

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

% Judgment reserved on: 10.07.2012
Judgment pronounced on: 19.07.2012

+ RFA 446/2003

ST. JOHN'S SCHOOL & ANR. Appellant

versus

ASHA BHAN Respondent

Advocates who appeared in this case:

For the Appellant: Mr. V.K. Rao with Mr. Biraja Mahapatra, Mr. Manoj V. George
and Mr. K. Gireesh Kumar

For the Respondent: Mr. P.K. Aggarwal with Ms. Mercy Hussain

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. This appeal is directed against the judgment and decree dated 17.03.2003, whereby a decree for recovery of Rs.8,81,667/- with proportionate costs and pendente lite and future interest @ 10% per annum was passed in favour of the respondent and against the appellants. The facts giving rise to filing of this appeal can be summarized as under:-

The respondent/plaintiff was employed as a Nursery/KG teacher with appellant No. 1 St. John's School, which is being run and managed by appellant

No. 2 Delhi Mar Thoma Church Society. The services of the plaintiff/respondent were terminated with effect from 01.10.2001. The case of the plaintiff/respondent is that though her salary was Rs.7331/- per month, the appellants/defendants were wrongfully and illegally deducting a sum of Rs 2706/- per month from her salary and when she protested against such deduction, the defendants/appellants threatened to terminate her services. A sum of Rs 64,896/- was deducted from her salary in this manner, in about 24 months. This was also her case that on a strong protest by her in July-August, 2001, the defendants/appellants offered her a package of 05 month salary in case she submitted her resignation. They also threatened her to resign or else they would terminate her services, in case the offer was not accepted by her. According to the plaintiff/respondent, she refused to resign as a result of which she was not allowed to take classes with effect from 01.08.2001 and subsequently her services were terminated with effect from 01.10.2001. She accordingly claimed Rs 64,896/- being the amount wrongfully deducted from her services, Rs 21,993/- as arrears of salary, Rs 7,18,438/- on account of damages for illegal and wrongful termination of her services and Rs 50,000/- on account of damages for mental sufferings.

2. The defendants/appellants filed written statement contesting the suit. They took a preliminary objection that the contract of service, being personal in nature, was not enforceable. They also claimed that the suit was barred under Order II

Rule 2 of Code of Civil Procedure since damages were not claimed by the plaintiff/respondent in an earlier suit which she had withdrawn. As regards deductions made from the salary of the plaintiff/respondent, they alleged that the plaintiff/respondent was making a voluntary donation of Rs 2706/- per month and there was no pressure on her to make such donation. They also disputed their liability to pay any arrears of amount and also denied having caused any mental agony to the plaintiff/respondent. They also claimed that the plaint did not disclose any cause of action.

3. The following issues were framed by the learned Trial Judge on the pleadings of the parties:-

- i. Whether the plaintiff is entitled to recover Rs 64,902/- on account of wrongful deduction from her salary? OPP
- ii. Whether the plaintiff is entitled to recover Rs 21,993/- on account of arrears of unpaid salary? OPP
- iii. Whether the plaintiff is entitled to Rs 7,18,438/- on account of damages for illegal termination of her services? OPP
- iv. Whether the plaintiff is entitled to recover Rs 50,000/- on account of damages for causing mental torture? OPP
- v. Whether the plaintiff is entitled to recover interest from the defendants? If so, at what rate, on what amount and for what period? OPP

vi. Whether the claim of the plaintiff is liable to be rejected under Order 7 Rule 11 CPC for disclosing no cause of action? OPD

vii. Whether the suit of the plaintiff is barred under Order II Rule 2 CPC? OPD

viii. Relief.

Issue No. 2

4. As far as salary for the month of August, 2001 is concerned, as noted by the learned Trial Judge even in the written statement, the defendants/appellants did not dispute their liability to pay the said amount. This liability has not been disputed even in the evidence produced by the appellants/defendants. As regards salary for the month of September, 2001, the case of the defendants/appellants is that the plaintiff/respondent had not worked during that month. In her affidavit by way of evidence, the plaintiff/respondent stated that since 01.09.2001, she was not allowed to enter the school and mark her attendance. She, however, admitted that she had attended the school on 01.09.2001. In rebuttal, DW-1 Shri A.J. Phillip, Honorary Secretary of appellant No. 2-Society and DW-2 Mr P.S. Jolly, Accountant/Office In-charge of appellant No. 1—School have stated that the plaintiff/respondent attended the school only for one day in the month of September, 2001 and that they never disallowed her to enter the school premises in the month of September, 2001. The plaintiff/respondent has, in her deposition, claimed that the gates of the school

were closed after 01.09.2001. This, however, has been repudiated by DW-1 and DW-2 who stated that the gates remained open for everyone in the month of September, 2001.

The learned Trial Judge has awarded salary for the month of September, 2001 to the plaintiff/respondent primarily on the ground that the averment by her in para 7 of the plaint that since 01.09.2001 she was not allowed to enter the school and mark her attendance was not specifically denied by the defendants/appellants and, therefore, amounts to admission of the averment made by her. I, however, find that the observation made by the learned Trial Judge is factually incorrect. In para 7 of the written statement, it has been specifically denied that the plaintiff/respondent was not allowed to enter the school from 01.09.2001. Hence, there is absolutely no admission of the averment made by the plaintiff/respondent in this regard.

No notice or protest letter by the plaintiff/respondent to the defendants/appellants, claiming therein that she was not allowed to attend the school in the month of September, 2001. Had the plaintiff/respondent not been allowed to enter the school after 01.09.2001, she would at least have lodged a written protest with the school in this regard. That, however, was not done. Even otherwise, it is difficult to accept that the gate of the school remained closed in the month of September, 2001. Admittedly, more than 250 children were studying in

the school in September, 2001 and a number of teachers were also working in the school at that time. Had the gates of the school been closed, neither those teachers nor the students would have been able to attend the school. This is not the case of the plaintiff/respondent that though the gates were opened for students, other teachers/staff members and visitors, she was prevented by the Security Guard or Gate Keeper from entering the school. In these circumstances, it is difficult to hold that the plaintiff/respondent was entitled to salary for the whole of the month of September, 2001. In my view, since she attended the school only on 01.09.2001, she would be entitled to 01 day's salary in the month of September, 2001.

Issue No. 1

5. It is an admitted position that a sum of Rs 6490/- was deducted from the salary of the plaintiff/respondent. The deduction was made at the rate of Rs 2706/- per month with effect from July, 1999. The case of the appellants/defendants is that this amount was paid by the plaintiff/respondent as voluntary donation, whereas the case of the plaintiff/respondent is that since the appellants/defendants had threatened to terminate her services in case she did not agree to the said deduction from her salary, she had no option, but to succumb to this pressure from them. Admittedly, the salary of the plaintiff/respondent at the relevant time was Rs 7331/- per month. It is difficult to accept that a person earning such a meager salary would make voluntary donation to the extent of more than 1/3 of her salary and that

too for a consecutive period of about 24 months. Yet another circumstance which rules out this deduction being a voluntary donation is the odd amount deducted every month from the salary of the plaintiff/respondent. If a person wants to make a voluntary donation, he/she would normally contribute a flat amount and not an odd amount such as Rs 2706 per month. The case of the plaintiff/respondent is that since she protested vehemently in July/August, 2001, against this involuntary deduction from her salary, she was asked to either resign or face termination and when she refused to resign, her services were terminated. In these circumstances, I see no reason to interfere with the finding of the learned Trial judge that the plaintiff/respondent was entitled to recover Rs 64902/- being the amount illegally deducted from her salary. The issue has, therefore, rightly been decided in favour of the plaintiff/respondent and against the defendants/appellants.

Issue No. 6

6. It has been alleged in the written statement that the suit having been filed without cause of action is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure. I fail to appreciate how it can be said that the suit does not disclose any cause of action. The case of the plaintiff/respondent is there her services were terminated, there was unlawful deduction from her salary and she had not paid salary for the months of August and September, 2001. All these allegations disclosed sufficient cause of action to file a suit for recovery of money.

The issue has, therefore, right been decided in favour of the plaintiff/respondent and against the defendants/appellants.

Issue No. 7

7. It was contended by the learned counsel for the defendants/appellants that the services of the plaintiff/respondent having been terminated before she filed the earlier suit for injunction, the subsequent suit for recovery of money being based on the same cause of action, is hit by Order II Rule 2 of Code of Civil Procedure.

Admittedly, the plaintiff/respondent, while withdrawing the previously instituted suit, had obtained permission of the Court to file a fresh suit on the same cause of action. A perusal of the order dated 06.08.2002 would show that the plaintiff/respondent stated that she did not want to pursue the suit in the present form and wanted to withdraw the same with liberty to file a fresh suit. The Court, while dismissing the suit as withdrawn, directed that she may file a fresh suit if it is maintainable according to law and subject to the provisions of Limitation Act. The suit for recovery of money is otherwise maintainable in law and having been filed on 07.08.2002, is within the prescribed period of limitation.

Order XXIII Rule 3 of the Code of Civil Procedure, to the extent it is relevant, provides that where the Court is satisfied that the suit must fail by the reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit, it may, grant the

plaintiff, permission to withdraw such suit, with liberty to institute a fresh suit in respect of the subject-matter of such suit. The subject-matter is nothing, but, cause of action, to institute the suit. The consequence of a suit being withdrawn and permission being granted by the Court to file a fresh suit on the same cause of action is as if the first suit was never filed. There is no decree passed in such a case, since withdrawal of the suit does not come in the definition of decree given in Section 2(2) of the Code. Therefore, there would be no scope for applicability of Order II Rule 2 of the Code of Civil Procedure to such a fresh suit which is filed consequent to the permission granted by the Court at the time of withdrawal of the earlier suit. Any relief which is not claimed in the withdrawn suit can be claimed in the fresh suit, even if it is based on the same cause of action. The issue has rightly been decided against the defendants/appellants.

Issues No. 3, 4, 5 and 8

The case of the appellants/defendants is that as private employers, they were entitled to terminate the services of the plaintiff/respondent at any time, without giving any reason and therefore plaintiff/respondent was not entitled to any damages on account of termination of her services.

9. It was held by the Supreme Court in *Vaish Degree College, Shamli & Ors. v. Lakshmi Narain & Ors.* AIR 1976 SC 888 that a contract for personal service cannot be specifically enforced and a court normally would not give a declaration that the contract subsists and such an employee even after having been removed from service cannot be deemed to be in service against the will and consent of the employer. This rule is subject to three well-recognised exceptions:

(i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

In *Pearlite Liners (P) Ltd. v. Manorama Sirsi* (2004) 3 SCC 172, the Supreme Court observed that a case of private employment would normally be governed by the terms of the contract between the parties. In *Sanjay Gupta (Dr.) v. Shroff's (Dr.) Charity Eye Hospital* 2002 VII AD (Delhi) 580, this Court held that if termination of services of the appellant was illegal, his remedy was to file a suit for damages.

In *N.P.Mathai v. The Federal Bank Ltd.* (decided on 6th November, 1992 by High Court of Kerala) MANU/KE/0322/1992 the appellant was Manager in Trivendrum Branch of the defendant bank. His services were terminated by the

bank and one month's salary in lieu of notice was given to him while terminating his service. The case of the appellant was that the termination order was a penal action which had not preceded by an inquiry and therefore was invalid. This was also his contention that the contract of service did not empower the defendant to terminate his services without sufficient reasons and his services were to endure till superannuation. The appellant sought a declaration that he continued to be in service. Alternatively, he claimed damages by way of compensation for wrongful termination of his services. He was 44 years old at the time when his services were terminated and had he continued in service, he would have superannuated on reaching the age of 60 years. However, before the High Court, the appellant did not press for reinstatement and the compensation claimed by him was also reduced. The defendant however, contended that it had got the right to terminate the services of the plaintiff under Rule 28 and the termination was in accordance with said Rule. This was also the case of the plaintiff before the Court that the action taken by the defendant was without bona fides and he had been removed from service because he was a stumbling block in the way of promotion and prospects of brother of Chairman of the defendant bank. The defendant contended that the principles of natural justice could not be imported in the matter of enforcing the contract and were not applicable to termination of a contract by one of the parties to the contract. The High Court, on an analysis of the facts and circumstances of the case,

was of the view that the plaintiff's services were terminated for an alleged misconduct and the termination order was passed to avoid an inquiry which the bank was bound to do under its own Code and therefore was in reality, a disciplinary action. The Court therefore directed payment of compensation to the plaintiff for a wrongful termination of his services.

10. In the case before this Court, the appointment letter issued to the plaintiff/respondent to the extent it is relevant reads as under:-

“On behalf of the Executive Committee of the Society I am to inform you that you have been selected for the post of Teacher effective from the 14th day of September, 1983 on a consolidated salary of Rs.300/- P.M. in the pay scale of Rs.300-10-350-EB-20-550-25-625.

2. Your appointment in the first instance, shall be probationary for a period of 12 months, subject to your services being found satisfactory, the same will be made regular.”

It would thus be seen that there was no clause in the appointment letter for terminating the services of the plaintiff/respondent. The letter whereby the services of the plaintiff were terminated w.e.f. 1st October, 2001 also does not indicate any contractual provision entitling the defendants/appellants to terminate the services of the plaintiff/respondent. In the context of retrenchment under Sec. 25F of Industrial Disputes Act, it was held in (2000) III LLJ 713 (MP) that in the absence of a clause in the agreement or letter of appointment for termination of service, retrenchment

was not permissible. In any case, as far as the case before this Court is concerned, though the appointment was not for a fixed period or till the plaintiff/respondent reached a particular age, the use of the words 'will be made regular' in the letter of appointment clearly indicates that the appointment was to subsist till a teacher appointed on regular basis would retire from the service of the school. In the absence of any contractual power to the defendants/appellants to terminate the services of the plaintiffs/respondents she was entitled to continue in service till the normal age of superannuation of the teachers employed by the defendant/appellants. In case of any pre-mature termination of her services, the respondent/plaintiff was entitled to appropriate damages though she could not have sought enforcement of the contract under which she was employed by the appellants/defendants.

11. The case of the plaintiff is that her services were terminated since she had vehemently protested against the involuntary deduction from her salary towards donation and her refusal to accept the offer of VRS extended to her by the defendants/appellants. In reply, this is not the plea taken by the appellants/defendants that they had, in their wisdom, terminated the services of the plaintiff/respondent and they were not bound to disclose the reasons which led to such an action being taken by them. Their case is that since they were seeking recognition of the school, they were required to comply with the conditions

imposed by the Directorate of Education for granting recognition and since the plaintiff/respondent, being more than 45 years old was overage, she was not qualified to be appointed as a teacher, her continuance in service, being contrary to the conditions imposed by the Directorate of Education, would have resulted in recognition being denied to the school. The onus was upon the appellants/defendants to prove that the Directorate of Education had, imposed a condition that the recognition to the school would be granted only if the services of those teachers who are overage as per the eligibility criteria laid down by it, were dispensed with. No document was, however, produced by the defendant/appellants to prove any such condition on the part of the Directorate of Education. No official from the office of Directorate of Education was produced to prove such a condition. As noted earlier, DW1 Sh. A.J. Philip and DW2 Sh. P.S. Jolly, are the only witnesses produced by the defendants. Both of them are private witnesses being the office bearers of the appellants. According to DW1, A.J. Philip, two officers from the Directorate of Education had orally told them that two teachers, including the plaintiff/respondent, were overage though they did not give in writing to them in this regard. Since neither the names of those officials were given nor were they produced in the witness box, no reliance can be placed upon this part of deposition of DW1. According to DW1, Govt. regulation was that on the date of application for recognition, a lady teacher should not be 45 years of age and the

plaintiff/respondent was more than 45 years of age at the time they applied for recognition. However, no such regulation was produced during trial. Oral deposition of DW1 with respect to regulation referred by him cannot be accepted, particularly when neither any official from Directorate of Education was produced nor any communication stipulating such a condition was filed by the defendants/appellants. It would only be appropriate to take note of Rule 50 of Delhi Education Rules, 1973 at this stage. This Rule prescribes the conditions for recognition of a private school. I need not burden the record by reproducing those conditions, suffice it to say that there is no condition that a private school seeking recognition should not have a serving teacher who is more than 45 years old. In these circumstances, I have no hesitation in holding that the appellants/defendants failed to prove that the Directorate of Education had made it a pre-requisite condition for granting recognition to the appellant school that none of the teachers working in the school at the time of seeking recognition should be more than 45 years of age.

12. Yet another reason given by the appellants/defendants for dispensing with the services of the plaintiff/respondent is that since the number of teachers in the school had declined quite substantially, the teachers in the school had become surplus and therefore, 11 of them had left the service during the year 2001. In his cross examination, DW1 Sh. A.J. Philip stated that out of 21 teachers working in

the school, 11 had resigned and the services of two teachers were terminated, thereby leaving nine working teachers in the school, all of whom were permanent. He admitted that since October 2001 they had employed four teachers, though he claimed that they were employed for intermittent period. He however admitted that one Mrs. Reena Sharma who started working from 23.8.2001 was continuing till date. Mrs. Saroj Sabharwal, who joined the school on 1.8.2001 worked till 8.8.2001, and thereafter she again joined work on 22.4.2002. He admitted that Mrs. Shaila Verghese who joined school on 20.9.2001 and Mrs. Saraswati who joined on 10.7.2002 were still working. I fail to appreciate how it can be said that the respondents had become surplus, when the school engaged two more teachers namely Reena Sharma and Mrs. Shaila Verghese just before terminating her services. Moreover, this is not the case of the appellants/defendants that they had followed the principle of last come and first go in terminating the services of the alleged surplus teachers. The principle to be adopted in such cases ordinarily is that the person who joined services last, goes first. No particular reason has been given by the defendant/appellant for engaging two teachers, while almost simultaneously dispensing with the services of the plaintiff/respondent. In these circumstances, there is no escape from the conclusion that the justification given by the appellants/defendants for terminating the service of the plaintiff/respondent is absolutely sham and frivolous. It would not be unsafe to presume in such

circumstances that the services of the plaintiff/respondent were terminated not on account of her being overage or surplus, but on account of her resisting continued involuntary deduction from her salary. The termination of her service, therefore, was clearly a mala fide act with a view to punish her on account of her refusing to accept a reduced salary. Even if it is presumed that the appointment of the plaintiff/respondent was not for a fixed term or till her reaching a particular age, it can hardly be disputed that an employee termination of whose services is actuated by mala fide would be entitled to appropriate damages though he/she cannot seek enforcement of the contract. A contrary view would give a handle to an unscrupulous private employer to take vengeance on the employees, who refuses to be party to an illegal or unlawful act on the part of the employer and therefore would be against the public policy. The right of an employer to terminate the service of an employee, who does not enjoy any statutory protection on account of his unsuitability to the job entrusted to him on account of his having become surplus, is altogether different from an action, which is actuated by malafide and therefore unsustainable in law.

13. The next question which comes up for consideration is as to what should be the quantum of damages which should have been awarded to the plaintiff/respondent on account of pre-mature termination of her services. No evidence has been led by the parties to prove the normal date of superannuation of

a teacher in the school. The appointment letter issued to the plaintiff/respondent did not stipulate the age of her retirement. The defendants/appellants did not lead any evidence to prove at what age the teacher employed in their school were normally superannuating. The retirement age of the teachers employed by them being a fact exclusively in the knowledge of the defendants/appellants, the onus was upon them to produce such evidence. That, however, was done by the defendants/appellants. The case of the plaintiff/respondents is that the age of her retirement from service was 60 years. In the absence of any evidence to the contrary from the defendants/appellants, I have no hesitation in accepting that the normal age of superannuation of teachers employed in the appellants' school was 60 years.

It is not in dispute that had the plaintiff/respondent continued in service till she was 60 years old, even without taking any increment, Dearness Allowance or promotion etc. into consideration, would have received Rs.7,18,438/- as salary. The learned trial Judge has awarded the whole of that amount as damages.

14. In **S.S. Shetty v. Bharat Nidhi Ltd.** (1958) SCR 442, the appellant before the Supreme Court was discharged from service on the ground that he had become surplus. An industrial dispute was thereupon referred by the Central Government to the Industrial Tribunal at Calcutta for adjudication. The order of discharge of the appellant was held to be illegal and he was directed to be reinstated with wages from the date of discharge. The respondent however, failed to implement the

decision of the Labour Appellate Tribunal within the prescribed period. Thereupon, the appellant before the Supreme Court claimed a sum of Rs. 47,738/- from the respondent as compensation. The Tribunal awarded a sum of Rs.1,000/- to him. The appeal filed by him having been dismissed by Labour Appellate Tribunal, he approached the Supreme Court by way of Special Leave Petition. The Supreme Court, after considering all the circumstances of the case, computed the benefit of reinstatement at Rs.12,500/- and awarded that amount to the appellant, during the course of judgment, Supreme Court, inter alia, observed as under:-

“The position as it obtains in the ordinary law of master and servant is quite clear. The master who wrongfully dismisses his servant is bound to pay him such damages as will compensate him for the wrong that he has sustained. “They are to be assessed by reference to the amount earned in the service wrongfully terminated and the time likely to elapse before the servant obtains another post for which he is fitted. If the contract expressly provides that it is terminable upon, e.g., a month’s notice, the damages will ordinarily be a month’s wages.....No compensation can be claimed in respect of the injury done to the servant’s feeling by the circumstances of his dismissal, nor in respect of extra difficulty of finding work resulting from those circumstances. A servant who has been wrongfully dismissed must use diligence to seek another employment, and the fact that he has been offered a suitable post may be taken into account in assessing the damages.” (Chitty on Contracts, 21st Ed., Vol. (2), p.559 para. 1040).

If the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured *prima facie* and

subject to the rule of mitigation in the salary of which the master had deprived him. (Vide *Collier v. Sunday Referee Publishing Co., Ltd.*). The servant would then be entitled to the whole of the salary, benefits etc. which he would have earned had he continued in the employ of the master for the full term of the contract, subject of course to mitigation of damages by way of seeking alternative employment.

Such damages would be recoverable by the servant for his wrongful dismissal by the master only on the basis of the master having committed a breach of the contract of employment. If, however, the contract is treated as subsisting and a claim is made by the servant for a declaration that he continues in the employ of the master and should be awarded his salary, benefits, etc., on the basis of the continuation of the contract, the servant would be entitled to a declaration that he continues in the employ of the master and would only be entitled to the payment of salary, benefits, etc., which accrued due to him up to the date of the institution of the suit.”

In *S.P.Bhatnagar v. Indian Oil Corporation* 1994 III AD(Delhi) 898, the appellant was placed under suspension and was dismissed from service on the basis of finding recorded in a departmental inquiry held against him. A suit was filed by him challenging his dismissal and seeking reinstatement or in the alternative Rs.50,000/- as damages for wrongful dismissal. The learned Additional District Judge awarded a sum of Rs.2250/- to him as damages. He filed an appeal before this Court and during the pendency of the appeal he filed an application for additional evidence enhancing his claim for damages from Rs.50,000/- to Rs.25,32,750/-. The application was however, dismissed. The Division Bench

which disposed of the appeal held that the inquiry held against the plaintiff was bad in law and the finding arrived at therein was perverse based on no evidence. It was held that he was entitled to declaration that he continued in service till he attained the age of superannuation on 28th July 1994 and to full back-wages and other benefits from the date of dismissal. The Court directed the defendant to compute them along with all retirement benefits including pension etc. A decree in those terms was passed accordingly. In an appeal filed by the respondent, it was agreed that the plaintiff was not entitled to reinstatement but was entitled to get damages on the ground of wrongful dismissal in view of the fact that he had already attained the age of superannuation. Supreme Court directed the parties to lead evidence, to determine quantum of damages. After remand by Supreme Court the plaintiff sought a decree for Rs.71,46,268/-. The Division Bench noted that as per the reply affidavit of the defendant/respondent the plaintiff was entitled to a sum of Rs.605142.27 towards pay and allowance. This figure was arrived at on the basis of the revised pay on account of revision of the pay scales firstly on 1.8.1974 and then on 1.8.1882. The aforesaid amount was awarded by this Court to the plaintiff as damages. His claim for compensation for harassment and mental torture was negated by this Court. While doing so, this Court relied upon the decision of Supreme Court in **S.S.Shetty** (supra) wherein it was held that no compensation can

be claimed in respect of injury done to the servant's feelings by the circumstances of the dismissal.

I, however, notice that there has been some shift in the approach of the Apex Court, with respect to payment of back wages, in case the dismissal of the employee from service is found to be bad in law. In **P.G.I of Medical Education and Research Chandigarh v. Raj Kumar** (2001) 2 SCC 54, the Supreme Court observed as under:

“Payment of back-wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back-wages in its entirety. As regards the decision of this Court in Hindustan Tin Works (P) Ltd. be it noted that though broad guidelines, as regards payment of back-wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back-wages only.”

In **U.P. State Brassware Corporation Ltd. & Anr. v. Udai Narain Pandey**

AIR 2006 SC 586, the Supreme Court inter alia observed as under:

“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 changes brought about by the subsequent decisions of this Court probably having regard to the changes in the policy decisions of the

government in the wake of prevailing market economy globalization, privatization and outsourcing is evident.”

In Allahabad Jal Sansthan v. Daya Shankar Rai and Anr. (2005) IILLJ

847 SC, the Supreme Court inter alia observed as under:

“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 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.”

In Kendriya Vadyalaya Sangathan & Anr. v. S.C.Sharma (2005) IILJ 153

SC, the Supreme Court granted only 25% of total back-wages to the respondent. In

Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya & Anr. (2002) IILLJ 1156

SC, the Supreme Court awarded 50% of the back-wages till the date of

reinstatement of the respondent. In U.P. State Electricity Board v. Laxmi Kant

Gupta 2009 LLR 1, the Supreme Court referring to its decision in U.P. State

Brassware Corporation Ltd. (supra) and Haryana State Electronics Development

Corporation v. Mamni AIR 2006 SC 2427 inter alia observed as under:

“Thus it is evident that there has been a shift in the legal position which has been modified by this Court and now

there is no hard and fast principle now that on the termination of service being found to be illegal, the normal rule is re-instatement with back-wages. Compensation can be awarded instead, at the discretion of the Labour Court, depending on the facts and circumstances of the case.”

The proposition of law, which emerges from these judgments, is that even if the dismissal or termination of an employee from service is illegal, he is not entitled to whole of the back-wages as a matter of right, and the Court needs to award a suitable compensation after considering all the facts and circumstances of the case before it.

15. This also cannot be disputed that the plaintiff/respondent should have tried to mitigate her loss either by taking alternative employment or generating alternative sources of income. As regards the plaintiff/respondent taking up another employment as a teacher, this is appellants’ own case that the defendant/respondent was overage for being employed as a teacher in a school. Therefore, she could not have got appointment as a teacher. It is, however, difficult to dispute that being a qualified teacher, the plaintiff/respondent could have taken up assignment such as home tuitions to earn her livelihood. There is no evidence of any such attempt having been made by the plaintiff to mitigate her damages either by exploring alternative avenues of employment or by trying to take home tuitions. She could

also have sought appointment in a private coaching centre. There is no evidence of that option having been explored by her.

16. Taking into consideration all the facts and circumstances of the case, I am of the view that the ends of justice would be met if the plaintiff/respondent is awarded an all inclusive compensation/damages amounting to Rs.3,50,000/- on account of wrongful termination of her services.

17. Thus, the plaintiff/respondent is entitled to recover the following amounts from the defendants/appellants:

- (i) Rs.64,902/- being the amount wrongfully deducted from her salary
- (ii) Rs.7,331/- towards arrears of salary for August, 2001.
- (iii) Rs. 244/- towards salary of one day in September, 2001 and
- (iv) Rs.3,50,000/- being the consolidated damages on account of wrongful termination of her services, thereby making a total of Rs.4,22,477/-.

The issues are decided accordingly.

18. For the reasons stated hereinabove, a decree for recovery of Rs.4,22,477/- with proportionate costs and pendente lite and future interest @ 6% per annum is passed in favour of the plaintiff/respondent and against the defendants/appellants. The appeal stands disposed of. Decree sheet be prepared accordingly. TCR be sent back.

V.K. JAIN, J

JULY 19, 2012bg/ 'raj'