

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P.No.155 of 2012

The Managing Director,
M/s.Faiveley Transport Rail Technology India Limited,
(Formerly known as Faiveley Transport India Limited),
Harita, Hosur - 635 109. .. Petitioner

Vs.

1. Presiding Officer,
Labour Court, Salem.

2. N.Srinivasan ... Respondents

Prayer:

Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of writ of Certiorari calling for the records of the 1st Respondent in I.D.No.159 of 2000 and quash its award dated 06.04.2011.

For Petitioner : Mr.S.Haroon Al Rasheed
for M/s.T.S.Gopalan and Co.

For R2 : Ms.Chitra Sampath (Senior Counsel)
for Mr.T.S.Baskaran
R1- Court

सत्यमेव जयते
O R D E R

The present Writ Petition is filed for issuance of writ of Certiorari, calling for the records of the 1st Respondent in I.D.No.159 of 2000 and quash the award of the first respondent dated 06.04.2011.

2.According to the petitioner, the second respondent joined the services of the petitioner on 16.12.1985 as Operator. On 25.07.1989, he was transferred to Madras. Thereafter, on 03.12.1992, he was transferred to Nagpur, on 21.01.1993 to Varanasi, on 30.04.1994 to Kapurthala, Punjab and on 21.11.1995 to Delhi. On 18.07.1996, while he was working in Delhi, he was asked to go to Railway Coach Factory, Kapurthala, Punjab. The

second respondent refused to obey the orders. He continued to idle at Delhi Office. Though he was not entitled for wages, on humanitarian ground wages were paid. The petitioner issued show cause notice to the second respondent on 27.07.1996 for his refusal to attend work at Kapurthala. In spite of the notice issued by the petitioner, the second respondent remained adamant. He did not apply for leave, but absented himself from work. On 27.02.1997, the petitioner issued another show cause notice to the second respondent treating the period from 14.02.1997 to 26.02.1997 as absence. Again by the notice dated 31.03.1997, the second respondent was warned on his refusal to carry out the work assigned to him by the Manager of Delhi Office. Again on 21.04.1997, another notice was issued to the second respondent.

3. The learned counsel appearing for the petitioner further contended that the petitioner conducted domestic enquiry following the principles of natural justice. The Enquiry Officer has held that the charges leveled against the second respondent was proved. On 28.03.1998, the petitioner sent a report of the Enquiry Officer to the second respondent, calling for his explanation. On 18.04.1998, the second respondent submitted his explanation. Not being satisfied with the explanation given by the second respondent, again on 22.04.1998 second show cause notice was issued to the second respondent proposing the punishment of dismissal of service. The second respondent submitted his reply on 20.05.1998. Not being satisfied with the reply given by the second respondent, by the order dated 11.06.1998, the second respondent was terminated from service for the proven charges.

4. The second respondent raised Industrial Dispute in I.D.No.159 of 2000, challenging the order of termination. According to the second respondent, he was appointed as Operator in Petitioner's Company on 16.12.1985 at Harita, Hosur, Durmapuri District. He was sent to Chennai Factory on deputation in the year 1989. Subsequently, the second respondent was sent back to Hosur in the year 1990. Even though he was working as Operator, he was transferred to Marketing Division and posted at Nagpur on 03.12.1992. According to the second respondent, whenever he was transferred, he has joined and worked to the satisfaction of the petitioner. From Nagpur, he was transferred to Varanasi. Subsequently, he was transferred to Kapurthala, Punjab, Delhi, Gujarat, Maharashtra, West Bengal and Bihar. The second respondent obeyed the said order of transfers and discharged his duties without any blemish. After the transfer, the second respondent was not paid any allowances and salary and the second respondent in the places where he was transferred did not know language and he suffered a lot. The second respondent

was not paid any allowance for the year 1991 to 1994. The petitioner has issued charge memo on false information, even though the second respondent was discharging his duties to the satisfaction of the petitioner. Without giving proper opportunity to the second respondent and without following principles of natural justice, the second respondent was terminated from service on 11.06.1998, based on the biased report of the Enquiry Officer and prayed for setting aside the order of termination and prayed for ordering reinstatement with continuity of service and attendant benefits and back wages.

5.The petitioner filed counter statement before the first respondent and denied various averments made by the second respondent in the claim petition. According to the petitioner, as per the condition of appointment, the second respondent is liable to be transferred or sent on deputation to any one of the offices of the petitioner throughout India. Whenever the second respondent was transferred to a place, he was paid allowances/batta applicable to the said places. Lastly he was posted to Delhi Office by the order dated 21.11.1995. He was paid consolidated batta of Rs.1,200/- per month over and above normal wages. On 18.07.1996, the second respondent was instructed to go to Kapurthala, Punjab to attend some urgent work. The second respondent refused to obey the said orders and has not reported at Kapurthala, inspite of repeated advise given to him. The petitioner is manufacturing and supplying Brakes equipments to Indian Railway all over the country. The employees of the petitioner must attend the rectification and servicing work at the petitioner's customer site. As per clause 4 of the certified standing orders of the petitioner and under the terms and conditions of the appointment order accepted by the second respondent, the petitioner can depute the second respondent to various places where his services are found necessary. The second respondent refused to obey the order directing him to go to Kapurthala and stayed in Delhi Office only and he also absented himself from attending to his duties from 14.02.1997 to 26.02.1997. A charge memo dated 27.02.1997 was issued to the second respondent. Not being satisfied with the explanation given by the second respondent dated 08.03.1997, an enquiry was conducted. Based on the report of the Enquiry Officer, the services of the petitioner was terminated.

6.Before the first respondent, the second respondent examined himself as W.W.1 and marked Ex.W1, a letter dated 20.05.1998 with enclosures. The petitioner examined one Mr.S.Venkataraman as M.W.1 and marked 19 documents as Exs.M1 to M19. The first respondent considering the pleadings, oral and documentary evidence and arguments advanced by the counsel, by the award dated 06.04.2011, set aside the order of termination and ordered reinstatement with continuity of service and back

wages. Against the said award, the present Writ petition is filed.

7.The learned counsel appearing for the petitioner reiterated the averments in the counter statement filed before the first respondent and further contended that the first respondent failed to see that the petitioner used to send employees on transfer to various Offices/locations, where petitioner's Manager would inturn direct the employees to undertake repair/maintenance and service work. After manufacture and supply, service is most important. By the order dated 18.07.1996, he was transferred to Kapurthala and he was not asked to go on tour. The second respondent refused to carry out the work assigned to him from 18.07.1996 till his dismissal on 11.06.1998, for nearly two years which is a serious misconduct warranting punishment of dismissal. The petitioner has proved by oral and documentary evidence the misconduct committed by the second respondent and making deliberate false and vexatious allegations against the petitioner. The first respondent erred in holding that petitioner can only transfer the employees and refusal of the second respondent to go on tour would not be a misconduct. The first respondent has not given any reason for ordering reinstatement of second respondent with continuity of service and payment of back wages, unless the second respondent alleges and proves that he was not gainfully employed he is not entitled to payment of back wages. The second respondent has not stated that he is not gainfully employed and therefore he is not entitled to payment of back wages. The second respondent is gainfully employed and therefore he is not entitled to back wages and payment under Section 17(B) of Industrial Disputes Act, 1947. The petitioner filed counter statement in M.P.Nos.2 and 3 of 2012 and contended that the second respondent is gainfully employed in M/s.Ahill Knit Exports, Garment Industrial Estate, Shed No.7, SIDCO, Mudalipalayam, Thirupur - 641 606. The petitioner further stated that on 11.09.2012, when the Deputy Manager-HR & GAD of the petitioner visited M/s.Ahill Knit Exports, Garment Industrial Estate, Shed No.7, SIDCO, Mudalipalayam, Thirupur - 641 606, he could not meet the Manager of the Unit. But he happened to meet the second respondent, who threatened him that "if you have come here to verify my employment, I will finish you and your family" and shouted at him in vulgar words against him and Management.

8.In support of his contention, he relied on three judgments of the Hon'ble Apex Court as follows:

(i)2005 2 SCC 363, [Kendriya Vidyalaya Sangathan and another Vs. S.C.Sharma], wherein at paragraph nos.9 and 16, it has been held as follows:

"...9. The High Court concurred with the views of the Tribunal that the disciplinary authority had not recorded reasons for dispensing with the enquiry and no material was produced to show that there existed reasons which justified dispensing with regular enquiry. The High Court further found that direction given for payment of back wages from date of dismissal was in order. It held that though the respondent-employee had not pleaded or produced any evidence that after dismissal from service, he was not gainfully employed, back wages can not be denied and it was not necessary to place any material, as payment of back wages was natural and consequential corollary whenever any order of termination is set aside.

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

(ii) 2015 2 SCC 410, [Collector Singh Vs. L.M.L. Limited, Kanpur], wherein at paragraph no.14, it has been held as follows:

"...14. Having said that the punishment of dismissal from service is harsh and disproportionate, this Court in ordinary course would either order reinstatement modifying the punishment or remit the matter back to the disciplinary authority for passing fresh order of punishment. But we are deliberately avoiding the ordinary course. We are

doing so because nearly two decades have passed since his termination and over these years the appellant must have been gainfully employed elsewhere. Further, the appellant was born in the year 1955 and has almost reached the age of superannuation. In such circumstances, there cannot be any order of reinstatement and award of lump sum compensation would meet the ends of justice. Considering the length of service of the appellant in the establishment and his deprivation of the job over the years and his gainful employment over the years elsewhere, in our view, lump sum amount of compensation of Rs.5,00,000/- would meet the ends of justice in lieu of reinstatement, back wages, gratuity and in full quit of any other amount payable to the appellant."

(iii)2018 SCC Online SC 1583, [Rajasthan State Road Transport Corporation Vs. Phool Chand], wherein at paragraph nos.11 and 12, it has been held as follows:

"11. In our considered opinion, the Courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.

12. It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, namely, that the employee was gainfully employed during the relevant period and

hence not entitled to claim any back wages. Initial burden is, however, on the employee."

The learned counsel appearing for the petitioner relied upon the above three judgments of the Hon'ble Apex Court and contended that first respondent erred in ordering back wages. The order of termination is dated 11.06.1998. The first respondent erred in ordering reinstatement by the award dated 06.04.2011. The second respondent is aged 54 years old now. Only three or four years of service is left for second respondent. In view of the above facts, the award of the first respondent may be suitably modified. On the above contentions, the learned counsel appearing for the petitioner prayed for allowing the Writ Petition.

9. The learned senior counsel appearing for the second respondent contended that the second respondent was not transferred to Kapurthala by the order dated 18.07.1996. On the other hand, he was asked to go on tour. There is no provision in the service conditions to send the second respondent on tour. The petitioner has power only to transfer or depute the second respondent to other office or site. The learned senior counsel further contended that the second respondent has filed M.P.Nos.2 and 3 of 2012 for payment of last drawn salary as per Section 17 (B) of the Industrial Disputes Act, 1947 and to permit the second respondent to withdraw the wages that has been deposited before the Labour Court, Salem to the credit of I.D.No.159 of 2000. In the affidavit filed in support of the said petitions, the second respondent denied various allegations made by the petitioner. The second respondent contended that he was appointed as Operator and was working as Operator but he was transferred to marketing division and transferred to various places. In spite of his difficulty in understanding new language and new circumstances, he discharged his duties. Due to change in atmosphere and food style, his health condition got worsened and applied for medical leave. The petitioner after granting the medical leave, issued show cause notice to the second respondent treating the leave period as unauthorized absence. The second respondent denied that he was gainfully employed. The second respondent has stated before the first respondent that he was not gainfully employed and also stated so in the affidavit filed in support of the petition filed for payment of last drawn salary under Section 17(B) of Industrial Disputes Act, 1947. The petitioner has not proved by acceptable evidence that second respondent was gainfully employed and prayed for dismissal of the Writ Petition.

10. Heard the learned counsel appearing for the petitioner as well as the learned senior counsel appearing for the second respondent and perused the entire materials on record.

11. From the materials available on record, it is seen that it is the contention of the petitioner that as per the service condition of the petitioner company, the second respondent and other employees could be transferred/deputed to any of the Offices of the petitioner throughout India based on requirements of the said Office. The petitioner transferred the second respondent to various Offices as per the requirement of the petitioner. By the order dated 21.11.1995, the second respondent was transferred to Delhi Office. According to the petitioner, on 18.07.1996, due to some urgent work, the second respondent was directed to go to Railway Coach Factory, Kapurthala, Punjab and the second respondent disobeyed the order and refused to go to Kapurthala, Punjab to attend the work and he also absented himself from duty.

11(a). From the materials on record, it is seen that the petitioner has power to transfer any of its employees to any of the Office or send them on deputation to any of the Office. The petitioner has not produced any material before the Labour Court to show that the petitioner has power to send any of the employees on tour to any of the Office or to the site of its customer. In the present case, the second respondent was neither transferred nor sent on deputation to Railway Coach Factory, Kapurthala, Punjab. On the other hand, in the counter affidavit filed by the petitioner in M.P.Nos.2 and 3 of 2012 filed by the second respondent, the petitioner has stated that the second respondent was transferred to Kapurthala, Punjab on 18.07.1996. It is not the case of the petitioner before the Labour Court or in the affidavit filed in support of the above Writ Petition that second respondent was transferred to Kapurthala, Punjab and disobeyed the said order of transfer.

11(b). The petitioner in the counter affidavit filed in M.P.Nos.2 and 3 of 2012, has stated that the second respondent has threatened the Deputy Manager-HR & GAD of the petitioner that "if you have come here to verify my employment, I will finish you and your family" and shouted vulgar words against him and Management on 11.09.2012 at M/s.Ahill Knit Exports, Garment Industrial Estate, Shed No.7, SIDCO, Mudalipalayam, Thirupur - 641 606. The said employee or the petitioner had not given any complaint to the police or no material has been filed to substantiate the said contention. The petitioner is making wild allegation against the second respondent without producing any material to substantiate the said contention.

12.From the award of the first respondent it is seen that M.W.1 has admitted that charge sheet issued against the second respondent is that he refused to go on tour and did not refuse any transfer order. He also admitted that the second respondent has discharged his duties wherever he was transferred. The petitioner has not produced the attendance register. On the other hand, the second respondent has filed Annexure 15 and 16 in Ex.W1, wherein he has applied for medical leave with Doctor certificate and petitioner has sanctioned leave from 14.02.1997 to 26.02.1997. The first respondent has considered the pleadings and Exs.M1 and M2, held that there is no condition in the appointment order that second respondent must go on tour. The first respondent has also taken note of the fact that second respondent obeyed all the orders of transfer to various places and that petitioner after granting leave to the second respondent, issued the charge sheet as though the second respondent has absented during that period and set aside the order of termination and ordered reinstatement with continuity of service and back wages. At the time of hearing, the learned counsel appearing for the petitioner contended that the second respondent was dismissed from service by the order dated 11.06.1998 and first respondent after a lapse of long period, erred in ordering reinstatement by the impugned award dated 06.04.2011. Now the second respondent has only three to four years of service and award of the first respondent may be suitably modified.

13.In view of the above admitted facts, it will be in the interest of Justice if lumpsum amount is awarded to the second respondent in lieu of reinstatement. The second respondent was appointed on 16.12.1985 and dismissed from service on 11.06.1998, after thirteen years of service with almost 24 years of service left for his superannuation. Considering the above dates, the second respondent is granted a sum of Rs.7,50,000/- in addition to the amount deposited by the petitioner to the credit of I.D.No.159 of 2000 and amounts paid under Section 17 (B) of Industrial Disputes Act, 1947. The petitioner is directed to pay the amounts so granted within a period of eight weeks from the date of receipt of a copy of this order.

14.With the above modification, this Writ Petition is allowed in part. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

krk

To

The Presiding Officer,
Labour Court, Salem.

+1cc to M/s.T.S.Gopalan and Co., Advocate, S.R.No.65304

+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.65660

W.P.No.155 of 2012

RV (CO)
CS/25/09/2019
CS/19/11/2019



WEB COPY