

(2011) 09 AP CK 0117

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 3293 of 2005 and 5620 of 2011

Hyderabad Co-Operative Central Trading Society Ltd.,
Hyderabad

APPELLANT

Vs

The Second Appellate Authority Under Section 48(3) of The
A.P. Shops and Establishments Act, 1988 and Deputy
Commisioner of Labour, Hyderabad and Two Others

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Andhra Pradesh Shops and Establishments Act, 1988 — Section 48, 48(3), 73, 73(1)
Constitution of India, 1950 — Article 66
Hyderabad Cooperative Central Trading Society Ltd., Service Rules — Rule 30, 35
Industrial Disputes Act, 1947 — Section 25FF

Citation : (2011) 09 AP CK 0117

Hon'ble Judges : G. Chandraiah, J

Bench : Single Bench

Advocate : A.K. Jayaprakash Rao, for the Appellant; S. Ravindranath, for the Respondent

Final Decision : Dismissed

Judgement

The Hon''ble Sri Justice G. Chandraiah

1. Heard both the counsel.
2. As both the writ petitions arise out of the common order passed by the lower authority and the parties are same, they are being disposed of by this common order.
3. The 3rd respondent in both the writ petitions was working as Assistant Business Manager/Public Relation Officer, Lakshmi Super Bazar, Hyderabad, which is the unit of the writ petitioner - Hyderabad Co-operative Central Trading Society Ltd., Hyderabad. He was charge sheeted by memo No.1/Enq/99-I dated 6.11.1999 for the following charge:

That you Sri S. Viswanatha Rao, while working as Asst. Business Manager/PRO, Lakshmi Super Bazar, Hyderabad (now defunct), a unit of the Hyderabad Coop. Central Trading Society Ltd., Hyderabad, during the period from 1989-90 to 1994-95, have indulged in falsification of accounts and other records and deliberately made fraudulent payments and misappropriated an amount of Rs.1,89,300.83 (Rupees one lakh eighty nine thousand three hundred and paise eighty three only) and thereby caused pecuniary loss to the Lakshmi Super Bazar and pecuniary gain to yourself and thus failed to serve honestly and faithfully and committed grave misconduct by misusing/abusing the powers vested in you and violated Rules 30 and 35 of the Hyderabad Cooperative Central Trading Society Ltd., Service Rules.

4. The 3rd respondent submitted his explanation and not being satisfied with the same, enquiry was conducted and the enquiry officer found the 3rd respondent guilty in the domestic enquiry and after issuing show cause notice and calling for the explanation, eventually he was dismissed from service by proceedings dated 21.8.2000. Aggrieved by the same, 3rd respondent filed appeal in S.A.No.14 of 2002 before the Authority under the Shops and Establishment Act, 1988 (for short "the Act") and the Assistant Commissioner of Labour-III, Hyderabad. The appeal was filed u/s 48 of the said Act. By order dated 24.3.2004, the lower authority held that the enquiry is conducted in violation of the principle of natural justice and that the charge is not proved and accordingly allowed the appeal filed by the 3rd respondent and set aside the order of dismissal and granted reinstatement with continuity of service.

5. Aggrieved by the order of the lower appellate authority in having allowed the appeal and denied back wages, the 3rd respondent filed second appeal in S.A.No.10/2004 on the file of the Authority u/s 48(3) of A.P. Shops and Establishment Act, 1988 & Deputy commissioner of Labour, Hyderabad (Twin Cities). Similarly, challenging the order of the primary authority in set setting the order of the dismissal and allowing the appeal filed by the 3rd respondent, the management filed other appeal in S.A.No.12/2004. By common order dated 3.2.2005, the lower appellate authority, dismissed the second appeal filed by the management and allowed the second appeal filed by the 3rd respondent and granted back wages along with attendant benefits.

6. Now aggrieved by the order of the lower appellate authority in dismissing the appeal filed by the writ petitioner in S.A.No.12/2004, W.P.No.5620 of 2011 has been filed and similarly, aggrieved by the order of the lower appellate authority in allowing the appeal filed by the 3rd respondent in S.A.No.10/2004 and thereby granting back wages along with other attendant benefits, the other writ petitioner in W.P.No.3293/2005 has been filed.

7. The learned counsel appearing for the petitioner - society submitted that that the 3rd respondent while working as Assistant Business Manager/Public Relation Officer has committed serious irregularities and misappropriated the amount of Laxmi Super Bazar, which is the unit of the petitioner -society and which is now

closed, to a tune of Rs.1,47,437,23-23 and complying with the procedure and following the principles of natural justice, the enquiry officer found him guilty based on the evidence and accordingly, he was terminated from service. The primary authority as well as appellate authority, without any cogent reasons, interfered with the findings of fact recorded by the enquiry officer and set aside the same. He contended that when the enquiry officer found the 3rd respondent guilty based on evidence, the authorities below are not justified in interfering with the findings of fact. He submitted that a suit in O.S.No.857/2001 was filed against the 3rd respondent by the petitioner -society on the file of VI Senior Civil Judge, Fast Tract Court, Rangared dy District for the recovery of the said amount. He contended that 3rd respondent was an exempted employee u/s 73(i)(a) of Act, as he was holding the post of supervising the work of all the employees who were working under his control and that he is holding the post of Assistant Business Manager/Public Relation Officer and hence, the authorities have no jurisdiction to entertain the appeal. Without considering this aspect, the authorities below erroneously held that the functions of the 3rd respondent do not fall within the ambit of managerial functions. This is a perverse finding and the same needs to be interfered with. He submitted that the petitioner - society earlier filed writ petitions before this court in W.P.Nos.11540/2003 and by order dated 11.9.2003 this court directed to decide the validity of the domestic enquiry as a preliminary issue, but the primary authority disposed of the main appeal itself and if the domestic enquiry was found to be not in conformity with the principles of natural justice, then the employer would have got opportunity to adduce evidence before the primary authority. Deciding the whole issue without confining to the preliminary issue of validity of domestic enquiry, amounts to violation of the principles of natural justice. He further contended that granting reinstatement is not automatic and in lieu of reinstatement, compensation also can be granted. He submitted that admittedly the Lakshmi supermarket is closed and therefore, the authorities below ought to have considered his case for grant of compensation u/s 25-FF of the Industrial Disputes Act, 1947 and therefore, he contended that the authorities below have not properly considered the issue while granting the relief. In support of this contention, he relied on the judgment of the Apex Court in A.K. Sharma v. Oberoi Flight Services 2009 IV LLH 73 He contended that the authorities below without considering the above aspects, erroneously granted reinstatement with full back wages and the same is liable to be set aside and the writ petitions be allowed.

8. On the other hand, the leaned counsel appearing for the 3rd respondent - employee supporting the impugned orders, submitted that when the enquiry officer recorded findings based on no evidence, the authorities rightly interfered with the same and set aside the said findings. He submitted that the authorities below by cogent and convincing reasons, passed the impugned orders. He stated that the suit filed by the society for recovery was dismissed by judgment and decree dated 13.7.2005 and as there was no appeal, the said judgment has become final. In view of these circumstances, he sought to dismiss the writ

petitions.

9. In view of the above contentions, of both the counsel, it is relevant to note few facts and the material evidence available on record, to see whether the impugned orders require any interference.

10. The charges against the 3rd respondent - employee are that he indulged in falsification of the accounts and deliberately made fraudulent payments and caused pecuniary loss to the unit of the petitioner - society and pecuniary gain for himself.

11. The employee has denied the said charge. From a perusal of the material available on record and the impugned orders, it could be seen that the authorities below have considered the duties of the employee before fixing the responsibility. The main allegation against the petitioner is that he deliberately made fraudulent payments and caused pecuniary loss to the unit and pecuniary gain to him. To prove this charge, the management has examined witnesses and the authorities below found that before payment, the check memos would be prepared by the Accounts Clerk, which would be scrutinized and recommended by the P.R.O. for payment and the General Manager approves the check memo for payment in cash or cheque. Sri K. Venkat Rao, who is the management witness, has deposed that some times, the check memo would be passed without the scrutiny and signature of the P.R.O. The evidence on record would show that the P.R.O. acts as a liaison officer between the Accounts Clerk and the General Manager and that even in his absence, the General Manager would pass the check memos for payment. The lower appellate authority found that the Enquiry Officer in his report at paragraph 45 of page no.24 that the General Manager is also responsible for the incorrect payments. Therefore, when the General Manager was also found responsible for excess payments, fixing the liability on the 3rd respondent -employee alone, cannot be sustained.

12. Furthermore, the management did not choose to either furnish the debit vouchers and check memos to the employee with regard to the double payments noticed during his period, nor examined the beneficiaries of the alleged payments made by him and no clerk concerned, who prepared the check memo for payments was also examined. Further it is noticed that no such false check memo were submitted for scrutiny and no evidence is also made available to show that any audit officer has pointed that the employee was responsible for alleged false payments.

13. The lower appellate authority also found that the enquiry officer in paragraph nos.14, 19 and 42 of the report, found that though the employee sought for certain documents, the same were not supplied to him. Further, it is found that no records were produced to show any falsification of accounts.

14. Both the authorities have concurrently found that the employee was not furnished with the required documents and the management failed to produce any evidence to show that there was any falsification of accounts and also failed

to examine either the beneficiaries of double payments, alleged to have been made by the employee and also the Accounts Clerk who prepared the alleged false check memo for payment of amount and failed to produce any evidence to show that any audit officer has found the employee responsible for falsification of accounts or fraudulent payments. On the other hand, based on the material, the enquiry officer found that the employee/respondent no.3 is only a liaison officer between the Accounts Clerk and the General Manager who scrutinizes the check memos for payment of cash and that even in the absence of Public Relation Officer, the General Manager would make the payment on scrutinizing the check memo. Therefore, it is clear that the management failed to prove that the employee is solely responsible for making fraudulent payments. The enquiry officer found that the General Manager is also responsible for incorrect payments.

15. In view of the above circumstances it is clear that as the enquiry officer came to the conclusion that the employee was responsible for the excess payments, without there being any substantial evidence and recorded findings on presumptions, the authorities below have rightly interfered with the findings of the enquiry officer, as being perverse.

16. With regard to jurisdiction of the Tribunal in interfering with the findings of the enquiry officer, while adjudicating the disputes relating to dismissal or discharge, the Apex Court in the decision reported in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, held as under:

31. We have exhaustively referred to the various decisions of this Court, as they give a clear picture of the principles governing the jurisdiction of the Tribunals when adjudicating disputes relating to dismissal or discharge.

32. From those decisions, the following principles broadly emerge:

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimization, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by

him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was *prima facie* case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognized that the Tribunal should straightway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimization.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate Vs. The Workmen*, within the judicial decision of a Labour Court or Tribunal.

17. In another decision reported in *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, , the Apex Court held as under:

3. There is two-fold approach to the problem and if lost sight of, it may result in some confusion. Firstly, in a case where there is no defect in procedure in the course of a domestic enquiry into the charges for misconduct against an employee, the tribunal can interfere with an order of dismissal on one or other of the following conditions:

(1) If there is no legal evidence at all recorded in the domestic enquiry against the concerned employee with reference to the charge or if no reasonable person can arrive at a conclusion of guilt on the charge leveled against the employee on the evidence recorded against him in the domestic enquiry. This is what is known as a perverse finding.

(2) Even if there is some legal evidence in the domestic enquiry but there is no prima facie case of guilt made out against the person charged for the offence even on the basis what the evidence so recorded is reliable. Such a case may overlap to some extent with the second part of the condition No.1 above. A prima facie case is not, as in a criminal case, as case proved to the hilt.

18. From the above guidelines as enunciated by the Apex Court it is clear that though the right to take disciplinary action and the decision with regard to quantum of punishment are within the domain of managerial functions, the Tribunal has power to see whether the action of the employer is justified or not and further in the domestic enquiry, if the findings of misconduct, are based on evidence, the Tribunal has no jurisdiction to interfere with the same and on the other hand, if such findings are perverse, or based on no evidence, or that no prudent man would arrive at based on such evidence or material on record or the management is found to be guilty of victimization, unfair labour practice or mala fide, the Tribunal will have jurisdiction to interfere with the findings of the enquiry officer in the domestic enquiry.

19. As the enquiry officer recorded findings of guilt of the employee without there being any evidence, they are vitiated by perversity and as per the judgments of the Apex Court referred to supra, the statutory authorities below have rightly set aside the said findings.

20. The other circumstances, which requires to be noticed is that the petitioner - society filed suit in O.S.No.857/2001 on the file of IV Additional Senior Civil Judge, Fast Tract court, Rangared dy District, L.B. Nagar for recovery of an amount of Rs.1,46,437-23, which is the amount involved in the present charge against the employee. As the petitioner-society, failed to prove the claim, the suit was dismissed by judgment and decree dated 18.7.2005 holding that the plaintiff is not entitled to recover the amount. The said judgment and decree has become final, as the writ petitioner herein failed to file any appeal.

21. The vehement contention of the counsel for the petitioner -society is that this court in the earlier writ petition in W.P.No.11540/2003 dated 11.9.2003 directed to decide the validity of the domestic enquiry as a preliminary issue, but the primary authority disposed of the main appeal itself and if the domestic enquiry was found to be not in conformity with principles of natural justice, then the employer would have got an opportunity to adduce evidence before the primary authority and deciding the whole issue without confining to the preliminary issue of validity of domestic enquiry, amounts to violation of the principles of natural justice. In order to meet this contention, it is necessary to note the direction of

this court in order 11.9.2003, while disposing of the writ petition:

In view of the above said submissions, I dispose of the writ petition directing the 1st respondent - authority to decide the validity of the domestic enquiry as a preliminary issue and dispose of the matter finally within a period of two months from the date of receipt of a copy of this order.

22. From the above order it is clear that this court not only directed the primary authority to decide the validity of the domestic enquiry, but also to dispose of the matter finally within a stipulated time. As already noticed above, the primary authority, considering the material evidence, has decided the validity of the domestic enquiry and found that the same is in violation of the principles of natural justice and that the findings arrived by the enquiry officer are based on no evidence and are perverse. Therefore, the contention of the counsel for the petitioner that primary authority ought to have decided the validity of the domestic enquiry only and ought not have proceeded further, cannot be countenanced.

23. The learned counsel also raised contention that the employee fall within the exempted category u/s 73(1) of the A.P. Shops and Establishment Act, 1988, since he is working as Public Relation Officer and hence not a workmen. To appreciation this contention, it is necessary to note the relevant provision as under:

73. Exemption:--(1) Nothing in this Act shall apply to

(a) employees in any establishment in a position of management and having control over the affairs of the establishment, whose average monthly wages exceed sixteen hundred rupees;

(b) establishment under the Central and State Governments, local authorities, the Reserve Bank of India, a railway administration operating any railway as defined in Clause 20 of Article 66 of the Constitution and Cantonment Authorities;

(c) establishment in mines and oil fields;

(d) establishments in bazaars in places where fairs or festivals are held temporarily for a period not exceeding one month at a time.

24. From the above provision u/s 73(1)(a) it is clear that the employees in an establishment who are in a position of management and having control over the affairs of the establishment, whose average monthly wages exceeds sixteen hundred rupees are exempted from the operation of the Act. In other words, the control of an employee over the affairs of the establishment, is the paramount consideration in order to decided whether such employee is exempted from the operation of this Act.

25. In the present case, the employee was working as Public Relation Officer, whose duties as per the proceedings dated 23.5.1987 issued by the Chairman of the petitioner - society are that he was made responsible for periodic stock

verification of their respective sections, shortages, quality control and maintain optimum inventory levels and up to date accounts and that he was entrusted with the duty to increase the business, especially with bulk customers and State/Central Government under takings. These duties would show that he is not in a position of management having control over the affairs of the establishment.

26. The Apex court in *Prem Sagar v. Standard Vaccum Oil Co.* 1964 (1) LLJ 47 while considering the status of an employee, whether he falls in the management position or a workman, held as under:

the question is when can a person be said to have been employed by the respondent in a position of management. It is difficult to lay down exhaustively all the tests which can be reasonably applied in deciding this question as several considerations would naturally be relevant in dealing with this problem. It may be enquired whether the person had a power to operate on the bank account or could he make payments to third parties and enter into agreements with them on behalf of the employer, was he entitled to represent the employer to the world at large in regard to the dealing of the employer with stranger, did he have authority to supervise the work of the clerk employed in the establishment, did he have control and charge of the correspondence, could he made commitments on behalf of the employer, could he grant leave to the members of the staff and could he hold disciplinary proceedings against them, has he power to appointment members of the staff or punish them, these and similar other tests may be usefully applied in determining the question about the status of an employee.

27. From the above judgment of the Apex Court it is clear that in order to decide whether an employee would falls within the managerial position, his powers and duties have to be examined. If he has power to operate bank accounts, make payments to third parties and enter into agreements with the third parties on behalf of the establishment and is empowered to represent the world at large on behalf of the establishment and if he has control over the correspondence of the establishment and could make commitments on its behalf or has administrative powers and also power to hold disciplinary proceedings against the staff and could make appointments, then he can be treated as in the position of management. If the said powers are not delegated to him, he has to be treated as workman. In the present case, as already noticed above, as per the proceedings dated 23.5.1987, the duties of the employee, who is a public relation officer, are in the nature of supervision of stocks and accounts and increase the business of the establishment and not in the nature of control over the affairs of establishment. Hence, it can safely be concluded that he is not in the exempted category u/s 73(1) of the Act, so as to deny him the benefit of the provisions of the Act for seeking redressal against his termination. So the contention of the counsel for the petitioner in this behalf, merits for rejection.

28. The next contention of the petitioner is that there is no averment of the petitioner to show that he was not gainfully employed elsewhere and hence, he

cannot be granted back wages. It is further contended that as admittedly the unit is closed and hence the 3rd respondent - employee, is entitled only for compensation u/s 25FF and not reinstatement.

29. With regard to the contention of the petitioner that the unit is closed is concerned, as noticed by the authorities below, the petitioner - society is still in existence and hence, denying the relief of reinstatement, in the light of the present facts and circumstances, is not justified.

30. In similar circumstances a learned single judge of this court in *B. Ramulu v. Presiding Officer, Labour Court II, Hyderabad* 2008 LAB. I.C. 155, while considering the facts that when a driver of the Corporation was terminated from service for causing accident and when he challenged the same before the Labour Court, which exonerated him from the said charge, but denied back wages by invoking the doctrine of proportionality, this court held that denial of back wages by invoking doctrine of proportionality, is not proper and accordingly held that the petitioner therein is entitled to back wages from the date of termination till the date of reinstatement. The relevant portion of the judgment is extracted as under better appreciation:

9. Having given categorical find that capsizing of bus was not on account of the fault of the petitioner, respondent No.1 very strongly invoked the doctrine of proportionality in the immediately following paragraph of the award. In my considered view the question of application of the doctrine of proportionality does not arise in a case where an employee is fully exonerated of the charges. It is only in cases where the employee is found guilty of one or more of the charges and the Court/Tribunal find that the penalty imposed on the employee is shockingly disproportionate to the gravity of misconduct proved that the doctrine of proportionality could be invoked. Therefore, the whole approach of the Labour Court in invoking the doctrine of proportionality and disallowing back-wages of the petitioner cannot be sustained at all. When once an employee is held not guilty of the charges framed against him and he is directed to be reinstated, ordinarily it should follow that he is entitled to all the attendant benefits including back-wages. It should be deemed that the punishment which is set aside on the finding of his not being found guilty was never suffered by him. On this premise, denial of back-wages in the instance is wholly unjust.

31. With regard to per cent of back wages, the Apex Court in *J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another*, held as under:

Coming back to back wages, even if the Court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *General Manager, Haryana Roadways Vs. Rudhan Singh*,

and U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment.

32. The contention of the counsel for the petitioner relying on the judgment of the Apex Court (6 supra) is that the workman has not taken any specific plea in the claim statement that he was not gainfully employed and hence granting back wages cannot be sustained.

33. In the decision referred to above, the Apex Court held that granting back wages fully or partially depends on the facts and circumstances of each case and that he has to assert that he is not gainfully employed from the date of his termination and that he has no income and then the burden will shift to the employer. The Apex Court further held that there is however, no obligation on the terminated employee to search for or secure alternative employment. In the present case, in the appeal filed by the 3rd respondent - employee, he stated as under:

5. It is further submitted that the appellant is a senior employee having worked in various capacities for 26 years. He has a family of 5 adults to support with no work or income at this late stage of his life. He is unjustly denied the very source of his livelihood. Denial of back wages will cause untold hardship and further destroy him and his family. He has been living for the past 4 years on borrowings from friends and relatives.

7. The respondent employer so far did not comply with the direction given by the Hon"ble Authority for reinstatement. The employer has thus caused further hardship and mental agony to the appellant, who is still living under the shadow of un-employment and want of money.

34. From the above it is clear that the 3rd respondent has specifically stated that he is not employed any where. The petitioner - society could not rebut the said averment of the 3rd respondent by producing any evidence in this regard.

35. In these circumstances and having regard to the fact and circumstances, the impugned award of the lower appellate authority is modified to the effect that the 3rd respondent shall be reinstated into service with all attendant benefits, with fifty percent back wages.

36. With the above modification in the impugned order with regard to back wages, W.P.No.3293/2005 is disposed of and W.P.No.5620/2011 is dismissed. No costs.