

(2012) 11 AP CK 0080
In the Andhra Pradesh High Court
Case No : W.A. No. 1253 of 2012

The Depot Manager, APSRTC, Zaheerabad Bus Depot, Medak District, Andhra Pradesh APPELLANT

Vs

B. Narasimhulu and Another RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Evidence Act, 1872 — Section 106
General Clauses Act, 1897 — Section 3
Penal Code, 1860 (IPC) — Section 304A

Citation : (2013) 3 ALD 393 : (2012) 6 ALT 614 : (2013) LabIC 51

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

Bench : Division Bench

Advocate : H. Venugopal, for the Appellant; V. Narasimha Goud, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Sri Justice C. Praveen Kumar

1. The present writ appeal is directed against an order dt. 9-11-2009 passed in Writ Petition No. 28509/1998, wherein and whereunder the learned single Judge allowed the writ petition and directed the A.P. State. Road Transport Corporation to pay back wages which were denied by the Labour Court while passing the order of reinstatement. For the sake of convenience, the parties hereinafter will be referred to as they are arrayed in the writ petition.

2. The brief facts, which led to the filing of the appeal are as under: The writ petitioner joined the service of A.P. State Road Transport Corporation in the month of April, 1990 as driver through due process of selection. On 19-10-1992, the vehicle which was driven by him got involved in the accident, which lead to the death of a boy aged about 8 years. On that ground that the writ petitioner drove the bus in a rash and negligent manner, he was subjected to domestic enquiry. Based on the report of the Enquiry Officer, he was removed from service

on 10-6-1993. Aggrieved by the same, the writ petitioner filed an appeal and also a revision before the appropriate authorities, which were rejected after due consideration. Aggrieved by the same, the writ petitioner approached the Labour Court vide ID No. 94/1994. The Labour Court by its award dt. 16-9-1997 allowed the ID in part and directed reinstatement of the writ petitioner with continuity of service but without back wages. It was further observed that the writ petitioner is entitled for annual notional increments. Aggrieved by the same, the writ petitioner filed WP No. 28509/1998. This Honourable Court by its order dt. 9-11-2009 allowed the writ petitioner modifying the award passed on 16-9-1997 by directing the authorities to pay 50% of the back wages from the date of termination from service till his eventual reinstatement into service. Against the said order, the A.P. State Road Transport Corporation preferred the present writ appeal.

3. There was no substantial material before the enquiry officer to hold that the accident took place due to rash and negligent driving by the writ petitioner. Normally, for a motor vehicle accident, a criminal case would be registered making the driver punishable for an offence under Sec. 304-A IPC and other case would be filed by the legal heirs of the deceased claiming compensation under the provisions of the Motor Vehicles Act. No material was placed before the enquiry officer either with regard to the registration of a crime or the legal heirs of the deceased filing any claim petition under the provisions of the Motor Vehicles Act. In the absence any material the Labour Court held that the petitioner is not guilty of causing the fatal accident. The said finding of the Labour Court was not challenged by the Corporation. The innocence of the writ petitioner reached its finality as the said findings were never challenged.

4. The only point canvassed by the learned counsel for the appellant-Corporation is that the writ petitioner was gainfully employed during the period of his removal, and as such he is not entitled for any back wages. Relying upon the observation made by the Apex Court in Metropolitan Transport Corporation Vs. V. Venkatesan, the learned counsel for the appellant would contend that the employee has to assert on oath that he was neither employed nor engaged in any gainful business and that he did not have any income. In the absence of employee entering the witness box and denying on oath his employment during the period of his discharge from service, the learned counsel contends that he is not entitled for any back wages.

5. On the other hand, the learned counsel for the writ petitioner contends that the learned single Judge has passed a very reasoned order, which needs no interference.

6. Payment of back wages has undergone a see-saw change. Direction to pay full back wages on a declaration by the Court or Tribunal that the order of termination was invalid used to be usual order. Taking into consideration the policy decision of the Government in the wake of economy, privatisation, outsourcing, globalisation etc., the approach of the Courts towards payment of

back wages as a course underwent a change. The Apex Court in many a cases has held that payment of back wages consequent to reinstatement is not mechanical and it depends on facts of each case.

7. Similarly, the burden of proving that the employee was gainfully employed during the period of his discharge from service was on the employer. Now, the Apex Court in *Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma*, held that while determining the entitlement of back wages, the employee has to show that he was not gainfully employed. The initial burden was cast upon the employee only. When the employee discharges his initial burden, employer has to bring material to rebut the said claim.

In *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, , the Apex Court went further ahead and held that the employee has to raise the said plea in the written statement having regard to the provisions of Section 106 of the Evidence Act.

In *J.K. Synthetics Limited v. K.P. Agrawal* (4 supra), the Supreme Court, while dealing with the aspect of payment of back wages consequent upon reinstatement and also with regard to gainful employment during the period of unemployment, held that it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. The Court held that as the employee cannot be asked to prove a negative fact, 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.

8. That being the position of law, the question now would be what is the meaning of Oath? Is it necessary for an employee to enter the witness box to say that he was not gainfully employed?

Section 3 of the General Clauses Act, 1897 defines "Oath" as under: Oath shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

The Oaths Act, 1968 does not define what an Oath is. It only prescribes the procedure for administering the oath, persons who can make an oath, forms of oath and affirmation etc., The provisions of the Oaths Act relate to proceedings before the Courts and persons and authorities recognised therein.

The Apex Court in *M. Veerabhadra Rao Vs. Tek Chand*, held that the expression "affidavit" is to be understood to mean a sworn statement in writing made specially on oath or on affirmation before an authorised Magistrate or an Officer. The essential ingredients of an affidavit are the statements of declarations made by the deponent relevant to the case and in order to add sanctity swears or affirms the truth of the statements made in the presence of a person who in law is authorised to administer Oath or to accept the affirmation.

In *Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal*, , the Apex Court observed, in the facts of case, that, "it is incumbent on the officer concerned

swearing the counter affidavit to take good care to satisfy himself that what he states on oath is absolutely true according to record".

An analysis of the above decisions would indicate that the word "oath" takes within its fold affirmation and declaration made by person allowed to affirm and declare and also person swearing to an affidavit. It is not necessary that a person has to enter a witness box for making a statement on oath, so as to satisfy the requirement of the law laid down in J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, and also the provisions of Section 106 of the Indian Evidence Act. Suffice if the declaration is made in the form of sworn affidavit or in the form of a verification duly signed by the person concerned and attested by a person authorised to do so.

9. As stated supra, the only ground urged by the learned Standing Counsel for the appellant-corporation is that the writ petitioner never pleaded on oath and also by entering the witness box that he was not gainfully employed after he was discharged from service. The said argument, in our view, is fallacious. In an application filed u/s 2-A (1) read with sub-section (2) of A.P. Industrial Disputes Act, 1987 before the Labour Court, the writ petitioner in paragraph 11 of his petition stated that he was out of employment and facing hardship to maintain himself and his family members, such as his two minor children, wife, father, mother, one unmarried sister and one unmarried brother. The said petitioner was signed by him and the contents were also verified by him. The relevant portion of the verification is extracted hereunder:

I, the petitioner do hereby declare that what, I stated above are correct. Hence verified at Hyderabad (A.P)

In the counter filed by the Corporation to the said petition, no denial was made with regard to the averments made in the petition with regard to his gainful employment. The counter is silent on the said aspect. In the affidavit filed in support of the writ petition, the writ petitioner reiterated the same and pleaded that he was not gainfully employed during the period of his removal from service. The management of the corporation has not disputed the said fact in their counter.

It is true that an employee cannot be asked to prove negative fact suffice if he asserts in the form of an affidavit or by way of his verification that he was not employed during the period of his removal from service. The contention of the learned Standing Counsel for the appellant that the writ petitioner should state on oath by entering into the witness box may not be correct in view of the discussion made above. The fact that the writ petitioner specifically stated in his petition filed before the Labour Court, which was signed by him and also in the sworn affidavit filed before the High Court in support of the writ petition answer the specific observations made by the Supreme Court in Metropolitan Transport Corporation (1 supra) and J.K. Synthetics (6 supra). Therefore, the material placed before the court clearly reveal that the writ petitioner specifically pleaded,

at the earliest point of time, that he was not gainfully employed from the date of his termination. Though he has not entered the box, he has sworn to an affidavit and also specifically stated in claim petition signed and verified by him denying the fact of gainful employment. Consequently the burden shifts on to the employer to prove that the writ petitioner was employed during the said period. In the absence of any material before the court rebutting the burden discharged by the employee, we feel that the order passed by the learned single Judge does not suffer from any infirmity. Hence, the writ appeal filed by the Corporation is dismissed. No order as to costs.