

(1977) 08 RAJ CK 0002

In the Rajasthan High Court

Case No : Civil Miscellaneous Writ Petition No. 45 of 1977

Raptakos Brett and Co. Ltd.

APPELLANT

Vs

B.B. Harsha and Others

RESPONDENT

Date of Decision : 12-08-1977

Acts Referred:

Rajasthan Shops and Commercial Establishments Act, 1958 — Section 28A

Citation : (1977) RLW 259 : (1977) WLN 461

Hon'ble Judges : A.P. Sen, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.P. Sen, J.—This writ petition by M/s. Raptakos, Brett Co. Ltd. Jaipur, is directed against the award of the Authority, appointed under the Rajasthan Shops and Commercial Establishments Act, 1958, dated December 31, 1976, setting aside the order of the petitioner dated April 8, 1976, terminating the services of the respondent No. 2, Jaswant Jayram, and discharging him from its employment.

2. The petitioner M/s Raptakos, Brett & Co., Ltd., Jaipur, which is a commercial establishment, terminated with immediate effect the services of respondent No. 2 Jaswant Jayram, who was employed as Office-bearer-cum-peon, by its letter dated April 8, 1976, which reads -

Mr. Jaswant Jairam, 8th April 1976

JAIPUR BRANCH

Dear Sir;

You are hereby informed that your services are no longer required by us.

We are enclosing a cheque for Rs. 794/- being one month's wages in lieu of notice. You are relieved of the duties with immediate effect

Your other dues will be settled in due course.

Yours faithfully,

Raptakos, Brett & Company Limited,

Sd/-

Dy. General Manager.

3. The respondent No. 2, Jaswant Jayram, made a complaint on April 17, 1975 to the Authority appointed under the Rajasthan Shops & Commercial Establishments Act, 1958, Jaipur, that his services had been terminated by the petitioner without any reasonable cause and was, therefore, contrary to Section 28-A of the Rajasthan Shops and Commercial Establishments Act, 1958 (hereinafter to be referred as "the Act").

4. In reply, the petitioner denied the allegation that there was no reasonable and proper cause for the termination of services of respondent No. 2 and made detailed submissions in regard thereto. It was pointed out that the respondent No. 2 ever since his transfer from Delhi to Jaipur as Office-bearer cum-peon, sometime in August 1973, had become rude and harsh in his behaviour towards the officers and other employees of the Company and despite several warnings, he did not improve on his conduct and behaviour and was also not doing the full work in the office and was working only for 2 to 3 hours in a day, and therefore was not allowed to cross the efficiency bar. It was also pointed out that the respondent No. 2 would not co-operate with the godown-keeper, had started abusing the godown-keeper in most vulgar terms and also threatened to cause him physical harm with the help of goondas, was going on leave without handing over the cycle and was otherwise guilty of several other serious lapses, and therefore, he was not a fit person to be kept in service of the Company. In these circumstances, there was no other way for the petitioner but to discharge the respondent No. 2 from the Company's service and he was paid one month's salary in lieu of the notice. Before termination of his services, the respondent No. 2 was served with a show cause notice dated March 17, 1976, but he did not submit his explanation. The Authority instituted an inquiry into the matter. The petitioner examined two witnesses viz., Shri P.K. Menon, Branch Executive and Shri S.R. Bhatkhande, Godown-Keeper and produced a number of documents. In rebuttal, the respondent No. 2 examined himself and produced one Shri Deshmukh in defence. The learned Authority, by its impugned order dated December 31, 1976, set aside the termination order on the ground that the allegations contained in the charge-sheet dated March 17, 1976, were not established and therefore, ordered the petitioner to re-instate the respondent No. 2 in service with full back wages.

5. There can be no doubt that the Authority has completely misdirected itself in assuming that respondent No. 2 had been dismissed from-service for misconduct, while this was a case of discharge simpliciter.

6. It is true that the form of the order of termination of the service, is not

conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It & therefore always open to the Tribunal to go behind the form and look at the substance; and if it comes to the conclusion, for example, that though in form the order amounts to termination simpliciter, but in reality cloaks a dismissal for misconduct, it will be open to it to set aside the order as a colourable exercise of power by the Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, ; The Chartered Bank, Bombay Vs. The Chartered Bank Employees' Union, ; and Mahendra Singh Dhantwal v. Hindustan Motors Ltd. and Ors. (3) AIR 1976 SC 2652. It is equally true that it is for the Tribunal to infer whether the order of termination is, in fact, discharge simpliciter or it amounts to dismissal. If it is satisfied that the order is punitive, that it is malafide, that it amounts to victimisation or unfair labour practice or was capricious or unreasonable as to lead to the inference that it had been passed for ulterior motives and was not bona fide exercise of the power arising out of the contract and in such cases it would be competent to the Tribunal to interfere with the order of the Management terminating the services of an employee and in a proper case, direct the reinstatement of the employee: Management of Utkal Machinery Ltd. v. Workman, Santi Patnaik (4) (1950) SCLJ 2968; Management of the Express Newspapers (P) Ltd. Madurai v. Presiding Officer, Labour Court Madurai (5). 1950 5. SC LJ 3489 ; and Tata Oil Mills Co. Ltd. Vs. Its Workmen, . These authorities however have no application to the facts and circumstances of the present case.

7. It is no body's case that respondent No. 2 was dismissed from service for misconduct. There was no allegation that his discharge from service by the Management was not in bona fide exercise of its powers, nor was there any allegation that it amounted to his victimisation or of any unfair labour practice or that such direction was capricious or unreasonable. On the contrary, respondent No. 2, in his complaint dated April 17, 1975 u/s 28-A of the Act, had himself unequivocally admitted that there was termination of his services by the petitioner, but only alleged that the termination was without any reasonable cause. The petitioner, in its reply, joined issue and showed that there was reasonable cause for the termination of service of respondent No. 2 as his services were far from satisfactory. It gave instances of the various acts of commission and omission on his part, which justified his termination from service. The only question in controversy before the Tribunal, therefore, was whether there was sufficient cause for the termination within the meaning of Section 28-A of the Act.

8. Section 28-A of the Act reads as follows:

28-A. Notice of Dismissal or discharge by employer. (1) No employer shall dismiss or discharge from his employment any employee who has been in such employment continuously for a period of not less than 6 months except for a reasonable cause and after giving such employee at least one month's prior notice or on paying him one month's wages in lieu of such notice:

Provided that such notice shall not be necessary where the services of such employee are dispensed with for such misconduct, as may be defined in the rules made by the State Government in this behalf, and supported by satisfactory evidence recorded at an enquiry held for the purpose in the prescribed manner.

On a plain reading of the section, it would appear that it deals with two contingencies viz., (1) dismissal of any employee and (2) discharge of such employee from employment.

9. No employer has the right to dismiss or discharge an employee who has been in such employment continuously for a period not less than six months except for a reasonable cause, and after giving such employee at least one month's prior notice or on paying him one month's wages in lieu of such notice. Whether or not there is reasonable cause for dismissal or discharge of an employee in a particular case must necessarily vary with the circumstances of each case. The proviso adds a fetter to the employer's power of dismissal or discharge of an employee for misconduct. It has a two fold function. While the first part of the proviso is in the nature of an exception and it provides that no such notice shall be necessary where the services of such employee are dispensed with for such misconduct, as may be defined in the rules made by the State Government in that behalf, the second part carves out an exception to the main provision. It adds a rider by providing that the services of such an employee for any Such misconduct, shall not be dispensed with unless the charge of such misconduct is supported by satisfactory evidence recorded at an inquiry held for the purposes in the prescribed manner.

10. The scheme of a similar legislation viz., The Bihar Shops and Establishments Act, 1958, came to be considered by the Supreme Court in *The Chairman, Brooke Bond India Private Ltd. and Another Vs. Chandranath Choudhary*, . Their Lordships observed that the proceedings u/s 26 of that Act, which is analogous to Section 28 A of the Act, are not by way of appeal against the order passed at or as result of the domestic inquiry; they are independent and original proceedings where the competent authority has to arrive at its own findings on appreciation of evidence led before it and not on evidence adduced in the domestic enquiry. That being so, the Supreme Court observed that it cannot be held that the competent authority u/s 26 has a limited jurisdiction as in the cases falling u/s 33 A of the Industrial Disputes Act, 1947.

11. It is, therefore, urged that the conclusion arrived at by the learned Authority that the allegations in the charge-sheet dated April 17, 1975 were not established, was a finding of fact based on appreciation of evidence, and even if the finding was wrong, that was nothing but an error of fact, and howsoever grave it may appear to be, a writ of certiorari cannot be issued in regard to such finding of fact on the ground of insufficiency or inadequacy of evidence. Reliance is placed on *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, . I am unable to appreciate this line of reasoning. As already stated, it was not the case of respondent No. 2 that he had been dismissed or discharged from service for

misconduct. Merely because the petitioner in its reply, gave instances of the various acts and omissions on the part of respondent No. 2, each of which may amount to an act of grave misconduct, that would not imply that what was a discharge simpliciter would, in law, amount to dismissal or discharge for misconduct.

12. The only point in controversy before the Tribunal was whether or not there was any reasonable cause for the discharge of respondent No. 2 from service within the meaning of Section 28-A (1) of the Act. In my judgment, the Tribunal exceeded its jurisdiction by embarking on an inquiry which did not arise from the pleadings of the parties. Its ultimate conclusion that the allegations in the charge-sheet dated March 17, 1976, were not proved, is vitiated because, firstly, the so called charge-sheet was nothing but a show cause notice, and secondly, there was no such plea taken by the respondent No. 2 that he was ever charge-sheeted. There was, in deed, no domestic enquiry held against the respondent No. 2. He was never charge-sheeted, no enquiry officer was appointed, no evidence led at any stage of the inquiry.

13. From a bare perusal of the reply filed by the petitioner, it would be manifest that there was ample justification for the termination of the service of respondent No. 2. Even if the acts, commission or omission were serious enough to entail a dismissal of respondent No. 2, the petitioner was not bound to dismiss him from service as a measure of punishment. The matter is squarely covered by the decision of their Lordships of the Supreme Court in *The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao*, . The Standing Orders of the Company provided for both the contingencies, viz., dismissal or termination. Standing Order 16 provides for a termination of service, while Standing Order 18 provided for dismissal on the ground of misconduct. There were in that case, as here, serious charges which would amount to misconduct and yet the Management terminated the service of the employee under Standing Order 16 by serving one month's notice. In repelling the contention that the Management was bound to take action under Standing Order 18, their Lordships observed:

The short answer to this argument is that no penalty for misconduct has been imposed on the respondent under Standing Order No.

18. The Company paid his salary to the respondent from the date of suspension to January 31, 1937, which also showed that no order was passed by way of punishment for misconduct.

Their Lordships then stated:

The Company chose to terminate the service of the respondent in accordance with the Standing Order No. 16, and did not think fit to proceed against the respondent for any alleged misconduct and it was open to the Company to do so. So far as Standing Order No. 16 is concerned, all the requirements thereof have been complied with." That precisely is the case here.

14. In the result, this writ petition succeeds and is allowed. The award of the Authority appointed under the Rajasthan Shops and Commercial Establishments Act, 1938, Jaipur, dated December 31, 1976 is set aside and the complaint filed by respondent No. 2 u/s 28-A of the Act as dismissed. There shall, however, be no order as to costs.