

(2009) 03 CAL CK 0093

In the Calcutta High Court

Case No : No. F.M.A. No. 593 of 2002 and MAT No. 2281 of 2002

Md. Amir Hossain

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 24-03-2009

Acts Referred:

Road Transport Corporations Act, 1950 — Section 3

Citation : (2009) 2 CALLT 511 : (2009) 5 SLR 138

Hon'ble Judges : S.S. Nijjar, C.J.; Indira Banerjee, J

Bench : Division Bench

Advocate : L.C. Bihani and N.C. Bihani, for the Appellant; Debayan Bera and B. Roy, for the Respondent

Judgement

Indira Banerjee, J.—The appellant, being the writ petitioner, has appealed against the judgment and order dated 6th May, 2002 in C.O. 11152 (W) of 1992 (Md. Amir Hossain v. State of West Bengal and Ors.), in so far as the learned Single Judge held that the appellant would not be entitled to emoluments during the period of the departmental proceedings and till date of the said judgment and order, except for the subsistence allowance that he had already received.

2. The appellant was a Conductor of South Bengal State Transport Corporation (SBSTC), a statutory body established u/s 3 of the Road Transport Corporation Act, 1950, which is hereinafter referred to as the respondent corporation.

3. On 25th January, 1990, when the appellant was on duty on vehicle No. WMH 9672, plying on the route from Sikarpur to Durgapur, a Checking Squad of the respondent corporation boarded the vehicle at about 11.35 a.m.

4. The Checking Squad found that a passenger was travelling without ticket. A sum of Rs. 21.50 was realized from the said passenger towards bus fare for journey from Islampur to Durgapur. Thereafter the cash bag of the appellant was searched and an excess amount of Rs. 99.55 was found in the cash bag.

5. A charge-sheet dated 5th February, 1990 was issued to the appellant charging

the appellant with:

- i) Keeping un-booked one passenger of Rs. 21.50 paisa fare stage, who had been travelling from Islampur to Durgapur.
- ii) Excess collection in cash bag beyond actual collection till that time.
- iii) Negligence and carelessness in performance of duty.
- iv) Violation of regulation 25(2) of the SBSTC Employees Regulations.

6. The appellant was placed under suspension, and was called upon to show cause, within 10 days, why the appellant should not be punished, in the manner prescribed in Regulation 36 of the SBSTC Employees Regulations.

7. After seeking several extensions of time, on the ground of his alleged illness, the appellant ultimately submitted his explanation to the allegations in the charge-sheet, by a letter dated 17th June, 1990.

8. In the meanwhile, a memo No. 2574/SBSTC/90 dated 12th June, 1990 was issued whereby the appellant was allowed to resume his duty provisionally, with immediate effect, without prejudice, pending disposal of the disciplinary proceedings initiated against him.

9. The Enquiry Officer, after considering the explanation of the appellant and the materials and evidence on record, exonerated the appellant of the first charge of keeping un-booked a passenger of Rs. 21.50 fare stage, travelling from Islampur to Durgapur.

10. The Enquiry Officer, in effect, found that in an overcrowded bus, it was possible that one solitary ticket-less traveller might go un-noticed. The Enquiry Officer, however, held that the second, third and fourth charges, that is, the charges of excess collection in cash bag beyond actual collection till that time, negligence and carelessness in performance of duty and violation of Regulation 25(2) of the SBSTC Employees Regulations, were established.

11. By a memo No. 2434 SBSTC/TS-297 dated 17th February, 1991, the Managing Director of the respondent corporation being the Disciplinary Authority concurred with the findings of the Enquiry Officer in respect of the charges against the appellant and dismissed the appellant from service. Even though the Disciplinary Authority expressed his reservation with regard to exoneration of the petitioner of the first charge, the Disciplinary Authority proceeded to give the appellant, the benefit of doubt.

12. Being purportedly aggrieved by the order of the Disciplinary Authority, dismissing the appellant from service, the appellant filed a writ petition being C.O. No. 11152 (W) of 1992. In the writ petition, it was inter alia contended that the disciplinary proceedings were held in violation of the principles of natural justice and the punishment imposed on the appellant was disproportionate to the gravity of the offence.

13. By a long and reasoned judgment and order dated 6th May, 2002, the learned Single Judge inter alia held that the naming of the Enquiry Officer in the charge-sheet, even before consideration of the cause shown, evinced bias against the appellant and set aside the entire disciplinary proceedings including the order of termination of service of the appellant. The learned Single Judge also found that the punishment imposed was shockingly disproportionate to the gravity of the offence.

14. The operative part of the judgment and order is set out hereinbelow:

In that view of the matter and in view of the above discussions, the entire proceeding including the final award of punishment is set aside. The respondent authorities are directed to reinstate the petitioner in service within a fortnight from the communication of this order and will go on paying his salaries and other allowances as he could have got had he been in service all along till date. The authority, however, is not prevented from issuing a fresh charge sheet only on those two charges and to proceed in accordance with law, giving all opportunities to the petitioner and following the principles of natural justice in the light of the observations made above. However, if the authority decides to proceed against the petitioner in departmental proceeding on the basis of those two charges on completion of the proceeding the authorities will at liberty to award penalty, if however the charges are proved beyond doubt, but when awarding penalty the authority will not award capital punishment that is penalty of dismissal or removal from service. Other than the said penalty, the authorities are permitted to award any other penalty as provided in their service regulation. It is, however, made clear that the petitioner will not be entitled to his emoluments during the period when the departmental proceeding was continuing and till date except the subsistence allowance he received, since he has not rendered actual service during that period.

This writ petition, is, disposed of with the above directions. There will be no order as to costs.

15. Being aggrieved by the judgment and order of the learned Single Judge, in so far as the learned Single Judge held that the appellant would not be entitled to his salary and emoluments for the period during which disciplinary proceedings were continuing and till the date of the said judgment and order, except for the subsistence allowance that the appellant had already received, the appellant has preferred this appeal.

16. Mr. Bihani appearing on behalf of the appellants, submitted that the appellant could not render service during the period when he was under suspension, for no fault of his own. The order of punishment having been set aside, and the learned Single Judge having arrived at the finding that the enquiry proceedings were illegal and in violation of principles of natural justice, the learned Single Judge, ought to have directed the respondent corporation to pay full wages to the appellant for the period during which the appellant remained under suspension,

and from the date of dismissal of the appellant, till his reinstatement.

17. In support of his submissions, Mr. Bihani cited the following judgments:

- i) Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others,
- ii) Desh Raj Gupta Vs. Industrial Tribunal IV, U.P., Lucknow and another,
- iii) Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others,
- iv) Union of India (UOI) Vs. Madhusudan Prasad,

18. In Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , the majority of the Judges of the Supreme Court held that, ordinarily a workman whose services had illegally been terminated would be entitled to full back wages, except to the extent he was gainfully employed. The discretion to deny reinstatement or pare down the quantum of back wages was absent except for exceptional reasons. The mandate of Article 43A had to be kept in view.

19. In Desh Raj Gupta Vs. Industrial Tribunal IV, U.P., Lucknow and another, , an order of dismissal was found to have been passed without proper enquiry, but the order of dismissal was affirmed by the Industrial Tribunal after holding an enquiry. The Supreme Court held that dismissal could not relate back to the illegal order of the management and the dismissed employee would be entitled to salary for the period between the date of dismissal and the date of the award affirming the dismissal.

20. In Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, , the Supreme Court held, that where an impugned order of termination was liable to be set aside, the employee would be entitled to reinstatement with back wages from the date of his termination till the date of his reinstatement, and also to continuity of service.

21. In Union of India (UOI) Vs. Madhusudan Prasad, the Supreme Court held, that where an order of dismissal was passed in contravention of principles of natural justice, the employee would be entitled to full back wages from the date of dismissal till the date of reinstatement.

22. In Union of India v. Madhusudan Pradhan (supra) cited by Mr. Bihani, the Supreme Court held as follows:

It is true that when a reinstatement is ordered in appeal or review, the authorities can pass specific order regarding the pay and allowances to be paid to the government servant for the period of his absence from duty preceding the dismissal, removal or compulsory retirement, as the case may be. This is an enabling provision and the authorities can consider the relevant facts as to whether the employee should be denied the salary for the period he was kept

under suspension preceding the removal, dismissal or compulsory retirement. The counsel for the appellant has placed reliance on the decision of the Constitution Bench of this Court in *Managing Director, ECIL v. B. Karunakar* where this Court held that the question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement, if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceeding and depending on the final outcome. If the employee succeeds in the fresh enquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any, and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the enquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh enquiry from the stage of furnishing the report and no more, where such fresh inquiry is held.

The above case was concerning an employee, who was found guilty in an enquiry but the report was not furnished to the employee and the show cause notice was not served on him. In view of the facts and circumstances of the case, the Court directed that appropriate order should be passed regarding the back wages. In the instant case, the Appellate Authority directed reinstatement of the respondent and held that he was not entitled to get back wages for the period he was out of service. It may be noticed that the respondent was removed from service without any enquiry and he was not even given a show-cause notice prior to his dismissal from service. There was fault on the part of the employer in not following the principle of natural justice. These relevant facts were considered and the learned Single Judge and also the Division Bench ordered the payment of back wages. We do not think this is a fit case where Fundamental Rule 54 could have been invoked by the authorities. We find no merit in the appeal.

23. Mr. Bera appearing on behalf of the respondents, on the other hand, submitted that the appellant was not entitled to back wages as of right. Mr. Bera further submitted that the charges against the appellant being serious, the learned Single Judge rightly declined the prayer of the appellant for reinstatement with full back wages

24. Mr. Bera cited the following judgments:

- i) *Regional Manager, U.P. S.R.T.C., Itawah and Ors. v. Hoti Lal and Ors.* reported in 2003 (3) SCC 625.
- ii) *M.L. Binjolkar Vs. State of Madhya Pradesh*, .
- iii) *State of U.P. and Ors. v. Ram Bachan Tripathi* reported in 2005 (6) SCC 496.
- iv) *U.P.S.R.T.C. Ltd. Vs. Sarada Prasad Misra and Another*, .

25. In *Regional Manager, U.P. S.R.T.C., Itawah and Ors. v. Hoti Lal and Ors.* (supra), the Supreme Court held as follows:

The Court or Tribunal will deal with the quantum of punishment as to record reasons as to why it is felt that the punishment was not commensurate with the proved charges. The scope of interference is very limited and restricted to exceptional cases. In the impugned order of the High Court, no reasons whatsoever have been implicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice.

26. Deprecating interference of the Court in a case of dishonesty of a Conductor, who held a position of trust, where honesty and integrity were inbuilt requirements of functioning, the Supreme Court held that it would not be proper to deal with the matter leniently. Where a person dealt with public money, the highest of integrity and trustworthiness was a must and unexceptionable.

27. In this case, the respondents have not preferred any cross-appeal from the judgment and order under appeal, setting aside the disciplinary proceedings including the order of termination. The judgment and order has assumed finality to the extent that the order of dismissal has been set aside and the appellant has been directed to be reinstated.

28. In *M.L. Benjolkar v. State of M.P.* (supra), cited by Mr. Bera, the Supreme Court held that full back wages was no longer a natural corollary to an order of reinstatement. Rather, grant and quantum of back wages would depend on several factors and the Court would have to weigh the pros and cons of each case and take a pragmatic view. The Supreme Court refused to interfere with the order of the High Court reducing the back wages awarded to 50%.

29. In *State of U.P. and Ors. v. Ram Bachan Tripathi* (supra) cited by Mr. Bera, the Supreme Court held that an employee terminated on account of unauthorized absence would not be entitled to any service benefits for the period he remained unauthorizedly absent or for the subsequent period during which he had not rendered service. The judgment is clearly distinguishable on facts.

30. In *U.P. S.R.T.C. Ltd. v. Sarada Prasad Mishra and Anr.* (supra) the Supreme Court held that no precise formula could be adopted nor any "cast iron rule" laid down with regard to payment of back wages. Payment of back wages was a discretionary power which had to be exercised keeping in view the facts and circumstances of each case. The approach of the Court ought not be rigid or mechanical, but flexible and realistic. In that case Supreme Court allowed 50% back wages from the date of his award till his reinstatement.

31. In this case, as observed above, the learned Single Judge set aside the entire disciplinary proceedings, including the impugned order of punishment, on the ground of violation of principles of natural justice as well as disproportionality of the impugned order of punishment to the gravity of the offence. Even though the learned Single Judge granted leave to the respondents to initiate fresh disciplinary proceedings, the learned Judge expressly directed that the respondents should not award the punishment of termination or removal from

service.

32. The learned Single Judge, however, made it clear that the appellant would not be entitled to salary or emoluments for the period during which departmental proceedings were held and till the date of the judgment and order under appeal.

33. As rightly submitted by Mr. Bera, there could be no precise formula, nor any "cast iron rule" for grant of back wages. Grant of back wages is not automatic but discretionary. When an order of punishment is set aside and an employee is reinstated, the Court may or may not direct payment of back wages. However, the discretion has to be exercised pragmatically, in accordance with law, taking into account relevant facts and circumstances.

34. Where an order of termination is set aside as wrongful, compensation in the form of back wages is generally granted, unless the facts and circumstances of the case are such, that grant of back wages would be unfair and inexpedient. To cite an example, the Court might not grant any back wages, where there is gross delay in approaching Court and the order of termination is set aside on a technical ground.

35. In this case, the learned Single Judge has not just refused full back wages but has not granted any back wages at all. The learned Judge has, with respect, not given any reasons for not granting any back wages to the appellant at all.

36. Having held the punishment of dismissal unwarranted, and having expressly restrained the respondents from awarding to the petitioner, the extreme penalty of removal, the learned Judge, in our view, erred in denying the appellant back wages altogether and that too without assigning any reasons.

37. The learned Judge has apparently overlooked the fact that, by an order dated 12th June, 1990, the petitioner was directed to resume his duties and he in fact rendered service till the date of his dismissal. The learned Judge, therefore, directed that the appellant would not be entitled to any back wages for the period during which disciplinary proceedings took place and till the date of the judgment and order under appeal, except for the subsistence allowance that he had received. There could be no question of denying the appellant of salary and allowances for the period during which he had rendered service.

38. We are, however, of the view that having regard to the serious charge of dereliction of duty on the part of the appellant, as also the fact that the learned Single Judge has given liberty to the respondent corporation to initiate disciplinary proceedings afresh, it would not be appropriate to grant full back wages to the appellant, who has not rendered service to the respondent corporation for over 11 years. In our view, ends of justice will be met if the appellant is awarded 50% of back wages for the period from the date of his dismissal till the date of his reinstatement.

39. We, therefore, modify the judgment and order under appeal, by directing that the appellant will be entitled to 50% back wages from the date of his

dismissal till the date of his reinstatement.

40 This appeal is disposed of accordingly. There will, however, be no order as to costs.