

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

WRIT PETITION No.19258 of 2006

ORDER:-

This writ petition, under Article 226 of the Constitution of India, filed by the petitioner-driver is directed against the orders, dated 19.03.2005, of the 2<sup>nd</sup> respondent-Depot Manager, Suryapet Depot of the Corporation, ordering removal of the petitioner from service; and, the orders, dated 17.08.2005, of the appellate authority/ Divisional Manager, 1<sup>st</sup> respondent, whereby the orders of the Depot Manager were set aside and a modified punishment was imposed while directing reinstatement of the petitioner into service. The said punishment that was imposed is as follows: "Reduction of pay by two incremental stages for a period of two years, which shall have cumulative effect on his future increments, and directing that the period from the date of removal till he reports for duty shall be treated as 'not on duty'."

2. I have heard the submissions of Sri G. Ravi Mohan, learned counsel appearing for the writ petitioner, and of Sri A. Ravi Babu, learned Standing Counsel representing the respondents. I have perused the material record.

3. From the pleadings of the parties and the submissions made before this Court, the following facts emerge for consideration:

The petitioner was appointed, on 01.10.1989, as a Driver in the respondents-Corporation. He absented from attending to duties from 06.06.2004 to 26.08.2004 without giving any intimation or obtaining prior sanction of leave. Therefore, and as the said absence resulted

in dislocation of services, inconvenience to traveling public and loss of revenue to the Corporation, the Corporation treated it as a serious misconduct. However, after 81 days, the petitioner submitted a private sick and fit certificate to the supervisor. The Corporation was of the view that the certificate was submitted to cover up his unauthorized absence. Basing on the report of the Officer concerned, a charge sheet was served on the petitioner, on 26.08.2004, formulating verbatim the following charges:

Charge no.1: For having absented for duties from 06.06.2004 to 26.08.2004 unauthorizedly without taking prior permission from your immediate supervisor or sanction of leave from the competent authority, caused dislocation of operation of services/cancellation of kilometers and also loss of revenues to the Corporation which constitutes misconduct in terms of Reg.28(xxvii) of APSRTC Employees (Conduct) Reg.1963.

Charge no.2: For having absented for duties from 06.06.2004 to 26.08.2004 to cover up absenteeism submitted a private sick certificate, which shows gross negligence to your duties, which constitutes misconduct on your part under Reg.28(xxvii) of APSRTC Employees (conduct) Reg.1963.

The petitioner gave an explanation denying the said charges. As the said explanation was not to the satisfaction of the disciplinary authority, an enquiry was ordered and an enquiry officer was appointed. After duly conducting an enquiry, the enquiry officer submitted a report, dated 27.11.2004, holding that the charges are proved. Thereafter a show cause notice, dated 09.12.2004, was served upon the petitioner and eventually proceedings, dated 19.03.2005, were issued removing the petitioner from service. The appellate authority while allowing the petitioner's appeal *vide* order, dated 17.08.2005, set aside the penalty of removal from service. And, while directing the Corporation to reinstate the petitioner into service, the appellate authority imposed a penalty of reduction of pay

by two incremental stages for a period of two years which shall have cumulative effect on his future increments. He further directed that the period from the date of removal till the date of reporting to duty on reinstatement shall be treated as 'not on duty'. Aggrieved thereby the petitioner filed this writ petition.

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

'The case of the petitioner is this: - 'The petitioner suffered Jaundice during the relevant time and, therefore, he could not attend to his duties. He has taken Allopathic medicine at a private dispensary and informed the same to the respondents and also submitted leave letters. However, without considering his applications for leave, a hasty decision was taken and orders for removal from service were passed. No evidence was produced by the management to prove the charges. When the appellate authority had set aside the penalty of removal from service having agreed with the submissions of the petitioner, he ought not to have imposed any penalty and ought to have further treated the period from the date of removal till reinstatement as 'on duty' and ought to have granted increments and consequential benefits. In any view of the matter, the penalty imposed is grossly disproportionate to the proved misconduct, which is only absenteeism for a short period. Hence, even the reduced punishment imposed by the appellate authority is excessive and grossly disproportionate to the gravity of the charge proved and shocks the conscience of the Court. For such a period of short absence, the punishment imposed is highly excessive and grossly disproportionate. Hence, the writ petition may be allowed and the punishment may be modified appropriately.'

5. Per contra, learned standing counsel for the Corporation would contend as follows: - 'The petitioner directly approached this Court by filing a writ petition without exhausting the alternative remedy. The petitioner ought to have approached the Tribunal/ Labour Court before approaching this Court. Therefore, the writ petition is not maintainable. The petitioner admittedly absented from attending to duty, during the period from 06.06.2004 to 26.08.2004, without prior intimation or sanction of leave. The said absence of the petitioner, who was a driver, not only caused inconvenience to the travelling public but also resulted in dislocation & cancellation of services and loss of revenue to the Corporation. Therefore, the said misconduct is a serious misconduct. The subsequent production of a Medical Certificate is of no avail to the petitioner. The allegation that the petitioner suffered from Jaundice and, therefore, he was under treatment is not accepted as a valid explanation for his unauthorized absence as he failed to substantiate his said plea. As the charge was proved in the detailed enquiry that was held, the Enquiry Officer gave a report holding that the charge is proved. After examining the case, in detail, the disciplinary authority imposed a punishment of removal from service. However, the appellate authority took a lenient view and altered the punishment and imposed a lesser punishment. The altered punishment is not proportional to the gravity of the charge held proved and the petitioner deserved a much higher punishment. However, the Corporation did not challenge the said finding of the appellate authority out of mercy and generosity. Therefore, the contention of the workman that the penalty is disproportionate is not correct. The order impugned needs no interference by this Court. The Corporation is providing medical aid to its employees through its

dispensaries and hospitals and is also sanctioning medical leave during the period of hospitalization as per its regulations. If really the petitioner suffered illness/ Jaundice, he ought to have availed the medical and other facilities by availing the necessary leave, but he did not do so. He submitted the certificate of fitness with a delay of 81 days only to cover up his unauthorized absence. The writ petition is devoid of merit and is liable to be dismissed.

6. Before examining the merits of the main matter, it is pertinent to deal with the contention of the learned Standing Counsel for the Corporation as regards the maintainability of the writ petition. The contention is that the petitioner ought to have raised an industrial dispute by filing a claim petition before the Tribunal or the Labour Court and that the writ petition filed without exhausting the statutory alternate remedy is not maintainable. *Per contra*, the learned counsel for the petitioner submitted that no capital punishment like dismissal or removal or termination was imposed and, therefore, the writ petition is the only remedy available and there is no alternate remedy. Before proceeding further, it is necessary to refer to the 'Industrial dispute' as defined in Sections 2(k) and 2A of the Industrial Disputes Act, 1947, which reads as follows:

(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;

2A. Dismissal, etc., of an individual workman to be deemed to be an industrial dispute

(1) Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman,

any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

(2) Notwithstanding anything contained in section 10, any such workman as is specified in sub-section (1) may, make an application direct to the Labour Court or Tribunal for adjudication of the dispute referred to therein after the expiry of three months from the date he has made the application to the Conciliation Officer of the appropriate Government for conciliation of the dispute, and in receipt of such application the Labour Court or Tribunal shall have powers and jurisdiction to adjudicate upon the dispute, as if it were a dispute referred to it by the appropriate Government in accordance with the provisions of this Act and all the provisions of this Act shall apply in relation to such adjudication as they apply in relation to an industrial dispute referred to it by the appropriate Government.

(3) The application referred to in sub-section (2) shall be made to the Labour Court or Tribunal before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1).

Under Section 2-A (2) of the Act, an individual workman, who was discharged or dismissed or retrenched or whose services were otherwise terminated has a remedy under the said provision of law as the intention of the legislation was that an individual workman placed in such circumstances should be given relief without being any necessity of his case being espoused by a Labour union or by a substantial number of workmen. The provision under the said Section of law is not attracted to the case on hand. Any dispute between an individual workman and the employer is not *per se* an industrial dispute unless and until the situation is covered by the provision of Section 2-A (2) of the Act. All other disputes not covered by the said provision shall be espoused or taken up by a union or a number of workmen making a common cause with the aggrieved individual

workman. Unless a union or a number of workmen sponsor the case of the petitioner, the machinery under the Act is not available to the case of such workman and he cannot make a claim by directly invoking the provision of section 2 A (2) of the Act. Since the penalty imposed upon the petitioner is not discharge or dismissal or retrenchment and as the services of the petitioner were not otherwise terminated, the proceedings of the respondents are amenable for judicial review and, therefore, the writ petition invoking the jurisdiction under Article 226 of the Constitution of India is maintainable and the contentions of the Corporation that the writ petition is not maintainable are misconceived.

7. Now that it is held that the writ petition is maintainable, it is necessary to examine the merits of the matter.

8. In the facts and circumstances of the case, the only question that falls for determination is in regard to the proportionality or otherwise of the punishment imposed. A perusal of the gravamen of the charge shows that the period of absence is from 06.06.2004 to 26.08.2004, that is, for 81 days and the said absence is unauthorized as the petitioner did not take prior permission from the immediate supervisor or seek sanction of leave or obtain prior sanction of leave from the competent authority and thus caused dislocation of the operation of services and the same resulted in cancellation of kilometers and loss of revenue to the Corporation. The basis for the charge is the report of the officer concerned wherein it is stated that the petitioner, driver of Suryapet Depot, absented from attending to duties from 06.06.2004 to 26.08.2004 without any intimation or prior sanction of leave. In the report it is also stated that to cover up the

said unauthorized absence, the petitioner submitted a private sick and fitness certificate on 26.08.2004 having absented from attending to duties. However, the petitioner stated in his explanation to the charge sheet that he was not available for attending to duties for 81 days as he was under continuous treatment at Vijaya Nursing home due to Jaundice and that he did not inform the Depot authorities as his wife is an illiterate. At the time of enquiry he further stated that he first took Ayurvedic treatment for Jaundice and that as the disease did not subside, he later took Allopathic treatment from the private hospital of Pullareddy, Suraypet, and hence, he could not attend to duties. Admittedly, he did not take treatment from the established/recognised hospitals of the Corporation. Charge no.2 relates to submission of a private sick certificate to cover up the period of unauthorized absence and gross negligence towards duties. The petitioner did not state anything about this charge in his explanation, but, during the course of enquiry, he stated that he submitted sick certificate to the depot authorities, on 07.06.2004, but it did not reach the Depot and hence, he submitted a copy of sick certificate, on 26.08.2004, along with fitness certificate. Since the certificate produced at the time of enquiry was itself the original, the explanation of the petitioner was not countenanced by the enquiry officer. Accordingly, the enquiry officer held in his report that the charges are proved. As already noted, the disciplinary authority after following the due procedure imposed a penalty of removal from service but the same was modified by the appellate authority; and, while ordering reinstatement of the petitioner into service a penalty of reduction of pay by two incremental stages for a period of two

years which shall have effect on his future increments was imposed by further directing to treat the period of absence as 'not on duty'.

9. A careful perusal of the material record including the proceedings/ orders impugned would show that after examination of the facts, relevant evidence and circumstances, the appellate authority arrived at the conclusion that the charges are proved and accordingly, confirmed the findings of the Enquiry Officer, before altering the punishment. This Court, in the facts and circumstances, does not find any grounds much less valid grounds calling for interference with the concurrent findings of the Enquiry Officer, disciplinary authority and the appellate authority. When once conclusions arrived at by the enquiry officer, disciplinary authority and the appellate authority are found to be sustainable on facts and the evidence and when such findings are based on some legal evidence, this Court will not normally substitute its subjective opinion in the place of the one that was concurrently arrived at by the said officers. In that view of the matter this Court does not find any reason to accept the contentions of the petitioner that the charges are not proved.

10. In the decision in Union of India v. P. Gunasekaran<sup>1</sup>, 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

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<sup>1</sup> (2015) 2 SCC 610

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;
  - (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.

Having regard to the reasons supra and the legal position obtaining, this Court finds that there are no grounds warranting interference with the finding of the Officers of the Corporation that the charges are proved.

11. Dealing now with the quantum of punishment, it is to be noted that the learned counsel for the petitioner would contend that for mere absence for a period of 81 days the penalty imposed by the appellate authority is grossly disproportionate and shocks one's

conscience. Per contra, learned Standing Counsel for the Corporation would contend that when the absenteeism for a long period is a serious misconduct resulting in inconvenience to public, dislocation & cancellation of services and loss of revenue, the appellate authority is justified in imposing the penalty and that there are no grounds calling for interference with the penalty which is proportional to the graveman of the proved charge.

12. Before proceeding further, it is necessary to refer to the decisions relied upon by the learned counsel for the petitioner and the learned standing counsel for the Corporation.

In PEPSU ROAD TRANSPORT CORPORATION Vs. RAWEL SINGH<sup>2</sup>, the facts disclose that the respondent-workman, who was serving as a driver in the Corporation, did not join duty on expiry of leave period and a charge sheet was, therefore, issued against him for knowingly and intentionally remaining absent without sanction of leave and without sending a leave application and for failure to take interest in work and for disobedience of rules of the Corporation. Ultimately the first charge was held proved and the other two charges, which are consequential in nature and are based on the first charge, were also held proved. Finally, the workman was dismissed from service. The Labour Court passed an award in favour of the workman and has granted all the benefits to which he was entitled to and the workman was reinstated into service. The High Court confirmed the order of the Labour Court. The Supreme Court found that the enquiry was validly held and did not agree with the findings of the Labour Court that the enquiry was either vitiated or was held in

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<sup>2</sup> (2008) 4 Supreme Court Cases 42

violation of principles of natural justice and fair play. The Supreme Court found that the Corporation should not have been asked to pay back wages to the workman. While not disturbing the finding of the High Court in regard to reinstatement of the workman, the Supreme Court set aside the direction to the Corporation to pay back wages to the workman with interest thereon as confirmed by the High Court, but however, held that the workman will be treated to be in continuous service and would be entitled to consequential benefits, but not back wages for the period he has not worked.

In CHAIRMAN-CUM-MANAGING DIRECTOR, COAL INDIA LIMITED AND ANOTHER Vs. MUKUL KUMAR CHOUDHURI AND OTHERS<sup>3</sup>, the facts disclose that the gravamen of the charge against the workman in the said cited case is misconduct namely, unauthorized absence from duty for six months and that the workman fairly admitted his guilt and explained his absence by stating that he did not have any intention or desire to disobey the order of the higher authority or not to follow any of the rules or regulations governing his employment and that he could not attend to duties purely for personal reasons beyond his control and that though his resignation was sent, the same was not accepted. In this setting of facts, the Supreme Court held that the order of removal is not justified and that in the facts and circumstances of the case, imposition of extreme punishment of removal is unduly harsh and grossly excessive. However, the Supreme Court without sending the matter to the appropriate authority for reconsideration on the question of punishment, ordered reinstatement, but denied back wages for the entire period by way of

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<sup>3</sup> (2009) 15 Supreme Court Cases 620

penalty for the proved misconduct of unauthorized absence of six months and held that the workman shall be reinstated forthwith, but he will not be entitled to any of the back wages from the date of his removal and till the date of his reinstatement. In the cited decision, the Supreme Court, while dealing with the doctrine of proportionality, dealt with a number of decisions on the said aspect and held as follows:

“19. 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.

20. 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 the recent decision in CENTRAL INDUSTRIAL SECURITY FORCE and others Vs. ABRAR ALI<sup>4</sup>, a Bench of three Hon'ble Judges of the Supreme Court, while dealing with the proportionality of punishment, noted that the penalty of dismissal from service is not commensurate to the delinquency, as the workman was found guilty of desertion of force for a period of five days and not improving his conduct inspite of imposition of penalties on three occasions earlier,

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<sup>4</sup> 2017 (152) FLR 431

and, further held that the penalty of compulsory retirement would meet ends of justice.

The above three decisions were relied upon by the petitioner in support of the contention that when the graveman of the charge is related to absenteeism for a short period, the punishment generally shall be proportional and shall not be severe and grossly excessive and that this Court is empowered to examine the proportionality of the punishment and reduce the same if the penalty is grossly excessive, shocks conscience and warrants interference.

12.1 DELHI TRANSPORT CORPORATION V. SARDAR SINGH<sup>5</sup>. In this cited case, the Tribunal refused to accord approval to the order of dismissal/ removal passed by the employer but a learned single Judge held that the employer was justified in passing the order of termination/ removal; however, a Division Bench reversed the view of the learned single Judge. Having regard to the facts that the respondents-conductors absented from duties even without sanctioned leave for a very long period and that, therefore, action was initiated against each one of them for unauthorized long absence from duty, negligence of duties and lack of interest in work, the Supreme Court observed that when an employee absents himself from duties even without sanctioned leave for a very long period, it prima facie shows lack of interest in work and that habitual absence is a factor which established lack of interest in work and that there cannot be any sweeping generalization; but at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings. Finally the Supreme

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<sup>5</sup> (2004) 7 SCC 574

Court while reversing the order of the Division Bench affirmed the view taken by the learned single Judge.

In L& T KOMTSU LTD., V. N. UDAYAKUMAR<sup>6</sup>, the facts and findings are as follows: - 'The workman remained absent unauthorisedly for 105 days; the management dismissed him from service; the workman raised an industrial dispute; it was held that the extreme punishment of dismissal from service was too harsh and disproportionate to the gravity of the charge. Hence, while ordering reinstatement with continuity of service but without back wages a penalty of stoppage of 4 increments with cumulative effect was imposed. A learned single Judge modified the Award and deprived the workman the benefit of continuity of service as there were proved cases of misconduct of unauthorized absenteeism for 15 times but the workman has not improved the conduct. The Division Bench while considering the appeals of the workman and management granted the benefit of continuity of service. The Supreme Court while noting that habitual absenteeism means gross violation of discipline held that the Labour Court and the High Court were not justified in directing reinstatement by interfering with the order of termination and set aside the said orders and restored the order of termination passed by the management.'

The above two decisions were relied upon by the learned standing counsel for the Corporation in support of the contention that even in cases of absenteeism, when the said misconduct is proved, the management would be justified in imposing the punishment of

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<sup>6</sup> (2008) 1 SCC 224

removal from service. However, in both the cited cases habitual absenteeism and long period of unauthorized absence are the vital aspects that fell for consideration. Whereas in the case on hand, the period of absence is 81 days and the Officer of the Corporation imposed a reduced penalty and for whatever reasons, the Corporation did not challenge the said penalty.

13. Having regard to the settled legal position and the precedential guidance in the decisions of the Supreme Court and also the facts of the present case, wherein the proved graveman of the charge is absence from duty from 06.06.2004 to 26.08.2004, this Court finds that the punishment imposed is proportionate to the proved misconduct and does not warrant interference.

14. In the result, the Writ Petition is dismissed.

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

01.06.2017  
Vjl

M. SEETHARAMA MURTI, J