

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :-

The Hon'ble Justice PARTHA SARATHI SEN

WPA 11856 of 2010

M/s Gillanders Abruthnot & Co. Ltd.

-Vs-

Ld. Fifth Industrial Tribunal & Ors.

For the Petitioner:

Mr. Ranajay Dey, Adv.,
Mr. S.K Singh, Adv.,
Mr. Sujit Sharma, Adv.

For private respondent no.3:

Mr.Firdous Samim, Adv.,
Ms. Gopa Biswas, Adv.,
Ms. Swati Dey, Adv.

Hearing concluded on:

20.12.2024.

Judgment on:

14.01.2025.

PARTHA SARATHI SEN, J. :-

1. By filing the instant writ petition the writ petitioner has prayed for issuance of appropriate writ for quashing and/or cancelling and/or setting aside the award dated 19.11.2009 as passed by the 5th Industrial Tribunal, West Bengal (hereinafter referred to as the said "Tribunal" in short).

2. While passing the impugned award the said Tribunal directed the writ petitioner/company to pay backwages to the private respondent no.3 to the extent of 80 per cent from the date of dismissal from service to the date of his superannuation after deducting the amount already paid.

3. Before adverting to the rival contentions of the contending parties some admitted facts are required to be looked into and those are stated hereinbelow in seriatim:-

- i. The private respondent no.3 was at all material time an employee of the writ petitioner/company at its unit at Kalamazuu Works in Kolkata and he was posted there as a workman.
- ii. On 13.01.1982 the private respondent no.3 was served with a charge sheet with a direction to submit his written explanation within 48 hours.
- iii. On 27.01.1982 the private respondent submitted his reply with the acting factory manager, Kalamazuu Works of the writ petitioner/company.
- iv. The writ petitioner/company being the employer was not satisfied with the explanation given by the private respondent no.3/ delinquent and accordingly initiated enquiry against him.
- v. In the enquiry proceeding the respondent no.3/delinquent was found guilty of the charges as framed against him.
- vi. By a memo dated 20.05.1982 the writ petitioner/company dismissed the respondent no.3 from service.
- vii. On 19.07.1985 Assistant Secretary to the Government of West Bengal, Labour Department made a reference to the said Tribunal in exercise of its power under Section 10 read

with Section 2A of the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act of 1947 in short) and while making such reference the following issue has been framed:-

“Whether dismissal from service of Shri Bimal Kumar Dutta is justified? What relief, if any, is he entitled to?”

- viii. During the pendency of the reference the said Tribunal by its order dated 21.07.2008 came to a finding that the domestic enquiry proceeding as conducted by the writ petitioner/company is invalid and accordingly the said Tribunal proposed to hear out the said reference on merit.
- ix. The order dated 21.07.2008 was challenged by the writ petitioner/company by filing WP no.26200 (W) of 2008 and by an order dated 30.01.2009 a Co-ordinate Bench dismissed the said writ petition.
- x. After recording evidence of PW1 and OPW1 the said Tribunal passed the aforementioned award which is impugned in this writ petition.

4. In course of his argument Mr. Dey duly assisted by Mr. Sharma, learned advocate for the writ petitioner at the very outset draws attention of this Court to Section 2 (oo) of the said Act. It is submitted that as per Section 2(oo) ‘dismissal’ does not come under the purview of ‘retrenchment’. Attention of this Court is also drawn to Section 11A and Section 25 F of the said Act. It is contended by Mr. Dey that the said

Tribunal while passing the award has failed to consider that the unit in which the respondent no.3 was employed was closed long back and all the workmen who were engaged there had taken voluntary retirement. It is thus contended by Mr. Dey that since the very unit where the respondent no.3 was working has been permanently shut down the said Tribunal while passing the award ought not to have directed the writ petitioner/company to pay the backwages as indicated hereinabove.

5. In his next fold of submission Mr. Dey draws attention of this Court to the charge sheet as submitted against the delinquent, the reply of the private respondent no.3 against such charge sheet, the evidence adduced by PW1 and OPW1 before the said Tribunal. It is argued by Mr. Dey that the said Tribunal while passing the award did not consider the material evidence i.e. the evidence of PW1 Asishmoy Moitra who actually witnessed the alleged misconduct of the workman on the relevant day and hour at the Kalamazuu unit of the writ petitioner/ company and on the contrary the said Tribunal believed the evidence of DW1 as gospel truth which vitiated the decision making process of the said Tribunal while passing the impugned award.

6. It is further submitted by Mr. Dey that while passing the impugned award the said Tribunal has miserably failed to appreciate that in a reference of like nature the mode of proof is based on preponderance of probability and not on conclusive proof as required in a criminal trial. It is further argued by Mr. Dey that the impugned award may be set aside since the said award is based on extraneous evidence without considering

the material and documentary evidence and thus the same is palpably erroneous.

7. In course of his argument Mr. Dey draws attention of this Court to the written statement filed by the respondent no.3 before the said Tribunal. It is contended that in the said written statement there is no whisper that after the dismissal of service from Kalamazuu unit of the writ petitioner/company till the date of his actual superannuation he was not gainfully employed anywhere and in absence of any such negative assertion the said Tribunal is not at all justified in directing the writ petitioner/company to backwages in favour of the respondent no.3.

8. It is further argued by Mr. Dey that while passing the award the said Tribunal has also failed to consider that in his reply to the charge sheet the delinquent has not specifically denied the allegation as labelled against him which tantamounts to admission.

9. Mr. Dey in support of his contention places reliance upon the following reported decision :-

a. Food Corporation of India Workers Union vs. The Food Corporation of India and Anr. reported in JT 1996 (6) SC 424;

b. Hondaram Ramchandra vs. Yeshwant Mahadev Kadam reported in (2007) 14 SCC 277;

c. Ramesh Chand vs. Management of Delhi Transport Corporation reported in 2023 SCC Online SC 776;

d. Rajasthan State Road Transport Corporation, Jaipur vs. Phool Chand Through Legal Representatives reported in (2018) 18 SCC 299;

e. Delhi Transport Corporation vs. Ramesh Chand reported in (2015) 16 SCC 227; and

f. M/s Tirupati Jute Industries Pvt. Ltd. and Anr. vs State of West Bengal and Ors. reported in 2009 LLR 568.

10. It is thus submitted on behalf of the writ petitioner/company that the instant writ petition may be allowed after setting aside the impugned award.

11. Per contra, Mr. Samim, learned advocate for the respondent no.3 submits before this Court that the respondent no. 3 was a workman in the writ petitioner/company and thus the writ petitioner/company being a juristic person cannot be permitted to claim that the relationship between the employer and workmen has been severed on account of closure of their Kalamazuu unit. It is further argued by Mr. Samim that the writ petitioner has failed to show any glaring perversity and/or arbitrariness in the impugned award since the said award is based on due consideration of the evidence as adduced by the parties and therefore there is little scope on the part of this Writ Court to interfere with such award while sitting in a judicial review. Mr. Samim further argues that in paragraph 25 of the written statement as filed before the said Tribunal it has been specifically stated by the respondent no.3 that he is still unemployed and is passing his days in great misery and hardship.

12. Before entering into the factual aspects of this case this Court proposes to deal with the prevailing law relating to the issuance of writ of certiorari since in the instant writ petition the writ petitioner has practically prayed for issuance of writ of certiorari questioning the correctness of the award impugned. In the reported decision of Central Council for **Research in Ayurvedic Sciences vs. Bikarthan Das and Ors.** reported in **2023 SCC Online SC 996** the Hon'ble Apex Court had occasion to deal with the two cardinal principles of law governing exercise of extraordinary jurisdiction under Article 226 of the Constitution of India more particularly when it comes to writ of certiorari. The relevant portion of the said reported decision is quoted hereinbelow in verbatim:-

“51. The first cardinal principle of law that governs the exercise of extraordinary jurisdiction under Article 226 of the Constitution, more particularly when it comes to the issue of a writ of certiorari is that in granting such a writ, the High Court does not exercise the powers of Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The writ of certiorari can be issued if an error of law is apparent on the face of the record. A writ of certiorari, being a high prerogative writ, should not be issued on mere asking.

52. *The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not.*

53. *The essential features of a writ of certiorari, including a brief history, have been very exhaustively explained by B.K. Mukherjea, J. in T.C. Basappa v. T. Nagappa, AIR 1954 SC 440. The Court held that a writ in the nature of certiorari could be issued in 'all appropriate cases and in appropriate manner' so long as the broad and fundamental principles were kept in mind. Those principles were delineated as follows:*

“7. ... In granting a writ of ‘certiorari’, the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous, but does not substitute its own views for those of the inferior tribunal

8. The supervision of the superior court exercised through writs of certiorari goes on two points, as has been expressed by Lord Sumner in King v. Nat Bell Liquors Limited [[1922] 2 A.C. 128, 156]. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise.

9. Certiorari may lie and is generally granted when a court has acted without or in excess of its jurisdiction.”

54. Relying on T.C. Basappa (supra), the Constitution Bench of this Court in the case of Hari Vishnu Kamath (supra), laid down the following propositions as well established:

“(1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior court or tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review

findings of fact reached by the inferior court or tribunal, even if they be erroneous.”

13. Keeping in mind the proposition of law as enunciated in the reported decision of **Research in Ayurvedic Sciences vs. Bikarthan Das** (supra) if I look to the factual aspects of this case it appears that during the pendency of the said reference the said Tribunal held that the domestic enquiry as conducted by the writ petitioner was erroneous and faulty and when such order is challenged before a Writ Court a Co-ordinate Bench of this Court by its order dated 30.08.2009 as passed in WPA 2600 of 2008 upheld such order. No appeal has been preferred against the order of the Co-ordinate Bench and thus the said order attains its finality.

14. In course of his argument Mr. Dey was very vocal regarding non-consideration of material evidence both oral and documentary by the said Tribunal and according to him such non-consideration of the material evidence tantamounts to perversity warranting invocation of writ jurisdiction in this court. This Court however is in respectful disagreement with the submission of Mr.Dey inasmuch as while exercising extraordinary jurisdiction under Article 226 of the Constitution of India this Court is not expected to act as an appellate court. A writ court is not supposed to review and/or reweigh the evidence like an appellate court. No material has been placed before this Court that the said Tribunal has acted without any jurisdiction and/or passed the award without adhering to the point of reference. No material also could be

placed before this Court that decision making process of the Tribunal while passing the impugned award has been vitiated in any way.

15. In view of such, the reported decision of Food **Corporation of India Workers Union (Supra)** as cited on behalf of the writ petitioner is of no help to the writ petitioner inasmuch as in the said reported decision it has been held that the Tribunal is not a Court and therefore is not bound by the strict rules of evidence.

16. The reported decision of **Hondaram Ramchandra (supra)** is distinguishable from the facts and circumstances of the instant case inasmuch as in the said reported decision the Hon'ble Apex Court declined to grant relief to the writ petitioner since the business of his employer was handed over to another company and thus there occurred a closure of business. On account of such, the workmen were entitled to compensation only in terms of Section 25 FFF of the said Act and no relief of reinstatement with backwages.

17. In order to come to a logical conclusion as to whether the said Tribunal is at all justified in passing the award directing the writ petitioner/company to pay 80 per cent of the back wages for the whole period after deducting the amount already paid it appears that the law is well settled in this regard that in the event a dismissed workman desires to get backwages he must specifically plead and prove with the aid of evidence that after his dismissal from service, he was not gainfully employed anywhere and had no earning to maintain himself and/or his family. It has been held in the case of **Rajasthan State Road Transport**

Corporation, Jaipur (supra) that the employer is also entitled to prove it otherwise against the employee, namely; that the employee was gainfully employed during the relevant period and hence not entitled to claim any backwages. Initially burden is however on the employee. The same view was taken by the Hon'ble Apex Court in the case of **Ramesh Chand (supra)** , **Delhi Transport Corporation (surpa)** and **M/s Tirupati Jute Industries Pvt. Ltd. (supra)**. Since the learned advocate for the writ petitioner and the respondent no.3 in course of their respective submissions draws attention of this Court to paragraph 25 of the written statement as filed by the respondent no.3 before the said Tribunal this Court proposes to quote the said paragraph no.25 of the written statement in verbatim and the same is as under:-

“25) That the workman is still unemployed and is passing his days in great misery and hardship”.

18. It appears that though in his written statement the respondent no.3 had averred that he is still unemployed and passing his days in great misery and hardship but there is no averment in such written statement that after dismissal from service he was not gainfully employed anywhere and /or for earning his livelihood he had to work at a lower amount of remuneration in comparison to the amount as received by him from the writ petitioner during his employment.

19. In view of such, this Court is of considered view that the said Tribunal is not justified in passing the award of 80 per cent of the back wages in favour of the respondent no.3 herein from the date of his

dismissal till the date of his actual superannuation after deducting the amount as received by him.

20. Considering the facts and circumstances of the instant case this Court considers that justice would be met if a sum of Rs. 3 lacs is ordered to be paid by the writ petitioner to the respondent no.3 in lieu of backwages. To that extent the appeal must succeed.

21. Accordingly, the impugned award dated 19.11.2009 as passed by 5th Industrial Tribunal, West Bengal is modified to the extent indicated above.

22. This Court directs the writ petitioner to pay a sum of Rs. 3 lacs to the respondent no.3 within a period of 2 months from today. The respondent no.3 shall provide his account details and a copy of a cancelled cheque of his bank account to the advocate for the writ petitioner. The amount shall be transferred by the writ petitioner to the bank account of respondent no.3 within a stipulated time of 2 months. In the event of failure of respondent no.3 to furnish details of his bank account and a copy of the cancelled cheque to the advocate for the writ petitioner within a period of one month from today, it will be open to the writ petitioner to deposit the amount with the 5th Industrial Tribunal, West Bengal.

23. The said Tribunal shall permit the respondent no.3 herein to withdraw the amount. In the event the writ petitioner fails to pay or deposit the sum of Rs.3 lacs within 2 months from today the said amount

will carry interest at the rate of 6 per cent from the date of passing of this judgment.

24. The appeal is thus allowed in part in terms of the observation made hereinabove.

25. There shall be no order as to costs.

26. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(PARTHA SARATHI SEN, J.)