
(1998) 10 MP CK 0041

In the Madhya Pradesh High Court

Case No : Writ Petition No. 4201 of 1995 (J)

Bajaj Electricals Ltd.

APPELLANT

Vs

Shri Nandkishore Kanojia and Another

RESPONDENT

Date of Decision : 14-10-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Madhya Pradesh Shops and Establishments Act, 1958 — Section 58(2)

Citation : (2000) 1 MPJR 95

Hon'ble Judges : S.C. Pandey, J

Bench : Single Bench

Advocate : Rohit Arya, for the Appellant; H.N. Vyas, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Pandey, J.

The Petitioner has filed this petition under Articles 226/227 of the Constitution of India, challenging the Order dated 6-12-95, Annexure P-7, passed by the Respondent No. 2, the Appellate Authority u/s 58 (2) of the Madhya Pradesh Shops & Establishments Act 1958 (henceforth "the Act"). This petition is being decided under the Article 227 of the Constitution as it is not necessary to invoke the power of this Court under Article 226.

The undisputed facts in this petition are as follows:

The Petitioner is an establishment within the meaning of the Act. The Respondent No. 1 was employed as a mechanic with the Petitioner. A charge-sheet, dated 23-11-92, Annexure P-4 was framed against the Respondent No. 1, containing the charges, reproduced here-in-below:

(i) Habitual Absentism.

(ii) Negligence towards work.

(iii) Absence without application & prior sanction.

(iv) Mis-use of Company funds.

(v) Intoxication during duty hours.

The Respondent filed reply dated 7-12-92 and contested the claim of the Petitioner that he was guilty of the aforesaid charges.

A domestic enquiry was held by the Petitioner. In that domestic Enquiry, Shri R.K. Bose, the standing counsel of the Petitioner, was appointed as the enquiry officer. The enquiry officer submitted his report, dated 11 -3-93, to the Petitioner holding that the charges Nos. (i), (ii), (iii) and (iv) were proved. As a consequence of the report of the Enquiry officer, the Petitioner terminated the services of the Respondent No. 1 by order dated 2-6-93, Annexure P-5.

The Respondent No. 1, thereupon, filed an appeal against the order of his dismissal, dated 2-6-93 u/s 58 of the Act and claimed that the Enquiry Officer, Mr. R.K. Bose, was biased against him. He did not follow the principles of natural justice. He was not permitted to engage an advocate. There was no reasonable opportunity given to him. A reply was filed by the Petitioner to the grounds of appeal, denying the allegations regarding the reasonable opportunity.

The appellate authority framed issues regarding the validity and legality of enquiry. It is alleged that it gave an opportunity to the Petitioner, to prove their allegations. It appears to have found that there was no formal defect in enquiry. However, the appellate authority was of the view that quantum of punishment awarded to Respondent No. 1 was too harsh and he was reinstated without back wages.

The learned Counsel for the Petitioner argued that, the appellate authority should not have interfered with the quantum of punishment on the foundation that it was too harsh. Apart from unauthorised absence, there were charges of negligence and misuse of the funds of the company on the part of the Respondent No. 1. The learned Counsel also assailed the order of the appellate authority for noting the fact that the Enquiry Officer of the Petitioner, who was its standing counsel, had conducted the appeal before the appellate authority supporting its own conclusion, despite objection, on the part of the Respondent No. 1.

The learned Counsel for the Respondent No. 1, on the other hand, pointed out that the Respondent No. 1 was not furnished with the report of the Enquiry Officer. He had taken this point specifically in the Return, at page 3 in reply to paragraph 3 of the petition. He also referred to the fact that the fact of non-supply of copy of report of Enquiry Officer before the award of punishment was not disputed by the Petitioner in its rejoinder. It was argued that in paragraph 3 of the rejoinder it was stated that -"The Respondent No. 1 never demanded the copy of the report at the stage of Departmental Enquiry or even before the appellate authority." However, he had full liberty to examine the enquiry record

(including the Enquiry Report) submitted before the appellate authority." On the basis of the aforesaid statement in the rejoinder filed by the Petitioner itself, it was contended that Mr. R.K. Bose, Advocate, who should have known better, deliberately did not supply a copy of the enquiry report prior to award of punishment. Non-supply of enquiry report was illegal as was so held by the Supreme Court. Further, it was argued that the non-supply of a copy of enquiry report in order to deprive the Respondent No. 1 of hearing prior to award of punishment further confirmed the bias of the Enquiry Officer, who was the standing counsel of the Petitioner-company. It was argued that under the facts and circumstances of the case, this Court should not interfere with the order of the appellate authority.

It would be necessary to reproduce Section 58 of the Act for determining the powers of the appellate authority. It reads as under:

Notice of dismissal -(1) No employer shall dispense with the services of an employee who has been employed for a period of three months or more except for a reasonable cause, and without giving such employee at least one month's notice or wages in lieu of such notice.

Provided that such notice shall not be necessary if the services of such employees are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held by the employer for the purpose.

(2) (a) The employee discharged, dismissed or retrenched may

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 or on the ground that such punishment of discharge or dismissal was severe.

(b) the appellate authority may, after giving notice in the prescribed manner to the employer and the employee, dismiss the appeal or direct the reinstatement of the employee with or without wages for the period during which he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case.

(3) The decision of the appellate authority shall be final and binding on both the parties and be given effect to, within such time as may be specified in the order of the appellate authority.

It would be clear from proviso to Sub-section (1) of Section 58 of the Act that no notice under that Sub-section is required where an employee is dismissed for "misconduct". It is also clear from Sub-Section 2 (b) of Section 58 aforesaid that the Respondent No. 1 was entitled to file an appeal on the ground that he had not been guilty of misconduct as held by the employer or on the ground that such punishment of dismissal was too harsh. The appellate authority is authorised to dismiss the appeal or direct the reinstatement of the employer with or without backwages or to grant compensation without reinstatement or such

relief as would be suitable under the facts and circumstances of the case. Now, the Act does not define a "misconduct". However, there are Rules framed under Section-59 of the Act, known as MP. Shops & Establishment Rules 1959 (henceforth "the Rules"). Rule 14 of the Rules defines the word "misconduct" as follows:

Misconduct -For the purposes of the proviso to Sub-section (1) of Section 58, the following acts and omissions shall be treated as misconduct on the part of the employees.-

- (a) wilful insubordination to, or disobedience, whether alone or in combination with orders, any lawful and reasonable order of a superior;
- (b) theft, fraud or dishonesty in connection with the employer's business or property;
- (c) wilful damage to or loss of employer's goods or property;
- (d) taking or giving bribes or any illegal gratification in connection with the employer's business;
- (e) habitual absence without leave or absence without leave for more than 10 days;
- (f) habitual late attendance;
- (g) habitual breach of any law applicable to the establishment;
- (h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;
- (i) habitual negligence or neglect of work;
- (j) striking work or inciting others to strike work in contravention of the provisions of any law or rule having the force of law.

In the opinion of this Court the powers conferred by Section 58 (2) (b) of the Act are of appellate nature and, therefore, the appellate authority exercising its powers under appeal, cannot seek justification of the employer's act by allowing the parties to lead evidence regarding the "misconduct" committed by the employee, for coming to its own conclusion, despite the fact the employer's enquiry was found to be defective or in extreme cases the employee was discharged without any enquiry. The function of the appellate authority is like an authority hearing departmental appeal and to pass order in accordance with Section 50 (2) (b) of the Act. Looking to the involvement of number of shops and establishments throughout the State of M.P., the Legislature, in its wisdom, provided for an appellate authority which could look into the grievance of the employees regarding the punishment as a result of an enquiry. There is nothing in the Act conferring powers upon the appellate authority, as are given under Sections 61 (1) (A) (a) and 61 (2) of M.P. Industrial Relations Act 1960, to a labour Court in respect of an application u/s 31 (3) of that Act. All that is

conveyed by Section 58 (2) (a) and (b) of the Act is that the appellate authority shall decide the disputed matters in appeal against the order of the employer. Therefore, The appellate authority has to confine to conclusions on the basis of matter, on record rather than seeking justification at that level. The aforesaid view of this matter commends itself to this Court also because it would check unnecessary spawning of litigation. In the opinion of this Court the appellate authority was not justified in giving any opportunity to an employer or the employee to prove or disprove the facts found by the Enquiry Officer. The appellate authority had ample power to set aside an order against a victim of defective enquiry. Being an appellate authority it had full powers to pass an order as per Section 58 (2) (b) of the Act. However, it is not necessary to set aside the order of the appellate authority particularly when the Respondent No. 1 was satisfied by the relief granted to him by the appellate authority.

The next question that has to be decided is, if the appellate authority could rightly come to the conclusion, that the Respondent No. 1 was a victim of bias on the part of Shri R.K. Bose, the standing counsel for Petitioner. It is not disputed that Shri R.K. Bose, the Enquiry Officer himself conducted the appeal before the appellate authority and that the appellate authority has deserved that he continued to do so despite the objection of the Respondent No. 1.

It is necessary to recall that the question of bias is rule of natural justice. In the case of *B. Surlindersingh Kanda v. Government of Malaya*, 1962 A C 322 at page 337, Lord Denning explained the two guiding principles of natural justice as follows:

The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims. *Nemo iudex in causa sua* and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

It is apparent that the principles of impartiality is developed from the maxim *Nemo iudex in causa sua* which means that no man should be a judge in his own cause. Such a person cannot be truly impartial. The principle was further extended to those cases where a man was so much interested in a particular case that It was possible that he may not be entirely impartial. It is very difficult to prove bias because it resides in the mind of a person and rarely comes out in open because even a biased person would like to show to the world that he is entirely impartial. Therefore, with development of common law, the existence of bias became a matter of inference from the facts of a particular case. The Courts do not require a person to prove bias to the hilt. What they require is that there be circumstances, from which a reasonable man would infer that the complainant apprehended likelihood of bias, and it was so possible for a reasonable man to infer, than the Court grant relief to the complainant. In the case of *Manak Lal Vs. Dr. Prem Chand*, , the Supreme Court was called upon to consider the case of an

advocate who complained that the Chairman of the tribunal, Shri Chhangani who was appointed by the Chief Justice of Rajasthan High Court to enquire into his misconduct, was disqualified to be a member of the tribunal. The Chairman, Shri Chhangani, had appeared for Dr. Premchand, the complainant in proceedings u/s 145 of the Code of Criminal Procedure. The proceedings for misconduct of Appellant originating from the same proceedings. The Supreme Court held that Shri Chhangani was disqualified. It is apparent that the Supreme Court would have quashed the entire proceedings, but for the fact, this point was waived by the Appellant before the tribunal and the point was raised for the first time before the High Court. Gajendragadkar, J. laid down the law on the point as follows at page 429:

(4)... It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judiciously; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done....

In the same paragraph (4) at page 429 it was further held:

.... In dealing with cases of bias attributed to members constituting tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant of the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. "The principle", says Halsbury, "nemo debet esse judex in causa propria sua precludes a justice, who is interested in the subject-matter of a dispute, from acting as a justice therein." (Halsbury's Laws of England, vol. XXI, P. 535, para 952). In our opinion, there is and can be no doubt about the validity of this principle and we are prepared to assume that the principle applies not only to the justice as mentioned by Halsbury but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of parties.

and at page 430 repelling the argument that Shri Chhangani may not have been aware of the fact that he was deciding the case of misconduct on the part of the Appellant arising out of proceedings u/s 145 of the Code of Criminal Procedure, the Supreme Court held that it was not necessary to prove natural bias in such cases. The fact that Shri Chhangani was appearing for the complainant was sufficient in itself. It was observed that:

(6).... Actual proof of prejudice in such cases may make the Appellant's case stronger but such proof is not necessary in order that the Appellant should effectively raise the argument that the tribunal was not properly constituted.

It would thus be clear that a person pleading bias need not prove actual bias but it would be sufficient if he proves that he apprehended bias and that apprehension was reasonable. In cases, where as person acting as a quasi-judicial or judicial authority, had a pecuniary interest in the matter then bias would be readily inferred. So in the case of Manak Lal (supra), Shri Chhangani disqualified himself automatically when it was proved that he appeared in the case of Premchand u/s 145 Cr. P.C. The reason is that any reasonable man would not expect a person like Shri Chhangani to act impartially and the Appellant was attributed with that apprehension. However, in that case, the Supreme Court declined to help the Appellant on the ground of waiver.

S.A. de Smith, in his book of "Judicial Review of Administrative Action" (First Edition) at page 139. has pointed out this. Lord Conke, in DT Benhams Case had stated -"One cannot be a judge and attorney for any of the parties." This statement of law made by Lord Conke, has not been departed from even to this day. An advocate, who advises his client in a case has definite interest to see that his client succeeds. He receives pecuniary benefits for rendering the advice in accordance with law. On the other hand, a person should appear to be absolutely free of bias when he presides over a body judicial or quasi-judicial or even administrative when it is necessary to observe the principles of natural justice. There is conflict of interest against duty if an advocate of a party accepts the quasi-judicial function whereby he is required to judge the conduct of a person named guilty by the concerned party.

It is not disputed that Shri R.K. Bose was standing counsel of the Petitioner. It was. therefore, an implied agreement that Shri R.K. Bose was to be paid a retainers-fee for advising and appearing in the cases of the Petitioner. Thus, he had an interest in seeing the cases of his client with the spirit that his client succeeds in the cases in which he rendered his advice and appeared on behalf of his client. His duty as a presiding officer over the domestic enquiry was to be absolutely impartial in finding out if the Respondent No. 1 was really guilty. Yet he accepted to preside the domestic enquiry. It is true that the domestic enquiry could be conducted by any other paid employee of the Petitioner and domestic enquiry could not be held to be invalid on that ground. However, such an employee would not ordinarily receive any remuneration for giving legal advice to the Petitioner. What would be the apprehension of a reasonable man ? What would be the apprehension of a right thinking person of a society ? In cases of pecuniary interest it has been laid down by Supreme Court in number of cases that pecuniary interest, howsoever small, would disqualify a person from adjudicating a matter. It has been held in Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, , at page 2162, paragraph 11 that there can hardly any doubt about this legal

position (see J. Mohapatra and Co. and Another Vs. State of Orissa and Another, . The presumption of such bias is conclusive. It has been so held in England in the case of Dimes v. Grand Junction Canal (1852) 3 HLC 769. The oft-quoted case of R. v. Sussex Justices ex. P. McCarthy (1924) 1 KB 256 is the case of a solicitor which would be relevant to the facts of the case. A solicitor was acting as a Deputy Clerk of justices who were trying the case of a motorist for dangerous driving. The motorist was convicted. The Clerk did not in any way influence or take part in the discussion. At least this fact was not proved. Lord Hewart C.J. expressed the principles behind the rule as follows:

The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered, the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

For applying the aforesaid principles to the facts of this case, we may recapitulate the facts again. It is not in dispute that since R.K. Bose was the standing counsel of the Petitioner, that is to say he was retained by the Petitioner for contesting the cases on its behalf. It is natural to presume looking to common course of events that he may be rendering his advice to the Petitioner. It is impossible to know if he rendered any advice to the Petitioner prior to his appointment in the case. However, any reasonable man in the shoes of the Respondent No. 1 would think so. At least there was likelihood of rendering such advice. Even if we apply the test laid down by Lord Goff in R. v. Gough, (1993) 2 All ER 726, the question is answered by the Court that looking to relevant circumstances there was a real danger of bias on the part of Shri R.K. Bose that he might have looked to case of the Respondent No. 1 disfavourable for his pecuniary interest as an standing Counsel. The fact that he had a pecuniary interest in the case has been proved by the fact that he appeared before the appellate authority defending his own conclusions despite the fact that there was an objection on behalf of the Respondent No. 1. Thus, the bias becomes manifest when he appeared as a counsel for the Petitioner in appeal justifying his own enquiry report. Here was a classic case of a "judge who become an attorney" obviously for remuneration. He forgot his duty as pecuniary interest ruled supreme to him. There is another circumstance that itself would be enough for showing that Shri R.K. Bose was partisan and not an impartial man. The Petitioner has not disputed that a copy of enquiry report was not supplied to the Respondent No. 1. In paragraph 3 of rejoinder the following fact has been accepted:

3.... The Respondent No. 1 never demanded copy of the Enquiry Report even at the stage of the Departmental Enquiry or even before the appellate authority. However, he had full liberty to examine the enquiry record (including enquiry report) submitted before the appellate Authority.

Now, Shri R.K. Bose was a trained lawyer. He should have, apart from anything else, known that the Respondent No. 1 had a remedy of appeal. It was demand of justice and fair play in action that Shri R.K. Bose, Advocate, should have supplied a copy of the enquiry report. Otherwise, the Respondent No. 1 was likely to be handicapped. The order of dismissal of the Respondent No. 1 was only the conclusion which was based on the finding of Shri R.K. Bose. The only inference that could be drawn from non-supply of the enquiry report to the Respondent No. 1 would be that Shri R.K. Bose wanted his report to be upheld by the Authority. At least, the danger of likelihood of this kind of conscious bias cannot be ruled out. Thus, there is material on record for coming to conclusion that Shri R.K. Bose conducted himself in such a manner that it cannot be safely concluded that justice was clearly and manifestly done by him. The action of Shri R.K. Bose is comparable to an act of a judge who would supply only a copy of the decree but not of the judgment by ordering the Head Copyist not to supply the copy of judgment and thereby, frustrating the chances of appeal against his judgment.

The learned Counsel for the Petitioner brought to the notice of this Court the decision of Supreme Court in *Dalmia Dadri Cement, Ltd. Vs. Shri Murari Lal Bikaneria*, and in *Saran Motors (Private) Ltd. New Delhi v. Vishwanath* and another, reported in 1964 (2) LIJ 139. In both these cases junior counsel were appointed as enquiry officers. They were not standing counsel of the company but occasionally engaged by the company. Nor did these advocates defend their enquiry report themselves in further proceedings against the enquiry report. As against the enquiry officer, Shri R.K. Bose, kept secret his pecuniary interest alive in the inner recesses of his mind. It became an open secret when he persisted to defend the order of termination, founded on his enquiry report, before the appellate authority. The Court cannot accept the argument that there was nothing wrong in defending the report submitted by the enquiry officer as by time he had no chance to change his report. The question is justice was done by him, but whether it appeared to the concerned party or the Court that justice was clearly and manifestly seen to be done. The conclusion is that it is possible that bias on the part of the enquiry officer had affected his report.

The question of waiver was not raised by the Petitioner before the appellate authority or before this Court. However, suffice it is to say that the conduct of the enquiry officer became manifest to Respondent No. 1 when the enquiry officer appeared before the appellate Authority as an Advocate on behalf of the Petitioner and was unwilling to give up the case despite the objection on the part of the Respondent No. 1. Thus, the enquiry officer forgot that there was conflict of his interest against duty. The bias of the enquiry officer became manifest at appellate stage when he showed complete disregard to his duty against his pecuniary interest.

The learned Counsel for the Respondent No. 1 also laid emphasis on the question of non-supply of the enquiry report prior to the passing of the order of

termination to support the order of reinstatement passed by the appellate Authority. The attention of this Court was drawn to a decision of Supreme Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, . It is true that the Supreme Court has now settled the law by holding that where the disciplinary authority delegates its power of holding an enquiry to another person, it is incumbent upon the enquiry officer to supply a copy of the enquiry report before the disciplinary authority which passes the order of punishment. Non-supply of copy shall vitiate the order of punishment. The Supreme Court, however, stated that the effect of non-supply of the report of enquiry officer would not always result in reinstatement. The relief to the delinquent would depend upon the degree of prejudice caused to him. This would be the question of fact. The Court could definitely quash the order of punishment and give the delinquent an opportunity of asserting that he was not liable to the punishment imposed upon him. In cases, where the labour Court was entitled to enquire afresh, the workman could be supplied with a copy of the enquiry report in domestic enquiry during the parallel enquiry held by the labour Court. Thus, there is no strait-jacket formula. However, this case would apply to facts of the case as the enquiry officer started the enquiry as per charge-sheet dated 23-11-1992 (Annexure P-4) and the order of dismissal was passed on 2nd June, 1993 (Annexure P-5) pursuant to the enquiry report dated 11-3-93 (Annexure P-8), much after 20th November, 1990 i.e. the date of decision of Supreme Court in the case of *Union of India and others Vs. Mohd. Ramzan Khan*, . The Court has already held that the appellate Authority could not hold a fresh enquiry for justifying the dismissal.

In view of this matter, the order of reinstating the Respondent No. 1 could be justified till he was given an opportunity to question the enquiry report. This Court, however, does not rest to ultimate decision on the aforesaid point because this Court is of the view that conduct of Shri R.K. Bose had vitiated the enquiry.

The result of the aforesaid discussion is that this petition under Article 227 of the Constitution of India, fails and is dismissed accordingly. By interim order dated 20-12-95 this Court had stayed the operation of the impugned order subject to the condition that the Respondent No. 1 would be paid current wages. The order sheet dated 2-7-1997 records the statement of the counsel for the Petitioner to the effect that the Respondent No. 1 was being paid current wages. The result of dismissal of this petition is that the Petitioner shall have to reinstate the Respondent No. 1. He shall also be entitled to all the consequential benefits that were likely to accrue to him as a consequence of the impugned order dated 6th of December, 1995, passed by the appellate Authority. There shall be no order as to costs.