

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.488 of 2009

ORDER :

This Writ Petition has been filed to call for records relating to Award dt.23-10-2008 passed by the 1st respondent in I.D.No.43 of 2005 and which was published by the 3rd respondent vide G.O.Rt.No.2312 dt.28-11-2008 and to quash the same by Writ of Certiorari.

2. The 2nd respondent was appointed as a Technician in the semi-skilled category (as Electrician) vide appointment order dt.02-04-1998. It is not in dispute that he suffered an accident on 24-10-2001 which resulted in a head injury and shortening of his foot

3. He was unauthorisedly absent from 17-11-2001 to 19-01-2004.

THE CHARGE MEMOS

4. During this period, he was issued charge memos on 28-11-2001, 09-03-2002, 18-09-2002, 21-02-2003 and 29-03-2003 stating that he was not attending duties since 17-11-2001 and his long absence from duty without intimation is a serious misconduct as per Clause 34(m) of the Certified Standing Order of the company, that he had not submitted any explanation and he should show cause why disciplinary action should not be initiated.

5. It is pertinent to note that on 04-04-2003, the 2nd respondent had addressed a letter to the petitioner stating that he received the charge memo dt.03-04-2003 and because he was unwell, he could not attend to duty and as soon as his health improves he would resume to his duties.

6. Finally, another charge memo dt.19-01-2004 was issued stating that he had been absent from duty wilfully and without any sufficient cause from 12-11-2001 without prior sanction of leave and/or information from the concerned authority, that his sudden absence had dislocated the work in the Department forcing the petitioner to make alternative arrangements, that the petitioner had not submitted any explanation to the charge memos referred to above, and therefore he is guilty of misconduct under clauses 34(h) (*wilful insubordination or disobedience*), (m) (*habitual absence without leave*), (r) (*act subversive of discipline*) and S(b) (*gross neglect of work*) of the certified Standing Order of the company. Still no explanation was forthcoming from the 2nd respondent. Therefore a Departmental Enquiry was directed to be conducted and an Enquiry Officer was appointed and he fixed 17-02-2004 as the date for commencement of the enquiry.

7. Before the Enquiry Officer, the petitioner marked M.Exs.1 to 39.

8. Though the 2nd respondent had not given any explanation to the charge memo dt.19-01-2004, he appeared before the Enquiry Officer and marked the medical certificate dt.13-10-2003 and also examined himself as a witness, but did not examine any other witnesses.

THE ENQUIRY REPORT

9. The Enquiry Officer then submitted a report stating that the charges are proved. He observed that the certificate dt.13-10-2003 produced by the 2nd respondent merely indicated that he was fit to resume duties, but the 2nd respondent failed to give sufficient reasons for remaining absent thereafter. It also noted that the 2nd respondent admitted that he did not submit any leave application for regularisation of his absence from 17-11-2001 though it was a fact that he did suffer an accident on 24-10-2001 which resulted in shortening of his foot. He also noted that the medical certificate issued by petitioner's Doctor stated that 2nd respondent developed stiffness in the right knee and shortness of limb by three inches and had certified that the 2nd respondent was not fit to undertake Electrician job. He noted that none of the certificates indicated the period of treatment received by the 2nd respondent.

THE SECOND SHOW CAUSE NOTICE AND EXPLANATION THERETO

10. Basing on this Enquiry report, on 18-03-2004, a show cause notice was issued to the 2nd respondent enclosing the copy of the Enquiry report. The 2nd respondent responded to the same by letter

dt.03-04-2004 reiterating that he suffered an accident on 24-10-2001 resulting in his hospitalisation as an In-Patient in Gandhi Hospital, that he sustained a fracture in his right thigh and because of non-union of right femur, he took treatment in St.Theresa Hospital, Sanath Nagar, Hyderabad and this prevented him from attending duties in petitioner company. He stated that his absence was neither wanton nor wilful and it was on account of the circumstances beyond his control.

THE ORDER OF DISCHARGE DT.2.7.2004

11. However, by proceedings dt.02-07-2004, the petitioner discharged him from service. It was stated in the said order that on account of the injuries sustained in the accident to 2nd respondent's head and thigh, the 2nd respondent had admitted that he lost his memory for one year and there was also loss of clear speech due to accident; that the certificate dt.13-10-2003 issued by St.Theresa Hospital indicated that 2nd respondent was not in a position to walk without a stick and was fit only for light duties; the 2nd respondent had admitted in the Enquiry that he cannot climb steps and higher places in the factory shed while performing duty as Electrician; and this renders him unfit to perform his duty as Electrician and so he is being discharged from service.

THE APPLICATION UNDER SEC.2A(2) OF THE INDUSTRIAL DISPUTES ACT, 1947

12. Assailing the same, the 2nd respondent filed an application under Section 2-A(2) of the Industrial Disputes Act, 1947 (for short 'the Act') before the Labour Court-II, Hyderabad. The said application was numbered as I.D.No.43 of 2005.

THE AWARD OF THE LABOUR COURT

13. By order dt.08-02-2007, the Labour Court upheld the validity of the Domestic Enquiry and held that there was no violation of principles of natural justice on the part of petitioner.

14. It then passed the impugned Award dt.23-10-2008 in I.D.No.43 of 2005 directing reinstatement of 2nd respondent into service in a job place other than that of an Electrician with continuity of service and 50% back wages and attendant benefits.

15. The Labour Court took note of the fact that 2nd respondent met with the accident, got admitted in Gandhi Hospital, that this was informed to the petitioner and petitioner's Personnel Officer visited the 2nd respondent in the Hospital. It also noted that the Medical Certificate dt.09-12-2003 issued by the Company Doctor showed that 2nd respondent developed stiffness in the right limb knee, which has been shortened by 3 inches and he was not fit to undertake Technician job; that the petitioner did not examine it's Doctor and merely relied on the certificate issued by the said Doctor; that the injuries sustained

by 2nd respondent were so severe that he could not attend his duties in petitioner's company; and though the 2nd respondent did not deny the unauthorised absence as alleged by petitioner, his explanation was quite reasonable. It held that since the 2nd respondent was unfit to perform the duty as Electrician, he ought to be appointed in an alternative job on either a labelling machine, copying machine, water treatment plant E.T.P. etc.

16. Assailing the same, this Writ Petition is filed.

CONTENTIONS OF COUNSEL FOR WRIT PETITIONER

17. Sri C.R. Sridharan, learned Senior Counsel appearing for petitioner contended that the Award passed by the Labour Court is contrary to law and suffers from error apparent on the face of record. He contended that once the Labour Court had upheld the validity of the domestic enquiry, without stating that the punishment imposed by petitioner on the 2nd respondent is shockingly disproportionate, it was not open to the Labour Court to set aside the discharge order dt.02-07-2004 and direct reinstatement of the 2nd respondent into service in the post *other than* that of Electrician, which he was holding at the time of his discharge, that too with continuity of service and with 50% back wages and attendant benefits. He also contended that one of the charges against 2nd respondent being one of unauthorised absence, once the 2nd respondent was held by the Labour Court not to have denied the said charge, the Labour Court ought not to have exercised power under Section 11-A of the Act and interfered

with the punishment imposed on the 2nd respondent. He also contended that the finding of the Labour Court that the petitioner ought to have examined its Doctor Ajay Sarada, who issued the certificate dt.09-12-2003 cannot be accepted; and since the said Doctor opined that the 2nd respondent was not fit to undertake technical job of Electrician, even under Section 2(oo)(c) of the Act, the petitioner cannot be compelled to employ the 2nd respondent in any other job on account of the long period of absence of 2nd petitioner was from 17-11-2001 till 19-01-2004. Even assuming that the 2nd respondent was disabled for some period from approaching the petitioner for leave application, at least after he was discharged from the hospital, he ought to have informed the petitioner about the reasons for his absence. He also contended that the certificate produced by the 2nd respondent before the Enquiry Officer issued by St. Theresa Hospital, Sanath Nagar, Hyderabad did not disclose for what period the 2nd respondent was actually hospitalised and the petitioner cannot be allowed to suffer by reinstating the 2nd respondent, who is not fit to do the job of Electrician, merely on sympathetic grounds. He pointed out that once the misconduct is proved, the Tribunal has to sustain the order of punishment unless it was harsh, indicating victimisation and also record the reasons for quantum of punishment. He relied upon the decisions in **Swaraj Tractors Division, Punjab Vs. Raghbir Singh¹, Pyare Lal**

¹ 2004-I- LLJ 458

Sharma Vs. Managing Director and others², The Binny Limited Vs. Their Workmen³, Delhi Transport Corporation Vs. Sardar Singh⁴, The Workmen of M/s.Firestone Tyre and Rubber Co. of India (Pvt) Ltd. Vs. The Management and others⁵, Bharat Heavy Electricals Ltd. Vs. M.Chandrasekhar Reddy and others⁶, State of U.P. and others Vs. Ashok Kumar Singh and another⁷, State of Rajasthan and another Vs. Mohd.Ayub Naz⁸ and Chennai Metropolitan Water Supply and Sewerage Board and others Vs. T.T.Murali Babu⁹.

CONTENTIONS OF COUNSEL FOR 2ND RESPONDENT

18. Sri A.K. Jayaprakash Rao, leaned counsel for 2nd respondent reiterated the above contentions and supported the order passed by the Labour Court. He contended that the fact that the 2nd respondent suffered an accident on 24-10-2001 resulting in serious injuries to his head and leg was known to the petitioner's Company and on receiving information from the 2nd respondent's parents, its Personnel Officer visited Gandhi Hospital where the 2nd respondent was admitted. He contended that there was non-union of right femur to the 2nd respondent resulting in shortening of his leg and in these circumstances, the 2nd respondent had a reasonable cause for not attending to duty and his absence cannot be termed as unauthorised

² (1989) 3 SCC 448

³ (1974) 3 SCC 152

⁴ (2004) 7 SCC 574

⁵ (1973) 1 SCC 813

⁶ (2005) 2 SCC 481

⁷ (1996) 1 SCC 302

⁸ (2006) 1 SCC 589

⁹ (2014) 4 SCC 108

absence. He also stated that on 04-04-2003, the 2nd respondent had addressed the petitioner informing the petitioner that his health was not good and he would start attending to duty after his health improves. He therefore contended that absence of 2nd respondent cannot be termed as 'unauthorised absence' and the other charges of wilful insubordination, performing acts of subversive of discipline and gross neglect of work do not get attracted to the facts of the case. He further contended that taking a sympathetic view of the matter, this Court ought not to have interfered with the Award by the Labour Court at this point of time. He relied upon the decisions in **M.Krishnam Raju Vs. The Electronics Corporation of India and others**¹⁰, **Pepsu Road Transport Corporation Vs. Rawel Singh**¹¹, **Roshan Deen Vs. Preeti Lal**¹², **Anil Kumar Vs. Presiding Officer**¹³, **U.P.State Road Transport Corporation and others Vs. Mahesh Kumar Mishra and others**¹⁴ and **Senapathy Whiteley Ltd. Vs. Karadi Gowda and another**¹⁵.

19. From the rival contentions of parties, the following issue arises for consideration:

“Whether in the facts and circumstances of the case, the Labour Court was correct in interfering with the order of discharge dt.02-07-2004 passed by the petitioner against 2nd respondent and in directing reinstatement into service in a job other than the job of

¹⁰ 1995(1) ALD 481

¹¹ 2008 Law Suit (SC) 1158

¹² (2002) 1 SCC 100

¹³ 1985 Law Suit (SC) 181

¹⁴ 2001-I LLJ 1113

¹⁵ 2000-I LLJ 273

Electrician, which he was holding, with continuity of service and 50% back wages and attendant benefits?”

THE CONSIDERATION BY THE COURT

20. The facts narrated above show that the 2nd respondent had been issued charge sheets dt.28-11-2001, 09-03-2002, 18-09-2002, 21-02-2003, 29-03-2003 and 19-01-2004 by the petitioner in regard to his unauthorised absence from 17-11-2001. The 2nd respondent acknowledged receipt of charge memo dt.29-03-2003 under M.Ex.6 and charge sheet dt.19-01-2004 by M.Ex.7.

21. During this entire period, he never wrote to the petitioner seeking grant of leave except one letter dt.04-04-2003 where he simply stated that his health was not good, that was why he was not attending the duty and as and when his health improves, he would resume his duties. There is no mention that he suffered any accident, what injuries he suffered in the accident, what was the period of hospitalization and on which date he would resume his duties.

22. It may be that the 2nd respondent did suffer an accident which injured his head and leg on 24-10-2001 though not in connection with his employment with the petitioner-company. It may also be true that the Personnel Officer of the petitioner visited him in the Hospital where he was admitted and therefore the petitioner was aware of the reason for his absence.

23. But in the absence of any evidence as to period for which the 2nd respondent was hospitalized, the petitioner cannot be expected to

ignore the duration of absence from 17-11-2001 till 19-01-2004 as absence with reasonable cause.

24. On 04-04-2003, in the letter addressed by the 2nd respondent to the petitioner, he did not mention even the nature of injuries or the duration of his absence. Even the medical certificate dt.03-10-2003 produced by him from St.Theresa Hospital, Sanath Nagar, Hyderabad did not state the duration of his hospitalization.

25. No doubt, a person, who suffers fractures and who undergoes a surgery for those injuries would remain hospital for a short period and even thereafter might have some difficulty in walking. But assuming that period would be a maximum of 3-4 months, after the expiry of the said period, at least the 2nd respondent should have informed the cause for his absence till 19-01-2004 and sought leave of absence.

26. Admittedly, the 2nd respondent received the charge memo dt.29-03-2003 and acknowledged it vide M.Ex.6. He ought to have immediately submitted explanation to the charge memo but he did not do so even after he received the charge memo dt.19-01-2004.

27. In these circumstances, it cannot be said that the petitioner had committed any error in initiating disciplinary proceedings against 2nd respondent for absence without leave, for wilful insubordination/disobedience, for committing acts of subversive or discipline and gross neglect of work.

28. The Enquiry Officer, on the basis of the evidence before him, rightly held that the 2nd respondent did not produce any evidence about the period of treatment, and why he remained absent after he obtained certificate dt.13-10-2003 from St.Theresa Hospital. He also took note of the nature of the injury suffered by the 2nd respondent and the nature of job of Electrician, which he was holding which would require the 2nd respondent to climb steps and other higher places in the factory shed apart from admission of 2nd respondent that he did not submit any leave application for regularization of his absence from 17-11-2001 and found him guilty of the charges.

29. On the basis of this report, the services of the 2nd respondent were discharged by order dt.02-07-2004.

30. The Labour Court also found that there is no violation of principles of natural justice by the petitioner in the conduct of disciplinary enquiry against 2nd respondent.

31. In **The Workmen of M/s.Firestone Tyre and Rubber Co. of India (Pvt) Ltd.** (5) supra, the Supreme Court had held that if proper enquiry is conducted by an employer and a correct finding arrived at regarding misconduct, the Labour Court, even though it has now power to differ from the conclusions arrived at by the Management, will have to very give cogent reasons for not accepting the view of the Employer.

32. In the present case, the Labour Court itself had observed that the charge of unauthorised absence was not denied by the 2nd respondent. Therefore the Labour Court cannot take a view that the 2nd respondent has a reasonable cause for being absent merely because he suffered an accident that too on 24-10-2001 more than 2 years prior to the last charge memo dt.19-01-2004. This finding of the Labour Court is clearly perverse. As stated above, assuming for a period of 3-4 months after the accident, the 2nd respondent had a valid reason for not attending to his duties as Electrician, still he was not absolved from applying for leave for his absence. No such leave letter was admittedly submitted by him.

33. Though learned counsel for 2nd respondent sought to contend that the 2nd respondent was an illiterate and was not aware that he should inform his Employer about the cause for his absence, such a plea cannot be countenanced since every employee, whether literate or not, is obliged under the Standing Orders to communicate the reason for his absence and if possible seek permission for going on leave. Remaining absent for a long time of more than 2 years cannot be a minor misconduct. No Employer can be compelled to put up with it. It would disclose negligence and lack of interest on the part of the employee.

34. Coming to the punishment of discharge imposed on the 2nd respondent by petitioner, under Section 11-A of the Act, undoubtedly, the Labour Court has jurisdiction to substitute one

punishment by another. Such jurisdiction can be exercised only where the punishment imposed by Employer is found to be grossly disproportionate.

35. In **Swaraj Tractors Division** (1 Supra), it was held that when there was no application for grant of leave by an employee till the plea of order of dismissal was passed, the charge of unauthorised absence is established and the punishment of termination of employee's service cannot be interfered with by the Management.

36. In **Pyare Lal Sharma** (2 supra), it was held that once it is established to the satisfaction of the authority that an employee remains on unauthorised absence from duty, the only action which can be taken is the termination of his services.

37. In **Delhi Transport Corporation** (4 supra), it was held that habitual or continuous absence from duty without sanction of leave for long, *prima facie*, amounts to 'habitual negligence of duty' and 'lack of interest in work' which constitutes a misconduct under the Standing Orders and the burden lies on the employee concerned to prove otherwise.

38. Even though, in **Bharat Heavy Electricals Ltd.** (6 supra), the Supreme Court held that Section 11-A of the Act did not confer an arbitrary power on the Labour Court, it held that it should be exercised judicially and the Labour Court is expected to interfere with the decision of the Management only when it is satisfied that the

punishment imposed by the Management is highly disproportionate to the degree of guilt of the workman concerned and also give reasons.

39. In **Chennai Metropolitan Water Supply and Sewerage Board** (9 supra), the Supreme Court held that it cannot be said that whenever there is long unauthorised absence, it is obligatory on the part of Disciplinary Authority to record finding that the said absence is 'wilful' even when the employee fails to show compelling circumstances to remain him absent. It also held that where the employee who is unauthorisedly absent does not report back to duty and failed to offer any explanation, or where the explanation offered by the employee is not satisfactory, the Employer will take recourse to disciplinary action in regard to the unauthorised absence and such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence.

40. In the decision in **Pepsu Road Transport Corporation** (11 supra) cited by the learned Counsel for 2nd respondent, it was held that if for a short period of absence, the services of an employee are terminated, and the Labour Court held that for the absence of few days, the punishment of dismissal is grossly disproportionate and excessively high, the Supreme Court agreed with the view of the

Labour Court. In the present case, the period of absence is more than 2 years. Therefore the said decision cannot be made applicable.

41. In **Roshan Deen** (12 supra), cited by counsel for 2nd respondent, no doubt the Supreme Court observed that power conferred on the High Court under Articles 226 and 227 of the Constitution of India is to advance justice; that the High Court should not merely pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. It also observed that if justice became the by-product of an erroneous view of law, the High court is not expected to erase such justice in the name of correcting the error of law.

42. However, a 3 Judge Bench of the Supreme Court in **Kerala Solvent Extractions Ltd. Vs. A.Unnikrishnan and another**¹⁶ cited by the Senior Counsel appearing for the petitioner, has taken a contrary view. It has held that misplaced sympathy, generosity and private benevolence cannot be basis for exercise of jurisdiction of the Courts and it is essential to maintain the integrity of legal reasoning of the legal legitimacy of the conclusions. It observed that expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will denude the judicial process of its dignity, authority, predictability and respectability.

43. In **Anil Kumar** (13 supra) cited by the learned counsel for 2nd respondent, the Supreme Court held that Enquiry Officer must

¹⁶ (2006) 13 SCC 619

pass a speaking order and his conclusion must be supported by reasons. In the present case, reasons had been given by the Enquiry officer. Therefore, the said decision does not help the 2nd respondent.

44. In **Mahesh Kumar Mishra** (14 supra), the Supreme Court held that the Supreme Court as well as High Courts can interfere with the punishment inflicted upon the employee, if that penalty shocks the conscience of the Court.

45. In **Senapathy Whiteley** (15 supra), during the course of hearing of the matter before the Supreme Court, there was a compromise between the workman and the Management and the case was disposed of on the basis of the said compromise. Therefore, the said decision also does not help the 2nd respondent.

46. In the present case, the Labour Court's view that the 2nd respondent had a reasonable cause for remaining absent for over a period of 2 years, has already been held by me to be perverse. That apart, it has nowhere held that the punishment imposed by petitioner on the 2nd respondent is disproportionate and warrants interference under Section 11-A of the Act. The long period of absence by 2nd respondent, even allowing that absence for a portion of this period might be justified on account of hospitalization and treatment, would still fall within the ambit of habitual unauthorised absence, lack of interest in work and negligence in performing his work. Therefore, in my considered opinion, the Labour Court ought not to have exercised

power conferred on it under Section 11-A of the Act and interfere with the quantum of punishment.

47. Accordingly, the Writ Petition is allowed; the Award dt.23-10-2008 in I.D.No.43 of 2005 of the 1st respondent is set aside and the punishment of discharge from service imposed on 2nd respondent by petitioner vide order dt.02-07-2004 is upheld. No costs. There shall be no recovery from the 2nd respondent of any amounts paid to the 2nd respondent by the petitioner under Sec.17-B of the Act.

48. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date : 03-03-2017

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