

(2013) 06 MAD CK 0234

In the Madras High Court

Case No : Writ Petition No. 5811 of 2009

Vinod Kumar Madan (Deceased) and Others

APPELLANT

Vs

General Manager, Andrew Yule and Co. Ltd. Others

RESPONDENT

Date of Decision : 25-06-2013

Acts Referred:

Citation : (2014) 1 MLJ 568

Hon'ble Judges : T. Raja, J

Bench : Single Bench

Advocate : Neelakantan, for the Appellant; V. Karthick for T.S. Gopalan and Co., for the Respondent

Judgement

T. Raja, J.—This writ petition was originally filed by Mr. Vinod Kumar Madan challenging the impugned order passed by the second respondent, the Director (Personnel), Andrew Yule and Company Limited, Kolkatta in Reference No. ADM/PER dated 25.6.2008 dismissing him without holding enquiry, to quash the same with a consequential direction to the respondents to reinstate him in service with effect from 25.6.2008 and to pay the consequential benefits flowing therefrom including continuity of service, back wages and other admissible allowances. During the pendency of the matter, the petitioner Mr. Vinod Kumar Madan unfortunately passed away on 28.11.2009. Therefore, an application in M.P. No. 1 of 2010 was filed by his legal representatives viz., mother, wife and daughter seeking to implead them as petitioner Nos. 2 to 4 in the writ petition and this Court, by order dated 10.2.2010, allowed the impleading application and brought them on record. Assailing the impugned order, Mr. Neelakantan, learned counsel for the petitioners submitted that the first petitioner was appointed as Assistant Manager (Sales), Electrical Division, Northern Region at Delhi vide appointment letter dated 14.6.90 and he joined the services of the respondent-Andrew Yule and Company on 22.8.90. After sometime, he was transferred from New Delhi to Chennai by order dated 13.8.2007 issued by the head office at Kolkatta. Immediately the first petitioner made a representation to the second respondent

on 19.8.2007 followed by another letter on 27.8.2007 seeking to reconsider the transfer order on the ground of old age and ill-health of his mother and other domestic commitments. However, when there was no positive reply from the second respondent, he handed over his charge on 30.8.2007 and joined the office at Chennai on 3.9.2007. In the meanwhile, he was compelled to go to New Delhi. Therefore, on application, the first petitioner was sanctioned earned leave from 17.9.2007 to 23.9.2007 by the first respondent. It was further stated that when he was staying in New Delhi, his mother's health deteriorated. Therefore, he applied to the first respondent for extension of leave for a further period from 24.9.2007 to 7.10.2007. In the meanwhile, by citing domestic reasons, he made a request to transfer him back to New Delhi. However, the first respondent, considering the request, sanctioned the leave till 7.10.2007, but rejected his request for transfer on administrative grounds. In the meanwhile, the first petitioner himself fell sick with severe cervical spondylosis and neck pain. In this connection, he consulted the doctors of All India Institute of Medical Sciences at New Delhi and he was taking continuous treatment for the same. The doctors, while giving treatment to the first petitioner, also advised him complete rest. On that basis, the first petitioner wrote a letter to the first respondent on 6.10.2007 seeking leave for a further period of 28 days from 8.10.2007 to 4.11.2007. However, the first respondent replied to him stating that he was eligible only for 11 days of sick leave and the remaining 17 days would be debited to the earned leave credit. Thereafter, the first petitioner, facing illness, sent another letter to the first respondent on 3.11.2007 seeking extension of medical leave from 5.11.2007 to 19.11.2007. The first respondent, by his letter dated 7.11.2007, informed the first petitioner to submit necessary documents within ten days of the receipt of the letter and thereafter to appear before the competent Medical Board. Immediately the first petitioner replied to the letter by reiterating his health condition and requested for the payment of salary and other reimbursements through the Delhi office by providing all the necessary particulars to the third respondent. Although the first respondent forwarded the cheque towards salary dues on 3.12.2007 to the third respondent to be collected by the first petitioner, the third respondent directed the first petitioner by a letter dated 14.12.2007 to appear before Dr. Ram Manohar Lohia Hospital, New Delhi on 20.12.2007 for examination. Accepting the said direction, when the first petitioner appeared for health examination, the Medical Board also, after examining the first petitioner's health, certified that the leave sought for by the first petitioner was justified and he should continue the treatment from the treating doctors. Therefore, it was further pleaded by the learned counsel for the petitioners that when the Medical Board, after examining the first petitioner's health, also certified that the request of the petitioner for sanction of leave was justified and also advised him to continue the treatment, the contention of the first respondent that any further leave would be debited against the earned leave credit cannot be accepted, as the first petitioner cannot be penalised or treated as an unauthorised absentee. Ignoring all these, the first petitioner was treated as an unauthorised absentee.

2. Adding further, it was stated that when the first petitioner was facing difficulties in obtaining the permitted medical leave, he had also submitted an application requesting the respondents to allow him to go on voluntary retirement. But keeping the said application pending, the respondents erroneously proceeded against the first petitioner by passing the impugned order without holding any enquiry whatsoever. It was also further stated that when the first petitioner all along has been submitting applications for medical leave, all the applications seeking reasonable medical leave were considered. After sometime, when the respondents doubted the first petitioner's genuineness, directed him to appear before the Medical Board at Dr. Ram Manohar Lohia Hospital, New Delhi. The first petitioner, as directed, obediently appeared before the Medical Board and after examining him, the Medical Board, by its letter dated 31.12.2007, has rightly justified the leave sought for by the first petitioner and further advised him to continue the treatment from the treating doctors. When the case of the first petitioner has been sufficiently proved that he was entitled to take medical leave in view of his health problem, the respondents should not have proceeded against him holding, on erroneous premise, that he has abandoned the employment.

3. Even though the respondents were entitled to proceed against the first petitioner for unauthorised absence by giving proper notice and holding enquiry, without holding any enquiry, the respondents have wrongly passed the impugned order. It was further pleaded that when the respondents have not come forward to issue even a show cause notice, the impugned order dated 25.6.2008 is contrary to law, hence, the same is liable to be set aside. Adding further, it was pleaded that the impugned order is violative of sub-rules (7) and (18) of Rule 5 of the Conduct, Discipline and Appeal Rules, which contemplate a proper disciplinary action to be conducted against the first petitioner. When the first petitioner was on sanctioned leave with the consent of the respondents, without application of mind, the impugned order should not have been passed. On that basis, he prayed for setting aside the impugned order. Further, it was pleaded that since the first petitioner unfortunately died during the pendency of the writ petition, the question of reinstatement or enquiry does not arise. Therefore, all the service benefits, if ordered, should be given to the legal representatives of the deceased first petitioner. In support of his submissions, he relied upon a judgment of the Apex Court in *Novartis India Ltd. Vs. State of West Bengal and Others*, for the proposition that any order of termination terminating a permanent employee without conducting any enquiry is void ab initio. In support of his prayer for payment of back wages, the learned counsel, relying upon another Division Bench judgment of this Court in *Executive Engineer, Tamil Nadu Water Supply and Drainage Board, Urban Division, Devipuram, Tuticorin v. Dharmar and Others*, LNIND 2009 MAD 1135: (2009) 5 MLJ 638, brought to the notice of this Court, in which while considering a similar prayer for grant of back wages, the observation of the Division Bench holds that if the employee concerned was not employed elsewhere during the period of non-employment

resulted by any order of dismissal, the said employee is entitled to get the full back wages as he has not been gainfully employed during the period during which termination order was in operation. By placing reliance on the above mentioned ratio, the learned counsel prayed for allowing the writ petition by setting aside the impugned order.

4. A detailed counter affidavit has been filed by the respondents. Mr. V. Karthick, learned counsel for the respondents, strenuously supporting the impugned order, stated that the first petitioner, while working in New Delhi, was not willing to come down to Chennai when the order of transfer was passed. The first petitioner, having been transferred to Chennai office, repeatedly made requests to transfer him back to Delhi by citing that his parents, wife and other family members were living in Delhi and to prove that the first petitioner was not willing to accept the transfer order dated 13.8.2007 posting him to Chennai office, relied upon the letter given by the first petitioner dated 19.8.2007, wherein he himself has admitted that his mother was very old and keeping very bad health; that his wife was also employed in Delhi and she was also not keeping good health and his daughter was also studying in Pune and that he had to attend to some domestic commitments in the near future. Therefore, when the first petitioner was all along unwilling to come down to Chennai accepting the transfer order for one or other reason, repeatedly sought for medical leave and finally after exhausting all the medical leave and earned leave, he remained absent unauthorisedly. This could be further seen from his application dated 11.7.2008 seeking voluntary retirement from service. In the light of these reasons, the respondents have come to the conclusion that the first petitioner had abandoned the service. Therefore, the decision reached by the respondents cannot be found fault with. On this basis, he prayed for no interference with the impugned order. Also the learned counsel raised a preliminary objection for the maintainability of the writ petition on the ground that when the impugned order was passed by the head office at Kolkatta and received at New Delhi, the first petitioner should not have come to this Court, as this Court has no territorial jurisdiction.

5. But this Court is not able to agree with any of the submissions made by the learned counsel for the respondents. So far as the preliminary objection raised by the learned counsel for the respondents is concerned, it is to be seen that the first petitioner was transferred from New Delhi to Chennai by the order dated 13.8.2007. After receiving the transfer order at Delhi, he came down to Chennai and worked at Chennai office for sometime. Thereafter, he applied for medical leave and after the respondents sanctioned medical leave, he was also directed to appear before the Medical Board at Dr. Ram Manohar Lohia Hospital, New Delhi. When the first petitioner, accepting the order passed by the respondents, appeared before the Medical Board, the Senior Physician and in-charge of the hospital, by the proceedings dated 31.12.2007, has certified as follows:-

Leave justified. To continue treatment from the treating doctors.

Therefore, the first petitioner is right in choosing this High Court for challenging

the correctness of the impugned order striking his name from the rolls of the company with immediate effect without holding enquiry. A mere perusal of the impugned order dated 25.6.2008 as well 21.11.2008 clearly shows that the respondents have not conducted any enquiry whatsoever. When it is settled law that the services of a permanent employee cannot be merely dispensed with without holding a proper enquiry by giving fair and reasonable opportunity, the case of the first petitioner that his name was struck off unlawfully from the rolls of the company without holding enquiry, particularly when his request for leave was also certified to be justified by the Medical Board, has to be accepted.

6. Admittedly, when the first petitioner was appointed as Assistant Manager (Sales) in the Electrical Division, Northern Region at Delhi by the appointment order dated 14.6.1990 in the respondent-Company, which is a public sector enterprise, completely giving a go-by to their own rules 5(7) and 5(18) of the Conduct, Discipline & Appeal Rules, which contemplate disciplinary action against any officer working in the respondent-Company, unlawfully struck off his name. Such an impugned order is not only in violation of the principles of natural justice, but also against the rules 5(7) and 5(18) of the Conduct, Discipline & Appeal Rules. Therefore, this Court holds that the termination of the first petitioner's services abruptly is illegal. Further, as rightly reiterated by the learned counsel for the petitioners, the ratio laid down by the Apex Court in *Novartis India Limited v. State of West Bengal and Others* (supra), will squarely apply to the present case, for the reason that the name of the first petitioner was erroneously struck off from the rolls of the company without conducting any enquiry. Accordingly, the impugned order is liable to be set aside.

7. Now coming to the question of payment of back wages, as rightly pleaded by the learned counsel for the petitioners, back wages are ordinarily to be granted considering the ground of damages in mind, more particularly by taking into account the vital aspect that the incumbent was not gainfully employed during the period in which the termination order was in operation. When this is the admitted position, the first petitioner has pleaded sufficiently in the affidavit filed in support of the writ petition and also before this Court during the course of arguments that he was not gainfully employed anywhere after the impugned order was passed. Further, when the first petitioner came to this Court challenging the correctness of the impugned order, unfortunately, he died leaving behind the legal representatives, who have come on record by order dated 10.2.2010 passed by this Court. Therefore, taking note of the above undisputed facts, which are relevant for the award of back wages, the respondents are directed to pay the entire back wages to the petitioners 2 to 4, as the order of reinstatement cannot be passed, since the first petitioner died on 28.11.2009. Resultantly, the legal heirs of the first petitioner viz., the petitioners 2 to 4 are entitled to get the service benefits of the first petitioner. For all these reasons, the impugned order is set aside. It must be also mentioned that this Court, during the pendency of the writ petition, by order dated 22.2.2010 in M.P. No. 2 of 2010, passed an order directing the respondents to pay the admitted gratuity

amount to the legal heirs of the deceased petitioner and also to pass orders on the application for payment of provident fund dues. Pursuant to the said order, the respondents had paid a sum of Rs. 3,00,873.46 towards gratuity vide cheque No. 185682 dated 21.4.2010 drawn on Axis Bank, Kolkatta and the said payment was also acknowledged by the third petitioner, the wife of the deceased. Similarly, the respondents had paid a sum of Rs. 11,79,232.88 towards provident fund dues vide cheque No. 545469 dated 20.4.2010 drawn on HDFC Bank, Kolkatta and the said payment was also acknowledged by the third petitioner, the wife of the deceased. In view of quashing the impugned order, the respondents are hereby directed to pay the balance service benefits of the first petitioner including back wages and other admissible allowances to which he was legally entitled to, to the petitioners 2 to 4 within a period of six weeks from the date of receipt of a copy of this order. The writ petition is allowed to the extent indicated above. There shall be no order as to costs.