

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2018

CORAM

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

W.P.No.16879 of 2003
and W.P.M.P.Nos.45430 & 45431 of 2003

The Management of
Indian Overseas Bank Ltd.,
Head Office "Habeeb Towers"
756 Anna Salai,
Chennai - 600 002.

..Petitioner

(Petitioner Cause title amended
as per order dated 29.06.2017
by VBSJ in W.P.M.P.No.88/2015 in
W.P.No.16879/2003.)

..Vs..

1.The Special Deputy Commissioner of Labour,
(Appellate Authority under Tamil Nadu
Shops & Establishments Act),
Chennai - 600 006.

2.J.S.Saini,
C-14, Ball Nagar,
New Delhi 15.

...Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India to issue a Writ of Certiorari calling for
the records of the 1st respondent in T.S.E.Case No.I/64 of 2001
and quash its orders dated 02.12.2002.

For petitioner : Mr.G.Anandakrishnan
for M/s.T.S.Gopalan & Co.

For Respondents: Mr.K.Ravikumar, AGP for R1
Mr.Ajoy Khose,
Amicus Curie for R2.

ORDER

The prayer sought for herein is for a Writ of
Certiorari calling for the records of the 1st respondent in
T.S.E.Case No.I/64 of 2001 and quash its orders dated 02.12.2002.

2. The necessary facts which are to be noticed for disposal of this writ petition are as follows:

(i) The second respondent joined as clerical staff at the petitioner bank in 1977. He was promoted as Manager in the year 1993. While he was working in Lucknow Branch on 01.11.1995, a charge memo consisting of 27 charges had been issued against the second respondent, who had given his explanation on 21.11.1995. Not satisfied with the explanation given by the second respondent, the bank authorities had proceeded for a domestic enquiry, where the second respondent also participated. Ultimately, the enquiry officer, by order dated 27.11.1996 has given findings that out of the 27 charges, 7 charges namely, charge Nos.4,5,12,13,14,16 and 21 were not proved. Charge No.9 was partly proved and all other charges were proved.

(ii) Thereafter, second Show Cause Notice was given to the second respondent, who gave reply on 29.03.1997. Not satisfying with the reply to the second Show Cause Notice and by taking into account the enquiry officer's report, the disciplinary authority had inflicted the punishment of dismissal of service on second respondent, by order dated 15.04.1997.

(iii) As against the order of punishment, appeal to the Appellate Authority had been filed by the second respondent, which was also rejected. Therefore, the second respondent preferred a petition before the Appellate Authority under Tamil Nadu Shops & Establishments Act 1947 (herein after referred to as "the Shops Act"), where the shops authority, having considered the said appeal filed by the second respondent, had passed the final order on 02.12.2002, whereby the Shops authority had set aside the order of dismissal passed by the bank i.e., disciplinary authority dated 15.04.1997. Aggrieved over the said order passed by the shops authority, dated 02.12.2002, petitioner bank has filed the present writ petition in June 2003.

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(iv) In a Miscellaneous Application in W.P.M.P.Nos.45430 & 45431 of 2003, this court by order dated 30.01.2004, directed the petitioner bank to pay salary at the rate of Rs.6,000/- per month to the second respondent from January 2004 and directed to pay the terminal benefits. Accordingly in March 2004, the petitioner bank had paid a sum of Rs.1,38,354.69/- towards gratuity and Rs.2,92,546.91/- towards Provident Fund contribution up to 1997 to the second respondent and he received the same. The bank had continued to pay the said amount of Rs.6,000/- as directed by this Court, dated 30.01.2004 to the second respondent from January 2004 till May 2015 i.e., up to his superannuation.

3. I have heard Mr.G.Anandakrishnan, the learned Standing Counsel appearing for the petitioner bank, who would submit that, first of all the shops authority does not have jurisdiction to hear the appeal filed by the second respondent, as at the time of the issuance of charge memo, the second respondent was working in Ludhiana and therefore, merely because the Head Quarters of the petitioner's bank is located in Chennai, the second respondent ought not to have invoked the provisions of the Shops Act and filed the appeal before the said authority at Chennai and therefore, on the question of jurisdiction itself, the order impugned can be assailed.

4. The learned Standing Counsel would further submit that, even though the enquiry officer, after having conducted the enquiry, has held that 20 out of 27 charges proved and the shops authority also even though erroneously held that 7 charges had been proved on the strength of the evidence and 5 charges have been proved because of the own admission of the second respondent, nevertheless, the shops authority had proceeded to set aside the punishment order in entirety and allowed the appeal, thus paved way for reinstatement of the second respondent. This order, according to the learned counsel for the Bank, is wholly unlawful and perverse finding, therefore it certainly requires interference from this Court.

5. The learned Standing Counsel for the bank has also made submission that, assuming that only 7+5, i.e., 12 charges out of 27 charges alone has been proved against the second respondent, the only course of action available before the shops authority was to confirm the punishment awarded against the second respondent, as the said authority even does not have the power to modify the punishment, by invoking the theory of proportionality, as such power as has been contemplated under Section 17B of the Industrial Disputes Act, is not available to the shops authority under the Shops Act.

6. In this context, the learned counsel for the bank has further submitted that, even though amendment has been brought in by the State Legislature in the Shops Act by bringing Section 41A, w.e.f 19.06.2008, inserting Tamil Nadu Act No.44 of 2008, vide Section 2 which is analogous provision as that, of Section 17B of the ID Act, the benefit of such amendment i.e., Section 41A of the Shops Act cannot be extended to the second respondent, as the occurrence taken place and the charges framed against the second respondent, enquiry conducted and punishment awarded, everything was prior to the said amendment. Therefore, the learned Standing Counsel for the bank would submit that, even the benefit under Section 41A of the Shops Act also could not have been invoked against the bank in respect of the present case.

7. In this context, the learned counsel for the bank has relied upon a decision of this Court reported in 2002 (3) LLN 541 in the matter of R.Kannabiran vs. Deputy Commissioner of Labour (Appellate Authority), Thiruchirapalli. In the said Judgment, the learned counsel has relied upon the following passage.

"8. Learned counsel appearing for the petitioner pointed out that punishment of dismissal is harsh and the appellate authority failed to take note of the consequences thereof. In support of his said contention, he relied on decisions in (1) TAFE, Ltd., v. R. Vinkatraman [1989 L.L.N. 710] C.V. Kotecha v. Halar Salt and Chemical Works [1986 L.I.C.938] Rama Kant Misra v. State of Uttar Pradesh [1983 (1) L.L.N 1] and Vasanti v. A.I.H.F.M. Cooperative Society Limited, Ahmadabad [1985 L I.C. 1104]. In the light of the submission made, I have carefully perused all the above decisions. All these decisions relate to power of the Labour Court/Industrial Tribunal under section 11A of the Industrial Disputes Act. There is no dispute that under section 11A, the Labour Court/Industrial Tribunal is empowered to impose lesser punishment in lieu of discharge or dismissal depending on the circumstance of the case. Admittedly, the first respondent has to consider whether the order of dismissal imposed on the petitioner is sustainable or not. There is no such provision in the Tamil Nadu Shops and Establishments Act, 1947 corresponding to section 11A of the Industrial Disputes Act. Even otherwise, in the light of the fact that all the 3 charges were found proved and the same were discussed by the appellate authority and it arrived a conclusion that petitioner was guilty of threatening, abusing, intimidating, and preventing high officials of the Stores, I am of the view that the punishment of dismissal would appropriate and the same has been rightly confirmed by the appellate authority."

8. I have also heard Mr.Ajoy Khose, who appeared as Amicus, since no one was appearing on behalf of the second respondent employee. Mr.Ajoy Khose, learned Amicus has made submissions that, even according to the enquiry officer, 7 out of 20 charges were not proved and Charge No.9 was partly proved. Out of the

remaining 20 charges, it was by his own admission of the second respondent, 5 charges were held proved. Even according to the shops authority, out of the remaining 15 charges, only 7 were proved based on evidence. Assuming that $7+5=12$ charges were proved, insofar as those proven charges are concerned, these are only procedural violations of the guidelines issued by the bank to its official employees while undertaking day to day business.

9. The learned Amicus also argues that, it is not the case of the petitioner bank that, there had been any financial loss to the bank due to the dereliction or violation on the part of the second respondent, even in respect of the proven charges. When there had been no financial loss to the bank, these violations can only be treated as procedural violations and therefore, there is no serious nature attached with those charges, assuming that those charges had been proved. That is the reason why the second respondent himself came forward to admit certain violations in respect of 5 charges

10. The learned Amicus would further submit that, taking into account these aspects only, the shops authority had come to a right conclusion that, since most of the charges have not been proved the punishment of removal of service inflicted on the second respondent, by taking into account the totality of the charges, as per the enquiry officer's report, is excessive punishment. The very basis of major charges, since has been held not proved, the edifice built on those charges to come to a conclusion that the second respondent deserve to be inflicted with the punishment of dismissal of services has been shattered. Therefore, the shops authority has ultimately held that the punishment awarded against the second respondent had to be set aside. Accordingly the appeal filed before the shops authority was allowed through the impugned order.

11. In respect of the jurisdiction point raised by the bank's side, learned Amicus had submitted that, even though the legal points such as jurisdiction can, at any point of time or at any stage, be raised or agitated, still certain restrictions are there. Herein the case on hand, according to the learned Amicus, the bank has never raised the issue of jurisdiction before the shops authority, where only merits of the case had been placed or argued. When that being the position, the bank cannot turn around now, that too at the stage of final hearing of the writ petition, cannot raise the issue of jurisdiction. He also submitted that, once the writ petition was admitted on merits and Rule Nisi was issued accepting all those aspects in all these years, the interim orders passed by this Court to pay a sum of Rs.6,000/- to the second respondent which is equivalent to a gesture as 17B wages in ID Act having been acted upon, the bank cannot raise the issue of jurisdiction at this juncture.

12. In this context, the learned Amicus has relied upon the Judgment of a Division Bench of this Court made in W.A.No.319 of 1986 dated 02.05.1990 in the matter of Indian Bank (represented by its Assistant General Manager), Madras and R.S.Thiruvankadam and another.

13. On the issue of the power of the shops authority with regard to the proportionality of the punishment is concerned, the learned Amicus would submit that, even though there is no express provision in the Shops Act as that of 11A of I.D.Act, such power is always inherently available with the shops authority under the Shops Act to mould the relief by taking into account the veracity of the proven charges. This power can be traced from the very same provision, i.e., under Section 41 of the Shops Act itself, even though there is no express provision available under the said Section as that of Section 11A of the I.D.Act. Therefore, the learned Amicus submits that, the Shops Authority has got wide and ample power to interfere with the punishment including the proportionality of the punishment and also to mould the relief in case of disciplinary actions, where major punishment has been inflicted against the delinquent.

14. By making all these submissions, the learned Amicus submitted that, the shops authority through the impugned order has not violated any legal principle and there is no procedural irregularities on the part of the shops authority in passing the impugned order, as admittedly there had been no financial loss to the petitioner bank. Therefore, by taking into account, the long service rendered by the second respondent right from the year 1977 till 1997, the said order of punishment of removal of service had been rightly set aside and the appeal has been allowed. Therefore, this court need not interfere with the said order passed by the shops authority.

15. I have considered the said rival submissions made by the learned counsel for the petitioner and learned Amicus who assist the Court and also perused the materials place before this Court.

16. It is an admitted case that, there had been 27 charges against the second respondent, out of which 7 charges were held not proved by the enquiry officer himself. With regard to the remaining 20 charges, Charge No.9 admittedly was proved partly. With regard to the remaining 19 charges, in respect of 5 charges, the second respondent has admitted and therefore 6 charges can be held proved. With regard to the remaining 14 charges, even though, the enquiry officer held, all those charges have been proved, the shops authority by re-appreciation of evidence has come to a conclusion that only 7 charges, out of 14 had been proved. Therefore, altogether $7+5=12$ charges had been proved either by way of own admission on the part of the delinquent or on the basis of the evidences adduced by the

management side. At any rate, the fact remains that 12 out of 27 charges had been proved.

17. However, the shops authority through the impugned order has given the reason that, when some of the charges were not proved, the gravity of other charges proved should have been explained and considered in detail in the final order, coming to generalized conclusion tend to weaken the edifice of the decision made by the respondent when a punishment is based on the entirety of charges, if some of them go unproved, then the sanctity in such punishment is lost. By giving this findings, the shops authority had come to a conclusion that the entire punishment inflicted on the second respondent is liable to be set aside and accordingly had set aside the entire punishment on the petition filed by the second respondent.

18. Assuming that only 12 charges, out of 27 charges framed against the second respondent had been proved, the shops authority could not have come to a conclusion that in view of certain unproved charges, the entire basis of the charges would go and therefore punishment which was given based on the entirety of the charges will also go. This kind of decision, the Shops Authority ought not to have made. Even though, there is no express provision available under the Shops Act to interfere with the punishment on the ground of proportionality, the shops authority instead of interfering the proportionality, cannot set aside the entire punishment, after having held that 12 out of 27 charges had been proved.

19. Assuming that there had been no financial loss to the petitioner bank because of the violations on the part of the second respondent, that would not ipso facto give a leverage to the Appellate Authority to completely exonerate the the second respondent from all charges.

20. Since the petitioner is the financial institution and the entire money dealt with by the petitioner bank is a public money, there must be a maximum degree of diligence, care and caution to be strictly maintained or adhered to by every officer and employee of the public sector bank like the petitioner bank.

21. I have gone through some of the proven charges including the charges, which had been admitted by the delinquent. Some of the charges may be procedural in nature like the review report once in six months to be submitted by the petitioner. But some of the charges definitely will have some serious repercussion. In one charge, the delinquent had advanced vehicle loan without having the hypothecation of the vehicle on which a loan was given. For instance, Charge No.25, the delinquent had misrepresented the fact to head office by seeking permission for substitution of the collateral security, vide his letter dated 16.03.1995. However, the substitution had already taken place on 21.12.1994 itself at the time of disbursement and in Charge

No.24, while the delinquent wanted to substitute the property belonging to one X, valued at Rs.9 lakhs, belonging to one Y valued at Rs.7.13 lakhs, he had done so without any authority or approval from Head office. Similarly Charge No.26 says that, the delinquent had violated the terms of sanction by not obtaining the hypothecation of car. These are all some of the charges which are already proved either by own admission of the delinquent or on the strength of the evidences adduced by the bank side.

22. Therefore, all these proven charges cannot be treated only as procedural violation, however, in some of the proven charges, it goes beyond the limit of procedural violation. When certain violations which has been apparently made by the delinquent, lead to some unwarranted consequences including the financial loss, unfortunately such loss had not taken place or the bank has not projected and proved any such loss. Those violations of the delinquent cannot be treated as only procedural violations.

23. When these kind of charges, since have been proved by way of evidence and some of the charges have been admitted by the delinquent, certainly, the shops authority should have thought of giving a proportionate punishment to the second respondent instead of completely setting aside the order of dismissal passed by the bank.

24. Insofar as the power of the shops authority to mould the relief or to interfere with the punishment on the ground of proportionality is concerned, though such power has not been provided expressly under the provisions of the Shops Act and though it was argued by the learned Amicus that inherently such power has been available to the shops authority, without going into that area, this Court is of the view that, at least before this Court, under Article 226 of the Constitution, the proportionality of the punishment can very well be testified and a suitable punishment, if required, can very well be inflicted on the delinquent.

25. Insofar as the question of jurisdiction is concerned, as has been rightly pointed out by the learned Amicus, bank has never raised the issue when the appeal was filed by the delinquent before the shops authority and in fact, the bank contested the case only on merits. Here also the issue was not raised at the time of admission and the interim orders passed by this Court has been accepted and acted upon by the bank and therefore, at the 11th hour during the final hearing, such issue need not be gone into, in view of the conclusion going to be arrived at by this Court.

26. Therefore, as per the discussion made above, with regard to the veracity of the proven charges is concerned and also the way in which it has been dealt with by the shops authority through the impugned order, without even exploring the possibility of awarding modified punishment to the second

respondent / delinquent in commensurate with the proven charges, the shops authority ought not to have passed an order setting aside the punishment of dismissal of service in entirety, for which this Court feels that, the shops authority does not have any sustainable and valid reasons.

27. Merely because some of the charges framed against the delinquent had been not proved, it cannot be said that the entire punishment has to go, as the punishment was given cumulatively in respect of all proven charges. Assuming that, some of the charges have not been proved, the service jurisprudence requires insofar as the proven charges are concerned, proportionate punishment can very well be awarded against the delinquent and in this context, there is no quarrel as it is a settled proposition.

28. In that view of the matter, this Court is of the considered opinion that, the order passed by the shops authority, which is impugned herein, is liable to be interfered with, as the setting aside the entire punishment awarded against the second respondent by the shops authority, cannot be approved by this Court.

29. By taking into account the factual matrix of the case and based on the discussions made above, this Court is inclined to pass the following order for the disposal of the writ petition:

(i) The impugned order passed by the shops authority is hereby set aside.

(ii) The second respondent shall be liable to be inflicted with punishment for the proved charges (12 charges proved out of 27) and for the said proven charges, this Court is of the view that, he shall be punished with the punishment of compulsory retirement.

(iii) On inflicting such punishment of compulsory retirement, it is needless to mention that, the second respondent shall be entitled to get benefits, for which he is eligible to, like Gratuity, Provident Fund, Encashment of Earned Leave and other benefits if any.

(iv) It is also made clear that, the payment of Rs.6,000/- per month paid to the second respondent by the petitioner bank pursuant to the interim order passed by this Court during the pendency of this writ petition from January 2004 till May 2015 (till the superannuation of the second respondent) shall be treated as wages like 17B wage of ID Act and therefore, the same shall not be recovered from the second respondent.

With these modified punishment, the writ petition is

allowed in part to the term indicated above. There shall be no order as to costs. Consequently the connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

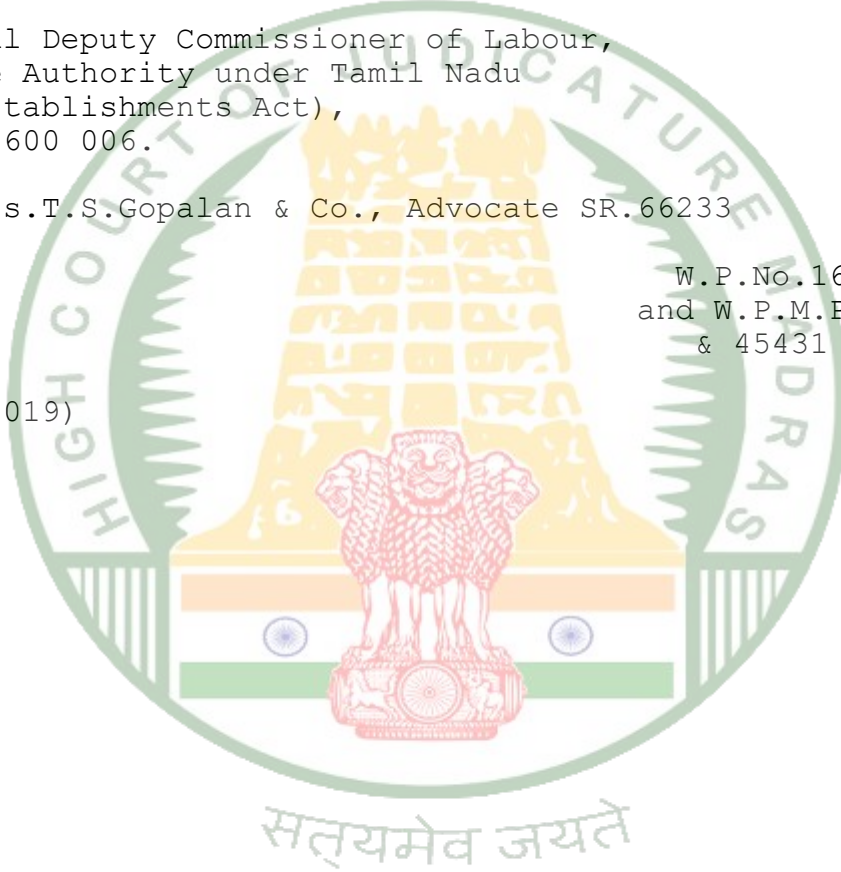
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To

The Special Deputy Commissioner of Labour,
(Appellate Authority under Tamil Nadu
Shops & Establishments Act),
Chennai - 600 006.

+1cc to M/s.T.S.Gopalan & Co., Advocate SR.66233

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