

IN THE HIGH COURT AT CALCUTTA

(Constitutional Writ Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Krishna Rao

WPA 8962 of 2003

With

CAN 1 of 2014 (Old No. CAN 1632 of 2014)

West Bengal State Electricity Board & Anr.

Versus

Third Industrial Tribunal & Ors.

Ms. Mitali Bhattacharyya

.....For the petitioners.

Hearing Concluded On : 22.06.2023

Judgment on : 27.07.2023

Krishna Rao, J.:

1. The West Bengal State Electricity Board has filed the present writ application against the order passed by the Judge, Third Industrial Tribunal, West Bengal dated July 30, 2002 wherein the Learned Tribunal held that the Board has failed to establish the case against the respondent no. 2 by producing sufficient evidence before the Tribunal for approval of the action taken by the petitioners.

- 2.** It is found from record that after filing of the present writ application, several attempts were made to serve the copy of the writ application upon the private respondent but the same could not be served and finally as per the direction of this Court, the writ petitioner had published the notice of this case in the English Daily News Paper and filed affidavit of service but in spite of substituted service, none appears on behalf of the private respondent and thus this Court had no option but to proceed with the case in the absence of the private respondent.
- 3.** The private respondent while working as Assistant (Cash) and posted at Gangarampur Group, West Bengal State Electricity Board (herein after referred to as “WBSEB”), an enquiry was initiated against the respondent no.2 on the allegation that the private respondent has defalcated an amount of Rs. 30,603.50/- from the cash of Gangarampur Group E/s. and utilised the said sum for his personal purpose from February 24, 1996 to March 17, 1996 thereby causing loss to the WBSEB. The respondent no. 2 did not deposit the revenue in the Board’s account in full on the same day of collection or the on the next working day and he retained a considerable amount of revenue collection which was not deposited.
- 4.** On June 12, 1997, the Disciplinary Authority has issued a Memorandum to the respondent along with Article of Charges with list of documents and list of witness and directed the respondent no. 2 to submit his reply to the said Memorandum within 30 days from the date of receipt of the same.

5. In reply to the Memorandum, the respondent had accepted the charges by stating that I am agreed with all the charges framed against me as categorically stated in the articles. He further stated that during the related period, the circumstances compelled me to utilise Board's money for my personal purpose. In the reply, the respondent no. 2 has prayed for mercy.
6. Even on acceptance of guilt, the Disciplinary Authority has appointed the Enquiry Officer and the Presenting Officer to enquire into the charges levelled against the respondent. After appointment of the Enquiry Officer, the Enquiry Officer had issued notice to the respondent no. 2 to appear before the Enquiry Officer and on September 22, 1997, the respondent no. 2 had appeared before the Enquiry Officer. The Enquiry Officer had explained the charges levelled against the respondent no. 2 and the respondent no. 2 accepted his guilt before the Enquiry Officer both orally as well as in writing. The acceptance of the guilt recorded in writing in the daily order sheet and the respondent no. 2 has also put his signature in the said order sheet on the same day.
7. As the respondent no. 2 has accepted his guilt orally as well as in writing and accordingly the Enquiry Officer has submitted his findings to the Disciplinary Authority. The Disciplinary Authority on receipt of the enquiry report, had issued show-cause notice to the respondent no. 2 by enclosing the findings of the Enquiry Officer as well as the proposed punishment to the respondent no. 2. On receipt of the show-cause

notice along with findings of the Enquiry Officer, the respondent no.2 has submitted his reply to the Disciplinary Authority.

8. On receipt of the reply, the Disciplinary Authority has passed an order of punishment of removal from service of the respondent no. 2 on December 29, 1998.
9. Since an Industrial Dispute was pending before the Third Industrial Tribunal, Calcutta against the respondent no. 2, an amount equivalent to his one month's wages has been remitted to the respondent no. 2 and matter was placed before the Industrial Tribunal for approval as required under Section 33 (2) (b) of the Industrial Disputes Act, 1947.
10. The learned Tribunal by an order dated July 30, 2002 has not accepted the decision of the Disciplinary Authority and rejected the request for approval of penalty imposed upon the respondent no. 2 which is impugned in the present writ application.
11. The only question in the present writ application is that whether the Learned Tribunal had justified by not accepting the order of punishment issued by the Disciplinary Authority inspite of the fact that the respondent has pleaded guilty before the Enquiry Officer.
12. In order to decide the said issue, it would be appropriate that provisions of Section 33 (2)(b) of the Industrial Disputes Act, 1947 to be quoted below :

“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 before [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 workman 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.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of sub-section (3) shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:

[Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that

any period specified in this sub-section had expired without such proceedings being completed.]"

13. From perusal of the provisions as contained in Section 33(2)(b) of the I.D. Act, 1947 it is evident that Section 33 bars alterations in the conditions of service prejudicial to the workmen concerned in the dispute and disciplinary punishment of discharge or dismissal when either is connected with pendente lite industrial dispute, save with the permission of the authorities before which the proceeding is pending or where the discharge or dismissal is for any misconduct not connected with the pendente lite industrial dispute without the approval of such authority.
14. Section 33(1) shows that provisions of the said sub-section protects the workman concerned in the main dispute which is pending for conciliation or adjudication. Fact of such sub-section (1) is that where condition precedent prescribed by it are satisfied, the employer is preferring from taking any action in regard to matters as specified in Clauses (a) and (b) against the employee concerned, no such dispute without previous express permission in writing by the authority before which the proceeding is pending. Otherwise, in cases falling under sub-section (1) before any action can be taken by the employer to which reference is made by Clauses (a) and (b) he may obtain expression permission by specified authority. Proviso to section 33(2) shows where action is required to be taken by an employer against any of these employees which falls within the scope of clause (b), he can do so

subject to the requirement of the proviso. If the employer intends to discharge or dismiss the workman, an order can be passed by the employer against him provided he has paid such employees wages for one month and he has made an application to the authority before which the proceeding is pending for approval of the action taken by him, these requirements of proviso are to be satisfied by employer on the basis of forming part of the same transaction. It also settled that if approval is concerned, it shall take effect from the date of the order passed by the employer for which approval is sought for. If the Tribunal has not granted order of dismissal or discharge passed by the employer is wholly invalid or inoperative and the employee can legitimately claim to continue to be an employee of the employer notwithstanding the order passed by him dismissing or discharging him. Scope of Section 33(2)(b) has been discussed by Hon'ble Apex Court in the case of ***Tata Iron and Steel Company Ltd. -vs- S. N. Modak*** reported in **1965 (2) LLJ 128**, ***Strawboard Manufacturing Co. Ltd. -vs- Govind*** reported in **AIR 1962 SC 1500**.

15. The issue as to whether fairness of the domestic enquiry can be looked into by the Tribunal while granting approval under Section 33(2)(b) of the Industrial Disputes Act, 1947 or not?, this issue fell for consideration before the Hon'ble Apex Court in the case of ***Tata Oil Mills Co. Ltd. -vs- Its Workmen*** reported in **(1964) 7 SCR 555** and ***W.M. Agnani -vs- Badri Das***, reported in **(1963) 1 LLJ 684**. In the

case of **W.M. Agnani -vs- Badri Das (supra)** the Hon'ble Apex Court held as under:

"It is true that if a domestic enquiry is properly held and the employer terminates the service of his employee, the industrial tribunal dealing with industrial disputes arising out of such dismissal is not authorized to sit in appeal over the findings of the enquiry committee, or to examine the propriety of the ultimate order of dismissal passed by the employer."

16. In the case of **P.H. Kalyani -vs- Air France**, reported in **(1963) 1 LLJ 679**, it has been held by the Hon'ble Apex Court :

"If the inquiry is not defective, the labour court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter, on coming to the conclusion that the employer had bona fide come to the conclusion that the employee was guilty, i.e. there was no unfair labour practice and no victimization, the Labour Court would grant the approval which would related back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective enquiry would still relate back to the date when the order was made."

17. In the case of **Lalla Ram -vs- D.C.M. Chemical Works Ltd.**, reported in **AIR 1978 SC 1004** it has been held by the Hon'ble Apex Court that in proceedings under Section 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to-

(i) *whether a proper domestic enquiry in accordance with the relevant rules, Standing Orders and principles of natural justice has been held;*

(ii) *whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out;*

(iii) *whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee, regard being had to the position settled by the decisions of the Hon'ble Apex Court in the case of Bengal Bhatdee Coal Co, v. Ram Probesh Singh, (1964) 1 SCR 709: AIR 1964 SC 486; Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar, (1961) 1 Lab LJ 511 (SC); Hind Construction & Engineering Co. Ltd. v. Their Workmen, (1965) 2 SCR 83: AIR 1965 SC 917; Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management & Ors, (1973) 3 SCR 587: AIR 1973 SC 1227; and Eastern Electric and Trading Co. v. Baldev Lal, 1975 Lab IC 1435: AIR 1975 SC 1892 that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Industrial Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe, yet an inference of mala fides, may, in certain cases, be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment;*

(iv) *whether the employer has paid or offered to pay wages for one month to the employee;*

(v) *whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will*

grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

- 18.** Thus, in view of the reasons given by the Larger Bench judgment of the Hon'ble Apex Court before the conditions mentioned in proviso to section 33(2)(b) of the I.D. Act, 1947 victimized part is also to be seen while granting approval by the Tribunal. In this connection, reference may be to the judgment rendered by the Calcutta High Court in the case **B. Yallappa -vs- Presiding Officer, Eighth Industrial Tribunal and Others** reported in **(1997) 2 LLJ 1047** needs to be referred wherein it has been held at para-11 which is being quoted herein below:

"Since a point has been raised that the proviso to such Section was not complied with inasmuch as, one month's salary was not paid to the petitioner, the Tribunal is certainly required to decide the question whether such application which has been made by the company was at all maintainable and proviso in respect of the said Section was complied with or not, Before going into such question, the question of examining the validity of the domestic enquiry, therefore cannot arise. I am not oblivious of the position that whether the domestic enquiry is valid or not is also to be examined prima facie for the purpose of granting or refusing (sic.) approval under Section 33(2) of the said Act and to that extent it may be said that such issue is also linked up with the previous question raised by the petitioner. But the learned Judge has erred in holding that the question as to the validity of the domestic enquiry must be decided first, inasmuch as, such a specific question having been raised by the petitioner that the proviso

to the said Section was not complied which pertains to the very maintainability of the application, unless such question is first decided, the question of examining the validity of the enquiry for the purpose of granting or refusing such approval does not arise. If the very application is not maintainable for non-compliance of the proviso, such application is bound to fail as such provisions have been held to be mandatory by the Supreme Court as indicated above."

19. The Hon'ble Apex Court has further considered the scope of Section 33(2)(b) of the Industrial Disputes Act, 1947 by its constitution Bench in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. -vs- Ram Gopal Sharma**, reported in **AIR 2002 SC 643** wherein it has been held that where an application is made under Section 33(3)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer, has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc.
20. After going through these authoritative pronouncements of the Hon'ble Apex Court, the original statute although provides that for getting approval the condition provided in the proviso to Section 33(2)(b), i.e. one month wages and approval from the Tribunal where the reference is pending connected with the workman but the Tribunal is also suppose to see regarding fairness of the enquiry and as to whether order of dismissal has been passed in way of victimization or unfair labour practice.

21. In the present case, this Court perused the disciplinary proceeding initiated against the respondent no. 2. On receipt of the Memorandum along with Article of charges, list of witnesses and list of documents, the respondent no. 2 has submitted his reply on October 16, 1997 which reads as follows :

*“To
The Secretary,
W.B. State Electricity Board,
Bidyut Bhaban,
Calcutta – 700 091.*

*Sub: Reply to show cause in regards to the
charges framed vide Memo No. AS/V-
1225/(1)/1206 dt. 12.06.97.*

Respected Sir,

With due respect, I beg to acknowledge the receipt of memorandum stated above along with the Articles of charges.

In this respect, I beg to inform you that I am agreed with all the charges framed against me as categorically stated in the articles.

In fact Sir, the circumstances appeared during the related period compelled me to utilise Board’s money for my personal purpose and to perform my entrusted jobs during the period for the reasons expressed in my letter dated 20.02.97 in reply to the show cause communicated vide your memo no. AS/V-1225/(1)/214 dt. 01.02.97. The copy of my letter dt. 20.02.97 is enclosed for your kind ready reference.

Under the circumstances, I have got no alternative way but only to approach you sir to excuse me the last time from the charges framed against me so that a poor employee like me one may get the chance to improve himself subsequently to offer his best and faithful services to the Board as well as to live in better way with the members of his family.

It is hoped Sir, you would kindly appreciate the facts expressed by me and excuse me for the last time."

Enclo : As above

Yours faithfully,

Date :

*Hafizuddin Ahamed
Assistant (Cash)
Gangarampur Gr. E/Suply."*

- 22.** Though the respondent no. 2 has accepted his guilt in his reply to the chargesheet, the Disciplinary Authority has appointed the Enquiry Officer and the Presenting Officer to enquire into the matter. The Enquiry Officer had issued notice to the respondent no. 2 to attend the enquiry and the respondent no. 2 had attended the enquiry proceeding on September 22, 1997 and when the Enquiry Officer has explained the charges to the respondent no. 2, the respondent no. 2 has again accepted his guilt before the Enquiry Officer both orally and in writing.

As the respondent no. 2 has accepted his guilt in writing as well as orally, accordingly, the Enquiry Officer after perusing the records submitted report. The Disciplinary Authority has forwarded the enquiry report along with proposed punishment to the respondent no. 2 for his reply and the respondent no. 2 has submitted his reply by accepting his guilty and prayed for mercy.

- 23.** The Judge, Third Industrial Tribunal, Calcutta has not found it fit to give approval of the action taken against the respondent no. 2 on the ground that charge levelled against the respondent no. 2 is vague,

baseless and the conditions for payment of one month's salary was not duly complied with as per the provision of law.

24. The learned Judge, Third Industrial Tribunal has not considered the order of punishment issued by the Disciplinary Authority wherein it is categorically mentioned that "*an amount equivalent to his one month's wages has been remitted to him on December 28, 1998*". It is pertinent to mention here that there is no plea of the respondent no. 2 that the said wages was not paid to the respondent no. 2 by the Authority.
25. As regard to the acceptance of guilt by the respondent no. 2, it was held that unless there is clear admission of his guilt, an enquiry is to be held. The learned Tribunal has not taken into consideration of the guilt accepted by the respondent no. 2 not at one occasion but on two occasions. During the enquiry proceeding, the respondent no. 2 not only orally accepted his guilt but also accepted in writing also when the Enquiry Officer has explained the charges to the the respondent no. 2, the respondent no. 2 has accepted his guilt and the Enquiry Officer has recorded the same in writing wherein the respondent no. 2 has signed the order sheet dated September 22, 1997.
26. It is settled law the admission made by the respondent need not to be proved. In the case reported in ***(2008) 5 SCC 569 (Chairman and Managing Director, VSP and Ors. vs. Goparaju Sri Prabhakara Hari Babu)***, the Hon'ble Supreme Court held that :

“16. *Indisputably, the respondent was a habitual absentee. He in his explanation, in answer to the charge sheet pleaded guilty admitting the charges. In terms of Section 58 of the Evidence Act, charges having been admitted were not required to be proved. It was on that premise that the enquiry proceeding was closed. Before the enquiry officer, he did not submit the explanation that his mother being ill. He, despite opportunities granted to report to duty, did not do it. He failed to explain even his prior conduct.*

17. *In Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, this Court noticing Section 58 of the Evidence Act, held :*

"214. In terms of the aforementioned provision, things admitted need not be proved. In view of the admission of Respondent 1 alone, the issue as regards allotment of 6475 shares should have been answered in favour of the appellants. The company petitioner at a much later stage could not be permitted to take a stand which was contrary to or inconsistent with the original pleadings nor could she be permitted to resile from her admissions contained therein."

18. *It was observed that judicial admissions can be made the foundation of the rights of the parties.*

19. *A subsequent explanation before another authority, which had not been pleaded in the departmental proceedings, cannot by itself a ground to hold that the principles of natural justice had not been complied with in the disciplinary proceedings."*

27. In the present case also the respondent no. 2 has not only in one occasion but in two occasions that is in the reply to the Memorandum wherein article of charges were supplied to the respondent no. 2, he has accepted his guilt and subsequently before the Enquiry Officer when the Enquiry Officer has explained the charges to the respondent no. 2 and the respondent no. 2 has accepted his guilt orally as well as

in writing. Thus the findings of the Learned Tribunal are not sustainable.

28. In view of the above, the order passed by the Learned Judge, Third Labour Tribunal dated 30th July, 2002, is set aside and quashed. The order passed by the Disciplinary Authority is upheld.

29. WPA No. 8962 of 2003 is thus **allowed**. Consequently, **CAN No. 1 of 2014 (Old No CAN No. 1632 of 2014)** is thus **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)