

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.07.2015

DATE OF DECISION : 6.08.2015

CORAM:

THE HONOURABLE MR. JUSTICE SATISH K. AGNIHOTRI
AND
THE HONOURABLE MR. JUSTICE M. VENUGOPAL

W.A.Nos.360 and 361 of 2015

and

M.P.Nos.1,1 and 2 of 2015

The General Manager,
Metropolitan Transport Corporation
Chennai Limited,
Pallavan Illam, Anna Salai,
Chennai-600 002.

.. Appellant in
both writ appeals

Vs.

1.D.Prasad

.. 1st respondent in
W.A.No.360 of 2015
and
2nd respondent in
W.A.No.361 of 2015

2.The Special Assistant Commissioner of Labour,
Teynampet,
Chennai-600 006.

.. 2nd Respondent in
W.A.No.360 of 2015

The Special Joint Commissioner of Labour,
Teynampet,
Chennai-600 006.

.. 1st respondent in
W.A.No.361 of 2015

These Writ Appeals are preferred under Clause 15 of the Letters Patent against the order dated 11.09.2014 passed in W.P.Nos.6311 and 15568 of 2014. Writ Petition No.6311 of 2014 filed under article 226 of the constitution of India to issue a Writ of Mandamus directing the Respondent to issue orders of reinstatement with continuity of service and other benefits applicable to the petitioner as per orders

passed by the Deputy Commissioner of labour (conciliation), Thenampet, Chennai in Approval Petition No.234 of 2012 dated 18.10.2013 within a time frame.

Writ Petition No.15568 of 2014 filed Under Article 226 of the constitution of India for the issuance of a writ of certiorari to call for the records of the order passed by the first respondent in Approval petition in A.P.No.234 of 2012, dated 18.10.2013 and to quash the same as illegal.

For Appellant .. Mr.P.Paramasiva Doss
in both W.As.

For respondents.. Mr.R.Y.George Williams for R-1
in W.A.No.360 of 2015 and
for R-2 in W.A.No.361 of 2015

Mr.N.Sakthivel, GA for R-2
in W.A.No.360 of 2015 and
for R-1 in W.A.No.361 of 2015

COMMON JUDGMENT

The instant appeals arise from the common order dated 11th September, 2014 passed in W.P.Nos.6311 and 15568 of 2014.

2 The first writ petition was filed by the employee / first respondent in W.A.No.360 of 2015, seeking a direction to the appellant herein to issue orders of reinstatement with continuity of service and other benefits as per the order dated 18th October, 2013 passed in the Approval Petition being A.P.No.234 of 2012.

3 The second petition was filed by the management/ appellant herein, questioning the legality and validity of the said order passed in the approval petition.

4 The facts in brief are that a Corporation bus driven by the first respondent herein in W.A.No.360 of 2015 (herein-after referred to as "the employee") met with an accident on 27th June, 2012 at about 1.40 p.m. over Anna flyover while running from Broadway to Vadapalani. The vehicle turned towards left to go to Cloverleaf road and dashed against the parapet wall, resulted into hanging of the vehicle from the bridge and caused injuries to the travelling 46 passengers. On account of this incident, the employee was placed under suspension on 28th June, 2012. Thereafter, a charge memo dated 31st June, 2012 on the allegation of rash and negligent driving was issued. An enquiry was conducted, which ended into finding the allegations proved. Consequently, the second show cause notice was

issued on 5th October, 2012, calling upon the employee for his explanation. Being dissatisfied with the explanation submitted by him on 13th October, 2012, the consequential order of dismissal from service was passed on 18th October, 2012. The appellant herein / the management served the order of dismissal enclosing a cheque for the last drawn monthly salary for a sum of Rs.21525.50. The appellant herein, thereafter, made an application for approval under Section 33 (2)(b) of the Industrial Disputes Act, 1947 (for short "I.D. Act") before the Special Deputy Commissioner of Labour, Teynampet, Chennai, which was rejected on 18th October, 2013. Thereagainst, two writ petitions were filed by both parties, as aforestated.

5 The learned Single Judge, considering the facts from all angles and also examining the question of law involved therein, came to the conclusion that the finding of the enquiry officer in respect of the fact that the vehicle was driven in a rash and negligent manner is not based on legal evidence and as such, the approval application was rightly rejected. On the next question about the payment of full last drawn monthly wages, the learned Single Judge upheld the finding of the Tribunal to the extent that the employee was drawing the monthly wage to the tune of Rs.21,655/- and he was given a sum of Rs.21,525.25, which was not the full last drawn monthly wage. On that account also, the management had failed to comply with the provisions of Section 33(2)(b) of the I.D. Act. Accordingly, the approval petition was rightly rejected.

6 Feeling aggrieved, the appellant management is before us by way of these appeals.

7 The Special Deputy Commissioner of Labour, while exercising his power under Section 33(2)(b) of the I.D. Act, clearly recorded the case of the employee that the driving seat suddenly gave way and as a result, he fell inside the bus, which resulted into losing control of the bus and causing the accident. The learned Commissioner examined the entire facts at length, particularly the fact that one Guruvaiah, as a sole witness, was examined on the side of the management. He was not a witness to the accident and his evidence was based on hearsay. Not a single passenger, who sustained injuries, was examined and as such, the departmental enquiry was based on no evidence and was perverse. It was also held that no opportunity to cross examine the said witness was afforded to the employee. The Enquiry Officer was expected to examine the witness in the light of the clear statement made by the delinquent employee that the driver seat was given way, which resulted into falling of the driver inside the bus and caused the said accident. It was further found that the enquiry officer had failed to establish that the delinquent employee was driving the bus in a rash and negligent manner.

8 On the question of payment of full last drawn wage, as the fact was not in dispute, it was held that the full last drawn wage was not paid and it was fatal to the dismissal as it was the

mandatory requirement to pay one month full last drawn wage to the employee and as such the provision of Section 33(2)(b) of the I.D. Act was not properly complied with.

9 The learned Single Judge had further examined the case from all angles and held as under :

"12. x x x x x x x x x x It is the case of the workman that while turning towards left to enter the cloverleaf road, the vehicle crossed 10 metres and the management witness has stated that it must be only 4 metres and he admitted that he has not measured the distance. However, it is admitted that the vehicle had turned towards left for going into cloverleaf road and in that process the accident had taken place. It is the case of the management that the vehicle was driven in a rash and negligent manner and that was the reason for the accident. Had the vehicle been driven in a rash and negligent manner as alleged by the management, the vehicle would have gone straight and the vehicle could not have turned towards left. Further, no material was produced by the management to arrive at the conclusion that the vehicle was driven in a rash and negligent manner. Though there was no necessity for the management to examine any passengers and take into consideration the principles of res ipsa loquitur, the Court has to arrive at a conclusion whether the vehicle was driven in a rash and negligent manner.

13. In this case, even by applying the said principle, it cannot be stated that the vehicle was driven in a rash and negligent manner. As stated supra, the vehicle had turned towards left and after crossing 4 metres or 10 metres, the vehicle dashed against the parapet wall and had the vehicle been driven in a rash and negligent manner, the vehicle would not have turned towards left and would have dashed against the parapet wall on the left side of the bridge. The fact that the vehicle had turned towards left coupled with the evidence of the workman would probablise the explanation given by the workman that the driver seat had given way and therefore, he had fallen and therefore, he was unable to control the vehicle, can be accepted. x x x x x x "

10 The learned counsel appearing for the appellant would contend that it was a case of rash and negligent driving. The delinquent employee was given full opportunity of hearing to present his case before the enquiry officer. The delinquent employee had failed to establish that the said accident occurred on account of some mechanical defect, as on inspection it was found that the driver seat was intact. The fact that the driver seat was intact was

sufficient to establish that the driver seat did not give way leading to falling of the driver inside the bus. It was further contended that the payment was made keeping in view the total salary, not including the dearness allowance, which was payable only on performance of duty. Thus, the finding that the provision of Section 33(2)(b) of the I.D. Act in respect of payment of last drawn wage was not complied with is not correct.

11 Per contra, Mr.R.Y.George Williams, learned counsel appearing for the employee would submit that the learned Special Deputy Commissioner of Labour had examined the facts in entirety. The employee had clearly stated in his statement that the driver seat gave way and as a result, the employee fell inside the bus. This had happened because of bad condition of the bus. Falling of the driver inside the bus was seen by all passengers present in the bus. The management had deliberately not examined even a single eye witness. The witness examined by the management was not an eye witness and he came to the accident site subsequently. The employee was also not given an opportunity to cross examine the Inspector, who had examined the bus and found the driver seat intact, as the said fact was incorrect. It is further contended that the Special Deputy Commissioner of Labour as well as the learned Single Judge had examined the entire case from all angles and there is no scope for interference with the same.

12 We have heard the learned counsel appearing for the parties, perused the pleadings and documents appended thereto.

13 There is no dispute that the finding of facts recorded by the Special Deputy Commissioner of Labour and confirmed by the learned Single Judge do not warrant any interference, as the appellant had failed to produce any material to establish that the Inspector, who had submitted the report that the driver seat was intact, was cross examined, except self serving statement. There is also no material to establish that the management had made all endeavours to produce travelling passengers for examination before the enquiry committee. In that view of the matter, we have no hesitation to hold that the finding recorded by the learned Special Deputy Commissioner of Labour, confirmed by the learned Single Judge, is not faulted and deserves to be affirmed. The entire case of the management was on the basis of the report submitted by the Inspector that the driver seat was intact. The total scenario of the accident was not examined, which has been explained by the learned Single Judge at length. Thus, the management had failed to establish even a prima facie legal case, necessitating dismissal of the employee. Consequently, the Special Deputy Commissioner of Labour was right in rejecting the approval petition, which was confirmed by the learned Single Judge in the writ petitions.

14 In respect of payment of wages, it is beneficial to extract the provision of Section 33(2)(b) of the I.D. Act, as under :

"33. Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings.—(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman,—

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

15 The Supreme Court, in the matter of Bharat Electronics Limited Vs. Industrial Tribunal, Karnataka, Bangalore and another¹, while examining the scope and ambit of Section 33(2)(b) of the I.D. Act, held as under :

"14. Now confluencing the two legal thoughts expressed in Bennett Coleman case⁴ and Dilbagh Rai Jarry case⁶, the stream of thought which inevitably gurgles up is that an allowance which from the term of employment flows as not contingent on actual working is part of wages for the purposes of Section 33(2)(b) but an allowance which is earnable only by active serving is not an allowance which will form part of wages, within the meaning of the said provision."

In the subsequent para, it was observed as under :

15. x x x x x Thus we hold that the Tribunal fell into a grave error in declining the application of the management for approval on the ground of short payment of Rs 12 on account of night shift allowance, which the workman supposedly would have earned had he gone to report on duty, which in the circumstances he could not, or having worked rotationally at night, which he did not, and that too fictionally, in the month following the month and the date of the application, on which date the dismissal was to be effective."

1 (1990) 2 SCC 314

16 In the case on hand, the appellant management has not produced any material to indicate that the dearness allowance, which was not included, was contingent upon performance of work. If it was not payable in lieu of performance of duty, that becomes a part of wages as defined under Section 2(rr) of the I.D. Act. Thus, the Special Deputy Commissioner of Labour as well as the learned Single Judge are right in coming to the conclusion that the full last drawn wages not paid to the employee to lessen the rigour of dismissal. Thus, dismissal order suffers from infirmity for want of non compliance of provision of Section 33(2) (b) of the I.D.Act.

17 For the reasons mentioned herein-above, both writ appeals are sans merit and deserve to be dismissed. Accordingly, both writ appeals stand dismissed. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

vvk

To

- 1.The General Manager,
Metropolitan Transport Corporation
Chennai Limited,
Pallavan Illam, Anna Salai,
Chennai-600 002.
- 2.The Special Assistant Commissioner of Labour,
Teynampet,
Chennai-600 006.
- 3.The Special Joint Commissioner of Labour,
Teynampet, Chennai-600 006.

+2 cc to Mr.P.Paramasivadoss, Advocate, sr.39065 & 40831
+2 cc to Mr.R.Y.George Williams, sr.40712.

km(co)
kra(18/08)

W.A.Nos.360 and 361 of 2015