Indian Railway Construction Co. Ltd vs Ajay Kumar on 27 February, 2003

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Author: Arijit Pasayat

Bench: Shivaraj V. Patil, Arijit Pasayat

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           CASE NO.:
Appeal (civil)  3299 of 2000

PETITIONER:
INDIAN RAILWAY CONSTRUCTION CO. LTD.

RESPONDENT:
AJAY KUMAR

DATE OF JUDGMENT: 27/02/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:
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JUDGMENT 2003(2) SCR 387 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. Bitter relationship between the employer and the employee has resulted in a large number of litigations; unfortunately and inevitably creating an atmosphere of distrust. In most of the cases, the employer complains of misconduct by the employed concerned; while the employee usually plead victimization. The present case is no exception.

Starting point of the controversy was about two decades back. The respondent (hereinafter referred to as 'the employee') was appointed on a probation basis in May, 1981. His appointment was on temporary basis and he was not confirmed even after the initial period of probation. Alleging that he assaulted a senior officer and along with others ransacked the office creating chaotic condition, an order of dismissal was passed on 7.12.1983. On the alleged date of incident, information was lodged

with police. The order was passed in respect of two employees, the present appellant and one Mr. V.K. Talwar. It was pointed out in the order of dismissal that it would not be practicable to hold an enquiry before directing dismissal. The respondent employee, on the other hand, alleged that the order of dismissal was the outcome of victimization. He took a stand in the writ petition filed before the Delhi High Court that because of union activities, he had become an eyesore of the management, and the order of dismissal without holding an enquiry was violative of law and was at variance with the requirements of Article 311(2) of the Constitution of India. 1950 (in short 'the Constitution').

Learned Single Judge was of the view that in a given case, enquiry can be dispensed with; but the case at hand was not of that nature. It was further held that the protection under Article 311(2) was available and non- observance of the procedure vitiated the order of dismissal. The matter was challenged in Letter Patents Appeal before the Division Bench of the Delhi High Court by the present appellant.

It was submitted that there was no scope for judicial review of the order dispensing with enquiry. The order of dismissal was quashed on the ground that it was activated with male fides. Though, it was observed that the decision whether an enquiry was to be conducted or not and could be dispensed with was primarily that of the concerned authority; it could not be his ipse dixit and in a given case could be judicially reviewed. In any event, Article 311(2) had no application.

The Division Bench by the impugned judgment held that Article 311(2) was not attracted. However, it upheld the judgment of the learned Single Judge holding that on a limited judicial review, the order dispensing with enquiry was not sustainable. It was noted that the appellant before it did not argue about the sustainability of the reasons and only raised issues relating to scope of judicial review.

In support of the appeal, Mr. Mukul Rohtagi, learned Additional Solicitor General appearing for the appellant submitted that the Division Bench was not justified in upholding conclusions of the learned Single Judge about the scope of judicial review. Both the learned Single Judge and the Division Bench proceeded to deal with the matter as if male fides had been established. There was no finding recorded that the incident did not take place. On the contrary, both the learned Single Judge and the Division Bench accepted that certain incident took place. After having held so, the plea on the presumptuous ground that the respondent-employee was the victim of bias and the authorities acted with male fides, cannot be sustained. There was no specific plea relating to mala fides and even persons who allegedly acted male fide were not impleaded in the writ petition. Except making a vague statement that the management was activated with male fides, there was not even a whisper as to how and why the management and who in particular would act with mala fides. The background scenario as projected by the respondent-employee does not in any way lead to a conclusion of victimization. Though enquiry would not have been necessary as the employee was on probation an order of termination simplicitor would have sufficed. According to him, reasons which weighed with the authority dispensing with enquiry were germane to the issue of impracticability in holding the enquiry.

Residually, it was submitted that the employer lost confidence on the employee for his grave acts of misconduct, which had adversely affected the image and reputation of the employer as the incident took place in the presence of valued customers, some of whom were foreign customers. If the High Court felt that the dismissal was untenable in the absence of enquiry at the most it could have directed enquiry before dismissal order was effectuated. The dismissal order could not have, in any event, been set aside without any such direction. These aspects have also to be considered along with the plea relating to loss of confidence.

In response, learned counsel for the respondent, employee submitted that the facts are tellate and the background highlighted by the respondent in the writ petition clearly shows that management was bent upon dismissing him for his union activities. That was sufficient to prove mala fides and even if no particular person was impleaded, the management acted in unison through some, of its officers for his dismissal from employment. It was submitted that the High Court was correct in holding that the order of dismissal was illegal.

It was submitted that though there was no assertion in the writ petition that the alleged incident did not take place, the same was on account of the fact that the employee was not aware of the alleged incident. In fact, the order dispensing with enquiry surfaced much later and in the rejoinder affidavit it was pleaded. In respect of the plea relating to loss of confidence, it was submitted that such a stock plea cannot be permitted to be raised, as every employer can take the plea and thereby crush the employee's right to raise legitimate demands through unions. Finally, it was submitted that there has been a long passage of time and it would not be appropriate, even if it is conceded that there were some infirmities in the order of High Court, to start the process afresh.

It would be appropriate to take not of the order dispensing with enquiry which forms the Karnei of the dispute. The reasons recorded by the concerned authority so far as relevant are as follows:

xxx xxx xxx
xxx

"(a) The delinquents have taken the extreme step of freely using abusive language and assaulting Shri S.L. Gupta right in the centre of the activities of the Corporate office of the company. With such high-handed and recalcitrant attitude of the delinquents, I am convinced that they can indulge in such intimidating and violent acts against other employees when they come forward to give evidence during the courage of the enquiry. It will therefore be difficult to hold a proper enquiry and witnesses may not come forward to give frank and true evidence.

(b) The holding of the enquiry will take some time and with the attitude of the delinquents mentioned above, I am convinced, that they will continue to indulge in such violent activities which will seriously disrupt the functioning of the company apart from affecting the safety of the employees.

(c) The delinquents have threatened the life of the senior officer of the rank of a manager in scale Rs. 1500-2000 openly in the office premises after hurling abuses. This assault appears to have been

intentional and deliberately executed. It can reasonably be inferred that the delinquents can resort to such methods against other higher officers also in case an enquiry is held."

Learned counsel for the appellant fairly submitted that merely because the enquiry would have taken some time, same cannot be a ground for dispensing with enquiry He, however, highlighted other grounds i.e. as contained in clause (a) above. According to him, the aggressive and violent manner in which employee were threatened leads to an irresistible conclusion that witnesses would not have come forward to give evidence during the course of enquiry. Such a conclusion would not be a valid ground for dispensing with enquiry in all cases. If there is material with the concerned authority that there is likelihood of witnesses not coming forward due to threats, coercion, undue influence etc. certainly it would, be a germane ground for dispensing with enquiry, and to hold that it would not be possible to hold a fair enquiry. Except making a bald statement that charged employee can indulge in intimidating and violent acts persons would not come forward, there is no other material. On the basis of a presumptuous conclusion, the concerned authority should not have dispensed with enquiry. As indicated above, if there exists material and basis for coming to a conclusions, same has to be specifically dealt with. If such material exists certainly it would be a valid ground for dispensing with enquiry. That is an aspect which relates to impracticability of holding an enquiry.

It is not in dispute that under the Indian Railway Construction Co. Ltd. (Conduct, Discipline and Appeal) Rules, 181 (hereinafter referred to as 'the Rules') the disciplinary authority could dispense with an enquiry. Reasons are to be recorded in writing and the authority is to be satisfied that it is not reasonably practicable to hold an enquiry in the manner prescribed in the rules. The Rule 30 reads as follows.

> "Rule 30: Special Procedure in Certain Cases.
>
> Notwithstanding anything contained in Rule 25 or 26 or 27, the disciplinary authority may impose any of the penalties specified in Rule 23 in any of the following circumstances:
>
> (i) xxx xxx
> xxx
>
> (ii) Where the disciplinary, authority is satisfied for reason to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner provided in these rules."

It is also not in dispute that one of the penalties specified in Rule 23 is dismissal from service.

It is fairly well settled that the power to dismiss an employee by dispensing with an enquiry is not be exercised so as to circumvent the prescribed rules. The satisfaction as to whether the facts exist to justify dispensing with enquiry has to be of the disciplinary authority. Where two views are possible as to whether holding of an enquiry would have been proper or not, it would not be within the

domain of the Court to substitute its view for that of the disciplinary authority as if the Court is sitting as an appellate authority over the disciplinary authority. The contemporaneous circumstances can be duly taken note of in arriving at a decision whether to dispense with an enquiry or not. What the High Court was required to do was to see whether there was any scope for judicial review of the disciplinary authority's order dispensing with enquiry. The focus was required to be on the impracticability or otherwise of holding the enquiry.

One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Government activities in which the repositories of power may exercise every class of statutory function of executive, qusai-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary See State of U.P. and Ors. v. Renusagar Power Co. and Ors., AIR [1988] SC 1737. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action"

> 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and
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> (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality' the second 'irrationality', and the

third 'procedural impropriety'. These principles were highlighted by Lord Diplook in Council of Civil Service Unions, v. Minister for the Civil Service, (1984) 3 All. ER. 935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Income tax v. Mahindra and Mahindra Ltd., AIR (1984) SC 1182). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldows and John Alder in their book "Applications for Judicial Review, Law and Practice" thus:

> "There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bonafide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Seaman and Roskili appeared to agree that there is no general distinction between poweres, based upon whether their source is statutory or Prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

(Also see Padfield v. Minister of Agriculture, Fisheries and Food, LR (1968) AC 997).

The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above ; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

The famous case commonly known as "The Wednesbury's case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] I KB 223 at p. 229. It reads as follows:

> ".....It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably, Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority.....In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p. 230 All ER p. 683) ".....it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable.....The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another." (emphasis supplied).

Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bonafide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that a case as follows:

> ".....Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of theme add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."

Lord Diplock explained "irrationality" as follows:

> "By 'irrationality' I mean what can by now be succinctly referred to as Wednesbury unreasonableness." It applies to a decision which is to outrageous in its definance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageious" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

These principles have been noted in aforesaid terms in Union of India and Anr. v. G. Ganayutham, [1997] 7 SCC 463. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself.

Neither learned Single Judge nor the Division Bench has examined the question as to practicability or otherwise of holding the enquiry in the correct perspective. They have proceeded on the footing as if the order was mala fide; even when there was no specific allegation of mala fides and without any specific person against whom mala fides were alleged being impleaded in the proceedings. Except making a bald statement regarding alleged victimization and mala fides no specific details were given.

Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting malafide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (See S. Pratap Singh v. The State of Punjab, [1964] 4 SCR 733). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in R.P. Royappa v. State of Tamil Nadu and Anr., AIR (1974) SC 555, Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.

The approach of the High Court, therefore, was not proper. But at the same time, the reasons which weighed with the disciplinary authority to dispense with enquiry equally do not appear to be proper.

Normally in such cases the proper course would be to direct authorities to hold an enquiry, if they so desire. But two significant factors need to be considered. One is long passage of time and the other

alleged loss of confidence.

While learned counsel for the respondent submitted that passage of time is a factor which would warrant dismissal of the appeal and confirmation of the High Court's order, learned counsel for the appellant submitted that any undesirable employee in an establishment is like a rotten apple in the pack of apples, and is likely to contaminate the whole pack. Even when he was on probation, he assaulted a senior officer, created a scene of terror, co-employees were threatened and even a lady employee was not spared. Union activities are meant to present views of employees before the employer for their consideration; but same is not intended to be done in a violent form. Decency and decorum are required to be maintained. We find substance in the plea of learned counsel for the appellant that an employee even if the claims to be a member of the employees" union has to act with sense of discipline and decorum. Presentation of demands relating to employees cannot be exhibited by muscle power. It must be borne in mind that every employee is a part of a functioning system which may collapse if its functioning is affected improperly. For smooth functioning, every employer depends upon a disciplined employees' force. In the name of presenting demands they cannot hold the employer to ransom. At the same time the employer has a duty to look into and as far as practicable, obviate the genuine grievance of the employees. The working atmosphere should be cordial, as that would be in the best interest of the establishment. Unless an atmosphere of cordiality exists there is likelihood of inefficient working and that would not be in the interest of the establishment and would be rather destructive of common interest of both employer and employees.

If an act or omission of an employee reflects upon his character, reputation, integrity or devotion to duty or it an unbecoming act, certainly the employer can take action against him. In this context, reference may be made to the following observations of Lopes C.J. In Perce v. Foster, (1866) 17 QBD 536, p. 542):

> "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

This view was re-iterated by a three-Judge Bench of this Court in Union of India and Ors. v. K.K. Dhawan, AIR (1993) SC 1478.

Here, the alleged acts have not been disbelieved by the High Court. They are prima facie acts of misconduct. Therefore, the employer can legitimately raise a plea of losing confidence on the employee, warranting his non-continuance in the employment. The time gap is another significant factor.

Question then would be how the conflicting interests can be best balanced. By an interim order dated 5.5.2000 the appellant was directed to reinstate the respondent subject to interim payment of

Rupees 3 lacs towards the back wages. Direction for reinstatement does not automatically entitle an employee to full back wages. In Hindustan Tin Works Pvt. Ltd. v. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and Ors., [1979] 2 SCC 80, a three-Judge Bench of this Court laid down : "In the very nature of things there cannot be straight-jacket formula forwarding relief of back wages. All relevant consideration will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefleld, (1891) AC 173, 179)."

In P.G.I, of Medical Education and Research, Chandigarh v. Raj Kumar, [2001] 2 SCC 54, this Court found fault with the High Court in setting aside the award of the Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus:

> "The Labour Court being the final Court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect."

Again at paragraph 12, this Court observed:

> "Payment of back wages having a discretionary element involved in it has to be dealt with in the facts and circumstances of each case and no straight- jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. (See Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Anr., (2002) AIR SCW 3008)". In our considered opinion, a further payment of Rupees 12 lacs towards back wages and for giving effect to the order of dismissal on the ground of loss of confidence would suffice. The total amount of Rupees 15 lacs shall be in full and final settlement of all claims. The payment is to be paid within eight weeks from today after making permissible deductions statutorily provided" and/or adjustments, if any, to be made.
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> The appeal is accordingly disposed of in the above terms.