IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13381 of 2017

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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AHMEDABAD MUNICIPAL TRANSPORT SERVICE
Versus
BODAR AUGUSTIN BHURJIBHAI & 1 other(s)

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Appearance:
MR DEEP D VYAS(3869) for the Petitioner(s) No. 1
MR YOGEN N PANDYA(5766) for the Respondent(s) No. 1
NOTICE SERVED for the Respondent(s) No. 2

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

Date : 21/02/2022

ORAL JUDGMENT

1. Draft amendment is allowed. To be carried out forthwith.

2. **RULE**. Learned Advocate Mr.Yogen Pandya waives service of Rule on behalf of respondent No.1.

3. This petition under Article 226 of the Constitution of India is filed by the Ahmedabad Municipal Transport Service against judgment and award 31.12.2016 passed by the Chief Presiding Officer, Labour Court, Ahmedabad in Reference (T) No.309 of 2004. It is the case where respondent No.1, who was employed as a conductor with the petitioner-Corporation, was dismissed from service on the ground of his continuous absenteeism, against which the respondent-workman had raised Reference (T) No.309 of 2004 claiming reinstatement with back wages on his original post. The Chief Presiding Officer of the Labour Court, by the impugned judgment and award, partly allowed the Reference confirming misconduct of absenteeism, but in exercise of powers under Section 11A of the Industrial Disputes Act, reduced the punishment from dismissal to withholding of two increments with permanent effect.

4. Learned Advocate for the petitioner submitted that the petitioner had resorted to due process of law for the misconduct against respondent No.1-workman by issuing show cause notices at different stages of inquiry, giving opportunity of producing necessary documents before the Inquiry Officer and after following principles of natural justice, the Inquiry Officer held charges to be proved, on the basis of which, order dated 06.12.2003 terminating services of the petitioner was issued. It is submitted that there was no procedural lapse or illegality in conducting of departmental

inquiry and therefore, the Labour Court has also not interfered with holding of departmental inquiry and the respondent-workman guilty of misconduct. It is submitted that, however, while exercising power under Section 11A of the Act, the Labour Court committed an error in not taking into consideration the magnitude of the misconduct and the fact that the petitioner-Corporation was rendering essential services, where the respondent-workman was discharging his duty and therefore, his absenteeism ought to have been viewed seriously as it directly interfered with essential services. It is submitted that where there is a question of essential services, discharge of duty of an employee of such essential service has to be viewed seriously as compared to other establishments and therefore, order of termination was justified.

4.1 It is submitted that period of absenteeism was rather large period and explanation offered also was not only substantiated with the documentary evidence, but were lame excuses as compared to the duty being discharged by the respondent-workman.

5. As against this, learned Advocate for the respondent-workman supported the judgment and award of the Labour Court and submitted that the Labour Court has rightly appreciated the explanation which was offered by the respondent-workman towards his absenteeism and therefore, had only invoked provisions of Section 11A of the Industrial Disputes Act.

5.1 It is submitted that considering long tenure of service by the respondent-workman, allegation of 331 days of absenteeism cannot be treated so serious so as to inflict punishment of termination of service and therefore, punishment substituted of withholding of two increments is justified.

6. Having heard learned Advocates for the parties and having perused documents on record, it appears that the petitioner is incorporated under the provisions of the Municipal Corporations Act and is discharging essential service of providing transportation to the city of Ahmedabad. The respondent-workman was engaged as a conductor with the petitioner-Corporation. For the misconduct of the respondent-workman, charge sheet being DRCA 71/2002-03 was issued for absenteeism from work for a period of 331 days between 1999 to April 2002. Pursuant to the charge sheet, departmental inquiry was undertaken where opportunity to defend the case was provided to the respondent-workman and principles of natural justice were followed. Ultimately, for the charges proved, show cause notice dated 05.08.2003 came to be issued and order of 06.12.2003 was passed terminating the services of the petitioner.

7. The Court is not examining the procedure undertaken by and during departmental inquiry as there is no challenge to the departmental inquiry on the ground of procedural lapse or violation of any provision for holding the departmental inquiry. The

respondent-workman has not challenged the order of the Labour Court. This is so mentioned as the Labour Court has upheld the inquiry and charges to be , proved. However, the Labour Court has proceeded to examine the punishment inflicted by raising issue as to whether the punishment of termination so established after proving all the charges is disproportionate and is required to be modified.

8. In the opinion of the court that on the issue of invoking Section 11A, it is incumbent upon the Labour Court to take into consideration various aspects which include past conduct of the delinquent, age of the delinquent and ability to earn. For the purpose of such consideration, reference is made by the Labour Court to the default card which was produced and in the default card, in all, there were six misconducts which were found against the respondent-workman, of which four misconducts were general in nature while only one was of serious nature. While examining the default card and mentioning previous misconducts, the Labour Court has not taken into consideration Exh.32 which refers to total six misconducts of the respondent-workman. It mentions out of six misconducts, four to be general in nature and one of absenteeism in past and one of theft. Therefore, apparently, the Labour Court has not taken into consideration one misconduct of theft, which in the opinion of the Court, relevant for the purpose when the case is being considered under Section 11A of the Industrial Disputes Act.

9. This Court in decision in case of ***Ahmedabad Municipal Transport Service Vs. Vinubhai J.Ghanchi***, reported in **2012 (2) LLJ 811** has held dismissal of conductor on account of absenteeism to be the punishment which is justified and that exercise of jurisdiction under Section 11A by the Labour Court in setting aside order of dismissal was set aside. While doing so, this Court has observed as under:-

> 5. In public service, absenteeism will have a greater impact. The respondent was working as a bus conductor with the petitioner and his absence would have resulted in disruption of essential services like public transport which would result into unnecessary harassment to the citizens. Persons occupying such posts deprive the more needy and more deserving and may be more serviceable persons of the post that they are occupying and they need to be dealt with firmly to ensure better administration.
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> 6. In a similar situation, Single Judge of this Court in the case of Divisional Controller, GSRTC vs. Heirs of Inayatkhan Sarifkhan Pathan, as reported in 2000 (0) GLHEL 203216, took the view that continuous absenteeism cannot be levelled as shockingly disproportionate punishment.
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> 6.1 A Division Bench of this Court in the case of Maganbhai L. Chauhan vs. Divisional Controller, GSRTC, as reported in 1999 (1) GLH 527, took the view that absence from duty especially in cases where the employee is connected with public services cannot be tolerated. Mere production of a medical certificate justifying absence, without prior intimation will not exonerate an employee, particularly when in the inquiry proceedings the charge is proved, looking to the past conduct and in absence of the delinquent examining the Doctor. That was a case where a conductor in the bus remained absent was dismissed from service.
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> 6.2 The Supreme Court in a very similar situation in the matter of L & T Komatsu Ltd. vs. N. Udayakumar, as

reported in (2008) 1 SCC 224 held that habitual absenteeism amounts to gross violation of discipline.

7. In the opinion of this Court, there is no justification for absence of the respondent for such a prolonged time. Such absenteeism only burdens the system and disturbs/disrupts the public services run by public bodies. In view of the consistent absenteeism of the respondent the Court is of the view that dismissal of the respondent from services was justified. The Labour Court erred in exercising its jurisdiction under Section 11-A of the I.D. Act by setting aside the order of dismissal and ordering reinstatement.

10. The Division Bench of this Court in decision in case of ***Prafulchandra Ramniklal Shah Vs. Banaskantha District Central Cooperative Bank thru Manager*** in **LPA No.1843 of 2019 dated 13.12.2019**, while examining the issue of dismissal on the ground of unauthorized absence from duty, has held as under:-

"5. The Court is of the view that the Letters Patent Appeal deserves to be dismissed for the following reasons:

5.1 The findings of the Labour Court, which is Court of the first instance, are based upon the material before the Labour Court in which there was stand of the present appellant that the inquiry proceedings and he procedures were not under challenge in any manner. When the inquiry proceedings were not under challenge, the scope of examining of the controversy got narrowed down. The learned Labour Court has based upon the material before it, has come to the conclusion that the conclusions based upon the findings of the Inquiry Officer were not perverse. In that situation, when even the misconduct was held to be proved, there remains hardly any scope for any other order, however, as per the Special Provisions of Industrial Disputes Act being Section 11(A), the discretion was exercised by the Court and in that exercise of discretion, in order to see to it that the employment of the applicant is not jeopardised and his livelihood is not affected, the order of reinstatement

with continuity of service was granted. The discretion exercised by the labour Court under Section 11(A) of the Industrial Disputes Act, in our view been based upon the circumstances and material before the Court. Therefore, the appellate Tribunal also rightly did not interfered therewith. The succinct depiction of the reasoning on the part of the learned Single Judge deserves to be set out herein for ready reference which would also indicate that the order does not call for any interference. The learned Single Judge has clearly articulated the following:

"10. It is also relevant to take into account relevant facts and documents which emerge from the record viz:

1) Undisputedly the claimant abstained from duty from July 1987 to November 1987.

2) Domestic inquiry in respect of said misconduct was conducted.

3) The claimant admitted legality and propriety of the inquiry before learned Labour Court.

4) On examination of the material on record of the application learned Labour Court reached to the finding of fact that the conclusion recorded by Inquiry officer are just and correct and they cannot be termed perverse.

5) Learned labour Court also reached to the conclusion that the misconduct is proved.

6) Learned Labour Court also recorded finding of fact that leave report submitted by the claimant was rejected by the bank and that was within the knowledge of the claimant however, claimant abstained from duty and thereby committed misconduct viz. Unauthorized absence.

7) Learned Labour Court also recorded that even if the claimant's case that he was on leave until 31.12.1997 is accepted, the fact remains that even after expiry of the said period, the claimant remained absent from duty until 31.3.1998 and that the said absence was unauthorized absence.

8) That he claimant failed to prove that he could not attend duty on account of illness.

> 11. The sum and substance of finding by learned Labour Court are that the employer granted reasonable and sufficient opportunity of hearing and defence to the claimant and the employer conducted legal and fair inquiry during which the charge and allegation about misconduct are proved. Learned Labour Court also took into account the fact that the claimant admitted legality and propriety of the inquiry".

11. In view of the aforesaid, the Court is of the view that the facts of the present case does not justify invoking of Section 11A of the Industrial Disputes Act and therefore, invoking of Section 11A by the Labour Court is required to be set aside. Hence, judgment and award 31.12.2016 passed by the Chief Presiding Officer, Labour Court, Ahmedabad in Reference (T) No.309 of 2004 is hereby quashed and set aside and the order of the petitioner-Corporation dated 06.12.2003 is upheld. The petition is allowed. Rule is made absolute. No order as to costs.

Sd/-
(A.Y. KOGJE, J)

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