
(2016) 04 DEL CK 0166
In the Delhi High Court
Case No : LPA No. 509 of 2010

Hindustan Times Ltd.

APPELLANT

Vs

Arun Kumar & Others

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B

Citation : (2016) 2 CLR 649 : (2016) 231 DLT 194 : (2016) 157 DRJ 603 :
(2016) 150 FLR 703

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : Mr. Sandeep Prabhakar with Ms. Ritika Ahuja and Ms. Shweta Priyadarshini, Advocates, for the Appellant; Mr. R.V. Sinha with Mr. R.N. Singh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The appellant hereafter called "HT Ltd." appeals against a judgment of the learned Single Judge which upheld the Award of the Labour Court that found, in a reference, that the termination of one (late) Mr. Arun Kumar's services was illegal.

Brief Facts

2. Late Mr. Arun Kumar, who is represented in this appeal by his legal heirs, was not a workman as ordinarily understood in labour law and was employed as a working journalist within the meaning of the Working Journalists & Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 ("The Working Journalists Act"). Under Section 3 of The Working Journalists Act, the provisions of the Industrial Disputes Act, 1947 apply to, or in relation to, working journalists as they apply to, or in relation to, workman within the meaning of the Industrial Disputes Act, 1947. Since Late Mr. Arun Kumar (hereafter referred to as the "workman") was employed as a working journalist with HT Ltd., the dispute around termination of his services was referred to the

Labour Court.

3. The workman was employed by HT Ltd. as an employee with effect from 01.12.1973. Almost fifteen years into his employment, he was posted as a Special Correspondent to the North-East Region at Shillong on 10.08.1988. On 15.12.1990, he sent a telegram to HT Ltd.'s head office at New Delhi seeking privilege leave from 26.12.1990 to 19.01.1991. While the appellant denied receiving such an application in its submissions before the Labour Court, in the list of dates and events submitted in CWP No. 3465/1993 pending reference in the Labour Court, the appellant claimed that the workman remained absent beyond the period of leave originally granted to him. Based on the averments and materials, the Labour Court held that the appellant was deemed to have admitted the receipt of application for leave till 19.01.1991 and to have granted leave till then. The learned Single Judge did not interfere with this finding of fact and we are also not inclined to interfere with this finding in our jurisdiction over this letters patent appeal.

4. The workman claimed before the Labour Court that he had made a railway booking for his return from Delhi to Shillong for 17.01.1991. He went to the railway station but could not board the train as he started feeling unwell and headed back to his house in Delhi. His diagnosis showed that he was suffering from acute diabetes and abscess of the liver, on the basis of which, he was advised to rest. It is his case that he sent news of his sickness through a colleague of his and that such informal communication of sickness followed by a medical leave certificate was an accepted practise at his workplace. The receipt of such informal communication and such practise being acceptable were both denied by the appellant. However, it is undisputed that on 07.03.1991, the appellant received a medical leave application w.e.f. 20.01.1991 along with a medical certificate from the workman. Though HT Ltd. claimed that the certificate was not genuine, it did not hold any enquiry to ascertain the genuineness of the medical certificate or give any opportunity to the workman to establish its credibility. Instead, the appellant issued a letter of termination, dated 20.03.1991 to the workman, which was served to him on 23.03.1991. The ground for termination, as is undisputed, was abandonment/desertion of services by the workman. In response to the letter of termination, the workman sent a letter, dated 25.03.1991 to the appellant protesting his termination and asking the appellant to withdraw the letter of termination. Not paying any heed to the letter sent by the respondent protesting his termination, the petitioner issued a public notice in Hindustan Times newspaper on 29.03.1991 informing the public about the termination of the workman's employment with HT Ltd.

5. The dispute of termination of the workman's employment was referred to the Labour Court. The appellant submitted that the employee had voluntarily abandoned his service as per Clause 9(3) of the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 which provides that an employee loses his/her lien if he/she overstays his/her sanctioned leave

for more than eight days. Alternatively, it was submitted that the workman's absence for more than ten days amounted to misconduct as per Clause 14(e) of the Model Standing Orders. The Labour Court in its order dated 04.01.2002 held that termination of the workman's services was illegal and ordered reinstatement with full back wages along with consequential benefits. The Labour Court held that the ground of abandonment was not proved against the workman, as he had no intention to abandon service. He was on authorised leave initially after which he was on medical leave and his service could not be terminated arbitrarily by HT Ltd. without holding any enquiry or providing him a hearing. The Labour Court did not consider the evidence submitted with the view of establishing misconduct as it was of the opinion that the petitioner did not take such plea in the first instance available to it while filing a written statement in response to the claim statement filed by the workman in the Labour Court.

6. Aggrieved by the order of the Labour Court, the appellant approached this Court under writ jurisdiction conferred by Article 226 of the Constitution of India. The learned Single Judge in his judgment dated 03.06.2010 wherein he upheld the award of the Labour Court dismissed WP (C) 3482/2003. The learned Single Judge was also of the view that no case of abandonment was made out against the workman. On the question of misconduct, he was of the opinion that since HT Ltd. in its letter of termination sent to its workman had taken the ground of voluntary abandonment by the workman, it could not plead misconduct by the workman resulting in termination of services as an alternative ground, since the two grounds were contrary to each other. Noting that the workman had already attained the age of superannuation, the learned Single Judge modified the Labour Court's award. In addition to the back wages already to be paid to the workman as per the Labour Court's award (on which interest was to be incurred at 7% per annum for the period between the order of the Labour Court and the date of disposal of writ petition), he directed the appellant to pay a sum of Rs. 7,50,000 as lump sum amount to compensate the workman (beyond the wages he was getting under Section 17B of the Industrial Disputes Act) for wages he was deprived of from the date of the Labour Court's award till the date when he attained superannuation age. The amounts were to be paid to the workman within six weeks of the judgment failing which they would incur interest at the rate of 9% per annum.

7. HT Ltd challenges the impugned judgment of the learned Single Judge. During the pendency of this appeal, the workman, late Mr. Arun Kumar expired on 1st November 2011. The appellant pleaded before this Court that as the workman's legal heirs were untraceable since his death, the appellant was ready to end the present litigation and sought an order to such effect. In light of the appellant's request, a two-judge Bench of this Court disposed off the LPA on 09.09.2015. The Court noted that no legal heir appeared in Court despite being brought on record and disposed the appeal holding the amount of Rs. 15,00,000 and the interest of Rs. 6,71,272 generated thereupon to be satisfaction of the award and its corrigendum passed by the Labour Court.

8. Subsequent to the order in this appeal, on 09.09.2015, the late workman's legal heirs filed RP 489/2015 and submitted that HT Ltd's claims about their non-traceability were false and requested for the matter to be disposed of on merits. The review Petition was allowed recalling the order in this LPA. Learned counsels of both sides were heard.

Arguments of parties

9. HT Ltd. contends that the learned Single Judge took an erroneous view that it was not open to it to argue that the workman had voluntarily abandoned his services and in the alternative, submit that his services had been justly dismissed for misconduct. The learned Single Judge based this view on the decision of the Supreme Court in Maharashtra State Seeds Corporation v. Vilas (2005) 12 SCC 422 where it was held that once an employer took a specific plea that the employee had been dismissed after a domestic enquiry, it could not take an alternate plea that it was a termination simpliciter.

10. Learned counsel argued that once evidence was led before the Labour Court, which had the material before it to decide whether the termination was justified, there was no question of saying that in the facts of this case the long and unexplained delay in rejoining the duties had to be condoned and reinstatement was justified.

11. This court is in agreement with the reasoning of the learned Single Judge and of the opinion that the employer could not take two contradictory pleas of the employee having voluntarily abandoned his services and that his services were terminated on account of misconduct. In this Court, it was specifically averred by HT Ltd that:

"no application for extension of leave accompanied by a proper medical certificate for the period beyond 19th January, 1991 was submitted by respondent no. 1 to the petitioner before the expiry of the leave originally granted to him and he thus having remained absent beyond the period of leave originally granted was deemed under Clause 9 of the Model Standing Orders applicable to working journalists of the newspaper establishments of the petitioner, to have lost, his lien on his appointment?"

The Single Judge noticed that the workman had proved due despatch of the telegram seeking leave, which was not denied by HT Ltd's witness; equally receipt of the medical certificate in support of the leave application for extension of leave was not denied.

12. The cases relied on by the appellant to submit that a Labour Court can look into the question of misconduct when there is no departmental enquiry held by the employer or where the enquiry has been vitiated but the employer adduces evidence to establish misconduct at the first instance before the tribunal, lend no support to the appellant's case. The first is the issue of whether the workman could have been visited with a dismissal order in the manner the management

did in the circumstances of this case. Now, it is well established that even when there are stipulations in the conditions of service of a workman or employee, in the form of standing orders, stating that delay in reporting for duties or absence from duties beyond a point without explanation results in a deemed forfeiture, loss of lien or deemed abandonment of service, nevertheless requires compliance with the rules of natural justice as an essential precondition to what in effect is a termination order. The Supreme Court also in *D.K. Yadav v. J.M.A. Industries Ltd.* (1993) 3 SCC 259 has held that even where the standing orders of the employer provide for dismissing the workman from service for unexplained absence, the same has to be read with the principles of natural justice and without conducting domestic inquiry and without giving an opportunity of being heard, termination of service on the said ground cannot be effected. The same view was reiterated in *Lakshmi Precision Screws Ltd. v. Ram Bahagat*, AIR 2002 SC 2914. Again, in *V.C. Banaras Hindu University v. Shrikant*, AIR 2006 SC 2304 it was held that although laying down a provision providing for deemed abandonment from service may be permissible in law, it is not disputed that an action taken thereunder must be fair and reasonable.

13. The learned Single Judge's finding that the Labour Court did not have to look into the question of misconduct was not on the basis of the appellant's omission to urge misconduct at the first instance before the Labour Court, but because of the contradictory grounds submitted by it to justify termination of the services of its workman. Once it could not establish the ground of voluntary abandonment of services by the workman, the appellant employer could not resort to an alternate plea of the workman's dismissal being a penal measure taken by the employer on account of misconduct by the workman.

14. As admitted by HT Ltd. in the pleadings submitted by it in CWP No. 3465/1993, the leave from 26.12.1990 to 19.01.1991 had been granted by it consequently it could not have treated the workman's staying away as unauthorised absence. Misconduct may only be established on grounds of absence from employment beyond the originally granted leave i.e. from 20.01.1991 to 07.03.1991, with the latter date being the one on which the appellant received the application for leave and medical certificate from the workman. It was the case of the workman that he fell sick at the end of the originally granted leave and was advised rest on medical grounds. He furnished a leave for application and a medical certificate to the employer only on 07.03.1991, a fact admitted by both parties. Submission of leave application and medical certificate subsequent to leave due to sickness does not amount to unauthorized leave for the mere reason that permission was not obtained prior to taking the leave. There is nothing in law, which imposes such an onus on a workman who may not have occasion to submit leave application and medical certificate prior to or during illness on account of being sick. He may furnish leave application and medical certificate subsequent to his sickness. On this point, reliance may be placed on the judgment of this Court in *Delhi Transport Corporation v. Ashok Kumar* (LPA 8/2010 decided on 16th April, 2013) where it

was held that:

"In our view, the Standing Orders cannot be interpreted in a manner which would give power to the appellant, to terminate the services of an employee who genuinely falls sick all of a sudden and for this reason is unable to get leave sanctioned in advance, submitted the leave application without undue delay and a medical certificate from the prescribed medical attendant is also submitted to confirm the illness claimed by the workman. Therefore, the Labour Court was justified at least in taking a prima facie view that no misconduct had been committed by the respondent."

Once the workman has furnished a medical leave application and a medical certificate after the sickness period (and given that he was diagnosed with acute and chronic diabetes) the employer could not disregard genuineness of the certificate without giving the workman an opportunity to establish the veracity of the certificate. Reliance may again be placed on the above-cited judgment of this Court where in the same paragraph, the learned Judges observed:

"In the case before us, the respondent, in our view, discharged the burden placed upon him by the producing medical certificates in support of his illness, once no attempt was made by the appellant to dispute the authenticity of the medical certificate and/or to verify the illness claimed by the workman by making any inquiry etc."

These observations are just a reiteration of the principles of natural justice, which ought to be observed by the employer before taking punitive measures against an employee. Even if the appellant doubted the genuineness of the medical certificate submitted by the workman, it was still required to give an opportunity to the employee to satisfy itself with respect to the said certificate, as has been rightly observed by the learned Single Judge in the impugned judgment.

15. While we need not examine the question of misconduct for reasons already listed above, this court reiterates that even if the workman was found guilty of misconduct on account of missing 47 days from 20.01.1991 to 07.03.1991, his services could not have been terminated on that ground alone. It is a cardinal rule of law that the punishment imposed on a workman has to be proportionate to the misconduct failing which an industrial tribunal or a labour court may give a lesser punishment even if it holds the workman guilty of misconduct. This rule is abundantly clear in the landmark judgment of the Supreme Court in *Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd. v. Management & Ors*, (1973) 1 SCC 813 where it was observed:

"41-A?Under section 11-A, though the Tribunal may hold that the misconduct is proved, nevertheless it may be of the opinion that the order of discharge or dismissal for the said misconduct is not justified. In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman

only lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by Section 11-A."

16. The workman had been employed by HT Ltd. for nineteen years and climbed up the ranks through his years of diligent work. Prior to the termination of his services, he had been serving for over two years as a Special Correspondent for North-East India, which as has also been admitted by the appellant employer, was a vital post for the appellant newspaper company. The fact that the workman served for over 19 years and at a highly crucial level for more than two years just prior to the termination of his services demonstrates his instrumentality for the appellant employer. Moreover, there was no prior misconduct or lack of diligence in his long course of service to the employer. Crucially a fact now lost in the deadening march of time he was in the North East at a turbulent phase of that region's history: indeed the nation's history. Political and economic instability coupled with a disturbed state of affairs prevailed at that time. Apparently the deceased workman held charge of HT's entire North Eastern Bureau and had to frequently go on tours and cover events; it is urged that he had not taken leave for about 2 years prior to the incident. In the facts of the case, even if a case of misconduct was made out against the workman, termination of service on account of unauthorized absence for 47 days amounting to misconduct would have been a disproportionate and harsh punishment, untenable in law.

17. HT Ltd relied on Rule 18(1) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957 which says that without permission a working journalist cannot leave his post. That provision, in our opinion is of no assistance to the appellant. HT admitted in its submissions in the writ petition pending reference in the Labour Court to having granted leave to the workman. It cannot now argue that the application for leave had to be made at least 30 days prior to the date from which leave is sought. Non-adherence to this technical stipulation is of no relevance when the employer did in fact authorise the leave.

18. As far as the Labour court's determination is concerned, the award given by the Labour Court was modified by the learned Single Judge on account of age of superannuation being attained by the workman during the pendency of the writ petition as also in light of the time elapsed between the order of the Labour Court and the date of disposal of the writ petition. The legal heirs of the workman late Mr. Arun Kumar urged for payment of Provident Fund and Gratuity amount in addition to the award given by the Labour Court and as modified by the learned Single Judge. It may be noted here that the workman had already attained the superannuation age at time of the order given by the learned Single Judge. It was open to the learned Single Judge to provide benefits like Provident Fund and Gratuity amount as well to the workman in his order but he decided not to do so. He modified the award given by the Labour Court appropriately in light of the facts of the case and his award does not suffer from any illegality to

warrant this Court's interference in its jurisdiction over this LPA. Till date, an amount of Rs. 21,71,272 (Rs. 15,00,000 and an interest of Rs. 6,71,272 accrued thereupon) towards satisfying a portion of back wages is the only part of the award as modified by the learned Single Judge that has been complied with by the appellant.

19. It is argued by HT Ltd that the burden of paying back-wages should be softened. Here it is highlighted that the workman never attempted to secure any alternative employment despite the fact that several opportunities were available during the pendency of the industrial reference. It was submitted that the workman was a journalist with nearly two decades' experience. He could have responded and secured employment in some other organisations; the management of HT relied upon vacancies in newspapers and journals that were advertised during the pendency of the reference to the Labour Court. This conduct, submitted HT Ltd's counsel, could not be overlooked and the workman's failure or omission to seek employment, to mitigate the employer's liability, had to be appropriately considered. Counsel also argued that this Court should take into account the trend of decisions which indicate that payment of full back wages amounts to a windfall that should be avoided because the employee would be earning without working.

20. It was argued on behalf of the workman that firstly when he was terminated from employment he was medically not in a position to secure employment; further he was impaired or handicapped because HT Ltd had widely advertised that it had nothing to do with him and that he had ceased to be in its services. It was next submitted that having worked at a fairly senior level, the workman felt that he would not be given an appropriate job even if he had applied because of the background of circumstances. The workman's counsel submitted that the award in this case was made in 2002. At least at that time, the management could have taken him back in service; instead it chose to file a writ petition, during pendency of which the workman was given only last drawn wages, under Section 17-B of the Industrial Disputes Act.

21. There is no doubt that the question of whether to grant back wages and if so, to what extent, is a matter of discretion ? that has to be judiciously exercised, taking into account all the established facts and circumstances of the case. Here, the management to an extent called upon itself in firstly insisting that the order of termination was justified and then contradicting itself in saying that the workman had voluntarily, by conduct abandoned employment. The falsity of its plea regarding not having received a leave application or not having sanctioned it, was exposed before the Labour Court and the Single Judge. The workman had to fight to vindicate himself, for more than ten years. A small amount of Rs. 2000/- per month was directed to be paid for a period of time. Ultimately, he succeeded and obtained a reinstatement order. The management chose not to utilise his services; instead it approached this court in writ proceedings. The pendency of its writ petition culminated in the inability to grant reinstatement

because the workman attained the age of superannuation; he even died without securing the relief he sought for. The Single Judge has actually modified the award and granted HT Ltd some relief, by directing it to pay a limited amount towards dues for the period the writ petition was pending. In the circumstances, the question is whether the direction to pay balance back wages is warranted.

22. During the hearing the appellants had expressed their willingness to settle the entire dispute by paying a lump sum amount over and above the Rs. 15,00,000/- (plus accrued interest thereon) received by the workman's heirs. The workman's heirs however, wished that apart from these amounts, further amounts towards employers' contribution under the Employees Provident Funds Act, and gratuity too had to be paid, given that the award of reinstatement was not upset. It was also stated by the employee's widow that since the workman had to face acute hardship and had fought to vindicate his honour as a journalist, this court should rule on the justification or otherwise of entitlement to back wages since he had to face penury and acute hardship.

23. On the question of withholding part of back wages because the employee did not work, the management's arguments ring hollow. The appellant obstinately refused reinstatement even when it was ordered and obtained an interim order, suspending operation of award. Secondly, the instances cited where the workman did not obtain employment relating to the earlier period; there is something relevant in the arguments on his behalf that having been stigmatized, in a way, through the appellant's public advertisement, he felt that securing meaningful employment would have been a difficult task if not an impossible one. The court cannot overlook that the respondent was a journalist with some experience; he was diagnosed with acute diabetes and abscess of liver and at the time of his termination, had two small children. The subjective compulsions, which drove him not to seek employment, however cannot become the main focus of this proceeding, which will substantially, in such case, obscure the impact of the appellant's illegal action. As regards the "new rule" this court would recollect a previous ruling on the "no back-wage without work" "rule" in the following observations from *The Principal Delhi College of Arts & Commerce v. Sunita Sharma & Anr* 2013 (3) ILR (Del) 1743:

"9. Counsel for the college had argued that the respondent would gain undue benefit by the dismissal of this appeal, since she would be entitled to full arrears of salary without working on the post. This Court is of opinion that the College invited such a result, if it can be characterised as such, upon itself by preferring this appeal. To compound this, it sought a stay of the impugned judgment, which resulted in the respondent being denied work and the entitlement to earn salary. Furthermore, this Court is of opinion that in such cases, there cannot be a blanket "no back-wage" rule as is sought to be urged. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often include damages for loss of profit, and further

direct payment of interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered, is entitled to interest for the duration the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e. a managerial cadre official in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of public employment, where the employee is terminated for no justifiable cause, surely restitution has to be likewise complete. Therefore, the Court upholds the impugned judgment and order of the learned single judge as regards full consequential benefits to the respondent."

24. The workman was dismissed on 20.03.1991; his reinstatement was ordered on 04-01-2002. The Single Judge noticed that as on 17th May, 2004, the amounts due according to the management, under the award, were in the range of Rs. 33,00,000/- (Rupees thirty three lakhs) of which Rs. 15,00,000/- were directed to be paid. This order was complied with; the amounts were ordered to be kept in a fixed deposit. The workman was directed to be paid Rs. 9157.96 per month as last drawn wage under Section 17-B on 01-09-2004. He attained the age of superannuation on 19th December 2009.

25. The remaining part of the award would be (1) balance back wages till date of award; (2) back wages during pendency of the writ petition till 19-12-2009. It is a matter of record that arrears of last wage drawn to the extent of Rs. 3,00,000/- was paid for the period up to September 2004 (from the date of the award) and the workman had been permitted to withdraw the sum of Rs. 15,00,000/- with accrued interest. Taking the totality of circumstances, including the fact that the workman did not make an attempt to secure employment, and that during the pendency of the reference, Rs. 2000/- was directed to be paid from 05-03-1993 (which was upheld by this court), and that w.e.f. 01-09-2004, payments due under Section 17-B, ends of justice would be sub-served by the following directions:

(1) The appellant shall pay the balance amount of back wages accruing and payable to the workman as on the date of the award, with interest at 6% per annum from the date of award till date of order in W.P.(C) 3482/2003, i.e., 03.06.2010;

(2) As far as the future wages for the period from the date of the workman's superannuation to the date of the order in W.P.(C) 3482/2003, i.e., 03.06.2010 is concerned, it is noticed that a sum of Rs. 9157.96 was directed to be paid each month. This order bound the parties for about 8 years, till the writ petition was decided. In the circumstances of the case, it would meet the ends of justice if the workman's legal heirs are paid a sum of Rs. 5,00,000/- or 50% of back wages (whichever is less) for this period.

(3) The management shall discharge the above liabilities (which are over and above the amounts received under orders of court) within eight (8) weeks from today failing which the amount owed to the legal heirs of the workman shall incur

interest at the rate of 9% per annum, (amounts already paid are permitted to be adjusted).

26. The appeal stands dismissed but in terms of the modification indicated in the above paragraph. There shall be no award as to costs.