The United Planters Associationof ... vs K.G. Sangameswaran & Anr on 6 March, 1997

Equivalent citations: AIR 1997 SUPREME COURT 1300, 1997 (4) SCC 741, 1997 AIR SCW 1396, 1997 LAB. I. C. 1513, (1997) 1 CTC 418 (SC), 1997 (3) ADSC 338, (1997) 2 SCR 756 (SC), 1997 (1) CTC 418, 1997 (2) SCALE 559, (1997) 3 JT 379 (SC), 1997 (1) UJ (SC) 690, (1997) 1 LABLJ 1104, (1997) 90 FJR 454, (1997) 1 MAD LJ 144, (1997) 2 SCT 811, (1997) 3 SUPREME 436, (1997) 3 ALL WC 1853, (1997) 1 CURLR 598, (1997) 2 LAB LN 73, (1997) 2 SCALE 559, (1997) 2 SERVLR 205, (1997) 75 FACLR 927, 1997 SCC (L&S) 1404

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Bench: S.C. Agrawal, S. Saghir Ahmad

PETITIONER:
THE UNITED PLANTERS ASSOCIATIONOF SOUTHERN INDIA

Vs.

RESPONDENT:
K.G. SANGAMESWARAN & ANR.

DATE OF JUDGMENT: 06/03/1997

BENCH:
S.C. AGRAWAL, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J D G M E N T S. SAGHIR AHMAD, J.

Leave granted.

The respondent, K.G Sangameswaran, who was employed with the appellant as an Accountant was dismissed from service by order dated 5.7.1934. This order was passed for serious misconduct including misappropriation on the part of and bu the respondent during the period 1986-87 to 1992-93, for which criminal proceedings were also initiated against him.

2. This order was challenged by the respondent before the Appellate Authority under section 41(2) of the Tamil Nadu shops & 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.

3. The order of dismissal by the appellant was set aside b the Appellate Authority (Respondent No. 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.

4. 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 he charge-memo was issued to the respondent. he filed his reply dated 24.1.1994 in which he denied the charges and made 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 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 bu participating in the enquiry as the enquiry was bound to be biased. The appellant consequently proceeded to dismiss the respondent form service after perusal of the documents and other relevant records indicating misappropriation and misconduct by the respondent.

5. 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 ?

6. On issue No.1, the finding recorded by the Appellate Authority was that since the United Planters Association of southern India which is appellant before us was declared as a commercial establishment by the Tamil Nadu Government vide its Notification in G.O.Ms. 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 Appellant 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.

7. 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 course for dispensing with the service or that he had not been guilty of misconduct as held by the employer. In a case of simple termination an appeal would not fall within any of the aforesaid grounds.

8. 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 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 form service forthwith.
>
> 3.....
>
> 4. It may be noted that this is without prejudice to the right of the Association to pursue criminal proceeding s initiated against you as well as to recover the amounts lost by 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 bu 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 but 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.

9. 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 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) or this Tamil Nadu shops a Establishments Rules 1943 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.

10. 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 bu 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 inquiry de novo would itself require the parties to produce their evidence do as to decide whether the charge for which action was taken against the employee were established or not. The pending proceedings keeps the employer and further of paramount importance that such proceedings should come to an end at the earliest so to maintain industrial peace and cordial relations between the management and the labour.

11. This court in M/s Indian Iron & steel co. Ltd. vs. their Workmen. AIR 1958 SC 130 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. vs. Its workmen,(1960) 1 SCR 806.

12. In M/s Bharat Sugar mills Ltd. vs. Jai Singh, (1962) 3 SCR 684 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 hold that in such a situation it would be appropriate to allow the partied to lead evidence so that the Tribunal itself may be satisfied about the misconduct imputes to the employee. The decision of the Labour Appellate 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. vs. Workers of the company, 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 management of Ritz vs. Its Workman (1963) 3 SCR 461 and the law laid down earlier was reiterated. To the same effect is the decision of this court in Khardah co. Ltd. vs. Their workmen, (1964) 3 SCR 506 and workmen of Motipur sugar Factory (p) Ltd. vs. Motipur sugar Factory, (1965) 3 SCR 588. In state Bank of India vs. R.K. Jain & ors. (1972) 1 SCR 755 and in Delhi cloth & General mills company Ltd. vs. Ludh Budh Singh ,(1972) 1 Labour Law journal 180 SC 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.

13. Provisions of the Industrial Disputes Act were. In the meantime, amended and on the recommendation of the International Labour Organisation section 11A was introduced in the Act by the 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 workmen it had also the power to award lesser punishment. The proviso to section 11A, However, provided that the Tribunal would rely only on the material already on record and shall not take fresh evidence.

14. In view of the provisions contained in section 11A, a question arose in The workman of M/s. Firestone Tyre & Rubber co. of India pvt. Ltd. vs. The management & ors. 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 11A the Tribunal in order to satisfy itself as to the guilt of the persons 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.

15. This decision has since been followed by this court in a number of cases including The East India Hotels vs. Their Workman & ors. AIR 1974 SC 696; The cooper Engineering Ltd. vs. P.P. Mundhe AIR 1975 SC 1900; Ruston & Hornsby Ltd. vs. T.B. Kadam. AIR 1975 SC 2025, and in a recent decision in Bharat Forge co. Ltd. vs. A.B. Zodge & Anr.,(1996) 4 SCC 374, 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.

16. we may now proceed to consider the provisions of section 41 and Rule 9 which are quoted below :-

> "Section 41. Notice of dismissal-
>
> (1) No employer shall dispense with the services of a not less than six months except for a person at least one month's except for reasonable cause and without giving such lieu of such notice provided however that such notice shall not be necessary where the services of such persons are dispensed with on satisfactory evidence recorded at an enquiry held for purpose. (2) The person employes shall have a right to appeal to such authority and within such time as may 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."

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 on the representation made by either of the parties any case under this Act. pending before an authority fr 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 br not practicable. by prepaid registered post to the last known address whin 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 he parties as soon as possible. Copies of the orders shall also be furnished to the parties. if required by them."

17. 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 records. if need be, such evidence as may be produced by the parties. Conversely, also if the domestic enquiry is ex parte of no evidence was recorded during those proceedings, the Appellate Authority would still be justified in taking additional evidenced to enable it to come to its own conclusions on the articles of charges framed against the delinquent officer.

18. This court in Remington Rand of India Ltd. vs. Thiru R. Jambulingam, (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 re-hear the matter completely and come to its own conclusion after re-appreciation of the evidence or entertaining additional evidence, if necessary, in the interest of justice.

19. A similar provision was considered by There Judges Bench of this court in chairman M/s Brooke Bond India Pvt. Ltd. vs. Chandra Nath Choudhary, (1969) 1 SCR 919. In that case, the court considered the provisions of the Bihar shops and commercial Establishment 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 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 compliant 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 any misconduct as held by the employer.

20. 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 also 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 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 where 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 question whether the employee was guilty or not of the charges framed against him.

21. The Madras High Court in Salem- shevapet Sri Venkateswara Bank, Ltd. vs. Krishnan (K.K.) and another. (1959) 2 Ltd. 797, 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.

22. The Madras High court again in Srirangam Janopakara Bank, Ltd. vs. Rangarajan (S.) and another, (1964) 1 LLJ 221, 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 de hors procedure, that the hearing of appeals shall be summary, that when orders are passed. reasons should be given. There is dissociated from s. 41(2), and to decide that rule 9(2) went far beyond the rule makings power under S.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."

23. 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.

24. 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 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.

25. We may now consider the contention of the learned counsel for the respondent relating to the principles of nature 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.

26. 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 vs. L.K Ratna & ors.,(1935) 4 SCC 537. 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 & Anr. vs. Tulsiram Patel, (1985) 3 SCC 398, 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 plead in an appeal filed by him that the charges for which he was removed from service were not true. Principles of nature justice in such a case will have to be held to have been sufficiently complied with. In Mrs. Menka Gandhi vs. Union of India & Anr. (1978)1 SCC 248 and in Liberty oil mills & ors. vs. Union of India & ors. (1934) 3 SCC 465 an opportunity of making a representation after the decision was taken, was held to be sufficient compliance. All depends on acts of each case.

27. 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 document 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 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 he evidence recorded bu it , irrespective of the findings recorded in the domestic enquiry the rule laid down in Ratna's case (supra) 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.

28. 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.