

(2011) 01 AHC CK 0123
In the Allahabad High Court
Case No : Special Appeal No. 1141 of 1999

Managing Director, U.P. State Handloom Corporation Ltd.	APPELLANT
Vs	
Ashok Kumar Pandey and Others	RESPONDENT

Date of Decision : 29-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14
Hindustan Paper Corporation Conduct, Discipline and Appeal Rules — Rule 23, 25
Uttar Pradesh State Handloom Corporation Ltd. (Officers and Staff) Service Rules, 1981 — Rule 63A, 67

Citation : (2011) 3 ADJ 218 : (2011) 1 UPLBEC 660

Hon'ble Judges : Sanjay Misra, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Special Appeal No. 1141 of 2009 as also Special Appeal No. 299 of 2003 have been filed by the U.P. State Handloom Corporation Ltd. through its Managing Director (Respondent-Appellant) assailing the judgment dated 8.9.1999 passed in Civil Misc. Writ Petition No. 31202 of 1992 (Ashok Kumar Pandey v. State of U.P. and others) as also the judgment dated 3.1.2003 passed in Civil Misc. Writ Petition No. 52715 of 2000 (Roop Narain Mishra v. State of U.P. and others) by a learned single Judge of this Court.

2. The Petitioner-Respondent in Special Appeal No. 1141 of 1999 claims to have been appointed as Production Inspector on 22.8.1983 and vide order dated 24.6.1988 he was transferred from Raebareli to Rishikesh. It is alleged that he was relieved from Raebareli on 5.1.1989 for joining at Rishikesh. However, he claims to have fallen ill on 6.1.1989 and hence he moved a representation dated 13.1.1989 praying that his transfer be cancelled. He alleges that an order dated 21.1.1989 was passed posting him at Naugaon production centre, but he failed to join whereupon a notice dated 25.1.1989 was issued to him. He applied for leave before the Project Officer, Rishikesh by his applications dated 10.1.1989, 31.1.1989, 15.2.1989, 10.3.1989, 2.4.1989, 3.4.1989 and 1.6.1989, During this

period the wife of the Petitioner-Respondent also moved two applications dated 20.1.1989 and 8.2.1990 praying for cancellation of the transfer of her husband. By a directive dated 14.3.1989 he was required to get himself medically examined by the Chief Medical Officer and submit his report. On 10.7.1989 a letter is alleged to have been issued by the General Manager of the Corporation giving him last opportunity. The Petitioner-Respondent alleges to have made further leave applications from 16.7.1989 to 13.8.1989 where after a notice was published in the newspaper "Swatantra Bharat" asking him to join his duties, but when he failed, his services were terminated by the order dated 7.11.1989.

3. According to the Corporation-Appellant after giving several opportunities to the Petitioner-Respondent to join his duties, but having failed, his services were terminated by order dated 7.11.1989 wherein it was clearly stipulated that the Petitioner has been unauthorisedly absent and appears to be not interested in performing his duties, hence his services have been dispensed with. It is stated that after two and a half years of such order the Petitioner-Respondent filed Civil Misc. Writ Petition No. 1677 of 1992 challenging his termination order dated 7.11.1989, but the writ petition was dismissed on 3.1.1992 on the ground that it was highly belated. The Petitioner-Respondent filed Special Appeal No. Nil of 1992 which was disposed of on 23.3.1992 with a direction to the Managing Director of the Corporation to decide the representation, if made by the Petitioner-Respondent. The said representation was rejected on 22.5.1992 by the Managing Director of the Corporation, who found no merit in the same. The Petitioner-Respondent thereafter filed Civil Misc. Writ Petition 31202 of 1992 challenging the order dated 22.5.1992 as also the order of termination dated 7.11.1989.

4. The writ petition has been allowed by the impugned order dated 8.9.1999 where against the present special appeal has been filed.

5. In Special Appeal No. 299 of 2003 the Petitioner-Respondent claims to have been appointed as a Salesman and when he absented from duty unauthorisedly, adverse entries were given to him on 30.6.1997 and 9.8.1997 for unauthorised absence of 447 days and further by letter dated 29.12.1997 for unauthorised absence of 600 days. By subsequent letters dated 16.1.1998 and 6.3.1998 the Petitioner-Respondent was required to report for duty and ultimately a notice was published in the newspaper on 2.9.1998 informing him that if he failed to join his duties, he would lose his lien and it would be a voluntary abandonment of service. When the Petitioner-Respondent failed to join, his services were terminated by order dated 28.8.1998 as having abandoned his services. The Petitioner-Respondent filed an appeal which was also dismissed by the Chairman of the corporation on 1.2.2000. The Petitioner alleges to have filed Civil Misc. Writ Petition No. 26698 of 2000 where after he was given another opportunity of hearing and his second representation was also rejected. He then filed Civil Misc. Writ Petition No. 52715 of 2000 which has been decided by the impugned order dated 3.1.2003 for the same reasons as in the judgment given in the case of

Ashok Kumar Pandey on 8.9.1999. The aforesaid judgment is challenged in the present special appeal.

6. Sri V.K. Birla has appeared on behalf of the corporation-Appellant in Special Appeal No. 1141 of 1999 and Sri K.N. Mishra has appeared on behalf of the corporation-Appellant in Special Appeal No. 299 of 2003. Sri L.K. Dwivedi has appeared on behalf of the Petitioner-Respondent in Special Appeal No. 1141 of 1999 and Sri K.N. Yadav has appeared on behalf of the Petitioner-Respondent in Special Appeal No. 299 of 2003.

7. Sri V.K. Birla and Sri K.N. Mishra have made their submissions to state that under Rule 63-A of the U.P. State Handloom Corporation Ltd. (Officers and Staff) Service Rules, 1981 (hereinafter referred to Rules of 1981), in the event of an employee remaining absent from his duty without any information or prior approval or overstays after expiry of the leave period, he will lose his lien on his appointment if he does not report for work within 15 days from the date of the beginning of such unauthorised absence. According to them apart from several notices and letters issued by the corporation to the Petitioner-Respondent a notice was also published in the newspaper requiring them to join their duties. They stated that the leave applications were never allowed, hence in absence of any prior approval and any information the Petitioner-Respondent remained unauthorisedly absent from duty. After publication of the notice in the newspaper they were required to join but failed to do so, hence the orders of termination was passed after they had lost their lien on appointment and the corporation could not be held to have denied any opportunity to the Petitioner-Respondent since they had remained unauthorisedly absent for a long period of time and never responded to the notice nor reported for work.

8. Learned Counsels have referred to the various letters and notices sent to the Petitioners-Respondents and the notice published in the newspapers and submit that under the second part of Rule 63-A of the Rules of 1981 when a lien is lost on the appointment it can be restored at any time subject to the discretion of the management but upon submission of satisfactory explanation by the employee concerned. They refer to the representations made by the Petitioners-Respondents against the order of termination and the decision taken thereupon by the corporation and submit that there was no sufficient explanation for absence of a long period inasmuch as the Petitioners-Respondents had not filed proper medical certificate about their illness. Learned Counsel points out that the Petitioner-Respondent Ashok Kumar Pandey claims to be a patient of eosinophilia which is not such an illness that would require absence from duty for more than 600 days without sanction of leave.

9. Learned Counsels for the corporation have also submitted that by the impugned judgment Rule 63-A of Rules of 1981 has been declared to be invalid on the ground that it is opposed to the public policy and is arbitrary. They assail the impugned decision on the basis of decision of the supreme court in the case of Hindustan Paper Corporation Vs. Purnendu Chakrobarty and Others, wherein a

provision similar to Rule 63-A of the Rules of 1981 was under consideration, such provision being Rule 23 (vi) E of the Hindustan Paper Corporation Conduct Discipline and Appeal Rules. The said provision provided for penalties in Rule 23 and under major penalties Clause (vi) E was termination of service due to loss of lien on his appointment by an employee. The rule was challenged as arbitrary and unreasonable vesting of authority, hence to be struck down. The Supreme Court considered such submission and held that when the principles of natural justice are not complied with for depriving a person of his livelihood under a provision, then it has to be tested on the anvil of Article 14 of the Constitution of India. It held that in the facts and circumstances of that case the employer had called upon the employee several times to explain his unauthorised absence for more than 6 months but for the reasons best known to the employee he did not avail himself of the opportunity, hence it could not be held that the principles of natural justice were not complied with by the employer. It found that the enquiry contemplated under Rule 25 of the Hindustan Paper Corporation Conduct Discipline and Appeal Rules were not attracted since the employee failed to avail the opportunity given to him which lead to the passing of an order of loss of lien on his appointment. The Supreme Court in that light of the matter held that Rule 23 (vi) E was not violative when tested on the anvil of Article 14 of the Constitution of India. The rule was, therefore, not liable to be struck down for the reason of violation of the principles of natural justice.

10. In the present case Rule 63-A of the Rules of 1981 is also relating to loss of lien on appointment due to unauthorised absence. The rule itself is extracted hereunder:

If any employee remains absent from his duty without any information or prior approval for his absence or over-stays after expiry of the leave period originally sanctioned or subsequently extended, thereby in time, he will lose lien on his appointment if he does not report for work within 15 days from the date of the beginning of such unauthorised absence. However, lien may be restored at any time subject to discretion of the management after submission of satisfactory explanation to the management by the employee concerned.

11. It provides for loss of lien on appointment on the failure of the employee to report for work within 15 days from the date of the beginning of such unauthorised absence. A perusal of the first part of the Rule indicates, prima facie, that there is no stipulation therein concerning the application of the principles of natural justice. Such was the situation under Rule 23 (vi) E of Hindustan Paper Corporation Conduct Discipline and Appeal Rules under consideration by the Supreme Court. In the case of Hindustan Paper Corpn (supra) the Supreme Court found that the rule was to be tested on the anvil of Article 14 of the Constitution of India for which the conduct of the employer was taken into account. The employer had satisfied the procedure and requirement of the principles of natural justice by noticing the employee asking him to furnish explanation, but the employee for the reasons best known to him, did not avail

such an opportunity. Therefore, although the said rule did not provide for any opportunity to be given but the employer had proceeded upon compliance of principles of natural justice. It was, therefore, held that the employer had justified inclusion of Rule 23 (vi) E in the Conduct and Discipline Rules which could not be struck down as being against the scheme of Article 14 of the Constitution of India.

12. The loss of lien contemplated in Rule 63-A of the Rules of 1981 is on account of the conduct of the employee. It operates when the employee has unauthorisedly absented himself. Once the unauthorised absence continues the lien on appointment is lost. There is nothing in the first part of the rule that the employer can do if the employee remains unauthorisedly absent. Therefore, for the rule to take effect on the employee it is the own conduct of the employee that is contemplated in the rule. Once the circumstance under the rule becomes applicable on the employee due to his unauthorised absence only then the employer can pass an order of termination if it finds a circumstance as contemplated in the Rule. The principles of natural justice would be fully complied if the employer has made effective and bonafide efforts to ask the employee to come back in service prior to passing any adverse order against him.

13. The first part of the Rule is a provision in the statute providing the consequences of unauthorised absence. The consequence is that the lien on appointment is lost. It is a logical inference of the provision which follows when the circumstances stipulated therein are satisfied. The unauthorised absence, therefore, leads to loss of lien on appointment. When the employee comes back and seeks to join on his post, the second part of the Rule comes into play. There the principles of natural justice are clearly contemplated. Hence the first part of the Rule is the consequence of the own conduct of the employee and is a statutory declaration about the status of his lien on appointment whereas the second part of the Rule is the right of the employee to have his defence considered for restoration of his rights under his appointment.

14. While considering the first part of the Rule it is apparent that it provides the consequences of unauthorised absence. When an act is committed it will have its consequences. Such a provision that envisages only consequences that are to follow upon unauthorised absence cannot be held to be violative of the principles of natural justice. It is only the action taken by the employer thereafter that can be tested for compliance of the principles of natural justice. Therefore, if the employer passes an adverse order as a result of the consequences contemplated in the first part of the Rule then such order would attract the scheme under Article 14 of the Constitution of India. The action of the employer would require compliance of the principles of natural justice. That has been provided in the second part of the Rule. Such principles cannot be attracted when it is the employee whose conduct results in the consequences so stipulated. The first part of the Rule and its consequence does not in any manner involve the employer, hence to say that the first part of the Rule can be struck down for violation of the

principles of natural justice, would be alien to the provision itself and inclusion of the principle in the first part of the Rule would also be an unnatural expansion of the principles of natural justice. In fact when the first part of the Rule is a position in statute the second part is the inclusion of principles of natural justice.

15. In the present case the employer has repeatedly sent notices to the employee to join his duties. He was required to get himself medically examined by the Chief Medical Officer since his application was also on medical grounds. Notice was also published in the newspapers but the employee appears to have ignored it. Therefore, when the absence was unauthorised without sanction of leave the provisions of Rule 63-A of the Rules of 1981 came into operation upon the writ Petitioner-Respondent. Clearly when the provision of Rule 63-A applied in the present case there was no requirement for the employer to also apply Rule 23 read with Rule 67 of the Rules of 1981 which relates to Misconduct and Enquiry.

16. Rule 63-A does not intend to find out a misconduct of the employee and thereby punish him. Whereas Rule 23 makes out a misconduct which can be alleged against the employee and if it is alleged then the procedure for proving the misconduct and holding of enquiry would necessarily follow. When the employer has chosen not to allege any misconduct on the part of the writ Petitioner-Respondent then it would be incorrect for the court to read a misconduct or to hold that Rule 23 was attracted in the present case.

17. The concept of abandonment would also not apply in this case for the primary reason that the Service Rules of 1981 contained Rule 63-A. In a circumstance where loss of lien is established as per the conditions under the rule there would be no element of abandonment involved. Where on the one hand abandonment would invite a clear intention of the employee to give up his duties or relinquish his services, loss of lien would not require any such element or intention of the employee.

18. For the aforesaid reasons, we are of the view that Rule 63-A of the U.P. Handloom Corporation Ltd. (Officers and Staff) Service Rules, 1981 cannot be struck down on the ground that it is arbitrary and against Public Policy. It is incorporated with the principles of natural justice and the employer had made strict compliance of the same. The concept of abandonment has no application in the facts and circumstances of this case.

19. The impugned order dated 08.09.1999 passed in (Ashok Kumar Pandey v. State of U.P. and Ors. Civil Misc. Writ Petition No. 31202 of 1992) as also the order dated 03.01.2003 passed in (Roop Narain Mishra v. State of U.P. and Ors. Civil Misc. Writ Petition No. 52715 of 2000) cannot be sustained and are accordingly set aside.

20. Both the Special Appeals are allowed, however without imposing any costs.