

1993 (0) GLHEL-HC 206596

**GUJARAT HIGH COURT**

**Hon'ble Judges:A.P.Ravani and J.M.Panchal JJ.**

Krishak Bharati Co-operative Limited Versus Chandramani Bhatt

SPECIAL CIVIL APPLICATION No. 1476 of 1992 ; \*J.Date :- FEBRUARY 23, 1993

- CONSTITUTION OF INDIA Article - 227

**Service Law -**

**CONSTITUTION OF INDIA - ART. 227**

- departmental inquiry - legality and validity thereof - right to contend that departmental inquiry held was not legal and valid and not in accordance with principles of natural justice - waiver of such right - petitioner-society did not raise this contention before Labour Court - permissibility to raise such contention for first time in petition under Art. 227 - held, petitioner cannot be permitted to raise this contention for first time in petition under Art. 227 - workman could not be precluded from asserting his right later on during pendency of proceedings before Labour Court - petitioner-society has been afforded opportunity to lead evidence and prove misconduct of workman - petitioner-society will not suffer prejudice - petition dismissed.

**Imp.Para:** [ 5 ] [ 8 ]

**Cases Referred To :**

1. Associated Hotel Of India Vs. Ranjit Singh, AIR 1968 SC 933
2. Dawsons Bank Ltd. Vs. Nippon Menkwa Kabushiki Kaisha, AIR 1935 PC 79
3. Satyanarayana Vs. Yelloji Rao, AIR 1965 SC 1405

**Equivalent Citation(s):** 1993 (2) GCD 438 : 1993 GLHEL\_HC 206596

**JUDGMENT :-**

**A.P.RAVANI, J.**

**1** The workman asserted his right to challenge the legality and validity of the departmental inquiry at the time when the decision on preliminary issue was taken by the labour court and the labour court decided in his favour. Can the workman be said to have waived his right to contend that the departmental inquiry held against him was not legal and valid and not in accordance with the principles of natural justice because his advocate had filed pursis that he did not challenge the legality and validity of the departmental inquiry ? This is the principal question which needs to be decided in this petition under Article 227 of the constitution of India filed by the employer - Co-operative Society.

**2** The respondent workman was engaged as security guard by the petitioner society. He was charged with the misconduct of obtaining reimbursement of two medical bills by attempting to forge the prescription of medical practitioner one Dr. Bhatra. Charge-sheet dated July 30 1984 was issued to him. He replied to the same on August 6 1984 Ultimately order dated December 26 1984 was passed and the respondent workman was removed from service. Thereupon the respondent raised industrial dispute and claimed that he be reinstated in service on his original post with full back wages. In the statement of claim the workman inter alia contended

that the departmental inquiry held against him was ex parte; that it was not legal and proper. The petitioner society also filed its reply. By application dated September 5 1986 (Exh.11) the respondent workman requested the labour court to raise preliminary issue as regards legality and validity of departmental inquiry held by the petitioner-society. The labour court passed order below the application that the issue with regard to the legality and validity of the departmental inquiry be heard as preliminary issue and at this stage permitted the parties to lead oral evidence on this issue. It appears that for quite some time the proceedings remained pending before the labour court. On December 9 1991 the labour court passed the impugned order holding that the departmental inquiry held against the respondent workman was not legal and was not in accordance with the principles of natural justice. The labour court directed that the petitioner-society may lead evidence to prove the misconduct of the workman and directed to post the case on January 7 1992 for proceedings further in accordance with law. The petitioner society has challenged the legality and validity of this interim order by filing this petition under Article 227 of the Constitution of India.

**3** The Labour Court has held the following preliminary issue against the petitioner-society :

"Whether the departmental inquiry held by the first party against the second party was legal and in consonance with the principles of natural justice".

To prove that the departmental inquiry held against the respondent workman was legal and valid no evidence was led by the petitioner-society. The petitioner society submitted pursis Exh. 25 and declared that it did not wish to lead any oral evidence. Similarly by Exh. 23 the workman also submitted pursis and did not lead any oral evidence. In view of this position the conclusion arrived at by the labour court that the petitioner- society has failed to prove the legality and validity of the departmental inquiry cannot be said to be in any way unjust or unlawful so as to call for interference in exercise of the powers under Article 227 of the Constitution of India.

**4** It may be noted the impugned order dated December 9 1991 is an interlocutory order. If the impugned order is not interfered with and the proceedings of the main reference are allowed to proceed further as directed by the labour court no prejudice whatsoever would be caused to the petitioner-society. At the most the petitioner society may have to lead the same evidence before the labour court. In fact the petitioner-society gets an opportunity to lead additional evidence also to prove the alleged misconduct of respondent workman. Therefore by no stretch of reasoning it can be said that the order would cause any prejudice much less serious prejudice to the petitioner society.

"4A Learned Counsel for the petitioner submitted that by pursis dated September 1 1987 (Exh. 12) it was submitted on behalf of the respondent-workman that he did not wish to challenge the legality and validity of the departmental inquiry. It is also submitted that in the written arguments submitted on July 31 1989 (Exh. 15) the statement made is pursis dated September 11 1987 (Exh. 12) has been reiterated. In view of this concession made by the advocates for the respondent workman it is submitted that it was not open to the respondent workman to raise the question regarding legality and validity of the departmental inquiry. It is further submitted that it was also not open to the labour court to decide the issue as regards legality and validity of the departmental inquiry a preliminary issue and hold the same against the petitioner. In short the contention is that by pursis Exh. 12 and the submission made in notes of arguments (Exh.15) dated July 31 1989 the workman has waived his right to challenge the legality and validity of the departmental inquiry. As against this it is contended by the learned counsel for the respondent that pursis Exh.12 was submitted by one advocate Mr. R.V. Master who appeared on behalf of Mr. V.B. Master who was the advocate engaged by the workman. It is submitted that the workman had never given instruction to waive the right to contend that the departmental inquiry was illegal and contrary to the principles of natural justice. It is also contended that the departmental inquiry was ex parte. After letter dated November 26 1984 alongwith which certain documents were sent to the respondent workman he never received intimation from the inquiry officer as regards the next date of hearing. The last intimation received by him was dated November 26 1984 wherein it was stated that the next date was November 28 1984 and thereafter straight away dismissal order is passed and the workman has not been given an opportunity to make his representation in the departmental inquiry. It is also submitted that after the notes of arguments were submitted on July 31 1989 the matter remained

pending for quite some time. Thereafter both the parties filed pursis Exh.25 and Exh.23 before the labour court and stated that neither of them wished to lead evidence as against the preliminary issue. When the arguments were heard on the preliminary issue the petitioner society did not raise the contention that the workman had waived his right to contend that the departmental inquiry was illegal and not in accordance with the principles of natural justice. Therefore now the petitioner society should not be permitted to raise this contention in a petition under Article 227 of the Constitution of India.

**5** There is much substance in the contention raised by the learned counsel for the respondent workman that since the petitioner-society did not raise this contention before the labour court the petitioner cannot be permitted to raise this contention for the first time in a petition under Article 227 of the Constitution of India. Had this contention been raised before the labour court the workman would have had an opportunity to show that he had never waived his right to contend that the departmental inquiry was not legal and not in accordance with the principles of natural justice.

**6** However the contention raised by the learned counsel for the petitioner be examined from yet another angle. According to the learned counsel for the petitioner the respondent workman has waived his right when his advocate filed Exh.12 dated September 11 1987 and when his advocate submitted written notes of arguments on July 31 1989. Be it noted that after July 31 1989 the matter remained pending with the labour court. The presiding officer before whom the arguments might have been advanced appears to have been transferred. Thereafter the impugned order is passed on December 9 1991 by another presiding officer of the labour court. He has heard the parties afresh. As indicated hereinabove before the learned presiding officer who passed the impugned order dated December 9 1991 the contention that the workman had waived his right to challenge the legality and validity of the departmental inquiry has not been raised by the petitioner-society. But in facts of the case can it be said that the workman ever waived his right ? The term waiver has been explained by the Supreme Court in the case of Associated Hotel of India vs. Ranjit Singh reported in AIR 1968 SC 933. In para 14 of the reported decision the Supreme Court has observed that waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.

**7** As observed by Privy Council in the case of Dawsons Bank Ltd. vs. Nippon Menkwa Kabushiki Kaisha reported in AIR 1935 PC 79 waiver is contractual and may constitute a cause of action : it is an agreement to release or not to assert a right. The said meaning of the term waiver has been referred to by the Supreme Court in the case of Satyanarayana vs. Yelloji Rao reported in AIR 1965 SC 1405 (para 11). Thus if the petitioner society wishes to set up a waiver against the respondent workman it should be established that the workman had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. After establishing these facts the petitioner society would also be required to prove that the workman agreed to release or not to assert the said right. In the instant case there is no such proof. On the contrary the facts and circumstances of the case show that the workman never knew that his right to assert that the departmental inquiry was illegal and void was ever waived. On his part there was no intention whatsoever to waive this right. As asserted by him by filing affidavit-in-reply that he never intended to waive this right. He never gave such instructions to his advocate and he had never released his right. In view of this position also the workman could not have been precluded from raising the contention as regards the legality and validity of the departmental inquiry held against him.

**8** Moreover it was during the pendency of the proceedings only that the workman raised the contention regarding the legality and validity of the departmental inquiry. Assuming for a moment that the workman knowing full well gave instructions to his advocate not to assert the contention regarding the legality and validity of the departmental inquiry even so during the pendency of the proceedings before the decision is taken by the labour court he may change his mind and assert that the departmental inquiry held against him was not legal and valid. In such a situation all that the court may be required to see is as to whether any prejudice has been caused to the other side. While determining the question of prejudice the court may have to see as to whether on account of the alleged waiver the other side has changed his position to his detriment relying on the waiver of such right. In the instant case it is not shown that the petitioner-society has changed its position relying on the alleged waiver of right to assert the legality and validity of the departmental inquiry. No prejudice whatsoever is alleged to have been caused to the petitioner-society. Therefore even if it is assumed

that at an earlier point of time the respondent workman had waived his right to assert the legality and validity of the departmental inquiry he could not be precluded from asserting his right later on during the pendency of the proceedings before the labour court. In such a situation all that would have been required by the labour court was to see as to whether the other side has been caused any prejudice. If any such prejudice has been caused care could have been taken to see that the prejudice caused is minimised and if possible removed. In the instant case no such prejudice is caused. On the contrary as indicated hereinabove since the petitioner society has been afforded an opportunity to lead evidence and prove the misconduct of the workman before the labour court the petitioner society will suffer no prejudice whatsoever.

**9** No other contention is raised. There is no substance in the petition.