Board of Trustees of The Port of Bombay

Vs

Dilipkumar Raghavendranath Nadkarni and Others

Civil Appeal No. 3734 of 1982

(D. A. Desai. R. M. Misra JJ)

17.11.1982

JUDGMENT

1. Special leave granted.

2. We heard Mr. F. S. Nariman for the appellant and Dr. Y. S. Chitale for the 1st respondent. With the consent of parties we proceed to dispose of the appeal.

3. A charge-sheet was drawn up against the 1st respondent for the alleged misconduct and an Enquiry Officer was appointed to hold the enquiry against the 1st respondent. Before the enquiry opened, the 1st respondent submitted a request seeking permission to engage a legal practitioner for his defence. The Chairman of the appellant rejected this request and simultaneously appointed two Officers, namely, Shri R. K. Shetty and Shri A. B. Chaudhary, Legal Adviser and Junior Assistant Legal Adviser respectively of the appellant as Presenting Officers before the Enquiry Officer. A copy of this letter was endorsed to the 1st respondent with a foot-note that his request for permitting him to appear through a legal practitioner in the enquiry has been rejected by the Chairman. As a sequel to the rejection of his request, the 1st respondent out of compelling necessity submitted a request that Shri V. V. Nadkarni be permitted to appear in his defence which appears to have been granted. The enquiry opened on April 13, 1976. On May 8, 1976 Bombay Port Trust Employees Regulations, 1976 came into force. Regulation 12 (8) reads as under :

> The employee may take the assistance of any other employee or, if the employee is a Class III or a Class IV employee, of an "Office Bearer" as defined in clause (d) of Section 2 of the Trade Unions Act, 1926 (116 of 1026) of the union to which he belongs, to present the case on his behalf, but may not engage a legal practitioner for the purpose unless the said Presenting Officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits.

4. It may be mentioned that the date on which the aforementioned regulation came into force, the second out of 25 witnesses for the employer was in the witness-box. It may as well be mentioned that even after the Regulation 12 (8) came into force, neither the Enquiry Officer nor the Chairman of the appellant thought fit to review the earlier decision so as to enable the 1st respondent to appear through a legal practitioner. At the end of the enquiry, the 1st respondent was dismissed from service.

5. The 1st respondent challenged the legality and validity of the order of dismissal in Miscellaneous Petition No. 705 of 1979 in the High Court of Judicature at Bombay. A learned Single Judge of the

High Court by his judgment and order dated September 13, 1982 quashed and set aside the order of dismissal, inter alia, holding that while appointing two Presenting Officers both legally trained, the Chairman of the appellant failed to afford a reasonable opportunity to the 1st respondent to defend himself by refusing him permission to appear through a legal practitioner and the principles of natural justice are violated. An appeal being O. O. C.J. No. 594 of 1982 by the appellant was dismissed in limine by a Division Bench of that High Court. Hence this appeal by special leave.

6. We were not inclined to grant leave to appeal in this case, but as we want to clear a legal misconception we though fit to hear learned counsel on either side and to dispose of this appeal by a short judgment.

7. The narrow question which we propose to examine in this appeal is whether where in a disciplinary enquiry by a domestic tribunal, the employer complaining misconduct appoints a legally trained person as Presenting-cum-Prosecuting Officer the denial or refusal of a request by the delinquent employee seeking permission to engage a legal practitioner to defend him at the enquiry, would constitute such denial of reasonable opportunity to defend oneself and thus violate one of the essential principles of natural justice which would vitiate the enquiry ?

8. The time honoured and traditional approach is that a domestic enquiry is a managerial function and that it is best left to management without the intervention of persons belonging to legal profession. This approach was grounded on the view that a domestic tribunal holding an enquiry without being unduly influenced by strict rules of evidence and the procedural juggernaut should hear the delinquent officer would be able to defend himself. The essential assumption underlying this belief is questionable but it held the filed for some time and there are decisions of this Court in Brooke Bond India (Pvt.) Ltd. v. Subba Raman (S.) and Dunlop Rubber Co. v. Workmen, in which it has been held that in a disciplinary enquiry before a domestic tribunal a person accused of misconduct has to conduct his own case and therefore as a corollary it cannot be said that in such an enquiry against a workman natural justice demands that he ought to be represented by a representative of his union much less a member of the legal profession. While buttressing this approach, an observation was made that unless rules prescribed for holding the enquiry do not make an enabling provision that the workman charged with misconduct is entitled to be represented by a legal practitioner, the Enquiry Officer and/or the employer would be perfectly justified in rejecting such a request as it would vitiate the informal atmosphere of a domestic tribunal. A strikingly different view was sounded by Lord Denning in Peti v. Greyhound Racing Association Ltd., wherein the concerned authority directed an enquiry to be held into the withdrawal of a trainer's dog from a race at a stadium licensed by the National Greyhound Racing Club. The rules of the Club did not prescribe the procedure to be followed in such an enquiry, and there was negative provision excluding a legal practitioner from such an enquiry. The procedure for enquiry was the routine one of examination and cross-examination of the witnesses. The licensee charged with misconduct sought permission to be represented by counsel and solicitor at the enquiry, which request was turned down by track stewards. When the matter reached the Court of Appeal. Lord Denning observed as under :

> I should have though, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.

The trend therefore is in the direction of permitting a person who is likely to suffer serious civil or pecuniary consequences as a result of an enquiry, to enable him to defend himself, adequately, he

may be permitted to be represented by a legal practitioner. But we want to be very clear that we do not want to go that far in this case because it is not necessary for us to do so. The all important question : where as a sequel to an adverse verdict in a domestic enquiry serious civil and pecuniary consequences are likely to ensue in order to enable the person so likely to suffer such consequences with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner, is kept open.

9. We concern ourselves in this case with a narrow question whether where in such a disciplinary enquiry by a domestic tribunal, the employer appoints Presenting-cum-Prosecuting Officer to represent the employer by persons who are legally trained, the delinquent employee, if he seeks permission to appear and defend himself by a legal practitioner, a denial of such a request would vitiate the enquiry on the ground that the delinquent employee had not been afforded a reasonable opportunity to defend himself, thereby vitiating one of the essential principles of natural justice.

10. Even in a domestic enquiry there can be very serious charges, and an adverse verdict may completely destroy the future of the delinquent employee. The adverse verdict may so stigmatize him that his future would be bleak and his reputation and livelihood would be at stake. Such an enquiry is generally treated as a managerial function and the Enquiry officer is more often a man of the establishment. Ordinarily he combines the role of a Presenting-cum-Prosecuting officer and an Enquiry officer a judge and a prosecutor rolled into one. In the past it could be said that there was an informal atmosphere before such a domestic tribunal and that strict rules of evidence and pitfalls of procedural law did not hamstring the enquiry by such a domestic tribunal. We have moved far away from this stage. The situation is where the employer has on his pay-rolls labour officer legal advisers - lawyers in the garb of employees - and they are appointed Presenting - cum-Prosecuting officer and the delinquent employee pitted against such legally trained personnel has to defend himself. Now if the rules prescribed for such an enquiry did not place an embargo on the right of the delinquent employee to be represented by a legal practitioner the matter would be in the discretion of the Enquiry Officer whether looking to the nature of the charges, the type of the evidence and complex or simple issues that may arise in the course of enquiry the delinquent employee in order to afford to appear through a legal practitioner. Why do we say so ? Let us recall the nature of enquiry. Who held it where it is held ad what is the atmosphere/ Domestic enquiry is claimed to be a managerial function. A man of the establishment dons the robe of a Judge. It is held in the establishment office or a part of it. Can it even be compared to the adjudication by an impartial arbitrator or a court presided over by an unbiased judge? The Enquiry Officer combines the judge and prosecutor rolled into one. Witnesses are generally employees of the employer who directs an enquiry into misconduct. This is sufficient to raise serious apprehensions. Add to these uneven scales, the weight of legally trained minds on behalf of employer simultaneously denying that opportunity to delinquent employee. The weighted scales and titled balance can only be partly restored if the delinquent is given the same legal assistance as the employer enjoys. Justice must not be responsible for fair play in action. And a quasijudicial tribunal cannot view the matter with equanimity on inequality of representation. This court in M. H. Hoskot v. State of Maharashtra clearly ruled that in criminal trial where prosecution is in the hand of public prosecutor, accused, for the adequate representation must have legal aid at State cost. This will apply mutatis mutandis to the present situation.

11. We are faced with the situation where when the enquiry commenced the rules neither provided fro permitting the delinquent employee to be represented by an advocate nor an embargo was placed on such appearance. The rules were silent on this point. But the Chairman of the appellant while rejecting the request of the 1st respondent seeking permission to appear through a legal practitioner

simultaneously appointed M/s. R. K. Shetty and A. B. Chaudhary. Legal Adviser and Junior Assistant Legal adviser respectively in the employment of the appellant as Presenting-cum-Prosecuting Officers. What does this signify ? The normal inference is that according to the Chairman of the appellant the issues that would arise in the enquiry were such complex issues involving intricate legal propositions that the Enquiry Officer would need the assistance of Presenting-cum Prosecuting Officers. And look at the array of law officers of the appellant appointed for this purpose. Now examine the approach of the Chairman. While he directed two of his law officers to conduct the enquiry as prosecutor, he simultaneously process to deny such legal representation to the delinquent employee, when he declined the permission to the 1st respondent to appear through a legal practitioner. Does this disclose a fair attitude or fair pay in action? Can one imagine how the scales were weight and thereby tilted in favour of he prosecuting officer. In this enquiry the employer would be represented by two legally trained minds at the cost of the Port Trust while the 1st respondent was asked either to feed for himself in person or have the assistance of another employee such as Nadkarni who is not shown to be a legally trained person, but the delinquent employee cannot engage a legal practitioner at his cost. Can this ensure a fair enquiry ? The answer is not far to seek. Apart from any legal proposition or formulation we would consider this approach as utterly unfair and unjust. More so in absence of rules, the Chairman of the appellant was not precluded form granting a request because the rules did not enact an inhibition. Therefore, apart from general propositions, in the facts of this case, this enquiry would be a one-side enquiry weighted against the delinquent officer and would result in denial of reasonable opportunity to defend himself. He was pitted against two legally minds and one has to just view the situation where a per son not admitted to the benefits of niceties of law is pitted against two legally trained minds and then asked to fend for himself. In such a situation, it does not require a long argument to convince the delinquent employee was denied the reasonable opportunity to fend for himself and the conclusion arrived at would be in violation of one of the essential principles of natural justice, namely, that a person against whom enquiry is held must be afforded a reasonable opportunity to defend himself.

12. Are we charting a new course ? The answer is obviously in the negative. In C. L. Subramanium v. Collector of Customs, Cochin a government employee requested the Enquiry Officer to permit him to appear through a legal petitioner and even though a trained Public Prosecutor was appointed as Presenting Officer, this request was turned down. When the matter reached this Court, it was held that the enquiry was in breach of the principles of natural justice. The order of the domestic tribunal was sought to be sustained on the submission that sub-rule (5) of Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 that "the Government servant may present his case with the assistance of any Government servant approved by the Disciplinary Authority but may not engage a legal petitioner for the purpose unless the person nominated by the Disciplinary Authority as aforesaid is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case, so permits". The submission was that it is a matter within discretion of the Enquiry Officer whether to grant permission and more so because the relevant rule fetters to claim to appear through a legal practitioner. Negativing this contention, this Court held that the fact that the case against the appellant was handled by a trained prosecutor was by itself a good ground for allowing the appellant to engage the a legal practitioner to defend him lest the scales should be weighed against him. This conclusion was recorded after reference to the earlier decisions in Broke Bond India (Pvt.) Ltd. v. Subba Raman (S.) 1 and Dunlop Rubber Co. v. Workmen 2. Reference was made to Pett case 3, reference to earlier, but it is observed that this case has not commended itself to this Court. The earlier cases of this Court were distinguished. In our view we have reached a stage in our onward march to fair play in action that where in an enquiry

before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner, the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated. The view has been taken by a learned Single Judge and while dismissing the appeal in limine approved by the Division Bench of the High Court commends to us. Therefore, this appeal is liable to be dismissed.

13. We would reach the same conclusion for a different reason altogether. The 1st respondent while submitting a reply to the charge-sheet dated April 14, 1975 requested the Chairman of the appellant to permit his assistance of an advocate at the enquiry. This request was refused and the decision was conveyed by the Dock Manager as per his letter dated March (sic) 1975. The enquiry opened on April 13, 1976. By May 8, 1976 evidence of only one out of 25 witnesses of the employer was offered and the second witness was under examination. On that date Bombay Port Trust Employee Regulations, 1976 admittedly came into force. The relevant regulation 12 (8) is extracted herein before. The latter portion off the regulation practically borrows the language of sub-rule (5) of Rule 15 referred to herein before, in that it provides that the delinquent officer may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the Disciplinary Authority is the legal practitioner, or the Disciplinary Authority having regard to the circumstances of the case so permits. Now the 1st respondent has already submitted his request for appearing through a legal practitioner at the enquiry. This eminently just request was turned down on an untenable grounds, and to make matters worst for the delinquent employee two Law Officers of the appellant were appointed Presenting-cum-Prosecuting Officers. Assuming that in the absence of the rules the Chairman has a discretion which was required to be exercised against the 1st respondent because he was not under any statutory obligation to grant this request. However, when Regulation 12 (8) came into force, the situation materially altered and the large number of witnesses almost all except one were examined after the regulation came into force and which made it obligatory to grant the request of the 1st respondent because the regulation provided granting of permission to appear and defend by a legal practitioner once the department was represented by legally trained minds. A very feeble submission was made by Mr. Nariman the after the Regulation 12 (8) came into force, the request was not renewed. In our opinion that is hardly relevant. The unjustly refused request was already there and obligation under the regulation coupled with fair play in action demanded that the employer should have suo motu reviewed his order refusing the request. In fact one can go so far as to say that the Enquiry Officer in order to be fair and just, whenever he finds the employer appointing legally trained persons as Presenting-cum-Prosecuting Officers must enquiry from the delinquent employee before commencement of enquiry whether he would like to take assistance of a legal practitioner. The opinion then is with the delinquent employee. In this connection, we would like to refer to a weighty observation on this point where despite constitutional inhibition this court conceded such a right. In A. K. Roy v. Union Of India at page 334 (Para 93) [1982 SCC (Cri.) p. 208], the learned Chief Justice while rejecting the contention that a detenu should be entitled to appear through a legal advisor before the Advisory Board observed that Article 22 (3) (b) makes it clear that the legal practitioner should not be permitted to appear before the Advisory Board or any party. While noting this constitutional mandate, the learned Chief Justice proceeded to examine, what would be the effect if the department is presented before the Advisory Board by a legally trained person. It was held that in such a situation despite the inhibition of Article 22 (3) (b) the fair procedure as contemplated by Article 21 requires that a detenu be permitted to appear by a legal practitioner. The spoke the learned Chief Justice :

> We must therefore make it clear that if the detaining authority or the government takes the aid of a legal practitioner or a legal advisor before the Advisory Board, the

> detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisors.

And this view was taken as following from Article 21 which mandates that no one shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The expression 'life' does not merely cannot animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. Where therefore outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of civilization which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures. In this context one can recall the famous words off Chapter II of Bhagwad-Gita :

> Sambhavitasya Cha Kirti Marnadati Richyate.

Therefore, in this case, there can be no doubt that for the additional reason that after the Regulation 12 (8) came into force, the 1st respondent should have been given a reasonable opportunity to appear through legal practitioner and failure on their part had vitiated the enquiry. For these reasons, this appeal fails and is dismissed with costs quantified at Rs. 2000.

14. Now, we may note the consequence of this decision. As the decision reached by the domestic tribunal is held to be vitiated on the ground that the enquiry was held in violation of the principles of natural justice on the ground that the 1st respondent was not afforded a reasonable opportunity to defend himself, the High Court was justified in quashing the order of dismissal. The sequel to our order would certainly mean that it would be open to the appellant to continue the enquiry. But it must be expedited. We therefore, direct that while continuing the enquiry, it will be open to the appellant to treat the examination-in-chief of each witness already recorded during the enquiry as proper but all witnesses examined at the enquiry will have to be afforded to the 1st respondent for cross-examination and the respondent would be entitled to appear through a lawyer of his choice and even examine witnesses and participate in the enquiry. The earlier cross-examination may also be retained as part of the record. Both sides would be entitled to adduce fresh evidence both document and oral, if considered necessary. The 1st respondent would be entitled to call upon the appellant to produce any document which he desires for effective adjudication subject to the decision of the Enquiry Officer about its relevance and necessity for efficient and just disposal of the enquiry. As the order of dismissal is being set aside and the enquiry is being continued, the order suspending the 1st respondent from service pending enquiry would be revived and the appellant should pay subsistence allowance throughout this period and till the end of the enquiry which would be continued hereafter, after taking credit of whatever payment that had been made since the suspension order and till today. The payment herein directed should be made within a month from today.

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