

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD

WRIT APPEAL No.1057 of 2017

Date:31.7.2017

Between:

The APSRTC, West Godavari
Region, Eluru, repled by its Regional
Manager and two others.

..... Appellants

And:

S.Vijay Kumar Raju,
S/o Seetharama Raju

.....Respondent

Counsel for the appellants: Mr. S.V.Ramana

Standing Counsel for APSRTC

Counsel for the respondent: Mr. G.Prasen

For Mrs. K.Udaya Sri

The Court made the following:

JUDGMENT: *(per Hon'ble Sri Justice C.V.Nagarjuna Reddy)*

This Writ Appeal arises out of order, dated 27.6.2017, in Writ Petition No.6397 of 2017, whereby the learned single Judge has set aside order, dated 06.10.2016, of appellant No.3 removing the respondent from service as Conductor.

We have heard Mr. S.V.Ramana, the learned Standing Counsel for the Andhra Pradesh State Road Transport Corporation (APSRTC) and Mr. G.Prasen, the learned counsel representing Mrs. K.Udaya Sri, the learned counsel for the respondent.

The respondent was a Conductor of APSRTC. A charge memo was issued to him to the effect that while he was conducting the bus bearing registration No.AP 11 Z 2594 plying between Bhimavaram and Eluru on 20.5.2016, he abused a passenger by name N.Tagore of Eluru in unparliamentary language. During the enquiry, the complainant-passenger and the driver were not examined in support of the charges. Only the Assistant Manager, who conducted the preliminary enquiry, was examined. Based on the sole testimony of the preliminary enquiry officer, the enquiry officer held the sole charge as having been proved and based on the report of the enquiry officer, appellant No.3 has passed the order, dated 06.10.2016, removing the respondent from service. Assailing the said removal order, the respondent filed Writ Petition No.6397 of

2017. By the order assailed in this Writ Appeal, the learned single Judge has allowed the said Writ Petition.

At the hearing, Mr. S.V.Ramana, the learned Standing Counsel for APSRTC, submitted that though in the enquiry, the complainant-passenger and the driver were not examined, the preliminary enquiry officer, who recorded the statements of the complainant-passenger and the driver, was examined and that, therefore, non-examination of the complainant-passenger and the driver in the enquiry is not fatal to the case of the employer. He has further argued that the respondent has not sought summoning of either the complainant-passenger or the driver and that, therefore, the enquiry officer cannot be found fault with. Alternatively, the learned Standing Counsel argued that award of back wages to the respondent for the period during which he was out of service is not sustainable as, he has not pleaded that during the said period, he was not gainfully employed.

As regards the submission of the learned Standing Counsel that examination of the preliminary enquiry officer, who recorded the statements of the complainant-passenger and the driver, is sufficient to prove the charges, we do not find any merit therein. The preliminary enquiry is intended to facilitate the ascertainment of the *prima facie* case for initiation of regular departmental enquiry. During the preliminary enquiry,

the statements of the witnesses are not subjected to cross-examination. Therefore, no statement which is recorded behind the back of the employee could be relied upon, unless the witnesses examined during the preliminary enquiry are made to figure as witnesses in the departmental enquiry and the delinquent is given an opportunity of cross-examining them. Admittedly, the complainant-passenger being the alleged victim and the driver being the direct witness were not examined. In our opinion, the learned single Judge has correctly held that their non-examination is fatal to the case of the employer.

With respect to the submission of the learned Standing Counsel that the respondent failed to seek summoning of the complainant-passenger and the driver in the departmental proceedings, the primary burden lies on the employer to prove the charges against the respondent. It is not for the delinquent employee to seek summoning of the persons, who ought to have been examined as witnesses, to prove the case of the employer. Therefore, we are not inclined to accept this submission of the learned Standing Counsel.

In our opinion, the learned single Judge has rightly set aside the order of appellant No.3 removing the respondent from service.

As regards the alternative submission of the learned Standing Counsel, the law is well settled that in order to claim

back wages, the delinquent employee must plead that he was not gainfully employed during the period of his being out of service. Learned counsel for the respondent has fairly conceded that his client has not raised any such plea. Hence, in the absence of necessary pleading relating to his not being gainfully employed during the period of his being out of employment, the respondent is not entitled to back wages.

In the light of the above discussion, the Writ Appeal is partly allowed and the impugned order of the learned single Judge to the extent of awarding back wages is set aside, however, with the direction that the respondent is entitled to continuity of service for the purpose of further promotions and pensionary benefits.

As a sequel to disposal of the Writ Appeal, WAMP.No.2036 of 2017 filed by the appellant for interim relief is disposed of as infructuous.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE G.SHYAM PRASAD

31st July 2017

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