

(2004) 09 DEL CK 0122

In the Delhi High Court

Case No : WA 585 of 2003

Thankur Singh Rawat and Others

APPELLANT

Vs

Jagjit Industries Ltd.

RESPONDENT

Date of Decision : 22-09-2004

Acts Referred:

Citation : (2006) 1 LLJ 775

Hon'ble Judges : Manju Goel, J;B.A. Khan, J

Bench : Division Bench

Advocate : Asha Jain Madan, for the Appellant; Divyajyot Singh, for the Respondent

Final Decision : Dismissed

Judgement

Manju Goel, J.—This Letters Patent Appeal is directed against the Order of Writ Court dated 28th January, 2003 upholding the view of the Labour Court that the appellants were not entitled to back wages. The appellants were "Peons" in the office of respondent No. 1 Jagjit Industries Limited. Their services were terminated on 11th December, 1993. They raised an Industrial Dispute which was eventually referred to the Labour Court vide Reference Order dated 27th October, 1995. The Labour Court held vide its Award dated 28th November, 2000, that the termination of their services was illegal. The Labour Court directed that the appellants be reinstated in service. However, back wages were denied on the ground that no averments were made in the statement of claim filed by the appellants to the effect that they were unemployed. Further, there was also no statement to this effect in the evidence. The Labour Court took into consideration the plea of the management that neither in the statement of claim nor in the affidavit filed by the three appellants, there was any averments that the appellants were unemployed during the period after their termination and till passing of the Award. On behalf of the appellants/workmen, it was submitted before the Labour Court that since the termination was illegal they were entitled to be reinstated with full back wages irrespective of the fact that they have failed

to plead or state that they were not gainfully employed. The Labour Court after going through the law cited before it came to the conclusion that the workmen had not asserted the fact that they were unemployed and thus there was no occasion for the management to deny and prove that the workers were gainfully employed and Therefore the workmen were not entitled to back wages.

2. Before proceeding further, it is necessary to identify the controversy involved in this case. The claim of the workmen was that their demand for full back wages has to be allowed irrespective of the fact that they have not pleaded or proved the fact of their unemployment. The judgment of the Labour Court to the extent it deals with the question of back wages has been reproduced by the learned writ Court in its entirety. The writ Court has accepted the entire judgment and has refused to interfere with it. Certain portions of the judgment of Labour Court are required to be extracted in order to understand the nature of controversy involved in this case. The judgment of the Labour Court dated 28.11.2001 says as under:

"Learned AR for the management has, however, argued that the workmen cannot be given back wages for the reasons that they have nowhere stated that they were unemployed during the course of their forced unemployment. In this regard he has drawn my attention to the statement of claim as well as affidavit filed by them.

Learned AR for the workmen on the other hand, had argued that in those cases where Labour Court comes to the conclusion that the termination of the services of the workmen is illegal, he is to be reinstated with full back wages. He has argued that irrespective of the fact that the workmen have pleaded the said act or not, the management is supposed to give full back wages to the workmen....

I have carefully gone through the relevant law cited by the learned Counsel for the parties. It is a settled law that whenever the termination is found to be illegal, the workman is to be reinstated with full back wages unless there are specific reasons to deny the same. The Courts have held that full back wages can be denied to the workman if the workman was gainfully employed during the course of his unemployment arising out of the illegal termination of his services. It is also a settled law that it is for the management to prove that workman was gainfully employed during the period from his illegal termination to reinstatement. The onus is always on the management to prove the fact. However, in the present case, the workman is totally silent about the fact whether he was unemployed during the period of his illegal termination to the date of order. It was for the workman to assert the said fact in his statement of claim as well as affidavit. Perusal of record reveals that workman has nowhere stated that he was unemployed during the course of his unemployment. In my opinion, without such assertion, the management is not supposed to prove the fact that workman was gainfully employed. Had the workmen pleaded such fact before the Court, the onus certainly was on the management to prove otherwise."

3. The stand of the workmen/appellants did not change even when the learned writ Court was hearing the matter. This is clear from paragraph 4 of the judgment of the learned writ Court which is as under:

"4. Mr. D.N. Vohra, learned Counsel appearing for the petitioners referred to the same judgments relied upon by him before the Labour Court and are discussed in detail by the Labour Court. He also referred to some more judgments towing the same line. However, he could not dispute that the workmen had not asserted that they were employed. His only submission was that the moment it is held that the termination of the services of the workmen is illegal, they have to be entitled to full back wages and onus to prove that the workmen were gainfully employed was on the management which management did not discharge."

4. The stand of the appellants before us continue to be the same namely that they are entitled to full back wages even without proving or ever alleging that they were never employed during the period after their removal from service till the order of the Labour Court. We have to go into the law on the aspect keeping in view the nature of controversy involved.

5. The appellants rely upon the judgments of Mohan Lal Vs. Management of Bharat Electronics Ltd., Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 Gammon India Limited Vs. Niranjan Dass, Narotam Chopra v. Presiding Officer, Labour Court and Ors., reported at 1989 Supp. (2) SCC 1997 and Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, , Delhi Consumer Cooperative Wholesale Stores Ltd. v. Secretary (Labour), etc., reported at 1983 Lab&i C 1652 and Hridayanand v. G.P. Stores, Allahabad and Ors., reported at 1996 LLR 433. Other judgments available on the point are State Bank of India v. Ram Chandra Dubey and Ors., reported at 1999 (83) FLR 1048; Food Corporation of India Workers Union Vs. Food Corporation of India and another, ; Haryana Urban Development Authority Vs. Devi Dayal, ; Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, ; Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and Another, M.P. State Electricity Board Vs. Smt. Jarina Bee, . In order to fully appreciate the law on the subject and also to see the development of the law on back wages it will be appropriate to read the judgments in a chronological manner. Thus, the first judgment which is required to be seen is that of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, . The workmen/appellants strongly rely upon this judgment. There is a long discussion in this judgment on the question of back wages, the important lines from the judgment can be extracted here:

"9. Ordinarily, Therefore, workmen whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule...."

"If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the

termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away there from on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them."

"11. In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view of the relevant circumstances. But the "discretion" must be exercised in a judicial and judicious manner."

"12. If the normal rule in a case like this is to award full back wages, the burden will be on the appellant employer to establish circumstances which would permit a departure from the normal rule."

6. Quoting this judgment, the learned Counsel for the appellant argues that it was for the management/respondent to plead and prove that the workmen were gainfully employed. The learned Counsel argues, if at all the employment of the workman was a relevant fact it was for the management to plead and prove that the workman was gainfully employed. This is a related aspect of the controversy and we will revert to it later.

7. Thus, Hindustan Tin Works does not lay down a law to say that in every case of reinstatement full back wages must necessarily be granted. On the contrary, it accepts that there is an element of discretion. In fact, in this judgment, the workmen were denied of full back wages and the reason for doing so, was the financial weakness of the management itself. In other words, if this judgment has to be strictly followed even if the workman is able to prove that it was altogether unemployed full back wages could have been denied on other grounds. Hindustan Tin Works does not come to the aid of the workmen although they staked their claims mainly on the basis of this judgment.

8. In the case of Mohan Lal Vs. Management of Bharat Electronics Ltd., , the law laid down is that if the retrenchment is found to be ab initio void, the workmen would be deemed to have continued in services and Therefore entitled to full back wages as if there had been no break in their service. The question in controversy before this Court was not at all raised in the case of Mohan Lal.

9. Delhi Consumer Cooperative Wholesale Stores v. Secretary (Labour) (supra) is a DB judgment of this Court. In this case, the workmen had actually led evidence that they were not gainfully employed but no evidence had been led by the employer to controvert this fact hence full back wages were awarded to the workmen. Thus, the question that has arisen in the present case was not at all before the Court in the case of Delhi Consumer Cooperative Wholesale Stores.

10. Gammon India Limited Vs. Niranjan Dass, , follows the judgment of Mohan Lal v. The Management of Bharat Electronics Ltd. (supra) repeats that retrenchment being void ab initio, the workman has to be treated to have been continuously in service and thus entitle to full back wages. The question as to whether back wages are payable even if the workmen were employed or even if the workmen had not at all asserted that they were unemployed was not directly addressed in this case. Nonetheless, the Court proceeded on the presumption that the workman was unemployed as it says in Para 4:

"4. It appears that the respondent has been unlawfully kept out of service, Therefore it is but just that the appellant company shall pay all the arrears as calculated according to the directions herein given with 12% interest from the date the amount became due and payable till realisation."

11. Narotam Chopra v. Presiding Officer, Labour Court and Ors., reported at 1989 Supp. (2) SCC 1997 follows Gammon India Limited Vs. Niranjan Dass, and does not answer the controversy before this Court.

12. Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 says that the back wages is a consequential order of reinstatement and that of grant of back wages follow unless there are reason on record which would justify a departure from the normal order. The Court found that there was nothing on record to come to the conclusion that the workman was gainfully employed during the period she was out of service. One thing that needs to be said about this judgment is that it related to service under the State and not to an industrial employment. The employment of the appellant in that case was governed by the service rules and not by Labour Law. It further noted that even in service law this judgment acknowledges the fact that if the Government servant was gainfully employed he/she could not claim full back wages on reinstatement.

13. Hridayanand v. G.P. Stores, Allahabad and Ors., reported at 1996 LLR 433 is Single Bench Judgment of the Allahabad High Court which acknowledges the element of discretion in payment of back wages and held that the workman despite being conscious that he was gainfully employed during the period after his wrongful termination did not assert that he remained unemployed or suffered any financial loss declined to grant back wages and further refused to remit the matter to the Labour Court for fresh decision on this question.

14. State Bank of India v. Ram Chandra and Ors., reported at 1999 (83) FLR 1048, is again a judgment on service law relating to back wages and acknowledges the relevance of being in or out of gainful employment after unlawful termination. Single Bench judgment places the onus of proof on the management but does not address the question as to whether the workmen could get the back wages even without raising a plea that he was all through unemployed.

15. In Vikramaditya Pandey Vs. Industrial Tribunal and Another, the Supreme

Court set aside the High Court order granting relief of reinstatement and taking note of the fact that the termination dated back to 1985 found it proper in the interest of justice to grant back wages only to the extent of 50 per cent without at all going to the question of the Employees State of Employment or earnings during the period of retrenchment. It appears that back wages of only 50 per cent were awarded on the presumption that the workmen could not have been altogether unemployed for about 6 years after illegal retrenchment similarly.

16. In the case of Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and Another, there being no pleading or response during the long interregnum period, the Court granted 50 per cent of the back wages in order to avoid to remit the matter back to Labour Court for further consideration at a distant time.

17. In Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, the Court having considered the judgments in the case of Hindustan Tin Works Ltd., PGI of ME and Hindustan Motors evolved its own calculation for grant of back wages and ordered for a lumpsum payment of Rs. 15 lakhs in view of the facts and circumstances present in that case.

18. The general principles of law that can be culled out from these judgments may be stated as under:

(i) Back wages is the normal rule to follow if a wrongful retrenchment or dismissal is set aside by the Court.

(ii) There is an element of discretion in the grant of back wages which the Court has to exercise keeping in view the facts and circumstances not only of the workmen but also of the management

(iii) The question whether the workman was or was not employed is a relevant consideration while granting back wages

(iv) If the workman was gainfully employed the back wages could be fully or partly denied to him

19. Applying these principles to the facts of the present case and the controversy involved herein we have no hesitation to say that the workmen cannot be heard to argue that irrespective of any plea of unemployment during such interregnum period having been raised the workmen are entitled to back wages as a matter of course.

20. The second question raised is about the pleading and onus of proof. The learned Counsel for the appellants have submitted by referring to Sarva Shramik Sangh, Bombay Vs. Indian Hume Pipe Co. Ltd. and Another, and Workmen of Balmer Lawrie and Co. Vs. Balmer Lawrie and Co., that the Labour Court is not bound by the technical rules of procedure. There is no quarrel with this proposition of law. Yet the Labour Court has to discharge the responsibility of finding the fact as to whether or not the workman was gainfully employed in the interregnum period mentioned above.

21. In PGI of ME v. Raj Kumar, JT 2000 SCC 336, the Labour Court had restricted the back wages to 60 per cent. The High Court set aside the judgment and granted full back wages. The Hon'ble Supreme Court held that it was not within the jurisdiction of the High Court to go into the factual aspect under the writ jurisdiction, and Therefore, could not set aside the judgment of the Labour Court.

22. If the workman does not even plead that he was unemployed is the management then required to plead the state of employment of the workman? The Labour Court says "No" and the writ Court accepts this answer. It is to be noted that the state of employment or unemployment of the workman is within the special knowledge of the workman and Therefore it should be his first duty to make an assertion that he was unemployed. Having so asserted in his statement of claim he may even state on oath about his state of unemployment for nothing more is required to prove his side of the case. It will then be for the management to assert or prove if the workman was at all employed.

23. In the present case, the workmen were conscious of the controversy from the very beginning. Even before the Labour Court, the workmen relied entirely on the proposition of law propounded by their representatives that full back wages were a matter of course and once reinstatement was ordered, the Court has no option but to award full back wages. Before us, the learned Counsel for the appellants has offered that the case be remanded to the Labour Court so that the workmen could amend the statement of claim and prove that they were unemployed. In our opinion the equities have to be balanced and it will be very unjust to do so at this late stage for the management cannot now be forced to investigate into the state of employment of the workmen that obtained about 10 years back and in case of its failure to do so suffer an order of payment of full back wages. It can be said here further that even before the writ Court, the workmen did not make any such offer or prayer. We are in agreement with the learned writ Court which answers the question as under:

"If the workman wants to claim back wages, it is for him to assert that he has remained unemployed after his termination Therefore initial burden is upon him. The moment he makes an assertion to this effect, burden of proof would shift to the management as workman cannot give any proof in the negative in support of his assertion. However, if no such averment is made that the workman remained unemployed after his dismissal, it cannot be said still the management has to prove that he was gainfully employed."

24. One cannot lose sight of the fact that the default of the workmen in pleading the factum of unemployment was raised by the management at the very initial stage before the Labour Court. The attitude of the workmen was defiant. They did not even care to pay on oath that they were unemployed during the interregnum period. It would be too late in the day to allow them to do so now.

25. Writ Court judgment is accordingly affirmed and this appeal is dismissed.