

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP (C) Nos. 7918/2003**

Judgment reserved on: 06.04.2009

% Judgment delivered on: 19.05.2009

Sh. Rajinder Singh Petitioner
Through: Ms. Kittu Bajaj, Advocate

versus

Delhi Transport Corporation Respondent
Through: Mr. J.S. Bhasin, Advocate

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.

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1. By way of this petition filed under Article 226 of the Constitution of India the petitioner seeks to challenge award dated 5.11.2001 passed in I.D. No. 247/1989 in which the Labour Court directed reinstatement of the petitioner with continuity of service and grant of 25% of the back wages.

Feeling aggrieved with the said award so far full back wages were denied to the petitioner, the present petition has been preferred.

2 . Brief facts of the case relevant for deciding the present petition are as under:-

The petitioner/workman was employed as Conductor in 1979. On 13.12.1985 he was served with a chargesheet in which it was alleged that on 2.11.1985 while he was performing duty in bus No. 1120 on route No. 405(DN), the checking officials intercepted the bus at Madanpur at 11.20 hour and found that 4 passengers alighted from the bus without tickets. It was alleged that the petitioner had collected fare from them but did not issue tickets and that subsequently 4 unpunched tickets were issued and cash of Rs.1.05 was found short. The petitioner denied that he had collected any fare from the said passengers. The petitioner was removed from his service vide order dated 16.12.1987. Show cause notice was issued to the petitioner and he submitted explanation which was not considered. The dispute was referred to the Labour Court and vide the impugned award directed the management to reinstate the petitioner with continuity of service with 25% back wages. Aggrieved with the

non-denial of full back wages the petitioner preferred this petition.

3 . Ms. Kittu Bajaj, counsel for the petitioner submitted that the Labour Court denied the full back wages only on the ground that the petitioner workman in his cross-examination disclosed his earning between Rs.50-20 per day by selling vegetables which fact was not mentioned by the petitioner either in his statement of claim or in his examination-in-chief adduced by way of filing an affidavit. The contention of the counsel for the petitioner is that the approach adopted by the Ld. Labour court suffers from illegality and perversity as the court did not appreciate that in the absence of an employment the petitioner with a view to sustain himself and his family members started selling vegetables and such self-employment cannot be considered as a gainful employment to be treated at par with gainful employment in any establishment. Strengthening her argument further the counsel contended that once the Labour Court came to the conclusion that termination of the petitioner was illegal and unjust then full back wages could not have been denied to him merely on account of admission of the petitioner in cross-examination disclosing his income of paltry amount

through sale of vegetables. Counsel also submitted that the onus is on the employer to show gainful employment of the petitioner and no such material was placed on record by the respondent in this regard and therefore the petitioner was entitled for the grant of full back wages. Non-disclosure by the petitioner of the said source of income by the sale of vegetables in his statement of claim or in his evidence cannot be considered so fatal to deny him the full back wages as the said source cannot be equated with gainful employment in any establishment.

4 . Justifying, filing of the second writ petition, the counsel submitted that filing of second petition by the petitioner cannot be held barred by the principles of res judicata as the withdrawal of the earlier petition by the petitioner was on account of the fact that in the earlier petition the petitioner failed to mention the fact about his reinstatement and grant of 25% back wages by the respondent which fact was later on explained by the petitioner in the present petition. In support of her argument counsel for the petitioner placed reliance on the following judgments:-

(1984) 4 SCC 635 Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others

AIR 1996 SC 2367 State of Maharashtra and another Vs. M/s Natioinal Construction Company, Bombay and another

102 (2003) DLT 60 Jaipal Sharma & Anr. Vs. The P.O., Labour Court No. VIII & Anr.

JT 2007 (5) SC 556 Krishi Utpadan Mandi Samity, Manglor Vs. Pahal Singh

(2008) 9 SCC 486 Talwara Cooperative Credit and Service Society Ltd. Vs. Sushil Kumar

5 . Refuting the said submissions of the counsel for the petitioner, Mr. J.S. Bhasin, counsel for the respondent submitted that vide orders dated 23.7.2003 the petitioner had withdrawn the earlier petition without seeking leave of the court and therefore the second petition on the same cause of action impugning the same award cannot be maintained. It was for the petitioner to have disclosed the reasons for the withdrawal of the writ petition and to take leave of the court to file a fresh petition but no such steps were taken by the petitioner, therefore, the present petition as per the counsel for the respondent is barred by the principles of constructive res judicata and therefore the same merits dismissal on this sole ground. On the issue of denial of full back wages, counsel for the respondent submitted that there has been a paradigm shift

in the recent approach of the Apex Court and in catena of judgments the Supreme Court has held that in appropriate cases the courts can either grant reinstatement without back wages, back wages without reinstatement or reinstatement with some back wages or the grant of suitable compensation depending upon the facts of each case. In support of his argument counsel for the respondent placed reliance on the following judgments:-

(2008) 3 SCC 304 Executive Engineer, Public Health Division Vs. Kumesh

(2008) 12 SCC 169 Depot Manager Andhra Pradesh State Road Transport Corporation and Another Vs. V. Surender

(2005) 6 SCC 36 A.P. State Road Transport Corporation and others Vs. Abdul Kareem

6 . I have heard counsel for the parties and perused the record.

7 . It is not in dispute that the petitioner had earlier challenged the impugned award by filing a writ petition bearing No. 4565/2003 which, was withdrawn by him as would be evident from the order dated 23.7.2003 passed by this court. The explanation given by the petitioner for filing the second petition does not appear to be totally illogical. In compliance of the award, the petitioner infact was reinstated by the respondent on 19.12.2002 and was also paid 25% back wages in

the month of January, 2003. The petitioner failed to mention these facts in the earlier petition and no doubt these facts were material and should have been disclosed in the first petition. Although, no leave was obtained by the petitioner nor any perceptible reasons were disclosed for withdrawing the first petition yet since notice was not directed on the first petition on the respondent and the petitioner was withdrawn at the stage of admission itself, therefore, I do not agree with the argument of the counsel for the respondent that the second petition is hit by the principles of constructive res judicata. Explaining the principles of Res-judicata, the Apex Court in **State of Maharashtra & Anr Vs. M/s National Construction Company, Bombay & Anr., AIR 1996 SC 2367** held as under:-

6. We may first dispose of the plea based on Section 11, Explanation IV, of the Code. That section deals with the doctrine of res judicata and provides that any matter which might or ought to have been made a ground for defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Since the plea of res judicata can be disposed of on a narrow ground, it is not necessary to examine the ambit of Explanation IV. The main text of Section 11 reads thus:

“11. *Res Judicata*.— No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

The important words are “has been heard and finally decided”. The bar applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata.

8. This statement of the law by the High Court is, with respect, incorrect in view of the decision of this Court in *Sheodan Singh v. Daryao Kunwar*¹ (AIR at p. 1336 : SCR at p. 307) where, while considering the meaning of the words “heard and finally decided”, used in Section 11 of the Code, it was held:

“Where, for example, the former suit was dismissed by the trial court for want of jurisdiction ... *or on the ground of non-joinder of parties* ... and the dismissal is confirmed in appeal (if any), the decision  not being on the merits would *not be res judicata* in a subsequent suit.” (emphasis supplied)

This Court in its recent decision *Inacio Martins v. Narayan Hari Naik*² has reiterated this proposition. It is, therefore, clear that the dismissal of the short cause suit and the subsequent appeal could not have operated as a bar to Special Civil Suit No. 27 of 1983. The plea based on the principle of res judicata fails.

8 . In the light of the above legal position, I do not find any merit in the submission of counsel for the respondent that the present petition is barred by the Principles of Res-Judicata.

9 . Adverting to the second issue of demand of full back wages, In **G.M., Haryana Roadways v. Rudhan Singh, (2005) 5 SCC 591** the Apex Court held that there is no rule of thumb that in every case where the Industrial Adjudicator gives a finding that the termination of service was in violation of Section

25-F of the Act, entire back wages should be awarded. The relevant para of the said judgment is referred as under:-

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

9 . In **URSRTC Ltd. Vs. Sharda Prasad Mishra – (2006) 4 SCC 733** also the Apex Court took the view that it would depend upon the facts and circumstances of each case to determine the question with regard to the payment of back wages keeping in view the principles of equity and good conscious. The relevant para of the said judgment is referred as under:-

“16. From the above cases, it is clear that no precise formula can be adopted nor ‘cast-iron-rule’ can be laid down as to when payment of full back wages should be allowed by the court or tribunal. It depends upon the facts and circumstances of each case. The approach of the court/tribunal should not be rigid or mechanical but flexible and realistic. The court or tribunal dealing with cases of industrial disputes may find force in the contention of the employee as to illegal termination of his services and may come to the conclusion that the action has been taken otherwise than in accordance with law. In such cases obviously, the workman would be entitled to reinstatement but the question regarding payment of back wages would be independent of the first question as to entitlement of reinstatement of service. While considering and determining the second question, the court or tribunal would consider all relevant circumstances referred to above and keeping in view the principles of justice, equity and good conscience, should pass an appropriate order.”

10 . In the judgment of the apex court reported in **(2008) 9 SCC 486 Talwara Cooperative Credit and Service Society Ltd. Vs. Sushil Kumar** after taking into consideration the facts of the case, the Supreme Court awarded compensation of Rs.2 lakhs instead of directing reinstatement with full back wages. In the present case already the respondent has complied with the direction given by the Labour Court by reinstating the petitioner in his employment and also by making the payment of 25% of the back wages. The petitioner did not feel satisfied so far the petitioner was denied the grant of full back wages. The Labour Court found the termination of the petitioner from his service being illegal on the ground that fair and proper opportunity was not afforded to the petitioner during the enquiry proceedings and therefore directions were given for the

reinstatement of the petitioner with continuity of service. It is a trite law that grant of full back wages is not automatic or a cast iron rule wherever the termination is held as illegal. It would depend upon the facts of each case to decide the payment of back wages and the ratio in which it should be allowed. The Labour Court granted 25% of the back wages influenced by the fact that the petitioner failed to disclose his income earned by him by selling vegetables. The Labour Court also found fault with the petitioner as he failed to explain the source of his sustenance and his family in the absence of any employment. There cannot be any doubt that once thrown out of employment the petitioner still has to sustain himself and his family members and for which one would undertake petty jobs not even befitting his status so that he and his family do not starve or lead the life of destitutes. The earning through such a source once being out of employment cannot be considered as a gainful employment to be equated with the employment from where he was illegally terminated. Nevertheless, it is expected of such a petitioner to at least truthfully state in his statement of claim and also in his evidence the exact source of his income during the course of his unemployment so as to enable the court to

grant appropriate relief. Non-disclosure of such facts or suppression of such facts will certainly influence the tribunals and courts exercising discretionary jurisdiction and can be viewed seriously. However, considering the facts of the instant case that the petitioner served respondent DTC for 8 years and his services were wrongfully terminated and the industrial dispute was answered in his favour after a long gap of 14 years and also considering the fact that at the time of reinstatement, the petitioner was of about 47 years of age, I feel that the interest of justice would be best served if 50% backwages are awarded to the petitioner.

11. In view of the above discussions, the respondent is directed to pay 50% back wages to the petitioner from 16.12.1987 till 19.12.2002 subject to adjustment of 25% back wages already paid to the petitioner.

12. With these directions, the petition is disposed of.

May 19, 2009

KAILASH GAMBHIR, J.