

(2012) 09 AP CK 0016

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 865 of 2012 and Writ Appeal No's. 913 and 1106 of 2012

M. Ch. Subba Rao

APPELLANT

Vs

The Depot Manager, APSRTC, Chilakaluripet Depot and
Another
 The Depot Manager, APSRTC, Chilakaluripet
Depot, Guntur District Vs M. Ch. Subba Rao and The Labour
Court, Guntur

RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Evidence Act, 1872 — Section 106

Industrial Disputes Act, 1947 — Section 11A, 25F

Citation : (2012) 6 ALT 459 : (2013) 136 FLR 637 : (2013) LabIC 881 : (2013) 2 LLJ 542

Hon'ble Judges : G. Rohini, J;C. Praveen Kumar, J

Bench : Division Bench

Advocate : V. Padmanabha Rao and Smt. B.G. Uma Devi, in WA No. 865 of 2012 and M/s. K. Satyanarayana Murthy, in WA Nos. 913 and 1106 of 2012, for the Appellant; K. Satyanarayana Murthy, Counsel for 1st Respondent, G.P. for Labour Counsel for 2nd Respondent, M/s. V. Padmanabha Rao and Smt. B.G. Uma Devi, Counsel for 1st Respondent and G.P. for Labour Counsel for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

C. Praveen Kumar

1. Lack of anticipation resulting in a fatal road accident made a driver of APSRTC bus bearing No. AP 9 Z 5273 come before us seeking back wages by way of W.A. No. 865 of 2012. Questioning the very order of reinstatement with continuity of service and also awarding 50% of back wages by the learned single Judge, the Corporation preferred W.A. No. 1106 of 2012 and W.A. No. 913 of 2012 respectively. Since these appeals arose out of same set of facts, parties and issues being one and the same, they are being disposed of by a common

judgment. For the sake of convenience, the parties are referred to as they are arrayed in Writ Petition No. 27122 of 2008 filed by the driver of RTC bus.

2. The petitioner was appointed as a driver in the 1st respondent Corporation in January 1986. On 31.08.1998, bus which he was driving on route from Chilakaluripet to Punur met with a fatal accident at Gandhi Circle near Clock Tower centre, Chilakaluripet. The 1st respondent while placing the petitioner under suspension issued a charge sheet dated 10.09.1988. The petitioner submitted his explanation denying the charges levelled against him. Not being satisfied with the explanation, the Corporation ordered domestic enquiry. The enquiry officer submitted his report for which the petitioner submitted his objections. Having come to the conclusion that the charges levelled against the petitioner are proved, a show cause notice of removal was issued. After considering the remarks sent by the petitioner the 1st respondent came to the conclusion that as the charges constitute grave misconduct, removed the petitioner from service. Challenging the said order, the writ petitioner preferred an appeal and then a revision before the Deputy Chief Traffic Manager and Regional Manager, Guntur, which were rejected on 04.06.1999 and 20.12.1999 respectively.

3. Aggrieved by the said orders, the petitioner raised an Industrial Dispute in I.D. No. 116 of 2000 before the Labour Court, Guntur. In the said I.D., the writ petitioner contended that the cyclist died due to his own fault as he suddenly crossed the road from one side to the other from behind a lorry, while the petitioner was overtaking the said lorry. According to him, it is not possible to observe each and every person or cyclist who entered the road suddenly from behind a parked vehicle. The respondent Corporation contended that if the petitioner was more conscious and cautious, he would have averted the accident.

4. The Labour Court, while deriving power from Section 11-A of the Industrial Disputes Act, adjudicated the matter by re-appreciating the entire evidence adduced in the domestic enquiry and held that the finding of the enquiry officer was not on material evidence, but were made on the basis of a report of the preliminary enquiry officer, who in turn based his findings on the basis that a young boy died in an accident while crossing the road. As no cogent reasons were given by the enquiry officer, to come to such a conclusion, the findings were found to be perverse. Therefore, the charges levelled were not found to be established and consequently ordered reinstatement of the petitioner with continuity of service but without back wages.

5. Challenging the award of the Labour Court to the extent of denying back wages, the petitioner filed Writ Petition No. 27122 of 2008 and the Corporation/1st respondent filed Writ Petition No. 6605 of 2008. A learned Judge of this Hon'ble Court by his order dated 14.3.2012, allowed Writ Petition No. 27122 of 2008 by directing the 1st respondent to pay 50% of the back wages from the date of removal till the date of reinstatement, consequently dismissed Writ Petition No. 6605 of 2008. Aggrieved by the same, the employee filed W.A.

No. 865 of 2012 against the order granting only 50% of back wages while the Corporation filed W.A. No. 1106 of 2012 and W.A. No. 913 of 2012 questioning the order of reinstatement and continuity of service and also awarding 50% of back wages.

6. The learned counsel for the respondent in Writ Petition/appellant in W.A. No. 913 of 2012 (APSRTC) would contend that having accepted the validity of the domestic enquiry and as the workman was neither put to unfair labour practice or victimised, the Labour Court could not have interfered with the order of punishment imposed by the enquiry officer as the findings of the enquiry officer are not perverse and are based on material evidence. According to him, the order of the learned single Judge in awarding back wages is contrary to the ratio laid down in U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, and Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, and J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another,

7. The learned counsel for the writ petitioner contends that the finding of the learned single Judge with regard to gainful employment is incorrect. According to him, the learned single Judge presumed that the petitioner must have been employed elsewhere as his licence was not suspended. He further contends that once the order of termination is set aside and the workman is reinstated, the payment of back wages will follow as a consequence thereof. To substantiate his argument, he also relied upon the observations made by the Supreme Court in J.K. Synthetics case (3 supra).

8. The points for consideration are

1) Whether the Labour Court was right in ordering reinstatement after re-appreciating the material before it?

2) When once the workman is reinstated, is he entitled to full back wages?

9. Section 11-A of the Industrial Disputes Act reads as under:

Sec. 11A: Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require: Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

10. The above section was introduced by way of amendment Act 45 of 71 to remove the limitation imposed on the power of jurisdiction of the Labour Court.

11. The Supreme Court in *Rama Kant Misra Vs. The State of Uttar Pradesh and Others*, and in *Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others*, held that since the introduction of Section 11A of the Act, the Labour Court/Industrial Tribunal is equipped with the powers to re-appreciate the evidence led in domestic enquiry and satisfy itself whether the said evidence relied upon by the employer establishes the misconduct alleged against the workman. Similar view was expressed by the Supreme Court in *Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others*,

12. However, in *J.K. Synthetics case (2 supra)* the Supreme Court sounded a note of caution and observed that the recent trend in regard to scope of interference with punishment in matters involving discipline at the workplace has been different. After referring to the observations made in *Hombe Gowda Edn. Trust and Another Vs. State of Karnataka and Others*, *Mahindra and Mahindra Ltd. Vs. N.B. Naravade etc.*, *U.P. State Road Transport Corporation Vs. Subhash Chandra Sharma and Others*, , *Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate*, *Madhya Pradesh Electricity Board Vs. Jagdish Chandra Sharma*, and *Regional Manager, RSRTC v. Ghanshyam v. Sharma*, (2002) 1 LLJ 234 SC the Supreme Court held that the Labour Court should interfere only when the punishment was shockingly disproportionate to the gravity of charge established.

13. Taking a clue from the observations made by the Supreme Court, the learned counsel for the respondent Corporation contended that the findings of the Labour Court, as affirmed by the learned single Judge with regard to reinstatement are contrary to law. According to him, the power u/s 11-A of the Act cannot be used to interfere with quantum of punishment on irrational and extraneous factors or on compassionate grounds. According to him, the discretion has to be used judiciously and not capriciously. It may be noted that the judgements referred to by the Supreme Court in *J.K. Synthetics case* were cases where the employee was found guilty of the charges levelled against him and the Court was considering only the quantum of punishment to be imposed on the said employee/workman. In that context, the Supreme Court held that the Labour Court should interfere only where punishment was disproportionate with the gravity of the charge established. In fact, the Supreme Court in *J.K. Synthetics case* was dealing with the situation where reinstatement was as a result of consequence upon imposition of lesser punishment after finding the employee guilty. The situation on hand is totally different. Here is a case where the employee was exonerated by the Labour Court of all the charges and the findings of the enquiry officer were found to be without any evidence and perverse. Therefore, the Labour Court rightly ordered reinstatement after analysing the evidence before it.

14. In that view of the matter, the findings of the Labour Court which was confirmed by the learned single Judge warrant no interference.

15. Awarding back wages depends upon facts and circumstances of the case. As held by the Supreme Court in *J.K. Synthetics case*, even if the Court finds that it

is necessary to award back wages, the question would be whether back wages should be awarded fully or only partially (and if so, the percentage). Now back wages are no longer considered to be automatic or a natural consequence of reinstatement. After referring to various decisions, the Supreme Court, in U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, observed as follows:

A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the courts realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatization and outsourcing, is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of section 6N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot therefore be the natural consequence.

16. In General Manager, Haryana Roadways Vs. Rudhan Singh, the Supreme Court while considering the termination of service was in violation of Section 25F of the ID Act held as under:

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment, i.e., whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period

of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period, i.e., from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration, is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily wage employment though it may be for 240 days in a calendar year.

17. In J.K. Synthetics case the Supreme Court also held that where the Court sets aside the termination as a consequence of employee being exonerated or being found not guilty of misconduct, the principles relating to back wages etc will be the same as those applied in case of illegal termination.

18. An analysis of the above decision would indicate few factors (though not exhaustive) which are to be taken into consideration while awarding back wages, and the same are summarised as under:

- a) Manner and mode of selection & appointment,
- b) Nature of employment, adhoc, daily wage contract labour, temporary, permanent-
- c) Length of service, which the workman had rendered. If the workman had rendered considerable period of service, he may be awarded full or partial back wages keeping in view the age and qualification passed by him and that he may not be in a position to get another employment.
- d) Whether he was gainfully employed during the period of suspension/termination.
- e) Payment of full back wages cannot be the natural consequence of reinstatement. It depends upon the facts and circumstances of each case.

19. In the present case as the Writ Petitioner was exonerated of all charges, he is entitled to reinstatement and also to the back wages basing on the limitation and guidelines indicated above.

20. The learned counsel for the Writ Petitioner would contend that the learned single Judge erred in awarding only 50% of the back wages while holding that the observations made by the Labour Court, with regard to the gainful employment of the Writ Petitioner as perverse.

21. It may be noted that in Annexure II to the claim petition in ID No. 116 of 2000 filed by the Writ Petitioner, a specific plea was taken that after removal from service, he tried for an alternative employment but in spite of his best efforts, he could not secure any job. It was further mentioned in the said application that the management failed to consider his family burden where

three sons, mother and brother's children are dependent on him. The Depot Manager, APSRTC, Chilakaluripet, who is the respondent in the ID filed counter stating that the applicant is put to strict proof that he was unemployed ever since the date of removal from service. There is no specific averment that the Writ Petitioner was gainfully employed during the said period. The Labour Court without considering the contents of the application held as follows:

In the instant case, the record clearly indicates that the petitioner in the petition did not contend that he was not gainfully employed after his termination.

22. While making the above observation, the Labour Court further held that as the Writ Petitioner was still holding a valid driving licence, he might have been employed elsewhere. So saying rejected the claim for back wages.

23. The learned single Judge while allowing Writ Petition No. 27122/2008 observed that the Labour Court denied back wages only on the ground that the driving licence of the petitioner has not been suspended by the RTO and that the Writ Petitioner might have been employed elsewhere. It was further observed that there is no pleading and no evidence adduced by the Corporation on this aspect and also held that the observation of the Labour Court is only on assumption without any basis and same appears to be perverse. Having held that the findings of the Labour Court with regard to the gainful employment of the Writ Petitioner as perverse, the learned single Judge awarded only 50% back wages from the date of removal till the date of reinstatement.

24. In *Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma*, the Supreme Court held as under:

..... When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places material in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

25. In *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, the Supreme Court held that having regard to the provision of Section 106 of the Evidence Act, or the provision analogous thereto, the plea that the workman was not gainfully employed should be raised by the workman. In *Metropolitan Transport Corporation Vs. V. Venkatesan*, , the Supreme Court held as under:

.....it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment....

26. In the present case the Writ Petitioner discharged his burden at the earliest point of time by stating that he was not gainfully employed during the period

when he was out of service. As he cannot be asked to prove a fact which according to him was not in existence, the burden of proving the said fact shifts on to the Corporation. The Corporation was not able to discharge its burden by producing an iota of evidence to prove that the Writ Petitioner was gainfully employed during the period of termination. It may be noted that even in the counter filed by the Corporation in the said I.D. it is not even alleged that the Writ Petitioner was employed gainfully during the period of his termination. It appears that though the said plea was taken in the Writ Petition filed by the employee no counter affidavit was filed denying the same.

27. In view of the above findings, we feel that the Writ Petitioner is entitled to full back wages. In the result, W.A. No. 865 of 2012 filed by the employee seeking total back wages is allowed and W.A. No. 913 of 2012 and W.A. No. 1106 of 2012 filed by the Corporation stand dismissed. No order as to costs.