

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 11.04.2019

Delivered on : 29.04.2019

CORAM:

THE HONOURABLE MR. **JUSTICE SETHILKUMAR RAMAMOORTHY**

W.P.No.35369 of 2006
and
WMP.Nos.1 and 2 of 2007

The Tamil Nadu State Transport
Corporation (Villupuram) Ltd.,
Vellore.
Rep. by its General Manager,
Vellore.

... Petitioner

Vs.

1.The Joint Commissioner of
Labour (Conciliation),
D.M.S. Compound,
Teynampet, Chennai-600 006.

2.V.Palani

... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorari call for the records of the First Respondent in Approval Petition No.386 of 2003 dated 01.08.2005 and quash the same.

For Petitioner : Mr.K.Kulandaivelu

For Respondents : Mr.Mr.K.S.Suresh
Government Advocate for R-1
Mr.S.T.Varadarajulu for R-2

ORDER

This Writ Petition is filed to quash the order of the First Respondent dated 01.08.2005 in Approval Petition No.386 of 2003 whereby the Petition filed by the Petitioner herein for approval of the dismissal of the Second Respondent was rejected.

2.The Second Respondent was appointed as a Conductor in the Petitioner Corporation. According to the Petitioner, he was absent from duty between 28.07.2001 and 14.08.2001 without prior information or permission. Accordingly, a charge memorandum dated 18.08.2001 was issued to him calling for an explanation with regard to his absence. In view of the fact that the explanation dated 29.08.2001 was not satisfactory, a domestic enquiry was conducted and the Enquiry Officer submitted a report dated 28.12.2001 (the Enquiry Report) holding that the charges against the Second Respondent were proved. Meanwhile, pending enquiry, the Second Respondent resumed duty on 04.09.2001. Based on the Enquiry Report and taking into

account the past conduct of the Second Respondent, a second Show Cause Notice dated 15.01.2002 was issued to the Second Respondent proposing the punishment of dismissal from service. The Second Respondent acknowledged receipt of the Show Cause Notice on 04.02.2002 but did not submit an explanation in respect thereof. Thereafter, the Petitioner issued an order dated 04.02.2003 dismissing the Second Respondent from service.

3.An industrial dispute between the management of the Petitioner Corporation and unions of workmen was pending before the First Respondent and, therefore, the Petitioner filed a Petition before the First Respondent for approval in respect of the dismissal of the Second Respondent under Section 33(1)(b) of the Industrial Disputes Act, 1947 (the ID Act). By order dated 01.08.2005, the First Respondent rejected the Petition for approval. The present Writ Petition was filed by the Petitioner to challenge the said order dated 01.08.2005. Meanwhile, it is the admitted position that the Second Respondent attained superannuation on 31.01.2013.

4.At the hearing on 11.04.2019, the learned counsel for the Petitioner submitted that the principles of natural justice were followed

in the conduct of the enquiry against the Second Respondent in as much as the Second Respondent was admittedly put on notice and, pursuant thereto, the Second Respondent participated in the enquiry and also adduced documentary evidence therein. The learned counsel further submitted that the evidence on record was duly considered by the Enquiry Officer and that, therefore, the decision dated 04.02.2003 of the Disciplinary Authority was not liable to be rejected by the First Respondent. In this regard, he submitted that the scope of proceedings under Section 33(2)(b) of the ID Act is limited to examining the following: whether a proper domestic enquiry was conducted in accordance with the relevant rules/standing orders by adhering to the principles of natural justice; whether a prima facie case for dismissal is made out based on evidence adduced in the enquiry; whether the employer had come to a *bona fide* conclusion that the employee was guilty and the dismissal did not amount to an unfair labour practice that was intended to victimise the employee; whether the employer paid or offered to pay wages for one month to the employee; and whether the employer had immediately or within a reasonably short time approached the authority for approval, i.e. whether it forms part of the same transaction. The learned counsel submitted that all the above requirements were satisfied in the instant

case.

5. With regard to the establishment of a prima facie case for dismissal, he referred to the Impugned Order at page 15 of the typed set of papers and contended that the First Respondent had erroneously recorded that the Enquiry Officer failed to examine the postal receipt filed by the opposite party with regard to informing the Petitioner herein about the fact that the Second Respondent herein was unwell. In order to controvert the said finding, he referred to pages 3 and 4 of the Enquiry Report wherein the Enquiry Officer records that the Employee's Ex.1 evidences that the employee had sent a letter to the management and that the employee's evidence, in this regard, is to be accepted. He further pointed out that the Enquiry Officer, thereafter, held that the absence of the Second Respondent was unauthorised because he failed to enclose the medical certificate dated 28.07.2001 with the leave letter dated 28.07.2001 or even thereafter.

6. With regard to the finding that the punishment is disproportionate, the learned counsel adverted to the Dismissal Order dated 04.02.2003 wherein the prior misconduct of the Second Respondent herein is listed under Serial Nos.1 to 39. In particular, he adverted to the misconduct specified under Serial Nos.18, 22, 26 and

37, which are relatively serious. He further submitted that prior conduct is relevant in deciding whether punishment is disproportionate. As regards the finding on whether the application is part of the same transaction, the learned counsel pointed out that the order of dismissal was issued on 04.02.2003 and the application for approval was filed on 13.02.2003. Therefore, he submitted that the finding that the Petitioner herein had not applied simultaneously or within a reasonable time so as to form part of the same transaction is patently erroneous.

7. In order to substantiate his submissions with regard to the punishment, he referred to the judgment of the Hon'ble Supreme Court in **MAHINDRA AND MAHINDRA Vs. N.B.NARAWADE reported in (2005) 3 SCC 134**, wherein it was held that discretion can be exercised under Section 11-A of the ID Act only if the gravity of misconduct is such as to disturb the conscience of the Court or if there are mitigating circumstances that require the reduction of the sentence. In the absence of such factors, the Labour Court cannot exercise power under Section 11-A of the ID Act on the basis of sympathy.

8. In addition, the learned counsel for the Petitioner circulated the following judgments with regard to the issues that are specified briefly below:

(i) **The Workmen of Firestone Tyre and Rubber Co. Of India vs. The Management, AIR 1973 SC 1227:** paragraph 40 regarding scope of proceedings under Section 11 A before the Tribunal;

(ii) **Mysore Lamp Works vs. State, MANU/KA/0350/1984:** paragraph 12 wherein various Supreme Court decisions on the scope of enquiry under Section 33 of the ID Act are discussed;

(iii) **The Lord Krishna Textile Mills vs. Its Workmen, AIR 1961 SC 860:** paragraphs 16 and 17 regarding the limited scope of enquiry under Section 33(2)(b) of the ID Act and, in particular, that adequacy of evidence is irrelevant for purposes of Section 33(2)(b) unless the finding is perverse because it is not supported by any legal evidence;

(iv) **Mithilesh Singh vs. Union of India, (2003) 3 SCC 309:** paragraph 8, where mere

application for leave was held to be insufficient in the context of the statutory rules of the Railway Protection Force;

(v) **Delhi Transport Corporation vs. Sardar Singh, (2004) 7 SCC 574**: paragraphs 7, 9, 10 and 11, wherein it was held that leave should be sanctioned in advance and that otherwise, leave is unauthorised notwithstanding an application for leave;

(vi) **North-Eastern Karnataka Road Transport Corporation vs. Ashappa, (2006) 5 SCC 137**: at paragraphs 8 and 9, where remaining absent for a long time was held to be a serious misconduct;

(vii) **M. Annadurai vs. The Chairman, Chennai Port Trust, 2017 SCC Online Mad 11869**: at paragraph 5, wherein the Court refused to interfere with the dismissal of an employee for long unauthorised absence.

9. In response, the learned counsel for the Second Respondent referred to the judgment of the Hon'ble Supreme Court in **LALLA RAM**

Vs. DCM CHEMICAL WORKS LTD reported in (1978) 3 SCC 1 (the Lalla Ram Case), wherein, at paragraph 12, the Hon'ble Supreme Court specified the relevant considerations while deciding an application for approval under Section 33 (2) (b) of the ID Act. He further submitted that there is no misconduct when the employee submits a leave letter in connection with his absence. In this connection, he referred to the finding of the Enquiry Officer that the postal certificate evidences that the Second Respondent herein had submitted a leave letter and the finding of the First Respondent that this vital document was not considered. Accordingly, he submitted that the finding of the First Respondent is not liable to be interfered with by this Court.

10. With regard to disproportionate punishment, the learned counsel submitted that the scope of enquiry was limited to the absence of the Second Respondent between 28.07.2001 and 14.08.2001 and did not extend to the alleged past misconduct. Therefore, he submitted that the alleged past misconduct was not tested before the Enquiry Officer. In order to substantiate his submissions, in this regard, he referred to the judgment of the Hon'ble Supreme Court in **COLOUR CHEM LTD. vs. ALASPURKAR A.L. AND**

OTHERS, in Civil Appeal No.510 of 1992, wherein, at paragraph 14, it was held that even if the charge of major misconduct is found proved, if the punishment of dismissal or discharge, as imposed, is found to be grossly disproportionate to the nature of misconduct or the past record of the employee concerned that no reasonable employer would ever impose such punishment, it could be treated as legal victimisation. He also referred to the judgment of the Bombay High Court in **RAJENDRA B. Oza Vs. AIR INDIA, BOMBAY, 2003 (1) L.L.N. 705**, wherein, at paragraph 7, it was held that the dismissal of the Petitioner for his absence for 38 days was shockingly disproportionate, severe and harsh and cannot be approved by the Tribunal while deciding an approval application under Section 33(2)(b) of the I.D Act. With regard to the judgment of the Hon'ble Supreme Court, which is reported in (2005) 3 SCC 134(cited supra) and was relied upon by the learned counsel for the Petitioner, he submitted that the said decision was rendered under Section 11-A of the ID Act and, therefore, cannot be relied upon to test a proceeding under Section 33(2)(b) of the ID Act. He also circulated a judgment of the Hon'ble Supreme Court in **ATLAS CYCLE (HARYANA) LIMITED Vs. KITAB SINGH, (2013) 12 SCC 573** (the Atlas Cycle Case), wherein the scope of interference, under Article 226, with orders of a Labour

Court was discussed.

11.The affidavit, documents on record and oral submissions of the Petitioner and the Second Respondent were considered carefully.

12.The scope of enquiry in proceedings under Section 33(2)(b) of the ID Act is abundantly clear from the judgment of the Hon'ble Supreme Court in the **LALLA RAM** case. It is further clear from the said case that the conditions specified in paragraph 12 thereof are cumulative and, therefore, all the conditions would have to be satisfied for an applicant to obtain approval under the said provision. In the instant case, the principles of natural justice were complied with because the Petitioner received the notice for enquiry and participated in the enquiry. In addition, the Petitioner received a show cause notice after conclusion of the enquiry. More importantly, the Impugned Order also records that the enquiry was conducted in accordance with the principles of natural justice.

13.This leads to the question as to whether there is a prima facie case for dismissal based on the legal evidence that was produced in the Enquiry Proceedings. The learned counsel for the Petitioner contended that the finding that the certificate from the Postal

Department was not considered by the Enquiry Officer is patently erroneous. On examining the Enquiry Report and the Impugned Order, it is clear that the Enquiry Officer held that the evidence of the Second Respondent herein that a leave letter was sent by him should be accepted on the basis of the postal receipt evidencing despatch under certificate of posting. Nevertheless, the Enquiry Officer refused to treat the absence of the Second Respondent as justifiable on the basis that the medical certificate dated 28.07.2001 was not appended to the leave letter of even date and arrangements were not made to submit the medical certificate to the Branch Manager after obtaining the same. Therefore, as held in the **LORD KRISHNA TEXTILE Case** (cited supra), the question arises as to whether the said finding of the Enquiry Officer is based on no legal evidence or such that no reasonable person could have arrived at this finding. In the instant case, the First Respondent did not record a finding with regard to the failure to enclose the medical certificate with the leave letter or even discuss this aspect although there is a reference to the medical certificate being given on 14.8.2001 while discussing whether a proper enquiry was conducted. Instead, the First Respondent held that the Enquiry Officer gave a finding without examining a vital document filed by the Opposite Party therein, namely, the postal receipt. Therefore,

there is a patent error on the face of the record in this regard.

14. This leads to the next question, namely, as to whether the punishment is disproportionate and whether, consequently, it may be concluded that the dismissal amounts to an unfair labour practice and victimisation. The corollary to this question would be what is the test to decide whether the punishment is disproportionate and amounts to an unfair labour practice leading to the inference of victimisation. Given that the First Respondent is not sitting in appeal, the test would be whether the action of the management, in the facts and circumstances, is within the spectrum of reasonable responses. If so, the punishment would not be construed as so disproportionate as to invite a finding of unfair labour practice and the consequential inference of victimisation. If not, the aforesaid conclusions and inferences may be drawn. When applied to the facts of the instant case, if the absence of the Second Respondent between 28.07.2001 and 17.08.2001 is viewed on a stand-alone basis, it could be said that it is outside the spectrum of reasonable responses and such a conclusion would not be unreasonable or perverse. Thus, if viewed on a stand-alone basis, the judgment of the Hon'ble Supreme Court in the **COLOUR CHEM** Case and that of the Bombay High Court would be applicable. On the other hand, if past misconduct is reckoned, the

punishment would be within the spectrum of reasonable responses. In this regard, the judgment of the Supreme Court in the **MAHINDRA AND MAHINDRA CASE**, which is reported in **(2005) 3 SCC 134** and cited supra, is relevant and states that past conduct is relevant to decide whether the punishment is disproportionate or not. In this regard, the submission of the learned counsel for the Petitioner is that past misconduct is relevant and, in the instant case, the Second Respondent was provided an opportunity to respond to the allegations of past misconduct. In particular, instances of past misconduct were specified in the second show cause notice that was issued after the conclusion of the enquiry and the Second Respondent was provided an opportunity to respond thereto. It is evident from the list of exhibits set out in the Impugned Order that the Show Cause Notice dated 15.01.2002 was not filed before the First Respondent but the Dismissal Order dated 04.02.2003 was filed. In these facts and circumstances, the First Respondent did not consider or discuss past misconduct in arriving at a conclusion in this regard. In view of the fact that the Order of Dismissal dated 04.02.2003 was filed as a document before the First Respondent and marked as Ex.A-1, past misconduct should have been adverted to or discussed. In addition, the written arguments of the Petitioner herein before the First Respondent refer to

the past misconduct and, in particular, to the fact that the Second Respondent/workman was punished 4 times for absence from duty and 16 times for shortage of cash but the Impugned Order contains no discussion on this issue. Therefore, the finding that the punishment is disproportionate and that it, consequently, amounts to an unfair labour practice and victimisation, without duly considering all relevant facts, in this regard, is patently erroneous.

15. The last issue to be considered is whether the Petitioner herein approached the First Respondent within a reasonable time so as to conclude that it is part of the same transaction as the dismissal of the Second Respondent. In this case, the Enquiry Officer submitted the report on 28.12.2001, the Order of Dismissal was issued on 04.02.2003 and the Application for Approval was filed on 13.02.2003. If computed from the date of dismissal, the finding of the First Respondent that the application was not part of the same transaction appears to be erroneous on the face of the record.

16. Thus, all the conditions for approval are satisfied as per the judgment in the **LALLA RAM** case. Moreover, the Impugned Order is liable to be interfered with under Article 226 as per principles laid down in the **ATLAS CYCLE case** (cited supra) and other cases in this

regard. Therefore, the Writ Petition is liable to be allowed.

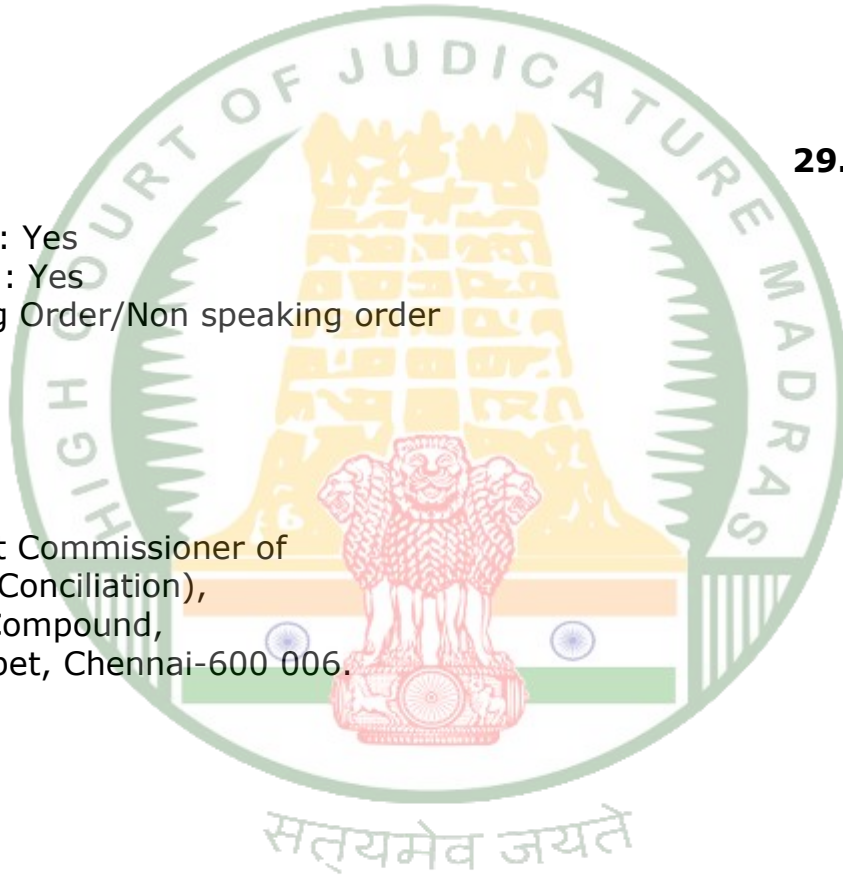
17. In the result, the Writ Petition is allowed by quashing the Order dated 01.08.2005 in Approval Petition No.386 of 2003 but there shall be no order as to costs. Consequently, connected WMPs are closed.

29.04.2019

Index : Yes
Internet : Yes
Speaking Order/Non speaking order
rrg

To

The Joint Commissioner of
Labour (Conciliation),
D.M.S. Compound,
Teynampet, Chennai-600 006.



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SENTHILKUMAR RAMAMOORTHY, J.,
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