

(1989) 04 MAD CK 0014

In the Madras High Court

Case No : Writ Petition No. 6167 of 1987

Spencer and Co. Ltd., Madras

APPELLANT

Vs

B. Vajravelu and Another

RESPONDENT

Date of Decision : 26-04-1989

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (1990) 1 LLJ 569

Hon'ble Judges : K.M. Natarajan, J

Bench : Single Bench

Judgement

1. This writ petition is filed under Art. 226 of the Constitution of India for issuance of a writ of certiorari, calling for the records connected with

T.S.E. No. 25 of 1986 on the file of the second respondent, namely, Deputy Commissioner of Labour (Appeals), Appellate Authority under the

Tamil Nadu Shops and Establishments Act, and to quash the order dated 1st June 1987.

2. The facts which give rise to the filing of the writ petition can be briefly stated as follows : The first respondent joined the services of the writ

petitioner on 6th September 1950 as a clear and in 1986 he was working as Pay Officer. By an order dated 23rd May 1986 his services were

terminated because the writ-petitioner-company had lost confidence in him. It is seen that the work of the first respondent includes disbursement of

wages as per pay bills prepared by the computer to the workmen and also payment of over-time, gratuity and compensation to them as Pay

Officer. One of the employees working under the first respondent, namely, Ratan, produced vouchers bearing the dates 30th April, 2nd May and

5th May, 1986, along with other records, as a result of which he claimed that over-time was due to certain employees. The claim was placed

before the then Chief Finance Executive who sanctioned the same. The said Ratan also obtained payment of cash from the cashier, although the

fact remains that no over-time was at all carried out as alleged by the said Ratan. Thereafter it was found out that Ratan has made false claim.

According to the writ petitioner, in spite of the above fact being known to the first respondent, he did not bring the same to the notice of his

superiors at the earliest point of time. In the meantime Ratan, who has been attending duty throughout, submitted a leave application dated 13th

May 1986 for the period from 6th May 1986 to 12th May 1986, wherein the first respondent endorsed that the leave may be sanctioned, although

the fact remains that till that period, Ratan had reported for work and actually worked. Thereupon the entries were reversed in the attendance

register which document was also admitted in the sole custody of the first respondent. On 13th May 1986 Ratan returned the money which was

unlawfully drawn by him from the company and it was received by the cashier. The petitioner-company felt that in view of the happenings in the

pay-section, over which the first respondent was the chief, it could no longer repose any confidence in the first respondent and after obtaining the

views of the first respondent discharged him from service by issuance of one month's salary in lieu of notice.

3. The said order of termination was challenged by the first respondent before the second respondent by way of appeal on the ground that the loss

of confidence on him cast a stigma on him and that since no enquiry was held, the order should be set aside. But, the writ petitioner contended that

this is a case of termination on the ground of loss of confidence and that it would not amount to a case of misconduct as alleged. Further, the

termination of service on the ground of loss of confidence would come under "reasonable cause" as contemplated under S. 41(1) of the Tamil

Nadu Shops and Establishments Act.

4. The petitioner examined two witnesses on his side while the first respondent examined himself and a number of documents were filed before the

Appellate Authority. The Appellate Authority held that since no enquiry was held, the termination of service was in violation of the principles laid

down in the decisions of the Madras High Court in Kotak and Co., v. Addl Commr., Workmen's Compn. Zenith Lamps and Electricals Vs.

Additional Commissioner of Workmen's Compensation and Another, . and Zenith Lamps and Electricals v. Addl Commr. 1973 II L.L.J. 445.

and similar other decisions cited on behalf of the first respondent. It was further held that the first respondent has established beyond doubt that the

order of termination has been issued in violation of the principles of natural justice and also in contravention of the provisions of S. 41(1) of the

Act. The appellate authority also came to the conclusion that there is no documentary evidence or other evidence that the First respondent was

aware of the misconduct committed by Ratan and as such the truth of the allegations contained in the termination order has not been proved. It is

only challenging the said order passed by the second respondent, this writ petition is filed.

5. The learned counsel for the petitioner submitted that three points emerge for consideration in this writ petition, namely, (1) Whether loss of

confidence would amount to misconduct, (2) If so, whether there is any bar to let in evidence for the first time before the appellate authority, and

(3) Whether the loss of confidence has been made out on the available evidence let in before the Deputy Commissioner of Labour (Appeals). As

regards the first point, it is worthwhile to extract the relevant portion of the impugned order relating to the termination of the service of the first

respondent.

It is noticed that the attendance register of the pay Section has been tampered and altered in respect of the leave records of Mr. Ratan working in

Pay Section of which you are in charge. On enquiry it was revealed that such alteration was done by you and not by the concerned clerk as stated

by you during discussion on this subject.

It was also noticed that during this period, Mr. C. R Ratan had drawn cash from the Company on the pretext of paying overtime. In reality, no

overtime payment was made. When this matter came to light and Mr. Ratan was closely questioned, he repaid the said amounts. These

irregularities were reported by you to the Executive Director (Administration) after a lapse of about 2 weeks.

The above developments give a distinct impression that although the misconduct

committed by Mr. Ratan came to your knowledge, in order to protect him and enable him to pay the money back, you have colluded with him. The above incidents have resulted in the Management losing confidence in you as incharge of the Pay Section".

It was urged before the lower Court that the writ petitioner-Management did not allege any misconduct against the first respondent herein; but would sustain the order of termination on the ground that there was a reasonable cause under the first limb of S. 41(1) of the Tamil Nadu Shops and Establishments Act. The Appellate Authority came to the conclusion that the impugned order was ex-facie an order of termination found on the misconduct, because the expressions used in the order of termination are unambiguous and they do throw adverse imputation against the first respondent herein that he had tampered and altered the attendance register of the Pay Section and colluded with Mr. Ratan and enabled him to pay the money back.

6. The learned counsel for the writ petitioner relied on the decision of the Supreme Court reported in L. Michael and Another Vs. Johnson Pumps Ltd., . That was a case under the Industrial Disputes Act. There, the appellant-employee was discharged from service. The respondent-management contended that it had lost confidence in the worker and that the discharge was one of discharge simpliciter and no stigma whatsoever attached. The Labour Court upheld the contention of the management and the workman approached the Supreme Court by way of appeal. The appeal was allowed. In that case, it was observed (p. 268) :

Loss of confidence is often a subjective feeling or individual reaction to an objective set of facts and motivations. The Court is concerned with the latter and not 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 a responsible post being misused or a sensitive or a 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 the matter. There, a termination simpliciter may be bona fide, not colourable, and loss of confidence may be evidentiary of good faith of the employer.

It was also observed in para 21 (p. 269) :

But such belief or suspicion of the employer should not be a mere whim or fancy. It should be bona fide and reasonable. It must rest on some

tangible basis and the power has to be exercised by the employer objectively, in good faith, which means honestly with due care and prudence. If

the exercise of such power is challenged on the ground of being colourable or mala fide or an act of victimisation or unfair labour practice, the

employer must disclose to the Court the grounds of his impugned action so that the same may be tested judicially.

On the other hand, the learned counsel for the first respondent submitted that S. 41 of the Shops and Establishments Act is not found in the

Industrial Disputes Act or any other Act, and both the conditions embodied in S. 41 are mandatory and the above decision relied on by the

learned counsel for the writ petitioner is not applicable to the case under the Shops and Establishments Act. The learned counsel for the first

respondent drew the attention of this Court to the decision of the Supreme Court in Chandu Lal Vs. Management of Pan American World

Airways Inc., where their Lordships of the Supreme Court observed in para 8 (p. 182) :

It difficult to agree with the finding of the Labour Court that when service is terminated on the basis of loss of confidence the order does not

amount to one with stigma and does not warrant a proceeding contemplated by law preceding termination. Want of confidence in any employee

does point out to an adverse facet in his character as the true meaning of the allegation is that the employee has failed to behave up to the expected

standard of conduct which has given rise to a situation involving loss of confidence; In any view of the matter this amounts to a dereliction on the

part of the workman and, therefore, the stand taken by the management that termination for loss of confidence does not amount to a stigma has to

be repelled.

It was further observed (p. 183) :

If the termination in the instant case is held to be grounded upon conduct attaching stigma to the appellant, disciplinary proceedings were

necessary as a condition precedent to infliction of termination as a measure of punishment. Admittedly this has not been done. Therefore, the order

of termination is vitiated in law and cannot be sustained.

The above view was reiterated and followed in a later judgment reported in Management of Bombay Ammonia (Madras) Pvt. Ltd., Madras Vs.

The Additional Commissioner for Workmen's Compensation II, Madras and Another, by this Court in a case under S. 41 of the Tamil Nadu

Shops and Establishments Act, 1947. Therein it was held (pp. 205-206) :

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. Termination order makes adverse imputations against the employee viz., that she has been acting

prejudicially to the Management's business interest and contracts. Order is ex-facie an order of termination for misconduct. It is a clear case of

action by way of punishment since a charge of imputation of carrying on activities detrimental to the business interest of the concern has been

made. No evidence can be let in before the appellate authority contradicting the explicit terms of the order of termination.

If services of an employee are terminated for misconduct without holding enquiry, the question of substantiating the charge by placing evidence

before the appellate authority does not arise.

The Appellate Authority also relied on Cls. 21(c) and (d) of the Staff Regulations, which is marked as Ex. A1, and also the earlier decisions of this

Court in Writ Petition No. 4211 of 1980 dated 10th September 1986 (Management of Bombay Ammonia (Madras) Private Limited, Madras and

Mrs. P. Bosser) (supra); Associated Corporation of Industries (India) Private Limited v. Additional Commissioner for Workmen's Compensation

1972 I LLJ 108 in addition to the ratio laid down in the above quoted decisions of the Supreme Court and this Court and came to the conclusion

that 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. As regards the second question, even assuming that it is a misconduct, we have to see whether the managements entitled to adduce evidence for

the first time before the appellate authority to sustain the said order when there is no enquiry before the order of termination was made. In *Zenith*

Lamps & Electricals v. Additional Commissioner (supra), a Division Bench of this Court while rendering a decision under S. 41(2) of the Tamil

Nadu Shops and Establishments Act, 1947, held (p. 446) :

Held, that *Srirangam Janopakara Bank Ltd. v. Ranganathan* 1964 I LLJ 222 is not an authority for the proposition that where there was no

enquiry at all held by the management the Commissioner can be called upon under S. 41(2) to hold a trial in exercise of his appellate power, take

evidence and then satisfy himself whether the removal was justified or not. The Commissioner's order is right and the appeal is dismissed.

The above view was supported by the earlier decision of this court in *Zenith Lamps and Electricals v. Additional Commissioner (supra)*. Where

Ismail J. (as he then was) held (p. 105) :

The scheme of the Act, in my opinion, does not lend any support whatever to this contention. Section 41(1) of the Act actually contemplates the

employer himself conducting an inquiry and recording evidence for the purpose of establishing the misconduct. The appellate authority functioning

under S. 41(2) cannot convert itself into the original authority and conduct the inquiry, when the original authority has not conducted such an

inquiry.

The same view was taken by the same Judge in a later decision in *Kotak and Co. v. Additional Commissioner. Workmen's Compensation*

(*supra*), and it was held that the "non-compliance with the statutory requirements provided under proviso to S. 41(1) or failure to hold enquiry by

the employer goes to the root of the matter rendering the order of termination of service of the employee ab initio void and the appellate authority

in such cases has no jurisdiction to go into the merits of the case on the basis of the evidence let in before him". This view was reiterated in

Management of Bombay Ammonia (Madras) Pvt. Ltd., Madras v. The Additional Commissioner for Workmen's Compensation II, Madras and

another (supra).

8. The decision relied on by the learned counsel for the petitioner in *Remington Rand of India Limited Vs. Thiru R. Jambulingam*, is not at all helpful

to the case of the writ petitioner, as in that case also it was observed (p. 452) :

There is no legal bar in entertaining additional evidence if that is necessary in the interests of justice.

In that case it was not held that even in case whether no enquiry was held, evidence can be let in for the first time before the appellate authority to sustain the said order. In view of the ratio laid down in the decisions already quoted above, when the very order of termination itself was ab initio void on the ground of absence of enquiry prior to the order of termination of service, the question of adducing evidence for the before the appellate authority does not arise. There is cast difference between ""adducing additional evidence"" in a case where there was already an enquiry and evidence was adduced and a case where there was no enquiry at all as rightly contended by the learned counsel for the first respondent. I have no hesitation in upholding the contention of the learned counsel for the first respondent, which was accepted by the appellate authority, that it is not open to the management to adduce evidence for the first time before the appellate authority to sustain the order of termination which is grounded on misconduct.

9. As regards the third question, the appellate authority came to the conclusion that the termination of service of the appellant for a reasonable cause has not been proved either by oral or documentary evidence. But, on the other hand, the admission of the witnesses examined on the side of the management itself clearly shows that the said charge has not been made out. There is absolutely nothing to differ from the said finding rendered by the appellate authority. There is absolutely nothing to substantiate the contention of the learned counsel for the writ petitioner that the appellate authority has misread the evidence. The learned counsel wants this court to infer the charge against the respondent on the ground that the attendance register for Ratan, which was found tampered was in his subordinate, has managed to draw money for overtime work and subsequently replaced the same. I do not find any merit in the said contention. On going through the materials placed before me and on the evidence, I do not find anything to support the said contention. On the other hand, the finding of fact rendered by the appellate authority is supported by evidence. Hence this contention also fails. For all these reasons, I am of the view that the petitioner has not made out any case for quashing the impugned

order dated 1st June 1987 passed by the appellate authority.

10. In the result, the writ petition fails and stands dismissed. However, in the circumstances of the case, there will be no order as to costs.