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ALLAHABAD HIGH COURT (LUCKNOW BENCH)

SINGLE BENCH

TRILOKI NATH PATHAK — Appellant

Vs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL (2), LUCKNOW —
Respondent

(Before : Narayan Shukla, J.)

Writ Petition No. 6328 (M/S.) of 2005.

Decided on : 08-08-2012

A. Service Law — Disciplinary Proceedings — Misconduct — Unauthorised Absence — When absence is due to compelling circumstances (illness, accident), it is not wilful and does not amount to misconduct — Disciplinary authority must prove absence was wilful; mere unauthorized absence is not always misconduct — Failure of employee to provide medical certificate for illness for all dates of absence after initial one, despite being able to note the ex parte order and file a restoration application later, suggests lack of compelling circumstances for the subsequent absences — Despite initial plea of sudden fits, unexplained subsequent absences are not excused. (Paras 3, 5, 8)

B. Service Law — Disciplinary Proceedings — Quantum of Punishment — Proportionality — Court can interfere if punishment is grossly disproportionate to the misconduct — Test: would a reasonable employer impose such punishment considering the measure, magnitude, and degree of misconduct and all relevant circumstances — Here, the employee was found negligent and caused significant monetary loss to the employer Corporation — Removal from service alongside recovery of financial loss is disproportionate; recovery of loss is sufficient punishment. (Paras 6, 8)

C. Service Law — Disciplinary Proceedings — Monetary Loss — Recovery — Where an employee's proven negligence leads to financial loss for the employer, the employer can recover the amount of loss from the employee — In this case, the petitioner's negligence in pursuing a legal case led to an ex parte award and substantial financial loss for the Corporation, justifying the recovery of this amount from him. (Para 8)

D. Service Law — Disciplinary Proceedings — Finding of Inquiry Officer vs. Disciplinary Authority — When the disciplinary authority forms a different opinion from the Inquiry Officer, especially regarding the cause of loss or the employee's liability for it, the employee must be given an opportunity to respond to this differing opinion before the final decision is made — However, in this case, a show cause notice was issued to the petitioner on this differing opinion, allowing him to respond. (Paras 7, 8)

E. Service Law — Punishment — Modification by Court — Reinstatement with Recovery — Where removal from service is deemed disproportionate for negligence that caused monetary loss, the court can modify the punishment to allow recovery of the loss while reinstating the employee — Employee is denied monetary benefits for the period of suspension/dismissal but retains continuity of service for future benefits. (Paras 8, 9, 10, 11)

Counsel for Appearing Parties

Ghaus Beg, Advocate, for the Petitioner; Umesh Chandra Pandey, Advocate, for the Respondents

Final Result : Allowed

JUDGMENT

Narayan Shukla, J.—Heard Mr.Ghaus Beg, learned counsel for the petitioner and Mr.Umesh Chandra Pandey, learned counsel for the respondents.

The petitioner has challenged the order dated 2nd of May, 1993, passed by the Divisional General Manager (Western Division), U.P. State Road Transport Corporation (hereinafter referred to as the 'Corporation'), Meerut, whereby the petitioner was removed from service, the order dated 4th of June, 1994, passed by the Chief Head Manager (Technical), Transport Corporation, Headquarter, Lucknow, whereby the petitioner's representation against the order of punishment has been rejected as also the award dated 10th of December, 2002, passed by the Industrial Tribunal (2), State of U.P. Lucknow.

2. The charge against the petitioner is that while the petitioner was deputed to attend the proceeding of a case No.PWUA 187/91 before the Labour Court, Meerut, he failed to

attend the proceeding on several dates, on account of which an exparte award allowing the compensation of Rs. 40,620/- and damages of Rs. 2,03,100/- total Rs. 2,43,720/- was passed against the Corporation. Thus, the Corporation was put to loss, on account of petitioner's negligence in duty. The petitioner's action was found misconduct. The petitioner was issued a charge sheet for the aforesaid charges. He submitted the reply of the charge sheet in the manner that it was the duty of the counsel appointed on behalf of the Corporation to attend the proceeding of the Labour Court, who was engaged therefor. It is further stated that he always persuaded the case to the counsel of the Corporation and intimated him the date fixed by the Labour Tribunal, therefore, it cannot be said that the petitioner was negligent in doing 'Pairvi' of the case.

3. However, upon perusal of the order of punishment, I find that after inquiry it has been established that no written statement was filed on behalf of the Corporation, which can be prepared by the counsel with the assistance of the 'Pairokar' of the Department. In the award it has been observed that on 10th of October, 1991, 15th of October, 1991, 26th of October, 1991, 30th of October, 1991 and 15th of November, 1991 nobody appeared before the Prescribed Authority on behalf of the Corporation. The petitioner has made an effort to explain his absence that suddenly he fell down due to attack of fits on 10th of October, 1991 in the court premises itself, therefore, he could not attend the proceeding of the court. Thus, it is stated by the petitioner that his absence was not willful, but it was inevitable. However, he has failed to explain the laches for not attending the court on the subsequent dates mentioned, as above. It was stated by him that he received the knowledge of exparte order on 13th of January, 1992, whereas it was found proved that he noted the order passed on 15.11.1991 on 20.12.1991, but moved the application for restoration on 28.1.1992 to set aside the exparte award, however, the same was dismissed also.

4. The learned counsel for the petitioner has placed reliance on the following judgments:-

(1) Krushnakant B.Parmar v. Union of India and another, reported in 2012 (30) LCD 519 : 2012 (132) FLR 1023 (SC)

(2) Chairman-cum-Managing Director, Coal India Ltd. and another v. Mukul Kumar Choudhuri and others, reported in (2009) 15 SCC 620 : 2009 (123) FLR 601(SC).

(3) State of Rajasthan v. M.C.Saxena and others, reported in (1998) 2 UPLBEC 987: 1998 (79) 140 (SC).

5. The relevant paragraphs 17, 18, 19 and 20 of the case of Krushnakant B.Parmar (Supra) are reproduced hereunder:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful.

18. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean wilful. 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 case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

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

20. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty."

6. The petitioner has raised the question on the quantum of punishment with the submission that the same is not commensurate to the charges levelled against him and thus he has pleaded the doctrine of proportionality, which has been discussed in the case of Chairman-cum-Managing Director, Coal India Ltd.(Supra), in which the Hon'ble Supreme Court has held that the 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. It has further been held that one of 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.

7. The petitioner has also raised one question that though after inquiry the Inquiry Officer has reported the petitioner's negligence in duty, but he has concluded that the petitioner's negligence has not caused any monetary loss to the Corporation, therefore, there was no occasion to pass the order of recovery of the amount allegedly put to loss i.e. the loss suffered by the department. It is further stated that the disciplinary authority has formed the different opinion, but without providing opportunity of hearing to the petitioner, which is not permissible in the eye of law, as has been held by the Hon'ble Supreme Court in the case of State of Rajasthan (Supra).

8. Upon perusal of the order of punishment, I find that the disciplinary authority has discussed the opinion of the Inquiry Officer, as above, but since the disciplinary authority formed the opinion that due to petitioner's negligence the loss was caused to the Corporation, a show cause notice was issued to him on 30th of January, 1993. The petitioner submitted reply of show cause notice on 15th of February, 1993. The disciplinary authority considered the petitioner's submissions in regard to attack of fits as well as the fact that he got prepared the affidavit with the aid of counsel of the Corporation and he signed it also, but it is established that on 20th of January, 1992 no affidavit or application was filed before the lower court on his behalf. So far as the sudden attack of fits upon the

petitioner is concerned, it is also observed that the petitioner has failed to produce any medical certificate whether he received the medical aid or any certificate of his sickness or fitness. Therefore, keeping in view the continuous absence in the Labour Court, the petitioner's negligence in discharge of duty of court 'Pairvi', cannot be denied, but the respondent-Corporation has failed to establish its proposed defence against the claim in that very case made by the applicant, therefore, at this stage it cannot be examined as to whether there was a proper defence with the Corporation to contest the matter. However, the petitioner's negligence has resulted into financial loss to the Corporation, for which the petitioner definitely can be held liable. Therefore, I am not inclined to interfere with the order of punishment to the extent it issues direction to recover the amount i.e. Rs. 2,43,720/-, as the Corporation has suffered the loss of this amount due to petitioner's negligence. Simultaneously, I am of the view that once the loss caused to the Corporation is allowed to be recovered from the petitioner, at the same time it is not appropriate to remove the petitioner from service. Therefore, the part of order of punishment i.e. the petitioner's removal from service is hereby interfered with and to this extent I hereby quash the order impugned.

9. It is provided that the petitioner shall not be entitled to get any monetary benefit accrued to him during the period of suspension except the subsistence allowance and also from the date of dismissal to the date of this order, but during this period the petitioner shall be treated in continuation of service for the purpose of next service benefits.

10. A direction is issued to reinstate the petitioner in service forthwith. It is further provided that if the amount proposed, as above, to be recovered from the petitioner, has not been recovered, the same shall be recovered from the petitioner's salary, unless the same is paid by the petitioner in lump sum.

11. In the aforesaid terms the orders impugned are modified.

12. The writ petition is partly allowed.