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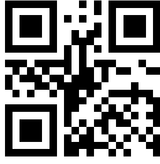

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1636/2022

THE INDUSTRIAL CO OPERATIVE BANK LTD. AND ANR.
S.S. ROAD, LAKHTOKIA, GUWAHATI-01, ASSAM

2: PANNA DEB
S/O LT SUDHENDRA KUMAR DEB
ADMINISTRATOR
REPRESENTING THE PETITIONER NO. 1
ADD-1ST FLOOR
INDUSTRIAL CO-OPERATIVE BANK LTD
S.S. ROAD
LAKHTOKIA
GUWAHATI-01
ASSA

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY ITS SECRETARY TO THE GOVT. OF ASSAM, LABOUR AND EMPLOYMENT DEPARTMENT, DISPUR, GUWAHATI-06

2:THE ASST. LABOUR COMMISSIONER
O/O THE ASST. LABOUR COMMISSIONER
KAMRUP(M)
ASSAM
GUWAHATI-07

3:REGISTRAR
LABOUR COURT
2ND FLOOR
DEPUTY COMMISSIONER
OFFICE BUILDING
GUWAHATI-01
KAMRUP(M)
ASSAM

4:THE CERTIFICATE COLLECTOR
2ND FLOOR
DEPUTY COMMISSIONER
KAMRUP(M) BUILDING
BAKIJAI BRANCH
KAMRUP(M)
ASSAM
GUWAHATI-01

5:DINESH CH DEKA
H. NO. 39
DEOSAL PATH
BORBARI
NEAR AKLAN CLUB
GUWAHATI-3

For the Petitioners : **Mr. B. Kaushik, Adv.**

For the Respondents: Mr. S. Chakraborty, Adv (R/5)
Ms. A. Talukdar, GA, Assam (R-1 to 4)

BEFORE
THE HON'BLE MR. JUSTICE SUMAN SHYAM

Date of hearing : 23/05/2023.

Date of judgement : 21/06/2023

JUDGEMENT AND ORDER (CAV)

1. Heard Mr. B. Kaushik, learned counsel appearing for the writ petitioners. Also heard Mr. S. Chakraborty, learned counsel representing the respondent no. 5. Ms. A. Talukdar, learned Government Advocate, Assam, had appeared on behalf of the respondent nos. 1 to 4.

2. By filing the instant writ petition, the Industrial Cooperative Bank Limited and its Administrator *viz.* Shri Panna Dev, have approached this Court assailing the award dated 19/12/2019 passed by the learned Labour Court at Guwahati in case No. 1/2019 registered U/S 2A(2) of the Industrial Dispute Act, 1947 (herein after referred to as ***the Act of 1947)*** *inter-alia* praying for quashing the award dated 19/12/2019, the order dated 04/03/2021 passed by the learned Labour Court at Guwahati in case No. 1/2020 US.33 C(2) of the Act of 1947 as well as the Bakijai Proceeding registered as Bakijai Case No. 02/2021 of Kamrup (M).

3. The facts of the case, as projected in the writ petition, briefly stated, are as narrated herein below. :-

(i) The respondent no. 5 had joined the petitioner no.1 Bank on 01/01/1987 as an Office Assistant. After serving the Bank for several years, the respondent no. 5 was appointed as the Branch Manager of the Guwahati Branch of the Bank by order dated 01/11/2008. Accordingly, the respondent no. 5 had functioned as the Branch Manager of the Guwahati Branch for the period from 01/11/2008 to 30/09/2010, drawing salary of Rs. 36,227.17 per month. During that time, the respondent no. 5 was also the administrative head of the Guwahati Branch. Subsequently, he was appointed as the Chief Manager (Human Resources and Administration) of the Bank, which post according to the writ petitioners, was just below the post of the Managing Director of the Bank.

(ii) While serving as the Branch Manager of the Bank, the respondent no. 5 had taken certain administrative decisions which were not found to be in accordance with the Banking norms. As such, a show cause notice dated 31/10/2012 was served upon the respondent no. 5 by providing him the facts and figures of his activities including the transactions in the OD account as well as excess drawals, by alleging that he had committed a misconduct. The respondent no. 5 was accordingly asked to submit his response.

(iii) The respondent no. 5 had submitted his reply to the show cause notice dated 31/10/2012 on 14/11/2012, admitting the fact that there were over-drawals during his tenure but he had made an attempt to justify his action by stating that the same were done as per instructions of the superior authority.

(iv) Not being satisfied with the reply submitted by the respondent no. 5, a disciplinary proceeding was initiated against him by serving charge-memo dated 05/12/2012, containing the statement of allegations. Shri Ajoy Bhattacharjee was appointed as the Enquiry Officer so as to enquire into the charges, whereafter, the enquiry proceeding had commenced on 23/09/2013. However, before conclusion of the enquiry proceeding, Shri Ajoy Bhattacharjee was released from his responsibility as the Enquiry Officer and in his place, Shri Jogesh Chandra Das was appointed as the Enquiry Officer on 23/02/2017. In the meantime, by order dated 24/08/2016, the respondent no. 5 was placed under suspension.

(v) Being aggrieved by the order of appointment of Shri Jogesh Chandra Das as

the new Enquiry Officer, the respondent no. 5, as the writ petitioner, had approached this Court by filing WP(C) No. 2193/2017, which was disposed of by the learned Single Judge by the order dated 23/06/2017 with a direction upon the Bank to reinstate the respondent no. 5 and also to complete the departmental proceeding within two months.

(vi) On 14/08/2017, the enquiry proceeding was concluded, whereafter, the Enquiry Officer had submitted his report dated 22/09/2017 holding that all the charges brought against the respondent no. 5 had been proved. A copy of the enquiry report was also forwarded to the respondent no. 5.

(vii) On 30/12/2017, a second show cause notice was also issued to the respondent no. 5 asking him to show cause as to why, he should not be removed from service. On 29/01/2018, the respondent no. 5 had submitted his reply to the second show cause notice. After considering the reply submitted by the respondent no. 5, the Managing Director of the Bank had issued the order of penalty dated 08/02/2018 of "Removal from Service" upon the petitioner as per clauses 26 & 27 of the Staff Service Rules of the Industrial Cooperative Bank Limited.

(viii) Aggrieved by the order of removal from service, the respondent no. 5 had approached the Assistant Labour Commissioner on 11/07/2018 raising an industrial dispute, thus, assailing the order of penalty dated 08/02/2018. Based on the complaint made by the respondent no. 5, a proceeding in the form of case No. 1/2019 was registered under section 2A(2) of the Industrial Dispute Act, 1947. Upon receipt of the notice in connection with the aforesaid proceeding, the petitioner no. 1 had appeared and submitted its reply, inter-alia, contending that the respondent no. 5 was not a 'workman' within the meaning of section 2(s) of the Industrial Dispute Act, 1947 and, therefore, the reference was not maintainable. It was also contended that the respondent no.5 had been removed from service after holding a proper departmental proceeding and as such, there was no scope of interfering with the order of penalty. The objection submitted by the writ petitioner no. 1, questioning the jurisdiction of the learned Labour Court to entertain the dispute on the ground that the respondent no. 5 was not a workman, was rejected by the learned Labour Court by the order dated 22/04/2019, inter-alia holding that the issue as to whether the employee is a workman or not, was a mixed question of fact and law, which has to be determined with due regard to the nature of duties and functions undertaken by the person. According to

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the learned Labour Court, without the written statement and evidence of the parties, it was not possible to decide the plea of maintainability. However, the Management was granted leave to file written statement, if so desired.

(ix) It appears from the materials on record that the petitioner no. 1 Bank had neither filed written statement in case No. 1/2019 pending before the learned Labour Court nor did the engaged counsel representing the Bank appear in the matter on the subsequent dates, as a result of which, the matter proceeded ex-parte. Eventually, the learned Labour Court had passed ex-parte award dated 19/12/2019 by observing that the respondent no. 5 deserves to be reinstated with full salary, back wages and other service benefits. Consequently, the order of "removal from service" was set aside.

(x) The respondent no.5 had thereafter approached the learned Labour Court by filing an application under section 33C(2) of the Act of 1947 for recovery of the amount awarded under the award dated 19/12/2019. The said application was registered as case No. 1/2020. It appears that the petitioners had failed appear before the learned Labour Court in connection with the aforesaid case No. 1/2020 as well. As such, on 04/03/2021, the learned Labour Court had passed an ex-parte order under section 33C(2) of the Act of 1947, in case No.1/2020, issuing a direction upon the petitioner no. 1 to pay the amount of Rs. 35,76,909/- to the respondent no. 5 including his arrear salary up to the month of May, 2020.

(xi) Based on the ex-parte order dated 04/03/2021, the respondent no. 5 had instituted Bakijai case No. 02/2021. It was on 07/12/2021, notice issued in connection with the Bakijai case No. 02/2021 was received by the petitioner, whereafter, the Bank became aware for the first time about the award dated 19/12/2019. Situated thus, the instant writ petition has been filed.

4. Mr. B. Kaushik, learned counsel for the writ petitioners has argued that there are materials available on record, including the evidence-on-affidavit filed by the respondent no. 5 before the learned Labour Court, which goes to show that the respondent no. 5 was a part of the Management of the Bank. As such, the respondent no. 5 was not a workman within the definition of section 2(s) of the Act of 1947. Such being the position, the reference registered before the learned Labour Court was not maintainable in the eyes of law, inasmuch as, the learned Labour Court did not have the jurisdiction under the Law to entertain the reference. In other words, according to Mr. Kaushik, the impugned award having been passed without jurisdiction, it is a nullity in the eyes of law and therefore, was liable to be declared so by this Court.

5. It is also the submission of Mr. Kaushik that there is no finding by the learned Labour Court that the order of discharge or dismissal or removal from service issued to the respondent no. 5 was not justified. In the absence of any such findings recorded by the learned Labour Court, submits Mr. Kaushik, the learned Labour Court was not correct in interfering with the order of penalty. The learned counsel for the writ petitioners has, therefore, argued that there has been a clear error in exercise of jurisdiction by the learned Labour Court under Section 11A of the Act of 1947 in setting aside the order of "removal from service".

6. By referring to the decisions of the Hon'ble Supreme Court rendered in the case of ***Usha Breco Mazdoor Sangh Vs. Management of Usha Breco Ltd. and another*** reported in ***AIR 2009 SC (Supp) 994*** as well as the decision in the case of ***General Secretary, South Indian Cashew Factory Workers' Union Vs. Managing Director, Kerala State Cashew Development Corporation Ltd.*** reported in ***AIR 2006 SC 2208 / 2006 (5) SCC 201***, Mr. Kaushik has argued that since there is no dispute about the fact that the departmental enquiry was conducted in a fair and proper manner and in the absence of any allegation of victimization or *mala fide* or unfair labour practice brought against the Bank, the learned Labour Court had committed serious error in exercise of jurisdiction under section 11A by interfering with the order of penalty of removal from service, without recording proper justification for doing so. The learned counsel for the petitioner has, therefore, prayed for setting aside the award dated 19/12/2019 as well as the consequential order dated 04/03/2021 and for remanding the matter back to the Labour Court for a fresh decision of the reference case.

7. Opposing the said submission of the learned counsel appearing for the writ petitioners, Mr. S. Chakraborty, learned counsel for the respondent no. 5 submits that the plea raised by the Bank in the instant writ petition is completely untenable in the eyes of law since the Bank had failed to appear before the learned Labour Court and file written statement despite opportunity having been granted to it by the learned Court below. Mr. Chakraborty further submits that the petitioners have approached this Court by suppressing material facts and by making misleading statements, for which the writ petition is liable to be dismissed on such count alone. According to Mr. Chakraborty, the Bank has deliberately delayed the filing of this writ petition so as to deprive the respondent no. 5 'workman' from an order under section 17B of the Act of 1947. Mr. Chakraborty has further argued that not to speak of filing its written statement, the petitioner Bank did not even cross examine the respondent no. 5 and, therefore, his evidence adduce to the effect that he was a workman, has remained unchallenged. Therefore, the petitioner Bank cannot now be permitted to improve its case by taking such plea after the award has attained finality.

8. On the issue of maintainability of the reference case, Mr. Chakraborty submits that the question as to whether an employee is a workman or whether he belongs to the management cadre, is to be determined not merely on the basis of designation of the employee but having due regard to the nature of duties and functions discharged by him. Since the management has failed to furnish evidence before the learned Labour Court to show that the respondent no. 5 was holding a managerial post, the plea regarding maintainability of the reference is liable to be rejected by this Court. Mr. Chakraborty has further submitted that the order of penalty of "removal from service" was imposed upon the respondent no. 5 by the Bank vide order dated 08/02/2018 during the pendency of the reference case no. 12/2017, without obtaining the leave of the Labour Court and, therefore, the order dated 08/02/2018, being hit by section 33(2)(b) of the Act of 1947, is *void ab initio* and is liable to be declared so by this Court.

9. By placing reliance on a decision of the Supreme Court rendered in the case of ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma*** reported in ***(2002) 2 SCC 244 (paras 13, 14 & 15)*** as well as in the case of ***Indian Telephone Industries Ltd, and another Vs. Prabhakar*** reported in ***(2003) 1 SCC 320 (paras 5, 6, 8 & 9***), Mr. Chakraborty has argued that an order of dismissal issued by the management during the pendency of a reference case before the learned Labour Court without obtaining the leave of the Court, would be violative of the provisions of Section 33 (2)(b) of the Act of 1947. Mr. Chakraborty has, therefore, prayed for dismissal of the writ petition.

10. I have considered the submissions made by the learned counsel for both the sides and have also carefully gone through the materials available on record.

11. After hearing the arguments of the learned counsel for both the sides and on perusal of the materials available on record, it appears that the facts of the case prior to issuance of the order of penalty dated 08/02/2018 are by and large undisputed. The dispute raised in this writ petition pertains to the events that took place after the issuance of the order of penalty dated 08/02/2018. Record reveals that on an application made by the respondent no. 5 on 11/07/2018 addressed to the Assistant Labour Commissioner, reference case No. 1/2019 was registered. The management of the petitioner no. 1 Bank had initially appeared before the learned Labour Court in connection with case No. 1/2019 and submitted a preliminary objection questioning the maintainability of the reference case. But, thereafter, the proceeding went ex-parte against the Bank.

12. As has been noted herein before, the preliminary objection was rejected by the learned Labour Court by order dated 22/04/2019 by holding that the issue of maintainability being a mixed question of fact and law, the said issue cannot be decided without the written statement and evidence

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brought on record. The Bank has admittedly not filed its written statement nor did it contest the reference case on merit.

13. Ordinarily, these facts would have been sufficient for this Court to dismiss the writ petition. However, this Court is reluctant to adopt such an approach in this case primarily in view of the statements made in paragraph 25 of the writ petition, which are quoted herein below for ready reference :-

> "*25. That it is pertinent to mention herein that meanwhile the erstwhile Managing Director of the petitioner Bank in connection to some alleged offence was arrested and the record of this instant case was retained by the said Managing Director and, therefore, through the notice was shown to be issued to the Petitioner Bank but as the record of this case was dealt by the earlier Managing Director and the matter rested at lurch owing to the unavailability on account of arrest.*"

14. In reply to the aforesaid statement, the respondent no. 5 has stated that the Managing Director of the Bank *viz*. Sri Shubra Jyoti Bharali was arrested on 17/10/2021 in connection with Panbazar PS case No. 551/2021 and, therefore, there was nothing preventing the Managing Director of the Bank to contest the matter by engaging a counsel at an earlier date. However, the respondent no. 5 has not denied the fact that during the relevant period, the Managing Director of the Bank was facing serious charges of financial irregularities committed by him leading to his arrest in connection with the aforementioned Police Case.

15. Be that as it may, the fact remains that the Managing Director, who was the apex authority of the Bank and was required to take appropriate steps for protection of the Bank's interest, had failed to do so. He had been subsequently removed from his post and the petitioner no. 2 had been appointed as the Administrator of the Bank. It is, therefore, evident that the normal functioning of the office of the administrative head of the Bank was severely disrupted at the relevant point of time due to the aforesaid events. It is not clear as to whether, the Bank had failed to appear before the Labour Court on the subsequent dates due to the disruption of the functioning of the then Managing Director or was it on account of deliberate inaction on his part. However, viewed from any angle it can been seen that the interest of the Bank went un-protected in the proceeding before the learned Labour Court due to the failure of the then Managing Director of the bank to take proper steps in the matter. Therefore, having regard to the facts and circumstances of the case, this Court is reluctant to brush aside the submissions of Mr. Kaushik that for the reasons mentioned in the writ petition, the writ petitioner no. 1 Bank did not get proper opportunity to defend its interest in the matter.

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16. Coming to the argument advanced by the petitioners' counsel to the effect that the learned Labour Court had erred in exercising its jurisdictional, it may be noted that section 11A of the Act of 1947 was inserted by the Industrial Disputes (Amendment) Act, 1971. Section 11A reads as follows :-

> "*11A.* ***Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen***.- *Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:*
>
> *Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.]* "

17. A plain reading of section 11A goes to show that an order of discharge or dismissal of a workman, when referred to the Labour Court, can be interfered with and a direction to reinstate the workman can be issued if the Labour Court is satisfied that the order of discharge or dismissal was not justified. In order to examine the submission of Mr. Kaushik that not to speak of proper justification in the impugned award dated 19/12/2019, there was complete non- application of mind on the part of the learned Labour Court in arriving at the conclusion leading to interference with the order dated 08/02/2008, this Court deems it appropriate to reproduce the operative part of the award dated 19/12/2019 as hereunder :-

> "*The evidence shows that the Management removed (dismissed) the workman and there was disciplinary proceeding against the workman as admitted by the workman himself, but nothing was produced about the result of the said disciplinary proceeding and not even about the charges of the said disciplinary proceeding.*
>
> *The management did not take part in the proceeding, as stated herein above, therefore, the veracity of authenticity of the contents of the evidence of the workman has been remained un-rebutted and unshaken in the case in our hand.*
>
> *Therefore, the workman is deserved to be reinstated with full salary during his period of*

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suspension and back salary and other admissible benefits.

Accordingly, award is passed setting aside the dismissal order of the Management and for his reinstatement in his service with arrears of all benefits."

18. From the above, it is evident that proper reason has not been recorded by the learned Labout Court so as to arrive at a satisfaction that the order of removal from service was not justified in the eyes of law. In other words, the learned Labour Court had set aside the order of "removal from service" dated 08/02/2018 merely on *ipse dixit* i.e. in a manner which was impermissible in the eyes of law.

19. The scope and ambit of jurisdiction of the Labour Court to interfere with the order of termination issued by the employer based on domestic enquiry, came up for consideration before the Supreme Court in the case of ***The Management of Ritz Theatre (Private) Ltd., Delhi Vs. Its Workmen*** reported in ***AIR 1963 SC 295*** wherein, the principles which would govern the limits and scope of exercise of jurisdiction of the Tribunal while exercising jurisdiction under the provisions of the Act of 1947 have been laid down. In the aforesaid decision, the Supreme Court has held as follows :-

> "*It is well-settled that if an employer serves the relevant charge or charges on his employee and holds a proper and fair enquiry, it would be open to him to act upon the report submitted to him by the Enquiry Officer and to dismiss the employee concerned. If the enquiry has been properly held, the order of dismissal passed against the employee as a result of such an enquiry can be challenged if it is shown that the conclusions reached at the departmental enquiry were perverse or the impugned dismissal is vindictive or mala fide, and amounts to an unfair labour practice. In such an enquiry before the Tribunal, it is not open to the Tribunal to sit in appeal over the findings recorded at the domestic enquiry. This Court has held that when a proper enquiry has been held, it would be open to the Enquiry Officer holding the domestic enquiry to deal with the matter on the merits bona fide and come to his own conclusion*."

20. In the aforesaid decision, issue of right of the employer to lead evidence before the Tribunal in support of the order of dismissal of the employee was considered and held that if the employer proposes to lead evidence it should be held that the employer accepts the position that there was no proper managerial enquiry and has given up his stand based on the previous departmental enquiry thereby, thus authorizing the Tribunal to examine the dispute on the merit for itself.

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21. The principles laid down in the case of ***The Management of Ritz Theatre (Private) Ltd (Supra)*** was restated in the subsequent decisions in the case of ***Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*** reported in ***AIR 1972 SC 1031*** as well as in ***The Workmen of M/s. Firestone Tyre and Rubber Co. of India Ltd Vs. The Management*** reported in ***AIR 1973 SC 1227*** wherein, the observations made in the case of ***The Management of Ritz Theatre (Private) Ltd (Supra)*** have been quoted with approval.

22. In another decision rendered in the case of ***Neeta Kaplish Vs. Presiding Officer, Labour Court and another*** reported in ***(1999) 1 SCC 517,*** it has been held that in cases where enquiry has not been held or the enquiry has been found to be defective, the Labour Court/Tribunal can call upon the employer to justify its action taken against the workmen and show by fresh evidence that the order of termination or dismissal was proper. If the Management fails to lead evidence by availing the opportunity granted by the Court, then in that event, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity as the Tribunal in those circumstances would be justified in passing an award in favour of the workmen. The observations made in paragraphs 24 and 25 of the said decision, are relevant for the purpose of this case and, therefore, are being reproduced herein below for ready reference :-

> "*24. In view of the above, the legal position as emerges out is that in all cases where enquiry has not been held or the enquiry has been found to be defective, the Tribunal can call upon the Management or the employer to justify the action taken against the workman and to show by fresh evidence, that the termination or dismissal order was proper. If the Management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the Tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If, however, the opportunity is availed of and the evidence is adduced by the Management, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidence.*
>
> *25. In the instant case, the appellant had questioned the domestic enquiry on a number of grounds including that her own answers, in reply to the questions of the Presiding Officer, were not correctly and completely recorded and that the Enquiry Officer was not impartial and was biased in favour of the respondent. It was further contended that her own witnesses were not called and she was not given the opportunity to lead evidence. The Labour Court has discussed a few of these grounds but has not given any finding on the bias of Enquiry Officer or the ground relating to*

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incorrectly recording the statement of the appellant. The Labour Court, however, found that the enquiry was not fairly and properly held. It was after recording this finding that the Labour Court called upon the Management to lead evidence on merits which it did not do."

23. The scope and ambit of jurisdiction of the Court/ Tribunal to interfere with an order of dismissal based on domestic enquiry came up for consideration in the case of ***M.L. Singla Vs. Punjab National Bank and another*** reported in (2018) 18 SCC 21.It was case where a departmental enquiry was held against the employee i.e. the appellant in that case, by serving charge-sheet. An Enquiry Officer was appointed to enquire into the charges, whereafter, the Enquiry Officer had submitted his report. On the basis of the enquiry report, the appellant was dismissed from service. The appellant had approached the State Government raising an Industrial dispute, based on which, a reference was registered before the Labour Court so as to decide on the question of legality and validity of the order of dismissal from service. Based on the evidence adduced by both the parties, the Labour Court had answered the reference in favour of the appellant. The writ petition filed by the employer Bank against the order of the Labour Court was allowed by the High Court by setting aside the order of the Labour Court. Dismissing the appeal filed by the employee against the order of the High Court, the following observations were made by the Supreme Court in paragraphs 15 to 22 which are reproduced herein below for ready reference :-

"*15. The first error was that it failed to decide the validity and legality of the domestic enquiry. Since the dismissal order was based on the domestic enquiry, it was obligatory upon the Labour Court to first decide the question as a preliminary issue as to whether the domestic enquiry was legal and proper.*

16. Depending upon the answer to this question, the Labour Court should have proceeded further to decide the next question.

17. If the answer to the question on the preliminary issue was that the domestic enquiry is legal and proper, the next question to be considered by the Labour Court was whether the punishment of dismissal from the service is commensurate with the gravity of the charges or is disproportionate requiring interference in its quantum by the Labour Court.

18. If the answer to this question was that it is disproportionate, the Labour Court was entitled to interfere in the quantum of punishment by assigning reasons and

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substitute the punishment in place of the one imposed by respondent No.1 Bank. This the Labour Court could do by taking recourse to the powers under Section 11A of the ID Act.

19. While deciding this question, it was not necessary for the Labour Court to examine as to whether the charges are made out or not. In other words, the enquiry for deciding the question should have been confined to the factors such as what is the nature of the charge(s), its gravity, whether it is major or minor as per rules, the findings of the Enquiry Officer on the charges, the employee's overall service record and the punishment imposed etc.

20. If the Labour Court had come to a conclusion that the domestic enquiry is illegal because it was conducted in violation of the principles of natural justice thereby causing prejudice to the rights of the employee, respondent No.1 Bank was under legal obligation to prove the misconduct (charges) alleged against the appellant (employee) before the Labour Court provided he had sought such opportunity to prove the charges on merits.

21. The Labour Court was then under legal obligation to give such opportunity and then decide the question as to whether respondent No.1 Bank was able to prove the charges against the appellant on merits or not.

22. If the charges against the appellant were held proved, the next question to be examined was in relation to the proportionality of the punishment given to the appellant. If the charges against the appellant were held not proved, the appellant was entitled to claim reinstatement with back wages either full or partial depending upon the case made out by the parties on the issue of back wages."

24. In the case of ***Standard Chartered Bank Vs. r.C. Srivastava*** reported in ***AIR 2021 SC 4879***, the Supreme Court had the occasion to interpret section 11A of the Act of 1947, wherein, it has been held as follows :-

"*19. The decision of the Labour Court should not be based on mere hypothesis. It cannot overturn the decision of the management on ipse dixit. Its jurisdiction under Section 11A of the Act 1947 although is a wide one but it must be judiciously exercised. Judicial discretion, it is trite, cannot be exercised either whimsically or capriciously. It may scrutinize or analyse the evidence but what is important is how it does so*."

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25. From a careful analysis of the aforesaid decisions, what follows is that the decision of the Management to terminate the services of an employee based on a domestic enquiry cannot be interfered with by the Labour Court on mere *ipse dixit.* The Labour Court will have to first decide as a preliminary issue, the question as to whether the domestic enquiry was fair and proper and the observance of the principles of Natural Justice [see ***Usha Breco Mazdoor Sangh (supra)]***. If the answer to the said issue is found to be in the negative, it is only then that the question of adducing evidence by the employer and the employee would arise so as to enable the Labour Court to pass an order on the merit of the reference based on the evidence brought on record by the parties. If however, the Labour court does not find any infirmity in the proceedings of the domestic enquiry, then the order of penalty can only be examined on the touch stone of proportionality of the punishment [see ***Joseph Solomon Vs. Presiding Officer, Labour Court & Anr.*** reported in ***2012(5) ALJ (NOC) 296 (ALL)].*** Thus, the question of the parties leading evidence before the Labour Court will arise only when it is established that the domestic enquiry is not found to have been conducted in an unfair, non-transparent or unjust manner.

26. In the present case, as has been observed here-in-above, no such exercise had been carried out by the learned Labour Court so as to ascertain as to whether the domestic enquiry was carried out in a fair and proper manner. Notwithstanding the same, the respondent No 5 was permitted to lead evidence, based on which, the order of penalty was set-aside. The above approach, in the opinion of this court, was not legally correct. Therefore, it is held that the impugned award dated 19-12/2019 is un-sustainable in law and hence, liable to be set-aside on such count alone.

27. Coming to the next question of maintainability of the reference, it is to be noted herein that a reference would be maintainable under section 2A of the Act of 1947 only if the same is registered at the instance of a workman coming within the definition of section 2(s) of the Act of 1947. Section 2(s) of the Act of 1947 reads as follows :-

> "2*(s) workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, 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*

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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

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(iii) who is employed mainly in a managerial or administrative capacity; or

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(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.].”

28. In the present case, the Bank had raised the question of maintainability of the reference on the ground that the respondent no. 5 was not a workman. The preliminary objection on maintainability raised by the Bank was rejected by the learned Tribunal by the order dated 22-04-2019. However, in the award dated 19/12/2019, no finding has been recorded by the learned Labour Court as to whether, the respondent no. 5 was a workman coming within the definition of section 2(s) or not. If it is found that the respondent no. 5 was not a workman within the meaning of section 2(s) than in that event, the learned Labour Court would not have the jurisdiction to entertain the reference case. Once an objection as to the maintainability of the reference was raised by the management by taking the plea that the employee was not a workman, regardless of whether any written statement is filed on not, it was incumbent upon the learned Labour Court to record a finding on the above aspect of the matter based on the materials produced by the employee. The burden to prove that the employee is a workman for the purpose of section 2 (s) would be upon the employee and not the Management.

29. Law is firmly settled that the question of want of jurisdiction of a Court to entertain a dispute is an issue which goes to the root of the matter and therefore, such issue can be raised at any stage of the proceeding. While dealing with an issue of similar nature, the Supreme Court, in the case of ***Dr. Jagmittar Sain Bhagat Vs. Director Health Services, Haryana and others*** reported in ***AIR 2013 SC 3060,*** has made the following observations in paragraph 7, which are reproduced herein below for ready reference :-

“ *7. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative*

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function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (Vide: United Commercial Bank Ltd. v. Their Workmen, AIR 1951 sc 230; Smt. Nai Bahu v. Lal Ramnarayan & Ors., AIR 1978 sc 22; Natraj Studios (P) Ltd. v. Navrang Studios & Anr., AIR 1981 sc 537; and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 sc 2213)."

30. This Court has also taken note of the findings recorded by the learned Labour Court to the effect that "nothing was produced regarding the result of the said disciplinary proceeding and not even about the charges of the said disciplinary proceeding". However, a plain reading of the evidence-on- affidavit of the respondent no. 5 submitted in connection with case No. 01/2019, goes to show that copy of the enquiry report, along with the show cause notices and the order of removal from service had been duly exhibited by the said respondent. Moreover, the respondent no. 5 had also stated in his affidavit that he was holding the post of Branch Manager and Chief Manager (HR and Administration). This Court is, therefore, of the opinion that the learned Labour Court had failed to consider relevant materials placed on record and had passed the impugned award dated 19/12/2019 in a most perfunctory manner. As such, the impugned award dated 19/12/2009 is vitiated by perversity and is liable to be declared so by this Court.

31. For the reasons stated herein above, this writ petition succeeds and is hereby allowed. The impugned award dated 19/12/2019, the order dated 04/03/2021 as well as Bakijai proceeding registered as Bakijai cas No. 02/2021 are hereby quashed. The entire matter is remanded back to the learned Labour Court for a fresh decision of the reference case No. 1/2019 in the light of the observations made herein above.

32. The parties are directed to appear before the learned Labour Court on 30/06/2023 and produce a certified copy of this order. Upon such appearance, the petitioner no. 1/Bank be permitted 10(ten) days time to file written statement of defence, if so desired. The proceeding may continue thereafter, in accordance with law and a decision be rendered by the learned Labour Court on merit,

on all the issues, including the issue of maintainability of the reference case, by recording cogent reasons.

33. Both the parties shall be permitted adequate opportunity to adduce evidence in support of their respective cases, if so desired.

34. Since the order of removal from service was issued on 08/02/2018 and considering the fact that the respondent no. 5 is out of employment, the learned Labour Court may make an attempt to dispose of the entire matter, as expeditiously as possible, preferably within 6 (six) months from the date of receipt of a certified copy of this order, if necessary by holding day to day hearing.

Parties to bear their own costs.

Registry to send back the LCR expeditiously.

JUDGE

Sukhamay

Comparing Assistant

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