

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 14TH DAY OF JANUARY 2015/24TH POUSHA, 1936

W.P.(C).No.33297 of 2006 (L)

AGAINST THE AWARD IN I.D.NO.1 OF 1999, DATED 30.11.2005,
OF THE LABOUR COURT, ERNAKULAM.

PETITIONER(S):-

N.K.SOMASEKHARAN PILLAI,
(REMOVED FROM SERVICE, W.E.F. 05.04.1983, AS L.D.CLERK, K.S.R.T.C.),
NEDUVELIL HOUSE, K.S.MANGALAM P.O.,
VAIKOM, KOTTAYAM DISTRICT, NOW RESIDING AT VANDANAM,
PANNIYAMKULANGARA LANE, AYYANTHOL, THRISSUR-3

BY ADVS.SRI.N.SUGATHAN
SMT.M.C.BINDUMOL.

RESPONDENT(S):-

1. STATE OF KERALA,
RERESENTED BY ITS CHIEF SECRETARY, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
2. THE CHAIRMAN AND MANAGING DIRECTOR,
KERALA STATE ROAD TRANSPORT CORPORATION (KSTRC),
TRANSPORT BHAVAN, THIRUVNANTHAPURAM.

R1 BY GOVERNMENT PLEADER SRI.V.K.RAFEEQ.
R2 BY ADV.SRI.M.GOPIKRISHNAN NAMBIAR.

R2 BY ADV. SHRI.JOHNSON P.JOHN, SC, KSRTC
R2 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA,SC,KSRTC
R2 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA,SC,KSRTC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
14-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONER(S)' EXHIBITS:-

- EXT.P1 TRUE COPY OF G.O.(Rt) NO.3132/98/LBR DATED 13.10.1998.
- EXT.P2 TRUE COPY OF THE CLAIM STATEMENT FILED BY THE PETITIONER
BEFORE THE LABOUR COPURT, ERNAKULAM IN I.D.NO.1/99.
- EXT.P3 TRUE COPY OF THE PRELIMINARY OBJECTION FILED BY THE
2ND RESPONDENT BEFORE THE LABOUR COURT, ERNAKULAM IN
I.D.NO.1/99.
- EXT.P4 TRUE COPY OF THE REPLICATION FILED BY THE PETITIONER
BEFORE THE LABOUR COURT, ERNAKULAM IN I.D.NO.1/99.
- EXT.P5 TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE
2ND RESPONDENT BEFORE THE LABOUR COURT, ERNAKULAM IN
I.D.NO.1/99.
- EXT.P6 TRUE COPY OF THE ADDITIONAL WRITTEN STATEMENT
FILED BY THE 2ND RESPONDENT BEFORE THE LABOUR COURT,
ERNAKULAM IN I.D.NO.1/99.
- EXT.P7 TRUE COPY OF THE ADDITIONAL REPLY STATEMENT FILED BY THE
PETITIONER BEFORE THE LABOUR COURT, ERNAKULAM IN
I.D.NO.1/99.
- EXT.P8 TRUE COPY OF THE ENQUIRY REPORT DATED 22.09.1984.
- EXT.P9 TRUE COPY OF THE ORDER OF REMOVAL, DATED 16.11.1984.
- EXT.P10 TRUE COPY OF THE JUDGMENT IN O.P.NO.5380/94
DATED 29.07.1994 OF THIS COURT.
- EXT.P11(a) TRUE COPY OF THE ARGUMENT NOTES FILED BY THE COUNSEL
FOR THE PETITIONER BEFORE THE LABOUR COURT IN THE I.D.
- EXT.P11(b) TRUE COPY OF THE ARGUMENT NOTES FILED BY THE COUNSEL
FOR THE 2ND RESPONDENT BEFORE THE LABOUR COURT
IN THE I.D.
- EXT.P12 TRUE COPY OF THE AWARD, IN I.D.NO.1/1999, DATED 30.11.2005,
BY THE LABOUR COURT, ERNAKULAM.

RESPONDENT(S)' EXHIBITS:-

- EXT.R2(a) TRUE COPY OF THE ORDER NO.PLB 5.30232/84 DATED 5.5.1984.

vkul/-

(true copy)

K.Vinod Chandran, J.

W.P.(C).No.33297 of 2006-L

Dated this the 14th day of January, 2015

JUDGMENT

The petitioner challenges Exhibit P12 award of the Labour Court. The petitioner admittedly was dismissed from service with effect from 05.04.1983, the justification of which, was the issue referred for adjudication. The learned counsel for the petitioner would contend that after an unblemished service of more than 17 years, the petitioner was unceremoniously sent out for the reason of six days absence. It has come out in the enquiry that the petitioner had submitted an application for leave. For the simple reason that the petitioner had absented from duty between 30.03.1983 to 04.04.1983, the petitioner has been sent out of service, is the plea. Though in the enquiry it was established that the petitioner had made applications for Casual Leave, the respondent-authorities are said to have rejected it and on that basis; unauthorised absence was found, argues counsel. The petitioner also has a case that after 05.04.1983 he had sought for joining duty, which was not permitted by the authorities.

2. The learned counsel would contend that since at this stage no reinstatement could be ordered, at least the pension which would be accrued to the employees of the 2nd respondent-Corporation may be directed to be paid, causing further interference to the punishment imposed by the disciplinary authority and modified by the Labour Court. The interference caused under Section 11A of the Industrial Disputes Act, 1947 [for brevity "the Act"] by the Labour Court modifying the punishment of dismissal to one of discharge does not confer any benefit to the petitioner and a further interference ought to be caused, since definitely the punishment imposed is shockingly disproportionate to the gravity of the offence, is the argument.

3. The learned counsel appearing for the respondent-Corporation, however, would contend that, it is not for the absence between 30.03.1983 and 04.04.1983 that the petitioner was proceeded with. The petitioner had remained absent from 05.04.1983 without any leave application and it was for such unauthorised absence, he was proceeded against. It was specifically pointed out that though the petitioner has a contention that he was not allowed to join duty after 05.04.1983, the petitioner

has not moved a little finger to redress his alleged grievance of denial of employment between 05.04.1983 and 16.09.1983, on which later date the show cause notice was issued. The learned counsel for the management would further submit that after Exhibit P9, issued on 16.11.1984, the petitioner has not chosen to challenge the same or raise a dispute with respect to his removal, within a reasonable time. The petitioner is also said to have approached this Court with three writ petitions, numbered as O.P.5035 of 1993, O.P.403 of 1994 and O.P.9701 of 1996, in which the specific issue dealt with was his removal; but, however without challenging the same as such. The petitioner, after more than 12 years, raised a reference, in which the aforesaid issue was referred for adjudication to the Labour Court.

4. The issue of delay in approaching the appropriate Government/Labour Court with a reference for adjudication of the dispute of dismissal would not be a consideration for the adjudication of the dispute. But the untimely delay in seeking reference would definitely weigh with the Labour Court when interference is made under Section 11A [vide ***Karan Singh v. M/s.Executive Engineer Haryana State Marketing Board*** [AIR

2007 SC (Supp) 989], *Haryana Land Reclamation and Development Corporation Ltd. v. Nirmal Kumar* [(2008) 2 SCC 366] and *Rajasthan State Agriculture Marketing Board v. Mohan Lal* [(2013) 14 SCC 543].

5. On reference being made, the enquiry files were produced before the Labour Court and the Enquiry Officer was also examined. There was no other ground raised against the sustainability of the enquiry. The Labour Court found that the enquiry was held following the principles of natural justice and there could be no infirmity found on that count. This Court does not find any reason to interfere with that finding.

6. The learned counsel for the petitioner has pointed out an anomaly in Exhibit P8 that, despite the title indicating the proceedings being for unauthorised absence from duty since 05.04.1983, the Enquiry Officer has gone beyond his brief; insofar as finding such absence from 29.03.1983. This Court is of the opinion that the said anomaly is glaring, but the prejudice caused to the delinquent employee is to be examined. The disciplinary authority has not reckoned the absence of the petitioner from

29.03.1983. The disciplinary authority, in Exhibit P9 order, specifically finds the guilt of the petitioner, only with respect to the charge that, the petitioner was unauthorisedly absent from duty from 05.04.1983. Hence, despite the Enquiry Officer having found that the petitioner was absent from a prior date than that indicated in the charge, the punishment imposed by the disciplinary authority does not take such a finding into account. Despite the Enquiry Officer having exceeded his brief in coming to such a finding, no prejudice was caused to the delinquent employee.

7. A reading of Exhibit P12 award would indicate that the petitioner was not proceeded against for the absence of four days between 30.03.1983 and 04.04.1983; 1st and 3rd of April, 1983 being holidays. The charge-sheet issued as also enquiry proceeded with, was for unauthorised absence from 05.04.1983. Admittedly the petitioner had not applied for any leave from 05.04.1983; but he asserts that despite attempting to join duty, he was not permitted to do so.

8. The facts as disclosed from the enquiry as extracted by the Labour Court would indicate that on 28.03.1983 the petitioner was transferred from the Audit Section to Ticket and

Cash Section. The petitioner is said to have, however, reported in the Audit Section on 29.03.1983 and signed the attendance register. In such circumstance, it was specifically instructed that the petitioner shall be allowed to work only in the Ticket and Cash Section from the next day onwards. It was hence that the petitioner submitted a Casual Leave application on 30.03.1983 and 31.03.1983. The first and third April, 1983 being holidays, the petitioner had further made a leave application for 2nd and 4th of April, 1983. The said applications were rejected by the Assistant Transport Officer. However, that is not relevant for consideration, since the question would be only with respect to the absence from 05.04.1983, for which admittedly, the petitioner did not make any application for leave.

9. With respect to the misconduct alleged, the same is of unauthorised absence from duty since 05.04.1983. The workman also did not have a case that he had applied for any leave from 05.04.1983. Though the workman alleged that he was not allowed to join duty, there is not even a request placed on record by the workman seeking permission to join duty; nor has the workman thought it fit to complain against the said alleged

refusal of the ATO, before any of the higher authorities. The defence set up by the petitioner was that he was not aware of the transfer. That would not be sufficient reason to absent himself, if he had not been permitted to join the post from which he was transferred. Definitely the petitioner would have taken it up with the higher authorities. Then again, the petitioner's own witness, one Sri.V.Subramonia Iyer, Superintendent of Audit Section, deposed that he had served the order of transfer on the petitioner. The petitioner had deliberately remained absent on his transfer.

10. The Labour Court had also noticed that the afore-mentioned Subramonia Iyer had also deposed that the petitioner had requested the ATO to permit him to join duty. The petitioner contends that, the said statement would show that he was unauthorisedly kept away from duty. The deposition of the said witness is only to the effect that on one day, in April 1983, the petitioner was seen in the office of the ATO seeking to join duty. It was also stated that the ATO had directed the petitioner to get the sanction of the Chief Office to re-join duty. Admittedly such request was made after the petitioner refused to join the transferred post and that too after the unauthorised absence commenced. That

solitary instance cannot lead to an inference that the petitioner was illegally kept away from duty. The petitioner too admits that he was asked by the ATO, to get sanction from the Chief Office for re-joining duty. But for an assertion that representations were sent, nothing was produced to substantiate the same. The petitioner admitted that he has not given any leave application after 05.04.1983 and the petitioner had also not joined duty thereafter. The petitioner did not even file a reply to the charge-sheet issued. In the circumstances, it was found that the finding of the Enquiry Officer, that, the management had proved the guilt of the delinquent employee, was not liable to be interfered with.

11. The charge of unauthorised absence having been found to be proved on the basis of the proceedings in the enquiry, the Labour Court also examined the question of punishment; whether the same was disproportionate to the gravity of the offence, as provided under Section 11A of the Act. The Labour Court found that the order of dismissal from service has to be interfered with and it was converted into one of discharge, with entitlement for all terminal benefits as per law in force as on 05.04.1983.

12. Though not specifically urged, then the distressing question would be whether the disciplinary authority could have passed an order with retrospective effect. Exhibit P9 order of dismissal was dated 16.11.1984 and it dismissed the petitioner from an anterior date. That would not be permissible as laid down by this Court in ***Philipose v. State Bank of Hyderabad* [2001 (3) KLT 378]** and ***Shanmukhan v. Joint Registrar* [2004 (2) KLT 1015]** as also the decision of the Hon'ble Supreme Court in ***State Bank of Patiala v. Ram Niwas Bansal* [AIR 2014 SC 1264]**. ***State Bank of Patiala* (supra)** considered the entire decisions on the subject and found:

“... but as far as the order of removal being made retrospectively operational, there can be no trace of doubt that it cannot be made retrospective”.

As to the validity of such an order, the Supreme Court relied on ***The Gujarat Mineral Development Corporation v. Shri.P.H.Bhambhatt* [AIR 1974 SC 136]** to hold so:

“This Court opined that an order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate

retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The said principle has been followed in *The Gujarat Mineral Development Corporation v. Shri.P.H.Bhambhatt*”.

Hence, the retrospective effect given to the dismissal under Exhibit P9 would be invalid. Exhibit P9 would be treated as an order of dismissal with effect from its date, i.e., 16.11.1984. On the interference caused by the Labour Court under Section 11A of the ID Act, the same would be modified as “discharge” as on 16.11.1984.

13. It is the submission of the learned counsel for the petitioner that even such interference, would only enable the petitioner to get paltry amounts and appropriately the Labour Court ought to have granted, atleast the entitlement of pension to the delinquent employee. It is seen from the additional counter affidavit filed by the respondent-Corporation that a pension scheme was introduced in the Corporation with effect from

01.04.1984. The interference being only to the extent of modifying the order of “dismissal” into an order of “discharge” that would not enable grant of pension to the petitioner by reason of Rule 29 of Part III of Kerala Service Rules. It would not be proper for the Labour Court or for this Court, examining the issue of interference under Section 11A of the Act, to direct grant of a benefit which was not available on the date of discharge.

14. In this context, the earlier conduct of the petitioner has also to be examined, especially the factum of the petitioner having approached this Court earlier with four writ petitions, the numbers of which are evident from the order of the Labour Court. This Court, hence, called for the Judges Papers in the said writ petitions. O.P.No.5035 of 1993 was filed for service benefits, like Gratuity, Provident Fund, Weflare Fund and Notice Pay on the ground that the petitioner was relieved from service on 05.04.1983 without giving any service benefits. This Court by judgment dated 06.04.1993 directed consideration of a representation produced along with the writ petition. With the very same reliefs, again a writ petition was filed as O.P.No.403 of 1994. This Court, by judgment dated 19.01.1994, directed further consideration of a

representation dated 29.09.1994.

15. It is to be noticed that in neither of these writ petitions there was a challenge against the order of dismissal passed after a valid enquiry; nor was there a mention about such a removal from service. The petitioner again sought for employer's provident fund and gratuity, in O.P.No.5380 of 1994. This Court by judgment dated 29.07.1994 found that:

“By virtue of Rule 29 of Part III of the Kerala Service Rules, the petitioner's past service had been forfeited by his removal. Therefore the petitioner is not entitled to the employer's contribution towards provident fund by reason of his removal. He is not entitled to the gratuity also because gratuity is related to the past service”.

However, the respondent was directed to serve a copy of the order of removal on the petitioner. Later, a further writ petition was filed, as O.P.No.9701 of 1996, challenging the order of the Managing Director of the Corporation, which specifically held that no pension and gratuity would be payable, as the petitioner had been removed from the service of the Corporation. This Court having examined the said contention, dismissed the Original Petition on 26.11.1996, rejecting the claim for pension.

16. This Court has already found that the interference caused by the Labour Court is sufficient, insofar as the jurisdiction conferred under Section 11A; when the punishment of dismissal was modified to one of discharge. In any event, the equitable jurisdiction under Article 226 was invoked by the petitioner and the claim stood negated by judgment in O.P.No.5380 of 1994 and O.P.No.9701 of 1996. There also exists no compelling ground to cause further interference in the punishment, beyond what has been done by the Labour Court.

The writ petition would stand partly allowed; modifying the order of discharge to be effective from the date of Exhibit P9, i.e., 16.11.1984. The petitioner shall be entitled to any benefits which flows from such discharge being made effective from 16.11.1984. Parties to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

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