

(2000) 09 MAD CK 0013
In the Madras High Court
Case No : W.A. No. 321 of 1998

Sankaran E.R.

APPELLANT

Vs

Mettur Government Servants Co-operative Stores Ltd. and
Another

RESPONDENT

Date of Decision : 29-09-2000

Acts Referred:

Citation : (2000) 3 LLJ 91

Hon'ble Judges : V.S. Sirpurkar, J;V. Kanagaraj, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—The second respondent in W.P.No. 9214 of 1988, has preferred this writ appeal having been aggrieved against the

order, dated January 8, 1998, made by the single Judge of this Court in so far quashing the order, dated March 15, 1988, passed by the second

respondent appellate authority, the Deputy Commissioner of Labour, Salem, in T.N.S.E. Appeal No. 6 of 1987 preferred by the appellant before

him u/s 41(2) of the Tamil Nadu Shops and Establishments Act, 1947, as against the order of termination from service of the first respondent-management.

2. Tracing the history of the case it comes to be known that the appellant herein while working as the salesman in the first respondent Co-

operative Stores, Ltd., was alleged to have committed various misconducts and charges were framed against him by the first respondent on

September 6, 1986 for misappropriation of funds on December 31, 1985 and on February 28, 1986, for stock deficit to the value of Rs.

11,541.06 as on December 31, 1982 and for a further misappropriation of funds to the tune of Rs. 8,267.28 being the sale proceeds of the

articles in the cloth section, that on explanations being called for, the appellant submitted his explanation on September 12, 1986 ; that on enquiry

held (with due opportunity for the appellant to be heard), the enquiry officer, in consideration of the evidence placed before him ultimately found

the appellant guilty of all the charges levelled against him; that thereafter the first respondent issuing a show-cause notice, dated April 12, 1987,

accompanied by a copy of the enquiry report called upon the appellant to explain as to why his services should not be terminated; that the

appellant tendered his explanation on April 18, 1987 to this show-cause notice and in consideration of the same since been found not satisfactory,

the first respondent terminated the services of the appellant by its order, dated May 7, 1987.

3. It is further revealed that the termination of the services by the order of the first respondent, dated May 7, 1987, had been challenged by the

appellant before the appellate authority/the second respondent herein and the said appellate authority in appreciating the evidence made available

on record in his own way had ultimately arrived at the conclusion to set aside. The order of termination as per his order, dated March 15, 1988,

made in T.N.S.E. Appeal No. 6 of 1987. This order of the appellate authority having been challenged by the first respondent-management in

W.P.No. 9214 of 1988, the learned single Judge of this Court who found the proceedings of the second respondent/appellate authority suffer with

illegality, material misdirections and error apparent on the face of the records, had ultimately allowed the writ petition quashing the proceedings of

the second respondent.

4. Aggrieved, the appellant has come forward to prefer the above writ appeal against the said order of the learned single Judge, dated January 8,

1998, on grounds such as:

(i) that the learned single Judge has utterly gone wrong in quashing the order, dated March 15, 1988, passed by the appellate authority and

categorical holding on facts that the appellant had been denied the opportunity of engaging a legal adviser;

(ii) that the learned single Judge erred in his exercise of the power of judicial

review under Article 226 of the Constitution of India even when no error apparent on the face of the records has been proved or established against the order, dated March 15, 1988, of the appellate authority thereby concluding that the domestic enquiry was never conducted in accordance with the principles of natural justice since the appellant was denied of the opportunity to engage a legal adviser to defend his case and to put in his written statement;

(iii) that the learned single Judge ought to have appreciated and applied the ratio laid down in Board of Trustees of the Port of Bombay Vs.

Dilipkumar Raghavendranath Nadkarni and Others, , in favour of the appellant;

(iv) that the learned single Judge, if at all, ought to have remitted back the impugned T.N.S.E. Appeal No.6 of 1987 for taking further evidence in

the interest of justice instead of quashing the order dated March 1, 1988, of the appellate authority;

(v) that the learned single Judge has also not considered the importance of the judicial pronouncement reported in J.K. Aggarwal Vs. Haryana

Seeds Development Corporation Ltd. and others, , wherein it is laid down that the representation by a lawyer is part of natural justice; and

(vi) that the learned single Judge has erred in holding that the proceedings of the appellate authority suffer from illegality, material misdirections and

error apparent on the face of the record while on the other hand it is only the finding and the conclusions arrived at by the enquiry officer that is

vitiated and rendered invalid for gross violation of the principles of natural justice.

5. During arguments, the learned counsel appearing on behalf of the appellant besides laying emphasis on the aforementioned grounds of appeal

would particularly stick to the following points, viz.:

(i) that the enquiry was conducted without even a presenting officer but with an advocate as an enquiry officer;

(ii) that the request of the appellant to engage an advocate or a labour law consultant to assist him during the domestic enquiry was turned down;

(iii) that the appellant had not been supplied with the statement of the witnesses previously recorded and list of documents relied upon; and

(iv) that no reasonable opportunity had been afforded to the appellant/workman and hence the enquiry was not a bona fide one.

6. Two judgments would be cited by the learned counsel for the appellant, the

first one delivered by the Apex Court in Board of Trustees of the

Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, :

Even in a domestic enquiry there can be very serious charges and adverse verdict may completely destroy the future of the delinquent employee.

The adverse verdict may so stigmatize him that his future would be bleak and his reputation and livelihood would be at stake. Such an enquiry is

generally treated as a managerial function and the enquiry officer is more often a man of the establishment. Ordinarily, he combines the role of

presenting-cum-prosecuting officer and an enquiry officer, a Judge and prosecutor rolled into one. In the past it could be said that there was an

informal atmosphere before such a domestic tribunal and that strict rules of evidence and pitfalls of procedural law did not hamstring the enquiry by

such a domestic tribunal. We have moved far away from this stage. The situation is where the employer has on his pay rolls labour officers, legal

advisers lawyers in the garb of employees and they are appointed as presenting-cum-prosecuting officers and the delinquent employee pitted

against such a legally trained personnel has to defend himself. Now if the rules prescribed for such an enquiry, did not place an embargo on the

right of the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the enquiry officer, whether

looking to the nature of charges, the type of evidence and complex or simple issues that may arise in the course of enquiry, the delinquent

employee in order to afford a reasonable opportunity to defend himself should be permitted to appear through a legal practitioner.....

7. The other judgment cited by the learned counsel for the appellant is one delivered by the Apex Court in J.K. Aggarwal Vs. Haryana Seeds

Development Corporation Ltd. and others, :

4. The right of representation by a lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be

enunciated.

7. Rule 7(5) of the Haryana Civil Services. (Punishment and Appeal) Rules recognises that where the charges are so serious as to entail a

dismissal from service the inquiry authority may permit the services of a lawyer. This rule vests a discretion. In the matter of exercise of this

discretion one of the relevant factors is whether there is likelihood of the combat

being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of the appellant being pitted against a presenting officer who is trained in law.

Legal adviser and a lawyer are for this purpose somewhat liberally construed and must include "whoever assists or advises on facts and in law

must be deemed to be in the position of a legal adviser." In the last analysis, a decision has to be reached on a case to case basis on the situational

particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question whether a person who

as a sequel to an adverse verdict in a domestic enquiry is likely to suffer serious civil and pecuniary consequences should, with a view to giving him

a reasonable opportunity to defend himself, on his request, be permitted to appear through a legal practitioner.

10. In the present case the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule

resulting in a failure of natural justice; particularly, in view of the fact that the presenting officer was a person with legal attainments and experience,

being the Personnel and Administration Manager who is stated to be a man of law. It may be that the appellant was no less adept having been in

the position of a senior executive and could have defended, and did defend, himself competently, but in defending himself one may tend to become

"nervous" or "tongue- tied." Moreover, appellant, it is claimed, has had no legal background.

8. The learned counsel for the appellant would end up his arguments with the request to consider the propositions arrived at by the Apex Court

wherein only two courses are open either to allow the above appeal setting aside the order passed by the learned single Judge or at least to order

fresh enquiry with a remand of the case.

9. On the contrary, the learned counsel appearing for the first respondent-management would impress upon the Court justifying the order passed

by the learned single Judge in all respects, since according to him, it is a well considered and well merited one and the clamour that was made on

the part of the learned counsel for the appellant that the appellant's request to engage a lawyer to defend him before the enquiry officer had not

been considered, has no place in the facts and circumstances encircling the

whole affair in the case in hand and would cite a Division Bench

judgment of this Court delivered in *A. Veemen v. Management of the Paramakudi Co-operative Urban Bank Ltd.*, and Anr. reported in 1990 I

LLJ 95, which has been rendered following the judgment of the Apex Court thereby repelling the contentions similar to the one, which has been

raised on the part of the learned counsel for the appellant. The Supreme Court case that had been relied upon is *Saran Motors v. Visvanath and*

Anr. reported in 1964 II LLJ 139 wherein the then Chief Justice of India GAJENDRAGADKAR, J. speaking for the Apex Court held at pp. 141,

142 of LLJ:

We repeatedly pointed out that domestic enquiries in industrial relations must be fairly conducted and whenever we are satisfied that any enquiry

was not fairly conducted or its conclusions were not supported by evidence, we have unhesitatingly ignored the findings recorded at such an

enquiry and held that the Tribunals must deal with the merits of the dispute for themselves. But it is impossible to accept the argument that because

a person is sometimes employed by the employer as a lawyer he becomes incompetent to hold a domestic enquiry. It is well known that enquiries

of this type are generally conducted by the officers of the employer and in the absence of any special individual bias attributable to a particular

officer, it has never been held that the enquiry is bad just because it is conducted by an officer of the employer. If that be so, it is obviously

unsound to take the view that a lawyer who is not a paid officer of the employer is incompetent to hold that enquiry because he is employer's

lawyer and is paid remuneration for holding enquiry.

Extracting the above paragraph from the judgment of the Apex Court and following the proposition propounded therein towards answering the

two questions:

(i) whether in a domestic enquiry, the appointment of a lawyer as an enquiry officer, on ground that he is an Advocate, would hamper or

jeopardise the chances of the delinquent? and

(ii) whether in the event of the presenting officer being not one judicially trained whether refusal of permission to engage a lawyer to assist the

workman would cause violation of the principles of natural justice? the Division Bench of this Court would answer in the following manner:

The law laid down above is a complete answer to the first submission of the learned counsel for the appellant. In our opinion, a lawyer must

normally be presumed to be a man who can act with a sense of detachment and without bias and prejudice as he is trained in law. In the absence of

any special individual bias attributable to him, no fault can be found with the appointment of a lawyer as an enquiry officer in a domestic enquiry

only on the ground that he is an advocate who had been engaged by the employer to conduct the enquiry...

So far as the second submission of the learned counsel for the appellant is concerned, we also do not find any force in the same. It is not disputed

that the presenting officer of the management was only a secretary of the society. He was not a legally trained person. The enquiry officer,

therefore, was justified in refusing permission to the workman to be represented by an Advocate. There was no violation of the principles of natural

justice because the parties were equally pitted and the management had no unfair advantage over the workman. The workman had been granted

an opportunity by the enquiry officer to be represented by any co-employee. If he did not do so, he has to thank himself for it. The refusal of

permission to be represented by a lawyer at the domestic enquiry, in the facts and circumstances of the case, did not violate any principles of

natural justice.

10. On these submissions, the learned counsel would emphatically deny the contentions of the learned counsel for the appellant that there had been

any lack of opportunity much less leading to violation of the principles of natural justice or would the enquiry proceeding get vitiated and would

pray to dismiss the appeal in toto.

11. In the light of the above arguments, if the judgment of the learned single Judge is to be testified, the learned single Judge has not only

considered the judgment cited on the part of the appellant reported in Board of Trustees of the Port of Bombay (supra), in its right angle for the

claim of the appellant that his request to appear through a legal practitioner was not considered, but also the other judgment reported in The United

Planters Association of Southern India Vs. K.G. Sangameswaran and another, , wherein the Section 41(2) of the Tamil Nadu Shops and

Establishments Act pertaining to the jurisdiction and scope of interference of the

second respondent/appellate authority had been widely discussed.

12. The learned single Judge has also observed that before the second respondent/ appellate authority, both the workman and the management did not prefer to examine any witness for oral evidence but they have both submitted their written arguments and in consideration of these and other documents placed by the management which are related to the notices given and explanations obtained including the findings of the enquiry officer, the second respondent herein has arrived at his conclusions. The learned Judge would further see that the appellate authority found discrepancies in the account books and with respect to the third charge would remark that it had already been finalised and the same should not have been included as one of the charges and the other comments of the appellate authority that if there had been a real misappropriation, the society should have initiated criminal action against the workman for such huge stock deficit and that the enquiry officer should have gone into detail to examine the specific explanation of the workman on the charges and the ultimate decision arrived at that the enquiry finding got vitiated and on such reasons allowing the appeal preferred by the workman.

13. The learned single Judge would sum up that the second respondent/appellate authority has chosen to set aside the orders of the society for the following reasons, viz.:

(i) that the copy of the enquiry proceedings relating to the examination of witnesses had not been produced before the first respondent (appellate authority).

(ii) that the enquiry officer had failed to examine in detail the explanation of the worker mentioned in his letter, dated September 12, 1986.

(iii) that the charge relating to the stock deficit was the subject-matter of proceedings of recovery before the co-operative arbitrator and amounts are being recovered.

(iv) that there were some discrepancies in the accounts and though evidence was available to prove the alleged misappropriation, the society had not initiated criminal action against the worker for stock deficit and alleged misappropriation and the failure to lodge a police complaint is fatal.

14. Tracing the procedures adopted by the enquiry officer stage by stage, on perusal of exhibits Rule 1 to Rule 57, the learned single Judge would

find that in spite of very many opportunities afforded to the workman by the enquiry officer, the workman had not chosen to avail those

opportunities and since the enquiry officer was left with no option but to conduct the enquiry, on March 22, 1987 and since the workman had

failed to examine his witnesses after the conclusion of the management side evidence, the enquiry officer declining to concede his request for yet

another adjournment, had submitted his report, dated April 8, 1987, that thereafter the management had communicated the same to the workman

along with the enquiry officer's report in April 18, 1987 and only thereafter the management had passed the order of termination of the workman.

On such scenario of the enquiry proceeding and finding leading to the termination of the services of the workman based on the record of the

proceedings made available before the appellate authority, the learned single Judge would arrive at the conclusion that there had been a fair

proceeding with sufficient opportunity to the workman by the enquiry officer and as such there had been no violation of the principles of natural

justice.

15. Even as regards the finding of the appellate authority that the enquiry officer had not considered the case of the workman in detail, the learned

single Judge would arrive at the just contrary conclusion on ground that the enquiry officer had only in consideration of the depositions of the

witnesses and the material documents as well had arrived at his finding on a clear discussion held with respect to all the charges and the defence

passed as a whole; that the enquiry report, in his considered view, is fair and there is no justification to assume that the enquiry officer had failed to

consider the evidence let in by the workman; that the workman had not chosen to examine witnesses in support of his case while producing

Exhibits W 1 to W 14 alone; that likewise, even before the appellate authority, the workman did not choose to examine either himself or any

witness on his behalf despite grant of time and adjournments on several occasions and hence there is no pith or substance in saying that the

workman was not afforded with either reasonable or adequate opportunity to defend him effectively and hence neither the enquiry officer could be

branded unreasonable nor had he acted arbitrarily to deny opportunity nor could the enquiry report be treated vitiated.

16. Regarding the third reason cited above, alleging the action of stock deficit or misappropriation of funds as arbitrary, the learned single Judge

would assail that the view of the appellate authority cannot be sustained since the society had already initiated action before the Co-operative

Sub-Registrar and after due enquiry, the Sub-Registrar had passed an award in favour of the society and the said award had not only become final

but also a statutory one, which the workman had not chosen to challenge. At this score also, the learned single Judge would find no illegality

committed on the part of the society in framing the charge with respect to misappropriation based on the earlier award. Hence, the learned single

Judge would conclude that merely because arbitration proceeding had been initiated, such proceeding is not a bar for charges being framed against

the workman.

17. Coming to the last reason that no criminal action or police complaint had been given with respect to the misappropriation or stock deficit, the

learned single Judge would assert that on any account, the non-registering of the criminal complaint would in no manner justify the act of the

appellate authority to reject the charge relating to the stock deficit and misappropriation of funds when there is sufficient evidence to establish the

same in the domestic enquiry, even though it was open for the management to have recourse to criminal proceeding also but this negligence alleged

would in no manner hamper the domestic proceeding, which is entirely based on a different set of law and procedure.

18. Likewise, the learned single Judge, also dealing with the point of denial of opportunity to engage a legal practitioner to defend the workman,

admitting that the workman sought for the said permission which had been rejected and further admitting that the enquiry officer was a law

graduate, would point out that no presenting officer had been appointed by the petitioner-society in this case; that only in the case of the presenting

officer with legal qualification getting appointed, the workman could complain of denial of his right of defence through a legal practitioner or a

person well versed in domestic enquiries and this vital aspect having been lost sight of by the appellate authority besides himself being only a fact

finding authority coupled with the fact that the workman having been freely allowed to cross-examine the witnesses effectively and in the absence

of any bye-law or resolution enabling the workman to engage a legal practitioner in the domestic enquiry, the learned single Judge has concluded

that in the case in hand, no prejudice has been caused, to the workman in any manner in respect of the domestic enquiry held by the enquiry officer

resulting in violation of the principles of natural justice and would hold that the views of the appellate authority are not sustainable in law. Further

discussing the cases cited on the part of the workman reported in Board of Trustees of the Port of Bombay (supra), and J.K. Aggarwal (supra)

having further discussion in the light of the above judicial pronouncements of the Apex Court, the learned single Judge is not inclined to accept the

views of the first appellate authority and the contentions of the learned counsel appearing on behalf of the workman that there had been violation of

the principles of natural justice and would outright reject the same.

19. The learned single Judge, further clarifying that the employer society was not at all represented by a legally trained person and that the

workman had effectively cross-examined the witnesses and that the employer had rightly exercised its jurisdiction, would not accept even the last

reason assigned on the part of the appellate authority but would hold the same cannot be sustained further holding that the proceedings of the

appellate authority suffer from material irregularities and error apparent on the face of the record consequently allowing the writ petition and

quashing the proceeding of the appellate authority.

20. So far as the two main points stressed on the part of the learned counsel for the appellant relying on the two judgments of the Apex Court

reported in Board of Trustees of the Port of Bombay (supra), and J.K. Aggarwal (supra) though the propositions propounded therein have been

adequately answered by the learned single Judge with specific instances, it would be fitting to add some more discussions in the context of the facts

encircling the cases referred to and that of the case in hand.

21. In the judgment first cited above, the Apex Court, generally anticipating the consequences that would follow in case of an adverse verdict

visiting the delinquent employee who is pitted against a legally trained personnel, has suggested that if the Rules prescribed did not place an

embargo on the right of the delinquent employee to be represented by a legally trained person at the discretion of the enquiry officer, the worker

would be permitted to appear through a legal practitioner. For this suggestion made by the Apex Court in this judgment, the very views expressed

by the same Apex Court in the second judgment cited by the appellant himself which is taken at a later point of time will serve as the answer. We

extract the relevant portions of the judgment:

The right of representation by a lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be enunciated.

It is further pointed out therein:

A decision has to be reached on case to case basis on the situational particulars and the special requirements of justice of the case.

Ultimately, adhering the facts of the case dealt: with by the Apex Court, it would remark:

In the present case, the refusal to sanction the services of a lawyer in the enquiry was not a proper exercise of the discretion under the rule

resulting in a failure of natural justice particularly in view of the fact that the presenting officer was a person with legal attainments and experience.

22. Needless to mention that the answer to the question raised on the part of the learned counsel for the appellant with the support of the first

judgment cited above regarding the rejection of the request of the appellant to engage an advocate or a labour law consultant to assist him during

the domestic enquiry lies within the second judgment cited by the very counsel for the appellant as shown in the preceding paragraphs. Firstly, the

right of representation by a lawyer may not in all cases be held to be a part of natural justice. Secondly, a decision has to be reached on case to

case basis and thirdly, only in strict adherence to the facts of the case dealt with by the Hon"ble Apex Court wherein the presenting officer was

legally trained person, the Apex Court had been prompted to arrive at the conclusion in that case that the refusal therein to sanction the services of

the lawyer in the enquiry not a proper exercise of the discretion under the rule resulting in a failure of natural justice. On the contrary, in the case in

hand, no legally trained person, was acting as the presenting officer and since the workman was not pitted against such a legally trained person, the

rejection of his request to engage a lawyer to assist him in the enquiry proceeding is on justifiable reasons and the learned single Judge has rightly

ratified the same.

23. Further more, the Division Bench judgment rendered in the case reported in Veemen's (supra), following the judgment of the Apex Court

reported in Sanam Motors (supra), is all pervasive on the subject wherein both the main questions raised by the appellant have been well

answered, first regarding the appointment of legally trained person as the enquiry officer opining thereby that a lawyer must normally be presumed

to be a man who can act with the sense of detachment and without bias and prejudice. In the absence of any special individual bias attributable to

him, no fault can be found with the appointment of a lawyer as an enquiry officer in a domestic enquiry and secondly, regarding the rejection of the

request of the appellant to permit him to engage a legally trained person to assist him during the domestic enquiry, observing it is not disputed that

the presenting officer of the management was not a legally trained person. The enquiry officer, therefore, was justified in refusing permission to the

workman to be represented by an advocate. There was no violation of the principles of natural justice because the parties were equally pitted and

the management had no unfair advantage over the workman. It is relevant to point out that in the case in hand there is no presenting officer himself.

24. For all the above discussions held, it must be mentioned that all the questions raised on the part of the appellant have been elaborately

considered by the learned single Judge and adequately answered so as to arrive at the valid conclusion that the proceedings of the second,

respondent suffered with illegality, material misdirections and error apparent on the face of the records, consequently, quashing the proceedings of

the second respondent. The learned single Judge has assigned tangible reasons in justification of the enquiry proceeding as held by the management

and as such neither we are able to see any serious infirmity nor inconsistency affecting the enquiry proceeding held by the enquiry officer in this case

nor has there been any error or legal flaw in the manner in which the learned single Judge has ratified the same in application of the law governing

such domestic proceedings. It is also not out of place to mention that patent errors of law and perversity in approach have crept in enormously in

the order passed by the appellate authority, which have been rightly pointed out with specific instances by the learned single Judge so as to arrive

that right conclusion to set aside the same.

25. In short, we are in perfect agreement with the conclusions arrived at by the learned single Judge since they have been arrived at on valid and

tangible reasons assigned both in setting aside the order of the appellate authority and restoring the order of the disciplinary authority. Therefore,

the interference of this Court that is sought to be made into the order of the single Judge by the appellant herein neither necessary nor required in

the circumstances of the case.

26. In result the above writ appeal fails and the same is dismissed.

27. The order of the learned single Judge, dated January 8, 1998, made by Writ Petition No. 9214 of 1988 is hereby confirmed.

28. However, in the circumstances of the case, there shall be no order as to costs.