

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 17.02.2017

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THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Writ Petition No.17119 of 2003

The Managing Director
Tamil Nadu State Transport Corporation
(Salem Division II) Ltd.,
Bharathipuram
Dharmapuri. .. Petitioner

Vs.

1.Aasaithambi
2.The Presiding Officer
Labour Court
Salem. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for a writ of Certiorari, calling for the records dated 17.07.2002 and made in I.D.No.48 of 2000 on the file of the Labour Court, Salem, the second respondent herein and quash the same.

For Petitioner : Mr.P.Paramasivadoss
For R1 : Mr.T.Anantha Sekar

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O R D E R

Aasaithambi was working as Junior Assistant in the Tamil Nadu State Transport Corporation (writ petitioner/hereinafter would be referred to as "management"). He was on unauthorised absence from 4.11.1996 to 11.11.1996, for which he was issued with a charge memo dated 19.11.1996. He gave his explanation

on 25.11.1996, in which he accepted that he was on unauthorized absence from 4.11.1996 to 11.11.1996 and sought to explain his unauthorized absence by saying that he had gone to temple. He also requested the management to condone his absence. Asaithambi once again went on unauthorized absence from 6.12.1996 and did not report to duty. Therefore, a second charge memo dated 27.12.1996 was issued to him for his unauthorized absence from 6.12.1996, for which he did not respond. Both the charge memos were displayed in the Notice Board. Since the petitioner did not respond to the charge memos, the Management appointed one Mr.S.Jayaseelan as enquiry officer to enquire into the charge memos dated 19.11.1996 and 27.12.1996. The enquiry officer proposed to conduct enquiry on both the charge memos on the same day. Therefore, he issued individual notices of hearing and he fixed the date of hearing as 14.02.1997 at 10.00 a.m. He issued enquiry notice to Asaithambi, asking him to appear for the enquiry on 14.02.1997 at 10.00 a.m.

2.After receiving the enquiry notice, Asaithambi sent a communication to the enquiry officer, seeking adjournment on the ground that he was physically indisposed. Therefore, the enquiry was adjourned to 24.02.1997 and enquiry notice was sent to Asaithambi by registered post. He received the enquiry notice and sent a telegram to the enquiry officer asking for adjournment on the ground that he was sick. Though he had not submitted any medical records, yet, the enquiry officer adjourned the enquiry to 04.03.1997 and sent a fresh enquiry notice to him by registered post. Asaithambi refused to receive the postal cover and therefore, the same was returned unserved by the postman with an endorsement 'refused'. Apart from sending the enquiry notice by post, the notice of enquiry was also affixed in the notice board by the management for public view.

3.On 04.03.1997, Asaithambi did not appear for the enquiry and therefore, after recording the events, the enquiry officer proceeded to conduct the enquiry individually into the charge memos against him. The enquiry officer recorded the evidence of the management witness and after considering the same, submitted two individual reports to the management stating that the charges, against Asaithambi in respect of the charge memos dated 19.11.1996 and 27.12.1996, have been proved.

4.After receipt of the enquiry reports, the management issued a second show cause notice dated 20.03.1997 to Asaithambi, enclosing the copies of the enquiry reports and calling upon Asaithambi to show cause as to why he should not be dismissed from service. Asaithambi received the show cause notice, but did not send any reply. Therefore, the management by order dated 04.04.1997 dismissed him from service.

5.Two years later, Asaithambi raised an industrial dispute before the labour officer. On the failure of the conciliation proceedings, the matter was referred by the Government to the labour Court in I.D.No.48 of 2000. Before the labour Court, Asaithambi was represented by Mr.R.Srinivasan, Advocate and the management was represented by Mr.T.V.Suresh, Advocate. Asaithambi conceded before the labour Court that he is not challenging the fairness of the enquiry proceedings and that he is only challenging the punishment imposed upon him. Therefore, the labour Court framed the following issues:

(i) Was the dismissal of Asaithambi from service justified?

(ii) To what relief, he is entitled to?

6.Since the enquiry proceedings were not challenged, no oral evidence was adduced by both sides. On behalf of Asaithambi, two documents were marked and on behalf of the management, 23 documents were marked including the charge memos, the enquiry proceedings etc.

7.The labour Court appraised the materials produced before it and concluded that there is no infirmity in the domestic enquiry proceedings, but held that the punishment of dismissal from service was disproportionate to the charges against Asaithambi and therefore, set aside the order of dismissal from service passed by the management and directed that he be reinstated in service without back wages, challenging which, the management is before this Court.

8.Heard Mr.Paramasivados, learned counsel for the management and Mr.T.Anantha Sekar, learned counsel for the first respondent/Asaithambi.

9.Mr.Paramasivados contended that the labour Court ought not to have interfered with the punishment of dismissal from service imposed on Asaithambi in the light of the fact that Asaithambi has been a chronic unauthorised absentee. He placed

strong reliance on the judgment of the Supreme Court in Chennai Metropolitan Water Supply and Sewerage Board and others v. T.T.Murali Babu in (2014) 4 SCC 108.

10.Per contra, Mr.T.Anantha Sekar, learned counsel appearing for Asaithambi sought to justify the labour Court award by submitting that Asaithambi did not contest the charges against him before the enquiry officer and had submitted himself and only prayed for leniency and in that context, the order of dismissal from service passed by the management was highly disproportionate. He placed strong reliance on the judgment of the Supreme Court in Chairman cum Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others in 2009-IV-LLJ-672 (SC).

11.This Court gave its anxious consideration to the rival submissions. In Mukul Kumar Choudhuri's case, the Supreme Court, after considering all the earlier judgments relating to doctrine of proportionality, has held as follows in para no.26:

"26. The doctrine of proportionality is, thus, well recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorized absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and

explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's Rules and Regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the respondent No.1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorized absence for six months. "

12. From a reading of the above, it appears that the employee in that case was an unauthorized absentee for six months and that he also submitted his resignation, which was not accepted by the management and was visited with the penalty of dismissal from service. In the said judgment, the Supreme Court has not stated that in every case of unauthorized absence, the employee should not be visited with the extreme penalty of dismissal from service. In fact, the Supreme Court has stated that the Court should see, whether any reasonable employer would have imposed such a punishment in like circumstances. सत्यमेव जयते

13. In T.T.Murali Babu's case in (2014) 4 SCC 108, wherein, Mukul Kumar Choudhuri's case has been referred to by the Supreme Court in para no.31, which is as under:

"31. It is apt to note here that in the said Mukul Kumar Choudhuri case, the respondent had remained unauthorisedly absent from duty for six months and admitted his guilt and explained the reasons for his absence by stating that he neither had any intention nor desire to disobey the order of superior authority or violate any

of the rules or regulations but the reason was purely personal and beyond his control. Regard being had to the obtaining factual matrix, the Court interfered with the punishment on the ground of proportionality. The facts in the present case are quite different. As has been seen from the analysis made by the High Court, it has given emphasis on past misconduct of absence and first time desertion and thereafter proceeded to apply the doctrine of proportionality. The aforesaid approach is obviously incorrect. It is tell-tale that the respondent had remained absent for a considerable length of time. He had exhibited adamant attitude in not responding to the communications from the employer while he was unauthorisedly absent. As it appears, he has chosen his way, possibly nurturing the idea that he can remain absent for any length of time, apply for grant of leave at any time and also knock at the doors of the Court at his own will.

"

14.Mr.T.Anantha Sekar, learned counsel for the first respondent, submitted that Asaithambi admitted his guilt, even when first charge memo was given and therefore, the law laid down in Mukul Kumar Choudhuri's case should be applied.

15.This Court is unable to accept the aforesaid submission, because Asaithambi was first issued with charge memo dated 19.11.1996, wherein the charge against him was that he was on unauthorized absence from 04.11.1996 to 11.11.1996. Though he pleaded guilty to the charge, even in his reply letter, the reason given by him was that he had gone to temple. Even after that, he did not report to duty. He was again given a second charge memo dated 27.12.1996, wherein it was stated that he is on unauthorized absence from 06.12.1996 onwards. Asaithambi did not appear even before the enquiry officer and instead, he sent letters and telegrams seeking adjournments from time to time. The enquiry officer had given a very long rope and only thereafter, had proceeded to conduct the enquiry by recording the evidence of the management witness on 04.03.1997.

16.Had Asaithambi participated in the enquiry and shown some reasonable cause for his unauthorized absence, things

would have been little different. As held by the Supreme Court in T.T.Murali Babu's case, Asaithambi had exhibited an adamant attitude in not responding to the communications from the enquiry officer and continued to be an unauthorized absence. In fact, before the labour Court, the management had produced materials to show that even prior to the first charge memo, Asaithambi had gone on different spells of unauthorized absence, which the management had condoned. This has been referred to in para no.9 of the award. The management contended that Asaithambi was on unauthorized absence from 11.08.1994 to 06.12.1994, for which, no punishment was imposed on him and his misconduct was condoned. Again he was on unauthorized absence from 22.05.1995 to 12.10.1995, which was also condoned by the management. Asaithambi was holding the post of Assistant, and was working in the Bus depot and was incharge of cash collection. It is the contention of the management that on account of continuous unauthorized absence, the work in the bus depot suffered. In para no.33 in T.T.Murali Babu's case, the Supreme Court has stated as follows:

"33. Another aspect need to be noted. The respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers in indiscipline in an organisation. In this context, we may fruitfully quote a passage from Govt. of India v. George Philip (2006) 13 SCC 1 : (SCC p.14, para 18)

"18. ... In a case, involving overstay of leave and absence from duty, granting six months' time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organisation. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain

discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same. " "

17. When a person, who is incharge of cash collection, frequently goes on unauthorized absence, it will undoubtedly cause disruption to work and mechanical condonations will embolden others to follow a bad example.

18. In fine, this Court is of the view that the labour Court ought not to have interfered in the penalty of dismissal from service imposed by the management in the facts and circumstances obtaining in this case.

19. In the result, this Writ Petition is allowed and the award dated 17.07.2002 of the labour Court is set aside and the order of dismissal from service imposed on Asaithambi is restored. No costs.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

1. The Managing Director
Tamil Nadu State Transport Corporation
(Salem Division II) Ltd.,
Bharathipuram
Dharmapuri.

2. The Presiding Officer
Labour Court, Salem.
+1cc to Mr. Parama Sivados, Advocate SR.No.10686
+1cc to Mr. T. Anantha sekar, Advocate SR.No.10526

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SDR 08.03.2017