material on record, the Tribunal held that the second party is a workman as contemplated under section 2(s) of the Act. He, therefore, submitted that no case is made out for invocation of the powers under Articles 226 and 227 of the Constitution of India.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. From perusal of the material on record it is evident that the second party was dismissed from services on 15.5.2010. Before dismissing the second party, no show cause notice was issued to him. No chargesheet was issued to him. That apart, no domestic inquiry was held against the second party. The petitioner straightway dismissed the second party on 15.5.2010. Perusal of the Written Statement and in particular paragraph 2(e) thereof shows that the petitioner craved leave to prove the reasons of termination of the second party before the Tribunal. In other words, the petitioner wanted to prove the misconduct by leading evidence before the Tribunal. Accordingly,

the parties have led evidence before the Tribunal. In the case of Workmen Vs. Fire Stone Tyre and Rubber Industries (supra), the Apex Court held that in case the inquiry is vitiated on the ground that it was not fair and proper or that on the ground that the findings are perverse, the employer can prove the misconduct by leading evidence before the Industrial Adjudicator. Even in case where no inquiry is held against the workman, the employer can prove the misconduct by leading evidence before the Industrial Adjudicator. In the present case, no inquiry was held against the second party. In view thereof, the petitioner was entitled to lead evidence before the Tribunal to prove the misconduct. Accordingly the parties have led evidence before the Tribunal. Perusal of the impugned order, however, does not indicate that the Tribunal has considered the evidence recorded before it. As noted earlier, the Tribunal has allowed reference substantially on the ground that no show cause notice was issued. No chargesheet was issued and no inquiry was held against the second party. In view of the decision of the Apex Court in the case of Workmen Vs. Fire Stone Tyre and Rubber Industries (supra), in my opinion, the Tribunal ought to have considered the evidence recorded before it before deciding the reference.

9. Mr. Jalisatgi submitted that this Court is not powerless in examining the evidence for the first time. It is not possible to accept this submission as it is obligatory on the part of the

Tribunal to consider the evidence that was led before it before deciding the reference. It is, therefore, not possible to accept the submission of Mr Jalistagi. He submitted that in any case the Tribunal rightly held that the second party is a workman. This aspect is considered by the Tribunal from paragraph 6 onwards. After considering the material on record, in paragraph 16 the Tribunal recorded that the second party was not performing any administrative or managerial duties. His duties were of manual and of clerical nature. The Tribunal accordingly held that the second party is a workman. Mr. Talsania submitted that this finding is perverse. It is not possible to accept this submission. With the assistance of the learned counsel appearing for the parties, I have gone through the evidence on record. I do not find that the Tribunal committed any error in holding that the second party is a workman. The Tribunal has recorded the finding after considering the evidence on record. It, therefore, cannot be said to be perverse finding. It also cannot be said that the said finding is contrary to the evidence on record. In view thereof, I do not find that the Tribunal committed any error in answering Issue no.1. In other words, Tribunal rightly held that the second party is a workman.

10. Having regard to the fact that the Tribunal has not discussed the evidence that was led before it, the matter is required to be remitted to it for deciding the reference as to

whether the petitioner has proved the misconduct on the basis of the evidence that was recorded before it. Hence, the following order.

- (i) The finding that the second party is a workmen is upheld.
- (ii) The findings against Issues no.2 and 3 are set aside. The Tribunal will decide the reference on the basis of the evidence already on record. All contentions of the parties in that regard are expressly kept open.
- (iii) The parties agree that they will appear before the Tribunal on 24.3.2015 and for that fresh notice need not be issued to them. The Tribunal is requested to decide the reference within three months from the date of appearance of the parties.
- (iv) Rule is partly made absolute in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.
- (v) Parties including the Tribunal to act on the authenticated copy of this order.

(R.G.KETKAR, J.)