

GAHC010101972020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3008/2020

NETRAMONI BARUAH

S/O- SRI KERKON BARUAH, R/O- NAMRUP N.T.P.S. NORTH COLONY, P.O.
N.T.P.S. NORTH COLONY, TYPE-4, 113, P.S. NAMRUP, DIST.- DIBRUGARH,
ASSAM, 786001

VERSUS

THE BRAHMAPUTRA VALLEY FERTILIZER CORPN. LTD. AND 4 ORS.
NAMRUP, P.O. PARBATPUR, DIST.- DIBRUGARH, ASSAM, PIN- 786623, REP.
BY THE CHAIRMAN/MANAGING DIRECTOR, BRAHMAPUTRA VALLEY
FERTILIZER CORPORATION LTD., NAMRUP, P.O. PARBATPUR, DIST.-
DIBRUGARH, ASSAM, PIN- 786623

2:THE CHIEF ENGINEER (INST)
BRAHMAPUTRA VALLEY FERTILIZER CORPORATION LTD.
NAMRUP
P.O. PARBATPUR
DIST.- DIBRUGARH
ASSAM
PIN- 786623

3:THE GENERAL MANAGER (UNIT)
BRAHMAPUTRA VALLEY FERTILIZER CORPORATION LTD.
NAMRUP
P.O. PARBATPUR
DIST.- DIBRUGARH
ASSAM
PIN- 786623

4:THE CHIEF MANAGER (HR)
BRAHMAPUTRA VALLEY FERTILIZER CORPORATION LTD.
NAMRUP

P.O. PARBATPUR
DIST.- DIBRUGARH
ASSAM
PIN- 786623

5:THE MANAGER (HR)
BRAHMAPUTRA VALLEY FERTILIZER CORPORATION LTD.
NAMRUP
P.O. PARBATPUR
DIST.- DIBRUGARH
ASSAM
PIN- 78662

Advocate for the Petitioner : MR. P K ROYCHOUDHURY

Advocate for the Respondent : MR S N SARMA SENIOR ADVOCATE

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 08-05-2024

Heard Mr. P.K. Roychoudhury, learned counsel for the petitioner as well as Mr. K. Kalita, learned counsel for the respondents.

2. The allegation against the petitioner was that he had used a fake Schedule Tribe certificate at the time of entry into the service which was also used for being promoted. On the fake ST certificate being detected, a departmental inquiry/ proceeding was initiated against the petitioner and by order dated 18.12.2006, penalty of dismissal from service was awarded. The dismissal was challenged by the petitioner by filing WP(C) 261/2007.

3. This Court by judgment and order dated 21.07.2015 passed in WP(C) 261/2007 was pleased to interfere with the dismissal order dated 18.12.2006 and permitted the management of the respondents to impose any other penalty except that of dismissal and removal from service as provided

under sub-clause (d) and (e) of Clause 39 (ii) of the Standing order for the Namrup unit of the Hindustan Fertilizer Corporation of India, which is now the Brahmaputra Valley Fertilizer Corporation Ltd. It was further ordered that as the management has not received any service from the petitioner during the interregnum, he shall not be paid any back wages on the reinstatement.

4. The petitioner had approached the General Manager (Unit) of the respondent no.1 (respondent no.3) and forwarded the certified copy of the order of this Court passed in WP(C) 261/2007. From reply bearing no. Ref. No.BVFCL/ PERS/ PB (98)/1873 dated 24.08.2015, it appears that the undated letter of the petitioner was received by the respondent on 28.07.2015. However, by the said letter the petitioner was informed that his case has been referred to their legal counsel for examination and it was opined that a review application be filed and accordingly the management of the respondents had filed a Review petition before this Court on 18.08.2015 against the judgment and order dated 21.07.2015 passed in WP(C) 261/2007. The petitioner was requested to await the final decision in the matter.

5. The learned counsel for the petitioner has drawn the attention of this Court in the statement made in paragraph-20 of this writ petition to project that the petitioner had not been reinstated in service and has not been paid his monthly salary since 2015. It is further submitted that it is only after the petitioner filed a contempt petition being Cont. Cas (C) 496/2020, that the Chief Personnel Officer of the respondent had issued a memorandum bearing Reference no.002/BVFCI/Pers/1733 dated 01.12.2020 to allow the petitioner to join in the post of Technician Grade-I (Inst.).

6. Per contra, the learned counsel for the respondents has submitted that as the service of the petitioner was reinstated by order dated 01.12.2020,

the petitioner is not entitled to any back wages without demonstrating that he was not gainfully employed between 21.07.2015 till 01.12.2020. It is further submitted that prior to 01.12.2020, the petitioner did not make any attempt to join service and accordingly, it is submitted that the petitioner would not be entitled to claim any back wages.

7. In support of his submissions that back wages cannot be granted without rendering any service and that the claim for back wages cannot be automatic, the learned counsel for the respondents has placed reliance on the case of *J.K. Synthetics Ltd. v. K.P. Agrawal and another*, (2007) 2 SCC 433.

8. In this writ petition, the petitioner has prayed for a direction upon the respondent authorities to reinstate the petitioner w.e.f. 21.07.2015, the date of judgment and order passed in WP(C) 261/2007. The petitioner by a letter submitted on 28.07.2015 had provided a certified copy of the order of this Court in WP(C) 261/2007 to the General Manager (Unit) (respondent no.3), which is admitted by the Chief Manager (HR) (respondent no.4) by his letter dated 24.08.2015. The said respondent no.4 by the said letter 24.08.2023 had asked the petitioner to await the final decision on the matter which is related to the filing of the Review petition on 18.08.2015. The Review petition filed by the respondents which was registered as Review Petition no.62/2020 was dismissed by this Court by order dated 20.02.2024.

9. Therefore, when there was no stay operating against implementing of the judgment and order dated 21.07.2015 passed by this Court in WP(C) 261/2007, in the considered opinion of this Court, it is not open to the respondents to refuse to comply with the directions contained in the said order dated 21.07.2015.

10. The petitioner could only have given a representation before the respondent authorities to reinstate him in terms of the order of this Court and therefore, when the respondent authorities have asked the petitioner to wait till the final decision, we find that the petitioner after waiting for a long period of 5 years, has approached this Court by filing this writ petition and it is projected that during the pendency of the contempt petition referred above the reinstatement of the petitioner was ordered on 01.12.2020.

11. It is also noticed from the order dated 02.09.2020 passed in this writ petition that the Registry was directed to track and to tag the record of unnumbered Review application filed under Sl. No.259482 of 2015. We also note that the Registry had put up a note dated 05.09.2020 in connection with this writ petition to inform the Court that an unnumbered review petition was lying at defective stage in the Filing Section for which it could not be tagged with this writ petition.

12. The said state of affairs is found to be recorded in the order dated 10.09.2020 passed by this Court. Accordingly, as an interim measure by order dated 10.09.2020, this Court had directed the respondents to reinstate the petitioner within a period of 2(two) weeks from the date of receipt of a certified copy of this order and allow the petitioner to draw his monthly salary with effect to the date of receipt of a certified copy of this order and it was also provided that the interim order would not prejudice the right of the petitioner to claim reinstatement with effect to the date of the order passed in WP(C) 261/2007. Therefore, the reinstatement of the petitioner by memorandum of the respondent no.1 dated 01.12.2020 issued by the Chief Personnel Officer has come into existence pursuant to the order dated 10.09.2020 passed by this Court in this writ petition.

13. The Review petition which came to be registered as Review Petition no. 92/2020, was dismissed by this Court by order dated 20.02.2024. Therefore, there being no impediment in the implementation of the judgment and order dated 21.07.2015 passed in WP(C) 261/2007, with no stay operating, there can be no escape from the fact that the direction of this Court passed in the said order dated 21.07.2015 passed in WP(C) 261/2007, has to be complied with.

14. The respondent authorities having postponed the implementation of the said order by asking the petitioner to wait by their letter dated 24.08.2015 (*Annexure-21*) referred above, it is not open to the respondents to insist that the petitioner should give a proof of not being employed elsewhere. The petitioner was not put to notice to not to take any activity to sustain his livelihood. The respondents have not explained that if the order dated 21.07.2015 of this Court is not complied with for a period of almost 9 years till date. Therefore, at best, before releasing payment, the respondent may ask the petitioner to furnish an affidavit that he did not undertake any service for the relevant period. .

15. The case of *J.K. Synthesis Ltd. (supra)*, cited by the learned counsel for the respondents is not found to help the respondents in any manner. The said judgment is not an authority on the point that by filing a review petition, there is an automatic stay operating against the judgment and order of this Court dated 21.07.2015. The ratio of the said case, amongst others, is that in cases of "mis-conduct reinstatement", when the Court does not hold that the employer was wrong or that the dismissal was illegal or invalid, the discretion of the Court to award a lesser punishment was held to be permissible and valid and the punishment awarded would be in force till the power of lesser

punishment is awarded. The relevant observation of the Supreme Court of India in paragraphs 15 to 19 are quoted below:

“15. But the manner in which 'back-wages' is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In [U.P. State Brassware Corpn. Ltd. vs Udai Narain Pandey](#), (2006) 1 SCC 479, this Court following [Allahabad Jal Sansthan vs. Daya Shankar Rai](#), (2005) 5 SCC 124, and [Kendriya Vidyalaya Sangathan vs. S. C. Sharma](#), (2005) 2 SCC 363 held as follows :

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 their significance.

".....although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the courts realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched... The changes (were) brought about by the subsequent decisions of the Supreme 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.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of [section 6- N](#) of the U.P. Industrial Disputes Act.. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot therefore be the natural consequence.

In [General Manager, Haryana Roadways vs. Rudhan Singh](#), (2005) 5 SCC 591, this Court observed:

"There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation

of [Section 25-F](#) of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In [Kendriya Vidyalaya Sangathan](#) (supra), this Court held:

"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. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In [U.P. State Brassware Corpn. Ltd.](#) (supra), this Court observed:

"It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of [section 106](#) of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."

17. There is also a misconception that whenever reinstatement is directed,

*'continuity of service' and 'consequential benefits' should follow, as a matter of course. The disastrous effect of granting several promotions as a 'consequential benefit' to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever courts or Tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether 'continuity of service' and/or 'consequential benefits' should also be directed. We may in this behalf refer to the decisions of this Court in *A.P.S.R.T.C. v. S. Narasa Goud*, (2003) 2 SCC 212, *A.P.S.R.T.C. v. Abdul Kareem*, (2005) 6 SCC 36, and *R.S.R.T.C. v. Shyam Bihari Lal Gupta*, (2005) 7 SCC 406.*

*18. Coming back to back-wages, even if the court finds it necessary to award back-wages, the question will be whether back-wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back- wages, in addition to the several factors mentioned in *Rudhan Singh* (supra) and *Udai Narain Pandey* (supra). Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.*

19. But the cases referred to above, where back-wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the court found that the termination was motivated or amounted to victimization. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or section 11A of the Industrial Disputes Act (or any other similar provision) is exercised by any Court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is

exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back-wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions etc."

16. In the present case in hand, the respondents have not been able to show that the reinstatement of the petitioner was a consequences of imposition of a lesser punishment. It has been stated in the bar that the punishment provided to the petitioner was never revisited and in the meanwhile the petitioner has already superannuated.

17. Under such circumstances, the Court is of the considered opinion that the respondents, under the unique circumstances of this case, cannot be permitted to deny back wages to the petitioner from 01.08.2015 as the judgment of this Court in WP(C) 261/2007 was served in their office on 28.07.2015.

18. It is clarified that the order of back wages is passed in this writ

petition under the unique facts of this case and therefore, this order is not intended to be cited as a precedent.

19. Accordingly, this writ petition stands allowed by directing the respondent authorities to make payment of back wages to the petitioner from 01.08.2015 till 30.11.2020 as the petitioner was thereafter reinstated by order dated 01.12.2020.

20. However, as the petitioner has approached the Court after a long gap of 5 years, we grant 50% of the back wages along with other accrued service and financial benefits.

JUDGE

Comparing Assistant