
(1979) 08 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No 193 of 1979

M.P. Electricity Board, Jabalpur

APPELLANT

Vs

State Industrial Court, M.P., Indore and others

RESPONDENT

Date of Decision : 20-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25F

Citation : (1979) 08 MP CK 0008

Hon'ble Judges : G.P. Singh, C.J.;C.P. Sen, J

Bench : Division Bench

Advocate : P.D. Pathak, for the Appellant; Gulab Gupta, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, C.J.—Shri B.P. Pandey, who is respondent No. 3 in this petition, was employed as a Meter Inspector in the M.P. Electricity Board. In December 1972 the respondent was posted at Rewa from where he was transferred to Chachai. In spite of his transfer, the respondent did not join at Chachai. The respondent's services were terminated on 4th December 1974 on the ground of abandonment of service. The respondent filed an application u/s 30 of the M. P. Industrial Relations Act, 1961, for setting aside the order terminating the services. The Labour Court, by order dated 18th February 1978, directed reinstatement of the respondent with half back wages. A revision was filed by the Electricity Board to the Industrial Court which was dismissed by order dated 8th January 1979. The Board then filed this petition under Article 226 of the Constitution challenging the aforesaid orders of the Labour Court and then Industrial Court.

2. The argument of the learned counsel for the petitioner in support of the petition is that the Industrial Court wrongly assumed that the order of termination of the respondent's services proceeded under Standing Order 8, that it failed to consider that the order was justified by the petitioner on the grounds

of abandonment and misconduct of unauthorised absence from duty and that it failed to notice that the said misconduct was held to be proved by the Labour Court. The argument of learned counsel for the respondent, on the other hand, is that in case of an order of discharge simpliciter, the employer cannot support the order on the ground that the employee was guilty of misconduct.

3. A perusal of the written statement filed by the petitioner before the Labour Court would go to show that it was clearly alleged in paragraphs 1 (c) and (f) that the respondent was guilty of unauthorised absence from duty for a considerable period and an enquiry was initiated against him for contravention of the transfer order and also for unauthorised absence from duty. It was further alleged that the enquiry could not proceed as the notice of enquiry along with the charge-sheet could not be served on the respondent and was returned unserved. It was also alleged that in the absence of knowledge of whereabouts of the respondent who had shown complete disinterestedness in the continuation of his employment, the departmental enquiry could not be proceeded and the respondent's services were terminated on the footing that he had abandoned his service. From the facts alleged in the written statement it is clear to us that the petitioner had supported the order of termination on the two grounds viz., (i) that the respondent had abandoned his service, and (ii) that he was guilty of misconduct of unauthorised absence from duty for a considerable period. Unauthorised absence from duty for more than ten consecutive days is a major misconduct under Standing Order 12 (1) (p). The Labour Court framed issue No. 2 on the question whether the respondent remained absent unauthorisedly. In deciding this issue the Labour Court clearly held that the respondent remained absent unauthorisedly from 19th September 1973 to 22nd September 1974 and was guilty of a major misconduct (see paragraph 12 of the order of the Labour Court). Although the Labour Court came to the conclusion that the respondent was guilty of misconduct, it failed to notice that the order of termination could be sustained on that ground and the respondent could not be reinstated. This was the mistake which the Labour Court apparently committed. The Industrial Court in dealing with the revision failed to take notice of this omission by the Labour Court. The Industrial Court also wrongly assumed that the order of termination of employment of the respondent was passed under Standing Order 8 and that it was invalid merely because no enquiry was held by the petitioner before passing the order. Standing Order 8 in the instant case was wholly inapplicable. An employee is deemed to have left service under Standing Order 8 (e) when he remains absent beyond the period of leave originally granted or subsequently extended unless he returns within ten days of the expiry of the sanctioned leave and/or satisfactorily explains to the Management or the officer authorised by it his inability to resume immediately on expiry of his leave. Now, in the instant case, the respondent had never applied for leave and there was no question of his over staying leave or remaining absent beyond the period of leave originally granted or extended. The order of termination did not refer to Standing Order 8 at all. In our opinion, the Industrial Court wrongly assumed that the petitioner

terminated the respondent's services under Standing Order 8. Instead of testing the legality of the order of termination under Standing Order 8, the Industrial Court should have concentrated upon the two questions which arose in the case, viz., (i) whether the order of termination of respondent's services could be justified on the ground that the respondent abandoned the service, and (ii) whether the said order could be justified on the ground that the respondent was guilty of a major misconduct of unauthorised absence from duty for more than ten consecutive days.

4. Abandonment of service connotes a total or complete giving up of duties so as to indicate an intention not to resume the same. The circumstances must be such that the employee can be legitimately said to have detached, unfastened, undone or untied the binding knot or link which holds one to the office and the obligations and privileges that go within it (see *G. T. Lad and Others Vs. Chemical and Fibres of India Ltd.*,) Standing Order 8 (e) makes provision for deemed abandonment when an employee overstays leave without sufficient cause for more than ten days. This provision is obviously intended to bring in within abandonment a fact situation which is not really an abandonment. The provision does not prevent a fact situation which is a real abandonment to operate as such and to bring about termination of employment. Therefore, if an employee abandons his service in the real sense explained above, an order passed by the employer recognising that the employee has abandoned his employment cannot be held to be invalid. The question of abandonment from this angle was not examined by the Industrial Court. As regards misconduct, we have earlier stated that the Labour Court gave a definite finding that the respondent was guilty of unauthorised absence from duty for the period from 19th September 1973 to 22nd September 1974 and that this amounted to major misconduct. The Industrial Court failed to take into account this finding which fully justified the respondent's termination from service under Standing Order 12 (1) (p).

5. The argument of the learned counsel for the respondent that if the order passed by the employer is an order of termination simpliciter, the employer cannot be allowed to justify it on the ground of a misconduct committed by the employee, does not appeal to us. The learned counsel for the respondent failed to show any authority in support of his submission. The learned counsel, however, strenuously argued on the basis of the decision of the Supreme Court in *L. Michael and Another Vs. Johnson Pumps Ltd.*, that in case of termination simpliciter if the employer supports the order of termination on misconduct, the issue of misconduct cannot be tried before the Labour Court and that the employer should be left to proceed against the employee after he is reinstated on the ground of misconduct in a separate domestic enquiry. Particular reference was made by the learned counsel to paragraph 24 of the judgment of the Supreme Court in *Mischael's case* (supra). It is true that in *Michael's case* the Supreme Court in paragraph 24 observed that the management will be free, if it has sufficient material, to proceed against the workman for misconduct, but that

does not mean that this course must always be adopted even though the management has taken a specific plea to support the termination on the ground of misconduct and has led evidence to prove the same. The judgment in Michael's case does not show that the management supported the order of termination on the ground of misconduct and has led evidence to prove it. The observations of the Supreme Court should be read in this background. The learned counsel also argued that if such a view is taken in every case of retrenchment which is invalid for non-compliance with section 25F of the Industrial Disputes Act, the employee will not get any relief and the order would be validated on proof of misconduct. There is no merit whatsoever in this argument. Retrenchment of an employee as defined u/s 2(90) of the Industrial Disputes Act, may be for various reasons. In case of an ordinary retrenchment where there is no misconduct alleged against the employee, if provisions of section 25F are not followed, the employee would normally be reinstated. The employer may, however, support the order of retrenchment on the ground of misconduct and if the employer is able to lead evidence to prove it before the Labour Court, the retrenchment would be upheld and the employee would not be granted any relief. An employer is very often faced with the dilemma whether to simply terminate the services of an employee or to hold a domestic enquiry against him and to punish him by an order of dismissal. An order of termination simpliciter is more favourable to the employee and, therefore, if an employer takes a benevolent attitude and instead of holding a domestic enquiry to punish the employee discharges him, the employer cannot be in a worse position than in what he would have been had he taken the step of holding a domestic enquiry and dismissing the employee. We do not find any reason why the employer should not be able to support an order of termination simpliciter on the ground of misconduct. Reinstating the employee in such cases and directing the employer to proceed against the employee by a domestic enquiry would only continue the industrial strife. The object of industrial adjudication is to put an end to industrial dispute as early as possible. By permitting the employer to prove before the Labour Court that the termination is justified on the ground of misconduct, the industrial dispute is brought to an end and the employee is given the benefit of an independent adjudication by the Labour Court without leaving him to the mercy of an adjudication in a domestic enquiry held by the employer. Indeed, in our opinion, the matter is squarely covered by propositions 5 and 7 laid down by the Supreme Court in *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . These propositions read as follows:

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether and also to revision applications. It is not possible to accept the contention raised by the applicants. The learned trial Judge has rightly pointed out that by virtue of section 141 of the Code, the provisions of

Order 22 can be made applicable whenever possible to proceedings other than a suit or an appeal. Section 141 provides that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. Therefore, there is no reason why the provisions, of Order 22 cannot be extended to miscellaneous proceedings, such as proceedings under Order 9. So far as execution applications are concerned, the same are excluded from operation of Order 22 in view of specific provision contained in Order 22, Rule 12. Regarding revisions, though there is conflict of decisions as to the applicability of Order 22 but the consensus of judicial opinion including the view of this Court is that Order 22 has no application to revision applications. Whatever that be non application of Order 22 to revision applications cannot be a ground for holding that Order 22 will have no application to miscellaneous proceedings. Miscellaneous proceedings such as those under Order 9 are nothing but offshoots of suits which have been disposed of due to non-appearance of parties. The trial Court was, therefore, justified in holding that the application for restoration has abated due to non-bringing of legal representatives within 90 days of the death of Smt. Maqbulanbi and no sufficient cause has been shown for condoning the delay.

4. The reference of the question to a larger Bench was considered necessary for reasons stated in paras 6 and 7 of the Referring Order which may be reproduced:

Order 22 applies essentially to suits and appeals. The miscellaneous proceedings for restoration of the suit dismissed in default, is not a continuation of a suit, since the suit is no longer pending after the order of dismissal is passed. Order 22 is not a mere matter of procedure which can be invoked with the aid of section 141, CPC to all civil proceedings of whatever nature pending in a Court of civil jurisdiction. Order 22 affects substantive rights of a party prosecuting or defending a civil action. That being so, Order 22 must apply to only suits and appeals, to which the provision is made expressly applicable.

Though there is a distinction between a revision and an original proceeding under Order 9, but in the applicability of Order 22, the distinction has little meaning. To various original proceedings, say under the Land Acquisition Act, the Motor Vehicles Act and the Workmen's Compensation Act, the provisions of Order 22 were held not applicable. That being so, having regard to the importance of the question, requiring an authoritative pronouncement; and in order to avoid conflicting views, I would refer this case to Hon'ble the Chief Justice for constituting a Division Bench.

5. Shri Awasthy, learned counsel for the petitioners, argued that in view of the Full Bench decision of this Court in Nathu Prasad Vs. Singhai Kapurchand, the controversy was well-nigh settled that the procedure provide.