
(2004) 01 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 2180 of 1991

Divisional Controller, MSRTC

APPELLANT

Vs

Sherkhan Chhotekhan

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Employees State Insurance Act, 1948 — Section 73, 73(1), 73(2)

Citation : (2004) 2 ALLMR 536 : (2004) 5 BomCR 783 : (2004) 3 LLJ 424

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : Wankhade, for the Appellant; Bastian, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—By invoking the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioner has sought the following reliefs:

(i) issue writ of mandamus and/or any other appropriate writ, order or direction to quash and set aside the impugned orders passed by the Member of the Industrial Court, Nagpur in Revision ULPA No. 97/88 dated April 8, 1991 and the order passed by the Labour Court, Nagpur, in Complaint ULPA No. 214/84 dated May 5, 1988; and

(ii) to hold and declare that the impugned orders passed by the Courts below dated April 8, 1991 and May 5, 1988 are violative of Article 14 of the Constitution of India."

2. Relevant facts are as under:

The respondent is working as a Conductor with the petitioner and as such he was on duty on August 24, 1982 on the bus No. 1033 on the route of Jaiwala to Wardhaman Nagar, Nagpur. The bus was checked by the checking staff at L.A.D. College bus stop and 50 passengers were found travelling in that bus out of

which four passengers were found travelling without tickets. The respondent had already recovered the fare of Rs. 1.90 from these passengers but had not issued tickets to them. Out of these four passengers, one passenger was traveling from Shraddhanandpeth to Shankarnagar, another one, was travelling from Shraddhanandpeth to L.A.D. College, third one was travelling from Madhavnagar to University Library and the fourth one was travelling from Gopalnagar to Shankarnagar. All these passengers had boarded the bus at different bus stops. The statement of the respondent was recorded on the spot on the same day, i.e. on August 24, 1982, wherein he has in his own hand writing admitted that he recovered the fare from these four passengers and in spite of that he did not issue tickets to them. The statement of the passengers who were travelling without tickets were also recorded who admitted that they were travelling without tickets after payment of fare. Preliminary enquiry was held and the respondent was served with the charge-sheet dated November 3, 1982. Thereafter Departmental Enquiry was conducted against him. Opportunity of hearing was given to him and principles of natural justice were followed. The Enquiry Officer came to the conclusion that the charges levelled against the respondent were proved and hence show cause notice dated March 7, 1984 was served on him and he was called upon to show cause as to why he should not be removed from service. The respondent in his reply dated March 14, 1984 to the show cause notice took a defence that he had submitted application for grant of leave on March 26, 1984 requesting the petitioner to grant leave to him for the period from April 1, 1984 to April 10, 1984.

3. The Competent Authority after going through the findings of the enquiry officer concluded that the charges levelled against the respondent were proved beyond doubt and therefore dismissed the respondent from service with effect from April 13, 1984 by the order dated March 24, 1984. This order of termination was challenged before the Labour Court vide Complaint ULPA No. 214 of 1984. The parties adduced evidence in support of their contentions. The Labour Court on consideration of the rival submissions came to the conclusion that the finding of the Enquiry Officer was perverse and not based on evidence. The Labour Court also recorded the finding that the respondent was on leave and was entitled to E.S.I. benefit and, as such, the order of dismissal is violative of Section 73 of the Employees' State Insurance Act, 1948 (for short the Act). Consequently, the Labour Court allowed the complaint vide order dated May 5, 1988 and set aside the order of dismissal and held that the respondent/complainant will be deemed to be in the employment and also entitled to all benefits including the wages.

4. Being aggrieved by the said order, the petitioner had carried revision before the Industrial Court vide Revision ULPA. No. 97 of 1988. The Industrial Court after examining the record and proceedings refused to re-appreciate the evidence and came to the conclusion that the order passed by the Labour Court is perfectly legal and consequently dismissed the revision application. These orders are under challenge in this writ petition.

5. Mr. Wankhede, learned counsel, for the petitioner contended that in order to get the benefit of the Act, so far as medical leave is concerned, the Medical Officer has to issue certificate under Regulation No. 58 of the ESI (General) Regulations, 1950 and the certificate has to be issued in Form 9. He contended that the respondent did not adduce any evidence to show that he had obtained the medical certificate under Regulation No. 58 and the documents (Exhibits 25, 26 and 27) are not the certificates issued by the Medical Officer but those are the benefit payment slips. He further contended that the application for leave submitted by the respondent was rejected and he was called upon to join his duties, but he continued to remain absent and, therefore, he would not be entitled to claim benefits of Section 73 of the Act.

6. The learned counsel for the petitioner further contended that the respondent/employee was found to have not issued tickets to the four passengers who were found travelling in the bus on August 24, 1982. He contended that the regular departmental enquiry was conducted against the employee and the Enquiry Officer rightly recorded the finding that all the charges levelled against the respondent are proved. He contended that the employee has admitted in his own handwriting that he recovered the fare from those four passengers but did not issue tickets to them. He contended that an opportunity of hearing was given to the employee and after going through the oral and documentary evidence, the Enquiry Officer drew that findings and came to the conclusion that the charges levelled against the employee were proved. He contended that the Labour Court was (sic) not justified in reversing the finding of the Enquiry Officer and in absence of any evidence adduced by the respondent to show that he is entitled to the benefit of Section 73 of the Act. He contended that simply because the passengers who were travelling at the relevant time have not been examined, both the Courts below have committed an error in coming to the conclusion that the finding of the Enquiry Officer was perverse. He contended that the order of dismissal dated March 24, 1984 was not disproportionate to the charges as the respondent was found to have misappropriated the amount of the tickets of the passengers by not issuing tickets to them and, in such circumstances the impugned orders passed by both the Courts below are not sustainable in law.

7. Mr. Bastian, learned counsel for the respondent contended that the dismissal was void ab initio, it being in contravention of Section 73(1) and (2) of the Act and, therefore, the respondent/employee continues to be in the employment of the petitioner and is entitled to all the benefits including wages. No relief under M.R.T.U. & P.U.L.P. Act was granted as there was no dismissal in legal existence and this view of the Labour Court has been upheld by the Industrial Court in revision which came to be dismissed. The learned counsel further contended that it is admitted that the respondent had produced the office copy of the leave applications along with the sickness certificates issued by the medical officer E.S.I. and the sickness benefit receipts before the Labour Court and claimed that he had received the sickness benefit from March 20, 1984 to April 12, 1984 from the E.S.I. Corporation. He further contended that there is no reason to interfere

into the concurrent findings of fact recorded by both the Courts below and the impugned orders were perfectly legal and valid.

8. I have given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. It is not in dispute that the dismissal order was passed on March 24, 1984. It is necessary to reproduce Section 73 of the Act which reads that:

"73. Employer not to dismiss or punish employee during period of sickness, etc. -
(1) No employer shall dismiss, discharge, or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit, nor shall he, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations to arise out of the pregnancy or confinement rendering the employee unfit for work.

(2) No notice of dismissal or discharge or reduction given to an employee during the period specified in Sub-section (1) shall be valid or operative."

9. Bare reading of the aforesaid provision would reveal that the bar contained in Section 73 of the Act only requires the employer not to dismiss or terminate the services of an employee by way of punishment during the period of sickness.

10. Similar question was under consideration of this Court in Writ Petition No. 1564 of 1989, Murliprasad Ayodhyaprasad Tiwari v. Maharashtra State Road Transport Corporation, decided on December 22, 1989 wherein it is observed in para No. 7 that "moreover, it may be seen that there is no such requirement in Section 73 of the ESI Act that unless the employer is made aware of the period of sick leave the order of dismissal or discharge would not be vitiated. In fact, in view of the obligation cast u/s 73 of the ESI Act it is the duty of the employer to first find out whether the employee concerned is undergoing medical treatment for sickness or is receiving sickness benefit before issuing the order of dismissal or discharge. This view is supported by the decision of this Court in the case of Maharashtra State Transport Corporation v. Industrial Court of Maharashtra, Bench at Nagpur, Nagpur (W.P. No. 2158 of 1988 decided on November 21, 1988)." This Court further observed in para 9 that:

"It is pertinent to see that if the order of dismissal is issued during the period when the employee is undergoing medical treatment for his sickness or when he is in receipt of sickness benefit, the said order is invalid and inoperative u/s 73(2) of the ESI Act. This Court has held in the judgment cited supra that such an order is void ab initio. If that is so, the dismissal of the petitioner is void is liable to be set aside on that ground."

11. In the present case, it is not in dispute that the respondent/employee has produced the benefit payment slips (Exhibits. 25, 26 and 27) on the record of the

Labour Court which were taken into consideration. It appears that the respondent had submitted his leave applications dated March 10, 1984, March 14, 1984 and March 31, 1984 and the wage cards of 3/84 (Exhibit 23) and 4/84 (Exhibit 24) were also issued to him. The documentary evidence adduced by the respondent was also considered by the Labour Court which recorded the finding that the respondent/employee has received sickness benefits and consequently the dismissal order would be void in view of Section 73(1) and (2) of the Act and, therefore, the respondent would be continued in the employment of the petitioner and he will be entitled to all the benefits including the wages. This order has also been confirmed by the Industrial Court by making specific observations in para 7 of the judgment that it must be seen that it is not necessary for an employee to bring to the notice of his employer that at the relevant time he was receiving sickness benefits. In fact, the knowledge of the employer in this regard is immaterial and it is for the employer to make necessary enquiry before passing and serving dismissal order against the employee. In this respect, the learned counsel for the complainants rightly placed his reliance on *M.S.R.T.C. v. Industrial Court of Maharashtra*, Bench at Nagpur and Anr., Writ Petition No. 2150 of 1988 decided on November 22, 1988, *Murliprasad Ayodhyaprasad Tiwari v. M.S.R.T.C.*, Nagpur, W.P. No. 1564 of 1989 decided on December 22, 1989. The Industrial Court further observed that the above two decisions, would be applicable to the present case and after careful scrutiny of the evidence on record he endorsed the finding of the Labour Court and came to the conclusion that the dismissal order was void ab initio as it has contravened the provisions of Section 73 of the Act.

12. In the present case, the learned counsel for the respondent rightly contended that it is admitted that the respondent had produced office copy of the leave applications accompanied with the sickness certificates issued by the Medical Officer, ESI Corporation and the sickness benefit receipts. The respondent had also claimed that he had received sickness benefit from March 20, 1984 to April 12, 1984 from the ESI Corporation and, therefore, the dismissal order in contravention of the provisions of Section 73 of the Act would be illegal. There is no reason as to why this Court should take a different view of the matter and, therefore, this Court has reached the conclusion that no case has been made put for interference into the concurrent findings recorded by both the Courts below.

13. In view of this position, it is not necessary for this Court to consider the contention of the petitioner that simply because the witnesses were not examined the evidence of the Checking Inspector is sufficient to bring the charge of misconduct at home against the respondent in view of the decision of the Apex Court on which reliance was placed by the learned counsel. In that view of the matter, the petition is dismissed and Rule is discharged.