

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.04.2017

CORAM:

THE HON 'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

Writ Petition No.17875 of 2012 and
M.P.Nos.1/2012 and 1/2015

The Managing Director,
Tamil Nadu State Transport Corporation,
Villupuram III Limited,
Kancheepuram.

... Petitioner

Versus

1. The Presiding Officer,
II Additional Labour Court,
Chennai.

2. G.Ramadoss

.. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, to call for the records pertaining to the I.D.No.849/2009 and quash the award passed by the 1st respondent in I.D.849/2001 dated 15.03.2012.

For Petitioner : Mr.P.Paramasivadosh
For Respondents : Mr.K.M.Ramesh for R-2

ORDER

Challenging the award dated 15.03.2012 made in I.D.No.849/2001 passed by the 1st respondent, the present writ petition came to be filed.

2. The case of the petitioner is that the 2nd respondent was employed as a driver attached to the Ponneri Depot of the Petitioner Transport Corporation, which is an Undertaking of the State of Tamilnadu. The 2nd respondent unauthorizedly absented from duty from 12.09.1996 onwards without any prior intimation. In this regard, a Charge Memo dated 03.10.1996 was issued to the 2nd respondent for which there was no reply. While so, the petitioner Management directed the 2nd respondent to appear before the Enquiry Officer on 18.10.1996 vide its notice dated 10.10.1996 and subsequently, the same was adjourned to 06.11.1996. Thereafter, the 2nd respondent along with a co-worker appeared before the Enquiry Officer and availed the opportunity for cross examination of the witnesses. Finally, the Enquiry Officer, concluded the enquiry and filed his report stating that the charges were proved.

3. The further case of the petitioner is that based on the Enquiry Officer's Report, a Second Show Cause notice dated 04.02.1997 was issued to the 2nd respondent calling upon him to show cause as to why he should not be removed from service, treating his absence as an "abandonment of service". The 2nd respondent submitted his explanation dated 11.02.1997 for the

same.

4. It is also the case of the petitioner that despite notice, the 2nd respondent failed to report for duty in the interregnum period of the pendency of the disciplinary proceedings. Hence, the petitioner Management was constrained to impose an order of dismissal vide its order dated 30.08.1997. Thereafter, the 2nd respondent raised an Industrial Dispute in I.D.No.849 of 2001 before the 1st respondent, namely, the II Additional Labour Court, Chennai under Section 2(A) 2 of the Industrial Disputes Act, 1947 seeking for his reinstatement with continuity of service and all other attendant benefits and the same was allowed vide award dated 31.07.2006 by the 1st respondent stating that the 2nd respondent shall be reinstated without back wages, continuity of service and all other attendant benefits. Aggrieved over the same, the 2nd respondent filed a Writ Petition in W.P.No.5027/2008, challenging the award to the extent of denying back wages and other benefits. This Court by order dated 23.10.2011 remitted the matter back for reconsideration to the 1st respondent on the ground that there was reasons assigned for the denial of back wages and other benefits. Thereafter, the 1st respondent Labour Court disposed of the I.D.No.849/2001 vide award dated 15.03.2012 holding that the 2nd respondent was entitled for 50% back wages and all other attendant benefits. Hence, the present Writ Petition.

5. Learned Counsel appearing for the petitioner Transport Corporation would submit that the 2nd respondent is a habitual absentee who had suffered various punishments in the past on 9 occasions for the same charge of unauthorised absence. The learned Counsel would further submit that there is no justifiable reason stated by the Labour Court to award 50% of back wages. Further, the 2nd respondent has not deposed in his evidence that he was not employed elsewhere during the said period and after reinstatement also, he has absented himself from attending the office. Under such circumstances, the 2nd respondent is not entitled for any relief.

6. In support of his contention, the learned Counsel for the petitioner placed reliance on a decision of the Hon'ble Supreme Court in **L&T Komatsu Limited Vs. N.Udayakumar** reported in **(2008) 1 Supreme Court Cases 224** wherein in an identical circumstance, on appeal, the Supreme Court has set aside the order of reinstatement awarded by the Labour Court and the High Court. The learned Counsel has also placed reliance on yet another case of the Hon'ble Supreme Court in **LIC of India vs. R.Dhandapani** reported in **(2006) 13 Supreme Court Cases 613** in which the Court has held that Section 11-A of I.D. Act is to be exercised only

when punishment is found to be shockingly disproportionate to degree of guilt of the workman and to support its conclusion, the Industrial Tribunal/Labour Court has to give reasons in support of its decision.

7. Learned Counsel appearing for the 2nd respondent /delinquent employee would submit that the 2nd respondent never absented himself from duty without prior intimation because as and when the leave applications were sent, the Branch Manager used to refuse the leave and mark it as absent. Further, absence from duty, that too, on health grounds should not be viewed seriously giving the extreme punishment of removal from service. The learned Counsel for the 2nd respondent would further submit that the 2nd respondent was not employed anywhere during the period of his dismissal. Further, the learned Counsel for the 2nd respondent would contend that for implementing the orders passed by the 1st respondent, the petitioner Transport Corporation has taken a long period for the reinstatement of the 2nd respondent. Therefore, according to the learned Counsel, the award of the Labour Court is a well considered one which does not warrant any interference at the hands of this Court.

8. I have considered the above said submissions and I

have also perused the records carefully.

9. At the outset, the facts that the appointment of the 2nd respondent as driver in the petitioner Transport Corporation, issuance of a charge memo dated 03.10.1996 due to his unauthorised absence from duty from 12.09.1996, issuance of a second Show Cause notice dated 04.02.1997 since the charge against him was held to be proved, failure to report for duty in the interregnum period of the pendency of the disciplinary proceeding and passing of the dismissal order are not disputed.

10. Originally, as per the award dated 31.07.2006, the 2nd respondent was reinstated without back wages, continuity of service and other attendant benefits. On challenge in W.P.No.5027/2008, the Court, while confirming reinstatement, remitted the matter for reconsideration with respect of back wages. Now the impugned order has awarded 50% wages which is under challenge.

11. The learned Counsel for the petitioner/Transport Corporation would submit that the employee was dismissed from service on 30.08.1997. The order of reinstatement was on 31.07.2006. The respondent reached the age of superannuation on 31.10.2006. Therefore, he was employed only for two months after

the order of reinstatement. In such circumstances, although there is a decision to pay 50% of the back wages, a pragmatic view has to be taken as to whether the Corporation has to be compelled to pay the workman for the period during which he apparently contributed little or nothing at all. Whether the employee would be entitled for even 50% back wages for a period that was spent unproductively. It is not pleaded that after his termination, the 2nd respondent was wholly unemployed. Albeit, there is no precise formula as to under what circumstances payment of entire back wages should be allowed. It certainly depends upon the facts of each case. However, it is incorrect to state that it is automatic. Whether back wages can be granted mechanically merely because the order of termination is in contravention to the Industrial Disputes Act. It has to be seen whether the workman was continuously employed and worked for 240 days in a calendar year based on which calculation can be made. No doubt, the reinstatement of the employee is not under challenge now. Only the question regarding back wages, the 2nd respondent is entitled to is to be determined.

12. "Ordinarily, a workman, who has been retrenched in contravention of the law is entitled to reinstatement with full back wages and that principle yields only where the justice of the case in the light of the particular facts indicates the

desirability of a different relief" is the view of the Hon'ble Supreme Court in **Surendra Kumar Verma etc. vs. The Central Government Industrial Tribunal-cum-Labour Court** reported in **1980 (4) SCC 443**. Therefore, payment of back wages having a discretionary element involved in it has to be considered in the facts and circumstances of each case and no Straight Jacket Formula can be involved.

13. However, whether a person is entitled to get something only because it would be lawful to do so. Payment of back wages also, therefore, cannot be the natural consequence. In this case, the legal proceedings have taken its own time from raising of the industrial dispute to the order of remand and again the challenge till now. Certainly, the employer cannot be blamed for the delay. When the workman was ready and willing to work throughout pending proceedings, whether the plea of 'No work, No pay' can be applied.

14. The petitioner/Transport Corporation is always running at loss. The workman can gainfully get his back wages after the order of reinstatement. But what about the petitioner who had suffered loss. Therefore, award of full or part of the back wages depends upon several factors and it is the court to weigh the

pros and cons of each case and to take a realistic view. When the Petitioner Corporation is suffering from serious financial crisis, the workman is already reinstated and he will be entitled to all retiral benefits like Gratuity etc.

15. While considering the question of back wages and determining the same, it is the employee who has to show that he was not gainfully employed. Once he discharges the initial burden, the onus shifts on the employer to rebut the same. In the instant case, it is noticed that before the remand, the punishment of removal from service was disproportionate to the parties. Therefore, the reinstatement was ordered, however, without back wages. Only after remand, 50% of the back wages was now directed to be awarded to the employee. The employee has been out of service for more than 6 to 7 years and after his reinstatement, he was employed only for two months. The Hon'ble Supreme Court has always been indicating that the reliefs granted by the courts must be logical and tenable within the framework of law and should not justify criticism. The jurisdiction of the court should not be allowed to degenerate into misplaced sympathy, genuinity and private benevolence. In such circumstances, this Court is of the view that the back wages may be confined to 25% of the total back wages payable.

PUSHPA SATHYANARAYANA, J.

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16. Accordingly, the award of the II Additional Labour Court, Chennai, made in I.D.849/2001 dated 15.03.2012 is modified and the back wages payable to the 2nd respondent is reduced from 50% to 25%.

17. With the above modification, the Writ Petition is partly allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

13.04.2017

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To
The Presiding Officer,
II Additional Labour Court,
Chennai.

W.P.No.17875 of 2012

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