

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2019

CORAM

THE HON'BLE Mr. JUSTICE M.GOVINDARAJ

W.P.Nos.10371 of 2004 and 28261 of 2011

V.Karunanidhi

... Petitioner in both petitions

Vs.

1.The Managing Director,
Tamil Nadu State Transport Corporation,
Karaikudi, Marudupathi,
Sivagangai District.

2.The General Manager,
Tamil Nadu State Transport Corporation,
Karaikudi, Marudupathi,
Sivagangai District.

... 1st and 2nd Respondents
in both petitions

3.The Joint Commissioner of Labour (Conciliation),
Chennai - 600 006.

... 3rd Respondent in
W.P.No.28261 of 2011

Prayer in WP.No.10371/2004: Petition filed under Article 226 of the Constitution of India praying for issuance of writ of certiorarified mandamus, to call for the records of the 2nd respondent in TNSTC/TS/T4/2084 dated 23.07.2003 and the order passed by the 1st respondent in TNSTC/IR/I2/45 dated 02.02.2004 and quash the same and consequently direct the respondents to reinstate the petitioner in service with all back wages, monetary, seniority and other attendant benefits.

Prayer in WP.No.28261/2011: Petition filed under Article 226 of the Constitution of India praying for issuance of writ of certiorarified mandamus, to call for the records of the 3rd respondent relating to the order passed in Approval petition No.237/2003 dated 14.08.2007 and quash the same and consequently direct the respondents to reinstate the petitioner in service with all back wages, monetary and other attendant benefits.

For Petitioner
In both petition : Mr.K.Raja

For Respondents
In both petition : Mr.V.R.Kamalanathan [for RR1 & 2]
M/s.R.Janaki
Additional Government Pleader [for R3]

C O M M O N O R D E R

The petitioner was employed as a conductor under the respondents. While he was on duty, on 31.07.2002, in a bus belonging to the respondent Corporation bearing No.TN-63-0699, a checking was conducted by the Checking Inspector. It was found that he had collected Rs.16.50 p. from the passenger and failed to issue ticket, thereby, he admitted to misappropriating a sum of Rs.16.50 p. Accordingly, a charge memo was issued on 23.08.2002. The petitioner had submitted his explanation and participated in the enquiry. The charge were held proved, and after issuing a second show cause notice and after receiving his explanation he was dismissed from service and the same is challenged in W.P.No.10371 of 2004.

2. An order of dismissal was sent for the approval of the Joint Commissioner of Labour and approval was granted by the authority on 14.08.2007, which is under challenge in W.P.No.28261 of 2011.

3. In W.P.No.10371 of 2004, the petitioner challenges the punishment order on the ground that the very basis for framing charges is itself illegal, for, closing of the first stage would arise only on reaching 12 kilometres from the starting point. Even before he could get an opportunity to verify the issuance of ticket and close the stage, the Checking Inspector of the respondent corporation boarded the bus at 6 kilometres and conducted the checking. Therefore, the petitioner was deprived of the opportunity of verifying the tickets before the close of the first stage.

4. Secondly, the very charge itself is only for attempting to misappropriate and it is not based on a concluded action by the delinquent. It is only on the basis of presumption, the petitioner was charged for misappropriation of amount. Hence, the charge framed on assumption is not sustainable in the eyes of law. After framing charges, the petitioner was given only 3 days time to submit his explanation, which amounts to denial of opportunity. During enquiry, the statements of passengers,

driver, Checking Inspector and the tickets issued to the remaining passengers, invoice etc., were presented before the enquiry officer. But, none of the documents were furnished to the petitioner nor he was permitted to verify the same. Petitioner was also not afforded with an opportunity to cross-examine and the enquiry report was also not served to him. Non-furnishing of documents and enquiry report by itself amounts to violation of principles of natural justice and finally, the punishment was almost based on the past conduct of the petitioner and hence, the punishment of dismissal from service is unsustainable.

5. Learned counsel for the respondents, relying on the counter, submitted that charge framed against the petitioner was proved. Learned counsel further submitted that challenging the order of dismissal, the petitioner has an effective remedy under the Industrial Disputes Act. However, without seeking such effective remedy, the petitioner has straight away approached this Court. Hence, the petitioner is disentitled from seeking any relief in these petitions and therefore, these Writ Petitions are liable to be dismissed. Further, the order of dismissal was duly sent to the competent authority for approval and the same was obtained. In respect of the allegation that sufficient time was not given to the petitioner, learned counsel submitted that the petitioner was given sufficient time on his request. Hence, principles of natural justice was strictly adhered to and taking into account the past conduct of the petitioner, the punishment was imposed on him, which cannot be stated as illegal and therefore, the order passed by the respondents need not be interfered with.

6. Heard the submissions of learned counsel on either side.

7. It is true that any order passed by the disciplinary authority should be approved by the competent authority and if the same is approved, the petitioner is entitled to raise an industrial dispute.

8. W.P.No.10371 of 2004 was admitted on 19.04.2004. The main question to be decided in the present writ petition is that whether the principle of natural justice has been violated by the respondent or not. Taking into account, the long pendency of these writ petitions for violation of principles of natural justice and since no objection has been raised by respondents in their counter affidavit dated 12.02.2014, I am inclined to decide the matter on merits.

9. At the outset, the very charge framed by the respondents is that the petitioner attempted to misappropriate a sum of Rs.16.50/- by not issuing a ticket to the passenger, but not for actual misappreciation. Admittedly, the Checking Inspectors boarded the bus at 6 kilometres from the starting point, the 1st stage of the bus closes at 12 kilometres. Therefore, the petitioner had an opportunity to fill up his invoice and close the stage by verifying the issuance of tickets before that. Even before the petitioner could complete his work of issuing ticket and collecting money from the passenger, the entry of Checking Inspector into the bus, would definitely deprive the petitioner from discharging his duties properly. The facts narrated above are not disputed. The predominant allegation in the charge issued to the petitioner is that he attempted to misappropriate a sum of Rs.16.50/- p. by not issuing a ticket. The defence taken by the petitioner was that the invoice should be closed at every stage. The first stage for closing the invoice is 10 kms from the starting point. But the checking inspectors boarded the bus at 6 km and thereby deprived the petitioner of verifying the issuance of tickets. Had he got time till closure of first stage, he would have issued ticket. On the other hand, it is the contention of the respondents that but for the checking, the petitioner would have misappropriated the amount which is a misconduct under Regulation 16 (c) of Standing orders.

10. In the above issue, it is clear that the petitioner collected the money, but failed to issue the tickets. To prove the attempt to misappropriate, it should have been proved that there was enough time and the checking inspectors need not wait for closing of the stage. Eventhough there was repeated crying form the side of the delinquent, the disciplinary authority had shifted the burden on the petitioner and found that he had not proved the same by documentary evidence. On the other hand, the procedure followed and instructions with respect to the procedures must be available with the management. When it is not asserted that there was no such procedure, it shall be construed that the charge is based on assumption.

11. The writ petitioner had raised repeated violation of principles of natural justice at every stage. He complained of non service of statements records from the passengers, driver and checking inspectors during enquiry. More particularly non furnishing of enquiry report along with second show cause notice. A perusal of the counter affidavit filed by the respondent does not aver any positive statement that it was served on the petitioner. The ground raised by the petitioner on this aspect has been cleverly omitted while replying the same.

From this it is clear that the ground of violation of principles of natural justice is made out to entertain the writ petition and to interfere with the order.

12. The petitioner had also raised an allegation against the checking Inspector, P.Sonaimuthu that he belonged to rival union and the very incident is predetermined with an ulterior motive. In that event the factum of attempt to misappropriate should have been proved by examining the passenger, Driver and the Checking Inspector. Mere marking the document in a quasi judicial proceeding will not amount to proof. The procedure that should be followed is that it should be proved through the author of the document by producing him as a witness.

13. The Hon'ble Supreme Court in the case of Roop Sigh Negi Vs. Punjab National Bank & other (2009 (2) SCC 570) has held as under:-

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

14. In the instant case, the said charge has not been proved by examining the proper witnesses. Unless there is unambiguous admission of guilt, it shall not be taken as admission of misconduct. The petitioner, in that sense, had not admitted the misconduct, but uttered that it was due to oversight and it could have been rectified at the time of closing of the invoice. Therefore the enquiry proceedings without giving ample opportunity and findings without materials to prove the charge will amount to perversity.

15. The disciplinary authority also has not applied his mind to these aspects, but passed an order justifying the punishment by narrating the facts suits his convenience. Non-service of enquiry report before issuing second show cause

notice is fatal to the disciplinary proceedings. The totality of the circumstances go to show that punishment imposed, taking into account the past history, is disproportionate to the charge framed. Hence the impugned order passed in TNSTC/TS/T4/2084 dated 23.07.2003 of the 2nd respondent stands set aside.

16. WP.No.28461 of 2011 is against the order of approval granted by the 3rd respondent authority under Section 33 (2) (b) of the Industrial Dispute Act, 1947. The Authority had proceeded on the basis of the judgment of the Hon'ble Supreme Court reported in AIR 1978 (SCC) 1004 [Lalla Ram Vs. D.C.M.Chemical works] has held as under:-

"The position that emerges from the above quoted decisions of this Court may be stated thus : In proceedings under section 33(2)(b) of the Act, the jurisdiction of the industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee regard being had to the position settled by the decisions of this Court in Bengal Bhatdee Coal Co, v. Ram Probesh Singh (1964) 1 SCR 709: (air 1964 sc 486): Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar, ((1961) 1 Lab LJ 511) Hind Construction & Engineering Co. Ltd. v. Their Workmen(1965) 2 scr 83:air 1965 SC 917: Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management & Ors (1973) 3 SCR 587:AIR 1973 SC 1227, and Eastern Electric and Trading Co. v. Baldev Lal(1975 LAB ic 1435: (AIR 1975 SC 1892) that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the game transaction applied to the

authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

17. Whether the authority accorded the approval in consonance with the principles laid down by the Hon'ble Supreme Court or not? is the issue to be decided. For the said purpose it has to be seen as to whether a proper domestic enquiry in accordance with principles of natural justice has been held. In that view of the matter the authority should have discussed as to whether the checking was premature and as to whether the management has proved that relevant rules/instructions/standing orders that checking can be done before closure of invoice at the relevant stage. Further the documentary evidence produced by the employer was properly proved or not? But without analysing the issue in proper perspective, the approval was granted on the pretext that the employee has not raised objections as to violation of principles of natural justice or the fairness of the enquiry conducted. It is incumbent on the authority to independently apply his mind, *de hors* the reply filed by opposite party.

18. Secondly, the authority failed to assess as to whether prima facie case made out for dismissal of the employee based on legal evidence. As discussed above, as per the judgment of Hon'ble Supreme Court in Roop Singh Negi's case mere marking of documents will not amount to proof. It shall be proved by cogent evidence of the witnesses. In the absence of evidence of the driver, passenger and the checking inspector, it can not be construed that it was legally proved and the decision was made on the basis of legal evidence.

19. Third, the petitioner had raised the issue of Union rivalry as the basis for victimisation. Even this issue was not

taken into consideration by the authority. The issue of payment of one month wages has not at been discussed by the authority.

20. Therefore, in the considered opinion of this Court, the approval granted in A.P.No.237/2003 dated 14.08.2007 by the third respondent is contrary to the principles laid down by the Hon'ble Supreme Court in Lalla Ram's Case and accordingly set aside.

21. It is submitted by the petitioner that he is at the verge of attaining the age of superannuation. Considering the same, it will not be practical to remit the matter for fresh disposal, not it will serve the purpose. The non-employment of the petitioner itself is a senior punishment. In the interest of justice, a direction is given to the first and second respondents to calculate the benefits due to the petitioner on notional basis from the date of dismissal till the date of superannuation and settle the same within a period of twelve weeks from the date of a copy of this order.

In fine both the writ petitions stand allowed with the above direction. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The Managing Director,
Tamil Nadu State Transport Corporation,
Karaikudi, Marudupathi,
Sivagangai District.

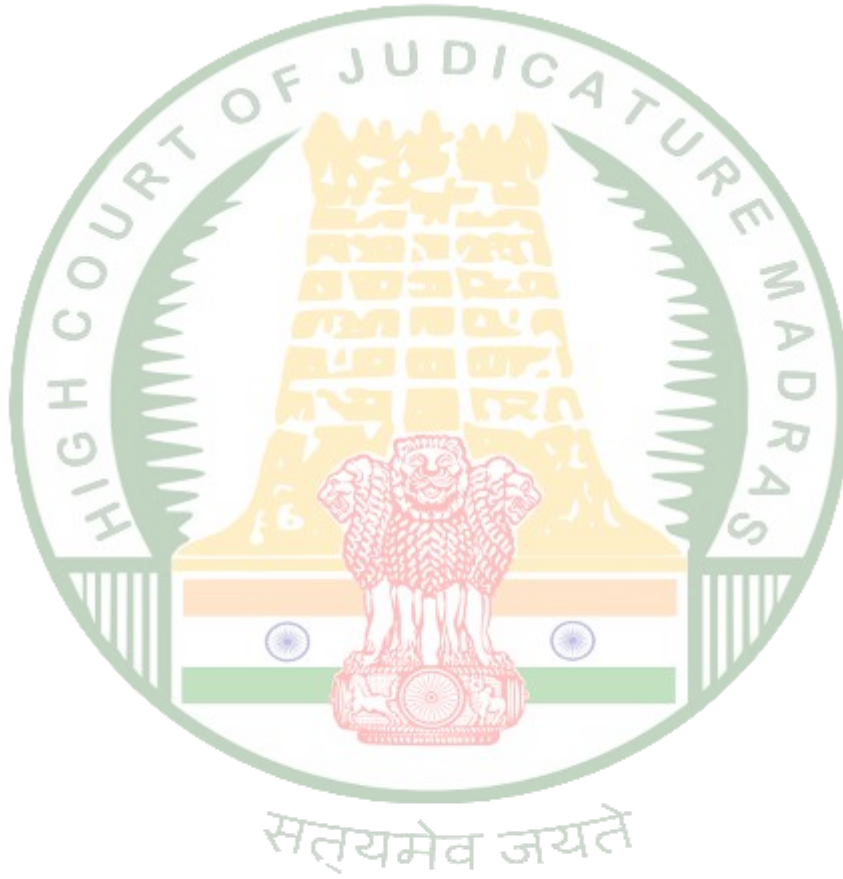
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3.The Joint Commissioner of Labour (Conciliation),
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+1 cc to Mr.K.Raja Advocate sr105572
+1 cc to Mr.V.R.Kamalanathan Advocate sr105679

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