

(1999) 02 DEL CK 0043

In the Delhi High Court

Case No : C.W. No"s. 1862/85, 1860/85 and 1809/85

Pramod Kumar Khare

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 16-02-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 2 AD 666 : (1999) 49 DRJ 456

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Anil Kumar, for the Appellant; Mr. B.S. Charya, for the Respondent

Judgement

K. Ramamoorthy, J.—It is not necessary to narrate the facts in each of the cases in details as the point involved is a common one and it is also a very short one. The three petitioners were working in the second respondent Organisation. On 19.01.1985 the charge sheet was issued to them and it is stated that the petitioner had claimed reimbursement of Leave Travel Concession (in short LTC) expenditure producing false/fake documents. The petitioner submitted their Explanation almost admitting the guilt and enquiry was conducted. The inquiry officer gave his report on 29.05.1985. When the enquiry was pending the second respondent issued circular in respect of employees who had claimed reimbursement on false/fake documents. The Circular reads as under:

MOTHER DAIRY

DELHI 110 092 A/OC/2/14 25/26th June, 1985 C I R C U L A R

It has been brought to our notice that some employees of the Dairy have claimed reimbursement of LTC expenditure without performing such journey by producing false/fake documents. An opportunity is being given to such employees to refund the amount taken/claimed by them in connection with LTC latest by 15.07.1985 by admitting the said fact in writing to Assistant Manager (Personnel) that they did not actually avail of the said facility but claimed the amount. Refund of the

amount may be allowed in installments by way of deductions from salary. Those who refund the amount taken by them as mentioned above voluntarily within the above specified date will be imposed the punishment of stop page of two future increments with cumulative effect. Stern disciplinary action based on the findings of the enquiry will be taken against such employees against whom enquiries will be initiated and conducted in the event of their failure to refund the amount voluntarily by the specified date.

It may be made very clear that the date of 15.7.1985 specified above will not be extended under any circumstances. This has been issued as per directions of General Manager.

Sd/

Dy. General Manager (A&C)

2. On 11.07.1985, Mr. P.K. Khare the petitioner in CW No. 1862/85 and Mr. R.R. Singh petitioner in CW No.1809/85 and Mr. Brij Mohan Dhawan petitioner in CW No. 1860/85 claiming reliefs and had agreed to the imposition of punishment as stated in the Circular. The letter dated 11.07.1985 reads as under:

P.K. KHARE (T.S)

Emp. No. 4042

Mother Dairy,

Patpar Ganj,

Delhi 110 092.

General Manager,

Mother Dairy,

Delhi.

Sub: Reply of show Cause notice dated 1.7.85 and request for mercy.

Ref: Charge sheet No. PER/PKK/548/20015 dt. 19.01.1985

2) Show Cause Notice letter No. PER/ PKK/548/5419 dated 1.7.1985.

Respected Sir,

May I respectfully express my gratitude for you having been extremely kind enough and merciful during the tenure of my services.

Respected Sir, as you are fully aware by the sincere dedicated, initiative, loyal, hardworking and creative attitudes of the undersigned towards our most esteemed organisation and hope that you are fully aware that the undersigned has never left any stone unturned for the welfare, prestige and uplifting the image of our esteemed organisation. Moreover, the undersigned had discharged

very important duties and assignments of our organisation and transaction of thousands of rupees most successfully with a loyalty and dedication.

With reference to your above cited letter, I humbly wish to state that the punishment may please be considered on the humanitarian ground and previous excellent service record of dedication and belongingness towards our esteemed organisation.

I want to submit that I did not take any claim from the department before others had taken the same. My senior officer and other employees took the same claim and persuaded me to submit the necessary bills. Being a gullible person, I succumbed to their pressure.

As the mistake committed by the undersigned ignorantly for the first time during the tenure of my services, I would most earnestly request your goodness to consider the punishment in the light of the principles of natural justice.

May I most humbly invite your merciful attention towards your circular No. A/OC/2/14 dated 24/25th June, 1985 regarding imposing a general punishment to employees who have committed such mistakes and are similarly situated like undersigned. May I request your goodness to consider the case in the light of above cited circular.

I am sure that the case will be considered on merciful and humanitarian ground and anticipating favourable responses.

Thanking you,

Yours faithfully,

Sd/

(P.K. Khare)

11.7.1985

3. Mr. Brij Mohan petitioner in CW No. 1860/85 did not send any letter to that extent but on general terms he prayed for a lenient punishment.

4. On 25.07.1985 the order impugned was passed removing the petitioners from service. The learned counsel for the petitioners submitted that the second respondent had issued the circular having regard to the general department of the employees and wanted to correct the employees and the second respondent did not intend to deprive the petitioners and other employees similarly situated of their livelihood.

5. Mr. B.S. Charya, the learned counsel for the second respondent submitted that:

a) that the petitioners are workmen within the meaning of Industrial Disputes Act, 1947 and Therefore, their remedy is to raise industrial dispute.

b) this court can direct the disciplinary authority to decide the question whether

the Circular is applicable to the petitioner and according to the learned counsel the Circular would not apply to the petitioners and it would apply only prospectively and the petitioners are claiming that the circular would have retro active operation. In any event, according to the learned counsel the petitioner cannot given wages as they are gainfully employed and they can avail of the remedy provided u/s 33(c)(2) of the Industrial Disputes Act, 1947, assuming that the circular would apply to the petitioner.

6. The learned counsel for the second defendant Mr. Charya referred to the judgment of Punjab & Haryana High Court reported in Subhash Chand Vs. State of Haryana and Ors. 1998 (1) SLR 480. The facts are noticed by the Court are as under:

The petitioner who was hold the post of a conductor in the Haryana Roadways, Karnal Depot, was removed from service by an order dated 28.7.1990 (Annexure P6). The revision petition filed by the petitioner against the order of his removal from service was accepted by the Commissioner and Secretary, Government of Haryana, Transport Department, on 8.7.1993. In his order, the Com missioner and Secretary to Government of Haryana noted that the petitioner was removed from service without holding any enquiry in accordance with the provisions of the Rules. He, Therefore, set aside the order of punishment and gave liberty to the punish ing authority to start enquiry against the petitioner u/s 7 of the Haryana Civil Service (Punishment and Appeal) Rules, 1987. On the basis of the order of Commissioner and Secretary, the General Manager, Haryana Roadways, Karnal passed order dated 31.8.1993 and reinstated the petitioner. After about a year and four months of his reinstatement in service, the petitioner served a notice upon the respondents and prayed for grant of back wages for the period between the date of his removal from service and the date of reinstatement and as he did not get any relief from the respondents, the petitioner has sought the intervention of the Court through this writ petition and has prayed that a mandamus be issued to the respondents to pay him salary and other emoluments for the period between the date of his removal from service and the date of reinstatement.

On this facts the Court observed:

In proceedings u/s 33C(2) of the Industrial Disputes Act, 1947, the employer has a right to plead and prove that the employee was gainfully employed after termination of his service and, Therefore, he should not be given full back wages or part thereof. This right of the employer cannot be defeated by enter taining a writ petition under Article 226 of the Constitution of India and by directing the respondents to pay full salary and allowances to the employee whose service had been terminated illegally.

7. Therefore, this case is clearly distinguishable and do not apply to the facts of this case. The learned counsel for the second defendant Mr. Charya referred to the judgment of the Bombay High Court reported in 1974 (2) LLJ 52 Sadanand

Patankar Vs. M/s New Prabhat Mills No.2 Bombay and another 1975 Lab IC 457 wherein the Bombay High Court noticed the facts in the following terms:

One Sadanand Patankar was in the employment of M/s New Prabhat Silk Mills No.2, since the year 1960. By an order dated 30th July 1967 he was suspended from service and later on 2nd August 1967 was served with a charge=sheet alleging three acts of misconduct viz. (i) that he was found talking and thus whiling away time on 30.7.1967 at about 6 p.m. (ii) that on 31.7.1967 he misbehaved with one of the partners and abused and threatened one Nari Seth and (iii) that he instigated the workers to stop work from 2nd August 1967. The employer Mills held an inquiry into the said charges and the Enquiry Officer in his finding dated the 29th September 1967 held that the said charges were proved against the employee. As a result of this finding the employee was dismissed from service with effect from the 29th September 1967. Thereafter, the employee made an approach to the employer by his letter dated 14th October 1967 u/s 42(4) of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as the said Act) and the said approach being of no avail, he filed an application before the Labour Court being Application No.7 of 1967 u/s 79 read with Section 42(4) of the said Act, for reinstatement with full back wages.

8. Regarding the point urged by the management about the reinstatement the court held:

What emerges from the aforesaid decisions is that the normal rule, once an order of termination of service is set aside, is to reinstate the employee in service. An employer who claims a departure from this rule must satisfy the industrial adjudicator by producing before him the necessary material in that behalf that the employee is disentitled to the said normal relief. It is not further enough that the employer makes allegations in his pleadings in his pleadings. The allegations must be justifiable and it is his duty to get the necessary point framed for determination in the adjudication proceedings. When so requested the industrial adjudicator should set down such point for decision and give opportunity to both the parties to lead the necessary evidence and to contest the same. It is neither fair nor legal to expect an industrial adjudicator to deny the normal relief to a workman on mere allegations and in the absence of the relevant material on record. If an employer fails in his duty to get the necessary point raised for decision he cannot thereafter be permitted to make a grievance against the relief of reinstatement granted to the employee.

In the present case, the employer Mills had not even pleaded either before the Labour Court or the Appellate Industrial Court that in the event the employee succeeded he should be denied the relief of reinstatement. Much less was any material placed on record before the said authorities to disentitle the employee to the said relief. The contention in that behalf is raised for the first time in this petition. Mr. Shetve's argument that the allegation of misconduct against the employee should be deemed to have strained the relations between the parties, if accepted will set at naught the right to the security of employment to acquire.

For then it will be open for by merely alleging some misconduct against him. The argument Therefore is merely to be stated to be rejected.

9. Dealing with the claim of back wages the Bombay High Court while remitting the matter back for consideration observed:

As things stand today, a majority of the employees are either unrepresented or inadequately represented in the adjudication proceedings. It is Therefore unfair either to insist or to expect that the employee should raise the relevant point. It is the duty of the industrial adjudicator himself to frame the necessary point for determination in each and every case and allow parties to lead evidence with regard to it and to contest the same, as in the case of the other points in the adjudication. A failure to do so will according to us, be tantamount to failure to exercise jurisdiction and an order either granting or refusing back wages in the absence of such determination, will be void, being an improper exercise of jurisdiction. In many cases, the direction with regard to the payment or nonpayment of back wages is as important as, if not more than the order of reinstatement itself, both from the point of view of the employer as well as the employee. the casual manner in which very often the said direction is given at present, must be discouraged. We are Therefore of the view that it is obligatory on the industrial adjudicator to frame and decide the point about the payment of back wages like any other point, irrespective of whether the parties have raised the same or not.

In the present case, we find a similar situation. Neither the Labour Court, nor the Industrial Court had framed the point for determination as to whether the employee was entitled to back wages or not. The employee was not given any opportunity to show that he was so entitled and in the absence of any material on record either way the Court denied back wages to the employee on the ground that the employee had not "shown" that he was not gainfully employed during the period. In the view which we have taken Therefore that part of the award will have to be quashed and the matter will have to be remanded to the Labour Court for determination of the question of back wages.

In the result, while we confirm the order of the Industrial Court granting reinstatement to the employee, we remand the matter to the Labour Court for inquiry into the limited question with regard to the payment of back wages between the period from the 29th September 1967, which is the date of the order of dismissal to 19th September 1969 which is the order of the Industrial Court granting reinstatement. The Labour Court will decide the question in the light of what we have stated earlier. We make it further clear that since the order of reinstatement is confirmed the employee should be reinstated forthwith and he will be entitled to all wages from the 19th September 1969 onwards. The inquiry which the Labour Court will hold will be limited to the period from the 29th September 1967 to 19th September 1969. The Labour Court will complete the inquiry and finalise its decision within two months of the writ reaching the Court.

10. The learned counsel for the second respondent Mr. Charya referred to the judgment of Allahabad High Court in Postal seals Industrial Cooperative Society Ltd. Aligarh and Labour Court II, Lucknow and Ors. 1971 (22) FR 38 wherein it was held:

If the normal rule in a case like the one before us is to award full back wages it will follow that the employer will bear the burden of establishing the countervailing circumstances if he seeks to neutralise the normal rule. It is for him to plead and prove to the satisfaction of the Labour Court that the workmen have made some earnings during the period of their enforced idleness or they have wilfully refused to seek or accept alternative jobs. It is not for the workmen to plead and prove that they have tried to minimise the loss during their enforced idleness. If the employer pleads that the workmen are not entitled to full wages as they have wilfully failed to seek or accept alternative jobs, it will be for the workmen then to offer due Explanation as to why they did not seek or accept alternative jobs or that they did seek alternative jobs but failed.

11. The learned counsel referred to the judgment of this Court reported in Mgmt. of Handicraft Handloom Corp. of India Ltd. and D.D. Gupta P.O. Labour Court and Ors. 1987 (54) FLR 512 wherein the learned Judge observed:

It is further contended by the petitioner that during this period the respondent no.2 has been gainfully employed. The learned counsel for the said respondent states that if respondent no.2 has been carrying on any work on her own then the amount which she earned has to be ignored and is not to be deducted from back wages. I cannot agree with him here. A person whose services have been terminated be gainfully employed for a number of years. That person may get another employment or may do his own and earn money from that. He may be self employed or he may do business. If it can be shown that the person was selfemployed and if there is any material on which one can come to the conclusion as to what is the amount earned during the period then that amount may have to be deducted from the back wages which the petitioner has been ordered to pay. It is following this principle that the Labour Court, in the present case, directed that the amount of wages earned by respondent no.2 from 1st January 1973 to April 1973 have to be deducted. During the pendency of this writ petition corporation the operation of the award had been stayed. Therefore, petitioner did not take respondent no.2 back in service. Never theless, as I am upholding the decision of the Labour Court, the petitioner will be liable to pay to respondent no.2 all back wages and will also have to reinstate respondent no.2 with continuity of service. What is the amount of back wages etc. which has to be paid by the petitioner to respondent no.2 is not for me to decide and that has only to be decided in an appropriate forum. As far as this Court is concerned, no other relief can be granted to the petitioner.

12. The petitioner has approached this court without any delay in 1985 itself. The matter was kept pending in this court. The second respondent had just said in the counter affidavit that the petitioners are gainfully employed and according to

the learned counsel for the second respondent Mr. Charya the averments by the second respondent in the reply had been admitted by the petitioners. Factually this submission is not correct. The petitioners have denied the averments. The second respondent has not placed on any material to substantiate the case. The decision relied upon by the learned counsel had laid down that it is for the Management to prove by producing the necessary material the fact that the employee was gainfully employed and Therefore would not be entitled to any backwages.

13. I am of the view that the circular issued by the second respondent would apply to the petitioners. The contentions of Mr. Charya, the learned counsel for the second respondent that the circular would not apply to the case of the petitioners and it would have only prospective operation is not at all tenable in law. The second respondent being aware of the fact that the inquiry was pending against the petitioner and apparently having come across several instances had issued the circular for the benefit of the employees. There is no question of the circular being retrospective or prospective, the circular would apply to the employee against whom enquiry was pending before the second respondent. Final orders were passed a month after the circular was issued. The second respondent having issued the circular must have given the benefit to the petitioners and the petitioners in law are entitled to call in aid the benefit granted by the second respondent by issuing the circular. The impugned orders are Therefore liable to be set aside and they are accordingly set aside. The 2nd respondent could impose the punishment mentioned in the circular on the petitioner. Regarding the claim of reinstatement and backwages, I am of the view, that the second respondent for nearly 14 years had not produced any accepted material to come to a finding that the petitioners were gainfully employed during the pendency of the writ petitions. The second respondent by taking an erroneous view denied the benefit of the circular to the petitioners and it is not open to the second respondent to say that the petitioners are not entitled to the benefit of the circular and they are entitled for back wages.

14. Accordingly, the writ petitions are allowed. The petitioners are entitled to reinstatement with back wages. There shall be no order as to costs.