

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition No.2219 of 2005

Ashok Kumar Sharma, S/o Shri Gulab Datt Sharma, Ex-Driver Bilaspur Depot, R/o Malhar, Distt. Bilaspur (C.G.)

--- Petitioner

Versus

1. The Chhattisgarh Infrastructure Development Corporation (C.I.D.C.), Through its Divisional Manager, Bilaspur (C.G.)
2. The State Industrial Court, D.K.S. Bhawan, Raipur (C.G.)

--- Respondents

For Petitioner:	Mr. Alok Kumar Dewangan, Advocate.
For Respondent No.1:	Mr. Ratan Pusty, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

15/03/2018

1. The petitioner was working as Driver in M.P. State Road Transport Corporation. His services were terminated for unauthorized absence from 4-12-1992 to 6-3-1993 pursuant to domestic enquiry. He filed an application under Section 31(3) of the Madhya Pradesh Industrial Relations Act, 1960 before the Labour Court. The Labour Court held the enquiry to be illegal and given opportunity to lead evidence to the employer MPSRTC and thereafter, recording the evidence parties and its appreciation, the Labour Court held that misconduct is not proved and directed for reinstatement of the petitioner along with full back-wages. The Chhattisgarh Infrastructure Development Corporation (CIDC) preferred an appeal before the Industrial Court. The Industrial Court interfered with the order of the Labour Court and set aside the order of the Labour Court directing reinstatement leading to filing of writ petition questioning the order of the Industrial Court.
2. Learned counsel for the petitioner submits that the petitioner has

explained his absence from 4-12-1992 to 6-3-1993 by producing medical certificate Ex.P-1 and examined the doctor who issued medical certificate. Apart from that, the petitioner had already given application Ex.P-2 for grant of leave for a period of one month from 4-12-1992 to 18-1-1993 to the In-charge Control Office, MPSRTC, Bilaspur, but no sanction was given to him, therefore, it could not be produced. As the petitioner has fully explained his absence, therefore, his absence cannot be termed as unauthorized absence from duty and as such, the order of the Labour Court ought not to have been interfered with, as it is a well reasoned and speaking order.

3. On the other hand, learned counsel for respondent No.1 submits that the Industrial Court has rightly interfered with the award of the Labour Court as it is not based on material available on record.
4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
5. True it is that the petitioner remained absent from 4-12-1992 to 6-3-1993. It is also true that the petitioner was given notice on 16-1-1993 to resume duty, but instead of resuming duty, he filed application on 20-1-1993 to the *Agaar* Manager, Bilaspur for grant of leave claiming to be unwell, but the application was not considered and finding the petitioner's absence unauthorized in terms of Standing Order, his services were terminated vide order dated 6-3-1993 in terms of clause 12(3)(b)(vi) of the Standard Standing Orders. The Labour Court declared the enquiry to be illegal and given an opportunity to lead evidence to the employer. On behalf of the employer, two witnesses namely, L.K. Pandey (NAW-1) and Anil Kumar Shrivastava (NAW-2) were examined. L.K. Pandey (NAW-1) has stated that the petitioner remained absent from 4-12-1992 to 6-3-1993 and hence, he submitted

report vide Ex.D-1, while Anil Kumar Shrivastava (NAW-2) has accepted that the petitioner has given application for leave from 19-1-1993 to 19-2-1993. Except this, no other evidence was led by the employer. However, the petitioner has filed document Ex.P-1, medical certificate issued by the doctor, that he was suffering from Viral Hepatitis and remained in treatment from 4-12-1992 to 8-3-1993. The doctor has been examined and he supported the case of the petitioner, but nothing has been extracted from the cross-examination to say that the petitioner was fully fit and did not resume the duty despite notice by the MPSRTC and as such, the petitioner has explained his absence for the aforesaid period.

6. The Supreme Court in the matter of **Krushnakant B. Parmar v. Union of India and another**¹ has held as under: -

“16. In the case of the appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether “unauthorized absence from duty” amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

1 (2012) 3 SCC 178 : (AIR 2012 SC (Supp) 42)

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.”
7. The petitioner, in this case, has clearly proved in evidence led before the court that his long and unauthorized absence is on account of compelling circumstances to remain absent and due to the reason that he was suffering from Viral Hepatitis and therefore he could not attend duty. Non-applicant witness NAW-2 Anil Kumar Shrivastava has admitted before the Labour Court that the petitioner has submitted application from 19-1-1993 to 19-2-1993. Thus, the petitioner has explained his absence which is said to be unauthorized.
8. In **Krushnakant B. Parmar** (supra), the Supreme Court has clearly held that if there are compelling circumstances beyond his control like illness, accident, hospitalization, etc., the employee cannot be held guilty of failure of devotion to duty. The principle of law laid down in that case squarely applies to the facts of the present case. Therefore, in view of the above, the Industrial Court could not have interfered with the finding of the Labour Court holding that misconduct is not proved, as such that part of the order passed by the Industrial Court is set aside.
9. Now, the question of back-wages comes in. The Labour Court has granted full back-wages to the petitioner.
10. In the matter of **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others**², the Supreme Court while dealing with wrongful/illegal termination of service qua back-wages, held as under: -

“38.3. Ordinarily, an employee or workman whose services

2 (2013) 10 SCC 324

are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under [Section 11-A](#) of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under [Article 226](#) or 136 of the Constitution and interfere with the award

passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages."

11. In this case, the petitioner has simply stated that he is not employed anywhere and he could not attend the duty due to illness. There is no other evidence forthcoming on record. The petitioner's services were terminated on 6-3-1993 by the erstwhile MPSRTC. CIDC has been constituted with effect from 31-12-2002. Since there is no evidence on record with regard to the question of back-wages led by the petitioner and the non-applicant MPSRTC, and there is serious dispute as to apportionment of liability between the MPSRTC and the CIDC, it would be expedient to remit the matter to the Labour Court to consider the question of grant of back-wages and the liability of the MPSRTC and the CIDC and in view that, the decision rendered in W.P.(L) No.6815/2007 (Poshanlal Verma v. Chairman, State Industrial Court and another), decided on 22-5-2017, shall not be applicable. It is ordered accordingly. The said enquiry will be concluded within a period of three months from the date of receipt of a copy of this order by the Labour Court.
12. Record be sent back to the Labour Court forthwith.
13. The writ petition is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge