

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

WRIT PETITION No.4697 of 2006

ORDER:

This writ petition, under Article 226 of the Constitution of India, by the unsuccessful petitioner-workman is directed against the Award, dated 27.09.2005, of the learned Chairman, Industrial Tribunal-II, Hyderabad, passed in ID.No.17 of 2005 (old No.59 of 2003 of Labour Court, I, Hyderabad).

2. I have heard the submissions of *Sri V. Narasimha Goud*, learned counsel appearing for the writ petitioner, and of *Sri C.R. Sridharan*, learned senior counsel representing Sri Saloori Ramesh, learned counsel appearing for the 1st respondent. 2nd respondent, Labour Court, is impleaded as per order, dated 04.03.2014 in WPMP.No.7653 of 2014. I have perused the material record.

2.1 The parties shall hereinafter be referred to as the petitioner and the respondent-company for convenience and clarity.

3. To begin with, it is necessary to refer to the cases of the parties and the facts that lead to the filing of the writ petition by the petitioner.

3.1 The case of the petitioner, in brief, is as follows:

The petitioner joined the services of the respondent Company in the year 1989. He was made a permanent employee in the year 1990. From 1990 onwards he made contributions to the Employees State Insurance scheme and his contributions were deducted from his salary. From 1997 onwards, the company stopped furnishing yearly provident fund accumulation slips to the petitioner. The petitioner was also not provided dress and protective shoes. The Company also did not furnish

his leave position, with details. The bonus payable for the year 2002-03 was not paid for no valid reasons. As the petitioner made requests in that regard, the management developed grudge against him and started harassing him. He was victimised and the management resorted to unfair labour practice. The petitioner fell sick in the month of October, 2002, due to chemical gasses and polluted air which emanated during the manufacturing of the products of the Company. He gave intimation of his sickness to the Company. He reported to duty, on 28.11.2002. An undertaking was taken from him that he would make best efforts to be sincere in attending to his duties in future. The petitioner once again fell sick, on 18.12.2002. Therefore, he could not attend to duties from the said date. He intimated about his sickness to the Company. He again reported to duty, on 02.01.2003, along with a fitness certificate. The fitness certificate was received by the management and he was informed not to come to duty. The said action amounted to terminating the services of the petitioner in violation of the provision of Section 25(f) of the Industrial Disputes Act, 1947, (hereinafter, 'the Act'). The petitioner, therefore, approached the respondent Company regularly for permitting him to attend to duty; but, his requests were not considered. He, therefore, sent a representation, dated 12.03.2003; but, the management refused to receive the same. He approached the Tribunal challenging the illegal retrenchment and praying to set aside the oral termination of the petitioner from service, with effect from 02.01.2003, and to direct his reinstatement into service with continuity of service, back wages and all consequential benefits.

3.2 The respondent company resisted the claim petition of the petitioner by filing a counter, *inter alia*, submitting as follows: 'The petitioner joined in the respondent Company, on 01.06.1990, as helper

and attended to his duties till 30.11.2002. He absented from attending to duties intermittently during the period from 07.11.2002 to 15.11.2002. He again attended to his duties on 16.11.2002. He again absented from attending to duties during the period from 18.11.2002 to 27.11.2002, without submitting any application for leave. The petitioner failed to attend to his duties from 01.12.2002 and did not visit the factory even to collect his salary for the month of November, 2002, and thus remained unauthorisedly absent since 01.12.2002. Thus, the petitioner left the services without any intimation to the management of the Company; and, the allegations to the contra in the petition of the petitioner are false. The allegations that the respondent did not issue Provident Fund subscription statement and did not pay bonus and provide details of leave position and that the petitioner submitted fitness certificate and reported to duty on 02.01.2003 are all false.

3.3 During the course of enquiry before the Tribunal, the petitioner and a witness for the management were examined as WW1 and MW1 and exhibits W1 to W3 and M1 to M8 were marked. Having regard to the pleadings, the Tribunal framed the following points for consideration:

- (i) Whether the workman was orally retrenched by the respondent as contended in violation of Sec.25(f) of ID Act?
- (ii) Whether the petitioner is entitled for the relief of reinstatement, back wages and other attendant benefits as prayed for?
- (iii) IF not to what relief the petitioner would be entitled for?

3.4 On merits, the Tribunal dismissed the claim petition of the petitioner-workman without costs. Aggrieved thereby the petitioner is before this Court.

4. Learned counsel for the petitioner would submit as follows:

The Award is unsustainable being contrary to the facts established and the legal position obtaining. The Tribunal ought to have seen that

the petitioner was orally retrenched from service and the provisions of the Act were violated. The Tribunal ignored the issues and gave findings on some other issues, which are not settled for determination. The said error is apparent on the face of the Award. Though the petitioner attended to duty, on 02.01.2003, he was not allowed to attend to duty by stating that his services are not required. The petitioner filed muster particulars for the periods – November, 2002, December, 2002, and January, 2003. His name was shown in the muster upto December, 2002. However, in December, 2002 muster, the entries against his name were kept blank. From 01.01.2003 onwards his name does not find a place in the muster. Thus, his services were illegally terminated. Before removing the name of the petitioner from the muster from 01.01.2003, no notice was issued and no pay in lieu of notice was also paid. The retrenchment compensation payable under the provision of Section 25(f) of the Act was also not paid. The management is not ready to take the petitioner into service and assign him any duties. No sufficient contentions are pleaded and no sufficient material is produced to prove that the petitioner absconded from duty or abandoned his service. Therefore, the findings of the Tribunal that the petitioner absconded from the duty and the related findings are apparent errors on the face of the record. When the petitioner sent a representation, dated 12.03.2003, by RPAD, the postal authorities returned it with endorsement that the management of the respondent company refused to receive the said letter. The said aspect was clearly pleaded in the claim application. The petitioner made best efforts for his reinstatement into service, but, the management of the Company did not consider his efforts and grant him any relief. Hence, he was constrained to approach the Tribunal. It is for the management to prove

that the petitioner absconded from duty. It is for the management to issue a notice to the employee informing him to attend to duty; and, on failure of the employee to attend to duty despite such notice, it can be presumed or it can be deemed that he absconded from duty. Neither there was pleading to the above effect nor was a notice given by the management to the petitioner. No charge sheet was also issued for absenteeism or for any other misconduct. No opportunity was given to the petitioner before striking down his name or removing his name from the muster with effect from 01.01.2003. The findings of the Tribunal that the petitioner abandoned his service is nothing but perverse and the Tribunal exercised its power arbitrarily. The Tribunal failed to appreciate the facts, the evidence and the legal position obtaining in proper perspective. The Tribunal did not give credence and weight to the refused postal cover though the management of the respondent Company has not denied by stating in its counter that the petitioner has not sent the representation, dated 12.03.2003. The findings of the Tribunal are contrary to the material evidence brought on record. To find out some way to deny the relief, the Tribunal assigned untenable grounds in support of its findings. MW1 admitted that the name of the petitioner was removed from the muster from 01.01.2003 onwards without notice of any kind. The Tribunal avoided recording a finding on the said aspect. The order was passed to help the management.

5. Per contra, learned senior counsel appearing for the respondent company while supporting the orders of the Tribunal mainly urged as follows: - 'There is neither perversity nor arbitrariness either in the approach of the Tribunal or the reasoned findings recorded by the Tribunal. The contention of the petitioner that the Award is unsustainable as the findings are perverse is a baseless allegation made

desperately to somehow get some relief from this Court. There are no errors in the findings of the Tribunal much less errors apparent on the face of the record. The Tribunal conducted a detailed enquiry. During the course of enquiry, both oral and documentary evidence was taken on record. After giving a fair opportunity of hearing to both the sides, the Tribunal answered the points and decided the issues raised by recording well reasoned findings. When there is no error or illegality or irregularity in appreciating the facts and evaluating the evidence, this Court while exercising jurisdiction under Article 226 of the Constitution of India is not obligated to re-examine and re-appreciate the evidence and the questions like adequacy and reliability of evidence need not be examined by this Court. The Tribunal is the last Court of fact. Any findings of fact recorded by the Tribunal are final and binding and need not be interfered with by this Court. The findings of fact, however, erroneous do not warrant interference. When the view taken by the Tribunal is also possible and plausible, this Court is not required to substitute its view in the place of the well considered view, which is taken by the Tribunal. When two views are possible on the analysis of facts and evidence, the view taken by the Tribunal shall have primacy. Hence, the writ petition is devoid of merit and is liable to be dismissed.'

6. Both the learned counsel placed reliance on a catena of decisions. Therefore, it is necessary to advert to the legal position.

7. Before dealing with the legal aspect, it is necessary to note the facts which emerge from the pleadings and submissions of the parties. According to the petitioner, the management of the respondent company developed a vindictive attitude towards him as he made certain reasonable demands regarding non issuance of provident fund slips, non furnishing of details of leave position and about bonus payable

for the year 2002-03. However, the petitioner admits that on the ground of his ill health he gave intimation about his sickness in October, 2002, but, reported to duty on 28.11.2002; and, again he did not attend to duties having fallen sick, on 18.12.2002. He also submits that he reported to duty, on 02.01.2003, with a fitness certificate and that the management having taken the fitness certificate did not allow him to join duty. He further pleads that he sent a representation, dated 12.03.2003, but, the management did not consider his representation and failed to reinstate him from 02.01.2003. Per contra, the case of the management is that the petitioner having joined duty as a helper in June, 1990, attended to his duties till 30.11.2002 and absented from attending to duties intermittently during the period from 07.11.2002 to 15.11.2002 and that he again attended to duties on 16.11.2002; but, thereafter he again absented from attending to duties from 18.11.2002 to 27.11.2002 without submitting any application for leave; and, that eventually he failed to attend to his duties from 01.12.2002 and failed to even come to the factory to collect his salary for the month of November, 2002; and thus, he remained unauthorisedly absent from 01.12.2002 and left the services without any intimation to the management.

7.1 From the pleadings of both the parties, it is manifest that the petitioner was frequently absenting himself from attending to duties. According to the petitioner, he last reported to duty on 02.01.2003; but, he was not allowed to join the duty. According to the management, the petitioner failed to attend duties from 01.12.2002 onwards. In these circumstances the petitioner contends that he was orally retrenched as his name was removed from the muster from January, 2003 onwards after the entries against his name in December, 2002, muster were kept

blank. Per contra, the management contends that the petitioner having absented from 01.12.2002 onwards and having failed to collect the salary for the month of November, 2002, left the services for good.

7.2 In this background, after evaluation of the evidence, the Tribunal held that the petitioner is not retrenched from services by the management illegally, but, the petitioner himself abandoned his services. Even according to the own showing of the petitioner, he last attended to duty on 17.12.2002 and absented from duty thereafter and according to him he reported to duty on 02.01.2003. But, according to the management, he failed to attend duties from 01.12.2002. The muster of December, 2002, shows that the petitioner did not attend to duty and his name was removed from the muster in January, 2003. However, learned counsel for the petitioner would contend that when there is no pleading in the counter of the management about abandonment of service by the petitioner, any amount of evidence on the said aspect cannot be looked into and the Tribunal was in error in recording a finding on the aspect, which is not supported by pleading of the management. Learned Senior Counsel appearing for the management would submit that there is a plain pleading which clearly signifies that the petitioner having failed to attend duties abandoned his services. Learned counsel for the petitioner would also contend that when the petitioner gave a representation, dated 12.03.2003, and filed a postal cover to show that the same was refused to be received by the management, the Tribunal erroneously held that the endorsement on the cover is manipulated and, therefore, the Tribunal erred in not giving due weight to the contention of the petitioner that his representation was ignored.

8. Now, it is necessary to advert to the decisions relied upon by both the sides.

8.1 The following decisions are relied upon by the learned counsel for the petitioner.

(1) Sudarshan Rajpoot v. UP State Road Transport Corporation¹ is relied upon in support of the proposition that striking off the name of the workman from the contract roll would amount to retrenchment.

(2) L. Robert D" Souza v. the Executive Engineer, Southern Railway and another² is relied upon in support of the proposition that striking off the name from the roll without anything more constitutes retrenchment.

(3) In Punjab Land Development and reclamation Corporation Ltd., v. Presiding Officer, Labour Court, Chandigarh³, the precise question that was decided was – ‘Whether on a proper construction of the definition of “retrenchment” in Section 2(oo) of the Act, it means termination by the employer of the service of a workman as surplus labour for any reason whatsoever, or it means termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and those expressly excluded by the definition. In other words, the question that was decided was – ‘whether the word “retrenchment” in the definition has to be understood in its narrow, natural and contextual meaning or in its wider literal meaning.’ Eventually it was held that “retrenchment” means the termination by the employer of the service

¹ 2015(1) SLR 533 (SC)

² AIR 1982 SC 854(1)

³ (1990) 3 SCC 682

of a workman for any reason whatsoever except those expressly excluded in the section.

(4) Raghubir Singh v. General manager, Haryana Roadways, Hissar⁴ is relied upon in support of the propositions that before retrenching the petitioner from services an enquiry ought to have been held and that a relief to which a workman is entitled to cannot be denied on the ground of delay in raising the industrial dispute.

(5) G.T.Lad and others v. Chemicals and Fibres India Ltd.,⁵ is relied upon in support of the proposition that temporary absence is not ordinarily sufficient to constitute abandonment of office.

(6) D.K.Yadav v. JMA.Industries Ltd.,⁶ is relied upon in support of the proposition that the action of the management in removing the name of the workman from the muster roll, which put an end to the employment for whatever reason is covered by the definition of 'retrenchment' in Section 2(oo), which is comprehensive.

(7) S. Ramachandra v. Deputy General Manager, Syndicate Bank, Hyderabad⁷ is relied upon in support of the proposition that under unavoidable circumstances sometimes employees may be forced to absent from duties unauthorisedly but in such cases also the management is required to give employee an opportunity to have a say in the matter before his retrenchment.

(8) Chief Engineer, ITDA (TW Dept) and others v. Presiding Officer⁸; Bondar Singh and others v. Nihal Singh and others⁹ and

⁴ (2014) 10 SCC 301

⁵ AIR 1979 SC 582

⁶ (1993) 3 SCC 259

⁷ 1999 (TLS) 402414

⁸ 2005 (4) ALD 756

⁹ (2003) 4 SCC 161

Shankar Chakravarti v. Britannia Biscuit Co. Ltd., and another¹⁰ are relied upon in support of the following propositions: 'If there is no pleading there is no question of proving what is not pleaded; no evidence can be looked into in relation thereto; a contention to substantiate which evidence is necessary has to be pleaded and that if there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side will have no notice of it; if such evidence not supported by pleading is examined it would tantamount to granting an unfair advantage to the party relying on such evidence which has no foundation in the pleading.'

(9) In Delhi Cloth and General Mills Co. Ltd., v. Shambhu Nath Mukherji and others¹¹, the facts show that the management wrote a letter to the workman stating that his name has been automatically struck off the rolls as per standing orders with effect from the date mentioned in the letter. Having regard to the legal position and the standing orders applicable, it was held that striking off the name of the workman from the rolls of the management is termination of service and such termination of service is retrenchment within the meaning of Sec.2(oo) of the Act.

(10) Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and others¹² is relied upon in support of the contention that if the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits then it is for the employer to specifically plead and prove that during the

¹⁰ AIR 1979 SC 1652

¹¹ AIR 1978 SC 8

¹² (2013) 10 SCC 324

intervening period, that is, from the date of illegal retrenchment till the date of reinstatement, the employee was gainfully employed and was getting same emoluments.

(11) *Syndicate Bank v. General Secretary, Syndicate Bank Staff Association and another*¹³ is relied upon in support of the proposition that when a notice is sent by registered post to correct address and when the postal cover bears some postal endorsement of refusal, there is no need to examine the post man.

8.2 The following decisions are relied upon by the learned senior counsel appearing for the respondent.

(1) *Bombay Steel Rolling Mills Ltd., and others v. Khemchand Rajkumar Steel Mills and Pahorpur Yards Labour Union, Calcutta*¹⁴ is relied upon in support of the proposition that the workman who absents himself from work and preferred to remain away and did not ask for work within a reasonable time after remaining away from work would not be entitled to reinstatement. In this cited case, it appears that the management promised to take the workmen to work after their acquittals in criminal proceedings. After such acquittal, the workmen preferred to remain away and did not ask for work. Therefore, it was held that it is neither fair nor reasonable to ask the management to comply with the demands for reinstatement made months and months after such acquittals. The Court also observed that during the long period the employer has naturally employed new workmen and in the special circumstances of the case that fact cannot be altogether ignored. Finally, the reinstatement ordered by the Tribunal being unsustainable was set aside.

¹³ (2000) 5 SCC 65

¹⁴ 1964 (2) LLJ 120

(2) *Buckingham and Carnatic Co. Ltd., v. Venkatiah and another*¹⁵ is relied upon in support of the proposition that abandonment or relinquishment of service is always a question of intention and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf; but, whether the parties agree upon the terms and conditions of service and they are included in Standing Orders, the doctrines of common law or considerations of equity would not be relevant and it is then a matter of construing the relevant term itself and, therefore, the Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment.

(3) *J.K. Cotton Spinning and Waving Mills Company Ltd., v. State of UP and others*¹⁶. It is a case where the employee voluntarily tendered resignation and the Court considered the effect of acceptance of such resignation.

(4) *T. Venkateswarlu v. Branch Manager, State Bank of India*¹⁷. It is also a case of voluntary vacation of services by an employee who was sent on deputation and who has not rejoined duty in the bank after expiry of deputation. In the facts and circumstances of the cited case, this Court held that conditions necessary to deem it as a 'voluntary resignation' were satisfied.

(5) *Thimmiah v. Additional Industrial Tribunal-cum-Additional Labour Court, Hyderabad and another*¹⁸ is relied upon in support of the proposition that termination from service on the ground

¹⁵ AIR 1964 Sc 1272

¹⁶ (199) 4 SCC 27

¹⁷ 1990 (II) LLJ 59

¹⁸ 2002 (1) ALD 314 (DB)

of continued absence from duty under the Standing Orders does not amount to retrenchment and when such order of termination was made after giving notice to the employee, it is not liable to be challenged.

(6) *Municipal Committee Tauru v. Harpal Singh and another*¹⁹ is relied upon in support of the proposition that if an employee takes inconsistent stands, it cannot be over looked and that even in labour matters such employee should be denied the relief as justice must be done both to the employer and the employee.

(7) *Savitri Devi v. District Judge, Gorakhpur and others*²⁰ is relied upon in support of the proposition that Judicial Officer need not be impleaded as a party and impleading Judicial Officer as a party is deprecated.

(8) *Shankar Chakravarti v. Britannia Biscuit Co., Ltd., and another*²¹ is relied upon in support of the following propositions: - 'The Labour Court or Tribunal has to decide the *lis* on the evidence adduced before it. While it may not be hide bound by the rules prescribed in the Evidence Act it is nonetheless a *quasi*-judicial Tribunal proceeding to adjudicate upon a *lis* between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the *lis* on any extraneous consideration. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court. The rules of fair play demand where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no

¹⁹ (1998) 5 SCC 635

²⁰ AIR 1999 SC 976

²¹ AIR 1979 SC 1652

question of proving something which is not pleaded. This is very elementary.'

(9) Parry and Co., Ltd., v. P.C. Pal, Judge of the Second Industrial Tribunal, Calcutta and others²² is relied upon in support of the proposition that the workman can invoke writ jurisdiction only in those cases where the Tribunal though competent to enter upon an enquiry, acts in flagrant disregard of the rules of procedure or violates the principles of natural justice where no particular procedure is prescribed and that mere a wrong decision cannot be corrected by a writ of certiorari as that would be using it as the cloak of an appeal in disguise but a manifest error apparent on the face of the proceedings based on a clear ignorance or disregard of the provisions of law or absence of or excess of jurisdiction, when shown, can be so corrected. This decision is also relied upon in support of the following propositions: 'Where a Tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding is not open to question under Article 226 unless it could be shown to be wholly unwarranted by the evidence. Where a Tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever have arrived at that conclusion, interference under Article 226 would be justified.'

(10) In Syed Yakoob v. K.S. Radhakrishnan and others²³, it is held by the Supreme Court as follows: 'The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal

²² AIR 1970 Sc 1334

²³ AIR 1964 SC 477

position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals. These are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be 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.' This decision is also relied upon in support of the proposition that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding and that the adequacy or sufficiency of evidence lead on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court and that what can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record.

(11) Chief Engineer (construction) v. Keshava Rao (D) by Irs²⁴ is relied upon in support of the proposition that when findings of the Tribunal do not suffer from perversity, they need not be interfered with. In this case, the facts show that the Tribunal recorded a finding that the respondent who was engaged as a casual labourer had abandoned his service and the said finding of the Labour Court was confirmed by the Supreme Court after setting aside the order of the High Court. In that case, on facts, the unauthorised absence of the respondent was considered as amounting to voluntary abandonment of service and it was held that the question of issuance of notice, charge sheet etcetera did not arise.

(12) P.V.K. Distillery Ltd., v. Mahendra Ram²⁵ is relied upon in support of the proposition that though the services of the workman have been terminated unjustifiably and illegally, it does not create a right of reinstatement with full employment benefits and full back wages.

(13) In Pyarelal Sharma v. Managing Director and others,²⁶ the facts show that an employee remained unauthorisedly absent from duty and therefore his services were terminated.

(14) In Swaraj Tractors Division, Punjab v. Raghbir Singh²⁷, the facts show that for absence from duty without leave, enquiry proceedings were initiated, conducted and termination orders were given. On facts, it was found that there are no violations of principles of natural justice in enquiry proceedings.

²⁴ 2005 LLR 446

²⁵ JT 2009 (3) SC 169 = MANU/SC/0315/2009

²⁶ (1989) 3 SCC 448

²⁷ 2004 I LLJ 458

(15) In Union of India (UOI) and others v. Bishamber Das Dogra,²⁸ the facts show that an employee who was regularly absenting himself was served with punishment of censure and withholding of annual increments and eventually a show cause notice was issued to him and after receiving his reply, a departmental enquiry was initiated against him and that during the pendency of the enquiry he again deserted the service and that eventually the enquiry report was accepted by the disciplinary authority and punishment of removal from service was awarded after taking into consideration his past conduct. The Supreme Court restored the punishment imposed by the disciplinary authority after setting aside the orders of the Division Bench and a learned single Judge of the High Court.

(16) In Mahesh Kumar Narottambhai Kantharia v. Administrative Officer, Nagar Prathmik Shikshan Samiti, Surat and another²⁹ the facts disclose that the workman/peon in a school remained absent from duty and continued to remain absent from duty and, therefore, a show cause notice was issued to him and thereafter his services were dispensed with by the employer considering the absence from duty as a serious and grave misconduct. The High Court, having found that there is no sufficient cause for the absence of the employee and that the medical certificates produced by him are of little help to him held that the High Court is not sitting as an appellate Court over the decision of the disciplinary authority and that the High Court sitting under Article 226 of the Constitution cannot appreciate the evidence and that judicial review in such matter is only relating to decision making process of the authority.

²⁸ MANU/SC/0887/2009

²⁹ 2002 (92) FLR 215

(17) In *Narendra Singh Solanki v. Raw and Finishing Production and another*,³⁰ the facts show that the petitioner therein absented from duty and failed to attend work and further failed to prove termination by employer by producing the order; he also could not prove by producing any record showing that he was ever prevented from doing work. In these circumstances, the finding of abandonment recorded was held to be legal.

9. Reverting to the facts of the instant case, coming to the aspect as to whether from the pleadings in the counter of the respondent Company, it could be gathered as to whether a contention that the petitioner abandoned his services is raised as a defence, it is necessary to extort from the Counter the following pleading: 'The petitioner failed to attend to his duties from 01.12.2002 and did not visit the factory even to collect his salary for the month of November, 2002, and thus remained unauthorisedly absent since 01.12.2002. Thus, the petitioner left the services without any intimation to the management of the Company'. In the considered view of this Court, the above extracted pleading is sufficient to come to a safe conclusion that there is sufficient pleading as the said pleading in the counter clearly reflects that the petitioner abandoned his services. Therefore, the decisions relied upon by the learned counsel for the petitioner that there is no pleading and, therefore, the evidence on the said aspect need not be looked into do not advance the case of the petitioner any further. It is a settled law that an employee cannot be termed as a slave; he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and voluntarily remaining absent for long.

³⁰ 2000 (85) FLR 821

10. I have gone through the Award of the Tribunal. The learned Chairman of the Tribunal having carefully considered the pleadings of the parties, the core facts and the evidence brought before him, determined the points, which are framed for consideration, by marshalling the facts correctly and the evidence in proper perspective. In the case on hand, the petitioner repeatedly and at different intervals absented from duty. He was at his will and wish absenting from duty and coming back to duty. The employer was patiently accommodating him. Even according to his own showing, from 18.12.2002 he did not attend to duty and reported to duty on 02.01.2003 along with a medical certificate. Though it is his contention that the certificate was received by the management and he was not permitted to join duty, he did not produce a copy of such certificate before the Tribunal or this Court. When he absented from duty, naturally, the entries in the muster against his name would remain blank. His further contention is that his name was removed from January, 2003, muster and, therefore, he is retrenched from service and he was illegally terminated from discharging his duties. However, even according to his pleading, he did not make any representation before 12.03.2003. No reasons are forthcoming as to why he did not raise any issue by making a representation when he was prevented from discharging his duties from 02.01.2003 onwards despite receiving a medical certificate, which was allegedly submitted by him. Though in the pleadings in the writ petition it is stated that he submitted a medical certificate when he reported to duty on 02.01.2003 and the same was received by the management but he was not allowed to join duties stating that his services are not required, what is to be noted is that in the copy of representation, dated 12.03.2003, filed before this Court, there is no mention that he

submitted a medical certificate while reporting to duty, on 02.01.2003. Though his contention is that his representation was refused to be received by the management and the same was returned to sender, on 15.03.2003, the Tribunal having examined the endorsements on the returned cover found that certain alterations are made subsequently on the postal cover and there is no clarification from the petitioner in regard to the said aspects in any manner. Therefore, the Tribunal did not believe the endorsement of rejection or refusal on the said postal envelope. Though it is sought to be contended that the management did not dispute in its pleading the correctness of endorsement on the postal cover and that it did not aver in its counter that the endorsement on the postal cover is manipulated, what is to be noted is that the management has no opportunity to see the endorsements on the postal cover till it was tendered in evidence by the petitioner; hence, the contention of the petitioner that the management ought to have denied the endorsement on the postal cover in its counter needs no countenance.

10.1 Admittedly, no termination order was issued to the petitioner by the management. Therefore, the Tribunal also held that the petitioner could not prove that he reported to duty and he was prevented from discharging his duties; and, hence, the Tribunal also held that he voluntarily abandoned his services. At this juncture, it is necessary to refer to the decision in Chief Engineer (construction) [24th supra] wherein the facts and ratio are as follows: 'The case of the respondent therein is that he has been prevented from working on 01.11.1977 and that the case of the appellant on the other hand is that the respondent voluntarily abandoned his service and therefore in accordance with the relevant rules his name was struck off from the muster roll. The Labour Court recorded two crucial findings of fact, namely, that the respondent

was engaged as a casual labourer in connection with project work, and secondly, he had abandoned his service and that the allegation that he was prevented from attending to his duties was not true. Those findings of fact were recorded by the Tribunal on the basis of evidence on record. The muster roll also supported the case of the appellant therein that after 01.11.1977 the respondent did not report for duty. The respondent did nothing till 04.04.1979 to ask his right for reinstatement. Considering the delay and the facts and as there is no evidence adduced by the respondent that he made an effort to seek reinstatement or complained against management to anyone, the Supreme Court held that the finding of the Labour Court did not suffer from the vice of perversity or unreasonableness and the High Court was in error in interfering with the findings of fact recorded by the Labour Court and, therefore, allowed the appeal and set aside the judgment of the High Court.’ In the considered view of this Court, the ratio in this decision applies on all fours to the facts of the present case. Absence from duty in the beginning may be a misconduct but when absence is long, deliberate and intentional, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. In the considered view of this Court, this is a class of case where the unauthorised absence reasonably gives rise to an inference that service is abandoned by the employee. Thus, on a careful examination of the matter, this Court does not find any perversity, illegality, irregularity or impropriety in the factual findings recorded by

the Tribunal. When once conclusions arrived at by the learned Chairman of the Tribunal are found to be sustainable on facts and evidence, this Court will not normally substitute its subjective opinion in the place of the one arrived at by the Tribunal. Therefore, none of the decisions relied upon by the petitioner advance his case any further. In the facts and circumstances of the case, this Court does not find any grounds much less valid grounds calling for interference with the well considered findings recorded by the learned Chairman of the Tribunal.

11. Before parting, it is necessary to refer to the decision in *Union of India v. P. Gunasekaran*³¹ wherein the Supreme Court dealt with the scope of interference of this Court under Articles 226 or 227 of the Constitution of India and held, *inter alia*, as under:

“In disciplinary proceedings High Court is not and cannot act as a second court of first appeal and that the High Court, in exercise of its powers Under Article 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence and that the High Court can only see whether:

- (a) the enquiry is held by a competent authority;
- (b) the enquiry is held according to the procedure prescribed in that behalf;
- (c) there is violation of the principles of natural justice in conducting the proceedings;
- (d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- (e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- (f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
- (g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;
- (h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
- (i) the finding of fact is based on no evidence.”

Under Article 226/227 of the Constitution of India, the High Court shall not:

- (i). re-appreciate the evidence;
- (ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

³¹ (2015) 2 SCC 610

- (iii). go into the adequacy of the evidence;
- (iv). go into the reliability of the evidence;
- (v). interfere, if there be some legal evidence on which findings can be based.
- (vi). correct the error of fact however grave it may appear to be;
- (vii). go into the proportionality of punishment unless it shocks its conscience.

12. In view of the legal position succinctly stated in the above decision, this Court shall not (i) re-appreciate the evidence; (ii) interfere with the conclusions in the enquiry, in case, the enquiry has been conducted in accordance with law, (iii) go into the adequacy and reliability of the evidence; (iv) correct the error of fact, however grave it may appear to be; and, (v) interfere, if there be some legal evidence on which the finding can be based.

13. On the above analysis and for all the afore-stated reasons, this Court finds that there is no merit in the writ petition and that the writ petition is liable to be dismissed.

14. Resultantly, the Writ Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

M. SEETHARAMA MURTI, J

20.04.2017
Vjl