
(2016) 09 BOM CK 0111

In the Bombay High Court

Case No : Writ Petition No. 6804 of 2005.

**Mr. Balasaheb Madhukar Bende Aged about 42 years, Occ - Nil At Post
and Taluka Mangalwedha District Solapur, Maharashtra - Petitioner
@HASH The General Manager BEST undertakings BEST Bhavan, Bombay
400 001**

Date of Decision : 21-09-2016

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2016) 6 ALLMR 536 : (2017) 1 CLR 328 : (2017) 153 FLR 26 :
(2016) 4 LLJ 329

Hon'ble Judges : R.M. Savant, J.

Bench : Single Bench

Advocate : Mr. Machindra Patil, Advocate, for the Petitioner; Mr. P.M. Palshikar i/
b M/s M.V. Kini and Co, for the Respondent No. 1

Final Decision : Dismissed

Judgement

R.M. Savant, J.(Oral) - The Writ Jurisdiction of this Court under Article 227 of the Constitution of Indian is invoked against the judgment and order dated 1-2-2005 passed by the Learned President of the Industrial Court, Mumbai by which order the Appeal filed by the Petitioner being Appeal (IC) No. 13 of 2004 came to be dismissed and resultantly the order dated 7-10-2003 passed by the Learned Judge of the 8th Labour Court Mumbai dismissing the Application (BIR) No. 49 of 2001 came to be confirmed.

2. The facts giving rise to the above Petition in brief can be stated thus:- The Petitioner herein was appointed as a bus conductor by the Respondent No. 1 on 5-4-1989. The Petitioner remained absent between 11-10-1999 to September 2000 for a period of 43 days. It seems that out of the said 43 days, he had applied for sick leave for 25 days for which he has forwarded medical certificates, he applied for 7 days casual leave and the balance 11 days of absence was without any permission or application. In view of the said absence, a charge sheet came to be issued to the Petitioner under the Standing Orders of the Respondent No. 1 i.e. BEST Undertaking and especially clause 20(f) of the said

Standing Orders which reads thus:

20. The following acts or omissions on the part of an employee shall amount to misconduct :-

(a)

(b)

(c)

(d)

(e)

(f) habitual absence without leave or absence without leave for more than fifteen consecutive days or overstaying sanctioned leave without sufficient grounds or proper or satisfactory explanation.

Hence the misconduct alleged against the Petitioner was one of habitual absence, an inquiry was commenced against the Petitioner pursuant to the said charge sheet. The Petitioner participated in the said inquiry. In the said inquiry witnesses were examined on behalf of the Respondent No. 1. The inquiry officer on the basis of the leave record of the Petitioner came to a conclusion that the charge against the Petitioner was proved. The inquiry officer observed that there was no sick leave to the credit of the Petitioner as also no casual leave to his credit and therefore the sick leave to the extent of 25 days and the casual leave of 7 days was not sanctioned by the Respondent No. 1. The inquiry officer held that in so far as the balance remaining 11 days of absence is concerned, there was absolutely no explanation or application in that regard. The inquiry officer as indicated above accordingly held that the charge was proved against the Petitioner. The Discipline Authority who was also the inquiry officer i.e. Traffic Officer having regard to the past record of the Petitioner which disclosed that he had been punished on as many as 7 occasions in the past for absence deemed it appropriate to impose the punishment of dismissal from service upon the Petitioner.

3. The Petitioner aggrieved by the said order of dismissal challenged the same by way of a departmental First Appeal which came to be dismissed by the Assistant Traffic Controller. The Petitioner thereafter filed a Second Appeal which came to be dismissed by the Traffic Manager of the Respondent No. 1 by order dated 7-3-2001. This gave rise to the Petitioner serving a demand notice on the Respondent No. 1 under the provisions of Bombay Industrial Relations Act now known as Maharashtra Industrial Relations Act, (for short the said Act) calling upon the Respondent No. 1 to reinstate the Petitioner in service with consequential benefits. Since the said demand notice did not evince the expected reply from the Respondent No. 1, the Petitioner filed an application under the said Act being Application No. 49 of 2001 challenging the order of dismissal passed by the Respondent No. 1. In the said application, the Petitioner sought to

appropriate his absence for 43 days by appropriating 25 days to sick leave, 7 days to casual leave and therefore according to the Petitioner what remained was only 11 days of absence. It was therefore the case of the Petitioner that for the said 11 days of absence the punishment of dismissal was very harsh. The Petitioner also sought to allude to his presence in the company in different years in which years according to the Petitioner he was not absent for more than 1 day. It was also the case of the Petitioner that the inquiry conducted against him was not fair and proper and that the inquiry was conducted in a very hasty manner and concluded as such.

The Respondent No. 1 filed its Written Statement. In the said Written Statement the Respondent No. 1 justified that the inquiry was fair and proper and that the action of dismissal was taken against the Petitioner after following the principles of natural justice. It was the case of the Respondent No. 1 that in so far as the leave application is concerned, it could not be said that the said leave applications were rejected in an illegal or wrong manner or that the Petitioner was entitled to sick leave as he has produced the medical certificates or that the Petitioner was wrongly marked absent though he had leave to his credit. The Learned Judge of the Labour Court having regard to the pleadings on record framed the following issues :

1. Whether the enquiry is fair and proper
2. Whether the findings are proper
3. Whether the punishment is harsh and proportionate
4. Whether the applicant is entitled to the reliefs
5. What order

4. The parties did not lead evidence but however relied upon judgments before the Labour Court. It was sought to be contended on behalf of the Petitioner that a show cause notice prior to his dismissal was not issued and therefore the order of dismissal was vitiated on the said ground. The said contention was rejected by the Learned Judge of the Labour Court by holding that for acceptance of such a contention, the prejudice that is caused to the party could have to be shown. In the instant case, the Petitioner has failed to show any such prejudice. The Labour Court thereafter proceeded to consider whether the findings recorded by the inquiry officer were proper and whether the punishment was disproportionate. The Learned Judge of the Labour Court considered the material which was on record in respect of the leave availed by the Petitioner. The Labour Court on such consideration held that the Petitioner would be entitled to 25 days sick leave as the same does not depend on the contingency of leave being available but can be granted if medical certificates are produced. Hence according to the Labour Court 25 days absence could be accounted for, however, in so far as the balance 18 days are concerned, the Labour Court held that the charge under Standing Orders 20(f) stands proved against the Petitioner. The Labour Court thereafter

proceeded to consider whether the punishment of dismissal could be said to be disproportionate. In the said context, the Labour Court adverted to 7 earlier punishments which were imposed upon the Petitioner for the same misconduct and which the Labour Court has tabulated on internal page 13 of the judgment. The same is reproduced herein under:-

1.

Dec 1990-91

Misconduct under 20(f) - Reduction in grade by 1st step for 9 months.

2.

Sept.1992-June 1993

Misconduct under 20(f) - Reduction in grade for 2 yrs.

3.

Jan-1994-Sept 1994

Misconduct under 20(f) - Reduction in grade by 2 steps permanently.

4.

13-5-95 - 29-5-95

Misconduct under 20(f) - Reduction in grade by 1 year

5.

Jan. 97 - Dec. 97

Misconduct under 20(f) - Reduction in pay

6.

12-10-98 - 29-10-98

Misconduct under 20(f) - 3 months suspension

7.

Oct.99 - Sep.2000

Misconduct under 20(f) - Dismissed

The above tabulated statement discloses that various punishments in the nature of reduction in rank, reduction in grade and suspension etc. were imposed upon the Petitioner on the said 7 earlier occasions. The Labour Court having regard to the past record as also having regard to the fact that in the instant case since there was no justification for the absence of 18 days on the part of the Petitioner held that the findings recorded by the inquiry officer were proper and that the punishment of dismissal was not disproportionate. The Labour Court accordingly

by judgment and order dated 7-10-2003 dismissed the application filed by the Petitioner.

5. The Petitioner aggrieved by the said order dated 7-10-2003 filed an Appeal being Appeal (BIR) No. 13 of 2004. The Industrial Court on a re-appreciation of the material on record in its Appellate jurisdiction confirmed the findings of the Labour Court, in so far as whether the findings of the inquiry officer that the charge was proved against the Petitioner was correct, as also confirmed the finding of the Labour Court on the proportionality of the punishment. The Industrial Court also adverted to the past record of the Petitioner as also held that since the misconduct alleged by the Respondent No. 1, in the present inquiry has been held to be proved, the punishment of dismissal could not be said to be disproportionate. Both the courts below have also observed that the Respondent No. 1 on the earlier occasions had adopted a reformatory approach but the same had no effect as the Petitioner continued to remain habitually absent. The Industrial Court lastly observed that the Respondent No. 1 is a public undertaking and therefore such type of conduct on the part of an employee cannot be countenanced as the same has a cascading effect on the functioning of the Respondent No. 1. The Industrial Court accordingly by judgment and order dated 1-2-2005 dismissed the Appeal filed by the Petitioner.

6. The Learned Counsel for the Petitioner Mr. Patil would seek to re-urge the contentions which were urged on behalf of the Petitioner before the courts below. It was the submission of the Learned Counsel that considering the absence being ultimately of 11 days the punishment of dismissal was harsh. The Learned Counsel would contend that an employee could be charged under Standing Order 20(f) if he remains absent for more than 15 consecutive days. In the instant case, according to the Learned Counsel the absence was intermittent and not consecutive and therefore the Petitioner could not be charged under Standing Order 20(f). It was also the submission of the Learned Counsel that in facts which were worst than the present case, the employees have been reinstated.

7. Per contra, the Learned Counsel appearing for the Respondent No. 1 Mr. Palshikar would support the impugned orders and would contend that having regard to the findings of fact recorded by the courts below, no interference is necessary with the impugned orders in the Writ Jurisdiction of this Court under Article 227 of the Constitution of India. It was the submission of the Learned Counsel that the Petitioner has been charged with habitual absence which is covered by the first part of Standing Order 20(f). The Learned Counsel sought to draw this courts attention to the past record of the Petitioner wherein the Petitioner has been punished on as many as 7 occasions in the past. It was therefore the submission of the Learned Counsel that this is a case where even though a reformatory approach was adopted by the Respondent No. 1, the Petitioner still continued to remain absent without leave.

8. Having heard the Learned Counsel for the parties, I have bestowed my anxious consideration to the rival contentions. The question that is posed in the

instant case is as to whether the findings recorded by the inquiry officer that the charge of habitual absenteeism was proved against the Petitioner requires interference and whether the punishment imposed upon the Petitioner can be said to be harsh and disproportionate. As stated in the earlier part of this judgment, the Petitioner has remained absent intermittently from 11-10-1999 to September 2000 which absence was for 43 days. It has come on record that the Petitioner did not have any sick leave nor any casual leave to his credit. Hence the inquiry officer has held that in the absence of any such leave being balance to the credit of the Petitioner, the said absence could not be justified. The courts below i.e. the Labour Court and the Industrial Court have held that 25 days absence could be appropriated towards sick leave which according to the courts below can be granted in an emergent situation arising if medical certificates are produced. However, the fact remains that even if 25 days are to be appropriated towards sick leave there still remains 18 days of absence which is unjustified in the absence of any casual leave or any other leave remaining balance to the credit of the Petitioner. The aforesaid fact coupled with the past record of the Petitioner therefore compounds the matter for the Petitioner. As indicated above, the charge has been held to be proved by the inquiry officer and coupled with the past record of the Petitioner, the inquiry officer deemed it appropriate to impose the punishment of dismissal. Both the courts below have also endorsed the punishment imposed by the inquiry officer by holding that the finding of the inquiry officer that the charge is proved is proper. In so far as the punishment is concerned, the inquiry officer as well as the Courts below have held that the said punishment is not disproportionate having regard to the charge of habitual absenteeism being proved as also having regard to the past record of the Petitioner. Hence apart from the inquiry officer both the Labour Court and the Industrial Court have concurrently held on the said two aspects against the Petitioner. In so far as the contention of the Learned Counsel for the Petitioner that a show cause notice was not issued to the Petitioner prior to the imposition of the punishment of dismissal. It is trite by the judgments of the Apex Court that the party who alleges such an infirmity has to demonstrate as to what prejudice has been caused to it on account of non issuance of the show cause notice. In the instant case as held by the Labour Court no such prejudice was demonstrated by the Petitioner. This is a case of habitual absenteeism and considering the fact that the Respondent No. 1 is a public utility catering to the residents of Mumbai, the absence of an employee obviously has obviously some effect on its functioning and the same cannot be brushed away by contending that other employees are available.

9. In that view of the matter, there is no error of jurisdiction on the part of the courts below, neither there is any illegality or infirmity for this Court to exercise its Writ Jurisdiction under Article 227 of the Constitution of India. The Writ Petition is accordingly dismissed. Rule discharged, with parties to bear their respective costs.