

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.Nos.5698 and 11103 of 2013

and

M.P.No.1 of 2013

in

WP.NO. 5698 OF 2013

W.P.No.5698 of 2013

The Managing Director,
The Pondicherry Co-operative Wholesale
Stores Ltd., No.P.44,
288, Mahatma Gandhi Road,
Puducherry-605 001.

... Petitioner

-vs-

1.The Presiding Officer,
Labour Court,
Pondicherry.

2.D.Sakthivel

... Respondents

PRAYER: Petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the 1st Respondent in I.D.No.35 of 2010 dated 22.10.2012 and to quash the same and direct the petitioner herein to proceed in accordance with law.

For Petitioner : Mr.Sreedhar
For R1 : Court
For R2 : Mr.S.Venkataraman

W.P.No.11103 of 2013

D.Sakthivel

... Petitioner

-vs-

1.The Managing Director,
The Pondicherry Coop Wholesale Stores Ltd.,
288, Mahatma Gandhi Road,
Puducherry-1.

2.The Presiding Officer,
Labour Court,
Puducherry.

... Respondents

PRAYER: Petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the award dated 22.10.2012 of the 2nd Respondent made in I.D.No.35 of 2010 as published in the Gazette of Puducherry dated 26.02.2013, quash the same insofar as it has denied the backwages to the petitioner and consequently direct the 1st respondent to pay the full back wages for the period of forced unemployment from 22.03.2004 till the date of award.

For Petitioner : Mr.S.Venkataraman

For R1 : Mr.Sreedhar

For R2 : Court

O R D E R

These Writ Petitions have been filed both by the Workman and the Management, challenging the Award dated 22.10.2012 made in I.D.No.35 of 2010.

2. For the sake of brevity, the parties would be referred to by their original nomenclature in the Award dated 22.10.2012 as 'the Workman' (in W.P.No.11103 of 2013) and 'the Management' (in W.P.No.5698 of 2013) and the facts are also being taken from the said Award.

3. The case of the Workman is that he joined the Management as Daily Rated Salesman on 09.09.1974 and was appointed on regular basis as Salesman Grade III on 21.01.1977 and thereafter, promoted to various cadres. The further case of the Workman is that he had rendered 25 years of unblemished service and unfortunately, he was placed under suspension and was issued a charge sheet for two allegations, namely, 1) he had signed an invoice for purchase of certain commodities and obtained commission from the grocery dealer without knowledge of the manager and 2) there was a stock deficit on various occasions. Yet another charge deals with his misconducts for the period between 1974 and 1998 and the Management has averred that the Workman caused loss to the assets of the stores and failed to maintain integrity and devotion to duty, thereby, committed a serious misconduct and therefore, as per the Regulations

governing the service condition of the Workman, he was placed under suspension on 22.03.2004 and the charge sheet was issued on 01.07.2004.

4. It is the submission of the Workman that the principles of natural justice have not been followed while conducting the enquiry and he was removed from service with effect from 28.05.2005. Aggrieved by the same, an Industrial Dispute was raised and the Tribunal has passed an Award, granting reinstatement without backwages, but with continuity of service and other benefits.

5. According to the Management, the Workman had invoiced for purchase of Cycle Brand Toot Dhal in favour of Rishab Traders, which was not at all dealing with the said product and collected Rs.10/- per bag as brokerage for the same. The 2nd charge was that similarly, he had invoiced for the purchase of Gram Dhal at the rate of Rs.2,390/- per bag from the very same Rishab Traders on 14.10.2003 and had again collected Rs.10/- per bag as brokerage. The next charge was that there was a stock deficiency by way of temporary misappropriation of stock of Pondicherry Co-operative Wholesale Stores Ltd., while working in various branches and the last charge was that he had also committed various misconducts, while working in various sections / branches of involved in Pondicherry Co-operative Wholesale Stores Ltd.

6. The Management has contended that though the Workman has denied the Charges 1 and 2, he had admitted the Charge No.4 and he had neither admitted nor denied the charges under Article 3. The Management had sent a copy of the enquiry report to the Workman with a direction to submit his explanation with regard to the proposal of removal from service and the Management, not satisfied with the explanation dated 19.05.2005, given by the Workman to the enquiry report, imposed the punishment of removal from service with effect from 28.05.2005. According to the Management, the Workman was examined as P.W.1 and Ex.Ps.1 to 10 were marked and on the side of the Management, R.W.1 was examined and Ex.Rs.1 to 5 were marked. The Labour Court, after analysing both the oral and documentary evidences, came to the conclusion that the Workman has not committed any misconduct and charges have been foisted on him and thereby awarded reinstatement without backwages, but with continuity of service.

7. It was the contention of the Management that when the charges are established before the Enquiry Officer, the Labour Court ought not have been interfered with the punishment. It was argued on behalf of the Workman that the Labour Court ought to have granted the relief of backwages, when charges are not established.

8. Heard the learned counsel on either side and perused the material documents available on record.

9. The Workman had joined the services of the Management as Daily Rated Salesman on 09.09.1974 and was brought into regular scale of pay on 21.01.1977. Consequent to several misconducts committed by the Workman, he was placed under suspension, followed by a charge sheet, which had resulted in his dismissal from service.

10. The issue before this Court is as to whether the charges are established or not and whether this Court can reappraise the evidence and come to a different conclusion. Even though the Management had marked a letter in Ex.R5 received from Rishab Traders, wherein it has been stated that the Workman had collected Rs.10/- as brokerage for purchase of Gram Dhal and Toor Dhal on 14.10.2003 and 18.10.2003, the Labour Court came to the conclusion that the signatory of Ex.R5 has not been examined in the domestic enquiry. The contention of the Workman that the said signatory was also not examined before the Labour Court and therefore, the entire charges are to be disbelieved, cannot be accepted, as the Hon'ble Supreme Court in the case of J.D.Jain vs. The Management of State Bank of India, reported in 1982 AIR 673, has held that hearsay evidence is an admissible evidence in the departmental enquiry being conducted against an employee. For better appreciation, the decision of the Hon'ble Supreme Court in the said case (supra) is extracted hereunder:

"In the instant case, the Tribunal after having made a detailed reference to the evidence of the witnesses found that a complaint was made by Kansal and that the appellant confessed that he had altered the debit authority, but held That as Kansal was not examined, this was not direct evidence but was of the nature of 'hearsay' evidence, with regard to the fact whether the appellant manipulated the documents, withdrew the excess amount and misappropriated it, there is no direct evidence of any of the witnesses except the appellant's confession. The evidence on which reliance has been taken by the respondent is the confession and circumstantial evidence. The evidence of Kansal would have been primary and material. if the fact in issue were whether Kansal authorised the appellant to make the alterations in the authority letter. But Kansal's complaint was to the contrary. No rule of law enjoins that a complaint has to be in writing as insisted by the Tribunal. For the purpose of a departmental enquiry, complaint substantiated by circumstantial

evidence is enough. What the respondent sought to establish in the domestic enquiry was that Kansal had made a verbal complaint with regard to the withdrawal of excess money by the appellant. On the factum of complaint of Kansal the evidence of these four witnesses is direct as the complaint is said to have been made by Kansal in their presence and hearing. It is not therefore 'hearsay'. The respondent has succeeded in proving that a complaint was made by Kansal on the evidence of these four witnesses."

11. Further, as per Ex.P9, the Management had appointed a Committee and the Convenor for obtaining quotations from the reputed wholesale dealers and to make arrangements for purchase of packing material required for groceries items by following routing methods and therefore, the Workman had no role in it to take a decision with respect to purchase of dhall. Based on Ex.P9, the Labour Court came to the conclusion that the Workman is in no way connected with the purchase of commodity and held that the Charge No.1 is not proved. With regard to the charge of temporary misappropriation, there is a possibility of tearing of bags and sometimes the rats in the shop may bite the gunny bags and also item in the gunny bags and there is also a possibility of pilferage, drayage, shrinkage and handling loss of commodities in the transaction. A circular was also issued to the effect that the maximum percentage of loss that can be allowed is 0.5% and therefore, the Labour Court came to the conclusion that there may be a loss of stock on account of the reasons mentioned supra.

12. The Labour Court has further stated that the Management has not framed any charge in respect of loss of stock against any Salesman, as there were several other persons employed therein. However, the Labour Court has duly noted down the fact that the Workman had remitted the amount for the deficiency in stock from 1979 onwards and subsequently, held that it was not clear as to whether the branch or section was fully under the control of the Workman and whether the stocks were under joint liabilities or single liability is also not specific. It is pertinent to state here that there is a common factor with regard to handling, lifting, loading and unloading of stocks and there may occur wastage and dryage. Based on this, the Labour Court has rendered a finding that merely because the Workman had remitted the amount, it does not mean that there is a misappropriation of amount, committed by the Workman as alleged by the Management.

13. It was further observed by the Labour Court that though there was a Business Manager, who had signed the purchase order, surprisingly he was neither included as a witness in the charge

sheet nor examined in the enquiry proceedings. However, as stated supra, hearsay evidence is an admissible evidence in the departmental enquiry and therefore, the finding rendered to that effect is not acceptable. The contention of the Management that it is the duty cast upon the Workman to rebut the evidence, cannot be accepted, as the burden is on the employer to establish not only the charges, but also the factum of gainful employment.

14. A reading of the charges levelled against the Workman reveals that the Management, having slept over for decades, awakened from slumber and issued charges against the Workman. In this regard, the observation made by the Labour Court that one person needs to be a scapegoat and that the Workman has been identified as that person for the purpose of victimization, cannot be lost sight of. When the Labour Court has clearly held that the charges are not established in the domestic enquiry and that the Workman was not at all guilty, this Court is of the view that this Court cannot re-appreciate the evidence and come to a different conclusion. More so, even a wrong finding of fact cannot be interfered with in terms of the judgment of the Hon'ble Kerala High Court in the case of Instrumentation Employees' Union vs. Labour Court, Kozhikode, reported in 1993 (I) LLN 75, following the judgment of the Hon'ble Supreme Court in the case of Syed Yakooob vs. K.S.Radhakrishnan (AIR 1964 SC 477), wherein it has been held as under:

"16. As pointed out by the Supreme Court in Syed Yakooob vs. K.S.Radhakrishnan [AIR 1964 SC 477], the jurisdiction of the High Court to issue writ of certiorari or direction under Article 226 or Article 227 of the Constitution of India is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. Findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal has erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which had influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari under Article 226 or Article 227 of the Constitution of India...."

15. It is no doubt true that the Labour Court has ample power to deprive the backwages, if it is established that the employee is gainfully employed or for any other reason to justify its stand. However, in the present case on hand, no reason has been given by the Labour Court in the Award to come to such a finding. Therefore, by applying the principles laid down by the Hon'ble Supreme Court in *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others*, reported in (2013) 10 SCC 324, this Court is of the view that the Labour Court, having found that the charges are not established, ought to have granted reinstatement with full backwages and to that extent, the Award of the Labour Court is perverse and therefore, the Writ Petition filed by the Workman needs to be allowed.

16. Accordingly, the Writ Petition filed by the Workman in W.P.No.11103 of 2013 is allowed and the other Writ Petition in W.P.No.5698 of 2013 filed by the Management is dismissed.

17. In view of the fact that the Writ Petition filed by the Management is dismissed and the Workman's Writ Petition is allowed and that the Workman had already attained superannuation on 30.04.2016, the Award of the Labour Court is modified as one of reinstatement with backwages, continuity of service and all other consequential benefits. During the pendency of the Writ Petition filed by the Management, the Workman has availed the benefit of wages in terms of Section 17B of the Industrial Disputes Act, 1947 and while granting backwages, if any amount is paid to the Workman by the Management under Section 17B of the Act, pursuant to the interim orders of this Court dated 28.03.2014, the same shall have to be adjusted and given credit to and the balance amount needs to be paid to the Workman.

18. It is made clear that since this order replaces / modifies the Award of the Labour Court, the Management is expected to implement the Award within a period of 45 days from the date of receipt of a copy of this order in the light of the decision of the Hon'ble Apex Court in the case of *Tamil Nadu State Transport Corporation vs. Neethivilangan, Kumbakonam*, reported in (2001) 9 SCC 99. It goes without saying that if any complaint is made by the Workman under Section 29 of the Industrial Disputes Act, 1947, the persons who are falling under Section 32 of the Industrial Disputes Act, 1947, need to be prosecuted and the Government shall sanction prosecution taking note of the decision of Apex Court in the case of *Rajkumar Gupta vs. Lt. Governor, Delhi* reported in 1997 (1) LLJ 994. Once the prosecution is launched, the appropriate criminal court is expected to take up the matter and it shall proceed with the matter on a day-to-day basis without adjourning the matter beyond fifteen working days at any point of time so as to bring

the issue to a logical end. It is further made clear that if the admitted amount is not paid, it is open to the Workman to seek remedy under Section 33C(1) of the Industrial Disputes Act, 1947 in view of the decision of the Apex Court in the case of Fabril Gasosa vs. Labour Commissioner, reported in (1997) 3 SCC 150 and in case of disputed amount, the computation lies only by invoking Section 33C(2) of the Industrial Disputes Act, 1947. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Presiding Officer,
Labour Court,
Puducherry.
2. The Managing Director,
The Pondicherry Co Op Wholesale Stores Ltd,
288, Mahatma Gandhi Road,
Puducherry -1.

+2cc to Mr.R.Sreedhar, Advocate, S.R.No. 67305, 67306
+1cc to Mr.S.Venkataraman, Advocate, S.R.No. 67323

W.P.Nos.5698 and 11103 of 2013

RSY(CO)
GN(27/08/2019)