

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

WRIT PETITION No.8773 of 2006

ORDER:-

This writ petition, under Article 226 of the Constitution of India, filed by the petitioner-driver is directed against the award, dated 22.09.2005, of the learned Chairman-cum-Presiding Officer, Industrial Tribunal-cum-Labour Court, Warangal, passed in I.D.No.119 of 2002, whereby the claim petition of the petitioner - workman was dismissed.

2. I have heard the submissions of Sri G. Ravi Mohan, the learned counsel appearing for the petitioner-workman, and of Sri B. Mayur Reddy, the learned Standing Counsel for the 2nd respondent Corporation-APSRTC (hereinafter, 'Corporation'). I have perused the material record.

3. The admitted and undisputed facts, in brief, are as follows:

The petitioner was appointed as a driver in the Corporation in the month of September, 1988, and his services were regularized in August, 1989. While so, according to the Corporation, the petitioner failed to attend to his duties from 11.10.2000 to 17.10.2000 and that he reported to duty, on 18.10.2000. However, according to the petitioner, he applied for leave, on 09.10.2000, due to illness and went to his native place and that on expiry of the leave applied for, he could not attend to his duties from 11.10.2000 to 17.10.2000. However, in view of his absence to duty without any intimation or prior sanction of leave, the Officer concerned prepared a report and sent it to the other Officer concerned of the Corporation. Based on

the said report, a charge sheet was issued to the petitioner formulating verbatim the following charge:

“For having unauthorisedly absented to your chartered duties from 11-10-2000 to 18-10-2000 without any intimation or prior sanction of leave which caused inconvenience to the traveling public and caused loss of revenues to the corporation, which constitutes misconduct under Reg.28 (xxvii) of APSRTC Employees (Conduct) Reg.1963.”

The petitioner offered his explanation to the said charge. As the Officer concerned of the Corporation was not satisfied with the explanation, a domestic enquiry was ordered by appointing an Enquiry Officer. After due enquiry, the enquiry officer submitted a report holding that the charge levelled against the petitioner is proved. Thereafter, a show cause notice was issued and the explanation of the petitioner was received. Eventually, the petitioner was removed from service *vide* proceedings, dated 03.06.2002. The petitioner's appeal and application for review were rejected *vide* proceedings, dated 05.08.2002 and 18.10.2002, respectively of the appellate and reviewing authorities. Therefore, the petitioner raised an Industrial Dispute in I.D.No.119 of 2002 by filing a claim petition. The same was resisted by the Corporation. On merits, the learned Chairman of the Tribunal, while confirming the findings of the Enquiry Officer and the penalty of removal from service imposed by the Management, dismissed the claim petition of the petitioner. Therefore, the petitioner is before this Court.

4. At the hearing, learned counsel for the petitioner-workman, while fairly stating that the petitioner absented to duty from 11.10.2000 to 18.10.2000 without prior intimation or sanction of leave, *inter alia*, contended as follows: - ‘The petitioner applied for leave on 09.10.2000 on ground of ill health and went to his native

place. He could not return and report back to duty. Thus, he absented from attending to his duties during the period covered by the charge. However, the petitioner admittedly produced medical record namely, exhibit W-4, photostat copy of outpatient ticket; and, exhibit W-5, Photostat copy of Medical Certificate and that the said documents were marked by consent and that the Corporation did not dispute the genuineness of the said Medical Certificate and that, therefore, the Medical Certificate submitted sufficiently established that the absence is not due to negligence or wanton conduct but only due to ill-health and that, therefore, the Enquiry Officer and the Tribunal ought to have considered the said explanation, which is well established by the workman and ought to have exonerated him from the charge levelled against him. In the alternative, he contended that even assuming for a moment that the charge is proved and the petitioner is guilty of the charge levelled against him, the punishment of removal from service for mere absence to duty for a short period of one week is highly disproportionate and shocks one's conscience and that neither the Management nor the Tribunal considered that the punishment is grossly disproportional to the allegedly proved misconduct and that, therefore, the punishment may be reduced in case this Court comes to the conclusion that the contention of the petitioner that the charge formulated is not proved does not merit consideration.'

5. *Per contra*, learned Standing Counsel for the Corporation would contend as follows: - 'The petitioner admittedly absented from attending to duty without prior intimation or sanction of leave during the period from 11.10.2000 to 18.10.2000. The said absence of the petitioner, who was a driver, not only caused inconvenience to the traveling 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 petitioner admittedly absented from attending to duty and over-stayed after expiry of the sanctioned leave without sufficient cause and further failed to send a prior intimation about his absence, either by way of a telegram or any other means. However, he subsequently produced exhibit W-5, Medical Certificate, to show that he underwent 'Hydrocel' operation. He did not bring the said sickness to the notice of the Officer concerned during the relevant period. Further, he failed to cross-examine the Officer of the Corporation, who was examined as a witness to prove the charge. In the facts and circumstances, the contention that the petitioner has sufficient cause for his unauthorized absence from duty cannot be countenanced. Therefore, the findings of the Enquiry Officer as well as the Tribunal that the charge is proved need no interference. Absence to duties without prior intimation or sanction of leave is a serious misconduct and hence, the penalty of removal from service is an appropriate punishment and the Corporation is justified in imposing the said penalty. The Tribunal having examined the facts and evidence in proper perspective agreed with the finding of the enquiry officer that the charge is proved and also recorded a finding that the punishment imposed is proportional to the gravity of misconduct and therefore dismissed the claim petition of the petitioner. The Supreme Court time and again observed in various decisions that when once the charges are proved, the punishment imposed by the disciplinary authority or the Officer concerned of the Management shall have primacy and shall not be interfered with. Therefore, the contention of

the workman that the penalty is disproportionate is not correct and needs no interference by this Court.

6. A careful perusal of the material record including the Award of the Tribunal would show that after careful and detailed examination of the facts, the relevant evidence and circumstances, the learned Chairman of the Tribunal arrived at reasoned findings before confirming the findings of the Enquiry Officer. This Court, in the facts and circumstances, does not find any grounds much less valid grounds calling for interference with the said concurrent findings of the Enquiry Officer and the learned Chairman of the Tribunal. When once conclusions arrived at by the enquiry officer and the learned Chairman of the Tribunal 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 concurrently arrived at by the said officers.

7. Dealing next with the proportionality of punishment, it is to be noted that the gravamen of the charge reflects that the period of absence is from 11.10.2000 to 17.10.2000, that is, seven days. The material record reflects that the petitioner applied for leave on the ground of sickness on 09.10.2000 and went to his native place but did not return and report back to duty after expiry of the leave applied for and over stayed without applying for further leave or extension of leave and reported to duty on 18.10.2000 and produced a medical certificate, exhibit W5, marked with consent showing that he underwent a surgery for Hydrocel and, therefore, he could not promptly report back to duty after expiry of the leave applied for. Thus, there is material to show that the absence is not due to negligence in attending to duty or for wanton reasons. It is not uncommon for employees to overstay after expiry of leave without seeking fresh leave or extension of leave. Now the short question is

as to whether in the facts and circumstances of the case the punishment of removal from service is grossly disproportional to the gravity of the misconduct proved and shocks the conscience of the Court. It is also to be examined as to whether the said penalty requires downward revision.

8. 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.

8.1 In **PEPSU ROAD TRANSPORT CORPORATION Vs. RAWEL SINGH¹**, 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 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

¹ (2008) 4 Supreme Court Cases 42

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.

8.2 In **CHAIRMAN-CUM-MANAGING DIRECTOR, COAL INDIA LIMITED AND ANOTHER Vs. MUKUL KUMAR CHOUDHURI AND**

OTHERS², 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 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 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

² (2009) 15 Supreme Court Cases 620

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.”

8.3 In the recent decision in **CENTRAL INDUSTRIAL SECURITY FORCE and others Vs. ABRAR ALI³**, 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.

³ 2017 (152) FLR 431

8.4 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.

8.5 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 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

⁴ (2004) 7 SCC 574

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

8.6 In **L& T KOMTSU LTD., V. N. UDAYAKUMAR**⁵, 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 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 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.

8.7 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

⁵ (2008) 1 SCC 224

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. Further, his previous misconduct, if any, and the penalties imposed upon him earlier, if any, are not the subject matters of the charge and 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.

9. Having regard to the settled legal position and the precedential guidance in the decisions of the Supreme Court relied upon by the petitioner and also the facts of the present case, wherein the proved graveman of the charge is absence from duty from 11.10.2000 to 17.10.2000 i.e., for a period of eight (8) days, this Court finds that the punishment of removal from service is highly disproportionate and grossly excessive and shocks the conscience of the Court and, therefore, warrants interference. On the above analysis, this Court finds that the penalty imposed needs modification after setting aside the punishment imposed *vide* award of the Tribunal.

10. In the result, the Writ Petition is partly allowed. Accordingly, the punishment of removal from service imposed by the Award impugned of the Tribunal is set aside and instead 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 Murthi, J

Dt: 28th April, 2017

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