
(1986) 09 MAD CK 0030
In the Madras High Court

K.S. Gurumurthy

APPELLANT

Vs

The Additional Commissioner for workmens Compensation
and Another

RESPONDENT

Date of Decision : 12-09-1986

Acts Referred:

Citation : (1987) 2 MLJ 335

Hon'ble Judges : Nainar Sundaram, J

Bench : Division Bench

Judgement

Nainar Sundaram, J.—The petitioner in this writ petition seeks to quash the order passed by the first respondent in T.S.E. No. 116 of 1976. That was an appeal preferred by the petitioner to the first respondent u/s 41(2) of the Tamil Nadu shops and Establishments Act, 1947, hereinafter referred to as the Act. That appeal came to be preferred under the following circumstances.

2. The petitioner was employed as a peon with the second respondent in its Coimbatore Branch. On 31-12-73 allegations of misconduct were thrown against him, and the body of the letter addressed to the petitioner in this behalf runs as follows:

it has been reported to me that you did not remit the proceeds of cheques which were entrusted to you for collection by the Branch management on the dates on which they were encashed by you.

2. Details of cheques which were collected by you and proceeds not remitted to the Branch on the same day is given below.

Particulars	of	Amount	Dates	on	Date	on
which	Cheques	encashed	(Paid)	accounted	for	by
Drawee	Bank	by	you.			

Cheque on City Rs. 276-00 17-9-1973 22-9-1973 Co-Op., Bank. " Rs. 1,001-00
" 27-9-1973 " Rs. 1,290-82 " " " Rs. 248-25 30-7-1973 18-9-1973 " Rs. 2 7-00
29-8-1973 " " Rs. 460-00 " " " Rs. 5 75-00 03-9-1973 18-9-1973 " Rs.
168-20 14-9-1973 _____

3. The above act if proved will amount to temporary misappropriation of money received by you in the course of your employment and therefore will amount to gross misconduct as per para 10.5(j) of the Bi-partite Settlement.

4. Please show cause within ten days from date as to why disciplinary action should not be taken against you for your above act. Please note that your reply should reach me within the stipulated time failing which it will be taken that you have no explanation to offer and the matter proceeded with further.

5. Since the misconduct alleged against you is of serious nature, you are placed under suspension with immediate effect.

On 10-1-1974 the petitioner replied to the above letter and the contents of the reply are as follows:

I have received your show cause notice dated 31-12-1973.

To enable me to submit my reply in writing to the show cause notice, I request you to kindly furnish me authenticated copies of the cheques as also the copies of the cash challans enumerated in para 2 of the notice.

I shall submit my reply immediately after examining them. They are necessary for preparing the reply.

I hope that appreciating my status as a sub-staff, you will surely concede to my request.

I request early compliance.

On 21-2-1974 the second respondent addressed a letter to the petitioner in the following terms:

We have for acknowledgment your letter dated 10th January, 1974. You are eligible to ask for copies of the cheques, of the copies of the cash chalans only if and when an enquiry into the charges is ordered against you and that too only if and when the Management decides to rely upon the documents mentioned in your above letter to substantiate its charges. However, if you wish to peruse any records or registers available at the branch, you will be permitted to do so on your specific request to Branch Manager.

Please note that your explanation should reach us within 10 days from date, failing which it will be taken that you have no explanation to offer and the matter proceeded with further.

The petitioner replied to the above letter on 6-3-1974 as follows:

I have received your letter marked "staff" and dated February 21, 1974 in which you have inter alia stated that the copies of the cash challans enumerated in the 2nd para of the show cause letter dated 31st October 1973 would be made available to me only if and when an enquiry is ordered into the charges and that too only if and when the Management decides to rely upon them to substantiate its charges.

But I have been permitted to peruse any records or registers available at the Coimbatore Branch.

I would have thought that the cheques and cash chalans mentioned in para 2 of the show cause notice formed the basis of the show cause notice. But your letter of February, 24, indicates that the management is on two minds about relying on them in order to proceed against me.

I wish to submit that if the Bank has come to the conclusion that there is a prima facie case against me warranting a charge sheet and enquiry, they should in fairness to me supply copies of the cheques and cash challans to enable me to prepare my reply.

I therefore, once again appeal to you to supply copies of the cheques and cash challans figuring in para 2 of your show cause notice dated 31st October, 1973.

On 13-5-1974 the second respondent framed a charge against the petitioner and directed the conduct of an enquiry in the following terms:

I refer you to the show cause notice dated 31-12-1973 and subsequent letters dated 21-2-1974, 14-3-1974 and 4-4-1974. Since no reply, has been received from you so far it is taken that you have no explanation to offer and the following charge is framed against you.

1. You did not remit the proceeds of cheques entrusted to you for collection by the Branch management on the dates on which they were encashed by you.

Details of cheques collected by you and proceeds not remitted to the branch on the date of collection are given below:

Particulars	of Amount	Dates on which	Date on
which Cheques encashed (Paid)	accounted for	by Drawee Bank	by you.

Cheque on City	Rs. 276.00	17-9-1973	22-9-1973	Co-Op., Bank.	- do -	Rs. 1001.00
"	27-9-1973	- do -	Rs. 1280.82	" "	- do -	Rs. 248.25
"	30-7-1973	- do -	Rs. 27.00	29-8-1973	" - do -	Rs. 460.00
"	18-9-1973	- do -	Rs. 575.00	03-9-1973	" - do -	Rs. 168.20
"	14-9-1973	- do -				

The above act, if proved, will amount to temporary misappropriation of money received by you in the course of your employment and therefore will amount to

gross misconduct as per. para 19.5 (j) of the Bi-Partite Settlement.

I am deputing Shri R. Venkataramani, Officer, Staff Department to conduct an enquiry into, the above charge. He will inform you the date and time of the enquiry. Please be present at the enquiry in person.

The enquiry was conducted and the Enquiry Officer rendered his findings holding the petitioner guilty of the charge of misappropriation in respect of all the items except item 1. I will refer to the findings of the Enquiry Officer presently. The petitioner was given a second show cause notice and he submitted his explanation on 10-4-1976, the contents of which run as follows:

The disciplinary authority vide his letter dated 4.12-1975 has proposed a punishment of dismissal from service and called for explanation from the employee as to why the proposed punishment should not be ordered. The disciplinary authority had also stated in this letter referred to above that he is concurring with the findings of the Enquiry Officer that the employee is guilty of charges framed against him vide charge sheet dated 13-5-1974.

The defence at the enquiry stage itself raised certain preliminary objections and the Enquiry Officer has filed to give his rulings over the same and the reply given by the presenter to the objections raised by the Defence are also vague. The defence in its summing up arguments had also stated that it is always open for them to raise the issue in future at any forum. The defence during the enquiry itself. called for material evidence to prove that the subject instruments were handed over to Shri K.S. Gurumurthy for local collection and the Enquiry Officer also in his findings (Vide last page last but one paragraph) stated that it is said no record was being kept at the branch as to the receipt of the instruments or as to disposal of the same. He further stated that non-maintenance of records as such will not in any way mitigate the offence. The defence wishes to point out that in the absence of material evidence to prove that the subject instruments were handed over to Shri K.S. Gurumurthy, it cannot be construed that the employee was guilty. Further, the Enquiry Officer has placed reliance on the Exhibits Nos.9 and 10, being the letters addressed to the Agent of Coimbatore Branch by the Coimbatore City Co-operative Bank Ltd., to come to the conclusion that the subject instruments were encashed by Shri K.S. Gurumurthy. But a clear reading of the Exhibit No-10 will clearly prove that the Coimbatore City Co-operative Bank Ltd., has only restated that the subject instruments were signed on the reverse and payment received by one Shri R.S.G. Gurumurthy and they had given the said reply on the strength of the confidential letter addressed to Shri K.S. Gurumurthy and copied to them. In view of the fact, that the prosecution has failed to let in necessary witnesses from the Coimbatore City Co-Operative Bank Ltd., to prove that the payments were made by them only to the charge - sheeted employee, the vague letters which were marked as exhibits should not be relied upon.

The defence also wishes to point out that the Coimbatore City Co-Operative Bank

Ltd., in their first letter marked as Exhibit NCT.9 had state that they are unable to trace out the date of payment of dividend.

In the absence of material evidence to prove that the subject instruments were handed over to Shri K.S. Gurumurthy only for local Collection; failure on the part of the prosecution that the payment! were made to the charge - sheeted employee only, and the contradictory depositions given by Shri William, the prosecution's witness, the employee should be exonerated from the charges and the punishment proposed is quite against principles of natural justice. The defence therefore pleads that the employee should be exonerated from the charges.

Ultimately, the petitioner was dismissed from service on 3-5-1976. The petitioner preferred a domestic appeal and that was rejected and thereafter he resorted to the process u/s 41(2) of the Act, before the first - respondent, and the first respondent by the impugned order dated 14-7-1979, has dismissed the appeal of the petitioner.

3. Mr. N.G.R. Prasad, learned Counsel for the petitioner, would urge that the charge levelled against the petitioner was temporary misappropriation and in the instant case it was alleged that eight cheques entrusted to the petitioner for encashment from the Coimbatore City Co-Operative bank Ltd., hereinafter referred to as the Co-operative Bank, were encashed by the petitioner on specified dates, but they were not remitted into the Coimbatore branch of the second - respondent on the respective dates, of encashment and they were remitted only after a lapse of considerable time and with regard to the entrustment of the cheques to the petitioner, encashment of the same by the petitioner and the dates of such encashment and the factum of remittal of the cash into the Coimbatore Branch of the second - respondent, there was total lack of legal evidence and hence it cannot be held that the petitioner was dismissed from service on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the said purpose within the meaning of the second limb of section 41(1) of the Act. Learned Counsel for the petitioner would complain that both the enquiry Officer and the first - respondent have glossed over these crucial aspect of lack of legal evidence in support of the charge of temporary misappropriation levelled against the petitioner. On an assessment of the materials as they stand exposed before me, I find that the grievance of the learned Counsel for the petitioner is not without substance. There are four aspects which go to make up the charge of temporary misappropriation. One is, that cheques were entrusted to the petitioner for encashment from the co-operative Bank. The Second is, that it was the petitioner who encashed the cheques. The third is, that the petitioner encashed the cheques on the alleged specified dates. The fourth is, the petitioner remitted the cash into the Coimbatore Branch of the second - respondent after the lapse of considerable time. We can assume, without in any way putting it as a concession made by the learned Counsel for the petitioner that the cheques were, infact, entrusted to the

petitioner for encashment. We can further assume that it was the petitioner, who remitted the cash into the Coimbatore Branch of the second - respondent on the dates mentioned. But with regard to aspects 2 and 3, namely, that it was the petitioner who encashed the cheques and if so the encashment took place on specified dates, I find that there is lack of legal evidence as contended by the learned Counsel for the petitioner. Mere keeping of the cheques without encashment would be of no consequence at all. The second - respondent on the aspects of encashment of the cheques by the petitioner and the said encashment being on specified dates, relied on certain correspondence exchanged between its Coimbatore Branch and the Co-operative Bank. In October, 1973, the petitioner was addressed a letter by the second - respondent in the following terms:

We find that the following items of cheques/Bills entrusted to you for collection have not been accounted for immediately on realisation. The amounts have been paid by you on a later date. Kindly give us your explanation for the lapse.

_____	Date on which	Particulars of	Amount	Date on
which given to you	Instrument	accounted for		

15.9.1973	Cheque on City Co.Op Bank	Rs. 2 76-00	22.9.1973	05.9.1973 -do-
Rs. 1,001-00	27.9.1973	11.9.1973 -do-	Rs. 1,280-82	27.9.1973
			07.7.1973	FDR
Int. Warrant on City Co-Op Bank	Rs. 58-12	18.9.1973	10.7.1973	D.W -do-
Rs. 14-45	18.9.1973	25.7.1973	Cheque -do-	Rs. 248-25
			18.9.1973	22.8.1973 -do-
Rs. 27-00	18.9.1973	25.8.1973 -do-	Rs. 460-00	18.9.1973
			28.8.1973 -do-	Rs. 575-00
18.9.1973	11.9.1973 -do-	Rs. 168-20	18.9.1973	_____

_____ It is claimed that a copy of this letter was also marked to the co-operative Bank. The said Bank replied on 21-12-1973 in the following terms:

Ref. Your copy of the confidential letter dated nil addressed to one Thir(sic) K.S. Gurumurthy.

The particulars required by you are give below:

_____	Cheque No.	Amount	Date of encashment	from our bank
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F 54289	Rs. 2 76-00	17-9-1973	F 63401	Rs. 1001-00	17-9-1973	F 63690	Rs. 1280-82	17-9-1973	SB 20351	Rs. 248-25	30-7-1973	SB 20514	Rs. 460-00
29-8-1973	F 60517	Rs. 27-00	29-8-1973	F 60794	Rs. 575-00	3-9-1973	F 63829	Rs. 168-20	14-9-1973				

As regards fixed deposit interest warrant for Rs58-12 and Divident Warrant for Rs. 14-45 we are not in a position to trace the exact date of payment, if you

furnish the Fixed Deposit No., for interest warrant and Admission No. or name for Divident warrant, we will furnish the date of payment to you.

This letter dated 21-12-1973 was follow (sic) up by another letter by the very sar(sic) bank on 19-8-1974, the contents of which run as follows:

Ref: your copy of the confidential letter dated nil addressed to one K.S. Gurumurthy. 2. Our letter dated 21-12-1973. In continuation of our letter 2nd cited we wish to state that one K.S. Gurumurthy has signed the cheques referred to in our letter and received cash payment from us.

Both with regard to encashment of the cheques by the petitioner and the dates of encashment, the letters, dated 21-12-1973 and 19-8-1974 from the Co-operative Bank alone have been placed as proof in the domestic enquiry. Adverting to the letter dated 21-12-1973 and 19-8-1974 from the Co-operative bank, the findings of the Enquiry Officer run as follows:

I would like to refer to Exhibit No.9 and Exhibit No. 10 being letters dated 21-12-1973 and 19-8-1974 respectively received from the Coimbatore City Cooperative Bank Ltd., 30, Dr. Nanjappa Road, Coimbatore, from where Shri K.S. Gurumurthy is reported have encashed the cheques referred to in the earlier paragraph. It is abundantly clear from the letters that Shri Gurumurthy has received the amounts specified from the coimbatore City Co-operative Bank Ltd, on the dates noted against each. The defence counsel in his arguments has stated that the Co-operative Bank had mentioned the particulars of payment only but that they had not said the payment was made to Shri K.S. Gurumurthy. The reading of Exhibit No. 10, i.e., letter from the co-operative Bank dated 19-8-1974 would reveal that shri Gurumurthy had signed the concerned cheques and had received cash payment from that co-operative Bank. So there can be no doubt as to Shri Gurumurthy having presented the concerned cheques at the drawee bank, namely, the City Co-operative Bank at the dates noted against each signing the cheques on the reverse and having received cash payment.

The first-respondent deals with the question in the following terms:

The sheet anchor of the appellant's case is that he was not furnished with copies of cheques and challans and that he Management had not examined him. The charge is that Thiru Gurumurthy encashed certain cheques from the drawee's Bank, namely, City Co-operative Bank on dates noted in the charge sheet but accounted for it only on different dates. In another words, the appellant has been charged with temporary misappropriation of the money of the Bank. It is not the case of the appellant that he was not entrusted with the cheques. In this case, admittedly, the appellant had received moneys by encashing the cheques from the drawee's Bank and remitted on different dates. It is strange that the appellant had thought of this plea in an appeal before the Additional Commissioner for Workmen's Compensation when he had not challenged the fact of encashment or remittance on different dates. The fact that he had been asking for cheques and challans and for calling certain persons to be examined

as witness on his side in case the management have not proposed to examine them goes to show that it is a deviation from the established fact. The onus is on the appellant to disprove the charge that he had not remitted on different dates when the charge was proved beyond doubt by the management. The appellant wants certain documents to be furnished even at the time of giving charge sheet. If he had not really committed the misconduct, nothing prevented him in denying the charge of encashment of cheques and remittance on different dates. Furthermore, it is strange that the appellant had not thought of vindicating his stand even at the time of domestic enquiry especially when the management had afforded him all reasonable opportunities. It may also be seen that the respondent had allowed the defence counsel who is none else than the president of the Indian Bank employees Union to assist the appellant in the enquiry. Though even according to the Enquiry Officer's report, there has been some irregularity in the office procedure of the bank, an irregular act would not confer right on the part of the employee to commit an illegal act. The factum of encashment of cheques on certain dates and remittance on different dates, thereby temporarily misappropriating the amount, had been established beyond all reasonable doubts.

None from the Co-Operative Bank was called and examined to speak about and corroborate the averments made in its letters dated 21-12-1973 and 19-8-1974. The letter dated 19-8-1974 merely says that one K.S. Gurumurthy has signed the cheques referred to in the earlier letter dated 21-12-1973. The petitioner in the two replies, one dated 10-1-1974 and the other dated 6-3-1974, has not admitted that it was he who encashed the cheques and that too on the specified dates alleged. The letter dated 19-8-1974 does not by itself establish the identity of the person who encashed the cheques. "K.S. Gurumurthy" mentioned in that letter is the petitioner, cannot be presumed. The cheques were not called for to establish that it was the petitioner, who encashed the cheques and in any event to confront the petitioner with the signatures found on the cheques; and to have the same identified as those of the petitioner. Certainly the burden was not on the petitioner to disprove the charge as opined by the first respondent. This concept by itself was basically wrong, and has got to be disapproved. To treat the bare letters "from the Co-Operative bank as proof by themselves of the charge without any corroborative evidence from the author of those letters will certainly contradict the very concept of legal evidence. Ramanujam J., In *W.B. Correya v. Deputy Managing Director, Indian Airlines* (1977) 2 L.L.J. 163 > (1977) 1 M.L.J. 364 : (1977) S.L.J. 82 : (1977) Lab. I.C. 1449 with regard to the nature of the evidence that the Domestic Tribunal should take note of and act upon, after referring to the pronouncements of the Supreme Court, summed up the proposition in the following terms:

The said decisions of the Supreme Court clearly lay down that though it is well established that domestic Tribunals like the enquiry officer is not governed by the strict rules of evidence or of procedure, it cannot ignore the substantive rules constituting the principles of natural justice. One of the statutory considerations

of natural justice is that a statement taken behind the back of the person charged is not to be treated as substantive evidence and that such statements can form part of the substantive evidence only when, the persons who make statements are examined before the Domestic Tribunal and the facts referred to in the statement are spoken to or affirmed before the enquiry officer. It is true, it is not necessary for the person who has given the statements behind the back of the person charged to, speak word by word or sentence by sentence before the Tribunal. But the facts referred to in the statements should be affirmed at least-in the general way in his evidence before the Tribunal.

The Judgment of the learned Judge has been confirmed by a Bench of this Court to which I had been a party in *Indian Airlines v. W.B. Correya* (1978) 2 L.L.J. 437, and there it has been countenanced if the statement recorded behind the back of the delinquent employee" is not put to the witness and he had not been given an opportunity to deny or affirm the" same, there is, in fact, no evidence of that witness in the course of Chief - examination at all and it is very doubtful whether such a statement notwithstanding copies thereof had already been furnished to the employee can be used as substantive evidence against the employee concerned. As stated above, here the documents taken note of and acted upon in the domestic enquiry are bare letters" from the Co-Operative Bank. Certainly they cannot be equated to evidence much, less legal evidence, in the absence of corroboration by the author of those letters. In the domestic enquiry, as already noted, the author of those letters was not "even called to corroborate, the contents of the letters. Further, the cheques called for by the petitioner himself have not seen the light of the day and in the, absence of the production of the cheques, to evidence encashment on specified dates by the petitioner, the averments in the letters, even assuming they get corroborated by the evidence of the author of those letters - here even that evidence is lacking - could not -be taken to be decisive, both on the question that it was the petitioner, who signed the cheques and the cheques were encashed on the specified dates. Hence, on the aspects of encashment of the cheques by the petitioner, and that too on the specified dates, there was a dearth of legal evidence. If there was dearth of legal evidence on these crucial aspects, it is not possible to spell out the theory for temporary misappropriation. It must be established that by virtue of encashment of the cheques on the specified dates by the petitioner and by remittance taking place after the lapse of time, into the Coimbatore Branch of the second - respondent, there was temporary misappropriation of the cash.

4. The second limb of Section 41(1) of the Act speaks about dispensation with the services of an employee on a charge of misconduct, supported by satisfactory evidence recorded at an enquiry held for that purpose. The expression "satisfactory evidence" must be deemed to have a legal potency in the sense that it could only be legal evidence and nothing short of it. It cannot be equated to any material, which the employee may choose to call evidence and about which he may claim satisfaction. It is not evidence, satisfactory to the

employer. It must be evidence, satisfying the concept of legal evidence. It must be a species of proof or probative matter, legally acceptable at the trial of an issue. Here, we find that the domestic Tribunal has acted upon and dismissed the petitioner without satisfactory evidence on the crucial aspects of temporary misappropriation.

5. This is sufficient for the petitioner to have the order of dismissal passed by the second - respondent against him set aside at the hands of the first-respondent. Yet, I must place on record the other contentions advanced by Mr. N.G.R. Prasad, learned Counsel for the petitioner. One such contention is that as per the bi - partite settlement, dated 19-10-1966, it was not at all the duty of the petitioner, who was functioning as a peon to encash cheques. Secondly, it was contended that the Enquiry Officer was not appointed in accordance with paragraph 19.14 of the aforesaid Bi partite settlement. Thirdly, it was urged that the records do show that the Coimbatore Branch of the Second - respondent is not above board with regard to its functioning in that no firm procedure was adhered to and no record was kept with regard to either receipt or disposal of the cheques, and in the said contingencies the petitioner ought not to have been penalised with an order of dismissal for laches, if any. There is no need to go into these contentions because I have upheld the primary contention that the dismissal was not the charge of misconduct, supported by satisfactory evidence. If this is so, a duty is cast upon the first - respondent to set aside the order of dismissal. The petitioner is bound to succeed on this ground.

6. However, Mr. G. Venkataraman, learned Counsel for the second - respondent, would urge an objection to thwart the grant of relief to the petitioner taking note of the above features. This objection is being taken for the first time in the counter - affidavit filed by the second - respondent in August, 1986. Learned Counsel for the second - respondent projects his objections in the following manner. He would state that the second-respondent is an establishment under the Central Government, coming within the ambit of Section 4(1)(c) of the Act and hence the Act itself would not apply to it and the petitioner was not in order in resorting to the process u/s 41 (2) of the Act, and the whole proceedings including the ultimate order passed by the first-respondent must stand ignored as lacking in jurisdiction. Learned Counsel, for the proposition that the second-respondent is an Establishment under the Central Government relies on a pronouncement of a Bench of this court in C.V. Raman and Ors. v. Bank Of India, Southern Region (1984) 2 L.L.J. 34. That pronouncement had come to be rendered on 18.4.1984 long after the impugned order dated 14.7.1979. Learned Counsel for the second-respondent, would submit that this is a case of lack of inherent jurisdiction in the first-respondent to entertain the very "appeal u/s 41(2) of the Act, in view of the fact the second-respondent falls within the ambit of Section 4(1)(c) of the Act. Of course, the pronouncement of the Bench is to the effect that the Nationalised Banks such as the second-respondent are Establishments under Central Government, coming within the exemption u/s 4(1) (c) of the Act. As to when an "Establishment" could be held to be one under the

Central Government is not a proposition explicitly set out in the statutory provision itself. Section 4(1)(c) reads as follows:

Establishments under the Central and State Governments, local authorities, the Reserve Bank of India, a railway administration operating any railways defined in Clause (2) of Article 366 of the Constitution and cantonment authorities.

There is a specific reference to the Reserve Bank of India. It is true that specific mention of Reserve Bank of India and omission to mention nationalised banks, cannot be taken to be a pointer that such banks cannot come within the ambit of the exemption u/s 4(1)(c). Only when it gets demonstrated that Nationalised Banks, such as the second-respondent are Establishments under the Central Government, they go out of the purview, of the Act by virtue of Section 4(1)(c) thereof. The exemption is not explicit, but on the other hand, the exemption has got to be spelt out by deductions and reasonings, certainly taking note of the factual aspects therefor. The Bench in the above pronouncement bodily imported and applied the principle applicable to the determination of an authority under Article 12 of the Constitution to the features emerging before it, to decide as to whether Nationalised Banks would be "establishments" under the Central Government. It is not as if the second-respondent could not have raised in this contention before the first respondent and asked for an adjudication in its favour to thwart the very prosecution of the appeal preferred by the petitioner u/s 41(2) of the Act. Equally so, it is not claimed that the first-respondent would lack jurisdiction to adjudicate this question if raised before him. Learned Counsel, for the second-respondent was at pains to draw any attention to very many, citations for the propositions that total, lack of jurisdiction cannot be cured by consent or acquiescence and acquiescence in the exercise of jurisdiction by a Tribunal or court, when it lacks such jurisdiction cannot bar the party¹ from raising the contention subsequently. There is no need to refer to these citations because we can take it that the above proposition is well-settled and nobody can dispute the said proposition. But that is not the question in issue here. The question is whether this Court while exercising its highly prerogative writ jurisdiction can omit to take note of the conduct of a party, before it. It is true the second-respondent is not before this court" seeking a relief as" such under Article 226 of the Constitution of India. But practically what the second-respondent asks for, is to strike down the very proceedings and the order that culminated it, as lacking in jurisdiction so as to stultify the relief which the petitioner should normally be entitled to, for the reason already set out. Hence, the general principle that the conduct of the party disentitles him from getting any relief at the hands of this Court in writ jurisdiction could be put against the second respondent when he seeks to raise this contention before this court; As already noted, the second-respondent could have raised this contention even before the first-respondent and coveted a decision thereon. Having participated in the proceedings before the first-respondent without raising a voice of protest that the very appeal u/s 41(2) of the. Act preferred by the petitioner was incompetent and the first-respondent lacked jurisdiction, by virtue of Section 4(1)

(c) of the Act, the second-respondent cannot at this belated state be permitted to raise this contention before this court. The principle is not one of conferment of jurisdiction by consent or acquiescence. On the other hand, the principle is that the conduct of the party disentitles him from pleading before and obtaining from this Court any relief, on the ground that the lower Tribunal lacked jurisdiction, when the party had sufficient and ample opportunity to raise this contention and require an adjudication over the same on the relevant facts and features before the lower Tribunal, here first-respondent himself.

7. On the question as to whether this Court in issuing the highly prerogative Writ, which is a matter of discretion of this court, can omit to take note of the conduct of the party, who seeks the same, there are a number of pronouncements : In Pannalal Binjraj Vs. Union of India (UOI), the conduct of the petitioners was taken note of by the Supreme Court as disentitling them to any relief at the hands of the Supreme Court under Article 32 of the Constitution of India. The following observations found at paragraph 45 need extracting to appreciate the principle recognised in the said decision.

There is moreover another feature which is common to both these groups and it is that none of the petitioners raised any objection to their case being transferred in the manner stated above and in fact submitted to the jurisdiction of the Income Tax Officers, to whom their cases have been transferred. It was only after our decision in Bidi Supply Co. Vs. The Union of India (UOI) and Others, was pronounced on 20th March 1956, that these petitioners woke up and asserted their alleged rights, the Amritsar Group on 20th April 1956, and the Raichur Group on 5th November 1956. If they acquiesced in the jurisdiction of the Income Tax Officers to whom their cases were transferred they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well settled that such conduct of the petitioner would disentitle them to any relief at the hands of this Court Vide Halsbury's Laws of England, vol. II, 3rd Edition, page 140, para 265, Rex v. Tabrum; Ex Parte Dash (1907) 97 L.T. 551 (U) O.A.O.K. Latchmanan Chettiar Vs. The Commissioner, Corporation of Madras and Another, .

In Moon Mills v. Industrial Court, Bombay (1968) 1. S.C.J. 364 : AIR 1967 S.C. 1450, it was observed that a Writ of certiorari is legally a matter of sound discretion and will not be granted if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The Supreme Court took note of the principle stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. The Proprietors of the Indian Petroleum Co. (1874) 5 P.C. 221 which runs as follows:

Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect has, though

perhaps not waiving that remedy, yet put the other party in, a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon were delay that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

The above principle stands reiterated in the pronouncement of the Supreme court in Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, . Palaniswamay, J. In Munia Goundar Vs. Palani Goundar and Others, took cognizance of the above principle and the learned Judge pointed out that the conduct of a party disentitles him from asking for the discretionary relief at the hands of the court even though consent or acquiescence may not confer jurisdiction upon an authority or Tribunal if it lacked inherent jurisdiction, in I.L. Honnegouda v. State Of Karnataka (1977) 1 S.C.J. 524 AIR 1978 S.C. 28, the Supreme Court pointed out that the appellant acquiesced to the concerned Rules by applying for the post in question, appearing before the Recruitment Committee for interview and taking a chance of being selected, and, he cannot be allowed to question the constitutional validity of the Rules.

8. In T. Kadiresan v. State of Tamil Nadu W.P. Nos. 1189 to 1191 of 1980, Order dated 2.7.1986, concisely reported in (1986) T.L.N.J. 150 , after adverting to the observations of Sir Barnes Peacock, quoted with approval in Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, , I observed that the conduct of the party is a relevant factor and when it speaks against him, it will dissuade this court from countenancing the subsequent pleas.

9. The second-respondent ought to have raised this plea of exemption u/s 4(1) (c) before the first-respondent, and asked for an adjudication over the same. The petitioner facing such a plea, could have decided about the course of action to be taken by him, for getting redressal and reliefs. This decision, he could take, even on an adjudication by the first respondent against him over this plea. In case, the adjudication by the first-respondent on the plea should be the same as the view of the Bench of this court, the petitioner may seek the remedy under Article 226 of the Constitution, treating the second-respondent as an authority within the meaning of Article 12 of the Constitution, to strike down its, order of dismissal as violative of the principles noted above. The second-respondent cannot be permitted to raise this plea at this belated stage after the lapse of ten years after so much water has flown over the matter. The submissions, made by the learned Counsel for the petitioner, on the above lines do merit consideration

and acceptance. Learned Counsel would further suggest and in my view legitimately, that this court even accepting the plea of the second-respondent that it is an establishment of the Central Government, may even now straightway strike down its order of dismissal noting the principles discussed above, for after all it is only the legal propriety of that order, that the first respondent was, and now this court is being called upon to examine and when that order suffers the patent illegality and infirmity noted above, this court need not shirk its obligations to strike down, that order, accepting this belated plea that first-respondent lacked jurisdiction to entertain the appeal over it, especially even as per its own plea the action of the second-respondent and its order are amenable to be examined straightway in Writ-jurisdiction.

10. It will be a matter of abhorrence to the judicial conscience of this court, if this point is permitted to be raised by the second-respondent at this juncture. Hence, the objection raised on behalf of the second-respondent with regard to lack of jurisdiction on the part of the first-respondent stands eschewed, and does not merit consideration at this juncture. In the said circumstances, and for the reasons expressed above, this Writ petition is allowed; the result of which is the order of dismissal passed by the second respondent against the petitioner will stand set aside. I make no order as to costs. Mr. G. Venkataraman, learned Counsel for the second respondent, would still plead that if it is a case of lack of legal evidence, the matter should be remitted to the file of the first-respondent so that the second respondent may lead the appropriate legal evidence on the aspects taken note of as forming a lacuna in the disciplinary action taken against the petitioner, it is not as if the second-respondent could not have availed of such an opportunity before the first-respondent. Nothing prevented the second-respondent from placing the legal evidence at the appropriate time and when the petitioner has approached this court, pointing out the lacuna, I do not think, on the facts of the case, the indulgence of remittal for the purpose of filling up the lacuna should be shown by the court. This is a case where the charge was not at all supported by any legal evidence and the indulgence need not be shown to fill up this lacuna by making an order of remittal to the first-respondent.

11. I am not expressing any opinion with regard to the propriety of the second respondent taking fresh action against the petitioner on the very same charge, since such a question does not require investigation into and consideration in this Writ Petition.