IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 796 of 2019
In
R/SPECIAL CIVIL APPLICATION NO. 11952 of 2000
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2018
In
R/LETTERS PATENT APPEAL NO. 796 of 2019

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DIRECTOR GENERAL R.P.F & ORS.
Versus
DIWAN SINGH, BVP (WORKSHOP)

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Appearance:
MS ARCHANA U AMIN(2462) for the Appellant(s) No. 1,2,3,4,5
MR NAGESH C SOOD(1928) for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 25/04/2024

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. This appeal has been filed by the original respondents challenging the order of the learned Single Judge dated 09.02.2018 in Misc. Civil Application (Stamp) No. 42 of 2018 as well as the judgment dated 15.06.2016 passed in the petition filed by the respondent. The respondent who was working as an RPF constable had approached the learned Single Judge challenging the orders of the penalty initially that of removal which was modified to that of compulsory retirement. The learned Single Judge on merits found that the charge that was imputed and

proved against the respondent was that he had remained absent for the period from 09.11.1996 to 23.12.1996. The charge therefore was that he had remained absent unauthorizedly. On the charge being proved, the respondent was imposed a penalty of removal from service. Dissatisfied with the order, he filed appeal. The Appellate Authority confirmed the order. The revision application also met the same fate. On a review being filed, the reviewing authority modified the order of removal to that of compulsory retirement.

2. The learned Single Judge on facts found that the accusations of the respondent having remained absent for 44 days was not absence from duty without application or prior permission, but was an absence as a result of compelling circumstances. The learned Single Judge in the judgment observed thus :-

> *"The petitioner herein is accused of having remained absent from duty for a period of 44 days. In the case of the petitioner referring to the unauthorized absence, the disciplinary authority, appellate authority, revisional authority as well as reviewing authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a police officer. The question, whether the 'unauthorized absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant, cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.*
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> *If the absence is the result of the compelling circumstances under which it was not possible to wait for sanction of the leave, such absence cannot be held to be willful. Absence from duty*

without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such a case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

In the case in hand, the Inquiry Officer, on appreciation of evidence though held that the petitioner was unauthorizedly absent from duty but failed to hold that the absence was willful; the disciplinary authority, the appellate authority as also the revisional authority, failed to appreciate the same and wrongly held the appellant guilty. (see Krushnakant B.Parmar v. Union of India and another, (2012)3 SCC 178).

In the case in hand, while modifying the punishment from removal to compulsory retirement, the Director General, being the reviewing authority, has observed that although the Constable was absent without leave, yet considering the circumstances of his wife's sickness and the fact that his application for leave was well-documented and he returned for duty after 44 days, the intention was not to abscond or desert, but to attend his ailing wife. In my view, the matter should conclude over here."

3. Perusal of the order of the learned Single Judge would indicate that having found that the absence was unintentional, the respondent deserved to be reinstated in service.

4. Perusal of the order of learned Single Judge also brings out a fact that in the quoted order of the reviewing authority, it is observed by the reviewing authority itself that "considering the circumstances of the wife's sickness" and the fact that his

application for leave is well documented and he has returned for duty after 45 days, it appears that the ex-constable's intention was not to abscond or desert, but to attend his 'ailing wife'. Obviously therefore, even the department was of the perception that the absence was not unauthorized. Having held thus, the learned Single Judge directed reinstatement of the respondent on the ground of proportionality of punishment and further directed that he be reinstated with 50% back wages. The learned counsel for the appellants has brought to our notice that even before the appeal was filed, the respondent has been reinstated in service on 14.10.2016.

5. The issue therefore before us would only be restricted to the aspect of examining the appropriateness of the learned Single Judge's direction in granting 50% back wages. Learned advocate Ms. Archana Amin would submit that the amount of back-wages to the extent of 50% was burden on the exchequer *inasmuch* as once a penalty was imposed, granting of back-wages would amount to premium over misconduct.

6. Mr. Nagesh Sood, learned counsel appearing for the respondent would rely on the decision of the Hon'ble Apex Court

in the case of ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED) & Ors.,*** reported in ***(2013) 10 SCC 324.*** He would press into service paragraph 38 of the decision which reads as under :-

> *"38. The propositions which can be culled out from the aforementioned judgments are:*
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> *38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*
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> *38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.*
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> *38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.*
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> *38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/ workman is consistent with the rules of natural justice and/or certified standing orders, if*

any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6 In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

> *38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/ workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to herein-above and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."*

6.1. Reliance was also placed on the decision of the Hon'ble Apex Court in the case of ***Pradeep S/O Rajkumar Jain v. Manganese Ore (India) Ltd., & Ors.,*** reported in ***(2022) 3 SCC 683*** and also on a decision of Division Bench of this Court in the case of ***Operations Research Group Employees Union v. State of Gujarat*** rendered in *Letters Patent Appeal No. 276 of 2023 and allied matters dated 13.10.2023.*

7. Considering the submissions made by learned counsels for the respective parties and the law laid down by the Hon'ble Apex Court in the case of *Deepali Gundu (supra)* which has been followed by the Hon'ble Apex Court in the case of *Pradeep Jain (supra)* and by this Court, what is apparent is that on perusing the principles enlisted in respect of payment of back wages in the case of *Deepali Gundu (supra)*, what appears is that if the Court finds that the employer had acted in violation of the statutory provisions or the employee was victimized, then the direction to pay back wages was justified. The Hon'ble Apex Court further observed that

the Court must always keep in view that in the case of wrongful/illegal termination of service, the wrong doer is the employer and the sufferer is the employee/workman and there is no justification to give premium to the employer of his wrong doing by relieving him of the burden to pay the employee/workman his dues.

8. In light of the aforesaid observations, the directions of the learned Single Judge to restrict the amount of back wages to 50% cannot be faulted.

9. The Letters Patent Appeal is accordingly dismissed. It is expected that the appellants shall comply with the order and pay the amount of back wages as directed by the learned Single Judge as far as in the year 2016 within a period of ***eight (8) weeks*** from the date of the receipt of copy of this order.

Consequently, the connected Civil Application for stay also stands disposed of.

(BIREN VAISHNAV, J)

(PRANAV TRIVEDI,J)

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