

(1999) 02 AHC CK 0147
In the Allahabad High Court
Case No : Writ Petition No. 6721 of 1985

Shyam Sunder Misra

APPELLANT

Vs

Labour Court, Lucknow and others

RESPONDENT

Date of Decision : 23-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5, Order 18 Rule 5(1), Order 18 Rule 5(2), Order 18 Rule 5(3), Order 18 Rule 5(4)
Industrial Disputes (Central) Rules, 1957 — Rule 21, 9(1), 9(4)
Industrial Disputes (General) Rules, 1987 — Rule 10B(5)
Industrial Disputes Act, 1947 — Section 11, 11A

Citation : (1999) 3 AWC 2170 : (2000) 84 FLR 196

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : U.K. Srivastava, for the Appellant; C.S.C. and S.K. Kalia, for the Respondent

Final Decision : Allowed

Judgement

D.K. Seth, J.—The award dated 31st July, 1985 passed by the learned Labour Court, U. P. at Lucknow in Adjudication Case No. 32 of 1984 has since been challenged in this writ petition, Mr. V. K. Srivastava, learned counsel for the petitioner contends that the learned Labour Court had come to a finding that there was no enquiry at all and, therefore, the finding of the purported enquiry cannot be sustained. Thereafter, he had held that the domestic enquiry was not fair and proper. It is also recorded that after the said order, the employer did not propose to adduce any further evidence. By reason thereof, the order of removal from service inflicted on the petitioner by an order dated 31st January, 1978 was set aside. But the learned Labour Court refused to grant back wages on the ground that the petitioner's conduct and work were far from satisfactory, on the basis of the statement made in the rejoinder-affidavit. According to him though the jurisdiction to grant back wages is a discretionary jurisdiction yet it has to be exercised judicially with an objective view. More in this case, there was no

material on record on the basis of which such discretion could be exercised against the workman. The learned Labour Court could not rely on the rejoinder-affidavit. It is only a pleading without being supported by any material, A pleading has to be supported by materials produced in evidence either oral or documentary or both. In the present case after the enquiry "was set aside, there was nothing and no further evidence having been adduced, there was nothing on record in the form of evidence either oral or documentary on the basis of which the learned Labour Court could have come to such a conclusion while exercising such discretion. Therefore, he prays that the part of the award by which back wages was refused, should be set aside.

2. Mr. Prabhakar Tewari, holding brief of Mr. S. K. Kalia, learned counsel for the respondent submits that it is the discretion of the Labour Court either to grant back wages or to determine what amount should be granted as back wages. Such discretion is to be exercised on the basis of the materials on record. According to him pleading is one of such material which can be taken into account since statements made in the rejoinder-affidavit remained uncontroverted. He also points out from paragraph 4 of the award that the learned Labour Court had taken note of the situation as to the performance of the workman. He contends that the workman had once earlier been terminated and, therefore, again he was reappointed. But his work was unsatisfactory and despite several instructions, he did not improve and that the workman was guilty of many irregularities and that he was only given temporary appointment and his term was extended from time to time. Therefore, having regard to such a situation, it was Justified on the part of the Labour Court to refuse back wages in the award. On these grounds, he prays that this writ petition should be dismissed.

3. I have heard both the learned counsel at length.

4. In fact, the learned Labour Court had come to a finding that there was no enquiry and it was not fair and proper. After such finding, it was open to the employer to prove the charges by independent evidence adduced before the Labour Court, who was supposed to give opportunity to both the parties in support of the respective contentions advanced as the case may be. It is not disputed that the employer did not propose to adduce further evidence after the enquiry was held to be vitiated. Soon the enquiry was held to be unfair and improper, there is no enquiry at all. The situation then relates back to the issue of charge-sheet. Unless an enquiry is held after giving an opportunity to the workman, there cannot be any finding as to the misconduct or guilt far less scope of inflicting punishment. The refusal to grant back wages invites civil consequence, which may be judicial in nature by depriving the workman of his financial gains or entitlement which he would have been entitled had he been in service. Thus this refusal is also in one way or the other a deprivation of legitimate claim.

5. Admittedly, the jurisdiction to grant or refuse back wages by the learned Labour Court or Industrial Tribunal is a discretionary jurisdiction. Such

jurisdiction has to be exercised judicially. A discretion can be exercised Judicially provided the learned Labour Court proceeds objectively to determine the scope and ambit in a given circumstance so as to assess the quantum of back wages to be granted or to be refused. In the present case, after having found the enquiry to be vitiated and no evidence having been adduced thereafter, on the records of the proceedings, there was no material in the form of evidence either oral or documentary. The pleadings before the learned Labour Court are normally verified. It is not necessary that it is to be affirmed on oath. It is not contended that the rejoinder-affidavit was affirmed by oath. The proceedings before the learned Labour Court requires verification of the pleadings. It is not necessary to be affirmed on oath. A verified pleading cannot be treated to be an evidence.

6. Then again, the procedure requires production of evidence to support the contentions. It is not decided on the basis of affidavit. Therefore, the pleading in the force of rejoinder-affidavit cannot be treated to be evidence for two reasons. First that it was not supported by affidavit. Second it was only a pleading unsupported by any evidence. In paragraph 4 of the award. It was only the contention that was raised by the employer was recorded and It is not a finding. The refusal to grant back wages shows that the Labour Court had relied on such contention made in the rejoinder without being supported by any materials, namely. evidence either oral or documentary. Therefore, the ground for refusal of back wages is not based on any objectivity. Such exercise of discretion cannot be said to have been exercised Judicially.

7. Mr. Srivastava has referred to a decision of a Division Bench of this Court in *Shanker Prasad Shukla v. State of U. P. and another* (1983) 1 LCD 296. but the said decision does not help us in the facts and circumstances of the case. Inasmuch as in the said decision the petitioner therein was suspended and an enquiry proceeding was held against him. in which he had replied to the charges and an enquiry report was submitted against him, but no action was taken. Subsequently on the retirement of the petitioner, pension was withheld. In the said case the petitioner could not have anticipated that the reply given by him to the charges against him, would be treated as enough for the purpose of action under Regulation 315A of "the Civil Service Regulation since the order was passed without giving any opportunity to the petitioner. In such circumstances, it was held that withholding of salary relating to suspension period and the withholding of pension was not justified since the petitioner therein was reinstated after the completion of the enquiry.

Section 11A of the Industrial Disputes Act empowers the Tribunal or the Labour Court, where it is satisfied that the award is not justified, to set aside order of discharge or dismissal and to direct reinstatement of workman "on such terms and conditions as it thinks fit or to give such other relief. But such power is not arbitrary, unguided or uncanalised as was held in *Christian Medical College Hospital Employees' Union and Another Vs. Christian Medical College Vellore Association and Others*, . Once such decision is taken by the Labour Court, it is

not open to Interference by the High Court or the Supreme Court as an appellate court. Such a view may draw support from the ratio decided in *Management of Hindustan Machine Tools Ltd., Bangalore Vs. Mohd. Usman and Another*, . But, however, the High Court and the Supreme Court can examine whether the Labour Court or the tribunal had properly approached the matter for exercising or refusing to exercise its power u/s 11A. It was so held in *Rama Kant Mishra v. State of U. P. and others* (1988) 3 SCC 346.

8. The proviso to Section 11A provides that while proceeding under the said section, the Labour Court or the Tribunal shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter. In the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, , the expression "material on record" occurring in proviso to Section 11A has been defined to mean : (1) the evidence taken by the management at the enquiry and the proceedings of the enquiry, or (2) the above evidence and in addition, any further evidence led before the Tribunal, or (3) evidence placed before the Tribunal for the first time in support of the action taken by an employer as well as the evidence adduced by the workman. In case the enquiry is held defective, then the employer can adduce evidence for the first time before the Tribunal. This section empowers the Tribunal to reappreciate the evidence.

9. Thus in order to pass appropriate order in exercise of Section 11A, the Labour Court or the Tribunal has to confine itself to the materials on record in order to come to its conclusion even when re-appreciating the evidence. As soon as the enquiry is held improper, there remains no evidence on record which can form the "material on record" as contemplated in the proviso to Section 11A. It is open then to the employer to adduce fresh evidence which is called the evidence adduced for the first time before the Labour Court or the Tribunal. Rejoinder is a pleading. A verified rejoinder does not have the force of an oath. Evidence is supported by oath. Even if a pleading is supported by oath the same cannot be a reliable piece of evidence unless it is tested through cross-examination of the person affirming the oath or unless the procedure prescribes use of affidavit in evidence. Proceeding before a Labour Court or Tribunal are not decided on affidavit as is provided in certain other proceedings.

10. The procedure to be followed by Tribunal or Labour Court as laid down in Section 11 unless prescribed by rules, shall be a procedure as may be thought fit by the authority concerned. Rule 10B sub-rule (5) of the Industrial Disputes (General) Rules, 1987 requires fixing of date for furnishing list of witness. Sub-rule (6) requires evidence to be "recorded in Court or on affidavit but in the case of affidavit the opposite party shall have the right to cross-examine each of the deponents filing the affidavit." While recording evidence, Order XVIII, Rule 5 of the CPC is to be followed. Statement of claim, written statement and rejoinder are pleadings as provided in sub-rules (1) to (4).

11. U. P. Industrial Disputes Rules. 1957 in Rule 9 empowers the Labour Court or

Tribunal to accept, admit or call for evidence in such manner as it thinks fit. Rule 21 prescribes that in "addition to the power as conferred by the Act, the Labour Courts, Tribunals.....shall have the same powers as are vested in a civil court under the CPC when trying a suit, in respect of.....(a) discovery and inspection (b).....(c) reception of evidence taken on affidavit ; and the Labour Court or Tribunal.....may summon and examine any person whose evidence appears to it/him to be material and shall be deemed to be a civil court....."

12. Therefore, in the matter of taking evidence the Labour Court or the Tribunal is required to follow the provisions or Orders XVIII and XIX of the Code. When evidence is sought to be adduced through affidavits. Order XIX. Rule 2 requires cross-examination of the witness seeking to give evidence through affidavit. Such affidavits are distinct and different from pleadings, viz, rejoinder, etc. It is the evidence in the form of affidavit and shall confine to the deponents' own knowledge to prove.

13. In the facts and circumstances of the case as discussed above, there was no material on record as contemplated in the proviso to Section 11A for coming to a conclusion that the workman was not entitled to back wages though reinstated after the order of dismissal set aside on the ground that his work and conduct was not good.

14. Andhra Pradesh High Court in *S. V. Mills v. Industrial Tribunal* (1973) 2 APLJ 374 . (Single Judge) expressed the view that reinstatement does not automatically entitle a workman to back wages. In order to claim back wages, the workman has to prove that he was unemployed or under-employed and that he had made sincere effort to mitigate the loss. A Division Bench of the same High Court later on took the view that if there is not even a demur to the statement of the workman that he was never employed, it is not necessary to show that he had made any attempt to secure employment. If the statement of the workman goes unchallenged, it is not necessary for him to prove anything. In such circumstances, he would be entitled to full back wages. It is only when the employer would be required to prove otherwise. Whereas, the Punjab High Court took the view in *Daljeet and Company v. State of Punjab*. AIR 1964 P&H 313, that payment of back wages upon reinstatement after setting aside of the order of dismissal, is the normal consequence to follow. Whether the workman was employed during the period, is a question to be raised and proved by the employer. Where the dismissal is set aside, reinstatement with all back wages is the normal rule is reiterated in *Sadhu Stngh v. State of Punjab* 1983 Lab IC 443 (P&H) and *S. S. Sombre v. Chief Regional Manager, S. B. I. Nagpur* 1992 (II) LLJ 684 The Kerala High Court in *C.G.G. Panicker v. T. M. Eapen* 1975 Lab IC 972 (Ker), took the view that on reinstatement being ordered, the contract of service is restored and the workman would be entitled to all benefits of the subsisting contract of service. Patna High Court in *Tata Iron and Steel Company Ltd. v. Central Government Labour Court* 1973 Lab IC 1372 (Pat) (DB), held that disapproval of the order of dismissal entitles a workman to full back wages. In

S.S. Shetty Vs. Bharat Nidhi, Ltd., the Supreme Court held that a workman on reinstatement is entitled to a declaration that he continues in employment and entitled to all benefits as if the contract of service continues.

15. In the case of Jitendra Nath Biswas Vs. M/s. Empire of India and Ceylon Tea Co. and Another, , the Apex Court had held that the Industrial Disputes Act not only confers the right on a workman for reinstatement but also back wages if the order of termination or dismissal is not in accordance with the standing order. In Colour-Chem Limited Vs. A.L. Alaspurkar and Others, , it was held by the Apex Court that where punishment of dismissal is held disproportionate reinstatement with continuity of service, is the normal rule. In Tulsidas Paul v. Second Labour Court, the Apex Court observed that the normal rule, in cases where dismissal or removal is unjustified, is reinstatement. But still the Tribunal has a discretion to grant compensation in exceptional or unusual circumstances where it considers reinstatement inexpedient or undesirable.

16. As soon as dismissal is set aside and reinstatement is ordered, entitlement of the workman to full back wages is the rule and disentitlement is an exception based on sound Judicial principle. It is for the Labour Court or Tribunal to award full back wages unless it concludes on the basis of the materials on record to award reinstatement with part of or without back wages. It is entitled to do so on such terms and conditions as it may think fit, a discretion to be exercised judicially. Exercise of such discretion requires to be justified by the rationale of the approach. Rationale of approach is to be supported by the materials on record.

17. In the present case, there is nothing on record to come to a conclusion that the workman's work and conduct was not good. It is not alleged that the workman was gainfully employed elsewhere. After the enquiry was held improper, there could not be any material unless the employer adduces fresh evidence. No fresh evidence having been adduced by the employer, the statement made in the rejoinder cannot warrant any such conclusion. Therefore, there is no material to justify the conclusion to refuse back wages. It is not a case of exception but is one of the rule.

18. In view of the discussions as above, this writ petition succeeds and is allowed accordingly. The part by which the grant of back wages was refused by the learned Labour Court in its award dated 31st July, 1985 in Adjudication Case No. 32 of 1984 is, hereby, quashed and writ of certiorari do accordingly Issue.

19. Let it be noted that the petitioner workman had retired in 1986. A long time has elapsed. No useful purpose would be served, by sending the matter back for reconsideration by the learned Labour Court as to the question of grant of back wages in view of the time consumed in between, as well as the materials on record which on the face of it does not warrant refusal to grant back wages, particularly when the employer did not take any such stand and sought to prove it. In the case of Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, , in

almost a similar circumstances, the Apex Court had observed that the "question next is, having held that the order of reinstatement was not a proper order, in that, it was not in consonance with the decided cases, do we simply quash the order of the Tribunal and that of the High Court and leave the concerned workman to pursue his further remedy? The other alternative would be to remand the case to the Tribunal to pass a suitable order. In either, case, in view of this judgment. no other order except that of compensation can be obtained by him. If the case is remanded and the Tribunal on such remand passes an order of compensation and fixes the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute, which would hardly be fair to or conducive to the interests of the parties. In these circumstances. we decided that it would be more proper that we ourselves should determine the amount of compensation which would meet the ends of justice. Having come to that conclusion, we heard counsel for both the parties. After doing so and taking Into consideration all the facts and circumstances of the present case, we have come to the conclusion in the light also of the decisions of this Court such as Assam Oil Company Vs. Its Workmen, ; Management Utkal Machinery Ltd. Vs. Workmen, Miss Shanti Patnaik, and the recent case of C. A. No. 1735 of 1969. dated 12.9.1969 (SC) that compensation for a period of two years at the rate of Rs. 160 per month, that being the last salary drawn by the concerned workman, would meet the ends of Justice."

20. In such circumstances, having regard to the materials on record and in the facts and circumstances of the case, the back wages for the period between the date of termination of service and the date of reinstatement be paid to the workman by the employer within a period of six months from the date a copy of this order is produced before the employer. A writ of mandamus do accordingly issue.

The writ petition is thus allowed. No costs.