
(1985) 12 KAR CK 0021
In the Karnataka High Court
Case No : Writ Petition No. 12570 of 1982

Indian Express Madurai Ltd.

APPELLANT

Vs

Presiding Office

RESPONDENT

Date of Decision : 11-12-1985

Acts Referred:

Industrial Disputes Act, 1947 — Section 11 A, 33 (2) (b)

Citation : (1987) ILR (Kar) 525

Hon'ble Judges : Bopanna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bopanna, J.—The petitioner-Management has called into question the correctness of the order made by the Industrial Tribunal, Bangalore rejecting its application under the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 ("the Act" for short). That application was filed by it seeking approval of the action taken against the 2nd respondent-Sub-editor for the alleged misconduct committed by him, as an industrial dispute was pending at the relevant time before the Tribunal between the petitioner and its workman in which the 2nd respondent was a concerned workman.

2. It is not in dispute that the 2nd respondent was a Working Journalist governed by the Working Journalists Act and he was appointed by the petitioner in the year 1965 as a Sub-editor with effect from 1-5-1965. The terms and conditions of appointment are found in the appointment order which is produced as Annexure-K in the Writ Petition and was marked as an Exhibit before the Industrial Tribunal. The relevant terms of the appointment order for the purpose of this case are :

"Clause 4 - You should abide by the rules and regulations of the Company now in force and issued from time to time and the Standing Orders.

xx xx xx xx Clause 6 - You shall not engage yourself in any outside work over

and above your legitimate work in the company on duty days on holidays and when you are on leave."

This order of appointment was followed by an Office Note dated 11-4-1979 produced as Annexure-M in the Writ Petition. That office note reads as under :

"All Sub-editors, reporters, photographers and all categories of working journalists are hereby informed that, as per the directions of the editor-in-chief, they are prohibited from writing/contributing to any other journal/periodical/newspaper/ magazines which is published either from India or abroad, without getting the prior permission in writing of the Editor-in-chief. Any violation or contravention of this instruction would mean that the matter would have to be referred to the management for suitable, appropriate action."

It could be seen from the order of appointment and the office note, that the 2nd respondent was prescribed from writing/contributing to any other journal/periodical/news-papers etc. But whether the violation of that note would amount to misconduct which would warrant his dismissal from the service of the petitioner is not clear either from the appointment order or from the office note. This aspect is of considerable significance for considering the case of the petitioner that the alleged misconduct had been proved. According to the Learned Counsel for the petitioner, Mr. Narayanaswamy, the appointment order read with office note admits of no doubt that respondent-2 ought to have known that he was committing a misconduct meriting his dismissal from service when he contributed certain articles whilst in the employment of the petitioner to magazines like Caravan and Onlooker and other journals. Respondent-2 did contribute certain articles to these magazines. But his plea in the light of the office note was that he had taken prior permission in writing of the Editor-in-chief.

3. With these indisputable facts in the background, the actual allegation of misconduct against respondent-2 and the enquiry in regard to the said misconduct should be considered.

4. The "show cause" notice which is produced as Annexure-E discloses that the petitioner had in view the office note dated 11-4-1979 (Annexure-M) for taking action against the 2nd respondent. As is clear from para-2 of the said notice the manager of the petitioner had stated that contribution of articles was in contravention of the office note dated 11-4-78 of which he was aware. This specific charge against respondent-2 was met by him by putting forth his explanation as per Annexure-F as follows :--

"In September 1972, I sought the permission of Editor-in-chief to contribute articles to other than the Indian Express and in reply he, in a T.P. message gave the "permission in writing." This T.P. message was shown to me by the News Editor.

Since there has been no objection to my writings so far from your side, I presumed that you were aware of this permission given to me."

So the defence of respondent-2 was that he had the permission in writing from the Editor-in-chief and that permission was given through a Teleprinter message. This explanation was not found to be satisfactory and therefore, the petitioner's Manager issued the enquiry notice dated 23-2-1979 (Annexure-G). In that notice he called upon respondent-2 to appear for an enquiry on 26-2-1979 before a D.K. Purushotham, Retired Deputy Labour Commissioner, Madras. The enquiry notice satisfies all the requirements of making the enquiry fair and proper. But one point that emerges from the enquiry notice is that the Management had included one more item of misconduct which was not in contemplation when it issued the first "show cause notice" on 23-2-1979. It had invited the attention of respondent-2 to Clause 6 of the appointment order dated 4-5-1965 which I have already excerpted above. So according to the Management, the alleged misconduct committed by respondent-2 was based on Clause-6 of the appointment order and also the office note dated 11-4-1979. Mr. Narayanaswamy, learned Counsel for the petitioner submitted that the office note was only a reiteration of Clause-6 of the appointment order and therefore, both Clause - 6 and office note should be read together. Granting it should be so read, the point for consideration would be whether the petitioner had made out that respondent-2 had committed a misconduct in terms of the contract of employment which merited dismissal from the service of the petitioner.

5. I was taken through the order of the learned Presiding Officer. He posed the following questions for his consideration :

- (i) If the validity of the domestic enquiry is not disputed then other questions for consideration would be as whether the domestic enquiry is in accordance with the rules of standing order ;
- (ii) Whether, a prima facie case for dismissal based on legal evidence was made out ;
- (iii) Whether the employer has come to a bonafide conclusion;
- (iv) Whether the dismissal did not amount to unfair labour practice and was not intended to victimise the employee.

While answering these four questions, the Industrial Tribunal, in my view, went into the correctness of various facts which could have only been the subject matter for consideration if a question had been raised that the domestic enquiry was not fair and proper. But on the concession made by the learned Counsel for the workman, the Industrial Tribunal should have confined itself, to the question whether there was a prima facie case for dismissal based on legal evidence. Mr. Narasimhan, the learned Counsel for respondent-2 submitted that the parties had proceeded on the basis that it was open to the Tribunal to go into all the questions raised by it after recording a finding that the domestic enquiry was fair and proper. He relied on the decision of the Division Bench of this Court in *Ideal Jawa (India) Pvt. Ltd. Vs. C. Madan Mohan and Another*, That decision of the Division Bench of this Court was the subject matter of consideration by another

Division Bench in K. Chandrasekhar and Others Vs. Management of Binny Ltd., It is unnecessary for me in this petition to go into the controversy arising out of the decision of this Court in those two decisions since Mr. Narayanaswamy for the petitioner very fairly contended that if this Court were to go into the question whether there was a prima facie case against respondent-2 that would meet the requirements of his challenge to the impugned order.

6. It is well-settled that a prima facie case u/s 33(2)(b) is not a case proved up to the hilt since an Industrial dispute between the parties does not come to an end either by granting approval or refusing approval. It is still open to the parties to raise an industrial dispute and have the same adjudicated by the Labour Court and in that dispute the scope of enquiry by the Labour Court would be wider than the scope of enquiry in an application u/s 33(2)(b) in view of the provisions of Section 11A of the Act. All the same for the purpose of Section 33(2)(b), unless the employer makes out a prima facie case, the decision of the appropriate authority rejecting the application cannot be faulted. As noticed earlier, the definite case of the petitioner was that there was violation of the terms of Clause 6 of the appointment order and the office note.

7. However, in the order of dismissal that was served on respondent-2, which is produced as Annexure-S in the Writ Petition, the management has given a categorical finding that respondent-2 had acted in contravention of the office note dated 11-4-1978 and the same amounts to serious misconduct. It has further come to the conclusion that respondent-2 also acted in contravention of the terms of appointment order which enjoined upon him not to engage in outside work apart from the legitimate work for the management. Mr. Narayanaswamy contended that in the light of the defence taken by respondent-2 in the enquiry proceedings, he had virtually admitted the alleged misconduct against him. His defence was that he had taken prior permission of the Editor-in-chief and he should have proved the same by producing the original T.P. message said to have been shown to/received by him. But having not produced that message there was nothing for the management to establish and therefore a prima facie case was made out. When his attention was drawn to the inconsistent stand taken by the management in the domestic enquiry, he admitted that it was so, but he maintained that the answers given by him in cross examination would not be relevant for considering whether a prima facie case had been made out. The questions put to the Manager and the answers given by him in cross-examination read as under :

"Q : Is there any Standing Orders applicable to the Working Journalists in Indian Express, Bangalore ?

A : A copy of the Standing Orders that was in existence has been given to the defendant under his acknowledgment.

Q : Is this the Standing Orders marked as Exhibit No. W-1 (W-1), referring to ?

A: Yes.

Q : Are you aware that this Standing Orders are not certified by the Govt. of Karnataka ?

A : The question has no relevancy since the charges have not been framed on the basis of the Standing Orders."

From these answers in cross-examination one thing is clear: that the Standing Orders of the Indian Express (Madurai) Limited, were, applicable to its Bangalore establishment and therefore prima facie the petitioner could not have taken action against respondent-2 on the basis of the alleged violation of the office note and Clause-6 of the appointment order. A close scrutiny of the Standing Orders shows that the issue of appointment letter is a requirement under Standing Order 2(f). If respondent-2 had been charged for misconduct under the Standing Orders in force he could have taken the benefit of the same by relying on Standing Orders 12 and 12(dd). Standing Orders 12(m) reads as under :

"Employment with any other firm or institution without permission of the management."

Standing Order 12(dd) deals with the professional misconduct --that is, a special type of misconduct applicable to Working Journalists in the course of their employment. A number of acts are enumerated under the heading "professional misconduct" but contribution of articles during the spare time of the Working Journalist to other periodicals is not one of them. So, the petitioner could not have found respondent-2 guilty under Standing Order 12 (m), i.e., employment in any other firm or institution without the permission of the management as it would have been open to respondent-2 to contend successfully that he was not in employment either under "Onlooker" or under "Caravan" or any other magazine to which he had contributed articles during his spare time. Therefore, the management had to fall back on the office note and Clause-6 of the appointment order and that is the case of the management also before this Court.

8. So, the short point for consideration is whether there is anything either in the office note or in the order of appointment which put respondent-2 on notice that he would be committing a misconduct by violation of the same and which in turn would warrant his dismissal from service. In my view, neither the office note nor the contract of employment as expressed in the order of appointment makes out a grave misconduct much less a misconduct which could entail in the dismissal of respondent-2. They, as they are worded, at best would amount to conditions of his service and the breach of the same may warrant an action for damages for breach of contract and not for disciplinary action warranting the dismissal of respondent-2. In U.K., under the Contracts of Employment Act, 1972, as amended, the employer is required to give the employee a written statement including "any disciplinary rules which apply". And the Code of Practice on Disciplinary Procedure and Practice recommends, in paragraph 8, that:

"Employees should be made aware of the likely consequences of breaking rules and in particular they should be given a clear indication of the type of conduct

which may warrant summary dismissal."

In paragraph 10 it adds "rules should not be so general as to be meaningless". Since we do not have the Contract of Employment Act as in U.K., we have to fall back on common law for determining what act amounts to misconduct in terms of the contract of employment. The question came up for consideration before the Court, of Appeal in U.K., in *Laws v. London Chronicle Ltd.* (1959) 2 All. ER. 285. In that case an employee of the defendant-company was dismissed for a single act of disobedience. Lord Evershed, Master of Rolls, observed:

"I think that it is not right to say that one act of disobedience, to justify dismissals must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience of misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passage which I have read that the disobedience must at least have the quality that it is "wilful" ; it does (in other words) connote a deliberate flouting of the essential contractual conditions."

9. In this case on the proved facts it cannot be said that respondent-2 had wilfully flouted the office note or the terms in the order of appointment. He bona fide believed that there was a teleprinter message from the Editor-in-Chief giving him permission to write the Articles. He might not have produced it but that does not lead to the conclusion that he admitted the misconduct. It has also come on record that these Articles were written by respondent-2 without causing any loss to the petitioner's business; that the magazines to which respondent-2 was contributing were in no way competing with the business of the petitioner and that only the articles rejected by the petitioner were sent to the magazines elsewhere. Generally in all contracts of employment a clause is introduced prohibiting the employees from dealing with third parties who are engaged in business competing with that of their employers. But all the same it should be made clear while stipulating that condition that employment with competing firms casual or surreptitious would be misconduct per se. But in this case it is not so. Every negative covenant or thou-shall-not-do office order may not lead to an action for misconduct. Even the office note says that violation of the same would be referred to the management for suitable and appropriate action. In the circumstances, a disregard of the office instructions or a term in the contract of employment on the bona fide belief that respondent 2 had prior permission of the Editor-in-Chief cannot be a misconduct warranting the extreme punishment of dismissal.

10. While interpreting the terms of employment I might have commented on the severity of punishment imposed on respondent-2 but those observations are applicable for determining whether there was a prima facie case. Prima facie case in the sense a prima facie case on the alleged misconduct to merit an order of dismissal. Though the jurisdiction of the Tribunal is a limited one u/s 33(2)(b),

it is of necessity should go into the nature of misconduct since what was alleged was not under the Standing Orders which governed the service conditions of respondent-2. For reasons best known to the petitioner, it chose to take action under the office note and under the order of appointment. Therefore, it should have made out a case before the Tribunal to show that a mere disregard of the office instructions or terms of the contract of employment was of such a nature as to make it unsafe for it to retain respondent-2 (see : Halsbury's Laws of England - Fourth Edition - Para 642). On the contrary the records point out that respondent-2 at worst committed a bona fide mistake under the impression that he had prior permission of the Editor-in-Chief. This fact by itself cannot be considered to be a wilful act which would render him unsafe for future employment. In the circumstances, the petitioner had failed to make out a prima facie case for the dismissal of respondent-2. Therefore, though I am not in complete agreement with the reasons given by the Tribunal, its decision does not call for my interference in these proceedings. In this view of the matter, there is no need to consider the argument of Mr. Narasimhan that it is also a case of victimisation, in that, another senior editor who was found to be contributing articles in his spare time to "Cochin Times" had not been dealt with either under the Standing Orders or otherwise.

11. Accordingly this petition is dismissed.