(2002) 08 BOM CK 0131

In the Bombay High Court

Case No : Writ Petition No. 3242 of 1990

Subramanian V. Iyer APPELLANT

Vs

Air India RESPONDENT

Date of Decision : 30-08-2002

Acts Referred:

Air India Employees Service Regulations, 2000 — Regulation 44(2)

Citation : (2003) 1 BomCR 579 : (2002) 4 BOMLR 860 : (2003) 96 FLR 624 : (2003) 2 LLJ 678 : (2003) 1 MhLj 871

Hon'ble Judges : R.M. Lodha, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : Anand Grover and Prakash Mahadik, for the Appellant; B.H. Patel and E.P. Bharucha, instructed by , Mulla and Mulla, for the Respondent

Judgement

R.M. Lodha, J.—Subramanian V. Iyer petitioner herein challenges by means of this writ petition the order dated 2nd August, 1990 whereby he has been dismissed from service by Air India-the respondent and prays that the said order be set aside and Air India be directed to reinstate him and with all consequential benefits.

2. The controversy arises in the circumstances which we briefly narrate hereunder:-

The petitioner initially joined Air India as Stenographer in operation department in the year 1969. He was promoted as operation assistant in the year 1972 and then as Assistant Flight Purser (Staff No. 27104) in the month of August, 1979. On 18th March, 1988 his residence was searched by the Enforcement Officers under the Foreign Exchange Regulations Act (FERA) and allegedly, foreign currency, one gold biscuit and some incriminating documents were found. He was arrested. While the petitioner was in custody, by order dated 22/23rd March, 1988, he was suspended with effect from 21st March, 1988. The Enforcement Directorate (FERA) issued six notices to the petitioner to show cause why adjudication proceedings as contemplated u/s 51 of FERA should not be held against him for contravention of provisions of FERA. The petitioner through his advocate responded to the said notices. The Directorate of Enforcement (FERA) on 29th January, 1990 imposed total penalty of Rs. 1,42,500/- upon the petitioner by finding him guilty for contravention of provisions of sections 8 and 9 of FERA. The petitioner preferred an appeal before FERA Appellate Board, New Delhi. Upon petitioners conviction under FERA, Air India issued notice dated 21st May, 1990 to the petitioner to show cause why disciplinary action should not be taken against him in accordance with Air India Service Regulations (for short Service Regulations) on the basis of the penalty/punishment imposed upon him by the Directorate of Enforcement (FERA). The petitioner responded to the said notice and submitted that the appeal against the order dated 29th January, 1990 passed by Directorate of Enforcement (FERA) is pending before the Appellate Board and therefore, further action should not be taken until disposal of said appeal. On 2nd August, 1990 under Regulation 44(2) of Air India Employees Service Regulations, the petitioner was dismissed from service. It appears from the averments made in the writ petition that the petitioner appealed to the Managing Director against the order of dismissal but since nothing was done, he filed the present writ petition in the month of October, 1990. It is material to notice here that during the pendency of writ petition, the appeal preferred by the petitioner before FERA Appellate Board, New Delhi against the order of Directorate of Enforcement (FERA) dated 29th January, 1990 came to be disposed of on 3rd November, 1999. The FERA Appellate Board allowed the appeal in favour of the petitioner and the order dated 29.01.1990 was set aside. The petitioner has amended the writ petition incorporating necessary facts in respect of the appeal decided by FERA Appellate Board on 3.11.1999. The petitioner also applied to Air India for withdrawing the order of dismissal in view of the order of Appellate Board setting aside the order of his conviction under FERA but nothing was done by Air India.

3. The learned counsel appearing for the respondent did not dispute that upon the order dated 29th January, 1990 passed by the Directorate of Enforcement (FERA) whereby the petitioner was held guilty for contravention of provisions of FERA and penalty was imposed upon him, having been set aside by the FERA Appellate Board, New Delhi vide order dated 3.11.1999, the dismissal of the petitioner cannot be sustained. The only issue raised before us is upon dismissal order dated 2nd August, 1990 being set aside whether petitioner deserves to be reinstated with all consequential benefits or he be granted reasonable compensation in lieu of reinstatement and back wages.

4. Mr. Grover, learned counsel for the petitioner strenuously urged that petitioner had suffered tremendously due to his wrongful dismissal and now since the order of Directorate of Enforcement (FERA) on the basis of which dismissal order came to be passed, has been set aside by FERA Appellate Board on merits, the petitioner must be restored his service. He submitted that in petitioners entire service of more than two decades with Air India and his service as Assistant Flight Purser for about 10 years till the alleged incident occurred, the petitioner

had rendered unblemished service. He contended that Air India has in past reinstated the employees who were allegedly involved in smuggling of gold or narcotic drugs but when allegations were found not proved. The present case is no different, the learned counsel urged and, therefore, there is no justification for Air India to deny the petitioner reinstatement in service. In this connection, he relied upon Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, ; Hukmi Chand Vs. Jhabua Cooperative Central Bank Ltd., Jhabua (M.P.) and Another, ; Krishnakant Raghunath Bibhavnekar Vs. State of Maharashtra and others, ; Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others, ; Hindustan Steel Works Construction Ltd., etc. etc. Vs. Hindustan Steel Works Construction Ltd. Employees'' Union, Hyderabad and another etc. etc., ; State of U.P. and another Vs. Ved Pal Singh and another, ; Babu Lal Vs. The State of Haryana and others, ; The The Food Corporation of India Vs. George Varghese and another, and Shireen Dubash (Ms.) v. Air India Ltd. & ors. 2000 2 CLR 230 .

5. On the other hand Mr. B.H. Patel, learned counsel appearing for Air India submitted that looking to the nature of the alleged incident, Air India has lost confidence in the petitioner and therefore, reinstatement would not be proper relief. He invited our attention to para 13 of the reply affidavit wherein the following averment has been made:-

"13.In the present case though the Petitioner has been acquitted, it is an admitted position that the unaccounted foreign exchange was seized from the premises of the Petitioner. This has neither been denied by the Petitioner nor has he adequately explained the same. It can be seen from the order acquitting the Petitioner that the proceedings have been quashed on technical grounds. In the circumstances the Respondent Corporation submits if reinstatement is granted the Petitioner being an Assistant flight pursuer will have to be assigned flying duties and the same would put the Corporation at grave risk."

6. We have thoughtfully considered the averments of learned counsel for the parties. In so far as the order of dismissal dated 2nd August, 1990 is concerned, the same is unsustainable as the foundation of that order viz. order dated 29th January, 1990 passed by Directorate of Enforcement (FERA) has been set aside by FERA Appellate Board on 3rd November, 1999. Upon perusal of the order passed by FERA Appellate Board, it is clear that the Appellate Board did not find any merit in any of the findings recorded against the petitioner by Directorate of Enforcement in respect of contravention of certain provisions of FERA. Even recovery of foreign exchange and seized documents from the residence of petitioner has not been held to be conclusively attributable to the petitioner by FERA Appellate Board. The question arises whether, in this backdrop, the stand of Air India that it has lost confidence in the petitioner could be accepted. But for the bald statement made in the reply that because of recovery of foreign exchange and documents from the residence of petitioner, the employer has lost confidence, there is nothing on record which may justify its belief of loss of

confidence. It is difficult to accept the stand set up in reply, particularly, para 13 referred to hereinabove, that the unaccounted foreign exchange seized from the premises of petitioner has neither been denied by petitioner nor has been adequately explained by him. The FERA Appellate Board has unmistakably held that recovery of foreign exchange and seized documents could not be conclusively attributable to the petitioner. It appears to us that case of loss of confidence set up by Air India is only make believe and it is not open to the respondent to rely on the same fact which has been negatived and not believed by FERA Appellate Board. Some instances have been given by the petitioner where upon charge of smuggling of gold or narcotics having not been substantiated, the delinquent has been reinstated. The case of one Mr. C. V. Khavshe is quite close to the present case even as per explanation given by Mr. Patel. During the course of arguments, Mr. Grover, learned counsel for petitioner suggested that if petitioner is reinstated in service, he may consider foregoing backwages. We were informed by Mr. Grover that if petitioner is reinstated, he would superannuate at the end of month of April, 2007. Alternatively, Mr. Grover fairly suggested that if petitioner is not reinstated then he shall be satisfied if reasonable compensation in lieu of reinstatement is awarded. According to him, for the period from April, 1988 to August, 2002 arrears of salary and allowances inclusive of proficiency linked allowance approximately come to Rs.21.60 lacs and salary for the period from September, 2002 (assuming he is reinstated) till he superannuates in April, 2007 shall be around Rs.14 lacs. In addition, Mr. Grover submitted, petitioner shall be entitled to bar compensation allowance from 1.2.1994 amounting to Rs.2.75 lacs till date and further amount of Rs.1.60 lacs from September, 2002 to April, 2007. Mr. Grover also submitted that the petitioner would have been entitled to lay over allowances/hourly flying allowances which for the period from April, 1988 to August, 2002 shall come to Rs.34.60 lacs while for the period from September, 2002 to April, 2007 shall come to Rs.11.20 lacs. Thus according to Mr.Grover, learned counsel for the petitioner, the petitioner is entitled to Rs.58.95 lacs towards arrears of salary and allowances inclusive of proficiency linked allowance, bar compensation allowance, layover allowance, hourly flying allowance and he shall be entitled to around further sum of Rs.26.80 lacs for the period from September, 2002 to April, 2007 towards his salary and allowances until he superannuates.

7. The learned counsel for the respondent was unable to give any positive response or indicate his views to the fair suggestion made by the learned counsel for the petitioner.

8. Though Mr. Grover, learned counsel for the petitioner cited various cases as noted above to buttress his argument of petitioners reinstatement, we do not consider it necessary to traverse those cases cited at Bar as legal position is settled that upon setting aside dismissal order, the employee ordinarily gets benefit of reinstatement and consequential benefits but a given fact situation may call for exception and the Court may in that view mould the relief. The court has to consider the factual aspects and circumstances of each case before it

passes the final order. Some important aspects and factors may militate against the reinstatement even when the order of dismissal has been set aside. In the present case, the petitioner had about 20 years of employment with Air India from the post of Stenographer to Operation Assistant to Assistant Flight Purser till the alleged incident occurred in the year 1988. But for the alleged incident, nothing adverse has been pointed out by the respondent against the petitioner and therefore, it can safely be assumed that service record of petitioner was unblemished till the alleged incident occurred. The plea of loss of confidence set up by Air India is not meritorious and seems to have been raised as a routine since it was not even suggested during the course of arguments that despite petitioners exoneration by FERA Appellate Board, Air India intends to initiate disciplinary action in the light of averments made in the reply, particularly para 13 thereof. However, the fact remains that the petitioner is out of employment for about 14 years and now only four years and 8 months service is left. In view of small period of service left, we are satisfied that reinstatement of the petitioner may not be justified. As already noticed by us even the learned counsel for the petitioner, alternatively suggested payment of reasonable compensation in lieu of reinstatement. In O.P. Bhandari Vs. Indian Tourism Development Corporation Ltd. and others, , the Apex Court awarded compensation on the basis of 3.33 years of salary including admissible allowances in lieu of reinstatement and back wages. According to the petitioner, for four years and eight months service left, the petitioner shall be entitled to Rs. 14 lacs approximately towards the salary and allowances inclusive of proficiency linked allowance, Rs. 1.60 lacs towards Bar Compensation allowance and about Rs.11.20 lacs towards layover allowances/hourly flying allowances, in all Rs.26.80 lacs while he is claiming Rs.21.60 lacs towards arrears of salary and allowances inclusive of proficiency linked allowance, Rs.2.75 lacs as arrears of bar allowance and Rs.34.60 lacs towards layover allowance/fly over allowances. This amount seems to be exaggerated and on much higher side. Some of the allowances claimed may not be payable without actual service. Taking overall facts and circumstances of the matter, we are of the considered view that an amount of Rs.15 lacs would be a reasonable and adequate compensation in lieu of reinstatement and the claim of the petitioner towards backwages and other allowances. In other words, this amount of Rs.15 lacs covers full period commencing from the date of termination of petitioners service till the period of his superannuation.

9. Consequently, we allow the writ petition by following order:-

i) The order dated 2nd August, 1990 dismissing the petitioner from service is quashed and set aside.

ii) The respondent- Air India shall pay compensation in the sum of Rs.15 lacs to the petitioner in lieu of his reinstatement, backwages and allowances from the date of unlawful dismissal until the date of superannuation.

iii) The petitioner shall be entitled to the amount of provident fund and gratuity over and above the aforesaid amount.

iv) The petitioner shall be entitled to retiral medical benefits as per the relevant rules.

v)The compensation awarded to the petitioner would be staggered between the year 1989 till date of actual payment for the purposes of income tax and given the appropriate relief by assessing authority.

vi) The amount already paid to the petitioner during the pendency of writ petition shall be adjusted in the amount of Rs.15 lacs. It would be open to the petitioner to forthwith withdraw the amount lying with the Prothonotary & Senior Master. The said amount comprises of the amount deposited by respondent and interest accrued thereon. After adjusting the aforesaid amount, the respondent-Air India is directed to pay remaining amount of compensation within four weeks from today, failing which Air India shall be liable to pay interest at the rate of 6% per annum on the unpaid amount from today till actual payment is made.

vii) The bank guarantee furnished by the petitioner stands discharged.

No costs.

