

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 12.04.2018	Order Pronounced on : 23.04.2018
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CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA

Writ Petition No.39366 of 2003
& WPMP No.47624 of 2003 & WVMP No.61 of 2004

P.Dhanapalan

... Petitioner

Vs.

1. The Managing Director, HTL Ltd.,
GST Road, Chennai 600 032
 2. The General Manager-Works,
HTL Ltd., GST Road, Guindy, Chennai 600 032
 3. The Personnel Officer, HTL Ltd.,
GST Road, Guindy, Chennai 600 032
- ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the relevant records on the file of the Personnel Officer, HTL Limited, GST Road, Guindy, Chennai 600 032, the third respondent herein, in his proceedings No.Ref.8C 2390 dated 08.10.2003, quash the same as illegal, arbitrary, unreasonable, being violative of the rules and principles of natural justice and thereby, direct the respondents to reinstate the petitioner herein with the consequential monetary and service benefits.

For Petitioner : M/s. G.S.Thilagavathi
For Respondents: M/s. Lakshya Anand, for,
M/s. S.Ramasubramanian Associates.

O R D E R

Exception to the principles of natural justice is the plea raised by the Management. To elaborate, when the administrative authorities, who perform public functions and are expected to follow procedural fairness, deprive opportunity of hearing to an employee on the ground of statutory exclusion and empty formality theory, whether the decision taken by them is open to challenge by the workman.

2. Non-maintainability of the writ petition:-

(a) against a private institution, in which the shareholding

of the Government is only 25%; and

(b) when there is a specific statutory remedy before a specific forum

- are the pleas by the management.

3. When there is no disputed question of fact and only disputed question of law, whether the appropriate remedy should be sought for only before the Labour Court and not before the writ court and more especially, when the petitioner had waited for nearly fifteen years for the issue to be decided. This is the issue raised by the workman.

4. The writ petition is filed by the petitioner seeking to quash the order, dated 08.10.2003, stating that the petitioner has abandoned the service, as passed by the third respondent and consequently, to direct the respondents to reinstate the petitioner into service with consequential monetary and service benefits.

5. The order passed by the third respondent dated 08.10.2003 reads that, the absence of the petitioner for duty is treated as unauthorized absence / abandonment of service with effect from 19.03.2003, as per Clause 10 (6) of the Standing Orders of the Company.

6. The name of the petitioner is directed to be removed from the rolls of the company.

6.1. The provision of Clause 10 (6) of the Standing Orders of the Company reads as under:-

"If an employee absented himself without leave for more than 15 days or remains absent beyond the period of leave granted for more than 15 days, he shall be considered as having voluntarily left and abandoned company's service and having voluntarily terminated his employment with the company."

7. This order is under challenge on the ground that the order was passed without following the principles of natural justice and it is disproportionate to the violation complained of. Therefore, the issue to be considered is, whether this order is liable to be quashed.

8. It is the case of the petitioner that he joined the respondent company on 17.08.1977 as a Clerk; that he was promoted as Supervisor in the year 1995; that he was removed from service on 08.10.2003, on account of absence for duty from 19.03.2003 onwards; that he has put in more than 25 years of clean and unblemished record of service and therefore, the order of termination must be quashed.

9. The contention of the learned counsel appearing for the

Management is that the petitioner is not entitled to opportunity of hearing as the statute itself exclude the opportunity of hearing by incorporating a deemed provision; even assuming that the opportunity of hearing is contemplated by implication, the denial of opportunity would not make a difference as the reply given by the employee would take him nowhere. In other words, the contention is that even if the opportunity of hearing had been given, it would not have made any difference, i.e., providing opportunity would have been an empty formality.

10. The main contentions raised by the learned counsel for the petitioner with regard to the justification for the claim made are as under:-

(i) On 18.03.2003, there was a problem in the family of the petitioner and on account of that, a criminal case has been registered against him and therefore, he was arrested by the Madipakkam Police and later, released on bail on 04.06.2003 and on account of this unexpected arrest, he was not able to inform the office; therefore, the absence is not willful.

(ii) The respondents have not followed the Standing Orders before passing the order of termination; Standing Order 15 (2) provides for framing of charge, opportunity of explaining his conduct, constitution of an enquiry committee, permission to produce evidence, opportunity to cross-examine the witnesses and the decision by the Disciplinary Authority.

(iii) There is also a right of appeal to the Managing Director within a period of 30 days from the date of receipt of the award of punishment; as in the case of the petitioner, no procedure has been followed, the impugned order is liable to be set-aside.

11. The respondents have filed a counter affidavit raising the plea of maintainability of the writ petition and giving justification for the punishment of termination. The respondents contended that the employer is not a state within the meaning of Article 12 of the Constitution of India and therefore, the writ petition is not maintainable as against a private institution.

11.1. In order to support the contention that the writ petition is not maintainable against a private institution, the respondents relied upon the proceedings of the Government of India, dated 12.10.2001, under which it is stated that the Government disinvest 74% of equity of M/s.HTL Limited in favour of M/s. Himachal Futuristic Communication Limited. It is alleged that the Government of India was having only 25% of shareholding, having disinvested 74% of the shareholding and therefore, the first respondent cannot be termed as a state, within the meaning of Article 12 of the Constitution of India and therefore, the writ petition is not maintainable.

12. With regard to the maintainability of the writ petition against a private institution, relying upon 1995 (1) L.L.J. 687 (cited supra), while considering a labour dispute between Madras Labour Union and Binny Ltd., a Division Bench of this Court, after analysing the earlier case laws, propounded the following propositions :-

(1) A private body which is not a "State" within the meaning of Art.12 of the Constitution of India is not generally amenable to Art. 226 of the Constitution.

(2) A writ will issue against a private body to protect the fundamental rights declared under Part III of the Constitution of India.

(3) A writ will issue in extraordinary circumstances if the monstrosity of the situation warrants it.

(4) A mandamus will be issued against a private body, if there is no equally convenient remedy and if there is a public duty.

....."

12.1. If there is violation of statutory provisions constituting unfair labour practice writ petition under Article 226 of the Constitution against a private employer is maintainable.

12.2. In 1998 (1) L.L.J. 349 (CHEMPLAST SANMAR LTD. v. METTUR CHEMICALS PODHU THOZHILALAR SANGAM), a Division Bench of this Court in a dispute between 37 work men and their employer Binny Limited, has arrived at the following conclusion:

"The decisions of the Supreme Court of India reported in (1986-1-LLJ-171), (1986-II-LLJ 509) and (1991-1-LLJ-607) declared the position of law beyond doubt that a Rule or Clause in the contract or Agreement of Service which entitles the Management to terminate the services of an employee by merely giving one calendar month's notice or one month's salary in lieu of such notice would be ultra vires Article 14 of the Constitution of India and that such provision would also be opposed to public policy and violative of Section 23 of the Indian Contract Act. The petitioners, even if relegated to the relief of Suit or the Industrial Dispute in the Labour Court, as it may deem fit, there could be no difficulty for those forums to strike down such a rule or declare such a clause to be void and unenforceable and it may not involve or necessitate any serious exercise or effort or any detailed enquiry to strike down such a rule or declare void such a clause, even in an agreement of service. The

determination of the validity of such a clause as noticed above does not involve any factual investigation or appreciation of evidence and adjudication of factual issues. Consequently, instead of driving the petitioners to the appropriate forum, having regard to the fact that the writ petition has been filed and has been pending, on being entertained on the file of this Court so long we consider it appropriate, in the interests of justice to declare clause 8 of the Agreement of Service extracted above to be void and unenforceable against the petitioners as being violative of Section 23 of the Indian Contract Act, applying the law declared by the Apex court in the cases noticed supra. Consequently, the orders of termination in these cases are also declared illegal and nonest, having no legs to stand in the absence of the provision contained in clause 8 above, which has been declared void."

12.3. From these decisions, it is clear that, under the facts and circumstances of this case, the writ petition is maintainable, since the petitioner is complaining of violation of fundamental rights.

13. Yet another contention raised is that the appropriate forum for the petitioner to raise the dispute is the Labour Court and the dispute ought to have been raised invoking the provisions of the Industrial Disputes Act, 1947.

13.1. Whether this contention is acceptable is the issue to be considered.

13.2. This writ petition has been filed in the year 2003. It is true that normally the remedy is only to raise an industrial dispute. But the question is whether it is proper to drive the petitioner to approach the Labour Court, after making him to wait for a period of 15 years, is the critical issue. Even if the petitioner is driven to the Labour Court what would be the difference it would make is yet another issue to be considered.

13.3. If the facts are in dispute, probably, this court would be justified in driving the party to the Labour Court. But here is a case where there is no disputed question of fact. The unauthorized absence and the consequent order without any enquiry are all admitted facts. The issue to be decided purely rests on admitted facts and on disputed question of law. Moreover, the respondents would not be prejudiced, if the issue is decided in the writ petition itself. Under the stated circumstances, this Court deems it appropriate to pass the orders on merits.

14. The learned counsel appearing for the petitioner submitted that the petitioner did not report for duty from 19.03.2003 to 07.10.2003, during which period the respondents claim that there was no intimation given to the company giving

reasons for his absence nor request for leave was given. It is further pointed out that the absence was on account of the arrest in a criminal case in Crime No.111 of 2003 of Madipakkam Police Station and later, the case ended in acquittal in Sessions Case No.1 of 2005, dated 31.10.2005.

15. It is alleged that in the meantime the petitioner joined duty on 05.01.2005, despite obtaining an order of interim stay of termination proceedings on 31.12.2003. Later, he retired on 31.10.2009. Thus, the learned counsel appearing for the petitioner prays for salary and retirement benefits for the period from 19.03.2003 (the date from which there was unauthorized absence) to 04.01.2005 (a day prior to the date on which, the petitioner was permitted to join).

16. Contending that the order of termination itself is illegal on account of dis-proportionality of punishment and the decision having been taken without enquiry, the decision dated 04.03.2015 rendered in W.P.(MD)No.5632 of 2008 (Vinothraj v. M/s. Bharath Heavy Electricals Limited) is relied upon, whereunder it has been held that the dismissal from service was an excessive punishment and not a proportionate punishment for the charge levelled, where the unauthorized absence was for a period of 78 days.

17. In this case, it is contended that though the absence was unauthorized absence, it was beyond the control of the petitioner / employee as he was in incarceration and the unavoidable circumstances should have been taken into account by the employer and had there been an enquiry, the employee would have been in a position to prove the same and therefore, the order of termination has to be set-aside.

18. The administrative authorities performing public functions are required to adopt fair procedure and the procedural fairness is the legitimate expectation of any person who is likely to be affected by the decision. Principles of natural justice are normally weighed in the balance of fairness. Principles of natural justice supplement the enacted statute with necessary implications. But sometimes observance of principles of natural justice may lead to injustice and therefore, the disregard will be justifiable.

19. There are several exceptions to the principles of natural justice, viz., i) Exclusion in case of emergency, (ii) Express statutory exclusion, (iii) Where disclosure would be prejudicial to public interests, (iv) Where prompt action is needed, (v) Where it is impracticable to hold hearing or appeal, (vi) Exclusion in case of purely administrative matters, (vii) Where no right of person is infringed, (viii) The procedural defect would have made no difference to the outcome and (ix)

Exclusion on the ground of 'no fault' decision maker.

20. It is the case of management that the case of the petitioner is covered by the exceptions, i.e., (a) express statutory exclusion and (b) the procedural defect would have made no difference to the outcome and therefore, non-observance of principles of natural justice is not fatal in this case.

21. The Standing Orders relied upon impliedly exclude the applicability of the principles of natural justice. This provision has been introduced in the interest of administrative efficiency and expedition. The services of the transport being a public utility service the unauthorized absence would lead to public unrest and inconvenience to public. Therefore, the provisions are very strict so far as unauthorized absence is concerned.

22. The next issue is, even assuming that the opportunity of hearing should have been given, whether the opportunity would have made any difference in the wake of the reply given by the petitioner. The reply of the petitioner is that he was in jail and therefore, he could not report for duty. There are various options open to the petitioner to inform the administrative authorities regarding his absence. Either the relatives should have informed the respondents about the absence of the petitioner or he could have very well sent an application through the Superintendent of Jails. It is not even his case that after release from bail, he sought for ratification of the absence.

23. Under such circumstances, even if the opportunity of hearing had been given, because of the non-acceptable reasons given, the opportunity would not have made any difference. Therefore, the order of termination is justified. However, despite the order of stay of termination proceedings by the Court, the respondents did not provide opportunity to join the duty. The petitioner was made to wait from 2003 to 2005, though he was armed with an order of the Court. The implication of it has to be analyzed.

24. It is not in dispute that the petitioner unauthorizedly absented himself for duty from 19.03.2003 to 07.10.2003 (seven months, short of 12 days). For this period of unauthorized absence, certainly, he is not entitled to any benefits. Because, it is not even his case that he intimated the office. Even if he is in confinement, he should have informed the office through family members. That has not been done. However, he has obtained an order of interim stay of termination on 31.12.2003 and has requested the office to provide employment by the letter, dated 14.01.2004. This has been communicated in writing on 12.01.2004. Despite the order of the court, he has

not been provided with employment immediately. Therefore, from 14.01.2004, the day on which the petitioner has directly approached the authorities asking for employment, he is entitled to all the service benefits, till the day of his retirement.

25. In the result, the writ petition is partly-allowed, directing the respondents to calculate the monetary and service benefits of the petitioner / employee for the period from 14.01.2004 to 04.01.2005 and to pay the same to the petitioner / employee within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, the connected WPMP and WVMP are closed.

s/d-
Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

srk

+1 CC to M/s. G.S.Thilagavathi, Advocate sr 29789.

+1 CC to M/s. S.Ramasubramanian Associates sr 29858.

W.P.No.39366 of 2003
& WPMP No.47624 of 2003
& WVMP No.61 of 2004

SP(06/08/2018)

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