
(2014) 01 AP CK 0085

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 24725 of 2002 and 22913 of 2004

G. Nagender

APPELLANT

Vs

The Additional Industrial Tribunal-cum-Additional Labour
Court and Another

RESPONDENT

Date of Decision : 20-01-2014

Acts Referred:

Constitution of India, 1950 — Article 14 21

Industrial Disputes Act, 1947 — Section 10 10(1) 11-A 25-F 2A(2)

Citation : (2014) 01 AP CK 0085

Hon'ble Judges : K.G. Shankar, J

Bench : Single Bench

Advocate : B.G. Ravindra Reddy, for the Appellant; C.R. Sridharan, for the Respondent

Final Decision : Dismissed

Judgement

Dr. K.G. Shankar, J.—Both these writ petitions are disposed of through this common judgment. The employer (Bharat Heavy Electricals Limited-BHEL) filed Writ Petition No. 24725 of 2002 assailing the award dated 26.04.2002 in I.D. No. 86 of 1998 on the file of the first respondent-Additional Industrial Tribunal-cum-Additional Labour Court, Hyderabad (the Tribunal, for short) ordering reinstatement of the workman by name G. Nagender together with continuity of service and attendant benefits, but without back wages.

2. The employee-G. Nagender in his turn filed W.P. No. 22913 of 2004 questioning the denial of back wages. As both the writ petitions seek for a Writ of Certiorari to quash the orders in the award in I.D. No. 86 of 2008 on the file of the Tribunal for different reasons, both the writ petitions are disposed of through the common judgment. I shall refer to the parties as they are arrayed in W.P. No. 22913 of 2004 and refer the employee as the petitioner and the employer as the second respondent.

3. The petitioner was appointed on 24.12.1980 by the second respondent as an

unskilled worker. The petitioner went on leave with effect from 28.10.1985 which was granted. The second respondent passed orders on 02.04.1986 terminating the petitioner from service with effect from 28.10.1985 on the ground that the petitioner was unauthorizedly absent from duty.

4. It is the case of the petitioner, on the other hand, that the petitioner could not attend to duty from 10.10.1985 till 02.04.1986 owing to ill-health. Sri C.R. Sridharan, learned counsel for the second respondent contended that the standing orders of the second respondent-BHEL contemplate that the unauthorized absence from duty for over 15 days period would automatically cancel the lien and that the same would be treated as misconduct. He contended that in view of such provision, the second respondent was entitled to hold enquiry against the petitioner for committing misconduct and may terminate the services of the petitioner. He also claimed that instead of terminating the services of the petitioner for misconduct, the lien of the petitioner could simply be cancelled leading to removal of the petitioner from the rolls of the second respondent-BHEL which would not be a termination and consequently would not be a retrenchment. He also submitted that if an employee is aggrieved by the cancellation of the lien by the invocation of the standing orders by the second respondent, the employee should raise the dispute within three years from the date of such cancellation of the lien, lest the dispute becomes a stale claim. He submitted that the services of the petitioner with the second respondent ended when the lien of the petitioner was cancelled and that the petitioner approached the Tribunal 13 years after cessation of the services of the petitioner with the second respondent-BHEL.

5. The facts leading to the present lis may briefly state at this stage.

a) As already noticed, the petitioner was employed by the second respondent as an unskilled worker with effect from 25.12.1980. The petitioner was alleged to be absent from duty unauthorizedly and had been warned through memoranda dated 13.11.1981, 12.08.1983, 22.04.1985 and 16.05.1985.

b) The petitioner allegedly suffered from acute stomach-ache and went on leave from 28.10.1985. The doctor of the second respondent-BHEL would appear to have advised the petitioner to take rest to recover from the ill-health. The application of the petitioner for leave on medical grounds was sanctioned. It would appear that the doctor of the second respondent-BHEL later advised the petitioner to undergo operation for hepatitis. The petitioner claimed that he underwent operation and was advised post-operation rest. The petitioner further claimed that he extended the leave as he was not fully cured of the disease.

6. The second respondent contended that as the petitioner was frequently absenting himself from duty on the ground of ill-health, without prior sanction of leave, the second respondent referred the petitioner to the Chief Medical Officer of the second respondent for thorough operation for fissure-in-a no. The second respondent issued a letter on 13.01.1986 to the petitioner directing him to

undergo operation. The petitioner who received the letter did not respond. The second respondent contended that it addressed another letter to the petitioner on 22.02.1986 according another opportunity to the petitioner to undergo operation. The Chief Medical Officer of the second respondent sent a letter on 12.03.1986 that the petitioner did not undergo the operation between 01.12.1985 and 11.03.1986 and that the absence of the petitioner from 28.10.1985 to 02.04.1986, consequently, was unauthorized.

7. The case of the second respondent is that Clause-9.13 of the Leave Rules of the second respondent-BHEL applies to the case of the petitioner. Clause 9.13 of the Rules is quoted for convenience:

If an employee who remains absent from duty without leave or permission or in excess of the period of leave or originally sanctioned or subsequently extended and where such period of absence exceeds fifteen (15) consecutive days, he shall be presumed to have left the services of the Company of his own accord without notice and his name will accordingly be struck off in the rolls of the Company.

8. It is the case of the second respondent that the petitioner did not attend to duty without prior sanction of leave and the lien of the petitioner, consequently, was cancelled. Sri B.G. Ravindra Reddy, learned counsel for the petitioner contended that the services of the petitioner could not be terminated without due enquiry. Although it is contended by the learned counsel for the second respondent that Clause-9.13 of the Leave Rules of the BHEL empowers cancellation of lien as abandonment of service, the second respondent has not produced any rule showing that the lien stands cancelled and that the unauthorized absence from duty would be treated as punishable misconduct. However, Clause 9.13 of the Leave Rules had been recited in the counter before the Tribunal, which has not been disputed by the petitioner.

9. In *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, the Standing Order of M/s. Buckingham & Carnatic Company Limited contemplated that any employee of the establishment who absented himself from duty for eight consecutive working days without leave should be deemed to have left the company's service without notice leading to the termination of the contract of service. Clause 13(f) also treated the unauthorized consecutive absence for eight days from duty as misconduct to be treated as a habitual absence. The standing orders of the BHEL provided for automatic termination of the services of a workman remaining absent for eight consecutive days without proper leave. There is a further provision in the standing orders that if the employee offers an explanation to the satisfaction of the management in respect of the absence, such an absence shall be converted into leave without pay and dearness allowance. One of the employees went on leave and later remained absent for a period of 52 days. Such an absence also constituted misconduct within the standing orders. The request for medical leave/leave on medical grounds was rejected as the medical officer did not find that the employee was suffering from the ailment; the removal of the employee on the ground of continuous absence

from duty by invoking the standings orders was held by the Supreme Court to be proper.

10. In *National Engineering Industries Ltd. Vs. Hanuman*, where the standing orders provided for a workman losing his lien on his appointment in case he did not join duty within eight days of the expiry of the leave was not ultra vires under Sections 33 and 33-A of the Industrial Disputes Act, 1947. In *Punjab and Sind Bank and Others Vs. Sakattar Singh*, an employee was unauthorizedly absent from duty for over 90 consecutive days beyond sanctioned leave. There was a bipartite settlement between the employer-bank and its employees that if there was unauthorized absence for over 90 consecutive days beyond sanctioned leave, the bank should issue notice calling him to report for duty and that if the employee did not report to duty within 30 days or did not offer satisfactory explanation for his absence, such employee should be deemed to have voluntarily retired. The Supreme Court observed that such a bipartite settlement was not a punishment of misconduct but was only recognition of realities of the situation and did not result in violation of principles of natural justice.

11. In *Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another*, an employee of a bank unauthorizedly absented himself from duty exceeding the prescribed period of 90 days. On the basis of the bipartite settlement, the employee was directed to report for duty and to explain the absence. The notice was refused by the employee. When the bank deemed that the employee had voluntarily retired from service, the Supreme Court held that the bank did not act in violation of principles of natural justice and that the term of employee has voluntarily retired from service is just and reasonable. In *Hindustan Paper Corporation Vs. Purnendu Chakrobarty and Others*, the employee went on leave without prior sanction and remained unauthorizedly absent for a period of more than six months. Notice was issued to the employee replying the allegations within 15 days. The employee neither submitted a medical certificate nor offered explanation. The Supreme Court held that Rule-23 of the Hindustan Paper Corporation Conduct, Discipline and Appeal Rules empower the employer to terminate the lien of the employee and treat him as having been compulsorily retired from service. The learned counsel for the petitioner placed reliance upon this decision to contend that when the petitioner absented himself from duty without proper leave, the termination of the lien and treating that the petitioner abandoned employment cannot be disputed.

12. As already noticed, Clause 9.13 of the Leave Rules envisages that any absence from duty for over 15 consecutive days shall lead to a presumption that the employee left the services of the company without notice leading to striking of the name of the employee from the rolls of the BHEL. It is contended by the learned counsel for the second respondent that the termination of the services of the petitioner is just and reasonable and could not have been ordered otherwise by the Tribunal. The Tribunal considered that the decisions cited before it had no application for the reason that notice u/s 25-F of the Industrial Disputes Act and

compensation thereof had not been paid in lieu of notice to the petitioner and that the termination of the petitioner consequently was not sustainable. The decisions relied upon by the learned counsel for the second respondent show that where the Standing Orders/Rules provide for the cancellation of the lien are loss of employment treating the same as voluntarily abandonment in case of absence for the period mentioned in the Rules was just and reasonable. Such a determination of the jural relationship of the employer and employment between the petitioner and the second respondent cannot be set aside on the basis of Section 25-F of the Industrial Disputes Act, as the determination cannot be treated as a termination by way of retrenchment. Where the petitioner absented from duty from 28.10.1985 till 02.04.1986, the termination of the services of the petitioner as voluntary abandonment is just and reasonable.

13. I may also point out that the learned counsel for the second respondent submitted that apart from Clause 9.13 of the Leave Rules, the standing orders of the second respondent also envisage about the cancellation of lien on the one hand and treating the absence as misconduct on the other hand in the event the employee absented himself from duty for more than 15 consecutive working days without prior sanction of leave. However, the standing orders have not been produced to consider the same. Apart from the Standing Orders, in view of the Clause 9.13 of the Leave Rules, which are admitted by the petitioner, the second respondent treating the petitioner as unauthorizedly absenting himself from duty and consequent treatment as abandonment of employment cannot be questioned by the petitioner at this stage.

14. The main attack of the learned counsel for the second respondent, however, is on the ground of abnormal delay on the part of the petitioner in filing the writ petition. As already pointed out, the award was passed by the Tribunal on 26.04.2002. The petitioner invoked the writ petition in 2004. This cannot be considered to be a delay within the meaning of various decisions. However, the services of the petitioner were terminated on 28.10.1985. The petitioner raised the industrial dispute in 1998. The second respondent considered that there was nearly 13 years delay between the date of termination the employment of the petitioner and his invoking the jurisdiction of the Tribunal and that the court could not have entertained the industrial dispute. The services of the petitioner were terminated on 02.04.1986. On 02.03.1998 the industrial dispute was raised by the petitioner. There was a delay of about 12 years. It was 11 years 11 months in fact. The learned counsel for the petitioner contended that the delay was not 13 years but was only 11 years 11 months. On facts, the delay of 11 years 11 months in approaching the Industrial Tribunal is true. What is the effect of such a delay may be considered.

15. The learned counsel for the 2nd respondent-BHEL insisted that I.D. No. 86 of 1998 raised by the petitioner is hit by latches in the shape of abnormal delay. In The Management of M/s. Indian Iron and Steel Co. Ltd. Vs. Prahlad, workman raised dispute 13 years after the cause of action had arisen. The Supreme Court

held that the abnormal delay constitutes laches on the part of the workman that it was justified in denying the relief to the petitioner.

16. In *Sapan Kumar Pandit Vs. U.P. State Electricity Board and Others*, Section 4K of the Uttar Pradesh Industrial Disputes Act, 1947 came up for consideration. It was provided by Section 4K of the Act that where the State Government was of the opinion that any industrial dispute existed or was apprehended, the State Government might at any time refer the dispute to a Labour Court for adjudication. The services of the employee were terminated in 1975. The dispute was referred to in 1993 u/s 4K of the Uttar Pradesh Industrial Disputes Act, 1947. The employer questioned the reference on the ground of delay. Where the conciliation proceedings were not concluded by the date the reference was made, the Supreme Court observed that the reference of the dispute by the Government could not be quashed on the ground of long delay.

17. In the State of Andhra Pradesh prior to incorporation of Section 2A(2) of the Industrial Disputes Act, 1947, an industrial dispute could be entertained on a reference u/s 10(1) of the Act only. It is contended by the learned counsel for the petitioner that where there was a delay of 13 years from the date of cessation of the jural relationship of employer and employee between the 2nd respondent-BHEL and the petitioner, the petitioner could not maintain an industrial dispute. The learned counsel for the 2nd respondent-BHEL contends that the question is whether the industrial dispute existed on the date of the reference for adjudication or not. The Supreme Court observed in para 9:

Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication?

If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which lapsed since the inception of the dispute.....

18. The learned counsel for the 2nd respondent-BHEL referred to *The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Others*, In this famous case, the question of delay was considered by the Supreme Court. The Supreme Court once again observed that a dispute which is stale could not be subject matter of reference u/s 10 of the Act.

19. The learned counsel for the 2nd respondent-BHEL placed various other decisions of the Supreme Court where the Supreme Court observed that abnormal delay in invoking the jurisdiction of the Labour Court would disentitle a workman to the relief from the Industrial Court. It is the contention of the learned counsel for the 2nd respondent-BHEL that the order of reinstatement together with continuity of service and attendant benefits by the Tribunal is highly unjustified where the petitioner approached the Tribunal with abnormal delay.

20. The learned counsel for the petitioner submitted that mere delay cannot defeat the very claim by a workman and that in such an event, the relief shall have to be moulded in tune with the delay. In *Chief Engineer, Central Zone, Andhra Pradesh State Electricity Board, Vijaywada and Others Vs. K. Naga Hema*, a Division Bench of this Court held that the long unauthorized absence from duty cannot result in automatic termination of service notwithstanding the Rules or Standing Orders.

21. In *Shahaji Vs. Executive Engineer, P.W.D.,* , where there was delay on the part of the workman in invoking Sections 10 and 11-A of the Industrial Disputes Act, it was observed that if the Industrial Court reaches the conclusion that the termination was illegal, it could suitably mould the relief to be granted to the workman and that in such a case, award of back wages might either be refused or might be curtailed.

22. In *State of Punjab Vs. Anil Kumar*, an employee moved the Tribunal 13 years after termination from service. The direction of the Labour Court to reinstate the employee into service was upheld by the Supreme Court. However, the Supreme Court declined to grant back wages to the employee who has approached the Court belatedly.

23. In view of these two decisions, I consider that delay per se cannot disentitle a workman from seeking the relief from an Industrial Court albeit in such an event, the relief of back wages may be denied.

24. In the present case, the learned counsel for the 2nd respondent-BHEL submitted that the Tribunal more or less brushed aside the decisions relied upon by the 2nd respondent-BHEL on the ground that they were not applicable to the facts of the case. He submitted that overwhelming judicial opinion is in favour of denying relief to a workman in the event of delay in approaching the Tribunal and more important, if the claim is stale, the relief cannot be granted. However, I consider that the present view of the Supreme Court would appear to be not to deny the relief to an employee merely on the ground that he approached the Tribunal belatedly. In such belated cases, the relief can be moulded depending upon the circumstances. I therefore reject the main contention of the learned counsel for the 2nd respondent-BHEL that I.D. No. 86 of 1998 was hit by delay and laches and was liable to be set aside.

25. Regarding the merits of the case, in *Jai Bhagwan Vs. Management of The Ambala Central Co-operative Bank Ltd. and Another*, where the employer passed simple orders of termination preceded by an enquiry ignoring the principles of natural justice, the Supreme Court held that such a termination was invalid as opposed to principles of natural justice.

26. In *H.D. Singh Vs. Reserve Bank of India and Others*, an employee worked for more than 240 days in a year. The Supreme Court held that striking off the name of such an employee from the rolls would amount to retrenchment covered by Section 25-F of the Industrial Disputes Act, 1947 and that striking off the name

leading to termination was bad.

27. In *D.K. Yadav Vs. J.M.A. Industries Ltd.*, , the Certified Standing Orders were held to have statutory force and that they must be in consonance with the principles of natural justice and under Articles 14 and 21 of the Constitution of India. The Supreme Court found that automatic termination of an employee for absence from duty for 8 days without sanctioned leave in terms of the Certified Standing Orders would violate the principles of natural justice and could not be enforced.

28. In *M/s. Scooters India Ltd. Vs. M. Mohammad Yaqub and Another*, a workman was absent from duty without leave. The Supreme Court held that the automatic termination on the basis of the Standing Orders would amount to retrenchment within the meaning of the Industrial Disputes Act, 1947.

29. Finally, in *H.M.T. Limited Vs. Labour Court, Ernakulam and Others*, an employee was dismissed from service leading to an industrial dispute. By the time the case reached the Supreme Court, 14 years have elapsed from the date of the dismissal. The Supreme Court upheld the order of the Labour Court to reinstate the workman into service. However, the Supreme Court granted 60% of back wages only.

30. In *K. Naga Hema (supra)*, a Division Bench of this Court clarified that the termination of the services on the ground of long and unauthorized absence from duty was not justified notwithstanding the Rules or Standing Orders. Thus, it is clear that inspite of Rule 9.13 of the Leave Rules, the services of the petitioner could not have been terminated without due enquiry. At the same time, where the petitioner approached and raised the industrial dispute nearly 12 years after his termination from service, the petitioner certainly would not be entitled to back wages till the date of the award by the Tribunal. Consequently, W.P. No. 24725 of 2002 is dismissed. W.P. No. 22913 of 2004 is also dismissed except granting the relief of back wages from the date of the award of the Tribunal. The 2nd respondent-BHEL shall reinstate the petitioner-employee into service within 4 (four) weeks from the date of receipt of a copy of these orders failing which the 2nd respondent-BHEL shall be liable to pay interest at 9% per annum on the back wages payable from the date of the award of the Tribunal till payment. The miscellaneous petitions pending, if any, shall stand closed. No costs.