

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

W.A.No.1504 of 2017
C.M.P.No.19824 of 2017

The Management of Metropolitan
Transport Corporation (Chennai) Ltd.,
Pallavan Illam, Anna Salai,
Chennai 600 002. ... Appellant

Vs.

1. The Special Deputy Commissioner of Labour,
(Under Section 33(2) (B) of the Industrial
Disputes Act, 1947)
Chennai.
2. Mr.S.Senthil Kumar
19, South West Bank Road,
T.Nagar, Chennai-17. ... Respondents

Writ Appeal filed under Clause 15 of the Letter Patent Act,
against the order in W.P.No.27479 of 2016, dated 23.06.2017.

W.P.No.27479 of 2016:

Writ Petition filed under Article 226 of the constitution of
India praying to issue a Writ of Certiorari to call for the
records of the order passed by the first Respondent in approval
petition in A.P.No.160 of 2013 dated 31.10.2013 and to quash the
same as illegal.

For Appellant : Mr.P.Paramasiva Doss

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J.)

Challenge in this writ appeal is to an order, made in
W.P.No.27479 of 2016, dated 23.06.2017, by which, the writ
Court, while modifying the penalty of dismissal, held that the
2nd respondent-employee is entitled to 25% of the backwages, and
ordered hereunder:

"5.Therefore, this Court, while confirming the order passed by the first respondent sofar as rejection of approval petition is concerned, is inclined to modify the order of dismissal. Accordingly, the order of dismissal is modified to the extent that the second respondent is entitled for 25% of the backwages. Apart from the other benefits, the arrears will have to be paid within a period of six weeks from the date of receipt of a copy of this order. Insofar as the provident fund contribution is concerned, it is fairly submitted by the learned counsel that out of 25% of the backwages, the same can be adjusted towards the provident fund contribution, otherwise payable by the second respondent.

6.Learned counsel appearing for the petitioner seeks eight weeks' time to implement the order. Accordingly, the petitioner is given eight weeks' time from the date of receipt of a copy of this order to implement the order. The writ petition is disposed of accordingly."

2. Reading the impugned order further shows that Mr.P.Paramasiva Doss, learned counsel for the Management of Metropolitan Transport Corporation (Chennai) Ltd., Chennai, appellant herein, has sought for eight weeks' time to implement the order and when the request has been acceded, de hors the time sought for, payment, the present writ appeal has been filed, on the following grounds,

"(i) The appellant is aggrieved over the portion of the order, granting 25% of back wages, with continuity of service. Granting benefits is against the principles of "no work no pay" as laid down by the Hon'ble Supreme Court, in a series of Judgments. The order suffers from various infirmities as the writ Court has failed to take note that the Special Deputy Commissioner of Labour has failed to refer, both the Approval Petition, as well as the Complaint, as disputes.

(ii) Writ Court has failed to take note of the conduct of the respondent and granted 25% of backwages, without any detailed adjudication to the facts of the case. Conduct of the 1st respondent is deterrent to the interest of the Management and granting backwages for unauthorized absence, for the period from 2007 to 2013, with continuity of service is irrational and deserves to be modified.

(iii) When reinstatement has been ordered solely on procedural lapses, backwages and continuity of service, ought not to have been ordered. Writ Court has failed to consider the decision of the Hon'ble Supreme Court in Ialla Ram v. DCM Chemical Works

Limited [(1978) 1 LLJ 507], in proper perspective, wherein, it has been held as follows:-

".....these conditions are satisfied/ the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If, however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

(iv) In the light of the above judgment, the appellant-management can sustain the order of dismissal, to assert that the same was indispensable on the facts of the case. Even though the appellant has placed the above decision, the Special Deputy Commissioner of Labour, Chennai, has failed to advert to the same and equally, the writ Court has failed to apply to the principles of law, to the facts on hand.

(v) Approval petition was filed, at the instance of the Special Deputy Commissioner of Labour, Chennai, the 1st respondent, on the complaint lodged, under Section 33(C) of the Industrial Disputes Act, 1947. But the Special Deputy Commissioner of Labour, Chennai, the 1st respondent, has disposed of the case, as if, the approval petition was filed in continuation of a dispute, pending before him. According to the appellant, it is for the learned 1st respondent to state the reasons for compelling the Management, to file the Approval Petition and to disapprove the same."

3. On 28.11.2017, when the matter came up for hearing, we passed the following orders,

"We have gone through the entire materials available on record, find absolutely, no reason to interfere with the order.

2. Mr.P.Paramasiva Doss, learned counsel for the Transport Corporation submitted that the appellant Transport Corporation would make the payment, as ordered by the writ Court, on or before 4/12/2017 and report the same before this Court.

3. It is made clear that if the above said submission is not honoured, this Court would be

constrained to pass suitable orders in the Writ Appeal.

4. Mr.P.Paramasiva Doss would communicate the orders, of this Court, for prompt action.

5. Post on 5/12/2017."

Thus, the matter is listed today.

4. Material on record discloses that the 2nd respondent-Conductor was absent from duty for more than 8 days from 18.08.2007 and a charge memo was sent to his residence by RPAD. On receipt of the same, he had sent his explanation, with necessary medical certificate, dated 10.10.2007. Vide memo, dated 15.10.2007, he was permitted to join duty at T.Nagar Depot, without prejudice to the disciplinary action, taken against him.

5. Taking note of the charge and past record of dissatisfactory performance, a memo, dated 24.12.2007, has been sent to the 2nd respondent. Responding to the above, he has submitted his explanation, dated 12.01.2008. Though he was permitted to join duty, he was stated to be continuously absent from duty from 04.12.2007.

6. Taking into consideration the uninterested attitude of the respondent, in attending duty, Management of Metropolitan Transport Corporation (Chennai) Ltd., Chennai, appellant herein, has confirmed the provisional decision to dismiss the 2nd respondent from service and accordingly, passed orders on 19.02.2008.

7. Thereafter, after five years, from the order of dismissal, in the year 2013, appellant herein, has filed A.P.No.160 of 2013, under Section 33(2)(b) of the Industrial Disputes Act, 1947, before the Special Deputy Commissioner of Labour, Chennai, 1st respondent herein, for approval of the decision to dismiss the 2nd respondent from service. The 2nd respondent-employee, has filed a counter to the said petition.

8. After considering the rival submissions, the Special Deputy Commissioner of Labour, Chennai, 1st respondent herein, vide award, dated 31.10.2013, has answered the points framed for consideration, in favour of the respondent. Relevant translated version of the said award, annexed in the typed set of papers, filed in support of this writ appeal, is as follows:

"(1) Whether the domestic enquiry has been conducted as per law, standing orders principles of natural justices?

Charge memo has been issued to the respondent by the petitioner for his absent of duty more than 8 days from 18.8.2007. Without any prior intimation. The petitioner has not conducted any enquiry for proving

the charges framed. as contended by the respondent it is reliably learnt that no enquiry was conducted according to the documents filed. Hence I decide that domestic enquiry has not been conducted as per law, standing orders principles of natural justices.

(2) Whether the prima facie case for dismissal has been proved in the enquiry according to the acceptable evidence?

Charge memo has been issued to the respondent by the petitioner for his absent of duty more than 8 days from 18.8.2007. Without any prior intimation. The petitioner has not conducted any enquiry for proving the charges framed. as contended by the respondent it is reliably learnt that no enquiry was conducted according to the documents filed. Hence I decide that prima facies case for dismissal has not been proved in the enquiry according to the acceptable evidence.

(3) Whether the petitioner management has come to his decision in taking action against the respondent that the employee is found guilty really without unfair labour practice and revenging action?

The respondent has not contended that action of dismissal is for unfair labour practice and revenging action against him. Hence I decide that there is no such dismissal action.

(4) Whether the one month wages has been paid to the employee?

The respondent has stated that 1 month wages has not been paid to him for which any such document regarding payment of wages has not been produced by the petitioner. Hence I decide that one month wages has not been paid to the respondent as per the Industrial Disputes Act, Sec. 33(2)(b).

(5) Whether the petitioner management has filed the approval petition within a short time or part and parcel of action on the employee?

The approval petition of the petitioner has been received in this office 28.2.2013, the petitioner has not filled the dismissal orders for the respondent. The respondent has stated in the counter that he has been dismissed as per the order dt 19.2.2008. After issue of dismissal order. the approval petition has been filled beyond the delay of 5 years. The petitioner has not stated any reasonable points for such delay. Hence I decide that the approval petition has not been filled in time or part and parcel of on the employee.

On the basis of above points adduced, the approval petition filled by the petitioner for approval of his action of dismissal of the employee Thiru.S.Senthil Kumar as per Section 33(2)(b) of the Industrial

Disputes Act 1947 is hereby rejected."

9. Correctness of the order made in A.P.No.160 of 2013, dated 31.10.2013, has been assailed by the Management of Metropolitan Transport Corporation (Chennai) Ltd., Chennai, appellant herein, in W.P.No.27479 of 2016. Going through the findings recorded by the Special Deputy Commissioner of Labour, Chennai, 1st respondent herein that there was no enquiry and that charges are not proved, writ Court, at Paragraph 3 of the order, dated 23.06.2017, made in W.P.No.27479 of 2016, observed as hereunder:

"As these findings have been rendered based upon the records and facts, this Court does not find any merit in this writ petition."

10. However, before the writ Court, submission has been made by the learned counsel for the Management, Metropolitan Transport Corporation (Chennai) Ltd., Chennai, appellant herein that, the order made in the approval petition has to be modified, in respect of the backwages. Learned counsel appearing for the second respondent-employee, seemed to have agreed for reduction of 50% of backwages, subject to the condition that, there should be continuity of service.

11. After considering the merits of the order passed in A.P.No.160 of 2013, dated 31.10.2013, by the Special Deputy Commissioner of Labour, Chennai, writ Court, in the opening sentence of Paragraph 5 of the order made in W.P.No.27479 of 2016, dated 23.06.2017, held that there is no perversity, warranting interference. However, on the facts and circumstances of the case and taking note of the order, dated 31.10.2013, writ Court, came to the conclusion that it would be sufficient, if 25% backwages is paid.

12. As stated supra, charge memo was issued, for the alleged absence of more than 8 days from 18.08.2007. The 2nd respondent had sent his explanation on 10.10.2007 and requested for joining duty and that he was permitted to join duty on 15.10.2007, at T.Nagar Depot.

13. Provisional decision by the Management for dismissal, has been taken, on the basis of the charge framed and dissatisfactory performance. Going through the material on record, we are of the view that past record is not a part of charge memo, already issued, nor any fresh charge has been issued for the continued absence. But the appellant herein had taken into consideration, the uninterested attitude of the respondent, in attending duty and thus, confirmed the provisional decision taken for dismissal of the 2nd respondent. Thus, on 19.02.2008, the 2nd respondent was dismissed from service. Issues in A.P.No.160 of 2013 have been duly considered.

14. When the writ Court held that there is no perversity, warranting interference and when it is settled law that once the approval petition is dismissed or rejected, the workman would be entitled to backwages and continuity of service, interference of the writ Court, on the decision made in the approval petition, on the premise that the approval petition, has been validly filed and that the order passed therein, requires to be modified the extent of backwages, in our opinion, runs contrary to the decision of the Hon'ble Supreme Court in Tamil Nadu State Transport Corporation v. Neethivilangan, Kumbakonam reported in 2001 (9) SCC 99, wherein, it has been held that the respondent therein was bound to treat the petitioner therein, as continuing in service with all consequential benefits, once the approval petition is rejected. At Paragraph 15, the Hon'ble Supreme Court held as follows:

"15. From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains order of approval from the Tribunal. By passing the order of discharge or dismissal de facto the relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under Section 733(2)(b) of the Act on merits the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the latter is entitled to have his right enforced by filing a petition under article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunals rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in Section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a prima facie case for dismissal/discharge of the workman, and therefore, dismissed the application filed by the employer on

merits. The inevitable consequence of this would be that the employer was duty-bound to treat the employee as continuing in service and pay him his wages for the period, even though he may be subsequently placed under suspension and an inquiry initiated against him."

15. Yet another factor to be considered, is that, on the facts and circumstances of the case, decision to dismiss the respondent-employee has been taken in the year 2008, but the Management of Metropolitan Transport Corporation (Chennai) Ltd., Chennai, appellant herein has filed approval petition, in the year 2013, after five years. Added further, before the writ Court, when the learned counsel for the appellant has requested for eight weeks' time to implement the order, quite contrary to the same, the appellant has chosen to file this appeal. Having held that there is no perversity in the order made in A.P.No.160 of 2013, dated 31.10.2013, writ Court has reduced the extent of backwages to 25%.

16. Today, on the basis of a letter, dated 05.12.2017, of the Senior Deputy Manager (HRD), Metropolitan Transport Corporation (Chennai) Ltd., Chennai, Mr.P.Paramasiva Doss, learned counsel for the appellant submitted that the Corporation has sanctioned 25% of backwages to the 2nd respondent and sought for time, to issue a cheque to him. He further submitted that payment would be made on 08.12.2017.

17. However, no sanction order was produced. Only the letter, dated 05.12.2017, was shown before this Court. We have already indicated on 28.11.2017 that payment should be paid, on or before 04.12.2017. However, statement made before this Court has not been honoured. There is no merit in this writ appeal.

18. Hence, the writ appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed. For reporting compliance, post on 08.12.2017.

skm

05.12.2017

While dismissing W.A.No.1504 of 2017, we directed the Registry to post the matter for compliance on 08.12.2017. It is listed today.

2. Mr.P.Paramasiva Doss, learned counsel for the appellant submitted that as ordered by the writ Court, after deduction of the Provident Fund Contribution, Cheque, dated 06.12.2017, to the tune of Rs.1,64,029/-, has been drawn, in favour of the 2nd respondent and thus, the order, dated 05.12.2017, in W.A.No.1504 of 2017, has been complied with.

3. For production of the said cheque to the 2nd respondent-employee, post this matter before the National Lok Adalat, to be held on 09.12.2017.

4. Learned counsel for the appellant will make necessary arrangement, for the presence of the parties, tomorrow in the National Lok Adalat.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

The Special Deputy Commissioner of Labour,
(Under Section 33(2) (B) of the Industrial
Disputes Act, 1947), Chennai.

W.A.No.1504 of 2017

GP(CO)
SP(12/02/2018)



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