

(2001) 03 AP CK 0107

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 24691 to 24700 of 2000

Hindustan Coca-Cola Beverages Private Limited

APPELLANT

Vs

Authority under Section 48(1) of the A.P. Shops and
Establishments Act, 1988 cum-the Assistant Commissioner of
Labour Ranga Reddy, Circle - I, Hyderabad and others

RESPONDENT

Date of Decision : 23-03-2001

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 38(3), 42

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10

Citation : (2001) 3 ALD 204 : (2001) 3 ALT 322 : (2001) 89 FLR 1078

Hon'ble Judges : E. Dharma Rao, J

Bench : Single Bench

Advocate : Mr. K. Kasturi and Mr. C.R. Sridharan, for the Appellant; Government Pleader for Labour and Mr. P. Sridhar Rao, for the Respondent

Judgement

1. These writ petitions can be disposed of by this common order inasmuch as the issues involved in these writ petitions are one and same.

2. These writ petitions are filed against the order of the Authority u/s 48(1) of the A.P. Shops and Establishments Act, 1988 (for brevity the Act), whereby the Authority has set aside the dismissal order dated 25-8-1999 as illegal and directed the third respondent therein to reinstate the petitioner into service with effect from 23-12-1998, treating the petitioner, as if he was not dismissed from service by the respondent No.2 and transferred the respondent No.3, with continuity of service with full back wages and all other attendant benefits.

3. Aggrieved by the said orders passed by the Authority, the third respondent therein i.e., M/s. Hindustan Coca Cola Beverages Private Limited, has preferred these writ petitions stating that it is not an employer of the ten workmen respondents and, therefore, the question of directing it by the Authority, to reinstate them into service and paying full back wages and all other attendant

benefits is illegal, that the writ petitioner has become owner of the unit by virtue of the agreement between the 2nd and the 3rd respondents to transfer the unit from 2nd respondent to the 3rd respondent. Therefore, it is not the immediate employer of the workmen and thus the question of reinstating the workmen into service with full back wages and other benefits does not arise.

4. Few facts in giving rise to the filing of these writ petitions are that the respondents workmen joined the service of M/s. KSSV Enterprises, as its their employees in different capacities in the year 1982 and they have put in unblemished record of service till they were illegally removed by the 2nd respondent therein. While removing them, the 2nd respondent has not considered their past conduct, length of service, gravity or misconduct alleged against them and the quantum of punishment imposed by the respondents is relatively severe than the misconduct alleged against them. The workmen were suspended by order dated 21-12-1998 which was served on 22-12-1998 mid night. On the next day i.e., on 23-12-1998, all the business activities were taken over by 3rd respondent from the 2nd respondent with all liabilities and assets. It is further stated that the workmen suspended without there being any authority in order to avoid their transfer to third respondent, that on 22-12-1998 the respondent workmen were suspended making certain allegations, that the order was issued by the Assistant Manager, who is not the competent authority to issue suspension order or charge-sheet and, therefore, the suspension order, charge-sheet and the subsequent orders passed by the incompetent authority are not legal. It is further submitted that in respect of the charge-sheet, the workmen have submitted their explanation denying the charges as false and incorrect, but without considering the explanation, the 2nd respondent ordered an enquiry into the matter and enquiry was conducted without giving reasonable opportunity to the workmen respondents. It is alleged that the workmen respondents have allegedly misappropriated some amounts and whether they are bound to collect the freight charges from M/s. Satya Enterprises and could not deposit with the second respondent therein and that whether the charges of misappropriation is valid, when the amounts were deposited prior to suspension and framing of charges.

5. On the basis of the evidence and the material placed before the first respondent,, the first respondent - first appellate authority has set aside the dismissal order and directed for reinstatement as stated above.

6. The issue involved for the consideration of this Court is when statute provide for second appeal u/s 48(3) of the Act, the writ petitioner is entitled to invoke extraordinary jurisdiction of this Court under Article 226 of the Constitution.

7. While addressing the arguments oil behalf of the writ petitioners, the learned senior Counsel Mr. K. Kasluri, submitted that the writ petitioner is not the employer of the workmen respondents, by virtue of the agreement between the petitioner and the 3rd respondent the unit was transferred to it and as per the terms and conditions of the agreement, the transfer of 195 employees, who were

working in the unit, is as per the terms and conditions of the agreement, the workmen who are facing disciplinary proceedings or inflicted with punishment are not liable to be transferred and therefore, the workmen who are facing disciplinary proceedings as on the date of transfer of the unit, were not transferred and, therefore, the workmen are not the petitioner's employees. Therefore, the first appellate authority has erred in directing the petitioner to reinstate the respondents workmen into service with back wages and attendant benefits. It is also contended that when once the petitioner is not an employee of the respondents workmen, the question of approaching the second appellate authority u/s 48 of the Act and depositing the back wages, as directed by the first appellate authority under proviso to Section 48(3) of the Act does not arise.

8. As per the terms and conditions of agreement, the unit was transferred to the petitioner on 23-12-1998 and from that day onwards, it has become the employer of the workmen who are transferred from the 3rd and 4th respondents, that once the unit is transferred from 3rd and 4th respondents to the petitioner, the employees who worked with the 3rd and 4th respondent, who are facing disciplinary proceedings are entitled for compensation but they are not liable to be transferred and relied on the judgment of the Supreme Court *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, . In this case, the company was engaged in manufacture of sugar and was running in loss and, therefore, I sold its machineries and the business to a Co-operative Society and it was agreed as part of sale transaction that the company should pay to its employees the statutory compensation, which was paid by the company; that the society did not purchase the goodwill of the company, that it did not purchase the outstanding and the liabilities of the company, 4000 bags of processed sugar were left with the company alongwith part of its land. The society continued the same business in the same place without any appreciable break and took in its employment a number of employees of the company. The dispute in regard to the claim of re-employment by the employees of the company who were not taken in service by the society was referred to the Industrial Tribunal for adjudication. The Industrial Tribunal held that the society was a successor in interest of the company and made necessary directions to the society to give re-employment to the concerned employees.

9. The issue considered in this judgment is with regard to the double benefit. The double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any one consideration of fair play and justice. Fair play and justice obviously mean fair play and social justice to both the parties and therefore, it would not be fair that the vendor should pay the compensation to his employees on the ground that the transfer brings about the termination of their services and the vendee should be asked to take them back on the ground that the principles of social justice require him to do so. Their Lordships further observed the industrial principle underlying the award of retrenchment compensation, that to give partial protection to workmen who are thrown out of employment for no fault of their own, to tide over the period of

unemployment. Therefore, if the transferor is by statute required to pay retrenchment compensation to his workmen, it would not be anomalous to suggest that the workmen who received compensation were entitled to claim immediate re-employment in the concern at the hand of the transferee. It is further held that the contention that in cases of this kind the workmen must get retrenchment compensation and re-employment almost simultaneously is inconsistent with the very basis of the concept of retrenchment compensation.

10. Applying the principle laid down in the above judgment to the facts of this case, it is manifest that the workmen are not seeking payment of either compensation or re-employment. What they are seeking is reinstatement into service in view of the order of the first appellate authority setting aside the order of dismissal passed by the first respondent herein.

11. As per the agreement, the petitioner has transferred 195 employees, but the respondents workmen could not be transferred on the ground that disciplinary proceedings are pending against them. After the order of dismissal of the respondent workmen was set aside by the 1st appellate authority, they are seeking reinstatement into service. The writ petitioner is relying on the agreement between the petitioner and the respondents 3 and 4, to transfer the employees who were working in the, unit before the sale of the petitioner unit. The petitioner has not filed copy of the agreement for perusal of this Court as to the existence of such a condition in the agreement restricting transfer of workmen who are facing disciplinary proceedings. Even according to the learned Counsel for the respondents, an interlocutory application was filed for production of the agreement, but the same was not produced before the first appellate authority, not even before this Court. In these circumstances, in the absence of production of the agreement, it can be presumed that there is no such condition contemplated to transfer the employees, who are facing departmental enquiry. On the other hand, one day before the transfer of unit, enquiry proceedings were initiated against the respondent workmen. Since the respondent workmen are not seeking retrenchment compensation or immediate re-employment, the ratio laid down in *Ankapalle Co-operative Agricultural and Industrial Society's* case, is not applicable to this case. Therefore, I have no hesitation in holding that the respondent workmen after transfer of the unit from the 3rd and 4th respondent are entitled to reinstatement, as ordered by the first appellate authority.

12. The second issue raised is whether the petitioners are entitled to file writ petition under Article 226 of the Constitution of India when the statute provide for a second appeal u/s 48 (3) of the Act?

13. The learned senior Counsel submitted that if the petitioners resort to filing of second appeal u/s 48(3) of the Act, before the Second Appellate Authority, then under proviso, the employer has to deposit the entire amount of back wages as ordered by the Appellate Authority under sub-section (2), the amount of compensation as the case may be, provided further that if the second appeal is against the order of reinstatement given by the Appellate Authority under sub-

section (2), the employees shall be entitled to wages last drawn by him during pendency of the proceedings before the appellate authority. Therefore, it is contended that when the petitioner is not the employer of the respondent workmen, the question of filing second appeal before the second appellate authority and depositing back wages as directed by the first appellate authority does not arise. He further contended that the Constitutional Bench of the Supreme Court in *Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another*, has held that though a second appeal is provided under the Madhya Pradesh General Sales Tax Act but the appellate authority has to deposit a portion of the tax before an appeal or revision can be filed, they can approach the High Court under Article, 226 of the Constitution of India, therefore, if the petitioner is directed to approach the second appellate authority, it has to deposit the entire amount of back wages as directed by the first appellate authority under proviso to sub-section (3) of Section 48 of the Act. The above finding was arrived at by the Supreme Court in the case of *M/s. Filterco*, when the parties have filed writ petition against the order passed by the Commissioner insofar as it went against them. The High Court disposed of the writ petition without entering into the merits by stating that it is not the case of the petitioners that in passing the impugned order, the Commissioner has acted contrary to the procedure prescribed by the Act or the Rules made thereunder. The petitioners having referred the dispute to the Commissioner he had jurisdiction to pass the impugned order. The Court further held that if the petitioners are aggrieved by the decision of the appellate authorities, a reference to the Supreme Court u/s 44 of the Act can be made and that since a remedy is available to the petitioners under the Act, it is not necessary to invoke the extraordinary jurisdiction of the Court under Article 226 or 227 of the Constitution of India. Aggrieved of the said decision, the appellants preferred the appeal after obtaining special leave.

14. The Supreme Court while considering the above issue, observed that the High Court should have examined the merits of the case instead of dismissing the writ petition in limine in the matter it has done, that the order passed by the Commissioner, Sale Tax was clearly binding on the assessing authority u/s 42-B(2) and although, technically it would have been open to the appellants to urge their contentions before the appellate authority; namely the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner has already passed a well considered order in the exercise of his statutory jurisdiction. under sub-section (1) of Section 42-B of the Act holding that u/s 21, varieties of the compressed woollen fed manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. The Honourable Supreme Court, therefore, held that the High Court ought to have considered the pronouncement upon the merits of the contentions raised by the parties and the summary dismissal of the writ petition was not justified.

15. The learned senior Counsel relied on the observations of the Supreme Court

in M/s. Fillerco 's case, to the extent that u/s 38 (3) of the A.P General Sales Tax Act, a substantial portion of tax has to be deposited before an appeal or revision is filed. This observation was made by their Lordships when the appellant therein preferred writ petition without availing appeal or revision, as provided u/s 38(3) of the MP General Sales Tax Act considering the fact that when the Commissioner himself has passed well considered impugned order, preferring an appeal to the Appellate Assistant Commissioner would have been a mere exercise in futility when the Superior Officer i.e., the Commissioner has passed the impugned order, in exercise of his statutory jurisdiction under sub-section (1) of Section 42-B of the Act holding that 21 varieties of the compressed woollen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. That contingency does not arise in the facts and circumstances of this case. This observation was made by the Supreme Court in view of the fact that when the Superior Authority himself has passed a well considered order, the filing an appeal before Assistant Appellate Commissioner, is nothing but a mere formality.

16. In this case, the deposit of back wages has to be made by the writ petitioner, as provided under proviso to Section 48 (3) of the Act, as back wages are directed by the first Appellate Authority which the workmen respondents are entitled to receive to mitigate their suffering due to loss of employment. Further the tax will be credited to the State Exchequer, whereas the back wages are payable to the workmen who are deprived of their livelihood during the period of dismissal. Thus the Legislature has incorporated this provision to deposit the back wages, as directed by the first appellate authority, to enable the second appellate authority to distribute the back wages to the workmen. There is vast difference between the deposit of tax and payment of back wages to the workmen. If tax is not deposited to the State Exchequer, nothing serious may happen, but the deposit of the back wages is mandatory in view of the fact that the said sum has to be distributed to the workmen, during the period of their termination to feed their dependents. Thus the ratio is distinguishable on more than one ground and does not help the petitioner in any way. Therefore, it is mandatory on the part of the petitioner to deposit back wages, as directed by the first appellate authority, before filing second appeal, as contemplated under proviso to Section 48 (3) of the Act.

17. Insofar as the question of maintainability of the writ petitions is concerned, the learned Senior Counsel has relied on the judgment of the Supreme Court Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , and further submitted that mere existence of an alternative remedy to file second appeal against the order of the 1st Appellate Authority is not a bar to approach this Court under Article 226 of the Constitution of India. This appeal arose out of the judgment rendered by the Allahabad High Court dismissing the writ petition filed by the appellant therein on the ground of existence of alternative remedy u/s 68 of the UP State Universities Act, 1973. The appellant therein Dr. Smt. Kuniesh Gupta was appointed as Principal of Hindu Kanya Mahavidyalaya, Sitapur, on 4-6-1984 and was confirmed in that post on

4-5-1985, that in view of existence of two unrecognised rival committees of Management, the State Government, in exercise of its power u/s 58 of the UP State Universities Act, appointed one of the Additional District Magistrates of the District as the Authorised Controller of the Institution and the Authorised Controller was entitled to exercise all the powers of the Committee of the Management. The appellant as the Principal of the Institution and the authorised Controller could not see eye to eye with each other and there were disputes and differences between them in regard to the management of the Institution and the difference reach to such a degree that the Authorised Controller by his order dated 27-1-1986 suspended the appellant, which was stayed by the Vice-Chancellor of the University on 29-1-1986 and after hearing the appellant and the Authorised Controller, the Vice-Chancellor maintained the stay order and the Authorised Controller held an ex parte enquiry and by his order dated 21-4-1986 dismissed the appellant from service in exercise of the powers of the Managing Committee vested in him by Statute 17.06 of the Statute of University, which provides for giving an opportunity of being heard to the teacher concerned and prescribes a procedure for enquiry which, according to the appellant, was not followed by the Authorised Controller. A copy of the dismissal order was sent to the Director of Education and to the Vice-Chancellor for approval, as required under Statute 17.06(3). The Vice-Chancellor after hearing the parties, by her order dated 24-1-1987 disapproved the order of dismissal of the appellant on the ground that the charges against the appellant did not warrant her dismissal from service and directed that the appellant should be allowed to function as Principal of the College forthwith. After the said order was passed by the Vice-Chancellor reinstating the appellant and granting liberty to the Authorised Controller to impose lesser punishment on the appellant, if deemed necessary, the Authorised Controller without passing any lesser punishment, by his order dated 27-1-1987 allowed the appellant to function as the Principal, but put various restraints and constraints on her powers and duties as Principal and directed her to vacate the quarters in which she was residing. Thereafter, she approached the High Court and filed writ petition and during the pendency of the writ petition, the Vice-Chancellor has passed an order on 7-3-1987, three days before the judgment of the High Court reviewing her earlier order, disapproving the dismissal of the appellant from service, and the Vice-Chancellor, by order dated 17-3-1987 passed on review, approved the order of the Authorised Controller, dismissing the appellant from service on the basis of two reports of the Joint Director of Higher Education, UP, dated 1-8-1986 and 18-7-1986 alleging great financial irregularities committed by the appellant. Once again thereafter, the appellant filed writ petition under Article 226 of the Constitution of India against that order dated 7-3-1987 passed by the Vice-Chancellor, but the High Court has taken objection that the impugned order can be challenged on a reference to the Chancellor of University u/s 68 of the UP State Universities Act, 1973 and accordingly dismissed the same on the ground of existence of alternative remedy.

18. Against that order of the High Court, the appellant approached Supreme

Court and the Apex Court while considering the matter, held that it is now well settled that a quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the Statute under which it derives its jurisdiction, that the Vice-Chancellor, in considering the question of approval of an order of dismissal of the Principal, acts as a quasi-judicial authority. It is not disputed that the provisions of the UP State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-Chancellor. In those circumstances, it was held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated 24-1-1987 by her order dated 7-3-1987 and therefore, the order dated 7-3-1987 passed by the Vice-Chancellor is a nullity.

19. The Apex Court also considered the question as to whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy, and observed that it is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor of the University u/s 68 of the UP State Universities Act, but held that an alternative remedy is not an absolute bar to the maintainability of a writ petition where an Authority has acted wholly without jurisdiction on the ground of existence of an alternative remedy. In Smt. Kuntesh Gvpta's case, the Vice-Chancellor had no power to review and the exercise of such a power by her was absolutely without jurisdiction and the order passed on review was a nullity, therefore, such an order is surely liable to be challenged before the High Court by a petition under Article 226 of the Constitution of India and thus the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant u/s 68 of the UP State Universities Act.

20. The learned senior Counsel also placed reliance on the judgment of the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , wherein, the Apex Court has considered the maintainability of the writ petition under Article, 226 of the Constitution of India and held that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction, but the alternative remedy has been considered by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The Supreme Court in Rashid Ahmed Vs. The Municipal Board, Kairana, , has ruled that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This judgment was followed by

another judgment K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., , which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226 and this proposition was, however, qualified by the significant words "unless there are good grounds therefor" which indicate that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 of the Constitution could still be entertained in exceptional circumstances. Thus it mandates that the writ petition cannot be rejected for not exhausting the alternative remedy where it is filed for enforcement of fundamental rights, or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged; further where alternative remedy existed it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution and it is qualified by the words "unless there are good grounds therefor".

21. Applying the ratio that emerges from the above decisions to the facts and circumstances of the instant case, these writ petitions were filed on the ground that the writ petitioner is not the employer of the respondent workmen in view of the transfer of the unit from the respondents 3 and 4 to the petitioner and, therefore, the 1st appellate authority cannot direct the petitioner to pay back wages and reinstate them. The petitioner, basing on the agreement between the petitioner and the 3rd and 4th respondents, transferred as many as 195 workmen from the respondent 3 and 4 unit to the petitioner and it is refusing to take the respondents workmen into service, contending that there is a condition in the agreement that those workmen, who were facing disciplinary proceedings, cannot be transferred. As observed in the foregoing paragraph, the petitioner has failed to produce copy of the said agreement for perusal of either the first appellate authority or this Court. Therefore, in the absence of the agreement, the respondent workmen are entitled to be taken into service by the petitioner, who is the successor employer of the unit. The second ground on which the petitioner has not approached the second appellate authority is that the appellant has to deposit back wages, as directed by the first appellate authority. On these two grounds, the petitioner, instead of approaching the Second Appellate Authority, has approached this Court invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution, without exhausting the existing alternative remedy u/s 48(3) of the Act. The petitioner is unable to satisfy any of the conditions for invoking writ jurisdiction of this Court viz., for enforcement of any of the fundamental rights, that there has been a violation of principle of natural justice, that the impugned order was wholly without jurisdiction or that vires of the Act is challenged. The petitioner has participated in the enquiry before the first appellate authority and the petitioner was given full opportunity of being heard and after considering his version, the first appellate authority has passed the order. The question whether the first appellate authority has passed the order correctly has to be further scrutinised by the second appellate authority

only and not this Court under extraordinary writ jurisdiction under Article 226 of the Constitution, inasmuch as there is no violation of fundamental rights, no violation of the principles of natural justice, or the proceedings were passed without jurisdiction or that the vires of any Act is challenged. Unless the petitioner justified one of the above aspects, without availing the alternative remedy, the writ petitions cannot be entertained as the High Court has imposed upon itself certain restrictions on itself.

22. In similar circumstances, this Court also dismissed Writ Petition No.15530 of 2000 by "order dated 13-11-2000 and Writ Petition No.26938 of 1999 by order dated 18-1-2000, holding that the writ petitions are not maintainable under Article 226 of the Constitution of India, in the High Court, which are filed without preferring second appeals provided under Section"48 (3) of the Act. Therefore, these writ petitions can also be dismissed as not maintainable on the ground of availability of alternative remedy provided u/s 48 (3) of the Act. Therefore, I am unable to appreciate the contentions raised by the learned senior Counsel. Therefore, the writ petitions are devoid of merits and they are accordingly dismissed. No costs.