United Planters Association of Southern India

Vs

K. G. Sangameswaran and Another

Civil Appeal No. 1786 of 1997

(A. M. Ahmadi, S. C. Agarwal JJ)

06.03.1997

JUDGMENT

S. SAGHIR AHMAD, J. –

1. Leave granted.

2. The respondent, K. G. Sangameswaran, who was employed with the appellant as an Accountant, was dismissed from service by order dated 5-7-1994. This order was passed for serious misconduct, including misappropriation on the part of and by the respondent during the period 1986-87 to 1992-93, for which criminal proceedings were also initiated against him.

3. This order was challenged by the respondent before the Appellate Authority under Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947 (for short "the Act"). The Appellate Authority, by its judgment dated 12-2-1996, allowed the appeal, set aside the order of dismissal and directed reinstatement of the respondent with full back wages. It is against this judgment that the present appeal has been filed.

4. The order of dismissal by the appellant was set aside by the Appellate Authority (Respondent 2), principally on the ground that the order being an order of dismissal, could not have been passed under Section 41(1) of the Act without first holding a domestic enquiry into the allegations made against him.

5. The appellant, in their written statement filed before the Appellate Authority, pleaded that the Act was not applicable to the respondent and consequently the appeal itself was not maintainable. It was also pleaded that when the charge-memo was issued to the respondent, he filed his reply dated 24-1-1994 in which he denied the charges and made a request for perusal of records before submitting his further reply. The appellant, by their subsequent letter dated 17-2-1994, wanted the details of the documents which the respondent wanted to inspect. The respondent, by his letter dated 20-2-1994 is said to have pleaded not guilty and is further said to have stated that no useful purpose would be served by participating in the enquiry as the enquiry was bound to be biased. The appellant consequently proceeded to dismiss the respondent from service after perusal of the documents and other relevant records indicating misappropriation and misconduct by the respondent.

6. In view of the controversy raised before the Appellate Authority, two issues were framed as under :

1. Whether the respondent/management and the appellant are covered under the

TNSE Act, 1947 ?

2. Whether the respondent followed the provisions of Section 41(1) before dismissing the appellant ?

7. On Issue No. 1, the finding recorded by the Appellate Authority was that since the United Planters Association of Southern India, which is the appellant before us, was declared as a commercial establishment by the Tamil Nadu Government vide its Notification in GOMs No. 6265 dated 20-12-1948 issued under Section 2(3) of the Act, it would be governed by the Act. It was further held that since the respondent was employed as an Accountant in that establishment, he would fall within the definition of "person employed" as set out in Section 2(12) of the Act. On Issue No. 2, it was found by the Appellate Authority that the respondent was dismissed from service without following the provisions of Section 41(1) of the Act and without holding the domestic enquiry.

8. Mr. G. B. Pai, learned Senior Counsel appearing for the appellant, did not seriously dispute the findings on Issue No. 1, but he vehemently argued that the finding recorded by the Appellate Authority on Issue No. 2 was wholly erroneous, inasmuch as the order by which the services of the respondent were brought to an end was not an order of dismissal and, therefore, there was no requirement to hold a domestic enquiry. It was contended that under Section 41(2) an appeal would lie only on the ground that there was no reasonable cause for dispensing with the services or that he had not been guilty of misconduct as held by the employer. In a case of simple termination, an appeal would, therefore, not lie as it would not fall within any of the aforesaid grounds.

9. The nature of the order, whether it is innocuous or punitive, is exhibited by the contents of the order. The order dated 5-7-1994, by which the respondent was dismissed from service, recites, inter alia, as under :

#"1. * * *##

2. On a consideration of the contents of the letters referred to above as well as the relevant evidence, (viz.) documents referred to in the Notice dated 18th January, 1994, it is clear that you are guilty of the misconducts alleged against you and it is found accordingly. Considering the gravity of the misconducts committed by you, particularly, in the light of the position of trust and responsibility that you hold as Accountant, it is decided to dismiss you from service forthwith.

#3. * * *##

4. It may be noted that this is without prejudice to the right of the Association to pursue criminal proceedings initiated against you as well as to recover the amounts lost by the Association pursuant to the misappropriation and other acts committed by you as also due to your gross and criminal negligence. It may also be noted that in view of the nature of the misconducts committed by you and the loss suffered by the Association, consequent to the same, you will not be entitled to any gratuity from the Association."

This order, ex facie, is punitive in nature as the respondent has been held guilty of misconduct, including misappropriation, allegedly committed by him. The order is not an innocuous order and cannot be treated as an order by which services of the respondent were simply terminated. He was,

in fact, dismissed from service.

10. It was next contended by the counsel for the appellant that the Appellate Authority before whom an application to produce the evidence was filed should have allowed the appellant to lead the evidence in support of the charges levelled against the respondent as the Appellate Authority has jurisdiction and power to record evidence at the appellate stage as provided by Section 41(2) read with Rule 9(3) of the Tamil Nadu Shops and Establishments Rules, 1948. The learned counsel for the respondent has, on the contrary, contended that if an opportunity of hearing was not given to the respondent at the initial stage during the domestic enquiry, the defect cannot be cured by giving him that opportunity at the appellate stage and, therefore, even if application to lead fresh evidence was not disposed of by the Appellate Authority, it would not vitiate the order of that authority.

11. Before construing the provisions of Section 14 and Rule 9, it may be stated that it has always been the philosophy of Industrial Jurisprudence that if the domestic enquiry held by the employer was defective, deficient, incomplete or not held at all, the Tribunal, instead of remanding the case to the enquiry officer for holding the enquiry de novo, would itself require the parties to produce their evidence so as to decide whether the charges, for which disciplinary action was taken against the employee, were established or not. The pending proceedings keep the employer and the employee in a state of confrontation generating further misgivings and bitterness. It is, therefore, of paramount importance that such proceedings should come to an end at the earliest so as to maintain industrial peace and cordial relations between the management and the labour.

12. This Court in Indian Iron & Steel Co. Ltd. v. Workmen [AIR 1958 SC 130 : (1958) 1 LLJ 260] had laid down that in case of dismissal for misconduct, the Tribunal does not act as a court of appeal and it is not within its jurisdiction to substitute its own judgment for that of the management and that it would interfere only when there was want of good faith, victimisation or unfair labour practice etc. on the part of the management. This decision was followed in Punjab National Bank Ltd. v. Workmen [(1960) 1 SCR 806 : AIR 1960 SC 160 : (1959) 2 LLJ 666].

13. In Bharat Sugar Mills Ltd. v. Jai Singh [(1962) 3 SCR 684 : (1961) 2 LLJ 644] the question of allowing an employer to adduce evidence before the Tribunal justifying its action (after the domestic enquiry was found to be defective) was considered and it was held that in such a situation it would be appropriate to allow the parties to lead evidence so that the Tribunal itself may be satisfied about the misconduct imputed to the employee. The decision of the Labour Appellate Tribunal in Buckingham and Carnatic Co. Ltd. v. Workers of the Co. [1952 Lab AC 490] in which it was laid down that evidence can be adduced even for the first time at that stage was approved. This question was again considered in Ritz Theatre (P) Ltd. v. Workmen [(1963) 3 SCR 461 : AIR 1963 SC 295 : (1962) 2 LLJ 498] and the law laid down earlier was reiterated. To the same effect is the decision of this Court in Khardah Co. Ltd. v. Workmen [(1964) 3 SCR 506 : AIR 1964 SC 719 : (1963) 2 LLJ 452] and Workmen v. Motipur Sugar Factory [(1965) 3 SCR 588 : AIR 1965 SC 1803 : (1965) 2 LLJ 162]. In State Bank of India v. R. K. Jain [(1972) 4 SCC 304 : (1972) 1 SCR 755] and in Delhi Cloth & General Mills Co. v. Ludh Budh Singh [(1972) 1 SCC 595 : (1972) 1 LLJ 180] it was again laid down that where an employer failed to make an enquiry before dismissing a workman, it would be open to him to produce all relevant evidence before the Tribunal to show that the action was justified.

14. Provisions of the Industrial Disputes Act were, in the meantime, amended and on the recommendation of the International Labour Organization, Section 11-A was introduced in the Act by Parliament, wherein it was provided that the Tribunal had not only the power to set aside the

order of dismissal and direct reinstatement of the workman, it had also the power to award lesser punishment. The proviso to Section 11-A, however, provided that the Tribunal would rely only on the material already on record and shall not take any fresh evidence.

15. In view of the provisions contained in Section 11-A, a question arose in Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd. [(1973) 1 SCC 813 : 1973 SCC (L&S) 341 : AIR 1973 SC 1227] as to the jurisdiction of the Tribunal to take evidence to decide the merit of the charges and it was laid down that in spite of the prohibition contained in the proviso to Section 11-A the Tribunal, in order to satisfy itself as to the guilt of the person charged, had the jurisdiction to take the evidence and that the law in that regard had not undergone any change. It was pointed out that if the domestic enquiry had been held by the employer, the Tribunal will examine the merits of that enquiry and would confine itself to the evidence already on record. But where the enquiry was defective, the Tribunal could still take fresh evidence to decide the merits of the charges.

16. This decision has since been followed by this Court in a number of cases, including East India Hotels v. Workmen [(1974) 3 SCC 712 : 1974 SCC (L&S) 245 : AIR 1974 SC 696]; Cooper Engineering Ltd. v. P. P. Mundhe [(1975) 2 SCC 661 : 1975 SCC (L&S) 443 : AIR 1975 SC 1900]; Ruston & Hornsby (I) Ltd. v. T. B. Kadam [(1976) 3 SCC 71 : 1976 SCC (L&S) 381 : AIR 1975 SC 2025] and in a recent decision in Bharat Forge Co. Ltd. v. A. B. Zodge [(1996) 4 SCC 374 : 1996 SCC (L&S) 945] in which it was again reiterated that the parties have the right to adduce evidence before the Tribunal and the Tribunal can, on the basis of such evidence, come to its own conclusion as to the guilt of the employee.

17. We may now proceed to consider the provisions of Section 41 and Rule 9 which are quoted below :

> "41. Notice of dismissal. - (1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause and without giving such person at least one month's notice, or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose.
>
> (2) The person employed shall have a right to appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.
>
> (3) The decision of the appellate authority shall be final and binding on both the employer and the person employed."
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> "Rule 9. Appeals under Section 41(1). - The Deputy Commissioners of Labour in their respective areas assigned to them by the Commissioner of Labour shall be the authorities for the purposes of hearing appeals under sub-section (2) of Section 41 of the said Act :
>
> Provided that the Commissioner of Labour may, by order in writing, on the representation made by either of the parties in this behalf or on his own record,

withdraw any case under this Act, pending before an authority and transfer the same to another authority for disposal. Such authority to whom the case is so transferred may, subject to the special direction in the order of transfer proceed either de novo or from the stage at which it was so transferred.

(2) Any appeal under sub-section (2) of Section 41 shall be preferred by the person employed within thirty days from the date of service of the order terminating the service with the employer, such service to be deemed effective if carried out either personally or if that be not practicable, by prepaid registered post to the last known address when the date of such service shall be deemed to be the date when the letter would arrive in ordinary course of post.

[Provided that an appeal may be admitted after the said period of thirty days if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within that period.]

(3) The procedure to be followed by the appellate authority (Deputy Commissioner of Labour), when hearing appeals preferred to him under sub-section (2) of Section 41 shall be summary. He shall record briefly the evidence adduced before him and then pass orders giving his reasons therefor. The result of the appeal shall be communicated to the parties as soon as possible. Copies of the orders shall also be furnished to the parties, if required by them."

18. From a perusal of the provisions quoted above, it will be seen that the jurisdiction of the Appellate Authority to record evidence and to come to its own conclusion on the questions involved in the appeal is very wide. Even if the evidence is recorded in the domestic enquiry and the order of dismissal is passed thereafter, it will still be open to the Appellate Authority to record, if need be, such evidence as may be produced by the parties. Conversely, also if the domestic enquiry is ex parte or no evidence was recorded during those proceedings, the Appellate Authority would still be justified in taking additional evidence to enable it to come to its own conclusions on the articles of charges framed against the delinquent officer.

19. This Court in Remington Rand of India Ltd. v. Thiru R. Jambulingam [(1975) 3 SCC 254 : 1974 SCC (L&S) 537 : (1975) 2 SCR 17] has already considered the scope of the provisions of Section 41 of the Act and held that the jurisdiction of the Commissioner (Deputy Labour Commissioner) who is the Appellate Authority under the Act is of wider scope unlike that of the Tribunal in an application under Section 33 of the Industrial Disputes Act. It was further held that the Commissioner was competent to rehear the matter completely and come to his own conclusion after reappreciation of the evidence or entertaining additional evidence, if necessary, in the interests of justice.

20. A similar provision was considered by a three-Judge Bench of this Court in Chairman, Brooke Bond India (P) Ltd. v. Chandra Nath Choudhary [(1969) 1 SCR 919 : AIR 1969 SC 992 : (1969) 2 LLJ 387]. In that case, the Court considered the provisions of the Bihar Shops and Commercial Establishments Act and the Rules framed thereunder. Sub-section (1) of Section 26 of the Bihar Act provided that no employer shall dismiss or discharge an employee except on a reasonable cause and without giving such employee at least one month's notice or one month's wages in lieu thereof. The proviso to sub-section (1) laid down that the notice shall not be necessary where the services are dispensed with on a charge of misconduct. It was provided by sub-section (2) that every employee,

dismissed or discharged, may file a complaint to the prescribed authority (labour court) on three grounds, namely -

> (1) that there was no reasonable cause for dispensing with his services, or
>
> (2) that no notice was served on him as required by sub-section (1), or
>
> (3) that he was not guilty of any misconduct as held by the employer.

21. Sub-section (5) of Section 26 enabled the competent authority to record evidence and come to its own findings on such evidence. It was held that the authority was required to come to its own independent findings on the evidence adduced by the parties and recorded by it independently of the findings given in the domestic enquiry. It was no doubt laid down that the proceedings under Section 26 were not by way of appeal against the order passed as a result of the domestic enquiry and that they were independent and original proceedings but the jurisdiction to record evidence so as to enable the prescribed authority to come to its own conclusion irrespective of the findings and evidence recorded in the domestic enquiry, was similar to the jurisdiction of the Appellate Authority under the Tamil Nadu Act. Here also the Authority (Deputy Labour Commissioner) has been given the power and jurisdiction to take additional evidence and to come to its own conclusion in respect of the charges framed against an employee. In view of the wide jurisdiction of the Appellate Authority, it cannot be legally argued that the jurisdiction of the Appellate Authority to record evidence would be limited only to those cases where no evidence was recorded at the domestic enquiry and the principles of natural justice were violated. In addition to such cases, namely, cases in which an opportunity of hearing was not given to the employee or the principles of natural justice were, in any way, violated, the Appellate Authority shall also have jurisdiction to record evidence, if necessary, in order to come to its own conclusion on the vital question whether the employee was guilty or not of the charges framed against him.

22. The Madras High Court in Salem-Shevapet Sri Venkateswara Bank Ltd. v. Krishnan (K.K.) [(1959) 2 LLJ 797 (Mad)] held that the Appellate Authority under Section 41(2) had the jurisdiction to enquire whether the statutory conditions subject to which alone a servant could be dismissed, have been complied with. It would imply that the Appellate Authority can also record evidence specially when it has also to record the findings whether the charges were established or not.

23. The Madras High Court again in Srirangam Janopakara Bank Ltd. v. Rangarajan (S.) [(1964) 1 LLJ 221 (Mad)] considered the ambit and scope of Section 41 read with Rule 9 and laid down that :

> "It appears to us that this rule is not intended to confer, on the appellate authority, a power to take evidence dehors Section 41(2); the rule really lays down a rule of procedure, that the hearing of appeals shall be summary, that the evidence (if) recorded shall be brief, and that when orders are passed, reasons should be given. There is therefore no room for examining Rule 9(2) dissociated from Section 41(2), and to decide that Rule 9(2) went far beyond the rule-making power under Section 49, on the ground that it confers power to take additional evidence on the appellate authority.
>
> It would also appear necessary in the interests of the proper working of an enactment like the Madras Shops and Establishments Act, to confer on the appellate authority the power to take evidence itself, if the circumstances of a case justify it."

24. In view of the above decisions, there remains no doubt that the Appellate Authority has jurisdiction to take evidence at the appellate stage and to come to its own conclusion about the guilt of the delinquent employee.

25. If the instant case is analysed in the light of the principles laid down above, it will be noticed that the Appellate Authority has interfered with the order of discharge/dismissal of the respondent on the ground only that a domestic enquiry was not held into the imputations made against the respondent. It did not decide the application of the appellant for recording evidence. The Appellate Authority, therefore, committed grave error in the exercise of its jurisdiction by not disposing of the application of the appellant for additional evidence and proceeding to dispose of the appeal on the ground that the order of dismissal having been passed without holding a domestic enquiry, was bad in law.

26. We may now consider the contention of the learned counsel for the respondent relating to the principles of natural justice which were not observed at the initial stage, namely, at the time of the domestic enquiry. Whether the defect is curable at the appellate stage or not is the question.

27. The learned counsel, in support of his arguments that the defect is not curable has placed reliance on the decision of this Court in Institute of Chartered Accountants of India v. L. K. Ratna [(1986) 4 SCC 537 : (1986) 1 ATC 714]. It was, no doubt, laid down in this case that a post-decisional hearing cannot be an effective substitute of pre-decisional hearing and that if an opportunity of hearing is not given before a decision is taken at the initial stage, it would result in serious prejudice, inasmuch as if such an opportunity is provided at the appellate stage, the person is deprived of his right of appeal to another body. There may be cases where opportunity of hearing is excluded by a particular service or statutory rule. In Union of India v. Tulsiram Patel [(1985) 3 SCC 398 : 1985 SCC (L&S) 672] pre-decisional hearing stood excluded by the second proviso to Article 311(2) of the Constitution and, therefore, the Court took the view that though there was no prior opportunity to a government servant to defend himself against the charges made against him, he got an opportunity to plead in an appeal filed by him that the charges for which he was removed from service were not true. Principles of natural justice in such a case will have to be held to have been sufficiently complied with. In Maneka Gandhi v. Union of India [(1978) 1 SCC 248] and in Liberty Oil Mills v. Union of India [(1984) 3 SCC 465] an opportunity of making a representation after the decision was taken, was held to be sufficient compliance. All depends on facts of each case.

28. In the instant case, the appellant has contended that the respondent did not participate in the domestic enquiry in spite of an opportunity of hearing having been provided to him. He was also offered the inspection of the documents, but he did not avail of that opportunity. He himself invoked the jurisdiction of the Appellate Authority and the order of dismissal passed against him was set aside on the ground that the appellant did not hold any domestic enquiry. It has already been seen above that the Appellate Authority has full jurisdiction to record evidence to enable it to come to its own conclusion on the guilt of the employee concerned. Since the Appellate Authority has to come to its own conclusion on the basis of the evidence recorded by it, irrespective of the findings recorded in the domestic enquiry, the rule laid down in Ratna case [(1986) 4 SCC 537 : (1986) 1 ATC 714] will not strictly apply and the opportunity of hearing which is being provided to the respondent at the appellate stage will sufficiently meet his demands for a just and proper enquiry.

29. In view of the above, the appeal is allowed. The judgment and order dated 12-2-1996 passed by the Appellate Authority is set aside and the case is remanded back to the Appellate Authority to dispose of the appeal filed by the respondent under Section 41 of the Act afresh in accordance with

law in the light of the observations made above. No costs.