

(1982) 12 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 5523 etc. of 1981

P. Mallaiah

APPELLANT

Vs

Andhra Bank

RESPONDENT

Date of Decision : 10-12-1982

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25G, 25H

Citation : (1983) 2 LLJ 44

Hon'ble Judges : K. Jayachandra Reddy, J

Bench : Single Bench

Judgement

1. These three writ petitions can be disposed of by a common order. The petitioners have been working as members of the sub-staff (peons) in different branches of the Andhra Bank, respondent herein, in Vijayawada town since 1948 and they claim to be permanent employees. While so, the respondent bank issued a charge memo on 23rd February, 1979 to each of the petitioners alleging misconduct of committing fraud and directed the petitioners to submit their explanations. It was alleged that the petitioners who are the employees of the respondent-bank introduced some fictitious persons who successfully cheated the branches of the Bank by pledging spurious gold ornaments as genuine and receiving large amounts of money. Further details may not be necessary for the purpose of these writ petitions. To a charge memo the petitioners submitted their explanations. An enquiry officer was appointed who submitted his report. In this report the enquiry officer however held that charges are not conclusively proved, but added that the petitioners acted in a negligent manner in introducing strangers and cheats without realising the consequences. The Bank thereafter conducted its own investigation and was satisfied that the petitioners were responsible for the disappearance of evidence; and having lost confidence in the petitioners, came to the conclusion that it would be a great risk to continue the petitioners in the services of the Bank. The Bank accordingly discharged the petitioners from the service of the Bank by the impugned orders dated 30th July, 1981, under Para 522 of Sastry Award by paying three months' salary in lieu of

notice. The petitioners were paid gratuity, and full pay and allowances for the period of suspension treating the period as duty. Each of the petitioners has challenged the impugned order discharging him from services.

2. The learned counsel for the petitioners submitted that the action of the respondent Bank in discharging the petitioners from service amounts to dismissal and without conducting a regular disciplinary enquiry the Bank authorities cannot simply discharge them from service purporting to exercise powers under Para 522 of Sastry Award. If a disciplinary enquiry is held, the employee will have an adequate opportunity to defend himself and will have many safeguards, and if an employee is to be discharged without any such enquiry for the alleged misconduct or negligence, the termination would be based upon subjective satisfaction of the appropriate authority who may act arbitrarily and therefore, even if there is such a power, viz., to discharge the employees from service without any enquiry, it is violative of Arts. 14 and 16 of the Constitution of India. The learned counsel further submitted that in the instant case a charge sheet was in fact issued and an enquiry was conducted and the authorities did not act upon the said report, but resorted to terminate the services of the petitioners by discharging them from service and therefore, according to the learned counsel, the petitioners are in fact punished for their alleged misconduct without holding a disciplinary enquiry, which is illegal. The learned counsel for the respondent on the other hand submitted that the Bank discharged the petitioners from service under Para 522(1) of Sastry Award and that the termination of the services of the petitioners is not mala fide and colourable.

3. The main question that arises for consideration is whether the respondent-management has power to discharge the employees without any enquiry and if so, whether the same is violative of Arts. 14 and 16 of the Constitution. The learned counsel for the respondent relied on judgment of the Supreme Court and the High Courts to show that the management is vested with power to discharge an employee from service after fulfilling the necessary conditions and it is not always necessary to resort to disciplinary enquiry before terminating the services. In *The Municipal Corporation of Greater Bombay Vs. P.S. Malvenkar and Others*, the Supreme Court observed that the question whether a particular order terminating the service of an employee is by way of punishment or not has to be determined on the facts and circumstances of each case and the form of the order is not decisive of the matter. Their Lordships, however, further held thus :

"The question is as to which power has been exercised by the management in the present case and this question has to be determined having regard to the substance of the matter and not its form. Now, one thing must be borne in mind that these are two distinct and independent powers and as far as possible, neither should be construed so as to emasculate the other or to render it ineffective. One is the power to punish an employee for misconduct while the other is the power to terminate simpliciter the service of an employee without any other adverse consequence."

Their Lordships have also held :

"The management is required to articulate the reason which operated on its mind in terminating the service of the employee. But merely because the reason for terminating the service of the employee is required to be given - and the reason must obviously not be arbitrary, capricious or irrelevant - it would not necessarily in every case make the order of termination punitive in character so as to require compliance with the requirement of Clause (2) of Standing Order 21 read with Standing Order 23. Otherwise, the power of termination of service of an employee under Standing Order 26 would be rendered meaningless and futile, for in no case it would be possible to exercise it."

Their Lordships have, therefore, clearly held that these are two distinct and independent powers. In Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, the Supreme Court reiterated the same view.

4. The learned counsel for the petitioner strongly relied on a decision of the Division Bench of this Court in Murali Krishna v. A. P. State Road Transport Corporation 1982 (2) AnWR 319. That was a case where the Andhra Pradesh State Road Transport Corporation, exercising its power under Regulation 6-B (4) of the A.P.S.R.T.C. Employees' (Service) Regulation, 1964, terminated the services of the employee which is otherwise called termination simpliciter. It was contended inter alia before the Division Bench that Regulation 6-B (4) cannot be employed in a case where the service is sought to be terminated on any of the grounds which amount to misconduct as mentioned in Regulation 9. The Division Bench accepted this contention and held that Regulation 6-B(4) can be invoked only in cases where the termination is on grounds other than those mentioned in Regulation 9 of the Classification Control and Appeal Regulations. The Division Bench also observed that if Regulation 6-B(4) is allowed to be invoked to terminate the service of an employee who is suspected of misconduct, misbehaviour, negligence, or insubordination, as the case may be, it would naturally result in the order of termination being passed on the subjective satisfaction of the appropriate authority. Relying on this decision it is submitted that in the instant case an enquiry was in fact conducted and therefore it must be presumed that the authorities in the initial stages wanted to take disciplinary action for misconduct and later abandoned the same and have exercised their power under Para 522 of Sastry Award and discharged the petitioners from service and therefore, as held by the Division Bench the impugned orders are illegal. It is true that the Division Bench has held that in order to by-pass the procedure to be followed in cases of misconduct and pass an order of termination simpliciter and discharge the petitioners from service. I have carefully examined the judgment of the Division Bench. The learned Judges have in fact referred to the various Supreme Court decisions and held that the two powers are distinct and they have "demarcated fields of operation" and it is also held that the two powers are distinct and they have "demarcated fields of operation" and it is also held that only in cases where the termination is sought to be effected otherwise

than on grounds mentioned in Regulation 9, the power under Regulation 6-B(4) of the A.P.S.R.T.C. Employees' (Service) Regulation can be resorted to. The learned judges however have not clearly indicated in what type of cases the management can exercise the power of termination simpliciter. Therefore, I am unable to agree with the learned counsel that in the instant case the impugned orders are illegal simply because, the disciplinary proceedings ought to have been taken. The Division Bench has however held that such a power is not violative of Arts. 14 and 16 of the Constitution and that the Court has to examine the orders and the necessary records to ascertain whether the orders passed by the management amount to colourable exercise of power. It can, therefore, be seen that much depends on the facts of each case.

5. The next important question for consideration is whether the impugned orders amount to colourable exercise or whether the management is justified in discharging the petitioners from service by passing the termination orders simpliciter under Para 522(1) of Sastry Award. Before I consider these points it is useful to refer to some of the authoritative pronouncements on the aspect as to when and how this power can be exercised by the management. In *Benjamin v. Union of India* 1967 I L.L.J. 718 the Supreme Court examined the scope of Rule 5 of the Central Civil Services (Temporary Services) Rules. That was a case where a temporary Government Servant was discharged from service. Their Lordships held that the appropriate authority possesses two powers to terminate the services of a temporary servant and it can either discharge of Government Servant purporting to exercise its powers under the terms of the relevant rule in which case the provisions of Art. 311 of the Constitution will not be applicable. The authority can also not under its powers to dismiss a temporary servant and make an order of dismissal in which case Art. 311 will be applicable. Their Lordships also held that even in a case where a formal departmental enquiry is initiated against a temporary Government servant, it is open to the authority to drop further proceedings in the departmental enquiry and to make an order of discharge simpliciter against the temporary servant. In *The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao*, the effect of Standing Orders of the Nagpur Electric light & Power Company and also the question whether the services of an employee could be terminated by way of discharge simpliciter from service were also considered. It is held that under the Standing Orders the company was entitled to choose either to proceed with the charges or discharge the employees. Their Lordship further held that no penalty for misconduct has been imposed on temporary employees that on the other hand the company paid the salary to him from the date of suspension and that the company chose to terminate the services of the respondent (employees) in accordance with the Standing Orders and did not think fit to proceed against the respondent for any alleged misconduct and that it was open to the company to do so. It can, therefore be seen that termination of service by way of discharge does not necessarily amount to punishment and it is not obligatory on the part of the management to resort to disciplinary enquiry. The courts have also held that

even in a case where a preliminary enquiry is first held in connection with alleged misconduct, it is still open to the employer to take action under the contract or the rules and that by itself does not amount to punishment. I shall not consider the submission that the action of the Bank in discharging the petitioner amounts to colourable exercise of power.

6. The learned counsel for the petitioner relied on a judgment of the Supreme Court in *L. Michael and Another Vs. Johnson Pumps Ltd.*, wherein it is held thus :

"Loss of confidence is often a subjective feeling of individual reaction to an objective act of facts and motivations. The court is concerned with the letter and not with the former although circumstances may exist which justify a genuine exercise of the power of simple termination. In a reasonable case of a confidential or responsible post being misused or a sensitive or strategic position being abused, it may be a high risk to keep the employee, once suspicion has started and a disciplinary enquiry cannot be forced on a matter. There a termination simpliciter may be bona fide not colourable and loss of confidence may be evidentiary of good faith of the employer."

The learned counsel for the petitioner submitted that in the instant case it is a colourable exercise of power and the same is evident from the fact that initially the bank resorted to disciplinary enquiry since it was found that the charges cannot be sustained, they have resorted to pass orders of termination simpliciter. I am unable to agree. As stated above the Supreme Court has held that mere institution of disciplinary enquiry does not prevent the management from giving up the same and taking action under the contract of the rules and pass orders of termination simpliciter complying with the conditions of contract. In *I.N. Subba Reddy Vs. Andhra University and Others*, the petitioner was a professor in the Andhra University and his services were terminated. Certain provisions of the University code provide the procedure to be followed in case of termination for misconduct. Some of the provisions also provide for termination of the services of the employees simpliciter by giving six months notice, etc. Their lordships rejected the contention that the provisions are ultra vires and further held that in as much as the order of termination was a termination simpliciter without attaching any stigma and was governed by the petitioner of service specified in the contract of employment. While the Syndicate as competent to provide for, the termination is not governed by the other provisions applicable in a case of misconduct. To the same effect in the *Air India Corporation v. V. A. Rabello* 1972 1 L.L.J. 509. Therefore, merely because the management, instead of holding a disciplinary enquiry, discharged the employee by termination simpliciter which course is also open for them, it cannot be said that the latter amounts to colourable exercise of power. In *Manohar P. Kharkhar and another Vs. Raghuraj and another*, a Division Bench of the Bombay High Court considered all these questions. In that case, the petitioner belonged to the Engineering Department of the Air India Corporation. Their services were terminated by the Chairman under Regulation 48 on the ground of loss of confidence in them due to their

negligence and inefficiency and unsuitability in as much as they did not take due care and precaution in respect of the aircraft "Makalu" which was selected for the Prime Minister's flight. In considering the question whether termination simpliciter is permissible under the circumstances where the reason for termination was negligence and inefficiency, the Bench held that the act or omissions alleged by the petitioner do not amount to misconduct and that for loss of confidence the service of employees can be terminated. The Bench further held thus :

"Termination simpliciter if permissible under the contract or service rules such as Regulation 48, is legal and is not vitiated merely because misconduct spurs it. Inadvisability of holding enquiry for any good reason by itself cannot make exercise of such power colourable or otherwise mala fide. Requirement to prove the existence of goods reason in the court, if challenged, is held to be adequate safeguard against the abuse of such power."

Therefore, the contention of the learned counsel that the acts complained of amount to misconduct and therefore only disciplinary enquiry should be conducted the termination simpliciter amounts to colourable exercise of power, has to be rejected.

7. The learned counsel for the respondent has submitted that the bank has power under vice of the employees by passing orders of termination simpliciter after complying with the condition of contract in this regard, and in doing so the Bank has acted bonafide in the instant case in as much as there is loss of confidence. As held by the Supreme Court in *I. Michael v. Johnson Pumps Ltd.*, (supra) loss of confidence is a subjective feeling of individual reaction to an objective set of facts and motivations. The Court can always examine whether such an action viz., discharging simpliciter, is bonafide or not. In *Air India Corporation v. V. A. Rabello* (supra) the Supreme Court held :

"If the termination of service is a colourable exercise of the power vested in the management or as a result of victimisation or unfair labour practice, the Industrial Tribunal would have jurisdiction to intervene and set aside such a termination. In order to find this out, the Tribunal has ample jurisdiction to go into all the circumstances which led to the terminations simpliciter."

Their lordships also considered whether an order of discharge simpliciter which could be passed under Regulation of the Air India Employees Service Regulations valid or not and held as follows :

"Regulation is which has been set out earlier as its plain language shows does not lay down or contemplate any defined essential pre-requisite for invoking its operation. Action under this Regulation can be validly taken by the employer at his sweet will without assigning any reason. He is not bound to disclose why he does not want to continue in service the employer must always have some reason for terminating the services of his employee. Such reasons apart from misconduct may, inter alia, be want of full satisfaction with his overall suitability

in the job assigned to the employee concerned. The fact that the employer not fully satisfied with the overall result of the performance of his duties by his employee does not necessarily imply misconduct on his part. The only thing that remains to be seen is if in this case the impugned order is mala fide."

Bearing these principles, I shall now see whether the impugned order are bonafide and whether the management is justified in passing such orders. The Division Bench of this Court in *Murali Krishna v. A. P. State Road Transport Corporation* (1982 2 AnWR 319), on which the petitioner's learned counsel strongly relied, has, as already mentioned, held that the management has power to pass an order of termination simpliciter. The Division Bench has also held thus :

"Merely because an order purports to be an order simpliciter, it does not preclude the Court from going behind the order and ascertaining whether the termination was in fact for any of the reasons mentioned Regulation 9".

No doubt the Division Bench added that if on such a scrutiny it is found that the termination is really for any of the ground mentioned in Regulation 9, the order is liable to be struck down. The learned counsel laid considerable stress on this observation but the Division Bench did not lay down a hard and fast rule. As a matter of fact in the above cited decisions the Supreme Court has even gone to the extent of holding that the employer is not bound to disclose the reason as to why the employer does not want to continue the employee in service. It is however held that all the conditions of service should be complied with when passing such an order of simpliciter. In *Bombay Municipality v. P. S. Malvankar* (supra) the Supreme Court held :

"Where an employer is entitled under the standing orders to remove its employee from service by giving notice as well as by way of punishment for misconduct after holding domestic enquiry, the question whether a particular order terminating the service of an employee is by way of punishment or not has to be determined on the facts and circumstances of each case and the form of the orders is not decisive of the matter. The two powers are distinct and independent and as far as possible, neither should be construed so as to emasculate the other or to render it ineffective."

In the instant case the Management in the counter-affidavit stated that the petitioners who were the employees of the Bank introduced some fictitious persons who successfully cheated different benches of the Bank. It may not be necessary for me to go into all the details. Even the enquiry report shows that the petitioners were negligent and to that extent at least it must be held that there was loss of confidence and the Management was justified in terminating the services. I have gone through the entire record and also the report on the enquiry officer. There is a categorical finding that these employees acted in a negligent manner in introducing strangers and cheats as genuine customers of the Bank, without realising the consequences. Therefore, it cannot be said that

the loss of confidence in such circumstances is not bonafide.

8. The learned counsel for the petitioners relied on an unreported judgment of a Division Bench of this court in Writ Petition No. 4062 of 1976 dated 18th July, 1977 and also a decision of a single Judge in Abdul Rahman v. E. I. D. Parry Ltd. (1976 ALT 305) in support of his submission that termination simpliciter is not mala fide. I have already discussed this aspect and as held by the Supreme Court in Bombay Municipality's case (supra) the facts and circumstances in each case have to be taken into consideration.

9. It is lastly submitted that the termination of the services of the employee amounts to retrenchment as defined u/s 2(oo) of the Industrial Disputes Act and that therefore Section 25(6) of the said Act is attracted and consequently the procedure laid down under that section has to be followed. I see no force in this submission. Section 25(6) does not lay down that it is mandatory. The language of Section 25-G is to the effect that where a workman in an industrial establishment is to be retrenched in the absence of any agreement between the employer and the workman, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. The word "ordinarily" is significant. Further in a case of loss of confidence, I am unable to see as to how the rule of "last come first go" can be followed. If the argument of the learned counsel viz., that the retrenchment as defined in Section 2(oo) applies to each and every form of termination, is to be accepted, then it will lead to an absurd and anomalous situation. Section 25G provides for the procedure for retrenchment to be followed only in a case of surplusage wherein the principle of "last come first go" has to be observed. In Kamleshkumar Rajanikant Mehta Vs. Presiding Officer, Central Government Industrial Tribunal No. 1 and Another, a Division Bench of the Bombay High Court considered the scope of Section 25-G in great detail, and held thus :

"This section also bring to the forefront that the centrifugal force revolving round the terminology "retrenchment" is excess or surplusage or superfluity. It is this in such a case is laid down the procedure that the last person to join must be the first to go. Section 25-H makes this even clearer

This section therefore casts an obligation and makes it mandatory on the employer not only to take back a retrenched worker but also to give preference to such workman over others. It would be anomalous to the point of absurdity and would result in a horrifying situation if an employer, who terminates the service of his workman for the loss of confidence or inefficiency or insubordination and the like, is to be expected, may, to be compelled to re-employ that very worker in the same industry or business and that too in preference to other workmen whose services are not terminated either for loss of confidence, inefficiency, insubordination and the like."

It can be added to this observation that it is equally absurd and anomalous that

where the services of the employee are to be terminated for loss of confidence and if the concept of "last come first go" is to be applied to such a case, then the delinquent employee has to be continued and an innocent and efficient employee who has come last should be sent out. We cannot apply the principle "Last come first go" underlying Section 25-G, to each and every form of termination. The principle applies only to a case of surplusage. For all the aforesaid reasons the writ petitions are dismissed, but under the circumstances without costs.