(1987) 12 KL CK 0026

High Court Of Kerala

Case No: None

Ananthakrishnan		APPELLANT
	Vs	
Oriental Fire and General Insurance Co. Ltd.		RESPONDENT

Date of Decision: Dec. 10, 1987

Acts Referred:

- Constitution of India, 1950 - Article 226, 311

Citation: (1988) 2 LLJ 526

Hon'ble Judges: Sreedharan, J; Paripoornan, J

Bench: Division Bench

Judgement

Sreedharan, J.

Petitioner was working as Assistant Branch Manager at the Trichur Branch of the first respondent Company. Disciplanary action was taken against him. He was served with memo of charges and statement of the imputation of misconduct or misbehaviour. An enquiry was held into the charges as provided by Rule 25 of the General Insurance (Conduct, Discipline and Appeal) Rules, 1975, (hereinafter referred to as "the Rules"). The Enquiry Officer found the petitioner guilty of the charges. On the basis of the enquiry report, the Assistant General Manager by Ext. P 5 order dated 13th January 1979 imposed a major penalty of removal from the service. The said order further provided for recovery of the financial loss sustained by the Company from out of the amounts payable to the petitioner by way of Gratuity and other amounts. The order Ext. P 5 was taken up in appeal before the General Manager as provided by Rulc31 of the Rules. By Ext. P 7 dated 6th August 1979, the Appellate Authority dismissed the appeal. Against the said decision the petitioner preferred a memorial before the Chairman-cum-Managing Director as provided by Rule 40 of the Rules. The memorial was disposed of by Ext. P 10 order dated 19th May 1980. By that order the petitioner was reinstated in service without exonerating him of the charges proved in the enquiry, on condition that the

reinstatement will come into effect only on his reporting to duty, that his services will stand transferred to Mangalore Divisional Office as A.A.O. (A), that the basic salary will be downgraded to the lowest stage in the time-scale, that pecuniary loss caused to the company which may be due from the petitioner will be recovered, that the period between the date of removal from service and the date of reinstatement will be treated as period under suspension and the petitioner will be entitled to subsistence allowance at the rate of 75 per cent and that no other benefit will accrue to him between the dates of removal and reinstatement as the said period will not qualify for any benefit whatsoever. The petitioner challenges Exts. P 5. P 7 and P 10 orders and also Ext. P 1 notice informing about the enquiry into the misconduct alleged against the petitioner and Ext. P 4 report filed by the officer who conducted the enquiry.

2. The main ground of attack against the orders Exts. P 5, P 7 and P 10 are that the disciplinary actions were not initiated by a competent authority prescribed in the Rules, that Ext. P 1 memorandum was issued by the Manager of the Regional Office at Madras, that he had no authority to issue such a memorandum or to initiate any disciplinary action against the petitioner for imposition of a major penalty, that all proceedings which followed in pursuance to Ext. P 1 are void as init is and that Ext. P 5 order removing the petitioner from service based on the enquiry report which is null and void cannot have any legal validity. It is the further contention of the petitioner that the Appellate Authority while disposing of the statutory appeal by Ext. P 7 did not consider the various points urged before it and that disposal was by a laconic order. The petitioner proceeded to state that the Chairman-cum-Managing Director also did not advert to the various aspects urged in the memorial while passing Ext. P 10 order. On these grounds it is argued that the original petition has only to be allowed.

3. A detailed counter affidavit has been filed on behalf of the respondents. The contentions raised therein are that Ext. P 1 charge memo was issued after a proper enquiry into the charges mentioned therein, that the enquiry officer submitted Ext. P 4 report, that further orders have been passed based on that report, that if the final and operative order, namely, Ext. P 10, is free from any infirmity, then the petitioner cannot ask for quashing the charge memo or the enquiry officer''s report, that the misconduct committed by the petitioner was in relation to the period from 31st December 1974 to 2nd January 1975, that the said charge memo and annexure were issued under the signature of the Manager, Southern Region of the 1st respondent Company, that the petitioner took part in the enquiry, that witnesses were examined in his presence, that he cross-examined them, that he examined two witnesses on his side, that he submitted a written brief after recording the evidence was concluded, that the enquiry officer took note of all relevant matters, that out of a sum of Rs. 13,098.49/- the petitioner remitted Rs. 7,600/-and the balance of Rs. 5,498.49 was ordered to be recovered, that the Appellate Authority came to the conclusion that there was no ground for interfering with the order passed by the

original authority, that the petitioner did not question the competence of the Manager to issue memo of charges or to appoint the enquiry officer, that after having answered the charges and after having submitted to the jurisdiction of the enquiry officer, it is not open to him to question the legality of the procedure in a proceeding under Article 226 of the Constitution, that the petitioner had full and effective opportunity to cross-examine the witnesses and to let in evidence in support of his defence, that the provisional authority took into consideration all the aspects while passing Ext. P10 order, that the orders passed by the Disciplinary Authority and Appellate Authority have merged in the revisional order and that the petitioner can succeed only if Ext. P 10 is found to be defective on all or any of the causes mentioned by the petitioner. Since the revisional authority had properly considered all the aspects of the matter, Ext. P 10 is not open to challenge and that the petitioner is not entitled to any of the reliefs.

4. The main ground of attack levelled against the proceedings initiated by the respondent is that the officer who issued Ext. P 1 memo of charges was not the competent authority under the Rules. It is the admitted case of the parties that the enquiry and the proceedings taken against the petitioner are governed by the provisions contained in the above said Rules.

5. The schedule to the Rules was amended by Circular No. H.O. 7/77 dated 28th March 1977. By the amendment the categories of employees in the cadre of Assistant Administrative Officers were brought within the disciplinary jurisdiction of the Managers for imposition of a minor penalty and within the jurisdiction of Assistant General Manager in the case of imposing a major penalty. It is common case that proceedings were initiated against the petitioner after the amendment dated 28th March 1977 and that the petitioner was proceeded against for the imposition of a major penalty. It is also admitted that the penalties imposed by Exts. P 5, P 7 and P 10 are those coming within the category of major penalties.

6. Since the proceedings for imposition of major penalties were initiated against the petitioner in pursuance to Ext. P 1 dated 14th February 1978, it is contended that the competent authority for taking the action was the Assistant General Manager. Ext. P 1 was issued by the Regional Manager of the Company. The legal position is that actions should have been initiated by the Assistant General Manager, the competent authority under the Rules. This fact stated in paragraph 2 of the Original Petition, has not been controverter in the counter affidavit. What the respondents stated in paragraph 11 of the< counter affidavit is:

In paragraphs 2 to 4 the petitioner has referred to the provisions of the General Insurance (Conduct, Discipline and Appeal) Rules, 1975 as amended from time to time. It is not necessary to traverse the statements made therein since they are all matters of record.

Thus, it is admitted by the respondents that the competent authority to initiate proceedings against the petitioner was the Assistant General Manager and not the Manager.

7. The respondents, in paragraph 13 of the counter affidavit admit that the charge memo was issued by the Manager. Southern Region, Madras and that it was he who appointed the Enquiry Officer as well as the Presenting Officer. But their stand is that since the petitioner did not question the competency of the Manager to initiate proceedings before the Enquiry Officer or before the Appellate Authority he should not be allowed to raise that objection in this proceeding under Article 226 of the Constitution. It is true that the petitioner did not challenge the competency of the Manager who sent Ext. P 1 to initiate disciplinary proceedings either before the Enquiry Officer or before the Appellate Authority. For the first time this contention was raised in the memorial submitted to the Chairman-cum-Managing Director. Will this situation disentitle the petitioner from raising the competency of the officer who initiated the disciplinary proceedings before this court?

8. In paragraph 9 of the Original Petition the petitioner has made the following statement:

At the outset this petitioner had requested for the relevant Rules. A copy was made available, but not the amendments of 1977.

This statement of the petitioner has not been denied by the respondents in their counter affidavit. It was only by the amendment brought out on 28th March 1977 the competent authority to initiate action against the Assistant Administrative Officers for imposition of major penalties was specified as Assistant General Manager. When the petitioner requested for a copy of the Rules, he was served with one which did not contain the amendment of 1977. So he was not aware of the change in the competent authority brought out by the amendment of 1977. Thus, he was prevented from raising the competency of the authority which issued Ext. P 1. It was the direct consequence of the act done by the respondents. After having withheld the Rule which was in force at the time of Ext. P 1, the respondents cannot be allowed to urge that the petitioner should be non-suited because he did not dispute the authority of the Manager to issue Ext. P 1. The failure on the part of the petitioner to raise the objection regarding the defect of lack of jurisdiction of the Manager to initiate action before the Enquiry Officer or the Appellate Authority cannot, on the facts of this case, disentitle him to put forth the same before this Court in this proceeding. It cannot be said that there is a general rule that in every case in which objection to the jurisdiction had not been taken before the primary authority, no relief should ever be granted in exercise of the discretionary power vested in the High Court under Article 226 of the Constitution. Whether the conduct of a petitioner disentitles him to any relief under Article 226 of the Constitution will depend on the facts of each case. Decisions are to the effect that it is not open to a party to raise for the first time in proceedings for the issue of certiorari to question

the jurisdiction of subordinate tribunal unless he has challenged the jurisdiction before that tribunal itself. The exemption to this rule has also been recognised in circumstances where when the party satisfies the court that he was unaware of the circumstances which would have put him on an inquiry as to the lack of jurisdiction of the subordinate tribunal. The effect of this is that if the party who prays for the issue of a writ of certiorari was not aware of the lack of jurisdiction of the subordinate tribunal, he will not be barred from challenging the jurisdiction or competence of the tribunal in a proceeding under Article 226 of the Constitution. If the circumstances were such that the party who prays for the issue of writ of certiorari had no possibility of coming to know of lack of jurisdiction of the subordinate tribunal when the proceedings were pending before it, he will not be prevented from questioning the jurisdiction of that Tribunal before High Court. Thus, it cannot be said that in every case in which objection to jurisdiction had not been taken before tribunal, no relief should ever be granted in exercise of the discretionary powers vested in the High Courts. How far the conduct of the petitioner has disentitled him to any relief would depend on the facts of each case. If reasonable explanation is given for not taking any objection to the jurisdiction before tribunal that can be accepted by the High Court and relief would be granted by way of certiorari. (Vide Division Bench decision in Section Kumaraswamy Reddiar v. Noordeen and Ors. (1960) KLT. 778. This legal position has been reiterated by another Bench in Anantha Mallan v. Commr. of Agrl. Income Tax and Ors. (1961) KLT 980. The Division Bench observed:

The learned Advocate General has argued that as the petitioners had not objected to the exercise of the jurisdiction by the Commissioner, these petitions should be dismissed and in support he has relied on Kumaraswami Reddiar v. Noor-deen (1960) KLT. 778: wherein one of us had held that, if a party armed with an objection fails to raise it at the appropriate time and allows the proceeding to continue, that would preclude the person from invoking the jurisdiction under Article 226. The Rule, however, is subject to relaxations and one such relaxation is to be found in Arunachalam v. Southern Roadways Ltd. (AIR) 1958 Mad 236. Therefore, should the failure be attributed not to negligence, it would not be fatal. As there has been no prior decision nor any pronouncement by this Court on this point and as legal advice, which is now available to the writ petitioners, was not forthcoming before the Commissioner, the omissions to object to the jurisdiction are not difficult to explain. In these circumstances, we feel there had not been such negligence in these cases, as would justify the writ petitioners becoming disentitled to relief under Article 226. The cases before us, we feel, are similar to Arunachalam''s case (AIR) 1958 Mad 236 and we respectfully agree with the principle laid down therein.

In the case before us the petitioner could not dispute the competency of the officer who initiated the proceedings before the Enquiry Officer or the Appellate Authority, because he was not aware of the same then and the respondents supplied to him the old set of Rules which did not contain the amendment brought out in 1977.

Therefore, we do not find any substance in the contention raised by the respondents.

9. Yet another argument advanced by the respondents is that the petitioner cannot now be allowed to challenge the enquiry because it was held in compliance with the principles of natural justice, that the petitioner was afforded sufficient opportunity to cross-examine the witnesses examined on the side of the company, that all documents relied on by the Enquiry Officer were made available to the delinquent officer, that the delinquent officer examined defence witnesses as well and that after the close of the recording of evidence the officer submitted a written brief controvert the points brought out by the presenting officer. In such a situation, it is argued that the report submitted by the Enquiry Officer or the orders which were issued by the Disciplinary Authority, Appellate Authority and the Revisional Authority are not open to challenge. We are not impressed with this argument. As found earlier the entire proceedings were initiated at the instance of an incompetent authority. Those proceedings cannot become valid on account of the fact that the enquiry was held in conformity with the principles of natural justice. In this view of the matter the mere compliance with the principles of natural justice will not cure the complete lack of jurisdiction of the authority which initiated the proceedings. Therefore the sufficiency or otherwise of the material collected by the Enquiry Officer to find the petitioner guilty of the charges is not a matter to be looked into by us at this stage. Sufficiency or otherwise of the evidence is not a matter to be scrutinised by this Court in a proceeding under Article 226 of the Constitution. This Court is not to sit in judgment over the decision arrived at by the authorities below or to reappreciate the evidence as a court of appeal.

10. Petitoner has got a case that he was called upon to answer the charges mentioned in Annexure I to Ext. P 1. (That has been produced by the respondents along with Ext. P 1 which is same as Ext. P 1). It reads:

February 14,1978

STATEMENT OF ARTICLES OF CHARGE FRAMED AGAINST Sri S.R. ANANTHAKRISHNAN, ASST. BR. MANAGER, TRICHUR.

While functioning as Asst. Br. Manager, Trichur during the period between 31st December 1974 and 2nd January 1975 you received in cash, premium from different parties for insuring their properties as described in Annexure II and instead of making over the cash payments received to the company, you substituted the cash payments by cheques for issue of policy documents. The cheques when presented for payment, were dishonoured.

You are, therefore, charged for the following offences:

1. Failing to make over the cash payments to the company:

2. Substituting the cash payments by third party cheques which were subsequently dishonoured:

3. Failing to cancel the policies when the cheques which were substituted were dishonoured.

The above mentioned charges, if proved, would constitute violation of Rule (1) and Rule 4(1) of the General Insurance (Conduct, Discipline & Appeal) Rules and would render you liable to be punished.

Please let us have your explanation.

Sd/- MANAGER

It shows that the misconduct alleged covered the, period between 31st December 1974 and 2nd January 1975. But the enquiry covered a period from 31st December 1974 to 28th February 1976. It is argued that the enquiry officer had no power to enlarge the period fixed in Annexure 1 to Ext. P 1. If it was found necessary to do so. it should have been done by properly amending the charge with notice to the petitioner. This having not been done, it is argued that the enquiry was illegal. In reply the learned Counsel representing the respondents submits that the period mentioned in Annexure I to Ext. P 1 is a clear mistake, that it is a typing error is clear from Annexure II to Ext. P 1, that the statement of imputation of misconduct or misbehaviour (Annexure II) covered the actions of the petitioner during the period from 31st December 1974 to 28th February 1976 and that the petitioner should not be allowed to take advantage of the above typographical error. We are not impressed with this argument. The petitioner was called upon to answer the charges levelled against him in Annexure I. The charges covered the period between 31st December 1974 and 2nd January 1975. The scope of the charge is not to be understood from the statement of imputations. When the enquiry officer came to know that there was defect in the charge he should have got the charge amended as per law. He was clearly in error in proceeding as if the dates mentioned in the charge were not of any consequence. In this situation we hold that the enquiry officer was not justified in enlarging the scope of enquiry. This has vitiated the entire enquiry.

11. The last argument that was advanced by the learned Counsel appearing for the respondents is that the orders passed by the Disciplinary Authority and Appellate Authority have merged in the order passed by the Chairman-cum-Managing Director, while he passed Ext. P 10 in exercise of his revisional power. If the order passed by the Revisional Authority is not shown to be in any way defective or infirm, it is contended that the petitioner cannot succeed on the ground of the defect or illegality or infirmity in the orders of the authorities below, because, the order now in force is the one passed by the Revisional Authority. According to the respondents, the petitioner has not put forth any ground to annul the order, Ext. P 10, passed by the Revisional Authority. Therefore, it is contended that the Original Petition has to

fail.

12. In support of the above argument, the learned Counsel appearing for the respondents brought to our notice the decision in Somnath Sahu v. The State of Orissa (1981) 2 SLR. 560. In that case an officer challenged the order of dismissal on the ground that it was passed without giving notice to him and that no enquiry was held into the alleged misconduct before the order of dismissal was made. On facts Their Lordship held that there was no element of punitive action in the order of dismissal which was issued in exercise of the contractual right of the employer to terminate the service without assigning any reason.

Accordingly, it was held that there was no necessity to issue notice to the appellant or to hold an enquiry. Therefore it was found that there was no violation of the principles of natural justice. After having found so, the Court went on to state:

The appellant was heard by the State Government in support of his appeal and ultimately the State Government dismissed the appeal in its order dated the 2nd January, 1962. In these circumstances we are of opinion that the order of respondent No. 4 dated the 11th March, 1960 has merged in the appellant order of the State Government dated the 2nd January, 1962 and it is the appellate decision alone which subsists and is operative in law and is capable of enforcement. In other words the original decision of respondent No. 4 dated 11th March, 1960 no longer subsists for it has merged in the appellate decision of the State Government and unless the appellant is able to establish that the appellate decision of the State Government is defective in law the appellant will not be entitled to the grant of any relief.

This decision, according to us, will not help the respondents in this case, because, the disciplinary action was initiated against the petitioner herein by an incompetent authority. He had no jurisdiction to proceed against the petitioner. There was a total lack of jurisdiction on the part of the authority who issued Ext. P 1. Such a total lack of jurisdiction of the primary authority cannot be cured in appeal. In Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another, , Their Lordships had to consider an identical situation. After the States Re-organisation Act of 1956 the conditions of service of any person who is allotted to another State could not be varied to his prejudice except with the previous approval of the Central Government. In the case before Their Lordships, employees in the Road Transport Department in the State of Hyderabad were allotted to the new State of Mysore on re-organisation of the State. Their services were terminated by the General Manager of the Mysore Government Road Transport Department. They were appointed by the Superintendent of Transport Department of the erstwhile State of Hyderabad. As Manager of the Mysore Government Road Transport Department was not a post co-ordinate in rank with Superintendent of Traffic Department of the erstwhile State of Hyderabad, the dismissal was contended to be violative of the provisions contained in Article 311(1) of the Constitution. The order of dismissal was challenged

before the Government. Since the Government confirmed that order of dismissal, it was contended before Their Lordships that the order of the primary authority merged in the appellate order and that the appellate order being one enforceable, the validity or otherwise of the primary order is not open to challenge. Repelling that contention Their Lordships observed at p. 268:

The second contention urged on behalf of the appellants that as the General Manager of the Mysore Government Road Transport Department confirmed on appeal the orders of dismissal of the first respondent that should be considered as substantial compliance with the provisions of Article 311(1) of the Constitution is, in our judgment, devoid of substance. The original order of dismissal of the first respondents being without jurisdiction and as such void and inoperative having been passed in contravention of the provisions of Article 311(1) of the Constitution, the order passed on appeal by the General Manager could not cure the initial defect.

This decision puts it beyond doubt that if the initial authority had no jurisdiction or legal authority to proceed with the enquiry, such a defect will not be cured, on account of the fact that the said order was confirmed by the appellate authority. This Court in PONKUNNAM TRADERS Vs. ADDITIONAL Income Tax OFFICER, KOTTAYAM, AND ANOTHER., took the view that where the original decision is illegal or a nullity by reason of want of jurisdiction, it cannot be cured by any appellate proceedings. This view has been affirmed by a Division Bench in Additional Income Tax Officer Vs. Ponkunnam Traders, . Earlier in this judgment we held that the Manager who issued Ext. PI had no power to initiate disciplinary action against the petitioner. The enquiry which proceeded in pursuance to Ext. P 1 was without authority. We also came to the conclusion that the enquiry officer illegally enquired into the deeds of the petitioner covering a larger period than that mentioned in the charge. Thus it has to be held that the enquiry was absolutely without jurisdiction and so infirm and illegal. This illegality cannot be cured by the decisions rendered by the appellate and revisional authorities. Therefore it cannot be held that the order passed by the disciplinary authority got merged in the order passed on the memorial in Ext. P 10. Conflicting views exist on the question of merger of the order passed by the primary authority with defective jurisdiction, in the order passed by the appellate authority. This conflict was taken note of by the Supreme Court in Beopar Sahayak (P) Ltd. and Others Vs. Vishwa Nath and Others, . Their Lordships did not resolve that controversy but left that question open by observing:
As we have already indicated we do not find any necessity to go into the merits of the contentions of the Counsel regarding the applicability of the rule of merger and the rule of finality for rendering our decision in this appeal. We, therefore, leave the rival contentions to rest there.

13. In view of what has been stated above, we allow this Original Petition and quash Exts. P 5, P 7 and P 10 orders. The petitioner will be entitled to all service benefits as if those orders have never been passed. We make no order as to costs.