

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8215-8216 OF 2011

NATIONAL GANDHI MUSEUM APPELLANT

v.

SUDHIR SHARMA RESPONDENT

J U D G M E N T

ABHAY S. OKA, J.

1. National Gandhi Museum is the appellant in these appeals. The appellant has taken an exception to the Judgment and Order dated 30th November 2009 delivered by a Division Bench of the High Court in Letters Patent Appeal No. 602/2009 and the Order dated 12th March 2010 by which the application made by the appellant for review of the Judgment and Order dated 30th November 2009 has been rejected.

FACTUAL CONTROVERSY

2. With a view to appreciate the controversy, a brief reference to the facts of the case will be necessary:

(a) In the year 1949, the Working Committee of the Indian National Congress executed a Deed of Declaration of a Trust in the name of

Gandhi Smarak Nidhi with the main object of maintaining a Museum for preserving relics, books, articles and things associated with the Father of the Nation. Another object of the Trust was to propagate his messages and teachings of truth and non-violence.

(b) Gandhi Smarak Sangrhalaya Samiti was incorporated and registered under the Societies Registration Act, 1860. The Museum (National Gandhi Museum) is being managed by Gandhi Smarak Sangrhalaya Samiti (for short “the said Society”).

(c) On 24th December 1996, the respondent was appointed as a Museum Assistant by the appellant. In the year 2002, the appellant issued an Office Order cancelling the option of compensatory leave against the extra attendance and provided for extra emoluments for extra attendance. The respondent objected to the said Circular. It is alleged by the appellant that on 27th December 2003, the respondent assaulted its Assistant Director and thus committed misconduct. Accordingly, a charge sheet was served upon the respondent. A writ petition was filed by the appellant for challenging the charge sheet.

(d) During the pendency of the said petition, on the basis of the dispute raised by the respondent and another employee, the appropriate Government referred the dispute regarding cancellation of compensatory leave for adjudication to the Industrial Tribunal.

(e) The Writ Petition filed by the respondent for challenging the charge sheet was heard on 12th July 2004 and was disposed of by granting a liberty to the respondent to challenge the Inquiry Report in the event the same be adverse to him. Inquiry Report was submitted by the Inquiry Officer holding that the respondent was guilty of acts of subordination, creating a scene, causing disturbance to others in performance of their duty and causing violence in the office. By the Office Order dated 16th September 2004, the appellant imposed penalty of compulsory retirement on the respondent. On 8th December 2004, the appellant filed an application before the Industrial Tribunal at Delhi in accordance with sub-section 2(b) of Section 33 of the Industrial Tribunal Act, 1947 (for short "I.D. Act"). The application was filed for seeking approval for imposing the penalty. However, the appellant applied for withdrawal of the said application to which an objection was raised by the respondent. The application for withdrawal was made on the ground that since it was a case of compulsory retirement, it was not necessary to obtain approval in terms of sub-section 2(b) of the Section 33 of the I.D. Act. By the order dated 8th December 2004, the application made by the appellant for grant of approval was dismissed as withdrawn.

(f) The respondent filed Writ Petition No. 10211/2005 before the Delhi High Court for a declaration that the Office Order dated 16th

September 2004 by which the penalty of compulsory retirement was imposed, was null and void on account of the failure to obtain approval under sub-section 2(b) of Section 33 of the I.D. Act. In the meanwhile, on 9th September 2005, the Industrial Tribunal disposed of the reference made earlier at the instance of the respondent on the basis of a statement made by the appellant that the workmen shall not be assigned any duty on second Sundays, Gazetted Holidays, and National Holidays.

(g) By the Judgment and Order dated 31st August 2009, the learned Single Judge of the Delhi High Court allowed Writ Petition No. 10211/2005 and directed the appellant to reinstate the respondent in service with back wages. Being aggrieved by the said Judgment and Order, an appeal was preferred by the appellant. In the meanwhile, the appellant applied for a clarification of the Judgment and Order dated 31st August 2009 which application was rejected. By the impugned Judgment and Order dated 30th November 2009, a Division Bench of Delhi High Court dismissed the appeal. Even a review petition seeking a review of the Judgment and Order of the Division Bench was rejected.

SUBMISSIONS

3. The submissions made by Shri Sunil Gupta, the learned senior counsel appearing for the appellant are summarized as under:

(a) The learned senior counsel appearing for the appellant submitted that the first question to be decided in these appeals is whether the appellant is an industry within the meaning of I.D. Act. He placed reliance on a decision of this Court in the case of **Bangalore Water Supply and Sewerage Board v. A. Rajappa and Ors.**¹ The learned counsel urged that the appellant has no income and it only depends on the Government grants and donations for its activities. He submitted that by no stretch of imagination, the appellant is an industry. Moreover, considering the conduct of the respondent of assaulting a senior official of the appellant, as well as the acts of violence, indiscipline and insubordination and considering the fact that for a period of 17 years, the respondent is not working with the appellant, the order of reinstatement is not at all justified. It is a case of loss of confidence and therefore, his continuation in service would result in encouraging gross indiscipline.

(b) The learned senior counsel appearing for the appellant further submitted that the appellant is not a profit making entity or a business concern. Moreover, it is not even charitable or philanthropic arm of a company or a business entity. He submitted that appellant is a part of the said society dedicated to propagation of Gandhian teachings and philosophy.

¹ (1978) 2 SCC 213

(c) The learned senior counsel appearing for the appellant submitted that the appellant did not exercise the option provided by the learned Single Judge of the Delhi High Court by initiating fresh proceedings against the respondent as the appellant wanted to test the issue whether it is an industry.

(d) He submitted that the onus was on the respondent to plead and prove that he was not gainfully employed from the date of the order of compulsory retirement. The learned senior counsel further submitted that as the respondent has not discharged the burden on him, he is disentitled to claim back wages. He pointed that in terms of the interim Order dated 10th May 2010 of this Court, entire amount of back wages payable as on that date amounting to Rs. 4,43,380/- was deposited by the appellant and the said amount has been withdrawn by the respondent. He submitted that as the appellant depends on Government grants and donations from the members of the public, any amount ordered to be paid to the respondent would be at the cost of the public interest. He submitted that the payment of any amount to the respondent will amount to his unjust enrichment.

(e) The learned senior counsel appearing for the appellant relied upon a decision of the Apex Court in the case of **Indian Railway**

Construction Co. Ltd. v. Ajay Kumar². By relying on this decision, he submitted that considering the misconduct proved against the respondent, it will be unjust to allow his reinstatement. Without prejudice to earlier contentions raised by him, the learned senior counsel urged that a reasonable compensation can be granted to the respondent in lieu of reinstatement. He pointed out that the respondent has withdrawn the sum of Rs. 4,43,380/- deposited by the appellant in this Court in the year 2010. He submitted that the respondent has enjoyed interest on the said amount and therefore, no further amount should be directed to be paid.

(f) The learned senior counsel appearing for the appellant relied upon another decision of this Court in the case of **Talwara Cooperative Credit and Service Society Ltd. v. Sushil Kumar**³. He submitted that as laid down by this Court, the respondent ought to have discharged the burden on him by showing that he was not gainfully employed after the order of compulsory retirement.

(g) Lastly, he relied upon another decision of this Court in the case of **Reetu Marbles v. Prabhakant Shukla**⁴. He submitted that order of payment of back wages cannot be mechanically passed after the order of termination is declared to be illegal.

2 (2003) 4 SCC 579

3 (2008) 9 SCC 486

4 (2010) 2 SCC 70

4. Shri Mukti Bodh, the learned counsel appearing for the respondent made following submissions:

(a) He pointed out that not only that the appellant did not raise a contention that it is not an industry within the meaning of I.D. Act, but filed an application for approval under sub-section 2(b) of Section 33 of the I.D. Act. Though the respondent objected to the withdrawal of the same, at its own risk, the appellant withdrew the said application. He submitted that before the learned Single Judge, no such contention was raised. Even in the appeal before the Division Bench, such contention was not raised and that the same was belatedly raised for the first time in Review Petition. He would, therefore, submit that the appellant cannot be allowed to agitate the said contention.

(b) He relied upon a decision of this Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Ors.**⁵ He submitted that the order of compulsory retirement of the respondent by way of punishment amounts to discharge or dismissal by way of punishment and therefore, in absence of approval under sub-section 2(b) of Section 33 of the I.D. Act, the respondent shall be deemed to have been continued in the employment. He submitted that the appellant was aware of the fact that the approval was required and therefore, an

⁵ (2002) 2 SCC 244

application for grant of approval was made which was unconditionally withdrawn. He would submit that there is absolutely no error in the order of reinstatement passed by the learned Single Judge, which is confirmed by the Division Bench.

(c) About the back wages, he urged that it was never the case made out by the appellant that the respondent was gainfully employed. The learned counsel for the respondent, therefore, submitted that no interference is called for with the impugned Judgment and Order.

CONSIDERATION OF SUBMISSIONS

5. We have given careful consideration to the submissions. The first question to be answered is whether the appellant can be allowed to raise a contention that it is not an Industry within the meaning of I.D. Act. For more than one reason, we are not inclined to consider the contention raised by the appellant that it is not an industry within the meaning of I.D. Act. The first reason is that the appellant at all material times proceeded on the footing that it is an industry within the meaning of the provisions of the I.D. Act. In fact, an application was made by the appellant for grant of prior approval as provided in sub-section 2(b) of Section 33 of the I.D. Act before the Industrial Tribunal. The appellant applied for withdrawal of the said application on the ground that prior approval for compulsory retirement was not required. Notwithstanding the opposition by the

respondent, the said application was allowed to be withdrawn. Secondly, an industrial dispute was raised at the instance of the respondent on the demand for compensatory leave in lieu of the work done by the employees on holidays. An award was made in the said industrial dispute by the Industrial Tribunal. The contention that the appellant was not an industry was not raised in the said proceedings and in fact, a settlement award was passed in the dispute. Thirdly, in the Writ Petition filed by the respondent for challenging the order of compulsory retirement, the said contention was not raised though the Writ Petition remained pending for four years. Even in the appeal before the Division Bench of Delhi High Court against the decision in the writ petition, the said contention was not raised. It was raised for the first time by making an application for review of the impugned Judgment and Order of the Division Bench. Whether the appellant is an industry or not is not a pure question of law. In a given case, it may require adjudication on factual issues. Considering the aforesaid facts, the appellant cannot be allowed to agitate the same in the present appeals. However, we make it clear that the issue is not concluded and the said issue will remain open which can be agitated by the appellant in the event any proceedings are taken by any other employee. As the issue that the appellant is not an industry cannot be allowed to be agitated, there is no reason to interfere with the

finding that the Order of compulsory retirement by way of penalty was illegal due to non-compliance with the requirement of obtaining approval.

6. The order of compulsory retirement passed against the appellant was set aside on the ground that an approval under sub-section 2(b) of Section 33 of the I.D. Act was not obtained by the appellant. The respondent did not raise any industrial dispute for challenging the outcome of the inquiry. The Inquiry Officer concluded that the charge of assaulting the Assistant Director of the appellant was proved against the respondent. The impugned order of compulsory retirement was passed on 16th September 2004. Therefore, here is a case where a serious misconduct was established against the respondent and the said finding of the Inquiry Officer has not been disturbed on merits by the High Court.

7. As mentioned earlier, the object of the appellant is to propagate the philosophy of the Father of the Nation and to preserve the personal relics, manuscripts, books and other material regarding the Father of the Nation. Now the question is whether the respondent should be reinstated. It is necessary to refer to a decision of this court in the case of **Indian Railway Construction Co. Ltd.** (supra). In paragraph 29 of the said decision, this Court held thus:

“29. Here, the alleged acts have not been disbelieved by the High Court. They are prima facie acts of misconduct. Therefore, the employer

can legitimately raise a plea of losing confidence in the employee, warranting his non-continuance in the employment. The time-gap is another significant factor.”

After considering the fact of loss of confidence in the employee and a long time gap, this Court granted compensation of Rs. 15 lakhs in full and final settlement to the employee without granting reinstatement. In the said case before this Court, there was no inquiry held for establishing misconduct. A finding was recorded that the acts of employee prima facie constitute misconduct. In our view, considering the aims and object of the appellant and the serious nature of misconduct proved against the respondent, instead of granting reinstatement, by balancing the conflicting interests, appropriate compensation needs to be awarded. Moreover, considering the nature of the misconduct proved against the respondent, the grant of reinstatement will not be in the interest of justice. The long gap of 17 years will be also one of the considerations for not granting reinstatement especially considering the nature of the activities of the appellant and the conduct of the respondent. All these relevant factors borne out by the record were glossed over by the High Court.

8. In the case of **Talwara Cooperative Credit and Service Society Ltd.** (supra), this Court has held that the fact whether an employee after

dismissal was gainfully employed is within his special knowledge and therefore, considering the principles laid down in Section 106 of the Indian Evidence Act, 1872, the burden is on the employee to come out with a case that he was not gainfully employed during the relevant period. We must note that whether such burden is discharged or not is an issue to be decided in the facts of each case. The issue has to be decided by taking into consideration the entire material on record.

9. In the present case, at no stage, even such a plea has been made by the respondent. Even in the counter filed to these appeals, no such statement has been made. The amount of back wages payable up to June, 2010 was deposited in this Court. The said amount of Rs. 4,43,380/- has been withdrawn by the respondent in the year 2010. From the year 2004, when order of compulsory retirement was passed, the respondent has not worked with the appellant. Moreover, he has not even pleaded that from the date of the compulsory retirement till date, he was not gainfully employed.

10. We may note here that in the Writ Petition filed by the respondent, he himself has pleaded the nature of activities conducted by the appellant. In fact, he has relied upon a brochure published by the appellant giving all the details. In the second paragraph of the Writ Petition filed by the respondent, he has stated thus:

“That the respondent management is managed by the Gandhi Smarak Sangrahalaya Samiti which is a registered society under the Societies Registration Act, 1860. The respondent management keep and preserve personal relics, Manuscripts, books, journals, documents relating to the life, philosophy and work of Gandhiji. It also sell books and literature (over 1400 titles, audio and video cassettes, CDs, films, picture cards, posters, framed photographs, and presentation items such as key rings, pens and figurines – related to Mahatma Gandhi, India’s freedom movement and allied subjects and philosophies. Government of India has provided land where it is situated. Its main financial support is a corpus fund of Rs.50 million provided by the Government of India and interest on the said corpus fund is utilized for management of the respondent Museum. Besides it there is income from sale of books, literature etc., and donations and contributions received from public and other institutions. A copy of the pamphlet containing its purpose and activities is enclosed as Annexure P-19.”

(emphasis added)

11. The object for which the said society was established and the activities admittedly carried out by the appellant will have to be borne in mind as one of the factors for deciding the quantum of compensation which can be granted to the respondent in lieu of reinstatement. The appellant is carrying on noble activities of propagating the thoughts of the Father of Nation by using the corpus given by the Government and by utilizing donations and sale proceeds of small articles.

12. The respondent has used the amount of Rs. 4,43,380/- for the last 11 years. His gross salary in the year 2004 was Rs. 5788/- per month. Taking overall view of the various factual aspects which we have

discussed above, we find that compensation in the range of Rs. 6,50,000/- to Rs.7,00,000/- in lieu of reinstatement will be just and proper in the facts of the case. Thus, after taking into consideration the sum of Rs. 4,43,380/- already received by the respondent, a sum of Rs. 2,50,000/- will be payable by the appellant to the respondent.

13. Hence, we partly allow the appeals by setting aside the order of reinstatement of the respondent and the order of payment of back wages to the respondent. We further direct the appellant to pay total compensation of Rs. 6,50,000/- to the respondent inclusive of the sum of Rs. 4,43,380/- already paid to the respondent. We direct the appellant to pay the amount of Rs. 2,50,000/- to the respondent by a demand draft/Account Payee cheque within a period of six weeks from today. On the failure to pay the amount within six weeks from today, the amount will carry interest at the rate of 12% p.a. from the date of this Judgment. There will be no order as to costs.

.....J
(AJAY RASTOGI)

.....J
(ABHAY S. OKA)

New Delhi;
September 24, 2021.