

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2016

CORAM:

THE HONOURABLE MR. JUSTICE R.SUDHAKAR

AND

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Writ Appeal No.425 of 2012

The Managing Director,
Tamil Nadu State Transport Corporation Ltd.,
Salem. ...Appellant/Petitioner

Vs.

1.S.Kalaiselvan
2.The Presiding Officer,
Labour Court,
Salem.

... Respondents/Petitioner
/ 2nd Respondents

Writ Appeal filed under Clause 15 of the Letters
Patent against the order dated 14.02.2011 passed by this Court
in W.P.No.19483 of 2003.

Petition Under Article 226 of the Constitution of India, to
issue a Writ of Certiorari or Order of direction in the nature
of a Writ calling for the records dated 16/09/2002 and made in
I.D.No.386/98 on the file of the Labour Court Salem, the 2nd
respondent herein and quash the same.

For Appellant : Mr.P.Paramasivadoss

For 1st Respondent : Mr.S.Ayyathurai

J U D G M E N T

(Judgment of the Court delivered by S.VAIDYANATHAN,J.)

The Management of Salem Transport Corporation has come on appeal challenging the order dated 14.02.2011 passed by the learned Single Judge in W.P.No.19483 of 2003, whereby, the Writ Petition filed by them seeking to quash the order dated 16.09.2002 made in I.D.No.386 of 1998 on the file of the Labour Court, Salem, came to be dismissed.

2. It is seen that the 1st respondent herein, a B.E. Graduate in Mechanical Engineering, joined the services of the appellant/Management in the year 1985 as Assistant Engineer, in which post, he was confirmed in the year 1986. On 19.06.1993, he was issued a Charge Memo for the charge that he left the work spot 40 minutes before completion of duty hours, to which he submitted his explanation on 22.06.1993 denying the charges. The Enquiry Officer conducted an enquiry and submitted his report holding the 1st respondent guilty. Thereafter, the appellant/Management issued a second show cause notice on 16.04.1994, for which also the 1st respondent submitted his explanation and ultimately, on 24.01.1995, the 1st respondent came to be dismissed. Against the said order of dismissal, the 1st respondent herein raised an Industrial Dispute in I.D.No.386 of 1998 and the Labour Court, after trial, found that the non-employment of the 1st respondent by the appellant is unjustified and directed reinstatement, but without backwages. While the appellant/Management filed W.P.No.19483 of 2003 challenging the order of reinstatement, the aggrieved 1st respondent filed W.P.No.28764 of 2003 challenging the denial of backwages.

3. Before proceeding to analyse the correctness of the order challenged in this appeal, the charges framed against the 1st respondent need to be looked into:

(i) In the first charge framed on 19.06.1993, it is stated that on 18.06.1993, the 1st respondent was to work between 14.00 hours and 22.00 hours, however, by 21.20 hours, he left abruptly without obtaining permission from higher authorities.

(ii) In the second charge framed on 04.10.1993, the appellant has stated that on 29.09.1993, when inspection was conducted by the Assistant Manager, Hosur Division, the 1st respondent was asked as to whether any vehicle was stationed for

the purpose of monthly inspection, to which the 1st respondent replied in the negative, while a bus No.0312 was stationed. The 1st respondent stated that it was not brought to his knowledge and submitted his explanation that he was busy in organising a meeting of supervisors.

(iii) The third charge memo dated 23.11.1993 was issued to the 1st respondent relating to various instances, viz.,

(i) that in respect of a bus bearing No.0312, Hosur to Puttaparthi, the period of FC has expired on 10.11.1993 and without sending it for extension of FC, the vehicle has been sent to the route;

(ii) that he failed to note that bus bearing No.0440 was involved in an accident on 09.11.1993 and when asked on 10.11.1993 as to whether the vehicle was released, he has put a question as to whether the vehicle was involved in an accident and that shows the negligence;

(iii) that he has failed to take the vehicle 0313 from Krishnagiri on 10.11.1993 from the renewal section;

(iv) that in spite of the specific instruction that special buses which are run on the day of Deepavali on 10.11.1993 are to be entered in the registers by keeping the alternative bus ready, wantonly he has sent the alternative buses on the route;

(v) that he has failed to inform about the accident that took place in the night of 10.11.1993;

(vi) that he has failed to send the alternative vehicle on 10.11.1993 and there has been certain dispute among the workers in that regard; and

(vii) that he has failed to take any further action in respect of the bus which has failed to go out of the station on 10.11.1993 at 21.15 hours and it was only after the Branch Manager directed the driver to take the bus, the bus was taken.

4. To all the above charges, the 1st respondent herein submitted his explanation and the Enquiry Officer found him guilty of the charges, based on which, the Management passed an order of dismissal dated 24.01.1995 against him. The 1st respondent herein has not disputed the fairness of the domestic enquiry. However, considering the nature of charges framed against him, the Labour Court found that the appellant/Management has imposed maximum punishment and therefore, set aside the order of punishment, holding that the 1st respondent will be entitled to reinstatement but without backwages.

5. Learned counsel appearing for the appellant/Management has taken a stand that the 1st respondent is not a workmen under Section 2(s) of the Industrial Disputes Act, since his duty is managerial and supervisory in nature.

6. While so, learned counsel appearing for the 1st respondent submitted that the finding of the Labour Court that the 1st respondent was a workman cannot be said to be either perverse or illegal.

7. Now, the issue before us is whether the learned Single Judge is right in upholding the view of the Labour Court that the 1st respondent is a 'workman'.

8. It is seen that the 1st respondent herein was doing supervisory work in allotting work to the employees. Taking note of the evidence of the Management Witness M.W.1 that the 1st respondent was working under him and the further evidence that the 1st respondent has no right of making appointment of employees or to take any disciplinary action against any erring employees and that he cannot give any Memo to any of the workers and he has no jurisdiction to grant batta or incentive bonus to workers and that granting leave to the workers is only within the jurisdiction of the Branch manager and that the charge memo issued to the 1st respondent is only based on the Model Standing Orders, the Labour Court, held that the 1st respondent was a workman, and in such view of the matter, the learned Single Judge, held that the Industrial Dispute was maintainable.

9. Also, the contention of the appellant/Management that the 1st respondent was drawing more than Rs.1600/- per month as mentioned under Section 2(s) of the

Industrial Disputes Act, 1947 and hence, he cannot be called a 'workman' cannot be accepted. There are a catena of judgments by the Apex Court and this Court on the issue that it is the nature of work and not the wages of the employee which determines whether he is a workman or not.

10. As early as in the year 1969, in the case of Ananda Bazar Patrika (P) Ltd. vs The Workmen, (1969) II LLJ 670 SC, the Supreme Court while deciding the issue as to whether the employee in that case was a workman on his date of retirement, has held as under:.

"2. The claim of the workmen was resisted by the appellant before the labour court on one single ground, viz., that Gupta was not workman, so that no industrial dispute could arise in regard to his retirement. The labour court rejected this contention of the appellant and held that Gupta was a workman at the date of retirement and, consequently, gave the award against the appellant. It is this order of the labour court that is challenged before us.

3. As the circumstances related above show, the sole question that fell for decision was whether Gupta was a workman on the date of his retirement or not. Admittedly his total wages at the relevant date exceed Rs. 500 per month and the contention of the appellant-company was that he was employed in a supervisory capacity and, consequently, under Section 2(s)(iv) of the Industrial Disputes Act, he was not a workman. On behalf of the workmen, the plea was that Gupta was clerk and was not employed in supervisory capacity and that is the contention which has been accepted by the labour court.

4. The question, whether a person is employed in a supervisory capacity or on clerical work, in our opinion, depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature carried out by a clerk. If a person is mainly doing supervisory work, but, incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and, conversely, if the main work done is of clerical nature, the more fact

that some supervisory duties are also carried out, incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity. This principle finds support from the decisions of this Court in *South Indian Bank, Ltd. v. A.R. Chacko* 1964-I.L.L. J. 19 and *May & Baker (India), Ltd. v. their workmen* 1961-II L.L J. 94. In the present case, we have, therefore, to examine the evidence to see whether the labour court is right, in holding that, because of the main work of Guptas being clerical in nature, he was not employed in supervisory capacity.

11. Taking into account the ratio laid by the Supreme Court in the above decision as also when there is a categorical finding by the Labour Court based on evidence, which has been accepted by the learned Single Judge that the 1st respondent was not performing any managerial function, we find no illegality in the order passed by the Labour Court on the conclusion that the 1st respondent is a workman.

12. Coming to the question of misconduct, admittedly, there were three charges, based on which, a dismissal order was passed on 24.01.1995. Even assuming that a single order of dismissal from service for three different sets of charges cannot be passed, the Tribunal is empowered to step into the shoes of the employer and see whether different punishments can be given to different sets of charges. In any event, assuming that for three different sets of charges, a single order of punishment could be imposed, the jurisdiction under Section 11-A of the Industrial Disputes Act empowers the Labour Court/Tribunal to interfere with the punishment. In this regard, the learned Single Judge relied on a decision rendered by the Andhra Pradesh High Court in the case of the District Manager, APSRTC, Jaggaiahpet vs. The Labour Court, Guntur, 1978 Lab I.C. 359, wherein, it is held as under:

"7. No doubt, a Tribunal may set aside an order of discharge or dismissal as unjustified either because, on merits it finds that the workman is guilty of misconduct but the discharge or dismissal is an excessive penalty not warranted under the circumstances of the case. The section does not contain any words which restrict the application of the first limb of the provision to the first category of cases and the second limb to the second category of

cases. The provision is too clear to permit any doubt and it plainly provides for the power of the Tribunal to pass an award setting aside the order of discharge or dismissal, if the Tribunal is satisfied that the order of discharge or dismissal is not justified, for one reason or the other. The power is alternative - the first is to direct reinstatement of the workman on such terms and conditions as it thinks fit and the second is to give some other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Under the second alternative the Tribunal may instead of directing reinstatement, give the relief of compensation to the workman. It may award any lesser punishment in lieu of discharge or dismissal. In the absence of specific words requiring the application of the first limb to one category of unjustified dismissals and the second limb to another category, it would not be reasonable nor permissible to interpret the provision so as to limit or restrict the application of either limb to any particular class of unjustified dismissals. Once the Tribunal is satisfied that the order of discharge or dismissal passed by the management is unjustified, the powers of the Tribunal are wide and it can pass orders under either of the two limbs of the provision contained in Section 11A of the Act depending upon the circumstances of the particular case.

8. It is well settled that when an employee is directed to be reinstated, he shall be put back in the same position and status as if the order of dismissal or discharge was never passed. Ordinarily, reinstatement contemplates payment of back-wages to the employee directed to be reinstated for all the period during which he was out of employment on account of the original order of wrongful dismissal or discharge. A direction withholding payment of back-wages either fully or partly is undisputably penal in nature and it cannot therefore be said that the Labour Court passed perverse orders of reinstatement without awarding any punishment to the employees even though it found them guilty of misconduct. All the employees who were found

guilty of misconduct though directed to be reinstated, were penalised by denial of their back-wages to which they would have been entitled but for the wrongful orders of removal."

13. It is settled law that even if the employee does not question the domestic enquiry and gives up the fairness of the enquiry, still the Labour Court has got powers under Section 11-A of the Industrial Disputes Act to re-appreciate the evidence and come to a different conclusion. The Tribunal/Labour Courts are not like Civil Courts to only interpret the contract of service. It can also create a new contract between the employer and the employee.

14. On the question as to whether the Labour Court can interfere with the finding of domestic enquiry even if the enquiry held is fair and proper, this Court in the case of Cork' Industries, Madras v. I.Addl. Labour Court & Ors. (1992-I-LLJ-384), has held that if the penalty imposed is disproportionate to the gravity of proved charges, the Labour Court can interfere with the quantum of punishment. Relevant portion of the said judgment is extracted hereunder:

'24. Considering the aforesaid contentions and the ratio of the authorities cited by both the counsel, it is clear that after the commencement of Section 11-A of the Act, the Labour Court is clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer established the misconduct alleged against a workman. The Labour Court is at liberty to consider not only whether the finding of misconduct recorded by the employer is correct, but also to differ from the said finding if a proper case is made out. It is the satisfaction of the Labour Court that finally decides the matter. The Labour Court has to consider the evidence and come to a conclusion one way or the other even in a case where an enquiry has been held by an employer and a finding of misconduct arrived at, the Labour Court can differ from that finding in a proper case and hold that no misconduct is proved. In view of the aforesaid position of law, it cannot be contended that the Labour Court cannot interfere with the finding of the domestic enquiry even if the enquiry is held to

be fair and proper in so far as Category A workmen is concerned.

25. It is also well settled that Sec. 11A of the Act confers powers on the Labour Court to evaluate the severity of misconduct. However when the finding of the Labour Court is based on appreciation of evidence and in the absence of any perversity in the finding, the High Court will not go into the question of adequacy or inadequacy of the material for interference with the findings of the Labour Court. ...''

15. Law is well settled that when an employee is directed to be reinstated, he shall be put back in the same position and status as if the order of dismissal or discharge was never passed. In the case on hand, the Tribunal came to the conclusion that for the misconduct stated supra, the punishment of dismissal from service is harsh and interfered with the punishment and awarded reinstatement without backwages, continuity of service and other attendant benefits. The said award was not held to be perverse by the learned Single Judge. We find there are no reasons, much less sound reasons, put forth by the appellant/Management to interfere with the order passed by the learned Single Judge and hence, we find no merits.

Accordingly, the Writ Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To:

The Presiding Officer,
Labour Court, Salem.

+1cc to Mr.P.Paramasivadosh, Advocate sr.19526
+1cc to Mr.S.Ayyathurai, Advocate sr.18957

W.A.No.425 of 2012

srg 18/05/2016.2016