

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02/02/2021

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.27881 OF 2005

AND

W.M.P.NOS.30309, 37077 AND 37078 OF 2005

AND

WVMP.No.2299 OF 2005

Tata Consultancy Services Limited,
Rep by its Vice President
11th floor, A wing
Tidal Park, Taramani, Chennai. ... Petitioner

Vs

1. J.Crossley
2. The Special Deputy Commissioner of Labour,
Appellate Authority under Tamil Nadu
Shops & Establishments Act, 1947
Teynampet, Chennai - 6. Respondents

PRAYER :

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records of the second respondent relating to the order dated 10.02.2005 in TSE 1/141/2001 and quash the same.

For Petitioner : Mr.R.Yashod Vardhan (Senior Counsel)
for Mr.Sundar Narayan

For Respondents : Mr.N.G.R.Prasad
for M/s.Row and Reddy (R1)

ORDER

The writ petition is directed against the order passed by the appellate authority under the Tamil Nadu Shops & Establishments Act, 1947, setting aside the order of termination.

2. The management is the petitioner. The first respondent was appointed by management on 16.12.1994 as Assistant System Analyst. Thereafter, his appointment was confirmed and he was deputed to Australia on 17.10.1995. Later, his services were extended for more than three years. He was promoted as Project Leader, Information Technology Analyst till June, 1999. On 10.06.1999, he came back India and worked as a project leader till 01.02.2001 at Sholinganallur and Tidel Park Offices. Thereafter, he was then deputed for a project to be executed in the United States for the petitioner's client called 'Qwest'. The post required high mental skills and constant interaction with the client. The project leader is supposed to supervise the work of the team members and give necessary guidance. However, the first respondent was not attending to the work allotted to him and his behaviour was also not proper. His performance was unsatisfactory and he became quarrelsome. In the course of employment, all the employees are supposed to submit a weekly report about their performance of work and progress of the project. The first respondent submitted a weekly status report to the petitioner's client that he was doing only the work of cleaning the mail box, sending e-mails and browsing websites. This had caused serious embarrassment to the petitioner and when an explanation was sought, the first respondent stated that he had lots of weaknesses and he would like to go back to India. Then he was brought back to India and assigned work at Tidel Park, Chennai. He did not attend the work assigned to him and lot of complaints were received that he picked up quarrel with the staff and shows gross disrespect to his superiors. The first respondent's father was also appraised the threats and abuses hurled by him. On several instances, the first respondent's misbehaviour was brought to the petitioner's notice by the staff. As the atmosphere in Tidel Park had been vitiated by his misbehaviour, he was transferred to Ambattur Office. Even after the relocation, his behaviour did not improve. He continued to threaten his colleagues in person and through e-mail. He used to threaten the staff with dire consequences and in one of his letters he called himself a terrorist.

3. The first respondent on his own went on medical leave from 01.06.2001 to 30.06.2001 to check-up his medical condition. Considering his medical condition, he was referred to in house doctor. On 08.08.2001, the consultant physician of the petitioner's medical facility declared that Neuropsychological evaluation of the first respondent showed features of anxiety, depression and a schiziform illness requiring psychiatric treatment under close psychiatric supervision. The physician also declared that the first respondent was not in fit frame of mind to continue in his job and he was unfit to work. Again, the first respondent availed medical leave from 19.08.2001 to 09.09.2001 and a day's leave on 18.09.2001. On his return, he

produced a medical certificate from Christian Medical College stating that he was being treated for emotional disturbance at that centre and he was advised to join duty a month later. Again, on 28.09.2001, the first respondent wrote to the petitioner stating that he regretted for the letters which had been purportedly written by him due to emotional disturbance. He submitted another certificate from the Christian Medical College dated 01.10.2001 stating that he was treated for emotional disturbance and he was fit to join duty.

4. The Human Resources Officer of the petitioner's company requested the first respondent to take rest as advised by the doctor. When he was counselling the first respondent, he started shouting and abusing him. The Assistant consultant who came to the aid of the Human Resources Officer was also abused. Despite the advise of the doctors, the first respondent continued to come to the office and demanded that allotment of work. There was no improvement in his behaviour and his continued presence in the office not only disrupted the functioning of the office, but also caused anxiety to the fellow employees. Despite several warnings and counselling, he had not improved, from quarrel some behaviour and violent tendencies. The medical board of the petitioner's company had also opined that the first respondent was not fit to work. Therefore, the first respondent was terminated from service on 19.10.2001 for the reasons that he failed to improve his performance and behaviour despite of being informed to do so and after being heard in person. Three months salary in lieu thereof was paid to the first respondent and the first respondent has encashed the cheques and accepted the dues stating that this was purportedly done without prejudice to his rights.

5. Against the order of termination, the first respondent preferred an appeal before the second respondent under Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947. He contended that the termination was allegedly without a reasonable cause and without holding any enquiry and that the order of termination should be set aside. He examined himself as P.W.1 and marked as Exs.A1 to A36. On the side of the petitioner/management, two witnesses were examined as R.W.1 and R.W.2 and Exs.R1 to R26 were marked.

6. After the enquiry, the second respondent has held that the petitioner/management has not established the reasonable cause and deficiencies in his performance and behaviour of the employee. Since the first respondent was terminated on the ground of deficiencies in his performance and behaviour. The termination is punitive in nature and stigma was cast on the conduct of the appellant employee. The deficiencies in his

performance and behaviour would have to be clearly and unambiguously proved. Since it was found that there was no evidence on the side of the management as well as the stated ground was for termination was not elicited even during cross examination, the termination order was set aside, as it did not disclose the reasonable cause to terminate the services of the first respondent. Aggrieved over the same, the petitioner before this Court.

7. According to the learned Senior Counsel appearing for the petitioner, the order passed by the second respondent/appellate authority, is contrary to facts and well settled principles of law. He would contend that the first respondent by himself produced a medical certificate to show that he had suffered mental disturbance and advised to take rest. During cross examination, the first respondent would categorically admit that the letters marked as Exs.R1 to R3 were authored by him. He would also admit that he had misbehaved and threatened his colleagues with dire consequences, apart from the evidence of witnesses on the side of the management. There was no cross examination insofar as the statement made by the management side witnesses to the fact that he behaved improperly, suffering from Neuropsychological illness, anxiety, depression and a schizofom illness and that not only the first respondent, but also his father was put on notice for taking treatment under close psychiatric supervision. Despite the fact stood proved, unambiguously the second respondent/appellate authority omitted to advert to the documents, as well as, oral evidence in proper perspective and held that the reasonable cause was not proved by the petitioner. He would also contend that a status reports which were marked as exhibits was admitted by the first respondent during cross examination that he sent report that he was doing the work of cleaning the mail box, sending e-mails and browsing websites. By his own admission, the first respondent himself clearly proved that the petitioner had reasonable cause for terminating his services. He would rely on the judgement of the Hon'ble Supreme Court in the case of United Planters Association of Southern India -vs- K.G.Sangameswaran reported in 1997 (1) CTC 418 for the proposition that the nature of termination, whether it is innocuous or punitive has to be determined by looking into the contents of termination order. In the judgement of the Hon'ble Division Bench of this Court in Alitalia Linee Aeree Italiane -vs- Iqbal Y Munshi reported in 2003 (3) CTC 275, the Hon'ble Division Bench has held that the order of termination need not state the reasonable cause and that the termination of service can be done without conducting prior domestic enquiry.

8. Per contra, Mr. N.G.R.Prasad, learned counsel appearing for the first respondent would contend that the first respondent

is very intelligent and meritorious person and appreciated by the petitioner. After appreciating him, he cannot be alleged as a person having mental illness. According to him, the first respondent passed BE in Civil Engineering from Regional Engineering College, Tiruchirapalli with distinction and he completed M.Tech in Management Studies from Indian Institute of Science, Bangalore with first class. Initially, he was taken into service by the petitioner for a period of 12 months. Thereafter, his services was confirmed and deputed to Australia and his deputation was extended for more than three years. He worked as a project leader and he was promoted as Assistant System Analyst and worked as a Programmer for AMP Fireman and General Insurance Systems Project (AMP) and on return from Australia, he worked as a Project Leader from 10.06.1999 to 01.02.2001. On appreciation of his service, he was awarded with an annual compensation for best performance vide Ex-A5. Due to his efficiency and skill, he was deputed to United States on project work with M/s.Net Work Legacy Maintenance. However, he returned to India because of his health condition. Such is the efficiency and performance of the first respondent. Suddenly, the first respondent was not allotted with work at Tidel Park, Chennai. Therefore, he is suffered loneliness and depression due to non-allotment of work. This would naturally force any employee to go on leave. Even for, on 28.06.2001, he was given annual compensation for best performance vide Ex-A7. Even thereafter, he was not allotted any work and was referred to Apollo Medical Centre to examine his health status and again he was forced to go on leave from his post continuously. Despite his request for allotment of work, he was not allotted and therefore, he obtained a medical certificate from Christian Medical College, Vellore, where the doctor opined that the first respondent is fit to work and recommended to keep him in the petitioner company with normal duties. Despite the same, work was not allotted and salary was not paid. Therefore, he caused a legal notice on 19.01.2001 against his termination from service. The first respondent thereafter joined another software company which shows that the first respondent is in good mental condition and an efficient person and therefore, the termination order shall be declared as bad. He would further contend that the termination order should specifically disclose a reasonable cause as to what are the deficiencies in his performance, behaviour and misconduct, but nothing has been disclosed in the termination order. Therefore, the authority has rightly come to the conclusion that the order of termination is a punitive in nature without clearly establishing cause and he would pray that the order passed by the appellate authority under the Tamil Nadu Shops and Establishments Act, 1947, shall be confirmed without interference. He further advanced that under Section 41(3) of the Tamil Nadu Shops and Establishments Act, 1947, the order of the appellate authority is final, cannot be interfered under

Article 226 of the Constitution of India, this Court has no jurisdiction to analyse the evidence adduced by the parties. Therefore, he would pray the order passed by the appellate authority be confirmed.

9. I have considered the rival submissions.

10. The admitted facts are that the first respondent is a Post Graduate Engineer and was appointed in the year 1994 and continued with the petitioner's company and confirmed his services and promoted to the post the Assistant System Analyst and deputed to Australia and United States of America. Till 22.05.2001 there was no problem. The issue arose only when the first respondent sent status reports dated 05.05.2001 and 12.05.2001 followed by a communication dated 17.05.2001. The status report dated 05.05.2001 marked as Ex-R1 reveal that the first respondent reported that his work was in the nature of cleanup of mail box, sending e-mails and status report preparation. Again, the status report dated 12.05.2001 marked as Ex-R2, it is reported by him that he was working the job of cleanup of mail box, sending e-mails, status report preparation and browsing internet site like www.samachar.com, www.oprah.com etc. It is also noted that vide Ex-R3, the first respondent had sent a communication that he was planning to go back to India due to his personal problems and that he had lot of weaknesses. During cross examination, it was categorically admitted that the weekly status report vide Exs-R1 and R2 was sent by him stating that his work involves cleanup of mail box, sending e-mails, status report preparation and browsing internet site like www.samachar.com, www.oprah.com etc. The communication sent vide Ex-R3 was also been categorically admitted by him that because of is personal problem and on his own volition he wanted to return to India and he would further reiterate that he has lot of weaknesses. In the cross examination, he would also admit that Dr.Prakash, Dr.Sheshadri and Dr.Jacob K.John have opined that he was suffering from neuropsychological illness, anxiety, depression and a schizoforn illness, he was unfit to work, but disagreed with the contents of the report. Likewise, he would admit to the fact that the certificate issued by Dr.Ravishankar, Christian Medical College, Vellore, for treating him for emotional disturbance. It is to be noted that the certificate issued by the said Doctor vide Exs-A10, A11, A14, R17 and R19 were marked as exhibits by the first respondent himself. All these documents and admission made by the first respondent clearly go to show that he was suffering from some mental ailment and that he needed neuropsychological treatment under close supervision. In fact, the report given by consultant physician of the petitioner that the above ailment required psychiatric treatment and the fact was informed to the first respondent as well as his father that he shall undergo treatment

under close supervision. It also reveals that the first respondent and his father were advised to take treatment by any psychiatrist of their choice. Further, letters sent by the first respondent vide Exs-R5 and R7, shows that he was suffering from acute psychosis and the fact that the appellant had sent letters to his colleagues was admitted by him during cross examination. Therefore, it is admittedly clear that the first respondent had suffered from acute psychosis and then his behaviour with his colleagues was not normal. The evidence of R.W.1 and R.W.2 regarding the illness and quarrelsome behaviour of the first respondent stand unimpeached even after cross examination.

11. Insofar as the discrepancies and performance are concerned, it is proved by the weekly status report sent by the first respondent vide Exs.R1 and R2 and its admission, during cross examination. However, the appellate authority has arrived at a finding that the petitioner has failed to establish that the performance and behaviour was not proved. The said finding without considering the available evidence, is perverse.

12. Insofar as the contention that no charge memo was issued by the petitioner before issuing the order of termination is concerned, Section 41 of the Tamil Nadu Shops and Establishments Act, 1947, reads as under:-

"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 months 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 be 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."

13. A reading of Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 mandates that employee shall be dispensed with the services without a reasonable cause and without giving such person atleast one month's notice or wages in lieu of notice.

14. In the instant case, the impugned order of termination clearly spells out his performance and behaviour was appraised/reviewed from time to time and deficiencies in performance and behaviour was brought to his notice of by his superiors. In spite of the first respondent being heard in the matter personally for appraisal of deficiencies and advised to improve his conduct, it was of no avail and therefore his services is terminated. The reasonable cause has been informed to the first respondent which was admitted by him. After notice to him, his services was terminated for the reasons explained to him and three months wages in lieu of notice was also paid to him and the cheque was encashed by the first respondent without prejudice his right. It shows that the requirement of Section 41 (1) of the Tamil Nadu Shops and Establishments Act, 1947 has been complied with. It is not the case of misconduct but the termination in view of the reasonable cause shown by the management.

15. The Hon'ble Supreme Court in the case of United Planters Association of Southern India -vs- K.G.Sangameswaran reported in 1997 (1) CTC 418 has held as under:-

"9. The nature of the order, whether it is innocuous or punitive, is exhibited by the contents of the order. The order dated 5.7.1994, by which the respondent was dismissed from service, recites, inter alia, as under :

1 ...

2. On a consideration of the contents of the letters referred to above as well as the relevant evidence, (viz.) documents referred to in the Notice dated 18th January 1994, it is clear that you are guilty of the misconducts alleged against you and it is found accordingly. Considering the gravity of the misconducts committed by you, particularly, in the light of the position of trust and responsibility that you hold as Accountant, it is decided to dismiss you from service forthwith.

3 ...

4. It may be noted that this is without prejudice to the right of the Association to pursue criminal proceedings initiated against you as well as to recover the amounts lost by the Association pursuant to the misappropriation and other acts committed by you as also due to your gross and criminal negligence. It may also be noted that in view of the nature of the misconducts committed by you and the loss suffered by the Association, consequent to the same, you will not be entitled to any gratuity from the Association."

16. In the judgement, it is held that the nature of order of termination whether it is innocuous or punitive can be determined by looking into contents of termination order. In the instant case, it has been proved that the first respondent was suffering from mental ailment, he could not discharge his duties properly and that he created disharmony in the office and threatened abused his colleagues and superiors. The Hon'ble Supreme Court has also observed that the appellate authority has jurisdiction to record evidence and come to its own conclusion. Insofar as the finding of the appellate authority that reasonable cause has not been disclosed in the termination order is concerned, the Hon'ble Division Bench of this Court in *Alitalia Linee Aeree Italiane -vs- Iqbal Y Munshi* reported in 2003 (3) CTC 275, has held that it can be done without conducting any domestic enquiry, an employee can complain of non-disclosure of reasonable cause before the appellate authority. In the said judgement, the Hon'ble Division Bench has observed as under:-

"23. ...In the present case, we are not dealing with the labour jurisprudence. In fact, the respondent herein was in the managerial position. He cannot claim the same insulation as is available to an ordinary workman. In *United Planers* case also the concerned person was not a 'workman' but an 'accountant' and yet the Supreme Court came to the conclusion that the misconduct could be proved for the first time before the appellate authority independently of the findings of the enquiry, if held, and even if no enquiry is held, the said exercise could be done before the appellate authority. If under the beneficial legislation like the Industrial Disputes Act in case of an ordinary workmen also if the dismissal is brought about without holding an enquiry, the misconduct can be proved before the Tribunal then, there should be really no reason why in case of a better placed person than a workman such exercise should not be possible.

24. It can be seen in all the earlier quoted High Court decisions, there is a presumption that the dismissal order must be in writing. In the first place, there is no such requirement under Sec. 41 of the Act that the dismissal order should be in writing. Like any labour jurisprudence, the dismissal could be even in oral. In that case, the ratio laid down in the above quoted High Court decisions would be of no consequence. Though ordinarily, this factor would have been an insignificant factor, in the backdrop of *United Planters* case, turning on labour jurisprudence, this factor will be a significant one - at least in the

facts of the present case. Suppose, an employer, as in the present case, brings about the termination or dispensation of the service of an employee orally without passing any orders but for a reasonable cause and an appeal is filed against such action of dispensation of service - indeed such an appeal can be filed against any dispensation of service which need not be a written order - it would undoubtedly be possible for the employer to firstly admit that he has dispensed with the services of the employee and then to prove the reasonable cause therefor. It cannot indeed be argued that such dispensation, if effected orally, is not appealable. The appeal is against the dispensation with the services necessarily not only against the order bringing about the dispensation with the services. For this reason also, the law laid down by the earlier quoted High Court decisions would have to be held to have been eclipsed by the judgment of the Supreme Court in United Planters case.

25. In this case, there can be no doubt that the respondent had the full idea as to the reason why he was terminated. In fact, he himself had resigned and then chosen to withdraw the same. On the heels of the withdrawal of that resignation, came the termination order. The justification for which was ultimately pleaded in the appeal when the appellant decided to challenge the termination order on merits rather than on the technicalities. When we see the order of the appellate authority, it is clear that he has given a specific finding that the termination was brought about for the misconduct on the part of the employee. He, however, refused to go into that question and skirted the same by holding that the said misconduct was not proved in the previous enquiry. That is the only reason why he proceeded to allow the appeal. In the wake of the law in the United Planters case, that was obviously not permissible. There was evidence allowed before him of the misconduct and he was bound to consider whether there was any misconduct on the part of the respondent. The appellate authority not having done that, it would have been better had the learned single Judge instead of confirming the order remanded the matter to the appellate authority for reconsideration on that aspect. We would choose to do the same thing. However, we would direct that it shall be open for the parties to lead fresh evidence. The opportunity to cross-examine the witnesses would have to be given to both the parties and it will be thereafter for the appellate authority to consider whether firstly misconduct was committed by

the employee and secondly, whether the employer was justified in taking the action that he did."

17. It only remain to deal with Section 41(3) of the Tamil Nadu Shops and Establishments Act, 1947, wherein it is noted that the order of the appellate authority is final and binding. However, when an order is passed without considering the evidence and based on no legal evidence, it shall be construed as a perverse order. In the instant case, though overwhelming evidence and specific admission made by the delinquent by himself the appellate authority without considering the same and without applying his mind has held that there is no reasonable cause and the petition has not proved the case. Such an order shall be declared as perverse. In such circumstances, the order can be interfered under Article 226 of the Constitution of India. The order, as such, on the basis of above findings the impugned order passed by the second respondent is liable to be set aside and accordingly set aside.

In the result, the writ petition is allowed. No Costs. Consequently, the miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dm

To

The Special Deputy Commissioner of Labour,
Appellate Authority under Tamil Nadu
Shops & Establishments Act, 1947
Teynampet, Chennai - 6. सत्यमेव जयते

+1cc to M/s.Row and Reddy , Advocate, S.R.No.5248

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AND WVMP.No.2299 OF 2005

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