

(2008) 02 KAR CK 0045
In the Karnataka High Court
Case No : Writ Petition No. 48545 of 2003

Karnataka Power Corporation Ltd.

APPELLANT

Vs

G.G. Bhat

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Industrial Disputes Act, 1947 — Section 10 (4A), 34

Citation : (2008) 118 FLR 571 : (2008) 2 KCCR 1243

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : S.N. Murthy and Somashekar, for the Appellant; Subba Rao and Co., for the Respondent

Final Decision : Allowed

Judgement

Subhash B. Adi, J.—This writ petition is directed against the award dated 31.07.02 in I.D. Application No. 29/99.

2. The brief facts of the case are:

The respondent was working as Assistant (A/c) Cashier in the office of the Divisional Officer (Finance), KPC, at Jog Falls. It is alleged that, there was a shortage of cash of Rs. 1,11,029.75 and the respondent admitted this shortage in his apply to the show-cause notice. In view of the alleged shortage of amount he was kept under suspension by office memo dated 11.12.96. A charge shed was served on him which was denied by the respondent and thereafter, an enquiry was held. In pursuance of the findings of the enquiry officer, the Chief Engineer issued the show-cause notice on 28.06.97 for which the respondent filed objections on 2.7.97 and thereafter, on 16.01.98, the Chief Engineer passed the order of dismissal and also direction was issued for recovery of the shortage amount of Rs. 1,11,029.75.

Against the order of dismissal, the respondent raised the dispute u/s 10 Sub-section (4-A) of the Industrial Disputes Act, 1947.

2. On the issue of fairness of the enquiry, the Labour Court by its order dated 31.07.02, held the enquiry is not fair and proper, and on merit it held that the order of dismissal is not sustainable as the same is passed by a person who is not competent to pass the order of dismissal.

3. The Labour Court, in order to arrive at the finding that the order of dismissal is one without authority of law and passed by an incompetent person, it relied on the standing order and the order of punishment passed by the Chief Engineer and held that the Chief Engineer is appellate authority and not Disciplinary Authority, and directed the petitioner - management to reinstate the respondent with 70% of backwages. Management has assailed the said order of the Labour Court in this writ petition.

4. Sri S.N. Murthy, learned Senior counsel, appearing for the management, submitted that the Labour Court was not justified in holding that the Chief Engineer who is on appellate authority had no power to pass an order of dismissal. He submitted that in hierarchy of the authority. Chief Engineer is an appellate authority against the order passed by the disciplinary authority and exercise of power by the Chief Engineer cannot be found fault with. It is also submitted that since there is no post of Project Engineer or equivalent post of Superintending Engineer in the Jog Falls for the last seventeen years, the Chief Engineer being higher authority to the Project Engineer as well as the Superintending Engineer and being the appellate authority has passed the order of dismissal. As against the order passed by the Chief Engineer the mercy petition is filed by the respondent before the Managing Director of the petitioner - company. He submitted that just because the order is passed by the appellate authority, it cannot be said that the dismissal order is illegal and submitted that the Labour Court was not justified in setting aside the order of dismissal on the said sole ground.

5. In support of his contention, he relied on the Judgment reported in S. Nagiah Vs. India Aluminium Co. Limited, and submitted that in case of an enquiry initiated in pursuance of a charge-sheet issued by an incompetent person, where the workman had participated in the enquiry and order of dismissal is passed thereto, the enquiry proceedings cannot be found fault only on the ground that the enquiry is initiated in pursuance of a charge-sheet issued by an incompetent person. In this regard, he drew my attention to para 20 of the said judgment. He also relied on another judgment reported in 1963 (2) Mys. L.J 490, in the case of D. Made Gowda v. State of Mysore and drew my attention to page 495, and submitted that the plea that there is a discrimination because there was a right of appeal against an order imposing penalty under one set of rules and no such right under the other, was rejected in Jagannath Prasad Sharma Vs. State of Uttar Pradesh and Others, It must therefore be held that the existence of a right of appeal against the order of an administrative head imposing penalty and absence of such a right of appeal against the other does not result in discrimination nor contrary to Article 14 of the Constitution of India.

6. He relied on a passage at page 496 quoting:

A delinquent's right to appeal arises only if an order is passed by such authority and not otherwise. The delinquent has no indefeasible right to have misconduct of his enquired into only by a particular authority. If therefore by proper exercise of the power under Rule 13 the Government declares itself to be a disciplinary authority, the delinquent cannot successfully contend that the inquiry should have been held by an inferior authority so that he may have a right of appeal. The position may be compared to the well known situation under the Code of Civil Procedure, under the 24th Section of which the High Court or the District Court may at any time withdraw a suit or appeal to its own file and dispose of it which may involve the deprivation of at least one appeal which would otherwise have been available to a party. It has never been suggested that the deprivation of the right of appeal which is involved in the power of transfer u/s 24 of the CPC vitiates the exercise of the said power of transfer by the High Court or the District Court. This argument on behalf of Chakrapani and Qamruddin has to be rejected.

7. By relying on the said passage, learned Senior Counsel submitted that just because a right of appeal is deprived is no ground to hold the order of dismissal is illegal. He also relied on another judgment of the Apex Court in the case of Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory, and submitted that even under the standing order if the dismissal order is passed by an incompetent person, the order of dismissal cannot be termed as illegal. However, it is open to the workman to assail the order on the question of validity of the enquiry which is available before the Labour Court in which case, the management can lead evidence in support of such decision. But the decision by itself cannot be termed as illegal. In this regard, he relied on the observation made by the Hon'ble Supreme Court at page 118 inter alia:

In either case if the enquiry is defective or if no enquiry has been held as required by Standing Orders, the entire case would be open before the Tribunal and the employer would have to justify on facts as well that its order of dismissal or discharge was proper.

8. By relying on the said judgment, he further submitted that even assuming that Standing Orders require an order to be passed by an authority and if an order is passed by other than authority that decision cannot be termed as illegal. The procedure adopted by the Disciplinary Authority in passing the order can be questioned before the Labour Court or the Tribunal as the case may be, to hold the enquiry is not fair and proper, where the management can lead evidence in support of its conclusion.

9. The learned Counsel also relied on another judgment of the Supreme Court in the matter of Chairman, A.P. State Electricity Board and Others Vs. M. Kurmi Naidu, and submitted that in identical circumstances, the Apex Court considering the case of Surjit Ghosh Vs. Chairman and Managing Director, United Commercial

Bank, and others, , has accepted the view taken by it in the case of Balbir Chand Vs. Food Corporation of India Ltd. and others, wherein, the Supreme Court has observed thus:

It is to be noted that in Surajit Ghose there was no further appeal provision provided against the order of the higher authority and no appeal could be preferred and, therefore, the appellant was deprived of the appeal provision, it is in these circumstances the above observation was made. Surajit Ghosh case was reconsidered and distinguished again by this Court in Balbir Chand case. It was pointed out at SCC pp. 373-74, para 3 asunder:

It is now a well-settled legal position that an authority lower than the appointing authority cannot take any decision in the matter of disciplinary action. But there is no prohibition in law that the higher authority should not take decision or impose the penalty as the primary authority in the matter of disciplinary action. On that basis, it cannot be said that there will be discrimination violating Article 14 of the Constitution or causing material prejudice. In the judgment relied on by the counsel, it would appear that in the Rules, officer lower in hierarchy was the disciplinary authority but the Appellate Authority had passed the order removing the officer from service. Thereby, the appellate remedy provided under the Rules was denied. In those circumstances, this Court opined that it caused prejudice to the delinquent as he would have otherwise availed of the appellate remedy and his right to consider his case by an Appellate Authority on question of fact was not available. But it cannot be laid as a rule of law that in all circumstances the higher authority should consider and decide the case imposing penalty as a primary authority under these Rules. In this case, a right of second appeal revision also was provided to the Board. In fact, appeal was preferred to the Board. The Board elaborately considered the matter through the Chairman. It is not violative of Article 14 of the Constitution.

10. Relying on the said observation, the learned Senior Counsel submitted that the Apex Court, considering the proposition of law laid down in Balbir Chand's case, held that the Chairman of the Board who originally passed the order of dismissal, and who is an appellate authority, would not vitiate the order of dismissal as it does not even deprive the delinquent the opportunity to appeal, the delinquent is permitted to file a mercy petition before the Board. The Apex Court observed that, where there is no remedy of appeal at all, in such circumstances, the question of deprivation of appeal arises and not in case where there is a remedy of appeal to the Board or other authority. The Apex Court in Surjit Ghosh's case observed that, when the appellate authority passes an order of dismissal against whose order there is no appeal and there was total deprivation of right of appeal, under such circumstances, it results in discrimination against the employee concerned. However, it distinguished the said observation in Balbir Chand's case and held that there was no discrimination as a mercy petition was available to the delinquent and in fact, appeal was preferred to the Board. The Board elaborately considered the matter through the

Chairman. It is not violative of Article 14 of the Constitution.

11. By strongly relying on the judgment reported in the matter of A.P. Electricity Board's case (supra), learned Senior Counsel submitted that, the facts and circumstances of the said case and the facts and circumstances of this CESS are identical and the Apex Court has held that just because appellate authority has passed the order of dismissal, that will not deprive the employee from filing the appeal, by way of mercy petition and has upheld the order of dismissal passed by the appellate authority. He submitted the Labour Court was not justified in passing the award holding that the order of dismissal is passed by incompetent person and thereby holding that the entire proceedings are vitiated.

12. Per contra, Sri. K. Subba Rao, learned Senior Counsel for the respondent, submitted that Standing Orders require that a particular act to be done in a particular manner, same cannot be done otherwise. Deviating from the Voiding order and passing the impugned order by a person other than the Disciplinary Authority is per se illegal. He submitted that, the Standing Orders are statutory in nature and they are binding on all the persons concerned. They are different from the rules framed under Articles 309 and 311 of Constitution of India. The Standing Orders are framed by adjudication by the quasi-judicial body and every act of the employer and employee have to be in consonance with the Standing Orders. In this regard, he relied on the certified Standing Orders of Mysore Power Corporation Limited, Bangalore and pointed out that under Clause 2 of the said Standing Orders, "Managing Director," "Management", "competent authority" have been specifically defined inter alia:

"Managing Director" means the Managing Director of the Corporation or any one duly authorised to act on his behalf.

"Management" means the Corporation's management and includes the Managing Director or delegated authorities.

"Competent authority" means the authority empowered and notified by the management to impose the penalties on a workman.

13. He relied on the definition of competent authority and Clauses 22, 23, 24, 25 of the Standing Order. Clause 23 relates to punishment and authority to impose the punishment as specified in the Annexure-1 to the Standing Order Annexure-1 to the Standing Orders refers to the authority to impose the penalty, appellate authority and the reviewing authority, He referred to Clause 7 of the Annexures and pointed out that the Project Engineer or officer of equal cadre is competent to pass order of dismissal. He also pointed out that the Chief Engineer is an appellate authority under Annexure-1 and Managing Director is the reviewing authority. By relying on the said Annexures to the Standing Order, he submitted that, when a standing order specifically provides that, the respective function to be performed by a respective officer, it cannot be performed by any other authority or person He referred to the definition of competent authority and pointed out that competent authority means, the authority empowered or

notified by the management to impose penalty on the workman. Relying on the definition of competent authority and the Disciplinary proceedings and Aflnexus-1, he submitted that indisputably this Project Engineer or any officer of equivalent rank is the only person who can pass an order of dismissal and not any other authority.

14. In support of his contention, he relied on the decision reported in *The General Manager, Mysore State Road Transport Corporation Vs. Devraj Urs and Another*, and submitted that, even the appointing authority has no power to pass an order of dismissal unless the standing order specifically empowers the said authority. He pointed out from the said decision that, the divisional authority is the appointing authority however the authority to take disciplinary action is conferred on the Deputy Manager, Bangalore Division and it is held that only the Deputy General Manager alone competent to pass the order of dismissal. He referred to para 13 of the said judgment and submitted that in the paid case, though the divisional controller is an appointing authority, yet, he has no power to take disciplinary action as he is not vested with the power of dismissal and the said power is vested only in Deputy General Manager. The Apex Court though observed that it may look too anomalous but as long as the standing order expressly confers such power on the particular authority, it is only the said authority that can exercise such power and not the other authority.

15. He also relied on the judgment reported in 1968 LLJ 571 in the matter of *Hindustan Brown Boveri Ltd. v. Their Workmen and Anr.* and submitted that in the said case, the Apex Court observed that the powers to pass an order of dismissal and of the lesser punishment in lieu of dismissal are both vested in the company and the said power cannot be exercised by the Works Manager though he is an employee of the company and if such power is exercised by the Works Manager, it would be contrary to the Standing Orders and is illegal. He also relied on another judgment reported in *Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others*, and submitted that right of appeal against order of Disciplinary Authority conferred on employee gets lost if the higher authority passes an order of dismissal and relied on para 5 of the said judgment and submitted that when an appellate authority exercises judicial power, it should be held that there is no right to appeal unless it is provided under Regulations. He also submitted that the right of appeal being a substantive right vested in the employee, it cannot be taken away by allowing the appellate authority to pass an order of dismissal.

16. The learned Senior Counsel also relied on an unreported judgment of a Division Bench of this Court in W.A. No. 141/78 dated 21.11.1978 (*The Deputy General Manager and The Divisional Controller, KSRTC, Hassan v. Labour Court and Anr.*) and submitted that an order of dismissal passed by an incompetent person was set aside by this Court by observing that it is nothing but total lack of jurisdiction to pass such an order and it can be cured by allowing the employer to adduce evidence to prove misconduct.

17. By relying on these judgments, learned Senior Counsel submitted that standing orders categorically make it clear, that the competent authority for the purpose of passing an order of dismissal is the Project Engineer or the authority of equivalent cadre.

18. It is not in dispute that the competent authority has not passed the order of dismissal and the order of dismissal is passed by the Chief Engineer. Though the Chief Engineer is an appellate authority, he cannot relegate himself to the position of Disciplinary Authority and his order cannot be held to be valid merely on the ground that he is an appellate authority in hierarchy. He further submitted that the explanation offered by the petitioner at para 12 of the writ petition that no post of Project Engineer or Superintending Engineer is in existence from 1970 is no answer, even if the Project Engineer is not there, the definition of "competent authority" provides delegation of such power to another authority and in this case, such power is not delegated to any other authority. He also submitted that the order of dismissal being illegal cannot be validated by showing that the appellate authority being the Chief Engineer in hierarchy, is the superior in authority. The Labour Court on appreciation of the provisions of the standing orders and the law as declared by the Apex Court, has rightly held that the order of dismissal is not sustainable.

19. From the rival contentions of both the parties, the only question that arises for consideration is:

Whether the order of dismissal passed by the appellate authority is sustainable or not?

20. The competent authority is defined under the Standing Orders as the authority notified by the management to impose penalties on a workman. In this regard, under Clause 25, the power is conferred to pass the order of punishment on the competent authority in terms of Annexure-1 as provided in Clause 23. It is not in dispute that Annexure-1 defines disciplinary authority, appellate authority as well as reviewing authority.

21. Indisputably, the disciplinary authority is a Project Engineer or Officer of equal cadre. It is also not in dispute that the order of dismissal in this case is not passed either by the Project Engineer or by an officer of equal cadre but, it is passed by a Chief Engineer who is an appellate authority.

22. In so far as the enquiry conducted by the enquiry officer, issue of charge-sheet are concerned, no defect is pointed out either by the Labour Court or by the learned Senior Counsel for the respondent. It is only the order of Disciplinary Authority which is stated to be illegal in this case. Distinction is sought to be made between the Standing Orders and the Rules and Regulations framed in exercise of power under Article 311 in the matter of disciplinary enquiry. The learned Senior counsel for the respondent submitted that the Standing Orders stand on different footing and the Rules and Regulations framed under Article 311 stand on a different footing and they cannot be compared.

23. The question that arises for consideration is how far it has prejudiced the case of the respondent, in case, the order of punishment is passed by the appellate authority instead of the Disciplinary Authority and would it vitiate the entire proceedings. No doubt, under the Standing Orders the order of dismissal has to be passed only by Project Engineer or an Officer of equal cadre. Object of holding enquiry before the punishment is imposed is that, the employee gets fair chance to defend his case and should not be punished without enquiry. Appeal is provided to give further opportunity to the employee to question the order of dismissal if it is erroneous. In this cast, as far as the enquiry is concerned no error is pointed out and the petitioner had an opportunity to defend his case. The enquiry officer has found that the charge is proved. What ought to have been considered by the Disciplinary Authority has been considered by the appellate authority.

24. It is not a case, that, the petitioner has no further appeal or right to file petition, the petitioner has filed the petition before the Managing Director who is reviewing authority. This means the petitioner had not only had the opportunity before the enquiry officer but also before the Chief Engineer by way of reply to second show cause notice and thereafter before the reviewing authority. Assuming that the decision of the authorities is erroneous, still the petitioner being workman has right to raise dispute on the question of fairness of the enquiry and also on the question of perversity, victimization and unfair labour practice. In view of this, it cannot be said that the parsing of order of punishment by the appellate authority has prejudiced the petitioner.

25. The judgment relied on by the learned Senior Counsel in Devaraj Urs case (supra), relates to an order of dismissal passed by the Divisional Controller and not by the Deputy General Manager. The standing order No. XIII inferring power to take disciplinary action and thud power was not delegated to the different divisional heads even after the re-organization of the States. In the absence of that delegation of power, the authority who has no authority in matters of disciplinary proceeding cannot pass the order. Deputy General Manager, Bangalore, irrespective of the Divisional Controllers, was the only disciplinary authority. In the absence of any power vested in the Divisional Controllers, the Apex Court observed that unless and until the delegation of power is made in exercise of power u/s 34, would be total lack of jurisdiction. The decision in the matter of Hindustan Brown Boveri Case (supra) relates to an order pasted by a Works Manager, whereas, the standing order confers power on the company interpreting the said provision, the Apex Court observed that if the powers to pass an order of dismissal or of lessor punishment lies with the company, it cannot be exercised by another authority, this is also case of total lank of power and the Surjit Ghosh's case relates to a right of appeal which is a substantive right In all these three cases, there is no issue as regards exercise of power by appellate authority in the place of disciplinary authority. The issue is whether person who is not otherwise prescribed authority he exercising power would be illegal. However, appellate authority stands on different footing in as much as it

is not only is superior authority but also appellate authority it cannot be said that it lacks the jurisdiction Further, where the order of disciplinary authority could be questioned before the appellate authority and the appellate authority having power to sit in appeal over the disciplinary authority, it cannot be said that the said authority lacks the inherent jurisdiction.

26. The Apex Court in the matter of A.P. State Electricity Board (supra) has considered the decision in Surjit Ghosh's case (supra) where it was held that the right of appeal is a substantive right conferred on the employee. However, the said decision was distinguished in Balbir Chand's case and in the said case, it is observed that:

It is now a well settled legal position that an authority lower than the appellate authority cannot take any decision in the matter of disciplinary action but there is no prohibition in law that the higher authority should not take decision or impose penalty as the primary authority in the matter of disciplinary action. On that basis, it cannot be said that there will be a discrimination violative of Article 14 of the Constitution of India or causing material prejudice.

27. The observation of the Apex Court in Balbir Chandra case makes it clear that passing an order of dismissal by the appellate authority or higher authority that by itself will not prejudice the case of the employee unless it is shown that there is no appeal provision provided under the Standing Orders. Considering the second appeal provided in the said case, the Apex Court held that the right of appeal is still available with the employee and the said decision is followed by the Apex Court in the A.P. State Electricity Board case wherein the order of dismissal was passed by the appellate authority who is a Chairman and thereafter, the employee had filed a petition before the Board. Though it is in the nature of mercy petition still it is held that there is an opportunity to file petition and does not deny the right of appeal to the employee.

28. The facts which are not in dispute in this case also is that the Chief Engineer has passed the order of dismissal. Under standing order No. 25, Clause (f), an appeal is provided. After the decision of the appellate authority, the further remedy is provided to the employee/workman to file a mercy petition before the Managing Director within 30 days from the date of receipt of the order from the appellate authority. In this case, the respondent - workman has filed such a petition before the Managing Director.

29. The contention that a power which is conferred on a particular authority cannot be exercised by another authority lower than the said authority cannot be disputed. No doubt if an authority is conferred with a power to exercise, it has to be exercised by that authority. But exercising power by a higher authority who has got an appellate jurisdiction, it cannot be said that, it is without jurisdiction. It is only in cases where the power is sought to be exercised by such an authority who is lower authority to disciplinary authority, but it cannot be said against the appellate authority, it cannot be said that it is a lack of jurisdiction to

exercise such power.

30. A distinction is sought to be made as regards to the Standing Order and the Rules and Regulations framed under the provisions of Article 311 however it is not the case of interpretation of rules or the scope, but exercise of power and the nature of prejudice.

31. Apart from this, what is to be noticed in this case is that the Labour Court, except on the question of jurisdiction of the appellate authority, in passing the dismissal order has held that the dismissal order is illegal. From the records, it is clear that the respondent had replied to the charge-sheet and the respondent participated in the proceeding and then, the enquiry report is submitted.

32. In my opinion, it cannot be found that the proceedings have caused prejudice to the interests of the workman. In similar circumstances, the Apex Court, in the matter of Indian Aluminium case, has considered this aspect of the matter and also answered the issue as to whether the workman suffered prejudice, whether the workman understood the scope of charges and further has observed that if that workman has participated and had understood the case, then, it cannot, be held that the enquiry is vitiated just because charge-sheet is issued by an incompetent person. In this case, the workman not only has participated in the enquiry, but enquiry officer submitted a report and thereafter, the appellate authority passed the order of dismissal. It is also necessary to notice, the decision of the Apex Court in the matter of The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, The para relevant for consideration is para 45:

In our opinion, the analogy placed before us by the counsel cannot stand scrutiny. It is no doubt true that Standing Orders, which have been certified under the Industrial employment (Standing Orders) Act, 1946, become part of the statutory terms and conditions of service between the industrial employer and his employee and that they govern the relationship between the parties. But there is no provision either in this statute or in the Act which states that an order of dismissal or discharge is illegal if it is not preceded by a proper and valid domestic enquiry. No doubt it has been emphasised in the various decisions of this Court that an employer is expected to hold a proper enquiry before dismissing or discharging a workman....

33. The Apex Court, by interpreting the standing order has held that there is no provision to treat the order of dismissal as illegal even if it is not preceded by a proper and valid domestic enquiry. All that it states is procedure may be illegal but the decision can be justified by leading evidence.

34. Even in this case, the standing order referred to by the parties, refer to an action to be taken by a particular authority and if it is not taken, the consequences have not been enumerated. But, by interpreting the statutory provisions, Apex Court has observed that by itself will not prejudice the interests of workman unless it is shown by the workman that, as to how it has prejudiced

his interest. But, in this case, except the question of competency of the authority to pass a dismissal order, no other questions have been raised. The Labour Court only on the ground that the order of dismissal is passed by the Appellate Authority has set aside the order of punishment. The other unreported decision relied on by the learned Counsel in W.A. No. 141/79 is a case where the authority who passed the dismissal order is not the authority prescribed under the Statute and it is not a case of appellate authority prescribed has passed the order, I do not find that judgment is relevant in this case. The writ petition deserves to be allowed and the order and the award require to be set aside. In the light of the above observation, the order of preliminary issue as well as the award requires to be set aside.

35. Since the award is passed only on the question of competency of the authority to pass the dismissal order, in my opinion, the matter requires to be reconsidered. The Labour Court has answered both preliminary issue and the award only on the competency of the disciplinary authority, hence in such circumstances the Tribunal is required to reconsider both the preliminary issue as well as on merit.

36. Accordingly, the Writ Petition is allowed. The award dated 31.7.2002 passed in I.D. Application (ICM) No. 29/99 is quashed.

37. In case the enquiry is held to be not fair and proper, the consequences would follow and the workman would be entitled to seek necessary interim relief. However, looking at the pendency of the matter and also the award having been set aside, in my opinion, the respondent - workman has to be paid some interim relief. Tentatively, the workman may be paid 50% of the last drawn salary till the application on the preliminary issue is adjudicated and thereafter subject to the decision of preliminary issue, interim relief and main award be adjudicated.