

(2001) 07 BOM CK 0053
In the Bombay High Court
Case No : Writ Petition No. 1656 of 2001

Air India Limited, Mumbai

APPELLANT

Vs

K.S. Bhat

RESPONDENT

Date of Decision : 24-07-2001

Acts Referred:

Air India Employees Service Regulations, 2000 — Regulation 42, 44
Customs Act, 1962 — Section 108, 129E
Industrial Disputes Act, 1947 — Section 33(2)

Citation : (2001) 91 FLR 650 : (2002) 2 MhLj 264

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : C.U. Singh and J.S. Saluja and Gitanjali Prabhu, instructed by M.V. Kini and Co, for the Appellant; R.J. Ghag, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule. Returnable forthwith. The respondent waives service. By consent taken up for hearing and final disposal.

2. Air India Limited challenges the order passed on 14th May 2001, by the Central Government Industrial Tribunal by which the Tribunal declined to grant its approval u/s 33(2)(b) of the Industrial Disputes Act, 1947 ("the Act"), to the dismissal of the respondent from its service. The respondent joined the services of the employer in August 1963 as a Teleprinter Operator. Between the night of 29th May 1986 and 30th May 1986, the respondent was on duty in the third shift between 9.30 p.m. and 6.30 a.m. One of his functions was to allot duties to Cleaners and Sweepers on incoming flights of Air India and other Airlines such as Air Canada with which Air India had Ground Services contracts. On the night between 29th May 1986 and 30th May 1986, the respondent transferred an employee of Air India, Peter David from Group-F to Group-E and assigned the job of cleaning an incoming Aircraft belonging to Air Canada to Group E. Peter David was asked to clean the Aircraft toilets of the Air Canada Flight. During the course

of investigation by the Customs Authorities it was found that in pursuance of a conspiracy between the petitioner, Peter David and one Anthony, Anthony was to bring in a large quantity of gold on the Air Canada Flight and leave it in a particular toilet of the Aircraft. Peter David was to be assigned the task of cleaning toilets of the Air Canada Flight by the respondent. Peter David would remove the said consignment of gold from the toilet and carry the gold concealed on his person out of the Customs enclosure. The allegation against the respondent was that in pursuance of the conspiracy, he shifted Peter David from one Group to the other in order to facilitate the smuggling operation, Accordingly, Peter David cleaned the toilet of the Air Canada Flight which arrived at Bombay Airport. While returning through the Airport, Peter David was searched by a Security Guard of the Air Intelligence Unit of the Customs Department and during the search 120 gold bars valued at Rs. 29.31 lakhs at the then local market rate were found on his person concealed in belts tied around his waist. The contraband gold was seized from Peter David and he was immediately arrested by the Customs Authorities. On interrogation, Peter David confessed to his involvement together with the respondent and one Anthony in a conspiracy to smuggle gold which was to arrive on the Air Canada Flight. The respondent was arrested on 29th/30th May 1986 by the Air Intelligence Unit, Customs at the Bombay Airport and came to be suspended with effect from 29th May 1986.

3. Adjudication proceedings came to be held against the respondent, Peter David and Anthony in pursuance of which the Additional Collector of Customs by an order dated 23rd October 1987 imposed a personal penalty each on the petitioner and the two other persons besides ordering the confiscation of the gold which had been seized. An amount of Rs. 4,500/- was also recovered from the residential premises of the respondent and that was directed to be adjusted towards the personal penalty of Rs. 25,000/- which was imposed on the respondent. The adjudicating authority relied upon the statement of Peter David as well as upon the statement of the respondent which was inculpatory. The contention that the statements had been retracted and that they should consequently be discarded was not accepted by the adjudicating authority. The adjudicating authority referred to the fact that the statements contained a detailed account of the nature of the smuggling activities; that there was no convincing explanation coming forth from the respondent as to why he had to make a last minute change in the posting of Peter David and that the surrounding facts and circumstances, therefore, pointed to the complicity of the respondent. The statement of the respondent showed that he had boarded the Aircraft on the particular night, and had used the Air India Vehicle for going up to the Aircraft. The adjudicating authority noted that if Peter David had not been intercepted by the Security Guards, the respondent would have utilised the Jeep for transporting the contraband together with Peter David outside the Airport.

4. On 8th April 1988, a notice to show cause came to be issued to the respondent by the petitioner calling upon him to show cause as to why the

punishment of dismissal from service should not be imposed upon him under Regulation 44(ii) of the Air India Service Regulations. The action proposed was founded upon the order of adjudication passed by the Additional Collector of Customs on 23rd October 1987 and the personal penalty imposed on the petitioner. Regulation (ii) at the material time provided as follows:

"44(ii) Notwithstanding anything contained in these Regulations, it shall not be incumbent upon the authority competent to impose a punishment to follow the procedure herein prescribed before imposing any of the penalties enumerated in Regulation 43 on an employee, when such employee has been convicted by any Court or Tribunal on a criminal charge involving moral turpitude or any penal action has been brought against him by the Customs Authorities under the Sea Customs Act or Rules made thereunder or by appropriate authorities under the Foreign Exchange Regulation Act, 1947 or Rules made thereunder for activities amounting to "misconduct" with the meaning of Clause (xxiv) of Regulation 42."

The respondent submitted his explanation on 30th April 1988 recording that he had preferred an appeal to the Customs, Excise and Gold (Control) Appellate Tribunal on 23rd February 1988. On 27th June 1988, the Disciplinary Authority passed an order under Regulation 44(ii) dismissing the respondent from service stating that the order was to take effect from the date of its communication to the respondent.

5. In the appeal which was filed by the respondent before the CEGAT, on 25th May 1988, the Tribunal passed an order on an application made by the respondent for a waiver of pre-deposit in terms of Section 129E of the Customs Act, 1962. u/s 129E a person desirous of appealing against the decision, inter alia, of the adjudicating authority to the Tribunal is required to deposit pending the appeal the duty and interest demanded or the penalty levied. The provisos to Section 129E empowers the Tribunal to waive the requirement of pre-deposit in a case of undue hardship subject to such conditions as the Tribunal may impose so as to safeguard the interests of the revenue. The order passed by the Tribunal on 25th May 1988 referred to the contention of the respondent that he has been placed under suspension and was drawing subsistence allowance as a result of which, he was unable to deposit any further amount. The respondent had also adverted to the existence of a Fixed Deposit of Rs. 10,000/- and certain jewellery of his wife which was in a locker. Having regard to the circumstance that an amount of Rs. 4,500/- had already been seized from the residence of the respondent, which was to be adjusted towards the penalty, the Tribunal granted an unconditional stay with regard to the requirement of pre-deposit and upon recovery of the balance amount of penalty.

6. As noted earlier, the competent authority of Air India had passed an order on 27th June 1988 to the effect that the respondent shall be dismissed from service with effect from the date of the communication of the order to him. A statement has, in fairness, been made before the Court by the Counsel for the two parties that on the date when the aforesaid order was passed by the appropriate

authority, the order which was passed by the Tribunal was not known either to the petitioner or to the respondent. The Learned Counsel appearing on behalf of the respondent fairly stated that the order of the CEGAT was in fact received by the respondent after the order of dismissal. Be that as it may, nothing material would really turn thereon since the effect of the order of the Tribunal which was passed u/s 129E was merely to waive the requirement of pre-deposit on the ground of financial hardship. The order of the Tribunal did not obliterate the finding which had been arrived at by the Additional Collector.

7. On 26th July 1988, Air India addressed a letter to the respondent stating that the explanation which had been furnished by the respondent to the show cause notice dated 8th April 1988 had been considered and not found satisfactory. The respondent was, therefore, informed that the competent authority had passed an order on 27th June 1988 dismissing him from service of the Corporation with effect from the date of communication of the order to the respondent. A cheque in the total amount of Rs. 2932.70 being the wages for a period of one month in terms of provisions of Section 33(2)(b) of the Act was remitted to the respondent. On the same date, an approval application (Approval Application No. CGIT-19/86) came to be filed by the petitioner before the Central Government Industrial Tribunal in view of the fact that a reference to adjudication being Reference CGIT No. 27 of 1986 was pending before the Tribunal. The respondent filed his written statement.

8. On 15th May 1991, the Tribunal passed an order dismissing the application filed by the management of Air India for approval u/s 33(2)(b) of the Act. Thereupon a Writ Petition under Article 226, being Writ Petition No. 2708 of 1991 was filed in this Court in which an interim order was passed, directing that while, the petitioner need not reinstate the respondent, the salary of the respondent with effect from 15th May 1991 shall be deposited in the Court. The respondent was given liberty to withdraw the salary on furnishing security. It is common ground that thereafter, the interim order was modified so as to permit the respondent to withdraw the amount which was deposited by Air India on furnishing security of his residential premises in Mumbai. Eventually by a judgment and order dated 10th March 1995, the Writ Petition filed by Air India came to be allowed principally on the ground that approval application had been disposed of without recording evidence and the matter was remanded back to the Tribunal. Accordingly, evidence was recorded before the Industrial Tribunal. By its Judgment and order dated 14th May 2001, the Tribunal declined to grant its approval to the application made by the Air India for the dismissal from service of the respondent. In the meantime, it may be stated that the respondent attained the age of superannuation in May 2001. In declining to grant its approval, the Tribunal has furnished the following reasons:

(i) The order of dismissal was passed despite the order of stay which had been passed by the CEGAT to the order of the adjudicating authority; (ii) The order of dismissal which was communicated to the workman under cover of a

communication dated 26th July 1988 was initially sent to a wrong address of the workman at Chembur and it was only on 10th September 1988 that the workman received the order of termination together with a cheque for his wages of one month. The requirement of Section 33(2)(b) of the Act was, held as not having been complied with; (iii) The passing of the order of dismissal despite the order of the CEGAT and the forwarding of the order to a wrong address initially were held by the Tribunal to be victimisation of the workman; (iv) The petitioner was held to have discriminated against the respondent in that two other employees against whom the order of adjudication had been passed by the Additional Collector of Customs had been continued in service by the employer; and (v) The Metropolitan Magistrate on 27th November 1998 had acquitted the respondent of the charge of conspiracy involving smuggling of imported gold.

9. The Learned Counsel appearing on behalf of the petitioner urged that each of the findings as aforesaid which have been arrived at by the Tribunal are unsustainable particularly having regard to the well settled parameters of the scope of an enquiry u/s 35(2)(b) of the Act. On the other hand, the Learned Counsel appearing on behalf of respondent urged that the order of the Tribunal was sustainable.

10. The first point which has weighed with the Tribunal is that on the date when the order of dismissal was passed viz., 27th June 1988, the CEGAT had stayed the order of the Additional Collector of Customs dated 23rd October 1987. This finding of the tribunal is ex-facie unsustainable. In fact, based on this finding, the Tribunal has come to the conclusion that the order of dismissal amounted to a victimisation of the respondent. Now, the admitted fact is that the Additional Collector by his order dated 23rd October 1987 had concluded the adjudication proceedings and had found that the respondent was guilty of being involved in the conspiracy of smuggling gold. A personal penalty of Rs. 25,000/- was imposed upon the respondent which was to be adjusted in part against the amount of Rs. 4,500/- which was seized from the residence of the respondent. The order of the CEGAT was passed u/s 129E of the Customs Act, 1962. Under the provisions of the Act, a person filing an appeal before the CEGAT against an order of the adjudicating authority in a proceeding arising under the Customs Act, 1962, is required to deposit the duty, interest or penalty as the case may be. The Tribunal is vested with the power of waiving the requirement of pre-deposit in the case of undue hardship in appropriate cases. The order of Tribunal, therefore, which was passed on 29th May, 1988 was not an order staying the operation of the order passed by the Additional Collector of Customs as was submitted before the Tribunal on behalf of the respondent. The order was merely an order waiving the requirement of pre-deposit. Therefore, the entire foundation of the impugned order of the Tribunal to the effect that the passing of the order of dismissal showed mala fides or victimisation is entirely without any basis or substance. But, what is even more significant is that the Tribunal ultimately by its judgment and order dated 29th October, 1997 affirmed the order of the Assistant Collector, save and except with the modification that the quantum of

the penalty which was imposed upon the respondent was reduced from Rs. 25,000/- to Rs. 4,500/-. The CEGAT has come to the conclusion that the respondent was in fact, involved in the incident of gold smuggling and has come to the conclusion that the statement which was made by the respondent u/s 108 of the Customs Act, 1962 could well be relied upon. However, having regard to the facts and circumstance of the case including the fact that an amount of Rs. 4,500/- had already been seized from the residence of the respondent and that the respondent had not derived any benefit from the alleged understanding to allow Peter David to escape with the contraband outside the Customs" area, the CEGAT has come to the conclusion that the quantum of penalty should accordingly be reduced. In the circumstances, it has been clearly established that an order of adjudication had been passed against the respondent within the meaning of Regulation 44(ii). The petitioner was, therefore, entitled to invoke those provisions.

11. Insofar as the second ground which weighed with the Tribunal is concerned, much emphasis has been laid upon the fact that the letter which was initially sent on 26th July 1988 was forwarded to a wrong address. The admitted fact in the present case is that the order of termination which was passed on 27th June, 1988 was to take effect from the date of its communication to the respondent. The approval application was filed before the Industrial Tribunal on 26th July, 1988 and on the very the same day, a letter containing the order of dismissal together with the salary of one month was remitted to the address of the respondent albeit at Chembur. After the letter was returned unserved, the petitioner forwarded the letter again to the address of the respondent at Goregaon. There is no dispute about the fact that the aforesaid letter dated 26th July, 1988 was accordingly received by the respondent on 10th September, 1988. The order of dismissal was to take effect from the date on which the letter was served on the respondent.

12. Sub-sections (1) and (2) of Section 33 of the Industrial Disputes Act, 1947 provide thus:

"33. Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings. -- (1) During the pendency of any conciliation proceedings before a conciliation officer or a Board or of any proceedings before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,

(a) in regard to any matter connected with dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or, where, there are no such standing orders, in accordance with the terms of the contract whether express or implied between him and the workman, --

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

The proviso to sub Section (2) lays down the safeguard that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made to the authority before which the proceeding is pending for approval of the action taken by the employer. In the present case, the Tribunal has come to the conclusion that the wages for one month were in fact remitted to the respondent. Indeed, during the course of his cross-examination the respondent admitted that his correct salary at the relevant time was Rs. 2?32.70 and the cheque which had been sent by the management was for that very amount. The respondent admitted that the cheque was sent to him for the correct amount. The order of dismissal in the present case was to take effect from the date of its communication to the respondent. There is no dispute about the fact that the order was communicated on 10th September 1988. The dismissal was, therefore, to take effect from that date. Having regard to the facts and circumstances of the present case, it is thus sufficiently clear that the order of dismissal which was sought to be communicated to the respondent, the payment of wages for one month and the filing of an approval application was part of one and the same transaction which commenced on 26th July 1988. A Bench of three Learned Judges of the Supreme Court has held in *State Bank of Bikaner and Jaipur v. Balai Chander Sen*, (1963)25 FLR 154 that there is nothing in Section 35(2)(b) which requires that an application for approval can only be made after the action has been taken by the employer against the workman and not for the approval of an action proposed to be taken before the actual action is taken. In the present case, the application for approval was filed on 26th July, 1958. The letter communicating the order of dismissal together with one month's salary was dated 26th July 1988. The letter was to take effect from its communication, which was 10th September 1988. Therefore, at the highest in the facts of the present case, what can be said is that the order of dismissal was not to take effect until the date of its communication which in the present case took place on 10th September 1988 and consequently after the date on which

the approval application was filed. That however, does not detract from the position that due observance of the requirements of the proviso to Sub-section (2) of Section 33 of the Act has taken place in the circumstances of the case.

13. The third ground which weighed with the Tribunal was equally without substance. The Tribunal seems to have proceeded on the assumption that in the case of two other employees of Air India, the employer had permitted them to continue in service despite "conviction" by the Additional Collector of Customs. The Tribunal, a reading of the judgment would show, seems to have proceeded on the basis that the cases of those two other employees were part of the same transaction as that involving the respondent. The Learned Counsel appearing on behalf of the contesting parties have both fairly stated that this assumption of the Tribunal is incorrect and that both Peter David as well as Anthony who are the co-workmen of the respondent in the present case were dismissed and have not been continued in the service of Air India. Therefore, even as a matter of fact, the finding on the aforesaid issue is palpably erroneous.

14. Finally, the Tribunal has referred to the fact that the respondent was acquitted on 27th November 1998 by the Learned Metropolitan Magistrate, 8th Court, Esplanade, Mumbai. A copy of the judgment of the Learned Metropolitan Magistrate has been annexed to these proceedings. A perusal of the judgment would show that insofar as the respondent was concerned, he was accused No. 2 in those proceedings. The Learned Metropolitan Magistrate in para 9 of the Judgment has concluded that the only evidence against the respondent was the statement of Peter David (accused No. 1) and the statement of the respondent himself. Having regard to the principles governing the conduct of criminal trials, a statement of the respondent which was recorded u/s 108 of the Customs Act, 1962 was held not to be admissible in evidence in the absence of independent corroboration. The considerations which are relevant to a criminal trial do not apply to the disciplinary jurisdiction of the employer. The provisions of Regulation 44(ii) came up for consideration before a Division Bench of this Court consisting of Mr. Justice M. N. Chandurkar (as the Learned Chief Justice then was) and Mr. Justice D.N. Mehta in *Air India v. Richard Rashid Khan* (1982) L I.C. 1542. The employee before the Court in that case was alleged to have been involved in smuggling activity and as found to be in unauthorised possession of diamond worth Rs. 1,50,000/- found in a coat belonging to him. An order of penalty was passed by the Additional Collector of Customs under the Customs Act, 1962. The employee was subsequently acquitted by the Criminal Court and on the basis of the said acquittal, he made an application for being released of the consequence of removal from service under Regulation 44(ii). Rejecting that argument, the Division Bench held as follows :

"Notwithstanding the acquittal of the respondent in the criminal proceeding, the order of the Additional Collector of Customs which levied a penalty of Rs. 20,000/- on him, continued to bind him and was effective against him. The acquittal by the criminal Court did not relieve the respondent of the liability

which he had incurred as a result of the order of the Additional Collector of Customs. He was bound to pay that penalty and that penalty was based on the finding that he was concerned in smuggling of diamonds. If expressly by the Regulation 44(ii) action is permitted to be taken on the basis of such an order, it is difficult for us to appreciate how the respondent's claim that he was entitled to show to the disciplinary authority that he was not guilty could be canvassed successfully. To adopt any such course would be to render not only Regulation 44(ii) otiose but it will give discretion to the disciplinary authority to go into the correctness of the order of statutory authority, which could be set aside only by one of the hierarchy of authorities under the relevant Act."

The Judgment of the Division Bench is a complete answer to the submission urged on behalf of the respondent which found acceptance in the decision of the Tribunal in the present case. The finding of guilt recorded in the adjudication proceedings is binding on the respondent. The finding of the Additional Collector of Customs in the proceedings under the Customs Act, 1962 has been affirmed by the CEGAT. Regulation 44(ii) permitted the petitioner to act on the basis of these findings of the competent authority exercising, as the case may be, quasi judicial and judicial powers. In these circumstances, Regulation 44(ii) was attracted to the facts of the present case and was properly invoked. The only question before the Tribunal was whether the finding arrived at by the adjudicating authority under the Customs Act, 1962 was ground enough, *prima facie*, for the employer to invoke the provisions of Regulation 44(ii). Having regard to the adjudication proceedings which had been concluded all the way upto the CEGAT with a finding of guilt against the respondent, the Tribunal, in my view, could not but have come to the conclusion that a case for the invocation of Regulation 44(ii) had been made out, and approval u/s 33(2)(b) of the Industrial Disputes Act, 1947 was liable to be granted.

15. The scope of the jurisdiction of the Tribunal u/s 33(2)(b) of the Industrial Disputes Act, 1947 is limited. The jurisdiction of the Tribunal under that provision has been considered in several judgments of the Supreme Court, amongst them in *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, . The Supreme Court held that the Tribunal has to consider whether a *prima facie* case has been made out by the employer for the dismissal of the employee in question. If the permission or approval is refused by the Tribunal, the employer would be precluded from discharging or punishing the workman and the action of discharge or dismissal already taken would be void. Contrariwise if approval is granted by the Tribunal, the employee is not precluded from claiming a reference to adjudication u/s 10 of the Industrial Disputes Act, 1947.

16. Having regard therefore, to the facts and circumstances of the case, I am of the view that the order of the Tribunal is unsustainable. The petitioner is accordingly entitled to succeed. The impugned order passed by the Industrial Tribunal on 14th May 2001 in approval application no, CG1T-2/1/2001 is quashed and set aside. The application filed by the petitioner for approval of the Tribunal

u/s 33(2)(b) of the Industrial Disputes Act, 1947 shall accordingly stand allowed.

17. Before concluding, it would be necessary to note that on 1.6th September 1991, the petitioner was directed to deposit the salary of the respondent with effect from 15th May 1991 and the respondent was granted liberty to withdraw the amount on furnishing security. This order was subsequently modified on 10th February 1993 so as to allow the respondent to withdraw the amount deposited by Air India against the security of his flat. The aforesaid order was continued by the order of this Court dated 10th March, 1995 during the pendency of the proceedings on remand. Upon the approval application u/s 33(2)(b) being allowed by this judgment, it would be open to the respondent to claim a reference to adjudication u/s 10 of the Industrial Disputes Act, 1947. Having regard to the aforesaid facts, it is directed that in the event of the respondent making an application within a period of 8 weeks from today for a reference to adjudication before the Competent authority, a copy whereof shall be furnished to Air India, the existing arrangement in respect of the continuing security under the order dated 10th March 1995 shall continue to operate during the pendency of the reference and for a period of four weeks thereafter. The petitioner is, however, permitted to withdraw the amount if any, which is lying with the Prothonotary and Sr. Master as of date. No question of any future payment by Air India arises having regard to the fact that the respondent has already attained the age of superannuation.

The Writ Petition is accordingly allowed. There shall be no order as to costs.

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