
(2015) 03 CAL CK 0030

In the Calcutta High Court

Case No : APO 119 of 2008 and WP 2392 of 2001

S.V.S. Marwari Hospital

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Citation : AIR 2015 Cal 82 : (2015) 1 CALLT 618 : (2015) 2 CHN 175 : (2015) 4 ESC 1937 : (2015) 145 FLR 470 : (2015) 2 LLJ 756 : (2015) 2 LLN 92 : (2015) LLR 642 : (2015) 2 SCT 636

Hon'ble Judges : Manjula Chellur, C.J.;Arijit Banerjee, J.;Joymalya Bagchi, J.

Bench : Full Bench

Advocate : Prasanta Kr. Banerji, for the Appellant; Partha Bhanja Chowdhury and Rani Kumar Dubey, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Arijit Banerjee, J.—This matter is before us by reason of a reference made by a Division Bench of this Court by an order dated 15th December, 2011 passed in the course of hearing an appeal against the judgment and order dated 7th April, 2005 passed by the Ld. Single Judge in W.P No. 2392 of 2001.

2. By an order dated June 25, 1999 the Government of West Bengal had referred an industrial dispute between the appellant and one of its employees to the First Industrial Tribunal. The dispute arose as the said employee was dismissed from service after a domestic enquiry was held by the management. The Ld. Tribunal considered the issue of validity of the domestic enquiry and by an order dated 22nd August, 2001, held that the participation of the Presenting Officer as a witness in the domestic enquiry rendered the enquiry as well as the entire proceeding inoperative and without jurisdiction. In passing such order the Ld. Tribunal relied on two decisions of this Court:-

(i) Sarajit Coomer Mazumder-vs.-Calcutta Dock Labour Board and Ors. reported in Cal. LT. 1998 (1) HC 431.

(ii) Mohd. Miya v. State of West Bengal and Ors. reported in 2000 (86) FLR 1.

3. The appellant challenged the said order of the Ld. Tribunal by way of a writ petition being WP No. 2392 of 2001.

4. The Ld. Single Judge held that as the Presenting Officer appeared as a witness in the domestic enquiry, the principle of natural justice was violated and, therefore, finding of the Enquiry Officer was liable to be set aside and the order of punishment of dismissal imposed on the employee should be quashed.

5. Being aggrieved, the appellant preferred the above appeal.

6. The Hon''ble Division Bench noted the decisions rendered by two Ld. Single Judges of this Court in the cases of Sarajit Coomer Mazumdar (supra) and Mohd. Miya (supra). In Sarajit Coomer Mazumdar the Ld. Single Judge held that the participation of the Presenting Officer as a witness in the enquiry, rendered the enquiry and the entire proceedings inoperative and without jurisdiction. In Mohd. Miya (supra) the aforesaid principle of law was reiterated and Sarajit Coomer Mazumdar (supra) was relied upon.

7. However, the Division Bench was faced with a dilemma since two earlier Division Bench judgments of this Court were placed before it, which came to diametrically opposite conclusions.

8. The Ld. Advocate for the delinquent employee relied on a decision of the Division Bench of this Court in the case of Bharat Cocking Coal Ltd.-vs.-Surendra Pratap Narayan Singh reported in 2003 (3) CLR 719. In this case the Court observed that the fact that the Presenting Officer acted as a witness in the enquiry proceeding was an abnormal feature in the conduct of the enquiry. Normally, the Presenting Officer has to present the case of a management and he cannot appear as a witness, but peculiarly, in this case the Presenting Officer appeared as a witness and what was submitted by him was taken as Examination-in-Chief and the delinquent was asked to cross-examine him. This was a peculiar method adopted by the authorities in conducting the enquiry which was unknown in law.

9. Ld. Counsel for the appellant on the other hand relied on another Division Bench decision of this Court in the case of Life Insurance Corporation of India Ltd. Vs. Presiding Officer, Central Government, Labour Court and Others, . In this case the Division Bench took a diametrically opposite view and held as follows:-

"21. Let us now come to the third objection raised by the delinquent and accepted by the Tribunal with regard to the evidence laid by the Presenting Officer.

22. Employer herein being a corporate entity was to act through individuals. The Presenting Officer deposed before the Enquiry Officer. The delinquent had an opportunity to cross-examine him. We are unable to find out any law by which the Presenting Officer was precluded from giving any evidence. In the instance

case, the Presenting Officer was an employee of the appellant. He was representing the appellant before the Enquiry Officer. Hence, he was entitled to examine himself. We do not find anything wrong on that score."

(Italic is our own)

10. The earlier Division Bench decision in the case of Bharat Coking Coal (supra) was not cited before the later Division Bench which decided the case of Life Corporation of India (supra). However, there is a direct conflict between the said two Division Bench judgments and, accordingly, the Division Bench hearing the above appeal as referred the following question of law to a Larger Bench:-

"As to whether mere participation of the Presenting Officer as a witness in the domestic enquiry is contrary to the principles of natural justice and renders the enquiry and the entire proceedings ineffective and without jurisdiction even in the absence of proof of prejudice to the employee concerned?" 11. Before expressing our opinion on the question referred to us, we may note the views of some other High Courts in this regard.

12. In the case of Management of Glaxo India Ltd. Vs. Presiding Officer, Labour Court, Guntur and Another, , the Andhra Pradesh High Court held that there was nothing wrong or irregular in the Presenting Officer going to the box as a witness for the management. In paragraph 19 of the judgment the High Court observed as follows:-

"19. Secondly, the Labour Court based its judgment on the ground that the enquiry is vitiated as the witness Koteswara Rao acted as a Presenting Officer. There is no dispute that Koteswara Rao acted as a presenting Officer and also appeared as a witness for proof of the 2nd charge. This point was also raised by the workman in his defence statement. The Labour Court relied on the judgment of the Calcutta High Court reported in Anil Kumar Ghosh Vs. Union of India (UOI), , wherein it was categorically held that "a witness cannot be a Presenting Officer". But this decision is distinguishable from the facts of the present case, inasmuch as in the Calcutta case, the person acted in three roles - (i) Investigating Officer, (ii) Presenting Officer and (iii) Witness. Such is not the situation in the present case. Mr. Koteswara Rao was examined only to prove charge No. 2 and also acted as a Presenting Officer. Above all, except making bald allegation that the enquiry is vitiated, it is not shown by the workman as to how the so-called prejudice adversely affected him. This view of mine is further fortified by the following observations made in N.N. Rao Vs. Greaves Cotton and Co. and Others, :

".....The final argument has been that G. G. Naik has not only given evidence as a witness but has acted as the prosecutor. We do not see anything strange in this conduct nor any failure to observe any rule of natural justice. After all, G. G. Naik was, as we have already explained, in the position of a complainant and since in a domestic enquiry no counsel can be engaged G.G. Naik was bound to conduct the enquiry before the Enquiry Officer. Since K.G. Naik had come and explained

to him in the first instance he (G.G. Naik) had gone into the witness box in support of his own complaint and thereafter he continued to examine the witnesses in support of his complaint. This is normally done where legal assistance is not available and we can see nothing wrong in principle in the Enquiry Officer allowing G.G. Naik to conduct the proceedings although he was himself a witness." 13. A decision of the Hon"ble Apex Court in the case of Mohd. Yunus Khan Vs. State of U.P. and Others, was cited before us. In that case the Enquiry Officer appeared as a witness for the management and also imposed the punishment as a disciplinary authority. The order of punishment was held to be null and void as being in violation of the legal maxim *nemo debet esse judex in propria causa* (no man shall be a judge in his own cause). We do not find the relevance of this decision in the context of the present reference.

14. Another decision of the Hon"ble Supreme Court in the case of Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, was cited before us. In this case also a member of the Enquiry Committee deposed as a witness in support of the management's case. The Supreme Court reiterated that this was in breach of the principles of natural justice, one wing of which is that no man can be a judge in his own cause. The Supreme Court set aside the order of dismissal of the delinquent employee. This case also has no application in the present context.

15. Another decision of the Hon"ble Supreme Court that was cited before us was in the case of Uma Nath Pandey and Others Vs. State of U.P. and Another, . In that case the Hon"ble Supreme Court discussed the meaning of "natural justice" and the "useless formality theory" i.e. whether Courts should interfere in a case of breach of natural justice even if it is clear that even if principles of natural justice were complied with, the aggrieved party would not succeed. In other words, it would be a useless formality to set aside the impugned order or decision.

16. In our view, the fact that the complainant acted as the Presenting Officer by itself will not vitiate a domestic enquiry if no other question of prejudice is there. There is no principle of natural justice which requires that a person who has lodged a complaint cannot be a Presenting Officer and a prosecutor in a domestic enquiry. This view of ours is supported by a decision of the Kerala High Court in the case of Vijaya Mohini Mills Vs. Industrial Tribunal and Another, . Similarly, in our view, an enquiry does not get vitiated merely on the ground that the Presenting Officer examined himself as a witness for proving the charges. This is also the view of the Andhra Pradesh High Court expressed in the case of Management of Glaxo India Ltd. (supra). In a domestic enquiry the management has the right to present its case against the delinquent employee. This is done through the Presenting Officer. His job is to adduce evidence in support of the charges. Generally, he is not a witness. But if he also appears as a witness on behalf of the management, he has to be offered for cross-examination by the delinquent employee. The enquiry will stand vitiated if the delinquent is not

allowed to cross-examine him.

17. While the Enquiry Officer himself must necessarily be completely impartial and unbiased, the same cannot be expected of a Presenting Officer. He is after all, the management's representative and his job is to advance the Management's case. In fact, a Division Bench of the Madras High Court observed in the case of R.S. Gopalan Vs. The Currently In Charge and Managing Director L.I.C of India, Bombay and Others, , bias of a Presenting Officer in a departmental enquiry is not very relevant because the control of the proceedings is primarily with the Enquiry Officer and it is he who has to guard the interest of the delinquent also.

18. As has been held by the Hon"ble Apex Court in the case of Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen, , the requisite of a valid domestic enquiry are (i) the employee proceeded against has been informed clearly of all the charges levelled against him. (ii) The witnesses are examined - ordinarily in the presence of the employee - in support of the charges. (iii) The employee is given a fair opportunity to cross-examine the management's witnesses. (iv) The employee is given a fair opportunity to examine his witnesses including himself in his defence if he so wishes on any relevant matter and (v) The enquiry Officer records his findings with reasons for the same in his report.

19. Ultimately the entire issue boils down to the question of prejudice. If the delinquent employee has suffered any prejudice by reason of the Presenting Officer acting as a witness on behalf of the management, the enquiry proceeding will possibly be held to be vitiated. The prejudice must be real prejudice as opposed to formal prejudice, affecting some substantial legal right of the employee. Naturally, the burden is on the employee to establish such prejudice.

20. The object of holding an enquiry proceeding is to give the delinquent employee a reasonable opportunity to prove his answers and to defend himself against the charges levelled against him. A domestic enquiry must be in conformity with the rules of natural justice. The rules of natural justice which are at present confined to the procedural side of law are a body of uncodified moral principles intended to supplement the existing law and not supplant it. The details of the procedure that are to be followed by the Enquiry Officer in a domestic enquiry are not prescribed in any rules framed under any statute. Some of the Standing Orders have prescribed certain guidelines on the procedure to be followed in a domestic enquiry. Similarly, Central Civil Service (Classification, Control and Appeal) Rules prescribe certain guidelines on the procedure to be followed. The Enquiry Officer may evolve his own procedure in the absence of any guidelines but the procedure must be fair, free from arbitrariness and in conformity with the principles of natural justice.

21. It is established law that an Enquiry Officer cannot act as a witness for the management or for that matter for the delinquent employee since a person cannot be a judge in his own cause. However, even an Enquiry Officer is at

liberty to put questions to the witnesses and that per se would not vitiate the proceedings. The Workmen Employed in B and C Mills, Madras Vs. The Management of B and C Mills, Madras, was a case where the Standing Orders had no provision for appointment of Presenting Officer. It was contended on behalf of the dismissed workers that the Enquiry Officer had acted both as the prosecutor and the judge when he recorded the evidence. The Hon''ble Supreme Court observed that what the Enquiry Officer had done in the case was to put questions to the witnesses and elicit answers and allowed workman to cross-examine those witnesses. Similarly, he had also taken the statements of the worker and asked for clarifications framed wherever necessary. Therefore, the enquiry proceedings were completely fair and impartial.

22. In view of the aforesaid discussion, our answer to the question referred to us is in the negative. In other words, mere participation of the Presenting Officer as a witness in a domestic enquiry is not contrary to the principle of natural justice and does not render an enquiry or the entire proceedings inoperative or without jurisdiction in the absence of proof of prejudice to the concern employee.

23. The reference accordingly stand disposed of. Let APO No. 119 of 2008 be placed before the appropriate Court for disposal in the light of the opinion we have expressed in this judgment on the question of law referred to us.

Manjula Chellur, C.J.

I Agree.

Joymalya Bagchi, J.

I Agree.