

(2013) 01 DEL CK 0142

In the Delhi High Court

Case No : LPA No. 24 of 2013 and C.M. No. 231 of 2013

Delhi Transport Corporation

APPELLANT

Vs

Sarjeevan Kumar

RESPONDENT

Date of Decision : 21-01-2013

Acts Referred:

Citation : (2013) 138 FLR 956 : (2013) LabIC 981 : (2013) 3 LLJ 69 : (2013) LLR 521

Hon'ble Judges : D. Murugesan, C.J;V.K. Jain, J

Bench : Division Bench

Advocate : Uday N. Tiwary, for the Appellant; G.C. Charya, for the Respondent

Judgement

D. Murugesan, C.J.

C.M.No.233/2013 (condonation of delay of 36 days in filing the appeal).

For the reasons stated in the application, delay of 36 days in filing the appeal is condoned and the application is allowed.

LPA No.24/2013

1. This intra Court appeal is preferred by Delhi Transport Corporation (hereinafter referred to as "the management") being aggrieved by the order dismissing the writ petition filed by it questioning the award made by the Industrial Tribunal (hereinafter referred to as "the Tribunal") reinstating the respondent-workman (hereinafter referred to as "the workman") with full backwages. The short question that arises in the appeal is as to whether the workman would be entitled to full backwages on reinstatement as per the award. The facts leading to the above question are as follows:-

2. The workman was employed with the management of Delhi Transport Corporation on 24.01.1981 as Assistant Blacksmith. He was posted in a section for repair of clutch plates during the year 1984. As carbon was being used in that section, it emanated fumes and gases which adversely affected the lungs of the

workman and he developed tuberculosis during the year 1990. He had to undergo treatment for a long time and for that reasons he availed 82 days of leave. On the ground that the workman remained absent without permission, an inquiry was conducted and he was removed from service vide order dated 22.05.1993.

3. The workman raised an industrial dispute against the order of removal on the ground that the enquiry was not fair, Sh. O.P. Huria was never appointed as enquiry officer and no presenting officer was appointed. The appropriate government vide its order dated 30.08.1996 referred the dispute for adjudication:-

Whether the removal from service of Shri Sarjeevan Kumar is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?

4. The claim petition was filed by the workman with the averment that he was not unauthorizedly absent and in any event the enquiry was not fair and proper. He raised other grounds as well. The claim of the workman was controverted by the Management on the ground that a proper enquiry was held and the workman was removed for his unauthorized absence.

5. Having gone into the evidence, the Tribunal vide order dated 13.05.2011 decided the preliminary issue regarding the fairness of enquiry conducted and found that the enquiry was not conducted in a fair and proper manner and the same was not in accordance with the principles of natural justice. Hence the management was given opportunity to let in evidence and consequently evidence were let in. Based on the material, the Tribunal found that the management had failed to prove the misconduct on the part of the workman and also rendered a finding that the management had failed to prove that workman was not having adequate interest in the work of the management. With that finding, the Tribunal held that removal of the workman from service was illegal and unjustified and consequently directed reinstatement of the workman into service with full backwages and continuity of service with consequential benefits.

6. It is also relevant to note that while the dispute was pending, an approval application was filed by the management u/s 33(2)(b) of the Industrial Disputes Act, 1947 and the same was dismissed by the Tribunal vide order dated 07.05.1997. Placing reliance on the above subsequent event and following the judgment of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, , the Tribunal also gave a finding that in view of the award passed in the approval application in favour of the workman, he would be entitled for reinstatement with full backwages and continuity of service.

7. The award dated 04.06.2011 was questioned by the management in the writ petition. While affirming the award, the learned Single Judge also referred to the order of dismissal of the approval application by the management u/s 33(2)(b) and held that in view of the dismissal of the approval application, the order of

dismissal of the workman had become non-est. The learned Single Judge also relied upon the decision of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Ltd. (supra). The said order has given cause to the management to file the present appeal.

8. The controversy in this appeal is as to whether the award for payment of full backwages as confirmed by the learned Single Judge in the writ petition would be justified in the given facts and circumstances of the case, as the management is aggrieved only with that portion of the award and the order in the writ petition directing full backwages. There is no dispute that pursuant to the award, the workman has been reinstated and for that reasons we are inclined to consider the only question as to whether the workman would be entitled to full backwages.

9. In the formative years of the Labour Court jurisprudence in this country, the labour courts or the industrial tribunals were awarding full backwages as a normal consequence in the case of illegal and unjustified discharge/dismissal/termination of workman. In later years, there has been a change in the law in the award of full backwages. In Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, , a three judge bench of the Apex Court laid down that "In the very nature of things there cannot be a straight-jacket formula for awarding relief of back wages. All relevant consideration will enter the verdict. More of less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular".

10. In the case of P.G.I. of M.E. and Research, Chandigarh Vs. Raj Kumar, , the Apex Court in paragraph 12 held as follows:-

12. Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straightjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. As regards the decision of this Court in Hindustan Tin Works Pvt. Ltd. (supra) be it noted that though broad guidelines, as regards payment of back wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back wages only.

11. Placing reliance on the judgments in Hindustan Tin Works Pvt. Ltd. (supra) and P.G.I. of Medical Education and Research, Chandigarh (supra), the Apex Court in Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, did not agree with

the Labour Court for further payment of Rs. 12 lacs toward backwages and restricted the total payment of Rs. 15 lacs already ordered and therefore, approved that the law that full backwages is not automatic. The very same principle has been further reiterated by the Apex Court in Ram Ahsrey Singh and Another Vs. Ram Bux Singh and Others, and in Nicks (India) Tools Vs. Ram Surat and Another, .

12. In the case of Vikramaditya Pandey Vs. Industrial Tribunal and Another, , the Apex Court held that "ordinarily once the termination of service of an employee is held to be wrongful or illegal, the normal relief of reinstatement with full backwages shall be available to an employee and it is open to the employer to specifically plead and establish the special circumstances which warranted either non-reinstatement or nonpayment of backwages".

13. In Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, , the Apex Court has held as follows in para-6:-

6. A law in absolute term cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration.

14. In the case of Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, , the Apex Court has held as follows:-

16. When the question of determining the entitlement of a person to backwages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

15. In Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another, , the Apex Court reiterated the same law again. A survey of the above judgments of the Apex Court shows that the payment of full backwages is not automatic and an award of full backwages or any lesser amount of backwages depends upon the facts of the case and the Tribunal should apply its mind to those circumstances. The Tribunal should give its reason for awarding full backwages or for even in cases where the backwages are determined less than the full backwages, the reasons therefor must also be given. Any award of backwages without giving reasons would be illegal and cannot be sustained. In the case of Kendriya Vidyalaya Sangathan & Anr.(Supra), it was held that as far as the question of determining the entitlement of a person to backwages is concerned, the workman should show that he was not gainfully employed and the initial burden is on him. In the event, the employee places materials in that regard, the management can bring on record materials to rebut the claim.

16. This takes us to the further question as to whether the very same principle of relief of payment of backwages would apply to a case where an application filed for approval is rejected by the Labour Court for non-compliance of Section 25F and for that reason order of discharge/dismissal/termination would be held to be illegal.

17. In the case on hand, the dispute was referred to the Tribunal on adjudication of dismissal of the workman and while the same was pending, an application u/s 33(2)(b) of the Industrial Disputes Act was filed by the management seeking for approval of the Tribunal. During the pendency of the earlier dispute, the Tribunal dismissed the application for approval. Once the application for approval is rejected or dismissed, the legal consequence would be that the order of dismissal/termination per se be unsustainable.

18. In the case of Jaipur Zila Sahakari Bhoomi Vikas Ltd. (supra), the Apex Court held that the order refusing to give approval for dismissal on the ground of non-compliance with the provisions of Section 33(2)(b) renders it void and inoperative and the respondent would deem to have continued in service as if no order of dismissal was passed. In our opinion, there cannot be any different approach as to the payment of backwages. Even when the order of dismissal is held to be unjustified by the Industrial Tribunal on merits or such dismissal becomes inoperative by virtue of contravention of Section 33(2)(b), payment of full backwages is not automatic as the same depends on facts of each case and the Industrial Tribunal should also consider the reasons for awarding full backwages or for that matter lesser backwages and give its own reasons.

19. The above discussions lead to the following discussions:

- i. Payment of full backwages is not automatic on Labour Court/Tribunal granting reinstatement of workman.
- ii. The same principle is equally applicable in case an order of dismissal is set aside by the Labour Court/Tribunal on the ground of non-compliance of Section 25F of the I.D. Act.
- iii. The Labour Court/Tribunal shall give reasons for determining the specified quantum of backwages.
- iv. The burden is on the workman to show that he is entitled to full backwages or to a reasonable backwages and he is not gainfully employed during the period he was not in service of the management.
- v. Once materials are placed by workman on the above, the burden shifts on to the Management to disprove such claim.
- vi. In the event, the Labour Court/Tribunal fails to give any reason to quantify backwages, the High Court can go into the said issue and decide on quantum.

20. Coming to the facts of this case, the Tribunal has found that the misconduct was not proved and for that reasons held the order of dismissal as unjustified

and awarded full backwages without there being any reasons. There is nothing to indicate as to how the Tribunal determined the award of full backwages. It is true that the Tribunal has referred to the subsequent event of dismissal of the application u/s 33(2)(b) and has referred to the judgment in Jaipur Zila Sahakari Bhoomi Vikas Ltd. (supra). In our opinion, the award of full backwages cannot be sustained for the simple reason that there has been no reason adduced for such award by the Tribunal. The order of the learned Single Judge also suffers from the same reason and there is nothing to indicate as to the determination of full backwages. As has been held in Kendriya Vidyalaya Sangathan & Anr.(Supra), the burden is on the employee to show that he has not been gainfully employed during the relevant period when the dispute was pending and equally, while the writ petition was also pending. There is nothing to show that the workman had discharged the said burden and accordingly, in the absence of any reason, the question to be considered is whether he would be entitled to full backwages.

21. In the case of Nicks (India) Tools (supra), the Apex Court held that in the event no reason is adduced by the Labour Court, the High Court would be justified in going into the reasons and determine the backwages depending upon the facts of the case. The only contention of the workman is that sufficient time has been taken for disposal of the dispute and for that reasons he should not be penalized by denying full backwages. On the other hand, it is the case of the management that for the same reason, the management cannot be penalized and directed to pay full backwages.

22. In our opinion, the matter has since been pending from 22.05.1993 when the workman was removed from service. The dispute was referred vide order dated 30.06.1996 and the award came to be passed only on 04.06.2011. In the case of Municipal Corporation of Delhi Vs. Prem Chand Gupta, (2000) 10 SCC 115 , the Apex Court took into consideration the fact that the Industrial dispute lingered on for as long as 33 years and nobody was really to blame for the delay, except the justice delivery system and hence only 50% backwages were awarded to the workman. A similar view was taken in Bharat Coking Coal Ltd. Vs. Presiding Officer and Another, , while awarding only 50% of backwages. Thus, in such cases, the Management cannot be mulcted with a direction for payment of full backwages.

23. In these circumstances, to strike the balance, in our opinion, the award of full backwages as awarded by the Industrial Tribunal and affirmed by the learned Single Judge in writ petition cannot be sustained and the workman would be entitled to 50% backwages. The LPA is accordingly allowed to the extent modifying the backwages from 100% to 50%. Rest of the award shall stand.