

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5519 OF 2012

Deepak Bhimraj Kamble,
Since deceased through his L.Rs.
Sangita Deepak Kamble,
Age 55 years, Occ. Household,
R/o Plot No.21, Hanuman Nagar,
Pipeline Road, Ahmednagar.

..Petitioner

Versus

Kirloskar Oil Engines Ltd.
13, Laxmanrao Kirloskar Road,
Khadki, Pune 414 003

..Respondent

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Advocate for Petitioner : Shri P.V.Barde
Advocate for Respondent : Shri T.K. Prabhakaran
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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 16 and 21, 2015
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ORAL JUDGMENT :-

1. Learned Advocates for both the sides have stated that they have no objection if this Court hears this matter.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. The petitioner is aggrieved by the impugned judgment and order

dated 19.3.2012, delivered by the Industrial Court, Ahmednagar. The relevant prayer made in this petition reads as under:-

“(A) By issuing appropriate writ, order, direction or any other order in nature of Writ, the Hon'ble High Court may be pleased to quash and set aside the judgment and order dated 19.3.2012 passed by learned Member, Industrial Court, Ahmednagar in Revision (ULP) No. 86 of 2011, thereby confirming judgment and order passed by learned Member, Industrial Court, Ahmednagar in Complaint (ULP) No. 28 of 2004.” (Should be read as Labour Court, Ahmednagar in Complaint (ULP) No. 28 of 2004).

5. This petition is prosecuted by Smt. Sangita Deepak Kamble, who is the legal representative of the deceased employee Deepak Bhimraj Kamble.

6. Shri Barde, learned Advocate summarises his contentions in brief as follows:-

(a) The deceased joined service on 21.12.1997.

(b) He was charge sheeted on 30.4.2003 for remaining unauthorizedly absent for 47 days between 1.10.2002 and 31.12.2002.

(c) The reason for absence was the marriage of his daughter which is said to have been solemnized on 25.12.2002.

- (d) By another charge sheet dated 12.8.2003, the deceased was alleged to have been unauthorizedly absent for 153 days on the dates mentioned from January 2003 till July 2003.
- (e) Reason for absence is stated to be severe hypertension.
- (f) By yet another charge sheet, dated 28.11.2003, the deceased was charged for having remained unauthorizedly absent for 96 days on the dates mentioned from August 2003 to November 2003.
- (g) Reason for absence is said to be sever hypertension.
- (h) Medical certificate is produced in the enquiry.
- (i) Charge of unauthorized absenteeism is held to have been proved.
- (j) All the charges have been admitted by the deceased but sought to be explained on the ground of illness.
- (k) The severe hypertension was lateron diagnosed to be Brain Tumour.
- (l) Was dismissed after enquiry on 18.2.2004.
- (m) The deceased filed Complaint (ULP) No.28 of 2004 on 25.5.2004 for challenging his dismissal, dated 18.2.2004.
- (n) The deceased passed away on 4.10.2004 due to brain tumor at the age of about 45 years.
- (o) The charge of unauthorized absenteeism relating to three

charge sheets was under Section 24(f) of Model Standing Orders, framed under the Industrial Employment (Standing Order) Act, 1946.

(p) The deceased was not suspended during the domestic enquiry.

(q) The two enquiries in connection with the charge sheets were held to be fair and proper and the findings were held to be fair.

(r) The domestic enquiries were conducted ex-parte since the deceased was unable to participate in the enquiries due to his continued illness.

(s) By the impugned judgment and order dated 18.10.2011, the Labour Court dismissed the Complaint and concluded that the punishment awarded is proportionate to the gravity of the misconduct.

(t) The petitioner preferred Revision (ULP) No. 86 of 2011 before the Industrial Court and by judgment dated 19.3.2012, the Revision Petition was also dismissed.

7. Since the legal heir of the deceased has prosecuted the complaint as well as the Revision Petition and is before this Court, Shri Barde, learned Advocate submits that there is no prayer made for reinstatement or continuity. He submits that the impugned judgments deserve to be quashed and set aside since the deceased had produced the medical certificates before the enquiry officer and had made every attempt to indicate that his continued illness prevented him from reporting for duties.

8. Shri Barde further submits that the deceased could not participate in the enquiry due to his continued illness and hence the enquiries were conducted *ex parte*. Nevertheless he contends that the enquiry officer should have considered as to whether the reasons for absence and not applying for leave are justified and the charge levelled upon the deceased was, therefore, not proved.

9. He submits that the Labour Court should have considered that the reason for absence was properly explained before the enquiry officer through the medical certificate and it should have, therefore, been concluded that the charges are not proved against the deceased. He further submits that under Standing Order 24(f), the enquiry officer should have considered the explanation placed before it and should have concluded that a valid and reasonable cause compelled the deceased to remain absent and hence, the charges were not proved.

10. He, therefore, submits that in the event the petitioner succeeds in this petition, compensation may be quantified and may be paid to the petitioner.

11. Shri Barde has placed reliance upon the following judgments:-

- (i) Krushnakant B. Parmar Vs. Union of India
2012 AIR SCW 1633,

- (ii) Chairman-cum-Managing Director, Coal India Vs. Mukul Kumar Choudhuri and others - 2009 (6) ALL MR 451 (SC),
- (iii) Mahinder Dutt Sharma Vs. Union of India - 2014 ALL SCR 1972,
- (iv) Union of India Vs. Prakash Narayan Thute - 2012 (7) ALL MR 712, and
- (v) Maharashtra State Road Transport Corporation Vs. Abdul Usman Mehboob Shaikh - 2000 (3) ALL MR 283.

12. Shri Barde further submits that the continued absence of the petitioner on the ground of serious illness itself justifies his absence. The deceased would get all the benefits of the settlement dated 30.12.2001. By allowing this petition, compensation be directed to be paid.

13. Shri Prabhakaran for the Respondent has strenuously submitted that it is now only an academic exercise to consider the entire enquiry so as to scrutinise whether the enquiry was conducted in a fair and proper manner and / or whether the findings of the enquiry officer can be branded as being perverse. He submits that this Court would be precluded from entering into this exercise for the reason that it would serve no purpose as the employee has passed away and hence there cannot be a *de novo* enquiry to be conducted before the Labour Court against a deceased person, in the event the enquiry is set aside or vitiated.

14. He further submits that the prayer clause (A) put forth by the petitioner indicates that the petitioner is satisfied if the judgment of the

Industrial Court is set aside. It is not prayed that the judgment of the Labour Court also be set aside and hence this Court should not grant relief to the petitioner.

15. Shri Barde has countered by stating that the prayer clause (B), “Any other just and equitable relief to which the petitioner may be found entitled, may kindly be granted” takes care of the interest of the petitioner and this Court may suitably modify the relief under prayer clause (B) and quantify compensation.

16. In the above factual matrix, I find that the only issue that needs to be considered is as to whether Standing Order 24(f) would enable a delinquent to justify the reasons for remaining unauthorizedly absent, before the enquiry officer. In the event, it is held that an employee can justify unauthorized absenteeism before the enquiry officer, then the enquiry officer should not hold the delinquent guilty who could then be entitled to consequential reliefs (compensation in this case since the employee has passed away).

17. Shri Prabhakaran submits that Standing Order 24(f) needs to be considered in the light of Section 73 of the Employees' State Insurance Corporation Act, 1948 so as to test the submission of the petitioner. He further submits that the memorandum of settlement, dated 30.12.2001 signed between the respondent / Company and its workmen also needs to

be looked into in the light of the contention of the petitioner that the scheme of rendering financial assistance in an unfortunate eventuality of the death of a workman, would render compensation / assistance to the petitioner.

18. He further states that every employee is under an obligation to file an application for leave and in the case of illness, forward such application through any co-worker or close person, so as to ensure that the employer is appraised of the reasons for absence, who then could be in a position to grant leave to such an ailing employee.

19. He relies upon the judgment of the Supreme Court in the matter of Delhi Transport Corporation Vs. Sardarsingh [2004 SCC (L & S) 946].

20. I have considered the submissions of the learned Advocates, who have taken me through the petition paper book. I have also considered the various reports placed on record by the respective advocates.

21. Standing Order 24(f) reads as under:-

“24. The following acts and commissions on the part of a workman shall amount to misconduct:-

(f) habitual absence without leave, or absence without leave for more than ten consecutive days or overstaying the sanctioned leave without sufficient grounds or proper or satisfactory

explanation.”

22. In my view, Standing Order 24(f) is in two parts. The first part constitutes, “habitual absence without leave or absence without leave for more than ten consecutive days.” The second part would constitute, “Overstaying the sanctioned leave without sufficient grounds or proper or satisfactory explanation.” Issue is whether the first four words in Standing Order 24(f) can be added with the last five words to construct a sentence as, “Habitual absence without leave or proper or satisfactory explanation.” It is canvassed that the last five words are in connection with over staying the sanctioned leave without sufficient grounds or proper or satisfactory explanation.

23. In my view, the ending words in Standing Order 24(f) are in connection with the sufficiency of grounds for over staying the sanctioned leave without sufficient grounds or proper or satisfactory explanation. Therefore, I am unable to accept the contention of Shri Barde that the last five words can be added to the first part. With regard to habitual absence without leave or absence without leave for more than ten consecutive days, issue of sufficiency of reasons or explanation does not appear to be the intent of law. These Model Standing Orders have been framed under the Bombay Industrial Employment (Standing Orders) Rules, 1959.

24. In the light of the above, I find it proper to interpret Standing Order

24(f) as being only in two parts as noted above. The act of habitual absence without leave or absence without leave for more than ten consecutive days would constitute a separate act which is defined as a mis-conduct. The second part would be with regard to over staying the sanctioned leave and for the said purpose it appears that the Legislature intended to give an opportunity to a disciplined employee, who has got his leave sanctioned and is required to overstay the leave, to put forth sufficient grounds as proper or satisfactory explanation. It, therefore, appears to be intended that only such employee, who has over stayed the sanctioned leave would explain the circumstances which compelled him to over stay.

25. The petitioner has made a statement that she would prefer to take compensation rather than claiming benefits which her husband would have been able to claim had he been alive. With regard to the aspect of the fairness of the enquiry and the findings of the enquiry officer, it is noted by the Labour Court that the deceased had appeared in the enquiries and admitted the charge under Standing Order 24(f). He has then justified his absence by citing medical reasons.

26. In the light of the view that I had taken in relation to Standing Order 24(f) as above, the issue turns upon the allegation of the management that the deceased has committed a misconduct by remaining unauthorizedly absent.

27. The explanation below Standing Order 24(f) provides that no act of misconduct which is committed on less than three occasions within a space of one year shall be treated as habitual. In the instant case, in the calendar year 2003, the deceased was said to be unauthorizedly absent for 153 days in between January and July 2003 and for 96 days in between August and November 2003. It is not in dispute that he was absent and had not submitted any leave application. It is also admitted that he tendered the medical certificate only before the enquiry officer while facing the enquiry. It is also not disputed that the deceased did not fully participate in the enquiry, purportedly due to his continued illness.

28. The issue, therefore, is whether the deceased could have justified his absence without leave for more than ten consecutive days by filing the medical certificate before the enquiry officer. It is the submission of Shri Barde that if an employee tenders a medical certificate before the enquiry officer, it would amount to a proper explanation and justification for remaining unauthorisedly absent.

29. I am unable to accept this contention for the reason that the enquiry officer cannot travel beyond the charge sheet issued to the delinquent. The enquiry officer is required to conduct an enquiry squarely within the framework of the charge sheet and neither can the management nor would the enquiry officer and the delinquent be

permitted to travel beyond the scope of the charge sheet. The onus and burden lies on the management to prove the charges levelled upon the employer. Specific clauses of the Model Standing Orders or the Certified Standing Orders or whichever Rules that may be framed for the said purpose, have to be set out in the charge sheet. The enquiry officer, therefore, has to conclude on the basis of the oral and documentary evidence as to whether the charge levelled upon a delinquent is established or not by the management.

30. In the instant case, the enquiry officer is not called upon to consider the sufficiency of grounds or explanation which is only in relation to overstaying of the sanctioned leave. The enquiry officer is only to judge whether the charge of absence without leave or absence without leave for more than ten consecutive days is proved or not. The issue, therefore, is as to whether any application for leave was filed and as to whether the said application has been accepted or rejected. A mere filing of an application for leave and proceeding on leave on the presumption that it may be allowed, is not enough. When an employee files an application for leave, it is his duty to note whether his application has been allowed or not. If the same is allowed, he could proceed on sanctioned leave. If the application is not allowed and if he proceeds to remain absent, it would amount to unauthorized absenteeism.

31. In the above backdrop, I am of the view that the enquiry officer is

required to judge whether the management proves that no application for leave was filed or if filed, was rejected. This could also be done with the assistance of the charge sheeted employee who has every right to prove before the enquiry officer that he had filed a leave application and the same was granted. If it is so proved, the employee would then fall in the second part of the Standing Order 24(f), which is, “over staying the sanctioned leave without sufficient grounds or satisfactory explanation.” As such, the role of the enquiry officer considering the two parts under Standing Order 24(f), is well defined and specified.

32. The issue raised by Shri Barde is that reasons for not filing an application could be proved in a domestic enquiry. Remaining absent without leave which presupposes no leave having been granted, in itself is a misconduct if the rules mandate obtaining of leave. Whether the charge sheeted employee could address the mind of the enquiry officer to put forth reasons for not filing a leave application, turns upon the phraseology of Standing Order 24(f). As such, unless it is provided in the Standing Orders, whereby an employee could offer sufficient grounds or proper or satisfactory explanation for not filing a leave application, the said employee cannot try to justify the non-filing of a leave application before the enquiry officer.

33. The above issue has a different angle as well. In the matter of Om Prakash Yadav Vs. Union of India [2009 (121) FLR 151], the Calcutta High

Court has held that a charge sheet cum show cause notice is issued so that the employee gets an opportunity to scrutinize the charges levelled upon him and the Standing Orders invoked for the purpose of concluding that he has committed a misconduct.

34. Paragraph No.7 of the Om Prakash judgment (supra), reads as under:-

“7. In view of the above admitted facts of the case in adjudicating the question of legality of the charge-sheet disclosing the name of the enquiry officer, I find that it is the settled principles of law that after issuing the charge-sheet the principles of natural justice is required to be followed by giving an opportunity to the delinquent employee to submit a reply to the same. On receipt of such reply the disciplinary authority is to decide as to whether the enquiry proceeding is required to be conducted. In the event the decision is taken by the disciplinary authority to conduct enquiry proceeding without giving opportunity to the delinquent employee to give reply to the charge-sheet, the decision making process suffers from the violation of the principles of natural justice on the ground of biasness. In this regard the relevant portions of the decision State of Punjab v. V.K. Khanna (supra) are quoted below:

34. The High Court while delving into the issue went into the factum of announcement of the Chief Minister in regard to appointment of an Inquiry Officer to substantiate the frame of mind of the authorities and thus depicting bias. What bias means has already been dealt with by us earlier in this judgment, as such it

does not require any further dilation but the factum of announcement has been taken note of as an illustration to a mindse viz. the inquiry shall proceed irrespective of the reply. Is it an indication of a free and fair attitude towards the concerned officer? The answer cannot possibly be in the affirmative. It is well settled in Service Jurisprudence that the concerned authority has to apply its mind upon receipt of reply to the charge-sheet or show-cause as the case may be, as to whether a further inquiry is called for. In the event upon deliberations and due considerations it is in the affirmative the inquiry follows but not otherwise and it is this part of Service Jurisprudence on which reliance was placed by Mr. Subramaniam and on that score, strongly criticised the conduct of the Respondents here and accused them of being biased. We do find some justification in such a criticism upon consideration of the materials on record.”

35. In my view, an employee can offer proper explanation to convince the employer that he was precluded by compelling circumstances from filing a leave application. The employer may consider the explanation put forth and may decide whether to conduct an enquiry or to drop the enquiry. If the explanation is not satisfactory, the employer may proceed to initiate the enquiry. This would be in tune with the law as is laid down by the Apex Court in State of Punjab Vs. V.K.Khanna [AIR 2001 SC 343], which was followed in Om Prakash's case (supra).

36. Since this opportunity is available to an employee to address the

mind of the employer, the enquiry officer need not step into the shoes of the employer and expand the scope of Standing Order 24(f) invoked, to accept the explanation of an employee and conclude that the charge under Standing Order 24(f) though proved, is not a misconduct since the delinquent has explained the reasons as to why he could not file the leave application. Standing Order 24(f), in fact, prohibits absence without leave.

37. I am not required to advert to Section 73 of the ESIC Act, relied upon by Shri Prabhakaran since I am dealing with the issue as to whether the enquiry officer can consider the reasons for not filing an application for leave and thereby conclude that the charge of unauthorized absenteeism is not proved.

38. The reliance placed upon the judgment of Krushnakant (supra), may not be of any assistance to the petitioner since the question that was being considered by the Apex Court as set out in paragraph No.16 was, *“The question whether ‘unauthorised absence from duty’ amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.”*

39. The issue in Krushnakant's case (supra), being gone into was under Rule 3(1)(ii) and Rule 3(1)(iii) of the Central Civil Services (Conduct) Rules,

1964 which pertained to all time maintaining of integrity, devotion to duty and to do nothing which is unbecoming of a Government servant. The said Rules are reproduced in paragraph No.14 of the said judgment. It was from this angle that the Apex Court dealt with the issue of willful absence. *Per contra*, in the instant case, the issue is regarding absence without leave. The reasons for absence are, therefore, not to be looked into under the first part of Standing Order 24(f). The ratio in the Krushnakant's judgment (supra), therefore, would not be applicable to the case of the petitioner.

40. The judgment of the Apex Court in the case of Chairman-Cum-Managing Director (supra), was in relation to the quantum of punishment. The concerned employee was absent for about six months, who admitted his guilt and also tendered his resignation. The resignation was not accepted and he was inflicted with the punishment of removal from service. It was held by the Apex Court that the punishment was disproportionate and denial of backwages was an enough punishment to the concerned employee. The other judgments cited by Shri Barde are on different facts.

41. Shri Barde has submitted that on the ground of disproportionate punishment, the petitioner be granted compensation. Shri Prabhakaran has countered this request by stating that the petitioner is not entitled for any compensation since even if it is presumed that the deceased continued in employment till his demise on 4.10.2004, he would not be entitled for

any monetary benefits since his death would have brought the employer - employee relationship to an end.

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Dated : July 21, 2015

42. The Supreme Court in the Delhi Transport Corporation's case (supra) has held in paragraph Nos.9, 10, 11 and 12 as under:-

"9. When an employee absents himself from duty, even without sanctioned leave for very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Order as quoted above relates to habitual negligence of duties and lack of interest in the Authority's work. When an employee absents himself from duty without sanctioned leave the Authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. Ample material was produced before the Tribunal in each case to show as to how the concerned employees were remaining absent for long periods which affect the work of the employer and the concerned employee was required at least to bring some material on record to show as to how his absence was on the basis of sanctioned leave and as to how there was no negligence. Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

10. Great emphasis was laid by learned counsel for the respondent- employee on the absence being treated as leave

without pay. As was observed by this Court in State of Madhya Pradesh v. Harihar Gopal (1969(3) SLR 274] by a three-judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination that is for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the Governing Standing Orders unauthorized leave can be treated as misconduct.

11. *Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. Clause (ii) of Para 4 of the Standing Order shows the seriousness attached to habitual absence. In clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non-observance of which renders the absence unauthorized.*

12. *The Tribunal proceeded in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave."*

43. In the light of the judgment of the Apex Court in the V.K.Khanna case (supra), it is settled that the employer can order initiation of a domestic enquiry only after considering the reply of the delinquent to the

charge sheet. Even after the conclusion of the enquiry, if held guilty, the delinquent is called upon to explain as to why the findings of the Enquiry Officer should not be accepted and whether he deserves to be punished.

44. Though the 42nd Amendment to the Constitution has taken away the second right of the workman to show cause on the quantum of punishment which was available under the 15th Amendment, it is replaced by the right to show cause on the findings of the Enquiry Officer. It does give him an opportunity to address the mind of the employer as to whether he should be punished or not.

45. In the above backdrop, I am unable to accept the contention of the petitioner that he can justify his unauthorized absence before the Enquiry Officer by offering an explanation narrating the circumstances in which leave application was not filed or leave was not obtained, thereby, vesting jurisdiction in the Enquiry Officer to conclude that the charges of unauthorized absenteeism are not proved against the delinquent despite having not applied for leave.

46. In the instant case, even if it is presumed that the charges were not proved against the deceased and he deserves reinstatement with continuity and full backwages, it cannot be over looked that the said employee has passed away on 4.10.2004, which is about eight months post his termination. Even on this count, had the deceased been continued in

employment till the date of his demise, he would not have been entitled to any wages since he was continuously absent even after the issuance of the charge sheet. To be precise from December 2003, after the last charge sheet dated 28.11.2003 was served upon the deceased, he remained absent till his date of death.

47. The petitioner is entitled for gratuity that was payable to her deceased husband. It is stated that gratuity has already been paid to the petitioner.

48. In the light of the above, I do not find any merit in this petition. The judgments of the Labour Court, dated 18.10.2011 delivered in Complaint (ULP) No. 28 of 2004 and the judgment of the Industrial Court dated 19.3.2012 delivered in Revision (ULP) No. 86 of 2011 cannot be termed as being perverse or erroneous.

49. The Writ Petition is, therefore, dismissed. Rule is discharged. No order as to costs.

(RAVINDRA V. GHUGE, J.)

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