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**(2002) 06 AP CK 0142**  
**In the Andhra Pradesh High Court**  
**Case No : Writ Petition No. 4122 of 1998**

Gopi Hotel

APPELLANT

Vs

S. Naidu and Others

RESPONDENT

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**Date of Decision :** 27-06-2002

**Acts Referred:**

Andhra Pradesh Shops and Establishments Rules, 1968 — Rule 20(3)

**Citation :** (2002) 6 ALT 417 : (2003) 2 LLJ 259

**Hon'ble Judges :** L. Narasimha Reddy, J

**Bench :** Single Bench

**Advocate :** M.V. Rama Rao and Srikanth Reddy, for the Appellant; Mirza Nisar Ahmed Baig and G.P. for Food and Agriculture for Respondent Nos. 2 and 3, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

L. Narasimha Reddy, J.—The petitioner challenges the common order passed by the second respondent in S.A. Nos. 56 and 68 of 1986, filed under the provisions of Section 41 of the Andhra Pradesh Shops and Establishments Act, 1966.

2. The petitioner is a hotel, wherein the first respondent was employed as a cook. The first respondent was alleged to have indulged in acts of indiscipline. Through order dated December 7, 1983 the petitioner terminated the services of the first respondent. The order of termination was challenged by the first respondent by filing an appeal before the third respondent under the provisions of the Shops and Establishments Act, 1966. The third respondent, through his order, dated February 18, 1986, held that there is no irregularity in the proceedings culminating in the termination of the services of the first respondent. However, treating the punishment imposed against the petitioner as disproportionate and finding that it is not possible to direct reinstatement of the first respondent, ordered payment of an amount of Rs. 3,500 as compensation in lieu of reinstatement.

3. The first respondent filed S.A. No. 56 of 1986 in so far as he was aggrieved by the order of the third respondent refusing reinstatement. The petitioner herein filed S.A. No. 68 of 1986 against the order of the third respondent directing payment of compensation.

4. The second respondent clubbed both the appeals and passed a common order, dated October 20, 1987. Having discussed the matter at length, on various aspects, the second respondent took the view that the order of termination, was not preceded by a notice, as contemplated under proviso to Rule 20(3) of the Shops and Establishments Rules, 1968, (hereinafter referred to as the Rules), and accordingly set aside the order of termination as well as the order of the third respondent and directed reinstatement of the first respondent with back-wages.

5. Sri M.V. Rama Rao, learned counsel for the petitioner, submits that the view taken by the second respondent as to issuance of notice to the first respondent, in the circumstances of the case, was totally unsustainable. He submits that the question of issuance of notice under the said provision would arise only if employer finds that the punishment was imposed only on the basis of the conduct. According to him, in the present case, the punishment was imposed on the basis of the misconduct resorted to by the first respondent, and the past conduct was taken into account only to see whether it mitigates the gravity of the misconduct.

6. Sri Mirza Nisar Ahmed Baig, learned counsel for the first respondent, on the other hand submits that the second respondent has appreciated the matter in its proper perspective and since it was established beyond doubt that the petitioner did not issue any notice as contemplated under Rule 20(3) of the Rules, the order of termination was vitiated.

7. The only question that arises for consideration in this case is as to whether, in the facts and circumstances of the case, it was obligatory on the part of the petitioner to issue notice as contemplated under proviso to Rule 20(3) of the Rules. To appreciate the contention, it is necessary to extract Rule 20(3) of the Rules.

"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.

Provided that no punishment shall be awarded based on the previous record and other circumstances that may exist unless the employee has been given an opportunity of making representation in respect of those charges."

8. A reading of the above rule indicates that before imposing the punishment, the employer shall take into account the past conduct as well as any extenuating or aggravating circumstances that may exist. The purport of Sub-rule (3) of Rule 20 of the Rules, as in the case of similar provisions in other service rules, is that

even where an employee is found guilty of misconduct, while considering the imposition of punishment, the employer is under obligation to consider the past conduct as well as other extenuating circumstances. The reason is that the employee may be compelled to resort to the acts, which may turn out to be misconduct under various circumstances. Whatever may have been the circumstances under which the employee has resorted to acts of misconduct, if his past conduct is such that he cannot be inflicted with such severe punishment, or that he deserves to be exonerated, that benefit should be extended to him.

9. Under the rules a situation emerging in reverse direction is also contemplated. In a given case, the acts which give rise to the disciplinary proceedings may be rather insignificant. However, if the cumulative effect of the past misconduct, as well as the one which gave rise to the current disciplinary proceedings is such that, it is no longer desirable to exonerate the employee, the employer may think in terms of imposing relatively severe punishment than what the act of misconduct under the current: proceedings may warrant. To put it in other words, the act or misconduct that gave rise to the current proceedings may be treated as the last straw on the camel's back. It is under these circumstances, that proviso to Sub-rule (3) of Rule 20 of the Rules requires the employer to issue notice to the employee.

10. When such is the clear distinction between the situations contemplated under Sub-rule (3) of Rule 20 of the Rules on one hand, and proviso thereto on the other hand, there is no possibility of taking one situation for the other at all. It clearly depends upon, whether, at the end of disciplinary proceedings, the employer was contemplating to consider the feasibility of reducing or, as the case may be, enhancing the same on the basis of the past conduct and other extenuating or aggravating, circumstances. Examined from this point of view, it is clear that the petitioner did consider the past conduct of the first respondent only to see whether the same can mitigate the punishment. It was not even the plea of the first respondent that the petitioner considered his past conduct and thereby enhanced the otherwise less vigorous punishment. The second respondent in its order has observed as under:

"In the instant case, Rule 20(3) and the proviso have been violated by the management because it is seen from Exhibit A1 which is the termination order issued to the employee terminating his services with effect from December 7, 1983 stating that they have considered his past record and found nothing to mitigate the punishment. That being so, in my view, it was incumbent upon the management to have issued notice to the employee giving the details of the past record which does not find anything to mitigate the punishment."

The approach of the second respondent was rather self-contradictory and it fails to draw a distinction between Sub-rule (3) of Rule 20 of the Rules on one hand, and proviso thereto on the other. That was unfortunately the basis on which the order of termination was set aside. Inasmuch as it was found that the view taken by the second respondent is unsustainable and runs contrary to the express

provisions of Rule 20(3) and proviso thereto, the order under challenge is accordingly set aside.

11. The result is that the first respondent shall be entitled to be paid compensation in lieu of termination fixed at Rs. 3,500. It is reported that the amount has been since deposited. I feel that ends of justice will be met if the amount is enhanced by another Rs. 5,000. The petitioner shall deposit the balance amount and the first respondent shall be entitled to withdraw the same. The petitioner shall deposit the amount within four weeks from today and the first respondent shall be entitled to withdraw the amounts together with interest accrued thereon.

12. The writ petition is allowed to the extent indicated as above. No costs.