

Jag Dev Vs. D.T.C. and ors.

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Court : Delhi

Decided On : Dec-07-2012

Judge : Mukta Gupta

Appellant : Jag Dev

Respondent : D.T.C. and ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + WP(C) 2644/2000 Decided on:

7. h December, 2012 % JAG DEV Through Petitioner Mr. Anil Mittal, Adv. Through Respondent Mr. U.N. Tiwari, Adv. for DTC/R-1. versus D.T.C. & ORS. Coram: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

(ORAL) 1. The present petition is limited to the extent of grant of back wages which has been denied by the Labour Court to the Petitioner. The Petitioner was employed as a conductor with the Respondent in the year 1982. On 1 st September, 1992 a charge-sheet was issued to him on the allegations that on 22nd August, 1992 while he was on duty on bus No. 9823 and his bus was checked by the checking staff at Sona bus stand, it was found that he charged the fare from four passengers but he did not issue the tickets. An enquiry was conducted pursuant where to the Petitioner was removed from his services with effect from 15th February, 1995. On a dispute being raised a reference was made to the Industrial adjudicator for adjudication of the following terms: Whether the

removal of Shri Jag Dev from service by the management is illegal and/ or unjustified and if so, what relief is he entitled and what directions are necessary in this respect? 2. The claim of the Petitioner was that the allegations against the Petitioner are wrong and baseless and an unfair and illegal enquiry was conducted and the findings of the enquiry officer were passed on no evidence. The management was duly served, however at the stage of filing of the written statement it was proceeded ex-parte as none appeared on behalf of the management. On the basis of the affidavits of the Petitioner the learned Court decided the matter. The Petitioner and the driver of the bus appeared and stated that the tickets were in the hands of the customers when the checking staff checked since this version of the workman remained unchallenged, as neither any affidavit was filed nor the witnesses were crossexamined, the learned Trial Court held that no fair and proper enquiry was held and the management has failed to prove the charges against the workman in the Court. Thus, the removal of the Petitioner was held to be illegal. As a consequential relief the learned Trial Court directed reinstatement. However since the affidavit on behalf of the workman did not state that the workman remained unemployed after his removal, it was held that the Petitioner/ workman was not entitled to back wages. Hence, the present petition.

3. A perusal of the claim statements of the Petitioner shows that he has sought quashing of the punishment of removal with effect from 15 th February, 1995 with all consequential benefits including seniority, back wages, cost of litigation etc. The Petitioner in the affidavit filed also stated that the order of removal was liable to be set aside and the Petitioner was entitled to reinstatement with all benefits including back wages. However, what has not been stated by the Petitioner in the affidavit is that he remained unemployed after the removal. Thus, there was no material before the Court to grant back wages.

4. In Allahabad Jal Sansthan Vs. Daya Shankar Rai and Anr. (2005) 5 SCC 12.relied upon by the learned counsel for the petitioner the Honble Supreme Court while dealing with a similar situation where there was no pleading by the workman that he continued to remain unemployed nor did he said so in his affidavit, held that the interest of justice would be sub-served if the Respondent is directed to be

paid 50% of the back wages. It was held:

6. A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that Respondent 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24-1-1987. Respondent 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the respondent herein had been reinstated from 27-2-2001.

16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.

17. In view of the fact that the respondent had been reinstated in service and keeping in view the fact that he had not raised any plea or adduced any evidence to the effect that he remained unemployed throughout from 24-1-1987 to 27-2-2001, we are of the opinion that the interest of justice would be subserved if the respondent is directed to be paid 50% of the back wages.

5. Learned counsel for the Respondent has relied upon *Kendriya Vidyalaya Sangathan and Anr. Vs. S.C. Sharma* (2005) 2 SCC 36 and *Managing Director, Balasaheb Desai Sahakari S.K. Limited Vs. Kashinath Ganapati Kambale* (2009) 2 SCC 28 to contend that in the absence of any material being placed on record that the workman was not gainfully employed, no back wages can be awarded. In *Kendriya Vidyalaya Sangathan* (supra) it was held:

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

6. Further in *Managing Director, Balasaheb Desai Sahakari S.K. Limited* (supra) it was held:

13. It is now well settled by a catena of decisions of this Court that having regard to the principles contained in Section 106 of the Evidence Act, the burden of proof to show that the workman was not gainfully employed is not on the employer. In this case, the burden of proof had wrongly been placed upon the appellant. This Court in *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey* [(2006) 1 SCC 47.:

2006. SCC (L&S) 250] held: (SCC pp. 495-96, paras 61-62) 61. It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

62. In *Kendriya Vidyalaya Sangathan v. S.C. Sharma* [(2005) 2 SCC 36.:

2005. SCC (L&S) 270] this Court held: (SCC p. 366, para

16) 16. ... When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

7. No doubt the Honble Supreme Court in exercise of its plenary powers can grant the relief, however, the legal position being that the burden of proof is on the workman to show that he was not gainfully employed, no fault can be found in the order of the learned Trial Court wherein it has been held that since there is no averment either in the pleadings or in the affidavit that the Petitioner is not gainfully employed during this period he is not entitled to back wages. I find no infirmity in the impugned award.

8. Petition is dismissed. (MUKTA GUPTA) JUDGE DECEMBER 07 2012 GA

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