
(2002) 04 CAL CK 0011

In the Calcutta High Court

Case No : A.F.O.O. No. 871 of 1998 & Original Order No. 871 of 1998

General Industrial Society Limited (Cotton Mills Division)

APPELLANT

Vs

Mongdayal Prasad and Others

RESPONDENT

Date of Decision : 22-04-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 11A, 17, 24
Limitation Act, 1963 — Section 5

Citation : 106 CWN 596

Hon'ble Judges : Ashok Kumar Mathur, C.J.; Subhro Kamal Mukherjee, J

Bench : Division Bench

Advocate : Arunabha Ghosh, Kanti Kumar Chakraborty, Bhaskar Prasad Vaishya, Ananta Shaw and Chandra Chakraborty, for the Appellant; Sukla Kabir Sinha and Mohamadi Yasmen, for the Respondent

Judgement

Subhro Kamal Mukherjee. J.

1. This letters patent appeal is directed against the judgment and order dated August 23, 1995 passed by a learned single judge of this court whereby the learned single judge rejected an application for recalling of the judgement and order dated January 31, 1992 holding, inter alia, that no ground, much less, satisfactory ground has been established for recalling of the said judgement and order dated January 31, 1992. The brief facts leading to the filing of this appeal is summarized as under:

Mongdayal Prasad (writ petitioner in short) was in employment at Cotton Mills Division of General Industrial Society Limited (the Company in short).

2. On December 24, 1974 the company issued a charge sheet against the writ petitioner alleging disobedience of lawful and reasonable order of superior, habitual absence without permission and gross neglect of work. The writ petitioner submitted his explanation, but such explanation was not accepted by the company and on January 2, 1975 the company appointed an Enquiry Officer.

The Enquiry Officer submitted his report finding the writ petitioner guilty of the charges as mentioned in the charge sheet dated December 24, 1974. On February 7, 1975 the company issued an order dismissing the writ petitioner from service.

3. The State Government by notification dated April 4, 1978 referred the industrial dispute between the company and the writ petitioner to the Eighth Industrial Tribunal. West Bengal u/s 10 read with Section 24 of the Industrial Disputes Act, 1947 for adjudication as to whether the dismissal of the writ petitioner from service was justified and relief, if any, he was entitled.

4. Both the parties appeared before the tribunal and at the behest of the company the tribunal took up the preliminary point regarding validity of the domestic enquiry held by the company against the writ petitioner.

5. By Order No. 82 dated November 5, 1982 the tribunal held that the domestic enquiry was just and fair and was not biased or perverted in the circumstances of this case. Therefore, the preliminary point was decided in favour of the company and against the writ petitioner. The tribunal fixed another date for adducing further evidence by the parties on the merits of the case on other grounds. Ultimately, the tribunal on February 28, 1984 passed the award and held that the dismissal of the writ petitioner from service was justified and that he was not entitled to any relief whatsoever. The State Government on March 22, 1984 published the said award passed by the tribunal u/s 17 of the Industrial Disputes Act, 1947.

6. Being aggrieved the writ petitioner moved an application under Article 226 of the Constitution of India (writ petition in short), inter alia, challenging the award passed by the tribunal.

7. By judgment and order dated January 31, 1992 a learned single judge of this court allowed the writ petition and directed reinstatement of the writ petitioner in service with all back wages, if not otherwise employed elsewhere. It was, further directed that if the writ petitioner was in employment elsewhere, he should not be reinstated, but he should be paid his back wages for the period during which he has been out of employment. The learned single judge, inter alia, held that the Enquiry Officer did not conduct the enquiry properly. The learned single judge, further held that the award passed by the tribunal was perverse. It was held that the tribunal failed to exercise its jurisdiction by not properly taking into account the relevant materials and acted on irrelevant materials. It was not just and proper for the tribunal to refuse to exercise its discretion in terms of Section 11A of the Industrial Disputes Act, 1947 while considering the quantum of punishment awarded against the writ petitioner.

8. However, the learned single judge noted. "Be it recorded that the matter was heard at length no one is present on behalf of the respondents nor any objection was filed to controvert the allegations made in the writ application."

9. The workman filed an application for contempt of court on account of failure of the company to reinstate the writ petitioner with all back wages in terms of the order dated January 31, 1992. The company, also, filed an application for recalling of the ex-parte judgment and order dated January 31, 1992.

10. Both the said applications came up for hearing a learned single judge of this court and by judgment and order dated August 23, 1995, the learned single judge dismissed the application for recalling holding, inter alia, that no ground, much less, satisfactory ground could be established by the company as they chose to remain absent from the court on the date when the writ petition was allowed ex-parte. However, the application for contempt was rejected.

11. Being aggrieved the company preferred two appeals. An appeal was filed against the judgment and order dated January 31, 1992 by which the learned single judge allowed the writ petition ex-parte. The company, also, preferred the present appeal against the order dated August 23, 1995 whereby the learned single judge rejected the application of the company for recalling of the order dated January 31, 1992.

12. The application u/s 5 of the Limitation Act, 1963 came up for hearing before a division bench of this court and by order dated November 6, 1995 the said application was rejected without, however, prejudice to the rights and contentions of the company in the present appeal preferred against the order rejecting the application for recalling. The division bench held that it was not a fit case to condone the delay, more so, when the company has already preferred an appeal against the order rejecting the application for recalling. It was made clear that the company would be entitled to place the merits of the matter in this appeal filed against the order rejecting the application for recalling.

13. Mr. Arunabha Ghosh, learned Advocate, appearing in support of the appeal, argued that the learned single judge was not correct in holding that the company has failed to establish sufficient cause for non-appearance when the writ petition was allowed ex-parte. Mr. Ghosh, on merits, submitted that when the learned single judge in the judgment and order dated January 31, 1992 held that the domestic enquiry was defective, the learned judge ought to have remitted the matter to the tribunal granting liberty to the employer to adduce evidence to justify its action inasmuch as the mere fact that the domestic enquiry has been defective does not by itself render the dismissal of the workman illegal. Mr. Ghosh in this connection cited the decision in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . Mr. Ghosh, also, drew our attention to the decision of a division bench of this court in the case of *Collector of Customs. Calcutta & Ors. vs. Biswanath Mukherjee*, reported in 1974 CLJ 251 and submitted that the learned single judge while allowing the writ application applied wrong legal tests in setting aside the award as it is well settled that in a writ petition the scope to interfere with the findings of the tribunal on any question of fact is very limited.

14. Ms. Sukla Kabir Sinha, learned Advocate, appearing on behalf of the respondent no. 1, however, supported the order impugned and submitted that the learned single judge was justified both in allowing the writ petition and in rejecting the application for recalling filed by the company. Ms. Kabir Sinha cited the decision in the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, and argued that as the employer did not ask for opportunity to lead evidence to prove charges against the workman, the learned single judge rightly did not grant such opportunity to the company. Ms. Kabir Sinha, also cited the case of Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, and submitted, on the basis thereof, that the learned Single Judge rightly applied the tests in deciding the writ petition and in setting aside of the order of dismissal of the workman with further direction to reinstate him with full back wages as the report submitted in the domestic enquiry was based on no evidence and the learned judge was right in reversing the award. Our attention has been drawn to the decision of the Delhi High Court in the case of M/s. Co-operative Store Limited vs. Shrimati Usha Kumar, reported in 1997 (77) FLR 162:66 (1997) Del Law Tim 113 In that case a division bench of the Delhi High Court upheld the findings reached by the learned single judge that the findings of the enquiry officer and the tribunal were perverse and it was held that the learned single judge correctly exercised his discretion in awarding the full back wages.

15. We have carefully considered the rival contentions advanced before us by the parties.

The application for recalling was filed, inter alia, with the following averments:

(a) The writ petitioner moved the present writ petition and obtained a Rule on September 13, 1984 and upon service of the notice of the Rule on April 4, 1986 the company engaged Shri Sunit Dutta, Advocate, to conduct its case in this court;

(b) the said learned Advocate, thereafter, prepared the affidavit-in-opposition, which was to be affirmed on September 4, 1987 and the officer concerned of the company, who was to affirm the affidavit before the Oath Commissioner, came to this court. Shri Durbadal Das, the Registered Clerk of the said learned Advocate, asked the officer concerned to sign the affidavit and to leave the court as there was a long queue before the commissioner;

(c) from time to time the representative of the company enquired from both the said learned Advocate and his clerk about the fate of the writ petition and he was assured that the writ petition was not likely to come up for hearing in the near future;

(d) on March 14, 1992, for the first time, the company was informed by a letter from the writ petitioner that on January 31, 1992 the said Rule has been made absolute with directions for the reinstatement of the writ petitioner with full back wages:

(e) on March 26, 1992 the writ petitioner supplied a xerox copy of the order and on perusal thereof, for the first time, it was learnt that at the hearing of the writ petition neither any affidavit was filed on behalf of the company nor any appearance was recorded on behalf of the company. As a result thereof the Rule was made absolute ex-parte;

(f) the representative of the company, in the meantime, contacted the said learned Advocate and was surprised to learn that the said learned Advocate completely forgot about the matter. It, further appeared that Shri Durbadal Das, the Registered Clerk, left his service sometime in 1988:

(g) on April 6, 1992 the said learned Advocate, after making enquiry, informed the company that he could trace out the brief from old records and it further appeared that the affidavit, which was signed by the representative of the company, was neither affirmed nor a copy thereof was supplied to the learned Advocate of the writ petitioner. It, however, appeared that a vokalatnama was filed on November 25, 1996. The said learned Advocate, further, informed that on January 31, 1992 he was present in the court room of the learned single judge, but unfortunately, he could not appear on behalf of the company since he had completely forgotten about the case.

16. The said application was filed under the signature of Shri Sunit Dutta, learned Advocate, and it appears to us, the said learned Advocate took full responsibility of the averments made in the said application.

17. However, as indicated hereinabove, the learned single judge rejected the application for recalling.

18. The apex court to the case of Rafiq and Another Vs. Munshilal and Another, observed The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job."

19. The apex court in the case of Jwala Prasad Vs. Ajodhya Prasad, reversed an order of the High Court, which affirmed an order passed by the Additional District Judge dismissing an application for restoration, on the ground that the party concerned has been denied an opportunity of being heard.

20. A division bench of this court in the case of Ranipet Chemicals and Engineering Company Private Ltd. vs. Swastik Stainless Steel Stores, reported in AIR 1986 Calcutta 76 held that a client should not be made to suffer for the negligence and inaction on the part of the lawyer.

21. On merits, also, prima facie, we find substance in the contentions of Mr. Ghosh that the learned single judge while allowing the writ petition failed to apply the proper tests laid down by the apex court in the case of The Workmen of Ms/. Firestone Tyre and Rubber Company of India Private Limited (supra).

22. When the question arises whether there have been sufficient grounds for recalling of an order passed ex-parte, the court would ordinarily be inclined to restore the matter unless there has been gross negligence on part of the party concerned. A party cannot be made to suffer for negligence of the advocate engaged in the matter. Normally, better justice is likely to be done if the two sides are heard.

23. We have considered the averments made in the application for recalling and we hold that sufficient cause has been made out for non-appearance on the date when the writ petition was allowed ex-parte and the company cannot be penalised for the inaction of the learned advocate. In the facts and in the peculiar circumstances of the case, the ex-parte order is liable to be recalled.

24. We, accordingly, allow this appeal and set aside the judgment and order dated August 23, 1995 rejecting the application for recalling of the order dated January 31, 1992 and recall the order dated January 31, 1992 passed ex-parte. The Rule is restored to its original file and number.

25. The company is, however, directed to file the affidavit-in-Opposition by two weeks from date and reply, if any, is to be filed by the workman within a week thereafter. Let this matter be listed for hearing before the appropriate bench after three weeks.

26. By way of abundant caution, we make it clear that we have not gone into the merits of the writ petition and all points are kept open.

27. There will be no order as to costs. Let xerox certified copy of this order, if applied for, be supplied to the parties expeditiously.

Ashok Kumar Mathur, C.J.

I agree.