
(2016) 01 AP CK 0042

In the Andhra Pradesh High Court

Case No : Writ Petition Nos. 4456 of 2006 and 29218 of 2008

APSRTC and Others

APPELLANT

Vs

N.V. Subbaiah and Others

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 311 (2) (b)
Industrial Disputes Act, 1947 — Section 11 A, Section 11A, Section 11-A, Section 6 (2A)
Uttar Pradesh Industrial Disputes Act, 1947 — Section 4 (k)

Citation : (2016) 5 ALT 354 : (2016) 3 AndhLD 517 : (2016) 151 FLR 661 : (2016) LIC 3183

Hon'ble Judges : C. Praveen Kumar, J.

Bench : Single Bench

Advocate : N. Vasudeva Reddy, Standing Counsel, for the Appellant; V. Narasimha Goud, for the Respondent

Final Decision : Disposed Off

Judgement

C. Praveen Kumar, J.—1. The order of reinstatement into service with 50% of the back wages is sought to be challenged in these two writ petitions by the Employee and Employer.

2. Since both the writ petitions are connected and arise out of the order in I.D. No. 132 of 2005 the same are being disposed of by this common order.

3. For the sake of convenience, the parties will be referred to as arrayed in I.D.

4. The petitioner joined as a Conductor in the Road Transport Corporation (hereinafter referred to as Corporation) on 11.11.1986 through due process of selection and his services were regularized with effect from 19.07.1987. On 05.06.2002, while the petitioner was conducting the bus, on route No. 17, between Kushaiguda and Secunderabad, the checking officials of the Corporation checked the bus after it moved a furlong from stage No. 7. On the ground that the petitioner indulged in misconduct of cash and ticket irregularities, a charge

memo was prepared by the checking officials on the spot and was served on him. The petitioner submitted an explanation stating that he has issued 15 tickets to the 15 passengers and the allegations made against him are false. Without taking into consideration the said explanation, the checking officials submitted a detailed report to the Depot Manager. Basing on the said report, the second respondent suspended the petitioner and issued a charge sheet. An explanation to the said charge sheet came to be submitted, which being un-satisfactory, a domestic enquiry was ordered. The Enquiry Officer, after following the principles of natural justice, held the petitioner guilty of the charges leveled against him and proposed removal from service. After receipt of the enquiry report, the same was sent to the petitioner calling for his objections. After considering the objections, the second respondent confirmed the penalty of removal. Accordingly, a show cause notice of removal from service was issued to the petitioner, to which he has submitted his explanation. Vide proceedings dated 12.09.2002, final orders came to be passed removing the petitioner from service. Aggrieved by the same, the petitioner preferred an appeal before the Divisional Manager, Secunderabad Division, which was rejected on 21.11.2002. A review preferred by the petitioner was also rejected on merits vide proceedings dated 22.11.2003. Challenging the same, the petitioner preferred I.D. No. 212 of 2003 which was re-numbered as I.D. No. 132 of 2005 before the Industrial Tribunal-II, Hyderabad. After considering the evidence available on record, the Tribunal held that the SR clearly pointed out issuance of 15 tickets to 15 passengers in the bus. It was also held that the Enquiry Officer was not justified in holding the petitioner guilty of the charges leveled against him. Consequently, the Tribunal ordered reinstatement of the petitioner with continuity of service and with 50% of back wages. Challenging the same both these writ petitions filed.

5. The main ground urged by the learned Standing Counsel for the Corporation is that the Tribunal erred in re-appreciating the evidence on record by upsetting a factual finding given by the enquiry officer which was confirmed in appeal and revision by the authorities of the Corporation. He further submits that this Hon"ble Court has no jurisdiction to entertain the present writ petition seeking issuance of writ of certiorari in view of the judgment of the Apex Court in Union of India and others v. P. Gunasekaran , (2015)2 SCC 610. Lastly he submits that no explanation is forthcoming from the petitioner as to the delay in filing W.P. No. 29218 of 2008.

6. Per contra, the learned counsel appearing for the petitioner/workman would submit that the Tribunal erred in awarding only 50% of the back wages having found that there was no irregularity committed by the petitioner. He further submits that in view of amendment to Section 11-A of the Industrial Disputes Act, 1947 (for short the Act), the Tribunal has jurisdiction to go into the merits of the case. Lastly, he submits that there is no substantial delay in filing the writ petition and since the order under challenge being contrary to the provision of law, the delay shall not weigh with the Court in coming to a different conclusion.

7. In order to answer the first issue, namely, the jurisdiction of the Tribunal in re-appreciating the evidence available on record and coming to a conclusion different from what has been held by the Enquiry Officer, it would be useful to refer to few judgments of the Apex Court on this aspect.

8. In *The Workmen of M/s. Firestone Tyre and Rubber Co. of India P. Ltd., v. The Management and others*, AIR 1973 SC 1227(1) the Apex Court while considering the scope of Section 11-A of the Act held as under:

"This position, in our view, has now been changed by section 11A. The words "in the course of the adjudication proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicates that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer, establishes the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a satisfaction being arrived at by, lie Tribunal that the finding of misconduct is correct. The limitations imposed on the powers of the Tribunal by the decision in *Indian Iron & Steel Co. Ltd. (1)*. case can no longer be invoked by an employer. The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is "correct; but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the satisfaction of the employer, has ceased to be so: and now it is the satisfaction of the Tribunal that finally decides the matter."

9. Therefore, it will-be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction under section 11 A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.

10. In *Scooter India Limited, Lucknow v. Labour Court, Lucknow and others*, AIR 1989 SC 149 the Apex Court, dealing with a case where a writ petition filed against the award of the Labour Court, in a reference made to it under Section 4 (k) of the U.P. Industrial Disputes Act, 1947, held in favour of the respondent/employee, substituting the order of termination of service by an order of reinstatement together with 75% of back wages. The employer also filed writ petition challenging the award of the Labour Court in providing back wages and reinstatement. The Allahabad High Court heard both the writs together and by a common order dismissed both the writ petitions. The Apex Court, while confirming the findings of the High Court, held that the High Court has considered at length the nature of the powers conferred on the Labour Court by Section 6 (2A) of the Act for setting aside an order of discharge or dismissal of a workman and substituting it with an order of lesser punishment and as such it

cannot be said that the High Court has failed to consider the facts in their entirety.

11. In *Raghubir Singh v. General Manager, Haryana Roadways, Hissar*, (2014)10 SCC 301 the Apex Court was dealing with a case where the appellant therein, who joined as conductor in Haryana Roadways, was charged on an allegation of misappropriation of amount collected from tickets and not depositing the same in time. He was arrested and sent to judicial custody on 15.09.1994. On 21.10.1994 the services of the appellants were terminated by the respondents therein. On 15.11.1994 the appellant upon being released, was assured that he would be reinstated into service after his acquittal by the Court. On 11.07.2002 the appellant was acquitted and consequently he reported to join his duty. It was informed to him that his services were terminated with effect from 21.10.1994. The Labour Court vide its order dated 22.05.1994 declared that the termination of the appellant from his services was illegal and passed an order of reinstatement with 60% of back wages from the date of issuance of demand notice till publication of the award and full back wages thereafter, till reinstatement. Aggrieved by the same, the respondent filed CWP No. 13366 of 2009 which was allowed by remanding the matter back to the Labour Court for fresh adjudication in the light of applicability of Article 311 (2) (b) of the Constitution of India. The Labour Court vide its orders dated 17.05.2011 answered the reference holding that the industrial dispute was time barred. Challenging the same, he filed Civil Writ Petition No. 20996 of 2011 before the High Court, which was dismissed by a learned Single Judge holding that the decision of the Disciplinary authority was in public interest and the same does not warrant interference. Letters Patent Appeal was filed before the Division Bench of the High Court, which was dismissed on 09.01.2012 holding that there was no illegality or irregularity in the order of the learned Single Judge. Aggrieved by the same, the employee approached the Apex Court. Referring to *M/s. Firestone Tyres case*, (2015)2 SCC 610 (*supra*) and having regard to the doctrine of proportionality in ensuring the preservation of rights of the Workmen, the Apex Court held that the Labour Court and the High Court have failed in not adjudicating the dispute on merits and also in not discharging their statutory duty in exercise of their power vested under Section 11-A of the Act and held that the impugned judgment, order and award were held to be contrary to the provisions of the Act and law laid down by this Court.

12. In *Nicholas Piramal India Limited v. Harisingh*, (2015) 8 SCC 272 the Apex Court held as under:

"The Labour Court at the first instance has erroneously failed to exercise its jurisdiction by not re-appreciating the evidence on record after holding that the preliminary issue regarding the domestic enquiry conducted by the appellant company is legal and valid. The said erroneous finding was challenging by the respondent workman in the appellate court after two remand orders were passed by the Industrial Court. Ultimately, the Labour Court has exercised its jurisdiction

and on re-appreciation of the facts and the evidence on record and in accordance with the decision of this Court in *Workmen v. Firestone Tyre & Rubber Co. Ltd.* , AIR 1973 SC 1227(1) (supra), it has found fault with the findings of the enquiry officer which were endorsed by the disciplinary authority which has erroneously held that the workman was guilty of the misconduct. The Labour Court after the two remand orders has rightly come to the conclusion on re-appreciation of the evidence on record and held that the charge leveled against the respondent is partially proved and even then the order of dismissal imposed upon him by the disciplinary authority, has been done without notifying the respondent workman about his past service record, as required under Clauses 12 (3) (b) and (c) of the SSO, which aspect is rightly noticed and answered by the Labour Court at para 20 of its award dated 29.10.2007. Thus, the order of dismissal of the workman from the service is disproportionate and severe to the gravity of the misconduct."

13. Similar views were expressed by this Court in *Ch. N. Kumar v. The Depot Manager, A.P.S.R.T.C. Bus Depot, Nirmal and another* (1990)1 An.W.R. 423(D.B) and *Divisional Manager, A.P.S.R.T.C. and another v. E. Raja Reddy and another* , (1999)5 ALD 735.

14. From the judgments referred to above, it is clear that Section 11-A of the Act authorizes the Labour Court with the power to adjudicate a dispute on merits by re-appreciating the evidence placed on record and also to examine the aspect of proportionality of punishment imposed upon a workman if the acts of misconduct alleged against the workman are proved. Hence, the argument of the learned Standing Counsel for the Corporation that the Labour Court has erred in re-appreciating the evidence on record by upsetting a factual finding given by the enquiry officer cannot be accepted.

15. The other argument which was advanced by the learned Standing Counsel for the Corporation is with regard to scope of interference with the orders passed in disciplinary proceedings by the Tribunal and by this Court under Article 226 of the Constitution of India.

16. Relying upon the judgments of the Apex Court in *Union of India v. P. Gunasekaran* , (2015)2 SCC 610 (supra) and *Syed Yakoob v. K.S. Radhakrishnan and others* , AIR 1984 SC 1361 the learned Standing Counsel for the Corporation strenuously contended that a writ of certiorari would not lie before this Court seeking quashing of the proceedings and that the High Court under Article 226 of the Constitution of India cannot interfere with the finding of the disciplinary authority.

17. Insofar as issuance of writ of certiorari is concerned, the Apex Court in *Syed Yakoobs case* , AIR 1984 SC 1361 (supra) held as under:

"The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises is not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not 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 a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again 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. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the reference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."

18. It is to be noted that in the present writ petition this Court is not interfering with a factual finding of fact arrived at by the Labour Court/Industrial Tribunal. As observed earlier, the issue is whether the Tribunal was justified in awarding only 50% of back wages having found the employee not guilty of the charges leveled against him. Having regard to the law laid down by the Apex Court, in the judgments referred to above, this Court holds that the Tribunal erred in awarding only 50% of the back wages, since this being purely an error of law, which is apparent on the face of the record, this Court under Article 226 of the Constitution of India has got the power to issue the writ of certiorari. Infact, in *Union of India v. P. Gunasekaran* , (2015)2 SCC 610 (supra), the Court was dealing with a situation where the findings of charge No. 1 having attained its finality was directed to be re-considered by the Administrative Tribunal, which view was endorsed by the High Court. Basing on which the order of dismissal was converted to compulsory retirement. The Apex Court held that such a finding cannot be re-opened in subsequent round of litigation at the instance of the respondents as it was only the punishment that was open to challenge. Hence, the Apex Court found fault with the High Court in re-appreciating the evidence, which was placed before the disciplinary authority, in arriving at a different conclusion in spite of earlier findings becoming final. Therefore, the two judgments relied upon by the learned Standing Counsel for the Corporation, more particularly the Judgment of the Apex Court in *Syed Yakoob case* , AIR 1984 SC 1361 (supra) which was referred by the Apex Court in *Union of India v. P. Gunasekaran* , (2015)2 SCC 610 (supra) may not apply to the case on hand.

19. Coming to the aspect of delay in filing the writ petition, the award was passed on 13.09.2005 which came into force with effect from 13.10.2005. The same was published in the gazette in the month of December, 2005. It is true that W.P. No. 29218 of 2008 was filed in the month of December, 2008 and it is also true that there was a delay of three years in filing the writ petition. But, having regard to the fact that the provisions of Article 137 of the Schedule to the Limitation Act, 1963, are not applicable to the proceedings under the Act, the relief sought for by the petitioner cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a

matter of fact by showing the real prejudice and not on mere hypothetical defence. Even in a case where the delay is shown to be existing, the Tribunal, Labour Court or Board, dealing with the case can appropriately mould the relief. In the absence of any prejudice being caused to the employer and having regard to the error, which is apparent on the face of the record, the writ petition cannot be rejected on that score.

20. Next, the argument advanced by the learned counsel for the petitioner is that having reinstated the petitioner with continuity of service and having found him not guilty of the charges leveled against him, the Tribunal erred in awarding only 50% of back wages. In order to deal with the said aspect, it would be appropriate to refer to the findings arrived at by the Tribunal in its order.

21. After considering the evidence placed on record, the Tribunal found that the petitioner did not involve in any misconduct of cash and ticket irregularity. Though there was some variation in the explanation given by the petitioner, which according to him was due to coercion, the Tribunal held as under:

"The perusal of SR show that at the check point that was stage No. 7/6 four tickets 957, 948, 949 and 950 denomination of Rs. 4.50 to 3.50 were issued and two tickets with Nos. 361 and 362 of denomination between Rs. 5.00 and 4.00 were issued and one ticket No. 126 was issued value between Rs. 7.00 and 6.00. Eight ticket numbers from 324, 325, 326, 327, 328, 329, 330 and 331 of denomination between Rs. 6 and Rs. 5 total 8 were issued. So the total tickets issued from stage No. 7 to stage No. 7/6 were 15. There were 15 passengers in the bus. So, it appears that the stand of the petitioner that he issued tickets to all the passengers and that the three passengers in question lost their tickets and shows some old tickets appears to be true. Besides that even though the petitioner admitted in the spot explanation and the explanation to the charge memo that he did not issue tickets to three passengers, he explained that due to coercion he gave such statement needs to be considered because the very checking officials themselves had shown that the SR clearly pointed out that there were issue of tickets for 15 passengers and 15 persons were therein the bus. So, there was ambiguity in the findings and the benefit by way of doubt must go to the workman, the I.D. Act being a welfare legislation. So hold that the enquiry officer was not justified in holding that the petitioner was guilty under the charge leveled against him."

22. In view of the findings arrived at by the Tribunal, and having found that the petitioner is not guilty of the charges leveled against him, it has to be seen whether the Tribunal was justified in awarding 50% of the back wages, while ordering reinstatement with continuity of service.

23. In *A.L. Kalra v. The Project and Equipment Corporation of India Limited*, (2013)10 SCC 324 a three Judge Bench of the Apex Court, while dealing with the issue of payment of back wages after holding his removal from service as illegal, held that though he was employed elsewhere during the period of his removal

still he is entitled to 50% of the back wages. In *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyala and others*, (2007) 2 SCC 433 the Apex Court after referring to all the judgments on the subject, including the judgments of the Apex Court in *J.K. Synthetics Ltd. v. K.P. Agrawal and Zilla Parishad* (2009) 4 Mah.LJ 628, *Gachiroli v. Prakash*, (1979)2 SCC 80, held as under:

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

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) 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 averments 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.

iv) 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.

v) 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 victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages."

24. Similarly, the Apex Court in *Raghubir Singh*, (2014)10 SCC 301 (supra), after referring to the judgments of the Apex Court in *Deepali Gundu Sarwase*,

(2007) 2 SCC 433 (supra), Hindustan Tin Works (P) Ltd. V. Employees and Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court , (1980) 4 SCC 443, held as under:

"the critical analysis of law laid down is very much relevant to the case on hand, which is neither discussed nor considered and examined by the courts below while answering the reference made by the State Government and passing the award, judgments and orders in a cavalier manner. Thus, the lives of the appellant and his family members have been hampered. Further, on facts, we have to hold that the order of termination passed is highly disproportionate to the gravity of misconduct and therefore shocks the conscience of this Court. Hence, we hold that the appellant is entitled for the reliefs as prayed and the respondent is directed to reinstate the appellant workman with back wages from the date of raising the industrial dispute till the date of his reinstatement with all consequential benefits such as continuity of service, wage revisions and other statutory monetary benefits."

25. From the judgments referred to above, it is clear that the workman, who has not been found guilty of the charges leveled against him and was not gainfully employed elsewhere during the period of his removal, is entitled not only for reinstatement with continuity of service but also with full back wages along with other consequential benefits.

26. For the aforesaid reasons, W.P. No. 4456 of 2006 is dismissed, where as W.P. No. 29218 of 2008 is allowed directing the Corporation to pay the balance of 50% of back wages from the date of filing of I.D. till date of reinstatement and with all consequently benefits, if any.

27. There shall be no order as to costs. Miscellaneous petitions, if any, pending, shall stand dismissed.