

(1976) 10 AP CK 0004
In the Andhra Pradesh High Court

B. Subbiah

APPELLANT

Vs

Andhra Handloom Weavers" Co-op Society Ltd. and Others

RESPONDENT

Date of Decision : 08-10-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1977) 1 APLJ 171 : (1978) 1 LLJ 37

Hon'ble Judges : S.H. Sheth, J;Alladi Kuppuswami, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—The petitioner was employed as a Technical Assistant by the first respondent, the Andhra-Handloom Weavers" Co-operative Society Ltd. which has now been statutorily known as Andhra Pradesh Handloom Weavers" Co-operative Society Ltd. It was the duty of the petitioner to procure stock of handloom cloth for the first respondent-society from primary societies. The first respondent-society alleged that in the course of his employment the petitioner procured on two occasions power-loom cloth for the society. The first respondent-society, therefore, felt that the petitioner had committed an act of misconduct. They, therefore, charge-sheeted him and levelled against him two charges of identical nature relating to his misconduct in procuring under the guise of handloom cloth powerloom cloth. The petitioner was given an opportunity of tendering his explanation to the charges. In his explanation he raised three pleas. Firstly, he contended that the stock of handloom cloth which according to him he had procured for the society might have been replaced by someone by powerloom cloth. Secondly, he contended that powerloom cloth could not be identified from the handloom cloth. Thirdly, he contended that it was open to the 1st respondent-society to recover damages from the primary society which supplied powerloom cloth under the guise of hand-loom cloth. A domestic enquiry was held into the matter and the enquiry officer came to the conclusion that the two charges levelled against petitioner were proved. The first respondent-society, therefore, dismissed the petitioner from service on the ground that he had committed grave misconduct in the discharge of his duties. The society also felt that it was

necessary to award punishment of removal from service to the petitioner in order to ensure discipline amongst its employees.

2. The petitioner raised an industrial dispute relating to his dismissal by the first respondent-society and the State Government made a reference of the dispute to the Labour Court. The Labour Court heard the reference and recorded the conclusion that the order of dismissal made by the first respondent-society was valid and was not open to any challenge. The Labour Court, therefore, made the award by which the order of dismissal made by the first respondent-society against the petitioner was confirmed.

3. It is that award of the Labour Court which is challenged by the petitioner in this petition.

4. Mr. V. Jagannadha Rao who appears for the petitioner has raised before us three contentions. The first contention which he has raised is that the order of dismissal made by the 1st respondent-society was in violation of the provisions of Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules and that the Labour Court was in error in ignoring this aspect of the matter. In order to make good his contention he has invited our attention to Sub-rule (3) of Rule 20 which provides as under:

In awarding punishment under this Rule, the employer shall take into account the gravity of the misconduct, the previous record, if any, of the employee and any other extenuating or aggravating circumstances that may exist.

5. So far as the gravity of the misconduct is concerned, a brief reference may be made to Clause (d) of Sub-rule (1) of Rule 19, which provides that "fraud or dishonesty in connection with the employees business or property" shall be an act of misconduct. If a Technical Assistant who is supposed to know the technical aspects of the powerloom cloth as well as handloom cloth procures for his society powerloom cloth under the guise of hand-loom cloth which he is required to procure for it from primary societies it cannot be gainsaid that it is a grave misconduct. In the instant case, the first respondent-society has been established for the purpose of giving encouragement to handloom cloth weavers. To encourage the production and marketing of handloom cloth appears to be its primary object. If on account of the misbehaviour of its technical assistant such a society is made, in ignorance, to deal in and deal with powerloom cloth procured by its Technical Assistant, it will defeat the very object for which the society has been founded. We have no doubt in our mind, therefore, that if the petitioner did what he was alleged to have done, then it was an act of grave misconduct because his action undermined the very foundation of the society.

6. However grave the misconduct may be, when a society punishes its employee after holding an enquiry it has got to take into account not only the gravity of the misconduct but his previous service record as well. It is also required to take into account the extenuating or aggravating circumstances, if there are any. In other words, having decided that the delinquent employee had committed an act of

misconduct, the quantum of punishment to be awarded to him must bear the reflection of his previous service record and must also be decided in the light of extenuating or aggravating circumstances which might be existing, Mr. V. Jagannadha Rao who appears for the petitioner has argued before us that the first respondent-society while taking the serious view of the matter did not take into account the clean past record of the petitioner and, therefore, violated the statutory condition incorporated in Sub-rule (3) of Rule 20. There is no dispute about the fact that the petitioner's record of service from 1955 when he joined the service under the first respondent-society until 1968 was clean and blameless.

7. The question which has, therefore, been argued before us is : what is the effect of the failure on the part of the society to take into account the petitioner's clean past record? In this connection he has invited our attention to a Bench decision of this Court recorded in W.P. No. 4234 of 1975 decided on 1st September, 1975. In that decision an extract from the decision of the Madras High Court in *Borosil Glass Works Limited Vs. M.G. Chitale and Richard M. D'souza*, has been quoted. The principle which the Madras High Court has laid down in the aforesaid decision is that the punishing authority must apply its mind to the factors specified in the Standing Order 16(c), that is to say, take into consideration the past conduct while deciding what punishment should be awarded to an erring employee. The factor which has been prescribed by Standing Order 16(c) under the Industrial Disputes Act is also one of the factors prescribed by Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rule. The principle laid down in that decision has been approved by a Bench of this Court in W.P. No. 4234 of 1975 to which we have already referred. The next decision to which he has invited our attention is *The Management of Mahalakshmi Textile Mills Vs. The Presiding Officer, Labour Court and Others*, . It was also a case under the Industrial Disputes Act. The standing order laid down that while awarding punishment to a workman for misconduct, the management shall take into account the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstance; that may exist. The language of the standing order relied upon in that case is in pari materia with the language used in Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules with which we are concerned in this case. A Bench of the Madras High Court has laid down that having regard to the mandatory nature of the standing order there was no option left to the management and that, therefore, it could not ignore the relevant factors. They have further observed that if these factors were not taken into consideration by the management while passing an order of dismissal of a workman such an order could not be sustained. A slightly different view has been taken by a learned single Judge of the Madras High Court in *Management of Solar Works v. Workmen Employed* AIR 1968 Mad. 265. While the mandatory character of such a standing order and the effect which it produces when it is violated or overlooked are such the single Judge has observed that it is not

necessary to give so much weight or emphasis to the standing order or the factors laid down in the standing order if the misconduct of the workman is grave. In his opinion, therefore, the question of taking into account the clean past conduct would have no relevance or significance if the erring workman had for example participated in the illegal strike because it would be an act of grave misconduct and must be viewed seriously. According to him, therefore, no question of awarding milder punishment under those circumstances would arise. It has been further observed by the learned single Judge in that decision that if the misconduct per se was sufficient to justify dismissal because of its serious nature, there was no scope at all for entertaining the apprehension that the management had failed to give due weight to the standing order while fixing the quantum of punishment. He has also observed that even if the management had done so the result would have not been different. We are unable to agree with the view expressed by the learned single Judge of Madras High Court in the case of *Management of Solar Works v. Workmen Employed*, (supra) because in our opinion, when a statutory factor is required to be taken into account for determining the quantum of punishment, it must be taken in all cases irrespective of whether the misdeed committed by the employee is grave, serious or light. We do not think it is open to us to make an exception judicially to the statutory requirement laid down by law. We think that there was no cogent or sound reason for the learned single Judge of Madras High Court to depart from the principle laid down by a Bench of that Court in the case of *The Management of Mahalakshmi Textile Mills Vs. The Presiding Officer, Labour Court and Others*, .

8. Mr. K. Srinivasa Murthy, who appears for respondent No. 1, has in reply raised several arguments. He has firstly argued that the petitioner had not raised this contention before the Labour Court. The reply filed by the petitioner before the Labour Court clearly shows that though he had not expressly referred to Sub-rule (3) of Rule 20, he had pleaded all facts to attract the application of Sub-rule (3) of Rule 20. Since those facts were pleaded, it was the duty of the Labour Court to consider them and to record such finding as they warranted. It was, therefore, an error on the part of the Labour Court that it did not notice the contention which the petitioner had raised and which attracted the application of Sub-rule (3) of Rule 20. It was not an error on the part of the petitioner. We cannot, therefore, preclude the petitioner from raising that contention in this petition.

9. The second argument which Mr. K. Srinivasa Murthy has raised is that in proceedings under the Industrial Disputes Act factors laid down by the Andhra Pradesh Shops and Establishments Act or the Rules made there under cannot be taken into account. In other words, his contention is that where an employee does not invoke the machinery provided by the Andhra Pradesh Shops and Establishments Act to get redress, he cannot rely upon the factors laid down by that Act and the Rules made there under. Next, if he invokes the machinery provided by the Industrial Disputes Act, it is not open to him to bring in or to plead the factors laid down by the Andhra Pradesh Shops and Establishments Act

and to mix them up with the proceedings under the Industrial Disputes Act. This argument which Mr. K. Srinivasa Murthy has raised appeared to us at the first flush to be attractive. However, on a closer scrutiny, we are unable to uphold it because by pleading the requirements of Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules, what the petitioner did was to invoke a statutory condition of his service. His conditions of service may be contractual or may be statutory. Every employer who punishes his employee for an act of misconduct--grave or light--is bound to take into account not only the contractual conditions of service and comply with them but also the statutory conditions of service where there is a statutory provision made in that behalf. In matters of private service, we have moved far away from the exclusive realm of contract. Private employees are also protected by the statute or the statutory rules and it is not open to any employer to disregard the statutory protection extended by the Legislature or the rule-making authority to such employee and to dismiss his employee from service at his whim and caprice even if the act of misconduct has been proved. Even the private employees have now moved from the realm of contract to the realm of status. In the instant case, the conditions of service which the petitioner enjoyed flowed from two sources: (1) his contract of employment; and (2) the statutory protection granted to him by the Legislature or the rule-making authority. When, therefore, respondent No. 1 took action against the petitioner for his act of misconduct, the respondent was bound to comply with his contractual conditions of service as well as the statutory protection extended to him. When respondent No. 1 held domestic enquiry against the petitioner and punished him, he did not know whether the petitioner would invoke, for getting redress, remedy provided by the Andhra Pradesh Shops and Establishments Act or by the Industrial Disputes Act. It is, therefore, not open to respondent No. 1 to say that since the petitioner had subsequently invoked the machinery provided by the Industrial Disputes Act, he was not under any obligation to give effect to a statutory condition of service prescribed by Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules. We do not think respondent No. 1 could have foreseen what course the petitioner would adopt and if respondent No. 1 did not foresee it, he was not at a subsequent stage justified in contending that he was not bound by the statutory protection granted by Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules to the petitioner. It cannot, therefore, be contended that the petitioner cannot plead it because he has selected the machinery provided by the Industrial Disputes Act. Mr. K. Srinivasa Murthy is in error in looking at Sub-rule (3) of Rule 20 as a mere statutory provision. It is not a mere statutory provision but is a statutory condition of service by which the employer is bound. Now the Labour Court in a reference made u/s 10 A of the Industrial Disputes Act must consider whether the dismissal was justified. This duty cast upon the Labour Court necessarily presupposes that it should examine the validity of the order of dismissal or removal in the light of both the contractual conditions of service of the petitioner as well as in the light of the statutory protection granted to him. Sub-rule (3) of Rule 20 does not lay down a procedural requirement but

confers upon an employee a valuable right. Since it is a right enjoyed by the employee, the dismissal or removal must stand the test of that right. If it is not able to satisfy the test laid down by Sub-rule (3) of Rule 20, the Labour Court is bound to come to the conclusion that the dismissal is unjustified. What is, therefore, argued before us on behalf of the petitioner does not amount to mixing up considerations flowing from the Industrial Disputes Act with the considerations flowing from the Andhra Pradesh Shops and Establishments Act and Rules made there under. The order of dismissal must be tested on the anvil of the right conferred upon an employee by Sub-rule (3) of Rule 20. In that view of the matter he is not justified in raising this argument. It is, therefore, rejected.

10. The third argument which Mr. K. Srinivasa Murthy has raised is that in the bye-laws of the first respondent-society, there is no provision corresponding to the provision made by Sub-rule (3) of Rule 20. This is an argument of desperation. It can never be argued that since the bye-laws of the first respondent-society did not provide for the factors which Sub-rule (3) of Rule 20 provided the bye-laws would overrule the rule. In fact, if there is an inconsistency between a bye-law and a rule, it is the rule which prevails over and supersedes a bye-law. If there are certain things which the rules provide for and which are not provided for by the bye-laws, the rules prevail and supplement them. Therefore, omission to incorporate such condition of service in the bye-laws of the first respondent-society does not in any manner whatsoever derogate from the petitioner's conditions of service.

11. The next argument which Mr. K. Srinivasa Murthy has raised is that what the petitioner really wants this Court to do is to determine the quantum of punishment. Proceeding on this line of reasoning, he has further argued that it is not open to this Court in exercise of its jurisdiction under Article 226 to interfere with the quantum of punishment. If it was a mere question of quantum of punishment, we would have very probably appreciated the argument raised by Mr. K. Srinivasa Murthy. In our opinion, this is not a mere question relating to the quantum of punishment. The question which has been raised before us relates to the failure on the part of the first respondent-society to give effect to the statutory protection conferred upon the petitioner by Sub-rule (3) of Rule 20. When we thus look at it, we have got to come to the conclusion that the first respondent-society committed an act of illegality in ignoring the statutory provision of Sub-rule (3) of Rule 20 of the Andhra Pradesh Shops and Establishments Rules. It is not open even to the petitioner to forego the right conferred upon him by Sub-rule (3) of Rule 20 because Section 58 of the Andhra Pradesh Shops and Establishments Act, 1969 provides that any contract or agreement whereby the employee relinquishes any right conferred by that Act shall be null and void in so far as it purports to deprive him of such a right. In other words so far as the rights conferred by the Andhra Pradesh Shops and Establishments Act, 1966 and the Rules made there under are concerned it is not open to an employer to ignore them under any circumstances.

12. Lastly, it has been argued by Mr. K. Srinivasa Murthy that it is only the authority constituted u/s 41 of the Andhra Pradesh Shops and Establishments Act, 1966 that can examine the validity or otherwise of the order of dismissal or removal on the basis of the statutory protection granted to an employee by the Act or the Rules made there under. We are unable to uphold this argument because whichever authority is empowered or has jurisdiction to enforce a right or an obligation must enforce it irrespective of the source or origin of that right or obligation. We are, therefore, unable to uphold any of the arguments raised by Mr. K. Srinivasa Murthy. The first contention, which has been raised on behalf of the petitioner, in our opinion, is well-founded and the order made by the Labour Court as well as the order of dismissal passed by the first respondent-society against the petitioner suffer from a serious infirmity. Both of them are, therefore, liable to be struck down.

13. The second contention which has been raised on behalf of the petitioner is that the first respondent-society terminated the services of the petitioner by order, dated 23rd December, 1970 but gave it retrospective effect from 25th January, 1969 when the petitioner was suspended. It has been argued by Mr. V. Jagannadha Rao that the petitioner's services could have been terminated only with effect from 23rd December, 1970 and that they could not have terminated with retrospective effect. He has in that behalf invited our attention to the decision of the Supreme Court in *R. Jeevaratnam Vs. The State of Madras*, . The observations made by the Supreme Court in paragraphs 4 and 5 of the report show that an order of dismissal takes effect on the date on which it is made and cannot operate retrospectively from an anterior date. Mr. K. Srinivasa Murthy, has, however, conceded before us that if the order terminating the petitioner's services was valid, it should take effect from the date on which it was made and not from an anterior date. The second contention which has been raised on behalf of the petitioner is, therefore, well-founded.

14. The last contention which has been raised is that there was no evidence to show that the goods which the petitioner purchased were the same as those in relation to which the technical expert gave the opinion that they were powerloom goods. This contention relates essentially to the identity of the cloth purchased by the petitioner. The order made by the Labour Court and the explanation tendered by the petitioner do not show that the petitioner had at any time raised the contention as to the identity of the cloth. It appears to us that the cloth which the petitioner had purchased was opened in his presence and that it was intact. Thereafter, it was produced before the Domestic Tribunal. All that he contended was that there was no procedure or method to identify powerloom cloth from handloom cloth. This contention which he raised was far removed from the one relating to identify of the goods. Since this is a question of fact which ought to have been pleaded before the Domestic Tribunal and since the petitioner did not plead it, we cannot permit the petitioner to raise it in this writ petition. The third contention raised on behalf of the petitioner, therefore, fails and is rejected.

15. In the result, in view of the finding which we have recorded on the first contention raised on behalf of the petitioner, we allow the petition, quash and set aside the order of the Labour Court and the order of dismissal recorded against him. We may, however, add that it shall be open to the first respondent-society to consider the question of awarding punishment to the petitioner in the light of its statutory and contractual obligation and in the light of the requirements laid down by Sub-rule (3) of the Rule 20 of the Shops and Establishments Rules. We would like to make clear that we are quashing and setting aside only the final order of termination of services of the petitioner and not the proceedings which led to the dismissal of the petitioner. There shall be no order as to costs of this writ petition.