

Kotak and Co. Vs. Additional Commissioner for Workmen's Compensation and Anr.

Kotak and Co. Vs. Additional Commissioner for Workmen's Compensation and Anr.

SooperKanoon Citation : sooperkanoon.com/806014

Court : Chennai

Decided On : Dec-29-1969

Reported in : (1970)IILLJ364Mad

Judge : M.M. Ismail, J.

Appellant : Kotak and Co.

Respondent : Additional Commissioner for Workmen's Compensation and Anr.

Advocate for Pet/Ap. : Mr. M.R. Narayanaswami

Judgement :

M.M. Ismail, J.

1. The second respondent herein was employed as a driver under the petitioner and his services were terminated by an order dated 25th February, 1964, issued by the head office of the petitioner-company at Bombay. Prior to this order dated 25th February, 1964, a charge-sheet dated 3rd February, 1964, was sent to the second respondent to his address at Coimbatore and also to his village address near Trichur, the substance of the charge-sheet being the rude and insolent behaviour of the second respondent and also his failure to report for duty on 27th January, 1964. The charge-sheet sent to him to both the addresses was returned

un-served. Thereafter, on 7th February, 1964, a telegram was sent to the second respondent to the following effect:

Show cause notice sent to you on the third February stop Seth Popitlal Kotak arriving Monday morning report duty forthwith.

It is the case of the second respondent that he did not receive that telegram. Even if he had received this telegram, he could not have known what the charges framed against him were, since the charges dated 3rd February, 1964, were returned unserved. Another telegram was sent to the second respondent on 13th February, 1964, to the following effect:

Show cause notices evaded not reported duty despite refusal of leave your-self responsible for consequences.

The second respondent received this telegram and on 16th February, 1964, he sent a communication to the petitioner. Thereafter the papers were sent by the petitioner to the head office at Bombay and it is the partner of the petitioner-company at Bombay who passed the order dated 25th February, 1964, terminating the services of the second respondent. This order pointed out that from the tenor of the second respondent's letter dated 16th February, 1964, the employer was reasonably satisfied that in spite of all attempts to serve the show cause notice on the second respondent to give him intimation of the fact that no leave had been granted to him, he (the second respondent) purposely evaded service. It further proceeded to state that in the absence of the explanation of the second respondent, the employer was satisfied that the charges made against him in the notice dated 3rd February, 1964, were true. Thereafter, the second respondent filed an appeal before the first respondent under Section 41(2) of the Madras Shops and Establishments Act, 1947 (Madras Act XXXVI of 1947), hereinafter referred to as the Act. Before the first respondent, the petitioner herein filed an application purporting to be under Rule 9(2) of the Madras Shops and Establishments Rules, 1948, hereinafter referred to as the rules, read with Section 41(2) of the Act. In this application, the petitioner stated that the enquiry prior to the dismissal of the second respondent proceeded ex parte in the context of the second respondent not having submitted any explanation to the charge-sheet and

there being therefore no explanation to be considered at the enquiry; and if however he should offer any explanation to the charges before the first respondent or if the first respondent should think that the second respondent should be given an opportunity, the first respondent may enquire into the misconduct on the merits and take such further evidence for this purpose as the first respondent may consider necessary, in conformity with the decision of the Madras High Court, in *Srirangam Janopakara Bank v. S. Rangarajan* 1964 I.L.J. 221. Pursuant to this application, evidence was adduced before the first respondent. However, by an order dated 19th February, 1968, the first respondent allowed the appeal of the second respondent. The finding of the first respondent is:

The employer is aware of the address of the appellant both at Coimbatore and at Trichur. As no notice has been attempted to be served for an enquiry and as no opportunity has been given to the appellant to offer his explanation, I am not able to accept that this is a case of discharge under the proviso to Section 41(1) wherein the service of the appellant has been dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose. As no attempt has been made to conduct an enquiry in which satisfactory evidence was recorded to support the charges, the dismissal order has to be set aside.

Before the first respondent, the petitioner contended in conformity with the application filed by it under Rule 9(2) read with Section 41(2) of the Act, that the first respondent himself should go into the evidence placed before it and come to a conclusion as to whether the charges levelled against the second respondent were true or not. The first respondent declined to embark on any such venture. The first respondent pointed out:

Though the right to record further evidence in this forum is conceded, evidently, it is not intended to substitute the enquiry contemplated to be conducted by the employer under Section 41(1) of the Madras Shops and Establishments Act. When there is no evidence on record on a question of jurisdiction as on the question whether the appellant is a 'person employed' or whether the Act is applicable to an establishment or where there is no satisfactory evidence to establish an important

fact one way or the other, the appellate authority can certainly record fresh evidence but this recording of evidence is not intended to substitute the enquiry contemplated by the employer.

It is to quash this order of the first respondent, the present writ petition under Article 226 of the Constitution of India has been filed.

2. Before I proceed to consider the contentions advanced by the learned Counsel for the petitioner, I shall refer to one or two matters on which there is no controversy. Admittedly, the charge-sheet dated 3rd February, 1964, sent to the second respondent was returned unserved and the telegram dated 13th February, 1964, received by the second respondent did not contain the details of the charge. Consequently, the second respondent had no knowledge of what exactly the charges framed against him were, before he received the order dated 25th February, 1964, terminating his services. Secondly, after the papers were despatched by the petitioner to its head office at Bombay, no notice whatever was sent to the second respondent herein asking him to appear for any enquiry to be conducted by anybody and the head office at Bombay did not conduct any enquiry and the order dated 25th February, 1964, was passed by a partner at Bombay, on perusing the papers sent by the petitioner herein. Under these circumstances, the conclusion of the first respondent that no attempt has been made to conduct an enquiry in which satisfactory evidence was recorded to support the charges, before the order dated 25th February, 1964, was passed, is correct and cannot be assailed in these proceedings. As a matter of fact, really, such a finding is one on a question of fact and cannot be challenged in proceedings under Article 226 of the Constitution of India, unless it can be shown that such finding was wholly unsupported by any evidence on record. Such is not the case here and, in fact, the petitioner could not challenge the correctness of this finding and that explains why the application purported to be under Rule 9(1) of the rules read with Section 41(2) of the Act was made before the first respondent. Therefore, in this writ petition, I have to proceed on the basis that the petitioner did not conduct any enquiry as contemplated by Section 41(1) of the Act before the order dated 25th February, 1964, was passed terminating the services of the second respondent.

3. It is because of this position Mr. M.R. Narayanaswami, learned Counsel for the petitioner, confined himself solely to the point that it was the duty of the first respondent under such circumstances to go into the merits as to whether the second respondent was guilty of the charges levelled against him in the charge-sheet dated 3rd February, 1964, and for this purpose evidence having been let in and having been recorded by the first respondent, it was his statutory obligation to consider that evidence and come to a conclusion one way or the other. In this context, the learned Counsel strongly relied on a decision of a Bench of this Court, which itself was referred to in the application purported to have been filed by the petitioner before the first respondent under Rule 9(2) of the rules read with Section 41(2) of the Act. I shall now consider this submission with reference to the actual statutory provision and the decisions relating thereto.

Section 41 of the Act is as follows:

41. (1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause and without giving such person at least one month's notice, or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2) the person employed shall have a right to appeal to such authority and within such time as may be 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(2) of the rules made by the Government under Section 41(2) of the Act is as follows:

9. (2) The procedure to be followed by the Commissioner for Workmen's Compensation 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 the parties as soon as possible. Copies of the orders shall also be furnished to the parties if required by them. The copies shall be on stamp papers to be furnished by the parties.

4. From these two provisions, without any reference to the decision of the Court relating thereto, the following things can be noticed, one is, Section 41(1) of the Act is enacted in two limbs. The first limb deals with dispensing with the services of employee for a reasonable cause and after giving him at least one month's notice or wages in lieu of such notice. The second limb is comprehended within the scope of the proviso and according to that, the said one month's notice shall not be necessary where the services of an employee are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry for the purpose. Therefore, when the services of an employee are not dispensed with for a reasonable cause and after giving at least one month's notice, but are dispensed with on a charge of misconduct it can be so done only after conducting an enquiry for the purpose at which satisfactory evidence is recorded, to establish the misconduct. Against the order dispensing with the services of an employee, the employee has got a right to appeal to such authority and within such time as may be prescribed. The ground for such appeal may be that there is no reasonable cause for dispensing with the services, if the case falls within the first limb or that the employee had not been guilty of misconduct, as held by the employer, if the case falls within the proviso. The decision of the appellate authority is final under Sub-section (3) of Section 41. Rule 9(2) itself does not impose any obligation on the appellate authority to record any evidence before it and it only enables the appellate authority to briefly record the evidence that may be adduced before it. The rule itself does not state the circumstances under which and the purpose for which evidence may be adduced, which the appellate authority could record. However, Rule 9(2) has to be correlated to the power and function of the appellate authority under Section 41(2) of the Act and therefore it can be easily seen that the evidence that may be adduced before the appellate authority must be with reference to the controversy between the parties as contemplated by Section 41(2) of the Act.

5. The first decision that has a bearing on this point is that of Rajagopala Ayyangar, J., as he then was, in *Sri Venkateswara Bank Limited, Salem v. K.K. Krishnan* 1959 I.L.J. 797. In that case admittedly there was no enquiry conducted by the employer as contemplated by Section 41(1) of the Act. In that context, the question for consideration was the scope and ambit of Section 41(2) of the Act in the background of the safeguards and security afforded by the statute for the benefit of the employee. After extracting Section 41(1), the learned Judge stated:

This section enacts a rule of law which is a variation from the common law contractual right of a master to dispense with the services of his servant. In the case of persons who are under the coverage of the statute it affords the protection of a security of tenure by restricting the right of the employer to dismiss or discharge the employee. The provision, it would be seen, has two limbs. Under the first, the master or the employer is entitled to dispense with the services of a servant for reasonable cause but after giving such person at least one month's notice.

Though at common law the right of an employer to discharge a servant on giving him notice or wages in lieu is unfettered, the statute effects a change in this right and requires in addition to notice for the contractual period, that there should be reasonable cause for the discharge. What would constitute reasonable cause, whether the employee should have notice of that reasonable cause with an opportunity to canvass it, are matters that do not arise in this petition and which would preferably be considered when they become material.

What is really relevant is the second limb of the section--where no notice or wages in lieu of notice is given, and the discharge or dismissal is effected for misconduct on the part of the servant. In such cases the statute enacts a greater degree of protection to the employee, and insists on the charge of misconduct being held to be proved by satisfactory evidence recorded at an inquiry held for the purpose..The protections afforded to the servant by the statute are thus : (1) an insistence on the employer holding an enquiry into the misconduct, and (2) have satisfactory evidence recorded at that enquiry held in his presence before he can be dismissed from service for misconduct.

It would, therefore, appear as if the enquiry of the sort set out in the statute is as essential a pre-requisite to a valid order of dismissal, as the presence of misconduct which is required by the common law as well, on the part of the employee.

Having said so much on Section 41(1), the learned Judge proceeded to state with regard to Section 41(2) thus:

It is in the light and context of these elements of protection granted to the servant that the terms of Section 41(2) have to be understood. Under Section 41(2) the grounds of appeal are two : (1) that there was no reasonable cause for dispensing with the services, and (2) that the employees (appellant) had not been guilty of misconduct as held by the employer. It would be seen that these two terms are related to the two limbs of Sub-section (1) of Section 41 to which I have already referred. I will refrain from dealing with the first of the grounds of appeal, namely, that there was no reasonable cause for dispensing with the services which applies to cases where notice of at least one month or wages in lieu of notice is given as that is not relevant to the present case and confine myself only to the other ground, namely, 'the appellant had not been guilty of misconduct' as held by the employer. The appellate authority under Section 41(2) must be held to have jurisdiction to enquire whether the statutory conditions subject to which alone a servant could be dismissed have been complied with. When it finds that this is lacking, I consider that it would be the duty of that authority to allow the appeal. It must be remembered that Section 41(2) of the Act enacts that it is the misconduct which has been held by the employer to have been established that is made the subject-matter of enquiry by the appellate authority. That 'holding' can only arise on the terms of Section 41(1) after an inquiry at which satisfactory evidence has been recorded. When those conditions are wanting, the terms of Section 41(1) would not be satisfied.

Besides, under Section 41(1) it is the employer that is vested with jurisdiction to terminate the services of a person employed, subject to the fulfilment of the statutory conditions and to hold that the appellate authority can conduct as it were an original inquiry into the charge of misconduct would not be in accordance with

the scheme of Section 41 and would nullify the protection afforded by the statute and place the servant in the same position as if the conditions laid down by the second limb of Section of 41(1) were not there. It is only when at an original enquiry held by the employer that the charges are held by him to have been proved that the appellate authority is directed to enquire as to whether the charge of misconduct could be taken to have been properly established. In my opinion, Section 41(2) was not intended to convert the appellate authority into a forum where an original enquiry into the misconduct of the employee justifying his dismissal could be conducted so as practically to deprive the servant of any right beyond what he was entitled to at common law.

I have extracted from the judgment of the learned Judge in extenso, because, it I may say so with respect, the learned Judge has very clearly and elaborately gone into the terms of Section 41(1) as well as Section 41(2) of the Act and considered the interaction and impact of one on the other, with reference to the objects sought to be achieved by the statutory provisions. These observations of the learned Judge were in answer to a contention put forward before him that the appellate authority erred in not enquiring into the merits of the misconduct charged against the employee and in allowing the appeal and setting aside the order of dismissal for the sole reason that no enquiry had been held by the management prior to the dismissal.

6. The learned Judge had again occasion to consider the scope of this provision in Writ Petitions Nos. 702 and 703 of 1959. In that case, a clerk in the Madras Purasawalkam Hindu Janopakata Saswatha Nidhi Limited, was discharged from service. He preferred an appeal to the appellate authority under Section 41(2) of the Act and that authority allowed the appeal on the ground that the termination of the services of the employee should be held to be not for reasonable cause. Before the appellate authority, evidence was let in on the alleged misconduct of the employee and the appellate authority went into the evidence and came to the conclusion that the charges levelled against the employee were not proved. It is to quash that order a writ petition was filed on the file of this Court. The judgment of the learned Judge does not indicate that any argument was advanced before him about the jurisdiction of the appellate authority to conduct an original enquiry into

the alleged misconduct of the employee. However, the learned Judge extracted the provisions of Section 41 of the Act and stated that from the minutes of the proceedings of the Board, it would be seen that there was no enquiry except the consideration of the explanation submitted by the employee and consequently the procedure adopted by the Board in dismissing the employee was in violation of terms of Section 41(1) of the Act. Thereafter, the learned Judge proceeded to state:

A question has sometimes been debated, as to the function and duty of the appellate authority under Section 41(2) when it finds that the mandatory provisions of Section 41(1) have been violated by an employer. Two views are possible; that the appellate authority was entitled to set aside the order of dismissal and leave it to the management to conduct an enquiry in conformity with the terms of Section 41(1) and take action if misconduct was established against the employee. In Writ Petition No. 376 of 1957 (the judgment reported in *Sri Venkateswara Bank Ltd. v. K.K. Krishnan* 1959 I.L.J. 797, referred to above) I took the view that there was no obligation cast upon the appellate authority functioning under Section 41(2) of the Shops Act to enter into the merits of the misconduct charged and its order in allowing an appeal without itself conducting an enquiry into the misconduct could not be said to be illegal. The other view is that it is open to the management and within the jurisdiction of the Tribunal to enquire into the misconduct on the merits and sustain the order of dismissal passed by the employer.

The latter was the position that obtained in the present case. The management led evidence before the appellate authority to establish the misconduct so as to justify the order of dismissal which was passed by them, and the Tribunal took evidence and it was as a result of the enquiry which itself held that it arrived at the decision I have set out earlier. The first question, therefore, to be considered is whether the appellate authority had committed any error in holding that the three charges had not been made out.

From this, it will be seen that though in *Venkateswara Bank Limited, Salem v. K.K. Krishnan* 1959 I.L.J. 797, the learned Judge has given elaborate reasons for coming to the conclusion that the enquiry contemplated in Section 41(1) of the Act

is an enquiry to be conducted by the employer and that enquiry cannot be substituted for by the enquiry to be conducted by the appellate authority, when the aggrieved employee approaches that authority under Section 41(2), in this case, the learned Judge refers to the other possible view, but does not state whether he agrees with that view and, if so, for what reasons. It can be immediately seen that both the views cannot simultaneously stand, If the view taken by the learned Judge in *Sri Venkateswara Bank Limited v. K.K. Krishnan* 1959 I.L.J. 797 is correct, it will follow that when the employer did not conduct the enquiry, as contemplated by Section 41(1) of the Act, the appellate authority, acting under Section 41(2) of the Act cannot conduct such an enquiry in substitution for the enquiry, which was obligatory on the part of the employer. Nor does the learned Judge in the subsequent decision state that he changed the view which he had taken, on the scope of the jurisdiction of the appellate authority under Section 41(2) of the Act, in the previous decision, *Sri Venkateswara Bank Ltd. v. K.K. Krishnan* 1959 I.L.J. 797. On the other hand, it would appear that in the unreported decision before the learned Judge, the point was not raised and argued, and the learned Judge merely assumed that the appellate authority had jurisdiction to conduct an enquiry and then proceeded to examine the correctness of the order of the appellate authority on merits. This is apparent from the last sentence, which I have extracted already, namely,

The first question, therefore, to be considered is whether the appellate authority had committed any error in holding that the three charges had not been made out.

7. In the portion of the judgment that follows, the learned Judge considers each one of the charges and the evidence before the appellate authority and the conclusion arrived at by that authority on such evidence and ultimately dismisses the writ petition filed by the employer. From this point of view, with reference to the facts of that case, there was no occasion for the learned Judge to consider the question whether the appellate authority itself can conduct the enquiry. For these reasons, I am of the view, that the decision of Rajagopala Ayyangar, J. (as he then was) in Writ Petitions Nos. 702 and 703 of 1959 cannot be considered as a decision on the powers and jurisdiction of the appellate authority under Section 41(2) of the Act, holding that, if the employer himself had not conducted any

enquiry, the appellate authority was entitled to or obliged to conduct an enquiry itself. There is no express statement in the judgment of the learned Judge to the effect that he changed the view which he had taken earlier in *Sri Venkateswara Bank Ltd., Salem v. K.K. Krishnan* 1959 I.L.J. 797.

8. Apart from this, there is no other decision brought to my notice by the learned Counsel for the petitioner dealing with a case where the employer himself did not conduct an enquiry and it was held that the appellate authority could conduct the enquiry which the employer was required to conduct under Section 41(1) of the Act.

9. Mr. M.R. Narayanaswami, learned Counsel for the petitioner, relied on the decision of Rajagopalan, J., in *S.U.S. Davey Sons, Madras v. Additional Commissioner for Workmen's Compensation* 1960 I.L.J. 485 and that of the Division Bench in *S.U.S. Davey Sons v. Additional Commissioner for Workmen's Compensation* 1963 I.L.J. 44, upholding the same and on another decision of a Bench of this Court in *Srirangam Janopakara Bank Limited v S. Rangarajan* 1964 I.L.J. 221, reversing the judgment of Veeraswami, J., as he then was. In my opinion neither of these decisions supports the case of the petitioner and I shall refer to them and state my reasons for my view. In *S.U.S. Davey Sons, Madras v. Additional Commissioner for Workmen's Compensation* 1960 I.L.J. 485, the employer did conduct an enquiry and only after the enquiry the employer held that the charges had been proved and terminated the services of the employee. The employee preferred an appeal to the appellate authority and that appellate authority allowed the appeal holding that the charge of misconduct had not been proved. It is to quash that order of the appellate authority, a writ petition was filed before this Court under Article 226 of the Constitution of India. In support of the writ petition, it was contended that the employee himself did not allege in his application or memorandum of appeal that he had been dismissed on the ground of alleged misconduct and that such misconduct had not been proved and that therefore the appellate authority had no jurisdiction to go into the questions whether the dismissal was justified or whether the finding of the management that the misconduct was established was correct. Such a contention was advanced because in the application preferred by the employee to the appellate authority he

had stated:

I served the management referred to above for 15 years faithfully and honestly. All of a sudden I was terminated from service from 21st February, 1959. Notice was served on 23rd February, 1959 without any reasonable cause.

It is this contention which the learned Judge (Rajagopalan, J.), repelled in his decision and pointed out:

No doubt, Section 41(1) makes distinction between the termination of services for a reasonable cause and termination of services on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose. None the less, the position is that termination of service on an established charge of misconduct is also termination of services for a reasonable cause; only where such termination of service is for established misconduct, the statutory requirement of one month's notice or wages in lieu of such notice is dispensed with. Still the contention of the learned Counsel for the petitioner has to be dealt with, when the respondent 2 chose to claim that his services had been terminated without a reasonable cause, had the Commissioner jurisdiction to decide the real question that arose before him in the appeal, whether the charges of misconduct had been established.

Thus, it will be seen that the argument that was advanced before the learned Judge on behalf of the employer was a technical one, namely, that when the employee himself had claimed that his services had been terminated without a reasonable cause, the appellate authority had no jurisdiction to go into the question whether any misconduct against the employee had been established or not. It is in this context, the learned Judge pointed out:

I am unable to accept as correct the contention that the jurisdiction of the appellate authority was confined to what was expressly stated in the written application presented to him. The respondent 2 had a statutory right to prefer an appeal against the order of dismissal. That right he exercised by invoking the appellate authority, and that was by a written application. The appellate authority has jurisdiction to decide the questions that arose for determination in appeal. He was

not necessarily bound by what was expressly pleaded in the application. It is not the case of the petitioner that he was taken by surprise at what he had to answer in the proceedings before the appellate authority. The appellate authority did go into the question whether the dismissal was justified, that is, whether the charge of misconduct was true, and in the enquiry that preceded the determination by the appellate authority the petitioner had the opportunity of taking part and did take part. I am unable to accept the contention of the learned Counsel for the petitioner, that the appellate authority had no jurisdiction to investigate whether the dismissal on the charge of misconduct was justified or not.

However, another argument was also advanced before the learned Judge in that case, namely, 'where an employee was dismissed for misconduct, the scope of the enquiry by the appellate authority should be whether the statutory conditions were complied with or not; the correctness of the findings of the punishing authority, the employer, could not be examined unless there was no evidence to support the finding of misconduct or unless that finding was perverse; the sufficiency of the evidence on which the management based its finding that misconduct had been established was not a matter for investigation by the appellate authority.' Thus, it will be seen that this contention, if accepted, would have the effect of equating the jurisdiction of the appellate authority to that of the High Court under Article 226 of the Constitution of India. It is this contention which the learned Judge repelled by stating:

It should be remembered that what Section 41(2) confers is an appellate jurisdiction. It is not a revisional jurisdiction. Rule 9(2) of the rules framed under the Act provides:

'The procedure to be followed by the Commissioner for Workmen's Compensation 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 the parties as soon as possible....

Neither Section 41(2), nor Rule 9(2) confines the appellate authority to the evidence already recorded in the enquiry for which Section 41(2) provided. As I

said, it was an appellate jurisdiction that was conferred, and the rule made it expressly clear that the appellate authority had jurisdiction to take such further evidence as it considered necessary. It was enough if the enquiry held by the appellate authority was summary. In the face of these provisions I am unable to accept as correct the contention of the learned Counsel for the petitioner, that the appellate authority had no jurisdiction to take further evidence. Of course, in exercise of the appellate jurisdiction the appellate authority had also to consider if the record at that stage was sufficient to support the finding reached by the management in this case that the charge of misconduct had been established. It was, however, open to the appellate authority to review that evidence afresh, and also to review that in the light of the further evidence taken in the enquiry before him and come to his own conclusion independent of and even at variance with the finding recorded by the management. Of course, as the appellate authority it should take into consideration the fact that the management had jurisdiction to hold an enquiry and to reach its conclusions; and those conclusions of the management with its right to terminate the services of an employee for misconduct proved to its satisfaction, should be treated with respect by the appellate authority, and, should not be lightly brushed aside. But that is not equivalent to saying that the appellate authority had no jurisdiction to review the evidence afresh.'

10. It is this judgment of Rajagopalan, J., that was approved by a Bench of this Court in *S.U.S. Davey Sons, Madras v. Additional Commissioner for Workmen's Compensation* 1963 I.L.J. 44. Before the Bench the contentions advanced were : (1) that the dismissal was for misconduct but in the memorandum of appeal there is no specific ground that he was not guilty of misconduct; and (2) that, in any event, the appellate authority exceeded its jurisdiction in itself investigating charges of misconduct. It is these two contentions, the Bench repelled, agreeing with Rajagopalan, J. I wish to make a few comments on this judgment. In the first place that is not a case where no enquiry was held. Secondly, the judgments do not show that any additional evidence was taken by the appellate authority, pursuant to Rule 9(2) of the rules. Thirdly, the substantial contention put forward on behalf of the employer was that the appellate authority had no jurisdiction to review the evidence placed before the employer on the basis of which the employer came to the conclusion that the misconduct had been established and all

that the appellate authority had to be satisfied about was whether an enquiry was held or not. Therefore, in my opinion, the decision either of Rajagopalan, J., or of the Bench in appeal does not throw any light on the scope and jurisdiction of the appellate authority in a case where the employer had not conducted any enquiry as contemplated by Section 41(1) of the Act. On the other hand the extracts from the judgment of Rajagopalan, J., I have given, will clearly show that the learned Judge was throughout dealing with a case where the employer had conducted an enquiry pursuant to Section 41(1) of the Act and he never intended to lay down any principle applicable to a case where the employer himself had failed to conduct an enquiry which the statute required him to conduct.

11. The next decision is that of Veeraswami, J., as he then was in *S. Rangarajan v. Srirangam Janopakara Bank Limited* [1962] 23 F.J.R. 194. In that case, the Board of Directors of the employer framed certain charge against an employee and kept him under suspension, pending enquiry. He was asked to show cause why disciplinary action should not be taken against him and he submitted his explanation. Thereafter he was informed that the Board of Directors would hold an enquiry in his case at 6 p.m. on a particular day. Subsequently, the Board of Directors by a resolution found the employee guilty and removed him from service. The employee preferred an appeal under Section 41(2) of the Act to the appellate authority. The appellate authority expressed the opinion that though the employee was present at the enquiry, he was not given an opportunity to participate in the enquiry and the charges were not borne out by the evidence. It allowed the appeal. The employer filed Writ Petition No. 200 of 1956 on the file of this Court and Rajagopalan, J, quashed the order and directed the appellate authority to rehear the appeal and dispose it of according to law. The appellate authority reheard the appeal and in the course of rehearing took additional evidence. Thereafter, the appellate authority dismissed the appeal upholding the order removing the employee from service. The employee then filed the writ petition which was disposed of by Veeraswami, J., as he then was. In that writ petition, the employee put forward the following three contentions:

(1) The proceedings of the Board of Directors culminating in the removal of the petitioner violated the principles of natural justice;

- (2) no evidence was recorded at the enquiry as is required by Section 41(1) and the findings of the Board of Directors were, therefore, not based on evidence; and
- (3) in any case, the Additional Commissioner exceeded his jurisdiction in taking additional evidence in disposing of the appeal on that basis.

On the first contention, the learned Judge was of the view that out of the thirteen directors of the Board, two had given statement in support of the charges and therefore those two directors could not form part of the Tribunal to sit in judgment over those very charges and hence the order of the Board of Directors should be set aside. The learned Judge was also of the view that the employee was not given a reasonable opportunity to defend himself. On the second contention also, the learned Judge came to the conclusion that the findings on the charges were not based on any evidence recorded at the enquiry held for the purpose. On the third contention too, the learned Judge was of the view that the evidence which is required to be satisfactory is to be taken not at the appellate stage but at the original stage and consequently Section 41(1) and Section 41(2) cannot be understood as permitting the appellate authority to take additional evidence and dispose of the appeal on that basis, and Section 41(1) did not enable the appellate authority to take or admit additional evidence and decide for himself whether there was satisfactory evidence to support the charge of misconduct. The learned Judge was also of the view that Rule 9(2) was not authorised by Section 49 of the Act, conferring the rule-making power on the Government, in view of the statutory provisions contained in Section 41 of the Act. On these conclusions, the learned Judge allowed the writ petition and quashed the order of the appellate authority. Against this judgment, a writ appeal was preferred and that came to be disposed of by Ramachandra Ayyar, C.J., and Ramakrishnan, J., in *Srirangam Janopakara Bank Limited v. S. Rangarajan* 1964 I.L.J. 221. In that judgment, the learned Judges first recorded that they were satisfied that an enquiry was held in that case by the employer acting under Section 41(1) of the Act though the appellate authority, at the earlier stage, when the matter came up before him, took a contrary view. The Bench disagreed with the conclusion of the learned Judge (Veeraswami, J., as he then was) on all the three points mentioned already and allowed the appeal. Having come to the conclusion that they were satisfied that an

enquiry was held by the employer acting under Section 41(1) of the Act, they were of the view that there was no violation of any principles of natural justice, when two directors, who had given statements against the employee on the charges, formed part of the tribunal which ultimately held the charges established and removed the employee from service. With regard to the power of the appellate authority to take evidence, the Bench disagreed with the learned Judge and came to the conclusion that Rule 9(2) was a valid rule and the appellate authority had jurisdiction to take additional evidence and dispose of the matter on such basis. It is the observations of the learned judges on this aspect of the case that are very strongly relied on by Mr. M.R. Narayanaswami. I may mention that the Bench referred to the judgment of Rajagopalan, J., in *S.U.S. Davey Sons, Madras v. Additional Commissioner for Workmen's Compensation* 1960 I.L.J. 485 already referred to, and approved of the same. The learned Judges in this context pointed out at page 225:

In our opinion, the power under Section 41(2) being defined as an appellate power, will entitle the appellate authority to go into the merits of the case and consider the evidence in support of it. Since the power thus granted has not been made subject to any restrictions in the matter of taking additional evidence, the appellate power will include the power to call for additional evidence in order to enable the appellate authority to come to a decision which would be final and binding on both the employer and the employee, as prescribed in Section 41(3).

12. After extracting Rule 9(2), the learned Judges proceeded to observe:

It appears to us that this rule is not intended to confer, on the appellate authority, a power to take evidence de hors Section 41(2); the rule really lays down a rule of procedure, that the hearing of appeals shall be summary, that the evidence (if) recorded shall be brief and that when orders are passed, reasons should be given. There is therefore no room for examining Rule 9(2) dissociated from Section 41(2), and to decide that Rule 9(2) went far beyond the rule-making power under Section 49, on the ground that it confers power to take additional evidence on the appellate authority.

The learned Judges also referred to the fact that the common law gives the employer the right to terminate the services of an employ ;e in accordance with the

terms of the contract between them, but Section 41(1) has provided a restriction on this right by making it obligatory on the employer to hold an enquiry and make a record of the evidence, before terminating the employee's services. Alter referring to the fact that many employers are not adequately equipped to conduct an enquiry dealing with an erring employee charged with misconduct and that fact by its own force cannot preclude the employer from holding the enquiry and from discharging the statutory obligations placed on him, the learned Judges pointed out:

By making the scope of the appeal sufficiently wide and comprehensive it will be possible for the aggrieved party to obtain redress in the appellate court, namely the Commissioner for Workmen's Compensation, who, functioning in a judicial capacity, holds the balance even between the employer on the one hand and the employee on the other. For that purpose, it may be necessary for him to take additional evidence in the interests of justice and for the purpose of giving an adequate and binding decision. The power of the appellate authority under Section 41(2) of the Act should be construed in the widest manner possible, so as to take in also the power to take additional evidence, where the needs of the case call for it.

I am of the view that these observations also do not support the case of petitioner in the present case for more than one reason. In the first place, the learned Judges had expressly recorded a finding that in the case which they were dealing there was an enquiry conducted by the employer acting under Section 41(1) of the Act and therefore their observations cannot be said to apply to a case where there was no enquiry conducted by the employer at all. As a matter of fact, the learned Judges were not concerned with such a case. Secondly, the repeated reference to the power of the appellate authority to take additional evidence assumes that evidence had already been taken at the enquiry conducted by the employer under Section 41(1) of the Act. This again supports my view that the learned Judges in that case were not laying down any rule or principle applicable to and governing the jurisdiction of the appellate authority in a case where the employer had not conducted an enquiry at all, as contemplated by Section 41(1) of the Act. Thirdly, the learned Judges have also referred to the judgment of Rajagopala Ayyangar, J.

(as he then was), in both the cases mentioned by me already. With regard to the first case, the learned Judges themselves pointed out:

A perusal of the judgment cited shows that in that particular case the employer did not hold any enquiry before dismissing the employee.

After extracting a portion from the judgment of Rajagopala Ayyangar, J. (as he then was), the learned Judges proceeded to state:

There is nothing in the judgment cited to show that the learned Judge intended to lay down principles which will apply to a case, where there had been in fact no enquiry by the employer under Section 41(1) of the Act. It does not also appear from the judgment that the learned Judge considered the validity of Rule 9(2) of the rules in the context of the rule-making power of the State Government conferred in Section 49 of the Act.

After referring to the second judgment of Rajagopala Ayyangar, J. (as he then was) and extracting the relevant portion therefrom, which I myself have already extracted, the learned Judges pointed out:

This would show that it was not in the contemplation of Rajagopala Ayyangar, J. (as he then was), to lay down either in the earlier judgment or in the later judgment cited above, that the power of the Additional Commissioner for Workmen's Compensation acting in appeal under Section 41(2) should be deemed to be so restricted as to permit him to consider only the evidence recorded by the employer at the time of the enquiry, and debarring him from taking additional evidence.

These observations of the learned Judges would tend to support the view Rajagapala Ayyangar. J. (as he then was), has taken in *Sri Venkateswara Bank Ltd. v. K.K. Krishnan* 1959 I.L.J. 797, where no enquiry had been held by the employer under Section 41(1) of the Act.

13. For these reasons, I am of the opinion that the Bench decision in *Srirangam Janopakara Bank Limited v. S. Rangarajan* 1964 I.L.J. 22, does not decide that, where the employer had failed to conduct an enquiry, which it is his duty to conduct under Section 41(1) of the Act, the appellate authority can conduct that

enquiry and on the basis of that enquiry sustain the order of discharge or dismissal passed by the employer.

14. I myself had an occasion to consider this question in my judgment dated 1st September 1969, in Writ Petition No. 931 of 1967--Zenith Lamps and Electricals v. Additional Commissioner of Workmen's Compensation [1969] 36 F.J.R. 383. In that case, the contention put forward before me was that even though the employer had not conducted an enquiry he had made an offer before the appellate authority to adduce evidence to prove the misconduct of the employee and it was therefore the duty of the appellate authority to take evidence, hold an enquiry and to arrive at a conclusion whether the second respondent therein was guilty of the alleged misconduct or not. I repelled that contention and for this purpose relied on the decision of Rajagopala Ayyangar, J. (as he then was), in Sri Venkateswara Bank Limited, Salem v. K.K. Krishnan 1959 I.L.J. 797 and also pointed out that the Bench decision in Srirangam Janopakara Bank Ltd. v. Rangarajan 1964 I.L.J. 221 did not deal with or cover the case where the employer did not conduct any enquiry at all. Nothing has been placed before me to change the view I have taken in that decision.

15. Independently of these decisions, I am of the view that, for various valid reasons, the appellate authority has no jurisdiction to conduct an enquiry for the purpose of finding out whether the employee is guilty of misconduct or not, when the employer himself had not conducted an enquiry as contemplated by Section 41(1) of the Act. From the language of that section already extracted, it is clear it is a statutory prerequisite for an employer to dispense with the services of an employee on the ground of misconduct to conduct an enquiry for the purpose of establishing that misconduct. That means, the condition precedent to the exercise of the power of dispensing with the services of an employee on the ground of misconduct is the holding of the enquiry for the purpose of establishing the misconduct and recording evidence at such an enquiry. When a statute states that a particular thing should be done in a particular manner, it impliedly prohibits the doing of the same in any other manner. Therefore, when the employer does not follow the statutory prescription and fulfil the condition precedent, the action of the employer dispensing with the services of an employee will be ab initio void. When

the appellate authority dismisses the appeal preferred by the employee, it merely sustains or confirms the order of the employer. When the action of the employer is ab initio void, there cannot be any subsequent confirmation or upholding of the same. When an order is ab initio void, in the eye of law, it has no existence. What does not exist in law cannot be revived or resuscitated by the appellate authority: nay, life cannot be infused into a still-born order of discharge. It is conceded by the learned Counsel for the petitioner himself that when the appellate authority conducts an enquiry and holds that the misconduct alleged against the employee is established and dismisses the appeal of the employee, it itself is not passing any order discharging or dismissing the employee and it merely approves or sustains or confirms the order already passed by the employer. But, if the order already passed by the employer is void and therefore has no existence in law, it cannot be approved or confirmed by the appellate authority. It may happen that an employer dismisses an employee without conducting any enquiry, as contemplated under Section 41(1) of the Act and the employee's appeal preferred against the order of dismissal is pending before the appellate authority for a considerable time and at the end of it the appellate authority conducts an enquiry and holds the charge levelled against the employee established and dismisses the appeal, thereby upholding the order passed by the employer, admittedly contrary to and in violation of the provisions of the statute. In such a situation, the employer loses nothing for not complying with the statutory requirements, but gains, while the employee for no fault of his own and notwithstanding the failure of the employer to discharge the statutory obligation imposed on him for his (employee's) benefit and advantage, gets himself dismissed or discharged retrospectively. Can it be said that such is the legal position and that is what the Legislature contemplated, when it enacted Section 41(1) and Section 41(2) of the Act? To hold that such is the legal position is to rob Section 41(1) of all its efficacy and to deprive an employee of the security and safeguard which the statute intended to confer on him deliberately departing from the common law contractual right of the employer to dispense with the services of his employee on giving notice or wages in lieu thereof. In other words, to hold that when the employer himself had not conducted the enquiry contemplated by Section 41(1) of the Act, the appellate authority can conduct that enquiry and on the basis of the said enquiry uphold the

order of the employer dispensing with the services of the employee is to wipe out the statutory requirement and to render the same totally nugatory.

16. With regard to the holding of such enquiry three possible situations may be contemplated:

(1) the employer does not hold any enquiry at all and simply passes an order dispensing with the services of the employee on grounds of certain misconduct;

(2) the employer makes a farce of conducting an enquiry without bona fide intending to conduct any such enquiry as contemplated by the statute and thereafter passes an order of dismissal;

(3) the employer bona fide conducts an enquiry, but subsequently it is found to be defective by the appellate authority.

As far as the first case is concerned, it does not present any difficulty and the result is that there had been a failure to comply with the mandatory statutory requirements. As far as the third case is concerned, the employer had bona fide conducted an enquiry; but the same had been determined to be defective by the appellate authority. In that case, it cannot be said that there had been a violation or contravention of the statutory requirements by the employer and therefore the appellate authority will be perfectly justified in remedying the defect in the enquiry by taking additional evidence and considering the question of the misconduct against the employee on merits and disposing of the appeal on that basis. As far as the second case is concerned, lack of bona fides wipes out the farcical enquiry and in substance it does not stand on any different footing than the first one, where there has been no enquiry. In this case also, the result is that there had been a contravention and violation of the requirements of the statute and the said deficiency cannot be made good by the appellate authority. In the first two cases, the defect or deficiency goes to the root of the matter and renders the ultimate action of the employer void so that there cannot be any affirmation or confirmation of such void action of the appellate authority on the basis of himself conducting an enquiry.

17. Under these circumstances, I am definitely of the view that when the services of an employee are dispensed with by an employer without conducting an enquiry as contemplated by Section 41(1) of the Act, the appellate authority has no jurisdiction whatever to itself conduct an enquiry, in the place of the enquiry to be conducted by the employer and as a result of such enquiry to come to the conclusion whether the employee was guilty of the misconduct alleged against him or not. In such a situation, the only course open to the appellate authority is to allow the appeal of the employee and set aside the order of dismissal. The result of this will be, the employer will be at liberty to take action again against the employee after complying with the statutory requirements. Though I have come to the said conclusion, with reference to the language contained in Section 41(1) and Section 41(2) of the Act and the objects sought to be achieved by the said statutory provisions, it may also be noticed that this conclusion does not damnify or prejudice the employer, because his right to take fresh proceedings after complying with the statutory requirements is preserved.

18. Some argument was sought to be advanced with reference to the decisions of the Courts on the jurisdiction of the Labour Courts and Industrial Tribunals, while dealing with reference made under Section 10(1) of the Industrial Disputes Act, arising out of dismissal of a workman or an application for approval made under Section 33(2) of the Industrial Disputes Act. I am of the opinion that these considerations do not apply since they do not concern a statutory provision like Section 41 of the Act, which is the subject-matter of the present writ petition. Further, such decisions were sought to be present into service before the learned Judges who decided *Srirangam Janopakara Bank Ltd v. S. Rangarajan* 1964 I.L.J. 224 of course, for a different purpose. But the learned Judges pointed out that the considerations governing and relating to the jurisdictional powers of Labour Courts and Industrial Tribunal under the provisions of the Industrial Disputes Act would not be relevant considerations for the purpose of Section 41 of the Act.

19. Under these circumstances, the only point raised by the learned Counsel for the petitioner failing, the writ petition fails and is dismissed. There will be no order as to costs.

