IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10438 of 2017
With
R/SPECIAL CIVIL APPLICATION NO. 12842 of 2017
With
R/SPECIAL CIVIL APPLICATION NO. 2325 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**No**
2	To be referred to the Reporter or not ?	**No**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**No**

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ABHISHEK INDUSTRIAL SERVICE PVT. LTD
Versus
NATHABHAI BHAGWANJIBHAI RATHOD & 2 other(s)

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Appearance-SCA No.10438 of 2017
MR PS GOGIA(2751) for the Petitioner(s) No. 1
MR TR MISHRA(483) for the Respondent(s) No. 1
MR PREMAL R JOSHI(1327) for the Respondent(s) No. 2
NOTICE SERVED BY DS for the Respondent(s) No. 1,3

Appearance-SCA No.12842 of 2017
MR TR MISHRA(483) for the Petitioner
MR PREMAL R JOSHI(1327) for the Respondent(s) No.1
MR PS GOGIA(2751) for the Respondent No.2

Appearance-SCA No.2325 of 2018
MR PREMAL R JOSHI(1327) for the Petitioner
MR TR MISHRA(483) for the Respondent No.1
MR PS GOGIA(2751) for the Respondent No.2

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CORAM:**HONOURABLE MR. JUSTICE A.Y. KOGJE**

Date : 13/07/2022

ORAL JUDGMENT

1. **RULE**. Learned Advocate Mr.T.R.Mishra waives service of Rule on behalf of respondent No.1 and learned Advocate Mr.Premal Joshi waives service of Rule on behalf of respondent No.2 in Special Civil Application No.10438 of 2017, learned Advocate Mr.Premal Joshi waives service of Rule on behalf of respondent No.1 and learned Advocate Mr.P.S.Gogia waives service of Rule on behalf of respondent No.2 in Special Civil Application No.12842 of 2017 and learned Advocate Mr.T.R.Mishra waives service of Rule on behalf of respondent No.1 and learned Advocate Mr.P.S.Gogia waives service of Rule on behalf of respondent No.2 in Special Civil Application No.2325 of 2018.

2. These three petitions are challenging the same award of the Labour Court, Junagadh dated 02.02.2017 in Reference (T) No.101 of 2006. The petitioner of Special Civil Application No.10438 of 2017 is a contractual employer, the petitioner of Special Civil Application No.2325 of 2018 is a principal employer and Special Civil Application No.12842 of 2017 is filed by the workman. By the impugned award, the Labour Court has ordered reinstatement of the workman without back wages and therefore, employers have filed the petitioners for setting aside the order of reinstatement with continuity in service, whereas the workman has challenged the award on the ground of non-grant of any back

wages.

2.1 It is a case where the workman was working as a tanker driver and on account of his remaining absent, was issued with the show cause notice and after issuance of show cause notice, as the explanation offered by the workman was not acceptable to the contractual employer, his services were terminated.

3. Learned Advocates appearing for the employers jointly submitted that the impugned award is required to be interfered with on the ground that the respondent was given opportunity to explain absenteeism and in his explanation to the show cause notice, he has given general reply about ill-health of his parents and thereafter death in the family, which precluded him from attending his duties. He had also given reasons of ill-health of his children. It is argued that such explanation could not be accepted by any standards. Moreover, in the reply itself, the workman has admitted about his misconduct of remaining absent and therefore, as he has admitted, there was no requirement of any further proceeding in the name of departmental inquiry as the same would be an exercise in futility. It is argued that the reasons mentioned by the workman cannot be accepted to be genuine as in the reply to the show cause notice, he has stated about ill-health of the family members, whereas in the statement of claim, he has resorted to a different stand of he himself being medically unfit.

3.1 It is further argued that even before the Labour Court, the workman has not been able to place anything on record to substantiate and justify his absence from duty.

3.2 It is submitted that though the proceedings which were challenged before the Labour Court were show cause notice and the order of dismissal passed by the contractual employer and there being no other evidence led by the workman, still without any basis, the Labour Court has proceeded to hold that the workman was employee of the principal employer and therefore directed both the principal and the contractual employer to reinstate the workman.

3.3 It is also submitted that by the conduct of the workman himself, it can be seen that he has accepted the order of dismissal as he has received demand draft towards his dues.

3.4 It is lastly submitted that in reply to the statement of claim, the petitioners had raised contention that in case the departmental inquiry is held to be defective, in that case, the petitioners-employers be given an opportunity to lead evidence before the Labour Court to prove misconduct. Despite this, the Labour Court has not passed any order in that regard.

3.5 Learned Advocates for the petitioners relied upon decision of the Apex Court in case of ***Central Bank of India Ltd.***

Vs. Karunamoy Banerjee, reported in **AIR 1968 SC, 266**, to contend that where guilt is admitted by the employee, there is no need for conducting a departmental inquiry.

3.6 Reliance is also placed on the decision of the Apex Court in case of ***Vijay S.Sathaye Vs. Indian Airlines Limited & Ors***., reported in **(2013) 10 SCC, 253**, to substantiate the case of the petitioners that where employee does not join duty and remains absent for long then such absence is required to be treated as misconduct. However, if such absence is for a very long period then it may amount to voluntary abandonment of service and thereby service comes to an end automatically without any order required to be passed by the employer.

4. As against this, learned Advocate for the workman has drawn attention of this Court to the reply given by the employers and submitted that a contradictory stand is taken in the reply as in the reply, it is stated that the workman is simply discharged from his service and therefore, there is no requirement of any charge sheet whereas order, which was challenged before the Labour Court, clearly is an order of dismissal pursuant to alleged misconduct.

4.1 It is submitted that the workman has worked for more than 10 years and has completed 240 days of service. Moreover, from the show cause notice itself, no clarify as to what the

petitioner has to show cause against, is coming out as there are no details with regard to days of absenteeism.

4.2 It is submitted that once the workman has offered his explanation and if such explanation is not acceptable, it is incumbent upon the employer to conduct a departmental inquiry as the workman may have compelling reasons preventing him from attending duty like hospitalization, etc. For the purpose, learned Advocate for the respondent placed reliance on the decision of the Apex Court in case of ***Krushnakant B.Parmar Vs. Union of India & Anr***., reported in **(2012) 3 SCC, 178**.

4.3 It is submitted that there is non-following of principles of natural justice as the show cause notice is highly deficient. Not only that, pursuant to the reply of the workman, no further action has been taken and simply, order of dismissal has been passed.

4.4 Insofar as receiving of the demand draft is concerned, it is submitted that the workman has clearly denied to have received or encashed the demand draft and therefore, it was the burden of the employers to establish as to whether dues have been paid by encashing demand draft issued by them.

5. Having heard learned Advocates for the parties and having perused documents on record, it appears that the workman was served with the notice dated 20.07.2004 (Exh.54) calling upon the workman to show cause for his absence between July 2003 to

June 2004 on several occasions and therefore, was negligent towards his duty. Again another show cause notice was issued on 09.12.2004 indicating that his attendance record shows very high absenteeism in the past one year and therefore, to show cause as to why his name should not be struck off from muster (Exh.47). It is pertinent to observe that both the show cause notices have been issued by the contractual employer and the workman has responded on 20.12.2004 (Exh.49), giving his explanation about prolonged ill-health of the mother and death of his father and thereafter, death of the mother, as a result of which to attend social responsibility, has not been able to attend duty. Thereafter, by order dated 25.12.2004, the contractual employer served the workman with the dismissal order, stating that reply submitted by the workman was not acceptable and reasons mentioned were not justifying the nature of absenteeism. Along with the letter of dismissal, demand draft was also forwarded to the respondent for an amount of Rs.8,450/- on 07.09.2005.

6. In the opinion of the Court, the Labour Court, after considering the aforesaid factual matrix, was justified in coming to conclusion that the petitioners-employers have not conducted proper inquiry as is required before terminating services of the workman. The explanation, if not acceptable to the employer, then it was incumbent for the employer to issue charge sheet specifying charges against the workman. In the facts of the case, as is evident

from the documents exhibited, the show cause notice did not indicate specific charge of absenteeism as no period was specified as such. It was, in the opinion of the Court, an incomplete show cause notice, to which the respondent workman had no occasion to file his response as expected by the employer, meaning thereby when the show cause notice /charge was not specific enough for the workman to respond to specifically, inquiry by issuing specific charge sheet was necessary. In the facts of the case, nature of allegations made in the show cause notice were sufficient for the workman to make out as to what response he has to give to such show cause notice. In the opinion of the Court, therefore, in absence of proper departmental inquiry, the Labour Court was justified to conclude that there is breach of Section 25(G).

7. The Court has perused the award of the Labour Court, where based on evidence of the workman, has concluded that the workman has rendered service of more than 240 days , 12 months prior to the order of termination. Over and above, the respondent workman was working since 1994 with the contractual employer as a tanker driver till the order of termination, thereby has rendered 10 years of services.

8. With regard to reliance placed by learned Advocate for the petitioners on the decision of the Apex Court in case of Karunamoy Banerjee (supra) to contend that where there is an admission, departmental inquiry would be an exercise in futility,

the Court finds that the nature of reply given by the petitioner cannot be termed to be an admission. Moreover, from para-18 of the aforesaid judgment, it appears that the inquiry had commenced and charges were also farmed against the workman and in answer to the charges levelled against the workman, guilt was admitted. As observed hereinabove, in the facts of this case, no charge sheet has been issued so as to enable the workman to assess the charge and respond thereto.

9. With regard to reliance placed by learned Advocates for the petitioners on the decision of the Apex Court in case of Vijay S.Sathaye (supra) to submit that absence from duty for a very long period amounts to voluntary absenteeism and would bring to an end the service automatically without there being any order by the employer, the Court is of the opinion that in the facts of this case, nothing has come on record to indicate the length of absenteeism as neither show cause notice nor order of dismissal would indicate as to for what period, the workman had remained absent. Moreover, the employers have passed a specific order of dismissal on the ground of absenteeism and therefore, there is no automatic end of service as was the case in the cited judgment.

10. Insofar as submission regarding workman being employee of the principal employer, it would be appropriate to refer to the impugned award, where, in para-9.8, simplicitor a conclusion is drawn that the respondent is the workman of the

principal employer. It is pertinent to observe that when the entire cause of action was based on the show cause notice issued by the contractual employer, reply to the show cause notice was addressed by the workman to the contractual employer and the order of dismissal also being passed by the contractual employer and all these documents being part of record, an error is committed by the Labour Court in merely relying upon oral evidence of the workman and that too to the extent that the workman was driving tanker, which was of the ownership of the principal employer. This, in the opinion of the Court, was not sufficient evidence to establish relation of master-servant with the principal employer and the workman. Moreover, as is observed from the reference made which is for the purpose of reinstatement with back wages, there was no issue with regard to whether contract between the contractual employer and the principal employer was sham or bogus. In absence of such issue, the Labour Court appears to have misdirected itself in drawing such a conclusion and issuing direction accordingly. It is also necessary to observe that in the issues framed, burden is directly shifted upon the principal employer to establish as to whether the workman was employee of the contractual employer. Such an issue, without there being any reference made to the Labour Court and merely on presumption, was not in consonance with the reference. In that view of the matter, the Court is inclined to interfere to the extent of the conclusion drawn by the Labour Court of holding that the

workman was employee of the principal employer, thereby direction of reinstatement is modified to the extent that the contractual employer shall reinstate the workman as per the final order of the impugned award.

11. Insofar as issue of back wages is concerned, the Labour Court has assigned proper reasons by applying principle of “no work no pay” and has therefore, refused back wages. The Court does not find any reason to interfere with the finding of the Labour Court in this connection.

12. In view of the aforesaid reasonings, Special Civil Application No.10438 of 2017 and Special Civil Application No.12842 of 2017 stand dismissed. Rule is discharged. No order as to costs. Special Civil Application No.2325 of 2018 stands partly allowed. Rule is made absolute to the aforesaid extent. No order as to costs.

(A.Y. KOGJE, J)

SHITOLE