

(2013) 10 GAU CK 0027

In the Gauhati High Court

Case No : Writ Petition (C) No. 2877 of 2006

Hindustan Paper Corporation Limited and Cachar Paper Mill APPELLANT

Vs

Sri Ranjit Kumar Deb and The Presiding Officer, Industrial Tribunal RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Citation : (2014) 140 FLR 663 : (2014) LabIC 222

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : J. Roy, for the Appellant; N. Dhar, for the Respondent

Final Decision : Allowed

Judgement

Tinlianhang Vaiphei, J.—The legality of the Award dated 20-12-2005 passed by the Industrial Tribunal, Silchar in Reference Case No. 6 of 1995 directing the petitioner-Corporation to reinstate the respondent No. 1 to his former post with full back wages, is called into question in this writ petition. The petitioner is a Corporation and a Government of India Undertaking, having its registered office at South Tower (4th Floor) Scope Minar Complex, Laxmi Nagar District Centre, New Delhi. The Corporation set up two units in Assam, namely, Nagaon Paper Mill (NP), which started its production in 1985 and, the petitioner No. 2, namely, Cachar Paper Mill (CPM) which started production in 1988. The Corporation is engaged in the manufacture and sale of various varieties of paper and newsprints and a small quantity of caustic soda and chlorine. The respondent was the workman of the petitioner No. 2, who was appointed as unskilled worker on 1-3-1986 in lieu of the acquisition of the land of his father by the Corporation for establishment of the unit. According to the petitioner-Corporation, the respondent No. 1 became habitual unauthorized absentee from 4-4-1988 to 24-2-1989 i.e. for a period of 385 days. However, on his written assurance that he was ready to face any action against him if he repeated his habitual absenteeism, his case was sympathetically considered by the petitioner, and he

was accordingly given fresh appointment on 24-4-1989. Unfortunately, he again unauthorizedly absent from duty from 31-7-1989 to 10-7-1990, for a period of 211 days from 27-10-1990 to 28-2-1991 i.e. for a period of 102 days and thereafter from 19-3-1991 onwards. This compelled the petitioners to strike off the name of the respondent No. 1 from the roll of the company till the date of his termination. The respondent No. 1 was thereafter given an opportunity to explain his absence from duty. When he neither gave satisfactory explanation nor resumed his duty, the petitioners, therefore, presumed that the respondent No. 1 had voluntarily abandoned his service and accordingly informed him vide the letter dated 9-10-1991 that his name had been struck off in accordance with the provisions of the Certified Standings Orders.

2. Aggrieved by termination of his service, the petitioner approached this Court in Civil Rule No. 1156/93, and this Court by the order dated 29-6-1994 referred the matter for conciliation before the Labour Court or Tribunal as the writ petition involved an industrial dispute. It was further directed therein that in the event of failure of the conciliation process, the Labour Officer, Hailakandi should make a report to the State Government within two months from the date of complaint and the State Government should thereafter pass appropriate order under the Industrial Disputes Act, 1947 ("the Act" for short) for referring the dispute to the Labour Court or the Industrial Tribunal as the case may be. In pursuance of the said order, the dispute was referred to the Labour Officer, Hailakandi for conciliation and when the conciliation process failed, the dispute was eventually referred to the Industrial Tribunal, Silchar ("the Tribunal") u/s 10 of the Act for adjudication. Though the Tribunal, after hearing the parties, came to the conclusion that though the Management was not at fault in dismissing the respondent No. 1 from service, it nevertheless, passed the award dated 18-12-1998 directing the petitioners to give fresh appointment to the respondent No. 1 together with 1/4th of his back wages to be calculated from 13-4-1991.

3. Aggrieved thereby, the petitioners filed WP(C) No. 3317/99 before this Court questioning the legality of the award dated 18-12-1998. The respondent No. 1 also filed WP(C) No. 1939/99 before this Court praying for full back wages. This Court by a common judgment and order bearing dated 26-2-2004 disposed of the two writ petitions by directing the Tribunal to hold a de novo adjudication of Reference Case No. 6/95 after hearing both the parties. The Tribunal again conducted the de novo trial and, after hearing the parties, passed the award dated 20-12-2005 directing the petitioners to reinstate the respondent No. 1 to his service forthwith with full back wages and that if they found him to be incapable of performing his duty due to physical disablement, it would be open to them to relieve him from service after his reinstatement in accordance with the established procedure provided for in the Certified Standing Order of the Corporation. Dissatisfied with this award, the petitioners initiated this round of litigation to question the legality thereof.

4. While passing the impugned award, the Tribunal recorded the findings from

the evidence of MW 1 that the evidence adduced by the management is not worthy of belief inasmuch as there was no evidence to substantiate the charge that the respondent No. 1 was very irregular in attending his duties since after or before his re-employment and that statement of this witness that the petitioners issued several show cause notices upon the respondent No. 1 in the year 1988, 1989, 1990 and 1991 is not proved by supporting documents: such self-serving statement cannot absolved them of their duty to proving proper service of those show cause notices. On the contrary, the Tribunal took the view that the respondent No. 1 has been able to establish by leading oral and documentary evidence that after his appointment as unskilled worker at HPC, Panchingram, he fell ill due to rheumatic fever, which prevented him from attending his duty; that when the petitioners resumed his duty after his fresh appointment, he fell ill again and had been undergoing treatment at different hospitals including the departmental hospital of H.P.C. from 28-12-90 to 12-12-1991 and from 19-03-91 to 12-4-91 and he applied leave for those days by sending petition to the management of H.P.C. and after recovering from his ailment, he visited the office of the H.P.C. with medical fitness certificate marked Ext. 4 and 5, but the Senior Manager did not allow him to join his services: he was rather issued show cause notice but even after submission of Ext. 9 his show cause, he was not allowed to resume his duty and that the Senior Manager, on the contrary, issued the impugned order dismissing him from service. According to the Tribunal, as the management has failed to rebut the aforesaid evidence adduced by the respondent No. 1, it could be safely concluded that the impugned dismissal order is illegal, mala fide and contrary to law. The Tribunal further took the view that the management, after receiving show cause from the respondent No. 1, ought to have conducted a departmental or domestic enquiry by affording him reasonable opportunity of hearing. It was on the basis of the aforesaid findings that the Tribunal passed the impugned order reinstating the respondent No. 1 to service with full back wages but by giving liberty to the petitioners to relieve him from after his reinstatement in accordance with the Certified Standing Order of the Corporation.

5. Clause 21 of the Standing Orders of Nagaland Pulp & Paper Co. Ltd., which is admittedly applicable to the petitioners, deals with absence without leave and reads thus:

21. Absent Without Leave

(i) An employee shall not absent himself without leave. If any employee remains absent without prior permission, he will be marked absent in the attendance register and it will render him liable to disciplinary action.

(ii) Absence without leave for more than eight days will be treated as voluntary abandonment of service without formal notice. The name of such employee will be struck off from the rolls of the Company.

6. In the instant case, we are concerned with abandonment of service, which is

dealt with by sub-clause (ii) of Clause 21 of the Standing Orders. There is no definition of the term "abandonment of service". The term came up for consideration before a three-Judge Bench of the Apex Court in *G. T. Lad and Others Vs. Chemical and Fibres of India Ltd.*, and the decision is found at para 6, 7 and 8 of the judgment, which read thus:

6. Re. Question No. 1: In the Act, we do not find any definition of the expression "abandonment of service". In the absence of any clue as to the meaning of the said expression, we have to depend on the meaning assigned to it in the dictionary of English language. In the unbridled edition of the Random House Dictionary, the word "abandon" has been explained as meaning "to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something". According to the Dictionary of English Law by Earl Jowitt (1959 edition) "abandonment" means "relinquishment of an interest or claim". According to Black's Law Dictionary "abandonment" when used in relation to an office means "voluntary relinquishment". It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an abandonment of office".

7. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of the case.

8. Re.-Question 2: This takes us to the consideration of the second question, namely, whether in the circumstances of the instant case, it could be said that the appellants had voluntarily abandoned the service of the Company. It may be recalled that the appellants had along with 229 other workmen gone on indefinite strike which ended on October 22, 1972 in response to the strike notice by the union to the company to press its demand for reinstatement of its three dismissed leaders and had not only by their letters dated September 21, 1972 and September 26, 1972 unequivocally intimated to the Company that they did not intend to abandon the service but had also returned the cheques sent to

them by the company on account of their leave salary gratuity, etc. The appellants" stand that the letter of the Company dated September 7, 1972 was received by them on September 20, 1972 and not earlier was never denied or refuted by the Company in the correspondence that passed between the parties. Thus, there was nothing in the surrounding circumstances or the conduct of the appellants indicating or suggesting an intention on their part to abandon service which in view of the ratio of Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, can be legitimately said to mean detach, unfasten, undo or untie the binding knot or link which holds one to the office and the obligations and privileges that go with it. Their absence from duty was purely temporary and could by no stretch of imagination be construed as voluntary abandonment by them of the Company's service. In Express Newspapers (P) Ltd. Vs. Michael Mark and Another, which is on all fours with the present case, it was held that if the employees absent from the work because of strike in enforcement of their demands, there can be no question of abandonment of employment by them. In the present case also the appellant's absence from duty was because of their peaceful strike to enforce their demand. Accordingly, we are of the view that there was no abandonment of service on the part of the appellants.

7. In other words, there has to be an intentional or willful relinquishment or abandonment of service on the part of the absentee employee so as to constitute abandonment of service. In this connection, the following observations of the Apex Court in Krushnakant B. Parmar Vs. Union of India (UOI) and Another, though rendered in the context of service law, will equally clarify the position:

16. In the case of the appellant referring to unauthorised 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 "unauthorised 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 willful 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 willful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, 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 a legation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

(Underlined for emphasis)

8. In the case at hand, while passing the impugned award, the Tribunal recorded the findings from the evidence of MW 1 that the evidence adduced by the management is not worthy of belief inasmuch as there was no evidence to substantiate the charge that the respondent No. 1 was very irregular in attending his duties since after or before his re-employment and that the statement of this witness that the petitioners issued several show cause notices upon the respondent No. 1 in the year 1988, 1989, 1990 and 1991 is not proved by supporting documents: the management could not produce copies of such show cause notices purported to have been issued to the respondent No. 1. The Tribunal further held that merely because the management had stated that show cause notices were issued upon the respondent No. 1 could not absolve them of their duty of proving the factum of service of such show cause notices upon the respondent No. 1 and that if the statement of MW 1 is discarded on the ground that he could not substantiate his case, the management has miserably failed to refute and rebut the evidence led by the respondent No. 1 and the documents exhibited by him.

9. On the contrary, the Tribunal took the view that the respondent No. 1 has been able to establish by leading oral and documentary evidence that after his appointment as unskilled worker at HPC, Panchingram, he fell ill due to rheumatic fever, which prevented him from attending his duty; that when the petitioners resumed his duty after his fresh appointment, he fell ill again and had been undergoing treatment at different hospitals including the departmental hospital of H.P.C. from 28-12-90 to 12-12-1991 and from 19-03-91 to 12-4-91 and he applied leave for those days by sending petition to the management of H.P.C. and after recovering from his ailment, he visited the office of the H.P.C. with medical fitness certificate marked Ext. 4 and 5, but the Senior Manager did not allow him to join his services: he was rather issued show cause notice but even after submission of Ext. 9 his show cause, he was not allowed to resume his duty and that the Senior Manager, on the contrary, issued the impugned order dismissing him from service. According to the Tribunal, as the management has failed to rebut the aforesaid evidence adduced by the respondent No. 1, it could be safely concluded that the impugned dismissal order is illegal, mala fide and contrary to law. The Tribunal further took the view that the management, after receiving show cause from the respondent No. 1, ought to have conducted a departmental or domestic enquiry by affording him reasonable opportunity of hearing. It was on the basis of the aforesaid findings that the Tribunal passed the impugned order reinstating the respondent No. 1 to service with full back wages but by giving liberty to the petitioners to relieve him from after his reinstatement in accordance with the Certified Standing Order of the Corporation.

10. In my judgment, the aforesaid findings of the Tribunal do not suffer from any infirmity: on the contrary, those findings are based on evidence. The respondent No. 1 was admittedly, suffering from rheumatic fever and had undergone

treatment at the departmental Hospital of Cachar Paper Mill from 1-3-91 to 12-4-91, for which he sent leave application to the management of H.P.C., and after recovering from his ailments, he visited his office with medical fitness certificates, but he was not allowed to join his service. Then one thing led to another whereafter the impugned order of removal was issued. In my judgment, the absence of the respondent from duty under the aforesaid proved facts cannot be held to be willful absence or abandonment of service: his absence was rather due to illness and, therefore, occasioned by circumstances beyond his control. The Tribunal did not commit any error of law or jurisdictional error in deciding the case against the petitioner-Corporation. The next question to be determined is whether the respondent is entitled to back wages. A number of decisions have been cited at the bar by counsel appearing for the rival parties. Suffice it to say that the principle of "no work, no pay" cannot entirely apply in this case inasmuch as the respondent was wrongfully removed from service as indicated earlier. Nevertheless, on considering the totality of the facts in this case and also of the difficulty being faced by the petitioner-Corporation, it will not be equitable to saddle them with the entire back wages either. Under the circumstances, by striking a balance between the interests of the Corporation and the respondent No. 1, I decide to give back wages to the respondent No. 1 only with effect from 20-12-2005 when the impugned award was passed by the Tribunal.

11. There is, however, another aspect of the matter which cannot be overlooked in this case. Therefore, the last question which falls for consideration now is the type of reinstatement, which can be ordered on the admitted position of the parties that the respondent No. 1 is paralytic patient (and he had remained absent from duty since the date of his fresh appointment).--See para 17 of the writ petition. In this context, it may be apposite to refer to Section 47(1) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Act" for short), which is in the following terms:

47. Non-discrimination in Government employment.--

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

12. As the petitioner-Corporation has admitted in paragraph 17 of their writ petition, there can be no dispute that the respondent No. 1 is a person with disability. Section 2(t) of the Act defines the term "person with disability" to

mean a person suffering from not less than forty percent of any disability as certified by a medical authority. In my considered view, on considering the admission made by the petitioner-Corporation in their writ petition and keeping in mind the definition of "person with disability" adumbrated above, there is presumption, or, at any rate, rebuttable presumption, that the respondent No. 1 comes within the purview of the definition. In fact, I have a sneaking suspicion that this disability must have at the first instance prompted the petitioner-Corporation to remove him from service. Consequently, the petitioner-Corporation, while reinstating the respondent No. 1 to his former post, shall follow the provisions of Section 47 of the Act. It is, however, vehemently argued by the learned for the petitioner-Corporation that there can be no presumption of disability to the extent of forty percent so as to automatically entitle the respondent No. 1 of benefit of the Act and that the question of reinstatement of the respondent No. 1 to his post should be preceded by his examination by an approved Medical Board on the extent of his disability. There is force in the contention of the learned counsel for the petitioner-Corporation. No other issue survives for consideration. For what has been stated in the foregoing, this writ petition is allowed with the following directions:

(a) The petitioner-Corporation is directed to refer the respondent No. 1 before an approved Medical Board to examine the extent of his disability, and if the Medical Board finds the petitioner to be suffering from not less than forty percent disability, the petitioner-Corporation shall thereafter act in accordance with the provisos to Section 47(1) of the Act.

(b) For enabling the petitioner-Corporation to facilitate the medical examination, the respondent No. 1 is directed to approach the petitioner No. 2 represented by the Manager (Legal), HPC within two weeks from the date of receipt of this judgment and on his appearance, the petitioner No. 2 shall cause the medical examination, without any delay.

(c) If the Medical Board determines that the respondent No. 1 is a person with disability as defined by the Act, the petitioners shall reinstate the respondent No. 1 in accordance with the provisos to Section 47(1) of the Act.

(d) On his reinstatement as indicated above, the petitioners shall pay all the back wages due with effect from 20-12-2005 to the respondent No. 1.

(e) The entire exercise shall be carried out by the petitioners within a period of two months from the date of receipt of the certified copy of this judgment, which shall be furnished to them by the respondent No. 1.

(f) The parties are, however, directed to bear their respective costs.

(g) Transmit the L.C. record forthwith.