

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition No. 5364 of 1996**

Badri Narayan Sharma (Since dead) through LR's

1. Smt. Savita Sharma, widow of late Badri Narayan Sharma, aged about 42 years.
2. Yogendra Kumar Sharma S/o late Badri Narayan Sharma.
3. Devendra Kumar Sharma, S/o late Badri Narayan Sharma.

All R/o Village Gaindpur, Tah. & Distt. Kawardha (CG).

---- **Petitioners**

Versus

1. MP State Road Transport Corporation, Through Managing Director, Habibganj, Bhopal (MP).
2. State Industrial Court, Madhya Pradesh, Indore (MP).
3. Labour Court, Raipur through its Presiding Officer, Raipur (MP).
4. Chhattisgarh Infrastructure Development Corporation, Through Managing Director, Shashtri Chowk, Raipur (CG).

---- **Respondents**

For Petitioners	Shri Vinod Deshmukh with Shri Lav Sharma, Advocates.
For Respondent No.2.	Shri RK Gupta, Advocate.
For Respondent No.4	Shri Ashish Shrivastav with Shri Afroz Khan, Advocates.

Hon'ble Shri Justice P. Sam Koshy

CAV ORDER

Delivered on 23/12/2015.

1. The petitioner (since dead and hereinafter called, deceased employee) through the present writ petition is challenging the judgment passed by the State Industrial Court dated 07.10.1988 in Appeal Case No. 1002/MPIR Act/87 setting aside the order of re-instatement with back-wages granted by the Labour Court on 27.08.1987.

2. The facts of the present case, relevant for consideration of this petition is that, the deceased was an employee of erstwhile Madhya Pradesh State Road Transport Corporation (for short, MPSRTC), Raipur depot. That, on 22.10.1984 the services of the deceased employee was terminated invoking clause-11(a) of the Standard Standing Order. A perusal of termination order would reveal that penalty of termination was imposed as a punishment on allegations of serious charges. The allegation against the employee was that on 19.09.1984, while working on the post of Driver on the Bus bearing registration No. NBF-1814 had driven the same in a rash and negligent manner resulting in an accident in which one of the lady passenger died and two other passengers were also badly injured.
3. On account of the said accident, a criminal case under Sections 279 and 304-A IPC was registered against the deceased employee before the court of Judicial Magistrate First Class, Kawardha. In the said case, the deceased employee was finally acquitted of all the charges vide judgment dated 02.05.1994. However, without any sort of enquiry, the services of the employee was terminated on 22.10.1984.
4. It is pertinent also to mention at this stage that before issuing the order of termination dated 22.10.1984, the respondents did not care to conduct a departmental inquiry or for that matter any sort of investigation so as to reach to a conclusion that it was the deceased employee alone who was responsible for the accident.
5. That, the petitioner had challenged the order of termination before the Labour Court, Raipur, by moving application under Section 31(3) read with Section 61 of the Madhya Pradesh Industrial Relations Act, 1960 (for short,

the Act) which was registered as case No.182/84/MPIR Act. The Labour court proceeded to decide the matter on merits and in the course after the statement of claim and the reply of the management, fixed the case for evidence of the management to prove the misconduct and the management was granted opportunity to lead evidence. Since the termination order was passed without conducting enquiry, the management could hold enquiry before the Labour Court by adducing evidence by which the charges against the deceased employee could be proved. The management inspite of repeated opportunities being given, did not lead any evidence to substantiate the charges levelled against the deceased employee and therefore the right to lead evidence was closed. On the basis of evidence led by the Petitioner, the Labour Court on 27.08.1987 held that petitioner was a permanent employee and that his services was terminated on account of misconduct and since the allegations or charges were levelled while terminating the services, hence the same cannot be brought within the definition of retrenchment and clause 11(a) of the Standard Standing Order also could not have been invoked. It was further held that since the management did not prove its case so far as the misconduct is concerned, the order of termination was held to be bad in law and allowed the claim of the deceased employee and ordered for re-instatement in service with back-wages.

6. The said order of re-instatement was put to challenge before the Industrial Court under Section 65 of the Act which was registered as Appeal Case No.1002/MPIR Act/87. The Industrial Court, however, after hearing the parties vide impugned order dated 07.10.1988 set aside the order of the

Labour Court and held that the charges of misconduct levelled against the petitioner stood proved from the evidence of deceased employee himself, and therefore, upholding the order of termination, quashed the order of the Labour Court.

7. It is this order of Industrial Court dated 07.10.1988 which is under challenge in the present writ petition.
8. Pending the petition before this court, the petitioner/employee died on 05.12.2003, and thereafter, legal heirs of the deceased employee were substituted and the petition is being prosecuted by the legal heirs of the deceased employee.
9. The counsel for the petitioners submits that he has filed this petition after the outcome of the criminal case so far as rash and negligent driving is concerned and which ultimately came in his favour on 02.05.1994 and further, in between the Madhya Pradesh High Court in MP No.597 of 1987 (MP Transport Workers Federation and three others Vs. The MP State Road Corporation & Another) had struck down clause 11(a) of the Standard Standing Order holding it to be ultravires the Constitution of India vide judgment dated 29.11.1990.
10. Counsel for the Petitioners submits that the order of the Industrial Court is per se illegal and is against the settled principles of Labour law jurisprudence. It was further contended that the law so far as proving of the misconduct in the case of termination without enquiry or a termination with bad enquiry is always the first issue which has to be decided by the Labour Court while adjudicating upon the case of termination from service on the ground of misconduct. While deciding the said issue, it is the

management which has to lead evidence first to prove the misconduct again before the Lacour Court. The principles enunciated in this regard is that in case if any person is inflicted with an order of punishment after enquiry, then the Labour Court has to first decide the issue of veracity of the enquiry and if the enquiry is found to be legal and justified then the remaining issue before the Labour Court are adjudicated upon. However, in case if there is an order of punishment without enquiry, but with specific allegation of misconduct, then also the management has to led evidence to prove the misconduct before the court below.

11. According to the petitioner, in the instant case, the management has failed on both the counts. Firstly, neither was there any enquiry conducted before terminating the deceased employee from service, nor the management inspite of ample opportunity being given, did not lead any evidence. Thus, the misconduct alleged against the deceased employee was not proved at all.
12. It is further argued that since the provision under which the order of termination was passed itself has been struck down by the High Court of Madhya Pradesh, the order of termination becomes nullity. Lastly it was contended that now the employee stands acquitted from the criminal case and further the provision on the basis of which he was terminated held to be ultravires and the management inspite of sufficient opportunity being granted did not care to lead evidence, vitiates the termination order. It is further submitted that since the employee is no more and the case is being prosecuted by the widow and children of the deceased employee, the petition may be allowed and the impugned order of Industrial Court may be

set aside and it be held that the petitioners may be given the consequential monetary relief which the deceased would have got had he not been illegally terminated from service.

13. Per contra, learned counsel appearing for the Respondents submitted that it is a case where the order of Industrial Court does not warrant any interference as the findings given are essentially findings of fact based upon the clear unambiguous evidence led by the employee himself. It is further submitted that on perusal of the findings of the Industrial Court it would reveal that Industrial Court has considered the evidence which have come on record and based on the evidence has set aside the order of reinstatement passed by the Labour Court. It is next submitted that as before the Labour Court it was a case which was filed by the petitioner himself, the burden of proof was upon the employee to lead evidence first and only then, if required, the management would have adduced its evidence, and as such, there is no illegality committed if the management has not led any evidence but could substantiate its case only on the basis of evidence of the employee concerned. The Respondents have also raised oral objection so far as the petition suffered from delay and laches is concerned as there is a delay of about 8 years in filing the writ petition and the petition deserves to be rejected only on this ground. The counsel for the Respondents drew the attention of the court on the gravity of the charges levelled against the deceased employee wherein there was a death of one lady passenger and two others were severely injured. In addition, the accident also caused huge loss to the person in whose house the Bus driven by the petitioner had ramped into.

14. Counsel for the Respondents further argued on the question of grant of back-wages. According to the Respondents, since there is a delay on the part of the Petitioner in filing the present writ petition and in between for all these intervening period the petitioner till his death was out of employment of the Respondents, he would not be entitled for back-wages if at all this court is inclined to set aside the order of Industrial Court. According to the Respondents, it is a fit case where the principles of No Work No Pay would be applicable. It is further submitted that by now the law so far as grant of back-wages is well settled and it has been time and again re-iterated by the Supreme Court that grant of back-wages along with order of re-instatement is not automatic and grant of back-wages would always depend upon the facts and circumstances of the case and only upon there being specific reasons and justified grounds, the court should award the back-wages.
15. Counsel for the Respondents also submitted that on the date of issuance of termination order, the provision of Claus-11(a) of the Standard Standing Order was not held to be ultravires and as the same was held ultravires by the High Court of Madhya Pradesh only in the year, 1990, the termination order cannot be said to be bad in law. Striking down of Clause-11(a) by the MP High Court would not have a retrospective effect on matters where the employer has already taken a decision much before provision declared ultravires. It was also the contention of the Respondents that the entire action under challenge in the present case was of the period under the erstwhile State of Madhya Pradesh and also by the MPSRTC and since the Respondent No.4/CIDC was not in existence on the relevant date, no

liability can be casted upon it and if at all any liability falls in the event of petition being allowed, the same would be upon the Respondent No.1/MPSRTC and not the Respondent No.4/CIDC.

16. Having considered the rival submissions and on perusal of the records, some of the admitted position in the present case are :

- The deceased employee namely Badri Narayan Sharma was a permanent employee of the MPSRTC i.e. Respondent No.1 and was working with the Respondent No.1 as a Bus Driver.
- That, on 19.09.1984, while the deceased employee was operating the Bus bearing registration No.NBF-1814 belonging to Respondent No.1, met with an accident resulting into death of one passenger and injuring two other passengers.
- That, for the said accident, a criminal case under Sections 279 and 304-A IPC was registered against the deceased employee before the court of Judicial Magistrate First Class-Kawardha.
- That, on 22.10.1984, invoking Clause-11(a) of the Standard Standing Order, the services of the deceased employee was terminated without any sort of enquiry.
- The termination order was issued for the alleged misconduct of negligent driving of the Bus on 19.09.1984.
- That, on 02.05.1994, the deceased employee stood acquitted from the criminal charges from the court of Judicial Magistrate First Class, Kawardha.
- The said termination order was challenged by the deceased employee before the Labour Court.

- The management, inspite of ample opportunity being granted, did not care to lead evidence before the Labour Court either to substantiate the allegations or to prove the misconduct levelled against the deceased employee.
- The Labour Court on 27.08.1987 held the order of termination illegal and violative of the principles of natural justice granting relief of re-instatement with back-wages.
- The management i.e. Respondent No.1/MPSRTC preferred an Appeal before the Industrial Court and vide impugned order dated 07.10.1988 the Industrial Court allowed the Appeal of Respondent No.1 setting aside the order of Labour Court and upholding the termination order.

17. It is also relevant to note that when a termination order alleging misconduct is challenged before the Labour Court or Tribunal, the Management is granted an opportunity in the case of departmental enquiry to show that enquiry was proper, legal and justified and in case of punishment order is without enquiry, then the management can lead evidence for the first time before the Labour Court to substantiate the charges and prove the misconduct. In the instant case, the management inspite of ample opportunities being granted, did not led evidence and thus, the charges levelled against the deceased employee was neither established nor was it proved.

18. If we peruse the provision of the Industrial Employment (Standing Orders) Rules, 1963, Rule 12 deals with disciplinary action for misconduct. Rule 12(1) defines various major misconducts. Likewise, Rule 12(2) defines

minor misconducts. Rule 12(3)(a) defines the different punishments which can be imposed for minor misconducts and Rule 12(3)(b) discloses the various punishment for major misconducts.

19. Further, Rule 12(4) deals with procedure to be adopted before imposing the order of punishment particularly a major misconduct. For ready reference, relevant portion of Rule 12(4) is re-produced as under :

- (a) The manager or other officer authorised by him in this behalf shall give to the employee a charge sheet clearly setting forth the mis-conduct charged and the circumstances appearing against him and requiring his explanation;
- (b) the employee shall be given for submitting his explanation a period of at least 24 hours if he is charged with a minor misconduct and at least 72 hours if he is charged with major misconduct;
- (c) An employee shall be allowed to defend by himself or the representative of employees, if he so desires;
- (d) Except in cases where he admits the charge levelled against him the employee shall be permitted to produce witness in his defence and cross-examine any witness on whose evidence the charges rests;
- (e) The substance of the evidence shall be recorded and read over;
- (f) An order of punishment shall be in writing and shall be issued over the signature of the manager or other officer authorised under standing order (1)(a). A copy of the order passed awarding the punishment shall be given to the employee;

XXX

XXX

XXX

20. Thus, from the above-referred Rule-12, it is clear that it is mandatory for the Management before imposing the punishment particularly when it is a

major punishment to conduct detailed departmental enquiry after issuing a charge-sheet clearly setting forth the misconduct, which in the instant case has not been adopted by the Management. Likewise, if we read Rule-11(a) which has been invoked for the purpose of terminating the services of the deceased employee, it clearly shows that such a provision is to be invoked in case of a termination simplicitor and the same cannot be invoked in a case where there are serious allegations of misconduct levelled against the employee as the same would cause stigma upon the employee. For ready reference, Clause-11(a) is re-produced as under :

“11. Termination of employment and the notice thereof to be given by employer and employee- (a) When the employment of a permanent employee is to be terminated, he shall be given one month's notice or shall be paid wages for one month in lieu of notice. No employee other than a permanent employee shall be entitled to any such notice or wages in lieu thereof for termination of his service.”

21. The law in this regard is well settled since ages that an order of punishment for alleged misconduct based on defective enquiry is as good as an order without enquiry and under both circumstances, the management has to lead evidence first to prove the misconduct and only in the event if the misconduct is established then, the court would go into the question of proportionality or for that matter the quantum of punishment. However, in the event if the management fails to prove the misconduct by leading evidence before the Labour Court, the punishment order is unsustainable.

22. If the analogy upon which the Industrial Court has set aside the order of reinstatement passed by the Labour Court is taken into consideration, it would amount to be a case where the workmen/employee has led evidence against himself in proving the misconduct which otherwise ought to have been done by the management-employer. The said analogy is totally in violation of Article 20(3) of the Constitution of India which stipulates that no person accused of any offence shall be compelled to be a witness against himself. Thus, in a case where the management/employer had miserably failed at all levels firstly the order of termination being issued without conducting any enquiry, secondly; the management failed to prove the charges before the Labour Court when opportunity was granted and lastly, the management did not led any evidence whatsoever, inasmuch as, not a single witness was produced in the dock to substantiate the contention of the management. Therefore, the entire action of the management leading to issuance of order of termination stands vitiated. The same is therefore bad in law, arbitrary, illegal and also unconstitutional. Thus, for the aforesaid reasons, the impugned order of the Industrial Court dated 07.10.1988 in Appeal Case No. 1002/MPIR Act/87 is set aside/quashed.

23. The second question to be adjudicated in the instant case in the given facts and circumstances of the case is as to what relief as on date can be issued in favour of the legal heirs of the deceased employee i.e. the present petitioners. The pending the petition before this court, the original petitioner i.e. workmen-employee died on 05.12.2003 thereafter his legal heirs were

brought on record and this petition is being pursued by the legal heirs of the deceased employee. The petitioners wanted the illegal order of termination to be set aside/quashed or else the stigma casted upon the employee being terminated for major misconduct would always remain. That, consequent upon setting aside the illegal termination order, the monetary benefit which otherwise would have accrued to the deceased employee had he remained in employment, be granted to the present petitioners i.e. legal heirs of the deceased employee.

24. The order of termination getting quashed, as a natural consequence, the concerned employee is entitled for being re-instated with consequential benefits. But, in the instant case, since the deceased employee had died, the question of re-instatement in service does not survive any further and the only question left is what consequential relief and benefits can be granted to the present petitioners i.e. legal heirs of the deceased employee in the factual background.

25. The counsel for the Respondent-corporation strongly and vehemently opposes the claim of the petitioners for grant of back-wages and consequential monetary benefits which the employee would have otherwise received had he not died on the ground that admittedly the deceased employee was terminated from service w.e.f. 18.10.1988 and that for all these period till the date of his death i.e. 05.12.2003 the workmen was out of employment and therefore, applying the analogy of 'No Work No Pay', the present petitioners would not be entitled for any back-wages or for that matter the monetary benefits.

26. Referring the judgment of Supreme Court in case of Uttar Pradesh State Textile Corporation Limited Vs. Suresh Kumar [2011(15)SCC 180], counsel for the Respondent-corporation submitted that grant of back-wages is a matter of discretion vested with the court and the conduct of an employee is an extremely relevant factor on this aspect and since in the present case, there was an allegation of serious mis-conduct and further the workmen was also prosecuted in a criminal case, there is no justification for grant of back-wages.
27. Similarly, referring to Guest Keen Williams Limited Vs. B.R. Govindaswamy [2010(15) SCC 747], counsel for the respondent-corporation further submitted that the Supreme Court had modified the order of grant of back-wages by quantifying a fixed amount as grant of back-wages
28. Again referring to Management of Christ College Registered Society Vs. P.N. Kenchareddi [2010(15)SCC 292], counsel for the Respondent-corporation submitted that the Supreme Court has re-iterated the same view and had granted a fixed compensation in lieu of back-wages, and therefore prayed for firstly rejection of the petition holding it to be devoid of merit. If not, by applying the principles of No Work No Pay, the petitioners should not be granted any back-wages. However, if at all, yet the court is inclined to grant back-wages, it should be a lump-sum fixed amount keeping in view the fact that the order of termination was passed in the year 1988 and it has already been about 27 years.
29. Per contra, learned counsel for the Petitioners so far as grant of full back-wages and consequential relief is concerned, relying upon the judgment of Supreme Court in case of Deepali Gundu Surwase Vs. Kranti Junior

Adhyapak Mahavidyalaya (D.Ed.) & Others [2013 (10)SCC 324] submits that where the employer wanted to deny back-wages or contest the employee's entitlement to get consequential benefits, employer ought to have plead and prove that employee was gainfully employed elsewhere during the intervening period. But, in the instant case, since the respondent-corporation has not adduced any evidence whatsoever even on the merits of the case, it is sufficient to establish the fact that respondents have failed to substantiate their contention for not granting of back-wages and consequential benefits to the employee. The Supreme Court in the said case (Deepali Gundu) has laid down the broad principles so far as the fact of order of termination being set aside. The relevant portion of order is re-produced as under :

“38. The propositions which can be culled out from the aforementioned judgments are:

38.1) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its

existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.”

30. Counsel for the petitioners further relying upon the decision of Supreme Court in case of Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Limited [2014(11)SCC 85] highlighted the aspect that in recent trends the Supreme Court has upheld the principle of re-instatement with full back-wages on the order of termination being set aside. In Bhuvnesh Kumar (Supra), the Supreme Court has infact upheld the order of Labour Court granting re-instatement with full back-wages which was set aside by the High Court under Article 227 of the Constitution of India to the extent of granting compensation to the tune of Rs.1,00,000/-. The Supreme Court relying upon the ratio of law laid down in Deepali Gundu (Supra) has held that the High Court has in fact exceeded its jurisdiction under Article 227 of Constitution while interfering with the award of Labour Court granting back-wages.

31. So far as grant of back-wages and other consequential benefits are concerned, the fact remains that once the court sets aside the termination order, as a consequence, the employee being exonerated or being found not guilty of the misconduct, it has to be treated as if the order of termination did not exist at all, and therefore, the concerned employee would be entitled for the monetary benefits including back-wages for the intervening period. In the instant case, since the relief of re-instatement does not exist, the only relief which the petitioners would be entitled would be the back-wages and other monetary benefits payable to the employee-

workmen had he been in employment including that of any pensionary and other retiral benefits.

32. The petitioners would be entitled for the said monetary benefits more particularly for the reason that the petitioners as well as the deceased employee, right from the date of order of termination till now, has faced great hardship and humiliation as well as undergone both mental and physical trauma firstly of being out of employment and secondly being ousted from employment illegally with stigmatic orders, and ultimately when the employee was entitled for getting the relief, unfortunately he expires leaving behind the legal heirs who have also faced and shared the trauma along with the deceased employee. Therefore, the only solace which the court can grant to the legal heirs of the deceased is granting of back-wages for the intervening period and for payment of retiral or terminal benefits, if any, payable to the employee.
33. For the foregoing reasons, the petition is allowed and the order of Industrial Court dated 07.10.1988 passed in Appeal Case No. 1002/MPIR Act/87 is set aside/quashed. The petitioners are entitled for back-wages and consequential benefits flowing from this order. No order as to costs.

Sd/-
(P.Sam Koshy)
JUDGE

inder