

(1988) 03 CAL CK 0011

In the Calcutta High Court

Case No : Appeal from Original Order No. 1334 of 1987

Sri Jayantanath Mazumdar

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 23-03-1988

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1989) 2 CALLT 170

Hon'ble Judges : Satyabrata Mitra, J; Bimal Chandra Basak, J

Bench : Division Bench

Advocate : Bidhan Chandra Ghoshal and Soumitra Banerjee, for the Appellant; Tapas Banerjee, Parthasarathi Sen Gupta and Dipak Kr. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Bimal Chandra Basak, J.—This is an useless appeal against an order passed in an useless writ petition. The writ Court now a days seems to be a place where all kinds of applications are made. The scope of writ jurisdiction is not appreciated. Result is this writ petition and this appeal. In the writ petition the appellant challenged an award of 8th Industrial Tribunal, Calcutta dated 5th August, 1983. The petitioner serving with M/s, Central Inland Water Transport Corporation Limited (A Government of India Undertaking) in its Rajabagan Dockyard. Admittedly the petitioner is a workman within the meaning of Industrial Disputes Act, 1947. In May 1977 the petitioner received show cause notice from the General Manager of the Corporation whereby the petitioner was directed to show cause as to why he should not be treated as medically unfit for duties and his services should not be terminated on medical ground under Regulation 98 of the Employees' State Insurance (General) Regulations 1950. The petitioner's case is that the petitioner showed cause. Petitioner's service was thereafter terminated. There was an order of reference u/s 10 of the 1947 Act on the following:

"Is the termination of service of Shri Jayanta Nath Majumdar justified ? To what

relief, if any, is he entitled ?"

2. The order of reference is dated 15th May, 1982. The order of termination was 6th July, 1977. The Tribunal held that the procedure followed, in discharging the petitioner was not in conformity with the provisions of the Regulation or Clause of the Standing Order and as such held that all alleged termination was not legal and it amounts to wrongful retrenchment or dismissal and that he was entitled to relief u/s 25A of the Industrial Dispute Act, 1947. The Tribunal observed that Section 25A has not been complied with and therefore, the termination was invalid and thereafter the Tribunal made an award to the following effect :

"The workman would in such case be entitled to reinstatement with all back wages. But in the instant case it appears that no such vacancy in the post is available with the company after such long lapse of time after such termination of the concerned workman. So, it would not be fair and reasonable to reinstate the workman in the said post which is no longer in existence due to absence of any vacancy in such post and he would thus only be entitled to compensation for such wrongful termination. It is an admitted fact that the concerned workman was drawing Rs. 400 per month at the time of such termination and it is also an admitted fact that he was drawing sickness benefit for more than a year without doing any work and was absenting without report for nearly two months at the time of issue for such show cause notice till the date of such termination of service and his conduct thus too is not above board and such it would be fair and reasonable that he may be given a lump sum payment of Rs. 5,000 (Rupees Five thousand only) as compensation instead of reinstatement of all back wages as claimed by him. In the circumstances, the company is directed to pay the workman Shri Jayanta Nath Majumdar a sum of Rs. 5,000 (Rupees five thousand) only as compensation at an early date."

3. The admitted position is that the Corporation did not challenge the award but made payment pursuant to the award and the same has been accepted by the petitioner. Thereafter, after a lapse of time this writ petition was filed. We may point out that in the affidavit-in-opposition a preliminary point was taken that having accepted the sum of Rs. 5,000 and having accepted the award, the petitioner cannot now challenge the same. It means approbate and reprobate and acquiescence. It is to be pointed out that though such acceptance has been admitted, such fact was not disclosed in the Writ petition. Reliance was placed on behalf of the Corporation of two decisions of the Supreme Court in the case of M. Ramnarain Private Limited and Another Vs. State Trading Corporation of India Limited, and Dhruvendra Deb v. Kumarendra Deb, reported in AIR 1989 Cal 19. Accordingly the learned Judge dismissed the writ petition. The learned Judge observed that the view taken by the Tribunal was not erroneous and there is no evidence of any error of law. The writ petitioner was not satisfied by the same and he has preferred this appeal.

4. In the appeal the learned Advocate for the appellant's only contention was, which was repeated more than once, that there was violation of Section 25F of

the Industrial Disputes Act and that the Tribunal having held that there was such violation it should have passed an order of reinstatement. No submission was made in respect of the finding of the learned Trial Judge regarding the conduct of the petitioner and no attempt was made to deal with the cases referred to by the learned Trial Judge in support of his finding regarding the conduct of the petitioner.

5. In our opinion, this appeal is totally misconceived as was the writ petition. Acceptance of some amount cannot prevent an employer from obtaining any relief before the Tribunal in case of a violation of a statutory provision. But that question is not the same as the question of the entertaining, a writ petition. In a writ petition the powers of writ Court are discretionary even if the legal right may be proved. The conduct of the writ petitioner may debar the writ petitioner from obtaining any relief. It is well-settled that if the party concerned has accepted the order appealed from, he is no longer a party aggrieved and he cannot be allowed to maintain the appeal. In the writ Court the question of conduct is much more important. In the present case the writ petitioner, if he was so advised, would have been entitled to challenge the said award in a writ petition or without challenging the award he could have accepted the award. In this case the writ petitioner has followed the second course. Having followed the second course he cannot be allowed now to seek recourse to the first course. This would be a mockery of the jurisdiction of the writ petition. In our opinion, the learned Judge was right.

6. There is another aspect of this matter. So far as the conduct of the petitioner is concerned, the fact that the petitioner accepted the amount awarded by the Tribunal, was not disclosed in the writ petition. This amounts to concealment of material facts. The writ petition implies that the award has not been accepted. To that extent there is mis-statement of fact. These conducts are to be taken into consideration in addition to the conduct of accepting the award. The petitioner cannot be allowed to blow hot and cold at the same time. A person cannot approbate and reprobate. This should be particularly kept in mind while the jurisdiction of high prerogative writ are being involved.

7. There is another aspect of the matter. The learned Judge has exercised his discretion and dismissed the writ petition in view of the conduct of the writ petitioner. It is well established that an Appeal Court should not interfere with the discretion exercised by the learned Trial Judge merely because it may be of the opinion that had the matter come up before the Appeal Court at the first instance, it would have exercised the discretion in some other fashion. This is not the sufficient ground for interference with the discretion exercised by the Trial Court. There must be some misdirection either of fact or of law. That is not the case here. The exercise of discretion by the Trial Court must be unreasonable or arbitrary before such exercise of discretion is to be interfered with. We are of the opinion that no case is or can be made out for interference with the same. We, however, make it quite clear that had it come up before us at the first instance

we would have passed the same order and exercise the discretion in similar fashion as done by the learned Trial Judge in this case.

8. Accordingly this appeal is dismissed with costs which is assessed at Rs. 170.

Satyabrata Mitra, J.

9. I agree.