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Court : Kerala

Decided On : Dec-05-2000

Reported in : [2001(90)FLR1018]; (2002)IVLLJ582Ker

Judge : K.A. Mohamed Shafi, J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 11A; [Constitution of India](#) - Article 226

Appeal No. : C.P. No. 5349/1994

Appellant : Rajan N.R.

Respondent : Mathrubhoomi Printing and Publishing Co. Ltd. and ors.

Judgement :

ORDER

K.A. Mohamed Shafi, J.

1. This OP is filed by the petitioner to set aside Exts. P3 and P6 award passed in I.D. No. 59/88 by the Labour Court, Ernakulam, to declare that the termination of the service of the petitioner is illegal and to direct the 1st respondent to reinstate the petitioner with back wages, continuity of service and all other consequential benefits.

2. Petitioner was originally appointed as an attender by the respondents and subsequently he was promoted as Franking Machine Operator. Alleging that the petitioner during the period from October 9, 1984 to June 15, 1985 misappropriated a sum of Rs. 9200/-drawn from the company without paying the amount to the post office towards the amount due as per the franking machine record. Ext. P1 show cause notice dated July 5, 1985 was issued to the petitioner. To that notice he sent Ext. P2 reply statement dated July 9, 1985 stating that he has not misappropriated any amount. He was served with Ext. P3 charge sheet dated January 17, 1986. The petitioner filed explanation to the charge sheet. But after conducting enquiry and accepting the enquiry report respondents found that the petitioner is guilty of misappropriation and terminated his service. Though the dispute was raised as I.D. No. 59/88 before the Labour Court, Ernakulam the Labour Court by Ext. P6 award conferred the findings of the enquiry officer and upheld the punishment of termination of service imposed upon the petitioner. Hence this OP is filed by the petitioner.

3. The petitioner contended that he is absolutely innocent of the allegation made against him and if any misappropriation or fabrication of the account is committed in this case, it should be the collusion between the concerned postal employees and the cashier, accountant and despatch clerk of respondents 1 and 2. According to him, not only they are not made accused in this case but they are made witnesses against the petitioner. According to him, from the very nature of the practice followed in setting franking machine from preparing indent by the despatch clerk till the amounts are received by the petitioner deposited to him with the postal authorities setting up of machine on remittance of the amount and sealing it to the postal authorities and submission of the franking machine along with the postal receipt and franking machine book before the Account Section of respondents 1 and 2, the allegation made against him that he did not pay the entire amount received by him from the office to the postal authorities and misappropriated a portion of the amount during the period from October 9, 1984 to June 15, 1985 cannot be believed and if in fact there is any such misappropriation or discrepancy, that fact should have come to the notice of anybody in the postal department and Accounts Section of R1 and R2 including the Accountant and Cashier. Therefore, according to him, without collusion and connivance of the

concerned clerk in the post office and the employees in the Accounts Section such misappropriation cannot be committed in this case. He further contended that there is no allegation that respondents 1 and 2 have suffered any loss and if at all loss is sustained by the postal authorities they have absolutely no complaint. It is also contended by the petitioner that on detecting misappropriation of the amount in order to protect the real culprits the manager obtained M. 57 letter from the petitioner on June 17, 1985 stating that Rs. 100/- per mensem from his salary can be deducted to make good the amount of Rs. 9,200/-, the above disciplinary proceeding is initiated against him and even though there is no allegation that the petitioner has fabricated the franking machine and the finding in the disciplinary proceedings is that the postal authorities fabricated the account the petitioner is found guilty and inflicted extreme penalty of termination of service without any sense of proportion to the misconduct alleged against him.

4. Respondents 1 and 2 have contended that the above OP is not sustainable and all the contentions raised by the petitioner in the OP cannot be entertained by this Court in the above proceedings under Article 226 of the Constitution.

5. Counsel for petitioner submitted that after issuing Ext. P1 show cause notice to the petitioner and Ext. P2 reply, Ext. P3 charge sheet was issued to him by respondents 1 and 2. Thereafter a domestic enquiry was conducted by appointing Sri A.N. Kuttan, advocate as Enquiry Officer. After enquiry, the enquiry officer filed report finding that the petitioner is guilty in this case. The disciplinary authority concurred with the finding of the enquiry officer and decided to terminate the service of the petitioner considering the gravity and nature and character of the misconduct of the petitioner.

6. Subsequently the petitioner raised industrial dispute before the conclusion officer who referred the dispute for adjudication. Accordingly the Labour Court, Ernakulam considered the entire contentions raised by the petitioner and respondents 1 and 2 after finding that the enquiry conducted in this case was proper, legal and valid and the findings of the enquiry officer is sustainable confirmed the order passed by the disciplinary authority after considering the quantum of punishment under Section 11-A of the Industrial Disputes Act and

finding the penalty is commensurate with charge. Therefore, according to the respondents the challenge made against the order passed by the disciplinary authority and the Labour Court against the petitioner is absolutely untenable and illegal.

7. The petitioner has contended that even though he sought for permission to appoint a counsel to represent him in the enquiry proceedings, the enquiry officer illegally rejected his request which affected him very badly in this case. Respondents 1 and 2 have contended that there is no provision in the standing orders of respondents 1 and 2 for providing legal aid to the delinquent employee and even though the enquiry officer offered to the petitioner that he can have the assistance of a union leader in the enquiry proceedings the petitioner declined the same and he himself conducted the enquiry and cross examined the witnesses deposed against him. Therefore in the absence of any specific provision in the standing order giving opportunity to the delinquent officer to seek legal aid the petitioner cannot as of right claim legal aid in the domestic enquiry conducted against him. It is also pertinent to note that though the enquiry officer offered to the petitioner an opportunity of the help of a union leader in the enquiry petitioner had declined the same and he himself conducted the enquiry. The petitioner has no case that the presenting officer was a person trained in law or aided by a lawyer. Therefore the contention of the petitioner that domestic enquiry conducted in this case is not legal or proper or without affording sufficient opportunity to be heard or to defend him in the proceedings and as such the entire domestic enquiry is vitiated in this case is not sustainable.

8. The above position of law is settled by the following decisions of this Court as well as the Supreme Court. In the decision reported in Francis v. Bank of Cochin Ltd. (1987) 2 Ker LT 720 this Court has observed as follows:

'The next question is whether the enquiry is vitiated for the reason that the petitioner's request to engage a lawyer was not accepted. Referring to this aspect of the case the Tribunal states that by Ext. W17 reply of the enquiry officer the request of the petitioner to have the services of a professional lawyer was rejected giving him permission to have the services of a friend or a colleague to defend

him. The Tribunal also finds that the management was not assisted by a trained lawyer at the enquiry and the workman was not pitted against a person trained in law in the matter of his defence. The Tribunal refers also to Ext. M 17 settlement between the management and its workmen under which an employee may have the services of a lawyer to defend him if only the management permits. The management had not given any such permission and the petitioner had no right to be defended by a lawyer at an enquiry where the management did not have the assistance of a lawyer to present its case.'

9. In the decision reported in *Cipla Ltd. v. Ripu Daman Bhanot* AIR 1999 SC 1635 : 1999 (4) SCC 188 : 1999-I-LLJ-900 (SC) the Supreme Court has held as follows at p. 903 of LLJ:

'It was held that the right to be represented by an advocate in the departmental proceedings can be restricted and regulated by statutes or by the service rules including the Standing Orders, applicable to the employee concerned. The whole case law was reviewed by this Court in *Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union* 1999-I-LLJ-352 (SC) and it was held that a delinquent employee has no right to be represented by an advocate in the departmental proceedings and that if a right to be represented by a co-workman is given to him, the departmental proceedings would not be bad only for the reason that the assistance of an advocate was not provided to him.'

10. Counsel for petitioner admitted that the punishment imposed in this case is beyond all sense of proportions to the charge alleged against him. He contended that in spite of the allegation made against the petitioner that he only misappropriated an amount of Rs. 9,200/-and he has caused loss of that amount to the postal department and he has not caused any loss to respondents 1 and 2 the extreme penalty of termination of service is imposed upon him cannot be sustained under any circumstances in this case.

11. Counsel for respondents 1 and 2 submitted that the award was passed by the Labour Court on June 6, 1991 and the same was published by the Government of Kerala in the Gazette dated September 17, 1991 and the above OP is filed on April 7, 1994. Therefore undue delay in preferring the above OP challenging the

award passed by the Labour Court itself is sufficient to dismiss the OP on the ground of laches and negligence on the part of the petitioner. Even though the above OP is filed more than 2 1/2 years of the publication of the award in the gazette, the explanation is offered by the petitioner for the delay in filing the above OP seeking relief under Article 226 of the Constitution. Therefore undue delay itself is a ground sufficient for dismissal of the OP on the ground of laches on the part of the petitioner. In the decision reported in *Canara Bank Staff Union v. Union of India* 1998-I-LLJ-859 (Ker) this Court has held that the delay of two years for filing the OP before this Court under Article 226 of the Constitution is sufficient to dismiss the OP on the ground of laches.

12. Counsel for respondents 1 and 2 submitted that in view of the fact that the finding of the enquiry authority has been confirmed by the Labour Court, the scope of judicial review by this Court under Article 226 of the Constitution is very much limited. He also submitted that this Court cannot consider the petition under Article 226 of the Constitution as an appeal and if the disciplinary authority has entered a finding on appreciation of the evidence it cannot be interfered with by this Court, unless the finding is based on no evidence or it is perverse or illegal. He also submitted that adequacy of the evidence before the enquiry officer cannot be canvassed or considered by the High Court and the High Court cannot substitute its own conclusion. In support of the above argument counsel for respondents 1 and 2 relied upon several decisions. In the decision reported in *Apparel Export Promotion Council v. A.K. Chopra* AIR 1999 SC 625 : 1999 (1) SCC 759 : 1999-I-LLJ-962 the Supreme Court has observed as follows at p. 967 of LLJ:

'The High Court appears to have over-looked the settled position that in departmental proceedings, the disciplinary authority is the sole Judge of facts and in case an appeal is presented to the appellate authority, the appellate authority has also the power/and jurisdiction to reappreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the

evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an appellate authority, over the factual findings recorded during departmental proceedings while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities'.

13. In the decision reported in *Saini R.S. v. State of Punjab* AIR 1999 SC 3579 : 1999 (8) SCC 90 : 1999-II-LLJ-1415 (SC) the Supreme Court has observed as follows at p. 1419 of LLJ:

'Before adverting to the first contention of the appellant regarding want of material to establish the charge and of non- application of mind we will have to bear in mind the rule that the Court while exercising writ jurisdiction will not reverse finding of the enquiry authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the enquiring authority it is not the function of the Court to review the evidence and to arrive at its own independent finding. The enquiring authority is the sole Judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings.'

In this case five witnesses were examined against the petitioner and no contra evidence is adduced against them. Documents were also produced to show that amount has been misappropriated by fabricating the receipts M4 to M54. The disciplinary authority after analysing the evidence on record found that the petitioner is guilty in this case. The Labour Court also after giving opportunity to both sides to adduce evidence and analysing the evidence on record found that the finding of the disciplinary authority is sustainable. Under the circumstances, it is clear that the finding arrived at by the disciplinary authority is supported by the evidence on record. Therefore in view of the above decisions of the Supreme Court, this Court by sitting under writ jurisdiction under Article 226 of the Constitution cannot go into the sufficiency or otherwise of the evidence before the enquiry officer and come to a different finding after reappreciating the evidence on record.

14. Respondents 1 and 2 contended that the petitioner has committed gross misconduct and he has played fraud upon the management and also the postal department. Therefore the management cannot retain him in service by imposing some minor penalty as it will affect the morale of the entire employees working under respondents 1 and 2. Therefore counsel for respondents 1 and 2 submitted that the termination of the petitioner from service is only proper and adequate in this case. He further submitted that the Labour Court which is entitled to go into the adequacy of the penalty imposed in this case has considered this aspect and held that the penalty is commensurate with misconduct of the petitioner and therefore this Court cannot interfere with the quantum of punishment imposed against the petitioner by the authorities. The Labour Court has got the authority to consider the sufficiency of the sentence imposed under Section 11-A of the Industrial Disputes Act.

15. In the decision reported in *Management of Hindustan Machine Tools Ltd. Bangalore v. Mohammed Usman*, AIR 1984 SC 321 : 1984 (1) SCC 152 : 1983-II-LLJ-386 the Supreme Court has held that as the Labour Court in exercise of the power conferred upon it by Section 11-A of the Industrial Disputes Act reduced the punishment by setting aside the punishment of termination of service and in its place imposed the punishment of stoppage of the increments for two years, the Supreme Court will not interfere in the absence of any important legal principle regarding adequacy or inadequacy of the penalty.

16. In the decision reported in *Punjab Dairy Development Corporation Ltd. v. Kala Singh*, AIR 1997 SC 2661 : 1997 (6) SCC 159 : 1997-II-LLJ-1041 the Supreme Court has observed as follows at p. 1042 of LLJ:

'It is seen that the Labour Court after adduction of evidence came to the conclusion that the dismissal is justifiable. On the basis of the evidence adduced before it, no doubt, the Labour Court has not elaborately considered the entire evidence but, agreed the decision that the misconduct has been proved. In view of the proof of misconduct, the necessary consequence would be that the management has lost the confidence that the appellant would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to

exercise the power under Section 11-A to grant relief of reinstatement with minor penalty.'

17. In the decision reported in 5. Nallasamy v. Second Addl. Labour Court Madras, (1996) 1 Cur LR 292, the Madras High Court has observed as follows:

'After finding the guilt of misconduct for stealing hammer which would have been worth Rs. 10/- to Rs. 15/- is justified since the charge is proved and there is very little scope for generosity to be shown or to bring into existence minor punishment for such misconduct of committing theft.'

18. In the decision reported in Harjinder Singh v. State of Punjab, 1999-I-LLJ-1292 (P&H-DB;). High Court has observed as follows at p. 1293 of LLJ:

'It is true that under Section 11-A the Labour Court has the power to reappraise the evidence. It is also true that the writ Court is normally reluctant to interfere with the findings recorded by the Labour Court. Yet, the power given to the Labour Court cannot be arbitrarily used to order reinstatement or re-employment of dishonest employee. Fraud of even a small amount is like a drop of poison in a bucket of pure milk. It ruins the milk completely and renders it unfit for human consumption. Similarly, an employee found to be guilty of a dishonest act renders himself unfit for retention in service.'

19. In view of the above rulings the contention of the petitioner that the penalty imposed in this case is disproportionate to the misconduct and leniency should be shown to the petitioner with regard to the penalty is not sustainable.

20. Counsel for petitioner lastly submitted that the petitioner was not given an opportunity to be heard before imposing penalty after the enquiry report is filed by the Enquiry Officer in the domestic enquiry. According to him, after the filing of the enquiry report he should have been given opportunity to make representation regarding the finding of the guilt as well as the proposed punishment. In support of the contention that the petitioner should have been given the copy of the enquiry report along with the notice proposing the punishment affording an opportunity to give his explanation and failure to give copy of the enquiry report is violative of

natural justice which vitiates the entire disciplinary proceedings. Counsel for 1 petitioner relied upon the decision reported in *Union of India v. Mohammed Ramzan Khan*, AIR 1991 SC 471 : 1991 (1) SCC 588 : 1991-I-LLJ-29. In that judgment the Supreme Court has held that the delinquent is entitled to get copy of the enquiry report conducted by the Enquiry Officer and failure to furnish report will amount to violation of natural justice vitiating disciplinary proceedings.

21. Counsel for respondents 1 and 2 submitted that the above decision is applicable only to the orders passed imposing punishment after the pronouncement of that judgment by the Supreme Court on November 20, 1990 and in this case the order terminating the service of the petitioner was passed much prior to the pronouncement of the judgment by the Supreme Court. He also submitted that since the Standing Orders relating to the disciplinary proceedings issued by respondents 1 and 2 do not contain any provision to give a second opportunity to the delinquent officer by furnishing the enquiry report and calling upon him for further explanation the above decision has no application to the facts of this case. In support of this contention he relies upon the decision reported in *Padmanabhan v. Kerala State Handloom Development Corporation Ltd.* 1993-I-LLJ-1226 wherein a Division Bench of this Court has observed as follows at p. 1228:

'It will be noticed that the regulation contemplates only one opportunity in relation to proof of the charges and no second opportunity is contemplated requiring a show cause notice as to the action that is proposed to be taken. We are therefore, of the view that as far as the Regulations are concerned they do not contemplate that there should be a second opportunity as to the proposed punishment by way of furnishing the Inquiry Officer's report and calling for further explanation.'

22. In the decision reported in *Hindustan Latex Ltd. v. P.G. Padmarajan* 1994-II-LLJ-278 a Division Bench of this Court has held that a second opportunity against the proposed punishment is not part of the general principles of natural justice applicable to disciplinary cases and that the order of dismissal is not liable to be challenged for that reason.

23. In the decision reported in *Managing Director, ECIL, Hyderabad v. B. Karunakar* 1994-I-LLJ-162 (SC) a Bench of the Supreme Court consisting of five Judges have observed as follows :

'As has been discussed earlier, although the furnishing of the Inquiry Officer's report to the delinquent employee is a part of the reasonable opportunity available to him to defend himself against the charges, before the 42nd amendment of the Constitution, the stage at which the said opportunity became available to the employee had stood deferred till the second notice requiring him to show cause against the penalty was issued to him. The right to prove his innocence to the disciplinary authority was to be exercised by the employee along with his right to show cause as to why no penalty or lesser penalty should be awarded. The proposition of law that the two rights were independent of each other and in fact belonged to two different stages in the inquiry came into sharp focus only after the 42nd amendment of the Constitution which abolished the second stage of the inquiry viz, the inquiry into the nature of punishment. As pointed out earlier, it was mooted but not decided in *E. Bashyam 's case* 1988 Lab IC 1702 (supra) by the two learned Judges at this Court who referred the question to the larger Bench. It has also been pointed out that in *K.C. Asthana 's case* (1989 Lab IC 1166) (supra), no such question was either raised or decided. It was for the first time in *Mohammed Ramzan Khan's case* that the question squarely fell for decision before this Court. Hence till November 20, 1990, i.e. the day on which *Mohammed Ramzan Khan's case* 1991-I-LLJ-29 was decided, the position of law on the subject was not settled by this Court. It is for the first time in *Mohammed Ramzan Khan's case* (supra) that this Court laid down the law. That decision made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November 20, 1990. The law laid down was not applicable to the orders of punishment passed before that date notwithstanding the fact that the proceedings arising out of the same were pending in Courts after that date. The said proceedings had to be decided according to the law prevalent prior to the said date which did not require the authority to supply a copy of the Enquiry Officer's report to the employee. The only exception to this was where the Service Rules with regard to the disciplinary proceedings themselves made it obligatory to supply a copy of the report to the employee.

24. It is clear from the authoritative pronouncement of the larger Bench of the Supreme Court in the above case that the law laid by the Supreme Court that the disciplinary authority should supply a copy of the Enquiry Officer's report to the delinquent employee is applicable only to the orders of punishment passed after November 20, 1990 and the orders passed imposing punishment before that date should be decided in accordance with law which was prevalent on the date of the order imposing punishment. Therefore in view of the fact that the order of punishment is passed against the petitioner much prior to November 20, 1990 the disciplinary authority is not obliged to give a copy of the enquiry report to the petitioner in this case before imposing the punishment. Hence this contention raised by the petitioner is also not sustainable.

25. It is clear from the foregoing discussion that the above OP filed by the petitioner seeking to quash Exts. P3 and P6 orders and to direct respondents 1 and 2 to reinstate him in service is not sustainable and the petitioner is not entitled to any relief in this OP. Therefore this OP is dismissed.