

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10459 of 1999

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Bihar State Road Transport Corporation through its Chairman-cum-Managing
Director, Paribahan Bhawan, Virchand Patel Road, Patna

.... Petitioner/s

Versus

1. The State of Bihar
2. The Presiding Officer, Industrial Tribunal, Patna.
3. Sri Nageshwar Jha, son of late Punit Lal Jha, resident of village-Kumaitha,
P.O.+ P.S.-Sultanganj, District-Bhagalpur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. P.K. Verma, Senior Advocate
Mr. Saroj Kumar Sharma, Advocate
For the Respondent-State : Mr. Anujit Sinha, AC to PAAG-2
For the Respondent No.3 : Mr. Sourendra Pandey, Advocate
Mr. Nalin Vilochan Tiwary, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 13-02-2018

Heard learned counsel for the petitioner, learned
counsel for the State and learned counsel for the respondent no.3.

2. In the present writ petition, the petitioner has
challenged the award dated 8th March, 1994 passed by the Presiding
Officer, Industrial Tribunal, Patna in Misc. Case No.26 of 1990 by
which the application under Section 33A of the Industrial Disputes
Act, 1947 (for short 'the Act of 1947') filed by respondent no.3 was
allowed and the petitioner was directed to reinstate him with full



back wages.

3. The brief facts of the case are that respondent no.3 was appointed in 1971 as a Conductor in Jamshedpur Division of Bihar State Road Transport Corporation (for short 'Corporation') and worked as such till 12.11.1986. By an order dated 13.11.1986, he was asked to work as Driver by the Divisional Manager on the same salary and benefit without any extra allowances. On 27.10.1987, he assigned to drive Bus No. BPJ-849 of Baridih Depot on which one Noor Hasan was on duty as conductor from Bhagalpur to Tata. At about 10:30 p.m., the said vehicle met with accident after dashing against a tree at Telodih at a distance of 3 kms from Giridih Depot resulting in injuries to eleven passengers in the bus out of whom one lady passenger died in hospital besides damages caused to the Bus.

4. The respondent no.3 was proceeded against for causing accident to Bus No.BPJ-849. It was alleged that Md. Noor Hassan, Conductor, was driving the bus at the time of accident.

5. In his explanation respondent no.3 stated that it was he who was driving the bus when it met with accident. He also stated that the accident took place due to failure of brake, which he applied to save the bullock carts standing on record.

6. In the disciplinary proceeding, the Disciplinary



Authority, vide order dated 13th August, 1990 held that it was proved that the respondent no.3 was driving the vehicle in a rash and negligent manner with the result that it met with a serious accident. Though, a criminal prosecution was also initiated against respondent no.3 for rash and negligent driving in which he was acquitted of the charges, the Disciplinary Authority held that the acquittal order was passed in the criminal case giving benefit of doubt, as prosecution failed to produce its witnesses. Respondent no.3 was, thus, dismissed from service with immediate effect.

7. It is not in dispute that prior to the order by which the respondent no.3 was dismissed from service, there was a proceeding pending before the Industrial Tribunal between the petitioner and respondent no.3 and others. Since no approval petition was filed, as required under Section 33(2)(b) of the Act of 1947 before the Industrial Tribunal, the respondent no. 3 filed an application under Section 33A of the Act of 1947 complaining against his removal from service by the petitioner during pendency of an industrial dispute before the Industrial Tribunal. After hearing the parties, the learned Presiding Officer, Industrial Tribunal, vide award dated 8th March, 1994 held that since there was no paper to show that the notice pay was made and no approval petition was filed under Section 33(2)(b) of the Act of 1947, the petitioner was



entitled to be reinstated with full back wages.

8. Assailing the said award dated 8th March, 1994, Mr. P.K. Verma, learned Senior advocate appearing for the petitioner submitted that at the time of dismissal from service of respondent no.3, some industrial dispute of general nature regarding drivers and conductors were pending before the Industrial Tribunal, Patna as Reference Case No.5 of 1989. The contention is that though the petitioner ought to have filed an application under Section 33(2)(b) of the Act of 1947 for seeking approval of its action, but due to inadvertence, the same could not be filed. However, the non-filing of the application under Section 33(2)(b) of the Act of 1947 would not entitle the respondent no.3 to file an application under Section 33A of the Act of 1947, as the witnesses examined during the domestic inquiry conducted against the petitioner had fully supported the case that due to rash and negligent driving of the petitioner the accident had taken place. Thus, the Tribunal ought not to have interfered with the order of dismissal. He submitted that the Presiding Officer of the Tribunal has misconstrued the provisions of law and the facts on record while passing the impugned order.

9. *Per contra*, Mr. Sourendra Pandey, learned advocate appearing for the respondent no.3 submitted that in view of the admitted fact that a proceeding was pending before the Tribunal



from before between the parties and no application for approval of the order of dismissal in terms of Section 33(2)(b) of the Act, 1947 was filed by the petitioner before the Tribunal, it will be deemed that the order of dismissal had never been passed. In this regard, he has placed reliance on the Constitution Bench judgment of the Supreme court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma and others [(2002) 2 SCC 244]**. He submitted that even otherwise the writ petition is in the nature of appeal challenging award of the Tribunal and there is no jurisdictional error or any violation of principle of nature justice and the findings of fact arrived at by the Tribunal are neither erroneous nor perverse. He submitted that both in the domestic inquiry as well as before the Tribunal, the respondent no.3 had produced cogent evidence in order to support his defence that the alleged accident took place not on account of any negligence in driving, but due to failure of brake.

10. Mr. Anujit Sinha, learned Assistant Counsel to Principal Additional Advocate General-2 appearing for the State has supported the submissions made by the learned advocate appearing on behalf of the respondent no.3. He submitted that no question of law is involved in the present writ petition and the findings arrived at by the Tribunal are based on the evidences adduced in the quasi-judicial proceeding. He submitted that the writ petition has been



filed by the petitioner like an appeal and in view of limited scope of judicial review, the same is fit to be dismissed.

11. I have heard learned counsel for the parties and perused the record.

12. I find force in the submissions made by the learned counsel for the respondent no.3.

13. On appreciation of evidences adduced on behalf of the parties, the learned Tribunal recorded its findings as under:-

“5. Before the Tribunal, two witnesses one on behalf of the petitioner i.e. petitioner himself and the enquiry officer for the corporation was examined. Besides the evidence, parties have relied the papers failed on their behalf. There is no controversy that the order of dismissal was passed on the charge of dereliction of duty which accounts terms conduct as per the standing orders. It is also not in dispute that the main reporting officer Rabindra Singh the then Divisional Manager was not examined and that after the order of dismissal, no approval petition was filed as required U/S 33(2) (b) of the act before the Tribunal although the petitioner was a concerned workman. The petitioner’s stand is that although he was dismissed on the charge of misconduct, no



such case was established in as much as there had been clear violation of principles of natural justice for want of a fair enquiry. It appears that the charge against the petitioner (Exts-A and A/1) was that although as per the Lodged sheet he was to function as a Driver, he permitted the conductor, Noor Hassan a learner, to drive the vehicle and the later drive it so rashly and negligently that it met with a serious accident by dashing against a mango tree causing injuries to 11 death one besides considerable damages to the Bus. There was also an allegation against the petitioner that had he performed his assigned duty to Driver this accident could have been avoided. It appears that when the allegation was not substantiated for want of evidence, the authorities shifted their earlier stand and took the view that he (O.P.) was actually driving the Bus and further observed that there might have been some confusion in distinguishing the Driver and the Conductor by the Passengers as both of them were basically conductors it may be pointed out here that by an order dated 24.2.1988 petitioner and many other conductor were appointed as driver on ad-hoc basis and on the particular dates the petitioner was deputed to work as driver in the circumstances, the main charge against the petitioner that on account of his permitting the conductor, a learner, to drive the vehicle, the accident took place was not



established. As stated earlier the case of the petitioner both in his evidence and written explanations was that he was driving the Bus and the authorities also ultimately accepted this position.

7. There is no controversy the Bus met with a serious accident on 27.10.1987 at about 10-30 P.M. at Telodih and on getting this information, the Divisional Manager rushed to the spot and later on, submitted report (Ext-B). The petitioner's case was that the Bus met with an accident on account of failure of brake and not on account of his rash and negligence in driving the Bus in his explanation (Ext-2) the petitioner took plea that at about 10.30 P.M. when he reached near Telodih more (crossing) he noticed three bullock carts loaded with coal in the middle of the road and having seen this as soon as, he used the brake, the said failed and immediately he took turn towards the left side of the Road, when the bus dashed against a road side Mango tree. According to the petitioner, had been not taken this action all cartmen including the bullocks would have been killed and that he had done so in order to save the lives of the Cartmen and the animals. In his evidence also he stated that the accident was on account of failure of brake. It has been brought out in his cross examination that he had checked the brake before the bus had started from Jamshedpur



and there was no defect in the brake upto Bhagalpur but when the bus was returning from Bhagalpur the brake was failed at Telodih. He further stated that brake had failed all of a sudden when the bus was coming down the hill. He also stated that there was a hand brake in the Bus and the function of brake could also be taken from gear, but that was only affective on plain. According to him, he had tried to use the hand brake but it also did not work. Then again, in the departmental proceeding, only two witnesses were examined, one is an Engineer named Mr. Soren and the other was the Depot Superintendent. On the basis of the evidence of these two witnesses, the authorities came to the conclusion that the case of failure of brake was incorrect, but it is significant to note that the M.V.I. who is an expert on this subject was not examined. His report was also not considered by the enquiry officer to find out whether it was a case of failure of brake which would have been very important place of evidence in case of persons nature. From the evidence of the Engineer, which is the sheet anchor by the M.V.I. but even then as stated earlier he was not examined for which no explanation has been given. The Engineer clearly admitted that he could not ascertain as to whether there had been failure of brake as the said portion of the Engine was considerably damaged. It also appears that



reporting officer the Divisional Manager who was a highly placed reasonable officer of the corporation was the first person to arrive at the spot but in spite of not any by his enquiry officers he did not turn up for his evidence to testify the informations given in his report (Ext-1) The before from the evidence and materials on which the authorities had acted no case was established that the accident and on account of rash and negligent driving of the vehicle by the petitioner. In the circumstances, the contention of the petitioner that the enquiry was not fairly conducted as the material witness and papers were withheld and the principles of natural justice had not been followed is fit to be accepted.

8. The charge of removing parts of the damaged bus by the petitioner had also not been proved as it has come in the evidence that he had also received injuries in the accident and was hospitalized.

9. It may not be out of place to mention here that on the same charge of rash and negligent driving, the corporation has failed a case against the petitioner and he was acquitted of the charges.

10. It is true that when the petitioner was removed for misconduct the management was bound to take action in accordance with standing orders, but this has not been done. Besides that, there is no paper to show that the notice pay was made, thus non-payment of wages and non-filing



of the approval petition also constitute contravention of section-33 of the Act. The application U/s 33A of the I.D. Act accordingly held to be maintainable. Section 33 of the I.D. Act speaks of several matters but in the instant case, we are only concerned with the dismissal for misconduct. It is for the corporation to prove the charge of misconduct in accordance with law, which has not been established in this case for the reason discussed in detail above.

11. In the circumstances, both on facts and law the application has to be allowed and it is ordered accordingly. The petitioner is directed to be reinstated with full back wages”.

14. Firstly, there is no dispute to the fact that there was an industrial dispute pending between the employer and employee at the time of dismissal. It is also of salience to note that approval of the action taken by the employer was not taken from the authority before whom the proceeding was pending before dismissing the employee from the service.

15. Section 33 of the Act of 1947 was amended in 1956 permitting the employer to make changes in conditions of service or to discharge or dismiss an employee in relation to matters not concerned with the pending industrial disputes. However, certain



safeguards were provided to the workman.

16. Section 33 (2)(b) of the Act of 1947 reads as under:-

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

(1) x x x xxx xxx

(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) xxx xxx xxx

(b) for any misconduct not connected with the dispute, 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.”



17. The proviso to Section 33(2)(b) clearly states that no 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 employee.

18. Thus, failure to make an application under Section 33(2)(b) of the Act of 1947 would amount to non-compliance with the statutory provisions of the Act.

19. What would be the effect of such non-compliance is no more *res integra*. A Constitution Bench of the Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (supra) held: *“the proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. Moreover, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1), this penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. In other words, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. Taking a view that*



an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute should be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. The protection afforded to a workman under the said provision cannot be taken away otherwise the employer may with impunity discharge or dismiss the employee”.

20. The Constitution Bench while dealing with the situation in case the authority upon making application does not accord approval held: *“if approval is not given, nothing more is required to be done by the employer, as it will have to be deemed that the order of discharge or dismissal had never been passed”.*

21. Keeping in mind ratio laid down by the Constitution Bench of the Supreme court, in **Jaipur Zila Shahkari Bhoomi Vikas Bank Ltd.** (supra), as no application under Section 33(2)(b) seeking approval of the order of dismissal was made before



the Tribunal, it shall be deemed that the order of termination had never been passed. The findings arrived at by the Tribunal on the above issue are just and proper.

22. So far as the charges against the petitioner in disciplinary proceeding are concerned, it would be evident that initially it was alleged that respondent no.3 had assigned the duty of driver to Md. Noor Hassan, a conductor, but when the allegation was not substantiated for want of evidence, the petitioner shifted the earlier stand and took the view that it was respondent no.3, who was actually driving the bus and there might have been some confusion in distinguishing with the driver and conductor. The Tribunal has given a clear finding that even on the basis of evidences, the petitioner failed to prove that the accident took place due to negligence in driving by the respondent no.3.

23. By now, it is well settled position in law that while reviewing the decision of a statutory Tribunal, the writ court ordinarily does not substitute its opinion for the opinion recorded by the Tribunal on appreciation of evidence (oral and documentary). Merely because another view is also possible, it cannot be a ground for the writ court to substitute its view on re-appreciation of evidence. The court of judicial review is not an Appellate Court and the court essentially reviews the decision making process rather than



the decision itself. However, it would always be open to the writ court to interfere with the finding recorded by the Tribunal, if the Tribunal has committed jurisdictional error or committed grave error apparent on the face of record while appreciating the evidence or has acted illegally or improperly and decided the question without giving opportunity of being heard to the party effected by the order or the procedure adopted is opposed to the principle of natural justice.

24. The finding arrived at by the Tribunal on the charges in the disciplinary proceeding is based on correct appreciation of evidence. It does not suffer from any illegality, irrationality or impropriety. There is no error apparent on the face of record. The procedure prescribed in law has duly been followed by the learned Tribunal. The writ petition being devoid of any merit is dismissed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
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