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Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 283 OF 2020

Brihan Mumbai Electric Supply and
Transport Undertaking ..Petitioner
Vs.
Shri. Shivaji K. Shinde ...Respondent

Mr. Saurabh Pakale with Ms. Sristi Shetty for Petitioner.
Mr. Satish Kumbhar with Ms. Swati Dube for Respondent.

CORAM : G.S. KULKARNI, J.
DATE : JANUARY 16, 2023

Oral Order :

1. This is a petition filed under Articles 226 and 227 of the Constitution of India whereby the petitioner-Brihan Mumbai Electric Supply and Transport ("BEST") has assailed the concurrent findings as rendered against the petitioner firstly by the Labour Court, Mumbai in its judgment and order dated 09 March, 2012 and secondly, as confirmed by the Industrial Court in dismissing its appeal vide judgment and order dated 13 September, 2017.

2. The relevant facts are :-

The respondent joined the services of the petitioner on 03 August, 1988 as a bus driver. His last drawn salary was of Rs.15,000/- per

month. A charge-sheet dated 04 May, 2010 was issued to the respondent on the basis of an incident of an accident which had taken place on 21 April, 2010, when the respondent on duty was driving a bus on route No.33. On the said day at about 12.35 a.m. when the bus being driven by the respondent was proceeding from Goregaon Bus Station to Goregaon Bus Depot, on Gajanan Maharaj Road, near Annabhau Sathe Square, one pedestrian while crossing the road from left side to the right side, collided with the bus and suffered a head injury. He was immediately taken by the respondent along with one passenger travelling in the bus one Mr. Vicky Mhasalkar to the Cooper Hospital when on medical examination, he was declared to be dead. On such incident, a charge-sheet dated 03 May, 2010 was issued to the respondent levelling two charges against him, firstly under standing order No.20(J) to the effect that the respondent had shown unpardonable negligence in discharge of his duties and secondly, under standing order No.20(K) to the effect that the respondent was discharging his duties contrary to the service rules and regulations and a notice no.301 of 2004 dated 22 September, 2004 issued for the bus drivers in regard to safe driving of bus. With effect from 04 May, 2010 the services of the respondent were suspended.

3. The respondent denied the charges levelled against him. He inter-alia contended that the bus he was plying was at a very moderate speed of about 15 to 20 km per hour and that the pedestrian who collided with the left corner of the bus was talking on his mobile phone, suddenly came before the bus and was hit by the left side of the bus. It was the respondent's case that it was impossible for the respondent to conceive that suddenly such person talking on mobile phone would cross the road and would get hit by the bus and injured. His case was that there was no negligence whatsoever in discharging his duties.

4. The petitioner appointed an enquiry officer Shri. P. R. Pandey, who was holding the post of a Traffic Officer who conducted the disciplinary enquiry. Only one witness, who was stated to be an eye witness, was examined namely Mr. Vicky Mhasalkar, who stated in his evidence that he was working in Mahindra and Mahindra Company, Kandivali (East). He stated that he used to take a bus at about 12.10 to 12.15 a.m. from Goregaon Bus Station to return home. He stated in his evidence that on the day of incident, he had boarded bus No.33 and when the bus after taking stop at Bhagatsingh Nagar No.1, proceeded further and was to take a left turn at the square, which was in slow speed, one person suddenly came in front of the bus from his vehicle which was parked at the side of the road and was hit by the bus. He stated that the person

collapsed on the ground and was injured. He stated that he along with the bus driver took the injured person to Cooper Hospital, but before the person could be admitted, he was declared as dead. In his deposition, he further stated that the speed of the bus was about 15 k.m. per hour and when the bus was taking a left turn, the speed of the bus was about 10 k.m. per hour. He also stated that on the side of the footpath, there were tempos, taxis, rickshaws, etc. which were parked and that as there was a speed breaker, when the bus driver (respondent) had applied brakes. He stated that the pedestrian/victim was speaking on the mobile phone while crossing the road. He also stated that it was impossible for the driver of the bus (respondent) to conceive that suddenly such person would come in front of the bus. He also stated that when the said person came in front of the bus after parking his vehicle, he was talking on the mobile phone while crossing the road, which he had witnessed from the third seat he was occupying. He stated that it was the pedestrian who was at fault and that it was not the fault of the bus driver. He had given a similar statement to the police officer. He also stated that the place where the pedestrian was intending to cross the road was also not a zebra crossing. On a question put to him by the enquiry officer, he confirmed that the victim had alighted from the vehicle parked at the side of the road and while crossing the

road, he was talking on the mobile. He also confirmed that it was not possible for the bus driver to notice that the person would suddenly cross the road and when the victim was hit by the bus, immediately the bus was halted. Except for this sole witness, no other witness was examined in the enquiry proceedings. The respondent examined himself and also was cross-examined. He stated that the victim was hit by the left side of the bus. He also stated that the said person while crossing the road was speaking on the mobile phone. He also stated in his cross-examination that he was plying the bus at about 10 km per hour and after the victim was hit, the bus was immediately stopped by him at the distance of 3 to 4 feet.

5. It is on such evidence, the enquiry officer prepared his enquiry report dated 15 June, 2010 which is titled by enquiry officer as an 'Order' and in fact, the enquiry report itself orders termination of the respondent from 15 June, 2010.

6. Be that as it may, the enquiry report has proceeded on the footing that the respondent admitted that when the accident happened, the respondent was plying the bus speedily. On a query made to Mr. Pakale, learned counsel for the petitioner as to whether this would be correct observation of the enquiry officer, he could not point out any material

from the evidence that the respondent had admitted that he was plying the bus speedily. This has some relevance for the reason that the Labour Court has held that the findings of the enquiry officer were perverse on certain issues. The enquiry officer purportedly appreciated the evidence to reach a conclusion that there was negligence on the part of the respondent who was plying the bus and therefore, charges against him as framed in the charge-sheet, as noted above, were proved and imposed the following order:-

> "Bus driver no. 098343 is terminated from the service of the Undertaking from today i.e. 15 June, 2010."

7. It appears that there is no separate order awarding punishment and punishment awarded by the enquiry officer itself was the punishment as imposed. There is also nothing on record to point out that the Traffic Officer was the authority/disciplinary authority. The enquiry proceedings were conducted in such manner. It is stated that the respondent exhausted two departmental appeals as provided under the standing order, however, having not succeeded in such appeals, the respondent approached the Labour Court by an application (BIR) No.53 of 2010 filed under Sections 78 and 79 of the Bombay Industrial Relations Act, 1946 (for short, "BIR Act") assailing the punishment of termination/dismissal as conferred on him. The Labour Court framed

issues, one of the issues was as to whether the findings of enquiry officer are perverse and answered the said issue as "Partly perverse" on recording findings thereon. Also there was an issue framed by the Labour Court as to whether the punishment was shockingly disproportionate. The said issue was answered in the affirmative.

8. At this stage, it needs to be stated that none of the parties examined any witness before the Labour Court and the parties relied on the evidence recorded before the enquiry officer. Appreciating such evidence and granting an opportunity of hearing to both the parties, the Labour Court recorded a finding of the fact that speed of the bus was moderate. It was observed that the findings of the enquiry officer could not be accepted to come to a conclusion that there was a gross negligence on the part of the respondent that the accident had occurred because of negligence of the respondent. It was observed that if at all it was to be a gross negligence of the bus driver and that the charges levelled against the respondent being of gross negligence while performing duty were not proved, there could not be any misconduct of the respondent under Standing Order 20(J). It was also observed that misconduct of mere negligence is different misconduct enumerated in the Standing Order. The Labour Court also noted that the enquiry

officer had observed that there was negligence without any evidence, hence the findings of the enquiry officer to that effect were perverse. It was held that in these circumstances, the enquiry officer could not have awarded the punishment of dismissal. It was observed that mere negligence would not amount to misconduct under Standing Order 20. It was also observed that the eye witness himself had specifically stated that the pedestrian all of a sudden came out from the parked vehicle and dashed on the bus. The Labour Court also observed that if the speed of the bus was not to be moderate, in that event the pedestrian would have been thrown far away. In these circumstances, the Labour Court has held that the punishment of dismissal which was awarded was unwarranted and disproportionate to the misconduct as alleged. It was thus held that the punishment of dismissal was illegal and contrary to the provisions of the Standing Orders and was liable to be set aside. Considering that there is no evidence which was led by the respondent that he was not employed, the Labour Court reached to a conclusion that this was not a case where any back wages would be awarded.

9. It is significant that the petitioner argued before the Labour Court that if the Labour Court was to come to a conclusion that the awarded punishment is shockingly disproportionate and if it is set aside, then

liberty be given to the petitioner for awarding any alternative punishment as per the Standing Order. The Labour Court accepted such contention as urged on behalf of the petitioner and observed that the petitioner was at liberty to award any other punishment than the dismissal in view of the provisions of the Standing Orders and accordingly, pass the following order :-

> " ORDER
>
> 1. Application is partly allowed.
>
> 2. The awarded punishment of dismissal and confirmed before the Appellate Authority is illegal and improper, hence, are hereby set aside.
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> 3. Opponent Undertaking is hereby directed to reinstate the applicant on his previous post with continuity of service, but without any back wages.
>
> 4. The Opponent Undertaking has liberty to award any other punishment than the dismissal as per the provisions of Standing Orders, by giving opportunity of hearing to the applicant.
>
> 5. No order as to costs."
>
> (emphasis added)

10. Being aggrieved by such order, the petitioner approached the Industrial Court in Appeal (IC) No. 10 of 2012 filed under Section 84 of the BIR Act. It appears from the perusal of the appeal memo that the petitioner intended to improve its case and which was not the case as pleaded in the charge-sheet namely that the past record of the respondent was not good in as much as he was awarded a minor punishment on earlier occasion and hence it ought to be presumed that

the respondent was rash and negligent in regard to the incident in question. The appeal memo also reflects that there is no ground as raised by the petitioner that the observations of the learned Judge in paragraph 11 recording the contention on behalf of the petitioner that if the Labour Court was to come to a conclusion that the awarded punishment is shockingly disproportionate and if it is to be set aside, then liberty be given to the petitioner for awarding any alternative punishment, and that the acceptance of such contention of the petitioner by the Labour Court, was erroneous and was perverse. This indicates that such contention of the petitioner as urged before the Labour Court was the correct contention, being not assailed in the appeal memo.

11. The learned Member of the Industrial Court after hearing the parties and examining the record, confirmed the findings as rendered by the Labour Court, also after considering the additional fact which was brought on record that the respondent had some hearing difficulties, ordered that the respondent shall be given an alternative employment considering his disability of hearing. In so far as the merits of the appeal are concerned, the learned Member of the Industrial Court observed that there was no error much less perversity in the findings as recorded by the Labour Court that the charges as levelled against the respondent

were not proved even from the enquiry report, and accordingly, dismissed the appeal by the impugned judgment and order.

12. Mr. Pakale, learned counsel for the petitioner in assailing the concurrent findings against the petitioner, has limited submissions which are as under :-

It is submitted that this is a clear case that the Labour Court itself has come to a conclusion that there was negligence on the part of the respondent and once such finding was recorded, the punishment of dismissal is justified. It is his submission that gross negligence of the respondent was also proved as the respondent could have avoided the accident as clear from the enquiry report. This was not considered in its proper perspective by the Labour Court and hence the findings recorded by the learned Judge of the Labour Court are required to be held to be perverse. It is next submitted that the evidence of the sole witness itself was not reliable. His next submission is that there was no jurisdiction with the Industrial Court to substitute the punishment as awarded to the respondent, as by the impugned order in dismissing the appeal, the Industrial Court has directed the petitioner to provide alternative employment to the respondent considering his disability of hearing. It is submitted that the Industrial Court also mechanically dismissed the

petitioner's appeal. It is hence his contention that the impugned orders as passed by the Labour Court as also the Industrial Court are required to be quashed and set aside.

13. On the other hand, Mr. Kumbhar, learned counsel for the respondent has supported the current findings as recorded by the Labour Court and of the Industrial Court. It is submitted that this is a clear case where the respondent was not at fault, as the incident was a mere accident. He submits that the evidence in that regard is quite clear that the pedestrian was crossing from the left side of the bus to the right side and was hit by the bus when the bus was not in speed. It is his submission that in these circumstances, it could not be said that there was any negligence whatsoever on the part of the respondent as also the same is not proved. He submitted that the punishment as awarded by the enquiry officer was grossly perverse as rightly observed by the Labour Court and confirmed by the Industrial Court. He submits that irreparable loss and prejudice would be caused to the respondent, if he is not given the benefit of the orders passed by the Labour Court and Industrial Court in the facts of the present case. He, therefore, prayed for dismissal of the petition.

14. Having heard learned counsel for the parties and having perused the record, the evidence and the report of the enquiry officer as also the impugned judgments and orders, in my opinion, this is not a case where any gross or unpardonable negligence on the part of the respondent was proved in the enquiry proceedings. The learned Judge of the Labour Court has recorded appropriate findings based on record. The said findings are required to be held to be correct much less perverse in the absence of any material to that effect. The findings are that the bus which the respondent was driving, was plying at the speed of about 15 to 20 km per hour. The pedestrian/ victim was crossing the road from the left side of the bus and was hit by the corner of the bus. He was immediately taken by the respondent and the passenger who was sitting in the bus to the Cooper Hospital, where he was declared as dead. The learned Judge of the Labour Court is required to be held to be correct in observing that the findings as recorded by the enquiry officer were partly perverse in as much as the enquiry officer has proceeded to record a finding that the respondent had admitted that the bus was plying at a moderate speed when there was no such evidence either in the deposition of the respondent or of the sole witness Shri. Vicky Mhasalkar, who was examined before the enquiry officer. In fact, Shri. Vicky Mhasalkar in his evidence stated that the speed of the bus was

around 15 k.m. per hour which certainly was the bare minimum motion of a vehicle. It also appears to be a proved fact that the victim had alighted from his stationary car and was speaking on mobile phone when he was crossing the road. Thus, in my opinion, the charges which were levelled against the respondent in the charge-sheet when tested on evidence, were not proved. Hence, the findings as recorded by the Labour Court in my opinion, cannot be faulted in that regard.

15. Mr. Pakale's contention that the actions of the respondent ought to be considered as unpardonable negligence and therefore, punishment of dismissal from service was justified, also cannot be accepted. It was clear that it was merely an accident and there was no negligence much less gross negligence on the part of the respondent. Also Mr. Pakale's contention that there were circumstances that the respondent could have avoided accident, is also not proved as seen from the record.

16. Mr. Pakale's contention that the evidence of witness Shri Vicky Mhasalkar was not reliable, is required to be stated to be rejected as before the Labour Court the petitioner did not examine any other witness for proving the charges as levelled against the respondent in the charge-sheet. Thus, such submission is also untenable.

17. In so far as Mr. Pakale's contention that the Industrial Court could not have awarded a substitute punishment, also cannot be accepted considering the powers of the Industrial Court under Section 88 of the BIR Act which provides that the Industrial Court in appeal may confirm, modify, add to or rescind any decision or order appealed against and may pass such orders therein as it may deem fit. Thus the powers of the Industrial Court are quite wide to pass appropriate orders considering the facts and circumstances of a case. It would be within jurisdiction of the Industrial Court to pass such appropriate orders as passed in the present case. In any event the Industrial Court in ordering that the respondent be not given the duties of the driver and be granted alternative employment was considering the fact of a disability of hearing which had occurred to the respondent during the pendency of the proceedings. Hence such orders cannot be said to be perverse or prejudicial to the petitioner.

18. In the above circumstances, in my opinion, no case has been made out by the petitioner to interfere in the present petition. The petition is devoid of merits. It is accordingly rejected.

19. The petitioner is directed to implement the impugned orders within a period of four weeks from the day a copy of this order is made available to the parties on the official website of the High Court.

20. No costs.

[G.S. KULKARNI, J.]