

CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH

DATE OF DECISION

:

31.5.1990

P R E S E N T

HON'BLE SHRI S.P MUKERJI, VICE CHAIRMAN

&

HON'BLE SHRI N.DHARMADAN, JUDICIAL MEMBER

ORIGINAL APPLICATION NO.215/89

1. A.P Rajan ,
2. K.Radhakrishna Pillai .. Applicants

v.

1. The Industrial Tribunal,  
Madras, Tamil Nadu.
2. The Executive Engineer(Construction),  
Southern Railway, Trichur.
3. The General Manager, Southern Railway,  
Madras.
4. The Union of India, represented by the  
Secretary to Government,  
Ministry of Railways, New Delhi. .. Respondents

M/s.Ashok M.Churian,C.A Joy .. Counsel for the  
applicants

M/s. M.C Churian, T.A Rajan .. Counsel for  
R2, 3 and 4

JUDGMENT

HON'BLE SHRI N.DHARMADAN, JUDICIAL MEMBER

The applicants in this case while working as Moplah Khalasis under the Bridge Inspector (Construction), Southern Railway, Trichur were dismissed from service pursuant to disciplinary proceedings initiated against them. The appeal filed against the dismissal order was rejected. Hence, they have raised an industrial dispute and the Central Govt. by order No.L-41012/55/83-D-II(B) dated 19.11.85 referred the following question for adjudication:

"Whether the action of the Executive Engineer (Construction), Southern Railway, Trichur, is justified in dismissing Sarvashri A.P Rajan and K.Radhakrishna Pillai, Moplah Khalasis from service? If not, to what relief?"

2. By the impugned award Annexure-I the first respondent, Industrial Disputes Tribunal, found that the order of dismissal of the applicants based on the finding of the EO cannot be sustained and accordingly it was set aside. The Tribunal directed the reinstatement of the applicants with continuity of service "but without back wages."

3. The applicants are challenging Annexure A-1 award to the extent it denies back wages to them on reinstatement. They are claiming back wages from 12.5.82 to 27.4.88.

4. The respondents strongly opposed the claim of the applicants. According to them the award is favourable to the applicants and since they have joined the service without raising any claim for back wages, they are estopped from raising such a claim in this application at this stage. They have also stated that the first respondent had exercised the discretion <sup>soundly</sup> ~~judicially~~ and passed the order of reinstatement of the applicants after an overall assessment of the facts without any back wages. Therefore this Tribunal should not interfere in this matter.

5. The only question that arises for consideration is whether the Industrial Tribunal, the first respondent, has exercised the discretion judiciously and validly in a judicial manner after <sup>by</sup> taking into consideration all relevant aspects while rejecting the back wages to the applicants at the time when the reinstatement was ordered after quashing the order of dismissal in this case?

6. The matter is not res integra. It is a settled proposition that it is the discretion of the Industrial Tribunal to grant or refuse back wages while ordering reinstatement of the workers in service. This

discretion should have been exercised in respect of the issue of granting or refusing of the back wages and not on the question of setting aside and reinstatement of the concerned employees.

7. The learned counsel for the applicants cited the following decisions in support of his contention that the applicants are entitled to back wages since it is a necessary corollary to be followed an order of reinstatement automatically:

1. Hindustan Tin Works V. Its Employees (AIR 1979 SC 75)
2. Devendra Pratap V. State of Uttar Pradesh (AIR 1962 SC 1334)
3. Surendra Kumar Verma V. Central Govt. Industrial Tribunal (1981 1 LLJ 386)
4. A. L. Kalra V. Project and Equipment Corpn. (1984 3 SCC 316)
5. Maharaja Sayajirao University of Baroda & others V. R. R. Thakar
6. Union of India and another V. Sri Babu Ram Lalla (AIR 1988 SC 344)

8. On the other hand the learned counsel for the respondents relied on Section 11-A of the Industrial Disputes Act 1947 and cited the following decisions:

1. Baldev Singh Vs. Presiding Officer, Labour Court Patiala and another (1986 4 SCC 519)
2. Jaswant Sing V. Pepsu Roadways Transport Corpn. and another (1984 1 SCC 35)
3. Management of Hinudustan Mechine Tools Ltd. Bangalore V. Mohd. Usman and another 1984 1 SCC 152
4. Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti and others (1988 (4) SCC 734)
5. C.A No. 1709 of 1988 U.O.I. V. Parma Nanda CA No. 6998 of 1988 Parma Nanda V. State of Haryana and others (1989 10 ATC 30)

9. It is not necessary to go into all the decisions cited at the bar. This case can be decided on the interpretation of Section 11-A of the I.D. Act. It says that the Tribunal may while setting aside the orders of dismissal direct reinstatement of the workmen " on such terms and conditions, if any, as it thinks fit or give such other relief to the workman including the award of a lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require." The expression "it thinks fit" connotes the discretion of the Tribunal. The question of back wages remains silent till a decision of reinstatement of the employee is taken. When once such a decision is taken it assumes importance and the Tribunal or adjudicator is bound to consider whether the mere reinstatement is sufficient as a proper relief to the employee or whether he should be awarded with full back wages or some sacrifice is expected of him as held by Justice Desai in M/s. Hindustan Tin Workers case, AIR 1979 SC 75. It is a general proposition that when an employee is reinstated in service after a certain period of unemployment he should be restored to the previous position without any disadvantage in the absence of any cogent reason to deny it. If the employee was always ready to work but he was kept away illegally on account of the illegal act of the employer there is no justification for not awarding him full back wages. There are exceptions to this general proposition and the <sup>relevance of</sup> ~~importance~~ of the discretion of the Tribunal assumes importance in this exceptional cases in which the Tribunal <sup>can</sup> ~~may~~ in its discretion may deny or reduce the back wages. Chinnappa Reddy, J. in Surendra Kumar Varma and others V. Central Govt. Industrial Tribunal, New Delhi, 1981 (1) LLJ 386 held as follows:

"But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is vestige of discretion left in the Court to make appropriate consequential orders."

10. Again in the case reported in Concerned workman of Sahai Industries V. B. D. Gupta and others, 1984 (1) LLJ 165 the Supreme Court quoted with approval the following passage from the earlier decision in Allahabad & Dhari Gram Panchayath V. Shri Brahad Santras Safai Kamdar Mandal 1971 (1) LLJ 508:

"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."

In Gujarat Steel Tubes Ltd. V. GST Mazdoor Sabha 1980 (1)LLJ 137 at page 174 the Supreme Court held as follows:

"Another fact of the relief turns on the demand for full back wages. Certainly, the normal rule, on reinstatement, is full back wages since the order of termination in non est. (see 1971 (1)(1) S.C.R. 563 and (1979) 3 S.C.R. 774). Even so, the Industrial Court may well slice off a part if the workmen are not wholly blameless or the strike is illegal and unjustified. To what extent wages for the long interregnum should be paid is, therefore, a variable dependent on a complex of circumstances. (see for e.g. 1967 (15) F.L.R. 395 paras 3 and 4)."

11. In the light of these decided cases we are of the view that there cannot be a straight jacket formula for the grant of back wages. The Tribunal or the court will have to be realistic and all relevant facts and considerations should enter the final verdict. More

or less, it would be a motion addressed to the discretion of the Tribunal. So we have to examine each case *and see* whether Industrial Tribunal has discharged the statutory duty of examining carefully the facts and relevant circumstances for the exercise of the discretion at the appropriate stage, after taking a decision to issue a direction for reinstatement, for deciding the further question of grant or refusal of back wages to the concerned employee. According to M.P. Jain, 'Principles of Administrative Law' fourth Edition, page 327 " The need for 'discretion' arises because of the necessity to individualize the exercise of power by the administration, i.e. the administration has to apply a vague or indefinite statutory provision from case to case." The Supreme Court in Jaisimghanis case, AIR 1967 SC 1427 held as follows:

"In a system governed by rule of law, discretion when conferred upon executive authorities must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey- 'Law of the Constitution'- Tenth Edn., Introduction cx). "Law has reached its finest moments," stated Douglas, J. in United States v. Wunderlich, (1951) 342 US 98, "when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion as Lord Mansfield stated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at page 2539 "means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful."

12. Under these circumstances we are not prepared to accept the contention of the learned counsel for the applicants that when a reinstatement is ordered after

setting aside an order of dismissal the payment of back wages should also follow as a necessary corollary to it. According to us as indicated above it depends upon the facts and circumstances of each case. Even in the leading case cited at the bar, namely: M/s. Hindustan Tin Workers Pvt. Ltd. V. the Employees of Hindustan Tine Workers and others, AIR 1979 SC 75, the Supreme Court only said "ordinarily the workmen whose service has been illegally terminated will be entitled to full back wages except when he is gainfully employed during the period". The expression "ordinarily" includes that there is no cast iron rule as contended by the applicants. It is flexible and the Tribunal can consider the relevant circumstances to deviate from the rule. The Ernakulam Bench of the Tribunal in R. A. 61/89, T. R. Rajan Vs. Executive Engineer and others, in which one of us (Hon'ble Shri N. Dharmadan) was a party, following the above Supreme Court decision held as follows:

"But we feel that grant of consequential benefits depends on various circumstances and facts such as conduct of the applicant, conduct of the respondents, whether the applicant was gainfully employed elsewhere when he was out of employment during disciplinary proceedings, whether the employer had engaged any other persons as substitute in the place of applicant and paid him etc. Only after a proper evaluation and assessment of overall circumstances in each case and the satisfaction of the court that the grant of consequential benefits to the government servant is necessary that such benefits are also granted along with the order of reinstatement. It is only in the interest of justice that the court passes such order granting consequential benefits. According to us it is not an invariable and inflexible rule to be applied in every case that whenever a direction is issued for the reinstatement of the officer, should it also automatically follow consequential benefits to be paid to the employee."

13. In the instant case the Industrial Tribunal though assessed the evidence and came to the conclusion that the dismissal of the applicants are unsustainable and decided to reinstate the applicant in service taking into consideration the facts and circumstances, it did not exercise the discretion in terms of Section 11-A of the I.D. Act for coming to the conclusion that the applicants are not entitled to back wages. We are not in a position to discern or understand any thing from the limited expression "but without back wages" used in the impugned award. It is impossible for us to come to the conclusion that there is an exercise of discretion by the Industrial Tribunal as stated by the learned counsel for the respondents. So as to enable us to come to a definite finding and uphold the award in toto the Industrial Tribunal ought to have given convincing reasons as to why on the facts and circumstances of this case the applicants are not entitled to back wages when they are directed to be reinstated in service after setting aside the order of dismissal. As a matter of fact, the Karnataka High Court, in a recent judgment (1990 Lab. IC 230) in M/s. Hind Plastic Industries Bangalore V. Labour Court Bangalore, held that the burden of proof that the employee was not gainfully employed does not lie on the workman, and that it is the employer who has to prove that the workman was gainfully employed. Really the Industrial Tribunal had not examined whether the employees have been gainfully engaged elsewhere while they were out of service during the course of the enquiry, whether the conduct of the applicants are such which will justify the rejection of their claim for back wages or that they can sacrifice the claim for such back wages. Without examining any of


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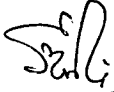
these aspects and coming to a definite finding it seems impossible for any Court or Tribunal to arrive at a conclusion that the Industrial Tribunal had exercised the discretion and that the employees are not entitled to back wages. Hence we are of the view that the Industrial Tribunal has not discharged its statutory duty enjoined upon the Tribunal under Section 11-A of the I.D. Act while passing the impugned award in this case.

14. In fine we are setting aside only the limited portion of the award dealing with the denial of back wages to the employees and remitting<sup>m</sup> the matter back to the Industrial Tribunal for a denovo decision on the question of entitlement of back wages of the applicants as claimed by them.

15. There will be no order as to costs.

  
(N. Dharmadani)  
Judicial Member

31.5.90

  
(S. P. Mukerji)  
Vice Chairman

31.5.90

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