

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.208 of 2009

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Ram Prahlad Singh Son of late Rama Singh, R/o village Bharpura, P.O. & P.S. Sonepur District Saran, at present residing at Mohalla Mahatma Gandhi Nagar, Anand Path P.O. Lohia Nagar, P.S. Agam Kuan District Patna.

.... Petitioner/s

Versus

1. The State of Bihar .
2. Bihar State Co-operative Bank Lt d., Ashok Raj Path, Patna.
3. The Managing Director, Bihar State Co-operative Bank Lt d, Ashok Raj Path, Pat na-4.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ram Janam Prasad, Adv.

For the State : Mr. Satyeshwar Prasad, AC to GP-9.

For the Co-operative Bank : Mr. S.N.Pathak, Adv.
Mr. Prashant Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL ORDER

8 16-01-2015 Heard learned counsel for the petitioner, for the State and for the Bank.

In this case petitioner is claiming salary from 15th t October 2004 to 31st December 2004 and arrear of salary due to revision of pay during the intervening period along with interest calculated thereon.

Petitioner was appointed as Assistant in the Bihar State Co-operative Bank in the year 1969 and subsequently he was promoted to the rank of Staff Officer in the year 1982.

While petitioner was posted at New Secretariat, Branch in August 2004, a show cause notice was served upon him

on 17th August 2004 pointing out some lapses allegedly committed by him while posted at New Market Branch. On receipt of the same, he gave a reply on 23rd August 2004 and prayed for certain documents so that he may submit effective reply.

As the respondents did not find the reply to be satisfactory, decided to initiate a departmental proceeding against him vide letter dated 28th August 2004 that his reply was not satisfactory, which led to issuance of charge-sheet dated 20th September 2004 and there after he was called for personal hearing by the Managing Director on 22nd September 2004 and thereafter the Managing Director vide his order No. 1458 dated 14th October 2004, dismissed the petitioner from service and also passed the order for forfeiture of gratuity, leave encashment and all non-CPF dues as the departmental proceeding was not properly conducted as per regulation nor there was power vested upon the Managing Director to pass order of punishment upon superior staff as the power was lying with the Chairman and that too after approval of the Board of Directors.

Petitioner filed CWJC No. 14830 of 2004 and this Court found that the procedure of enquiry did not suffer from error but the Managing Director did not have power to award punishment and accordingly, the order of dismissal was quashed

with liberty to the respondents, if so advised, they may proceed departmentally against him.

Counsel for the petitioner has submitted that he has filed his representation on 30th June 2006 along with the copy of the order passed by this Court and requested to pass the order for payment of salary for the dismissal period i.e. from 15th October 2004 to 31st December 2004. Even thereafter no order was passed nor payment was made. That led to filing of a contempt petition, vide MJC No. 2824 of 2006 and the same was disposed vide Order dated 24th July 2008. While the contempt application was pending he was informed vide letter no 2149 dated 6th March 2007 about the decision of the Bank to make payment of retiral dues whereafter petitioner was paid gratuity, leave encashment and unpaid salary, from 1st October 2004 to 31st December 2004, but no payment was made for the period the petitioner remained under dismissal nor communicated any reason for non-payment of the aforesaid amount.

The petitioner has filed several representations which did not work. Ultimately he filed the present case. The Bank has filed a counter affidavit where the stand has been taken that there was a misappropriation of money of Rs.60,00,000/- (sixty lacs) at the New Secretariat Branch of the Bank. Out of the above some



portion money was defalcated when the petitioner was posted as Branch Manager of that Branch and some vouchers were passed by the petitioners. After thorough enquiry by the team of Officers a departmental proceeding was conducted by the Managing Director against the petitioner and other staff/Officers involved in the defalcation of money.

Petitioner was dismissed from service vide letter no. 1458 dated 14th October 2004 in anticipation of approval by the Board of Directors and later on the Board of Directors approved the order. After remand by this Court, the case of petitioner was considered and they took a lenient view in the matter of six teen other employees who were involved in the defalcation case and vide item no.20 of its meeting held on 25th November 2006 reinstated the sixteen employees with a condition that they will not be paid any salary from the date of dismissal to the date of reinstatement and in the case of petitioner, vide memo No. 2129 dated 6th March 2007, modified the earlier order of dismissal and petitioner was granted leave salary etc. and other retiral dues.

Thereafter respondents did not opt again for initiating departmental proceeding against the petitioner As has been claimed during the argument by the Bank that a criminal case was initiated against the petitioner along with co-accused, namely,

Lallanji Prasad and, as such, during the pendency of the criminal case, he should not be given any salary for the aforesaid period.

In the supplementary affidavit, petitioner has brought on record the charge sheet filed in pursuance of direction of this Court dated 6th June 2014 where Police did not find any material against him and submitted Final Form but filed charge-sheet against Lallanji Prasad and he is facing incarceration of criminal trial. As the Corporation after remand by this court did not initiate a proceeding nor any criminal case is pending against the petitioner, he is claiming that he was wrongly dismissed and should be given wages for the period he remained under dismissal.

In support of his contention, counsel for the petitioner has relied on the judgment in the case of Deepali Gundu Surwase v Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and others reported in (2013)10 SCC 324 where the Supreme Court in Para-33 has dealt with in what circumstances the back wages can be given to the employees, as follows:

Para- 33. 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.

There the Hon'ble Supreme Court has also considered illegal order has been passed by the authority concerned, the employee cannot be deprived of the legitimate right but the question would arise whether he should be given the full back wages as certainly in this the petitioner has not worked during that period so much so the Bank financial condition is not sound and as such cannot be saddled with the burden of full back wages.

In this view of the matter, it will be in the ends of justice, this Court is of the view that he should be paid 50per cent of the salary for the period 15th October 2004 to 31st December 2004. For other reliefs, petitioner may file a representation before the authority concerned who are obliged to dispose of the same in accordance with law.

With this observation and direction, this petition is allowed.

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(Shivaji Pandey, J)