

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

WRIT PETITION No.19063 of 2008

ORDER:-

This writ petition, under Article 226 of the Constitution of India, filed by the petitioner-conductor is directed against the order No.PA/19(77)/08-RM.N, dated 10.07.2008, passed by the Regional Manager, APSRTC, Nalgonda Region, Nalgonda, second respondent herein, insofar as imposing the punishment of deferment of annual increments for a period of two (2) years which shall have cumulative effect besides treating the removal period as 'not on duty' as well as denying the back wages.

2. I have heard the submissions of Sri Narasimha Goud, learned counsel appearing for the writ petitioner, and of Ms. Vladimeer Khatoon, learned counsel representing Sri A. Ravi Babu, learned Standing Counsel for the Corporation-SRTC (hereinafter referred to as 'Corporation') representing the respondents 1 to 4. I have perused the material record.

3. The facts and chronological events, in a nutshell, are as follows:

The petitioner joined the services of the Corporation as conductor, on 26.02.1992. His services were regularized with effect from 01.10.1992. On the ground that the petitioner unauthorizedly absented from attending to his duties from 13.09.2006, a charge sheet was served upon him on 21.09.2006. The contents of the charge formulated verbatim read as follows:

“For having unauthorized absented for your duties from 13.9.06 to till date without any intimation or without submitting valid sick certificate within the time stipulated, which resulted in dislocation of operational services causing late running, cancellation of KMs., and loss of revenues to the Corporation besides public inconvenience which constitutes misconduct in terms of Reg. No.28(xxvii) of APSRTC Employees (Conduct) Regs. 1953.”

The petitioner gave an explanation to the said charges. As according to the Corporation, his explanation is not satisfactory, an enquiry was ordered and an Enquiry Officer was appointed. The Enquiry Officer, after conducting an enquiry, gave a report, dated 11.12.2006, holding that the charges are proved. After issuing a show cause notice proposing punishment of removal of service and exhibiting the same on notice board, since the notice sent by post is not served, the disciplinary authority, *vide* orders, dated 12.03.2007, ordered for removal of the petitioner from service. The petitioner's appeal was rejected by the appellate authority *vide* order, dated 05.05.2008. However, the petitioner's review petition was partly allowed by the reviewing authority *vide* order, dated 10.07.2008. The said authority, while agreeing with the finding that the charge is proved, considered the past record of more than 16 years of the petitioner and took a lenient view and accordingly, set aside the order of removal from service and directed reinstatement of the petitioner into service subject to the following conditions:

- “1) The petitioner is reinstated into service as conductor and posted to Suryapet Depot.
- 2) The period of removal shall be treated as not on duty.
- 3) Since the security deposit is forfeited the DM/SPRT shall collect SD once again afresh.
- 4) Annual increment deferred for a period of two years which shall have cumulative effect.
- 5) The petitioner may be directed to Medical Officer, APSRTC, for medical examination and he shall be taken as conductor after being declared as fit by Medical Officer, APSRTC.
- 6) The petitioner is directed to report to DM/SRPT within one week from the date of receipt of the proceedings, failing which the order stands cancelled.”

Aggrieved of the said orders insofar as the imposition of penalty of deferment of annual increment for a period of two (2) years with cumulative effect, treatment of period of removal as ‘not on duty’ and denial of back wages, the petitioner-conductor filed this writ petition.

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

The petitioner gave an explanation to the charge stating that while discharging his duties, he has fallen down in the bus and that on account of the injuries sustained, his hip was swollen and thereby he was not in a position to perform his duties and that on account of the said problem, he has taken treatment in Hyderabad and, therefore, he could not attend to

duties during the period covered by the charge. However, the said explanation was not considered by the Depot Manager, 3rd respondent. Without considering the health problems as well as past service record, the order of removal was passed by the disciplinary authority. The second respondent/reviewing authority was pleased to consider the past record of 16 years and also the further fact that the order of removal was passed for the first time against the petitioner and set aside the order of removal from service as the said punishment is shockingly disproportionate to the gravity of the charge. However, the reviewing authority imposed penalty of deferment of two annual increments with cumulative effect and further denied back wages and directed to treat the period of removal from service from 12.03.2007 till the date of reinstatement, 21.07.2008, as 'not on duty'. The period of absence from 13.09.2006 till the charge sheet was served on 21.09.2006 is just nine days. Hence, even the reduced punishment imposed by the reviewing authority is excessive grossly disproportionate to the gravity of the charge 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. 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 is not a disciplined workman. He was imposed several punishments in the past. Three opportunities were given to the petitioner to attend to the enquiry. He avoided to avail such opportunities. He failed to participate in the enquiry. An *ex parte* enquiry was duly conducted. As the charge was proved, the Enquiry Officer gave a report holding that the charge is proved. After examining the case, in detail, and considering the past adverse record of the petitioner, the disciplinary authority imposed a punishment of removal from service. The appellate authority confirmed the said findings by dismissing the appeal of the petitioner. However, the reviewing authority, considering only the long 16 years of past service and also the fact that punishment of removal was imposed for the first time, took a lenient view and altered the punishment and imposed a lesser punishment. Even the altered punishment is not proportional to the gravity of the charge held proved. However, the Corporation did not challenge the said finding of the reviewing authority out of mercy and generosity. The allegation that the petitioner fell down in the bus and sustained an injury to his hip and, therefore, he was under treatment is not accepted as a valid explanation for his unauthorized absence. The Corporation is providing medical aid to the employees who sustain injuries while on duty and is also duly paying full pay while on treatment and is also sanctioning leave on medical grounds during the period of hospitalization as per its regulations. If really the petitioner sustained injury while

on duty, he ought to have availed the medical facility and other facilities, but he did not do so. The writ petition is devoid of merit and is liable to be dismissed.

6. Before advertng to the contentions and 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 or 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 3 and 4 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. The graveman of the charge reflects that the petitioner unauthorizedly absented from attending to duties from 13.09.2006 and, therefore, the charge sheet was served on

21.09.2006. Therefore, the graveman of charge deals with absence from duty from 13.09.2006 till 20.09.2006 i.e., for a period of nine days. Concurrent findings of fact are recorded by the Enquiry Officer, disciplinary authority, appellate authority and reviewing authority that the charge is proved. The petitioner admittedly did not participate in the domestic enquiry. An ex parte enquiry was conducted. His explanation that on account of an injury sustained while discharging his duties, he could not attend to duties as he was under treatment for the injury sustained while on duty is not accepted by the Officers of the Corporation.

8.1 The period of absence covered by the charge is nine days. The petitioner was initially removed from service *vide* order of the disciplinary authority, dated 12.03.2007. His appeal was rejected *vide* order, dated 05.05.2008. The reviewing authority *vide* orders, dated 10.07.2008, ordered his reinstatement. He was reinstated into service on 21.07.2008. In this backdrop, the learned counsel for the petitioner would contend as follows: -
The reviewing authority imposed penalty of deferment of two annual increments with cumulative effect and further denied back wages and directed to treat the period of removal from service from 12.03.2007 till the date of reinstatement, 21.07.2008, as 'not on duty'. On account of withholding of two annual increments, the resultant loss would be more than Rs.1,00,000/-. On account of the treatment of removal period as 'not on duty', the petitioner would be losing about two more increments. Further, the period of one year four months and

nine days was treated as 'not on duty'. Thereby, the petitioner became junior to his colleagues and it affected his seniority. Hence, even the reduced punishment imposed by the reviewing authority is excessive and grossly disproportionate to the gravity of the charge and shocks the conscience of the Court. The period of absence from 13.09.2006 till the charge sheet was served on 21.09.2006 is just nine days. For such a period of short absence, the punishment imposed is highly excessive and grossly disproportionate. Therefore, the punishment requires to be reduced to keep it in proportion to the graveman of the charge.' Per contra, learned standing counsel for the Corporation would contend as follows: - 'The petitioner is highly undisciplined employee. Several punishments were imposed against him in the past. The punishment of censure was imposed twice on 26.02.1994 and on 26.02.1994, pursuant to two separate proceedings; one annual increment was deferred for a period of six (6) months *vide* proceedings, dated 14.03.1997; subsequently, penalty of censure was imposed twice *vide* proceedings, dated 30.10.1998 and 28.01.2002; annual increment was withheld for a period of six (6) months *vide* proceedings, dated 27.04.2003; he was placed under suspension *vide* proceedings, dated 08.09.2003; annual increment was withheld for a period of two (2) years *vide* proceedings, dated 15.03.2004; penalty of censure was imposed twice *vide* proceedings, dated 24.05.2004 and 02.11.2004. The petitioner was unauthorizedly absent to duties with effect from 13.09.2006 till the date of removal, i.e., for 205 days. His absence caused inconvenience to the travelling public and resulted in dislocation

of work, cancellation of services and loss of revenue to the Corporation. Therefore, even the punishment imposed by the reviewing authority is not adequate. However, the Corporation did not assail the said finding out of generosity and mercy and on humanitarian considerations. The said punishment does not call for any interference.

8.2 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**¹, 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 the workman was reinstated into service and granted all the benefits which he was entitled to. 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

¹ (2008) 4 Supreme Court Cases 42

either vitiated or was held in 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 OTHERS²**, the facts disclose that the graveman 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 reasons for 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

² (2009) 15 Supreme Court Cases 620

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 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**³, 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, 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 of removal from service is grossly in excess and warrants interference and that the Labour Court/Tribunal as well as this Court are empowered to examine the proportionality of the punishment and reduce the same when the penalty imposed is grossly excessive and shocks the conscience of a reasonable and ordinary prudent man.

In **DELHI TRANSPORT CORPORATION V. SARDAR SINGH**⁴, the facts and ratio are as follows: - 'The respondents-conductors absented from duties even without sanctioned leave for a very long period and, 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

³ 2017 (152) FLR 431

⁴ (2004) 7 SCC 574

Court while observing 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. On facts of the case, it was noticed that the Tribunal refused to accord approval to the order of dismissal/removal passed by the employer but a learned single Judge justifiably 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. Finally the Supreme 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. UDAYAKUMAR⁵**, 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 the gravity of the charge and accordingly 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

⁵ (2008) 1 SCC 224

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 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 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 only about 8 days and it is not borne out by record that the petitioner is remaining absent on several occasions and the proved misconduct is not unauthorized absenteeism. Further, his previous misconduct, if any, and penalties imposed upon him earlier are not the subject matters of the charge and that even in the show cause notice that was issued proposing the penalty there was no reference to such previous misconduct and earlier penalties and no opportunity was also given to him to explain his position on the said aspects. The law is fairly well settled that past adverse record of the charged employee cannot be considered at the stage of imposition of punishment unless he is

put on notice and is given an opportunity to explain his position (See: Indu Bhushan Dwivedi v. State of Jharkhand [AIR 2010 SC 2472]). Further, in the considered view of this Court, the past unblemished and clean record can always be considered while deciding the measure of punishment and its proportionality to the proved misconduct.

8.3 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 13.09.2006 to 21.09.2006 i.e., for a period of eight (8) days, this Court finds that the punishment comprising of conditions that the period of removal shall be treated as not on duty and not granting the benefit of continuity of service and imposition of penalty of deferment of annual increment for a period of two years with cumulative effect being excessive and grossly disproportionate to the graveman of the charge needs to be set aside and a modified punishment shall be imposed.

9. In the result, the Writ Petition is partly allowed. Accordingly, the conditions imposed in the order impugned of the 2nd respondent while awarding punishment are set aside and the following punishment is awarded: - 'The petitioner is reinstated into service with continuity of service but without back wages and attendant benefits. However, the period from the date of removal till date of reinstatement shall be counted for the purposes of calculating retiral benefits. Annual increment

shall be deferred for a period of two years, however, without cumulative effect.'

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

M. Seetharama Murti, J

Date: 28th April, 2017

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THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI



WRIT PETITION No.19063 of 2008

Date: 28th April, 2017

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