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Court : Chennai

Decided On : Dec-13-2011

Judge : K.Chandru, J.

Acts : Industrial Disputes Act - Sections 17B, 33(2)(b)

Appeal No. : W.P.(MD)No.5057 of 2008

Appellant : The Management

Respondent : The Joint Commissioner of Labour (Conciliation) and anr.

Advocate for Def. : Mr.T.S.Mohamed Mohideen, Adv.

Advocate for Pet/Ap. : Mr.S.C.Herold Singh, Adv.

Judgement :

The petitioner is a State owned Transport Corporation having its Headquarters at Madurai. In this writ petition, the petitioner corporation has challenged the order of the first respondent, the Commissioner of Labour, (Conciliation), Chennai, made in Approval Petition No.86 of 2005, dated 05.01.2007.

2. By the impugned order, the first respondent declined to grant approval to the dismissal, vide order dated 23.05.2005, of the second respondent, who was

employed as a driver in the petitioner corporation.

3. The writ petition was admitted on 22.10.2008. Pending the writ petition, this Court granted an interim stay. On notice from this Court, the second respondent filed two applications namely M.P.(MD).Nos.1 and 2 of 2009 seeking to vacate the interim stay and also payment under Section 17-B of the Industrial Disputes Act. These two applications were heard along with the stay application and on 18.01.2010, this Court directed the payment of last drawn wages in terms of Section 17-B of the Industrial Disputes Act, but refused to vacate the interim order. Liberty was also given to the management to give employment to the workman to avoid payment of wages to the worker.

4. The learned Judge who heard the miscellaneous petitions directed the matter to be posted before the appropriate bench for final disposal. But, however, the Registry mistook the same and issued notices on 28.01.2010 informing the counsels that the matter should be posted before a Division Bench as per the order dated 18.01.2010. But, a perusal of the order as well as the note sheets shows that there was no order directing the matter to be posted before a Division Bench. The Registry has misunderstand the term 'Bench' as one meaning a 'Division Bench'. Since it is a date fixed matter, this matter came to be listed before this Court.

5. Heard the arguments of Mr.S.C.Herold Singh, learned standing counsel for the petitioner management, Mr.T.S.Mohameed Mohideen, learned Additional Government Pleader for the first respondent and Mr.D.Rajendiran learned counsel for the second respondent.

6. According to the petitioner corporation, the second respondent who was appointed as a driver on 28.10.1999, at that time of joining had produced a bogus educational certificate. The matter was sent for verification by the Director of Government Examinations. They sent a letter dated 09.08.2004 stating that the certificate produced by the second respondent was bogus. Therefore, a charge memo dated 02.11.2004 was given to the second respondent and he was also placed under suspension. The second respondent gave an explanation on 10.12.2004. An enquiry was ordered to be conducted by an enquiry officer. The

said enquiry officer gave its finding on 02.03.2005. Based upon the findings of the enquiry officer, a show cause notice dated 10.03.2005 was given to him. The second respondent gave further reply on 28.03.2005. Not satisfying with the explanation, he was dismissed from services by an order dated 23.05.2005.

7. At the relevant time a conciliation proceeding was pending before the first respondent. A petition for approving the action of the petitioner management was filed under Section 33(2)(b) of the Industrial Disputes Act. The said application was registered in Approval Petition No.86 of 2005 and notice was ordered to the second respondent workman. The second respondent workman filed a counter statement dated Nil.

8. Before the first respondent on behalf of the petitioner corporation 15 documents were filed and marked as Ex.A1 to Ex.A15. The first respondent on the basis of the material placed before him came to the conclusion that proper enquiry was not conducted according to the principles of natural justice. A dismissal order must be based upon legal evidence let in the domestic enquiry. The letter received from the Director of Government Examinations showed that the certificate with the registration Number 081572 for the examination held during April 1990 and the certificate with registration Number 361785 for the examination held during March 1993 are genuine. But, the mark sheets were not genuine. Therefore, the two certificates were though held to be genuine, the mark sheets alone were not genuine. The document contain contradictory statements. But, the educational qualification certificates given by the second respondent was genuine. The mark sheets alone were not genuine. It was based upon the contradictory statements, the disciplinary proceeding was taken.

9. This is not the case of lack of evidence, but there was no prima facie basis for initiating the disciplinary proceedings. Though in the counter filed before the the authority the first respondent, the petitioner management sought for permission to lead fresh evidence or additional evidence in case of any deficiency in the enquiry, the first respondent failed to provide any such opportunity, but flatly refused to grant approval stating that there was no basis to initiate action. Challenging the same, the writ petition came to be filed.

10. Mr.S.C.Herold Singh, learned standing counsel for the petitioner corporation produced the application form submitted by the second respondent at the time of joining duty and in that column number 11, the second respondent has given registration number for the examination wrote in April 1990 as 081572. The registration number for the examination wrote during March 1993 as 656138. While in the examination for April 1990, he had secured 312 marks and in the examination during March 1993, he has secured 930 marks. The marks sheet produced by him for S.S.L.C during April 1990 shows the total marks as 312. But upon verification, the Directorate of Government Examinations, informed that the marks found in the certificate produced by the second respondent was compared with the mark Register and found it had been prepared without any authorisation.

11. The enquiry officer on the basis of the said report found that the certificate containing the total marks as 312 was produced by the second respondent at the time of joining and he had duped the department in securing the employment, whereas the certificate issued for the very same registration number for April 1990 showed the total marks as only 192 and not 312 as produced by the second respondent at the time of his joining.

12. In the present case apart from examining a selection Grade Assistant from the Administrative Side, the petitioner corporation had not examined anyone else. However, they made a request in the application for approval to lead additional evidence. The finding rendered by the first respondent with reference to lack of legal evidence may not be found fault with. At the same time, the first respondent, being the authority to decide approval petitions filed under Section 33(2)(b) of the Industrial Disputes Act, did not give opportunities to the petitioner corporation to lead evidence to substantiate their charges. A plea to this effect was found in the approval petition itself and that has been brushed aside by an erroneous reason that there was no basis for conducting a disciplinary proceedings. This finding of the first respondent is objectionable. This is especially so, when the charge was that a fake mark sheet was produced by the second respondent at the time of his joining. That issue will have to be gone into in depth.

13. The scope and power under Section 33(2)(b) of the Industrial Disputes Act was dealt with by the Supreme Court vide its judgment in DCM v. Ludh Budh Singh, reported in (1972) 1 SCC 595, wherein in paragraphs 61 to 63 the Supreme Court had summed up the law as follows:-

61.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."

62.Having due regard to the above principles, as could be gathered from the decisions, referred to above, in our opinion, the application filed by the management for permission to adduce evidence was highly belated. We have already emphasised that the enquiry proceeding before the Tribunal is a composite one, though the jurisdiction of the Tribunal to consider the validity of the domestic enquiry and the evidence adduced by the management before it, are to be considered in two stages. It is no doubt true that the management has got a right to adduce evidence before the Tribunal in case the domestic enquiry is held to be vitiated. The Tribunal derives jurisdiction to deal with the merits of the dispute only if it has held that the domestic enquiry has not been held properly. But the two stages in which the Tribunal has to conduct the enquiry are in the same proceeding which relates to the consideration of the dispute regarding the validity of the action taken by the management. Therefore, if the management wants to avail itself of the rights, that it has in law, of adducing additional evidence, it has either to adduce evidence simultaneously with its reliance on the domestic enquiry or should ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue with a request to grant permission to adduce evidence, if the decision of preliminary issue is against the management. An enquiry into the preliminary issue is in the course of the proceedings and the opportunity given to the management, after a decision on the preliminary issue, is really a continuation of the same proceedings before the Tribunal.

63.In the case before us, it is seen from the order sheet that Item 5 relates to the entry of March 21, 1967, regarding the appellant having filed the enquiry proceedings and to the Tribunal having heard the arguments of both sides on the basis of the enquiry proceedings. There is also the further entry that judgment has been reserved by the Tribunal. That shows that the enquiry proceedings have closed by then and what was left was only the delivery of judgment by the Tribunal. The order sheet further shows that after the judgment was reserved on March 21, 1967, the appellant filed the application in question praying that if the enquiry proceedings are found to be defective, it should be given an opportunity to adduce evidence. In the order sheet the entry relating to the receipt of this application is shown as Item 6, after Item 5 which, as pointed above, relates to the reserving of judgment. No doubt, it would have been proper for the Tribunal to have dealt with this application in its main order and expressed its opinion on the same. It is regrettable that the Tribunal apart from just making a reference to the filing of the application in its main order, has not dealt with it on merits. But, that is of no consequence, so far as the present case is concerned. The appellant did not ask for an opportunity to adduce evidence when the proceedings were pending; nor did it avail itself of the right given to it in law to adduce evidence before the Tribunal during the pendency of the proceedings. If such an opportunity had been asked for and refused or if the Tribunal had declined to receive evidence, when it was sought to be tendered on behalf of the management, when the proceedings were still pending, the position would have been entirely different. In such a case, it can be held that the appellant had been deprived of the opportunity which should have been afforded to it, in law, of adducing evidence on merits before the Tribunal if the domestic enquiry was held to be defective. Having due regard to the fact that the appellant moved the Tribunal in that regard only after the proceedings had come to an end, it cannot be said, in this case, that such an opportunity had been denied to it.(Emphasis added)

14. If this principle of law was applied, the first respondent was bound to give opportunity to the petitioner management to lead evidence on the charge memo framed against the second respondent.

15. In view of the above, the writ petition stands allowed and the impugned order is set aside. The matter is remitted back to the first respondent i.e., the Joint Commissioner of Labour (Conciliation), Chennai - 600 006, for fresh consideration according to law. The said authority shall dispose of the matter, within 6 months from the date of receipt of a copy of this order, after giving due notice to both parties and after observing all formalities.

16. Since the second respondent is without employment from May 2005 and he has been getting only last drawn wages as per the orders of this Court, at this stage if the amount is stopped, he will not be in a position to defend himself in the proceedings before the first respondent. Hence, the petitioner is directed to pay the last drawn wages to the second respondent for a period of six months or till the disposal of the approval petition which ever is earlier.

17. With the above direction, the writ petition is allowed on the above terms. No costs.

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