

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2020

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 12964 of 2020

The Managing Director
M/s. S&S Power Switchgear Equipment Limited
No.4, EVR Street
Sedarapet
Puducherry - 605 111. Petitioner

-vs-

E.Poongavanam Respondent

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records connected with I.D. No. 15 of 2016 on the file of the Presiding Officer Industrial Tribunal cum Labour Court, Pondicherry and to quash award dated 12.02.2020 made therein.

For Petitioner : Mr. M.R.Dharanichander

O R D E R

(through video conference)

Heard Mr. M.R.Dharanichander, Learned Counsel for the Petitioner and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner had terminated the Respondent from its services by order dated 18.04.2015 on the charge that he had used abusive language against a co-employee. As the conciliation proceedings failed, the Government of Puducherry by G.O. Rt. No. 52/AIL/LAB/T/2016 dated 06.06.2016 referred the matter for adjudication before the Industrial Tribunal cum Labour Court, Pondicherry (hereinafter referred to as the 'Industrial Tribunal' for short). The Industrial Tribunal in its order dated 12.02.2020 in I.D. (L) No. 15 of 2016 came to the conclusion that there was no violation of the principles of natural justice during the enquiry proceedings conducted before the Petitioner, but was of the view that the punishment of dismissal for the

misconduct was disproportionate and excessive. The Industrial Tribunal relying on the decisions of the Hon'ble Supreme Court of India in Ram Kant Misra -vs- State of U.P. [(1982) 3 SCC 346] and Ved Prakash Gupta -vs- Delton Cable India (P) Ltd [(1984) 2 SCC 569] set aside the order of dismissal dated 18.04.2015 and the Respondent was directed to be reinstated into service with effect from 18.04.2015 with full back wages and all other monetary benefits with a cut in the increment in the wages for a period of two years with cumulative effect. That order of the Industrial Tribunal is assailed in the Writ Petition.

3. Learned Counsel for the Petitioner citing the decisions of the Hon'ble Supreme Court of India in Christian Medical College Hospital Employees' Union -vs- Christian Medical College Vellore Association [(1987) 4 SCC 691], New Shorrock Mills Ltd. -vs- Maheshbhai T. Rao [(1996) 6 SCC 590], Ashok Leyland Ltd. -vs- Presiding Officer, Labour Court Coimbatore [(1999) 1 LLJ 788], Mahindra and Mahindra Ltd. -vs- N.B.Narawade [(2005) 3 SCC 134] and M.P. Electricity Board -vs- Jagdish Chandra Sharma [(2005) 3 SCC 401], contends that when the charge of use of abusive language has been proved, the dismissal from service is a commensurate punishment and as such, the interference by the Industrial Tribunal on the punishment is not warranted.

4. As already noticed, the Industrial Tribunal has relied on certain other decisions of the Hon'ble Supreme Court of India for arriving at the conclusion that the punishment of dismissal from service for misconduct of use of filthy language is disproportionate. Though it is true that the Hon'ble Supreme Court of India has in some other cases approved the order of the employer dismissing a workman for the misconduct for use of abusive language, it must be recalled here that the Constitution Bench of the Hon'ble Supreme Court of India Padma Sundara Rao -vs- State of Tamil Nadu [(2002) 3 SCC 533] has aptly explained this perspective of the matter, as follows:-

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington -vs- British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board -vs- Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

That apart, the legal position on the scope of interference on

punishment has been summed up by the Hon'ble Supreme Court of India in Mahindra and Mahindra Ltd. -vs- N.B.Narawade [(2005) 3 SCC 134] as follows:-

"It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment."

The Industrial Tribunal in this case has specifically taken note of the fact that there was no past record of misconduct against the Petitioner, which is certainly a relevant circumstance that deserves acceptance, while granting relief on finding the punishment imposed to be disproportionate to the gravity of misconduct. This view is also fortified by the decision of the Hon'ble Supreme Court of India in Collector Singh -vs- L.M.L. Limited [(2015) 2 SCC 410], where it has been opined as follows:-

"10. Insofar as the next limb of contention at the hands of the learned counsel for the respondent as to the quantum of punishment is concerned, it is not necessary for us to refer to the plethora of judgments relied upon by the respondent. In those decisions, the termination of services was held to be justified on the basis of abusive and filthy language in the light of the facts and circumstances of those cases. It is well settled that the court or the tribunal will not normally interfere with the discretion of the disciplinary authority in imposing of penalty and substitute its own conclusion or penalty. But the punishment should be commensurate with the proved misconduct. However, if the penalty imposed is disproportionate with the misconduct committed and proved, then the Court would appropriately mould the relief either by directing the disciplinary/appropriate authority to reconsider the penalty imposed or to shorten the litigation, it may in exceptional cases

even impose appropriate punishment with cogent reasons in support thereof. This principle was reiterated in various decisions of this Court in Dev Singh -vs- Punjab Tourism Development Corpn. Ltd. [(2003) 8 SCC 9], Om Kumar -vs- Union of India [(2001) 2 SCC 386], Union of India -vs- G. Ganayutham [(1997) 7 SCC 463] and Sardar Singh -vs- Union of India [(1991) 3 SCC 213].

11. Considering the scope of judicial review on the quantum of punishment and referring to various cases in Jai Bhagwan -vs- Commissioner of Police [(2013) 11 SCC 187], in which one of us (T.S. Thakur, J.) was a member, this Court held as under: (SCC pp. 190-91, para 10)

"10. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rests in the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment as much as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the gravity of the misconduct that the Court considers it to be arbitrary in that it is wholly unreasonable. The superior courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. A punishment that is so excessive or disproportionate to the offence as to shock the conscience of the Court is seen as unacceptable even when courts are slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court."

12. Coming to the case at hand, we are of the view that the punishment of dismissal from service for the misconduct proved against the appellant is disproportionate to the charges. In Ram Kishan -vs- Union of India [(1995) 6 SCC 157], the delinquent employee was dismissed from service for using abusive language against the superior officer. On the facts and circumstances of the case, this Court held that the

punishment was harsh and disproportionate to the gravity of the charge imputed to the delinquent and modified the penalty to stoppage of two increments with cumulative effect. The Court held as under: (SCC p. 161, paras 11-12)

"11. It is next to be seen whether imposition of the punishment of dismissal from service is proportionate to the gravity of the imputation. When abusive language is used by anybody against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of abusive language. No straitjacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts. What was the nature of the abusive language used by the appellant was not stated.

12. On the facts and circumstances of the case, we are of the considered view that the imposition of punishment of dismissal from service is harsh and disproportionate to the gravity of charge imputed to the delinquent constable. Accordingly, we set aside the dismissal order."

Reference may also be made to the decisions of this Court in *Rama Kant Misra -vs- State of U.P.* [(1982) 3 SCC 346] and *Ved Prakash Gupta -vs- Delton Cable India (P) Ltd.* [(1984) 2 SCC 569].

13. The High Court has relied on the judgment in *Mahindra and Mahindra Ltd. -vs- N.B. Narawade* [(2005) 3 SCC 134], wherein it was held that the penalty of dismissal on the alleged use of filthy language is not disproportionate to the charge as it disturbs the discipline in the factory. We are of the view that in the facts and circumstances of the present case, the above decision may not be applicable. Considering the totality of the circumstances, in our view, the punishment of dismissal from service is harsh and disproportionate and the same has to be set aside."

5. It is attempted to persuade this Court that there have been earlier instances of misconduct committed by the Respondent, which disentitles him to any benefit of reduction in punishment and the documents in that regard have been now produced in the typed-set filed along with the Writ Petition. However, a persual of the impugned order clearly shows that those documents had not been marked as exhibits in the proceedings before the Industrial Tribunal and the affidavit

filed in support of the Writ Petition is conspicuously bereft of any details in that regard. There is also no plea regarding past conduct of the Respondent in the Counter Statement filed by the Petitioner before the Labour Court. It would be relevant here to quote from the ruling of the Hon'ble Supreme Court of India in General Manager, Electrical Rengali Hydro Electric Project, Orissa -vs- Giridhari Sahu [(2019) 10 SCC 695], dealing with the rule of pleadings and evidence in proceedings under the Industrial Disputes Act, 1947, as extracted below:-

"45. An application under Section 33-A of the Act is not a civil suit. The provisions of Order 6 Rule 4 CPC, as such, are not applicable to proceedings under the Act. Does it mean that the law as to pleadings is not to apply at all to proceedings under the Act or will it be more correct to say that the law as to pleadings will apply but without its full vigour. We would think the latter would be the correct position in law. While the provisions of the CPC may not apply the salutary principles embodied would apply. This is for the reason that the purpose of pleading, be it in a civil suit or other proceeding, is to allow the opposite party to meet the case of his opponent to ready the evidence to be adduced and marshal the law in support of its case."

As such, it would not be appropriate for this Court to entertain materials which had not been placed in the impugned proceedings before the Industrial Tribunal in the exercise of discretionary powers of judicial review under Article 226 of the Constitution of India.

6. The next contention raised by the Learned Counsel for the Petitioner is that when the charges have been proved and the Industrial Tribunal has substituted the penalty inflicted by the employer, discretion ought to have been exercised to deny backwages to the Respondent. It would suffice here to refer to the governing position of law in this regard enunciated by the Hon'ble Supreme Court of India in Deepali Gundu Surwase -vs- Kranti Junior Adhyapak Mahavidyalaya [(2013) 10 SCC 324] as follows:-

"38. The propositions which can be culled out from the aforementioned judgments are:

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make

a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4 The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5 The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the

employee/workman his dues in the form of full back wages.

38.6 In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. -vs- Employees [(1979) 2 SCC 80].

38.7 The observation made in J.K. Synthetics Ltd. -vs- K.P.Agrawal [(2007) 2 SCC 433] that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches [Hindustan Tin Works (P) Ltd. -vs- Employees, [(1979) 2 SCC 80] , [Surendra Kumar Verma -vs- Central Govt. Industrial Tribunal-cum-Labour Court, [(1980) 4 SCC 443] referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

Having regard to the aforesaid parameters laid down, it requires to be noticed here that Respondent had expressly stated in the Claim Statement filed before the Industrial Tribunal that after his illegal termination, he has not been gainfully employed anywhere in any establishment and his last drawn wage was Rs.19,204/- per month, but the said statement has neither been disputed in the Counter filed by the Petitioner nor it is the case of the Petitioner that any rebuttal evidence had been adduced before the Industrial Tribunal on that aspect of the matter, which has not been taken into account. In that view of the matter, the Industrial Tribunal cannot be faulted in having awarded full backwages for the period that the Petitioner had wrongfully deprived employment to the Respondent.

In the result, the Writ Petition, which lacks merits, cannot be admitted and stands dismissed.

Sd/-
Assistant Registrar(CS III)

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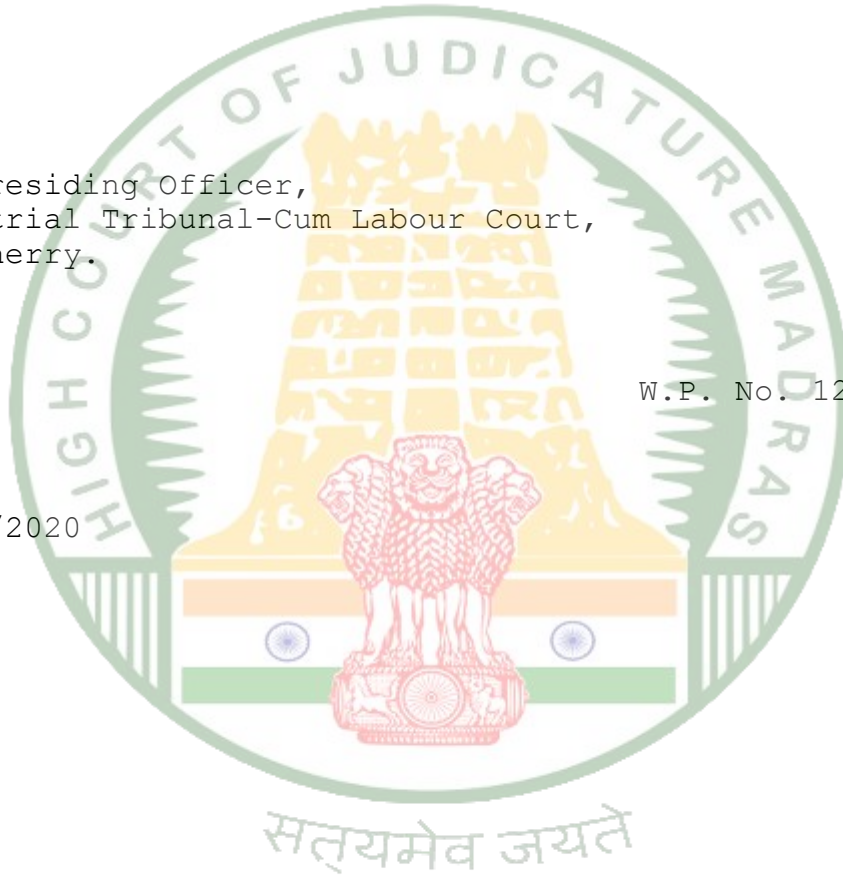
Sub Assistant Registrar

To

The Presiding Officer,
Industrial Tribunal-Cum Labour Court,
Puducherry.

W.P. No. 12964 of 2020

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