
(2000) 09 MAD CK 0009
In the Madras High Court
Case No : W.A. No. 321 of 1998

E.R. Sankaran

APPELLANT

Vs

The Mettur Govenment Servants Cooperative Stores Limited

RESPONDENT

Date of Decision : 27-09-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu Shops and Establishments Act, 1947 — Section 41(2)

Citation : (2000) 09 MAD CK 0009

Hon'ble Judges : V.S. Sirpurkar, J;V. Kanagaraj, J

Bench : Division Bench

Advocate : R.M. Krishna Raju, for the Appellant; M.R. Raghavan, for Respondent No. I, for the Respondent

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—The second Respondent in W.P. No. 9214 of 1988 has preferred this Writ Appeal having been aggrieved against the

order dated 8.1.1998 made by the single Judge of this Court in so far quashing the order dated 15.3.1988 passed by the second Respondent

appellate authority, the Deputy Commissioner of Labour, Salem, in T.N.S.E. Appeal No. 6 of 1987 preferred by the Appellant before him u/s

41(2) of the Tamil Nadu Shops and Establishments Act, 1947, as against the order of termination from service of the first Respondent

Management.

2. Tracing the history of the case it comes to be known that the Appellant herein while working as the salesman in the first Respondent

Cooperative Stores Limited was alleged to have committed various misconducts and charges were framed against him by the first Respondent on

6.9.1986 for misappropriation of funds on 31.12.1985 and on 28.2.1986, for stock deficit to the value of Rs. 11,541,06 ps. as on 31.12.1982

and for a further misappropriation of funds to the tune of Rs. 8,267,28 ps. being the sale proceeds of the articles in the cloth section; mat on

explanations being called for, the Appellant submitted his explanation on 12.9.1986; that on enquiry held (with due opportunity for the Appellant to

be heard), the Enquiry Officer, in consideration of the evidence placed before him, ultimately found the Appellant guilty of all the charges levelled

against him; that thereafter the first Respondent issuing a show-cause notice dated 12.4.1987 accompanied by a copy of the Enquiry Report called

upon the Appellant to explain as to why his services should not be terminated; that the Appellant tendered his explanation on 18.4.1987 to mis

show-cause notice and in consideration of the same since been found not satisfactory, the first Respondent terminated the services of the Appellant

by its order dated 7.5.1987.

3. It is further revealed that the termination of the services by the order of the first Respondent dated 7.5.1987 had been challenged by the

Appellant before the appellate authority/the second Respondent herein and the said appellate authority in appreciating the evidence made available

on record in his own way, had ultimately arrived at the conclusion to set aside the order of termination as per his order dated 15.3.1988 made in

T.N.S.E. Appeal No. 6 of 1987. This order of the appellate authority having been challenged by the first Respondent Management in W.P. No.

9214 of 1988, the learned single Judge of this Court who found the proceedings of the second Respondent/appellate authority suffer with illegality,

material misdirection and error apparent on the face of the records, had ultimately allowed the writ petition quashing the proceedings of the second

Respondent.

4. Aggrieved, the Appellant has come forward to prefer the above writ appeal against the said order of the learned single Judge dated 8.1.1998,

on grounds such as,

(i) that the learned single Judge has utterly gone wrong in quashing the order dated 15.3.1988 passed by the appellate authority and categorical

holding on facts that the Appellant had been denied the opportunity of engaging a legal adviser;

(ii) that the learned single Judge erred in his exercise of the power of judicial review under Article 226 of the Constitution of India even when no

error apparent on the face of the records has been proved or established against the order dated 15.3.1988 of the appellate authority thereby

concluding that the domestic enquiry was never conducted in accordance with the principles of natural justice since the Appellant was denied of the

opportunity to engage a legal adviser to defend his case and to put in his written statement;

(iii) that the learned single Judge ought to have appreciated and applied the ratio laid down in (1983) 1 LLJ in favour of the Appellant;

(iv) that the learned single Judge, if at all, ought to have remitted back the impugned T.N.S.E. Appeal No. (of 1987 for taking further evidence in

he interest of justice instead of quashing the order dated 15.3.1988 of the appellate authority;

(v) that the learned single Judge has also not considered the importance of the judicial pronouncement reported in J.K. Aggarwal Vs. Haryana

Seeds Development Corporation Ltd. and others, wherein it is laid down that the representation by a Lawyer is part of natural justice; and

(vi) that the learned single Judge has erred in holding that the proceedings of the appellate authority suffer from illegality, material misdirections and

error apparent on the face of the record while on the other hand it is only the finding and the conclusions arrived at by the Enquiry Officer that is

vitiated and rendered invalid for gross violation of the principles of natural justice.

5. During arguments, the Learned Counsel appearing on behalf of the Appellant besides laying emphasis on the aforementioned grounds of appeal

would particularly stick to the following points, viz.

(i) that the enquiry was conducted without even a Presenting Officer but with an Advocate as an Enquiry Officer;

(ii) that the request of the Appellant to engage an Advocate or a Labour Law Consultant to assist him during the domestic enquiry was turned

down;

(iii) that me Appellant had not been supplied with the statement of the witnesses previously recorded and list of documents relied upon; and

(iv) that no reasonable opportunity had been afforded to me Appellant/workman and hence the enquiry was not a bona fide one.

6. Two judgments would be cited by the Learned Counsel for the Appellant, the first one delivered by the Apex Court in Board of Trustees of the

Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, wherein it is held:

Even in a domestic enquiry there can be very serious charges and adverse verdict may completely destroy the future of the delinquent employee.

The adverse verdict may so stigmatize him that his future would be bleak and his reputation and livelihood would be at stake. Such an enquiry is

generally treated as a managerial function and the enquiry officer is more often a man of the establishment. Ordinarily he combines the role of

Presenting-cum-Prosecuting Officer and an Enquiry Officer, a Judge and prosecutor rolled into one. In the past it could be said that there was an

informal atmosphere before such a domestic Tribunal and that strict rules of evidence and pitfalls of procedural law did not hamstring the enquiry

by such a Domestic Tribunal. We have moved far away from this stage. The situation is where the employer has on his pay rolls labour officers,

legal advisers, lawyers in the garb of employees and they are appointed as presenting-cum-prosecuting officers and the delinquent employee pitted

against such a legally trained personnel has to defend himself. Now if the rules prescribed for such an enquiry, did not place an embargo on the

right of the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the enquiry officer, whether

looking to the nature of charges, the type of evidence and complex or simple issues that may arise in the course of enquiry the delinquent employee

in order to afford reasonable opportunity to defend himself should be permitted to appear through a legal practitioner.

7. The other judgment cited by the Learned Counsel for the Appellant is one delivered by the Apex Court in J.K. Aggarwal Vs. Haryana Seeds

Development Corporation Ltd. and others, wherein it is held:

The right of representation by a lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be

enunciated. Rule 7(5) of the Haryana Civil Service (Punishment and Appeal) Rules recognises that where the charges are so serious as to entail a

dismissal from service the inquiry authority may permit the service of a lawyer. This rule vests a discretion. In the matter of exercise of this

discretion one of the relevant factors is whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a

denial of a real and reasonable opportunity for defence by reason of the Appellant being pitted against a presenting officer who is trained in law.

Legal Adviser and a lawyer are for this purpose somewhat liberally construed and must include ""whoever assists or advises on facts and in law

must be deemed to be in the position of a legal adviser"". In the last analysis, a decision has to be reached on a case to case basis on the situational

particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question whether a person who

as a sequel to an adverse verdict in a domestic enquiry is likely to suffer serious civil and pecuniary consequences should, with a view to giving him

a reasonable opportunity to defend himself, on his request, be permitted to appear through a legal practitioner.

In the present case, the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting

in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience, being

the Personnel and Administration Manager who is stated to be a man of law. It may be that the Appellant was no less adept having been in the

position of a Senior Executive and could have defended, and did defend, himself completely ; but in defending himself one may tend to become

nervous"" or ""tongue-tied"". Moreover, Appellant, it is claimed, has had no legal background.

8. The Learned Counsel for the Appellant would end up his arguments with the request to consider the propositions arrived at by the Apex Court

wherein only two courses are open either to allow the above appeal setting aside the order passed by the learned single Judge or at least to order

fresh enquiry with a remand of the case.

9. On the contrary, the Learned Counsel appearing for the first Respondent Management would impress upon the Court justifying the order

passed by the learned single Judge in all respects, since according to him, it is a well considered and well merited one and the clamour that was

made on the part of the Learned Counsel for the Appellant that the Appellant's request to engage a lawyer to defend him before the Enquiry

Officer had not been considered, has no place in the facts and circumstances encircling the whole affair in the case in hand and would cite a

Division Bench judgment of this Court delivered in *A. Veemen v. The Management of The Paramakudi Cooperative Urban Bank Limited and Ors.*

reported in 1993 Writ L.R. 489, which has been rendered following the judgment of the Apex Court thereby repelling the contentions similar to the

one, which has been raised on the part of the Learned Counsel for the Appellant. The Supreme Court case that had been relied upon is *Saran*

Motors v. Visvanath and Anr. reported in 1964 (II) LLJ 139, wherein then Chief Justice of India Gajendragadkar, speaking for the Apex Court

held:

We repeatedly pointed out that domestic enquiries in industrial relations must be fairly conducted and whenever we are satisfied that any enquiry

was not fairly conducted or its conclusions were not supported by evidence, we have unhesitatingly ignored the findings recorded at such an

enquiry and held that the tribunals must deal with the merits of the dispute for themselves. But it is impossible to accept the argument that because a

person is sometimes employed by the employer as a lawyer he becomes incompetent to hold a domestic enquiry. It is well known that enquiries of

this type are generally conducted by the officers of the employer and in the absence of any special individual bias attributable to a particular officer,

it has never been held that the enquiry is bad just because it is conducted by an officer of the employer. If that be so, it is obviously unsound to

take the view that a lawyer who is not a paid officer of the employer is incompetent to hold that enquiry because he is employer's lawyer and is

paid remuneration for holding enquiry.

Extracting the above paragraph from the judgment of the Apex Court and following the proposition propounded therein towards answering the

two questions (i) whether in a domestic enquiry, the appointment of a Lawyer as an Enquiry Officer, on ground that he is an Advocate, would

hamper or jeopardise the chances of the delinquent? and (ii) whether in the event of the Presenting Officer being not one judicially trained whether

refusal of permission to engage a lawyer to assist the workman would cause violation of the principles of natural justice? the Division Bench of this

Court would answer in the following manner:

The law laid down above is a complete answer to the first submission of the Learned Counsel for the Appellant. In our opinion, a lawyer must

normally be presumed to be a man who can act with a sense of detachment and without bias and prejudice as he is trained in law. In the absence

of any special individual bias attributable to him, no fault can be found with the appointment of a lawyer as an Enquiry Officer in a domestic enquiry

only on the ground that he is an Advocate who had been engaged by the employer to conduct the enquiry....

So far as the second submission of the Learned Counsel for the Appellant is concerned, we also do not find any force in the same. It is not

disputed that the Presenting Officer of the management was only a Secretary of the Society. He was not a legally trained person. The Enquiry

Officer, therefore, was justified in refusing permission to the workman to be represented by an Advocate. There was no violation of the principles

of natural justice because the parties were equally pitted and the management had no unfair advantage over the workman. The workman had been

granted an opportunity by the Enquiry Officer to be represented by any co-employee. If he did not do so, he has to thank himself for it. The refusal

of permission to be represented by a lawyer at the domestic enquiry, in the facts and circumstances of the case, did not violate any principles of

natural justice.

10. On these submissions, the Learned Counsel would emphatically deny the contentions of the Learned Counsel for the Appellant that there had

been any lack of opportunity much less leading to violation of the principles of natural justice or would the enquiry proceeding get vitiated and

would pray to dismiss the appeal in toto.

11. In the light of the above arguments, if the judgment of the learned single Judge is to be testified the learned single Judge has not only considered

the judgment cited on the part of the Appellant reported in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni

and Others, in its right angle for the claim of the Appellant that his request to appear through a legal practitioner was not considered, but also the

other judgments reported in The United Planters Association of Southern India Vs. K.G. Sangameswaran and another, wherein the Section 41(2)

of the Tamil Nadu shops and Establishments Act pertaining to the jurisdiction and

scope of interference of the second Respondent/appellate

authority had been widely discussed.

12. The learned single Judge has also observed that before the second Respondent/appellate authority, both the workman and the management did

not prefer to examine any witness for oral evidence but they have both submitted their written arguments and in consideration of these and other

documents placed by the Management which are related to the notice given and explanations obtained including the findings of the Enquiry Officer,

the second Respondent herein has arrived at his conclusions. The learned Judge would further see that the appellate authority found discrepancies

in the account books and with respect to the third charge would remark that it had already been finalised and the same should not have been

included as one of the charges and the other comments of the appellate authority that if there had been a real misappropriation, the society should

have initiated criminal action against the workman for such huge stock deficit and that the Enquiry Officer should have gone into detail to examine

the specific explanation of the workman on the charges and the ultimate decision arrived at that the enquiry finding got vitiated and on such reasons

allowing the appeal preferred by the workman.

13. The learned single Judge would sum up that the second Respondent/appellate authority has chosen to set aside the orders of the Society on the

following reasons, viz.

(i) that the copy of the enquiry proceedings relating to the examination of witnesses had not been produced before the first Respondent (appellate authority).

(ii) that the enquiry officer had failed to examine in detail the explanation of the worker mentioned in his letter dated 12.9.1986.

(iii) that the charge relating to the stock deficit was the subject matter of proceedings of recovery before the Cooperative Arbitrator and amounts are being recovered.

(iv) that there were some discrepancies in the accounts and though evidence was available to prove the alleged misappropriation, the society had

not initiated criminal action against the worker for stock deficit and alleged misappropriation and the failure to lodge a police complaint is fatal.

14. Tracing the procedures adopted by the Enquiry Officer stage by stage, on perusal of Exs.R.1 to R.57, the learned single Judge would find that

in spite of very many opportunities afforded to the workman by the Enquiry Officer, the workman had not chosen to avail those opportunities and

since the Enquiry Officer was left with no option but to conduct the enquiry, on 22.3.1987 and since the workman had failed to examine his

witnesses after the conclusion of the management side evidence, the Enquiry Officer declining to concede his request for yet another adjournment,

had submitted his report dated 8.4.1987; that thereafter the management had communicated the same to the workman along with the Enquiry

Officer's report on 18.4.1987 and only thereafter the management had passed the order of termination of the workman. On such scenario of the

enquiry proceeding and finding leading to the termination of the services of the workman based on the record of the proceedings made available

before the appellate authority, the learned single Judge would arrive at the conclusion that there had been a fair proceeding with sufficient

opportunity to the workman by the Enquiry Officer and as such there had been no violation of the principles of natural justice.

15. Even as regards the finding of the appellate authority that the Enquiry Officer had not considered the case of the workman in detail, the learned

single Judge would arrive at the just contrary conclusion on ground that the Enquiry Officer had only in consideration of the depositions of the

witnesses and the material documents as well had arrived at his finding on a clear discussion held with respect to all the charges and the defence

case as a whole; that the Enquiry Report, in his considered view, is fair and there is no justification to assume that the Enquiry Officer had failed to

consider the evidence let in by the workman; that the workman had not chosen to examine witnesses in support of his case while producing

Exs.W.1 to W.14 alone, that likewise, even before the appellate authority, the workman did not choose to examine either himself or any witness on

his behalf despite grant of time and adjournments on several occasions and hence there is no pith or substance in saying that the workman was not

afforded with either reasonable or adequate opportunity to defend him effectively and hence neither the Enquiry Officer could be branded

unreasonable nor had he acted arbitrarily to deny opportunity nor could the enquiry report be treated vitiated.

16. Regarding the third reason cited above, alleging the action of stock deficit or misappropriation of funds as arbitrary, the learned single Judge

would assail that the view of the appellate authority cannot be sustained since the Society had already initiated action before the Cooperative Sub

Registrar and after due enquiry, the Sub Registrar had passed an Award in favour of the Society and the said Award had not only become final but

also a statutory one, which the workman had not chosen to challenge. At this score also, the learned single Judge would find no illegality committed

on the part of the Society in framing the charge with respect to misappropriation based on the earlier Award. Hence, the learned single Judge

would conclude that merely because arbitration proceeding had been initiated, such proceeding is not a bar for charges being framed against the

workman.

17. Coming to the last reason that no criminal action or police complaint had been given with respect to the misappropriation or stock deficit, the

learned single Judge would assert that on any account, the non-registering of the criminal complaint would in no manner justify the act of the

appellate authority to reject the charge relating to the stock deficit and misappropriation of funds when there is sufficient evidence to establish the

same in the domestic enquiry, even though it was open for the management to recourse to criminal proceeding also but this negligence alleged

would in no manner hamper the domestic proceeding, which is entirely based on a different set of law and procedure.

18. Likewise, the learned single Judge, also dealing with the point of denial of opportunity to engage a legal practitioner to defend the workman,

admitting that the workman sought for the said permission which "had been rejected and further admitting that the Enquiry Officer was a Law

graduate, would point out that no Presenting Officer had been appointed by the Petitioner Society in this case; that only in the case of the

Presenting Officer with legal qualification getting appointed, the workman could complain of denial of his right of defence through a legal

practitioner or a person well versed in domestic enquiries and this vital aspect having been lost sight of by the appellate authority besides himself

being only a fact finding authority coupled with the fact that the workman having been freely allowed to cross-examine the witnesses effectively and

in the absence of any bye law or resolution enabling the workman to engage a legal practitioner in the domestic enquiry the learned single Judge has

concluded that in the case in hand, no prejudice has been caused to the workman in any manner in respect of the domestic enquiry, held by the

Enquiry Officer resulting in violation of the principles of natural justice and would hold that the views of the appellate authority are not sustainable in

law. Further discussing the cases cited on the part of the workman reported in Board of Trustees of the Port of Bombay Vs. Dilipkumar

Raghavendranath Nadkarni and Others, and (1991) 2 SCC 283 (cited supra) and having further discussion in the light of the above judicial

pronouncements of the Apex Court, the learned single Judge is not inclined to accept the views of the first appellate authority and the contentions

of the Learned Counsel appearing on behalf of the workman that there had been violation of the principles of natural justice and would outright

reject the same.

19. The learned single Judge, further clarifying that the employer Society was not at all represented by a legally trained person and that the

workman had effectively cross-examined the witnesses and that the employer had rightly exercised its jurisdiction, would not accept even the last

reason assigned on the part of the appellate authority but would hold the same cannot be sustained further holding that the proceedings of the

appellate authority suffer from material irregularities and error apparent on the face of the record consequently allowing the writ petition and

quashing the proceeding of the appellate authority.

20. So far as the two main points stressed on the part of the Learned Counsel for the Appellant, relying on the two judgments of the Apex Court

reported in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, and (1991) 2 SCC 283 (mentioned

supra), though the propositions propounded therein have been adequately answered by the learned single Judge with specific instances, it would be

fitting to add some more discussion in the context of the facts encircling the cases referred to and that of the case in hand.

21. In the judgment first cited above, the Apex Court, generally anticipating the consequences that would follow in case of an adverse verdict

visiting the delinquent employee who is pitted against a legally trained

personnel, has suggested that if the Rules prescribed did not place an embargo on the right of the delinquent employee to be represented by a legally trained person at the discretion of the Enquiry Officer, the worker would be permitted to appear through a legal practitioner. For this suggestion made by the Apex Court in this judgment, the very views expressed by the same Apex Court in the second judgment cited by the Appellant himself which is taken at a later point of time will serve as the answer. We extract the relevant portions of the judgment:

The right of representation by a Lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be enunciated.

It is further pointed out therein:

A decision has to be reached on case to case basis on the situational particulars and the special requirements of justice of the case.

Ultimately, adhering the facts of the case dealt with by the Apex Court, it would remark:

In the present case, the refusal to sanction the services of a Lawyer in the enquiry was not a proper exercise of the discretion under the Rule resulting in a failure of natural justice particularly in view of the fact that the Presenting Officer was a person with legal attainments and experience.

22. Needless to mention that the answer to the question raised on the part of the Learned Counsel for the Appellant with the support of the first

judgment cited above regarding the rejection of the request of the Appellant to engage an Advocate or a Labour Law Consultant to assist him

during the domestic enquiry lies within the second judgment cited by the very counsel for the Appellant as shown in the preceding paras. Firstly, the

right of representation by a lawyer may not in all cases be held to be a part of natural justice. Secondly, a decision has to be reached on case to

case basis and thirdly, only in strict adherence to the facts of the case dealt with by the Hon''ble Apex Court wherein the Presenting Officer was a

legally trained person. The Apex Court had been prompted to arrive at the conclusion in that case that the refusal therein to sanction the services of

the lawyer in the enquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice. On the contrary, in the

case in hand, no legally trained person was acting as the Presenting Officer and

since the workman was not pitted against such a legally trained person, the rejection of his request to engage a lawyer to assist him in the enquiry proceeding is on justifiable reasons and the learned single Judge has rightly ratified the same.

23. Further more, the Division Bench judgment rendered in the case reported in 1993 Writ.L.R. 489 following the judgment of the Apex Court reported in 1964 (II) LLJ 139 is all pervasive on the subject wherein both the main questions raised by the Appellant have been well answered, first regarding the appointment of legally trained person as the Enquiry Officer opining thereby that a Lawyer must normally be presumed to be a man who can act with the sense of detachment and without bias and prejudice."...In the absence of any special individual bias attributable to him, no fault can be found with the appointment of a Lawyer as an Enquiry Officer in a domestic enquiry" and secondly, regarding the rejection of the request of the Appellant to permit him to engage a legally trained person to assist him during the domestic enquiry, observing it is not disputed that the Presenting Officer of the Management was not a legally trained person. The Enquiry Officer, therefore, was justified in refusing permission to the workman to be represented by an Advocate. There was no violation of the principles of natural justice because the parties were equally pitted and the Management had no unfair advantage over the workman". It is relevant to point out that in the case in hand there is no Presenting Officer himself.

24. For all the above discussions held, it must be mentioned that all the questions raised on the part of the Appellant have been elaborately considered by the learned single Judge and adequately answered so as to arrive at the valid conclusion that the proceedings of the second Respondent suffered with illegality, material misdirections and error apparent on the face of the records, consequently, quashing the proceedings of the second Respondent. The learned single Judge has assigned tangible reasons in justification of the enquiry proceeding as held by the Management and as such neither we are able to see any serious infirmity nor inconsistency affecting the enquiry proceeding held by the Enquiry Officer in this case nor has there been any error or legal flaw in the manner in which the learned single Judge has ratified the same in application of

the law governing such domestic proceedings. It is also not out of place to mention that patent errors of law and perversity in approach have crept

in enormously in the order passed by the appellate authority, which have been rightly pointed out with specific instances by the learned single Judge

so as to arrive at the right conclusion to set aside the same.

25. In short, we are in perfect agreement with the conclusion arrived at by the learned single Judge since they have been arrived at on valid and

tangible reasons assigned both in setting aside the order of the appellate authority and restoring the order of the disciplinary authority. Therefore,

the interference of this Court that is sought to be made into the order of the learned single Judge by the Appellant herein is neither necessary nor

required in the circumstances of the case.

26. In result, the above Writ Appeal fails and the same is dismissed.

27. The order of the learned single Judge dated 8.1.1998 made by W.P. No. 9214 of 1988 is hereby confirmed.

28. However, in the circumstances of the case, there shall be no order as to costs.