88 CWN 393

Calcutta High Court

Case No: C.R. No. 13359 (W) of 1979

Santok Singh		APPELLANT
	Vs	
Ninth Industrial Tribunal and Others		RESPONDENT

Date of Decision: Jan. 18, 1984

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 11A, 27(c), 33A

Citation: 88 CWN 393

Hon'ble Judges: Amitabha Dutta, J

Bench: Single Bench

Advocate: Sunit Krishna Dutt, for the Appellant; Monotosh Mukherjee and Manick Chandra Das for the Respondent Nos. 3 and 4., for the Respondent

Judgement

Amitabha Dutta, J.

This writ petition for certiorari and mandamus is directed against the award dated the 12th March, 1979 and certain orders passed by the 9th Industrial Tribunal in case no. 5 of 1975 u/s 33A of the Industrial Disputes Act, 1947. The petitioner joined service under the respondent no. 3, the Fertiliser Corporation of India Ltd. now renamed as Hindusthan Fertiliser Corporation at Durgapur, District Burdwan as a Crane Operator in 1968 and was subsequently promoted as Equipment Operator, Grade II or in other words, his duties were those of a truck driver. During the pendency of an industrial dispute between the workmen of the respondent no. 3 and their employer, the management of the employer company issued a charge sheet on 2.5.1974 against the petitioner containing the following charges :

1) That the petitioner fraudulently changed the gear box of truck no. WGH 7336;

2) That the petitioner had taken 31/2 days to return from Calcutta with the said truck which was considered abnormal and he had wasted company''s money and time deliberately;

3) The petitioner was in the habit of taking unauthorised leave and had been absent without intimation from 22.4.1974 onwards as indicated in the allegations accompanying the charge sheet to the effect that the petitioner was absenting from 11.4.1974 to 15. 4. 1974 and again with effect from 22.4.1974 uptil the date of issue of the charge sheet without any information.

An order of suspension was passed against the petitioner on 3.5.1974. Petitioner replied to the charge sheet on 4.5.1974. The management is said to have appointed an enquiring officer or committee for enquiring into the charges levelled against the petitioner and the said enquiring authority is said to have submitted a report after enquiry, finding the petitioner guilty of all the three charges mentioned in the charge sheet. Thereafter, the management is said to have accepted the findings of guilt against the petitioner in the report submitted by the enquiring authority. An order of dismissal is said to have been passed by the General Manager who is the competent authority against the petitioner which was communicated to him by a memo dated 17J29th July, 1975, signed by the Chief Engineer, Mechanical and Chief Personal Officer. In the said memo, it has also been stated that the amount equivalent to loss or destruction of property belonging to the employer caused by the petitioner will be forfeited from the amount payable as gratuity and the company''s contribution to the Provident Fund of the petitioner from 1972-1973 onwards up to the date of dismissal would also be forfeited.

2. The petitioner filed a complaint before the Industrial Tribunal u/s 33A of the Industrial Disputes Act challenging the aforesaid order of dismissal and forfeiture of gratuity and Provident Fund Contribution passed by the management, without prior permission of the Industrial Tribunal during the pendency of the ''industrial dispute''. The company contested the complaint by filing a written statement. As the records of the domestic enquiry made against the petitioner was mislaid and not available, the employer sought to justify the action taken against the petitioner, by adducing evidence before the Tribunal. The Tribunal took evidence produced by the employer as well as the petitioner and after considering such evidence came to the conclusion that the first two charges against the petitioner were not proved and were thus baseless. As regards the first part of the third charge viz., the charge of taking unauthorised leave habitually, it was abandoned by the learned lawyer for the employer company. The second part of the third charge that the petitioner was absent without intimation from 22.4.1974 onwards till the state of issue of the charge sheet, that is, 2.5.1974 was pressed on behalf of the employer before the Tribunal as a misconduct under item (48) of clause (24) of Certified Standing Orders as it amounted to absence for more than 10 days without intimation. The Tribunal observed as follows :-

This continued absence for more than 10 days is admitted in the written statement of the workman as well by the workman himself. He, however, says that he was sick from 22.4.1974 till he was suspended and he handed over the medical certificate on the date on which he was suspended. This in my opinion is an afterthought. Firstly there is no case in the written statement that he was ailing from 22.4.1974. As regards this charge it has been simply averred in the written statement "nor can on May 2, 1974 an absence from April 22, 1974 be called continued absence for more than 10 days unless the mind of the person calling so is very much biased and prejudiced (vide ground (h) in the written statement). So the story that he could not intimate the authority due to his sickness cannot be believed. If he actually handed over the medical certificate to Sri Mukherjee, he would have obtained something in writing from him specially when he was served with a charge sheet and was suspended on the date on which he allegedly handed, over the certificate. Even if he was ailing there is nothing to show that his illness was such that it was not possible for him to give intimation to the employer before the expiry of the stipulated time. Therefore it has been proved beyond doubt that the workman remained absent for more than 10 days without any intimation when the charge sheet was issued. Therefore there was a misconduct under clause 24(48) of the Standing Orders. It is a discretion of the management to impose any of the major penalties for the misconducts enumerated in the earlier clause. Dismissal is a major penalty. Therefore the Corporation was free to dismiss Sri Singh for the continued absence for more than 10 days without permission". The Tribunal further held in connection with the imposition of the punishment of dismissal as follows :-

No doubt there were three charges in the charge sheet and only one was proved but in the dismissal letter (Ext Q) it has been clearly stated that the charges are grave. The punishment was not inflicted as some of the charges only were grave. The absence without information was a grave misconduct specially when the Corporation was anxious to know who was responsible for the change of the gear. box. When the plea of illness has been disbelieved, it must be held that there was no extenuating circumstances. On the other hand there were aggravating circumstances as he appeared only when he was suspended. In view of the above, I am unable to hold that the dismissal for unauthorised absence for more than 10 days continuously is unjustified". In that view, the Tribunal dismissed the complaint holding that the dismissal in question was justified.

3. The Tribunal passed the award on 12.3.1979. The petitioner filed an application for review on 26.3.1979. The Tribunal rejected the said application on 24.7.1979. The present writ petition was filed before this Court on 26th November, 1979.

4. The learned Advocate for the petitioner has raised several points in support of the reliefs claimed in the writ petition. It is submitted that the absence of the petitioner alieged in the second part of the third charge without intimation from 22.4.1974 onwards till 2.5.1974 does not constitute misconduct as mentioned in paragraph 24(48) of the Standing Orders (Certified) which runs as follows :--

(48). "continued absence without permission from work for more than 10 days".

In support of this contention he has relied on the decision in the case of D.C. & G. Mills vs. Shambhu Nath (1977 Lab; I.C. page 1695). in which an order was made striking oil the name of the workman from the rolls u/s 27(c) of the Standing Orders under which if any workman absented for more than 8 consequtive days his services should be terminated and he should be treated as having left the service without notice. The learned Judge, P.K. Goswami J. delivering the judgment of the Supreme Court found that the workman last attended work on 14th August, 1965, that 15th August was a public holiday and that he was therefore absent from work only from 16th August. His Lordship held that so even under the Standing Orders, the workman was not absent for more than 8 consecutive days on 24th August 1965. It was held that the order in question was clearly untenable even on the basis of the Standing Orders (vide paragraph 13 of the report at page 1698). But in my opinion, the reported decision is of no aid to the petitioner in view of the distinguishing features in the facts and circumstances of the present case. The petitioner in his complaint has not specifically denied the charge in question and has not stated that he was not absent for more than 10 days. He has taken a plea which is rather technical in a ground mentioned in paragraph 19 (h) of the complaint that on May 2, 1974, absence from April 22, 1974 cannot be called continued absence for more than 10 days. On the other hand, the petitioner has stated in his evidence before the Tribunal that he was ill from 22.4.1974 till the order of suspension which was passed on 3.5.1974 and thus he sought to justify his continued absence for more than 10 days from 22.4.1974 till 2.5.1974 inclusive of the latter date. The Tribunal, therefore, proceeded on the footing of such admission of continued absence for more than 10 days. So, in my view, the point that is raised before this Court that the charge in question is defective as it does not cover the misconduct mentioned in (48) of paragraph 24 of the Standing Orders, cannot stand.

5. The next point raised on behalf of the petitioner is that before the Tribunal after the close of the evidence and arguments, the petitioner made an application to call for the relevant register of the company''s hospital to show that the petitioner was ill from 22.4.1974 and was declared fit by Dr. Das from 7.5.1974 under ticket no. 8283 but the Tribunal unjustifiably rejected the said application. In my view, no doubt the Tribunal has the power to allow the workman to adduce further evidence in support of his case at the stage after the closure of arguments and before the passing 01 the award in special circumstances explaining the delay, stated in an application which is bona-fide, but in the present case the Tribunal rejected the petitioner''s application as it found that there is no case in the complaint that the complainant was sick and treated in the hospital. It may be mentioned that the petitioner did not take the plea of his ailegea illness also in his reply to the charge sheet filed on 4.5.1974 nor did he take the plea in his written complaint u/s 33A.of the Act. In my view, it cannot be said that the Tribunal''s order rejecting the petitioner''s application is unsupportable so as to furnish a ground for remanding the matter to the Tribunal.

6. The other point urged on behalf of the petitioner is that the order of dismissal of the petitioner is bad as it was not passed by the General Manager of the Company who alone is competent to impose such extreme penalty under paragraph 26 clause (d) of the Standing Orders and that the Chief Engineer and the Chief Personal Officer had no authority to pass any order of dismissal of the petitioner. But I find that although the fact that the General Manager did not pass the order of dismissal was alleged in the petition of complaint which is a verified one, the complainant did not state in the verification that the said fact was true to his knowledge. The contesting respondent in the written statement stated in paragraph 17 thereof that the order of dismissal was passed by the General Manager and the said order was duly communicated through the Chief Personnel Officer and the Chief Engineer Mechanical. Inspite of such pleadings, the complainant in his deposition before the Tribunal did not state that the order of dismissal was not passed by the General Manager of the company nor did the petitioner take any steps for calling for the original records of the company to show who passed the impugned order of dismissal. On the other hand, the communication by a memo. dated 17/29th July, 1975 of the order of dismissal to the petitioner was signed by the Chief Engineer and Chief Personnel Officer and it was stated therein that the findings of the enquiry officer, in which the petitioner had been found guilty of the charges levelled against him, were accepted by the management and that the order of dismissal had the approval of the General Manager who was the competent authority to award such penalty. In the circumstances, it appears that there was sufficient indication in the aforesaid memo, which is annexure "F" to the writ petition to show that the order of dismissal was passed by the competent authority although in the memo of communication it is stated that it had the approval of the General Manager. In any event, the question of fact, raised in the petition of complaint was not followed up in evidence by the complainant before the Tribunal and the decision of the Tribunal does not show that the point was agitated before it on behalf of the complainant. In the circumstances, the question of fact alleged but not sought to be proved by the complainant, cannot be raised before this Court for decision in exercise of the writ jurisdiction.

7. The last point taken on behalf of the petitioner is that the Tribunal has failed to exercise its jurisdiction u/s 11A of Industrial Disputes Act to decide properly whether the penalty; of dismissal is warranted by the alleged misconduct which according to it has been proved and it has given wrong reasons for maintaining such penalty imposed by the management which is quite out of proportion to the misconduct alleged and found to have been proved and is unconscionably harsh. On the other hand, it is submitted on behalf of the respondents that the employer has unrestricted power to impose any penalty when a misconduct on the part of the employee or workman has been proved. The learned Advocate for the respondents has referred to the reasons given by the Tribunal for sus-taining the extreme penalty of dismissal awarded by the management and has submitted that the reasons are adequate. After hearing the learned Advocates for the parties and considering the reasons given by the Tribunal I find that the Tribunal has not properly exercised its jurisdiction u/s 11A of the Act to decide whether the penalty

imposed by the management is warranted by misconduct proved in evidence, as it appears that it has not taken into account the relevant circumstances which should have been considered in deciding the appropriate penalty for the proved misconduct of continued absence without permission for more than 10 days. In this connection, it may be mentioned that the management levelled three ''charges against the petitioner of which the first charge of changing the gear box of the truck was a serious one. The second charge of delay in returning with the truck and causing loss to the company deliberately was also somewhat grave one. But the Tribunal has found after considering the evidence adduced by the parties that both the first and second charges are totally baseless. The first part of the third charge was of habitual absence and it was worded as the habit of taking unauthorised leave. This part of the third charge though more serious than the other part was abandoned on behalf of the company before the Tribunal. Only the other part of the third charge, viz., absence without intimation from 22.4.1974 onwards up to 2.5.1974 amounting to more than 10 days, has been found to have been proved. Considering the reasons given by the Tribunal in its appraisal of the evidence in support of this charge, I find that the Tribunal''s finding regarding proof of this charge is justified and cannot be interfered with. But regarding the reasons given by the Tribunal for the penalty of dismissal, I find that they are not supportable. The Tribunal has observed that it is a discretion of the management to impose any one of the major penalties for the misconducts enumerated in the earlier clause, but the Standing, Orders do not warrant this view. In the Standing Orders although penalties have been classified into minor penalties and major penalties, there is no provision to show which types of misconduct, would attract minor penalty and which types of misconduct will attract major penalty. There is nothing in the Standing Orders to warrant the view that the management can impose any major penalty for any of the types of misconduct enumerated in paragraph 24. Moreover, although the Tribunal has taken notice of the fact that out of the three charges in the charge sheet, only one was proved, though in fact only a part of the third charge was proved, he has adverted to the statement of the management in the letter communicating the order of dismissal that the charges were grave. This view of the management is not relevant as the management while imposing the penalty took into consideration the findings of the enquiry officer that all the three charges had been proved and on that basis the management imposed the extreme penalty. This was not a relevant consideration before the Tribunal when the Tribunal found that the serious charges levelled against the petitioner could not be prove by the management nor did the management pursue before the Tribunal the charge of habitual absence without information.

8. The Tribunal again observed that as the plea of illness has been disbelieved, it must be held that there was no extenuating circumstances. But the fact is that the complainant did not take the plea of illness in his complaint and his oral evidence of illness was considered to be an after-thought. It cannot be said that the management has an unrestricted power of imposing any penalty or awarding the penalty of dismissal which cannot be interfered with by the Tribunal if such penalty is on proper assessment found to

be disproportionate or not commensurate with the proved misconduct (See The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others,). In the present case, there is no question of dishonesty or lack of integrity or of any action prejudicial to the company like misbehaving with the customer or any action involving loss of confidence or dislocation of work. The complainant was just a truck driver and the only misconduct was that he was absent without previously obtained leave although absence by and employee on taking leave is a normal phenomenon in an industrial undertaking. It is not a grave misconduct with aggravating circumstances. In my view, the extreme penalty of dismissal is not justified in this case, in view of the nature of the proved misconduct, viz., absence without permission for more than 10 days. The punishment of extreme penalty of dismissal for such misconduct is harsh and out of proportion to the nature of the offence and cannot be sustained.

9. The next question is, what is the appropriate punishment to be imposed on the petitioner for his prove" misconduct. This Court has jurisdiction to decide the question on failure of the Tribunal to exercise its jurisdiction properly in deciding the matter. In my view, having regard to the nature of misconduct, stoppage of one increment of the petitioner with cumulative effect will be the appropriate punishment. Connected with this question is the other question as to whether in this case the petitioner is entitled to reinstatement in his post under the Company. In this connection, it has been submitted on behalf of the petitioner that where the penalty of dismissal is found to be unjustified and is set aside, the normal rule is that the employee should be reinstated. In this connection reference may be made to the decision in Hindusthan Steel Limited vs. A.K. Roy A.T.R. 1970, S.C. 1401 wherein the Supreme Court has observed that some of the decisions of the Supreme Court have laid down that where the discharge or dismissal of a workman is not legal or justified, the relief which would ordinarily follow would be reinstatement. The Court has further observed that the Tribunal has discretion to award compensation instead of reinstatement, if the circumstances of a particular case are unusual or exceptional so as to make reinstatement inexpedient or improper (vide paragraph 14 at page 1406). But in the present case, the decision has to be taken on the materials on record. The employer has not given evidence of any unusual or exceptional circumstances which would justify payment of compensation to the petitioner depriving him of the normal relief of reinstatement. It has been submitted on behalf of the respondents that the company hap already filled up the post which was occupied by the petitioner before his dismissal and that if he is reinstated there will be dislocation of work. But there are no materials on record to bear out this submission made on behalf of the respondents. In the case of Gujarat Steel Tubes Ltd. v. G.S.T. Majdoor Sabha (1980 (1) L.L.J. 137 at page 173), cited on behalf of the petitioner, the Supreme Court has observed :

Passive participation in a strike which is both illegal and unjustified does not ipso facto invite dismissal or punitive discharge

The Court has in this connection observed that "Article 226 of the Constitution, however, restrictive in practice, is a power wide enough, in all conscience, to be a friend in need when the summons comes in a crisis from a victim of injustice; and more importantly, this extraordinary reserve power is unsheathed to grant final relief without unnecessary recourse to a remand. What the Tribunal may, in its discretion do, the High Court too can, under Article 226, if facts compel it to do so. In that case, the Supreme Court found that an illegal and unjustified strike cannot be equated with brazen misconduct by every workman without" so much as identification of the charge against each and in the absence of such accusation the extreme economic penalty of discharge is wrong. In considering the question whether there should be reinstatement or payment of compensation, the past record, the nature of the alleged misconduct found to have been proved, the ground on which the employer"s order is set aside, the nature of the duties performed by the employee and the nature of the industrial establishment, are the broad relevant facts to be taken into account. (See The Management of Panitole Tea Estate Vs. The Workmen,). Normally, reinstatement is. not granted where the workman indulged in activities highly prejudicial to the company or there is lose of confidence, of the employer in the employee or dislocation of work or likelihood of dislocation of work. In deciding the question of reinstatement both fairplay to the employee and the interests of the employer have to be kept in view. Mere delay or the filling up of the post by the employer is not a ground to deny the normal relief of reinstatement, where the penalty of dismissal is found to be unjustified and there are no exceptional circumstances as indicated above which justify the denial of such relief to the workman. In the present case, in the absence of any such unusual features or circumstances, the petitioner should get the relief of reinstatement in his post, subject to the penalty of stoppage of one increment which would have been due to him after the date of the purported dismissal, with cumulative effect as the appropriate penalty for the proved misconduct.

In the result, the award of the Tribunal in so far as it imposes penalty of dismissal on the petitioner is quashed and the respondents are directed not to give effect to such award. The petitioner shall be deemed to have been continuing in service and will get the consequent benefits, subject to the award of penalty of stoppage of one increment with cumulative effect. The management"s order regarding forfeiture of a part of the gratuity of the petitioner and of the employer"s contribution to his provident fund will consequently be of no effect. Let the back wages of the petitioner be paid by the respondents within two months from date. The Rule is made absolute to the extent indicated above. Let appropriate writs be issued accordingly.

On the oral submission made on behalf of the respondents, let the operation of this order be stayed for three weeks.