
(1988) 08 MAD CK 0023
In the Madras High Court

N. Sundaram

APPELLANT

Vs

Indian Airlines Corporation and Another

RESPONDENT

Date of Decision : 17-08-1988

Acts Referred:

Citation : (1988) 2 MLJ 389

Hon'ble Judges : S.A. Kader, J

Bench : Division Bench

Judgement

S.A. Kader, J.—This writ petition has been filed under Article 226 of the Constitution of India for the issuance of a writ quashing the order of the Regional Director of the first respondent - Indian Airlines Corporation in MAA/RD/ADMN./1-6/581, dated 9-1-1981 confirming the order of the second respondent - Commercial Manager in his reference MAA: CM:Admn., 1-6/11058, dated 4-9-1980 and pass such other necessary orders.

2. The brief facts of the case of the petitioner necessary for the disposal of this writ petition are these The petitioner was employed as Traffic Assistant in the first respondent-Indian Airlines Corporation at Madras Airport. He was transferred to Vijayawada, and this transfer was challenged by him in vain in W.P.No. 2628 of 78 on the file of this Court. He then reported for duty at Vijayawada and was working there as Traffic Assistant. On 6-11-1978 he applied for privilege leave from 8-12-1978 to 31-12-1978 for giving surgical treatment to his wife for sceptic tousils and enlargement of facial glands and for searching alternative accommodation to enable him to vacate the Airlines Quarters at Madras. He did not receive any communication from the Indian Airlines either sanctioning or refusing the leave. According to the petitioner, invariably leave was sanctioned after the commencement of the leave period but where leave was refused it would be communicated immediately. As he did not receive any order of refusal of leave, he proceeded on leave on 8-12-1978 on the assumption that the leave would be sanctioned. On reaching Madras he secured an alternative accommodation in a couple of days and his wife's surgery was postponed. He,

therefore spent the rest of his leave abroad. Seven months after he rejoined duty at Vijayawada he was served with a charge-memo dated 6-6-1979. The following were the two charges framed against him:

1. Absence without leave for more than 8 days without sufficient grounds or proper or sufficient explanation,
2. The reasons given in the leave application were false and therefore it amounted to dishonesty in connection with the business of the Indian Airlines Corporation.

The petitioner submitted his explanation in detail. An enquiry was ordered. By his letter dated 13-10-1979 the petitioner pointed out that the presiding Officer conducting the case on behalf of the management had legal qualifications and was experienced in conducting disciplinary proceedings, that none of the employees of the Indian Airlines Corporation whom the petitioner could approach for the purpose of representing him as a friend in the disciplinary proceedings was possessed of legal qualifications of equal training and it was therefore necessary that he should be allowed to have the assistance of a lawyer to defend the case against him. He requested that he may be permitted to engage the service of Mr. M.N. Krishnamani, Advocate, No. 41, Law Chambers, High Court, Madras. This request was turned down. The petitioner participated in the enquiry under protest and the enquiry officer by his order Nil, found the petitioner guilty of both the charges. Thereafter, the punishing authority the second respondent herein by his notice dated 21-7-1980 called upon the petitioner to show cause why he should not be removed from service. The petitioner sent his explanation on 15-8-1980 and the final orders were passed by the second respondent on 4-9-1980 removing the petitioner from service. The petitioner preferred an appeal to the Regional Director, Indian Airlines and the Appellate Authority, according to him, without properly considering the various points raised by him in his appeal, rejected the same by his order dated 9-1-1981. it is this order that is challenged in this writ on several grounds.

3. The Deputy Manager, Personnel Services of the first respondent-Indian Airlines, has filed a counter-affidavit denying all the averments of the petitioner, justifying the rejection by the first respondent-Corporation of the request of the petitioner to engage a counsel, the findings of the Enquiry Officer and the punishment imposed upon him.

4. The first contention advanced by Mrs. Nalini Chidambaram learned senior counsel for the petitioner is that while the management was represented in the enquiry against the petitioner by a presenting officer with legal qualification and vast experience in the field, in Mr. Pushpavanam, the denial of the opportunity to the petitioner to engage an Advocate to defend him especially when he could not find a legally trained person from among the employees of the first respondent-Corporation amounted to gross violation of the principle of natural justice and consequently the enquiry and the impugned order are vitiated. Per contra, it is

contended by Mr. N.C.R. Prasad, learned Counsel for the Corporation that Mr. Pushpavanam, the presenting officer of the Corporation is a full time employee of the Corporation and the fact that he has legal qualification is only incidental. It is pointed out that under S.O.32 of the Standing Orders (Regulations) concerning Discipline and Appeals in the Indian Airlines Corporation, the delinquent employee is entitled to the assistance of a friend, who must be an employee of the Corporation, but he cannot engage any outsider for assistance in the enquiry and hence the refusal by the Corporation of the request of the petitioner to engage a lawyer is in conformity with the Rules and regulations of the Corporation and is not violative of the principles of natural justice.

5. S.O.32 of the Standing Orders (Regulations) concerning Discipline and Appeals reads thus:

An employee may be permitted, if he so desires, to have, under his own arrangements, the assistance of a "friend" during the course of the enquiry. Such a "friend" must be an employee of the Corporation. No outside representation shall be permitted in any circumstances.

As per this rule, the delinquent employee can have the assistance of another employee of the Corporation in the enquiry against him, but, he cannot engage any outsider for the purpose, but, the question is, whether when the Corporation is represented by a legally qualified person, the denial of the request of the delinquent employee to have the assistance of a lawyer would amount to denial of reasonable opportunity and violate the principles of natural justice.

6. In C.L. Subramaniam Vs. Collector of Customs, Cochin, one trained police prosecutor was appointed as an officer to present the case of the Department before the Enquiry Officer in support of the allegations against the appellant. The appellant wrote to the Disciplinary Authority for permission to engage a counsel to defend his case, but he was denied the permission. It was held by the learned Judges of the Supreme Court:

The fact that the case against the appellant was being handled by a trained prosecutor was a good ground for allowing the appellant to engage a legal practitioner to defend him, lest the scales should be weighed against him....It is not unlikely that the Disciplinary Authority's refusal to permit the appellant to engage a legal practitioner in the circumstances mentioned earlier had caused serious prejudice to the appellant and had amounted to a denial of reasonable opportunity to defend himself.

The impugned order was, therefore, struck down. This position was reiterated by the Supreme Court in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, : Thus:

In our view we have reached a stage in our onward march to fairplay in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a

legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated.

In *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , which was a case of preventive detention, The Supreme Court observed:

Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be able to take shelter behind the excuse that such officers are not "Legal practitioners" or Legal Advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Board will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them.

7. A case almost identical with the one on hand and which related to the very same respondent viz., the Indian Airlines Corporation, came up for consideration before a single Judge of this Court in *Pushpa Iyenger Vs. The Indian Airlines Corporation and Others*, . There in that case also Mr. R. Pushpavanam, Assistant Manager was the presenting officer on behalf of the Corporation. The request of the delinquent employee for engaging a legal practitioner was turned down on this was challenged before this Court. The learned Judge observed:

In W.P. No. 595 of 1984, the presenting officer is Mr. R. Pushpavanam, Assistant Manager/ Personnel Services. He is admittedly a law graduate and has acquired expertise in conducting disciplinary proceedings. In spite of being fully aware that there is no provision in Standing Orders for a presenting officer to be appointed by Corporation had chosen to enlist the services of a legally trained person, and therefore in the light of what is held in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, , in spite of a prohibition existing, once the authority chooses to take the aid of the legal practitioner or legal adviser or legally trained person to present its case, to avoid breach of Article 14 of the Constitution, a similar facility should not be denied to the delinquent.

I respectfully agree with the view expressed by the learned Judge.

8. No doubt, S.O.32 of the Standing Orders (Regulations) concerning Discipline and Appeals prohibits the delinquent employee from engaging any outsider to

assist him in the domestic enquiry. But, where the management is represented by a legally trained men the denial of such a facility to the delinquent creates an imbalance, for he is pitted against a legal force and it would amount to denial of reasonable opportunity to defend himself. It is no answer to say that there are innumerable legally qualified employees in the Indian Airlines Corporation and the petitioner could engage the services of any one of them. This argument overlooks the fact that such a legally qualified employee of the Indian Airlines Corporation must first be prepared to assist the delinquent against the management and the delinquent must have confidence in him. It is the case of the petitioner that he could not secure the services of such a "friend" and hence his request to engage a legal practitioner. The denial of this request by the Corporation amounts to denial of a reasonable request to defend himself and the essential principles of natural justice are violated thereby. The enquiry and the impugned order are, therefore, liable to be struck down.

9. In view of my above conclusion, it is needless to go into the other grounds raised by the petitioner against the impugned order. It is, however, necessary to deal with the question of the maintainability of the petition raised by the respondent.

10. It is strenuously contended by Mr. N.G.R. Prasad, learned Counsel for the respondents that the petitioner is a workman as defined in Section 2(s) of the Industrial Disputes Act, hereinafter referred to as the Act, Indian Airlines Corporation is an industry as defined in Section 2(j) of the Act, that the dismissal of the petitioner is an industrial dispute by virtue of Section 2-A of the Act, introduced by the amending Act 35 of 1965 and it is, therefore, open to the petitioner to have this dispute referred by the State Government u/s 10 of the Act for adjudication by an Industrial Court. It is pointed out that u/s 11-A of the Act, an Industrial Court has got wide powers to find out as to whether the finding of guilt of the workman recorded in the domestic enquiry held by the management is justified and whether the penalty imposed is proper. Even if there has been any procedural defect in the disciplinary enquiry conducted by the Corporation in that there has been violation of rules of procedures or principles of natural justice, the Corporation has the right to adduce evidence before the Industrial Court in support of the charge and to sustain the order of dismissal. The entertaining of the writ petition under Article 226 of the Constitution of India and the quashing of the Enquiry Officer's order on the grounds of procedural defect would cause serious prejudice to the Corporation in that it would be deprived of the valuable opportunity of proving the charge which it has if the matter were to be taken before the Industrial Court. All that the High Court can do in the exercise of its jurisdiction under Article 226 of the Constitution, if it comes to the conclusion that there has been procedural defect is to set aside the order of dismissal or removal as a result of which the petitioner get reinstated into the service and would also become entitled for payment of salary and other emoluments from the date of the dismissal to reinstatement and the Corporation would be put to heavy financial loss. The dispute does not also come to an end

and the Corporation would have the power to institute a de nova enquiry. It is further pointed out that the remedy provided u/s 10 of the Act is certainly a better and more effective remedy even from the view of the workman. He would have full opportunity of adducing rebuttal evidence before the Industrial Court and would have the benefit of an independent Judicial Officer of the rank of a District Judge to appreciate the evidence and record the finding. The Industrial Court has also the power of adjudication even regarding the quantum of penalty. If the Industrial Court comes to the conclusion that the penalty imposed in a given case is disproportionate to the gravity of the charge proved, he could modify the penalty. It is, therefore, contended that the petitioner ought to have availed of the effective and alternative remedy provided under the Act instead of invoking the extraordinary writ jurisdiction of this Court. This contention is based entirely on the decision of a single Judge of the High Court of Karnataka in Hariba Vs. K.S.R.T.C., . In that case before the High Court of Karnataka, the writ petition was filed by an ex-conductor of K.S.R.T.C., for quashing the order of dismissal passed against him by the Disciplinary Authority and Deputy General Manager which was confirmed in appeal by the Appellate Authority. The question of maintainability of the writ petition came up for preliminary hearing and the learned Judge accepted the contentions of the respondent-Corporation and held:

Whenever a workman employed in an industry is dismissed or removed from service and the workman desires to challenge the legality of such action of the management of an industry, on grounds of violation of procedure, as regulated by the prescribed rules or rules of natural justice, the workman should resort to the remedy available u/s 10 of the Industrial Disputes Act and a petition under Article 226 should not be entertained, notwithstanding the fact that the industry is under the management of a statutory corporation or a body, which is an "authority" falling within the definition of the word "state" as defined in Article 12 and amenable to the Writ jurisdiction of this Court under Article 226 of the Constitution.

The learned Judge, therefore, dismissed the writ petition giving liberty to the petitioner to resort to the remedy available under the provisions of the Act.

11. In the case on hand the plea against the maintainability of this writ petition has not been raised by the respondents in their counter and it is for the first time in the course of the arguments on the final disposal of the writ petition this contention is put forward and hence as rightly pointed out by the learned Counsel for the petitioner, it is not open to the respondents to raise this contention at this stage. This writ petition has been filed in August, 1981 and the respondents have filed their counter in July, 1982 and we are now in August, 1988. If the respondents had raised this plea against the maintainability of the writ petition in their counter it would have been open to the petitioner to then and there seek the alternative remedy available u/s 10 of the Act but that opportunity is now lost. After an agonising wait for over 7 years it is neither just nor equitable to direct the petitioner to knock at the doors of the Government to

make a reference u/s 10 of the Act. The fact that the first respondent-Corporation would be put some financial constraints in that it will have to reinstate the petitioner and pay the back wages is hardly a ground to deny to the petitioner the relief he is entitled to. The availability of an alternative remedy is not an absolute bar to the maintainability of a writ petition. It is a matter of discretion rather than of jurisdiction. That discretion in this case can certainly not be exercised in favour of the respondents, who have chosen to raise the plea against the maintainability of the writ petition so late in the day. This contention must, therefore, fail.

12. In the result, the writ petition is allowed and the impugned order of the Regional Director, Indian Airlines Corporation in his reference MAA/RD/ADMN/1-6/581 dated 9-1-1981, confirming the order of the second respondent in No.MAA:CM:Admn.1-6/11058, dated 4-9-1980 is quashed. It is open to the respondents to order a fresh enquiry after giving the petitioner sufficient and reasonable opportunity to defend himself. No costs.