

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8109 of 1998

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Braj Kishore Jha S/o Late Bhrigudeo Jha, resident of village- Chainpur
Panchayat Secretary Bangoon district Saharsa, at present clerk-cum-cashier
Telia Hatt Branch Koshi Kshetriya Gramin Bank in the district of Saharsa

.... Petitioner

Versus

1. Koshi Kshetriya Gramin Bank, through H.C. Purnea through its Chairman
2. The Chairman, Board of Director, Koshi Kshetriya Gramin Bank, H. C. Purnea
3. Senior Manager, Chairman- Secretariat, Koshi Kshetriya Gramin Bank HC Purnea
4. The Branch Manager, Koshi Kshetriya Gramin Bank, Telia Hat Branch in the district of Saharsa

.... Respondents

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Appearance :

For the Petitioners :	Mr. N. K. Malhotra, Sr. Advocate
	Mr. Shashank Shekhar Jha, Advocate
	Mr. Binod Kumar Sinha, Advocate
For the Respondents:	Mr. Ajay Kumar Sinha, Advocate
	Mrs. Manju Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 19-02-2015

This is an application seeking quashing of the decision dated 15.03.1996 of the Board of Directors of Koshi Kshetriya Gramin Bank, now the Uttar Bihar Gramin Bank, communicated to the petitioner under reference No. 50 dated 16.07.1996, whereby, his claim for full salary for the period during which he had remained under suspension and was under the orders of dismissal, which subsequently came to be set aside by the Appellate Authority, has been rejected.

2. At the outset, it has been submitted by learned senior counsel appearing on behalf of the petitioner that Koshi

Kshetriya Gramin Bank and other regional rural banks came to be merged to form new Uttar Bihar Gramin Bank (hereinafter referred to as the Bank) with its headquarters at Muzaffarpur.

3. Mr. Ajay Kumar Sinha, learned counsel, has accepted this fact and has also accepted notice on behalf of the Bank. Let necessary correction be made in the cause title of the writ application, as regards description of the respondents in view of changed situation to this effect, which is formal in nature.

4. From the writ application, it appears that the petitioner, while working as Clerk-cum-Cashier of Bariahi branch of the Bank, was put under suspension vide memo No.2 dated 22.05.1990 and a departmental proceeding was subsequently held against him for certain charges relating to interpolation in his date of birth. The Enquiry Officer submitted his report holding the petitioner guilty. Based upon that the Disciplinary Authority vide his order dated 03.04.1993 imposed upon the petitioner punishment of his removal from service. The petitioner preferred appeal before the Appellate Authority, i.e., the Board of Directors of the Bank. The Appellate Authority on 30.05.1995 decided to exonerate the petitioner from the charges leveled against him, superseding the order of the Disciplinary Authority/ Chairman of the Bank passed on 03.04.1993. Subsequently, vide order dated 05.07.1995 the



petitioner was directed to report to the Bank's headquarters which he is said to have received on 11.07.1995. He reported joining on 12.07.1995, whereafter, he was posted at another branch namely Telia Hat branch of the Bank where he submitted his joining on 15.07.1995. The petitioner thereafter started working and getting his salary from the Bank and, in course of time, after the attaining the age of superannuation, he retired from Bank's service.

5. A short question has been raised in the present writ application as to whether the petitioner would be entitled for full salary for the period during which he remained under suspension, i.e., 22.05.1990 to 03.04.1993 after adjusting the subsistence allowance, which the petitioner had availed during the said period. In addition, whether he will be entitled for full salary during which he remained under orders of dismissal, i.e., from 03.04.1993 till 12.07.1995 when he joined the Bank's service. The petitioner had approached the competent authority for payment of salary for the period in question which, however, has been rejected by the Board of Directors of the Bank on 15.03.1996 in terms of no pay no work.

6. A counter affidavit has been filed on behalf of the Bank denying the petitioner's claim and it has been stated that the Appellate Authority set aside the order of the Disciplinary Authority without making any provision for payment of salary

for the period in question, which the petitioner accepted and having done so, it has been stated in the counter affidavit, that he will not be entitled for the salary as claimed by him.

7. Mr. Malhotra, learned senior counsel appearing on behalf of the petitioner, has placed reliance upon a Supreme Court judgement reported in **(1994) 3 SCC (supp) 671 (Manorma Verma vs. the State of Bihar & Ors.)** and has submitted that once the termination order was found to be illegal, consequential order of grant of backwages must follow unless there are reasons justifying a departure from a normal order. He has also placed reliance upon a decision of this court reported in **1999 BLJ (1) 137 (Umesh Rai vs. Union of India & Ors.)** to submit that an employee, who has been reinstated in service is entitled for remaining backwages after adjusting the subsistence allowance.

8. Mr. Ajay Kumar Sinha, learned counsel appearing on behalf of the Bank, on the other hand, has opposed the prayer and has submitted that the petitioner is not entitled for backwages as he has not mentioned anywhere in the writ application whether he was gainfully employed or not during the period in question. He contends that without there being any pleading that petitioner was not gainfully employed during the period, such relief cannot be granted.

9. I have perused the order of the Appellate



Authority exonerating the petitioner of the charges leveled against him. The order is unambiguous to the extent that the Appellate Authority quashed the order of the Disciplinary Authority, dismissing the petitioner from service, and exonerated him of the charges leveled against him. Upon perusal of the order of the Appellate Authority, one and the only irresistible conclusion can be arrived at is that the petitioner was wrongfully dismissed from service. He remained out of service not out of his own volition but because of an order of the Disciplinary Authority, which was found to be illegal and has been superseded by an order of the Appellate Authority. In such circumstance, I am of the view that the petitioner cannot be denied of his backwages unless there is some finding that he was gainfully employed, else where during the period in question.

10. In the case of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak & Ors** reported in **(2013) 10 SCC 324** the Supreme Court has elaborately dealt with the law relating to payment of backwages upon reinstatement of an employee. The Supreme Court held that in the cases of wrongful termination of service, reinstatement with continuity in service is the normal rule. The Supreme Court considering the law laid down in the case of **J. K. Synthetics Ltd. vs. K. P. Agrawal, (2007) 2 SCC 433** held in paragraph 38.3 as

follows:-



"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".

11. The Supreme Court while laying down the law held that the Supreme Court decision in the case of *J. K. Synthetics vs. K. P. Argawal* was not a good law wherein the Supreme Court had held that on reinstatement an employee or workman could not claim continuity of service as of right.



12. Following the law laid down in the case of *Deepali Gundu Surwase vs. Kranti Junior Adhyapak & Ors* (supra), I am of the view that an employee desirous of getting backwages would be required to make statement before the adjudicating authority whether or not he was gainfully employed during the period he remained out of service because of an order which was found to be illegal and If the employer wants to avoid backwages, it will have to come to a finding on the basis of cogent material that the employee/ workman was gainfully employed and was getting backwages equal to the wages he/ she was getting during the intervening period. However, there is no statement in the writ application that the petitioner was not gainfully employed during the period in question.

13. Learned senior counsel appearing on behalf of the petitioner, on the basis of instruction, has submitted that petitioner was not gainfully employed during the said period. If that be so, the petitioner shall have the liberty to approach the appropriate authority afresh seeking payment of backwages for the period during which he was remained under the order of dismissal with specific plea that he was not gainfully employed else where during the said period, supported by an affidavit to this effect before the appropriate authority. If the appropriate authority wants to avoid payment for the said

period, he will have to come to a conclusion, on the basis of cogent evidence that the petitioner was gainfully employed during the said period. If no such conclusion is arrived at by the appropriate authority, the petitioner will be paid his entire backwages for the period during which he remained under the orders of dismissal. So far as the payment of full salary for the period during which the petitioner remained under suspension is concerned, I direct the Disciplinary Authority to consider as to whether, in the facts and circumstances of the case, the petitioner's suspension can be said to be justified, particularly, when the Appellate Authority exonerated the petitioner of all the charges against him. The decision as regards payment of backwages, admissible allowances and increment shall be taken within a period of six months from the date of receipt/production of a copy of this order.

This writ application is, accordingly, allowed.

(Chakradhari Sharan Singh, J)

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