

Management, Pandiyan Roadways Corp. ... vs N. Balakrishnan on 15 May, 2007

Equivalent citations: 2007 AIR SCW 3595, 2007 (9) SCC 755, AIR 2007 SC (SUPP) 1361, (2007) 114 FACLR 613, (2007) 4 ALLMR 770 (SC), (2007) 4 LAB LN 172, (2007) 7 SCALE 758, (2007) 4 SUPREME 657, (2007) 4 SERVLR 561, (2007) 6 MAD LJ 1675, (2007) 3 SCT 517

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:

Appeal (civil) 2534 of 2007

PETITIONER:

Management, Pandiyan Roadways Corp. Ltd.

RESPONDENT:

N. Balakrishnan

DATE OF JUDGMENT: 15/05/2007

BENCH:

S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T CIVIL APPEAL NO. 2534 OF 2007 [Arising out of S.L.P. (Civil) No. 12280 of 2006] S.B. SINHA, J :

1. Leave granted.

2. Respondent herein was employed as a helper at Kumuli Depot of Appellant. A criminal complaint was lodged against him for alleged commission of theft of Rs.37,086.05 on 03.11.1985. A disciplinary proceeding was also initiated against him. He pleaded not guilty to the said charge both before the disciplinary authority as also the criminal court. In the disciplinary proceeding, he was, however, found to be guilty of the said charge. He was dismissed from services only after a show cause notice was served on him.

3. Appellant filed an application for approval of the said order of removal purported to be in terms of Section 33(2)(b) of the Industrial Disputes Act, 1947 (for short, 'the Act'). Approval sought for was not granted on the premise that in passing the said order of termination, Clause 17(5) of the Certified Standing Orders of the

Corporation, which required the management to take into account the past record before passing the order of dismissal, was not complied with.

4. During pendency of the said proceedings before the Tribunal, admittedly the Criminal Court held the respondent not guilty of commission of the charge of removal of the said amount of Rs. 37,086.05. He was, therefore, acquitted.

5. A Writ Petition was filed by the appellant questioning the said Order of the Labour Court which was marked as Writ Petition No. 1485/1990. A learned Single Judge of the said Court allowed the Writ Petition. Aggrieved by and dissatisfied therewith, Respondent preferred an appeal before a Division Bench of the High Court. By reason of the impugned judgment, the said appeal has been allowed holding :

"14. Unfortunately, the learned Judge while accepting the case of Management, committed two errors. The first one is that he proceeded that the charge leveled against the workman relates to misappropriation. It is not in dispute that based on the complaint of the Management, prosecution was launched against the workmen for the offence of theft, which also ended in acquittal in C.C. No. 75 of 1986 on the file of Judicial Magistrate, Uthamapalyam dated 14.10.1987. Secondly, the learned Judge committed an error in holding that when an employee is involved in the case of misappropriation of funds, no lesser punishment than the dismissal from service can be imposed. However, according to the learned Judge when a major punishment is to be imposed depending upon the nature or gravity of the offence, then the factors mentioned in clause 17(5) of the Standing Orders have some relevance."

6. Appellant is, thus, before us.

7. Mr. T. Harish Kumar, learned counsel appearing on behalf of the appellant, would submit that Clause 17(5) of the Certified Standing Orders of the Corporation cannot be held to be imperative in character. According to the learned counsel, in a case of misconduct involving criminal breach of trust, the employer would be justified in imposing a punishment of termination of services and in that view of the matter, question of looking into the past conduct of the employee would not arise.

8. It was contended that past conduct of an employee would be taken into consideration, only in the event the misconduct proved is not a grave one. In a matter involving commission of grave misconduct on the part of the workman, it was contended, there is no place for generosity or sympathy and the case has to be dealt with firmly. Reliance, in this behalf, has been placed on Janatha Bazar (South Kanara Central Cooperative Wholesale Stores Ltd.) and Others v. Secretary, Sahakari Naukarara Sangha and Others (2000) 7 SCC 517] and Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane [(2005) 3 SCC 254].

9. The learned counsel argued that it was not a case where the High Court could have taken into consideration the question as to whether the punishment imposed was shockingly disproportionate to the misconduct proved. It was urged that the jurisdiction of the Labour Court in considering the

petition under Section 33(2)(b) Act being limited; it could not reappraise the evidence adduced in the disciplinary proceeding. Even acquittal in a criminal proceeding Mr. Harish Kumar submitted, could not have any effect in a domestic enquiry, in view of the fact that the standard of proof in criminal proceeding and domestic enquiry is entirely different. Strong reliance, in this behalf, has been placed on *South Bengal State Transport Corporation v. Sapan Kumar Mitra and Others* [(2006) 2 SCC 584] and *N. Selvaraj v. Kumbakonam City Union Bank Ltd. and Another* [(2006) 9 SCC 172].

10. Mr. S. Guru Krishna Kumar, learned counsel appearing on behalf of the respondent, on the other hand, would submit that it is not a case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. It was contended that clause 17(5) of the Certified Standing Orders was clearly applicable and the conditions laid down therein must be considered before imposition of punishment keeping in view its cumulative effect. The learned counsel would contend that clause 17(5) of the Certified Standing Orders is mandatory in character. It was also contended that admittedly past conduct of the respondent has not been considered while imposing the punishment. It was urged that the conduct of the respondent was otherwise blemishless otherwise. Our attention, in this behalf, has been drawn to the fact that in terms of the order of the Labour Court refusing to grant approval, the respondent was taken back in service in the year 1989 and since then he has been working in the bank without any blemish whatsoever. The learned counsel would submit that the order of acquittal passed by the Criminal Court having been taken into consideration by the Division Bench, the same should be considered to be an additional factor apart from the factors contained in Clause 17(5) of the Certified Standing Orders.

11. Clause 17(5) of the Standing Orders of the Corporation reads as under :

"In awarding the punishment under this standing order the employer shall take into account the gravity of the misconduct, the previous record of the workman and any other extenuation or aggravating circumstances that may exist."

12. On a plain reading of the said provision and particularly in view of the fact that the word "shall" has been used, *prima facie* it would be construed to be imperative in character. It may, however, be held to be directory in certain situation. While construing a statute of this nature, the context plays an important role. Interpretation of a statute would also depend upon the fact situation obtaining in the case. There are, however, certain exceptions to the said rule. The question came up for consideration before this Court in *U.P. State Electricity Board v. Shiv Mohan Singh and Another* [(2004) 8 SCC 402] wherein it was, *inter-alia*, noticed :

"96. Ordinarily, although the word shall is considered to be imperative in nature but it has to be interpreted as directory if the context or the intention otherwise demands. (See *Sainik Motors v. State of Rajasthan*, AIR para)

97. It is important to note that in *Crawford on Statutory Construction* at p. 539, it is stated:

271. Miscellaneous implied exceptions from the requirements of mandatory statutes, in general. Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law.

105. Only because the expression shall has been employed in sub-section (4) of Section 4, the same may not be held to be imperative in character having regard to the fact that not only, as noticed hereinbefore, a contract of apprenticeship commences but also in view of the fact that an application for registration of apprenticeship contract is required to be made within a period of three months in terms of Rule 4-B of the Apprenticeship Rules, 1992. The Act nowhere provides for the consequences of non-registration.

109. It is now a well-settled principle of law that if the language used in a statute is capable of bearing more than one construction, the true meaning thereof should be selected having regard to the consequences resulting from adopting the alternative constructions. A construction resulting in hardship, non-fulfilment of the purpose for which the statute has been brought in force should be rejected and should be given that construction which avoids such results."

13. Yet again in *P.T. Rajan v. T.P.M. Sahir and Others* [(2003) 8 SCC 498], this Court observed :

"45. A statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words shall or may. Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.

46. What is mandatory is the requirement of sub-section (3) of Section 23 of the 1950 Act and not the ministerial action of actual publication of Form 16.

47. The construction of a statute will depend on the purport and object for which the same had been used. In the instant case the 1960 Rules do not fix any time for publication of the electoral rolls. On the other hand Section 23(3) of the 1950 Act categorically mandates that direction can be issued for revision in the electoral roll by way of amendment in inclusion and deletion from the electoral roll till the date specified for filing nomination.

The electoral roll as revised by reason of such directions can therefore be amended only thereafter. On the basis of direction issued by the competent authority in relation to an application filed for inclusion of a voters name, a nomination can be filed. The person concerned, therefore, would not be inconvenienced or in any way be prejudiced only because the revised electoral roll in Form 16 is published a few hours later. The result of filing of such nomination would become known to the parties concerned also after 3.00 p.m.

48. Furthermore, even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is a well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See *Shiveshwar Prasad Sinha v. District Magistrate of Monghyr*, *Nomita Chowdhury v. State of W.B.* and *Garbari Union Coop. Agricultural Credit Society Ltd. v. Swapan Kumar Jana*)

49. Furthermore, a provision in a statute which is procedural in nature although employs the word shall may not be held to be mandatory if thereby no prejudice is caused. (See *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, *State Bank of Patiala v. S.K. Sharma*, *Venkataswamappa v. Special Dy. Commr. (Revenue)* and *Rai Vimal Krishna v. State of Bihar.*)"

14. In *Ashok Lanka and Another v. Rishi Dixit and Others* [(2005) 5 SCC 598], it was held :

"53. The question as to whether a statute is mandatory or directory would depend upon the statutory scheme. It is now well known that use of the expression shall or may by itself is not decisive. The court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve. (See *P.T. Rajan v. T.P.M. Sahir* and *U.P. SEB v. Shiv Mohan Singh.*)"

15. There cannot also be any doubt that ordinarily consequences flowing from contravention of an imperative character of a statute has to be given effect to. A statutory provision may be substantive or procedural. If it is substantive, the requirements laid down in the statute should ordinarily be complied with. However, when the provisions contain a procedural matter, substantial compliance thereof would serve the purpose.

16. Application of a statute or principle of law, however, may vary from case to case.

17. Only because the statute is imperative, it may not necessarily lead to a declaration that the order impugned is a nullity.

18. In *State Bank of Patiala and Others v. S.K. Sharma* [(1996) 3 SCC 364], this Court has, inter alia, laid down the law in the following terms :

"33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the

context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar*¹⁸. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called."

19. Ordinarily, although sub-clause (5) of Clause (17) of the Certified Standing Orders is required to be complied with, the same, in our opinion, would not mean that in a given situation, there cannot be any deviation therefrom. In a case where dismissal or removal of service is to be ordinarily followed, e.g. in a case of grave misconduct like misappropriation, strict enforcement of the rule may not be insisted upon. When, we say so, we are not oblivious of the law that an executive agency is ordinarily bound by the standard by which it professes its actions to be judged. [See *Harjit Singh & Another v. The State of Punjab & Another* [2007] (3) SCALE 553]. But where a procedural provision merely embodied the principles of natural justice, in view of the decision of this Court in *State Bank of Patiala* (supra), the question as to whether the principle has been followed or not, will depend upon the fact situation obtaining in each case. [See *Ashok Kumar Sonkar v. Union of India & Others* [2007 (3) SCALE 517].

20. It will be useful to note that in *State of Punjab and Others v. Sukhwinder Singh* [(1999) SCC (L&S) 1234], this Court has held that the words "gravest act of misconduct" occurring in Rule 16.2(1) of the Punjab Police Rules need not be used in the order of punishment, as it can be found out from the factual matrix obtaining in each case.

21. However, there is another aspect of the matter which cannot be lost sight of. Respondent, in the meanwhile, has been acquitted. The factum of his acquittal has been taken into consideration by the Division Bench, which was considered to be an additional factor. Ordinarily, the question as to whether acquittal in a criminal case will be conclusive in regard to the order of punishment imposed upon the delinquent officer in a departmental proceeding is a matter which will again depend upon

the fact situation involved in a given case.

22. There are evidently two lines of decisions of this Court operating in the field. One being the cases which would come within the purview of Capt. Paul Anthony v. Bharat Gold Mines Ltd. and Another [(1999) 3 SCC 679] and G.M. Tank v. State of Gujarat and Others [(2006) 5 SCC 446]. However, the second line of decisions show that an honourable acquittal in the criminal case itself may not be held to be determinative in respect of order of punishment meted out to the delinquent officer, inter alia, when :

(i) the order of acquittal has not been passed on the same set of fact or same set of evidence; (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered. [See Commissioner of Police, New Delhi v. Narender Singh (2006) 4 SCC 265], or; where the delinquent officer was charged with something more than the subject-matter of the criminal case and/or covered by a decision of the Civil Court. [See G.M. Tank (supra), Jasbir Singh v. Punjab & Sind Bank and Others - 2006 (11) SCALE 204, and Noida Enterprises Assn. v. Noida & Others - 2007 (2) SCALE 131 Para 18]

23. In Narinder Mohan Arya v. United India Insurance Co. Ltd. and Others [(2006) 4 SCC 713], this Court held :

"39. Under certain circumstances, a decision of a civil court is also binding upon the criminal court although, converse is not true. (See Karam Chand Ganga Prasad v. Union of India). However, it is also true that the standard of proof in a criminal case and civil case is different.

40. We may notice that in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., this Court observed: (SCC p. 695, para 35) "35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instance case."

41. We may not be understood to have laid down a law that in all such circumstances the decision of the civil court or the criminal court would be binding on the disciplinary authorities as this Court in large number of decisions points out that the same would depend upon other factors as well. See e.g. Krishnakali Tea Estate v. Akhil Bharatiya Chah Mazdoor Sangh and Manager, Reserve bank of India v. S. Mani. Each case is, therefore, required to be considered on its own facts.

24. In Delhi Cloth and General Mills Co. v. Ganesh Dutt and Others [(1972) 4 SCC 834], this Court stated :

"31. Mr. Sharma referred us to Paragraph 40 of the Certified Standing Orders of the appellant Company Ex. M-4 to the effect that in the order deciding to dismiss the

workman, the appellant Company has not taken into account, as it is bound to, the previous record, if any, of the workmen. This contention cannot be accepted because in the order dated May 9, 1966, communicated to each of the workmen, in the penultimate paragraph it has been stated that while arriving at the decision to dismiss the employees from the service for misconduct, all relevant circumstances including the past record of service, have been fully taken into consideration. So far as we could see, no challenge has been made by the workmen that the appellant has not taken into account his past record."

25. We are, however, of the opinion that it is not a fit case where this Court should exercise its extra-extraordinary jurisdiction under Article 136 of the Constitution of India. Respondent has been taken back in service in the year 1989. The occurrence took place in the year 1985. The application under Section 33(2)(b) of the Act was filed on 16.06.1986. It was rejected by an order dated 19.4.1989. Respondent, thereafter, was taken back in service. Despite the fact that the Writ Petition filed by the appellant was allowed on 08.10.1999, by reason of an interim order of stay granted by the Division Bench, he continued in his service. By reason of the impugned judgment, the Division Bench, as noticed hereinbefore, set aside the judgment of the learned Single Judge. Respondent is merely a class IV employee, it does not hold any office of confidence. He was not charged with an offence of criminal breach of trust.

26. Thus, it is now well-settled principle of law that this Court shall not exercise its jurisdiction under Article 136 of the Constitution of India, only because it may be lawful to do so. [See *Transmission Corporation of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.* (2006) 5 SCC 540] and *Chandra Singh and Others v. State of Rajasthan and Another* [(2003) 6 SCC 545].

27. For the reasons aforementioned, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.