

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**M.A.T. 627 of 2024
IA NO: CAN 1 of 2024**

**SURESH GOPE
VS.
FOOD CORPORATION OF INDIA & ORS.
WITH
MAT 628 of 2024
+
CAN 1 of 2024**

**PARAMESHWAR RAM
VS.
FOOD CORPORATION OF INDIA & ORS.
WITH
MAT 629 of 2024
+
CAN 1 of 2024**

**SUSHILA DEVI
VS.
FOOD CORPORATION OF INDIA & ORS.
WITH
MAT 630 of 2024
+
CAN 1 of 2024**

**NILAMANI DAS
VS.
FOOD CORPORATION OF INDIA & ORS.**

For the Appellants : Mr. Soumya Majumder, Advocate
 Mr. Dwaipayan Sengupta, Advocate
 Ms. Sanjukta Dutta, Advocate
 Mr. Barnomoy Basak, Advocate

For the Respondents : Mr. Devajyoti Barman, Advocate
 Ms. Sanjukta Basu Mallick, Advocate

Hearing on : 28.06.2024

Judgment on : 28.06.2024

DEBANGSU BASAK, J.:-

1. Four appeals are taken up for analogous hearing as they are between the same employer and its dismissed employees and involves similar issues.
2. Appeals are at the behest of the dismissed workmen and directed against the order dated February 29, 2024 passed in writ petitions filed by them.
3. By the impugned orders, the learned Single Judge dismissed the writ petitions on the ground of availability of statutory alternative remedy to the appellants/writ petitioners.
4. Learned advocate appearing for the appellants submits that, writ petitions are not maintainable notwithstanding the availability of a statutory alternative remedy particularly, when the writ petitioners are able to establish either breach of principles of natural justice or breach of fundamental rights or where the impugned order is arbitrary or wholly without jurisdiction.

5. Learned advocate appearing for the appellants draws the attention of the Court to the disciplinary proceedings held as against his client. He submits that, in the enquiry proceedings on the first date, prosecution witnesses were examined. Request for adjournment was made on behalf of the appellants as defence assistance not available to the appellants in the enquiry proceedings. Defence assistance made available to the appellant raised objection with regard to the cross-examination of the prosecution witnesses on the second date. The authorities did not decide on the objections on the second date of the enquiry but passed a detailed order subsequently rejecting the objections with regard to the cross-examination. Thereafter, in the enquiry, the appellants were not allowed to cross-examine any prosecution witnesses. In fact, in the second order, the enquiry authority stated that, no prosecution witnesses will be made available for cross-examination.

6. Learned advocate for the appellants relies upon **(2023) 2 Supreme Court Cases 703 (M. P. Power Management Company Limited, Jabalpur versus Sky Power SouthEast Solar India Private Limited & others)** in support of the contention that, notwithstanding availability of statutory alternative remedy, writ petition is maintainable when, the action of the State is arbitrary.

7. Learned advocate appearing for the respondents submits that, the appellant was dismissed from service. Dismissal from service is a dispute within the meaning of Industrial Disputes Act, 1947. Appellant should

approach the appropriate authority under the Act of 1947 for redressal of the grievances, if any. He relies upon **(2021) 3 Supreme Court Cases 108** *(State of Uttarakhand & ors. Versus Smt. Sureshwati)* in support of the contention that, even if there is no enquiry or enquiry is defective, the employer is entitled to lead evidence with regard to the same before the Industrial Tribunal. Therefore, the learned Single Judge did not err in exercising discretion in dismissing the writ petition on the ground of availability of statutory alternative remedy to the appellant.

8. Relying upon **(1996) 3 SCC 364** *(State Bank of Patiala & ors. Versus S. K. Sharma)* learned advocate appearing for the respondents submits that, complaint of non observation of procedure rule governing a disciplinary proceeding should be tested on the ground as to whether, non-compliance was in respect of the fundamental provisions or not. He draws attention of the Court to the various paragraphs of such report and submits that, in the facts and circumstances of the present case, the appellants were allowed to right to cross-examine the prosecution witnesses twice. On the first date, they sought an adjournment on the ground of non-availability of the defence assistance which was allowed. On the second date, defence assistance although, being present did not proceed with the cross-examination. Thereafter, the enquiry officer decide not to direct the prosecution witnesses to be present in the enquiry for the purpose of cross-examination as no further request for cross-examination of the prosecution

witnesses was made by the appellants. Consequently, he submits that, there is no breach of principles of natural justice as alleged by the appellants.

9. Since facts of the four appeals are similar, it would be appropriate to advert to the factual motion of MAT 627 of 2024. Appellant was an employee of the first respondent herein. A transfer order was issued to the appellant on February 9, 2022. Appellant along with others agitated before the Divisional Manager on April 5, 2022 with regard thereto. Appellant, however, joined his transferred post on June 8, 2022. Thereafter, appellant was placed under suspension on July 29, 2022. A show-cause notice was issued to the appellant on August 11, 2022. Appellant replied thereto on August 25, 2022 denying the charges levelled and prayed for exoneration from the charges.

10. Notice was issued to the appellant on August 30, 2022 for preliminary hearing in the departmental enquiry. First date of preliminary enquiry was fixed on August 31, 2022. Due to paucity of time, appellant was not in a position to engage a defence assistance although entitled to do so. However, appellant attended the preliminary hearing on August 31, 2022 and expressed his desire to engage a defence assistance. Appellant engaged defence assistance on September 2, 2022. Such engagement of defence assistance was accepted by the authorities on September 14, 2022.

11. Regular hearing of the enquiry was fixed on September 22, 2022 by a notice dated September 20, 2022. Appellant came to know on September 21, 2022 that, the defence assistance was out of station and therefore requested for postponement of enquiry proceeding. Enquiry Officer held the first

hearing on September 22, 2022 and passed an order with regard thereto. Prosecution witnesses was tendered and examined during such hearing. Enquiry Officer fixed the second hearing on September 26, 2022 by a notice dated September 24, 2022. Thereafter, the enquiry officer deferred the hearing and refixed the same on September 27, 2022.

12. Second hearing of the inquiry was held on September 27, 2022 where, defence assistant of the appellant was present. Inquiry Officer recorded that no cross examination was undertaken, as about nine objections were raised on behalf of the appellant.

13. Significantly, the objections raised during the second hearing were not decided upon immediately. Inquiry Officer passed an order dated September 29, 2022 with regard to the objections raised. Inquiry Officer proceeded to negate all objections raised. Thereafter Inquiry Officer, by a writing dated September 29/30, 2022 informed the appellant that, no further prosecution witnesses will appear before the Inquiry Officer and since the appellant did not submit any list of defence witnesses, the regular hearing was concluded.

14. Facts as narrated above demonstrate that, prosecution witnesses were examined during the inquiry. Appellant, as the delinquent, exercised his right to cross-examine such prosecution witnesses. Appellant raised objections with regard to the cross-objection, which were accepted by the Inquiry Officer by his order passed subsequent to the date on which such objections were raised. It is not a case that the objections raised were decided immediately and the appellant was asked to continue with the cross-

examination. Inquiry Officer concluded the hearing without the prosecution witnesses being cross examined.

15. Facts narrated above demonstrates that, despite the appellant exercising his right to cross-examine prosecution witnesses, he was not allowed to do so.

16. **M.P. Power Management Company Limited (supra)** delves into and explains what constitutes arbitrariness within the Article 14 of the Constitution of India. It also recognises the scope of judicial review on the ground of arbitrariness, vis-a-vis, the availability of alternative remedy. It is of the view that, despite availability of statutory alternative remedy, a writ petition under Article 226 of the Constitution of India is maintainable in the event, the action or inaction of the State as mired with arbitrariness.

17. We are of the view that, existence of alternative remedy or even statutory alternative remedy is not a complete bar to the Court exercising jurisdiction under Article 226 of the Constitution of India. Notwithstanding the existence of alternative remedy, or statutory alternative remedy, as the case may be, a writ petition is maintainable in the event, the writ petitioner is able to canvass and establish that, fundamental rights of the writ petitioner stands violated or the action or inaction of the State authorities were tainted with arbitrariness or were perverse or authorities acted without jurisdiction or the authorities were guilty of breach of principle of natural justice.

18. In the facts of the present case, it is the contention of the appellants that, principle of natural justice stood breached by the Inquiry Officer closing the inquiry proceedings without affording an opportunity of cross-examination of the prosecution witnesses. In our view, every witness, in any proceedings, examined by a party, should be allowed to be cross-examined by the adversarial party. Unless the party examining its witness allows such witness to be cross-examined the evidence in chief of such witness cannot be taken into consideration to decide any issue in the lis between the two parties. It is not a question of the adversarial party requesting for cross-examination of the witness examined by a party but it is the obligation of the party examining such witness to offer the witness for cross-examination to the adversarial party. Once such witness is offered for cross-examination, it is open to the adversarial party to either proceed with the cross-examination or to deny cross-examination. Offer of cross-examination is a sine quo non for the evidence in chief to be taken into consideration.

19. In the facts of the present case, although the prosecution witnesses were present at least on the second date of the inquiry for the purpose of cross-examination, they were not cross-examined in view of the objections raised on behalf of the appellant. Objections raised were not decided in the inquiry proceedings itself. Appellant was not asked to continue with the cross-examination of the prosecution witnesses after the objections raised being over-ruled. Rather, in the facts of the present case, the decision on the objections raised came at a later date. Thereafter, no prosecution witnesses

were placed before the appellant for cross-examination. In fact, the Inquiry Officer by his writing, as noted above, proceeded to direct that, no prosecution witnesses would be present for the purpose of cross-examination.

20. **State Bank of Patiala & Ors. (supra)** is of the view that, invalidating an action or a decision of the authorities on the ground of mere technical violation of the principles of nature justice would not be justified. It notes that, there is difference between a person being denied an opportunity to cross-examine the witness and an adequate opportunity to do so. It observes that, where, regulations governing the disciplinary proceedings are of substantive nature and is required to be complied with then, theory of substantial compliance is not available. If the Regulations contain procedural provisions, some of such procedural provisions may be of fundamental nature, non-compliance of which cannot be explained on the ground of substantial compliance. However, in respect of procedural provisions other than those of fundamental nature, theory of substantial compliance is available.

21. Right of cross-examination is fundamental. It can be waived by the party entitled to it. However, the party entitled to it must be granted reasonable opportunity to exercise it. As noted above, the adversarial party is required to be offered cross-examination of the witness examined by the party. In the facts of the present case, the same was not done. It is also trite law that, mere breach of a principle of natural justice, without any prejudice

being caused, is no ground to set aside an order of the authorities. Again, in the facts of the present case, denial of the right of cross-examination was undoubtedly prejudicial as the proceedings culminated into orders of dismissal from services on the basis of evidence in chief of prosecution witnesses. Denial of right of cross of examination being established, prejudice stands established consequently.

22. **Sureshwati (supra)** is rendered in a suit and a decree passed therein. A disciplinary proceeding was the subject matter of challenge in such suit. In such context, the Supreme Court held that, it would be open to the employer to justify the action taken. In the facts of the present case, challenge thrown in the writ petition is from the stage of the inquiry.

23. One of the contentions raised by the respondents is that, the learned Single Judge exercised discretion in not admitting the writ petition on the ground of availability of statutory alternative remedy. Discretion available to the Court is required to be exercised in accordance with law. As noted above, existence of statutory alternative remedy is not a complete bar to the exercise of jurisdiction under Article 226 of the Constitution of India. In the facts of the present case, breach of principles of natural justice causing prejudice to the appellant stands established.

24. In the facts of the present case, although disciplinary proceedings culminating into an order of dismissal, we are of the view, it would be in the interest of justice that disciplinary proceeding is allowed to be continued

from the stage of the second regular hearing dated September 27, 2022, that is to say, the objections with regard to the cross-examination stands overruled by the authorities. Prosecution will place the prosecution witnesses examined in such inquiry, for the purpose of cross-examination on the next date fixed. Appellants will be allowed opportunity to cross-examine such prosecution witnesses. All steps subsequent to the order dated September 27, 2022 in the disciplinary proceedings including the order of dismissal from service are set aside.

25. MAT 627 of 2024, MAT 628 of 2024, MAT 629 of 2024 and MAT 630 of 2024 along with all connected applications are disposed of without any order as to costs.

26. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

27. I agree.

(Md. Shabbar Rashidi, J.)