

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3628 OF 2020

SANTOSH
SUBHASH
KULKARNI

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M.S.R.T. Corporation, The Depot
Manager, MSRTC Bhore Depot, Pune
Division, Pune.

...Petitioner

Versus

Madhukar s/o Sadashiv Bandal
Age : Major, Occu. Nil
Residing at 797, Vetalpeth, Bhore,
Taluka, Bhore, Pune – 412 206

...Respondent

Mr. Y. P. Deshmukh, for the Petitioner.
Ms. Sonali Kunekar, i/b Vikas Kisan Mahangare, for the
Respondent.

CORAM: N. J. JAMADAR, J.

DATED : 10th JULY, 2023

JUDGMENT:-

1. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of an award dated 30th October, 2017 passed by the learned Presiding Officer, Labour Court, Pune, in Reference (IDA) No.385 of 2005, whereby the reference came to be partly allowed directing the petitioner Maharashtra State Road Transport Corporation (“MSRTC”) - first party, to pay full backwages to the respondent – second

party from the date of termination of his services till the date of retirement.

2. The petition arises in the backdrop of the following facts.

(a) The respondent joined MSRTC as a Conductor at petitioner's Bhor Depot on 7th December, 1977. The petitioner alleged that the respondent unauthorizedly remained absent from duty on various dates in between 24th November, 2002 to 15th May, 2003. On account of the said misconduct, the respondent was served with multiple charge-sheets in accordance with the Discipline and Appeal procedure of the petitioner. The explanations of the respondent – employee were found unsatisfactory. Resultantly, disciplinary proceedings were instituted.

(b) In Default Case No.48 of 2003, post disciplinary enquiry, the respondent was found guilty of misconduct and, eventually, penalty of dismissal from service came to be imposed and the respondent's services were terminated with effect from 11th August, 2003.

(c) The respondent raised an industrial dispute. As the conciliation failed, reference was made to the Labour Court for adjudication of the industrial dispute under Section 10 of the Industrial Disputes Act, 1947 ("the ID Act, 1947"). The

respondent – second party filed a Statement of Claim. The petitioner resisted the Statement of Claim by filing written statement. The respondent examined himself. The petitioner – first party also examined Smt. Manisha Gaikwad (CW-1).

(d) After appraisal of the evidence and documents tendered for the perusal, the Labour Court returned the findings that the petitioner failed to prove the charge of misconduct, the respondent was illegally terminated from service and the punishment imposed by the petitioner on the respondent was disproportionate. It was, thus, held that the respondent, having in the meanwhile attained the age of superannuation, was entitled to full backwages from the date of termination till the date of retirement.

3. Being aggrieved, the petitioner MSRTC has preferred this petition.

4. I have heard Mr. Deshmukh, the learned Counsel for the petitioner, and Ms. Kunekar, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

5. Mr. Deshmukh, the learned Counsel for the petitioner, submitted that the learned Presiding Officer, Labour Court,

committed a manifest error in arriving at the finding that the petitioner failed to establish the misconduct. The Labour Court did not record a finding that the enquiry was not fair or proper. Having noted the period of absenteeism, the Labour Court went on to unjustifiably record a finding that there was no misconduct.

6. Amplifying the submission Mr. Deshmukh would urge that the mere fact that an employee had leave to his credit and had submitted applications for leave, even on medical grounds alongwith medical certificates, by itself was not sufficient. It was not the case of the respondent that the leave applications were duly granted. In the absence thereof, the absence was wholly unauthorized. The learned Presiding Officer, Labour Court, according to Mr. Deshmukh, was swayed away by the fact that the respondent had submitted applications for leave before proceeding on leave, supported by medical certificates. Such conduct on the part of a workman has been disapproved by this Court in the case of *Amgauda Sidram Hakke vs. Maharashtra Small Scale Industries Development Corporation Ltd*¹, urged Mr. Deshmukh.

7. It was further submitted that the learned Presiding Officer, Labour Court, was also in error in not giving weight to the facts

1 1995(1) Mh.L.J. 638.

that the respondent was served with multiple charge-sheet for the various periods of absenteeism, during the period 24th January, 2022 to 25th May, 2003, and the past conduct of the respondent was also not clean. The respondent was punished in the year 1984, 1986, 1994 and the said factor was also erroneously downplayed by the learned learned Presiding Officer. At any rate, a direction for payment of full backwages cannot be sustained, submitted Mr. Deshmukh.

8. Per contra, Ms. Kunekar, the learned Counsel for the respondent, supported the impugned order. It was submitted that there was no unauthorised absence, as alleged. On account of genuine health issues, the respondent had availed leave by submitting proper applications accompanied by medical certificates. The Enquiry Officer had not given due weight to the fact that the respondent was unwell and the daughter of the respondent was suffering from mental illness. Therefore, the learned Presiding Officer, Labour Court, was within her rights in answering the reference in the affirmative as the penalty of dismissal from service in the context of the charge of misconduct was wholly disproportionate.

9. At the outset, it is necessary to note that Mr. Deshmukh fairly submitted that the order of dismissal from service came to

be passed in Default Case No.48 of 2003 only and no order was passed in Default Case No.116 of 2003 and Default Case No.77 of 2003. The Labour Court also proceeded to adjudicate and answer the reference in the context of Default Case No.48 of 2003 for the alleged unauthorized absence from 1st January, 2003 to 31st January, 2003, only.

10. In the aforesaid context, the learned Presiding Officer found that each of the periods of absence was preceded or accompanied by an application for grant of leave alongwith a medical certificate. Indisputably, the daughter of the respondent was suffering from mental ailment and Disability Certificate (Exhibit-55) came to be placed on record to substantiate the said fact. The moot question that arises for consideration is, whether the absenteeism was unauthorized?

11. Mr. Deshmukh, urged with tenacity that the facts that leave was available to the credit of the respondent's account and applications for leave were forwarded by themselves do not dilute the misconduct. In the case of *Amgauda Hakke* (supra), on which reliance was placed by Mr Deshmukh, it was, *inter alia*, observed as under:

“8.Even assuming that this was a case of misconduct of an employee for which his service has been terminated by not holding a domestic inquiry, I am not inclined to interfere with the finding recorded by the Labour Court, for the reason that I am not satisfied that the Petitioner's case of

sickness was true. From the facts as on record it appears to me that the excuse of sickness was put forth repeatedly in order to exhaust all the accumulated privilege leave – never mind the consequences to the employer. It is unfortunate that, even when entitled to privilege leave, workmen assume that they have the right to go on leave, at the drop of a hat, forgetting it that leave is to be sanctioned at the discretion of the employer. This position is evident from the provision of Regulation 68(i) about general conditions regarding leave, which provides:

“68. *General Conditions regarding leave.* – (i) Leave shall be granted by the Management having regard to the exigencies of services and it shall be the discretion of the Management to refuse, postpone or revoke leave of any kind to any employee, subject to the provisions of any law for the time being in force.”

Notwithstanding this provision, if the employee chooses to remain away from work, shoot off innumerable telegrams to the employer for extension of leave on vague excuses, and then finds himself in hot water, he does so at his peril. The argument of Miss Buch that the employer is guilty of breach of service rules by not holding an inquiry, leaves me unimpressed. It does not lie in the mouth of the petitioner, who is equally guilty of transgressing the rule, to thus contend.”

12. Evidently, in the facts of the aforesaid case, this Court came to the conclusion that the case of the petitioner in the said case of sickness was not true and, in that backdrop, observed that if the employee chooses to remain away from work and sends requests for grant of leave on vague excuses, he does so at his own peril. If the Court finds that the reasons for being away from duty were not true and *bona fide*, the mere availability of leave to the credit of the employee can in no case be an answer to the charge of the misconduct.

13. The facts of the instant case are quite distinct. It is not the case of the employer that the respondent had remained away from duty on the false pretext. It is not disputed that the respondent had submitted the applications for leave. Nor it appears to be the case of the petitioner that no leave was available to the credit of the account of the respondent. That leaves the questions of justifiability of absence from duty.

14. A useful reference, in this context, can be made to a decision of the Supreme Court in the case of *Krushnakant B. Parmar vs. Union of India and another*². The charge of misconduct with reference to unauthorized absence in the context of Rule 3(1)(ii) and 3(i)(iii) of the Central Civil Services (Conduct) Rules, 1964 was under consideration in the said case.

In that context, the Supreme Court observed as under:

“16. In the case of the appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether “unauthorized absence from duty” amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident,

2(2012) 3 Supreme Court Cases 178.

hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the inquiry officer on appreciation of evidence though held that the appellant was unauthorizedly absent from duty but failed to hold that the absence was wilful; the disciplinary authority as also the appellant authority, failed to appreciate the same and wrongly held the appellant guilty.”

(emphasis supplied)

15. The Supreme Court enunciated that misconduct with reference to unauthorized absence would hinge upon the answer to the question as to whether absence is willful or on account of compelling circumstances. Absence from duty without any application or prior permission may amount to unauthorized absence but it does not always mean willful. In a disciplinary proceedings, where allegation of unauthorized absence from duty is made the department is required to prove that the absence was willful and in the absence of such finding the absence would not amount to misconduct.

16. Undoubtedly, the misconduct of unauthorized absence depends on the nature of the organization, the nature of the duty, the requirements of the services of the employee, in the given circumstances, the exigency of situation and attendant circumstances. No straight jacket formula can be laid down

that if the absence is preceded by an application for leave, it would not amount to misconduct in any case. Yet, the element of absenteeism without a justifiable cause, ordinarily, needs to be established.

17. Re-adverting to the facts of the case at hand, as noted above, the periods of absence were preceded or accompanied by applications for leave. They were duly supported by the medical certificates. The fact that the daughter of the applicant was suffering from acute mental illness and disability certificate was pressed into service to justify the absence for the said cause, in itself, militates against willful absence from duty. Cumulatively the circumstances had an element of compulsion to prevent the respondent from attending the duty. I do not find that the learned Presiding Officer, Labour Court, committed any error in appraising the material to draw an inference that the period of absenteeism did not constitute misconduct.

18. The past conduct attributed to the respondent also does not sustain the charge of a continuous course of absenteeism. The periods of absenteeism were during the years 1984, 1986 and 1994. The learned Presiding Officer, Labour Court, was within her rights in not giving much weight to the minor penalties of Rs.25/- and Rs.50/- and stoppage of increment for

six months for the aforesaid misconduct, which were at a distant past. In any event, it cannot be urged that there was a continuous course of absenteeism.

19. It is true that the learned Presiding Officer, Labour Court, after holding that the petitioner failed to establish misconduct also went on to delve into the aspect of the proportionality of the punishment and return a finding that penalty of dismissal from service was grossly disproportionate to the gravity of the charge. Having found that misconduct itself was not proved, the Labour Court was not required to delve into the aspect of proportionality of punishment. However, that does not detract materially from the principal finding that the petitioner failed to establish the misconduct.

20. On the aspect of the relief, since the respondent had rendered 26 years of service, and superannuated during the pendency of the reference, the direction for payment of full backwages from the date of termination till superannuation cannot be faulted at. The Labour Court noted that the respondent had asserted that he could not secure alternate employment despite efforts and the petitioner failed to establish that the respondent was gainfully employed. The services of the respondent were terminated after he rendered 26 years of

service. In the absence of any material to indicate that the respondent was gainfully employed, this Court may not be justified in interfering with the order for grant of backwages in exercise of writ jurisdiction.

21. The conspectus of aforesaid consideration is that the petition fails. Hence, the following order.

: O R D E R :

- (i)** The petition stands dismissed.
- (ii)** Rule discharged.
- (iii)** No order as to costs.

[N. J. JAMADAR, J.]