

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.01.2016

Coram :

The Hon'ble Mr.Justice K.KALYANASUNDARAM

W.P.No.38617 of 2015
and M.P.No.1 of 2015

Joy Aich

... Petitioner

vs

1.Chairman & Managing Director,
Container Corporation of India
A Government of India Undertaking
Ministry of Railways,
Concor Bhavan,
C-3, Mathura Road,
New Delhi - 110 076.

2.Chief General Manager
Container Corporation of India,
Southern Region,
8th Floor, Office of Southern Railway
EVR Periyar Salai,
Egmore, Chennai.

3.N.K.Subash
Retired Senior Superintendent of Post Offices,
House No.F3, First Floor,
Soundariya, 8th Main Road,
Kasturibai Nagar,
Adyar, Chennai.

... Respondents

Writ Petition is filed under Article 226 of the Constitution of India for issue of writ of mandamus directing the respondents to permit the petitioner to have the assistance of Shri Shernik Runwal, Retired Senior Vigilance Officer, Western Railway as petitioner's Defense Assistant in the enquiry held against the petitioner pursuant to the charge memo issued by the 1st respondent in No.CON/VIG-NWR/19/2015/AV dated 14/08/2015.

For Petitioner : Mr.V.Selvaraj
For Respondents : Mr.R.Thiagarajan,
Senior Counsel for
Mr.V.G.Suresh Kumar for R2

O R D E R

By consent, this writ petition is taken up for disposal at the admission stage itself.

2. This writ petition is filed for issuance of writ of mandamus directing the respondents to permit the petitioner to have the assistance of Shri Shernik Runwal, Retired Senior Vigilance Officer, Western Railway as petitioner's Defense Assistant in the departmental enquiry pursuant to the charge memo issued by the first respondent dated 14.08.2015.

3. The case of the petitioner is that he was employed as General Manager - Finance & Accounts in the Southern Regional Office of the Container Corporation of India. The first respondent issued a charge memo dated 14.08.2015 containing 19 charges, for which the petitioner submitted his reply on 10.09.2015. The first respondent appointed the third respondent as the enquiry officer.

4. The petitioner would further state that by letter dated 05.11.2015, the petitioner nominated Shri Shernik Runwal, Retired Senior Vigilance Officer, Western Railway as petitioner's Defense Assistant, but the third respondent, vide letter dated 07.11.2015 rejected the nomination of the petitioner informing that the petitioner has to nominate only an employee of the Respondent Corporation as his defense assistant. The petitioner would allege that during the year 2004 - 2005, in similar facts and circumstances, a employee of Customs & Excise Department was allowed to be nominated as defense assistant and therefore the defense assistant of petitioner's choice should also be accepted.

5. The second respondent filed counter affidavit stating that as per Rule 11 (vi) of CONCOR Discipline and Appeal Rules, a person in the employment of the Respondent Corporation including employees, whose services are temporarily placed at the disposal of the Government or subsidiary or any other public undertaking alone can be appointed as defense assistant. Based on the rule, the request of the petitioner was already rejected by the first respondent on 17.11.2015. It is further stated that the request of the petitioner is in violation of the rules

and that an error occasioned in according permission for the engagement of an outsider as defense assistant is against the dictum of the Hon'ble Supreme Court and the appointment of the 3rd respondent is in accordance with Rules.

6. Mr.V.Selvaraj, learned counsel appearing for the petitioner submitted that the petitioner is working as a General Manager - Finance & Accountants in the Container Corporation of India and only two or three higher officials are working in the respondent Corporation. Since the petitioner could not get their assistance, he sought permission for appointment of Shri Shernik Runwal, Retired Senior Vigilance Officer, Western Railway as his Defense Assistant and in order to give a fair chance to the petitioner to defend his case in the disciplinary proceedings, the defense assistant sought for by the petitioner has to be permitted. It is further contended that the first respondent who is the disciplinary authority has appointed a retired postal employee as an enquiry officer, while so, there is no reason to reject the request of the petitioner in appointing the Retired Senior Vigilance Officer, Western Railway as his Defense Assistant.

7. The learned counsel for the petitioner further submitted that the Rules framed by the respondent Corporation does not have statutory force and therefore relying on their own rules, the petitioner cannot be denied fair enquiry. It is his further contention that the earlier rejection of the petitioner's request dated 17.11.2015 is only a communication and therefore the petitioner has not challenged it.

8. Per contra, Mr.R.Thiagarajan, learned Senior Counsel appearing for the respondent Corporation would submit that the prayer sought for in the writ petition is to direct the first respondent to permit the petitioner to have the assistance of a retired Senior Vigilance Officer from the Western Railway, which request was already rejected by the first respondent on 17.11.2015. The learned Senior Counsel further submitted that as per Rule 11 (vi) of CONCOR Discipline and Appeal Rules, the petitioner can have an assistance only of an employee of respondent Corporation and this Court, while exercising jurisdiction under Article 226 of the Constitution, cannot issue a writ of mandamus directing the respondents contrary to the Rules. It is further submitted that the petitioner has got no absolute right to have an assistance unless the statute or rules / standing orders provide for such right and the refusal to grant the assistance of the choice of the petitioner would not amount to violation of principles of natural justice.

9. The learned Senior Counsel has relied upon the

following judgments of the Hon'ble Supreme Court in support of his contentions -

In 1993 (2) SCC 115 [Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi], the Hon'ble Supreme Court has held as follows -

A delinquent appearing before a Tribunal may feel that the right to representation is implied in the larger entitlement of a fair hearing based on the rule of natural justice. He may, therefore, feel that refusal to be represented by an agent of his choice would tantamount to denial of natural justice. Ordinarily it is considered desirable not to restrict this right of representation by counsel or an agent of one's choice but it is a different thing to say that such a right is an element of the principles of natural justice and denial thereof would invalidate the enquiry. Representation through counsel can be restricted by law as for example, Section , 36 of the Industrial Disputes Act, 1947, and so also by certified Standing Orders. In the present case the standing orders permitted an employee to be represented by a clerk or workman working in the same department as the delinquent. So also the right to representation can be regulated or restricted by statute. Such provisions in fact serve to underline the importance attached to the right to representation.

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.

10. In the case of [Railway Protection Force and others v. K.Raghuram Babu](#) reported in 2008 (4) SCC 406, the Hon'ble Supreme Court has held as follows -

It is well settled that ordinarily in a domestic/departmental inquiry the person accused of misconduct has to conduct his own case vide [N. Kalindi and others vs. M/s. Tata Locomotive and Engineering Co. Ltd](#) AIR 1960 SC 914. Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry vide [Brook Bond India vs. Subba Raman](#) 1961 (11) LLJ 417.

Following the above decision it has to be held that there is no vested or absolute right in any charge-sheeted employee to representation either through a counsel or through any other person unless the statute or rules/standing orders provide for such a right. Moreover, the right to representation through some one, even if granted by the rules, can be granted as a restricted or controlled right. Refusal to grant representation through an agent does not violate the principles of natural justice.

11. The Hon'ble Supreme Court, in the case of [State of U.P. v. Harisha Chandra](#), reported in 1996 (9) SCC 309 has observed as follows -

Further question that arises in this context is whether the High Court was justified in issuing the mandamus to the appellant to make recruitment of the Writ Petitioners. Under the Constitution a mandamus can be issued by the Court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the Government to refrain from enforcing the provision of law or to do something which is contrary to law.

12. In yet another judgment of the Hon'ble Supreme Court in Union of India V. Assn. for Democratic Reforms reported in 2002 (5) SCC 294, it has been dealt as follows -

At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

13. In 2004 (2) SCC 130 (Teri Oat Estates (P) Ltd., v. U.T. Chandigarh, the Hon'ble Supreme Court has held as follows -

We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation where to the appellants miserably fail to establish a legal right. It is further trite that despite an extraordinary constitutional jurisdiction contained in [Article 142](#) of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision.

As early as in 1911, Farewell, L.J. in Latham v. Richard Johnson & Nephew Ltd. observed: (All ER p. 123 E)

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our

judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles."

14. In a judgment of the Hon'ble Supreme Court reported in AIR 2007 SCC 1211 (Union of India and Ors. v. S.K.Saigal and Ors.), it is observed as follows -

It was, therefore, clearly an admitted case of the respondents by themselves that they had not worked for 5 years as Scientists 'B', which is the mandate of the Rules and, therefore, the Tribunal transgressed its jurisdiction granting the relief to the respondents de hors the mandate of the Rules. It is now settled principle of law that no mandamus can be issued which would be contrary to the Act and the Rules. See *State of U.P. v. Harish Chandra* (1996) 9 SCC 309; *Union of India v. Association for Democratic Reforms and Anr.* (2002) 5 SCC 294.

15. In the instant case, it is not in dispute that the petitioner is an employee of the Container Corporation of India. The first respondent has issued a charge memo dated 14.08.2015 against the petitioner and thereafter appointed the third respondent as enquiry officer. Now, the only question arises for consideration of this court is whether the petitioner is entitled to appoint an employee of Railways as his defense assistant. The main contention of the respondent is that as per Rule 11 (iv) of CONCOR Discipline and Appeal Rules, the petitioner can have an assistance of an employee of the Respondent Corporation. The relevant rule is extracted below -

(vi) the employee charged may take the assistance in preparing his / her defense of any other employee but may not include a legal practitioner for the purpose.

The term 'employee' has been further defined vide clause 3 (a) of CONCOR Conduct Rules & CONCOR Disciplinary & Appeal Rules as under -

(i) a person in the employment of the Corporation including employees whose services are temporarily placed at the disposal of Government or a subsidiary or any other public undertaking.

16. It is to be noted that the request of the petitioner was already rejected by the disciplinary authority

viz. the first respondent on 17.11.2015. Admittedly, the petitioner has not challenged the said order. It is to be seen from the above decisions of the Hon'ble Supreme Court that a delinquent has no vested or absolute right of his choice to claim assistance of a particular person unless such right has flown from the relevant statute or rules. In other words, he is bound by the restrictions in law or by statute in representation before the departmental proceedings and in such cases, the charge sheeted employee cannot complain violation of principles of natural justice. Further, writ of mandamus cannot be issued against statutory rules or regulations. In view of my findings, I do not find force in the contentions of the learned counsel for the petitioner. Therefore, this court is of the considered opinion that there is no merit in the writ petition.

In the result, the writ petition is dismissed. However, there is no order as to cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1.Chairman & Managing Director,
Container Corporation of India
A Government of India Undertaking
Ministry of Railways,
Concor Bhavan,
C-3, Mathura Road,
New Delhi - 110 076.

2.Chief General Manager
Container Corporation of India,
Southern Region,
8th Floor, Office of Southern Railway
EVR Periyar Salai,
Egmore, Chennai.

+1 cc to Mr.V.Selvaraj, Advocate, sr.3890

+1 cc to Mr.V.G.Sureshkumar, Advocate, sr.4590

W.P.No.38617 of 2015

gj co, kra 02.02.2016