IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30..11..2011

CORAM

THE HON'BLE Mr. M.Y. EQBAL, CHIEF JUSTICE
and
THE HON'BLE Mr. JUSTICE T.S. SIVAGNANAM

Writ Appeal No.5 of 2011

Kalyanasundaram .. Appellant

Vs.

1. The Management of
Tamil Nadu State Transport Corporation
(Kumbakonam Division - 1) Ltd.,
Railway Station New Road,
Kumbakonam - 612 001.

2. The Presiding Officer,
Labour Court,
Cuddalore. .. Respondents

PRAYER: Appeal filed under Clause 15 of the Letters Patent against the order of the learned single Judge dated 17.08.2010 passed in W.P.No.17589 of 2001. Writ Petition filed under Article 226 of the constitution of India to call for the records pertaining to the award 13.3.2001 passed by the 2nd Respondent in I.D.No.108 of 1993 quash the same.

For Appellant :: Mr.V.Ajoykhose

For Respondent - 1 :: Mr.V.R.Kamalanathan

J U D G M E N T

The Hon'ble Chief Justice &
T.S.Sivagnanam, J.

This writ appeal has been preferred against the order of the learned single Judge dated 17.08.2010 passed in W.P.No.17589 of 2001, whereby the learned Judge remitted the matter back to the Labour Court, Cuddalore for fresh disposal of the I.D.No.108 of 1993, with certain directions.

2. The appellant herein was working as a Driver in the 1st respondent - Transport Corporation. On 05.10.1986 the vehicle driven by the appellant met with an accident killing a pedestrian. In respect of the said accident, he was issued with a charge memo. As he denied the charge levelled against him, an enquiry was ordered to be conducted. The Enquiry Officer in his report found the appellant guilty of the charge levelled against him. Based on the Enquiry Report he was terminated from

service with effect from 07.10.1993. Challenging the Enquiry Report he raised an Industrial Dispute in I.D.No.108/1993 before the Labour Court, Cuddalore. In the Claim Petition he claimed that he was not negligent in driving the vehicle, and he further stated that he was not paid with the subsistence allowance during his suspension period, which adversely affected him in defending his case. Finally, he stated that the enquiry was not conducted fairly and properly.

3. The Labour Court on the basis of the evidence let in before it rejected the contention of the appellant – driver that the enquiry conducted by the Enquiry Officer was not fair and proper. However, finally it observed that the respondent – management has not submitted either the standing order or byelaws, so as to show that under which clause the alleged negligence or rash driving on the part of the petitioner-driver was classified as one of the misconducts, for which termination from service is warranted, and held that the petitioner-driver is entitled for reinstatement of service with full backwages.

4. Aggrieved by the order of the Labour Court the Transport Corporation has preferred a writ petition in W.P.No.17589 of 2001. The learned single Judge vide his order dated 17.08.2010 allowed the writ petition by setting aside the award of the Labour Court, and remitted the matter back to the Labour Court, Cuddalore with a direction to the Labour Court to dispose of the I.D.No.108/1993 afresh by passing a fresh award. While doing so, the Labour Court shall consider only the enquiry proceedings and shall eschew the evidence recorded earlier by the Labour Court in respect of the merits of the charges. The learned Judge further directed that on considering the records relating to the domestic enquiry and after affording sufficient opportunity to the parties, the Labour Court shall pass an award. In any event, the I.D.No.108/1993 shall be disposed of within a period of two months from the date of receipt of a copy of the order.

5. Aggrieved by the above order of the learned single Judge the present appeal has been preferred by the appellant – workman.

6. We have heard the learned counsel appearing for the appellant – workman and the learned counsel appearing for the 1st respondent – management and considered the impugned judgment passed by the learned single Judge from which it reveals that the award of the Labour Court was set aside and matter has been remitted back to the Labour Court for fresh decision by giving the following reasoning:-

> "4. As I have already pointed out, a preliminary issue was raised by the workman in respect of the fairness of the enquiry. It is the statutory obligation of the Labour Court to decide the said preliminary issue. If only the Labour Court decides that the enquiry was not held fairly and properly, then it can call upon the management to let in evidence to substantiate the order of termination. While doing so, the workman will also be allowed to let in evidence. In the event of the Labour Court coming to the conclusion that the enquiry was held fairly and properly, then the Labour Court cannot allow the management to let in any evidence further. In any event, the Labour Court, under law, is required to consider the proceedings of the Domestic Enquiry Officer and the records placed before the Enquiry Officer to come to the conclusion whether the Enquiry Officer was right in holding

the charges proved and whether the termination from service is sustainable or not. In the case on hand as I have already pointed out, having come to the conclusion that the enquiry was held fairly and properly, the Labour Court ought not to have allowed any further evidence to be let in by the management in respect of the merits of the charge. Since, the award of the Labour Court is based on the evidence recorded by the Labour Court, I am of the view that the award of the Labour Court cannot be sustained. The matter needs to be remitted to the Labour Court for fresh disposal in accordance with law."

7. There is no dispute with regard to the settled proposition of law as enunciated by the learned single Judge in the paragraph quoted herein before. The question that fell for consideration before the learned single Judge was as to whether the reasoning given by the Labour Court in passing the award can be sustainable or not.

8. For the alleged negligent driving of the bus the appellant was served with a charge memo and a domestic enquiry was conducted. After the appellant was put under suspension he was not paid with any subsistence allowance during the course of suspension period though several demands were made. The 1st respondent – management had not disputed that since the date of suspension the appellant continued under suspension without payment of any subsistence allowance. It has also not been disputed by the 1st respondent – management that both the criminal case and the domestic enquiry were initiated on the same set of facts that there had been rash and negligent driving of the vehicle by the appellant, which caused the accident. In the criminal case the appellant was acquitted. Moreover, it was the specific case of the appellant that the rash and negligent driving of the vehicle will not amount to mis-conduct. The 1st respondent – management either before the Labour Court or before the learned single Judge has not produced any service rule or condition of service to substantiate that the alleged rash and negligent driving is a mis-conduct. After taking into consideration of all these facts the Labour Court held that the dismissal of appellant from service cannot be sustainable in law. These facts have not been taken into consideration by the learned single Judge. It is well settled that if an employee is put under suspension and remain as such without any departmental enquiry and without payment of any subsistence allowance, then the entire enquiry become vitiated in law. It is equally well settled that if both the criminal proceeding and the domestic enquiry are based on same set of facts, then the decision of the criminal court has to be taken into consideration while passing an order of punishment.

9. Admittedly, the appellant was exonerated by the criminal court from the charges of negligent driving by judgment dated 20.6.1991. The criminal court held, on the basis of evidence, that the appellant was not guilty of rash and negligent driving of the vehicle. The judgment of the criminal court was passed during the pendency of the departmental enquiry and the said fact was brought to the notice of the authority concerned, but on the basis of the evidence produced by the Management, the order of termination of the appellant from service was passed on 7.10.1993 without full opportunity of hearing.

10. In the case of the Capt. M. Paul Anthony vs. Bharat Gold Mines Limited reported in (1999) 3 S.C.C. 679, the Supreme Court observed as

hereunder :-

"26. To place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules framed by various authorities, including Govt. of India and the State Governments. [See: for example, Rule 10 of Central Civil Services (Classification, Control & Appeal) Rules]. Even under the General Clauses Act, this right is conceded to the employer by Section 16 which, inter alia, provides that power to appoint includes power to suspend or dismiss.

27. The order of suspension does not put an end to an employee's service and he continues to be a member of the service though he is not permitted to work and is paid only Subsistence Allowance which is less than his salary [See: State of M.P. vs. State of Maharashtra, (1977) II S.C.C. 288].

…

29. Exercise of right to suspend an employee may be justified on facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by "suspension syndrome" and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often resulted in suspension. Suspension notwithstanding, non-payment of Subsistence Allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilized and the salary is also paid to him at a reduced rate under the nick name of 'Subsistence Allowance', so that the employee may sustain himself. …"

Their lordships further observed thus :-

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, 'the raid conducted at the appellant's residence and recovery of incriminating articles there from.' The findings recorded by the Inquiry Officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by Police Officers and Panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the Inquiry Officer and the Inquiry Officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex-parte departmental proceedings, to stand.

35. Since the facts and the evidence in both the

proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

11. On consideration of these admitted facts and the law laid down by the Supreme Court, we are of the view that the learned single Judge ought not to have set aside the award passed by the Labour Court with a direction to re-consider the enquiry proceeding and to pass a fresh order taking into consideration the procedure provided under Section 11-A of the Industrial Disputes Act, 1947.

12. For the reasons aforesaid, this writ appeal is allowed and the impugned order passed by the learned single Judge is set aside. Consequently, the 1st respondent - management is directed to satisfy the award passed by the Labour Court. However, there shall be no order as to costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sm/ab

Copy to:-

1. The Branch Manager,
   Tamil Nadu State Transport Corporation
   (Kumbakonam Division - 1) Ltd.,
   Railway Station New Road,
   Kumbakonam - 612 001.

2. The Presiding Officer,
   Labour Court,
   Cuddalore.

+1cc to Mr.V.Ajoy Khose, Advocate Sr 73181
+1cc to Mr.V.K.Kamalanathan, Advocate Sr 73198

SJ(CO)
km/9.12