IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.10.2010

CORAM:

THE HON'BLE MR.JUSTICE M.M. SUNDRESH

W.P.NO.24830 of 2002

1.R.Balavenkatakrishnan (died) ... Petitioners
2.Tmt.Kokilammal
3.Tmt.Gunasree
4.Sabaridaran

Vs.

1.The Presiding Officer,
Labour Court, Salem.

2.The Management,
Tamil Nadu State Transport Corporation,
(Coimbatore Division-2) Ltd.,
Chennimalai Road, Erode-1. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records from the first respondent relating to I.D.No.160/99, dated 12.09.2001 passed by the first respondent, quash the same and consequently direct the second respondent to reinstate the petitioner with continuity of service, backwages and other attendant benefits and award costs.

For Petitioners : Mr.V.Ajoy Khose
For Respondents : Mr.T.Chandrasekaran
Special Govt.Pleader for R2

ORDER

This writ petition has been filed by the employee of the second respondent's Corporation seeking to quash the award passed by the first respondent, dated 12.09.2001 in I.D.No.160/99 with consequential direction, directing the second respondent to reinstate him with backwages and continuity of service.

2. It is seen from the records that the writ petitioner, after filing the writ petition died on 29.02.2008. Thereafter, a substitution has been made by impleading his wife, daughter and son as the petitioners.

3. The writ petitioner joined the service of the second respondent as driver on 16.05.1987. Thereafter, he was placed at a higher scale and designated as a senior driver. During the service of the petitioner, there were only two minor blemishes in his service records namely imposition of Rs.50/- as fine for the damage to the tyre and absent from duty, which was converted as leave absent.

4. The writ petitioner did not attend his duty from 21.11.1996, in view of the fact that he was seriously suffered by illness and both his mother and son met with accidents. Therefore, in view of his unauthorised absent, a charge memo was issued by the second respondent in and by the proceedings dated 19.12.1996. Pursuant to the charge memo, enquiry notice was sent on 30.04.1997, fixing the hearings on 09.05.1997. The petitioner received the said notice, few days before the proposed enquiry, but did not attend the same.

5. After the enquiry, a report was filed, in which, it was found that the charge framed against the petitioner is proved and that a second show cause notice was issued, in which, the petitioner was asked to show cause as to why, he should not be removed from service. Prior to the said notice, the petitioner was also asked to re-join duty. The petitioner did not respond to any other communications and as a result, an order of dismissal has been passed against him. The petitioner has made an appeal in and by his representation dated 12.12.1997, as against the order of dismissal on 09.09.1997. The said appeal of the petitioner was also rejected by the proceedings dated 31.12.1997.

6. Thereafter, the petitioner has filed a petition before the Labour Court, after the failure of the conciliation before the Conciliation Officer. In I.D.No.160/99, the Labour Court has dismissed the dispute against the petitioner. Challenging the same, the present writ petition has been filed.

7. Mr.V.Ajoy Khose, learned counsel for the petitioner submitted that the award of the Labour Court in dismissing the claim petition without exercising the power under Section 11(A) of the Industrial Dispute Act, will have to be set aside. The learned counsel further submitted that the petitioner was, in fact, absent for only 29 days, which is a subject matter of the enquiry and therefore, the subsequent period cannot taken into account. Even assuming that the subsequent period is taken into account, the unauthorised absentism for a period of eight months also cannot be the basis to pass an order of dismissal. The petitioner has stated in his appeal petition that due to the reason beyond his control, he could not attend to his work, as he became sick and his mother and son met with serious accidents. The above said facts and aspects have not been taken into consideration by the Labour Court. The petitioner himself died on 29.02.2008 and therefore, this Court will have to pass suitable

orders enabling the writ petitioners herein to get the retiral benefits, since they have no other means of livelihood. In support of his contentions the learned counsel placed reliance upon the judgment of the Hon'ble Apex Court reported in (2009) 8 MLJ 460 (SC) (Chairman cum Managing Director, Coal India Limited and another Vs. Mukul Kumar Choudhuri and others) and submitted that the writ petition will have to be allowed by passing appropriate orders.

8. Per contra Mr.T.Chandrasekaran, learned Special Government Pleader for the second respondent submitted that the enquiry has been properly conducted and the notice has been served on the writ petitioner. For the reasons best known to him, he did not attend the enquiry. Even thereafter, sufficient opportunities were given, which, the writ petitioner had failed to take advantage of. Even during the proceedings, the writ petitioner was asked to join duty, but he did not do so. Therefore, under those circumstances, the second respondent did not have any other option, except to dismiss the writ petitioner, from service and the same has been taken into consideration by the Labour Court in dismissing the claim petition. Hence, the learned Special Government Pleader submitted that no interference is warranted in this writ petition.

9. The above said facts would indicate that the petitioner was asked to attend the enquiry. The enquiry notice was dated 30.04.1997 and the date of enquiry was fixed on 09.07.1997. It is the specific case of the petitioner that only few days time was given for attending the enquiry. The enquiry was concluded on the very same day. However, the petitioner has not chosen to give any reply to the show cause notice.

10. The records would also indicate that there was no serious misconduct by the petitioner in his service, prior to imposition of the punishment. On the earlier occassion, a fine of Rs.50/- was imposed against the petitioner for the damage caused to the tyre of the vehicle and on the second occasion, the absent of the petitioner was converted into one of sanctioned leave. Admittedly, there is a negligence on the part of the writ petitioner by not reporting to his duty. However, the writ petitioner gave his explanation before the Appellate Authority stating that he could not attend the work due to his serious illness and the accident caused to his mother and son. It is no doubt true, that the enquiry was conducted in a proper manner and sufficient opportunity was given to the petitioner. However, a perusal of the proceedings dated 31.12.1997 would show that the petitioner's request for reinstatement was not properly considered. The petitioner has clearly stated the reasons for his absence. He has specifically stated that his mother met with the road accident during the relevant point of time and she died thereafter. She was treated in a hospital for six months. He has further stated that due to the accident caused to his son by the electric shock, the writ petitioner

will have to give continuous treatment to him. Therefore, he has made a request that being a sole bread winner, his case will have to be considered sympathetically. The Appellate Authority ought to have considered the said request, not only on the merits of the case, but also on the quantum of the punishment, which he has not chosen to do so. Merely because, the charges against the writ petitioner are proved it will not prevent the Appellate Authority from reducing the quantum of punishment.

11. The Labour Court also committed an error in not considering the issue in the proper perspective. The petitioner has made a specific statement about the reasons for his absence. The said fact has not been denied by the respondent. Therefore, the Labour Court ought to have exercised its power under Section 11(A) of the Industrial Dispute Act in modifying the relief asked for by the writ petitioner. The Hon'ble Supreme Court of India, in the case of Chairman cum Managing Director, Coal India Limited and another Vs. Mukul Kumar Choudhuri and others, reported in (2009) 8 MLJ 460 (SC), by applying the doctrine of proportionality, has modified the order passed by this Court. The Hon'ble Supreme Court in the above said judgement held as follows.

> "26. The doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of porportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be : would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's Rules and Regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which

was not accpeted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the respondent No.1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorised absence for six months.

27. Consequently, both these appeals are allowed in part. The appellants shall reinstate respondent No.1 forthwith but he will not be entitled to any back wages from the date of his removal until reinstatement. Parties will bear their own costs."

12. Similarly, in the judgment of Hon'ble Supreme Court of India reported in 2009 III LLJ-373 (SC) between Jagdish Singh Vs. Punjab Engineering College and Others, has held as follows:-

"9.The other principle that requires to be kept in view, is the observation made by this Court in Kerala Solvent Extractions Ltd., V. A.Unnikrishnan and Another 1994-II-LLJ-888 (SC), wherein it is stated at p.890:

"7.... In recent times, there is an increasing evidence of this, perhaps well meant but wholly unsustainable tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability."

10.The instant case is not a case of habitual absenteeism. The appellant seems to have a good track record from the date he joined service as a sweeper. In his long career of service, he remained absent for 15 days on four occassions in the month of February and March 2004. This was primarily due to sort out the problem of his daughter with her in-laws. The filial bondage and the emotional attachment might have come in his way to apply and obtain leave from the employer. The misconduct that is alleged, in our view, would definitely amounts to violation of discipline that is expected of an employee to maintain in the establishment, but may not fit into the category of gross violation of discipline. We hasten to add if it were to be habitual absenteeism, we would not have ventured to entertain this appeal."

13. This Court in Union of India, represented by the Chief Workshop Manager, Southern Railway, Madras Vs. Registrar, Industiral Tribunal, Chennai and another, (2010-III-LLJ-349 Mad) has held as follows:-

"8.Though Mr.Vellaichamy, the learned counsel for the petitioner contended that the absence will have to be viewed strictly and no indulgence should be shown, but in the present case, the Tribunal, taking into the overall circumstances of the case, held that the punishment of removal was shockingly disproportionate and therefore, in the exercise of power under Section 11-A of the Industrial Disputes Act, interfered with the proportionality of the punishment, but at the same time in order to balance the interest of both sides, it had deprived backwages for the entire period.

9.In this context, it is necessary to refer to the judgment of the Supreme Court in Chairman-cum-Managing Director, Coal India Ltd., and another V. Mukul Kumar Choudhuri and Others (2009) 8 MLJ 460 (SC). In that case, the Bench of the Supreme Court headed by P.Sathasivam, J., also dealt with the cases of absence and finally analysed the scope for interference under Section 11-A of the Act. Paragraph 26 of the said judgment reads as follows:

26.The doctrine of proportionality is, thus, well recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, intervention if exercised in a manner which is out of

proportion to the fault. Award of punishment which is grossly in access to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied, while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevent matters before imposing punishment. In a case like the present or where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the company Rules and Regulations but the reason was purely personal and beyond his control and as a matter of fact, he sent his resignation, which was not accepted, the order removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the respondent No.1 is denied backwages for the entire period by way of punishment for the proved misconduct of 'unauthorised absence' for six months.

10.Applying the above ratio propounded by the Supreme Court to the present case, it is not a fit case where this Court should interfere with the order passed by the Tribunal. Further, after the impugned award was passed, the petitioner has reached the age of superannuation. Hence, the writ petition stands dismissed. The petitioner-Railways is directed to comply with the award in its entirety within a period of eight weeks from the date of receipt of copy of this order. No costs."

14. Therefore by applying the above said ratio laid down by the Hon'ble Apex Court and followed by this Court, this Court is of the opinion that it is a fit case where appropriate relief will have to be moulded in favour of the petitioners herein. Considering the nature of the charges involved and the subsequent developments of the

death of the writ petitioner as also observing that the petitioners herein are the wife, widow and the children of the deceased writ petitioner, this Court, in the interest of justice, feels it appropriate to direct the second respondent that the first petitioner, viz, wife of the deceased petitioner, herein will have to be given the pension and gratuity benefits due to the deceased writ petitioner by treating the period from 21.11.1996 till his date of super annuation dated 29.02.2008 as the period of service for the purpose of calculating the pension and pay the same accordingly to the first petitioner. It is made clear that inasmuch as the charges have been proved, the petitioners are not entitled for the salary for the above said period. But the said period will be construed as on duty only for the purpose of computing the writ petitioner's pension alone. The second respondent is also directed to pay the employees contribution towards the pension fund for the deceased writ petitioner so as to enable the first petitioner wife to get the required pension and gratuity benefits. The writ petition is ordered accordingly.

15.It is also made clear that if any provident fund which otherwise is due to the deceased petitioner and the same is available with the second respondent, it also will have to be paid to the first petitioner. The second respondent is also directed to complete the said exercise within a period of three months from the date of receipt of a copy of this order in three months. This writ petition is ordered accordingly. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssp

To
1.The Presiding Officer,
Labour Court, Salem.
2.The Management,
Tamil Nadu State Transport Corporation,
(Coimbatore Division-2) Ltd.,
Chennimalai Road, Erode-1.
3.The Section Officer, V.R.Section, High Court, Madras.

1 cc To Mr..V.Ajoy Khose, Advocate, SR.78572
1 cc To Mr.T.Chandrasekaran, Advocate, SR.78522

W.P.NO.24830 of 2002

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