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WP-990-2015

14.7.2015

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.990 OF 2015

The Indian Hotels Company Limited Petitioner
having registered office at Mandlik
House, Mandlik Road,
Coloba, Mumbai -400 001.

Vs.

Mr. Yuvraj Suresh Khaire Respondent
Residing at Suresh Smruti Bldg.,
Room No.8, 2nd Floor,
Kisan Nagar No.3, Road No.22,
Wagle Estate, Thane (West)- 400 604

Mr. K.M. Naik, Senior Counsel alongwith Mr. R.N. Shah alongwith Mr.
Pinkesh Shah i/by Mulla & Mulla & C.B.C. for the Petitioner.

Mr. S.C. Naidu alongwith Mr. T.R. Yadav, Advocate for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.

Date : 14th July, 2015.

JUDGMENT :

1 The short but important question of law that arises for
consideration of the court in this petition is whether a person, who is
neither a co-employee nor an office bearer of the registered union can

be permitted to represent delinquent in a domestic enquiry.

2 The brief statement of facts required to be noted for deciding the question is as follows:

 The respondent-employee has been served with charge-sheet dtd.5th September, 2014 under Model Standing Orders applicable to him for the following misconduct.

“24(d) “Theft--or dishonesty in connection with the employer's business or property or the theft or property of another workmen within the premises of the establishment;

24(l) Commission of any act subversive of discipline or good behaviour on the premises of the establishment.”

3. The enquiry into the charge-sheet commenced on 16th September, 2014. The respondent was represented therein by one Mahendra Shinde, an office bearer of the registered union. While the enquiry was in progress, the respondent cancelled that representation and on 8th November, 2014 made an application requesting for appointment of Mr. P.P. Saher as his defence representative. The application described Mr. P. P. Saher as the General Secretary of the union. The petitioner opposed the application submitting that Mr. P. P. Saher was neither it's employee nor the General Secretary of the union. Mr. P. P. Saher had retired from service about two years back

and his status as General Secretary was sub-judice before the Industrial Tribunal. After hearing the parties the Enquiry Officer gave his ruling on 13th November, 2014 that in view of the Model Standing Order applicable to the respondent, he could be represented either by a co-workman from his department or an officer bearer of the union of which he is a member. Mr. P. P. Saher did not fall in either of the category. As such he could not be the defence representative for the respondent. The Enquiry Officer however gave liberty to the respondent to bring as his representative either a co-workman from his department or an office bearer of the union of which he is a member.

4. After the above ruling, instead of participating in the enquiry proceedings, the respondent on 29th November, 2014 filed complaint with the Labour Court being a Complaint ULP No.274 of 2014 alleging unfair labour practices under Items no. 1(a),(b),(c),(d), (f) and (g) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("MRTU and PULP Act" for short). In the complaint the respondent alleged, inter-alia, that the doubts raised as regards the status of Mr. P. P. Saher by the Enquiry Officer was not correct in view of the order dated 10th October, 2012 passed by the Dy. Registrar of Unions. The main directions sought in the complaint were quashing of the charge-sheet and direction to the petitioner not to take any action against the respondent on the basis of the charge-sheet.

5. In the complaint the respondent applied for several interim reliefs. One of them was, to allow him to be represented in the enquiry proceedings through Mr. P. P. Saher, General Secretary of the recognized union. This relief was obviously inconsistent with the main reliefs sought in the complaint of quashing of the charge-sheet. The Labour Court rejected the application by its order dated 20th December, 2013. The respondent then approached the Industrial Tribunal by filing Revision Application being Revision Application (ULP No.4/2015). The Industrial Tribunal allowed the revision by its order dated 21st February, 2015. It set aside the interim order of the Labour Court and partly allowed the application for interim relief. The interim relief granted to the respondent was direction to the petitioner to allow the respondent to represent his case in the departmental enquiry through Mr. P. P. Saher with further directions to the petitioner to complete the inquiry within a period of three months from the date of the order.

6. The reasons stated by the Industrial Tribunal at paragraphs-20 and 21 of the impugned order for granting relief to the respondent read as follows:

“20. It is undisputed that Mr. P. P. Saher was employee in the employment of the revision opponent, whether he is retired or still in service, no record is produced. Further whether he is or is not ,

still member of the recognized union i.e. Member of the Indian Hotel Company Employees Union, no record was produced, justification in supporting to the enquiry office, on the point, refusing the appearance of Mr. P. P. Saher as a defence representative of the revision applicant in the departmental enquiry was not proper on the part of the Labour Court.

21. If the revision applicant is not allowed to represent his defence through the person of his choice i.e. Mr. P. P. Saher, there will be violation of the principles of natural justice. Further there will be the cause for the complainant to challenge the finding of the enquiry officer, show cause notice and further order of discharge or dismissal, if any, issued by the revision opponent as a result of the enquiry. Therefore, it is not improper to consider the prayer of the revision applicant to allow him to represent in the departmental enquiry through the defence representative Mr. P. P. Saher.”

Being aggrieved by the order the petitioner has challenged the same by the petition herein.

7). The union recognized for the petitioner company had taken out Chamber Summons No.182 of 2015 for impleading itself to the petition. It claimed that, it was entitled to be heard on the aspect of the status of Mr. P. P. Saher as it's General Secretary. When the Chamber Summons was taken up for hearing on 29th June, 2015 Mr. Naidu, the learned advocate for the respondent admitted that Mr. P. P. Saher is no longer an employee of the petitioner, he having retired from service and made a statement that the representation by Mr. P. P. Saher in the departmental enquiry will not be in his capacity as General Secretary of the recognized union. In view of the statement made the cause for the recognized union for impleading itself to the petition did not survive and Chamber Summons was disposed of accordingly on that date.

8. Mr. Naik, the learned Senior Counsel appearing for the petitioner submits that the two statements made by Mr. Naidu strike at the very basis of the application made by the respondent before the Enquiry Officer and the Labour Court and therefore the petition deserves to be allowed straightaway without any further deliberations. By extensively referring to the statements made in the complaint he points out that the selection of Mr. P. P. Saher as the defence representative by the respondent was on account of he being the General Secretary of the recognized union and also an employee of the petitioner.

9). Perusal of the complaint confirms the submission of Mr. Naik. The respondent has, in terms, so averred in his complaint. He has claimed therein that, the Model Standing Order entitles him to be represented through a co-workman from the same department or an office-bearer of the recognized union. The relevant provision under the Model Standing Order reads thus :-

“25(4) “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.”

In view of the statement made by Mr. Naidu, the status that enabled Mr. P.S. Saher under the above provision to act as a representative of the delinquent workman, is no longer enjoyed by him. Consequently, as has been rightly submitted by Mr. Naik, the petition needs to be and ought to be allowed without any further discussion and delay.

10). Mr. Naidu, however, in an attempt to salvage the situation, seeks to expand the application of the respondent with a submission that, even without the status as a co-workman or office bearer of the recognized union, the respondent can be permitted in law, to be

represented through Mr. P.P. Saher in order to meet the principles of natural justice. This argument also, in fact, needs to be outright rejected in view of the specific provision of Clause 25(4) of the Model Standing Orders which clearly helps the respondent in getting effective hearing in the enquiry. Despite that, the argument is being considered hereinafter firstly because extensive arguments have been advanced thereon and secondly because appointment of a representative would be an important matter for a delinquent employee.

11). Mr. Naidu argues that, the pleadings of the application of the respondent should be considered liberally and should be given the same concession as the mofusil pleadings. If it is so treated, there would be no constraint of the specific pleadings from the application upon the respondent as regards the status of Mr. P.P. Saher and the application can be treated as an application for being represented by Mr. Saher, irrespective of his status. According to Mr. Naidu, infact the substratum of the case of the respondent is his representation by Mr. Saher as an individual. These are the aspects, which according to Mr. Naidu, were considered by the Tribunal while passing the impugned

order.

12). The next argument of Mr. Naidu is that, Clause-25(4) of the Model Standing Orders is only illustrative in the matter of representation for the delinquent and there is nothing in it to prohibit representation by any person outside it. Mr. Naidu, also argues that the charges alleged against the respondent being serious, it is but natural for the respondent to desire to have a representative of his choice in whom he can have complete confidence, particularly when the Presenting Officer of the petitioner is a legally trained person. Lastly, Mr. Naidu has submitted that para-21 of the impugned order, is a possible and plausible view of the Industrial Tribunal on the application filed by the respondent. Therefore, this Court should be extremely slow in its extra-ordinary jurisdiction under Article 226 of the Constitution of India to interfere with the same.

13). Mr. Naidu, relies upon three decisions of the Apex Court in support of his submission that the respondent would be entitled to be represented by a person of his choice in the domestic enquiry so as to meet the principles of natural justice. The first decision cited by him

is in the case of **The Board of Trustees of the Port of Bombay V/s.**

Dilipkumar Raghavendranath Nadkarni and Ors. Reported in AIR

1983 SC 109. In the decision cited, the Apex Court was considering

embargo on the right of the delinquent employee to be represented by

a legal practitioner before a domestic Tribunal. In that decision, a

chargesheet had been drawn up against the workman for alleged

misconduct and an Enquiry Officer was appointed to hold enquiry

against him. Before the enquiry opened, the workman submitted a

request seeking permission to engage a legal practitioner for his

defence. That request was rejected. However, thereafter the employer

appointed two of its officers who were legal Advisor and Junior

Assistant Legal Advisor to him, as Presenting Officers before the

Enquiry Officer. At the end of the enquiry, the workman was dismissed

from service. While challenging the legality and validity of the order

of dismissal, it was contended by the workman that, he was not

afforded a reasonable opportunity to defend himself by refusing him

permission to appear through a legal practitioner and hence there was

violation of principles of natural justice. The Apex Court, therefore

considered the question, whether, where in a disciplinary enquiry before a domestic Tribunal, the employer complaining misconduct appoints legally trained person as a presenting-cum-prosecuting officer, the denial or refusal of a request by the delinquent employee seeking permission to engage a legal practitioner to defend him him at the enquiry, would constitute such denial of reasonable opportunity to defend oneself and thus violates one of the essential principles of natural justice which would vitiate the enquiry. The Apex Court, while noting that a domestic enquiry is a managerial function and that it is best left to the Management without the intervention of persons belonging to legal profession, observed that even in such enquiry, there can be very serious charges and adverse verdict can completely destroy the life of the delinquent employee. It noted that, in the past there was informal atmosphere before a domestic Tribunal and that strict rules of evidence and pitfalls of procedural law, did not hamstring the employee by such a domestic Tribunal. However, with the passage of time, the situation has changed where the employer has on his payrolls, labour officers, legal advisors-lawyers in the garb of

employees and they are appointed as Presenting-cum-Prosecuting officers. The delinquent employee pited against such legally trained personnel had to defend himself. Therefore, in such circumstances, the denial to the delinquent employee was denial of a reasonable opportunity to defend himself and the conclusion arrived at such enquiry was in violation of principles of natural justice.

14). The second decision cited by Mr. Naidu is of Single Judge of this Court in the case of **Yashwant Harichandra Gharat V/s. Clairant Chemicals (India) Ltd. & anr. reported in 2010 II CLR page 471**. In this decision cited also, the Court was considering the prayer of the employee to be represented by legal expert i.e. an Advocate, had been declined by Enquiry Officer. This Court noted that the facts of the case and the charges made were not simple and were complicated. They were complicated enough for the Management to be represented through a legally trained person and the employee was not in a position to conduct the proceedings on his own. This Court held that, in such situation, the employee would be entitled to be represented through an Advocate. It further observed that, even if the

charges were to be apparently simple and uncomplicated, the employee would be entitled to the assistance of legal practitioner, if Management representative/Presiding Officer is a legal trained person.

15). The third decision cited by Mr. Naidu, is of the Apex Court in the case of **Om Prakash Chautala V/s. Kanwar Khan & Ors. Reported in AIR 2014 SC 1220**. This decision was cited by Mr. Naidu to emphasize upon importance of reputation of a person. It is his submission that, if the respondent must be dismissed on the allegations of misconduct, it would disrepute him. In the opening para of the decision cited, the Apex Court observes that reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on the posterity. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the down trodden and the privileged.

16). There can be no two opinions as regards the importance of reputation to any person. Therefore, before taking any step of termination of service on account of misconduct, which has

potentiability of disreputation of a person, law requires that a domestic enquiry is held into the allegations of misconduct and only after the same is established that the action for misconduct is taken. As regards the other decisions cited by Mr. Naidu, it is to be noted that in the proceedings before the Courts, the employer was being represented by a legally trained person. This obviously caused imbalance in the matter of opportunity of hearing to the delinquent employee. Further, the question before the Court, was not whether despite specific provision for representation being made under the Model Standing Orders, the workman can be permitted to be represented by a person of his choice, who is not even a lawyer or a legally trained person.

17). Mr. Naik, on the other hand, has submitted that representation of the delinquent outside the provision has not been accepted by the Apex Court in **Crescent Dyes & Chemicals Ltd V/s. Ram Naresh Tripathi, reported in (1993) 1 LLJ 907 (S.C.)**. In that case, the delinquent desired to be represented by an office-bearer of another Trade Union who was not a member of either a recognised union or a non-recognised union functioning within the Undertaking

in which the delinquent was employed notwithstanding the statutory limitation contained in the Certified Standing Order. The argument advanced in the proceedings was that, for the purpose of the domestic enquiry to be fair and impartial it is very much necessary that the delinquent workman be allowed to be represented by a person of his choice and if an employee is refused, such a fair opportunity of putting forward his case by a representative of his choice, even if the representative is an outsider, it could be well said that the principles of natural justice were violated. After considering the provisions under labour laws, concerned Standing Order, decisions of the Indian and English Courts, the Apex Court held as follows :-

“12. It is, therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations or Standing Orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent. In the instant case the delinquent's right to representation was regulated by the Standing Orders which permitted a clerk or a workman working with him in the same department to represent him and this right stood expanded on Sections 21 and 22(ii) permitting representation through an officer, staff-member or a member of the Union, albeit on being

authorised by the State Government. The object and purpose of such provisions is to ensure that the domestic enquiry is completed with despatch and is not prolonged endlessly. Secondly, when the person defending the delinquent is from the department or establishment in which the delinquent is working he would be well conversant with the working of that department and the relevant rules and would, therefore, be able to render satisfactory service to the delinquent. Thirdly, not only would the entire proceedings be completed quickly but also inexpensively. It is, therefore, not correct to contend that the Standing Order or Section 22(ii) of the Act conflicts with the principles of natural justice.”

18). The decision has been followed by the Apex Court in the subsequent decision in **Cipla Ltd & Ors. V/s. Ripu Daman Bhanot & Anr. reported in 1999 I LLJ 900 S.C.**

19). Undoubtedly, as reflected in the recent decisions of the Apex Court cited by Mr. Naidu, the judicial view as regards the representation for a delinquent employee has changed. It is broadened with passage of time to keep pace with the change of scene in the industrial matters. This is essentially to strike balance between the two sides to the dispute. Careful reading of the decisions cited by Mr. Naidu would reveal that the change in the view is not to say that the statutory limitations contained in the Model Standing Orders are no longer good or that the same are only illustrative in nature. The

decisions, instead, provide for certain exceptional circumstances that cannot be met fully by the provision in the Model Standing Orders. The circumstances considered needing a professional expert as a representative are (i) complicated facts of the charges and (ii) the presenting officer being a legally trained person. In the case on hand, no allegations of either of the circumstances have been made at any point of time. Besides, Mr. Saher is not a legally trained person or a lawyer. In the circumstances, the decisions cited by Mr. Naidu are not attracted to the present case.

20). The Tribunal, therefore was not correct in its opinion that denial of representation by Mr. Saher to the respondent, will amount to violation of principles of natural justice or that it can be a cause for the respondent to challenge the findings of the Enquiry Officer. The petition is therefore allowed in terms of prayer clause (a).

(SMT. R.P. SONDURBALDOTA, J)