

Court No. - 17

Case :- WRIT - A No. - 17669 of 2021

Petitioner :- Vimal Chand And Others

Respondent :- State Of U.P. Thru. Secy. Medical Edu. Lko And Others

Counsel for Petitioner :- Lalta Prasad Misra,Deepak Tewari

Counsel for Respondent :- C.S.C.,Shubham Tripathi

Hon'ble Manish Mathur,J.

1. Heard Dr. L.P. Mishra and Mr. Deepak Tewari learned counsel for petitioners, State Counsel for opposite party No.1 and Mr. Shubham Tripathi learned counsel for opposite parties 2,3 and 4.

2. Petition has been filed seeking quashing of the resolution dated 27th June, 2020 adopted by the executive council of the King George Medical University, Lucknow so far as it relates to condition for fresh engagement of petitioners on the post of Ambulance Driver. Further prayer for a direction to opposite parties to treat petitioners in continuous employment and pay them consequential benefits of service such as arrears of salary, continuity of service, seniority and other benefits from the date of their initial appointment has also been made.

3. It has been submitted that initially selections were advertised for the post of Ambulance Driver on contract basis vide advertisement dated 20th October, 2004 and 22nd October, 2004. The petitioners applied for same and were selected but certain unsuccessful candidates filed writ petition No. 3477 (S/S) of 2005 which was allowed by means of judgment and order dated 13th February, 2006 quashing the selection process while directing re-advertisement for the purposes of recruitment on the said post. The aforesaid judgment was thereafter challenged in special appeal No. 151 of 2006 and 190 of 2006, Vimlesh Chand versus Lalit Kumar and King Georges Medical University versus Lalit Kumar, respectively. The said special appeal was allowed by means of judgment and order dated 12th February, 2020 setting aside judgment and order dated 13th February, 2006 rendered by learned Single Judge.

4. It is submitted that aforesaid judgment passed in special

appeal thereafter attained finality whereafter the impugned resolution was adopted by the executive council of University concerned primarily on the basis of judgment rendered in special appeal. It is also submitted that in pursuance of the impugned resolution, various appointment letters were issued. Some of the appointment letters dated 29th June, 2020 have been brought on record as annexure No.1 to the writ petition.

5. Learned counsel for petitioners submits that once the judgment rendered by learned Single Judge had been set aside in special appeal, the effect thereof would be that petitioner should be continued in service from the initial date of appointment but condition No.12 in the appointment letters dated 29th June, 2020 states that after reinstatement, petitioners would not be entitled to any service benefits prior to the date of joining in pursuance of the appointment letters. It is submitted that such a condition is de hors the legal proposition of restitution.

6. Learned counsel appearing on behalf of opposite parties have refuted submissions advanced by learned counsel for petitioner with submission that since at the time of rendering of judgment by learned Single Judge, petitioners were only continued on probation without confirmation, as such, the aforesaid condition No.12 has been indicted in the appointment letters and particularly since they would be entitled to service benefits only upon successful completion of the probation period. Learned counsel has further submitted that even otherwise the petitioners are not entitled for any back wages in view of the fact that they had not submitted any affidavit or indicated any document to prove that they were not gainfully employed during the period of operation of judgment of learned Single Judge. He has placed reliance on judgment rendered in the case of Pramod Singh Kirar versus State of Madhya Pradesh and others (2023) 1 SCC 423.

7. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is undisputed that petitioners were selected on the post of Ambulance Driver in pursuance of the advertisement whereafter the aforesaid recruitment was challenged by certain unsuccessful candidates and the said writ petition was thereafter

allowed by means of judgment dated 13th February, 2006 quashing the entire selection process. It is also undisputed that the aforesaid judgment and order dated 13th February, 2006 was thereafter itself set aside vide judgment and order dated 12th February, 2020 passed in special appeal, which has attained finality.

8. In view of the aforesaid admitted facts, it is quite evident that had the selection process not being quashed in the writ petition filed by unsuccessful candidates, petitioners would have continued in their employment without hindrance subject to successful completion of the period of probation. However their services were disrupted only on account of challenge raised to the recruitment process which was upheld by learned Single Judge but was thereafter set aside in special appeal.

9. In such circumstances, in the considered opinion of this Court, the principles of restitution would definitely come into play and therefore the petitioners were entitled to be put back in the same condition as they were prior to passing of judgment and order of learned Single Judge. The consequence thereof would naturally be that they should be deemed to be continued in said service on the post on which they were selected right from the date of initial appointment. Any other view would be contrary to the principles of restitution. In the considered opinion of this court, the impugned resolution dated 27th June, 2020 as well as condition No. 12 indicated in the appointment letters dated 29th June, 2020 are contrary to the aforesaid settled legal proposition.

10. In view thereof, the impugned resolution dated 27th June, 2020 and the appointment letters dated 29th June, 2020 so far as they indicate applicability of service benefits to petitioner only from the date of joining in pursuance of appointment letters is hereby quashed by issuance of writ in the nature of Certiorari. A further writ in the nature of Mandamus is issued commanding the opposite parties to treat petitioners in continuous service on the post of Ambulance Drivers from the initial date of appointment subject to successful completion of probation.

11. So far as question of back wages is concerned learned counsel for petitioner has placed reliance on judgment rendered by Supreme Court in the case of Jayantibhai Raojibhai Patel

versus Municipal Council, Narkhed and others (2019) 17 SCC 184 in which reliance has been placed in earlier judgment of Supreme Court rendered in the case of Deepali Gundu Surwase versus Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324 to hold that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

12. The only rider indicated therein is that the employee has to make a statement before the adjudicating authority that he was not gainfully employed during the period he remained terminated from service. The proposition indicated is as follows:-

" 14. The Court laid down the following principles to govern the payment of back wages : (Deepali Gundu Surwase case [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] , SCC pp. 356-58, para 38)

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the

misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in

majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] .”

13. So far as the judgment cited by learned counsel for opposite parties in the case of Pramod Singh Kerar is concerned, a perusal thereof will clearly indicate that the said judgment is distinguishable on facts since in the said case, candidature of petitioner have been rejected on account of conviction in a criminal case and had sought appointment on being acquitted. Clearly in the aforesaid matter, petitioner had not even been

born in the cadre whereas in the present case, the petitioners were very much performing their duties in pursuance of their appointments and were therefore very much in the cadre. In the considered opinion of this court, the judgment in the case of Jayantibhai Raojibhai Patel(supra) would be clearly applicable in the facts and circumstances of the case.

14. In view of aforesaid discussion, liberty is therefore granted to the petitioners to furnish their affidavits before the opposite party No.4 i.e. Registrar, King George Medical University, Lucknow specifically indicating that they were not gainfully employed or were employed on lesser wages during the period of subsistence of their termination. The same shall be considered by the opposite party No.4 with regard to grant of back wages to petitioners who shall also keep in mind the conditions indicated in the judgment of Deepali Gundu Surwase (supra). Petitioners are granted liberty to file such affidavits before opposite party No.4 within a period of two weeks from today. The opposite party No.4 shall take a decision thereupon within a period of four weeks from the date of receipt of such affidavit/representation. Orders with regard to grant of continuity of service shall also be issued by the concerned authority within a period of six weeks from the date a certified copy of this order is produced before the said authority in the light of observations made herein above.

15. In view of aforesaid, the writ petition succeeds and is allowed. Parties to bear their own cost.

Order Date :- 18.1.2024

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