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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
LETTER PATENT APPEAL NO.31 OF 2007 IN
WRIT PETITION NO.2315 OF 2004

Balaso Aba Shelke ...Appellant
vs.
Hutatma Kisan Aher Sahakari
Sakhar Karkhana Ltd.Walwa,
and others ...Respondents

Mr.Narendra Bandiwadekar for the Appellant
Mr.Suresh S. Pakale and Mr.S.M.Katkar for the
respondent No.1

CORAM : A.S.OKA & SMT.ANUJA PRABHUDESSAI, JJ.
DATE ON WHICH THE JUDGMENT IS RESERVED: DECEMBER 23,2016
DATE ON WHICH THE JUDGMENT IS PRONOUNCED:MAY 5, 2017

JUDGMENT : (PER A.S.OKA,J.)

1 By this Appeal, the appellant has taken an exception to the Judgment and Order dated 9th January 2006 passed by the learned Single Judge in Writ Petition No.2315 of 2004 filed by him. With a view to appreciate the controversy, we must refer to the facts of the case in brief.

2 The appellant was employed as a Turbine Attendant in the year 1980 with the first respondent co-operative Sugar Factory. On 28th June 1993 the appellant was transferred to another section of the first respondent sugar factory where there was no work for the category and the grade of the appellant. There were other workers of the first

respondent who were also aggrieved by the order of transfer. Therefore, the representative Union approached the Industrial Court, Kolhapur for challenging the illegal transfers of the workers. Initially, ad-interim relief of stay of transfers was granted by the Industrial Court which came to be vacated. The representative-Union challenged the said order in this Court. However, no relief was granted by this Court.

3 According to the case of the appellant, the management of the first respondent got annoyed due to filing of the said proceedings and he was prevented from joining the duty. Therefore, a representation in writing was made by him to the first respondent requesting the first respondent to allow him to report to his duties. On 2nd December 1993, the first respondent issued a show cause notice to the appellant calling upon the appellant to show cause as to why action should not be taken against him for his continuous unauthorized absence from duty. It was alleged that the appellant continuously remained absent from 2nd November 1993 without applying for leave and without permission. It was alleged in the notice that the appellant has made false allegations in his letter dated 12th November 1993. The reply dated 5th December 1993 was submitted by the appellant to the said show cause notice. In the reply, he pointed out that through the representative Union, he has filed a ULP complaint in the Industrial Court at Kolhapur. He further stated that though he reported to duty from

2nd November 1993, his attendance was not marked. He alleged that unlawful remarks have been made on the attendance sheet for showing that the appellant was absent. He stated that on 12th November 1993, he has made an application requesting the first respondent to allow him to report to his duty and record his attendance.

4 However, the explanation given by the appellant was not accepted and charge sheet dated 8th December 1993 was served to the appellant. The allegation in the charge sheet was that the appellant unauthorizedly remained absent from 2nd November 1993 onwards and thus, as per the standing orders, he lost his right to the employment. There are allegations made of instigating other workers and of acts of indiscipline. On 15th December 1993, the appellant filed a reply to the charge sheet. According to the appellant, by way of an empty formality, a departmental enquiry was conducted by the first respondent. On 28th August 1995 an order of discharge of the appellant from the employment was issued by the first respondent.

5 Being aggrieved by the order of discharge, the appellant filed an application under section 78 and 79 of the Bombay Industrial Relations Act, 1946 (for short 'BIR Act'). He claimed a declaration that the termination order dated 28th August 1995 was illegal, improper and malafide. He prayed for setting aside the said order and for reinstatement with back wages.

6 By Judgment and Order dated 29th February 2000, the learned Judge of the Labour Court held that the enquiry conducted against the appellant was legal and proper. The findings recorded by the Enquiry Officer regarding the misconduct of the appellant were justified. The learned Judge of the Labour Court held that the appellant was in the employment of the first respondent for more than 10 years and therefore, punishment of discharge from the employment was disproportionate. Therefore, the learned Judge proceeded to pass an order of reinstatement of the appellant in the employment with continuity of service and 50% back wages. A liberty was granted to the first respondent to award a lesser punishment than dismissal/ discharge/ termination of the employment.

7 Being aggrieved by the said Judgment and Order of the Labour Court, an Appeal was preferred by the first respondent under section 84 of the BIR Act to the Industrial Court at Kolhapur. A separate Appeal was preferred by the appellant for challenging the findings of the Labour Court on the issue of legality of enquiry. By Judgment and Order dated 10th June 2003, the Appeal of the first respondent was allowed by setting aside the Judgment and Order dated 29th February 2000 passed by the learned Judge of the Labour Court. The Industrial Court dismissed the application made by the appellant under sections 78 and 79 of the BIR Act.

8 Being aggrieved by the order of the Industrial Court, a Writ Petition was filed by the petitioner in this Court. The learned Single Judge by an order dated 9th January 2006 dismissed the said Writ Petition.

9 At the outset, the learned counsel for the appellant pointed out that the appellant has reached the age of superannuation at the end of May 2013. He pointed out that the appellant had a clean record in the employment spanning over more than 10 years. He pointed out that even before show cause notice was served on 12th November 1993, the appellant had applied to the first respondent pointing out that his attendance was not being marked. He invited our attention to the reasons recorded by the Industrial Court. He submitted that the learned Judge of the Labour Court had rightly held that the punishment of discharge from the service is disproportionate and he passed an order of reinstatement with back wages of 50%. He submitted that instead of availing of the liberty granted of imposing lesser punishment, an Appeal was preferred by the first respondent. Inviting our attention to the impugned Judgment and Order of the Industrial Court, he submitted that no reasons are assigned by the Industrial Court for setting aside the findings of the Labour Court on disproportionate penalty awarded against the appellant. The learned counsel for the first respondent supported the impugned order of the learned Single Judge as well as the impugned

Judgment and order of the Industrial Court. He submitted that there is a clear finding recorded by the Industrial Court based on the material on record that it was not established by the appellant that the punishment of dismissal/discharge from the employment was shockingly disproportionate. He submitted that the said finding is not rightly interfered with by the learned Single Judge. He submitted that the defence taken by the appellant was disbelieved by the Industrial Court. He, therefore, submitted that no interference is called for.

10 We have perused the judgments of the Labour Court, the Industrial Court and the learned Single Judge. The learned Judge of the Labour Court held that the enquiry conducted against the Appellant was legal and proper and the finding of misconduct was justified. The learned Judge of the Labour Court found that absenteeism from 2nd November 1993 was the first misconduct on the part of the appellant. He observed that the fact that the appellant was in the employment for more than 10 years and for the first time, misconduct was alleged against him, was relevant. He, therefore, came to the conclusion that considering his length of service and even his clean service record, punishment awarded against the appellant was disproportionate. In paragraph 6 of the Judgment, the learned Judge of the Labour Court held thus:

"6...It is undisputed that the order of

discharge of service of the Applicant dated 28.8.1995 is by way of punishment for his proved misconduct and the same was issued under the standing orders. But after perusing standing order No.24 the punishment of discharge is provided thereunder. Now question arises whether punishment of discharge for the proved misconduct of absenteeism is proportionate. It is undisputed fact that the Applicant was in employment for more than 10 years and the present involved misconduct against him was first instance and considering his length of service and clean service record, in my opinion, awarded punishment is disproportionate. With due respect to the case law relied upon by the learned Advocate for the Opponent report in 1997 II CLR p.390 in State of Punjab & others vs. Bakshi Singh and 1996 I CKR p.188 in Doddaraju Vs. District Sessions Judge, which are not to be made helpful because the facts of the cited case show about the absence of years together and also the same was chronic. But in the present facts of the application this is the first misconduct of the Applicant for the period of one month's absenteeism. The submission of the learned Advocate, Shri Upadhye that the order of discharge is not acceptable, in the present facts of the case. Hence, in my opinion, order of discharge dated 28.8.1995 is not legal,

proper and justified. Hence, this issue No.3 is answered in negative."

11 The operative part of the order passed by the learned Judge of the Labour Court reads thus :

"(i) The Opponent is hereby directed to reinstate the Applicant on his transferred post with continuity of service and 50% back wages by setting aside the order of discharge of his services dated 28.8.1995.

(ii) The Opponent is at liberty to Award any other lesser punishment than the dismissal, discharge or termination of his services to the Applicant.

(iii) In the circumstances, no order as to costs."

12 The first 10 paragraphs of the Judgment of the Industrial Court in Appeal contain facts. Paragraph 11 incorporates points for determination. Paragraphs 13 to 16 deal with the findings of the Enquiry Officer. For the reasons recorded therein, the findings of the Labour Court regarding the legality and validity of the Enquiry were uphold. The paragraphs 17 and 18 are the re-production of submissions on the issue of disproportionate punishment. Paragraphs 21 and 22 (wrongly numbered as 22) are only general observations made on the issue of punishment. Paragraph 22 again deals with with the argument of the counsel for the appellant and the paragraphs 23 and 24 are the only paragraphs

which contain reasons regarding the issue of disproportionate punishment. Paragraphs 23 and 24 read thus:

"23 Advocate Shri Upadhye relied upon many other decisions. I am respectfully bound by observations therein wherein it is held that punishment of dismissal not proved absenteeism is not shockingly disproportionate.

24 Considering the observations in the decisions relied by Advocate Shri Upadhye, it cannot be accepted that proved misconducts are of minor or technical nature. No doubt, there may be compelling circumstances like illness of an employee or death of his nears and dears, duty is after thought. Thus, it is a calculated misconduct and cannot be casual manner. It cannot be ignored that the period of absence of any employee adversely affected entire team work. In such back ground, provision of loss of lien is made and the same is certified while certifying the standing orders. As such, learned lower Court erred in holding that punishment of discharge is unjustifiable. On the contrary, the same is provided under the certified standing orders and is well justifiable. No prudent employer will continue to employ such an employee who has no cause must less sufficient cause for absenteeism.

Accordingly, I answer point No.2 in the negative.

13 Now we come to the order of the learned Single Judge which is impugned in this Appeal. The reasons have been recorded in paragraph 4 which reads thus:

"4 In this regard it must be noted that we are concerned only with the propriety and quantum of punishment passed against the Petitioner. The Industrial Court appears to have come to the conclusion that it cannot be denied that absenteeism erodes the very potentiality, credibility and productivity of any company or organization and punctuality is must. Regularity in attendance is implied service condition and an employee must not absent himself from work without sufficient cause. In the present case, Applicant's explanation that he was not allowed to joint duties was also held to be an after thought and therefore was illegal. The learned counsel for the petitioner submitted that apart from the fact that the punishment awarded is not in proportionate with the misconduct of the petitioner, his unblemished service should have been taken into account by the Industrial Court which has not been done. However, in my considered opinion, the view taken by the Industrial Court appears to be reasonable and proper, especially when the only defence taken by the petitioner was

found to be only an after thought. Under the circumstances, I do not see any reason to interfere with the order passed by the Industrial Court. It is needless to mention that unauthorized absence from duties on employer's service and gravity of misconduct of such nature has to be dealt with scrupulously and seriously."

14 Perusal of the record of the Writ Petition shows that the Writ Petition was summarily dismissed at admission stage.

15 It appears that on 23rd November 1993, the appellant had addressed a letter to the first respondent complaining about the failure to record his attendance with effect from 2nd November 1993. We have carefully perused the reply dated 5th December 1993 to the show cause notice. A stand was taken that the appellant was reporting the duty from 2nd November 1993 but his attendance is not shown. This defence has not been accepted by the Enquiry Officer. It will be necessary to make a reference to the findings recorded by the learned Judge of the Labour Court in his Judgment. In paragraph 5 he has recorded a finding that the appellant along with other employees were transferred by the first respondent and in fact, the appellant was transferred to Gavan Department with effect from 2nd November 1993. Even according to the case of the appellant, there was stay granted to the order of transfer on the complaint filed by the Union, the

but subsequently stay was vacated. The learned Judge of the Labour Court has recorded that the appellant in his cross examination admitted that he never worked in Gavan Department with effect from 2nd November 1993 or thereafter. The Industrial Court noted that the appellant did not approach the Union with the grievance that the attendance of the appellant is not being recorded. Therefore, the Enquiry Officer proceeded to record a finding that the allegations of misconduct have been proved against the appellant. We must note here that in the Judgment in Appeal delivered by the Industrial Court, in paragraph 13, there is a finding recorded that no serious argument was canvassed as regards the fairness of the Enquiry. Thus, the finding recorded by the Enquiry Officer that there was unauthorised absence by the appellant with effect from 2nd November 1993 which amounts to misconduct was upheld by both the Labour Court and Industrial Court.

16 As far as the order of transfer is concerned, the case of the appellant made out in the application before the Labour Court is that order was passed by the first respondent on 28th October 1993. In paragraph 4 of the application made by the Labour Court, he has specifically stated that on the complaint made by the representative Union, initially the order of transfer was stayed and thereafter the stay was vacated. Though the paragraph refers to the proceedings filed in this Court by the representative Union, it is not the

case of the appellant that on 2nd November 1993 or thereafter, an order of stay of the order of transfer was in operation. Therefore, with effect from 2nd November 1993, the appellant should have reported to duty in Gavan Department to which he was transferred. In the reply to the show cause notice, the petitioner has not come out with the case that with effect from 2nd November 1993, he reported duty in that department. The appellant has adopted the said reply to the show cause notice as the reply to the charge sheet served to him. As noted earlier, the learned Judge of the Labour Court has referred to the admissions given by the appellant that he never worked in that department with effect from 2nd November 1993 and thereafter. The allegation in the show cause notice dated 2nd December 1993 and charge sheet served to the appellant is regarding his continuous unauthorized absence from 2nd November 1993. The Labour Court and the Industrial Court have concurrently held on the basis of the evidence that the findings of the Enquiry Officer regarding misconduct by the appellant are correct. No interference can be made with the said findings.

17 Therefore, it is difficult to find fault with the finding recorded by the Industrial Court that the punishment of discharge from service was not disproportionate to the misconduct established. The misconduct was of continuous unauthorized absence from 2nd November 1993 for a period of at least one month.

18 The learned counsel for the appellant pleaded that the appellant will be deprived of all benefits though he has served for more than 10 years in the employment.

19 It cannot be accepted that for the misconduct of remaining continuously absent for one month and more any lenient view can be taken. The penalty of discharge is certainly not disproportionate. We find no merit in the Appeal. Accordingly, Appeal is dismissed with no order as to costs.

(ANUJA PRABHUDESSAI,J.)

(A.S.OKA,J.)