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(2014) 11 DEL CK 0255

In the Delhi High Court

Case No : Writ Petition (Civil) 3256/2013

Lufthansa German Airlines — APPELLANT

Vs

Sudhin Sarkar — RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:
Constitution of India, 1950 — Article 226, 227, 311
Delhi Shops and Establishments Act, 1954 — Section 30
Industrial Disputes Act, 1947 — Section 10, 2(oo), 2(s), 25B, 25F

Citation : (2015) 147 DRJ 227

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Alok Bhasin and Poonam Das, Advocate for the Appellant; Mridula Ray Bhardwaj for Sumant Bhardwaj, Advocate for the Respondent

Judgement

Suresh Kait, J.

W.P. (C) 3256/2013

1. Vide the present petition, the petitioner has assailed the award dated 31.12.2012, passed by the Central Government Industrial Tribunal No. 1, Karkardooma Courts Complex, Delhi, (in short ''the Tribunal''), whereby a sum of Rs.10,00,000/- each has been directed to be paid in favour of the respondents No. 1 and 2/workmen.

2. Case of the petitioner Airlines as averred in the petition is that the respondent Nos. 1 and 2 were employed with the petitioner as Supervisors and were performing supervisory and managerial duties. Their services could be terminated by the petitioner in exercise of powers vested in it under Clause 8.2.4 of the Rules of Employment, on payment of requisite salary in lieu of notice. Having been employed and worked as Supervisors, the respondents No. 1 and 2 did not fall under the definition of ''workman'' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 (for short ''ID Act'').

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3. The petitioner, therefore, raised a preliminary objection against the statement of claim filed by the respondents No. 1 and 2 before the learned Tribunal that the respondents were employed as Supervisors and were exclusively performing supervisory duties and, as such, they were not ''workman'' with the meaning of Section 2(s) of ID Act, and, therefore, the learned Tribunal had no jurisdiction to adjudicate upon the reference or to grant them any relief.

4. Despite, having examined the evidence on record, the learned Tribunal recorded a categorical finding that the respondents were employed as Supervisors and that their job was to supervise flights etc. There were 13 workmen working under them. The relevant findings recorded by the learned Tribunal are as under:-

"....However, during the course of their cross-examination, they conceded that they used to supervise flights as supervisors. According to them, it was part of their job to supervise flights. They used to assign duties to subordinate employees to carry out different operations in flight handling. Both of them admit that they used to brief employees before arrival of flight. According to them, they used to ensure that all operation of flight handling should be completed within scheduled time so that flight may take off in time. It has been admitted by them that they used to exercise powers to waive excess baggage and upgrade tickets from economic class to business class. They used to write details of overtime work performed by the employees on their attendance sheet. They had verified overtime work performed by the employees on Sheets Ex.WW1/M1 to Ex.WW1/ M2, Ex.WW2/M6, Ex.WW2/M7 respectively. According to them they were competent to recommend leaves for their employees. They used to conduct surprise checks of flight handling operations. Shri Baretto admits that letter Ex.WW1/7 was signed by him for the Station Manager. He had signed Ex.WW1/ M8 to Ex.WW1/M$ for the Airlines. Both of them candidly admit that telephone facilities were provided by the Airlines at their residence."

5. Based on the evidence noted above, the learned Tribunal in paras 25 and 26 of the impugned order recorded as under:-

"25. When facts unfolded by the claimants, Shri Parvez Khan and Shri G.Rajkumar are closely appreciated, it came to light that the claimants were entrusted with supervisory duties (functional responsibility and the disciplinary authority) on employees upto Group E-2 and entrusted with more complex task within the scope of work of employees of Group E-2 combined with functional responsibilities and/or functional authority for employees upto Group E-2, besides supervisory duties towards passenger/cargo sales, passenger/cargo service and station operations. To perform these duties, claimants were allocating duties to 13 employees working under them. They used to supervise work of those employees. Claimants supervise flights in their capacity of supervisors. They used to assign duties in respect of flight handling operations to the employees working under them. They used to brief employees and ensure that flights handling operating were carried out within the scheduled time.

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Besides these supervisory duties, they used to recommend overtime to their subordinates on their attendance sheets and recommend leaves for them. Claimants were competent to exercise authority to waive excess baggage, upgrade tickets from economic to business class and settle complaints of customers. Therefore, it becomes crystal clear from duties performed by the claimants that they used to supervise work of 13 employees who were working under them. They used to keep watch on the work performed by their subordinates, besides making them to work in scheduled time. Surprise checks of flight operations were made by them with a view to correct mistakes of their subordinates. Thus, it is emerging over the record that duties performed by the claimants were of supervisory in nature.

26. As pointed out above, mere performance of supervisory duties would not take out an employee from the definition of workmen. To push him within the exceptions contained in third limb of section 2(s) of the Act, it is to be established that such employee draws more that Rs.1600.00 per mensem as his wages. Here in the case, Shri Sudhin Sarkar was drawing emoluments of Rs.25,301.00 per men sum, while Shri A.B. Baretto, was drawing total emoluments of Rs.28,123.00 per men sum inclusive of fixed allowances. Thus it is apparent that the Airlines could bring it over the record that duties performed by the claimants were of supervisory in nature and they were drawing more than Rs.1600.00 per month as their wages. Consequently, the Airlines had been able to project that the claimants were supervisors."

6. Mr. Alok Bhasin, learned counsel appearing on behalf of the petitioner submitted that despite having recorded categorical finding that the petitioner duly established on record that the duties performed by the respondents were supervisory in nature and they were drawing more than R.1,600/- per month as their wages, the learned Tribunal held that the petitioner was precluded from challenging the status of the respondents No. 1 and 2 as ''workman'', having given them benefits under the settlements entered with the Lufthansa Employees Union. Accordingly, hold that the termination of services of respondents amounted to retrenchment and that non-payment of retrenchment compensation invalidated their termination of service.

7. Mr. Bhasin submitted that the aforesaid findings recorded by the learned Tribunal are erroneous and contrary to the settled position of law. The Tribunal is the creation of the Industrial Disputes Act, and, as such, it can adjudicate upon only such matters referred under Section 10 of ID Act. It is empowered to adjudicate upon a dispute only in respect of employees, who fall within the definition of ''workman'' under Section 2(s) of ID Act.

8. Further submitted, the learned Tribunal failed to appreciate that the Union, viz., the Lufthansa Employees Union was the Union of employees and was not restricted to the workmen falling under Section 2(s) of ID Act, nor the settlements were entered into under the Industrial Disputes Act. The Union represents the employees as a whole and not merely those falling within the

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definition of ''workman'' as per Section 2(s) of ID Act, and that being the reason, the settlement between the Lufthansa Employees Union and the petitioner has been titled as a ''collective agreement''. The settlement provides annual increase in salaries not only to auxiliary staff but also the employees in Grade AT-1 to Grade D. Therefore, there was no question of petitioner treating them as workmen.

9. Mr. Bhasin submitted that the learned Tribunal further committed error by holding that the termination of services of respondents was in terms of Clause 8.2.4 of the Rules of Employment. However, the learned Tribunal failed to notice that services of the respondents were terminated vide letter dated 17.05.1999, without causing any stigma, under Clause 8.2.4 of the Rules of Employment read with Section 30 of the Delhi Shops and Establishments Act, 1954. It empowers the Management to terminate the services of an employee by giving one months'' notice or salary in lieu thereof.

10. The learned Tribunal also failed to notice that the petitioner vide its letter dated 22.05.1999, in reply to letter dated 21.05.1999, received from respondents, brought to their notice that they were working as Supervisors and had been performing supervisory duties. The respondents had been indulging in certain activities which were highly prejudicial to the interest of the organization in general and discipline in particular. They were intimidating and threatening the employees of dire consequences in case they did not provide full support to the case of Mr. Chandrashekhar, the President of the Union, who was under suspension pending enquiry. It was further brought to their notice that they had created an atmosphere of fear and tensions at the Airport, making the employees feel insecure.

11. Mr. Bhasin submitted that the activities being carried on by the respondents were totally incompatible with the discharge of their duties as supervisors and, as such, the Management could no longer repose any confidence in them. Not to cause any stigma on their career and to enable them to get a job elsewhere, their services were terminated in accordance with the Rules of Employment applicable to them. Therefore, in these circumstances, termination of services of the respondents was valid and in accordance with law.

12. Mr. Bhasin further submitted that the termination of services for the reasons of loss of confidence, cannot, under law, be regarded as retrenchment, as has been wrongly and erroneously held by the learned Tribunal. Neither the provisions of Section 25F nor Section 25N of ID Act, requiring prior permission before retrenching the workmen are attracted, as has been erroneously held by the learned Tribunal.

13. Mr. Bhasin, submitted that the respondent No. 1 has completed 10 years in service, whereas respondent No. 2 has completed 20 years of service, however, the learned Tribunal has granted compensation of Rs.10,00,000/- each in favour of both the respondents. He submitted that the quantum of compensation cannot

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be same for the lesser service and for more service.

14. While concluding the arguments, learned counsel for the petitioner submitted that the impugned award is patently illegal. Having held that the petitioner had succeeded in proving that the respondents were Supervisors and discharging supervisory duties as functional heads, the learned Tribunal ought to have dismissed the reference. It had no jurisdiction to adjudicate upon the reference on merits and grant any relief. Even otherwise, the impugned award has been passed holding that the termination of services of the respondents amounted to retrenchment in contravention of Section 25N of ID Act, is erroneous and contrary to the settled position of law and, is thus, liable to be quashed.

15. To strengthen his arguments, learned counsel for the petitioner relied upon the case of Municipal Committee, Sirsa Vs. Munshi Ram, , wherein the Apex Court held as under:-

"If the order of termination indicates that it is a termination simpliciter and does not cast any stigma on the employee by the said order of termination the mere fact that there was an inquiry into his conduct earlier would not by itself render the termination invalid. Applying the said principle, if we see that the order of termination in the present case is an order of discharge simpliciter. But in the course of the inquiry, the Labour Court noticed that on an earlier day, there was some incident where the administrative officer found some lacunae in the working of the respondent but based on that no charge-sheet was served nor inquiry was conducted. However, the appellant came to the conclusion that it is not in its interest to continue respondent''s services, hence, discharged him. In the background, the mere fact that there was a misconduct on the part of the respondent which was not enquired into ipso facto does not lead to the conclusion that the order of the termination is colourable and in fact is a punitive order."

16. Learned counsel relied upon case of Parshotam Lal Dhingra Vs. Union of India (UOI), , wherein the Apex Court held that:-

"If the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."

17. Also relied upon case of Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, , wherein the Apex Court held that:-

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".....Once bona fide loss of confidence is affirmed the impugned order must be considered to be immune from challenge. The opinion formed by the employer about the suitability of his employee for the job assigned to him even though erroneous, if bona fide, is in our opinion final and not subject to review by the industrial adjudication. Such opinion may legitimately induce the employer to terminate the employee''s services; but such termination can on no rational grounds be considered to be for misconduct and must, therefore be held to be permissible and immune from challenge."

18. On the same preposition, learned counsel for the petitioner has also relied upon case of Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, , wherein the Apex Court held that:-

"10. Retrenchment as defined in section 2(oo) of the Industrial Disputes Act as held by this Court in several cases means termination of service for any reason whatsoever otherwise than punishment inflicted by way of disciplinary action and the other exceptions indicated therein. In the present case though no formal domestic inquiry had been held the employer took the stand in the adjudication that termination was grounded upon loss of confidence and substantiated that allegation by leading evidence. The legal position firmly established is that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open to the employer to ask for such opportunity in the course of adjudication. In the facts of the present case, the order of separation grounded upon loss of confidence has been justified before the Labour Court and the Labour Court has come to that conclusion upon assessment of the evidence.

11. Several decisions were relied upon by appellant''s learned counsel in support of his contention that the conclusion in Chandu Lal''s case that loss of confidence amounted to stigma was wrong. We have not been shown a single case other than Chandu Lal''s where this aspect has been directly considered. Whether termination is grounded upon stigma would not vary from case to case depending upon whether it involves a government servant or a workman. But the procedural safeguards appear to be difference when termination is sought to be founded upon stigma. if disciplinary inquiry has not preceded the prejudicial order in the case of a Government servant the action would be bad while in the case of a workman the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act even though no inquiry had been undertaken earlier."

19. On the other hand, Ms. Mridula Ray Bhardwaj, learned counsel appearing on behalf of both the respondents submitted that the respondent No. 1 joined the services with the petitioner Airlines on 01.11.1988 as Passenger/Operations (Airport) Agent in Grade ''D'' and he was made permanent employee with effect from 01.05.1989. The respondent No. 2 joined the services on 01.01.1979 as Passenger Handling Agent at the Airport in Grade ''D'' and made permanent with effect from 05.06.1979. The duties performed by the respondents were

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passengers check-in and arrival duties, lost and found, weight and balance documentation (loan sheet) aircraft handling (ramp agent). The Salary Grades A to G for general staff as described in the Rules of Employment, India, are of workmen. All the staff members in these Grades were eligible to be members of the Union, which is recognized by the Management. Wage negotiations for these Grades were being held annually between the Management and the Union. A separate Salary Grade called ''S'' Grade exists for supervisory staff, which is not part of the Rules of Employment governing workmen.

20. Ms.Bhardwaj, learned counsel submitted that the respondent No. 1 was given the title of ''Supervisor'' with effect from 01.06.1993 in salary grade ''F''. Though given the post and title of Supervisor, respondents did not have any authority which is generally exercised by a Supervisor. She submitted that suddenly the petitioner issued a letter dated 17.05.1999, whereby terminating the services of the respondents by paying one month''s salary in lieu of notice in terms of Clause 8.2.4 of Rules of Employment read with Section 30 of the Act, without giving any reasons. Neither any explanation was called nor any inquiry was held against them. They were permanent employees and their services could not be terminated simipliciter in the manner it was done by the petitioner Airlines.

21. Vide letter dated 21.05.1999, the respondents questioned the aforesaid act of the petitioner and demanded reinstatement in service. The respondents were victimized because they were defending Mr.P.V. Chandrashekhar, the President of Lufthansa Employees Union, against whom a domestic enquiry was constituted.

22. In affidavit Ex. WW1/A filed by respondent No. 2, it is stated that service rules Ex. WW1/4 laid down various conditions, such as working time of the employees, holidays, overtime/night work, leaves, provident fund, gratuity etc.. These service rules govern qua employees in the category of workmen upto grade ''G'', but do not govern officers cadre. Thus, the respondent No. 2 was given title of ''Supervisor'' without any power or authority of Supervisor.

23. Learned counsel submitted that respondent No. 1, Sudhin Sarkar had filed his evidence by way of affidavit Ex.WW2/A on the same lines. However, during course of their cross-examination, the respondents conceded that they used to supervise flights as Supervisors. According to them, it was part of their job to supervise flights. They used to assign duties to the subordinate employees, who carry out different operations in flight handling. Both of them admitted that they used to brief employees before arrival of flights. They used to ensure that all operations of flights handling should be completed within the scheduled time so that flight may take off in time. They used to exercise powers to waive excess baggage and upgrade tickets from economy class to business class.

24. Mr. Parvej Khan, in his affidavit Ex.MW/A, stated that the respondents were supervising flights as part of their duties. They were exclusively discharging duties of supervisory and administrative nature. However, during course of cross-examination, respondents conceded that in service rules, classification of

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employees have been made from Group A to Group G. The Petitioner Airlines used to settle service conditions of employees from Group A to Group G, accordingly settlements Ex. WW1/8 to Ex.WW1/10 were entered into by the petitioner Airlines with the Union.

25. Ms. Bhardwaj, learned counsel further submitted that it is not disputed by the petitioner that the Union used to enter into the settlement in respect of wages and service conditions for the employees of workmen category only. Job clarification detailed in Appendix 1B, annexed with service rules Ex. WW1/4, made it clear that service rules specifically mention that rights such as overtime, conveyance, medical and other conditions of service are only available for workmen. Clause 8.3.3 of Rules of Employment Ex. WW1/4 stipulates that petitioner Airlines may observe respective regulations of the Industrial Employment (Standing Orders) Act, 1946, concerning case of misconduct. Therefore, it is crystal clear that the petitioner Airlines used to treat the respondents as workmen within the meaning of Section 2(s) of ID Act.

26. Ms. Bhardwaj, learned counsel submitted that in view of evidence and facts discussed above, if the respondents used to perform supervisory functions, it would not oust them out of arena of industrial laws. By its own representation, the petitioner Airlines made the respondents well aware that they were treated as workman. The status of workman, clothed on them by the petitioner Airlines, could not be taken away at the juncture when they sought redressal of their grievances from the learned Tribunal. Therefore, the learned Tribunal recorded that the respondents do fall within the ambit of ''workman'', as enacted by Section 2(s) of ID Act.

27. She submitted that in their statement of claim, the respondents have specifically stated that they were given title of ''Supervisors'', but they did not have any authority to exercise the same. The respondents did not have any power or authority to sanction leave to any employee, sign the duty roster of the employees prepared for each month. The workmen could not authorize or sanction any payment of any employee. Though workmen were given the titles of ''Supervisors'', they were basically working as they had no power of supervision over persons working with them in the lower category, in as much as, there was no disciplinary power or authority given to them. Even they had no power to issue or sign warning letters, order of suspension or termination of services of any staff whatsoever. The respondents were to report the matter to the Station Manager or the Deputy Station Manager but they had no power to punish any of the staff. So far as functional responsibility is concerned, the respondents were working under the Station Manager/Deputy Station Manager, who had the overall power/authority and control on all the workmen working at the Airport.

28. In support of her case, learned counsel for the respondents has relied upon a case of J.K. Cotton Spinning and Weaving Mills Company Ltd. 1963 (II) LLJ 435, wherein the Apex Court held that the industrial disputes are to be adjudicated upon with the concept of social justice. Relevant portion of the same reads as

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under:- "Indeed the concept of social justice has now become such an integral part of industrial part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claim of social justice in dealing with industrial disputes. The concept of social justice is not narrow or one sides, or pedantic, and is not confined to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basic idea of social economic equality and its aim is to assist the removal of social economic disparities and inequalities."

29. Further relied upon case of Ahmedabad Mfg. and Calico Ptg. Co. Ltd. Vs. Ram Tahel Ramnand and Others, , whereby the principles laid down in J.K. Cotton Spinning and Weaving Mills Company Ltd.''s case (supra) have been reiterated.

30. I have heard learned counsel for the parties.

31. On perusal of Clause 8.2.4 of Rules of Employment Ex.WW1/4, it emerges that a right has been accorded to the petitioner Airlines to dispense with the services of employees by giving salary for one month in lieu of notice thereof. Whether the Tribunals or Courts should shake off its hands by interpreting provisions of the above Clause and answered the dispute by applying it to the facts of the case?

32. On a plain reading of Clause 8.3.4 of Rules of Employment, it reveals that the said Clause enables the petitioner Airlines to resort to the policy of ''hire and fire'' since it gives unguided powers to it to terminate employment of even a permanent employee under the stipulations contained therein. It also empowers the petitioner Airlines to terminate the employment of any employee irrespective of the circumstances in which it was entered into or the nature or extent of work for which he was employed. It is apparent that the contract in the form of Clause 8.2.4 Ex.WW1/4 was stipulated as a devise to escape applicability of the definition of retrenchment. Industrial dispute Act does not recognize the employer''s right to employ labour on terms contrary to the provisions of the Act. Therefore, the concept of social justice would require limiting the operation of aforesaid Clause 8.2.4 of the Rules of Employment to the cases only where managerial discretion of the employer to regularize the services of an employee is yet to be exercised. In a case where such discretion has been exercised and the employee renders continuous service of one year or more as contemplated by the provisions of Section 25B of ID Act, by use of the provisions of Clause 8.2.4 Ex.WW1/4, the employer cannot be allowed to breach the provisions of Section 25F or 25N of ID Act, as the case may be, besides provisions of Section 25G and 25H of ID Act.

33. It is an admitted fact that services of the respondents were dispensed with on 17.05.1999. At that time, the respondent Nos. 1 and 2 had rendered services of more than 10 years and 20 years respectively. They had unblemished service, which was appreciated by the petitioner Airlines by giving them upgradation from time to time. However, their unblemished service was dispensed with an

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unceremonious manner. Provisions of Clause 8.2.4 of Rules of Employment are limited to the cases where managerial discretion of the Airlines is to be exercised to regularize the services of the employees, therefore, these provisions were not to be exercised by the petitioner against the respondents, without following the provisions of Section 25F or Section 25N of ID Act.

34. There is another aspect of the matter which cannot also be lost sight of. The petitioner contended that the nature of duties and responsibilities of employee were in the supervisory nature, therefore, the respondents are not coming in the purview of definition ''workman'' as it is envisaged under Section 2(s) of the Industrial Disputes Act, 1947.

35. In the present case, the employees had admitted that they were also performing supervisory nature of work. It is very important to note that the respondents'' employees were also performing manual work in addition to the supervisory work. The entire analysis of evidence would not show that the employees were performing only the supervisory nature of job whereas the petitioner Management has been considering the respondents as workman. Therefore, the substantial nature of employment is to be tested for excluding an employee from the application of Industrial Dispute Act, 1947. I note, there is no document or material to show that the employees were only performing supervisory nature of work, which is essential in character for excluding the employee from the definition. Moreover, it also came on record that the respondents were performing duties in the nature of manual labour with other workmen.

36. In addition, the respondents have specifically stated that they were given title of ''Supervisors'', but they did not have any authority to exercise the same. The respondents did not have any power or authority to sanction leave of any employee and sign the duty roster of the employees prepared for each month. The workmen could not authorize or sanction payment of any employee. Though workmen were given the titles of ''Supervisors'', they were basically working as they had no power of supervision over persons working with them in the lower category, in as much as, there was no disciplinary power or authority given to them. Even, they had no power to issue or sign warning letters, order of suspension or termination of services of any staff whatsoever. They had no power to punish any of the staff. The respondents were to report the matter to the Station Manager or the Deputy Station Manager. So far as functional responsibility is concerned, the respondents were working under the Station Manager/Deputy Station Manager, who had the overall power/authority and control on all the workmen working at the Airport.

37. The issue raised by the petitioner is that respondent No. 1 served with the petitioner / Establishment only for 10 years and the respondent No. 2 served for 20 years, however, the Ld. Tribunal granted compensation of Rs.10,00,000/- each to both the respondents.

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38. It is not in dispute that the ld. Tribunal has not granted reinstatement in service. The Tribunal might have kept in mind the age of respondent No. 1, as he still has 10 years of service, whereas the respondent No. 2 attained the age of superannuation. Therefore, ld. Tribunal has compensated the respondent No. 1 keeping in view his age and service left and granted equal compensation for his 10 years service, whereas respondent No. 2 served with the Establishment for 20 years.

39. There cannot be a straight-jacket formula for awarding relief of reinstatement. All relevant considerations will enter into the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. But the discretion must be exercised in a judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. It should not be arbitrary, vague and fanciful, but legal and regular. The court may deny the relief of reinstatement and grant compensation in lieu thereof. The Tribunal has exercised its discretion keeping in view all the relevant circumstances. Moreover, the discretionary power used by the ld. Tribunal cannot be challenged under Articles 226 and 227 of the Constitution of India before this Court.

40. In view of above discussion and settled law, I find no merit in the instant petition. Accordingly, the same is dismissed with no order as to costs.

CM No. 6161/2013 (for stay)

With the dismissal of the present petition, the instant application has become infructuous. The same is accordingly dismissed.

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