

Item No.1.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 23.02.2022 and 06.04.2022.

DELIVERED ON:06.04.2022

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

MAT 1213 of 2019

**Avijit Das.
VERSUS**

West Bengal Surface Transport Corporation Limited & Ors.

Appearance:-

Mr. Pappu Adhikari

.....for the appellant.

**Mr. Narayan Ch. Bhattacharya,
Mr. Subrata Das Gupta**

.. for the respondents/State.

**Mr. Manoj Malhotra,
Mr. Ravi Kumar Dubey**

... for the respondent nos.1 and 2.

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

1. This intra-Court appeal is directed against an order dated 5th July, 2019 in W.P. 938(W) of 2011 filed by the respondent,

viz., the West Bengal Surface Transport Corporation Limited (hereinafter referred to as "the employer"). The facts leading to the filing of the writ petition could be summarised as follows:-

2. The appellant/workman was a permanent employee of the respondent working as a driver initially joined as a trainee driver on 26th April, 1996 and was confirmed in service with effect from 26th April, 1998. The workman would contend that on 16th May, 2002, he was allotted duty for driving a bus bearing registration no. WB-04/WB-19 2120 by the duty in-charge at Purbasha bus depot with an instruction to report at Esplanade gate for route allotment and reach there at 9.05 hours. The workman was allotted duty on the route Esplande - Ramganga service at 10.30 hours. The workman would state that for 14 hours 45 minutes at a stretch on the first day i.e. 16th May, 2002 and 3 and ½ duty on the next morning for two days, the workman is stated to have requested to allow him 16 hours duty for two days as he is to take care of his ailing wife. The workman alleged that all of a sudden, the JTO came to the spot and took out the job card and asked the workman to leave the place. The workman alleged that on 17th May, 2002, he was not

allowed to join duty and on 18th May, 2002 he was not allowed to sign the attendance register and no written order or notice was issued and it were all verbal instructions from the Traffic Manager (Acting).

3. The workman lodged a complaint before the local Police Station on 21st May, 2002 alleging non-allotment of duty. Thereafter, he has submitted written representations to the Depot Manager on various dates. The workman also addressed the Managing Director requesting for allotting duty to him and also payment of back wages. At that juncture, the respondent / Management had served show cause notice dated 28th May, 2002 for which the workman had submitted reply on 10th June, 2002.

4. Since the representations did not yield any result, the workman approached the Assistant Labour Commissioner, Kolkata requesting for initiating conciliation proceedings, which was started pursuant to proceedings dated 23rd September, 2002. The respondent / management issued charge memo dated 17th October, 2002 along with an order of suspension with retrospective effect from 18th May, 2002. The workman would state that such retrospective suspension is bad in law and the charge memo

issued after five months of alleged occurrence is not sustainable. The workman submitted his reply dated 28th October, 2002.

5. Parallely, the conciliation proceedings were continued. However, no settlement could be arrived at and the Conciliation Officer issued a certificate under Section 10(1)(B) of the Act on 8th July, 2002. The workman alleged that he has been illegally terminated from service and refusal to provide employment to him with effect from 18th May, 2002 is in violation of all statutory principles and also in violation of the principles of natural justice. Accordingly, a dispute was raised and the matter travelled to the Labour Court, viz. Second Labour court, West Bengal, Kolkata.

6. Written statement was filed in July, 2003 by the workman for which the management also filed their reply / written statement to the allegations made by the workman. The Labour Court adjudicated the matter and passed the award dated 11th May, 2010. The Labour Court framed two questions for consideration - firstly, as to whether the dispute as raised by the workman was

maintainable and secondly, as to whether the service of workman was illegally terminated.

7. With regard to the issue nos.1 and 2, the Labour Court held that the proceedings were maintainable before it and also held that the workman was illegally terminated by way of refusal of employment. With regard to the entitlement of back wages, the Labour Court held that the workman should be reinstated in service with full back wages after 9th June, 2002 until reinstatement and did not grant back wages for the period from 17th May, 2002 to 19th June, 2002 as already the workman has moved the authority under the Payment of Wages Act. Taking note of the fact that during the period of suspension, the workman was paid subsistence allowance, the management was granted liberty to adjust the amount so paid from the salary payable.

8. The management challenged the award by filing the writ petition on the ground that there was no refusal of employment nor there was termination of service of the workman and the workman was placed under suspension and he was paid subsistence allowance and despite the same, the Labour Court erroneously held that there was termination of service. The workman

contended that in terms of the provisions contained under Section 33(1)(b) of the Act, once conciliation proceeding is pending before the officer, the employer is debarred from discharging or punishing by way of dismissal or otherwise any workman concerned in such dispute. Further, it was contended that the workman could not have been placed under suspension without the express permission of the conciliation officer.

9. The Learned Writ Court did not agree with the contentions raised by the workman and held that on the face of the record, there was no order of termination and therefore, the contention of the workman that the proceedings initiated against him cannot be continued by the management is an incorrect submission. With regard to the order of suspension, the learned Writ Court held that there was no challenge made to the said order by the workman and accordingly, the award passed by the Labour Court was set aside. The end result of the case is that the management was at liberty to proceed further with the charge memo dated 5th October, 2002. Challenging the correctness of the order passed by the learned Writ Court, the workman is before us by way of this appeal.

10. We have elaborately heard the learned advocates for the parties today as well as on 23rd February, 2022. On the earlier date of hearing we had, after going through the entire material placed on record were of the prima facie opinion that the finding of the Labour Court that the charge memo is a lapsed document, is an incorrect finding. Admittedly, the charge memo was not taken to its logical end. In other words, the disciplinary proceedings did not commence. The explanation of the management is that by then, the workman had moved the Labour Court and thereafter, during the pendency of the writ petition, the management was advised not to proceed further and even during the pendency of this appeal, such advice was rendered.

11. The fundamental principles in service jurisprudence is that a charge memo issued to a serving employee cannot lapse; either the charges should be dropped or if an enquiry is warranted, the same should be conducted in accordance with law and the disciplinary authority has to come to a conclusion whether the charges have been proved or not and then take a decision. Admittedly, the workman did not challenge the charge memo before the Labour Court. Therefore, if we eschew the finding of the Labour Court that the charge memo is a lapsed document as being

incorrect finding not in accordance with law, then the charge proceedings would automatically revive. The consequence would be that the award of the Labour Court directing reinstatement with back wages calls for interference.

12. After the hearing on the last hearing date as well as when we heard the matter today, we are of the considered view that even assuming that the charges as set out in the charge proceedings are true and are established, even then the workman cannot be inflicted with any major penalty of denial of employment; either by way of termination or dismissal from service. At best, the charge if found to be proved can be construed to be an act of insubordination. However, we are also required to consider the submission of the workman that he had represented that continuous working hours has prevented him from taking care of his wife, who required medical attention and help and therefore, he made a request to the JTO to re-allot the duties, which, according to the workman, was not received well resulting in denial of employment. The management is also right in their contention by stating that assuming there was denial of employment by the JTO or the Depot Manager in-charge, there is no justification on the part of the workman to lodge a police

complaint. This may be true. Nevertheless, considering the strata of the society from which the workman hails, it can be construed to be a wrong advice rendered to him. Therefore, the management should not harbour anything against the workman merely because he has lodged a police complaint.

13. Thus, we are of the considered view that the order passed in the writ petition has to be interfered. Consequently, the award of the Labour Court requires to be set aside and the management should be directed to conclude the disciplinary proceedings initiated pursuant to charge memo dated 5th October, 2002.

14. The next aspect is whether the workman should be kept under suspension. Admittedly, there is no rule or regulation framed by the respondent / management empowering them to place an employee under suspension with retrospective effect. Therefore, the retrospective suspension is bad in law. The workman has been placed under suspension on 17th October, 2002 with retrospective effect from 18th May, 2002.

15. Prolonged suspension is bad in law and even assuming the employee has to be placed under suspension, review of the suspension by the disciplinary authority is required to be done after a period of six months. We find that no such review has been done. That apart, considering the nature of allegations in the charge memo, there is absolutely no justification to continue to keep the workman under suspension any longer. Therefore, the order of suspension is quashed.

16. Having come to such a conclusion, the last issue would be as to what is to be done for the period during which the workman was under suspension, i.e. with effect from 18th May, 2002. Admittedly, the workman has been receiving upto a maximum of 50% of the last drawn wages for first three months and then 75% of the last drawn wages (as on May, 2002) as subsistence allowance. The workman has also not performed any duty for all these years. We are informed that the gross salary of the driver as on date is more than Rs.50,000/-. In our view, claim for back wages is wholly unjustified and it is the workman, who initiated the litigation and the litigation prolonged for several years. When we expressed this opinion, the learned counsel appearing for the appellant submitted that he has instructions from his client to

say that his client does not want any back wages for the period but would plead that the period during which he was placed under suspension, should be notionally treated as a period in service for the purpose of calculating pension.

17. We have heard the submissions of the learned advocate appearing for the respondent / management on this issue. In our considered view, the undertaking given by the workman that he will not claim any back wages for the said period is placed on record and this undertaking shall bind the appellant/workman. Since we have held that the order of suspension is bad in law and also held that the workman has to be reinstated, the period during which the workman was kept out of employment, should be regarded as "period in service" for all purposes except for monetary benefits less the amount of subsistence allowance already received.

18. If this direction is issued, then while calculating the length of service of the workman during which he was placed under suspension, the entire period will be counted to determine the superannuation/pensionary benefits of the workman.

19. The next issue would be what would be the scale of pay payable to the workman upon reinstatement. As we have held that the workman should be treated to have been notionally in employment from 2002, it goes without saying that upon reinstatement pursuant to this judgment, the appellant/workman would be entitled to the current salary payable to a similarly placed workman in the respondent / corporation.

20. In the result, the writ appeal is allowed to the extent indicated below and the directions contained hereunder.

- (a) The order passed in the writ petition is set aside and the award of the Labour Court is set aside.
- (b) The charge memo dated 5th/17th October, 2002 stands revived and the respondent / management shall consider the reply given by the appellant/workman dated 28th October, 2002 and proceed to conclude the disciplinary proceedings. While doing so, the management shall bear in mind our observation that assuming charge is held to be true, it does not warrant any major penalty for such a delinquency. So, this aspect should not be lost sight of by the management while proceeding to conclude the disciplinary proceedings.

- (c) In the light of the undertaking given by the appellant/workman, he shall not be entitled to have any back wages for the period during which he was out of employment.
- (d) The order of suspension is quashed and the appellant/workman shall be reinstated as driver and paid current salary as payable to any other driver similarly placed to that of the appellant/workman.
- (e) The period during which the appellant was out of employment from 2002 till the date of reinstatement shall be treated as a period to be notionally in service and the said period should be reckoned while calculating the length of service of the appellant/workman to determine his superannuation / pensionary benefits.

21. The above directions shall be complied with by the management within a period of five weeks from the date on which the website copy of this judgment and order is received by them.

22. No costs.

23. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB (AR.C)