

(1978) 07 MAD CK 0019
In the Madras High Court

Indian Airlines and Others

APPELLANT

Vs

W.B. Correya

RESPONDENT

Date of Decision : 03-07-1978

Acts Referred:

Citation : (1978) 2 LLJ 437

Hon'ble Judges : Nainar Sundaram, J;Ismail, J

Bench : Division Bench

Judgement

Ismail, J.—This is an appeal by the respondents in W. P. No. 4153 of 1974 against the judgment and order of our learned brother Ramanujam, J., dated 22nd July, 1976, allowing the writ petition and quashing the order of the first and second appellants herein. The facts are within a very short compass. The respondent herein was employed as Flight Steward in the Madras Branch of the Indian Airlines. On 24-7-1973, the following three charges were framed against him in respect of his alleged conduct in Operations Officers and departure lounge on 19-7-1973 :

(i) even though not on duty, he was found in the above offices appearing to be under the influence of liquor :

(ii) he behaved in a rude, indecent and abusive manner towards Capt. N.M. Pereira, Officiating Operations Manager, by talking to him in an aggressive and threatening manner ; and

(iii) he created a scene in the departure lounge, where passengers were seated, by shouting and using, abusive and threatening language towards Capt. Pereira.

According to the management, the conduct which constituted the subject-matter of the said three charges, was in violation of the Standing Orders (Regulation) 16(11), 16(13) and 16(18), a mistake for 16(8). By the said charge memo, the respondent was asked to give his explanation to the said three charges. It is not necessary to refer to the subsequent correspondence that passed between the respondent and the management in view of the narrow compass within which

this appeal lies. It is enough to point out that finally an enquiry was conducted by one Thiru R.R. Singh into the charges. After the conclusion of the enquiry, the enquiry officer submitted his report to the effect that all the three charges had been proved. On the basis of the said findings, a notice dated 14-10-73 was issued to the respondent herein asking him to show cause why he should not be removed from service. The respondent submitted his representations to the show cause notice on 5-1-74. However, by an order dated 7-2-1974 the conclusion of the enquiry officer was confirmed and the second appellant removed the respondent from service. Against the said order of removal the respondent appealed to the Assistant Managing Director, Indian Airlines, New Delhi, who by an order dated 22-4-74 dismissed the appeal holding that the action taken by the second appellant was justified. The respondent thereafter filed W.P. No. 4153 of 1974 on the file of this Court praying for the issue of a writ of certiorari to quash the order of removal passed against him.

2. We shall refer to some of the main points of attack against the orders made by the respondent a little later. One of the points taken by the appellants herein Was a preliminary one in the sense that no petition for the issue of a certiorari will lie against the orders of appellants 1 and 2. The learned Judge overruled that objection and held that the writ petition was maintainable. Before us in this appeal that objection was not urged and, therefore, we are not concerned With that preliminary objection and we are concerned only with the case on merits.

3. As far as the merits are concerned, the respondent herein in the writ petition impugned the validity of the order passed by the appellants herein on several grounds. The very first ground put forward as Ground No. 1 in the affidavit filed in support of the writ petition is :

Admittedly a preliminary enquiry was conducted behind the back of the petitioner. In the regular enquiry which was conducted on 4-10-1973 and on the subsequent dates, no witness produced by the department was examined-in-chief by the department. All the " witnesses produced by the department were having their prior statements recorded in the preliminary. The petitioner was straightaway asked to cross-examine the witnesses with relation to the statements given by these witnesses in the preliminary enquiry. The petitioner orally objected, but his objection was overruled by the enquiry officer. That the witnesses were having in their hands the statement recorded in the preliminary enquiry is abundantly made clear in the enquiry proceedings. In answer to a question put by the petitioner, Capt. N.M. Pereira has stated that " it is all given in para 2 of my statement". At one time when a question was put by the petitioner to Capt. S.L. D'Souza the enquiry officer advised the petitioner that the question did not arise from the ; statement of Shri D'Souza and, therefore, it was not considered relevant. All these would go to show that the departmental witnesses never gave any statement of their own in the regular enquiry. Therefore, the whole enquiry the report based on that enquiry and the punishment based on that enquiry report are unsustainable in law. This irregular

procedure resulting in much prejudice to the petitioner was pointed out to the enquiry officers really by the petition at the time of enquiry and in fact it was pointed out clearly in the written reply given by the petitioner on 5-1-1974 to the second show cause notice issued by the punishing authority on 14-12-73. But this has not been considered at all by the punishing authority at any time.

A perusal of the papers produced before the Court clearly shows that the respondent has persisted in this complaint all through. One other ground taken by the respondent in the petition was that the enquiry was contrary to Clause 26 of the Standing Order (Regulations) concerning Discipline and Appeal of Indian Airlines.

4. Ramanujam, J., himself has summarised the grounds put forward in support of the writ petition as four in number and mentioned them in his judgment as follows :

The grounds on which the petitioner attacks the order of removal are four in number. The first ground is that there have been vital and serious defects in the procedure followed by the enquiry officer which have vitiated the impugned order. Secondly, it is contended that certain additional documents which are necessary for establishing the petitioners defence have been denied to him and this amounts to the violation of the principles of natural justice. The third ground is that the disciplinary authority, the second respondent merely accepted the findings of the enquiry officer without any discussion of the evidence for and against and proceeded to impose the punishment without considering the various objections raised by the petitioner in his answer to the show cause notice. Fourthly, it is contended that the appellate authority has merely affirmed the order of dismissal passed by the second respondent without considering the various objections raised by the petitioner in his grounds of appeal.

However, the learned Judge himself did not consider Grounds 2 to 4 elaborately and on consideration of Ground No. 1, he came to the conclusion that there had been violation of principles of natural justice. He also held that Regulation 27 has been violated. On these grounds, he allowed the writ petition. It is the order of the learned Judge allowing the writ petition that is challenged in the present writ appeal before us.

5. Now let us mention certain admitted facts in the present case :

(1) Before a regular enquiry was conducted, statements were taken from certain persons behind the back of the respondent herein and those persons were called in as witnesses on behalf of the management in the regular enquiry subsequently conducted by Thiru R.R. Singh.

(2) At the regular enquiry, the statements which the said nine witnesses had earlier made were not put to them and they were not asked to state whether the contents of the statement were made by them and they stood by the same or not ;

(3) The respondent herein was straightway asked to cross-examine the said witnesses, the respondent having been already furnished along with the memorandum of charges, copies of statements made by those witnesses at the preliminary state ; and

(4) The witnesses had in their hands the copies of statements earlier made by them and they gave answers to the questions put to them during the course of cross-examination with reference to the said statements they had already made, the copies of which they had with them.

6. It is on these admitted facts, the question that arises for consideration is whether there had been a fair enquiry and a reasonable opportunity had been given to the respondent to prove his innocence with reference to the charges framed against him. It is not in dispute that a statement given by a witness at the preliminary enquiry can be made use of in a regular domestic enquiry. But before that can be made use of, certain conditions must be fulfilled. It is not necessary that the witness must read out the statement itself or parrotlike repeat what he had stated in the statement. But he must at least affirm the contents of the statement by stating that he made the statement and he stood by the contents of the statement. As pointed out by the Supreme Court in *State of Mysore Vs. S.S. Makapur*, .

When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him and admitted in evidence a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that the contents of the previous statement should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities, and rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses and read over to them marked on their admission, copies thereof given to the " person charged, and he is given an opportunity to cross-examine them.

7. If the statement is not put to the witness and he had not given an opportunity to affirm the same as indicated above, there is in fact no evidence of that witness in the course of the chief-examination at all and it is very doubtful whether such a statement, notwithstanding copies thereof had already been furnished to the worker, can be used as substantive evidence against the worker concerned. It is this aspect of the matter which weighed with Ramanujam, J., who held that the failure to put these statements to the witnesses and the witnesses not having affirmed their statement-not having stated that stood by their statements violated the principles of natural justice. No decision of any court was brought to our notice by the learned Counsel for the appellants holding that this requirement need not be satisfied even in a domestic enquiry. On the face of it, the procedure followed by the enquiry officer is certainly defective, detrimental

and prejudicial to the case of the respondent herein.

8. However, that is not all. Not only the witnesses were not asked to affirm the statements which they had previously made and to State whether they stood by the statements or not, they were also allowed to use the statement they had earlier given for answering the questions put to them during the course of cross-examination by the respondent. To say the least, that is to make a mockery of the cross-examination itself. In fact whenever a witness is examined or cross-examined, one of the objects of the cross-examining party is to prove that the veracity of the witness cannot be accepted, he has given conflicting versions and his case, has not been consistent and, therefore, he was not speaking the truth or at least he was not sure of what he saw or what he heard. All these things can be established by several methods. If there is an earlier statement given by a witness and subsequently he was called Upon to depose in the course of the enquiry, the inconsistency between the two can be taken advantage of by the other side for the purpose of calling upon the enquiry officer not to accept the evidence of the witness. Similarly, the inconsistency between what a witness stated in the chief-examination and what he stated in the cross-examination, can be taken advantage of by the cross-examining party to request the enquiry officer not to accept and rely upon the evidence of that witness in view of the inconsistency. If a method is adopted which will avoid all possibilities of a witness being over inconsistent at all, as has happened in the present case the other side is denied a very valuable opportunity to establish his innocence and to show that what was spoken against him was not true. It is well recognised that the principal aims of cross-examination are so destroy material particulars of the evidence-in-chief ; to weaken the evidence where it cannot be destroyed ; to elicit new evidence helpful to the party cross-examining and to undermine the witness to shake his credit by showing that he cannot be trusted to speak the truth or that he is deposing, however honestly, to matters of which he has not real knowledge. It has always been recognised that cross-examination is the most effective and efficacious test which law has devised for the discovery of truth. Consequently any impairment of this right, whether deliberately or accidentally, will have the effect of preventing a person who cross examines from establishing the truth.

9. Equally it is well-settled that if a witness had made a contemporaneous record of what he has seen or heard the same can be used for refreshing his memory in the course of his giving evidence. But certainly a statement made by him at the stage of a preliminary enquiry cannot be said to be a record made by him of what has happened in the present case in contrary to the well-established principles that have to regulate proceedings before any judicial authority and even in a domestic inquiry. In fact as we pointed out already, in this particular case admittedly the statement given by witnesses behind the back of the respondent, were in the hands of the witnesses when they gave answers to the questions put during the course of cross-examination. The very object of the cross-examination is to find out whether the witness is sticking on to what he

has stated in the courses of his chief examination or whether he has made any statement contrary to the facts or whether there is any contradiction between what he has stated in the chief-examination and what he states in cross-examination. Any such opportunity which the respondent was entitled to have, was totally denied to him by the procedure adopted by the enquiry officer in the present case. As we pointed out already, the respondent has been making a grievance of this procedure throughout, in his explanation to the second show cause notice and in his grounds of appeal to the appellate authority. But neither of the authorities had any answer to the complaint except to totally ignore the same. From what we have pointed out already it is clear that what happened actually in this case is only a mockery of enquiry and not an enquiry in the real sense of a person accused of certain acts or charged with certain misdemeanour or misconduct getting a real opportunity to defend himself or to establish the truth.

10. In *Khardah Co. Ltd. Vs. Their Workmen*, , the Supreme Court observed :

Normally, evidence on which the charges are sought to be proved must be led at such an enquiry in the presence of the workmen himself. It is true that in the case of departmental enquiries held against public servants, this Court has observed in the *State of Mysore v. Shivabasappa Shivappa* (supra) that if the deposition of a witness has been recorded by the enquiry officer in the absence of the public servant and a copy thereof is given to him, and an opportunity is given to him to cross-examine the witness after he affirms in a general way the truth of his statement already recorded, that would conform to the requirements of natural justice ; but as has been emphasised by this Court in *Kesoram Cotton Mills Ltd. Vs. Gangadhar and Others*, , these observations must be applied with caution to enquiries held by domestic Tribunals against the industrial employees. In such enquiries it is desirable that all witnesses on whose testimony the management relies in support of its charge against the workman should be examined in his presence. Recording evidence in the presence of the workmen concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him, and, therefore, he is cautious in making his statement. Besides, when evidence is recorded in the presence of the accused person there is no room for persuading witness to make convenient statements and it is always easier for an accused person to cross-examine the witness if his evidence is recorded in his presence. Therefore, we would discourage the idea of recording statements of witnesses ex parte and then producing the witnesses before the employee concerned for cross-examination after serving him with such previously recorded statements, even though the witnesses concerned make a general statement on the later occasion that their statements already recorded correctly represent what they stated. The above decision and a number of others have been considered by the Supreme Court in *Central Bank of India Ltd. Vs. Prakash Chand Jain*, . For the above reasons, we agree with the conclusions of Ramanujam, J., that in this case there had been a denial of an effective opportunity to the respondent to defend himself

and a violation of the principles of natural justice.

There is yet another ground on which also the writ petition filed by the respondent had to be allowed. Chapter XIII of the Indian Corporation Employees' Service Rules and Establishment Orders, deals with discipline and appeal. Rule 78 states :

The Corporation may from time to time issue standing orders governing the conduct of their employees... A breach of these orders will amount to misconduct.

Annexure IV contains Standing Orders (Regulations) concerning discipline and appeals. Regulations 26 and 27 are important in the context of the complaint made by the respondent herein. The said Regulations read as follows :

26. When there is a prima facie case against an employee or the explanation referred to in Rule 25 is unsatisfactory, the competent authority shall take cognizance of the case and pass orders for initiation of disciplinary proceedings, which will be conducted as follows : (a) The ground on which it is proposed to take action against the employee should be reduced into definite charges with a statement of allegation enumerating all the facts and circumstances on which the decision to start proceedings against him was taken. (b) the charges should be communicated to the official concerned in the form at Appendix I, along with the order of suspension if any and he should be asked to put in, by a prescribed date, a written statement of his defence, and to state whether he desires to be heard in person, cross-examine witnesses appearing against him and he adduced oral evidence in his defence. One week at least should be allowed for submitting written statement of defence, including details about cross examining and production of witnesses and being heard in person.

27. After the written statement of the employee has been received, the enquiring officer shall give him a personal hearing, if the employee has desired in his written statement, or the enquiring officer considers it necessary witnesses will be called and examined on such of the allegations as are not admitted in the explanation. The person charged shall be allowed to produce documentary evidence in his defence, to cross-examine the witnesses appearing against him and to examine any witnesses in his defence. All the proceedings will be recorded by the enquiring officer may in his discretion refuse to call any witness for sufficient reasons which should be recorded in writing.

From the second sentence of Regulation 27, it is clear that a witness can be called on behalf of the management to prove the charge made against the employee in either of the two contingencies, namely, in case the employee had desired in his written statement the calling for such witness or even when the employee has not expressed a desire, if the enquiry officer considered it necessary. Whichever may be the contingency, what is important is that once such a witness is called, he is to be examined on such of the allegations are not admitted in the explanation. In this case admittedly the respondent did not admit the charges made against him in his explanation. Consequently, the moment the

enquiry officer called the nine witnesses, he had to examine them on the points not admitted by the respondent in his explanation. Admittedly again, the same has not been done. In fact at one stage the learned Counsel for the appellants who argued the appeal wanted to contend that the second sentence occurring in Regulation 27 does not convey that meaning. But the third sentence belied his contention, because the third sentence dealt with all the three rights to which the delinquent officer was entitled, namely, the right to produce documentary evidence in his defence, to cross-examine the witnesses appearing against him and to examine any witnesses in his defence, Consequently ; the examination of witnesses contemplated in the second sentence must be examination of witnesses produced by the management for the purpose of proving the allegations not admitted in the explanation of the delinquent employee. Once the purport of this provision was recognised Mr. Pai who argued the appeal had really no answer to the complaint of the respondent that Regulation 27 had not been followed. It is not in dispute before us that an enquiry conducted in violation of the Regulations dealing with the enquiry, will be vitiated and this Court will have jurisdiction to quash the resultant order. Hence on this ground also the respondent was entitled to succeed.

12. In view of these points which are basic to the enquiry itself, it is not necessary for us to consider the order complaints made by the respondent herein, even though every one of the complaints cannot be rejected as being without substance. For instance, we may point out that though the enquiry officer held that all the charges framed against the respondent were proved, the respondent in his explanation dated 5-1-1974 took up the stand that the allegation against him that he was under the influence of liquor was not proved. However, the second appellant in his order removing the respondent from service stated :

I have carefully examined your reply dated 5-1-1974 to the show cause notice and do not find any substance on the contentions raised therein. In regard to the findings of the enquiry officer in charge under Clause 16(11) (Which reads " drunkenness riotous, disorderly and indecent behaviour in the premises of the establishment) it is observed from the report of the enquiry officer that he has held you guilty of disorderly and indecent behaviour in the premises of the establishment. Therefore, your contention that drunkenness has not be established is totally unfounded.

As we pointed out already, we are not dealing with the merits of the charges and we are merely pointing out by way of illustration that all the complaints of the respondent on merits also cannot be said to be totally unfounded. Under these circumstances, the appeal fails and is dismissed with costs. Counsel's fee Rs. 1,000.