

(1995) 04 CAL CK 0009
In the Calcutta High Court

Case No : Appeal No. 418 of 1987 and Matter No. 1835 of 1983

Bajnath Singh

APPELLANT

Vs

Mining and Allied Machinery Corpn. Ltd. and Others

RESPONDENT

Date of Decision : 05-04-1995

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F, 33(2)

Citation : (1998) 3 LLJ 593

Hon'ble Judges : Bhagabati Prasad Banerjee, J; Basudeva Panigrahi, J

Bench : Division Bench

Advocate : Partha Sarathi Sengupta and S. Singhvi, for the Appellant; Udayan Sen, for the Respondent

Final Decision : Allowed

Judgement

Bhagabati Prasad Banerjee, J.—This is an appeal against the judgment dated August 1, 1986 passed by the Learned Trial Judge. The facts of the case briefly are as follows :-

2. The appellant was employed by the respondent Company as "Chowkidar" in the Security Department in April, 1960. On or about June 4/5, 1967 a theft took place which was reported to the police. In the First Information Report to the police filed by the company, the appellant/workman was not named. On July 29, 1967 a charge-sheet was issued against the appellant by the Company alleging that while the appellant was on duty at the main gate on that date, the appellant had allowed one Sri Peter Rana, an outsider, who committed theft in the plant and who was subsequently arrested by the police.

3. The said act on the part of the appellant was alleged to constitute gross misconduct in accordance with the Standing Orders of the Company. The relevant Standing Order which was alleged to have been violated was clause 29 of the Standing Order No. 36-B which provides that "irresponsible action resulting in loss of property of the Company". The appellant submitted his reply denying the

charges. But, the enquiry was held ex parte for the reason that the appellant did not participate in the enquiry on the ground that a criminal case was pending in the Court or in other words, took the stand that when the matter is pending before the Court, no departmental enquiry could be held. However, the Enquiry Officer concluded the enquiry ex parte holding that the complicity of aiding and abetting and negligence on the part of the appellant was not at all established and proved clearly and as such the benefit of doubt was given to the appellant.

4. The Deputy General Manager, as it appears when considering the matter, was of the view that he was convinced about the irresponsible action on the part of the appellant which resulted in loss of property of the company and further held that the appellant's complicity in aiding and abetting the attempted theft was there and he was negligent in his duty or apprehending and/or helping the security personnel in apprehending miscreants. Accordingly, the Deputy General Manager held that he had lost confidence on the appellant and, passed an order of dismissal from service under Clause 39 of the Certified Standing Orders. An application u/s 33-2(b) of the Industrial Disputes Act, 1947 was filed for approval of the action taken against the appellant. It was ultimately withdrawn.

5. Thereafter, the appellant filed a suit for a declaration that the order of dismissal was illegal. The learned Munsif, ultimately, held that the dismissal of the appellant was in gross violation of the Standing Orders. An appeal was preferred by the Company against the said judgment and decree of the learned Munsif before the learned District Judge, Burdwan, and the said appeal was allowed by the learned District Judge holding that the said suit was not maintainable as the Civil Court had no jurisdiction to pass an order of reinstatement in respect of contract of service. The said second appeal was preferred against the said judgment but, ultimately, the said appeal was dismissed for non-prosecution.

6. Thereafter, on July 7, 1981 the Government of West Bengal under the Industrial Disputes Act made a reference for adjudication of the following issue :-

"Whether the dismissal of Sr. Baij Nath Singh, Security Guard (Staff No. 7939) is justified ? What relief, if any, is he entitled to?"

7. The Ninth Industrial Tribunal adjudicated the matter and by the award dated November 1, 1983 directed reinstatement of the appellant with the payment of back wages at the rate admissible to the appellant till the appellant was actually re-employed. The appellant had attained the age of superannuation.

8. On the basis of the evidence adduced before the Tribunal that the employer failed to establish the charge of misconduct. The Tribunal also found that the company had taken contradictory stand. The company took two inconsistent and different stands. Firstly, took the stand that the dismissal was by way of punishment and as a measure of disciplinary action and at the same time, took the stand that it as a case of termination simpliciter for loss of confidence only. The Tribunal held that such contradictory stand could not co-exist. The Tribunal

also found that there was nothing on record to indicate that the appellant was proceeded against in the police case. The Tribunal on evidence found that although four security Guards were arrested, the appellant was not one of them. The Tribunal on evidence clearly found that the appellant was sent out from the gate by one Sri D.L. Roychowdhury who was superior officer to inside the plant to check the duties of the security personnel inside the plant. It was clearly found that at time of the incident, the appellant was inside the plant who was directed to go there by Sri, D.L. Roychowdhury who had the authority to direct those security Guards to move from one place to another. On the question of facts, the Tribunal held that there was no scope for holding that the appellant was guilty in any manner whatsoever in respect of the charges and that there was no ground whatsoever for holding that the employer had lost confidence on the appellant. Accordingly, the Tribunal was also of the view that theory of loss of confidence has been relied upon after an unsuccessful attempt in the disciplinary proceedings. On the question of reinstatement, a plea was taken by the Company before the Tribunal that since the Security Department of the Company had been abolished and replaced by the C.I.S.F. the Tribunal could not direct the appellant to be absorbed in the C.I.S.F. On this question, the Tribunal held that it can normally be expected that when the Company decided to induct C.I.S.F. in place of its own Security Force, it should be given an option to its employees either to join the C.I.S.F. or in an alternate job under the employer. But, ultimately, no evidence was adduced in this regard in support of the plea of the Company that the appellant was entitled to be reinstated. The Tribunal also found that the establishment had not been wound up and it was the responsibility of the employer to give the appellant a suitable position under its employment so as to protect his pay and seniority. The Tribunal also found that there was no evidence that the appellant was gainfully employed in the intervening period elsewhere. Accordingly, the Tribunal passed an order of reinstatement subject to the age of superannuation as per the company records.

9. Being aggrieved by and dissatisfied with, the said award of the 9th Industrial Tribunal dated November 1, 1983, the respondent-Company filed a writ application. The learned Trial Judge by the order dated August 1, 1986 allowed the writ application simply recording the submission of both the parties without recording any findings or giving reasons and/or reversing any of the findings made by the Tribunal in the matter. It is only after recording the submission and the case laws relied on by the parties, the learned Trial Judge held that "this Court is of the view that in the facts and the circumstances of the case, the award directing reinstatement of the workman was inappropriate and hence set aside. The rule is made absolute." On perusal of the judgment of the learned Trial Judge dated August 1, 1986, it would be clearly evident that there was total non-application of mind and the learned Trial Judge failed to consider reasonings given by the learned 9th Industrial Tribunal in the award.

10. Mr. Partha Sarathi Sengupta, learned Counsel appearing on behalf of the appellant, at the very outset, submitted that an award of an Industrial Tribunal

has been set aside without giving any reason therefore and/or without reversing any one of the findings of facts and/or law by the Tribunal. It was submitted by Mr. Sengupta and which is evident in the judgment that the cases cited at the bar have been merely recorded and the ratio decided therein have been quoted only but application of those principles to the facts and circumstances of the case have not been discussed. It was further submitted by Mr. Sengupta that the principles laid down in the cases decided by the Hon''ble Supreme Court as well as the High Court referred to in the judgment did not apply at all to the facts and circumstances of this case. It was next submitted that the disciplinary proceedings initiated under Order 38 of the Certified Standing Orders resulted in exoneration of the appellant-workman. Even in the First Information Report, the appellant-workman was not mentioned even as an accomplice. The appellant was not even questioned by the police authorities. In fact, it was submitted that the appellant-workman was never mentioned before the Police authorities. After exoneration of the appellant-workman in the domestic enquiry which was held ex parte, the respondents purported to take shelter under Certified Standing Order No. 39 which, inter alia, confers powers to the authorities concerned to dismiss the workman, if it is expedient to do so in the interest of the organisation without holding any enquiry. It was submitted by Mr. Sengupta that after exoneration of the appellant-workman in a full fledged departmental enquiry under Standing Order No. 38, the ingredient of expediency which gives the authority jurisdiction under Order 39 of the Certified Standing Order does not and cannot exist at all. It was submitted that, in fact, the same is no longer available to the respondents authorities and no action could be taken under Order 39 of the Certified Standing Order. It was further submitted by Mr. Sengupta applying the doctrine of election that once having elected to exercise power under Order 38 of the Certified Standing Order, the management cannot turn round and invoke the jurisdiction under Order 39 of the Certified Standing Order to dismiss the workman summarily. It was further submitted that the Tribunal in its award had come to a finding of fact that the appellant was not involved in the alleged theft. It was also found by the Tribunal that at the material time, the appellant was sent inside the plant by a superior officer and as such he could not be there and he could not have been involved in the alleged theft which occurred at the main gate of the respondent company. The said finding of facts found by the Tribunal was based on evidence and the said findings could not be challenged in the writ application. It was further submitted that even if the Tribunal erroneously came to a conclusion, the same could not be challenged in the writ application unless the same was proved to be perverse. No challenge was made in the writ application or before the learned Trial Judge that the findings of the Tribunal was perverse. The learned Trial Judge without holding that finding of the Tribunal was perverse and/or without reversing any of the findings made by the Tribunal set aside the award which could not be sustained. It was further submitted that the respondent-company had not stated the reasons for coming to the conclusion that it was inexpedient to continue the employment of the appellant workman, in the service of the Company. In fact, after exoneration of the workman in the

domestic enquiry, the respondent could not come to the conclusion that it was inexpedient to continue the employment of the appellant- workman. It was submitted that the said statement made in the said order of dismissal was mechanical reproduction of the language used in the relevant Standing Order which is not based on any fact or any evidence. It was submitted that the company could not be allowed to justify its action by affidavits and/or other documents filed before the learned Trial Judge. It was submitted that apart from the order of dismissal no other document can be looked into for justifying the said order. In this connection, reference was made to the decision of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

11. Lastly, it was submitted that the dismissal under Order No. 39 of the Certified Standing Order is a dismissal simpliciter which spells retrenchment and hence the provisions of Section 25-F of the Industrial Disputes Act, 1947 was to be complied with. Admittedly, no retrenchment compensation as provided for u/s 25-F of the said Act had been paid by the respondent-company. The payment of retrenchment compensation is a condition precedent to any action of the retrenchment, it was submitted that non-compliance of the said provision renders the order of dismissal void, ab initio. In this connection, reference was made to the decision of the Supreme Court in the case of Management of Karnataka State Road Transport Corporation, Bangalore v. M. Boralah and Anr. reported in (1984-I-LLJ-110).

12. It was submitted that the order of dismissal passed in exercise of the power conferred under Clause 39 of the Certified Standing Order does not amount to retrenchment and, accordingly, the provision of Section 25-F had no manner of application. It was further submitted that the decision to dismiss under Clause 39 of the Certified Standing Order is based on subjective satisfaction and not open for review by the Tribunal or by the Court. It was further submitted that the authorities concerned dismissed the appellant on the ground of loss of confidence is not entitled to any relief. However, it was submitted that the reference was stale one and made after a long lapse of time from the date of termination to the date of reinstatement passed by the Tribunal. It was submitted even though no period of limitation prescribed for reference of dispute to the Industrial Tribunal, it is only reasonable that the disputes should be referred to as soon as possible after the same had arisen.

13. It is well-settled principle that a finding of fact made by the Tribunal in the award cannot be interfered with in writ jurisdiction by the High Court, but it is not inflexible but, as exception recognised by judicial decisions which are being well known are not necessary to be recapitulated. For instance, this rule will not apply if a finding is arbitrary or based on no evidence. It is also a basic principle that the award given by the Tribunal could not be interfered with or reversed unless the finding and/or reasonings given by the Tribunal are reversed by the High Court. In the instant case, the learned Trial Judge had no occasion to

discuss the facts and circumstances of the case which have been specifically dealt with by the Tribunal in the award, but what was done was that the cases cited at the bar had been merely recorded and the ratio decided therein have been merely quoted. No reason has been given in the judgment of the learned Trial Judge for allowing the writ application and holding that the reinstatement of the workman concerned was inappropriate. It was not disclosed why the order of reinstatement passed by the Tribunal was inappropriate or illegal and why it is liable to be set aside. As no reason has been given by the learned Trial Judge for reversing award, it has become necessary to examine the facts and circumstances of this case particularly the findings made by the Tribunal in the award in the light of submissions made by the learned Counsel appearing on behalf of the parties. In this case, admittedly, a charge-sheet has been issued and on the basis of the charge-sheet a full fledged departmental enquiry was held under Standing Order 38. Even though the enquiry was held ex pane, the Enquiry Officer found that the complicity of aiding and abetting and negligence on the part of the appellant had not been established and proved clearly. The Disciplinary Authority without reversing the finding made by the departmental authority and/ or disagreeing with the finding of not guilty made by the Disciplinary Authority invoked the power under Clause 39 of the Certified Standing Order and dismissed the appellant from service on the ground of loss of confidence. Clause 38 of the Standing Order prescribes a detailed procedure for dealing with the case of misconduct. Elaborate provisions have been made how the proceedings will be conducted and after the enquiry is held, the Disciplinary Authority has been given the power to impose punishment. Order 39 of the Certified Standing Orders provides special procedure in certain cases. The said Order 39 of the Certified Standing Order reads as follows :-

"Where a workman has been convicted of a criminal offence in a Court of Law or where the Managing Director/Local Chief Executive or his nominees, is satisfied for reasons to be recorded in writing, that it is inexpedient or against the interest of security to continue to employ the workman, the workman may be removed or dismissed from service without following the procedure laid down in Standing Order No. 38 and without assigning any reasons to the workman."

14. Order 39 of the Certified Standing Orders could only be invoked when the workman has been convicted of a criminal offence in a Court of Law or where the authority is satisfied for reasons to be recorded in writing that it is the inexpedient or against the interest of security to continue, to employ the workman, the workman may be removed from service without following the procedure laid down in Standing Order No. 38 and without assigning any reasons. When two elaborate courses of action are open and when the authorities resorted to one of the courses as provided in the Standing Order No. 38, question is whether by adopting the course laid down in Standing Order No. 38, a special and a summary procedure laid down in certified Standing Order No. 39 could be resorted to. Standing Order No. 39 confers power to dismiss from service without following the procedure laid down in Standing Order No.38 but

when procedure laid down in Standing order No. 38 has been resorted to and when in that proceeding it was found that the appellant was not guilty of the charges can it be said that the employer can exercise that power.

15. In our view the authorities concerned cannot abandon that course of action when it was found that the appellant could not be dismissed from service on the basis of the enquiry, could not summarily dismiss invoking the special procedure under Standing Order No. 39, The power conferred in Standing Orders No. 38 and 39 could not be mixed up which has been done in this case as the said two powers are mutually exclusive.

"It is of the essence of election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice. In this respect, election is clearly distinguishable from promissory estoppel in which a party makes a declaration of his intention, similar in many ways to an election, but in circumstances which do not call upon him to make any choice at all. In election he is always found confronted by a choice of two alternatives, one of which he must eventually choose, to the exclusion of the other."

16. There are two main types of estoppel by election. The first of these comprises those cases in which the election giving rise to the estoppel : is made between two persons alternatively liable to the represent or, with the result that exclusive recourse to one of these two will, if the remaining conditions of a valid election are present, preclude him from subsequently claiming against the other. The second embraces those cases in which the representor's choice is made between two alternative and inconsistent courses of action, steps, proceedings, or attitudes, in relation to one and the same person, whereby, under the like conditions, he is estopped from afterwards, as against that person, taking up the position which he formerly waived or abandoned, or any position other than that which he then notified his intention of assuming." (See: The Law Relating to Estoppel by Representation Spencer Bower and Turner).

17. The Supreme Court in the case of Dr. Akshaibar Lal and Others Vs. The Vice-chancellor, Banaras Hindu University and Others, , held in connection with termination of service of the incumbent by the University. There the University after following the procedure laid down in the Statute No. 30 and after issuing show-cause notices had abandoned the Course of action under Statute 30 and proceeded to act under powers which it thought; flowed from the agreements and the ordinances and terminated the services of the incumbents giving four or six months" salary in lieu of notice. In that connection, it was held by the Supreme Court that after the special procedure under Statute 30 was invoked, it could not be dropped in the mid course and other powers exercised. The University could not, having started enquiries under Statute No.30, abandon the enquiries in mid course and pass on to something else. It was further observed that in such case, question of motive or justice was immaterial.

18. Accordingly, we are clearly of the view that when the Management had initiated a procedure for dealing with case of misconduct by issuing a charge-sheet and after enquiry the appellant was found not guilty, the Management could not resort to the summary power conferred under Order No. 39 and dismiss him without assigning any reason. If the appellant was not found guilty of the charges, there could not be any material on record to hold that the Management has lost confidence on the appellant and that consequently his service could not be terminated in the interest of the security of the Company.

19. In our view, the invocation of the said Order 39 was on the face of it illegal, void and without jurisdiction and without assigning any reason does not mean without existence of any reason.

20. The Supreme Court in the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, held that expression without assigning any cause cannot be equated with "without existence of any cause." When the termination of service could be made without assigning any cause, it merely means that reason for which termination is made need not be assigned or communicated to the appointee. The non-assigning of reasons or the non-communication thereof will be based on public policy, but termination of an appointment without existence of any cogent reason in furtherance of object for which the power is given would be arbitrary and void. There was no material before the Disciplinary Authority excepting the finding made by the Enquiry Officer in which the appellant was found not guilty and, accordingly, no fact or circumstance did exist for invoking the power under Order 39. Accordingly, in the instant case, the order of dismissal cannot be sustained. Loss of confidence attaches a stigma to the concerned employee. In that instant case, the disciplinary proceedings had completely exonerated the appellant workman. Therefore, no action can be taken on the basis of loss of confidence attaching stigma to the appellant workman, when there, in fact, did not exist any material. Further question of loss of confidence could have arisen unless the appellant was found guilty of the charges. It was found on evidence that workman concerned was sent inside the plant for some other duty. It could not be said by any stretch of imagination that he was conniving with the thieves and/or have done anything that betrays confidence.

21. The Tribunal, in our view, applied correct principles of law in the facts and circumstances of this case and evidence on record and we do not find any reason to interfere with the award given by the 9th Industrial Tribunal in the said award dated November 1, 1983. There was no material on record on the basis of which we can hold that the Management had bona fide for the opinion regarding loss of confidence. This is contrary to evidence. If there were facts suggesting loss of confidence in that event it is well settled principle that in such cases question of reinstatement does not and could not arise at all. But, in the facts and circumstances of the case, it would be perverse to hold that there are facts suggesting loss of confidence. The learned Trial Judge discussed the principles of

law which have been laid down by several decisions of the Supreme Court/but if the said principles of law are applied in the facts and circumstances of the case particularly evidence on record, the learned Trial Judge could not come to the conclusion that the Tribunal committed an error in directing reinstatement of the workman. The Courts are bound to give reasons for its findings, absence of reasons for setting aside an award is an infirmity and disclosed total non-application of mind. We are of the view that the order of the learned Trial Judge could not be sustained as we find no reason or ground for interfering with the findings made by the Tribunal in its award. All the points raised on behalf of the Management have been fully and correctly dealt with by the Tribunal and we do not find any reason to interfere with the findings either on evidence and/or the principles of law. The principles discussed by the learned Trial Judge in the judgment could not be disputed. Those principles if applied to the facts and circumstances of the case, the award of the Tribunal could not have been revoked by the learned Trial Judge. Accordingly, we set aside the order passed by the learned Trial Judge and dismiss the writ application and discharge the rule. The appeal is allowed with costs. All the benefits to be given to the appellant within 4 months from to-day.

Basudeva Panigrahi, J.

22. I, agree.