HIGH COURT OF GUJARAT

BECK AND CO INDIA LIMITED, ANKLESHWAR
Versus
S J MEHTA

Date of Decision: 08 February 1999

Citation: 1999 LawSuit(Guj) 31

Hon'ble Judges: Rajesh Balia

Eq. Citations: 1999 1 GLH 712, 1999 2 LLJ 836, 1999 83 FLR 858, 1999 LabIC 3049, 1999 2 GCD 1447

Case Type: Special Civil Application

Case No: 1797 of 1998

Subject: Labour and Industrial

Acts Referred:
Industrial Disputes Act, 1947 Sec 11A

Final Decision: Petition allowed

Advocates: Nanavati Associates, J S Brahmbhatt

Cases Cited in (+): 1
Cases Referred in (+): 3

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[1] Heard learned counsel for the petitioner. No one appears for the respondent in spite of service, though reply on behalf of respondent has been filed. Perused the reply. The petitioner has challenged the order of the Labour Court Bharuch dated 12.11.1997 by which the application of the present petitioner to lead evidence to justify the termination of the respondent in the reference pending before it has been rejected on the ground that demand at such a belated stage to lead evidence can be termed as delaying tactics and not bonafide and that the petitioner otherwise is not entitled to lead evidence to sustain termination of service of respondent, its employee. Respondent has raised objections that no charge sheet has ever been served before terminating the service of the respondent, and the employer has not claimed the termination to be punitive. Therefore if the Tribunal holds the termination to be punitive but not termination simpliciter then now permitting the petitioner to lead

evidence to prove the alleged misconduct is not permissible in law and if termination is found to be invalid, reinstatement must follow. Secondly the refusal to lead evidence at this stage is interlocutory matter, the court ought not to interfere.

[2] It would be apposite to notice the chronology of the facts in the present case, which has bearing upon the validity of the order in question. Services of respondent S.J. Mehta along with another employee Mr. J.T. Mehta were terminated with effect from 22.4.86. On a reference being made, claim was submitted on 12.4.1988 on behalf of the workmen challenging the said terminations, to be a case of victimisation and of unfair labour practice and claimed termination to be punitive. Written statement to claim was filed within two months on 9.6.88. Shorn of details, the management claimed that termination of two employees was termination simpliciter by way of discharge without any intention to punish them and to deprive them any terminal dues due to them. It was also stated that both the workmen were offered their all legal dues including the amount of retrenchment compensation before their retrenchment and they had accepted the same. Claim to reemployment under Section 25H was also denied. It was further pleaded that without prejudice to these contentions with a view to satisfy the court that the said termination was bonafide and for just and proper reason the company had found the two workmen indulging in anti-company activities and instigating the workers for go slow, hampering smooth operation of its working by loitering in various sections and departments of the company at the cost of performance of their duties. In view of this they bonafide took the decision that it was not in the interest of the company to retain them in service. The company simultaneously offered to prove these facts on opportunity being given to lead evidence.

[3] This assertion clearly go to show that the company had not taken at any time a specific plea that before termination of services of the two workmen any enquiry whatsoever has taken place. It has resorted to discharge simpliciter and has pleaded the reasons for which such termination has been brought into effect. alternatively it has offered to lead evidence to substantiate the facts which motivated to take recourse to termination of the services of two workmen. Obviously, this defence was nothing but an alternative plea that if the termination is not found to be discharge simpliciter motived by these facts and is considered to be a direct result of punishment for the alleged anti-establishment activities of the workmen and it is held to be punitive in character, the employer be given a chance to prove these facts to sustain the order of termination as justified. In furtherance of this plea, the application for leading evidence was made on 6.2.91 which was replied to by the respondent workman prior to 27.3.1991. From the reply it further transpires that the respondent workman has alleged that 90% statement of S.J. Mehta has been completed, that is to say, the

evidence of the workmen has still not come to an end and it was in progress. Thereafter the written arguments have been submitted by the workman in 1996. Before that one of the employee concerned viz., J.T. Mehta has settled the dispute with the company on 5.8.92 as per Annexure F.

[4] The foremost reason that weighed with the labour court to reject the prayer to led evidence to prove the facts that lead to termination order were that apparently no enquiry has been conducted before terminating the services of workman, no charge sheet has been served, nor any misconduct is alleged, and evidence of workman is completed upto 90%, thereafter making of application is not bona fide but is only with a view to protract the proceedings. Secondly, opportunity to lead evidence can only be given if before termination some notice of misconduct is given or, show cause notice is given or some document has been given to workman about his misconduct. That is to say if fair opportunity is not given and the departmental enquiry is held to be invalid, the opportunity to prove the misconduct can be given to employer, not otherwise. Where no enquiry is held prior to dismissal, no opportunity to prove misconduct can be given in reference.

[5] To throw out the application dated 9.2.1991, which reiterated the prayer made in the written statement of 1988, on the ground of delay on the face of it does to commend itself. The impugned order does not say a word about what happened since making of application dated 6.2.1991 and the making of order rejecting the application on 11.11.97 when 90% per cent of the workers evidence has already been complete prior to making of the application as per the assertion made by the workman in his reply asking to fix a date on 31.3.91 or 27.3.91. IT is also an unusual statement to say 90% of evidence is over, when the statement of workman has not completed and he has not closed his evidence. How it could be assessed on 6.2.91 that workman has completed 90% of its evidence. Merely reproducing the version of opposite party in the order goes to show non application of mind to circumstances of the case. It has failed to notice that written arguments were submitted by workman somewhere in 1996, copy of which is part of Annexure E (collectively) that is to say after about 5 years of making of application and reply thereto was filed alleging that evidence of workman was 90% over. The order does not reflect whether remaining 10% of evidence was completed during this time and if completed when. It does not show why it took 5 years to complete hearing this application resulting in submitting written arguments in 1996 and why thereafter it has taken almost a year by the court to pronounce upon the application. The application in such circumstance cannot by any standard of reasoning be dismissed as a design to protract the proceedings. The Tribunal could not throw the burden of delay on its own end to deny a party opportunity to lead evidence.

[6] It may be noticed that any order of punishment imposed by the management by termination without holding an enquiry though by itself cannot be sustained, but when a reference is made to Labour Court in such event, the management gets right to justify its action to prove the facts which justify the order of termination. It is also well settled that where certain facts which act as motive only but not the foundation for an order of termination results in termination simpliciter and the order is not termed as punitive but once that motive transcends to foundation of termination order it becomes punitive. The line is thin but is always there. Therefore in cases where the employer by certain conduct of the employee adopts the procedure of termination simpliciter it always remain a matter of decision of the court when challenged whether the order be termed as punitive or discharge simpliciter and has to be adjudged in the light of such finding and if termed to be punitive, it becomes bad in breach of principles of natural justice if the order is termination simpliciter but does not become bad for want of failure to adherence to principles of natural justice, it has to be decided as per the other provisions governing the rules of termination. In the former case, if the matter is before the Labour Court, the court on finding that the termination order is founded on conduct attributed to workman but in fact and is punitive, term the management to prove those facts to sustain the order of termination. It may further be noticed in such event facts constituting motive or foundation, remain the same. In the former it may be irrelevant, in the latter the order may fall or stand on proof of its existence.

[7] The Supreme Court, while considering the question whether discharge of civil servant during the period of probation on the tenor of order be construed as discharge simpliciter or punitive, in the latter case carrying with its stigma, in the case of Shamsher Singh vs. State of Punjab AIR 1974 SC 2192 said:

> "No abstract proposition can be laid down that where the services of probationer are terminated without saying anything more in the order of termination it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct or inefficiency or for similar reason without proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it may in a given case amount to removal from service within the meaning of Article 311."

[8] Thus the form of order is not the conclusive test of the nature of order. It is the substance that prevails over the form. In each case on facts it is to be determined, whether the order terminating the services, when questioned, is really by way of punishment or is a discharge simpliciter, as it purport to be. What is the test for such determination? The court in Shamsher Singh's case culled out two principles discerning from its earlier judgment in Purshottamlal Dhingra v. Union of India 1958 SC 36, which governs such enquiry.

"One is that if a right exist under a contract or service rules to terminate the service, the motive operating in the mind of the government (employer) is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct negligence inefficiency or other disqualification, then it is a punishment. The reasoning why motive is irrelevant is that it inhers in the State of mind which is not discernible. On the other hand, if termination is founded on misconduct it is objective and is manifest."

[9] The same principle was enunciated by the apex court earlier in Jagdish Mitter v. Union of India AIR 1964 SC 449. The court speaking through Gajendragadkar, J opined:

"It is now well settled by decision of this court that motive operating in the mind of authority in terminating services of a temporary servant does not alter the character of termination and is not material in determining the said character. .... But since consideration of motive operating in the mind of the authority have to be eliminated in determining the character of the termination of service of temporary servant, it must be emphasized that the form in which the order terminating his services is expressed will not be decisive. ..... What the Court will have to examine in each case would be, having regard to the material facts existing upto the time of discharge, is the order of discharge in substance one of dismissal."

[10] The determination of this question further determines the course of enquiry into the validity of the orders and procedure to be followed before determining such issue and relief that may be granted as a result of such enquiry. Parameters of adjudicating the validity and consequence differ in the case arising purely as a result of master-servant relationship between State and individual under service rules and the case which is governed by labour legislation like Industrial Disputes Act. In the former case on finding the invalidity of action the consequence flow straight away in the form of relief. That is not so in the case of claims adjudicated under the Industrial Disputes Act. IN the former case if it is found that it is a case of discharge simpliciter of a temporary employee and the order is not punitive the order will be sustained, unless it is otherwise contrary to rules. If the order is found to be punitive the court will enquire whether an enquiry has been held in the alleged misconduct and whether principles of natural justice have been flowed. If the answers are in the affirmative the order is sustained. if the answers are in negative the order of termination is vitiated. Neither the court examine the correctness of finding on appreciating the evidence, nor the court grants an opportunity to prove the misconduct, in case enquiry is not held or it is defective, to the employer. However, the case is different when it comes to be tested on the anvil of Industrial Disputes Act. In case the order is found to be termination simpliciter, it needs to be enquired whether the employee is workmen and termination

amounts to retrenchment if so whether he falls in the protection envisaged under Chapter VA or VB as the case may be, and conditions of valid retrenchment have been complied with. If the order is found to be punitive, it does not become a case of falling under retrenchment, and provision governing retrenchment are not attracted. However, the enquiry takes different turn. In case termination is found to be by way of punishment the order can be sustained on proof of a fair and just enquiry preceding the dismissal or removal in which guilt of workmen is proved. The Labour Court or Tribunal not only examines the fairness of the enquiry but also the validity of findings reached in enquiry even if the enquiry is found to be just and fair. The matter does not rest there. Where the labour court finds that enquiry is not fair or was defective, or even in case no enquiry is at all held, it has to given an opportunity to employer to lead evidence, if so demanded, to prove the alleged misconduct on which termination order is founded and thereafter reach its own conclusion. As to scope of enquiry in the case the order is found to be punitive the law is well settled, and there is no charge in that regard by insertion of Section 11A in the Industrial Disputes Act. The position was clearly stated by the Apex Court in Workmen of F.T.&R Co. v. The Management AIR 1973 SC 1227. The relevant principles governing the adjudication of dismissal order until insertion of Section 11A for the present purposes, the court summarised as under:

> "(3) When a proper enquiry has been held by an employer, and the finding of misconduct is plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide. (4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra. (5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about th exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry. (6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an

employer is found to be defective. (7) It has never been recognised that the Tribunal should straightway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective. (8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.. (9) Once the misconduct is proved either in the enquiry conduct by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation."

[11] The court after considering th effect of Section 11A further said:

"If there has been no enquiry held by the employer or if the enquiry is held to be defective it is open to the employer even now to adduce evidence for the first time before the Tribunal justifying the order of discharge or dismissal. ..... No doubt this procedure may be time consuming elaborate and cumbersome. As pointed out by this Court in the decision just referred to above it is open to Tribunal to deal with the validity of domestic enquiry, if one has been held as a preliminary issue. If its finding on the subject is in favour of the management, then there will be no occasion for additional evidence being cited by management. But if the finding on this issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence justifying action. This right in the management to sustain its order by adducing independent evidence before the Tribunal if no enquiry has been held, or if the enquiry is held to be defective has been given judicial recognition over a long period of years."

[12] Question again came up before apex court in somewhat different context in Gujarat Steel Tubes Limited v. Gujarat Steel Tubes Mazdoor Sabha (1980) 1 LLJ 137. Workmen had gone on total strike. Management terminated services of 853 workmen by innocuously termed discharge orders. The dispute as to termination was referred to arbitration under Section 10A of the Industrial Disputes Act. The two questions arose whether the order of discharge simpliciter could be treated as order of punishment and if so whether arbitrator in exercise of his jurisdiction under Section 10A can invoke provisions of Section 11A to examine the issue relevant under Section 11A. The court answered both the issues in affirmative. The arbitrator found that termination was direct result of participating in strike which was illegal and unjustified. Therefore

notwithstanding order passed in harmless verbalism, but was an act of punishment. The court said:

> "If misconduct was basic to discharge and no enquiry precedent to the dismissal was made, the story did not end there in favour of the workmen. The law is well settled that management may still satisfy the Tribunal about the misconduct."

[13] On facts it was found by the Tribunal that misconduct of participants in illegal and unjustified strike was proved, and sustained the order of discharge as order of punishment. High Court on writ petition while upheld the finding above punitive punishment, invoked the provision of Section 11A, and allowed the petition against toward sustaining dismissal by holding the punishment to be excessive. The question was raised in proceeding under Section 10A provision of Section 11A were not applicable. The Court repelled the contention has held the Section 11A is plenary in scope.

[14] Thus in proceedings under Industrial Disputes Act holding of enquiry and finding facts which prove constitute foundation of order in connection with discharge simpliciter when the order is found to be punitive but without enquiry was held to be permissible. The principle appropriately applies to facts of present case.

[15] In the present case if the order is ultimately found to be discharge simpliciter, as is claimed by the workmen, enquiry in the motive which led to order will not be relevant except to the extent it has bearing on bonafides of action. In such case the order will stand or fall on proof of compliance with the conditions of valid retrenchment. In case the order is found to be by way of punishment for alleged inefficiency or disrupting the normal functioning of the establishment by disturbing and inciting other workmen not to work, the order cannot be sustained even if conditions of retrenchment are shown to be complied with. However in such case, in the words of apex court in Gujarat Steel Tubes Limited, the stay does not end there in favour of the workmen, the management may still satisfy the Tribunal about misconduct.

[16] Even otherwise, these facts pleaded by the present petitioner were relevant for considering the relief that may ultimately be granted. If the facts alleged by the petitioner are found to be true and the termination simpliciter as retrenchment fails the required statutory provisions, still while considering the question of relief of reinstatement, these considerations become relevant.

[17] In these circumstances, the Labour Court has seriously erred and has erred apparently in denying the petitioners an opportunity to lead evidence into the facts pleaded and prayers sought along with the filing of written statement on the jejune ground of delay when nothing has been attributed to the petitioners for any delay that

has been caused since the date of filing of application in February 1991 until written arguments submitted by the respondent workman and the matter was heard and decided on that application only in 1997.

[18] The petition therefore is allowed. The impugned order is set aside and the Labour Court is directed to proceed further in the matter in accordance with law after giving an opportunity to the petitioners to lead evidence in the facts alleged in the written statement. Notice discharged. No order as to costs.