

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

+ WRIT PETITION (CIVIL) NO. 7804/2010

Reserved on: March 11, 2011

Date of Pronouncement: May 11, 2011

SANJAY YADAV & ANR. Petitioners
Through Mr. Raj Kumar Maan, Advocate.

versus

M/S YADAV PLASTICS Respondent
Through None.

CORAM:
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SUDERSHAN KUMAR MISRA, J.

1. The instant writ petition has been preferred against the Award of the Labour Court, dated 23rd April, 2008, granting reinstatement in service to the petitioners, to modify it to reinstatement with full back wages.

2. It is the case of the petitioners that they had been working with the respondent since January, 1995. The petitioners allege that no appointment letter, attendance card, leave books, pay slip, etc were given to them by the respondent. It was further alleged that when the petitioners demanded their statutory benefits

verbally from the respondent management, the respondent got enraged and terminated their services on 9th August, 2003. No reason was assigned for their termination and they were also not paid their earned wages from 1st February, 2003 to 9th August, 2003. It is further stated that the petitioners sent a demand notice dated 13th August, 2003, to which the respondents did not give any reply. Ultimately, they raised a labour dispute claiming reinstatement in service with full back wages.

3. The matter was then referred to the Labour Court for adjudication on the following terms;

“Whether the services of Sh. Sanjay Yadav S/o Sh. Nanku Ram Yadav and Sh. Rakesh Kumar Nishad S/o Sh. Paltu Ram have been terminated illegally and/or unjustifiably by the management and if so, to what relief are they entitled and what directions are necessary in this respect?”

4. The Labour Court framed the following issues:

- i) “Whether there existed relationship of employer and employee between the parties?
- ii) As per terms of reference.”

5. The Labour Court decided the first issue in favour of the petitioners, holding that the relationship of employer and employee existed between the respondent and petitioners. Regarding the second issue, the Labour Court held that the services of the petitioners were terminated illegally since the respondents had not

complied with the provisions of section 25-F of the I.D. Act while terminating their services. Both the petitioners were, therefore, granted relief of reinstatement with continuity of service. However, while granting relief, the Labour Court did not grant any back-wages to the first petitioner and granted only 30% back-wages to the second petitioner.

6. The grievance of both the petitioners is that although they have been reinstated with continuity of service, the Labour Court ought also to have granted full back-wages to each of the petitioners, because they had specifically stated in their affidavits that they had remained unemployed since their termination. In support of this contention, the petitioners have cited the case of **Hindustan Tin Works Pvt. Ltd. V. Employees of Hindustan Tin Works Pvt. Ltd.** LLJ 1978 240 wherein, according to the petitioners, the Supreme Court has held that when the termination of services of a workman is set aside as illegal and unjustified, the normal relief that shall follow is reinstatement in service with full back wages and departure from this rule shall be only in cases of proved gainful employment. Counsel for the petitioners further submits that the Division Bench of this Court had also followed the above decision of the Supreme Court in LPA No. 356/2009 titled as **Chand Ram v. Management of MCD & Anr.**, decided on 17th September, 2009. In this case, this Court followed the judgment in

Hindustan Tin Works (supra) and modified the Award of the Labour Court, granting compensation in lieu of reinstatement, and directed reinstatement of the workman with 50% back wages.

7. The petitioners' contention does not appear to be well founded. In several of its later judgments, the Supreme Court has consistently held that full back wages are no longer a natural consequence in every case of reinstatement. In fact, even in the case of **Hindustan Tin Works (supra)**, upon which the petitioners rely, what the Supreme Court has only held that where termination of service is found to be invalid, the relief of reinstatement with continuity of service "can be granted". That Court did not lay down any law in absolute terms to the effect that in every case where the termination of service is found to be illegal, it must necessarily be followed by reinstatement and the grant of full back wages. Regarding back wages, it was further held in paragraph 11 therein that :

"In the very nature of things there cannot be a straight jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner."

Furthermore, although the Supreme Court in this case laid down guidelines regarding the payment of back wages, nevertheless, having regard to the peculiar facts and circumstances of that matter, the Court thought it fit to modify the relief of full back wages granted by the Labour Court and reduced it to only 75%, instead.

8. Further, the Supreme Court in paragraph 8 of **P.G.I. of M.E. and Research, Chandigarh v. Raj Kumar** 2000 (8) SCALE 469 stated that :

“While it is true that in the event of failure in compliance with Section 25(F) read with Section 25(B) of the Industrial Disputes Act, 1947 in the normal course of events the Tribunal is supposed to award the back wages in its entirety but the discretion is left with the Tribunal in the matter of grant of back wages and it is this discretion, which in Hindustan Tin Works Pvt. Ltd. case (supra) this Court has stated must be exercised in a judicial and judicious manner depending upon the facts and circumstances of each case. ”

9. The Apex Court in **M.P. State Electricity Board v. Smt. Jarina Bee** AIR 2003 SC 2657 and again in **General Manager, Haryana Roadways v. Rudhan Singh** AIR 2005 SC 3966 held that 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. Again, in paragraph 18 of **Allahabad Jal Sansthan v. Daya Shankar Rai and Anr.** AIR 2005 SC 2372 the Court observed :

“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 realized 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.”

The same view was reiterated in **M.L. Binjolkar v. State of Madhya Pradesh (2005) 6 SCC 224**, wherein the Supreme Court, after referring to its earlier decisions, concluded that in every case of illegal termination, full back wages cannot be the natural corollary as the same would depend upon several factors and the Court will have to weigh the pros and cons of each case. Reference may also be made to another decision of the Supreme Court, **U.P. State Brassware Corpn. Ltd. and Anr. v. Udai Narain Pandey** AIR 2006 SC 586, wherein the Court stated that “a person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an industrial court shall lose much of its significance.” The Court

further stated that while granting relief, application of mind on the part of the industrial court is imperative and payment of full back wages cannot be the natural consequence.

10. The Supreme Court again examined the issues with regard to payment of full back wages in the case of **P.V.K. Distillery Ltd. v. Mahendra Ram** (2009) 5 SCC 705, where the question for consideration was whether the Labour Court was justified in awarding full back wages while directing the employer to re-instate the workman in service. The Court concluded that illegal termination does not create a right of reinstatement with full employment benefits and further stated that the grant of full back wages to an employee depends on the facts and circumstances of each case. The Court, therefore, considered it fair and reasonable to restrict the back wages payable to 50%, instead of full back wages awarded by the Labour Court.

11. Further, in **Chandra Prabhu International Ltd. v. Shri Ram Avtar**, being Writ Petition(C) No. 949/2008, decided on 21st February, 2008, this Court has reiterated that there is no precise formula applicable where back wages are claimed and that it is a discretionary power, where a flexible and realistic approach is required to be adopted by the Tribunal and the Court. Depending upon the circumstances, the further relief that the Labour Court can

grant in addition to reinstatement ranges from full back wages to no back wages at all.

12. A perusal of all the above cases makes it clear that upon an order of termination being declared illegal, payment of full back wages cannot be granted mechanically. It would depend upon the facts and circumstances of each case. Further, a reading of paragraph 16 and 17 of the impugned order shows that the Labour Court gave detailed reasons for its decision regarding the grant of back wages. The Labour Court noted that the first petitioner had not stated in his affidavit as to where he had tried to get a job and also how he was maintaining himself and his family without a job. It was because of the aforesaid reasons that the Labour Court concluded that the first petitioner had failed to prove that he had been unemployed since the date of his termination and, therefore, he was not entitled to any back wages. On the other hand, the second petitioner managed to prove before the Labour Court that he had tried and failed to get a job in Delhi, and was now dependent on his father. However, the Labour Court pointed out that during his cross examination, the second petitioner had stated that he had started residing in his native village and was looking after cows and buffaloes belonging to his family. Therefore, the Court concluded that although he had proved that he had remained unemployed since the date of his termination, he must have been getting some

income by selling milk of cows and buffaloes. Accordingly, he was held entitled to only 30% back wages.

13. I do not find any perversity in the reasoning given by the Labour Court. However, counsel for the petitioners insists that the above reasoning is bad since there is no positive evidence by the management of the petitioners being employed somewhere else after their termination. I do not agree. In paragraph 16 of **Kendriya Vidyalaya Sangathan and Anr. v. S.C. Sharma** AIR **2005 SC 768**, the Supreme Court had clearly stated that:

“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.”

However, in the present case, the petitioners failed to discharge this burden and satisfy the Labour Court as to how they were maintaining themselves and their families if they were not gainfully employed.

14. Counsel for the petitioners contends that once he has stated that he had tried to get a job but had failed, his client's obligation to try and mitigate the loss stands discharged, and nothing more could be expected from him in this behalf. The principle of mitigation of loss is a concept that has to be borne in

mind by the Court while awarding damages. In **M. Lachia Setty and Sons Ltd. v. Coffee Board, Bangalore and Giri Coffee Works Vs. Coffee Board, Bangalore**, AIR 1981 SC 162 the Court noted in paragraph 14 that :

“the correct statement of law in this behalf is to be found in Halsbury's Laws of England (4th Edn.) Vol. 12, para 1193 at page 477 which runs thus :

1193. Plaintiff's duty to mitigate loss. The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.”

Thus, the claimant is under a duty to mitigate or minimize the losses suffered by him by taking all reasonable steps to avoid losses. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated, since the claimant is not entitled to profit from his own neglect. Therefore, the petitioners ought to have made an attempt to mitigate the loss and satisfy the Court that they had indeed made efforts to find a job. It was necessary for the petitioners to at least spell out the efforts made to secure employment, and if they had got one and left the same after some time, then for how long did they work with that company, and so on and so forth. The first petitioner, however, merely stated in his affidavit that he had tried to find a job but without any success. He

did not state where and in what manner he had tried to find a job or any other relevant particulars. Such a bald statement clearly failed to inspire confidence and persuade the Labour Court. Hence, the Labour Court held that he was not entitled to any back wages. However, the second petitioner had proved before the Court that he had tried to find a job in Delhi and had even gone to many shops in the Pahar Ganj area looking for a job. He was, accordingly, granted 30% back wages, keeping in mind the fact that he must have been making some income by selling milk of cows and buffaloes belonging to his family.

15. Even as regards the relief of reinstatement, the legal position has been constantly evolving and it is no longer axiomatic for reinstatement to be ordered in every case of illegal termination of service. In the case of **M/s Lords Homeopathic Laborites Pvt. Ltd.** vs. **Ms. Lissy Unnikunju & Ors.** 2006 IV AD (DB) 739, a Division Bench of this Court examined the question with reference to number of decisions of this Court, and of the Supreme Court, to conclude that it is not always mandatory to order reinstatement after holding that the termination is illegal. Currently, the relief of reinstatement is considered more valuable than mere back wages and, often, in their desire to secure employment, workmen are willing to forego back wages so long as future employment is secured. In this case, the Labour Court has decided to direct

reinstatement of the petitioners thereby ensuring continued employment to the petitioners. It appears that after having secured this relief, and since the Management has chosen not to challenge the same, the petitioners have decided to take a chance on any further relief that they could get from the High Court towards back wages also.

16. A reading of the impugned Award shows that while deciding the relief of back wages, the Labour Court has set down clear reasons for its conclusions, which cannot be said to be far fetched or untenable. In view of the facts and circumstances in this case, I do not think that the Award of the Labour Court can be said to have resulted in a gross miscarriage of justice or any other perversity requiring interference of a writ court under Article 226 of the Constitution.

17. Consequently, the writ petition is dismissed.

SUDERSHAN KUMAR MISRA, J.

MAY 11, 2011