

(1996) 09 MAD CK 0039

In the Madras High Court

Case No : Writ Petition No. 5953 of 1986

P.R. Subramaniam

APPELLANT

Vs

The Deputy Commissioner of Labour and Another

RESPONDENT

Date of Decision : 05-09-1996

Acts Referred:

Tamil Nadu Shops and Establishments Act, 1947 — Section 41(1), 41(2)

Citation : (1996) 2 LLJ 1190

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : K. Chandru, for the Appellant; Renganathan, for King and Partridge and V. Subbarayan A.G.P., for the Respondent

Final Decision : Allowed

Judgement

N.V. Balasubramanian, J.—The subject matter of the writ petition is an order of the first respondent, the Deputy Commissioner of Labour

(Appeals), Madras, dated March 31, 1986 passed u/s 41(2) of the Tamil Nadu Shops and Establishments Act, 1947 (hereinafter referred to as

"the Act")

2. The case of the petitioner as seen from the affidavit filed in support of the petition is hereunder: The petitioner joined the services in the second

respondent-company, a public limited company, in its factory at Mettupalayam, as a Works Manager. The petitioner was given a responsible post

in commissioning the plant for the production of wattle extract. The petitioner tendered his resignation during the month of October, 1968, on the

ground that he was not given the necessary facilities. However, the second respondent-company persuaded the petitioner to withdraw his

resignation and consequently, on the withdrawal of the resignation, revised terms

of service by various office orders were issued in favour of the petitioner. Subsequently, the petitioner was also promoted as General Works Manager of the factory. According to the petitioner, the relationship with the Managing Director of the second respondent-company got strained and the Managing Director started to humiliate the petitioner by various means. In the month of November 1982, the petitioner was informed that he should either resign from service or his services would be terminated. The petitioner did not resign from the service. The petitioner was directed to go to Madras, and the petitioner was also informed that they had proposals to appoint a new General Manager at the factory. Since the petitioner was shifted to work in the Head Office at Madras, he handed over the charge on November 18, 1982. When he came to Madras, he found that he was not given even a proper seat in the Head Office and even the transport facilities were denied to him. According to the petitioner, he was not given any assignment and no papers were circulated to him. The Managing Director of the Company suggested to the petitioner to go on leave for a period of three months and accepting the suggestion of the Managing Director, the petitioner went on leave for three months. The petitioner joined duty again and met the Managing Director who insisted that the petitioner should resign from the company and the petitioner was not obliging the Managing Director and went for reporting duty. The complaint of the petitioner is that he was not provided any chair and table and none of the Office people was willing to speak to him. He was in effect treated like an unwelcome guest in his own office. After January 1984, the salary was not paid to him and he went to the Managing Director who informed that the same would be paid once a decision regarding his future was taken. On June 29, 1984, the petitioner received a registered letter terminating the services of the petitioner on the ground that he has been staying away from duty since January 15, 1984 without any prior permission or prior intimation to the management. It was also stated in the letter that the continued, long, and unauthorised absence amounted to abandonment of service on the petitioner's own accord and the management has lost confidence reposed in the petitioner.

2A. The petitioner filed an appeal before the first respondent, the Deputy Commissioner of Labour (Appeals). The petitioner challenged the order

before the first respondent on the ground that there was no communication from the second respondent that the petitioner was staying away from service on his own and the order of termination passed is against the provisions of Section 41(2) of the Act. The case of the petitioner before the first respondent was that the order of termination was punitive in character and there was no enquiry before the order of termination was passed and further the order was stigmatic in character. The writ petitioner also raised an objection that the second respondent has no right to adduce fresh evidence before the authority and the charges levelled against the petitioner were not proved. The second respondent contended before the authority that the termination of the petitioner was in terms of the agreement and the termination was for a reasonable cause. According to the second respondent, the order of termination was not punitive in character and it is not a stigmatic order on the character of the writ petitioner. The second respondent contended before the authority that the termination was not for misconduct committed by the petitioner and hence, the question of conducting a prior enquiry before the termination of the petitioner from service did not arise at all. The second respondent examined two witnesses on their side and they were also cross-examined on behalf of the writ petitioner. The authority, after considering the evidence on record, found that the petitioner was absenting himself from duty from January 14, 1984 and there was no sanction order for the extended leave. The authority relied upon a decision reported in 1983 (1) LLN 387 and held that the unauthorised absence for over continuous spell of ten days would entitle the employer to terminate the services of the employee. The authority, therefore, concluded that the second respondent was legally correct in terminating the services of the petitioner by treating the case of voluntary abandonment by the writ petitioner himself. The authority, on the question whether there should be an enquiry prior to the termination of the writ petitioner on the ground that there was a "loss of confidence", held that it was not necessary that the allegation of "loss of confidence" should be proved by recording satisfactory evidence in the prior enquiry conducted for that purpose. The authority relied upon decisions in 1975 I LLN 159 and 1983 I LLN 387 and held that there is no justification in setting aside the order of termination for the reason that no enquiry was conducted in this case before issuing the order of termination.

3. Mr. K. Chandru, learned counsel for the petitioner submitted that the view of the authority that the allegation of "loss of confidence" need not be proved by recording evidence in an enquiry conducted prior to the order of termination is illegal and is not sustainable in law. Learned counsel submitted that the order of termination stating that there was a long continuous and unauthorised absence by the petitioner which amounted to abandonment of his service and the statement in the order of termination that the management has lost confidence in the petitioner clearly show that the order cast a stigma on the petitioner and without a prior enquiry held under the provisions of the Act, the order of termination passed which is of a stigmatic character is not sustainable in law. He further contended that the view of the authority that there need not be a prior enquiry is also not correct in law. He relied upon a decision of this Court in Management of Bombay Ammonia (Madras) Pvt. Ltd., Madras Vs. The Additional Commissioner for Workmen's Compensation II, Madras and Another, and also another decision of this Court in Spencer and Co. Ltd., Madras Vs. B. Vajravelu and Another, and a decision of a Division Bench of this Court in Rallis India Ltd., Madras Vs. M. Narasimha Rao and another, .

4. Learned counsel for the second respondent, on the other hand, relied on a decision of the Supreme Court in L. Michael and Another Vs. Johnson Pumps Ltd., and contended that in a reasonable case, where there is "loss of confidence", it would be high risk on the part of the employer to put the employee on the roll and since there was "loss of confidence" on the part of the employee, the services of the petitioner were terminated. According to the learned counsel for the second respondent, it is a case of termination simpliciter and the order is not a stigmatic order. He submitted that the termination order read as a whole would indicate that there was no stigma attached to the character and conduct of the employee petitioner. He also submitted that the order in question amounted to only making a record on the part of the employee that he failed to turn up for the employment after January 15, 1984 without any prior permission or prior intimation to the management. Since the petitioner failed to turn up for the employment for nearly 5 months, the second respondent came to a bona fide conclusion that his continued, and unauthorised absence was due to abandonment of service by the petitioner on his own accord and it is only in this context, the expression "loss of confidence"

was used in the order of termination of service. He, therefore, submitted that there was no obligation on the part of the second respondent to wait

indefinitely for the writ petitioner to turn up for work and the second respondent was justified in terminating the services of the writ petitioner.

Hence, according to the learned counsel for the second respondent, the second respondent has terminated the services of the writ petitioner only

on a reasonable ground and the case of the writ petitioner would fail under the first limb of Section 41(1) of the Act, and not under the second limb

of Section 41(1) of the Act. Learned counsel for the second respondent, therefore, contended that since the case falls within the first limb of

Section 41(1) of the Act, notice provided for u/s 41(1) of the Act, was given and the petitioner has also accepted the same. The counsel for the

second respondent contended that there was no necessity to conduct an enquiry on the part of the second respondent before terminating the

services of the writ petitioner. He also submitted that whatever defeated was there before passing the order of termination, that was cured in the

appeal before the first respondent/appellate authority. He therefore, submitted that since it is a case of order of termination simpliciter, and hence

no enquiry was needed to be conducted and the order of termination which was upheld by the appellate authority is perfectly legal and justified in

law.

5. Mr. Chandru, learned counsel for the petitioner in his reply submitted that it cannot be stated that the order of termination is a non-stigmatic

order. The petitioner was a senior officer in the second respondent-company and there was no necessity for him to sign in the attendance register.

There was nothing proceeded prior to the issue of show-cause notice and even the allegation in the order of termination that the petitioner had

abandoned the employment is not correct as the writ petitioner was reporting for duty even after January 15, 1984. He, therefore, submitted that

the contention that the petitioner has abandoned the service or was unauthorisedly absent from duty would cause a slur upon on the conduct of the

petitioner and the order of termination is stigmatic in nature. He also submitted that the expression, "loss of confidence" in the order of termination

is clearly stigmatic in nature, because when the writ petitioner desires to join in a new job, he may be forced to or he may be required to disclose

to the proposed employer, or new employer the reasons for leaving the earlier job and if the person who is offering a fresh job looks into the order

of termination of the service passed by the second respondent, he would come to a definite conclusion that the services of the petitioner were

terminated on account of loss of confidence which would tarnish the image of the petitioner and it will deny a chance of getting a future job. He,

therefore, submitted that this Court has the jurisdiction to go behind the order and to find out the reasons which impelled the second respondent to

terminate the services of the petitioner.

6. He relied upon a decision of the Supreme Court in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others,

and submitted that the order of termination passed in this case would fall only within the second limb of Section 41(1) of the Act. He, therefore,

submitted that since no enquiry was conducted prior to the passing of the order of termination, the order is illegal. He submitted that the appellate

authority constituted under the Act has no power to conduct the enquiry and receive fresh evidence from the management to sustain the order of

termination when there was no prior enquiry conducted before the termination of service. It is necessary to see the provisions of Section 41(1) of

the Act. Section 41(1) of the Tamil Nadu Shops and Establishments Act reads as under;

No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable

cause and without giving such person atleast one month's notice, or wages in lieu of such notice, provided, however, that such notice shall not be

necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an

inquiry held for the purpose"".

Section 41(1) of the Act was subject matter of consideration before this Court in several decisions. In order to apply the provisions of Section

41(1) of the Act, it has to be determined at the initial stage, whether the case would fall in the first limb or the second limb of Section 41(1) of the

Act.

6A. The order of termination dated June 29, 1984 was passed by the second respondent on the ground that the second respondent has lost the

confidence reposed in the petitioner. The question that immediately arises is whether the "loss of confidence" would amount to misconduct within

the scope of Section 41(1) of the Act. The question whether the imputation of loss of confidence would amount to misconduct came up for

consideration before the Supreme Court in Chandu Lal Vs. Management of Pan American World Airways Inc., and the Supreme Court held that

the want of confidence in an employee points out to an adverse facet in the employee's character as the true meaning of the allegation is that the

employee has failed to come up to the expected standard of conduct which has given rise to a situation involving loss of confidence. The said

decision of the Supreme Court was followed by a decision of this Court in the case of Mngt. B.A. Pvt. Ltd. v. A.C.W."S. Compensation II, Mds.

and Anr.(supra) wherein this Court held that the expression, "loss of confidence" used in the order of termination does throw adverse imputation

against the employee and the order ex facie makes it clear that the order of termination of services was founded on misconduct. This Court held

that ex facie, the order of termination levels a charge of imputation against the conduct and attitude of the employee which would amount to a

charge of imputation or misconduct. The said decision Management of Bombay Ammonia (Madras) Pvt. Ltd., Madras Vs. The Additional

Commissioner for Workmen's Compensation II, Madras and Another, was followed by another decision of this Court in Spencer & Co. Ltd.

Madras v. B. Vajravelu and Anr. (supra) wherein the learned Judge after following the earlier case-law on the subject held as under:-p. 573

... the imputation of loss of confidence amounts to imputation or charge of misconduct and termination of services on that account would amount

to punishment inflicted by way of disciplinary action. In the instant case, the impugned order was ex facie an order of termination of service on the

ground of misconduct. I do not find any infirmity or illegality with the said finding which is supported by judgments of the Supreme Court and this

Court which include the decision under the very Act.

7. High Court of Karnataka in the case of A. Ram Mohan v. Labour Court, Bangalore and Anr. 1988 II LLJ 179 held that where the services of

an employee were terminated on the ground of loss of confidence, it is not a discharge simpliciter, but is in nature of penalty for misconduct and it

casts a stigma on the character and conduct of the employee. The above decision (cited supra) clearly establishes that where the charge is loss of confidence on the part of the employee, it would cast a stigma on the character and conduct of the employee and the order is really in the nature of penalty for misconduct, and hence, the submission of the learned counsel for the second respondent that the termination for "loss of confidence" does not amount to stigma on the "character or the conduct of the writ petitioner, has to be rejected. As rightly pointed out by the learned counsel for the petitioner, if the order of termination showing loss of confidence is produced before a prospective new employer, the new employer on a perusal of the order would definitely come to a conclusion that the earlier employer has lost the confidence on the employee denying the chance of getting a new or fresh employment. The test to determine whether the order is stigmatic or not is the impression that an order would make in the mind of a reasonable person perusing the order. If that test is applied to the facts of the case, the order of termination has to be held as stigmatic in character.

8. Nodoubt, learned counsel for the second respondent relied upon a decision of Supreme Court in the case of L. Michael v. Johnson Pumps India Ltd. (supra). The said decision was noticed by KM. Natarajan, J. in Spencer & Co. Ltd. Madras case (cited supra) and the learned Judge held that the case that arose before the Supreme Court was under Industrial Disputes Act and the question that arose before the Supreme Court was whether the order of discharge is one of discharge simpliciter and no stigma whatsoever is attached. Learned Judge also noticed that Section 41 of the Tamil Nadu Shops and Establishment Act is differently worded and the conditions prescribed u/s 41 of the Act are mandatory and the decision of the Supreme Court in L. Michael's case (cited supra) has no application to the facts of this case. In my view, it is not necessary to consider the other cases cited by the learned counsel for the second respondent, in view of the authoritative pronouncements of this Court in several decisions that "loss of confidence" would amount to imputation of charge of misconduct. Once it falls within the scope of the second limb of Section 41(1) of the Act, it is incumbent upon the amount respondent to hold an enquiry to prove the misconduct and then only, an order of termination can be

passed. Hence, the view of the appellate authority that the continued absence of nearly six months would have enabled the second respondent to draw inference that the petitioner has abandoned the service, and the loss of confidence imposed in favour of the writ petitioner does not amount to misconduct, cannot be sustained in law. A decision of this Court in *Rallis India Ltd. v. M.N. Rao and Anr.* (supra) makes it clear that the disclosure of cause or reason in the order is a must, since it is only then the appellate authority could be in a position to see whether it is a case of simpliciter discharge for reasonable cause or for an alleged misconduct and further to see whether a proper domestic enquiry was conducted before passing of an order of termination on the ground of misconduct. This Court has held that the management should disclose in the very order of termination the cause or all the factors which made the management to come to such a conclusion and in the absence of the disclosure in the order of termination, there is absolutely no scope for the management to contend that the dispensing with the services of the employee was for a reasonable cause. This Court also held that the fact that the order of termination does not contain any express words of stigma is not conclusive of issue and it may be evident from the entire circumstances preceding or attendant on a particular order on the question and for that purpose, materials have to be examined to see whether the misconduct is a mere motive or is very foundation of the order. The said decision in *Rallis India Ltd.* case (cited) was followed by another decision of this Court in *Air France Vs. Dy. Commr. of Labour and Others*, wherein AR. Lakshmanan, J. held that the employer is bound to disclose the reason for termination in the order of termination itself and the failure to do so would render the order invalid and non est. Viewed from this angle, the order of termination makes it clear that the loss of confidence was the basis for the termination of services of the petitioner. In other words, the foundation of the order was loss of confidence imposed by the second respondent in favour of the writ petitioner. Once it is held that the loss of confidence casts stigma on the character and conduct of the writ petitioner, the order passed without an enquiry is not sustainable in law. The Supreme Court in *D.K. Yadav Vs. J.M.A. Industries Ltd.*, held that where the management did not conduct any domestic enquiry, nor it gave the appellant any opportunity to put forth the case, the order passed for termination

cannot be sustained in law.

9. The next question that arises is whether it is open to the management to lead evidence before the appellate authority where the services of the

petitioner were terminated without any enquiry. This Court in the case of Zenith Lamps and Electricals Vs. Additional Commissioner of

Workmen's Compensation and Another, held that the scheme for the Tamil Nadu Shops and Establishments Act makes it clear that where the

employer did not hold any enquiry u/s 41(1) of the Act, and record evidence, for the purpose of establishing the misconduct, the appellate

authority cannot convert it into original authority when the original authority has not conducted such an enquiry. This Court also held that Section

41(2) was not enacted to convert the appellate authority into a forum where an original enquiry into the misconduct of an employee justifying the

dismissal could be conducted so as to deprive him of any right to what he was entitled to in a common law. The above decision was affirmed by a

Division Bench of this Court in the case of Zenith Lamps and Electricals v. Addl Commr. 1973 II LLJ 445 wherein this Court held that where

there was no enquiry by the management, the Commissioner cannot be called upon u/s 41(2) to hold the trial in exercise of appellate power, take

evidence and then satisfy himself as to whether the removal was justified or not. The view has been reiterated by Nainarsundaram, J. in the case of

Management of Bombay Ammonia (Madras) Pvt. Ltd. Madras (cited supra) where the learned Judge held that when the services of an employee

were terminated for misconduct without holding an enquiry, the question of substantiating the charge by taking evidence did not arise. K.M.

Natarajan, J. also has taken the same view in Spencer & Co. Ltd Madras case (cited supra). The said view has been reiterated by a Division

Bench in Rallis India Ltd. Madras case (cited supra). In view of a long catena of decisions holding that the appellate authority has no power to

conduct a fresh enquiry and take fresh evidence where there was no prior inquiry, the appellate authority exceeded in its jurisdiction in this case in

taking new evidence to sustain the order of termination. The decision of the Supreme Court in Gujarat Steel Tubes Ltd. v. G.S.T. Mazdoor Sabha

(supra) relied upon by the learned counsel for the petitioner is relevant to the facts of the instant case, the extract of which is hereunder:-at P 150.

The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the

termination is. If thus, scrutinised, the order has a punitive flavour in course or consequence, it is a dismissal. If it falls short of this test, it cannot be

called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent

desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order

under the Standing Order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not

detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an

alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple

termination, are given and non-injurious terminology is used.

The decision cited supra clearly states that where there is an imputation of loss of confidence, which would amount to misconduct, the order of

termination cannot be passed without holding an enquiry as contemplated u/s 41(1) of the Act. Since it is a void order, the appellate authority has

no jurisdiction to conduct fresh enquiry and take evidence to sustain the order of termination. The appellate authority also held that the imputation

of loss of confidence would not amount to misconduct by placing reliance upon the decisions which arose under the Industrial Disputes Act. The

question whether there is abandonment of services has to be seen in the context of the case. The petitioner was a highly placed Officer in the

second respondent-company and it is not expected that he should sign in the attendance register each day. So, when there was an allegation in the

order of termination that he was absenting himself from duty, which was denied by the petitioner, there should have been a prior enquiry before the

order of termination was passed. Since the second respondent failed to conduct an enquiry before the order of termination was passed the order is

not sustainable in law. Consequently, the order of the appellate authority upholding the order of termination is also not valid in law. In this view of

the matter, I am inclined to allow the writ petition by quashing the impugned order. The writ petition is allowed. Consequently, the matter is

remitted to the first respondent to determine the amount of wages payable to the petitioner till the date of his retirement since the petitioner has already reached the age of superannuation. No order as to costs.