

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

Judgment reserved on: 01st September, 2017

Judgment pronounced on: 12th October, 2017.

+ W.P.(C) NO.15785/2004

BALDEV RAJ

.... Petitioner

Through: Mr.K.C. Chandra Dubey, Adv.

Versus

THE MANAGEMENT OF DTC & ANR.Respondents

Through: Mr.U.N. Tiwari and Mr.S.K.
Ojha, Advs.

CORAM:-

HON'BLE MR. JUSTICE C. HARI SHANKAR

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JUDGMENT

12.10.2017

C. HARI SHANKAR, J.

1. Baldev Raj – petitioner before me and Conductor with the respondent- Corporation before he was shown the door on 3rd July, 1990 has invoked the extraordinary jurisdiction, conferred on this Court by Articles 226 and 227 of the Constitution of India, against orders dated 23rd February, 2004 and 5th April, 2004, passed by the Labour Court No. 1, Karkardooma, Delhi.
2. The opinion which I propose to take, in the present case, obviates the necessity of any exhaustive allusion to facts. (Indeed, any such allusion would advisably merit eschewal, lest it prejudices the case of either party.) The case at hand would,

therefore, have to be set out, in the proverbial “nutshell”, as under.

3. The petitioner, while working as a conductor with the respondent, was issued a charge sheet, dated 14th December, 1988, essentially alleging that he had overcharged certain passengers. Submission of reply, by the petitioner, thereto, was inexorably followed by a domestic inquiry, which commenced on 26th May, 1989 and was concluded, on 10th July, 1989. The inquiry report, submitted by the Inquiry Officer (hereinafter referred to as “IO”), pursuant thereto, held the charges against the petitioner to have been proved. Following thereupon, the respondent issued a show cause notice to the petitioner on 19th January, 1990, proposing his removal from service. The reply, by the petitioner, thereto, was held to be unsatisfactory and, again inexorably, order dated 3rd July, 1990, removing the petitioner from service, followed.
4. On the same date, i.e. 3rd July, 1990, the respondent filed an application, under section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as “the Act”), before the Labour Court, seeking approval of its decision to remove the petitioner from service as there was, at that time, an industrial dispute pending between the petitioner and the respondent. This application came to be numbered OP 35/1990. Reply and rejoinder were filed, therein, followed by affidavit-in-evidence, on the part of the petitioner, and the IO, each being cross-

examined thereon. Thereafter, on 5th July 1991, the following preliminary issue was framed (in OP 35/1990):

Whether the applicant held a legal and valid enquiry against the respondent according to the principles of natural justice?

5. In the interregnum, notice, dated 13th July, 1990, was sent by the petitioner to the respondent, alleging that his removal from service was illegal. No response being forthcoming, thereto, a statement of claim was filed, by the petitioner, before the Conciliation Officer, on 20th July, 1990. Conciliation failed, resulting in a reference, dated 21st January, 1991 (later numbered ID 147/1991), to the Labour Court, under Section 10(1)(c) and 12(5) of the Act, the term of reference reading thus:

“Whether the termination of the petitioner was illegal and/or unjustified and, if so, to what relief is he entitled and what direction is unnecessary in this respect?”

6. Statement of claim, was filed, therein, by the petitioner, before the Labour Court on 15th February, 1991. The following preliminary issue was framed (in ID 147/1991):

“Whether proper and fair enquiry was held against the workman?”

7. So far, the petitioner would contend, so good. At this point, however, according to the petitioner, the Labour Court went

completely astray, in clubbing OP 35/1990 and ID 147/1991, for adjudication. *Vide* a common order, dated 24th February 1994 (impugned by the petitioner), the preliminary issues framed in OP 35/1990 and ID 147/1991 were decided, by the Labour Court. The operative portion of the said order (para 13) reads thus:

“Accordingly, I hold that management conducted fair and proper enquiry against the claimant on which basis the Enquiry Officer held the claimant guilty for the charges levelled against him which were based on evidence as was adduced by the parties before him. The enquiry issue is accordingly decided in favour of the management and against the claimant.” (Emphasis supplied)

8. Having returned the above findings, the Labour Court proceeded, *vide* a separate order sheet of the same date, i.e. 23rd February 2004, to fix the matter for evidence and arguments, in the following terms:

“Vide separate order sheet enquiry issue is decided in favour of the mgt and against the workman. Now, the file be put up for evidence if any and for arguments on reference/approval petition on 4/3/04.” (Emphasis supplied)

9. *Prima facie*, there appears to be some incongruity in directing the file to be put up “*for evidence*”, after already holding that the charges against the petitioner stood rightly proved, on the basis of evidence on record. Ld. counsel for the respondent

sought to contend, in this regard, that the “evidence”, to which reference was made, was only for the purpose of determining whether the punishment imposed on the petitioner was disproportionate to the misconduct alleged to have been committed by him, or not, and not for ascertaining the correctness of the charges levelled against him, and found proved. But more on that later.

10. Affidavit-in-evidence was, thereafter, sought to be filed, by the respondent, on 26th March 2004, but was not taken on record in view of the judgment, of this Court, in ***UCO Bank v The Presiding Officer, 1999 LLR 1026***, which purportedly states that, once the decision on the enquiry issued had been taken in favour of the management, no occasion to adduce further evidence existed or arose.
11. The Labour Court, thereafter, proceeded to pass order dated 5th April, 2004, annexed as Annexure P-1 to the writ petition and impugned herein. A reading of the said order makes it appear that it decides only the application, of the respondent, under Section 33(2)(b) of the Act. The very first sentence in Para 1 of the said order reads thus:

*“This order shall dispose of petition filed U/S 33 2 (B) of the Industrial Dispute Act, 1947 in the matter of reference no./I.D. No. 17/1988.”
(Emphasis supplied)*

Further, the said order concludes thus (in para 10):

“The removal of the respondent/workman is neither disproportionate to the charges nor shocking to the extent to need lesser punishment. Also the management had made compliance of Section 33 2(b) of the ID Act, 1947 with regard to payment of one month wages which the claimant avoided to accept. Petition filed by the management for approval of the removal of the claimant from his services is accordingly accepted.” (Emphasis supplied)

Interestingly, though the initial, and concluding, recitals in the impugned order dated 5th April 2004 indicate that the Labour Court was addressing itself only to the application filed by the respondent under Section 33(2)(b) of the Act, for approval of its decision to remove the petitioner from service, the opening sentence in Para 6 thereof states, in a somewhat contradictory vein, thus:

“Before passing orders on merits of the petition as well as under Section 11 A of the ID Act, 1947, it would be appropriate to refer to the charges as were levelled against the respondent workman which were duly proved against him in the enquiry proceeding leading to removal of the claimant from services.”

(Emphasis supplied)

The above recitals, in the impugned order dated 5th April 2004, do seem to indicate some amount of ambivalence in the mind of the Labour Court, on the issue of whether it was, in fact,

passing the impugned order under Section 33 (2)(b), or Section 11A, of the Act. But more on that, too, later.

12. Be it noted, here, that, on facts, the petitioner and respondent are *ad idem* that, apart from the aforementioned orders dated 23rd February 2004 and 5th April 2004 – both of which are impugned in the present proceedings – no other adjudicatory order, prior thereto or thereafter, was passed by the Labour Court. Neither do the pleadings refer to any such order/orders.
13. Chagrined by the orders dated 23rd February 2004 and 5th April 2004 aforementioned, the petitioner has moved this Court, by means of the present writ petition. Various grounds have been urged therein, of which Grounds A and B raise a serious and pertinent legal issue.
14. Ground A, in the writ petition, essentially contends that the Labour Court erred in amalgamating the proceedings under Section 33(2)(b), and 11 A of the Act, into one. The scope of the two provisions, it is urged, was markedly different, with the scope of Section 33(2)(b) being much more limited than that of Section 10, or 11A, of the Act. Adjudication of an application for approval, filed under Section 33(2)(b) of the Act, was limited to examining whether there existed a *prima facie* case, to lift the ban on the employer from taking action against the workman, whereas examination of a referred industrial dispute,

relating to dismissal or removal of a workman, the petitioner would contend, entails an analysis of the evidence, even if such analysis falls short of re-appreciation thereof. Reliance was, for this proposition, invited to the following decisions:

- (a) ***LKT Mills v Workman 1961 SCR (3) 204,***
- (b) ***Punjab Beverages Pvt. Ltd, v Suresh Chand, (1978) 2 SCC 144,***
- (c) ***T.N. State Transport Corporation v Neethivilangan, Kumbakonam, (2001) 9 SCC 99, and***
- (d) ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v Ram Gopal, (2002)2 SCC 244.***

15. Ground B, analogously, urges that, even if approval, of the order of removal of the petitioner, as sought for, was granted under Section 33(2)(b) of the Act, the petitioner, nevertheless, retained the right to challenge his removal by raising an industrial dispute. A finding against the workman, under Section 33(2)(b) would, not, therefore, it is urged, foreclose an adjudication under Section 10/11A. *Res judicata* did not apply in such a case. The following decisions were relied upon, in this context:

- (a) ***Laxmi Devi Sugar Mills v Ram Sarup, 1957 (I) LLJ 17,***
- (b) ***East Asiatic Company (India) Pvt. Ltd. v their Workman, 1964 (II) LLJ 626;***
- (c) ***Management of Amalgamated Electric Company v Workman 1975 LIC 879,***

- (d) *K. Ramulu v Industrial Tribunal, 1972 LIC 1949,*
- (e) *Grafite India Limited v State of West Bengal 1979 LIC 1279,* and
- (f) *D.T.C. v Ram Kumar, 1982 LIC 1378.*

16. Having examined these contentions, I am of the opinion that they merit acceptance, which would entail, in its inevitable wake, a remand of the present proceedings to the Labour Court. The remand being on the basis of a preliminary objection, any expression of opinion, by me, on the merits of the controversy between the petitioner and respondent would be both inept and inappropriate. I refrain, accordingly, from doing so.
17. Adverting, now, to the above grounds urged by the petitioner in the writ petition, Mr Dubey, learned Counsel for the petitioner, emphatically pressed them into service during arguments, expressing his serious reservation against the decision of the Labour Court to club the adjudication of the application of the respondent, under Section 33(2)(b) of the Act, along with the reference of the industrial dispute raised by the petitioner, under Section 10/11A thereof. The scope of the said provisions, in his submission, being totally different, it was not permissible, *ex facie*, for the Labour Court to, by a single order, adjudicate both. Reliance was placed, for this proposition, on the judgment of this Court in *Vijay Kumar v D.T.C., MANU/DE/2955/2005*. Other submissions of Mr Dubey, made without prejudice, turn

on the merits of the matter, and discussion thereof is, therefore, being eschewed, as already noted hereinbefore.

18. Apart from the above, another preliminary issue arising for consideration would, in my view, be whether the decision, of the Labour Court, in its order dated 23rd February, 2004 (*supra*), to the effect that the petitioner was guilty of the charges levelled against him, the said finding being based on evidence available on record, did not travel beyond the preliminary issue which was being considered by the Labour Court, which was limited to whether the inquiry held by the respondent against the petitioner was legal, valid, proper and fair. In my opinion, it requires to be considered whether the Labour Court, could, while examining the propriety, fairness, legality or validity of the inquiry, proceed to pronounce on the sustainability, or otherwise, of the findings returned by the Inquiry Officer/ Disciplinary Authority on the charges against the workman.
19. A decision on these issues necessarily involves an analysis of the relevant sub-sections of Sections 10, 11A and 33 of the Act which are, therefore, being reproduced as under:

- (i) Sub-sections (1) and (4) of Section 10A:

***10. Reference of disputes to Boards, courts or
Tribunals***

(1) *Where the appropriate government is of opinion that any industrial dispute exists or is apprehended, it may at any time], by order in writing-*

(a) *refer the dispute to a Board for promoting a settlement thereof; or*

(b) *refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry; or*

(c) *refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labor Court for adjudication; or*

(d) *refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:*

PROVIDED that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate government may, if it so thinks fit, make the reference to a Labor Court under clause (c):

PROVIDED FURTHER that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

PROVIDED ALSO that where the dispute in relation to which the Central Government is the appropriate government, it shall be competent for that government to refer the dispute to a Labor Court or an Industrial Tribunal, as the case may be, constituted by the State Government

- (4) *Where in an order referring an industrial dispute to a Labor Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate government has specified the points of dispute for adjudication, the Labor Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto.*

(ii) Section 11A:

“11A. Powers of Labor Court Tribunal, and National Tribunal to give appropriate relief in case of discharge or dismissal of workmen

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labor Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labor Court, Tribunal or National Tribunal, as the case may be, 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:

PROVIDED that in any proceeding under this section the Labor Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.”

(ii) Section 33(1) and (2):

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of

any proceeding before² an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall--

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman,--

(a) alter, in regard to any matter not connected with the dispute,

the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.”

20. Unfortunately, the statutory provisions extracted hereinabove do not really provide any guideline or even guidance as to their scope and ambit. They merely set out the circumstances in which a reference would be made, of an industrial dispute, or an application would be preferred for approving the decision to dismiss or remove an employee from service. The considerations and factors, to be borne in mind by the Labour Court, or Industrial Tribunal, while examining a reference under Section 10, or an application under Section 33 (2)(b) of the Act, cannot be gleaned from the provisions themselves. The matter has, however, engaged the attention of the Supreme

Court on several occasions, and the mandate of Article 141 of the Constitution of India obliges this court to seek guidance therefrom. The better wisdom of the court below must yield to the higher wisdom of the court above.

21. As already stated, the interplay between Sections 10/11A, and Section 33(2)(b), of the Act, has come in for judicial examination, by the Supreme Court, in a number of cases. A few such decisions, which would be instructive in underscoring the view of the Supreme Court on the issue, may be cited as under:

- (i) ***Punjab National Bank Ltd v Its Workmen, (1960) 1 SCR 806***

While this decision involved several other aspects, paras 23 to 37 of the report set out the following clear indicia, governing exercise of jurisdiction under Section 33(2)(b), and Section 10/11A, of the Act:

- (a) Section 33 imposes a ban on the power of the employer to dismiss his employee, in respect of whom an industrial dispute is pending, save with the express written permission of the Tribunal. The object is to provide for continuance and termination of the pending proceedings in a peaceful atmosphere, undisturbed by friction

between the employer and employee. In substance, it insists on the maintenance of the status quo pending disposal of the industrial dispute between the parties; nevertheless it recognizes that occasions may arise when dismissal/discharge of the employee is justified, and allows the employer to do so, subject to obtaining written permission of the Tribunal.

- (b) The jurisdiction of the Tribunal, while dealing with an application for approval, under Section 33 of the Act, is limited to considering whether a *prima facie* case has been made out, for dismissal of the employee, subject to the enquiry being proper, and the dismissal of the employee not amounting to victimization or unfair labour practice.
- (c) In dealing with an application under Section 33 of the Act, the Tribunal does not have the power to consider the propriety or adequacy of the proposed punishment.
- (d) Grant of permission/approval, under Section 33 of the Act is not, however, the end of the matter; *neither does it validate the order of dismissal*. It merely removes the ban on dismissal/removal. *The validity of the order of dismissal is still open to challenge by way of an industrial dispute. Such an industrial dispute, if raised, has to be scrutinized*

by the Tribunal independently. This position, it was noted, stood settled in several earlier decisions, including *Atherton West & Co. Ltd v Suti Mills Mazdoor Union*, (1953) SCR 780, *Automobile Products of India Ltd v Rukmaji Bala*, (1955) 1 SCR 1241 and *Laxmi Devi Sugar Mills Ltd v Pt Ram Sarup*, (1956) SCR 916. To the same effect, it may be noted, are the later decisions in *Remington Rand of India Ltd v Thiru R. Jambulingam*, (1975) 3 SCC 254, *Dharampal v National Engineering Industries Ltd*, (2001) 10 SCC 40 and *Cholan Roadways Ltd v G. Thirugnanasambandam*, (2005) 3 SCC 241. The obvious corollary, to this, would be that grant of approval, to the dismissal of an employee, under Section 33(2)(b) of the Act, would not, *ipso facto*, validate the dismissal, and it would always be open to the employee to establish, in the proceedings initiated at his instance under Section 10, that the dismissal was illegal or unjustified. If, therefore, such a dispute was pending before the Labour Court, the Labour Court was bound to decide the said dispute on merits, independent of its decision to grant approval to the decision to remove the petitioner from service. Quite clearly, this has not

been done, by the Labour Court, in the present case.

- (e) The peripheries of jurisdiction of the Court, in dealing with an industrial dispute raised under Section 10 of the Act, also stood crystallised in, *inter alia*, the decisions in ***Indian Iron and Steel Company Ltd v Workmen, (1958) SCR 667*** and ***G. McKenzie & Co. Ltd v Its Workmen, (1959) 1 LLJ 285***, as being limited to cases in which
- (i) no proper enquiry has been held, or
 - (ii) there is want of good faith, or
 - (iii) there is victimisation, or
 - (iv) there is unfair labour practice, or
 - (v) the management is guilty of a basic error, or
 - (vi) there has been violation of the principles of natural Justice, or
 - (vii) the finding of the management is completely baseless or perverse, or
 - (viii) the findings against the employee travel beyond the allegations in the chargesheet issued to him or her.

It was emphasised that, in exercising jurisdiction on an industrial dispute referred under Section 10 of the Act, the court does not sit in appeal over the decision of the management, or substitute its own judgment for that of the management.

- (ii) ***Management of Ritz Theatre (Pvt) Ltd v Workmen, AIR 1963 SC 295*** expounded the law thus:

“In enquiries of this kind, the first question which the Tribunal has to consider is whether a proper enquiry has been held or not. Logically, it is only where the Tribunal is satisfied that a proper enquiry has not been held or that the enquiry having been held properly the findings recorded at such an enquiry are perverse, that the Tribunal derives jurisdiction to deal with the merits of the dispute. It is quite conceivable, and in fact it happens in many cases, that the employer may rely on the enquiry in the first instance and alternatively and without prejudice to his plea that the enquiry is proper and binding, may seek to lead additional evidence. It would, we think, be unfair to hold that merely by adopting such a course, the employer gives up his plea that the enquiry was proper and that the Tribunal should not go into the merits of the dispute for itself. If the view taken by the Tribunal was held to be correct, it would lead to this anomaly that the employer would be precluded from justifying the dismissal of his employee by leading additional evidence unless he takes the risk of inviting the Tribunal to deal with the merits for itself, because as soon as he asks for permission to lead additional evidence, it would follow that he gives up his stand based on the holding of the domestic enquiry. Otherwise, it may have to be held that in all such cases no evidence should be led on the merits unless the issue about the

enquiry is tried as a preliminary issue. If the finding on that preliminary issue is in favour of the employer, then, no additional evidence need be cited by the employer; if the finding on the said issue is against him, permission will have to be given to the employer to cite additional evidence. Instead of following such an elaborate and somewhat cumbersome procedure, if the employer seeks to lead evidence in addition to the evidence adduced at the departmental enquiry and the employees are also given an opportunity to lead additional evidence, it would be open to the Tribunal first to consider the preliminary issue and then to proceed to deal with the merits in case the preliminary issue is decided against the employer. That, in our opinion, is the true and correct legal position in this matter.
(Emphasis supplied)

(iii) ***Bengal Bhatdee Coal Co. Ltd v Ram Probesh Singh, AIR 1964 SC 486***

- (a) The Constitution Bench of the Supreme Court (speaking through *K. N. Wanchoo, J.*, as His Lordship then was) was, in this case, concerned only with the interpretation of Section 10 of the Act, and the scope and ambit of the jurisdiction of the Labour Court/Industrial Tribunal, while adjudicating upon a reference made under the said provision, and the decision may justifiably be regarded as an early authority thereon.

- (b) 13 workmen were, in this case, chargesheeted for physically obstructing others from performing their duties. The Welfare Officer, who enquired into the matter, found all the workman guilty and recommended their dismissal. As a reference, involving the said workmen, was pending before the Industrial Tribunal, an application, under Section 33(2)(b) of the Act, for approval of the decision to dismiss the said 13 workmen, was filed by the Management. *Approval, as sought, was granted by the Industrial Tribunal, and the workmen did not contest the matter further.* They, however, raised an industrial dispute, resulting in a reference under Section 10 of the Act. The Industrial Tribunal held the enquiry to be proper (which, as the Supreme Court itself noticed, was a foregone conclusion, in view of the decision already taken on the application of the management under Section 33(2)(b) of the Act), but, nevertheless, set aside the order of dismissal, and directed reinstatement of the workmen, on the ground that it was a case of victimisation.
- (c) The Supreme Court unequivocally spelt out the parameters within which jurisdiction could be exercised, in a reference under Section 10 of the Act, in the following words:

“The tribunal was not unaware of the fact that where a domestic enquiry is held properly, the tribunal does not sit in appeal on the findings of the domestic Tribunal and it can only interfere with the punishment inflicted as a result of the domestic inquiry where there is want of good faith or basic violation of the principles of natural Justice, or where the findings are perverse or baseless or the case is one of victimisation or unfair labour practice.”

The following circumstances, in which the Industrial Tribunal/Labour Court, exercising jurisdiction in a reference under Section 10, could act, thereby, stand clearly delineated in this decision:

- (i) where there is want of good faith, or
- (ii) where the principles of natural justice are violated, or
- (iii) where the findings are perverse, or baseless, or
- (iv) the case is one of victimisation, or
- (v) there has been unfair labour practice.

On facts, the Supreme Court found, in this case, that there was no evidence of victimisation. That finding, however, does not constitute any part of the law laid down by the Constitution Bench,

within the meaning of Article 141 of the Constitution of India, and need not, therefore, detain this judgment.

- (iv) ***The Hindustan General Electrical Corpn Ltd v Bishwanath Prasad, (1971) 2 SCC 605***

This decision is relevant to the extent it holds that contravention, by the management, of Section 33 of the Act, in the matter of dismissal of an employee from service, would not, *ipso facto*, invalidate the order of dismissal. It is open to the management to justify the order of dismissal, in the industrial dispute before the Tribunal, and the Tribunal would be obliged to examine whether, on facts, the dismissal of the employee was justified or not.

- (v) ***Workmen of the Motipur Sugar Factory Pvt Ltd v The Motipur Sugar Factory, AIR 1965 SC 1083***

This decision, by a bench of four learned judges of the Supreme Court, is significant as an authority for the proposition that, even where no enquiry, or a defective enquiry, is held before the employee is dismissed, that would not, by itself, invalidate the order of dismissal, and it was always open to the management to establish, in the industrial dispute, before the Tribunal, that the

circumstances of the case warranted dismissal of the employee. In such a case, the important distinction would be that the jurisdiction of the Tribunal would not be limited or circumscribed, as it would be in cases where a valid enquiry was held before dismissing the employee. Rather, the Tribunal would have, as it were, before it, a *tabula rasa*, and could examine, as an original authority, whether, on facts, dismissal of the employee was merited. This decision need not detain the present judgment any longer, as, in the present case, the enquiry was found to have been conducted validly and properly.

(vi) ***M/s Bharat Iron Works v Bhagubhai Balubhai Patel, (1976) 1 SCC 518***

The opening paragraphs of this judgment (as expostulated by P.K. Goswami, J., speaking for a 3-judge bench) constitute, arguably, the clearest exposition of the law relating to Section 33 of the Act. Any attempt at paraphrasing the same is likely to imperil their efficacy and effect. They, therefore, are reproduced, *in extenso*, thus:

“ *In a long line of decisions of this Court the ambit of Section 33, Industrial Disputes Act, 1947, is now well-established. There is also no difference in principle of the law applicable to a case under Section 10,*

Industrial Disputes Act and that under Section 33. To put it clearly, it is this.

2. *When an application under Section 33 whether for approval or for permission is made to a tribunal it has initially a limited jurisdiction only to see whether a prima facie case is made out in respect of the misconduct charged. This is, however, the position only when the domestic enquiry preceding the order of dismissal is free from any defect, that is to say, free from the vice of violation of the principles of natural justice. If on the other hand, there is violation of the principles of natural justice, the Tribunal will then give opportunity to the employer to produce evidence, if any, and also to the workman to rebut it if he so chooses. In the latter event the Tribunal will be entitled to arrive at its own conclusion on merits on the evidence produced before it with regard to the proof of the misconduct charged, and the tribunal, then, will not be confined merely to consider whether a prima facie case is established against the employee. In other words, in such an event, the employer's findings in the domestic enquiry will lapse and these will be substituted by the independent conclusions of the Tribunal on merits.*
3. *There is a two-fold approach to the problem and if lost sight of, it may*

result in some confusion. Firstly, in a case where there is no defect in procedure in the course of a domestic enquiry into the charges for misconduct against an employee, the Tribunal can interfere with an order of dismissal on one or other of the following conditions:

(1) If there is no legal evidence at all recorded in the domestic enquiry against the concerned employee with reference to the charge or if no reasonable person can arrive at a conclusion of guilt on the charge levelled against the employee on the evidence recorded against him in the domestic enquiry. This is what is known as a perverse finding.

(2) Even if there is some legal evidence in the domestic enquiry but there is no prima facie case of guilt made out against the person charged for the offence even on the basis that the evidence so recorded is reliable. Such a case may overlap to some extent with the second part of the Condition 1 above. A prima facie case is not, as in a criminal case, a case proved to the hilt.

4. It must be made clear in following the above principles, one or the other, as

may be applicable in a particular case, the tribunal does not sit as a court of appeal, weighing or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is, in order to find out either whether there is a prima facie case or if the findings are perverse.

5. Secondly, in the same case i.e. where there is no failure of the principles of natural justice in the course of domestic enquiry, if the Tribunal finds that dismissal of an employee is by way of victimisation or unfair labour practice, it will then have complete to interfere with the order of dismissal passed in the domestic enquiry. In that event the fact that there is no violation of the principles of natural justice in the course of the domestic enquiry will absolutely lose its importance or efficiency.
6. Whether and under what facts and circumstances a tribunal will accept the plea of victimisation against the employer will depend upon its judicial discretion.” (Emphasis supplied)

Thus,

- (i) if the enquiry against the workman has proceeded in accordance with law and in compliance with the principles of natural justice, the jurisdiction of the

Tribunal, exercising powers under Section 33 of the Act, is limited to seeing whether a *prima facie* case, of commission of misconduct, is made out.

- (ii) It is only where there is violation of principles of natural justice, that the Tribunal would permit the employer to produce evidence, and the workman to rebut the same. In such an event, the Tribunal would be entitled to examine the evidence and arrive at its own conclusion on merits [subject to (iii) hereinbelow], and would not be limited to examining the issue from a *prima facie* angle alone. The said findings, of the Tribunal, would, in that case, prevail over the decision of the employer.
- (iii) In cases covered by (ii) above, the Tribunal does not sit in appeal over the decision of the employer, re-appreciating the evidence in its entirety. Even in such a case, the Tribunal would be justified in interfering with the decision on the employer only if
 - (a) the case is one of no evidence, or
 - (b) the conclusion, in enquiry, is perverse, so that no reasonable person could arrive at such conclusion on the evidence available on record, or

- (c) though some evidence exists, it does not make out a case of *prima facie* guilt, on the part of the employee, in respect of the offence alleged, or
- (d) the case discloses victimisation of the employee by the employer.

The judgment, thereafter, proposes, in detail, to examine the concept of “victimisation”, in the case of domestic enquiries, and may rightfully be regarded as an authority on the issue. However, as no issue of victimisation arises in the present case, this judgment need not be burdened with any discussion thereon. The above principles stand reiterated, recently, in ***Management of Karur Vysya Bank Ltd v S. Balakrishnan, (2016) 12 SCC 221***, which holds the law enunciated in the following passage in ***Pure Drinks (P) Ltd v Kirat Singh Maungatt, (1961) 2 LLJ 99 (SC)***, more than half a century ago, to be holding the field even today:

“It is plain that the Tribunal has exceeded its jurisdiction in making the order of reinstatement under appeal. The jurisdiction of an Industrial Tribunal in dealing with industrial disputes of this character is of a limited character. The limits of the said jurisdiction have been expressly laid down by this Court on several occasions in the past. In dealing with an industrial dispute arising out of dismissal or termination of service the Industrial Court is entitled to

enquire whether the impugned order has been passed mala fide and with improper motive or is the result of a desire to victimise the workman. If the answer to this question is in favour of the workman the Tribunal can and should set aside the said order. If a proper charge has been framed and a proper enquiry has been held by the employer the Industrial Tribunal can interfere with the findings or conclusions reached by the enquiry officer at the domestic enquiry if, for instance, the conclusion is perverse and is not supported by any evidence. Similarly, if the trial has been conducted unfairly in violation of the principles of natural justice interference by the Industrial Tribunal would be justified; but, it is not open to an Industrial Tribunal to sit in appeal over the conclusions of fact recorded by the domestic enquiry, and that is precisely what the Tribunal has purported to do in the present case. It has elaborately examined the evidence adduced in the case considered the probabilities, examined the reliability of the two rival versions and has come to the conclusion that the version of the workman should be preferred to that of the employer; and that clearly would be open only to a court of appeal on facts. Therefore, there is an obvious infirmity in the approach adopted by the Tribunal in dealing with the present dispute and that infirmity has vitiated its final order.”
(Emphasis supplied)

(vii) ***Management of Tamil Nadu State Transport Corporation (Coimbatore) Ltd v M. Chandrasekaran, (2016) 16 SCC 16:***

This decision is, again, of considerable significance insofar as the issue being considered by me, is concerned. The respondent-workman in this case, was – somewhat like the petitioner in the present matter – employed as a driver with the appellant. Disciplinary enquiry was instituted, against him, on the charge of driving the bus in a rash and negligent manner. The charge was found proved in the enquiry that followed, resulting in the inevitable order of dismissal from service, passed by the disciplinary authority. The petitioner before the Supreme Court (i.e. the management) submitted an application, before the Labour Commissioner, under Section 33(2)(b) of the Act, for approval of the decision to dismiss the workman from service as there was, at the time, an industrial dispute, involving the workman, pending for conciliation before him. The Commissioner found that the enquiry, against the workman, had been conducted in accordance with the principles of natural justice and in conformity with the applicable Standing Orders. However, on merits, the Commissioner found that the evidence on record could, by no standard, be said to substantiate the charges framed against the workman, and that the decision of the IO, to the contrary, relying merely

on the evidence of two persons who were not eyewitnesses, was perverse. For this reason, the Commissioner refused to accord approval, under Section 33(2)(b) of the Act, for dismissing the workman from service. Writ petitions were preferred, before the High Court, by the management as well as by the workman, with the management, needless to say, challenging the decision of the Commissioner, and the workman praying for enforcement thereof and consequent reinstatement in service with back wages. The learned Single Judge, in the High Court, agreed with the decision of the Commissioner and, consequently, dismissed the writ petition preferred by the management and allowed the writ petition of the workman. This decision of the learned Single Judge was affirmed, in appeal, by the Division Bench, paving the path to the Supreme Court in SLP, which was subsequently converted into a Civil Appeal and decided. Without reproducing, in extenso, the words contained in the judgment, it would be sufficient to state that, in para 12 of the report, the Supreme Court clearly holds that “*the jurisdiction under Section 33(2)(b) of the Act is a limited one*” and “*cannot be equated with that of the jurisdiction under Section 10 of the Industrial Disputes Act*”. The para proceeds, thereafter, to reproduce the dictum, in ***Cholan Roadways (supra)***, to the effect that “*if the permission or approval is granted,*

the order of discharge or dismissal which may be passed against the delinquent employee would be liable to be challenged in an appropriate proceeding before the Industrial Tribunal in terms of the provision of the Industrial Disputes Act.” The right, of the workman to challenge the decision, of the disciplinary authority to dismiss or remove him from service, as well as the justness and propriety thereof, was further reiterated in para 16 of the report. This principle stands reiterated, albeit somewhat obliquely, in what is probably the most recent authority on the point, ***Managing Director, NEKRTC v Shivasharanappa***, decided by a three-judge bench of the Supreme Court on the 1st of August 2017 and reported in ***MANU/SC/1233/2017***, by holding that non-application, for approval of the order dismissing the employee, under Section 33(2)(b) of the Act. “*could not have authorized the High Court to interfere with the punishment imposed without an adjudication on the validity of the dismissal*”.

22. Wading through the above decisions, the following clear principles emerge:

- (i) Section 33 (1) of the Act proscribes the management from dismissing, or removing, from service, an employee vis-à-vis whom it already has, pending, an industrial

dispute, at whatever stage. Any order by the management, to the said effect, is still-born.

- (ii) Life may, however, be infused into such an order/decision, by obtaining the approval, thereto, of the court/Tribunal/other authority before whom the industrial dispute is pending, by applying, therefor, under Section 33(2)(b) of the Act. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of the employer and employee relationship from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. The relationship between the employer and employee comes to an end *de jure* only when the authority grants approval.
- (iii) The authority adjudicating such an application, if made, is *not*, therefore, pronouncing on the merits of the allegation against the employee. Its brief is limited to deciding whether the circumstances are such as would warrant relaxation of the proscription, against issuance of the order of dismissal/removal, contained in Section 33 (1) of the Act. In doing so, the authority/court/Tribunal is required, in the first instance, to examine whether the enquiry has been fairly, validly and properly held, in due compliance with the principles of natural justice.

- (iv) Even if it is found that the enquiry has *not* proceeded in accordance with the principles of natural justice, the authority/court/Tribunal is not empowered, on that sole ground, to deny approval to the decision to dismiss/removed the workman. Rather, it is required to afford the management an opportunity to lead evidence to demonstrate the legitimacy of its action, and the workman is also afforded an opportunity to rebut the same. The authority/court/Tribunal, then, adjudicates the matter unfettered by the limitations otherwise cast on it by Section 33 (2)(b), by examining, on merits, whether the case warrants dismissal/removal. Such examination is not limited to a *prima facie* evaluation. However, even while doing so, the court/Tribunal does not sit in appeal over the decision of the management, but is entitled to interfere with the order of dismissal/removal only.
- (a) if there is no legal evidence, at all, against the employee, with reference to the charge against him, or
 - (b) if no reasonable person can arrive at a conclusion of guilt, on the basis of the evidence available on record, i.e., if the decision of the management is perverse, or

- (c) if there is some legal evidence, but no *prima facie* case, of guilt, on the part of the charged employee, is made out on the basis thereof.
- (v) If, however, it is seen that the enquiry has been validly held, the authority/court/Tribunal, thereafter, has to satisfy itself that
 - (a) a *prima facie* case, warranting dismissal/removal of the employee from service, is made out, and
 - (b) the employee is not being victimised or subjected to any unfair labour practice.

If the dismissal/removal of the employee clears these two hurdles, approval, of the order of dismissal/removal, would be accorded; else, it would not. The authority/court/Tribunal, considering the application under Section 33 (2)(b) of the Act does not, therefore, possess the jurisdiction to consider the propriety or adequacy of the punishment imposed on the employee.

- (vi) Inasmuch as the decision on an application, moved by the management under Section 33(2)(b) of the Act, is not a pronouncement on the merits of the action taken against the employee, grant of approval, thereunder, does not validate the said action. At the cost of repetition, it may be emphasised that grant of approval, under Section 33(2)(b) of the Act, merely “lifts the ban”, on passing the

order of punishment, which is otherwise imposed by Section 33(1).

- (vii) Grant of approval, by the authority/court/Tribunal, to the dismissal/removal of the employee, does not, therefore, preclude the employee from challenging the merits of the said decision by raising an industrial dispute under Section 10 of the Act. In the alternative, the employee may challenge the order of approval, by moving an application under Section 33A. Such an application, if moved, is also to be adjudicated as if it were a reference under Section 10.
- (viii) If an industrial dispute is raised, by the employee, either directly under Section 10, or by a side-wind, as it were, by way of an application under Section 33A, the principles governing adjudication of such dispute would immediately apply. The court/Tribunal adjudicating such an industrial dispute, has to do so independently of the decision to grant approval to the order of dismissal/removal, unfettered and uninfluenced by the considerations which operated at that stage.
- (ix) Having said that, the jurisdiction of the court/Tribunal, adjudicating the industrial dispute, challenging the dismissal/removal of the workman, does not extend to

sitting in appeal over the said decision. The court/Tribunal cannot, while adjudicating such dispute, re-appreciate the evidence, or interfere with the decision of the management to dismiss/remove the employee from service merely because, in its opinion, another view is possible. The court/Tribunal is not entitled to substitute its own view for that of the management, but has to limit its interference to cases in which

- (a) no proper enquiry has been held, or
- (b) there is want of good faith, or
- (c) there is victimisation, or
- (d) there is unfair labour practice, or
- (e) the management is guilty of a basic error, or
- (f) there has been violation of the principles of natural Justice, or
- (g) the finding of the management is completely baseless or perverse, or
- (h) the findings against the employee travel beyond the allegations in the chargesheet issued to him or her.

23. It is plainly obvious that the impugned order, dated 5th April 2004, infracts the above principles. In the first place, as rightly pointed out by Mr K.C. Dubey appearing for the petitioner, the scope and ambit of proceedings under Section 33(2)(b), and Section 10/11A of the Act, are fundamentally different, and the

considerations which weigh with the court, in each case, are distinct from the other. *Proceedings under Section 33 (2)(b), and Section 11A, of the Act, can, therefore, never be clubbed.* There has to be independent application of mind to the request for approval, in one case, and the challenge by way of an industrial dispute, in the other, in strict compliance with the guidelines culled out hereinabove, which have emerged from the pronouncements of the Supreme Court and, therefore, constitute “law declared” under Article 141 of the Constitution of India. In the present case, the proceedings under Section 33(2)(b) and Section 10, of the Act, have, from the beginning, remained clubbed, and are, therefore, vitiated *ab initio*.

24. The Labour Court has limited its exercise to adjudication of the application for approval, under Section 33(2)(b) of the Act. There has been no adjudication, whatsoever, of the industrial dispute raised by the petitioner-workman, which was also at large before the Labour Court. The Labour Court has contented itself with granting approval to the order of removal of the petitioner from service, apparently in ignorance of the legal position that grant of such approval did not end the matter, and the industrial dispute, raised by the workman, was required to be independently decided. The requirement of such an independent decision, by itself, predicates separate adjudication of the application under Section 33(2)(b), and the industrial dispute raised under Section 10.

25. I am not entering into the merits of the decision to grant approval to the order of dismissal/removal, as such approval was, in any case, granted, and the petitioner remained away from service thereafter. It is not possible to unwind that clock at this stage. In any event, the parameters of judicial examination, while dealing with the industrial dispute under Section 10 of the Act, are, as already noted hereinbefore, much wider than the scope of evaluation while dealing with the application under Section 33(2)(b), and the former has to proceed independent of, and uninfluenced by, the latter. As such, any expression of opinion, on the decision to grant approval to the order of dismissal/removal would, at this stage, and after this lapse of time, be reduced to a mere academic exercise which, it is trite, is not to be undertaken under Article 226/227 of the Constitution of India.
26. The inevitable sequitur, to the above discussion, would be that the orders, dated 23rd of February 2004 and 5th April 2004, would be required to be quashed, and the matter remitted to the Labour Court, to be decided *de novo*, from the stage at which it was prior to the passing of the order dated 23rd of February 2004, on the preliminary issues raised in OP 35/1990 and ID 147/1991.
27. The preliminary issues raised in OP 35/1990 and ID 147/1991 being essentially the same, it may be possible to argue that the

order, dated 23rd February 2004 may be allowed to stand, as it adjudicates only the said preliminary issue. That, however, is unfortunately not the position. In my considered opinion, the Labour Court has, even while purportedly adjudicating the preliminary issues referred to it in OP 35/1990 and ID 147/1991, *vide* the order dated 23rd of February 2004, travelled outside the boundaries thereof. The scope of enquiry, by the Labour Court, while adjudicating the said preliminary issues, was only to decide whether the domestic inquiry, held against the petitioner-workman, was proper and fair. The Labour Court was not at that stage entitled to pronounce, even *prima facie*, on the sustainability of the charges against the petitioner, or the legitimacy of the decision, of the management, to remove him from service on that ground. In endorsing the finding of guilt, arrived at by the respondent against the petitioner, therefore, the Labour Court, in my view, acted in excess of the jurisdiction vested in it at that stage, which was limited to examining the preliminary issues referred to it for decision.

28. The paradoxical consequence resulting from this fundamental error, committed by the Labour Court, is apparent from the separate order sheet, of the same date recorded by the Labour Court which, after holding that “*enquiry issue is decided in favour of the NGT and against the workman*”, directed that the “*file be put up for evidence, if any, and for arguments on reference/approval petition on 04th March, 2004*”.

29. In the first place, it was not entirely correct, on the part of the Labour Court, hold that the “enquiry issue” had been decided by it, against the workman and in favour of the management. The brief of the Labour Court was only to adjudicate on the preliminary issues raised before it, which pertained to the propriety and fairness of the enquiry, and not the merits of the findings therein. It could not, therefore, be said that “enquiry issue” stood decided by the order dated 23rd February, 2004.
30. Secondly, if, in the perception of the Labour Court, it had actually decided the “enquiry issue”, there was no sense in directing the file to be put up for evidence. Examination of evidence after deciding the enquiry issue would amount to placing the cart before the horse. In actual fact, the Labour Court was only to decide the preliminary issue and, having found the inquiry to have been conducted in a proper and fair manner, the case should have been listed for consideration of evidence and arriving at a finding on the merits of the decision, of the management, to dismiss the petitioner, by adjudicating the industrial dispute arise by him.
31. Thirdly, the Labour Court has again erred by directing the file be put up for arguments on the *reference/approval petition*. The reference petition and approval petition were different and distinct proceedings, and it was not open to the Labour Court to club the same. Arguments on the application of the management seeking approval and the reference petition of the workman had

to be separately addressed and separately considered. In fact, in view of the law emerging from the decisions already cited hereinabove, the occasion for hearing the arguments, on the reference petition would normally arise only where approval was granted, under Section 33(2)(b) of the Act.

32. As the Labour Court has adopted a procedure which is contrary, not only to the statute, but also to the law that stands crystallized, by a wealth of judicial authority, the impugned orders dated 23rd February, 2004 and 05th April, 2004 stand fatally imperilled.
33. In all such instances, where cases reach for decision after lapse of several years, the court always walks the thin edge of the precipice, while deciding whether to remand the matter, or put a quietus to the controversy by adopting some ingenious *via media*. In this case, however, as the petitioner and respondent are both represented, and have contested their respective stands with due emphasis, I am not inclined to don the mantle of the Labour Court. A request, to the Labour Court, to re-examine the matter in accordance with the principles adumbrated hereinabove, within a time-bound frame, would, in my opinion, be a wholesome course of action to pursue, and would satisfy the cause of justice.

34. The admissibility of such a cause of action would also seem to be vouchsafed by para 21 of the judgment of a Division Bench of this Court in **Vijay Kumar** (supra), which reads thus:

“Moreover, the judgment of the learned single Judge has also to be set aside on the ground that even if he was of the opinion that the application of the management under Section 33(2)(b) was wrongly rejected, he could have only remanded the matter to the Tribunal, and he could not have himself granted the approval. It is well settled that the High Court cannot take over the function of the statutory authorities under an Act, vide G. Veerappa Pillai, Proprietor, Sathi Vihar Bus Service Porayar, Tanjore District, Madras v. Raman and Raman Ltd. Kumbakonam, Tanjore District and Ors. , State of U.P. v. Section Officer Brotherhood and Anr. , U.P. State Road Transport Corporation and Anr. v. Mohd. Ismail and Ors. and State of U.P. and Anr. v. Raja Ram Jaiswal and Anr. (1985) 2 SCC 131”

35. Resultantly, the present writ petition is disposed of as under:

- (i) The impugned orders, dated 23rd February 2004, and 5th April 2004, passed by the Labour Court, are quashed and set aside.
- (ii) The Labour Court is directed to adjudicate the industrial dispute raised by the petitioner-workman, i.e. ID 147/1991, *de novo*, uninfluenced by the findings contained in the orders dated 23rd February 2004 and 5th April 2004.
- (iii) In doing so, the Labour Court would be guided by the principles set out in para 21 hereinabove, to the extent they are applicable and relevant.

- (iv) In order to ensure that complete justice is done to petitioner as well as respondent, this court refrains from making any observations, tentative or otherwise, on the merits of the rival contentions, whether on the aspect of the legitimacy of the enquiry proceedings and the manner in which they were conducted, or on the sustainability of the charges against the petitioner, and the consequent decision, by the respondent, to remove him from service.
- (v) In view of the time that has already been spent, in the present proceedings before this court, the Labour Court is requested to pass a final order, on ID 147/1991, as expeditiously as possible and, in any event, not later than four months from the date of pronouncement of the present judgment.
- (vi) Both parties would, needless to say, be entitled to challenge the said decision of the Labour Court, if they are aggrieved thereby.

36. In view of the fact that a time-bound remand of the matter is being directed, I refrain from passing any order as to costs.

**C. HARI SHANKAR
(JUDGE)**

OCTOBER 12, 2017
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