IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1153 OF 2010
WITH
INTERIM APPLICATION (L) 1411 OF 2022
IN
WRIT PETITION NO.1153 OF 2010

RAJIV SINGH)
Age 54 years, Indian Inhabitant)
Residing at A-667, Indira Nagar,)
Lucknow (U.P.))**...PETITIONER**

Vs.

THE SHIPPING CORPORATION)
OF INDIA LTD.)
(A Govt of India Enterprise) having)
its registered office at shipping)
house, 245, Madam Cama Road)
Mumbai – 400 021)**...RESPONDENT**

Mr. Nitesh Bhutekar a/w. Ms. Ayodhya Patki a/w. Ms. Gargi Warunjikar and Mr.Aniket Nangare, Advocate for the Petitioner and Applicant.

Mr. Vijay Purohit a/w. Mr. Pratik Jhaveri, Mr. Virendra Vikram and Mr. Samkit Jain i/by. P and A Law Offices, Mumbai, Advocate for the Respondent.

CORAM : DIPANKAR DATTA, CJ &
V.G.BISHT, J.

RESERVED ON : 5th May 2022
PRONOUNCED ON : 27th June 2022

JUDGMENT : (PER : V. G. BISHT, J.)

1 The present petition has been filed under Article 226 of the Constitution of India for issuance of writ in the nature of mandamus or any other writ, questioning the legality of letter dated 24th August 2009 (Exh. H) and for quashing and setting aside letter dated 23rd September 2009 (Exh. J) for closure of service and directing the respondent to reinstate the petitioner on his original post with backwages and continuity of service or in the alternative, to release the terminal benefits, contribution towards the Provident Fund and fleet service gratuity amount in favour of the petitioner.

2 We shall first state the facts as discerned from the petition :

(a) The petitioner joined the services of respondent as “Cadet” in the year 1975. He was promoted from the post of “Cadet” to

the rank of 3rd Officer in the year 1979. During his service with the respondent for more than 30 years, the petitioner had unblemished service record with very good track record.

(b) On 23rd June 2001, the petitioner started sailing on vessel named "Samudranidhi" which was going from Mumbai to Dubai. When the vessel was sailing in the sea, on 26th June 2001, because of some dispute with the captain of the ship, the captain assaulted the petitioner, which resulted in bleeding from his nose. The Medical Officer on the ship immediately examined the petitioner. However, the captain of the ship and the Medical Officer of the ship issued a false certificate in the name of petitioner on 1st July 2001 stating that the petitioner is chronic alcoholic and chain smoker. Pertinently, "Samudranidhi" being an ONGC vessel, alcohol is strictly prohibited. One cannot enter there if he is found under the influence of alcohol. Even the petitioner made a complaint to the DGM on 11th November 2001 against the captain of the said ship in respect of the said incident.

(c) On 23rd March 2006 when the petitioner reported for medical examination for joining duty, the petitioner was declared temporarily unfit for sea service and was advised to report after six to eight months after taking treatment and abstinence from alcohol. The petitioner time and again visited the office of respondent. However, he was not allowed to resume and report for his services on one ground or the other. Even he was not paid salary during that period. Since the petitioner was without any income for nine to ten months, he was constrained to work with other private companies on temporary basis.

(d) On 24th August 2009 the petitioner received a letter **(Exh. H)** from the respondent being a letter for closure of service informing the petitioner that the services of the petitioner are being closed without any terminal benefits and company's contribution towards the Provident Fund and fleet service gratuity is forfeited and the same will not be paid to him.

(e) Again on 23rd September 2009 the respondent issued another letter **(Exh. J)** for dismissal from service stating that the previous letter of closure of service be treated as dismissal with effect from 24th August 2009. The petitioner alleges that he was forced to sign on the said letter and accordingly whilst signing on the said letter, the petitioner gave the said remark "forced to sign". Therefore, the present writ petition.

3 The respondent, on the other hand, by way of Affidavit-in-reply denied all the contentions raised in the petition. The respondent denies the incident dated 26th June 2001 which allegedly took place when the vessel "Samudranidhi" was sailing from Mumbai to Dubai. The respondent further denies that the petitioner was not allowed to resume office and report for duty. According to the respondent, the petitioner being an offshore employee of the respondent-company is governed by the terms and conditions stipulated in the INSA–MUI Agreement (**"the Agreement"** for short). The Agreement contains the terms and conditions of employment of foreign going officers by Indian Shipping Companies on the basis of Memorandum of Agreement

settled by the Indian National Shipowners Association on one hand and the Maritime Union of India, on the other. Clause 124 of the said Agreement *inter alia* provides for medical examination. The petitioner had become addicted to alcohol and was prone to epileptic seizures and therefore was required to undergo periodic-sea examination. On 23rd March 2006 the petitioner presented himself for the periodical medical examination and was declared "temporarily unfit" for reasons more specifically stated in the medical certificate issued by the Company's Medical Officer. Clause 93 of the Agreement provides that on the expiry of medical treatment and/or convalescence leave, the officer concerned shall report in writing and in person at the nearest office of the company or at its Agent's office, unless advised otherwise by the company and on his such reporting and on being found fit by the company's Medical Officer, he shall be deemed to be as "on Staff". The petitioner, however, did not report and instead, admittedly, took up a job with other companies in breach of Clause 29 of the Agreement. In the circumstances, the petition, being devoid of merits, deserves to be dismissed with costs.

4 Mr. Nitesh Bhutekar, learned counsel for the petitioner, vehemently submits that the petitioner is dismissed from his service without giving any notice and following due process of law, and thus, there was violation of principles of natural justice. Not only the petitioner was dismissed illegally, but the respondent forfeited Provident Fund contribution and fleet service gratuity amount which clearly shows illegality and arbitrariness on the part of the respondent.

5 The learned counsel then next strenuously submits that although the petitioner was declared temporarily unfit on 27th March 2006 for sea services and was advised to report after undergoing six to eight months of treatment, however, when the petitioner went to the respondent for reporting, he was not allowed to join the services on various grounds. Thus, no opportunity of hearing was given nor any inquiry was conducted. Even Clause 29 of the Agreement provides that services of an officer can be terminated only if he takes up a job while in the service of the respondent. Since the petitioner was not taken in

service by the respondent on the ground that he was medically unfit, he was required to work with other companies on contractual basis, so as to earn his livelihood by exercising his fundamental right, which could not have been denied to him. Thus, for all these reasons, the petition deserves to be allowed, argued learned counsel.

6 Mr. Vijay Purohit, learned counsel for the respondent, has submitted written notes of arguments, which are taken on record. Per contra, the learned counsel vociferously resisted the submissions by submitting that since the petitioner was found temporarily unfit, he was advised to report after undergoing six to eight months of treatment, in view of Clause 93 of the Agreement. Admittedly, petitioner did not report and rather secured employment in other companies in breach of Clause 29 of the Agreement. Thus, there was clear cut breach of above noted clauses of the Agreement at the hands of the petitioner. Since the petitioner had breached the clauses set out in the Agreement while obtaining employment in other companies whilst in

permanent employment of the respondent company and as also suffered from an addiction to alcohol and bouts of epilepsy, there was no necessity to issue any chargesheet and thus the respondent company was justified in dismissing the petitioner from the employment of the respondent company. There being no merit in the writ petition, the same is liable to be dismissed with costs, argued learned counsel. The learned counsel also placed reliance on the decisions in **Tejinder Kaur vs. State of Punjab and Another**[1], **Aligarh Muslim University and Others vs. Mansoor Ali Khan**[2], **Gadde Venkateswara Rao vs. Government of Andhra Pradesh and Others**[3], **South India Corporation (P) Ltd. vs. Secretary, Board of Revenue Trivandrum and Another**[4], **Sam K. Julius vs. The Chairman & Managing Director, Shipping Corporation of India Ltd., and Others**[5] and **Vijay S. Sathaye vs. Indian Airlines Limited and Others**[6] in support of his contentions.

1 2016 SCC Online P&H 9857
2 (2000) 7 Supreme Court Cases 529
3 (1966) 2 SCR 172
4 AIR 1964 SC 207
5 2015 SCC Online Ker 6366
6 (2013) 10 Supreme Court Cases 253

7 Certain clauses of the Agreement have been pressed into service during course of oral submissions and as also in written arguments by learned counsel for the respondent. Since those clauses have material bearing on the outcome of the present writ petition, the clauses viz. 29, 93 and 135 to 139 are quoted hereunder for better understanding and elucidation.

> "**29.** It is agreed between MUI and INSA that an Officer on permanent employment of the Company, while in service takes up employment elsewhere, if proved, Company may take appropriate action, including dismissal of such errant officers without any terminal benefits being paid. It is further agreed that if an officer on leave (except on medical leave) does not report to the company within a maximum period of 12 months, it will be presumed that the officer has left the services of the company and the company may terminate the services of such officer without any further notice."
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> "**93.** On the expiry of medical treatment and/or convalescence leave, the Officer concerned shall report in writing and in person at the nearest office of the company or at its Agent's office unless advised otherwise by the Company and on his such reporting and on being found fit by the company's Medical Officers, he shall be

deemed to be as “on staff”.”

“**135.** An Officer guilty of misconduct may be -

(a) Warned or censured; or

(b) Reduced in seniority for a specified period; or

(c) Reverted to the next lower rank for a specified period; or

(d) Deprived of his annual increment for a specified period not exceeding two years but which may be restored by the Company; or

(e) Suspended from service for a period not exceeding three months; or

(f) Discharged from service with or without notice; or

(g) Dismissed from service without notice.”

“**136.** No action under (b), (c), (d), (e), (f) and (g) above shall be taken unless the Officer concerned has been given a charge sheet setting out therein the charges against him and unless he has been given an opportunity to tender his explanation and an inquiry has been held in respect thereof.”

“**137.** In all cases under Clause 135 above, the Officer concerned shall be issued a charge-sheet within the shortest period possible of the incident or conduct of the

Officer in respect of his disciplinary action is proposed to be taken and the entire process of charge-sheeting and inquiry shall be completed as early as possible."

"**138.** While holding an inquiry, principles and rules of natural justice shall be followed and observed, and the Union shall have the right to be present at the Inquiry to ensure that the same is conducted in a satisfactory manner."

"**139.** In awarding punishment, the Company shall take into account the gravity of misconduct, the previous record of the Officer and other relevant circumstances."

8 According to learned counsel for respondent, Clause 29 and Clause 136 are on a different footing. While Clause 29 envisages a situation resulting out of acceptance of employment under another employer while being in service, as also abandonment of service, Clauses 135 to 139 provide for the procedure to be adopted in case of general misconduct. Therefore, as far as Clause 29 is concerned, it operates independent of Clauses 135 to 139. Further, according to learned counsel, Clauses 135 to 139 would apply in case of "onboard misconduct" of a seafarer and not otherwise. On the other hand, Clause 29 would apply in

situations other than those contemplated under Clauses 135 to 139.

9 There is need to guard against the self serving construction and interpretation of Clauses 29 and 135 to 139, as canvassed by the learned counsel for the respondent. The argument is unlikely to cut the ground from under our feet. How, let us examine.

10 If Clause 29 is read carefully, then it would be seen that it provides for taking of action in two eventualities i.e. (i) an action (including dismissal) if an officer on permanent employment of the Company takes up employment elsewhere; or (ii) termination of service based on presumption if an officer on leave (except on medical leave) does not report to the company within a maximum period of twelve months. Significantly, in respect of the first eventuality, action could be taken only if it is proved.

11 On the other hand, Clauses 135 to 139 pertain to disciplinary action. While Clause 135 provides punishment to an

officer having been found guilty of misconduct, Clause 136 lays down that no action shall be taken against an officer if he is sought to be dismissed from service unless the officer concerned has been given a chargesheet setting out therein the charges against him and unless he has been given an opportunity to tender his explanation and an inquiry has been held in respect thereof.

12 Clause 135 is made further more clear and transparent by Clause 137 which specifically provides that in all cases under Clause 135, the officer concerned shall be issued a chargesheet within the shortest period possible of the incident or conduct of the officer in respect of his disciplinary action is proposed to be taken and the entire process of charge-sheeting and inquiry shall be completed as early as possible.

13 Assuming for the sake of argument that the respondent was justified in taking recourse to Clause 29 of the Agreement, even then the requirement of issuing charge-sheet before passing order of dismissal as stipulated under Clauses 135 and 136 should be

and ought to be read into provisions contained in Clause 29 regard being had to the words “if proved”, appearing therein. These clauses are so interweaved that they should not and ought not to be read in isolation. Their intrinsic worth lies in reading together.

14 Reverting to Clause 29 and more particularly first eventuality that the petitioner had taken employment in some other company and that is why it prompted the respondent to base its action on one of these grounds, so as to terminate his services, we appreciate the stand taken by the petitioner who has been commendably candid in disclosing that he was forced to undertake contractual employment in order to earn bread and butter for his family as according to him he was refused to join his regular employment despite his entreaties and visits to the office of the respondent. The onus, obviously, in the light of Clause 29, was on the respondent to prove after holding an inquiry that the petitioner had obtained permanent employment in some other company despite being on muster and regular appointment of the

respondent company without justifiable cause. We do not find material on record to show that any such exercise or procedure known to law as is mandated by Clause 29 had been undertaken by the respondent company.

15 Another allegation against the petitioner and which is also made a ground for termination of his service, is that he violated Clause 93 of the Agreement as the petitioner was under an obligation to report to the nearest office after expiry of his medical treatment and/or completion of convalescence leave. We may note from the pleadings of the petitioner that after undergoing six to eight months of treatment, he went to the office of the respondent for reporting but was not allowed to join the services on one or other grounds. Even assuming for the sake of argument that after the period of treatment was over, the petitioner neglected to join duty, even then it was incumbent on the part of the respondent to call upon him by issuing show cause notice or other established means of communication to command him to join the service within a particular time frame with a further

intimation of warning of taking appropriate action if he failed to comply the notice or command, as the case may be. Again, we do not find any material on record that the respondent infact and did so intimate and despite that there was abysmal failure/violation on the part of the petitioner.

16 During the course of argument much emphasis has been placed by respondent on Exh. C at page 71 which is report of the captain and Medical Officer. A perusal of this report reflects the personal history of the petitioner as “patient is chronic alcoholic and chain smoker.” We also note aptly and appropriately here that it is the specific case of the petitioner that “Samudranidhi” being an ONGC vessel, alcohol is strictly prohibited. One cannot enter there if he is found under the influence of alcohol. This piece of pleading is nowhere controverted or denied in so many unequivocal terms by the respondent. We also have advantage to have service record of the petitioner and more particularly the Continuous Discharge Certificate (CDC). Column “Copy of Report of Character” gives remark of the employee as to the “ability” and

"general conduct". The remarks given to the petitioner in that column are very good (VG).

17 The facts and circumstances of the case beg the question why the show cause notice was not given to the petitioner particularly when in the words of respondent, the petitioner had obtained permanent employment in some other company despite being on the muster of respondent company and breached Clause 93 of the Agreement. The respondent is tellingly silent on this material aspect. The approach of respondent has left us under a state of palpable unease. Had such notice been issued, the petitioner could have explained the circumstances forcing him to accept employment elsewhere.

18 In **Krushnakant B. Parmar vs. Union of India and Another**[7] it has been held by the Hon'ble Apex Court that 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.

7 (2012) 3 Supreme Court Cases 178

19 In the present case, the respondent has utterly failed to prove that the absence of petitioner from duty was willful in as much as no such finding has been recorded for want of a proper inquiry. The petitioner has taken a specific defence that he was prevented from resuming duty on one or the other grounds and keeping this defence in mind, it was all the more necessary for the respondent to initiate an inquiry so as to take it to its logical conclusion. We have set out hereinabove the actual facts and circumstances of the case. The respondent ought to have drawn up a chargesheet against the petitioner consistent with the requirements of the situation and in accordance with the principles of natural justice. The failure is all the more glaring, considering the defence taken by the petitioner. We are constrained to observe that there was an ominous abdication of responsibility. The action smacks of arbitrariness and illegality. This being so, the petitioner has every reason to be piqued over. The petitioner's discomfiture is understandable. There is, thus, little point in arguing that in the facts and circumstances of the

case, there was no necessity to issue notice or initiate disciplinary proceedings against the petitioner.

20 This brings us to the judgments cited by the learned counsel for the respondent.

21 First of such judgments is of **Tejinder Kaur (supra).** In the said case, the petitioner remained absent from duty for years together on the basis of unauthorised leave which was never sanctioned. Even she did not bother about the public notice published in the newspaper. Not only unauthorized absence from duty was there but the petitioner also left the country without seeking any permission and that too at the cost of interest of the children. It was held that the unauthorized absence from duty for such a long period amounts to a presumption that the petitioner was not interested in pursuing her job and had abandoned it and as such the action of the respondent was found to be justified. It was further held that in case of long unauthorized absence from duty, a reasonable presumption can be drawn that the incumbent was not interested in the job and for passing order, no notice or

inquiry was required. The factual position obtained in the case in hand is quite different. Neither it is a case of unauthorized absence nor that of publication of notice in the newspaper calling upon the petitioner to join the services. Therefore, the decision has no utility to the case in hand.

22 In **Aligarh Muslim University and Others (supra)** the employee obtained two years extraordinary leave to join a job in a foreign country and therefore sought extension of leave by further two years but was granted extension for only one year with the warning that no further extension would be granted and that in case of overstaying, he would be deemed to have vacated the office. The said employee, despite this warning, joined a fresh two year job in the foreign country. On account of omission to join after the expiry of the third year of leave, he was held to have vacated his office and therefore in such circumstances, the Hon'ble High Court held that issuance of notice to him would not have made any difference. Moreover, the conduct of the employee in ignoring the employer's warning, disentitled him to the relief under Article 226. Again, the factual narratives in the case in

hand vis-a-vis above noted case are distinguishable and therefore, the ratio laid down therein cannot be made applicable to the case here.

23 In **Sam K. Julius (supra),** the Kerala High Court while interpreting Clause 29 of the Employment Agreement of Shipping Corporation of India *inter alia* held that "no doubt when an abandonment arises, no proceeding need be initiated against the employee for disciplinary proceeding for unauthorized absence." In that case, the employee was permitted authorized study leave and the Shipping Corporation of India did not grant extension thereafter. However, the petitioner by writing a letter had made it clear that he was very much inclined to join service if authorities were not willing to grant leave. In this factual scenario, the court held that the Shipping Corporation of India cannot place reliance on Clause 29 to treat that the petitioner's service was deemed to have been terminated.

24 In **Vijay S. Sathaye (supra)**, the Hon'ble Apex Court ruled that an employee cannot be termed as a slave. He has a right to

abandon the service any time voluntarily by submitting his resignation and alternatively, by not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer. Again, here it is not the case of abandonment of service. On the contrary, we have already pointed out that after medical / convalescence leave was over, the petitioner many times visited the office of the respondent in order to resume his services but was avoided on one or the other grounds.

25 For the aforesaid reasons, we are inclined to allow the Writ Petition No. 1153 of 2010. Therefore, the following order:

ORDER

1 We hereby quash and set aside letters dated 24th August, 2009 (Exh.H) and 23rd September, 2009 (Exh.J).

2 The petitioner having attained the age of superannuation during pendency of the writ petition, his reinstatement in service cannot and does not arise. However, he shall be treated to be on duty right from 24th August 2009 till attaining the age of superannuation. Whatever retiral benefits are due and payable to him according to law shall be released within 3 (three) months from date of service of an authenticated copy of this judgment and order.

3 We find that the respondent has paid Rs. 6,83,840.78 (Rupees Six Lakhs Eighty Three Thousand Eight Hundred Forty and Seventy Eight Paise only) (Exhibit-A) towards provident fund by way of cheque (Exhibit-B) No. 036614 dated 10th October, 2009. In so far as back wages is concerned, we are of the considered view that interest of justice would be sufficiently served if the respondent pays to the petitioner 50% of the back wages within the time frame as fixed above; hence, we order accordingly.

4 In view of disposal of Writ Petition No. 1153 of 2010, the Interim Application (L) 1411 of 2022 stands disposed of.

5 No costs.

(V. G. BISHT, J.) **(CHIEF JUSTICE)**