
(2017) 01 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 1653 of 2016

Vinod Pralhadrao Farkade

APPELLANT

Vs

M/s. Ceekay Daikin Limited

RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Citation : (2017) 4 AIRBomR 362 : (2017) 2 BCR 686 : (2017) 153 FLR 436 : (2017) LabLR 322 : (2017) 1 LLJ 562

Hon'ble Judges : Mr. Ravindra V. Ghuge, J.

Bench : Single Bench

Advocate : Shri More Ashok A., Advocate, for the Petitioner; Shri Kawre B.R., Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Ravindra V. Ghuge, J. (Oral) - Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The Petitioner/ Employee is aggrieved by the part-1 judgment of the Labour Court dated 26.06.2015 in Reference (IDA) No.3/2008 by which it was concluded that the enquiry conducted against the Petitioner/ workman is fair and proper and the findings of the Enquiry Officer are not perverse.

3. When this matter was heard by this Court initially on 15.02.2016, both the learned Advocates stated that they have no objection if this Court hears this matter. The same has been recorded in the order dated 15.02.2016.

4. I have heard the learned Advocates for the respective sides at length on 12.01.2017, 13.01.2017, 16.01.2017 and today.

5. Having considered the submissions of the learned Advocates and having gone through the record with their assistance, the undisputed factors are as follows :

(a) Reference (IDA) No. 3/2008 is pending before the learned Labour Court in the light of the dismissal of the Petitioner/ Workman.

(b) The Petitioner has assailed the enquiry as well as the findings of the Enquiry Officer and the Labour Court, therefore, framed the following two issues:

(i) Whether, the Second Party proves that the enquiry conducted against him is illegal, improper and void?

(ii) Whether, the Second Party proves that the findings of the Enquiry Officer are perverse?

(c) By the impugned part-1 judgment dated 26.06.2015, the Labour Court answered both the issues in the negative and concluded that the enquiry is not vitiated and the findings of the Enquiry Officer are not perverse.

(d) The charge sheet-cum-enquiry notice dated 08.09.2007 was issued by the Respondent/ Management.

(e) There was no charge sheet-cum-show cause notice issued by the Respondent before arriving at a decision to conduct an enquiry.

(f) By the same charge sheet-cum-enquiry notice, the Petitioner was placed under suspension.

(g) The enquiry commenced on 17.09.2007.

(h) The letter dated 11.09.2007 served on the Petitioner indicates that the Enquiry Officer was appointed. The Enquiry Officer was actually appointed by the order dated 17.09.2007 by the Respondent/ Management and the first date of hearing in the enquiry is on the same date 17.09.2007 at 11:00 am.

(i) The enquiry Roznama dated 17.09.2007 does not disclose that the enquiry procedure was explained to the Petitioner/ Employee.

(j) On 23.09.2007, the Enquiry Officer was not available and the enquiry was adjourned.

(k) On 30.09.2007, the Management witness, who claimed to be the victim, was examined and on the same day, he was cross-examined by the Petitioner/ Workman. Next date is 14.10.2007.

(l) On 14.10.2007, the Petitioner/ Workman filed an application in the enquiry voicing certain grievances against the Enquiry Officer. He prayed for further cross-examining the Management Witness No.1 and also prayed for change in the Enquiry Officer.

(m) Upon receiving the application dated 14.10.2007, instead of forwarding the said application to the Management for its decision, the Enquiry Officer himself rejected it and stated in the order that the Management has previously rejected the said request.

(n) The entire record of the enquiry does not reveal any application filed by the Employee in the enquiry seeking change of the Enquiry Officer, much less any

order passed by the Management rejecting such application.

(o) Consequentially, the Petitioner/ charge sheeted workman walked out of the enquiry.

(p) Immediately after he walked out of the enquiry, the Enquiry Officer closed the enquiry on the ground that the Petitioner has abandoned the enquiry.

(q) The Enquiry Officer submitted his report within 48 hours on 16.10.2007 concluding that the charges are proved against the Petitioner.

(r) Thereafter, the Management issued the second show cause notice along with the copy of the Enquiry Officer's report and after receiving the reply of the Petitioner, issued the order of dismissal dated 07.11.2007.

(s) The reply of the Petitioner is dated 06.11.2007 which the Management has received on 07.11.2007 and on the same day, the order of dismissal is issued instantly.

6. Considering the conspectus of the matter, I find that this case needs to be decided by considering the following issues:

(a) Whether, the Management can issue the charge sheet-cum-enquiry notice without considering the explanation or soliciting the explanation of the employee and whether, the Enquiry Officer could be appointed and the enquiry could be commenced on the same day without proper intimation to the delinquent?

(b) Whether, in this case, the Petitioner can prove that the enquiry is vitiated on account of non compliance of the principles of natural justice?

(c) Whether, the findings of the Enquiry Officer, in this case, could be termed as being perverse?

7. With regard to the first issue as recorded above, the charge sheet-cum-show cause notice was not issued to the Petitioner. Instead, the charge sheet-cum-enquiry notice was issued and in the said document, it was mentioned as under:-

"The Management has decided to hold an enquiry in the said incidence. The name of the inquiry officer and date, place and time of enquiry will be communicated to you in due course of time. However, you may if you so desire submit a written explanation within 48 hours about the said incidence.

Pending enquiry and final disposal thereof, you are suspended from duty with immediate effect. Needless to say that suspension allowance will be paid to you as per the law."

8. Standing Order 25(4) under Schedule-I of the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 reads as under:-

"25(4) A workman against whom an inquiry is proposed to be held shall be given a charge-sheet clearly setting forth the circumstances appearing against him and

requiring his explanation. He shall be permitted to appear himself for defending him or shall be permitted to be defended by a workman working in the same department as himself or by any office bearer of a trade union of which he is a member. Except for reasons to be recorded in writing by the officer holding the inquiry, the workman shall be permitted to produce witness in his defence and cross-examine any witness on whose evidence the charge rest. A concise summary of the evidence led on either side and the workman's plea shall be recorded.

All proceedings of the inquiry shall be conducted in English, Hindi or Marathi according to the choice of the workman concerned and the person defending him.

The inquiry shall be completed within a period of three months:

Provided that the period of three months may, for reasons to be recorded in writing, be extended to such further period as may be deemed necessary by the enquiry officer."

9. It is apparent that the Standing Order mandates that the charge sheet must clearly set forth the circumstances appearing against the workman against whom the enquiry is proposed to be held requiring his explanation.

10. Under the 15th amendment to the Constitution, the first right of the employee was to show cause as against the charge sheet. The 42nd amendment to the Constitution maintained this right as being the first right of the employee. (See *Union of India and others v. Mohd. Ramzan Khan*, 1991 (I) CLR 61 (SC) and *Managing Director, ECIL v. B. Karunakar*, 1993 (4) SCC 727)

11. In the matter of *Om Prakash Yadav v. Union of India and others*, 2009 (121) FLR 151, it is concluded that unless the reply of the charge sheeted employee is not received within the time frame, the Management cannot conclude that an enquiry deserves to be conducted. After receiving the reply and considering the explanation of the employee, the Management is required to take a decision as to whether, an enquiry needs to be conducted or whether, such an enquiry could be dropped as the explanation put forth by the employee could be accepted. The conduct of the Respondent in this case indicates that it was determined to conduct an enquiry, before issuing the charge sheet.

12. In the instant case, the Petitioner was informed that he may submit a written explanation within 48 hours and the name of the Enquiry Officer and the date, place and time of the enquiry would be communicated later. The appointment letter of the Enquiry Officer indicates that he was served with the said appointment order dated 17.09.2007 on the same day and he was called upon to conduct the enquiry on the same day at 11:00 am. It cannot be ignored that the Petitioner was placed under suspension on 08.09.2007 and was not in the factory on 17.09.2007. It is equally curious to note that the Enquiry Officer was appointed in the morning on 17.09.2007 and the enquiry was commenced at 11:00 am. However, there seems to be no protest from the Petitioner.

13. Though the above aspect may not necessarily vitiate the enquiry, the above factors indicate that the Respondent/ Management has acted in undue haste and the exercise of appointing the Enquiry Officer and calling upon him to immediately commence the enquiry at 11:00 am on the same day, would establish undue haste. This needs to be avoided by any Management.

14. Insofar as the second issue is concerned, on 30.09.2007 the Management Witness was examined. On the same date, the Petitioner conducted the cross-examination and has mentioned below his signature on the Roznama that the Enquiry Officer was not recording the testimony factually. On 14.10.2007, he moved an application praying for change in the Enquiry Officer and an opportunity to further cross-examine the Management Witness. It was stated that he desired to further cross-examine the Management Witness and the said opportunity was not given to him as the Enquiry Officer closed the cross-examination and adjourned the matter. By order dated 14.10.2007, the Enquiry Officer rejected the application of the Petitioner.

15. In my view, when the Enquiry Officer is appointed by the Management, any application filed by the charge sheeted workman or his defence representative seeking a change in the Enquiry Officer, needs to be placed by the Enquiry Officer before the Management. It is the domain of the Management to decide whether, the allegations of the charge sheeted workman need consideration and thereby, change the Enquiry Officer or reject such an application on the ground that the allegations are baseless. It is, therefore, the Management which has to pass this order.

16. I find that one application dated 01.10.2007 was filed by the Petitioner before the Management seeking change in the Enquiry Officer. Said application is not a part of the enquiry record. Any order passed by the Management on the said application was not placed in the enquiry, so as to enable the Enquiry Officer to place reliance on the said order and conclude that the request of the Petitioner is rejected by the Management. Though the Enquiry Officer has mentioned that the Management has earlier rejected such request, there is nothing on record to indicate that the Management had passed such an order. No such order is placed in the enquiry or before the Labour Court or even before this Court. I am, therefore, of the view that the Enquiry Officer cannot reject such an application as it is within the domain of the Management to take a decision on such request.

17. There is no dispute that after the order was passed by the Enquiry Officer rejecting the application dated 14.10.2007, the charge sheeted workman appears to have got agitated and he left the enquiry. Instantly, the Enquiry Officer closed the enquiry by observing that the enquiry is concluded. There can be instances in the enquiry when the charge sheeted workman would leave the enquiry hall and refrain from participating on the said date. Such conduct, at times, is in the heat of the moment and can be termed as being an impulsive act. One solitary instance of such nature, in my view, is not enough to conclude that the charge sheeted workman has boycotted the enquiry and never intends

to participate in the enquiry any time thereafter.

18. What is desirable in these circumstances is that the Enquiry Officer must act patiently and in order to demonstrate that the enquiry is being conducted by adhering to the principles of natural justice, he could very well post the enquiry on some other date and direct the Management to intimate the charge sheeted workman of the next date of enquiry. With the passage of time, there is a possibility that such a charge sheeted workman would cool down and would reappear in the enquiry on the next date. The Enquiry Officer is expected to act fairly. In the instant case, it appears that the Enquiry Officer concluded the enquiry the moment the Petitioner left the enquiry hall and observed that no evidence has been led by him. Within 48 hours, the report of the Enquiry Officer is tendered to the Management.

19. In the judgment delivered by the Honourable Supreme Court in *State Bank of India v. Narendra Kumar Pandey*, (2013) 2 SCC 740, cited by the Respondent, paragraphs 15, 16 and 17 read as under:-

15. In *Bank of India v. Apurba Kumar Saha*; (1994) 2 SCC 615, this court held:

"A bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct involving his integrity and honesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges levelled against him and the disciplinary proceeding conducted against him by the bank employer had resulted in violation of principles of natural justice of fair hearing".

16. The High Court, in our view, under Article 226 of the Constitution of India was not justified in interfering with the order of dismissal passed by the appointing authority after a full-fledged inquiry, especially when the Service Rules provide for an alternative remedy of appeal. It is a well acceptable principle of law that the High Court while exercising powers under Article 226 of the Constitution does not act as an appellate authority. Of course, its jurisdiction is circumscribed and confined to correct an error of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of the principles of natural justice. In *State Bank of India and Others v. Ramesh Dinkar Punde* (2006) 7 SCC 212, this Court held that the High Court cannot re-appreciate the evidence acting as a court of Appeal. We have, on facts, found that no procedural irregularity has been committed either by the Bank, presenting officer or the Inquiring Authority. Disciplinary proceedings were conducted strictly in accordance with the Service Rules.

This court in *State of Andhra Pradesh v. Sree Rama Rao*; AIR 1963 SC 1723 held:

"Where there is some evidence, which the authority entrusted with the duty to hold the inquiry has accepted and which evidence may reasonably support the conclusion that delinquent officer is guilty of the charge, it is not the function of

the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence especially when the charged officer had not participated in the inquiry and had not raised the grounds urged by him before the High Court by the Inquiring Authority."

17. This Court in *Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup*; AIR 1957 SC 82 held where a workman intentionally refuses to participate in the inquiry, cannot complain that the dismissal is against the principles of natural justice. Once the inquiry proceed ex parte, it is not necessary for the Inquiring Authority to again ask the charged officer to state his defence orally or in writing. We cannot appreciate the conduct of the charged officer in this case, who did not appear before the Inquiring Authority and offered any explanation to the charges levelled against him but approached the High Court stating that the principles of natural justice had been violated."

20. It is, therefore, apparent that in the *Apurba Kumar Saha* case, *State of Andhra Pradesh* case and *Lakshmi Devi Sugar Mills Ltd. case* (supra), numerous opportunities were granted by the Enquiry Officer. When the employee refused to avail of the opportunities, the Court concluded that the charge sheeted workman has given up the enquiry and is, therefore, not participating in the enquiry. Thus, the observations of the Honourable Supreme Court in the *State Bank of India* judgment (supra) support the fact that the Enquiry Officer should not have acted hastily in closing the enquiry the moment the charge sheeted workman left the enquiry hall in a huff.

21. In *State Bank of Patiala v. S.K. Sharma*, AIR 1996 SC 1669, the Honourable Supreme Court evolved certain basic principles of natural justice keeping in view the context of disciplinary enquiries in paragraph 32 which reads as under:-

32. We may summarise the principles emerging from the above discussion. [These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee]:

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/ departmental enquiry in violation of the rules/ regulations/ statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained herein-before and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural

provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/ employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision g expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/ employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a-case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) here-in-below is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory characters the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provisional which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirements either expressly or by his conduct. If he is found to have waived its then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/ employee has not it or that the provision could no be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in B. Karunkar, (1994 AIR SCW 1050). The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules / regulations / statutory provisions and the only obligation is to observe the principles of natural justice

or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a total violation of natural justice [rule of audi alteram] and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule [audi alteram partem]. (b) But in the latter case, the effect of violation [of a facet of the rule of audi alteram] has to be examined from the standpoint of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem [the primary principle of natural justice] the Court/ Tribunal/ Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/ State interest with the requirement of natural justice and arrive at an appropriate decision."

22. It is, thus, settled that the Court may not insist on proof of prejudice in every case. The circumstances emerging from a given case, if lead to the inference that the Enquiry Officer has not afforded a reasonable or fair opportunity to the delinquent, prejudice would be apparent from the enquiry proceedings. On account of procedural violations, an enquiry need not be vitiated unless such violations are tested on the touchstone of prejudice and indicate denial of a fair and reasonable opportunity to defend.

23. Considering the above and that the Enquiry Officer himself dealt with the application for change in the Enquiry Officer and on account of the fact that the enquiry was closed from the moment the charge sheeted workman left the enquiry hall in protest, indicates that the substantive right of the Petitioner of participating in the enquiry and a reasonable opportunity of defence, has been infringed. The enquiry is, therefore, vitiated for non adherence to the principles of natural justice.

24. Insofar as the findings of the Enquiry Officer are concerned, the said

document runs into six pages. The Enquiry Officer has reproduced the statement of the Management Witness Shri Tupe. He has formulated his two points and offered his answers by concluding that the Management has proved the charges against the Petitioner and the Petitioner has failed to prove that he has not committed any misconduct.

25. I, however, find from the reasons assigned by the Enquiry Officer in paragraph 12, which is the only paragraph to that extent, that the Enquiry Officer has not analyzed the evidence adduced before him. He has not drawn specific conclusions as to why the charges levelled upon the Petitioner can be held to be proved. There is no analysis of evidence and there are no conclusions except that the examination-in-chief of the Management Witness is reproduced in the report.

26. It is settled law that reproduction of the statements of witnesses cannot be conclusions of the Enquiry Officer. The entire cross-examination of the Petitioner is brushed aside in one observation that "However, in the cross-examination there are no contradictions in the statement of Shri Tupe." It is then concluded that "There is nothing on record to disbelieve the statement of the Management Witness Shri Tupe". The Enquiry Officer, quite strangely, has himself certified in paragraph 8 of his report that he has conducted the enquiry by following the principles of natural justice.

27. Considering the above, I find that the Enquiry Officer has merely reproduced the examination-in-chief of the Management Witness and has not analyzed the evidence by drawing specific conclusions based on the same. On account of the deficiency of analysis and conclusions, the findings of the Enquiry Officer cannot be said to be a judgment of the quasi-judicial authority on the charges levelled upon the Petitioner.

28. The Labour Court concluded in paragraphs 14 and 16 of the impugned part-1 judgment as under:-

"14. Thus, from the above oral evidence, inquiry papers and documents, it clearly shows that the charge sheet contains the necessary proof of the charge. The explanation from the second party was called. During the course of inquiry, opportunity was given to the second party. The management witness is examined in presence of the second party. The second party cross-examined management witness Mr. Tupe and then on considering entire material and observations were observed by the inquiry officer."

"16. The second party has not disclosed any reason to remain absent for the rest of the domestic inquiry process. The second party also not disclosed the reason for not challenging the order of rejection of application to change the inquiry officer."

29. Apparently, the Labour Court has lost sight of the fact that the Enquiry Officer has closed the enquiry the moment the Petitioner left the enquiry hall. There were no further dates in the enquiry by virtue of which the Labour Court

could have concluded that he has remained absent for the rest of the domestic enquiry.

30. In the light of the above, I find that the findings of the Labour Court in the part-1 judgment are unsustainable and perverse.

31. As such, this Writ Petition is allowed. The part-1 judgment of the Labour Court dated 26.06.2015 is quashed and set aside. It is hereby concluded that the enquiry conducted by the Respondent/ Management is vitiated and the findings of the Enquiry Officer are perverse.

32. However, since the Respondent/ Management has reserved it's right for conducting a denovo enquiry in paragraph 15 of it's Written Statement, keeping in view the law laid down by the Honourable Supreme Court (five judges Bench) in the matter of KSRTC v. Lakshmiddevamma, 2001 (2) CLR 640, the Respondent/ Management would be at liberty to conduct a denovo enquiry against the Petitioner with reference to the charge sheet dated 08.09.2007, before the Labour Court.

33. Rule is made absolute in the above terms.

34. At this stage, Shri More, learned Advocate for the Petitioner prays that since the Petitioner has already retired from service and is litigating from 2008, the proceedings before the Labour Court be expedited. Shri Kawre opposes the said request on the ground that the reference was once dismissed in default and was subsequently restored in 2012.

35. Considering the above, the Labour Court may endeavour to decide Reference (IDA) No. 3/2008 as expeditiously as possible and preferably on or before the 15th day of December, 2017.