

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

TUESDAY, THE 24TH DAY OF FEBRUARY 2015/5TH PHALGUNA, 1936

WP(C).No. 19899 of 2009 (F)

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AGAINST THE AWARD DATED 20-01-2009 IN ID 2/2004 OF
INDUSTRIAL TRIBUNAL, ALAPPUZHA.**

PETITIONERS:

- 1. P.N.LALY,
POZHATHU HOUSE,
KALOOR-KADAVANTHARA ROAD,
ERNAKULAM, COCHIN-17.**
- 2. A.D. GEORGE,
ARIMBILLY HOUSE, CHENGAMANAD P.O.,
POIKKATTUSSERY, ERNAKULAM DISTRICT.**

**BY ADVS.SRI.ASOK M.CHERIAN
SRI.T.R.RENJITH
SRI.S.KANNAN
SMT.S.RAKHEE**

RESPONDENTS:

- 1. THE MANAGING DIRECTOR,
KONE ELEVATOR INDIA (P) LTD.
50 VANGARAM ROAD,
AYANAMBAKKAM, CHENNAI.**
- 2. THE BRANCH MANAGER,
KONE ELIVATOR INDIA (P) LTD.,
PEYOLI LANE, KACHERIPADI, KOCHI -18.**
- 3. THE INDUSTRIAL TRIBUNAL, ALAPPUZHA.**
- 4. THE STALA,
REP.BY THE SECRETARY TO GOVERNMENT,
LABOUR AND REHABILITATION DEPT,
SECRETARIAT, THIRUVANANTHAPURM.**

**R1 & 2 BY ADV. SRI.P.RAMAKRISHNAN
R4 BY GOVT. PLEADER SRI. SOJAN JAMES**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24-02-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONERS' EXHIBITS

- EXT- P1- TRUE COPY OF THE ENQUIRY REPORT OF THE DOMESTIC ENQUIRY
CONDUCTED BY MR. JIMMY GEORGE, ADVOCATE.
- EXT- P2- TRUE COPY OF THE ORDER DATED 18-02-2003 DISMISSING THE
1ST PETITIONER FROM THE SERVICE OF THE 1ST RESPONDENT.
- EXT- P3- TRUE COPY OF THE PRELIMINARY ORDER OF THE 3RD RESPONDENT
TRIBUNAL DATED 25-08-2006 IN ID No.56/2004.
- EXT- P4- TRUE COPY OF THE AWARD OF THE 3RD RESPONDENT TRIBUNAL
DATED 20-01-2009 IN ID No.56/2004 JOINTLY WITH ID No.2/2004.

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

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“CR”

C.K. ABDUL REHIM, J.

W.P.(c) No. 19899 OF 2009-F

DATED THIS THE 24th DAY OF FEBRUARY, 2015.

J U D G M E N T

The petitioners, who were workmen under the 1st respondent, are challenging Ext.P4 Award passed by the 3rd respondent, confirming punishment of dismissal imposed by the management, subject to conversion of the punishment as discharge.

2. The petitioners were charged for alleged misconduct. The allegation was that, on 15th August 2002 they have removed certain parts of a lift from the premises of a customer and sold it to a scrap dealer for an amount of Rs.2,250/- and shared the amount among themselves, along with another employee. A domestic enquiry was conducted, based on the above said charges, by appointing an Enquiry Officer. Exhibit P1 is the report of the enquiry. Based on Ext.P1 the 1st respondent had dismissed the petitioners through Ext.P2 order, dated 18-02-2003. The petitioners

raised an industrial dispute through their trade union, which was referred for adjudication by the 3rd respondent, raising the issue as to whether the dismissal of the petitioners by the management can be justified and if not what reliefs the petitioners are entitled to. During the course of adjudication the 3rd respondent had issued a preliminary order as per Ext.P3 finding that the domestic enquiry was conducted in full compliance of the principles of natural justice. But it was found that the findings of the Enquiry Officer are not supported by any legal evidence and therefore the enquiry is vitiated and unsustainable. Therefore the Tribunal permitted the management to adduce fresh evidence. The adjudication was proceeded by clubbing together another I.D. (No.2/2004) which was referred based on a dispute raised by the 3rd respondent employee, challenging acceptance of his resignation and for declaring that the confession letter was not valid. The Tribunal passed Ext.P4 Common Award holding that, the dismissal from service on the basis of the alleged

misconduct against the petitioners stands proved. However, the Tribunal observed that, considering the gravity of the misconduct proved the punishment of dismissal can be converted as discharge, so that the petitioners can avail terminal benefits such as gratuity and other statutory benefits. The petitioners are challenging Ext.P4 award. Inter alia a declaration is sought for to the effect that the dismissal of the petitioners is not justifiable in view of the findings contained in Ext.P3 preliminary order. Consequent direction for reinstatement of the petitioners with consequential benefits is also sought for in this writ petition.

3. Contention of the petitioners are mainly based on the findings contained in Ext.P3 preliminary order. Attention of this court is drawn to the specific conclusions arrived by the 3rd respondent Tribunal. It is found that the domestic enquiry was conducted in full compliance of natural justice. At the same time, findings of the Tribunal is to the effect that, the conclusions arrived by the Enquiry

Officer is not supported by any legal evidence and hence the enquiry is vitiated and is unsustainable. According to learned counsel for the petitioners, when the Tribunal arrived at a satisfaction that the order of dismissal was not justified, it ought to have set aside the order of dismissal and directed the reinstatement, as contemplated under Section 11A of the Industrial Disputes Act, 1947. It is pointed out that, when the Tribunal had arrived at a conclusion that the enquiry was not defective, the management should not have been afforded with opportunity to adduce any fresh evidence in support of the order of dismissal.

4. Per contra learned counsel appearing for respondents 1 & 2 contended that, even if the Tribunal finds that the conclusions arrived by the Enquiry officer is perverse, it cannot straight away set aside the order of dismissal, without affording the management with an opportunity to adduce fresh evidence in support of such order.

5. Both sides have placed reliance on the land mark decision on the point rendered by the hon'ble Supreme Court, in **Workmen of M/s. Firestone Tyre and Rubber Company of India (Pvt.) Ltd. V. The Management and others ((1973) 1 SCC 813)**. In the said decision the hon'ble apex court had elaborately considered the procedure to be followed by the Labour Courts and Industrial Tribunals in adjudicating a dispute. Effect of the amendment incorporating Section 11A, from the year 1971 onwards, was also discussed elaborately. After exhaustive reference to various decisions of the hon'ble Supreme Court, with respect to principles governing jurisdiction of the Tribunal when adjudicating industrial disputes relating to dismissal or discharge, the apex court had drawn certain broad principles which are illustrated in paragraph 32 of the decision as follows;

“32. From those decisions, the following principles broadly emerge:

(1) 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.

(2) 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.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing 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 malafide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before The Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in jurisdiction of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) 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.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) 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.

(10) In a particular case, after setting aside the order of dismissal, whether the workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate V. The workmen*, within the judicial decision of a Labour Court or Tribunal."

Thereafter the hon'ble Supreme Court proceeded to consider whether Section 11A has made any change in the legal position and if so to what extent? It is found that the Tribunals are now at liberty by virtue of Section 11A to consider not only as to whether the findings of misconduct recorded by an employer is correct or not; but also to differ from the said finding if a proper case is made out. The findings of the apex court is that, what was once largely in the realm of the satisfaction of the employer, has ceased to be so; and now it is the satisfaction of the Tribunal that finally decides the matter. Hon'ble Supreme Court had discarded the contention of the workmen that the right of the employer is to adduce evidence before the Tribunal for the first time, which was recognised in various decisions, has been taken away by virtue of the introduction of Section 11A. The court observed that, there is no indication in the Section that the said right has been abrogated. It further observed that, if the intention of the legislature was to do away with such a right, which has been recognised over a

long period of years through various decisions, the Section would have been differently worded. Since there are no express words to that effect, and since there is no indication that the section has impliedly changed the law in that respect, the position is that, even now the employer is entitled to adduce evidence for the first time before the Tribunal in a case where he had not held any enquiry or in a case where it is found that the enquiry held is defective.

6. Learned counsel for the petitioner made an attempt to draw a distinction between, cases where the enquiry is found to be defective and cases where the enquiry is found not defective but the conclusions are not supported by materials and evidence. Attention was drawn to the provisions contained in Section 11A, which provides that during the course of adjudication proceedings with respect to a reference relating to discharge or dismissal of a workman, if the Tribunal is satisfied that the order of dismissal or discharge is not justified, it may set aside the order of dismissal or discharge and direct the

reinstatement. Referring to the discussions contained in **M/s. Firestone Tyre and Rubber Company's** case (supra) it is pointed out that, Section 11A enables the Tribunal to have a re-appraisal of the evidence on record, which were adduced at the time of the domestic enquiry, in order to arrive at a satisfaction as to whether the discharge or dismissal is justified or not. Contention is that, once the Tribunal exercises such power of re-appraisal of evidence and arrives at a conclusion that the findings in the enquiry are not supported by evidence, it would amount to a satisfaction that the discharge or dismissal was not justified. In such cases permitting the management to adduce fresh evidence was not warranted and it will run contrary to the provisions contained in Section 11A. In other words, the contention is that, the dictum contained in **M/s. Firestone Tyre and Rubber Company's** case (surpa) is only to the effect that the Tribunal is bound to permit the management to adduce fresh evidence only in cases where there was no enquiry conducted or when the

Tribunal finds that the enquiry conducted was defective. But in a case where the Tribunal arrives at a finding that the conclusions in the enquiry was supported by evidence, no such opportunity to adduce fresh evidence can be granted to the management, but the Tribunal should arrive at a satisfaction that the order of dismissal is not justified.

7. Learned counsel appearing for respondents 1 & 2 resisted the above contention arguing that, the procedure laid down in **M/s. Firestone Tyre and Rubber Company's** case (surpa) with respect to affording opportunity to the management to adduce fresh evidence will equally apply in both cases where the Tribunal finds that the enquiry was defective or perverse or where it is found that the conclusions in the enquiry was not correct based on the evidence adduced. It is contended that, when the Tribunal finds that the conclusions of the enquiry are not supported by evidence, the finding is only that the enquiry report is perverse or where it is found that the conclusions in the conclusions arrived by the Enquiry Officer is perverse. In

such case the enquiry report need to be treated in the same pedestal as that of a defective enquiry and in both the cases it is obligatory on the part of the Tribunal to permit the management to adduce fresh evidence, in support of order of dismissal. Learned counsel had placed reliance on the decision of the hon'ble Supreme Court in **Bharat Forge Company Ltd. V. A.B. Zodge and another ((1996) 4 SCC 374)**. The question considered therein is almost identical, as to whether the industrial Tribunal was justified in refusing prayer of the employer to lead evidence in support of the order of dismissal, which was upheld by the Bombay High Court. In the said case the Tribunal found that the enquiry was properly held, but the findings in such enquiry was perverse. No opportunity was afforded to the employer to lead evidence. Referring to another decision of the hon'ble Supreme Court it was contended on behalf of the employer that, even when the finding is perverse the whole issue is at large before the Tribunal and it should be entitled to deal with the merits of the dispute itself. Then it

would be open to employer to adduce additional evidence. Per contra, on behalf of employee it was contended that the position of law after insertion of Section 11A has been altered. But referring to the observations contained in **M/s. Firestone Tyre and Rubber Company's** case (surpa) the hon'ble Supreme Court observed that, even though the Tribunal is clothed with the power to assess evidence under Section 11A for deciding as to whether the decision made by the employer was justified or not, the right of the employer to adduce evidence before the Tribunal for the first time stands recognised. It was reiterated that there was no indication of Section 11A that such right has been abrogated, since there are no express words to that effect. There is no indication in Section 11A that the law has been impliedly changed in that respect. Contentions raised on behalf of the employee relaying on the proviso to Section 11A, bars introduction of any fresh materials, was also negatived. Placing reliance on an earlier decision in **Shanker Chakravarti V. Britannia Biscuit Co. Ltd.**

(AIR 1979 SC 1652). The apex court in **Bharat Forge Company's** case (supra) observed that, a domestic enquiry may be vitiated either for non-compliance of the rules of natural justice or for perversity on the part of the employer. But the right of the employer to adduce evidence in both the situations is well recognised through a catena of decisions rendered by the hon'ble apex court. Therefore it is held that the employer if chooses to do so, the Tribunal should allow to adduce fresh evidence, even in case where the preliminary findings is to the effect that the report of enquiry is perverse.

8. Learned counsel for the petitioner still made an attempt to draw a distinction contending that, when the finding of the Tribunal is that the conclusions in the enquiry is not supported by proper evidence, it cannot be termed that the enquiry is vitiated by perversity. If such a decision is arrived by the Tribunal on a re-appreciation of the evidence on record, it cannot be contended that the enquiry report was bad for perversity. But this court is of the

considered opinion that even a wrong appreciation of evidence can be termed as a perverse appreciation made by the Tribunal and the broad distinction can only be that the enquiry report is being defective or perverse. In both cases, as held by the hon'ble apex court in **Bharat Forge Company's** case (supra), the management has to be afforded with opportunity to adduce evidence. Therefore the contention that the 3rd respondent went wrong in further proceeding with the matter after Ext.P3 order, cannot be sustained. This court is of the considered opinion that there is no illegality or irregularity with respect to the procedure adopted by the Tribunal in permitting the 1st respondent to adduce fresh evidence.

9. Eventhough it was contended on behalf of the petitioners that the conclusions arrived in Ext.P4 in support of the finding of misconduct is not legal and proper, the petitioners are not in a position to specifically point out any illegality, impropriety or error with respect to appreciation of the evidence adduced during adjudication of the dispute.

10. Under the above mentioned circumstances this court do not find any valid reason to set aside Ext.P4. However, the modification regarding punishment awarded by the Tribunal will sustain and that the petitioners will be entitled to the consequential benefits.

Resultantly the writ petition fails and the same is hereby dismissed.

Sd/-
C.K. ABDUL REHIM
JUDGE

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P.A. to Judge