IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.2.2005

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

WRIT PETITION NO.10417 of 1997

S.Rajendra Babu .. Petitioner

Vs.

1. Presiding Officer,
   First Additional Labour Court,
   Madras.
2. Management,
   The Hindu,
   (Proprietor - Kasturi & Sons Ltd.,),
   Anna Salai,
   Madras-600 002. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India as stated therein.

For Petitioner : Mr. K.S.Narayanan
For 2nd Respondent : Mr.N.Balasubramaniam
R1-- Court.

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O R D E R

The above Writ Petition has been filed by the petitioner praying to issue a Writ of Certiorari to call for the records relating to the Award dated 25.3.1996 made in I.D.No.1131 of 1991 by the First Additional Labour Court, Madras, the first respondent herein and quash the same.

2. The case of the petitioner is that he joined the employment of the second respondent in the year 1984 as an Off Set Rotary Operator; that he fell sick in June, 1989 and submitted his leave application to the second respondent with medical certificate to undergo continuous treatment ; that the second respondent issued a Memo. dated 3.3.1990 terminating him from service alleging that he had stayed away from work without any intimation since 1.6.1989 and that it was construed that he left the service voluntarily forthwith, further informing him to settle his account with the office who will pay the notice pay with retrenchment compensation; that by a letter dated 16.3.1990, he informed the second respondent about his taking continuous treatment for which the medical certificate and leave letter were already submitted and that the absence on leave was not unauthorised and sought permission to join duty immediately; that the second respondent by its letter dated 19.3.1990 rejected his explanation as unsatisfactory and refused employment to him.

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3. The further case of the petitioner is that he raised an Industrial Dispute before the Conciliation Officer, stating that the termination of his service by Memo. dated 3.3.1990 without enquiry and opportunity was illegal and invalid in law and that the procedure laid down under section 25(F) of the Industrial Disputes Act, was not also followed, assuming that the termination amounts to retrenchment; that since no amicable settlement could be arrived at between the parties, the Conciliation Officer submitted his failure report dated 19.11.1991 under Section 12(4) of the Industrial Disputes Act 1947; that immediately thereafter, he preferred a petition in I.D.No.1131 of 1991, under Section 2A(2) of the Industrial Disputes Act on the file of the first respondent praying for reinstatement with all the legal benefits due on the ground that the termination was illegal and invalid in law.

4. The first respondent by its award dated 25.3.1996 made in I.D.No.1131 of 1991 having considered the materials placed before it would ultimately hold that the workman could not have attended the duty and his absenteeism from work was established by the investigative agencies report which clearly established the same and that the claim of the workman for having sent the medical certificate could not be believed and that it was a case of termination simpliciter on the ground that he left the services voluntarily due to his alleged remaining absent unauthorisedly and that the claim of reinstatement with consequential benefits was unjustified, however, the claimant is entitled to one month's notice pay and compensation under Section 25(F) of the Industrial Disputes Act 1947 and accordingly directed the management to remit retrenchment compensation and notice pay. It is only testifying the validity of the said award, the petitioner has come forward to file the above writ petition praying for the relief extracted supra.

5. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the second respondent as well and the materials placed on record have also been perused.

6. During arguments, the learned counsel for the petitioner would submit that the termination of the petitioner from service by Memo. dated 3.3.1990 without enquiry and without an opportunity is illegal and invalid in law; that assuming that the termination amounts to retrenchment, the procedure laid down under Section 25(F) of the Industrial Disputes Act, was not followed by the second respondent; that his long absence from duty without sufficient cause would attract only lesser punishment of fine or suspension under the Company, Service Rules; that since there is no enquiry, the order of termination passed by the second respondent is defective one; that the alleged report of the private investigation agency without the knowledge of the petitioner is not sustainable in law; that in any event the private investigating agency was not examined before the Court to substantiate the findings therein; that on the basis of enquiry alone it could be ascertained whether the petitioner's case comes under the purview of punishment or retrenchment; that the copy of the report of the private investigating agency was not furnished to the workman at any time and workman's objection or otherwise was not sought for from him; that the findings of the first respondent that mere expression of offer for payment of retrenchment

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compensation together with other dues at the time of passing the impugned order was enough compliance and fulfilment of the procedure laid down under Section 25(F) of the Industrial Disputes Act is contrary to law and the provisions of the Industrial Disputes Act as laid down by the Apex Court. At this juncture, the learned counsel for the petitioner would cite a judgment reported in 1973 I L.L.J. Supreme Court 278 (Workmen of Firestone Tyre & runner Co., v. Management) wherein the Hon'ble Apex Court after following the decision reported in (Workmen of Motipur Sugar Factory (Pvt.) Ltd., v. Motipur Sugar Factory, (1965-II L.L.J.162) and some other decisions, has framed the following principles:

> (1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a deispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.
> (2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the standing orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.
> (3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fides.
> (4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action; and it is open to the employee to adduce evidence contra.
> (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 the misconduct alleged is proved. In such cases, the point about the exericse of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.
> (6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no enquiry has been held or after the enquiry conducted by an

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employer is found to be defective.

(7) It has never been recognised that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in The Management of Panitole Tea Estate v. The workmen, (supra), within the judicial decision of a Labour Court or Tribunal. The above was the law as laid down by this Court as on 15.12.1971 applicable to all industrial adjudication arising out of orders of dismissal or discharge.

On such arguments, the learned counsel for the petitioner would pray for the relief extracted supra.

7. On the other hand, the learned counsel for the second respondent would submit that under Section 11-A of the I.D. Act, once no enquiry was conducted by the management, the question arises for consideration is whether the legal position is correct even after Section 11-A; that as per the decision of the Supreme Court, even no enquiry has been held by the employer or if the enquiry held by the employer is found to be defective the award of punishment is sustainable. At this juncture, the learned counsel for the respondent would cite a judgment reported in 1957(1) LLJ 226 (Burn & Co., Ltd., v. Their 'Employees'), wherein the Hon'ble Supreme Court has held:

" (1) S.N.Chatterjee had an eye defect, and acting on the advice of its medical officer, the company discharged him on that ground. The tribunal has found him to be fit, and directed his reemployment. He now claims compensation on the ground that he had produced a certificate of fitness from a competent medical officer but that the company discharged him without making any enquiry thereon. The Appellate Tribunal found that the company had acted bona fide, but that as the order of dismissal was made without due enquiry it was bad, and accordingly awarded compensation at

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the rate of six months' basic wages. We are unable to hold that on the facts found the Appellate Tribunal had acted without jurisdiction in interfering with the award or that its order is unjust. No case has been made out for our interference with it under Ar.136."

8. The learned counsel for the second respondent would further argue that it is a case of termination for misconduct and that it is a settled legal position since no enquiry or defective enquiry, it should be proved by the delinquent by satisfactory evidence before the Labour Court and that the Labour Court based on the documents Ex.W1, dated 22.5.1989, Ex.W2, dated 25.5.1989 and Ex.W3, dated 3.3.1990 has rightly arrived at the conclusion that the workman has not reported for duty for nearly 9 months; that he has not even produced the medical certificate before the Court and that he has not even examined himself as a witness before the Labour Court so as to prove that his absence is not unauthorised but it is only a leave on medical ground and that he has not even cross examined the witnesses of the management before the Conciliation Officer and hence the decision rendered by the Labour Court is justifiable. At this juncture, the learned counsel for the respondents would cite a judgment reported in 1993(1) LLJ, 1105 (Anand Cinema v. Mohan Tiwari and another), wherein the Bombay High Court has held:

"The Labour Court as well as the learned Single Judge held that the termination of services of the employees amounts to 'retrenchment' as defined under Section 2 (oo) of the I.D. Act and the same was ab initio void as no retrenchment compensation as required by Section 25-F of the I.D. Act was paid to the employees. The Labour Court and the learned Single Judge rejected the contention of the employer that its action was not an action of retrenchment, but was an action of terminating the services based on misconduct which should be permitted to be proved before the Labour Court, although it did not hold any domestic enquiry."

"Admittedly, in this case neither a charge-sheet was issued nor the misconduct was mentioned in the order of termination, but that should not, in our opinion, preclude the employer from proving before the Labour court that the conduct of the employees was such that they should not either be reinstated in service or paid back wages and their discharge or termination be maintained. The apprehension is baseless that the employer, even if there was no misconduct and had simply retrenched the employee, might still get opportunity before the Labour Court to prove the misconduct which was never the foundation of the order nor was it in contemplation of the employer wherein he took the adverse action against the employee."

9. The learned counsel for the second respondent would cite yet another judgment reported in 1993 (2) LLJ, 696 (D.K.Yadav v. J.M.a.Industries Ltd.,), wherein it has been held:

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"It is settled law that certified standing orders have statutory force which do not expressly exclude the

application of principles of natural justice. Conversely, the Act made exceptions for the application of the principles of natural justice by necessary implication from specific provisions in the Act like Sec. 25F, 25FF and 25FFF, the need for temporary hands to cope with the sudden and temporary spurt of work demands appointment temporarily to a service of such temporary workmen to meet such exigencies and as soon as the work or services are completed, the need to dispense with the services may arise. In that situation on compliance of the provisions of Sec.25F resort could be had to retrench the employees in conformity therewith particular statute or statutory rules or orders having statutory flavour may also exclude the application of principles of natural justice expressly or by necessary implication. In other respects, the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies."

10. The learned counsel for the second respondent would cite yet another judgment reported in 2001 LAB. I.C. 1255 (Ramesh Pandharinath Taharabadkar v. Executive Engineer, Jayakwadi Project), wherein it has been held:

"I do not find anything wrong or breach of Section 25F if the employer has requested the workman/workmen to come to the accounts department or the office and collect the amount of retrenchment compensation as required u/S.25F of the Act. According to me in the present case the notice of retrenchment carried an assurance that retrenchment compensation would be paid and subsequently by a separate letter the workmen were informed and they were requested to collect the retrenchment compensation from the office. There is no violation of Section 25F of the Act and therefore, I am not able to accept the contention of the petitioner that the retrenchment notices/orders were in violation of the mandatory provisions of the Act and therefore, they were null and void."

11. The learned counsel for the second respondent would further point out that since the respondent management has made an offer to pay the petitioner the retrenchment compensation though not legally entitled and since the Labour Court has also expressed an offer for payment of retrenchment compensation together with other dues, there is no violation of provisions of Section 25F of the ID Act. At this juncture, he would cite a judgment reported in 1993 (1) LLJ, 789 (Superintending Engineer, Urdhwa Painganga Project Circle & Anr. v. Yavatmal Zilla Raste & Others), wherein it has been held:

"It is no doubt settled law that an offer may be as good as payment, but the offer must be genuine and bona fide. If an offer is made at the close of the day or even a bit earlier, it can never be said that the offer was genuine and bona fide, more so if the office

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from which the amount is to be collected is at a place away from the place of work. "

12. The the learned counsel for the second respondent would further argue that since the petitioner was unauthorised absentee for more than 9 months, the termination would not amount to retrenchment as provided under Section 2(oo)(bb) and 25F of the ID Act. At this juncture, he would cite a judgment reported in 2002(1) LLJ, 663 (Thimmiah v. Additional Industrial Tribunal-cum-Addl. Labour Court, Hyderabad and Another), wherein it has been held:

"The termination of the petitioner's services was effected under a certified Standing order enabling the employer to determine the employment on ground of unauthorised absence for stipulated period and such termination would not amount to 'retrenchment' as per Section 2(oo)(bb) and 25-F of the Industrial Disputes Act, 1947. Further the termination itself had also been brought about in a fair manner and after complying with the principles of natural justice."

13. The next judgment cited on the part of the learned counsel for the second respondent is one reported in 2003(4) SCC 619 (Pramod Jha and others v. Statse of Bihar and others), wherein it has been held:

" that the proviso did not mean that the wages for one month have to be actually paid; the employer is expected to tender the amount before the dismissal but cannot force the employee to receive the payment before dismissal becomes effective. The making of the tender of the amount, before the order of dismissal becomes effective, would be sufficient compliance."

On such arguments, the learned counsel for the respondents would pray for dismissal of the above writ petition.

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for the petitioner and the second respondent, what comes to be known is that the petitioner who was in the employment of the second respondent management from the year 1984, he fell ill in June, 1989 and he applied for leave with the second respondent management along with medical certificate , but the second respondent issued a memo. dated 3.3.1990 terminating him from service alleging that he had stayed away from work without any intimation since 1.6.1989 and that it was construed that he left the service voluntarily forthwith; that since the petitioner was undergoing continuous treatment and applied for leave along with the medical certificate, his absence was not unauthorised; that the petitioner by a letter dated 16.3.1990 informed the second respondent that he was ready to join the duty immediately, but the second respondent by the letter dated 19.3.1990 rejected his plea and he was refused employment.

15. The petitioner would further plead that his termination of service was by a memo. dated 3.3.1990 and without any enquiry or opportunity nor did they follow the procedure laid down under Section 25(F) of the I.D. Act; that left with no choice he attempted

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for an amicable settlement and on failure with the Conciliation Officer, he raised Industrial Dispute on the file of the first respondent praying for reinstatement with all service benefits and the first respondent by its Award dated 25.3.1996 made in I.D.No.1131 of 1991 opining that it was not a case of termination simpliciter but he left the service voluntarily remaining absent unauthorisedly, the claim of reinstatement with consequential benefits was unjustified and that he is only entitled to one month's notice and pay and compensation under Section 25(F) of the I.D. Act and accordingly directed the management to remit retrenchment compensation and notice pay, it is only against this Award passed by the Labour Court below, the petitioner has come forward to file the above writ petition.

16. On the part of the petitioner he would cite the landmark judgment of the Hon'ble Apex Court reported in 1973-I LLJ SC 278, which was rendered following another decision reported in 1965-II LLJ 162, wherein certain principles were framed of which the second principle is relevant for consideration which observes that "before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the standing orders, if applicable, and the principles of natural justice. The enquiry should not be an empty formality."
Principle 4 framed by the Hon'ble Apex Court in the judgment cited supra would contemplate that "even in the absence of any enquiry held by an employer, the Tribunal has to give an opportunity to the employer and employee to adduce evidence before it." and principle 7 would add that "the Tribunal should not straight away, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held."

17. On the other hand on the part of the second respondent also certain judgments would be cited, the first judgment cited is one reported in 1957(I) LLJ 226, wherein on facts it would be held that " the Tribunal had acted without jurisdiction in interfering with the award."

18. The second judgment cited is one reported in 1993(1) LLJ, 1105, wherein the termination of service of employees was found amounting to retrenchment and that no retrenchment compensation as required under Section 25-F of the I.D. Act was paid to the employees. It was found that "a termination based on misconduct should be permitted to be proved before the Labour Court although it did not hold any domestic enquiry."

19. The third judgment cited by the employer is one reported in 1993(2) LLJ, 696, wherein it is held that "the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies."

20. Some more judgments would be cited on the part of the second respondent viz., (i) reported in 2001 LAB. I.C. 1255, (ii) 1993(1) LLJ, 789, (iii) 2002(1) LLJ 663 and (iv) 2003(4) SCC 619, giving clarity to section 2(oo)(bb) and 25F of the I.D. Act, depending upon the factual circumstances of the cases and since the Labour Tribunal below has concluded that the case in hand is one

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falling under the category of termination, further directing to comply with Section 25F of the I.D.Act and since the prayer of the petitioner is not the relief under Section 25F of the I.D. Act, but reinstatement with all service benefits, quashing the order of the I Additional Labour Court, Chennai made in I.D.No.1131 of 1991, the case of the petitioner has to be dealt with in a larger spectrum.

21. The facts relating to the petitioner's case are that he fell ill and had to take treatment and therefore, applying leave with the medical certificate and after recovery when he sought for joining the service of the second respondent, he was not permitted to join, but a memo. of termination of service was issued abruptly by the second respondent without conducting any enquiry. Either regarding the veracity of the statement of the petitioner for his long absence or to know about the bona fides, since no enquiry was conducted, basically, no such conclusion of terminating the service of the petitioner could have been arrived at on the part of the management.

22. On the part of the second respondent management it would be argued that even though no domestic enquiry has been conducted by the management, the Court below conducted an enquiry wherein the petitioner could have made use of his opportunity to prove his case, which he failed and therefore, the Labour Court rightly arrived at the conclusion that he left the service voluntarily and concluded the case as discharge simpliciter.

23. At this juncture, it is relevant for consideration that on the part of the management, neither the fact that the petitioner applied for leave along with medical certificate has been rebutted nor any evidence let in to that effect, but only based on certain created records to the effect that the petitioner's absence was unauthorised and therefore, presuming that he had left the service voluntarily, by issuing Ex.M3 memo. bluntly refusing employment to the petitioner and this attitude adopted on the part of the second respondent management is not only discredited but also held as an unfair labour practice adopted on the part of the management, in many of the earlier judgments of the upper Forums and the Labour Forum below has not at all bothered about to have a discussion to find out as to the fact whether the petitioner had voluntarily left the service as it is the stand taken on the part of the second respondent employer or was it true that in spite of having applied for leave on account of ill health the employer did not give effect to the said document and when he joined duty should have admitted him to resume his work, which have not at all been gone into nor any answer obtained. The Labour Court below has neither discussed nor decided as to why the second respondent management has not conducted any domestic enquiry and without going into such of the basic questions of non conduct of the domestic enquiry by the management and without opportunity, terminating the service of the petitioner abruptly without adhering any of the provisions of law is neither fair nor legally acceptable and therefore, the Labour Court should have held that denial of employment for an employee going on leave and for no fault of his is erroneous on the part of the employer and should have ordered reinstatement with all service benefits and without recourcing to such a method, simply ordering

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only to observe 25F of the I.D. Act, the Labour Court has only done grave injustice to the petitioner which is unacceptable or unjustified in law and hence this Court is of the view that the award of the Labour Court is liable to be quashed for the foregoing reasons assigned and hence the following order:

In result,

(i) the above writ petition succeeds and the same is allowed.

(ii) the Award dated 25.3.1996 passed by the I Additional Labour Court, Madras in I.D.No.1131 of 1991 is quashed.

(ii) however, in the circumstances of the case, there shall be no order as to costs.

gr.

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Presiding Officer,
I Additional Labour Court, Madras.

2. The Management
The Hindu,
(Prop. Kasturi & Sons Ltd.)
Anna Salai, Madras - 2.

ORDER IN
W.P.NO.10417 OF 1997

28.2.2005

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