

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.07.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

W.A.No.1616 of 2014 and W.A.No.145 of 2015
and

M.P.No.1 of 2014

W.A.No.1616 of 2014

- 1.M/s.ICICI Bank Ltd., rep.by its Chairman
and Managing Director, ICICI Towers
IV Floor, South Tower,
Bandra Kurla Complex
Mumbai - 400 051.
- 2.Senior Executive Vice President
ICICI Bank Ltd., Corporate Office
Chennai Unit,
Chennai - 600 002. ...Appellants/Petitioner

-Vs-

1. S.R.Varadarajan
2. Special Deputy Commissioner of Labour
(Authority under the Tamilnadu Shops and
Establishments Act), DMS Campus
Teynampet,
Chennai - 600 018. ...Respondents/Respondents

For Appellants : Mr.Sanjay Mohan
for Mr.S.Ramasubramaniam & Associates

For Respondent: Mr.Balan Haridas - for R1

Prayer :Writ Appeal under Clause 15 of the Letters Patent,
against the order passed by this Honourable Court in
W.P.No.24067 of 2003 dated 17.07.2014.

Prayer in WP.No.24067 of 2003:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for the records pertaining to the order dated 03.06.2003 made in T.S.E.No.I.3 of 2002 on the file of the second Respondent and to quash the same.

W.A.No.145 of 2015

S.R.Varadarajan

... Appellant /1st Respondent

-Vs-

1.M/s.ICICI Bank Ltd., rep.by its Chairman
and Managing Director, ICICI Towers
IV Floor, South Tower,
Bandra Kurla Complex
Mumbai - 400 051.

2.Senior Executive Vice President
ICICI Bank Ltd., Corporate Office
Chennai Unit, Chennai - 600 002.

3.Special Deputy Commissioner of Labour
(Authority under the Tamilnadu Shops and
Establishments Act), DMS Campus
Teynampet, Chennai - 600 018.

... Respondents/
(1st and 2nd Petitioner and
2nd Respondent)

For Appellant : Mr.Balan Haridas

For Respondent : Mr.Sanjay Mohan
for Mr.S.Ramasubramaniam &
Associates - For RR

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C O M M O N J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

The employer bank as well as the employee, Manager (Operations), have filed these cross appeals, aggrieved by the order of the learned Single Judge dated 17.07.2014 in the Writ Petition filed by the employer ICICI Bank Limited, against the employee S.R.Varadarajan, aggrieved by the order passed by the appellate authority viz., Special Deputy Commissioner of Labour under the provisions of Tamil Nadu Shops and Establishments Act, 1947, by which the appeal filed by the employee S.R.Varadarajan came to be allowed and the order of punishment of dismissal was set aside by the said appellate authority.

2. The employer ICICI Bank approached the learned Single Judge by way of a writ petition in W.P.No.24067 of 2003, which came to be allowed. The learned Single Judge of this Court made the following observations.

" 42. I have actually considered the other grounds raised by the first Respondent to see if the impugned order could be sustained at least by providing artificial limbs. I endeavoured to look into the evidence of M.W.1 and M.W.2 and the reports of Ex.M1 and M2 to see whether the impugned order could be sustained on other reasons, but I have found that it could not be.

43. The decision of the Supreme Court in United Planters Association vs. K.G.Sangameswaran (1997)4 SCC 741, is relied upon by Mr.Balan Haridas, learned counsel for the first Respondent in support of his contention that the jurisdiction of the authority under Section 41(2) of the Tamil Nadu Shops and Establishments Act is very wide and that he is entitled even to record evidence to come to his own conclusion.

44. But I have no difficulty in accepting the above proposition. I have not found fault with the impugned order of the Appellate Authority merely on the ground that he exceeded the jurisdiction vested in him. I have actually found at least with respect to two charges, that the findings of the Appellate Authority are completely perverse. The findings are so perverse that they have gone against even the explanation submitted by the delinquent to the charges. When the findings of the Appellate Authority are so perverse, I have no alternative except to set aside the same.

45. In *Rajasubramaniyan P. vs. IOB* (2000-II-LLJ 212), relied upon by Mr. Balan Haridas, learned counsel for the first Respondent, a Division Bench of this Court modified the penalty from termination to compulsory retirement, on the ground that the employee was found guilty of procedural irregularities in the sanction of loans to poor people and that the same were part of the loan Mela. But I do not think that the said decision have any assistance. The specific case of the first Respondent before the Enquiry Officer was that the two customers in question were the most favoured VIP customers of the Bank. According to the first Respondent, he treated both the customers differently in tune with the policy of the Management. But he did not even go to the witness box to support the same. Hence his case cannot be compared to that of a person who granted loans to poor people.

46. In *Kasi M. vs. Management of Indian Bank* (2001-II-LLJ 617, another Division Bench modified the penalty awarded to a person on the ground that the charges relate only to procedural lapses. But as seen from the law that had developed in respect of the officers employed in Banks, there is no scope for any leniency in such cases.

47. Relying upon a decision of the Supreme Court in *Secretary, School of Committee vs. Government of Tamil Nadu* (2003 (2) CTC 175), Mr. Balan Haridas, learned counsel for the first Respondent contended that the proportionality of punishment should be gone into. Even in cases governed by Section 22 of the Tamil Nadu Recognized Private Schools Regulation Act, the Supreme Court read into the statutory provision, that is requirement. Therefore he contended that the proportionality of penalty is to be considered.

48. It is true, that the first Respondent entered into service way back on 12.05.1970. He was dismissed after 31 years of service. Unfortunately, the Appellate Authority did not go into to the question of proportionality, as it set aside the order of penalty on merits. Therefore on that limited question, I am of the view that the matter could be remitted back to the Appellate Authority.

49. Even in *Kailash Nath Gupta vs. Enquiry Officer* (2003(2) L.L.N 392), the Supreme Court pointed out that though the power of interference

with the quantum of punishment is extremely limited, the Court can direct reconsideration if relevant factors had not been taken note of. Therefore I am of the view that the matter could be remitted back to the Appellate Authority.

50. In Chairman cum Managing Director Coal India Limited vs. Mukul Kumar Choudhuri (CDJ 2009 SC 1698), the Supreme Court reiterated that the doctrine of proportionality is a well recognized concept of Judicial Review. Though in extreme cases, I could myself test whether the penalty is disproportionate or not, I do not think that it could be proper to do it when the Appellate Authority whose order is impugned herein, did not even apply its mind to the same.

51. Contending that the High Court can itself look into the question of proportionality, Mr. Balan Haridas invited my attention to the decision of the Supreme Court in State of Uttar Pradesh vs. Rajpal Singh (2010) 5 SCC 783). But in the said case the Supreme Court pointed out that the normal rule is the one propounded in B.C. Chaturvedi vs. Union of India (1995) 6 SCC 749 to the effect that the High Court cannot interfere with the quantum of penalty. In rare cases, the question of proportionality as well as equality of treatment, could be gone into as held by the Supreme Court in Man Singh vs. State of Haryana (2008 (4) L.L.N. 113).

52. But as I have pointed out earlier, the Appellate Authority whose powers are wide under Section 41(2), as propounded by the decision of the Supreme Court in United Planters Association of South India, did not consider this question. Therefore on this short ground, I am of the view that the matter could be remitted back.

53. In the light of the above, the writ petition is allowed, the order of the second Respondent (Statutory Appellate Authority) dated 03.06.2003 made in T.S.E.No.I.3 of 2002, is set aside, holding that the findings are completely perverse. However, the matter is remitted back to the second Respondent for a fresh consideration on two aspects namely: - (a) Proportionality of penalty especially in the light of 30 years of service of the first Respondent and (b) Equality of treatment. The Appellate Authority shall give opportunity to both parties and pass fresh orders after hearing both parties on those two questions, within a period of 12 weeks from the date of receipt of copy of this order. No costs. "

3. Learned counsel for the employer bank Mr.Sanjay Mohan has submitted that once the learned Single Judge arrived at the findings that, on account of admission of guilt / charge by the respondent official of the bank, about purchasing of the cheques of some of the parties beyond his prescribed limits and on that basis, the learned Single Judge was pleased to set aside the findings of the appellate authority, by which the said appellate authority found the delinquent official not guilty, the learned Single Judge could not have remanded the case back to the appellate authority, only to look into the aspect of proportionality of the penalty and equality of treatment. He submitted that one more official involved in the said misconduct voluntarily resigned from his services and therefore, equality of treatment could not have been looked into by the appellate authority at this stage. He further submitted that Section 41 of the Tamil Nadu and Shops and Establishments Act has been amended in the year 2017 by Tamil Nadu Act 9 of 2017, by insertion of Subsections (2A) and (2B), whereby the powers have been conferred upon the appellate authority to direct reinstatement with or without backwages etc., and therefore, for the present case, prior to the said amendment in the year 2017, the appellate authority could not have looked into the aspect of proportionality of the punishment also and therefore, the dismissal order passed by the disciplinary authority on 31.12.2001, deserves to be restored in the writ petition filed by the employer bank.

4. Learned Senior Counsel Mr.Sanjay Mohan, relied upon the following judgments in support of his contentions.

(a) Gujarat Steel Tubes Ltd., and Others
-Vs-Gujarat Steel Tubes Mazdoor Sabha and
Others (1980) 2 Supreme Court Cases 593,.

(b) Madras Fertilizers Limited -Vs- First
Additional Labour Court in W.A.No.1058 of
1983, decided by a Division Bench of this
Court on 31.08.1989.

5. Per contra, Mr.Balan Haridas, appearing for the respondent official and appellant in the connected appeal W.A.No.145 of 2015, submitted that the appellate authority had rightly arrived at the findings of no misconduct being made out on the part of the respondent official S.R.Varadarajan and having found him not guilty, the dismissal order was rightly set aside by the learned appellate authority, which could not have interfered by the learned Single Judge in the writ petition filed by the employer bank, as has been done in the present case.

6. As far as the amendment in Section 41 is concerned, the said provision of the Tamil Nadu Shops and Establishments Act, 1947 prior to amendment and after the amendment are quoted below.

" Prior to Amendment

41. Notice of dismissal. (1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2) The person employed shall have a right to appeal to such authority and within such time as may prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

(3) The decision of the appellate authority shall be final and binding on both the employer and the person employed.

After the amendment

"2. Amendment of Section 41 - In Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 (Tamil Nadu Act XXXVI of 1947) (hereinafter referred to as the principal Act) after sub-section(2), the following sub-sections shall be inserted, namely:-

(2-A) The appellate authority, may if it considers that any document or the testimony of any person is relevant or necessary for the discharge of its duties under this Act as appellate authority, call for and inspect such document or summon and examine such person. For the aforesaid purposes, it shall have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 (Central Act V of 1908), in respect of the following matters, namely :-

(i) summoning and enforcing the attendance of any person and examining him on oath;
(ii) compelling the production of documents;
(iii) issuing commissions for the examination of witnesses.

(2-B) The appellate authority, may, after giving notice in the prescribed manner to the employer and

the person employed, dismiss the appeal or direct the reinstatement of the person employed, with or without wages for the period he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case."

7. The power of the appellate authority prior to the amendment will obviously be governed by the provisions as they existed prior to amendment, as the order of the appellate authority has been passed much prior to 01.04.2017, viz., on 03.06.2003. But, the question remains as to whether the learned Single Judge could have arrived at any finding of guilt on the basis of the alleged admission made by the delinquent employee. We are afraid, the learned Single Judge could not have arrived at any definite finding of facts and misconduct being made out or not, while dealing with the Writ of Certiorari under Article 226 of the Constitution of India. The findings arrived at by the learned Single Judge, in the order impugned before us, do not even prima facie appear to be definite findings of facts and the learned Single Judge merely seems to have observed or assigned them as reasons for setting aside the order of the appellate authority, which was in favour of the employee and restored the matter back to the appellate authority. Illustratively, we quote paragraphs 19 and 26 from the impugned order passed by the learned Single Judge.

" 19. At least the first Respondent could have examined himself to prove two things:- (a) that under instructions from Mr.Dhathathri he who acting in violation of the Head Office Circular fixing the ceiling limit of his disciplinary power; and (b) that the customer was so highly connected that he was obliged to do favours to him. The fact that the account of the particular customer had become a Non Performing Asset, by the time the purchases were made is not in doubt nor in dispute. Therefore it is open to the first Respondent who was working as ManagerOperations, to contend that he exceeded his discretionary powers under oral instructions from a higher authority, especially after refusing to summon him as a witness in the enquiry.

.....
.....

26. Therefore it is clear at least from the two charges which I have taken up for discussion that the findings of the Appellate Authority independently coming to his own conclusions on the charges and the explanation, is wholly perverse and arbitrary. Hence they are liable to be set aside. "

8. The observations of the learned Single Judge with the words "at least" in these two paragraphs and several other places in the order impugned before us, indicates that they are factors which have formed the basis of the learned Single Judge setting aside the order passed by the learned appellate authority and remanding the case back to the appellate authority for deciding the appeal afresh, including considering the aspects of punishment in the light of the directions given by the learned Single Judge.

9. We are clearly of the opinion that the fact finding bodies under the relevant Service Rules relating to the case in hand, are only two viz., (i) the Disciplinary Authority and (ii) Appellate Authority, having co-extensive powers with that of the Disciplinary Authority. In writ jurisdiction, the High Court is neither a second appellate court, nor a fact finding court, while dealing with the writ petitions filed under Article 226 of the Constitution of India. The powers of the Court under Article 226 of the Constitution of India are plenary and wide, nonetheless, the Court cannot substitute the appellate authority under the relevant service rules, while exercising the writ jurisdiction. Therefore, the tenor of the observations made by the learned Single Judge in the order impugned before us, which are said to be relied upon or referred as findings of fact by the learned counsel for the employer, are not really findings of facts, but are merely observations and reasons for setting aside the order passed by the appellate authority and nothing beyond that. Equally, therefore, the discretion to impose appropriate punishment by the appellate authority under the relevant rules cannot be curtailed or restricted, while setting aside such order and restoring the appeal back to the first appellate authority.

10. Therefore, we are of the opinion that, to the extent of the order of the learned Single Judge being treated as a case of partial remand or restricted remand with limited directions, leaving a narrow scope for the appellate authority, it should be treated as a whole remand, restoring the whole matter back to the appellate authority to decide the appeal de novo uninfluenced by any observations of the learned Single Judge in the order impugned before us. Both the parties, it is needless to say, will be free to raise their contentions before the said appellate authority in accordance with law. In view of the long lapse of time, we expect that the appeal before the appellate authority shall be disposed as expeditiously as possible, preferably within a period of six months from today. In the first instance, both the parties may appear before the appellate authority on 07.08.2019.

11. With the above observations, the above appeals are disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

KST

To

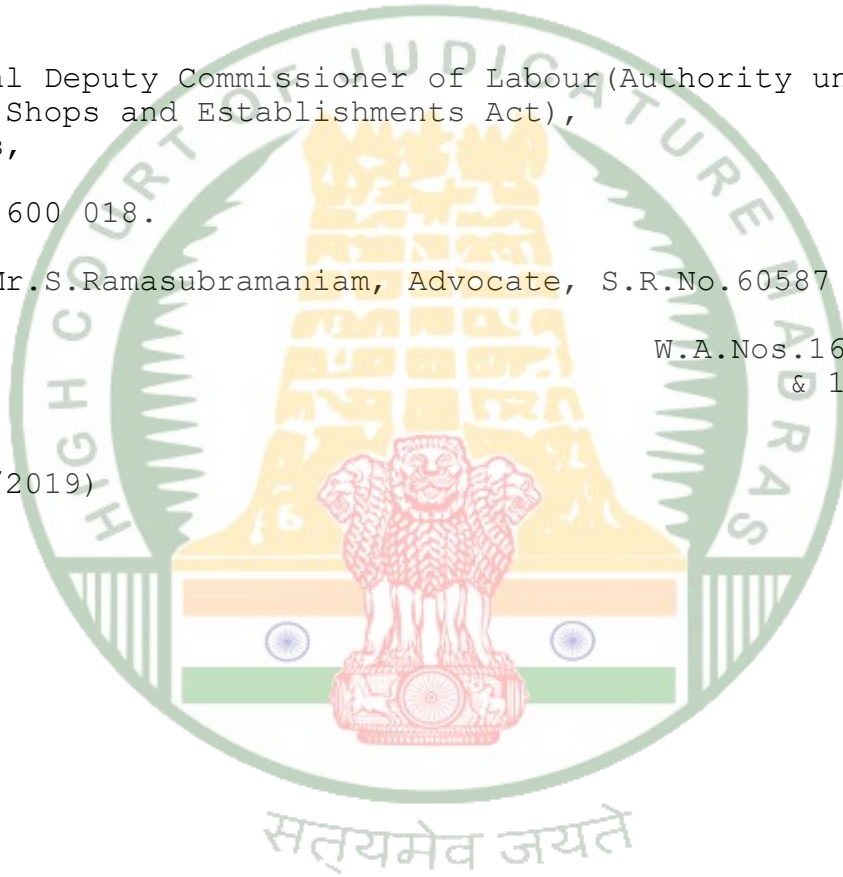
The Special Deputy Commissioner of Labour (Authority under the Tamilnadu Shops and Establishments Act),
DMS Campus,
Teynampet,
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+2ccs to Mr.S.Ramasubramaniam, Advocate, S.R.No.60587

W.A.Nos.1616 of 2014
& 145 of 2015

LN (CO)

RRS (20/08/2019)



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