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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6492 OF 2018

Thane Municipal Corporation & Ors. ..Petitioners.

V/s.

Devidayal Nandan Kund ..Respondent.

Mr.Mandar Limaye for the petitioners.

Mr.Ravindra B.Nair for respondent.

CORAM : NITIN W.SAMBRE, J.

DATE : AUGUST 2, 2019

P.C. :-

Heard respective counsel.

2. From August 24, 2001 till December 6, 2001, respondent remain absent from service, which is formed to be basis for initiation of departmental proceedings against respondent by the petitioner statutory Corporation.

3. The submissions of respondent that the disciplinary proceedings are governed by the Model Standing Order framed under the Industrial Employment (Standing Orders) Act, 1946 ('the Standing Order' for short). However, the respondent was proceeded against by the petitioners under the provisions of Maharashtra Civil Services (General Conditions of Service) Rules, 1981 ('the MCS Rules' for short).

4. Ultimately, after the order of dismissal was passed, the proceedings were taken up through Complaint (ULP) No.318/2012 before the Industrial Court, Thane. The Industrial Court, Thane vide order impugned dated December 21, 2017 was pleased to grant reinstatement. The Industrial Court allowed the complaint preferred by the respondent thereby declaring that the petitioners are engaged in unfair labour practices and quashed and set aside the charge-sheet lodged against the respondent. The petitioners were granted liberty to initiate departmental inquiry against the respondent for his unauthorized absenteeism and also directed the petitioners to refer the respondent to the competent medical board for his examination. As such, this petition.

5. The submissions of learned counsel for the petitioners are, it is admitted position that the service of respondent is governed by the Standing Order, referred supra. It is also contended that the respondent was proceeded against departmentally pursuant to the provisions of MCS Rules. Learned counsel would then invite attention of this Court to the findings recorded in paragraph 11 of the order impugned by the Industrial Court that the provisions of the Standing Order and that of MCS Rules to conduct

departmental inquiry is in violation of service condition and comes within the ambit of unfair labour practices. According to him, a fair opportunity of hearing was granted to the respondent after the order impugned came to be passed. As such, learned counsel for the petitioner would urge that reliance placed by the learned Industrial Court on the judgment of the Apex Court in the matter of *Raghubir Singh V/ s. General Manager, Haryana Roadways, Hissar*¹ is also useful.

6. So as to substantiate his contention, he has relied on the observations of the Apex Court in paragraphs 18 to 24 of the said judgment. The submissions of learned counsel for the petitioners is, in the matter of *Raghubir Singh (cited supra)*, the delinquent was served with the charge-sheet under the provisions of Haryana Civil Services Rules, though his services were governed by the provisions of the Standing Order. The fact remains that without taking such inquiry to its logical end, the services of the delinquent was terminated in exercise of powers under Article 311 of the Constitution of India. According to learned counsel, once the Industrial Court has recorded a finding that the provisions of MCS Rules which are taken recourse to by the petitioners against the respondent in completion of an inquiry under the Model

¹ Civil Appeal No.8343 of 2014

Standing Orders or Industrial Employment (Standing Orders) Act, the order impugned is not justifiable, as fair opportunity to represent his case was not denied to the respondent. The petitioners have placed reliance on the judgment of the Apex Court in the *State Bank of Bikaner & Jaipur and others V/s. Prabhu Dayal Grover*², particularly paragraphs 9 and 10 so as to claim that unless prejudice is demonstrated by the delinquent, the order of the Industrial Court accepting the proceedings of an inquiry and order of dismissal are sustainable.

7. *Per contra*, learned counsel for the respondent while placing reliance upon the judgment in the matter of *State of Patiala & Ors. V/s. S.K.Sharma*³, would urge that the respondent is not required to demonstrate prejudice if the disciplinary proceedings are conducted against him under a wrong statute. According to him, there was no occasion for the respondent to demonstrate that the provisions of both the Acts *viz.* MCS Rules and the Standing Order are paramateria and that being so, the observations made by the Industrial Court without any adjudication on said issue cannot be relied upon. He sought dismissal of the petition.

² (1995) 6 Supreme Court Cases 279

³ 1997 LLR 266

8. Considered rival submissions.

9. This Court initially thought it fit to call upon learned counsel for the respondent to demonstrate as to whether the prejudice is caused to him once the disciplinary proceedings are taken up against him under MCS Rules and not Standing Order, particularly in the backdrop of findings recorded by the Industrial Court that the provisions under both these statutes are paramateria.

10. Learned counsel would urge that unless such an opportunity was offered by the Industrial Court, it is open for this Court to go in the said issue.

11. In the aforesaid backdrop, the findings recorded by the Industrial Court that provisions of both the statutes are paramateria is required to be accepted.

12. The next submission of learned counsel for the petitioners that the Industrial Court committed error of law in relying on the judgment of the Apex Court in the matter of *Raghubir Singh (cited supra)*. The facts in the matter of *Raghubir Singh* are, the employee's services were governed by the provisions of the Industrial Employment Standing Order, the employer-corporation has chosen to invoke the provisions of the Harayana Civil Services Rules, which is

admittedly not applicable to the said employee. The fact remains that the said provisions are invoked perhaps the intention of invoking the provisions of Article 311 of the Constitution of India so as to exercise the powers of termination / dismissal of the employee without any inquiry in the matter.

13. As far as the case in hand is concerned, the fact remains that the respondent was charge sheeted, he submitted his reply to the charge-sheet and participated in the proceedings without raising any objection as to the applicability to the Standing Order or the provisions of the MCS Rules. As such, the respondent has submitted to the jurisdiction of the Enquiry Officer and for the first time has challenged the invocation of a wrong statute before the Industrial Court.

14. No doubt, the respondent has every right to canvass such an issue of law before the Industrial Court but this Court cannot be oblivious to the fact that it was incumbent on the part of the respondent to demonstrate prejudice caused to him by invoking the said statutory provisions which are not applicable or which does not govern his service conditions (may be having similar effect).

15. Apart from above, the fact remains that in both the judgments cited by the petitioners and the respondent viz. the *State of Bikaner and State of Patiala (cited supra)*, the Apex Court has laid down the principles which can be considered while examining the issue which fall for consideration in this case viz. fair and proper opportunity was given to the delinquent or not.

16. But for making his submission that wrong provisions are invoked against the respondent, the respondent has failed to demonstrate any substantial prejudice caused to him in the proceedings in question.

17. This Court is required to be sensitive to the fact that Corporation, in discharge of their public duty, has proceeded against the respondent for his unexplained and unreasonable absence for almost a period of 10 years.

18. in the aforesaid background, this Court is left with no other option but to allow the petition.

19. Writ petition stands allowed in terms of prayer clause (a).

20. The petitioner-employer is restrained from making an order of dismissal for a period of ten weeks from today.

(NITIN W.SAMBRE, J.)