
(2004) 02 AHC CK 0071

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 28557 of 1996

H.N. Jain

APPELLANT

Vs

National Textile Corporation Ltd.

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 14
Penal Code, 1860 (IPC) — Section 509

Citation : (2004) 2 AWC 1807

Hon'ble Judges : Yatindra Singh, J; V.C. Misra, J

Bench : Division Bench

Advocate : Yashwant Verma, for the Appellant; V.B. Singh and Vijai Sinha, for the Respondent

Final Decision : Allowed

Judgement

Yatindra Singh, J.

1. The only question involved in this writ petition is, "Whether an employee is entitled to encashment of earned leave for the period he could not work due to illegal termination of his service, after it is struck down by a court of law".

THE FACTS

2. The petitioner was an employee of National Textile Corporation Ltd. (the Corporation). He was posted as General Manager of Bijli Cotton Mills, Hathras, one of the Mills owned by the corporation on 17.6.1981. His services were terminated by the corporation on 18.1.1984 after giving him three months salary in lieu of notice in accordance with the terms and conditions of service. The petitioner filed a writ petition no. 1272 of 1984. The Court held that:

(a) The Corporation is a State within the meaning of Article 12 of the Constitution of India.

(b) The petitioner is entitled to protection of Article 14 of the Constitution of

India.

(c) The terms and conditions of service, permitting the Corporation to terminate the services of a confirmed employee after giving him three months notice or salary in lieu thereof, is illegal as it is against public policy.

3. On the aforesaid findings, the writ petition was allowed on 4.8.1986 and the following order was passed:

"In the result, the writ petition succeeds and allowed. The order dated 18.1.1984 is quashed. As a result of quashing of the said order, the petitioner would be entitled to be reinstated to the post which he held earlier to the passing of that order. He will further get the entire arrears, which he may be entitled to and was deprived of due to the illegal termination. The petitioner will also get costs from respondent no. 2."

4. In pursuance of the aforesaid order, the petitioner filed a representation for grant of arrears. It is not disputed that the petitioner has been given his arrears except encashment of earned leave for the period he could not work due to illegal termination of his service. The corporation by its letter dated 23.8.1994 informed him that:

"All kinds of leave including Earned Leave is not admissible to you for the intervening period and your representation in the matter, therefore, stands rejected."

5. The petitioner filed an appeal which was dismissed by the Board of Directors on 17.1.1996. Hence the present writ petition .

THE PARTIES' SUBMISSIONS

6. The counsel for the petitioner submits that

(a) Once the termination order is quashed by the Court, the result is that the petitioner is deemed to be in service throughout.

(b) He is entitled to salary and all other benefits.

(c) Earned leave can not now be availed as the petitioner has retired but it can be encashed and he is entitled for the same.

7. The counsel for the respondent does not dispute that the petitioner is entitled to salary and other consequential benefits but according to him,

(a) Earned leave or its encashment can be availed only if the petitioner had actually worked.

(b) The petitioner did not work and he is entitled neither to the earned leave nor its encashment.

THE DECISION

Order Set Aside - Deemed To Be In Service

8. The question regarding consequence of quashing of a termination order has been considered by the courts. It has been held that in such an event, the employee is deemed to be on duty and in service, he is entitled to all remuneration that he might have received, had his service was not terminated. This is clear from the following observation:

(a) "In this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil courts is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not on such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work". (Devendra Pratap Narain Rai Sharma Vs. State of UP AIR 1962 SC 11334).

(b) "Once a dismissal order is quashed, it must be deemed in the eye of law that the dismissal never took place. Hence it must be deemed that the petitioner was in service throughout." Sahngoo Ram Arya Vs. Secretary, Minor Irrigation Department and Rural Engineering Services and Others,

9. The courts have also considered the question whether the principle of "no work and no pay" has any application in this situation and has negated the same. It is clear from the following observation:

"It was submitted by learned Senior Counsel for the respondent-authorities that no back salary should be allowed to the appellant as the appellant did not work and therefore, on the principle of "no work, no pay", this amount should not be given to the appellant. This submission of learned Senior Counsel does not bear scrutiny as the appellant was always ready and willing to work but the respondents did not allow him to work after 31.1.1990." (JN Srivastava Vs. Union of India and another (1998) 9 SC 559).

10. However, it is only when the termination order is set aside and not in a case where merely punishment is varied, even though the employer is reinstated with continuity of service and consequential benefits. This is clear from the case of A.P.S.R.T.C. and Another Vs. S. Narsagoud, (the Narsagound case).

11. In the Narsagound case, the employee was a Bus conductor. He was charged with unauthorised absence from duty. A departmental inquiry was conducted for which charges were proved and his services were terminated. He raised industrial dispute. The Labour Court upheld the finding of disciplinary inquiry but held the punishment to be excessive. The Court ordered reinstatement of the employee with continuity of service but without back wages. The employer reinstated the employee but did not give him periodical increment which he would have earned had he been in service. The High Court directed for granting

all increments. The employer filed an appeal before the Supreme court. The Supreme Court set aside this order and held that:

"In our opinion, the employee after having being held guilty of unauthorised absence from duty can not claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of community in service".

12. Of course, this is subject to the order passed at the time of setting aside the termination order. The courts, some times, according to the facts of the case and especially in the case of temporary or ad-hoc employees are refusing to grant back wages or grant only part of back wages. Some Allowances Are Granted - Only On Working

13. Generally an employee, on termination order being set aside, is entitled to salary and all other benefits. But does it include all kinds of allowances also. Does the word "salary wages" include every allowances that are given even for working in special conditions? This has been considered in,

(i) Bharat Electronics Vs. Industrial Tribunal AIR 1995 SC 1080 (The Bharat Electronic Case),

(ii) Dilbagh Rai Jarry Vs. Union of India (UOI) and Others,

14. In the Bharat Electronic case, a workman had committed misconduct. The employer applied before the Industrial Tribunal for the permission to terminate his services by paying him wages for one month. Night shift allowance was not included in this amount. The workman contended that permission should be refused as in one month wages night shift allowance was not included. The Industrial Tribunal refused to grant permission on the ground that one month wages were short by night shift allowance. The Supreme Court has set aside the order and held that it was not necessary to include the night shift allowance while giving him wages as it is only given when a person works in the night shift. The Court has held that:

"The workman had to earn night shift allowance by actually working in the night shift and his claim to that allowance was contingent upon his reporting to duty and being put to that shift."

15. In the DR Jerry case, the employee was a Guard in the Northern Railway. He was prosecuted u/s 509 of IPC and was given three months simple imprisonment. His conviction was maintained by the High Court though his period of sentence was reduced. His service was terminated on the ground that he had been convicted. His appeal was allowed in the Supreme Court and he was acquitted. He filed a writ petition in the High Court for reinstatement. It was allowed holding that his dismissal was void. He was reinstated in services. He filed an application before the Prescribed authority under the Payment of Wages Act claiming his salary for the period he could not work . The prescribed

authority partly allowed the application but refused to grant travelling/running allowances. The appeal of the employee was allowed and the application was dismissed on the ground of limitation. The High Court upheld the order. The Supreme Court held that the claim was not barred by time and restored order of the Prescribed authority. It also held that the employee was not entitled to travelling/running allowance as it is given if the employee had travelled or run. The Court has held:

"[T]he deduction in the instant case is akin to this category covering the entire deficiency for the period of absence, the only difference being that here, the appellant's absence from duty was involuntary. Such absence in official parlance is euphemistically called "Inactive service" if the employee is later on reinstated."

"Travelling allowance or running allowance is eligible if the officer has travelled or run, not otherwise."

16. This shows that on order of termination being set-aside, the employee is treated to be in service, he is entitled to his salary (unless otherwise directed) but is not entitled to those allowances that accrue to him only if he had worked in the conditions entitling him to draw allowances. Is the earned leave or its encashment, a kind of benefit or akin to an allowance that accrues only if a person actually works?

Earned Leave - Entitled

17. The corporation has annexed the Leave Rules along with counter affidavit¹. There is nothing to suggest that earned leave is akin to the night shift or travelling allowance that accrue only if the person is kept in the night shift or has travelled. The earned leave becomes admissible in case the person is in service on duty. In this case the petitioner could not work due to the fault of the corporation. And once the order is quashed, he is treated to be on duty and in service: he is also entitled for earned leave. He has retired; he may be given its encashment as admissible in accordance with law.

CONCLUSION

18. Our conclusions are as follows:

(a) When an order of termination is set-aside, the employee is treated to be on duty and in service. He is entitled to his salary (unless otherwise directed) but is not entitled to allowances that accrue to him only if he had worked in the condition entitling him those allowances.

(b) However, the proposition in clause (a) is applicable in case of permanent / confirmed employee and only when the termination order is set aside and not in a case where merely punishment is varied even though the employee is reinstated with continuity in service and consequential benefits.

(c) There is nothing to suggest that earned leave is akin to the allowances (like night shift or travelling allowance) that accrue only if the person works in special

condition on which they are given.

18. In view of our conclusions, the writ petition is allowed. The order dated 23.8.1994 and 17.1.1996 are quashed. The respondent may encash the earned leave, for the period that the petitioner could not work due to illegal termination of his services, in accordance with law within three months from the date of receipt a certified copy of this order. Date: 13. 2. 2004 SKS

The relevant rules regarding earned leave are as follows:

3.2 Earned Leave means leave earned in respect of periods of services with the Corporation and granted on full pay.

6.1 Earned Leave on full pays: An employee will be credited with 30 days" and 31 days" Earned Leave in alternative calendar year. Earned leave will be on full pay and allowances.

6.4 When an employee is appointed on or after 1st of the calendar year, earned leave will be credited to to his leave account at the rate of 2 1/2 days for each completed month of service and one day for every 12 days.

6.6. When an employee has taken any leave/(not including casual leave) other than earned leave in a half year the credit to be afforded to his leave account at the commencement of the next half year shall be reduced by 1/11th of such leave e.g., if an employee has taken 11 days half pay leave, the credit to his leave account will be reduced by 1 days.

7.1 Only earned leave on full pay is encashable and not any other leave such as commuted leave half-pay leave, casual leave etc.