

(2002) 02 GUJ CK 0062

In the Gujarat High Court

Case No : Special Civil Application No. 6479 of 2001

Gujarat State Road Transport Corporation

APPELLANT

Vs

Vijaykumar N. Raval

RESPONDENT

Date of Decision : 06-02-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A

Citation : (2002) 57 GLH 22 : (2002) 22 GLH 57

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : Ashish M. Dagli, for the Appellant; Mukesh H. Rathod, for the Respondent

Final Decision : Partly Allowed

Judgement

Jayant Patel, J.—The present petition is preferred against the Judgment and award dated 25/09/2000 passed by the Labour Court, Himatnagar in Reference (LCH) No. 742 of 1996 whereby the Labour Court has directed the petitioner Corporation to reinstate the respondent - workman in service with full backwages. The aforesaid award appears to have been published on 04/04/2001 and, hence, the petitioner - Corporation has preferred this petition before this Court.

2. The short facts leading to the present petition are that the respondent - workman was working as a helper with the petitioner - Corporation. The respondent in past had remained absent without leave six times and for such absence, penalties were imposed by the petitioner Corporation upon the respondent - workman. It is a matter of fact that the said orders for imposition of penalty have not been challenged by the respondent workman at any point of time. The respondent - workman remained absent for the period from 20/05/1994 to 02/07/1994 without obtaining prior permission of the competent authority and, therefore, the petitioner Corporation had initiated departmental inquiry. During the course of the departmental inquiry also, the respondent -

workman did not remain present and ultimately, the departmental inquiry was concluded and a show-cause notice for imposition of penalty was issued to the respondent - workman. The explanation given by the workman was that he had undergone treatment under one Dr. A.D.Patel for the period from 20/05/1994 to 16/06/1994 and for the said period, the said doctor has also issued certificate. It was the case of the workman that thereafter from 16/06/1994 to 02/07/1994, he had undergone treatment in the Civil Hospital, Himatnagar and he had also forwarded a leave report on 21/06/1994. The disciplinary authority of the Corporation examined the matter and found that, in the certificate issued by Dr. A.D.Patel, it was certified that the respondent - workman is fit to join duty from 17/06/1994. In spite of the same, he has not joined the duty. It was also considered by the disciplinary authority that the workman is having a habit of remaining absent without obtaining prior leave and not only that, but in past he had remained absent for six times without prior leave and for such absence, penalties were also imposed upon the said workman. It was further found by the disciplinary authority that the workman is guilty of misconduct and it is not in the interest of institution to continue him on the post of helper and, therefore, ultimately, a decision to dismiss the workman from service was taken.

3. Thereafter, the dispute was raised by the respondent - workman under the Industrial Disputes Act, 1947 [for short the "Act"] which ultimately came to be referred to the Labour Court, Himatnagar for adjudication being Reference (LCH) No. 742 of 1996. It may be noted that before the Labour Court also, the respondent workman did not challenge the legality and validity of the inquiry report and only contended that the finding of the authority is perverse. The Labour Court in purported exercise of powers u/s 11A of the Act, observed that on account of sickness, if the employee has not remained present on duty, it is not an offence and, therefore, the punishment is excessive. The Labour Court further observed that the medical certificate was already produced and the same was received by the Depot Manager on June 24, 1994 and, therefore, the misconduct is not proved and the petitioner herein has not established the said aspect. Ultimately, the Labour Court observed that the findings of the Inquiry Officer and the decision of the disciplinary authority are in violation of principles of natural justice and are also against the Service Regulations. The Labour Court allowed the Reference by directing reinstatement of the workman with full backwages and the said award is under challenge before this Court.

4. It is already on record that the respondent workman had not challenged the legality and validity of the inquiry report and only the contentions before the Labour Court were that the decision of the disciplinary authority is perverse and that penalty was excessive or disproportionate to the misconduct. In this regard, if we consider Section 11A of the Act, it is true that Labour Court or Industrial Tribunal, as the case may be, if satisfied that the order of discharge is not justified, it may by its award set aside the order of penalty and may give relief to the workman awarding lesser punishment in view of discharge or dismissal, as the circumstances of the case, may require. Mr. Dagli, learned advocate on

behalf of the petitioner contended that the Labour Court while arriving at the conclusion that the penalty is disproportionate to the nature of the misconduct, has not taken into consideration three important aspects of the case; firstly, the workman did not challenge the departmental inquiry; secondly, past absence and imposition of the penalty upon the workman by the Corporation are not at all considered; and thirdly, the workman himself had remained absent during the course of the inquiry.

5. So far as the first aspect is concerned, even if the workman does not challenge the legality and validity of the departmental inquiry, it cannot be said that the workman is not entitled to raise a contention that the penalty is disproportionate to the nature of the misconduct and, therefore, the said contention of Mr. Dagli deserves to be rejected. So far as the second contention regarding non-consideration of the past record by the Labour Court is concerned, there is substance in the contention of Mr. Dagli because if the award of the Labour Court is seen while arriving at the finding as to whether this penalty is disproportionate to nature of misconduct or not, the Labour Court has not considered the said aspect. It is worthwhile to note that gravity of remaining absent for one time would stand altogether on different footing than habitually remaining absent without obtaining leave. Not only that, but in the present case, as stated above, six times, the workman had remained absent and penalties were imposed upon him. On the said aspect, there is no challenge by the workman and, therefore, it has remained as a matter of his past record that the workman was remaining absent from time to time without obtaining prior leave of the competent authority and for such misconduct in the past, penalties were also imposed upon him. The Labour Court has, therefore, not examined the whole case on that basis and has only considered the last absence of the respondent workman on the ground that he was sick and the medical certificate was produced. The Labour Court has also lost sight of the important piece of document, namely, the medical certificate issued by Dr. A.D.Patel wherein it was certified that the respondent - workman is physically found fit to discharge his duty from 17/06/1994. In spite of the same, the respondent - workman continued to remain absent and, thereafter, another certificate of the Civil Hospital, Himatnagar is produced. Therefore, it appears that the Labour Court has committed an error apparent on the face of the record.

6. The third point raised by Mr. Dagli that the respondent - workman remained absent during the course of inquiry and the said aspect is not considered by the Labour Court also deserves consideration inasmuch as, the Labour Court in the award has proceeded on the basis that even if the inquiry is held and it is concluded, the burden of proving misconduct is upon the employer. When the workman himself had not remained present during the course of departmental inquiry and not only that, but when the workman himself has not challenged the legality and validity of the inquiry and has not complained regarding any breach of principles of natural justice, it was not proper on the part of the Labour Court to arrive at the conclusion that the petitioner Corporation had not been

able to discharge burden of proving the fact that the misconduct is committed. In my view, the approach of the Labour Court is erroneous on the face of the case and calls for interference.

7. It would be worthwhile to refer to decision of this Court in the case of Gujarat Road Transport Corporation Vs. Kachraji Motiji Parmar, , in which the Division Bench of this Court had an occasion to consider the scope of powers of Labour Court or Industrial Tribunal u/s 11A of the Act. The Division Bench of this Court [speaking through Mr. Justice M.B.Shah, as he then was] observed that powers u/s 11A of the Act has to be exercised judicially and Industrial Tribunal or the Labour Court can interfere with the decision of the management u/s 11A of the Act only when it is specified that the punishment imposed by the management is highly disproportionate to the degree of guilty of the workman concerned. Reference may also be made to a recent decision of the Apex Court in the case of Janatha Bazar (South Kanara Central Co-operative Whole Sale Stores Limited) Etc. Vs. The Secretary, Sahakari Noukarara Sangha Etc., wherein in case of misappropriation, the Apex Court observed that once an act of misappropriation is proved, may be small or large amount, there is no question of showing uncalled sympathy and reinstating the employee in service. It is also, inter alia, observed by the Apex Court that in view of the proof of misconduct a necessary consequence will be that the management had lost the confidence that the workman would truthfully and faithfully carry on his duty. It is true that earlier observation of the Supreme Court as well as by this Court pertains to the case of misappropriation. However, in the present case, the Labour Court was considering the case of remaining absent on account of sickness without prior permission and without producing necessary medical certificate. The principle regarding decision of the disciplinary authority would remain the same, save and except, that degree and nature of misconduct and nature of the duty may vary while taking final decision of imposing penalty. If we examine, the present case before us, it is a matter of record that six times, the workman concerned had remained absent and not only that, but after following the proper procedure, penalties were imposed upon him and the workman has accepted the penalties. During the period from 02/05/1994 to 02/07/1994, he had not only remained absent without leave but had not joined the duty for a single day even though he was certified physically fit by Dr. A.D.Patel, as per his own document. Under this circumstances, when the employer has taken the decision of imposing punishment of dismissal on the ground that the workman is in habit of remaining absent without obtaining prior leave, it cannot be lightly interfered with by Labour Court in mechanical exercise of the powers.

8. Mr. Upadhyay, learned advocate appearing for the respondent - workman has placed reliance upon a judgment of the Bombay High Court in the case Divisional Controller, Maharashtra State Road Transport Corporation vs. Rajaq Abbas reported at 2000 L. I.C. 608 and in his submission, in a case of remaining absent eighth time, the learned Single Judge of the Bombay High Court has granted benefit of continuity in service while reversing the order of the Labour Court

granting 50% backwages and, therefore, he has requested this Court to take same approach. I am of the opinion that when in the past not only sixth time, penalties have been imposed upon the workman but even as per his own medical certificate though he was physically found fit, has not attended duty. Mr. Upadhyay has also relied upon a judgment of this court in the case of Gujarat State Road Transport Corporation vs. Abdulkarim I. Shaikh reported at 2000 (4) G.L.R. 3130. The same was the case of remaining absent for one time and it was not the case of remaining absent seventh time and, therefore, the said judgment is of no help to Mr. Upadhyay. Lastly, Mr. Upadhyay, learned advocate appearing for Mr. M.H.Rathod contended that if the Court finds that the misconduct is serious and the charges are proved, this Court may impose a suitable punishment by modifying the award of the Labour Court. It is true that a single instance of remaining absent without prior sanction of the competent authority by a person who is working as a helper may not constitute a serious misconduct, which would call punishment of dismissal. However, in the case before us, it has already come on record that not only once but for six times, the workman was imposed penalties for remaining absent without obtaining leave and from the above, it is apparent that the workman has a habit of remaining absent without obtaining prior leave of the employer.

9. Mr. Upadhyay appearing on behalf of the workman has also relied upon the judgment of this Court reported in 2001 (3) G.L.H. 442 and 2000 Labour Law Reporter, page 364 to contend that in case of absence on the aground of sickness, a lenient view may be taken by this Court even if the Court finds that the Labour Court ought not to have granted reinstatement with full back wages.

10. Considering over all facts and circumstances of the case, I am of the view that the Labour Court has of course exceeded in exercise of the jurisdiction by substituting the penalty, but at the same time the misconduct is not such which calls for the serious penalty. It is also reported by Mr. Dagli that though the opportunities were given even after the award to the workman concerned to join the duty, he has not joined the duty and, therefore, in the submission of Mr. Dagli, it is apparent that the workman is not interested in the work and he is only interested in taking undue fruits of the litigation, namely backwages. Considering the facts and circumstances of the case, I am of the view that the ends of justice would be met if a simple reinstatement without any backwages is made with the penalty of withholding five increments with future effect with the further clarification that the Corporation shall call upon the workman to join the duty within a period of six weeks and if the workman does not offer himself for the job, the Corporation shall not require to reinstate him in service.

In the result, this Special Civil Application is partly allowed to the aforesaid extent and there shall be no order as to costs. Rule is made absolute to the aforesaid extent.