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

WRIT PETITION NO. 3536 OF 2019

Hindustan Organic Chemicals Ltd.

.....Petitioner

V/s.

Deepak Narayan Joshi

.....Respondent

Counsel Mr. R. S. Pai a/w Mr. Kunal Kirpalani, Mr. Vipul Bilve, i/b
Mulla & Mulla & Craigie Blunt and Caroe for the Petitioner
Mr. Hemant Ingle a/w Mr. Damodar Dondge i/b Mr. Prashant Goyal
for respondent no. 1

CORAM : NITIN W. SAMBRE, J.

DATE : AUGUST 5, 2019.

P.C.

On 10/12/2011, respondent-employee was served with charge-sheet alleging misconduct which further followed with his suspension.

2 Based on finding of Inquiry Committee, a show cause notice was issued to respondent-employee.

3 Pursuant to the proviso to Section 33(2)(b) of the Industrial

Order corrected pursuant to speaking to minutes order dated 11/08/2021.

Disputes Act (Hereinafter referred to as 'the Act) since the petitioner requires approval of the authority to issue order of dismissal, on 25/04/2014, an application came to be moved.

4 While dealing with such application for grant of approval to issue order of termination/discharge, the petitioner claimed to have reserved its right to adduce additional evidence justifying on merit, the charge against respondent.

5 The aforesaid application came to be decided by Tribunal against the petitioner vide order impugned dated 31/12/2018. According to the learned counsel for the petitioner, the aforesaid order is not sustainable on the following grounds.

(i) Section 33(2)(b) provides for an additional opportunity to the employer like the petitioner to adduce evidence in support of claim that inquiry conducted was fair and proper. According to him, petitioner-employer having raised such plea before the Tribunal, the least that was expected of the Tribunal was to grant an opportunity

to the petitioner to adduce evidence justifying the claim that inquiry conducted against the respondent-employee is just and proper.

(ii) So as to substantiate the aforesaid contentions, petitioner has placed reliance upon the Judgment of this Court in the matter of **Sanghi Oxygen (Bombay) (Private), Ltd. V/s. Madhav Koderi, Thane and another**¹ particularly paragraph nos. 4,5,7 & 8. The learned counsel then would draw support from the Apex Court Judgment in the matter of **Bharat Forge Co. Ltd. Vs. A. B. Zodge and another**² particularly paragraph 7 which reads thus:

“7. A domestic enquiry may be vitiated either for non-compliance of rules of natural justice or for perversity. Disciplinary Action taken on the basis of a vitiated enquiry does not stand on a better footing than a disciplinary action with no enquiry. The right of the employer to adduce evidence in both the situations is well-recognised. In this connection, reference may be made to the decisions of this Court in Workmen of Motipur Sugar Factory (P) Ltd. v. Motipur Sugar Factory (P) Ltd. [(1965) 2 LLJ 162], State Bank of India v. R.K. Jain [(1972) 4 scc 304], Delhi Cloth General Mill Co. Ltd. v. Ludh Budh Singh [(1972) 1 SCC

¹ [1998 (1) L.L.N. 199]

² [(1996) 4 Supreme Court Cases 374]

595] and **Firestone Tyres Co. [(1973) 1 SCC 813]** . The stage at which the employer should ask for permission to adduce additional evidence to justify the disciplinary action on merits was indicated by this Court in **Delhi Cloth and General Mill's case (supra)**. In **Sankar Chakraborty's case (supra)**, the contention that in every case of **disciplinary action coming before the Tribunal**, the Tribunal as a **matter of law must frame preliminary issue** and proceed to see the validity or otherwise of the enquiry **and then serve a fresh notice on the employer by calling him to adduce further evidence to sustain the charges**. If the employer chooses to do so, by relying on the decision of this Court in the case of **Cooper Engineering Ltd. (1975) 2 LLJ 379**, has not been accepted. The view expressed in **Delhi Cloth Mill's case (supra)** that before the proceedings are closed, an opportunity to adduce evidence would be given if a suitable request for such opportunity is made by the employer to the Tribunal, has been reiterated in **Sankar Chakraborty's case** after observing that **on the question as to the stage as to when leave to adduce further evidence is to be sought for**, the decision of this Court in **Cooper Engineering Ltd. has not overruled the decision of this Court in Delhi Cloth Mill's case**. There is no dispute in the present case that before the closure of the proceedings before the Tribunal, prayer was made by the employer to lead evidence in support of the impugned order of dismissal. Hence, denial of the opportunity to the employer to lead evidence before the

Tribunal in support of the order of dismissal cannot be justified.”

6 As such, in the aforesaid background of position of law, the learned counsel for the petitioner submits that the order impugned in the present petition is not sustainable and is liable to be quashed and set aside directing the Tribunal to permit the petitioner to lead evidence justifying the order of termination.

7 While countering the aforesaid submissions, the learned counsel for the respondent-employee would urge that the fact that pleadings were raised seeking an opportunity to adduce additional evidence in justification of the order of termination, is not in dispute. What is disputed is, stage at which opportunity should have been availed of by the petitioner. According to him, petitioner should have adduced evidence at once when the evidence was recorded in the proceedings on the application seeking approval under Section 32(2)(b) of the Act. He would urge that the Statute or the Judgments which are relied upon by the petitioner are not supporting the

contention of the petitioner. According to him, the petitioners were duty bound to adduce evidence simultaneously justifying the order of dismissal. As such, according to him, the petitioner cannot be permitted to take benefit of his own wrong. So as to substantiate the aforesaid contentions, reliance is placed on the Judgment of the Apex Court in the matter of **Shankar Chakravarti Vs. Britannia Biscuit Comapny Limited**³ particularly paragraph nos. 18, 19 & 20. The learned counsel would further urge that even if in the case in hand, no preliminary issue was framed as regards fairness of the inquiry, still fact remains that the petitioner should have adduced additional evidence justifying the proposed punitive action. He submits that as such, according to him, petition is liable to be dismissed.

8 Considered rival submissions.

9 As parties to the petition have not disputed that in Reference No. CGIT-2/56 of 2011 preferred under Section 33(2)(b), an

3 [1979 (3) SCC 371]

application No. 1/2014 dated 25/04/2014 was moved with a prayer for grant of an opportunity of justifying the action of issuance of termination order on merit.

10 The learned counsel for the petitioner has claimed that after recording findings in negative based on pleadings in the main application under Section 33(2)(b), upon knowledge of same to the employer, opportunity to adduce evidence justifying the order of termination on merit is prescribed. According to him, non framing and answering of a preliminary issue, not granting opportunity of adducing evidence inspite of application seeking permission to that effect moved by the petitioner amounts to denial of opportunity of hearing. There was no occasion for the petitioner to know about the decision of the Tribunal on the issue of approving the action of the petitioner.

11 In the case in hand, there was no occasion to the petitioner to canvass before the Tribunal on the issue of justifying the action of termination on merit. In absence of such an opportunity, the order

passed after denial of opportunity of hearing is required to be accepted.

12 On perusal of the Judgment in the matter of **Sanghi Oxygen** [cited supra] and **Bharat Forge Co. Ltd.** [cited supra] what can be inferred is, the employer is given opportunities at two stages to justify the order of termination; one to justify the action of issuance of termination order based on inquiry and; in case if the Tribunal is not satisfied with the justification of the action of issuance of order of termination, then it is duty bound to give an opportunity to petitioner employer to justify the action of issuance of order of termination on merit. Though at both these stages, parties like the petitioner are permitted to lead evidence, however, at the first stage, evidence is lead only to the extent of justifying the action of issuance of order of termination whereas at the later stage, employer has every right to justify his act of issuing the order of termination based on the oral or documentary evidence independent of findings recorded on the issues.

13 In *Delhi Cloth General Mill Co. Ltd. v. Ludh Budh Singh* [(1972) 1 SCC 1031] the Apex Court in para 62 has summarised the position of employer and the duty of the Court in proceedings under Section 33(2)(b) of the Industrial Disputes Act as under:

62. From the above decisions the following principles broadly emerge:

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference

can be drawn, without anything more, that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management.

However elaborate and cumbersome the procedure may

be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged

misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been available of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo moto the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before

the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act”.

14 The Apex Court has gone to the extent of making an observation that the stage as to when leave to adduce further evidence is to be sought for is, before closure of proceedings. In the present case, though there was such a prayer for grant of leave as observed herein above, the Tribunal has failed to decide the said prayer of the petitioner and has rather proceeded to decide the proceedings against the petitioner thereby causing prejudice.

15 In the aforesaid background, the plea of the respondent that petitioner should have adduced evidence simultaneously for stage one i.e. justifying the inquiry and order of termination thereby seeking permission to terminate the services of the respondent-employee is at all not justifiable.

16 In that view of the matter, the contentions raised by the learned counsel for the respondent are rejected.

16 For the aforesaid reasons, in my opinion, petition needs to be allowed in terms of prayer clause (a).

17 As a consequence of above, proceedings preferred by the petitioner being Approval Application No. CGIT-2/1 of 2014 arising out of Reference No. CGIT-2/56 of 2011 stood restored to file of Central Government Industrial Tribunal-Labour Court, Mumbai before whom parties are directed to appear on 10/02/2020.

18 Considering the fact that proceedings are pending since 2011, it is directed that the Tribunal shall make every endeavour to decide the proceedings as expeditiously as possible and in any case not later than 31/05/2020.

19 Respective learned counsel for the parties assure that they shall co-operate with the Tribunal in expeditious disposal of the matter.

[NITIN W. SAMBRE, J.]

Order corrected pursuant to speaking to minutes order dated 11/08/2021.