

(1983) 05 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ Petition No. 3866 of 1982

Sunder Dass

APPELLANT

Vs

Asthetic Exports Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 18-05-1983

Acts Referred:

Citation : (1983) 5 DRJ 364 : (1984) LabIC 209 : (1983) 2 LLJ 246 : (1983) RLR 782 : (1985) 1 SLJ 577

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : B.S. Charya and Rakesh Munjal, for the Appellant;

Judgement

A.B. Rohatgi, J.

(1) The question of award of backwages has been troubling the courts and the legislature. In what cases backwages must be awarded to the workman who is ordered by the Tribunal to be reinstated in service.

(2) George Orwell once wrote, ""How right the working classes are to realise that the belly comes before the soul not in the scale of values but in point of time." One of the most important facts about life is that human beings cannot get on without food, clothing, and shelter. Most modern men regard it as the most important fact of all, and spend most of the waking hours of a brief lifetime in trying to deal with it.

(3) These are the facts. The petitioner Sunder Dass was employed by the management of M/s, Aesthetic Exports Pvt. Ltd., respondent No. I, as a machine man in their factory in printing section with effect from 16-10-1978 on a consolidated salary of Rs. 1100.00 per month as a permanent employee. Previously he was working in another factory. He left that service and joined Aesthetic Exports Pvt. Ltd. As he was asked by this management to leave the previous concern and to join them they also gave Rs. 3000.00 as an advance and Rs. 850.00 as ex gratia payment to avoid loss caused to him by leaving his

earlier employment.

(4) The petitioner worked with the management hardly for 2 months. From 21-12-1978 he was not allowed to enter the factory and join duty without issuing any written order of termination of service.

(6) On the question of back wages the labour court took the view that he was not entitled to back wages because he had not placed any material on record to substantiate his claim. Following the decision in *Krishan Murari Lal Kapur v. Zodiac Press* 1976 (33) F.L.R. 76 decided by H.L. Anand, J., it held that the workman was bound to produce sufficient material to show that after termination of service he remained unemployed and was not able to earn anything. In its opinion the petitioner had failed to make out a case for back wages. So no back wages were awarded. Only reinstatement was ordered.

(7) The workman has brought this writ petition under Art. 226 questioning the validity of the Labour Court's refusal to award him back wages. In his petition of claim dated 18-8-1979 the workman prayed to the tribunal that the illegal termination be set aside and the management be directed to reinstate him with full back wages and continuity in service. In paragraph 6 also he said much the same thing. In the reply of the management nothing has been said why the workman was not entitled to back wages. All that was said was that the labour court may kindly reject the "false claim". When the stage of evidence arrived the workman appeared as his own witness on 23-9-81. In cross-examination the management put a question to him. To this he gave this answer : "Since the date my services were terminated I am unemployed."

(8) The question for decision is : Will it be right to refuse back wages to the workman where it is held that the termination is illegal and that he is entitled to reinstatement with continuity of service ? In support of its view the labour court has solely relied on *Krishan Murari Lal Kapur* (supra).

(9) In view of the recent decisions of the Supreme Court in *G. T. Lad and Others Vs. Chemical and Fibres of India Ltd.*, , *Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others*, , *Gujarat Steel Tubes Ltd.v. Its Mazdoor Sabha* 1980 Lab. I.C. 1004 and *Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another*, the legal position admits of no doubt. The setting aside of an order terminating the services of a workman must ordinarily, as a matter of course, lead to the reinstatement of the Workman. An illegal order of termination is non est. A void dismissal is just void and does not exist. (See *Gujarat Steel Tubes Ltd. (supra)* at P.1041). It is as if the order had never been made. The award of full back wages must Therefore follow once the order of termination is declared to be void. This is the normal rule. Ordinarily this normal rule must not be departed from. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and the Workman to direct reinstatement with full back wages. For instance the industry might have

closed down or might be in severe doldrums ; the Workman concerned might have secured better or other exceptional cases the court may mould the relief but ordinarily the relief to be awarded must reinstatement with full back wages. (See Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another,).

(10) The burden of proving that the normal rule should be departed from because the case is an exceptional one lies on the management. Special circumstances must be pleaded specifically by the management and should be proved by producing the necessary material in this behalf.

(11) Hindustan Tin Works v. Its employees (supra) is the locus classious on the subject. In an eloquent passage D.A. Desai J. at P. 77 said :

"THE specter of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages docs not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings, if thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More "so in our system where the law"s proverbial delay has become stlipifying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself. ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, Therefore, a workman whose service has been illegally terminated would be entitled to full back wages extent to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be premium on the unwarranted litigative activity of the employer."

(12) Following the decisions of the Supreme Court a division Bench of Rajindar Sachar and M.L Jain JJ. of this Court in Management. Delhi Transport Corporation v. Ram Kumar 1982 Lab. IC 1378 has held that it is for the employer to establish and prove that the workman was gainfully employed during enforced idleness. No presumption of being gainfully employed can be raised. The same is the view of a division bench of Orissa High Court in Suresh Chandra v. State of Orissa 1982 Lab I.C. 748.

(13) Applying the principles laid down by the Supreme Court to the present case

I do not think the labour court justified in refusing to award back wages to the Workman.

(14) Mr. Munjal on behalf of the Management has tried to support the view of the labour court. He has referred me to M/s. Daily Tej Private Ltd. v. Lt. Governor, Delhi 1979 (39) F.L.R. 302 and Malik Dairy Farm v. Its Workers" Union 1968 (2) L.L.J. 523 in support of his submission that backwages were rightly refused to the workman on the ground that he had failed to produce any material on the record to substantiate his claim. The first decision cited by Mr. Munjal is a decision of S.S. Chadha J. Chadha J. relied on Krishan Murari Lal (supra). In Krishan Murari Lal Kapur at P. 79 H.L. Anand J. had said :

"NOW it is well settled that the claim of back wages would not succeed merely because the termination or dismissal is set aside. The aggrieved workman would still be bound to make out a cases for award of back wages by producing sufficient material which may show that during the period of his forced unemployment by the management he had remained unemployed or partly employed or was otherwise not able to earn what his employment, if subsisting with the management, would have entitled him to."

(15) In the light of the latest decisions of the Supreme Court the view taken in Krishan Murari Lal cannot be said to be good law any longer. Anand J. decided Krishan Murari Lal in 1976. The decisions of the Supreme Court rendered between 1978 and 1980 establish that the normal rule is to award back wages whenever the court orders reinstatement. This normal rule can be departed from only in exceptional cases. So it was enough for the workman in the present case to make a prayer of reinstatement with full back wages which he did. It was for the management to show that this normal rule should not be followed and departure should be made there from because there were exceptional circumstances requiring a departure. This the Management had to plead and to prove. This they failed to do. It was not for the workman to say anything more than what he averred in the writ petition. In evidence it was established that he remained unemployed after the termination of his services. What more is required of him. The burden was fairly and squarely on the shoulders of the management to prove that back wages should not be awarded to the workman. The view that it is for the workman to make out a case for award of back wages by producing sufficient material on record is now obsolete. Hindustan Tin Works and Gujarat Steel Tubes Ltd. (supra) decidedly reject that view.

(16) The ideas of nineteenth century freedom of contract have lost their appeal today. Social security is the dominant note of labour law. Law has not stood still. The "felt necessities of the time" have compelled the courts and the legislature to abandon the doctrine of mitigation of damages which was the corner-stone of the common law. If a workman is able to keep his body and soul together somehow during retrenchment and reinstatement there is. no good reason why he should be denied back wages which logically flow from the declaration of illegal termination of services.

(17) It is my duty to follow the Supreme Court. I cannot follow Krishan Murari Lal Kapur decided by H L. Anand, J. or Daily Tej Pvt. Ltd. decided by S.S. Chadha J. They are no longer good law.

(18) As the division bench of this Court has said that it is for the employer to establish and prove that the workman was gainfully employed and Therefore should not be awarded back wages or some other exceptional circumstances may be pleaded and proved by the employer so that the court exercises its discretion in favor of the management. The decision of the Bombay High Court in Malik Dairy Farm (supra) is no longer good law in view of the decision of the Supreme Court to which I have referred.

(19) Mr. Munjal said that the powers and functions in respect of management of the printing factory in Mayapuri where the workman was employed have since been transferred by Aesthetic Exports Pvt. Ltd. to Albion Mills Private Limited, respondent No. 3. This is stated to have been done on 7-7-1982. But there is nothing in the award to show this. Nor was it pleaded before the labour court. This has not been proved by any cogent. evidence. But even if it is so, the award of the Labour Court would be binding on the parties to the industrial dispute as well as to the transferee of the establishment to which the dispute relates See Section 18(3)(a) and (c) of the Industrial Disputes Act).

(20) In the result I order the management of Aesthetic Exports Pvt. Ltd. and M/s. Albion Metal Pvt. Ltd. respondents I and 3. to pay full back wages to the workman from 21-12-1978 to 7-8-1982. The award of the Labour Court is modified to this extent. The relief of reinstatement granted by it will stand. The respondents will also pay Rs. 300.00 as costs.