

Management of Continental Construction Ltd. Vs. Workmen of Continental Construction Ltd.

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SooperKanoon Citation : sooperkanoon.com/384664

Court : Karnataka

Decided On : Apr-01-2003

Reported in : ILR2004KAR54; (2003)IIILLJ612Kant

Judge : S.R. Nayak and ;K. Ramanna, JJ.

Acts : Industrial Employment (Standing Orders) Act, 1946 - Sections 3(1)

Appeal No. : W.A. No. 6983/1999 c/w 7454/1999

Appellant : Management of Continental Construction Ltd.

Respondent : Workmen of Continental Construction Ltd.

Advocate for Pet/Ap. : S.V. Shastry, Adv.

Disposition : Writ appeal allowed

Judgement :

1. The validity of the action of the management of the Continental Construction Ltd., Respondent in Writ Appeal No. 7454 of 1999 and the Appellant in Writ Appeal No. 6983/1999 terminating the service of four workmen under Clause 16 of the Certified Standing Orders (CSOs) of the Company and discharging another workmen during his probation in terms of the power reserved to the management

in the appointment order is the subject matter of dispute between the management and the Continental Construction Limited Employees Union which is said to be a Trade Union representing those workmen. The Industrial Tribunal at Hubli held that the impugned action of the management is in accordance with law and in accordance with the power reserved to the management under Clause (6) of the CSOs and consequently, the reference was rejected by the Industrial Tribunal. When the award of the Industrial Tribunal was assailed in Writ Petition No. 33435 of 1998 in this Court, a learned single Judge of this Court, found the impugned action of the management as illegal and in violation of the law laid down by the Supreme Court in the case of D.K. Yadav v. J.M.A. Industries Limited, , opining, the learned single Judge has allowed the writ petition and set aside the impugned order of the management and directed reinstatement of the four workmen into service with 50% of back wages from the date of order of termination till the date of reinstatement. In the case of another workmen, who was discharged when he was on probation, the learned single Judge has directed his reinstatement into service as a probationer. The Union feeling aggrieved by the order of the learned single Judge in granting only 50% of back wages and seeking full back wages, has preferred Writ Appeal No. 7454 of 1999, whereas, the management feeling aggrieved by the same order of learned single Judge, had preferred Writ Appeal No. 6983 of 1999. Since both the writ appeals are against the same judgment of the learned single Judge, they were clubbed and heard together and they are being disposed of by this judgment.

2. The events leading to filing of the writ petition be noted first briefly and they are as follows: Continental Construction Limited is a public limited company registered under the Indian Companies Act, 1956, having its registered office at Delhi and Dam Site Offices at various places throughout India. The company undertakes construction of dam works in different places. Accordingly, at the relevant point of time, the company had undertaken the construction of dam work at Kodasalli of Uttara Kannada District of Karnataka State. In that connection, it engaged the services of the workmen. It is admitted position that since the head office of the company is situated in New Delhi and since company undertakes the construction works throughout India, the employees employed by the company, in terms of the contract and CSOs, are liable to be transferred from one place to another place

and one post to another equivalent post.

3. The Continental Construction Limited Employees Union (hereinafter referred to as 'the Union' for the sake of brevity) is a registered trade union of the employees of the company at its dam site at Kodasalli. The Union raised industrial dispute before the Deputy Labour Commissioner, Belgaum, who is the Conciliation Officer under the Industrial Dispute Act, 1947 contending that the employees of the company formed the Union and got it registered in the year 1991, Nanakchand Bharnia, S.K. Tiwari, Sri. Bhagwan Singh Rana, Sri Sunil Sharma and Sri. G.D. Mandal were the office-bearers of the Union; during the pendency of the proceedings before the Conciliation Officer with regard to the Charter of Demands, the company terminated the services of the above said five workmen and requested the Conciliation Officer to conciliate the dispute between the parties. The conciliation initiated by the Conciliation Officer was ended in failure and the Government of Karnataka on receipt of the failure report from the Conciliation Officer, referred the matter to the Industrial Tribunal, Hubli Under Section 10(1)(d) of the Act for adjudication. The point of reference that was referred to by the Government of Karnataka was whether the management of the company is justified in terminating the aforesaid five workmen with effect from the dates shown against their respective names. The Industrial Tribunal registered the reference as I.D. No. 75/1991. The Union filed claim statement reiterating the same allegations made by it before the Conciliation Officer. It was also contended that the action of the company in, terminating the services of five workmen without holding any departmental enquiry is ex-fade illegal and contrary to the principles of natural justice and the action amounts to "retrenchment" within the meaning of that term as defined Under Section 2(oo) of the Act. It was also alleged by the Union that the impugned action of the Company is totally arbitrary and unreasonable.

4. The management of the company has filed its counter inter alia contending that the Union has no power to espouse the cause of the workmen concerned; the Union is not validly constituted and therefore, the dispute referred by the Government of Karnataka for industrial adjudication cannot be construed as an "industrial dispute" as defined under Section 2(k) of the Act; five workmen concerned are not the office-bearers of the Union; terms and conditions of service

of workmen provide for transfer from one place to another, the transfers of four workmen were effected in the exigencies of the service but they refused to report for duty at the transferred places despite three reminders dated January 20, 1991, January 25, 1991 and February 04, 1991; since the said action of the four workmen concerned tantamounts to absenting from duty without permission, Clause (16) of the CSOs was attracted and therefore, the action of the management of the company in terminating their services under Clause (16) of the CSOs was valid and legal; that discharge of Sri Mandal, another workman while he was on probation was also in perfect conformity with the powers retained by the management of the company in terms of the appointment order and therefore, in the absence of any mala fide attributed to the management of the company, the discharge simpliciter of the probationer would not constitute an "industrial dispute" within the meaning of Section 2(k) of the Act.

5. In view of the pleadings of the Union and the management, the learned Presiding Officer of the Industrial Tribunal, Hubli framed three additional issues apart from the point of reference. The first issue is with regard to covering the dispute under Section 2(k) of the Act; second issue is with regard to the registration of the Union and third issue is with regard to espousal of the dispute by a substantial number of workmen. On behalf of management, two witnesses - M.W. 1 & M. W. 2 were examined and 32 documents were marked as Exhibits M1 to M36. On behalf of the Union, five concerned workmen were examined as WW1 to WW5 and 11 documents were marked as WW1 to WW11. The Tribunal held that the Union has been validly registered. The Tribunal has also held that the dispute referred to it by the Government of Karnataka is an "industrial dispute" within the meaning of Section 2(k) inasmuch as the same was espoused by a substantial number of workmen. The learned Presiding Officer of the Tribunal, however dealing with the point of reference, after evaluating both documentary and oral: evidence placed before him, held that the management of the company fully justified in terminating services of the five workmen concerned and in view of that finding he rejected the reference by order dated February 24, 1998.

6. Being aggrieved by the above award passed by the Industrial Tribunal, Hubli, the Union preferred Writ Petition No. 33435 of 1998 inter alia contending that the

award of the Industrial Tribunal is perverse and it ought not to have held that the termination of the five workmen is justified and legal and in accordance with Clause (16) of the CSOs, particularly, in view of the law laid down by the Supreme Court in the case of D.K. Yadav v. J.M.A. Industries Limited (supra). It was contended that the impugned action of the management of the company is arbitrary and unreasonable and tantamounts to victimisation of Labour and unfair labour practice. The learned single Judge agreeing with the contentions of the Union that services of four workmen ought not to have been terminated by the management of the company without notice and without holding regular domestic enquiry and in breach of the law laid down by the Supreme Court in the case of D. K. Yadav v. J.M.A. Industries Limited(supra), allowed the writ petition of the Union and directed reinstatement of the workmen concerned into service and granted 50% of the back wages insofar as the four regular workmen are concerned by his order dated September 02, 1999. Further, the learned single Judge directed reinstatement of the probationer workman also into service.

7. We have heard Sri. V. S. Naik, learned counsel for the Union and Sri. S.V. Shastri, learned counsel for the management of the company. Sri. V.S. Naik contended that the learned single Judge having come to the conclusion that the termination of services of four workmen and discharge of the services of probationary workmen were illegal and violative of the law laid down by the Supreme Court in D.K. Yadav v. J.M.A. Industries Limited (supra) case, ought to have granted full back wages while directing reinstatement of the workmen. Sri Naik would maintain that the learned single Judge has not given any cogent, tenable reasons to deny 50% of the back wages in the case of four workmen and not to grant any back wages in the case of the probationary workman. Supporting the judgment of the learned single Judge on merits, Sri Naik contended that the management acted illegally in invoking Clause (16) of the CSOs. It is nobody's case that the workmen concerned went on leave and overstayed the leave period or absented themselves from duty without prior sanction of the management and therefore, there was no occasion for the management to invoke Clause (16) of the CSOs. According to Sri Naik, the case of the four workmen squarely falls under Clause 24.15 of the CSOs under which refusal to carry out the orders of transfer is regarded as a kind of misconduct. According to Sri Naik, if according to the

management, the four workmen were guilty of committing misconduct in terms of Clause 24.15, it ought to have framed charges against them and, conducted domestic enquiry. Be that as it may, Sri Naik would contend that in light of the judgment of the Supreme Court in the case of D.K. Yadav v. J.M.A. Industries Limited(supra), it was not permissible for the management to straight-away terminate the services of workmen concerned without complying with the principles of natural justice and conducting domestic enquiry. Even assuming that the refusal of the four workmen not to report for duty at the transferred places within the stipulated time, could be brought under Clause (16) of the CSOs, since the management did not frame any charges and hold any departmental enquiry against them, the order of the learned single Judge on merit is fully justified. With regard to probationary workmen, Sri. Naik would maintain that" though the discharge order seems to be discharge simpliciter, what influenced the management of the company to take such a drastic step is that he had become an office-bearer of the Union and therefore, the -said action of the management should also be regarded as an instance of victimisation of labour tantamounting to unfair labour practice.

8. Sri. S.V. Shastri, learned counsel forme management of the company, on the other hand, would highlight that the four workmen concerned were brought to the dam site at Kodasalli from different places of northern India and they were holding transferable posts as per the CSOs and administrative instructions issued by the company from time to time and therefore, they ought to have reported for duty at the transferred places without raising untenable pleas. Sri Shastri also contended that the four workmen did not report for duty at the transferred places, despite three reminders by the management. According to Sri Shastri, it is not as if the management straightaway invoked the power reserved to it under Clause (16) of the CSOs without giving any opportunity of the concerned workmen to have their say in the matter. Three reminders issued by the management of the company to the workmen to go and report at transferred places would satisfy the requirement of principles of natural justice. Sri Shastri would highlight that despite service of three reminders, none of the workmen did come forward with any reason much less any good reason not to report for duty at the transferred places. Sri Shastri would conclude by contending that the facts and circumstances of the case would

clearly indicate that the management resorted to the procedure prescribed under Clause (16) of the CSOs after complying with the principles of natural justice and therefore, it could not be said that the action of the management was in breach of law declared by the Apex Court in the case of D.K. Yadav v. J.M.A. Industries Limited, (supra). With regard to the decision of the probationary workman, Sri Shastri, would maintain that since the management was not satisfied with the performance of the probationary workman, it was entitled to discharge him without assigning any reason in terms of the contract of employment. Sri Shastri contended that the action of the management in discharging the probationary workman was bona fide and there was absolutely no material or evidence to show that the said action was tainted by mala fide on the part of the management.

9. When the company undertook construction works at the darn site in Kodasalli in Uttara Kannada District, admittedly, it brought M.R. Nanakchand Bharmha, Bhagwan Singh Rana, Sunil Sharma, and S.K. Tiwari, who were then working at different dam sites and construction places, to serve the company at the dam-site at Kodasalli. It has come in the evidence that M.R. Nanakchand Bharmha, Bhagwan Singh Rana, Sunil Sharma and S.K. Tiwari, were appointed by the company in the year 1984, 1987, 1983 and 1976 respectively and they served in various units of the company. There is also no dispute that under the CSOs, the employees are liable to be transferred from place to place in exigencies of the service of the company. It is quite often held and reiterated by the Courts that if an employee holds a transferable post, it is the prerogative of the employer to decide who should work where and such decision of the employer cannot lightly be interfered with by the Court unless in a given case it is shown that the transfer order is invalid for breach of mandatory provisions of any statute or is tainted by mala fides or the order is issued by an incompetent authority. At this stage itself, it needs to be noticed that the validity of the transfer orders is not assailed by any of the workmen concerned. It also needs to be noticed that despite the transfer orders which obligate the four workmen to go and report at the transferred places to serve the company and despite three reminders issued by the company's management and without submitting any reply to those reminders, these four workmen, for the reasons best known to them, did not report for duty. As regards Mr. Mandal, he was discharged with effect from January 07, 1981 as he was a

probationer and the contract between the parties provided for discharge of probationer on the ground of unsatisfactory service. The order passed by the company's management is a 'discharge simpliciter' and it does not carry any stigma against Sri. J.D. Mandal.

10. In view of this fact-situation, what arises for decision is whether the invocation of Clause (16) of the CSOs by the management to declare that the aforesaid four workmen have voluntarily abandoned the job is justified and legal.

11. Before considering the above question, it is profitable to notice certain provisions of the Certified Standing Orders framed by the management of the company Under Section 3(1) of the Industrial Employment (Standing Orders) Act, 1946. Clause (16) of the CSOs reads as follows:

"(16) A workman who absents himself for ten consecutive days or overstays leave beyond the period of leave originally granted or subsequently extended for 10 consecutive days, will be deemed to have left the services of the Company without notice."

12. Further Clause 19.1 provides that a workman shall be liable to be transferred from one station to another or from one establishment to any other establishment of the company, or to an existing or future establishment of the company, and shall also be liable to be transferred from one department/Section to another or from one job to another provided his emoluments are not adversely affected. Further, Clause 19.2 provides that a workman will always be liable to do any suitable alternate work provided by the Company, in the event of lack of work on the job for which he is normally employed, provided he gets the same emoluments. Clause 24.1 states that wilful insubordination or disobedience, whether alone or in combination with others to any lawful or reasonable order of the superior, is a misconduct. Clause 24.6 provides that habitual absence without leave, or absence without leave for more than seven days is regarded as misconduct. Similarly, Under Clause 24.8 treats absence from the place of duty without permission as misconduct. Under Clause 24.15 the refusal to carry out the order of transfer, is also regarded as a form of misconduct. Under Clause 24.57 the disobedience of any legal and reasonable order of the Management of the company or of Superior

Officers is treated as a kind of misconduct.

13. The cumulative reading of the aforementioned clause in the CSOs would indicate that the four workmen who were transferred to different places from the dam site, Kodasalli were under an obligation to report for duty at the transferred places within the stipulated time unless it is extended by the management. As stated above, the four workmen held the transferable posts and since transfers were effected in the exigencies of the services, they should have complied with the transfer orders. Be that as it may, if for any reason, the four workmen thought that the transfer orders were illegal or otherwise and unjustifiable, they should have assailed the validity of the same in appropriate legal proceedings. Having allowed the transfer orders to stand, it was totally unbecoming of any responsible employee to ignore the transfer orders for months together and raise trivial and untenable pleas not to comply with the transfer orders and this was done by the concerned four workmen despite three reminders issued by the management of the company from time to time. Under these circumstances, the question to be considered is whether the circumstances warranted the management to take action Under Clause (16) of the CSOs and whether the action of the management in declaring that the four workmen concerned deemed to have left the services of the company, is justified and legal.

14. The transfer is an incidence of service. Who should work where is for the management to decide taking into account the interest of the administration. No employee has a vested right to serve in a particular place. In the instant case, the post held by the petitioner was a transferable post. A transfer order cannot be said to be invalid unless such transfer order is issued by an incompetent authority or in violation of mandatory statutory rules or is tainted by mala fide. Even in a case where a transfer results in hardship or inconvenience to an employee, the proper course for such employee is to approach the higher-ups in the administration. That is what the Apex Court declared in *Shilpi Bose v. State of Bihar*, and in *Union of India v. H.N. Kirthania*, and in *Gujarat Electricity Board v. Atmaram Sungomal Poshani*, . The Supreme Court, in *State of M.P. v. S.S. Kourav*, , rejecting a contention that in an unfortunate situation, the transferee's wife had committed suicide leaving three children and that the transferee would suffer extreme

hardship if he had to work at the new place situated in tribal area, held that the Court cannot go into the question of relative hardship, and it would be for the administration to consider the real hardship in the interest of good and efficient administration. The petitioners did not challenge the validity of the transfer orders dated November 14, 1983 and therefore, there is no necessity to delve into it any further.

15. A contract of employment can be determined under a number of circumstances such as death, impossibility, frustration, abandonment, voluntary retirement, superannuation, retrenchment, discharge under the contract, discharge on transfer or closure of the establishment, and dismissal or removal by way of punishment. Therefore if it is proved that an employee voluntarily abandoned the job, then, the contract of employment between such employee and the management comes to an end. The contract of service comes to an end where the employee abandons his job. The term "abandonment of service" has not been defined in the Rules. In RANDOM HOUSE DICTIONARY, the word "abandonment" has been explained to mean "to leave completely and finally, forsake utterly, to relinquish, to renounce, to give up all concern in something". According to ENGLISH LAW DICTIONARY by EARL. LOVITT (1959) Edn., abandonment when used in relation to an office, according to BLACK'S LAW DICTIONARY means "Voluntary relinquishment". In order to constitute abandonment, therefore, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. Abandonment must be total and under the circumstances, it should clearly indicate an absolute relinquishment. Abandonment may be actual or can be imputed. Abandonment or relinquishment of service is a question of intention, and normally such intention is not attributed to an employee in the absence of adequate and substantial evidence in that behalf. However, the intention may be inferred from the acts and conduct of the employee. The question whether an employee has abandoned the employment or not is a question of fact which is required to be resolved in the light of facts and circumstances of each case. There cannot be any strait-jacket formula in that regard. Temporary or short absence, perhaps, may not constitute an abandonment of an office. The length of absence and other attending facts and circumstances of the case may lead to an inference that an employee has

voluntarily abandoned the employment. Under Common Law, an inference that an employee has abandoned or relinquished his service is not easily drawn unless from the length of absence and from the surrounding circumstances an inference to that effect can be legitimately drawn. But, in those cases, where parties agree upon the terms and conditions of service and they are included in Certified Standing Orders or in Service Rules, the doctrine of Common Law would not be relevant.

16. A three-Judge Bench of the Supreme Court in *Buckingham and Carnatic Co. v. Venkatayya* :

"It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service and they are included in Certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself."

In that case, the Court held that under the relevant standing order, an employee remaining absent for eight consecutive days without leave shall be deemed to have terminated his contract and thus relinquished or abandoned his employment. The Court also held that the fact that such absence is also a misconduct under the standing order would not affect the position as it is not incumbent on the management to take recourse to the standing order providing for disciplinary proceedings for such absence on the part of any employee. A two-Judge Bench of the Supreme Court in *National Engineering Industries v. Hanuman*, , held that when a standing order provides that a workman will lose his lien on his appointment in case he does not join his duty within eight days of the expiry of his leave, it obviously means that his services are automatically terminated on the happening of the contingency; where a standing order provides that a workman

would lose his lien on his appointment if he does not join his duty within certain time after his leave expires, it can only mean that his service stands automatically terminated when the contingency happens. In *Binny Limited v. Their Workmen*, , the concerned workmen therein was held to have himself left the service, terminating his contract under the relevant standing order for absenting himself without leave for eight consecutive working days.

17. However, another three-Judge Bench of the Supreme Court in *D, K, Yadav v. J. M. A. Industries* (supra), held that the principles of natural Justice must be read into such standing order in that case, the respondent management invoking the power under standing order No. 13(2)(iv), by its letter December 12, 1980 informed the appellant. *D.K. Yadav v. J.M.A, Industries Limited* (supra), a workman that the appellant willfully absented from duty continuously for more than 8 days from December 3, 1980, without leave or prior information or intimation or previous permission from the management, and therefore, deemed to have left the service of the company on your own account and lost your lien and the appointment with effect from December 3, 1980. In that context, the Supreme Court held that the procedure prescribed in the Standing Order affecting the civil rights of workman would have to answer the requirement of Article 14, and, therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given complying with the principles of natural Justice. What emerges from the aforementioned decisions of the Supreme Court is that the management cannot put an end to the tenure of an employee/workman straightaway acting under an enabling provision in the Standing Orders of Service Rules, and before taking a decision under such enabling Standing Order or Service Rule, principles of natural justice are required to be complied with. In other words, the affected employee against whom an adverse action is proposed should be given a right of hearing. There cannot be any rigid or strait-jacket formula for affording a reasonable opportunity to the affected employee or workman to have his or her say against the proposed action, and it is for the Court to decide what should have been a fair hearing in a given case taking into account the totality of facts and circumstances of such case.

18. A careful reading of the observations of the Apex Court in paras 12, 13 and 14 of the judgment in D.K. Yadav's case makes it clear that what is insisted on is that before taking any action putting an end to the tenure of any employee/workman, a reasonable opportunity to put forth his or her case is given, and, not necessarily a domestic enquiry should be held particularly when the act of the employee in overstaying after the expiry of the leave is not considered by the management to be a misconduct under the Certified Standing Orders/Rules. This is what I gather from the combined reading of the Judgments of the Co-ordinate Benches of the Supreme Court in Buckingham and Carnatic Company's case (supra) and D. K. Yadav 's case (supra). In D. K. Yadav's case (supra), the Supreme Court did not notice its earlier decisions in Buckingham and Carnatic Company's case (supra) and in National Engineering Industries's case (supra). However, it may be noted that when the Supreme Court delivered judgments in Buckingham and Carnatic Company's case (supra) and National Engineering Industry's case (supra) the question whether the principles of natural Justice were applicable to purely administrative actions was not settled and there was divergence of opinions on the question. It was in 1970, in A.K. Kraipak v. Union of India, , that the Supreme Court made a categorical statement that the distinction between quasi-judicial and administrative actions should be discarded for the purpose of giving a hearing to the affected parties. K.S. h EGDE, J. speaking for the Bench said:

"The dividing line between an administrative power and a quasi-Judicial power is quite thin and is being gradually obliterated... The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily and capriciously.... In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power".

19. In Kraipak (supra), the extension of the right of hearing to the person affected by the administrative process has been consummated, by the extension of the scope of quasi-judicial and natural justice as well as by discarding the distinction "between quasi-judicial" and "administrative" and invoking the concept of fairness

in administrative action. The innovative trend set in by *Kraipak* (supra), was subsequently expanded and reinforced by the Supreme Court in *Maneka Gandhi v. Union of India*, , *Mohinder Singh Gill v. Chief Election Commissioner* , *Swadeshi Cotton Mills v. Union of India* , to cite a few. In *Maneka Gandhi's* case (supra), BHAGWATI, J. has emphasised that natural justice is a great "humanising principle" intended to invest law with fairness and to secure justice. In *Mohinder Singh Gill* (supra), the Supreme Court has observed:

"Today in our jurisprudence, the advances made by natural justice far exceed old frontiers and judicial creativity belights penumbral areas it is only for improving the quality of Government by injecting fairplay into its wheels. Law lives not in a world of abstractions but in a cosmos of concreteness and to give something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity."

20. The Supreme Court in *Swadeshi Cotton Mills* case (supra), spoke in the same vein:

"..... This rule of fairplay must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications".

21. In England too with the decision of the House of Lords in *Ridge v. Baldwin*, (1964 AC 40) and the decision of the Court of Appeal in *Infant K(H)*, 1967 (1) All E.R. 226 the horizons of the right of hearing, whether as a part of natural justice or of fairness, have been expanded.

22. Therefore, it is now well established law that irrespective of the nature of an administrative action, whether it is quasi-judicial or pure administrative, if such administrative action has the effect of affecting Civil rights of a person, principles of natural Justice and fair play should be complied with before the action is taken. Power to determine contract of employment vested in the employer is an administrative act and when the same is exercised, it would certainly affect the legal rights of the employees concerned. That power has to be exercised

judiciously and in consonance with the principles of natural justice and fair play. Therefore, the law laid down in O.K. Yadav's case (supra), is in consonance with the enunciation of law in Kraipak (supra) and followed subsequently in large number of cases. But, from the decision of the Supreme Court in O.K. Yadav's case (supra), it cannot be said that the employer is stripped of power to declare that the workmen concerned voluntarily abandoned the appointment and thereby forfeited their appointment, by taking action under Clause 16 of the CSOs. What is important is that even while acting under Clause (16), the management's action should be fair and, in accordance with the principles of natural justice. If an employee absents himself unauthorisedly from duty for considerable time then, it cannot be said that the management should necessarily treat such unauthorised absence as a misconduct under the Rules or Certified Standing Order and hold a regular departmental/domestic enquiry and it cannot act under Clause (16) and declare that the employee forfeited contract of employment. The legal consequences of abandonment of job by an employee may be different from removal or dismissal or removal of an employee as a disciplinary measure. If it is a case of abandonment, it will not disentitle the employee to seek fresh employment under the same employer or elsewhere, whereas, dismissal or removal of an employee as a disciplinary measure will disable him to seek employment anywhere. The declaration of law in O.K. Yadav's case (supra) cannot be considered to be sacrosanct or inviolable. There are instances where the Apex Court itself upheld the validity of Service Rules enabling the management to dismiss its employees, under certain extraordinary circumstances, without holding a departmental enquiry or without compliance with audi alteram partem rule. In Hari Pada Khan v. Union of India , the petitioner, Hari Pada Khan who was a permanent staff member, at the relevant time, of the Indian Oil Corporation was dismissed by the management of the Corporation acting under Standing Order No. 20-IV of the Corporation. Standing Order No. 20-IV reads:

"Where a workman has been convicted for a criminal offence in a Court of Law or where the General Manager is satisfied, for reasons to be recorded in writing, that it is neither expedient nor in the interest of security to continue the workman, the workman may be removed or dismissed from service without following the procedure laid down under III of this clause."

The petitioner therein questioned the validity of the above rule on the ground that the rule is *ex facie* arbitrary and violative of Articles 14 and 16 of the Constitution. The Calcutta High Court upheld the validity of the rule and dismissed the petition. In the appeal preferred by the employee, the Supreme Court, while dismissing the appeal held that the impugned rule has been made by the Corporation with the intention to prevent an employee of the Corporation served with a charge sheet and arrested in furtherance thereof, from continuing in service, the continuance of such employee in service of the Corporation would demoralise the service and therefore it was most expedient in the public interest not to hold any further enquiry and terminate his services forthwith, however, subject to the result of the trial. The Court also held that the doctrine of principles of natural justice has no application when the authority concerned is of the opinion that it would be inexpedient to hold an enquiry and that it would be against the interest of security of the Corporation to continue in employment the offender-workman. It is relevant to note that the judgment in both D.K. Yadav's case (*supra*) and Hari Pada Khan's case (*supra*), was delivered on behalf of the Benches by K. RAMASWAMY, J. of course, there is a difference in the provisions of Standing Order 20-IV of the Indian Oil Corporation and Rule 92 of the State Bank of India (Supervising Staff) Service Rules. Standing Order 20-IV specifically excludes procedure laid down under Clause III of Standing Order 20. I have referred to the decision of the Supreme Court in Hari Pada Khan's case (*supra*), only for the limited purpose to say that a regular departmental enquiry is not a 'must' before termination of contract of employment in all cases and in all situations. Regular departmental enquiry becomes imperative only in a case where a particular conduct of an employee is treated as misconduct by the employer under the relevant service regulations/Certified Standing Orders and the disciplinary authority chooses to punish such employee by removal or dismissal on that ground. But, a contract of employment can be determined on account of many other factors/grounds stated *supra*.

23. In the backdrop of the principles noticed above, now let us advert to the facts of this case to see whether the requirement insisted by the Supreme Court in O.K. Yadav's case (*supra*), has been complied with by the Bank's management before the impugned action was taken against the four workmen concerned and whether

it could be said that the four workmen concerned deemed to have left the service of the Company. The impugned action was admittedly taken by the appellant-Company under Clause (16) of the CSOs. Clause (16) provides that the workman who absents himself for 10 consecutive days or overstays leave beyond the period of leave originally granted or subsequently extended for 10 consecutive days, will be deemed to have left the services of the Company without notice. In other words, if a workman overstays his leave or the workman absents himself from duty, the Management will be justified in invoking the power reserved to it under Clause (16). Therefore, the first question to be considered is whether, in the facts and circumstances of this case, the four workmen concerned could be said to have absented themselves from duty for 10 consecutive days.

24. This question need not detain the Court for long. The facts are not in dispute: the four workmen concerned had been brought to the Dam site at Kodasalli on transfer from different places by the appellant-Company when it undertook construction work at Kodasalli. Admittedly, the workmen concerned held transferable posts and, therefore, they were under an obligation to serve the appellant-Company at different places at which they might be transferred in the exigencies of service. The workmen just forgetting this obligation cast on them under the CSOs and without any valid justification ignored the transfer orders and did not go and report for duty at the transferred places. It needs to be emphasized that the workmen did not report for duty at the transferred places despite the fact that the Management issued three reminders dated January 20, 1991, January 25, 1991 and February 04, 1991 to them. The subsequent plea put forth by the workmen that they are the office bearers of the Trade Union also does not seem to be correct inasmuch as it is satisfactorily established that at the relevant point of time when the transfer orders were issued, the workmen concerned were not office bearers of the Trade Union. Be that as it may, even assuming that they are the office bearers of the Trade Union and the transfer orders passed by the appellant-Company are illegal or invalid for any reason whatsoever, in that event, the workmen ought to have assailed the validity of the same in an appropriate legal proceeding. The workmen having allowed the transfer orders to stand cannot ignore the transfer orders and this conduct itself, on the part of the workmen, speaks loudly about their attitude towards employment which they have secured

with the appellant-Company. No employer is expected to countenance such dictatorial conduct of workman. The above facts cumulatively and satisfactorily prove that the workmen were determined not to go and report for duty at the transferred place and insisted that they should be allowed to serve only at Kodasalli dam site as a matter of right. In a case like this, it is not one piece of evidence but the whole evidence has to be taken into account to infer intention of the workmen to decide whether they have left the services of appellant-Company. If the Court were to take into account the totality of the facts and circumstances and the events that led to the appellant-Company invoking its power under Clause (16) of the CSOs, and declaring that the workmen concerned deemed to have left the services of the Company, the only probable conclusion is that the workmen concerned had no mind to serve the Company in terms of the CSOs and they had no mind to go and report for duty at the transferred places under any circumstances. Therefore, from the cumulatively established facts with regard to the conduct of the four workmen concerned, we hold that the appellant-Company is justified in drawing the inference that the workmen had abandoned the service of the appellant- company and thereby forfeited their appointments.

25. In this case, such inference was drawn and declaration made by the appellant-Company after complying with the principles of natural justice and fair play in action. It is true that the appellant-Company did not issue any show cause to the four workmen concerned, specifically with regard to the action to be taken by it under Clause (16) of the CSOs. But, since the impugned action was preceded by three notices dated January 20, 1991, January 25, 1991 and February 04, 1991 to the workmen and since the workmen did not come forward with any valid or tenable reasons and/cause not to report for duty at the transferred places, it should be held that the principles of natural justice and fair play in action in terms of the judgment of the Supreme Court in D.K. Yadav v. J.M.A. Industries Limited (supra), have been complied with by the Management of the first respondent-Company. Therefore, no exception can be taken to the action of the Management taken under Clause (16) of the CSOs.

26. This takes us to the examination of the validity of the action of the Management of the first respondent-company in discharging Sri Gadadhar Mondal

when he was on probation by its order dated January 7, 1991. The proceeding of the Management dated January 7, 1991 discharging Sri Gadadhar Mondal produced as Annexure-C in W.A. No. 6983 of 1999 at page 86 reads as follows:

"Mr. Gadadhar Mondal,

Electrician,

Code No. 4873, KSD UNIT.

Sub: Termination of Services

Dear Sir,

You were appointed with effect from September 28, 1990 vide appointment letter No. 287/KSD/530 dated September 11, 1990 on probation for a period of six months services terminable during the probation period without assigning any reason.

Your services are no longer required by the Company and the same are hereby terminated with immediate effect as per terms of your appointment letter.

You may contact the accounts department of our KSD Unit for settlement of your dues, if any, after obtaining clearance from all concerned.

Yours faithfully for CONTINENTAL CONSTRUCTION LTD."

27. A careful reading of the above proceeding makes it very clear that the discharge of Sri Gadadhar Mondal is a discharge simpliciter. The proceeding does not cast any stigma on his conduct; it also does not attribute any inefficiency to him. The appellant-Company in its written statement filed in I.D. No. 75 of 1992 before the Industrial Tribunal, Hubli, defending its action taken against Gadadhar Mondal, has stated thus:

"It is true that he was appointed as electrician in the year 1990. At the time of his appointment one of the conditions of his appointment was that during the course of his probationary period of six months if his services were found to be not

satisfactory, the management would be free to terminate his services without giving notice or without assigning any reason. Since his work during the probationary period was not found to be satisfactory, his services were terminated by order dated January 7, 1991. The other contentions taken in this para are denied in toto"

28. It is trite, the purpose of placing a person on probation to try him during the period of probation to assess his suitability for the job concerned. It is well settled that an order of discharge or termination simpliciter is not an order of punishment and, therefore, there is no question of giving a hearing before termination of his service. This position is well settled by the judgment of the Supreme Court in *Unit Trust of India v. T. Bijaya Kumar*, 1993-I-LLJ-240. However, if an employee who is on probation or holding an appointment on temporary basis is removed from services with stigma because of some specific charge; then the plea that his service was temporary or his appointment was on probation is not sustainable. In such a case, it is necessary for the employer to hold an enquiry affording him an opportunity to show that the charge levelled against him is either not proved or is without any basis. The principles of law relating to discharge under contract of discharge simpliciter were extended to the discharge of probationer as well by the Supreme Court in *Management of Express Newspapers Ltd v. Presiding Officer, Labour Court, Madras*. The probationer in this case was appointed as a journalist on a probation for six months and had to be confirmed if he was found suitable for the job during this period. But, before the expiry of the probationary period, the employer terminated his service on the ground that his work was unsatisfactory. The discharge was challenged by the workman as mala fide and a measure of unfair labour practice. The plea of the management was that the journalist having been appointed only as a probationer, the termination, of his service for unsatisfactory work was well within the rights of the management. DAS GUPTA, J. speaking for the Apex Court stated the law in following words at p. 10 of LLJ (head note):

"There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his service had either not been

terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months' period, the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer."

29. From the above observations of the Apex Court, the Apex Court seems to make a distinction between the cases of termination of employment of probationer before the period of probation had expired and cases where the employer exercises his inherent right either to confirm or to terminate the employment of a probationer at the end of the period of probation. The employer's right to terminate the service of a probationer, during and at the end of the probationary period, without anything more was recognised. It will be totally meaningless to refer to a person's employment on probation if the management has no right to terminate the service during probation and to insist that services of such probationer could be terminated only on the ground of proved misconduct. It is of the very essence of the concept of probation that the person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption on the expiry of the probationary period.

30. A Constitution Bench of the Supreme Court in *Shamsher Singh v. State of Punjab* , has stated the law on the termination of the services of probationers in great elaboration. The principles discernible from *Shamsher Singh's* case are: The termination of the service of a probationer will not, ordinarily and by itself, be a punishment because the employee so appointed has no right to continue to hold such a post any more than a servant who has no right to continue to hold such a post; such a termination does not operate as forfeiture of any vested right of the employee to hold the post; if he has no such right, his termination cannot be described as dismissal, removal or reduction in rank by way of punishment. On the other hand, according to *Shamsher Singh* if the termination or discharge of a

probationer is founded on misconduct, negligence or inefficiency or any other disqualification, then it is punishment and in such a case motive becomes relevant. To sum up, if a person is an employee on probation, it is the inherent power of the employer to terminate, during or at the end of probationary period- Of course, such termination or discharge should be termination or discharge simpliciter and it should not carry any stigma or disability for the concerned workman or employee to secure employment elsewhere. In a given case, if the Court finds the discharge or termination is mala fide or it amounts to victimization or unfair labour practice or is so capricious or unreasonable as would lead to the inference that it had been passed with an ulterior motive to punish the probationer and not in bona fide exercise of the power arising out of the contract, the Court would be justified in lifting the veil to see the actual motive behind the action of the employer. In this case, the impugned discharge (termination) order does not carry any stigma nor alleges any incompetency or misconduct against the probationer-workman. Although an attempt was made by probationer before the Labour Court and this Court meekly that the action was mala fide and his services if were terminated solely because he became an office bearer of the Trade Union, he has utterly failed to bring home the charge against the Management both in terms of factual matrix in the pleading and the proof in support of the same. At this stage itself, it needs to be noticed that even the four workmen concerned who have been transferred from the Dam site at Kodasalli, have also contended that the transfers were effected not in bona fide exercise of the managerial power of the Company but as a punishment because the Management did not like them to become office bearers of the Trade Union. Here again, the allegations are as vague as they could be and no substantive and acceptable legal evidence is placed before the Industrial Tribunal or this Court to sustain the charge of mala fide against the Management of the appellant-Company.

31. In the result and for the foregoing reasons, we allow the Writ Appeal No. 6983 of 1999 filed by the Management of the appellant- Company and set aside the order of the learned single Judge dated September 2, 1999 and dismiss the Writ Petition No. 33435 of 1998. Consequently, the Writ Appeal No. 7454 of 1999 filed by the workman concerned is liable to be dismissed and it is accordingly dismissed. In both the appeals, the parties are directed to bear their own costs.

