

(2013) 10 AP CK 0012

Andhra Pradesh High Court

Case No: Writ Petition No. 2725 of 2007

Bala Shankar

APPELLANT

Vs

Managing Director, APSRTC and
OthersRESPONDENT

Date of Decision: Oct. 25, 2013**Citation:** (2014) 1 ALT 235**Hon'ble Judges:** Dama Seshadri Naidu, J**Bench:** Single Bench**Advocate:** Subhan, for APSRTC, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Dama Seshadri Naidu, J.

The petitioner is a Workman, being a Driver in Andhra Pradesh State Road Transport Corporation (for short, "the Corporation"). He filed the present writ petition questioning the Award of the Labour Court-I, Hyderabad, passed in I.D. No. 37 of 2004 dated 06.03.2006. The facts in brief are that the petitioner was initially employed as a Casual Driver on daily wage basis on 29.08.1990, but was subsequently appointed as a regular Driver from 26.01.1991. Initially, he was removed from service on 02.11.1996 for his unauthorized absence, but was reinstated into service as per the orders, dated 30.09.1999, passed in the departmental revision petition. Later in course of time, there appears to be a relapse on his conduct, as the petitioner has come to be charged with unauthorized absence from 13.02.2000 to 03.05.2000, i.e., for 81 days - without applying for leave.

2. The Traffic Inspector - III, Tandur Depot, having enquired into the issue of unauthorised absence, submitted his report dated 24.03.2000 stating that the petitioner remained absent from his duty for 81 days, as was mentioned above, without prior intimation or sanction of any leave. Basing on the said report, the Corporation issued a charge sheet on 03.05.2000 with the following charge:

for unauthorised absence for duty for all 81 days i.e. from 13-2-2000 to 3-5-2000 without any intimation or prior sanction of leaves, which amounts to also conduct (sic. misconduct) under Regular (xxviii) of APSRTC, Employees (Conduct) Registrations, 1968.

3. The record reveals that consequent upon the serving of the charge sheet, the petitioner did not seem to have submitted any explanation within the stipulated time; resultantly, an enquiry was ordered to be conducted based on the charge sheet which was earlier served on the petitioner.

4. It is the case of the respondent Corporation that, despite being aware of the fact that an enquiry was being conducted into the charge, the petitioner did not avail himself of the opportunity to participate in the enquiry; and as such, the Corporation had no other alternative than to conduct the enquiry ex parte. It appears that on two occasions, the Corporation has tried to serve the petitioner with an intimation about the dates of enquiry, but on those occasions, it could not effect the service on the ground that the petitioner was continuously absent from his residence. During the course of enquiry, as the record reveals, the statement of one particular employee, namely Sri H.S. Reddy, E. 59927, T-I-III was recorded. On appreciation of the material on record, the Corporation, having come to the conclusion that the unauthorized absence was willful, passed final orders removing the petitioner from service through proceedings dated 24.09.2000. The record further reveals that though an intra-departmental appeal was preferred by the petitioner, it was also dismissed. Even the revision that came to be filed by the petitioner was also dismissed by the Regional Manager.

4-A. Aggrieved by the order of removal from service, as has been confirmed in appeal and revision, the petitioner raised an Industrial Dispute before the 3rd respondent in I.D. No. 37 of 2004. During the course of the enquiry before the 3rd respondent, neither of the parties has chosen to lead any evidence. Eventually, the 3rd respondent passed an award on 06.03.2006, modifying the order of the corporation. In fact, the Tribunal directed the respondent Corporation to reinstate the petitioner into service as a fresh candidate, but without back wages, continuity of service and other attendant benefits.

5. The learned counsel for the petitioner has strenuously contended before this Court that the absence on the part of the petitioner from duty for the said period was not deliberate, but was due to reasons beyond his control. To be more specific, the learned counsel has stated that the petitioner was seriously ill and could not attend the duties, despite his best intentions. As the petitioner is not much educated, he could not know the intricacies of the service provisions. Accordingly, the petitioner did not obtain any prior permission or take other steps to protect his service during his absence. The learned counsel has also laid heavy stress on the aspect that the entire proceedings were conducted ex parte and at no point of time was the petitioner given an opportunity to vindicate his stand as to his alleged

absence without leave. He has further contended that he has rendered considerable service in the Corporation without any remarks and has still been left with considerable service, which was put in jeopardy by way of removal. He has further contended that even assuming, without admitting, that the petitioner was absent without authorization for a brief period of 81 days, removal from service is shockingly disproportionate to the alleged misconduct. In a sense, the contention of the learned counsel for the petitioner is that the alleged misconduct is non-pecuniary in nature. The learned counsel has urged that as the misconduct is not grave in nature, a lenient view may be taken keeping in view the fact that the petitioner has to provide succour to the entire family. Further, the petitioner has not possessed any other qualification or personal skill except being a Driver to provide the succour to his family. The learned counsel placed reliance on a decision reported in [Syed Zaheer Hussain Vs. Union of India \(UOI\) and Others,](#) , apart from the judgments of this Court in W.P. No. 5551 of 2007 and 17606 of 2001.

6. Per contra, the learned Standing Counsel for the respondent Corporation has vehemently contended that the 3rd respondent Tribunal itself has been very indulgent in its approach in modifying the order of removal passed by the Corporation. There was no justification for reinstating the petitioner, since on an earlier occasion too, the petitioner absented himself. The learned counsel has further contended that though every opportunity was given to the petitioner to submit his explanation to the charge sheet duly served on him and to face the subsequent enquiry, the petitioner has deliberately avoided facing the enquiry and as such, he could not be heard saying that he was not given an opportunity to defend himself in the departmental enquiry. Finally, the learned Standing Counsel appearing for the Corporation has submitted that by absenting himself without leave for approximately three months, the petitioner has caused severe inconvenience to the Corporation and any lapse of this nature involving the respondent Corporation, which is a service industry, ought to be viewed seriously, lest it should set a lenient precedent for the rest of the employees. In sum and substance, the learned Standing Counsel has defended the order passed by the Corporation and has eventually stated that the Corporation has not contested the Award of the 3rd respondent Tribunal by already taking a lenient view. As such, any further inference (sic. interference) by this Court exercising its power of judicial review is unwarranted.

7. Heard the learned counsel for both the parties and perused the record.

8. It is the specific case of the petitioner, as could be seen from the record, that though he was absent continuously for 81 days, his absence was not deliberate, but was due to his ill-health. Barring his unauthorized absence, his service is not marked by any other serious disciplinary lapses; nor has the petitioner faced any disciplinary proceeding on earlier occasions, save the earlier issue of absenteeism in 1996, details of which are not obtained from record, since no material has been placed by

the Corporation as to the length of his absence in 1996. In any event, as he was reinstated into service on that occasion, not much importance can be attached to the previous incident of absence. It is indisputable, that for whatever reason, the entire proceeding was ex parte and the petitioner had already suffered having lost considerable length of service until the 3rd respondent reinstated him by modifying the order of the Corporation. Though the Corporation has strenuously defended the order of the 3rd respondent Tribunal and has urged this Court not to show any lenience to the petitioner, still the issue may have to be viewed on the touch stone of proportionality.

9. Time and again, this Court as well as the Apex Court have stated that though the Doctrine of proportionality has come to stay, the same cannot be put in a straight jacket, nor can it be cribbed and confined on absolutely predictable lines. In other words, the principle of proportionality has to be invoked and applied based on the facts and circumstances of each case. In the present instance, the allegation faced by the petitioner is unauthorised absence for a period of 81 days. For that absence, he has already foregone his salary, apart from suffering the departmental proceedings, the course of which has already been described. Though the 3rd respondent Tribunal has modified the Award to the extent of reinstating the petitioner, but without back wages and continuity of service, it may well serve the ends of justice, if under the totality of circumstances, the petitioner is given the leverage by a slight modification of the Award passed by the 3rd respondent Tribunal to the extent that the petitioner, apart from having the benefit of reinstatement, may also have the benefit of continuity of service, but without back wages. In this regard, the Apex Court, in Syed Zaheer Hussain's case (1 supra) has held that the punishment which will involve a substantial monetary loss to the appellant therein would meet the ends of justice and would be a sufficient corrective measure for the appellant.

10. In another judgment of this court in W.P. No. 17606 of 2001, dated 26.11.2010, involving the respondent Corporation touching upon the aspect of unauthorized absence, the Hon'ble Single Judge has held that the petitioner therein was absent only for a short period of just over three months, and that no misfeasance or malfeasance was attributed to the petitioner for the said unauthorized absence, though it would amount to misconduct in terms of A.P.S.R.T.C.'s Regulations. It was thus held in the said case that, under those circumstances, the punishment of denying him the long service rendered by him from 1977 would not be commensurate to the misconduct or be justified on facts. It was eventually held that denial of back wages and actual monetary benefits for the period would suffice.

11. In the present instance too, the petitioner was absent for less than three months and barring the said absence, which was sought to be explained away by the petitioner though not convincingly, there was no other allegation of whatever gravity against the petitioner. The fact remains that the petitioner has already put in

substantial service and still has about a decade service to his credit. In another judgment in W.P. No. 5551 of 2007, dated 21.09.2013, a learned Single Judge of this Court has considered the legality of improper service or in the alternative, non-service of a show cause notice and denial of opportunity to the delinquent employee during the course of departmental enquiry. In the facts and circumstances of the said case, the learned Single Judge has held that the show cause notice of the enquiry was not personally served upon the petitioner, that the petitioner did not participate in the enquiry, and that, resultantly, the proceedings ended in an ex parte enquiry, rendering a finding of unauthorized absence. The learned Single Judge has further held that it would not be proper to accept the enquiry report where proper notice was not served upon the petitioner - be it either the show cause notice or be it notice about the enquiry. In this matter, however, there is a slight change in the circumstances to the extent that initially, the show cause notice was served, as the record indicates, on the petitioner, but the intimation about the departmental enquiry does not said to have been duly served on the petitioner. Be that as it may, for the other reasons that have already been stated above, denial of both back wages and the continuity of service would be harsh and disproportionate to the misfeasance of absence from service without leave. Thus, balancing the equities and applying the principle of proportionality, it is appropriate that the order of the 3rd respondent Tribunal be modified to the extent that apart from reinstatement, the petitioner is entitled to continuity of service with attendant benefits, yet without back wages.

12. Thus, for the reasons mentioned above the present writ petition is partly allowed modifying the order of the 3rd respondent Tribunal to the extent of restoring the continuity of service, but without touching the aspect of back wages, for which the petitioner is not entitled. Accordingly the Writ Petition stands disposed of. There shall be no order as to costs. Miscellaneous petitions pending, if any, in this Writ Petition shall stand closed.