

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 23178 of 2008

**Sri Rabin Kanti Medda
Vs.**

Shellac and Forest Products Export Promotion Council & Ors.

For the petitioner	:	Mr. Bikash Ranjan Neogi Ms. Soma Chakraborty Ms. Ananya Neogi
For the respondents	:	Mr. Arunava Ghosh, Sr. Adv. Mr. Soumya Majumder Mr. Ranojit Talukdar Mr. Victor Chatterjee
Heard on	:	21.03.2023
Judgment on	:	12.09.2023.

Raja Basu Chowdhury, J:

1. The writ petitioner was appointed as a Clerk Grade-II in the office of the Shellac and Forest Products Export Promotion Council, sometimes in the year 1978. On 9th August, 2001, he was promoted as Assistant Grade-II.
2. On 21st April, 2004, the vacancy created by reasons of acceptance of the VRS of Sri Gautam Datta in the post of Laboratory Assistant Grade-II, the petitioner by communication

dated 21st April, 2004, was directed to continue to work in laboratory. In course of employment on 31st March, 2005, the petitioner was served with a charge-sheet and a suspension order, wherein he was designated as a Laboratory Assistant. Subsequently, on 4th April, 2005, an additional charge-sheet was also served on the petitioner.

3. The petitioner duly responded to the charge-sheet by a letter dated 8th April, 2005, and in such reply, he had identified the documents he required to appropriately respond to the charge-sheet. It is the petitioner's case that since, he was not supplied with all relevant documents, he had moved this Hon'ble Court by filing a writ petition which was registered as WP 5449(W) of 2006.
4. By an order dated 29th March, 2006, a Coordinate Bench of this Hon'ble Court by recording that the respondents' advocate despite taking the plea of maintainability of the writ petition, having handed over the entire set of documents as sought for by the petitioner along with a list of witnesses which the prosecution intended to produce in support of their case, without prejudice to his rights had granted liberty to the petitioner to submit a rejoinder within a period of 2 weeks from the date of passing of the said order and upon receipt of the rejoinder, the departmental proceeding would be held in accordance with the Service Rules.

5. The petitioner thereafter, not only responded to the charge sheet but had also participated in the enquiry. After conclusion of enquiry, the report of the enquiry was supplied to the petitioner on 19th December, 2007. It would appear from the enquiry report that the charges against the petitioner stood proved. The petitioner had also submitted a detailed representation to the enquiry report. The Disciplinary Authority thereafter, by a letter dated 19th February, 2008, had issued a second show-cause notice. The petitioner had since, responded to the second show-cause. Following receipt of reply by the petitioner, the Disciplinary Authority passed a Final Order dated 15th April, 2008, thereby dismissing the petitioner from service.
6. Challenging the Final Order as aforesaid, including the enquiry proceeding the writ petition has been filed.
7. Mr. Neogi, learned advocate representing the petitioner, submits that the petitioner was appointed as a Clerk, Grade-II. By referring to the letter of appointment, he submits that although, the petitioner had been appointed as a Clerk, Grade-II, subsequently, the petitioner was promoted, within the Clerical cadre and was placed in Assistant Grade-II. By relying on the Service Rules of 1984 as also of 2007, he says that Assistant Grade-II is a Grade-II post. The petitioner was never appointed as a Laboratory Assistant which is in technical cadre. Although, on the voluntary retirement of Gautam Datta, the petitioner was

directed to continue in the laboratory, however, the vacancy created by Gautam Datta was filled up on 16th December, 2004, when one Kalyan Kumar Mukhopadhyay was appointed as in-charge/Manager of Laboratory which was communicated vide letter dated 2nd March, 2005.

8. By referring to the charge-sheet, he says that the charge-sheet was prepared by designating the petitioner, as Laboratory Assistant Grade-II. Since, the petitioner objected to the recording of his designation as Laboratory Assistant Grade-II and had refused to accept such charge-sheet with the aforesaid designation, the respondents caused the charge-sheet dated 31st March, 2005 to be served on the petitioner by speed post with no designation at all. This was followed by an additional charge-sheet dated 4th April, 2005. Mr. Neogi by drawing attention of this Court to the copy of the enquiry report, submits that the enquiry report also does not bear the designation of the petitioner. By referring to the second show-cause notice, he says that the same also does not bear the designation of the petitioner. The petitioner was never designated as a Laboratory Assistant. The petitioner was only deputed to work in the laboratory and that to for a particular period. The petitioner was also paid allowance for working at the laboratory. Subsequently, such allowance was discontinued and the petitioner had been drawing his salary as an Assistant Grade-II. The petitioner was never designated as a

Laboratory Assistant. Unfortunately, the charge-sheet had been drawn by treating him to be a Laboratory Assistant. The enquiry proceeding was also continued by treating him to be a Laboratory Assistant. The order of dismissal was also affected on him by treating him to be a Laboratory Assistant. As such, the enquiry proceeding including the order of dismissal stands vitiated on the aforesaid ground.

9. It is submitted that in a departmental proceeding, onus lies on the prosecution to prove the charge. By referring to the enquiry report, it is submitted that there is no finding that the petitioner was entrusted with the job of Laboratory Assistant, or to perform the job of Laboratory Assistant. Since, the petitioner was never entrusted with the aforesaid job, the respondents could not have held the petitioner guilty, for not discharging his duty, in respect of a job which he was not entrusted with at all. The Enquiry Officer is biased, as he had arrived at a finding that the petitioner had committed an offence, notwithstanding the charge-sheet not spelling out any offence. The findings of the Enquiry Officer are based on presumption which no man of ordinary prudence would believe to be true. The entire enquiry proceeding proceeded by treating the petitioner to be a Laboratory Assistant and as such the same is a mistake of fact. No enquiry could be held nor could the petitioner be dismissed by treating him as a Laboratory Assistant. In course of the enquiry proceeding, the

petitioner had duly objected to the enquiry being proceeded with, by treating him as a Laboratory Assistant. By referring to the 1984 Rules, he submits that since, the enquiry was initiated under the said Rule, the said Rule should be followed.

10. By placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***Nand Kishore Prasad v. The State of Bihar and Others***, reported in **AIR 1978 SC 1277.**, he says that the disciplinary proceeding before domestic tribunal is of a quasi-judicial character and as such, a minimum requirement of the rules of natural justice is that the tribunal is to arrive at its conclusion on the basis of some evidence, i.e. evidentiary material with some degree of definiteness pointing to the guilt of the delinquent, in respect of the charges levelled against him. Suspicion alone cannot be the sole criteria and should not be allowed to take place of proof, even in a domestic enquiry. In support of the aforesaid proposition, reliance has been placed on the following judgments delivered by the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh and Others v. Saroj Kumar Sinha***, reported in **(2010) 2 SCC 772**, and in the case of ***Moni Shankar v. Union of India and Another***, reported in **(2008) 3 SCC 484**. In the facts as stated hereinabove, it is submitted that the enquiry proceeding stands vitiated, as such the same, along with the final order of dismissal,

should be set aside. On the ground of maintainability of the writ petition Mr. Neogi, has relied on the following judgments.

1. ***Balco Captive Power Plant Mazdoor Sangh and Another v. National Thermal Power Corporation and Others***, reported in **(2007) 14 SCC 234**.
 2. ***Lalaram & Ors v. Jaipur Development Authority & Anr.***, reported in **(2016) 11 SCC 31**.
 3. ***Radha Raman Samanta v. Bank of India & Ors.***, reported in **(2004) 1 SCC 605**.
 4. ***L. Hirday Narain v. Income Tax Officer, Bareilly***, reported in **AIR 1971 SC 33**.
11. *Per contra*, Mr. Ghosh, learned advocate assisted by Mr. Majumder, submits that the aforesaid proceeding is not at all maintainable before this Hon'ble Court. The petitioner has an alternative remedy before the Tribunal. By referring to the provisions of Industrial Disputes Act, 1947 (herein after referred to as the "said Act"), he says that the petitioner is a 'workman' within the meaning of Section 2(s) of the said Act and as such is also entitled to raise an industrial dispute in terms of the said Act. In support of his aforesaid contention, reliance is placed on the judgment delivered by the Hon'ble Supreme Court in the case of ***Delhi Cloth and General Mills Co. v. Ludh Budh Singh***, reported in **AIR 1972 SC 1031**.

12. The petitioner had originally offered himself for the post of Laboratory Assistant and on the basis of his application, the petitioner was appointed as a Laboratory Assistant and was also issued a letter of appointment. On being so appointed, the petitioner came to be governed by Service Rules of the Council. As per the existing Service Rules, the petitioner being a class III employee, no designation was given to him, the designation of employment of the petitioner was only with regard to his pay.
13. The petitioner was guided by the Service Rules of 1984. Although, the Service Rules were amended in the year 2007, the petitioner had opted to be governed by the old Service Rules. As such, reference of designation in the new Service Rules is not relevant. The designation of the petitioner as Assistant (clerical cadre) was only relevant for his pay fixation.
14. The petitioner was issued a charge-sheet for the following acts of misconduct:-
- (i) Willful insubordination or disobedience of lawful or reasonable order of superior officer;
 - (ii) Unauthorised absence;
 - (iii) Insolent and impertinent behavior;
 - (iv) Gross negligence and neglect of work;
 - (v) Pursuance of conduct unbecoming of an employee of your status;

(vi) Acting in a manner prejudicial to the interest of the Council.

15. An additional charge was also issued, as the petitioner refused to accept the charge-sheet.

16. Although, the petitioner had responded to the charge-sheet yet he did not deny his liability to carry out inspection of samples or to remain present on the days of visit by the NABL team. The Enquiry Officer had dealt with the charges and on the basis of the materials collected during the enquiry, had returned a finding of guilt.

17. The penalty of an order of dismissal was passed after the writ petitioner was granted opportunity to make a representation against the enquiry report, and after the proposed penalty order was issued to him. The writ petitioner also replied to the proposed penalty order; however, without making a new case with regard to the proportionality of punishment. The Disciplinary Authority, taking into consideration the reply given by the petitioner, passed the order of dismissal dated 15th April, 2008.

18. Considering the Service Rules applicable to him, the writ petitioner's classification as a Class III employee was referable, to his pay of Rs. 260/- on the date of appointment. This was the mandate of the Service Rules governing the service of the petitioner at the relevant point of time. The point of

maintainability of the writ petition had been kept open when direction for exchange of affidavits were given by this Hon'ble Court. The writ petitioner, on his own showing, is a 'workman' within the meaning of the said Act. His remedy, if at all, is before an Industrial Tribunal. The validity of domestic enquiry is taken up as a preliminary issue before an Industrial Tribunal, if domestic enquiry fails the test, then the Tribunal has the power to grant opportunity to the employer to prove the charges afresh, by leading evidence. Such a judicially recognised right of an employer to prove the charges before Industrial Tribunal cannot be taken away. In the given facts, writ petition deserves to be dismissed.

19. From the submissions made by the learned advocates for the parties and considering the materials on record, I find that at the stage of admission of the writ petition a Co-ordinate Bench of this Court by an order dated 3rd November, 2008, by keeping the issue relating to maintainability of the writ petition open, had directed exchange of affidavits. The matter has now been finally heard by this Court. It is, therefore, necessary for this Court at the first instance to consider the point of maintainability of the writ petition which is yet to be decided. I find that it has been strenuously argued on behalf of the learned advocate representing the respondents that the present writ petition is not maintainable inasmuch as the writ petitioner is a workman

within the meaning of Section 2(s) of the said Act. In support of the aforesaid contention the learned advocate for the respondents has placed reliance on the Service Rules which have been adopted by the respondents in the year 1984. From a perusal of the aforesaid Service Rules, it would appear that not only the word 'employee' has been defined but classification has also been made in respect of the employees. It would appear that as per the said classification, 4 (four) groups have been identified. In order to appreciate the aforesaid classification, the classification of employees as identified in the Service Rules, 1984 is extracted herein below:

“ CLASSIFICATION:

The employees of the Council shall be divided into four classes, viz. Class I, Class II, Class III and Class IV as follows:-

Class I : *Officers whose initial pay in their time scale is Rs. 700/- per month and above;*

Class II : *Officer whose initial pay in their time scale is Rs. 550/- per month and above;*

Class III : *Staff members whose initial pay in their time scale is Rs. 260/- per month and above;*

Class IV : *Staff members whose initial pay in their time scale is less than Rs. 260/- per month.”*

20. Admittedly, in this case, I find that the writ petitioner has been appointed on 25th March, 1978, to a temporary post of clerk Grade-II. On the basis of the said classification, the appointment of the petitioner was, therefore, placed in Grade-III. I, also, find

that by an office order dated 9th August, 2001, which is at page no.49 of the writ petition, the petitioner was promoted to the position Assistant Grade-II in the pay scale of 5,000-150-8,000 with effect from 1st May, 2001. I find that it has been contended on behalf of the respondents that the designation of the petitioner was with reference to his pay, however, the 1984 Rules do not identify such a pay structure/scale. The petitioner, however, contends that he is guided by the 1984 Rules. Perusal of such Rules would in no uncertain terms show that the petitioner certainly, do not fall under classification Class-II, as Class-I and Class-II are designated officers.

21. In any event, as to whether or not that the petitioner is a workman within the meaning of the said Act has to be considered on the basis of the provisions contained in the said Act and the same cannot be considered on the basis of the rules framed by the respondents. If the petitioner otherwise qualifies to be a workman within the meaning of Section 2(s) of the said Act, then petitioner can certainly approach the Tribunal. To appropriately appreciate the same, section 2(s) of the said Act, is extracted below:

“Section 2(s) : - *“workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for*

the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person –

- (i) Who is subject to the Air force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or*
- (ii) Who is employed in the police service or as an officer or other employee of a prison; or*
- (iii) Who is employed mainly in a managerial or administrative capacity; or*
- (iv) Who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”*

22. It may be true that alternative remedy may not be an absolute bar for this Court to exercise jurisdiction, however, since, it appears that the point of maintainability had been kept open, I have proceeded to decide the same as a preliminary issue. Even taking the best case of the petitioner, I find that the petitioner was designated as an Assistant Grade –II in the clerical cadre. He was certainly not an officer. Having regard to the aforesaid, his pay scale and the definition of the workman as

defined in the said Act, I am of the view that the petitioner is a workman within the meaning of the said Act.

23. It has, however, been contended by the petitioner that the alternative remedy is not a bar, and in support thereof, reliance has been placed on the judgments delivered by the Hon'ble Supreme Court in the case of **Balco (supra); Lala Ram (supra); Radha Raman Samanta (supra) and** the case of **L. Hirday Narain (supra)**. In the case of **Balco (supra)**, no serious objection was raised as regards maintainability of the writ petition. Issues involved, claim of employees relating to interpretation of certain clauses in the agreement and the appointment letters and no disputed question of fact were involved. In the case of **Lala Ram (supra)**, the Hon'ble Supreme Court had exercised its powers under Article 142 of the Constitution of India. The issue in the case of **Radha Raman Samanta (supra)**, was with regard to absorption of Budli workmen and their entitlements, by virtue of a bipartite settlement with the bank. No disputed questions of fact were involved. In in the case of **L. Hirday Narain (supra)** the Hon'ble Supreme Court in the facts of the said case was of the view that the High Court was justified in dismissing the writ petition on merits, having entertained the same. In the present case, the writ petition was not entertained to be heard on merits. The writ petition was to be heard subject to the point of maintainability being kept open. The above judgments relied on

by the petitioner are distinguishable on facts. It is well settled that a judgment is an authority for what it decides and not what can be logically deduced there from, a slight variation in the facts may alter the final outcome.

24. The petitioner in this case challenges not only the order of dismissal but the entire enquiry proceeding, including designating and treating him as a Laboratory Assistant. I find that the Hon'ble Supreme Court in the case of **Delhi cloth and General Mills (supra)**, in paragraph 60, has been pleased to summarize the principles governing exercise of jurisdiction by the tribunal. The same is extracted below:

“60. 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 straightway 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 availed 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.”

25. Having regard to the aforesaid and taking note of the fact that an order of dismissal of an individual workman constitutes a deemed industrial dispute within the meaning of section 2A of the said Act, I am of the view that the alternative remedy before the Tribunal/Labour Court, is far more efficacious especially when disputed questions of facts are involved. If, after considering the validity of the domestic enquiry, the Tribunal is of the opinion that the domestic enquiry stands vitiated, the

management as well as the delinquent shall have the opportunity to lead evidence, both on the ground of the nature of duties entrusted to the petitioner, his designation, as well as, and as regards the proof of the charges.

26. In the aforesaid premise it is not necessary for this Court to consider legality and validity of the charges and or whether the same has been proved, or to go into the issue whether the petitioner could be designated as a Laboratory Assistant. The issue of designation, cannot be decided independently in the given facts. It is true that the matter has been kept pending for decades, however, at the same time, the fact that the objection as to maintainability was raised by the respondents at the threshold, cannot be lost sight of. The petitioner was aware as regards the point of maintainability not being decided at the time of admission of the writ petition. The writ petition was admitted subject to maintainability being kept open. The petitioner had taken a chance. Having thus, taken in a chance, the petitioner must face the consequences as well.

27. On the aforesaid ground the writ petition fails, the same is accordingly dismissed. Dismissal of the writ petition shall, however, not stand in the way of the petitioner applying before appropriate forum for the redressal of his grievances. The petitioner shall be entitled to exclusion of the period spent pursuing its case before this Hon'ble Court.

28. There shall be no order as to cost.
29. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on priority basis upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)