

In the High Court of Judicature at Madras

Dated: 06.07.2015

Coram:

The Hon'ble Mr.Justice SATISH K. AGNIHOTRI
and
The Hon'ble Mr.Justice M.VENUGOPAL

W.A.No.835 of 2015

B.Mohamed Manzoor Ali ..Appellant/2nd Respondent

Vs.

1. The Management,
Tamilnadu State Transport Corporation
(Kumbakonam) Ltd.,
Kumbakonam
Rep. By its Managing Director ..Respondent/Petitioner

2. The Presiding Officer,
Labour Court, Cuddalore. ..Respondent/1st Respondent

Prayer: Writ Appeal filed under Clause 15 of the Letter Patent
Appeal against the Order of this Court dated 06.01.2015 made in
W.P. No. 11687 of 2011.

Prayer in W.P.11687 of 2011:- Writ petition filed under
Article 226 of the constitution of India to issue a writ of
certiorari calling for th records relating to ID.No.130 of 2003
dated 8.2.2010 on the file of the 1st respondent herein and quash
the same.

For Appellant : Mr.L.Chandrakumar

JUDGMENT

[Judgment of the Court was Delivered By
M.VENUGOPAL, J.]

The Appellant / 2nd Respondent has focused the instant Writ
Petition as against the Order dated 06.01.2015 passed by the
Learned Single Judge in allowing the Writ Petition.

2. According to the Learned Counsel for the Appellant/2nd Respondent, the Order of the Learned Single Judge in allowing the Writ Petition is against all Canons of Law, Violative of Settled Principles and therefore, it is liable to be quashed in the Eye of Law.

3. The Learned Counsel for the Appellant urges before this Court that the Learned Single Judge had failed to consider the Award of the 2nd Respondent/Labour Court, Cuddalore in I.D.No.130 of 2003 wherein both the oral and documentary evidences came to be appreciated in a threadbare discussion. Further, the Award was passed by exercising the power conferred under Section 11-A of Industrial Disputes Act, 1947. While confirming the findings of the Enquiry Officer, ie., to say that "the charge was absent from duty without any information and applying leave" and when the same was appreciated in relation to the nature of duties of that of appellant was modified to that of reinstatement without backwages from that of dismissal from services.

4. The Learned Counsel for the Appellant brings it to the notice of this Court that the 2nd Respondent/Labour Court had also opined that the 1st Respondent / Transport Corporation/Management had to arrange for Counselling Session so that the Appellant could modify his character. When that be the fact situation, the Learned Single Judge of this Court ought not to have interfered with the Award passed by the Labour Court in I.D.No.130 of 2003.

5. The Learned Counsel for the Appellant proceeds to project an argument that the punishment of dismissal imposed on the Appellant is not only shockingly disproportionate but also not commensurate with the alleged misconduct of absence of 22 days without intimation. In effect, the plea taken on behalf of the Appellant is that in the absence without leave termed as unauthorised absence, awarding a capital punishment of dismissal is impermissible in Law.

6. The Learned Counsel for the Appellant contends that the 1st Respondent/Management instead of providing Counselling Session and that of a Psychotherapist so that the Appellant could mend himself had chosen to submit falsity coupled with bias and victimisation as if the Appellant had not chosen to change his attitude when no such opportunity whatsoever was extended to him.

7. The Learned counsel for the Appellant submits that the Order of the Learned Single Judge in allowing the Writ Petition suffers from the vice of improper appreciation of facts in evidence as well as materials on record. That apart, it is represented on behalf of the Appellant that the Learned Single Judge of this Court had proceeded on the basis that the earlier punishment were not taken

into account, when admittedly the said punishment were already imposed and undergone by the Appellant and at this distance point of time to speak of the antecedents of such occurrence would be squarely infractive of double jeopardy violating Article 20(2) of the Constitution of India.

8.It is not in dispute that the Appellant/2nd Respondent was employed as a Driver in the 1st Respondent/Transport Corporation. He was issued with a Charge Memo dated 03.01.2001 for his continuous absence from duty without intimation or permission for 22 days in the Month of December, 2000. He offered his explanation to the Charge Memo. Being dissatisfied with the explanation offered by the Appellant, a Domestic Enquiry was held. The Enquiry Officer after analysing the evidence as well as the documents available before him came to the resultant conclusion that the charge against the Appellant was held proved and in this regard submitted a Report on 30.01.2001.

9.Resting on the Enquiry Report, the 2nd Show Cause Notice dated 28.02.2001 was served on the Appellant, for which an explanation was submitted on 16.03.2001. Thereafter, the Appellant was required to appear before the Committee for counselling. He appeared before the Committee and furnished an Undertaking Letter dated 24.07.2002 that he would come for duty regularly in future (which marked as Ex.M.18). Even after this, the Appellant had not turned up for duty contrary to the Undertaking Letter dated 24.07.2002 furnished by him. His explanation was considered by the 1st Respondent/Management and since it was found not satisfactory, he was dismissed from service by means of an Order dated 25.11.2002.

10.It comes to be known that the Appellant had not furnished a Letter or Medical Certificate for availing leave in question. Indeed, the Enquiry Officer after perusing the evidence and looking into the relevant documents ultimately opined that charges levelled against the Appellant were established.

11.In the instant case on hand, the Appellant who furnished an Undertaking dated 24.07.2002 to the effect that he would attend duty regularly in future, had not followed the same. Per contra, he had violated the same and had not turned up for duty. Admittedly, the Appellant was issued with the 2nd Show Cause Notice dated 28.02.2001, for which an Explanation dated 16.03.2001 was submitted by him. As a matter of fact, the explanation submitted by the Appellant was found to be an unsatisfactory one and finally he was dismissed from service by virtue of an Order dated 25.11.2002.

12. In reality, the Appellant remained absent for 22 days. On earlier 34 occasions also he was punished (inclusive of his Unauthorised absence/Leave for ten times and further, he remained absent from duty for a quite long time). At this stage, it is to be pointed out that before an individual can be said to be guilty of negligence it is to be established that he was guilty of the same for normal occurrence so as to establish that negligence is his habit. A carelessness can, often be a productive of more harm than any malevolent conduct. The question whether the unauthorised absence of the Appellant for 22 days constitutes a gross misconduct or not, will certainly depend upon its own peculiar facts and circumstances and the nature of work performed by him as well as the status or position he occupies in the considered opinion of this Court.

13. There is no dispute in regard to a fact that an Employee or Worker is under an obligation not to absent himself from work without good cause from the time at which he is required to be at work by the terms of his Contract of service. As per decision of National Coal Board v. Galley (1958) 1 ALL ER 1991 (CA). An absence of an employee from duty, if it amounts to misconduct inconsistent with faithful discharge of his duties would constitute good cause for his dismissal as per decision of Hanley v. Pease and Partners Limited (1915) 1 KB 698 705 (DC).

14. It is to be remembered that no Workman/Employee can claim leave of absence as a matter of right and remain absent without leave will constitute violation of discipline as per decision of Hon'ble Supreme Court Burn & Co., v. Their Workmen (1959) 1 LLJ at page 450, 452. Moreover, in order to justify the extreme penalty of discharge or dismissal, it has to be established that employee or workman remained absent without leave for an inordinate long duration or he is habituated to absent himself from duty.

15. Systematically leaving work without permission is another form of absence without leave. As such, when a workman systematically absents himself from work without permission and without making any application for leave, such Act is gross violation of discipline, as per decision of Hon'ble Supreme Court Burn & Co., Limited v. Their Workmen (1959) 1 LLJ at Page 450, 452.

16. Coming to the plea taken on behalf of the Appellant that the Appellant's previous punishments/antecedents of occurrence should have been taken into account by the Learned Single Judge at the time of allowing the Writ Petition filed by the Transport Corporation/Management and in this regard taking into account of Appellant's earlier punishments on 34 occasions by the Learned

Single Judge is a clear case of infractive of 'Double Jeopardy' attracting Article 20(2) of the Constitution of India, it is to be pertinently pointed out by this Court that to attract the ingredients of Article 20(2) of the Constitution of India, there must be a 'Second Prosecution' for the 'Same Offence' for which an accused was prosecuted and punished previously.

17. At this juncture, this Court significantly points out that in so far as the Appellant is concerned, a Departmental enquiry was conducted against him for his unauthorised absence for 22 days and therefore, it can be safely concluded that he was not 'Prosecuted' and 'Punished' for an offence contemplated under Article 20(2) of the Constitution of India. Therefore, this Court holds that the Appellant's case is not the one of 'Double Jeopardy' and as such Article 20(2) of the Constitution is not attracted, as opined by this Court. That apart, for the purpose of Article 20(2) of the Constitution of India 'Prosecution' means Judicial proceedings before a Court of Law or a Legal Tribunal. It cannot have reference to the Departmental or Disciplinary proceedings taken for imposing penalty or punishment on an employee belonging to the Departmental/Transport Corporation for any misconduct, as the case may be.

18. In regard to the exercise of power under Section 11-A of the Industrial Disputes Act, 1947 by the 2nd Respondent/Labour Court, Cuddalore, it is to be pointed out that the Labour Court for deciding the issue of Leave / unauthorised absence has to examine the facts and circumstances of a given case to find out whether 'Reinstatement' of a dismissed worker/employee is not inexpedient. In a case where no option other than order of dismissal of the Workman/Employee could be made on the established facts, arbitrary power of exercise of 'Reinstatement' would be reviewable on Certiorari before the Hon'ble High Court.

19. No wonder, the Labour Court/Tribunal is to exercise its judicial discretion based on the settled well known principles. Further, the Labour Court/Tribunal can refuse the Order of 'Reinstatement' where such a course in the circumstances of the case is not fair and proper. Ordinarily, 'Reinstatement' is not granted where a workman had indulged in activities prejudicial to the interests of the Management/Company/Corporation or where there is loss of confidence of the employer on him or likelihood of dislocation of work or dislocation of work.

20. In the present case, on going through the Award dated 08.02.2010 in I.D.No.30 of 2003 passed by the 2nd Respondent/Labour Court, Cuddalore, this Court is of the considered view that the 2nd Respondent/Labour Court had committed an error in arriving at a conclusion that the absence of the Appellant could be construed as

unauthorised absence. Even the past conduct of the Appellant, that he was punished for 34 times and further he had also violated the Undertaking furnished by him dated 24.07.2002 that he would attend duty regularly in future on all circumstances which goes against him. After furnishing an Undertaking dated 24.07.2002, he had not attended the duty. When the past conduct of earlier punishments reflect true character of the Appellant, then, in the considered opinion of this Court he could not be reinstated in service.

21.Per contra, the views taken by the 2nd Respondent/Labour Court, Cuddalore in modifying the punishment of dismissal from service imposed on the Appellant by exercising its discretion under Section 11-A of the Industrial Disputes Act, 1947 and allowing the I.D.No.130/2003 in part by directing the Appellant's reinstatement without backwages with continuity of services etc., are not Fair, Just and Valid one based on the facts and circumstances of the present case which float on the surface.

22.Looking at from that angle, the Order passed by the Learned Single Judge dated 06.01.2015 in W.P.No.11687 of 2011 in setting aside the Award passed by the 2nd Respondent/Labour Court, dated 08.02.2010 in I.D.No.130 of 2003 and confirming the order of the dismissal dated 25.11.2002 do not suffer from any legal infirmities in the eye of law.

Resultantly, the Writ Appeal fails. In the result, the Writ Appeal is dismissed leaving the parties to bear their own costs. Consequently, the Order dated 06.01.2015 passed by the Learned Single Judge in W.P.No.11687 of 2011 dated 06.01.2015 is affirmed by this Court for the reasons assigned in this Appeal.

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

ssd

To

1. The Managing Director
Tamilnadu State Transport Corporation
(Kumbakonam) Ltd.,
Kumbakonam

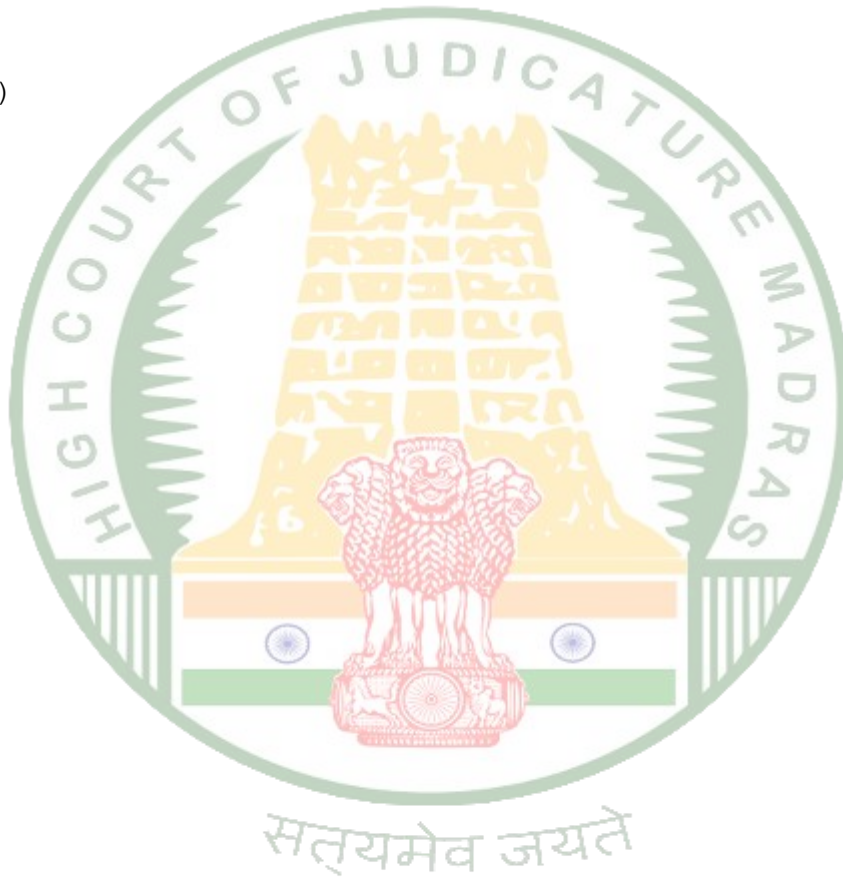
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2. The Presiding Officer,
Labour Court, Cuddalore.

1 cc to Mr.L. Chandrakumar, Advocate, Sr. 33534

W.A.No.835 of 2015

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