

Babian and anr. Vs. Lt. Col. Offg. Col.Q Branch H.C.

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Court : Chennai

Decided On : Jul-13-1993

Reported in : (1993)2MLJ265

Appellant : Babian and anr.

Respondent : Lt. Col. Offg. Col.Q Branch H.C.

Judgement :

ORDER

Bakthavatsalam, J.

1. All these writ petitions have been filed by salesmen, sales-Assistant-cum-packer, and Cycle Mechanic who were working in the canteen in Tamil Nadu and Kerala sub Area in Madras, against the orders of termination dt. 16.12.1991 and 15.12.1992.

2. Since the facts of these cases are similar, except the service put in by each of the writ petitioners, suffice it to state the facts in W.P. No. 2472 of 1992 which are as follows:

The petitioner has been working as Senior Salesman in the Tamil Nadu and Kerala sub Area C.S.D. Canteen at Madras and the said Canteen is being run by the Tamil Nadu and Kerala sub Area, which is under the control of the Commander, the second respondent herein. The petitioner herein has been

working in the Canteen for the past 15 years. The stores, goods, articles etc. in the Canteen are meant to be sold only to the army personnel, ex-servicemen and not to general public. It is alleged in the affidavit that there are about twenty persons working in the Army canteen including the Manager, that a proposal was being considered to remove the civilian employees in the Unit Rum Canteens and to substitute ex-servicemen in the place of the civilians. But that idea was given up on the representation made by the All India Defence Civilian Canteen Employees' Union to the Ministry of Defence. It is alleged in the affidavit that the canteen has sales turnover about Rs. 2 lakhs per month, that it serves about 4,000 card-holders in addition to serving officers and transients who are also entitled to make purchases in the canteen its others and that through the stuff employed were insufficient the respondents, for various reasons best known to them, sought to terminate without any notice to the employees. It is also alleged in the affidavit that the employees are governed by the Standing Orders for the Sub-Area and that Clauses 37-C, 52-C, 52-D, and 55-E(iii) of the Standing Orders for the sub-Area speak about the mode of running the Canteen. It is also stated that on 12.2.1992, the Canteen officer suddenly came into the Canteen premises, that he took six bottles of rum which was in possession of the petitioner and that he seized them. It is also stated that the petitioner was called upon by the first respondent and that he was served with an order of termination of services on untenable charges. It is also stated that no show cause notice was given, no explanation was called for and no enquiry was conducted. The petitioner also alleges in the affidavit that the order of the first respondent in terminating the service of the petitioner is illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India. It is also stated by the petitioner in the affidavit that the respondent sought to terminate the services of the petitioner without even asking for an explanation, and that the services were terminated at the whims and fancies of the first respondent and that the action of the respondent in terminating the services of the petitioner is violative of the principles of natural justice. It is also alleged in the affidavit that no explanation has been asked from the Manager, who would be better person to give a detailed report on the functioning of the Canteen and that the respondents contemplated to remove the civilians from service but fearing publicity they have adopted such unconstitutional and arbitrary methods without any justification by

removing the petitioner and others summarily under some pretext or other.

3. The facts of other cases are almost similar. The petitioners in W.P. No. 18464 of 1991 were working as salesman and sales assistant cum-packer having put in 7 years and 24 years respectively. The petitioners in W.P. Nos. 2473 and 2474 of 1992 were working as Salesman Cycle Mechanic having put in five years and 2 1/2 years service respectively. The grounds raised by the petitioners against the orders of termination are almost similar except that the petitioner in W.P. No. 18464 of 1991 raised the plea that Article 21 of the Constitution of India is also violated. It is also stated that the impugned orders of termination were passed all of a sudden, throwing out the petitioners in the streets.

4. A counter-affidavit has been filed in W.P. No. 2472 of 1992 on behalf of the respondents and similar counter affidavits have been filed in other cases also. It is stated in the counter affidavit that the only point that arises for consideration in these cases is that whether the writ petitioners are entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. It is pointed out in the counter affidavit that the petitioners are not in Government service and that they are not defence personnel. It is also claimed in the counter affidavit that Sub Area Canteen is a welfare organisation run by the officials as measure of social service and that the service in the organisation is non-Government service. It is also stated in the counter affidavit that even if it is contended to be service matter pertaining to civil servant, the proper forum is Central Administrative Tribunal and that the petitioners cannot raise such an issue before this Court in this writ petition. It is also pointed out in the counter affidavit that the employees of canteen stores department are civil servants in the defence department and that in the instant case, the canteen is a social welfare organisation though in name they have the same semblance of Canteen Stores Department. It is also stated that it is a private institution run in accordance with the Standard Operating Procedure framed by the department from time to time. It is also stated that the records maintained by the administration will reveal the output quality of work of the petitioners and that since the petitioners have failed to carry on their duties their services were terminated. It is also claimed in the counter affidavit that mere supervision of Commander over social welfare

organisation does not help the case of the petitioner. It is also stated in the counter affidavit that the respondents have acted strictly in conformity with Standing Operating Procedure. It is also claimed in the counter affidavit that the impugned orders have been passed invoking Para 36(a) of Standing Operating Procedure and that the petitioners cannot have any grievance against the impugned orders. It is also claimed that the petitioners cannot invoke the extraordinary jurisdiction under Article 226 of the Constitution of India as the 'Canteen Stores' will not be a state under Article 12 of the Constitution of India. It is also stated that the petitioners services are governed by Standing Operating Procedure and that the procedure prescribed therein had been followed.

5. When the writ petitions came up for final hearing, Mr. C. Krishnan, the learned Additional Central Government Standing Counsel appearing for the respondents contends that the writ petitions are not maintainable as it cannot be said that the Tamil Nadu and Kerala sub Area CSD Canteen is a State under Article 12 of the Constitution of India and that if it will not come under Article 12 of the Constitution of India, the petitioners cannot raise the grounds on the basis of violation of Articles 14, 16 and 21 of the Constitution of India which are basically the fundamental rights enshrined in Part III of the Constitution of India. The learned Additional Central Government Standing Counsel drew my attention to the Regulations which are issued under the Authority of India. It is also stated that these Regulations are promulgated under Defence Service under Paras. 548 and 585. It is also stated that the Regulations for the Army, being non-statutory, are supplemental to the relevant statutory provisions, wherever they exist, and do not supplant them. The learned Additional Central Government Standing Counsel took me through various provisions of the Standing Operating Procedure, especially paras. 15, 16, 17, 18, 19, 35 and 36 and contended that the petitioners cannot avail of the remedy under Article 226 of the Constitution of India, that if they are aggrieved their remedy lies elsewhere i.e. before the Central Administrative Tribunal, if they are so desired. Further the learned Additional Central Government standing counsel argues that it is only a voluntary welfare association and that it cannot be termed as a State for the purpose of Article 12 of the Constitution of India and relies upon the pronouncement of the Supreme Court in *Chander Mohan Khanna v. The National Council of Educational Research and Training* :

(1992)ILLJ331SC and the decision of the Full Bench of the Bombay High Court in The Shamrao Vithal Co-operative Bank Ltd. v. Padubirdri Pattabhiraman Bhat : AIR1993 Bom91 . Learned Counsel for the respondent also contends that each Welfare Association is running a Canteen and that Ex-servicemen are employed therein. So the main plank of contention submitted by Mr. C. Krishnan, the learned Counsel appearing for the respondents is that no writ will lie. However, Mr. C. Krishnan, the learned Counsel for the respondents is not able to defend the Impugned orders on merits, except stating and it is a condition of service under a contract that the orders have been passed in pursuance of para. 36 of the Standing Operating Procedure.

6. Mr. K. Govindarajan, the learned Counsel appearing for the petitioners contends that it cannot be said that the Tamil Nadu and Kerala Sub Area CSD Canteen is not a State under Article 12 of the Constitution of India and that it is a part of Canteen Stores Department. Learned Counsel also refers me to the appointment orders which had been issued by the Welfare Association. According to the learned Counsel, in so far as the Headquarters has got the control, it is part and parcel of the Canteen Stores Department. Learned Counsel also relies upon the decision of the Supreme Court in Radha K. Kakde v. Union of India : (1986)ILLJ300SC , wherein the Supreme Court was concerned with whether Canteen Stores Department is an 'establishment' under Ministry of Defence. The learned Counsel also relies upon the decisions; in Ajay Hasia v. Khalid Mujib Sehravardi : (1981)ILLJ103SC and B.S. Minhas v. Indian Statistical Institute, : (1984)ILLJ67SC . Learned Counsel also refers to the decision of Kerala High Court in N.C.C. Corps Unit Run Canteen (CSD) Employees Association v. The Group Commander, N.C.C. Group Headquarters, Calicut, O.P. No. 2899 of 1989, dated 12.10.1989 and the learned Counsel himself is not able, to say whether Article 12 of the Constitution was considered in that case. According to the learned Counsel, the Tamil Nadu and Kerala Sub Area CSD Canteen is a State under Article 12 of the Constitution of India and the orders of termination are bad in law. The learned Counsel relies upon the decisions in Delhi Transport Corporation v. D.T.C. Mazdoor Congress : (1991)ILLJ395SC and in Shrilekha Vidyarthi v. State of U.P. : AIR 1991 SC537 for the proposition that para 36 of the Standing Operating Procedure has not been followed though it is a non-statutory order.

7. Mr. G. Jawaharlal, the learned Counsel appearing for the petitioners contends that it is not the case of the respondents that the Tamil Nadu, Kerala Sub Area Canteen is a Registered Society or a Company, that even assuming that the Tamil Nadu and Kerala Sub Area CSD Canteen is a registered society or a company in so far as the funds flow from Military Department and the Department being a military office, a writ will lie against the impugned orders, which have been passed arbitrarily in this case.

8. In reply, Mr. C. Krishnan, the learned Additional Central Government Standing counsel appearing for the respondents contends that the Tamil Nadu and Kerala Sub Area CSD canteen is not under the control of the Government that it is a voluntary organisation that the orders passed in these cases are purely of contractual nature and that as such this question cannot be gone into under Article 226 of the Constitution of India. Learned Counsel relies upon the decisions in *Radhakrishna Agarwal v. State of Bihar* : [1977]3SCR249 in *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd v. Sipahi Singh* : [1978]1SCR375 in *Praga Tools Corporation v. Imanual* : (1969)11LLJ479SC in support of his contention.

9. I have considered the arguments of Mr. K. Govindarajan, the learned Counsel for the petitioners and of Mr. G. Jawaharlal, the learned Counsel for the petitioner in W.P. No. 18464 of 1991 and of Mr. C. Krishnan, the learned Additional Central Government Standing Counsel appearing for the respondents. I have also considered the written submissions submitted by the learned Additional Central Government Standing Counsel. It is necessary to understand the question raised before this Court to see how the Tamil Nadu and Kerala Sub Area CSD Canteen is being run at Madras. It is seen from the Regulations for the Army-Volume 2, in which defence service regulations are found, which is a comprehensive compilation covering the salient aspects of administration of the Regular Army, that the Regulations being non-statutory, are supplemental to the relevant statutory provisions, wherever they exist, and do not supplant them. It is also seen that Standing Operating Procedure are promulgated under paragraphs 584 and 586 of the Regulations for the Army. In the introduction it is seen that the Standing Orders are promulgated under DSR paras 584 and 586 of the Regulations for the

Army and that the guiding principle is 'service to servicemen (including servicemen)'. It is also stated that the aim of the Standing Operating Procedures is to lay down the general policy and guidelines with regard to the organisation, functioning and management of all Sub area, Station and other Canteens. Each canteen shall be controlled through a management Committee headed by Station Commander. There are two members of the Managing Committee, apart from the Managing Officer and the Committee includes the Manager in the particular Committee. Each canteen shall function under respective Headquarters Sub Area/ Station Head Quarters, as a separate Regimental Institution. In paragraph 9 of the Standing Operating Procedure, it is stated as to who are all entitled persons to the Canteen. Para 10 speaks of Canteen staff as follows: To enable the committee to run the canteen effectively, a suggested staffing pattern is given in Appendix 'C. Number of employees can be increased depending upon the yearly turnover, number of dependents and number of mobile canteens keeping in view of profit earning...

Mode of selection of staff is stated in para 18 of the Standing Operating Procedure. It is very important to note Para 19 of the Standing Operating Procedure which runs as follows:

Nature of service: All employees should bear in mind that CSD is a welfare organisation. It is not a government service. Whatever facilities have been given are for the good of serving soldiers and Ex-servicemen. Therefore, the staff so employed are to serve their fellowmen, while earning reasonably for the service thus rendered...

As per para. 21 of the Standing Operating Procedure, all canteen staff are entitled for basic pay, DA, gratuity, contributory provident fund etc. The age limit is fixed as 60 years under Para 34. Para 35 speaks of discipline as follows:

Discipline:

(a) An employee can be given warning for his/ her lapses/omissions and breach of conduct immediately on occurrence, by the Canteen Officer.

(b) The service of the individual, who has not improved his/her behaviour/conduct even after getting three warning, will be terminated....

Para 36 speaks of 'notice for termination of service' and it runs as follows:..(a) All appointments are on probation during the first six months. The Patron may terminate an employee's service after giving one month's notice in writing or granting pay for one month without assigning any reason

(b) An employee may resign his/her service after one month's notice. Otherwise, one month pay will be deducted....

It is not necessary for the purpose of this case, to refer to other Paragraphs of the Standing Operating Procedure, except Para 67, which reads as follows:CSD Canteen is a Welfare Institute for all entitled personnel. It should, therefore, be the endeavour of the canteen staff to render the best of service to the customers with due courtesy....

It is not in dispute that the petitioners in W.P. No. 18464 of 1991 have put in 7 years and 24 years respectively, that the petitioner in W.P. No. 2472 of 1992 has put in 15 years Service and the petitioner in W.P. No. 2473 of 1992 Has put in 5 years Service and the petitioner in W.P. No. 2474 of 1992 has put in 2 1/2 years service. It is also seen that the services of the petitioners were terminated by the impugned orders, without any notice, calling for any explanation. In such circumstances, unless it can be held that the Tamil Nadu and Kerala Sub Area CSD Canteen is a State under Article 12 of the Constitution of India, surely a writ cannot lie as contended by the learned Additional Central Government Standing Counsel for the respondents. It is seen from the Regulations and the Paras of the Standing Operating Procedure, extracted above, that the petitioners herein are not Government servants and that they are not entitled to the protection under Article 311 of the Constitution of India. So they have to approach the Central Administrative Tribunal. It cannot be said that they are part of the defence personnel. CSD Canteen is a shop almost run by persons controlled by Commanding Officers and the petitioners are employed under their control. Just because the appointment order is being made by Headquarters office, it cannot be said that the petitioners are Government servants, or belong to , Military service. In

Chander Mohan Khanna v. The National Council of Educational Research and Training : (1992)ILLJ331SC . It has been held as follows: Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression 'State'. A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of welfare State, independent institution, corporation and agency are generally subject to State control. The , State control does not render such bodies as 'State' under Article 12. The State control, however, vast and pervasive is not determinative; The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is 'State'. If the Government operates behind a corporate veil] carrying out governmental activity and governmental functions of vital public importance, there may be little difficulty in identifying the body as 'State' within the meaning of Article 12...

If the principles laid down by the Supreme Court mentioned hereinabove, I am satisfied that the Tamil Nadu and Kerala Sub Area CSD Canteen cannot be said to be a State under Article 12 of the Constitution of India. I do not think that the decision relied On by Mr. K. Govindarajan, the learned Counsel for the petitioners on this aspect, will help the petitioners.

10. The next question to be considered is if the CSD Canteen is not a State coming under Art 12 of the Constitution of India, whether it will come under the expression 'any person or authority' under Article 226 of the Constitution of India. Undoubtedly, a power is vested in the Court to issue a writ against a private body or even an individual. It has been held so by Krishna Iyer, J. in *Rohtas Industries Ltd v. Rohtas Industries Staff Union* A.I.R. 1976 S. C. 125, as follows: The extensive and extraordinary power of the High Courts under Article 226 as wide as the amplitude of the language used indicates and so can affect any person-even a private individual-and be available for any (other) purpose-even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226(l-A) reiterates the targets of the writ power as inclusive of any person

by the oppressive reference to 'the residence of such person'. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a China shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights...

The Supreme Court in *Shri Anadi Mukta Sadguru S.M.V.S. J.M.S. Trust v. V.R. Rudani* : (1989)11LLJ324SC , has held as follows:..The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights as well as non-fundamental rights. ...The words 'any person Or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant...

The Supreme Court has further held: The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances...

It has been further held thus:..Technicalities should not come in the way of granting that relief under Article 226...

A reading of the Defence Service Regulations and the Standing Operating Procedure would clearly Show that service conditions are prescribed by the Standing Operating Procedure. Para 36 is a condition of service. A similar condition has been considered by the Supreme Court in *Delhi Transport*

Corporations. D.T.C. Mazdoor Congress : (1991)ILLJ395SC , with regard to Delhi Transport Regulations. In that case, K. Ramaswamy, J. in a separate judgment has held that the Regulation itself is arbitrary, unjust, unreasonable, unconstitutional and violative of Articles 14, 16 and 21 of the Constitution of India and it is also opposed to the public policy and thereby void under Section 21 of the Indian Contract Act. As such, the impugned Orders have got to be set aside on the ground the order of termination has been passed without any proper guidelines or procedure. M. Srinivasan, J. in John Paulraj v. Central Board of Secondary Education, 1990 W.L.R. 223 has held that the common thread which runs through the fabric of case law is, Article 226 can be invoked only against the State or statutory bodies or authorities who are State instrumentalities and that the expression is 'any person or authority including in appropriate cases, any Government', and that undoubtedly, a power is vested in the Court to issue a writ against a private body or even an individual. If the facts of the case are looked at, I have no hesitation to hold that the termination orders against persons who put in a service of several years, which are impugned in these cases, have got to be set aside, as I am of the view that the monstrosity of the situation and other exceptional circumstances of these cases, necessitate the issuance of writ in these cases.

11. Apart from that, the Supreme Court has held in Neelima Misra v. Harinder Kaur Paintal : AIR 1990 SC1402 , that even if an administrative order is passed which involves civil consequences, it must be made consistently with the rule expressed in the Latin Maxim 'audi alteram partem'. In that case, the Supreme Court has held as follows: The shift now is to a broader 'notion of 'fairness' or 'fair procedure' in the administrative action. As far as the administrative officers are concerned, the duty is not so much to act judicially as to act fairly. For this concept of fairness, adjudicative settings are not necessary, nor it is necessary to have *lites inter parties*. The duty to act judicially or to act fairly may arise in widely different circumstances. It may arise expressly or impliedly depending upon the context and considerations. All these types of non-adjudicative administrative decision making are now covered under the general rubric of fairness in the administration. But when even such an administrative decision unless it affects one's personal rights or one's property rights, or the loss of or prejudicially affects

something which would judicially be called at least a privilege does not involve the duty to act fairly consistent with the rules of natural justice....

If the impugned orders are tested at the backdrop of the dicta laid down by the Supreme Court cited supra, there cannot be any doubt that the minimum requirement of principle of natural justice has not been followed in these cases.

12. More so, I do not think that the respondents can escape by saying that it is purely contractual in nature and that no writ can issue. When the petitioners have been in service for a very long number of years, as I have stated above, to throw them out of employment without any enquiry with the aid of para 36 of the Standing Operating; Procedure, in my view, is wholly arbitrary and against public policy. The view I take, I do not think it is necessary to consider all the decisions cited by the learned Additional Central Government Standing Counsel, both in his arguments as well as in the written submissions. As such, the impugned orders are set aside and the writ petitions shall stand allowed. If the respondents want to pursue the action, it is open to them to take action afresh, after calling for explanation and holding enquiry if they so desire. However, there will be no order as to costs in these writ petitions.