

Mahabir Prasad Vs Delhi Transport Corporation

Court: Delhi High Court

Date of Decision: July 23, 2014

Acts Referred: Constitution of India, 1950 " Article 136, 226
Industrial Disputes Act, 1947 " Section 11-A, 29

Citation: (2014) 6 AD 802 : (2014) 212 DLT 503 : (2014) 144 DRJ 422 : (2014) 143 FLR 858 : (2014) 4 LLJ 413

Hon'ble Judges: Vipin Sanghi, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: G.S. Charya, Advocate for the Appellant; Avnish Ahlawat, Advocate for the Respondent

Final Decision: Allowed

Judgement

S. Ravindra Bhat, J.

This petition under Article 226 of the Constitution of India questions an order dated 23.03.2012 of the Central

Administrative Tribunal (hereafter "the Tribunal") in O.A. No. 3579/2011 and the order dated 12.05.2011 of the Delhi Transport Corporation

(hereafter "DTC") to the extent that it denies the petitioner notional fixation of pay and increments and counts the period out of employment as not

being in service, for the purposes of pension and terminal benefits. The question requiring decision is whether an employee reinstated to his position

is entitled to benefits of notional pay fixation, increments etc. and also additionally, if his services are to be counted for the purpose of pension and

terminal benefits for the intervening period (between the date of termination order and the date of reinstatement).

2. The facts are that the petitioner is an employee of the DTC. He was removed from service by an order dated 19.01.1995 on allegations of

misconduct. Aggrieved, he raised an industrial dispute, which led to the Labour Court, by its Award dated 02.08.2010, setting aside the enquiry

proceedings as well as the removal order. The DTC was directed to reinstate the petitioner with continuity of service but without back wages.

3. The respondent DTC, issued a letter/order dated 12.05.2011 reinstating the petitioner without back wages. The order at the same time denied

him the benefits of notional pay fixation, promotion, ACP, and increments. It also stated that the services of the petitioner were not to be counted

for the purposes of pension and terminal benefits for the intervening period. Further, the pay of the petitioner was fixed in terms of the last pay

drawn when his services were terminated. The petitioner joined the services upon receiving the said letter which withheld the pension and terminal

benefits etc.

4. The petitioner felt aggrieved and approached the Tribunal, by filing an application, O.A. No. 3579/2011. The Tribunal by its order dated

23.03.2012 disposed of the application stating that the petitioner should invoke Section 29 of the Industrial Disputes Act, 1947 to seek

appropriate remedy instead of approaching it. The review application against this order by the respondent was dismissed by the Tribunal on

05.09.2012.

5. In order to understand the issues involved, it is necessary to consider the award of the Labour Court dated 02.08.2010. The relevant portion

has been reproduced as under;

In this peculiarity of the situation, I do not find any evidence to fasten the charges as proved against the workman for the reason that the key

witness to the theft namely Raj Bahadur, is not examined. The corroborative evidence of the other eye witnesses namely Moti Ram and Om

Prakash, are also not forthcoming. In this context, I have no other alternative than to hold the charges having not been proved. In the result, the

workman is entitled for reinstatement.

[emphasis supplied]

Further the Labour Court considered the aspect of award of grant of back wages to the petitioner. While placing reliance on the decisions of

Senior Superintendent Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and Others, which followed Jagbir Singh Vs. Haryana State

Agriculture Marketing Board and Another, the Labour Court held that:

Reinstatement with back wages is not automatic and may be wholly in-appropriate in a given fact situation even though the termination of an

employee is in contravention of the prescribed procedure.

Applying this to the petitioner the Ld. Labour Court held that;

12. In the present case where the enquiry is vitiated on the ground of the technicalities of the confession statement of the workman. The

management could have proved the theft before this court by examining the proper witnesses. The order of termination is being interfered only for

want of evidence before the court. Several years have passed after the alleged incident. Considering the peculiarity of the situation, I do not find

any scope for grant of back wages to the workman as an automatic consequence. I am of the considered view that the relief of reinstatement

would meet the ends of justice.

13. Consequently, the management is directed to reinstate the workman with continuity of service and without back wages...

[emphasis supplied]

6. Subsequent to the Labour Court's award, the petitioner wrote a letter to DTC seeking reinstatement. He requested that he may be allowed to

re-join his past job and stated that the reinstatement be given effect with, "continuity of my services and without any back wages benefit or claim".

DTC, by its reinstatement order dated 12.05.2011, in compliance with the award of the Labour Court, reinstated the petitioner to its services. The

relevant portion of that order has been reproduced below;

Sh. Mahabir Parshad...is hereby re-instated in the services of the Corporation with immediate effect without back wages and he will not been

titled for benefits of Notional pay fixation, Promotion, ACP, increments and his services is not to be counted for the purpose of pensionary benefits

for the intervening period. His pay will be fixed as per last pay drawn when his services were terminated.

7. The petitioner resumed his position in the respondent corporation but contested this reinstatement order in O.A. No. 3579/2011 before the

Tribunal. The Tribunal by its order dated 23.03.2012 held,

5.....Since the grievance raised by the applicant is regarding the impugned order dated 12.05.2011 passed pursuant to the award given by the

Labour Court and according to the applicant such order has been passed in breach of the Award; inasmuch as respondents have not treated the

intervening period from the date of termination till date of reinstatement as continuity in service, including for the purpose of pensionary benefits,

thus according to us the appropriate remedy for the applicant is to invoke the provisions of Section 29 of the Industrial Disputes Act, 1947, instead

of filing the OA before this Tribunal as is settled law that when a person has invoked the provisions of a particular Act and if remedy for redressal

is provided in that Act, only the remedy under that Act should be invoked instead of resorting to other remedies.

[emphasis supplied]

8. The Tribunal furthermore also recorded a pertinent observation, which has been reproduced below,

6. However, before parting with the matter we wish to observe that in the impugned order dated 12.05.2011 respondent while reinstating the

applicant with immediate effect inter alia have also recorded that "his services is not to be counted for the purpose of pensionary benefits for the

intervening period" whereas in the reply-affidavit respondents have also stated that continuity without back wages only means that on reinstatement

in service his past service will be counted towards pensionary benefits and his pay on reinstatement will be fixed as per the last drawn pay when his

services were terminated. ""This stand taken by the respondent appears to be contradictory in terms of the impugned order dated 12.05.2011

passed pursuant to the Award passed by the Labour Court, whereby the applicant has been directed to be reinstated in service with continuity of

service. Suffice it to say that appropriate authority in the Department may look into this aspect and pass appropriate orders and if need be

reconsider the matter and pass fresh orders, without dragging the applicant to the remedy available to him u/s 29 of the Industrial Disputes Act,

1947.

9. Later, the Tribunal in its order dated 05.09.2012 in R.A. No. 259/2012 while upholding the order dated 23.03.2012 held that,

2.. these are the observations made by the Bench after disposing of the case in the light of the findings recorded in the earlier part of the order, as

this Tribunal was of the view that there is a contradiction between the findings recorded in the impugned order dated 12.05.2011 and the stand

taken by the respondents in the reply affidavit, the departmental authorities were directed to look into the matter and pass appropriate orders. Thus

the Tribunal has not given any specific findings on the merits of the case and the observation made in the light of the discrepancy, as noticed and for

that purpose the appropriate authority of the department was directed to look into the matter and pass appropriate order. It is for the appropriate

authority to pass appropriate order in the light of the observations made above and certainly it is not a ground for reviewing the Tribunal's order.

10. The petitioner's argument is that the denial of benefit of service for pension and terminal benefits, as well as continuity of service for purposes

of notional pay fixation would mean that he is denied all consequential benefits and not merely back wages. Having held that the charge of

misconduct was not proved a finding that became final-the petitioner could not be visited with a drastic consequence of denying him the benefits of

his employment. Whilst the Labour Court was within its rights to hold that he could not claim back wages for not having worked, the denial of

continuity for other purposes such as notional pay fixation for the interregnum period and for calculation of pension and other terminal benefits was

an infliction of a greater penalty which had no sanction; the Labour Courts award did not authorize it.

11. DTC argues in reply that there is no right to continuity of services and unless the order of reinstatement is categorical as to the precise nature of

benefits that an employee is entitled to, he cannot seek or articulate a vested right to such consequence. The discretion of granting whole or part of

back wages, deeming an employee in service for the whole of period of the operation of the termination order, and the nature and extent of

consequential benefits to be granted was that of the Labour Court alone. Reliance was placed on the judgment reported as J.K. Synthetics Ltd.

Vs. K.P. Agrawal and Another, to say that each term such as consequential benefit, continuity of services, etc have distinct meanings.

12. The award, in this case, held that the petitioner/was to be reinstated with "continuity of service" without payment of back wages. DTC has

reinstated the petitioner by its order dated 12.05.2011. The question is whether the petitioner is entitled for benefits of Notional Pay, Promotion,

ACP, etc. and if his services are to be counted for the purpose of pension benefits for the intervening period.

13. In cases of wrongful termination of service, reinstatement with continuity and back wages is the normal rule. This was the observation of the

Hon"ble Supreme Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, . The concept of

reinstatement was also discussed therein:

17. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the

employee will be put in the same position in which he would have been but for the illegal action taken by the employer.

14. The court observed that the term ""reinstatement"" has not been elucidated in the Industrial Disputes Act, 1947. The Shorter Oxford English

Dictionary, Vol. II, 3rd Edition stated that, the word ""reinstatement"" means to reinstall or re-establish (a person or thing in a place, station, condition

etc.); to restore to its proper and original state; to reinstate afresh and the word ""reinstatement means the action of reinstating; re-establishment.

As per Black"s Law Dictionary, 6th Edition, ""reinstatement"" means "to reinstall, to re-establish, to place again in a former state, condition, or

office, to restore to a state or position from which the object or person had been removed".

15. The question of grant of back wages has already been adjudicated upon by the Labour Court. The petitioner had in his letter to DTC

requested that he be reinstated without any back wages. The counsel for the petitioner argued that consequential benefits arising from continuity of

service is to be given in terms of order of the Labour Court as it had awarded reinstatement with "continuity of service". In J.K. Synthetics Ltd.

(supra) the Supreme Court dealt with the matter and stated that:

There is also a misconception that whenever reinstatement is directed, ""continuity of service"" and ""consequential benefits"" should follow, as a matter

of course. The disastrous effect of granting several promotions as a ""consequential benefit"" to a person who has not worked for 10 to 15 years and

who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised

while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the

facts and circumstances to decide whether ""continuity of service"" and/or ""consequential benefits "" should also be directed.

16. The award of the Ld. Labour Court contained a direction for reinstatement with "continuity of service". The Supreme Court sought to clarify

the law in interpreting this direction in the awards of the lower courts/tribunals in A.P.S.R.T.C. and Another Vs. S. Narsagoud, where it was

observed that;

there exists a distinction between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where

reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily

flow/from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the

period of absence. In our opinion, the employee after having been held guilty of unauthorised absence from duty cannot claim the benefit of

increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he

has been directed to be reinstated with benefit of continuity in service.

17. The law elucidated in Narsagoud (supra) was further discussed in Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and

Others Vs. Abdul Kareem, wherein the Supreme Court underlined the importance of specific directions in the relief granted and held that;

..the Labour Court specifically directed that the reinstatement would be without back wages. There is no specific direction that the employee

would be entitled to all the consequential benefits. Therefore, in the absence of specific direction in that regard, merely because an employee has

been directed to be reinstated without back wages, he could claim a benefit of increments notionally earned during the period when he was not on

duty or during the period when he was out of service. It would be incongruous to suggest that an employee, having been held guilty and remained

absent from duty for a long time, continues to earn increments though there is no payment of wages for the period of absence.

18. The Bombay High Court in Maharashtra State Road Transport Corporation, Nagpur Vs. Leeladhar and another, appears to have followed the

above reasoning. The Kerala High Court in Board of Directors of the Venjaramood Co-operative Rubber Marketing Society Ltd. and Another

Vs. M. Nazimuddin and Others, applied a similar reasoning and held as follows:

8. The Joint Registrar in Exhibit P-4 order has stated that the period of dismissal will be treated as period of service meaning thereby there will be

continuity of service. But the order is silent as to consequential benefits...Exhibit P-4 order, so far as the case is concerned, is silent with regard to

the payment of "consequential benefits" such as monetary benefits, promotion etc. In the absence of such specific stipulation in Exhibit P-4, we

have to take it that "consequential benefit" has been denied but only "continuity of service" is granted.

19. J.K. Synthetics, Narsagoud and Abdul Kareem (supra) suggest that any award reinstating the employee with the term of "continuity of service

cannot be interpreted to mean that the court granted consequential reliefs or benefits and a specific direction by the court to grant such benefits

upon reinstatement, is required. At the same time, the decision in Deepali Gundu Surwase (supra) discusses and assimilates a large number of

previous decisions, including those rendered by three judge benches which emphasized the essential purpose of reinstating with back wages and

other benefits, i.e. its restitutionary intent. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman

whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often includes damages for loss of profit, and

a further interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered is entitled to interest for the duration

that the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e. a managerial cadre official

in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of employment contract of employment, where

the employee is terminated for no justifiable cause or wrongfully, surely restitution has to likewise, be complete. This Court notices that the ruling in

Deepali Gundu Surwase (supra) relied on at least three larger, three judge bench rulings Hindustan Tin Works Pvt. Ltd. Vs. The Employees of

Hindustan Tin Works Pvt. Ltd. and Others, ; Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour

Court, New Delhi and Another, and General Manager, Haryana Roadways Vs. Rudhan Singh, and held that J.K. Synthetics (supra) did not

correctly state the principle; J.K. Synthetics, in turn had considered Narasagoud and Abdul Kareem. The relevant discussion in Deepali Gundu

Surwase (supra) is as follows:

33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into

consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the

financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at

least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on

lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the

employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This

is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about

its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not

employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or

substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power u/s 11-A of the Industrial Disputes Act, 1947 and finds that even

though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but

holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages.

However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had

foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the

principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in

directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution

and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement

of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the

cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to

give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back

wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of

litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower

is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an

employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality

given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-

vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman,

who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the

course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of

service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This

part of the judgment is also against the very concept of reinstatement of an employee/workman.

20. The above discussion reveals that there appeared to be no standard pattern of directing how a reinstated employee is to be given the benefit

after reinstatement. In Deepali Gundu Surwase(supra), for the first time, the restitutionary principle underlying reinstatement and other benefits was

spelt out and a semblance of uniformity was attempted. If that is to be kept in mind, what is apparent in this case is that the petitioner had to battle

for over a decade and a half to secure justice. The Labour Court held that that the enquiry against him illegal; went into the material and found that

the charge of misconduct was baseless. It consequently directed reinstatement without back wages. Whilst the denial of back wages is not in

question, the Award directed continuity of service. If DTC's contention were to be accepted, the petitioner would stand doubly penalized for the

delay in securing justice, plainly for no fault of his. The denial of 15 years' salary would result in his denial of pension, or at least a vastly diminished

pension, gratuity and other terminal benefits. If these benefits are denied, the direction to grant continuity of service would be a hollow relief.

Furthermore, to restore him in the pay scale at the stage of his termination would be to freeze him in a pay scale that is no longer existent, or at

least unrecognizable. It is pertinent that a withholding of 2 increments for two years, with cumulative effect has been held to be a major penalty

(imposable only after an enquiry) since the increments ""would not be counted in his time-scale of pay"" in perpetuity. In other words, the clock

would be set back in terms of his earning a higher scale of pay, by two scales. See Kulwant Singh Gill Vs. State of Punjab, . Keeping this in mind,

if the petitioner were to be restored in the pay scale at the stage of his termination, it would amount to withholding several increments, and thus be

equivalent to imposing a compounded major penalty.

21. Consequently, it is held that the direction to grant continuity meant that the petitioner had to be given notional increments for the duration he

was out of employment, in the grade and the equivalent grade which replaced it later, till he reached the end of the pay scale. Since there is no

direction to give consequential benefits, the petitioner cannot claim promotion as a matter of right; it would have to be in accordance with the rules.

ACP benefits however, should be given. The notional pay fixation would also mean that he would be entitled to reckon the period between his

removal and reinstatement as having been in employment for pension, gratuity, and contributions to provident fund etc. This Court directs the DTC

to issue an order extending these benefits to the petitioner for the 15 year period between his dismissal in 1995 and his eventual reinstatement in

2011, within eight weeks from today. The writ petition is allowed in these terms; there shall be no order as to costs.