

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 1963 of 2006

ORDER:

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Aggrieved by the award dated 06.10.2004 passed by the Labour Court-III, Hyderabad in I.D.No.68 of 2002, the workman preferred this writ petition in which the Labour Court denied him back wages without attendant benefits for the period he remained out of employment.

For the sake of convenience the parties herein referred to as arrayed before the Labour Court.

The workman joined in the respondent Corporation as Cleaner on 30.06.1977. In the year 1979 he was promoted as Helper. While things stood thus a charge sheet came to be issued against him on 16.03.2000 for his un-authorised absence from 02.02.2000 to 16.02.2000. The petitioner denied the allegations leveled against him and submitted that while working in the tyre section, he was affected with Asthma which became worse during February, 2000. He placed on record the medical certificate to show that his absence during the said period was due to his ill health and not otherwise. A domestic enquiry came to be conducted wherein the enquiry officer found the charge of un-authorised absence proved and accordingly, the respondent Corporation terminated the petitioner from service. Challenging the said order of termination the petitioner filed I.D. seeking to set aside the order of removal and consequently to reinstate him into service as helper with all benefits. Upon considering the material placed before it, the Labour Court held that the absence of the

petitioner was due to sickness which is supported by the certificates issued by the medical officer. Having held so, the Labour Court set aside the order of termination and ordered reinstatement the petitioner into service as helper with continuity of service without back wages and attendant benefits. Challenging the same, the petitioner preferred the present petition.

The respondent Corporation filed counter stating that after appreciating the evidence the Labour Court came to a conclusion that it was a mistake of the petitioner but cannot be treated as misconduct as the period of absence is well explained by producing medical certificates and that there can be no reason to disallow such certificates issued by Government Hospital, Suryapet. It is urged that there is no illegality and irregularity committed by the Labour Court.

During pendency of the writ petition, the petitioner died and his legal representatives were brought on record as per Court order dated 17.10.2012 passed in W.P.M.P.No.36833 of 2012.

The short point that arises for consideration is whether the Labour Court was justified in denying the back wages and attendant benefits for the period he remained out of employment?

A perusal of the award passed by the Labour Court show that while holding that his absence during the said period was not willful and that it was only due to his sickness which gets support from two medical certificates filed by the petitioner, denied the back wages and attendant benefits. As seen from the impugned order, the Labour Court set aside the order of termination and ordered reinstatement of the petitioner into service with continuity

of service. The findings of the Labour court further show that the charge of un-authorised absence for 15 days is proved for mistake because he was suffering from Asthama and there was no intentional negligence to cause loss to the corporation. The medical certificates which are produced before the authorities even prior to termination of the service establish that he was suffering from Asthama and was bed ridden during the said period. Therefore, in all probability, he could not have been in a position to inform about his absence during the said period. Immediately after recovery from the sickness he produced the certificates issued by the Medical Officer, Government Hospital, Suryapet in support of his sickness.

The main ground urged by the learned Standing Counsel for the Corporation is that this Hon'ble Court has no jurisdiction to entertain the present writ petition seeking issuance of writ of certiorari in view of the judgments of the Apex Court in ***Union of India and others v. P.Gunasekaran***^[1] and ***Syed Yakoob v. K.S.Radhakrishnan and others***^[2].

Insofar as issuance of writ of certiorari is concerned, the Apex Court in Syed Yakoob's case (2 supra) held as under:

"The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises is not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the

impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the reference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal.”

In ***Union of India v. P.Gunasekaran*** (1 supra) the Apex Court was dealing with a situation where the findings of charge No.1 having attained its finality was directed to be re-considered by the Administrative Tribunal, which view was endorsed by the High Court. Basing on which the order of dismissal was converted to compulsory retirement. The Apex Court held that such a finding cannot be re-opened in subsequent round of litigation at the instance of the respondents as it was only the punishment that was open to challenge. Hence, the Apex Court found fault with the High Court in re-appreciating the evidence which was placed before the disciplinary authority in arriving at a different conclusion in spite of earlier findings becoming final. Therefore, the two judgments relied upon by the learned Standing Counsel for the Corporation more particularly the Judgment of the Apex Court in ***Syed Yakoob case (14 supra)*** which was also referred to by the Apex Court in ***Union of India v. P.Gunasekaran (1 supra)*** may not apply to the case on hand.

Insofar as granting the reliefs as sought for, definitely in my view the punishment which has been ordered is shocking and disproportionate to the charge. If no reasons are given for the un-authorised absence and if the petitioner was gainfully employed during the period of his un-authorised absence definitely it can be said that the punishment that was awarded is sustainable. But

here is a case where the petitioner produced medical evidence to show that he was sick during the period of his un-authorised absence and the said material was accepted by the Labour Court while holding that his absence was genuine. However the Labour Court held as under:

“So absence in this matter shall be taken as proved for mistake because he was suffering from Asthma and there was no intentional negligence to cause loss to the Corporation. Accordingly, the charge is proved for mistake due to health reasons duly certified by the Medical Officer, Government Hospital, Suryapet.”

Having given such a finding and having ordered reinstatement with continuity of service, the denial of entire back wages and attendant benefits for the period he is out of employment is in my view is disproportionate and shocking.

In ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyala and others***^[3] the Apex Court after referring to all the judgments on the subject, including the judgments of the Apex Court in ***J.K.Synthetics Ltd. V. K.P.Agrawal***^[4] and ***Zilla Parishad, Gachiroli v. Prakash***^[5], held as under:

- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
- ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.
- iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of

getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under [Section 11-A](#) of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages.

Though the learned Standing Counsel for Corporation relied upon the judgment of the Apex Court in ***A.P.S.R.T.C. and another vs. S.Narsagoud*** ^[6] but the said case may not apply to

the case on hand for the reason that the respondent conductor in the said case remained absent from duty from 05.06.1982 to 09.08.1982 and again from 13.10.1992 and 01.11.1992. A departmental inquiry on the charges of un-authorised absence from duty for the said periods culminated into removal from service. However, the Labour Court while upholding the departmental inquiry and the findings arrived thereafter, held that denial of back wages was the appropriate punishment for the respondent's guilt. Accordingly, it directed the respondent to be reinstated with continuity of service but without back wages. At the instance of the respondent, the High Court directed the appellant to fix the wages payable to him on his reinstatement by taking into account the increments that he would have earned had he been in service during the period of absence from duty. After preferring an unsuccessful intra-court appeal, the appellant filed appeal and the same was allowed by the Apex Court. Therefore, the judgment of the Apex Court relied upon by the learned Standing counsel for the Corporation may not apply to the case on hand.

The issue identical to the case on hand came up for consideration before this Court in W.P.No.6973 of 2005, dated 15.09.2015, wherein a learned Single Judge of this Court relying upon various judgments of the Apex Court including Deepali Gundu Surwase case (3 supra), allowed the writ petition to the extent of granting the petitioner the relief of attendant benefits in the form of notional increments for the period that he was kept out of service. To that extent the award passed by the Labour Court was modified.

In this case the petitioner is no more. Having regard to the

findings arrived at by the Labour Court and taking into consideration the judgments of the Apex Court and this Court referred to above, the order under challenge is set aside and the respondent Corporation is directed to pay all the emoluments including the back wages and attendant benefits to the legal heirs of the workman/petitioner.

Accordingly, the writ petition is allowed. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

04.02.2016

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[\[1\]](#) (2015) 2 SCC 610

[\[2\]](#) AIR 1964 SC 477

[\[3\]](#) (2013) 10 SCC 324

[\[4\]](#) (2007) 2 SCC 433

[\[5\]](#) (2009) 4 Mah.LJ 628

[\[6\]](#) (2003) 2 SCC 212