
(2000) 12 CAL CK 0012
In the Calcutta High Court
Case No : C.O. No. 9155 (W) of 1996

Gouranga Acharjee

APPELLANT

Vs

Third Industrial Tribunal and Others

RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Industrial Disputes Act, 1947 — Section 10

Citation : 105 CWN 901 : (2001) 90 FLR 1008 : (2002) 4 LLJ 260

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Baskar Bhattacharya, J.—In this writ application, the writ petitioner, an employee, has challenged an award dated November 27, 1995 passed by the 3rd Industrial Tribunal, West Bengal in Case No. VIII-294/88 thereby answering the reference in favour of the employer.

2. The following disputes were referred to the Tribunal u/s 10 of the Industrial Disputes Act ("Act"):

"1. Whether the termination of service of Sri Gouranga Acharjee is justified?

2. To what relief if any is he entitled ?"

3. The petitioner was a permanent employee of the private respondent. There is no dispute that the petitioner was absenting from work since March 19, 1987 without information and submitted a medical certificate issued by one Dr. P.N. Mukherjee along with an application stating that due to his sickness he could not resume his duty and inform the employer earlier. On that day viz. April 9, 1987 he was not permitted to join and subsequently a letter dated April 18, 1987 was served upon the petitioner thereby asking him to explain why he should not be discharged from Company's service for his absence without information for more than 10 days. It may be mentioned here that April 8, 1987 was the weekly

holiday.

4. The petitioner answered the said show cause and stated that due to his illness he could not attend office and on April 9, 1987 he intended to join along with a medical certificate praying for condonation of the absence but he was not permitted to join.

5. By order dated May 25, 1987 the employer refused to take into consideration the medical certificate issued by a Doctor, who was not the E.S.I. panelled Doctor. Accordingly, the employer concluded that the name of the petitioner should be removed from the list of permanent worker as per Rule 9-C, 1st part of the Company's Standing Order and the petitioner lost lien on the appointment. Under the aforesaid circumstances, the dispute mentioned above was referred to the Tribunal for adjudication.

6. At the time of hearing, the petitioner himself deposed in support of his claim while a Junior Supervisor of the Company figured as the witness for the employer.

7. Ultimately, the learned Tribunal by the award impugned herein has held that the action taken by the Company in terms of provision of Rule 9-C of the Standing Order (1st part) by removing his name in the list of permanent worker on losing lien on employment and keeping his name as badli worker was justified. Being dissatisfied, the employee has come up with the instant writ application.

8. Mr. Mukherjee, the learned counsel appearing on behalf of the petitioner has firstly contended that the Tribunal below in passing the award impugned did not take into consideration the real question whether Rule 9-C of the Standing Order (1st part) is applicable to the fact of the present case or whether the Company was entitled to invoke the same.

9. Mr. Mukherjee further submits that the Tribunal did not take into consideration the fact that the medical certificate produced by the petitioner from a non-ESI panelled Doctor cannot be rejected. Mr. Mukherjee lastly submits that the Tribunal could not take into consideration the past conduct of the petitioner while deciding the disputes referred to it.

10. Mr. Ganguly, the learned senior counsel appearing on behalf of the employer has on the other hand supported the award impugned and has contended that the employer as quite justified in refusing to take into consideration medical certificate issued by a non-Empanelled ESI Doctor as the benefit of E.S.I. Act is available to the petitioner. Mr. Ganguly further contends that the past conduct of the petitioner shows that he was not at all interested in the service of the Company and as such the Company rightly invoked Rule 9-C of the Standing Order (1st part). According to Mr. Ganguly, the parties are bound by the Standing Order of the Company and as such there is no illegality in the award impugned.

11. To appreciate the aforesaid contention raised herein, Rule 9-C of the Standing Order is quoted below:

"If the workman remains absent beyond the period of leave originally granted or subsequently extended, he shall lose his lien on his appointment, unless he (1) returns within eight days of the expiry of the leave and (2) explains to the satisfaction of the manager his inability to return before the expiry of his leave. In case the workman loses his lien on his appointment he shall be entitled to be kept on the list of Badlis."

In this case, the petitioner was enjoying his leave up to March 18, 1987. Therefore, as per Rule 9-C of the Standing Order, he should lose his lien on his appointment unless he joins within March 27, 1987 and explains to the satisfaction of the manager his inability to return within March 19, 1987.

12. Now the first question that arises for consideration is whether this type of a clause providing termination of service of an employee for overstaying the period of leave, grants absolute right to the employer. The Supreme Court in the case of *Upton India Limited Vs. Shammi Bhan and Another*, answered the question in the following terms at p. 1169 of LLJ:

"This provision, therefore, confers a discretion upon the management to terminate or not to terminate the services of an employee who overstays the leave. It is obvious that this discretion cannot be exercised or permitted to be exercised capriciously. The discretion has to be based on an objective consideration of all the circumstances and materials which may be available on record. What are the circumstances which compelled the employee to proceed on leave; why he overstayed the leave; was there any just or reasonable cause for overstaying the leave; whether he gave any further application for extension of leave; whether any medical certificate was sent, if he had, in the meantime, fallen ill? These are the questions which would naturally arise while deciding to terminate the services of the employee for overstaying the leave. Who would answer those questions and who would furnish the materials to enable the management to decide whether to terminate or not to terminate the services are again questions which have an answer inherent in the provision itself, namely, that the employee against whom action on the basis of this provision is proposed to be taken must be given opportunity of hearing. The principles of natural justice, which have to be read into the offending clause, must be complied with and the employee must be informed of the grounds for which action was proposed to be taken against him for overstaying the leave".

13. In the instant case, the petitioner on joining duty on April 9, 1987 produced application for condonation with a medical certificate in support of his illness. The Company refused to accept such certificate on the ground that the same was not issued by Insured Medical Practitioner and issued a notice asking the petitioner to show cause why he should not be dismissed. The petitioner duly showed cause pleading illness as the ground of unintentional absence. As mentioned earlier, the Company invoked Rule 9-C of the Standing Order without considering the medical certificate issued by a non-empanelled Doctor.

14. In evidence, the petitioner specifically asserted that he could not bring the medical certificate from the E.S.I. empanelled doctor as the said doctor was ill at the relevant time as a result he was treated by a private doctor. Such fact has not been disputed by the sole witness for the employer and even no suggestion to the contrary has been given to the petitioner in cross-examination. Therefore, the Company could not refuse to consider the medical certificate simply because the same was issued by a non-empanelled E.S.I. Doctor. Thus, in the absence of any material showing the plea of illness taken by the petitioner was a false one, there was no justification of disbelieving the case of illness.

15. It further appears from the order of termination that the Company took into consideration the fact that the petitioner in the past was absent for days. In my view for the purpose of invoking Rule 9-C such "past absence" cannot be taken into consideration. Moreover, the Company having been satisfied with the fact of illness of the petitioner condoned such absence. Therefore for the purpose of invoking Rule 9-C the employer should have restricted its consideration for the absence from March 19, 1986 to April 8, 1986. The sole witness for the Company has admitted in his evidence that the Company refused to allow him to join as he came up with a certificate from a private doctor. Such approach was entirely wrong as the petitioner has explained the reason why he could not bring such certificate from a panelled doctor.

16. The Tribunal, it appears from the record has not at all considered this aspect of the matter and has relied mainly upon the fact that he was absent for several days in previous years.

17. I have already mentioned that those absence cannot afford a ground for invoking Rule 9-C. The sole witness for the Company was constrained to admit in cross-examination that the Company could not produce any medical certificate to show that the petitioner has been physically incapacitated or has been rendered unfit to do any work. Therefore, the Company could not take away the permanent status of the petitioner even on that ground.

18. Mr. Ganguly strenuously contended that the petitioner's service has not been terminated but he has been merely kept in the "Badli" role. The letter dated May 25, 1987 shows that the petitioner lost Hen on his appointment and was given option to be placed in the list of Badli worker, if he agreed. The petitioner is not bound to accept such term if his name is removed illegally from permanent list. Therefore such order virtually amounted to termination.

19. Mr. Ganguly next strongly placed reliance upon the decision of the Apex Court in the case of Aligarh Muslim University and Others Vs. Mansoor Ali Khan, and contended that "useless formality theory" should be applicable here. In that case, in spite of specific warning given to the employee while granting one year extension of the leave to join after the expiry of that period, the employee not having joined, the Apex Court held that there was no necessity of giving fresh show cause. Such is not the case in our hand.

20. In the case of Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another, another decision relied upon by Mr. Ganguly, an employee was unauthorisedly absent exceeding 90 days. The bank sent notice by registered post in terms of bipartite agreement requiring him to explain his absence and to join within the prescribed period of 30 days. The said notice came back with the postal endorsement "refused". Under such circumstances, termination of service without departmental enquiry was held to be valid. In my opinion, the said decision does not help Mr. Ganguly's client in any way.

21. Similarly, in the case of Hindustan Paper Corporation Vs. Purnendu Chakrobarty and Others, the Supreme Court held that an employee remaining absent for more than six months without giving proper show cause was valid. In this case, the petitioner has come forward with a medical certificate explaining his absence but the respondent refused to consider such certificate on a ground not tenable in law. Thus, the said decision is of no avail to the employer.

22. Lastly, in the case of Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, all that was held was that although the Standing Orders do not have statutory force, they bind both employer and employee. There is no dispute with the aforesaid proposition of law. But in this case such Standing Order was wrongly applied and that too without taking into consideration the defence of the employee which was supported by medical certificate.

23. The Tribunal below in this case did not follow the principles laid down by the Apex Court in the case of Upton India (supra) in considering the scope of application of Rule 9-C of the Standing Order and totally failed to consider the evidence on record. From the materials on record it must be held that the order dated May 25, 1987 was patently illegal and no other view is possible from the materials on record.

24. Thus, the award-impugned is on the face of it illegal and is liable to be set aside. The order dated May 25, 1987 issued by the Company is illegal and as such the petitioner is entitled to the order of reinstatement with full back wages. As the petitioner attained the age of superannuation on December 31, 1994, he is entitled to wages till that day from May 25, 1987. However, the amount received by way of interim relief should be adjusted.

26. The writ application is thus allowed to the extent indicated above.