Before M. M. Kumar & Mehinder Singh Sullar, JJ.

DINESH KUMAR,—*Appellant*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

LPA No. 1374 of 2009 in

CWP No. 4473 of 2004

3rd August, 2010

Constitution of India, 1950—Art. 226—Industrial Disputes Act, 1947—S. 11-A —Absence from duty—Termination—Labour Court holding department enquiry not held in accordance with law—Management leading evidence after conclusion of issue—Such evidence could not be taken into account—Single Judge committing an error by placing reliance on evidence adduced after conclusion of issue and without affording any opportunity to workman—No finding recorded either by Labour Court or by Single Judge that management ever asserted its rights for conducting an inquiry before Labour Court afresh—View taken by Single Judge is neither based on record nor on evidence adduced before Labour Court—Appeal allowed, judgment of Single Judge set aside while modifying award of Labour Court with regard to grant of back wages.

Held, that the burden of proof in respect of the issue framed by the Labor Court "whether departmental enquiry was not held by the management" was obviously placed on the management—Haryana Roadways. The issue stood concluded on 19th November, 2001 and there was no effort made to reopen the aforesaid issue because on that date the Industrial Tribunal-cum-Labour Court has recorded categorical finding that the inquiry against the appellant was not held in accordance with law. It is one thing to say that before the Labour Court evidence could be adduced to record a finding that inquiry proceedings were fair but it is quite another thing that some evidence was led before the Labour Court after the issue was concluded on 19th November, 2001, which was reiterated by the award dated 13th May, 2003. The learned Single Judge has mixed up the issue by reading the evidence of one Bhagwati Prashad, Clerk, who

had produced photocopies of the attendance register, after the order dated 19th November, 2001 concluding the issue with regard to fairness of the inquiry. The aforesaid evidence adduced by Bhagwat Prashad, Clerk could not be taken into account and the learned Single Judge committed an error by placing reliance on the evidence adduced by Bhagwati Prashad before the Labour Court after the conclusion of the issue and without affording any opportunity to the workman-appellant. The learned Single Judge has committed an error because there is no finding recorded either by the Labour Court or by the learned Single Judge that the management-Haryana Roadways ever asserted its rights for conducting an inquiry before the Labour Court afresh. The view taken by the learned Single Judge is neither based on the record nor on the evidence adduced before the Labour Court. Accordingly, the same is liable to be set aside.

(Para 9)

Rajiv Sharma, Advocate, *for the appellant.*

Ms. Mamta Singhal Talwar, Advocate, *for the State*

M. M. KUMAR, J.

(1) The instant appeal filed under Clause X of the Letters Patent is directed against the judgment dated 19th August, 2009 rendered by the learned Single Judge while disposing of C.W.P. No. 4473 of 2004. The respondent-Haryana Roadways had terminated the services of the workman-appellant. He had worked in Haryana Roadways for about 3 years as 'Helper' from 7th December, 1986 to 5th December, 1989. On the allegation of absence for two months from duty with effect from 22nd May, 1989 to 23rd July, 1989, an enquiry was held where charges were found proved by the Inquiry Officer in his report. A copy of the inquiry report along with a note of agreement by the Appointing Authority has been placed on record as Annexure P-5, which reads thus :—

> "On receipt of a written report from Shri Bhagwati Parshad, T.R.C. in this office, the official/ Employee was charge-sheeted,—*vide* No. 8736/EA/ECW, dated 6th June, 1989,—*vide* which the following allegations were levelled against the official/ workman.

"A report has been received against Shri Dinesh Kumar helper that he has been absent from the office since 22nd May, 1989, with not any prior information or without any sanction of leave. By doing so, he disobeyed this orders and has created in-discipline. He is charged of remaining wilful absent from duty from 22nd May, 1989 and also disobedience of orders."

The charge-sheet was sent on the home address of the official, but the official did not submit his reply and he was reminded, *vide* No. 10276/EC, dated 1st July, 1989, but the official did not tender his reply. I was appointed as enquiry officer, *vide* order No. 12728/EC, dated 10th August, 1989 for conducting regular departmental enquiry. For proceeding the enquiry, I called the complaint and the delinquent official on 26th October, 1989 and the statement of Shri Bhagwati Parshad was recorded before the delinquent official. The official was given full opportunity to cross examine the complaint. The official stated that he did not want to ask any question. In the capacity of enquiry officer, I asked several questions. In reply to my question, the complaint clarified. That the official remained absent from duty from 22nd May, 1989 to 23rd July, 1989 without sanction of leave. Thereafter, the statement of the official was recorded and in the capacity of Enquiry Officer, I asked several questions. The official clarified in reply to one of my question that he did not give any information to the office in regard to his illness. Thereafter, the official was given opportunity of producing any witness in his defence, but declined and showed his inability to produce any witness.

Conclusion

At last, I carefully examine the allegations levelled against the official, enquiry proceedings and the record of case file. After having examined carefully, I have come concluded that the official is guilty of remaining absent from 22nd May, 1989 to 23rd July, 1989 without sanction of leave and without any information.

because the official disturbed the essential services and disobeyed the office order. So, the allegations levelled against the official are fully proved.

Sd/-

Enquiry Officer,
Transport Manager,
Haryana Roadways, Gurgaon.

I agree with the report. So issue show cause notice to the employee.

Sd.-"

(2) The workman-appellant challenged the enquiry report before the Labour Court arguing that the enquiry was vitiated because no opportunity of hearing was granted. The whole enquiry proceedings were completed in one hearing on 26th October, 1989 allegedly in flagrant violation of the principles of natural justice. The workman-appellant succeeded before the Labour Court and the view of the Labour Court has been expressed in its short award, dated 13th May, 2003 (P-13) which reads as under :

"3. Dinesh Kumar petitioner made his statement on oath as WW-1 and stated that his services were illegally terminated by the management though he continuously worked as Helper from 7the May, 1986 to 4th December, 1989. It has further come in the statement of this witness that his services were illegally terminated because the enquiry officer did not allow him to defend himself properly and also to produce evidence. Dinesh Kumar WW-1 deposed that did was ill and he not appear and so wanted to lead evidence in this regard. Bal Kishan a witness of the management examined in the case stated that enquiry was got conducted by the management from Shri B. S. Yadav, and proved some of the documents placed on record. Shri B. S. Yadav the enquiry officer has not come in the witness box to state as to whether he allowed opportunity to the petitioner to defend himself properly in the case. If the Enquiry Officer would have been produced, he must have been asked whether he told the workman before starting the enquiry, the method and

the procedure of the enquiry to be conducted by him or not. There is no evidence that the copies as required were supplied to the workman. No representative of the management ever appeared to defend the proceeding on behalf of the management. The enquiry proceedings on file indicate the petitioner was not allowed to lead any evidence in his defence. The enquiry officer has been asking questions on behalf of the management. This was not fair. The enquiry report on the file does not show that petitioner was made to understood (sic understand ?) the procedure as well as the method (of ?) the enquiry before starting the enquiry proceedings against him. Even there is no mention in the enquiry report that the petitioner was allowed to be represented by some other worker or a legal person for defending enquiry.

All the proceedings were conducted on 26th October, 1989 by the enquiry officer and then the report was submitted accordingly. The report in the circumstances, cannot be said to be fair and proper. The principles of natural justice demand that the petitioner must be given opportunity to be defended evidence in his defence. This is missing in this case. Moreover, the petitioner was not told procedure, method etc. of the enquiry, before starting the enquiry proceedings. Copies of the statements of the witnesses were not supplied to the petitioner. Dinesh Kumar WW-1 clearly stated that he can still give evidence that he was actually ill and so did not come to join duty. No evidence in rebuttal came from the side of the management in this regard. Simply alleging that due procedure was followed, is not enough.

4. In view of the above, I conclude to told that the departmental enquiry was not held in a proper manner by the management. The enquiry thus not fair and proper. Issue No. 1 is decided against the management." (emphasis added)

(3) A perusal of the award would show that there is no observation by the Labour Court to the effect that *'the workman-appellant did not lead any evidence in rebuttal but the Labour Court held that once the enquiry was held to be unfair and improper the evidence of the Management subsequently cannot rectify that lapse.'*

(4) The aforesaid award of the Labour Court was challenged before this Court and the learned Single Judge placed reliance on the document tendered in evidence by one Shri Bhagwati Prashad, a Clerk in Haryana Roadways who is stated to have been examined as MW-1. The aforesaid Clerk is stated to have tendered in evidence MW-1/1, M/W-1/3, which were photocopies of the attendance register. This piece of evidence concerning attendance register has neither been noticed by the Labour Court in its award nor any plea has been raised by the Management - Haryana Roadways in the writ petition. It is further appropriate to mention that in the award, there is no observation made by the Labour Court that the Management-Haryana Roadways could not have rectified the lapse of leading evidence before that Court. However, in para Nos. 2 and 3, the learned Single Judge referred the following view, which reads as under :

> "2. Before the Labour Court, the evidence was led by the workman that he had not been given any opportunity to lead any evidence before enquiry officer and the enquiry had not been fair and proper. There was no counter evidence to the workman's contention and the Labour Court,—*vide* order dated 19th November, 2001 held that the enquiry was not fair and proper and directed the parties to adduce evidence. Subsequently Shri Bhagwati Prasad, a Clerk in Haryana Roadways had been examined as MH-1. He had tendered evidence with reference to photo copies MW-1/1, M/W-1/3 which were attendance registers to show that the workman had been absent without adequate reasons for several days during that period. The workman however, did not lead any evidence in rebuttal but the Labour Court held that once the enquiry has held to be unfair and improper the evidence of the Management subsequently cannot rectify that lapse.
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> 3. The reasoning of the Labour Court is absolutely untenable and against the law laid down by the Supreme Court in Workmen versus Firestone Tyre and Rubber Co. of India (P) Ltd. AIR 1973 SC 1227. The Hon'ble Supreme Court held, "if no enquiry is held or the enquiry is defective, then the employee can adduce evidence before the Industrial Tribunal and the Tribunal will decide about the merits of the order of dismissal

or discharge and in such cases the point about exercise of managerial functions does not arise. In case no enquiry is held or the enquiry is defective, the Tribunal can not straightway direct reinstatement. If the employer wants to adduce evidence for the first time before the Tribunal, it should ask at an appropriate stage and then the Tribunal will have no power to refuse. If the misconduct is established by the evidence placed before the Tribunal, except when it is so harsh as to suggest victimization."..... The finding of the Labour Court that the moment the domestic enquiry was found to be bad, workman would be entitled to reinstatement does not accord with law."

(5) We have heard learned counsel for the parties and perused the record. It is true that by virtue of Section 11-A of the Industrial Disputes Act, 1947 (for brevity 'the Act'), the Labour Court or the Tribunal has been empowered to re-appreciate the evidence and examine the correctness of the findings recorded therein. Section 11A further empowered it to interfere with the punishment imposed by the employer. The aforesaid provision has been interpreted keeping in view the beneficent rule of construction in the case of **Workmen** *versus* **Firestone Tyre and Rubber Co. of India (P) Ltd. (1),** However, it is a different matter as to whether the principle laid down in the aforesaid case would be attracted to the facts and circumstances of the present case. The only issue framed by the Labour Court is as under :

"Whether departmental enquiry was not held by the management"?

(6) The burden of proof in respect of the aforesaid issue was obviously placed on the management-Haryana Roadways. The issue stood concluded on 19th November, 2001 (P-12) and there was no effort made to re-open the aforesaid issue because on that date the Industrial Tribunal-cum-Labour Court has recorded categorical finding that the inquiry against the appellant was not held in accordance with law. It is one thing to say that before the Labour Court evidence could be adduced to record a finding that inquiry proceedings were fair but it is quite another thing that some

(1) (1973) 1 S.C.C. 813

evidence was led before the Labour Court after the issue was concluded on 19th November, 2001, which was reiterated by the award dated 13th May, 2003 (P-13). The learned Single Judge has mixed up the issue by reading the evidence of one Bhagwati Prashad, Clerk (MW1), who had produced photocopies of the attendance register, after the order dated 9th November, 2001 concluding the issue with regard to fairness of the inquiry. The aforesaid evidence adduced by Bhagwati Prashad, Clerk, could not be taken into account and the learned Single Judge committed an error by placing reliance on the evidence adduced by Bhagwati Prashad before the Labour Court after the conclusion of the issue and without affording any opportunity to the workman-appellant. It is erroneous for the learned Single Judge to conclude at the end of para 2 *'that the workman-appellant did not lead any evidence in rebuttal but the Labour Court held that once the enquiry has held to be unfair and improper the evidence of the Management subsequently cannot rectify that lapse'*. It is not even pleaded case in the writ petition by the Management-Haryana Roadways.

(7) The aforesaid sequence of event would show that the learned Single Judge has committed an error because there is no finding recorded either by the Labour Court or by the learned Single Judge that the management-Haryana Roadways ever asserted its right for conducting an inquiry before the Labour Court afresh. The view taken by the learned Single Judge is neither based on the record nor on the evidence adduced before the Labour Court. Accordingly, the same is liable to be set aside.

(8) As a sequel to the aforesaid discussion the impugned judgment dated 19th August, 2009 rendered by the learned Single Judge is hereby set aside and the award of the Labour Court is restored with a modification that the workman-appellant shall be entitled to back wages to the extent of 50% from the date of termination till the date of award. However, he shall be paid full back wages from the date of the award till the date of reinstatement. The needful shall be done within a period of three months from the date of receipt of a copy of this order.

R.N.R.