

HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION Nos.23582 of 2000 and 14577 of 2009

COMMON ORDER:

WP.No.23582 of 2000:

The petitioner was appointed as a Tongsman in the year 1977 on a monthly salary of Rs.350/-. The last drawn salary was Rs.1,640/- per month. The order of transfer dated 21.09.1995 was issued to him transferring to Trichy and he was asked to report for duty at Trichy in Sabari Mills, Trichy. The Standing Orders which govern the service conditions of the petitioner do not permit the 2nd respondent to transfer an employee outside Hyderabad even. Though, he made several representations for cancelling the order of transfer, the order of transfer was not cancelled. Consequently, an application was filed before the 1st respondent Tribunal under Sec.2A(2) of I.D.Act challenging the oral order of termination as violative of Section 25F of I.D. Act.

The 2nd respondent filed a counter and supported the order of transfer on the ground that M/s. Sabari Mills is a sister concern of it and the services of the petitioner was required there.

The petitioner deposed himself as WW1 and marked Exs.W1 to W5 and the 2nd respondent examined its Finance Manager as MW1 and marked Exs.M1 to M4. The Tribunal on 27.12.1999 passed an Award directing the 2nd respondent to reinstate the petitioner as Tongsman in the 2nd respondent company at Hyderabad with continuity of service for all purposes except back wages. Challenging that portion of the award denying the back wages, the present writ petition was filed.

Heard the learned counsel for the petitioner and learned counsel for the 2nd respondent.

The learned Counsel for the petitioner contends that in view of

the order of reinstatement by the labour Court on the ground that the said Sabari Mills at Trichy where the petitioner was asked to report for duty was closed and the petitioner was held to be entitled to reinstatement by setting aside the order of transfer, the denial of back wages was bad. On the other hand, the learned Counsel for the 2nd respondent contends that the petition before the labour Court itself is not maintainable under Section 2(A)(2) of ID Act as there was no order of termination or dismissal and it was only an order of transfer dated 21.09.1995 which was challenged.

The labour Court, on evidence, held that the appointment letter states that the petitioner can be transferred anywhere in India to the other concern and of the same management. The petitioner was a Tongsgman in the 2nd respondent company which is a steel factory but the petitioner was transferred to cloth mill and such transfer appeared to be vindictive. Since the petitioner was not allowed to do work at Hyderabad it amounted to termination. The labour Court also noticed that MW1 agreed that there was mass retrenchment in the year 1995 and he also admitted in cross-examination that the said Sabari Mills at Trichy was closed. Consequently, the labour Court held that the petitioner was entitled to reinstatement, but the labour Court did not assign any reason for denying back wages.

The learned Counsel for the petitioner relied on the decisions of the Hon'ble Supreme Court reported in **P.G.I. OF MEDICAL EDUCATION & RESEARCH, CHANDIGARH Vs. RAJ KUMAR**^[1], **KENDRIYA VIDYALAYA SANGATHAN AND ANOTHER Vs. S.C. SHARMA**^[2] and **U.P. STATE BRASSWARE CORPORATION LIMITED AND ANOTHER Vs. UDAY NARAIN PANDEY**^[3]. In Rajkumar's case (1 supra) the Supreme Court held that the payment of back wages has a discretionary element involved in it and 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. In S.C. Sharma's case (2 supra) it was held that while determining the entitlement of a person to back wages, the employee has to show that he was not gainfully employed. The initial burden is on him and after he places material in this regard the employer can bring on record the material to rebut the claim. In Uday Narain Pandey's case (3 supra) also it was held that onus is on the employee to plead and prove that he was not gainfully employed during the period for which back wages were claimed having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto. In a recent judgment of the Hon'ble Supreme Court reported **DEEPALI GUNDU SURWASE Vs. KRANTI JUNIOR ADHYAPAK MAHAVIDYALA (D.ED.) AND OTHERS**^[4], after reviewing the entire case law relating to payment of back wages in para 38 it was held as follows:

"The propositions which can be culled out from the aforementioned judgments are:

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

ii) 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.

iii) 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 averments 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.

iv) 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.

v) 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 victimizing the employee or workman, then the concerned Court or Tribunal 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 be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give 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.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization 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 Private Limited v. Employees of Hindustan Tin Works Private Limited* (supra).

vii) The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

In the facts and circumstances of the case, the Award of the labour Court in I.D.No.77 of 1999 dated 27.12.1999 to the extent of the denial of the back wages to the petitioner is set aside and consequently the petitioner is entitled to the back wages from the date of termination of his service to the date of reinstatement.

W.P.No.14577 of 2009:

In this case it is the contention of the petitioner that consequent to the Award in I.D.No.77 of 1999, he was reinstated into service without back wages on 05.06.2000. But on reinstatement, he was not given the post of Tongsman and he was asked to discharge manual work, which included lifting of iron sheets and girdles. The petitioner was again transferred to Trichy and when he resisted, his services were terminated. Challenging the order of termination, he filed I.D.No.238 of 2001 on the file of labour Court-I, Hyderabad under Sec.2A(2) of I.D.Act seeking a direction to the respondent to reinstate him into service with full backwages and attendant benefits.

Before the labour Court, the petitioner was examined as WW1 and on behalf of the respondent, its Finance Manager was examined as MW1 and the petitioner marked Exs.W1 to W3 while the respondent marked Exs.M1 to M9. Before the labour Court, the petitioner contended that the respondent issued order of transfer and posted him at Trichy where there was no unit of respondent and therefore the order of transfer is nothing but an order of termination. The said contention was resisted by the respondent stating that during the pendency of the proceedings in I.D.No.77 of 1999, the Poddar Projects Limited was taken over by Maharshi Commerce Limited after due amalgamation as per the directions of the Calcutta High Court. After Maharshi Commerce Limited took over, all its manufacturing operations are carried out on contract basis by a different contractor and no reproduction workers are left over on the rolls of the company, as many of them left over the organization after settling their dues. However with the consent of the petitioner, the respondent management obliged to provide job but it was not specified. When a transfer order was issued to him with a view to provide appropriate job at Trichy, the petitioner did not report for his duty. The labour Court found that the transfer of the petitioner was made in view of the changed circumstances and he was advised to take up the job at

Trichy for which the petitioner was not willing to join. The labour Court also held that the name of the petitioner was still available on the rolls of the company and he was at liberty to join the duty as he was posted at Trichy and accordingly held that he was not dismissed from the service. Since the service of the petitioner was not terminated or dismissed, he was not entitled for reinstatement and consequently the petition was dismissed.

The learned counsel for the petitioner contended that the same labour Court noticed that in I.D.No.77 of 1999 and I.D.No.92 of 1999 filed by the Petitioner and V.K. Mishra respectively, who were earlier transferred in 1995 to Trichy came to conclusion that there was no branch of the 2nd respondent in Trichy. In those cases, the orders of transfer were set aside by the labour Court and they were directed to be reinstated in service and hence the finding of the labour Court was not correct.

The labour Court noticed from the deposition of the petitioner who was examined as WW1 that after the proceedings in I.D.No.77 of 1999, when he was asked to report to duty to Maharshi Commerce Limited, the petitioner categorically stated that he was not prepared to join duty with the respondent at Trichy and he expressed his willingness to join duty if he was posted to Hyderabad. In those circumstances only the labour Court came to the conclusion that there was no termination or dismissal from service and accordingly it dismissed the petition by order dated 31.03.2006. In view of these facts, it cannot be held that the Award of the labour Court is erroneous. Consequently the award of the labour court in I.D.No.238 of 2001 dated 31-3-2006 is confirmed.

In view of the above, the award of the Labour Court in I.D.No.77 of 1999 dated 27-12-1999 is set aside to the extent of denial of back wages to the Petitioner and W.P.No.23582 of 2000 is allowed holding that the petitioner is entitled to back wages from the date of dismissal from service on 21.12.1995 to 05.06.2000, the date on which he

reported for duty.

W.P.No.14577 of 2009 is dismissed confirming the award of the Labour Court in I.D.No.238 of 2001 dated 31-3-2006. No order as to costs.

As a sequel, Miscellaneous Petitions, if any, pending in these petitions shall stand closed.

A.RAMALINGESWARA RAO, J

Date: 31.12.2013

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[\[1\]](#) (2001) 2 SCC 54

[\[2\]](#) (2005) 2 SCC 363

[\[3\]](#) (2006) 1 SCC 479

[\[4\]](#) (2013) 10 SCC 324