

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

WP(C).No. 10156 of 2014 (T)

PETITIONER:

INDIA COFFEE BOARD WORKERS CO-OPERATIVE
SOCIETY LTD.No.4227, THRISSUR,
P.B.NO. 184, PIN 680 001,
REP.BY ITS SECRETARY VARGHESE , S/O.THOMAS.

BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENTS :

1. STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY,
DEPARTMENT OF INDUSTRIES, SECRETARIAT,
THIRUVANANTHAPURAM 695 001.
2. KERALA CO-OPERATIVE TRIBUNAL,
THIRUVANANTHAPURAM- 695 001, REP.BY SECRETARY.
3. CO-OPERATIVE ARBITRATION COURT (NORTHERN),
KOZHIKODE, 5TH FLOOR,
HOUSEFED COMPLEX, SASTHRI NAGAR, ELANJIPPALAM,
KOZHIKODE.
4. DEPUTY REGISTRAR,
DISTRICT INDUSTRIES CENTRE, AYYANTHOLE,
THRISSUR 680 003.
5. M.P.RAJAN, AGED 57 YEARS,
S/O.PARAMESWARAN, KIZHAKKOTTIL HOUSE,
NEDUPUZZHA PO- 680 007, THRISSUR

R5 BY ADV. SRI.DILEEP VARGHESE
R5 BY ADV. SMT.TESMY VARGHEESE
R1-R4 BY GOVERNMENT PLEADER SRI.V.K.RAFEEQ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 COPY OF FRONT PAGE AND PAGE NO.9 OF SERVICE AND GRATUITY REGULATIONS OF THE PETITIONER SOCIETY.

EXHIBIT P2 COPY OF RELEVANT PAGE OF MATHRUBHOOMI DAILY DATED 5/5/09 .

EXHIBIT P3 COPY OF RESOLUTION OF MANAGING COMMITTEE OF PETITIONER DATED 5/6/09.

EXHIBIT P4 COPY OF NOTICE ISSUED TO THE 5TH RESPONDENT BY THE SUB COMMITTEE ON 23/5/09.

EXHIBIT P5 COPY OF THE RETURNED COVER SENT TO THE 5TH RESPONDENT WITH EXHIBIT P4 NOTICE.

EXHIBIT P6 COPY OF ORDER IN ARC 104/11 DATED 3/4/13 OF THE 3RD RESPONDENT.

EXHIBIT P7 COPY OF LETTER SENT BY THE PETITIONER TO THE 5TH RESPONDENT ON 7/6/13.

EXHIBIT P8 COPY OF LETTER SENT BY 5TH RESPONDENT TO THE PETITIONER SOCIETY ON 18/6/13.

EXHIBIT P9 COPY OF APPEAL MEMORANDUM IN AP 62/13 FILED BY THE 5TH RESPONDENT BEFORE THE 2ND RESPONDENT.

EXHIBIT P10 COPY OF ORDER OF 2ND REESPONDENT IN AP 62/13 DATED 25/10/11.

EXHIBIT P11 COPY OF ATTACHMENT SCHEDULE FILED BY 5TH RESPONDENT BEFORE MUNSIFF'S COURT, THRISSUR IN EP 246/14 IN ARC 104/11 DATED 25/1/14.

EXHIBIT P12 COPY OF LETTER ISSUED BY MANAGER STATE BANK OF TRAVANCORE , THRISSUR MAIN BRANCH TO THE PETITIONER BEARING NO.DGM/TCR/2293 DATED 11/3/14.

EXHIBIT P13: TRUE COPY OF FRONT PAGE AND PAGES 16 AND 17 OF THE SPECIAL REGULATION OF THE PETITIONER SOCIETY.

EXHIBIT P14: COPY OF APPLICATION SUBMITTED BY THE 5TH RESPONDENT BEFORE THE SECRETARY OF PETITIONER SOCIETY ON 16.5.01.

EXT.P15: COPY OF APPLICATION FILED BY THE 5TH RESPONDENT ON 12.6.2001 BEFORE THE SECRETARY OF PETITIONER SOCIETY.

EXT.P16: COPY OF LETTER SENT BY THE BRANCH MANAGER OF THE KERALA HIGH COURT BRANCH COFFEE HOUSE TO THE SECRETARY DATED NIL.

WP(C).No. 10156 of 2014 (T)

EXT.P17: COPY OF REPORT SUBMITTED BY THE MANAGER OF KERALA HIGH COURT BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY ON 2.7.2001.

EXT.P18: COPY OF REPORT SUBMITTED BY THE MANAGER OF THE KERALA HIGH COURT BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY ON 7.8.01.

EXT.P19: COPY OF SHOW CAUSE NOTICE ISSUED TO THE 5TH RESPONDENT BY THE SECRETARY OF THE PETITIONER ON 23.8.01.

EXT.P20: COPY OF REPLY SENT BY THE 5TH RESPONDENT TO EXT.P19 SHOW CAUSE NOTICE ON 8.9.01.

EXT.P21: COPY OF APPEAL PETITION FILED BEFORE THE MANAGING COMMITTEE OF THE PETITIONER SOCIETY BY THE 5TH RESPONDENT ON 22.10.11.

EXT.P22: COPY OF RESOLUTION OF THE PETITIONER SOCIETY DT.9.12.01.

EXT.P23: COPY OF LETTER SENT BY PRESIDENT OF THE SOCIETY TO THE 5TH RESPONDENT ON 11.12.01.

EXT.P24: COPY OF REPORT SUBMITTED BY THE MANAGER OF PATTIKKAD BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY ON 9.9.03.

EXT.P25: COPY OF ORDER ISSUED BY THE PRESIDENT OF THE SOCIETY TO THE 5TH RESPONDENT ON 10.9.03.

EXT.P26: COPY OF SHOW CAUSE NOTICE ISSUED TO THE 5TH RESPONDENT BY THE SECRETARY OF THE PETITIONER ON 28.10.03.

EXT.P27: COPY OF REPLY SENT BY 5TH RESPONDENT TO EXT.P26 SHOW CAUSE NOTICE ON 4.11.2003.

EXT.P28: COPY OF REPORT SUBMITTED BY THE MANAGER OF CHITRANJALI STUDIO BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY DT.NIL.

EXT.P29: COPY OF LETTER SENT BY THE 5TH RESPONDENT TO THE MANAGER OF CHITRANJALI STUDIO BRANCH COFFEE HOUSE ON 24.12.2003.

EXT.P30: COPY OF LETTER SENT BY THE 5TH RESPONDENT TO THE SECRETARY OF THE SOCIETY ON 24.12.2003.

EXT.P31: COPY OF REPORT SUBMITTED BY THE MANAGER OF KERALA AGRICUTURAL UNIVERSITY BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY DT.22.4.05.

EXT.P32: COPY OF REPORT SUBMITTED BY THE MANAGER OF KERALA AGRICUTURAL UNIVERSITY BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY DT.20.7.06.

EXT.P33: COPY OF REPORT SUBMITTED BY THE MANAGER OF M.G.KAVU BRANCH COFFEE HOUSE TO THE SECRETARY OF THE SOCIETY DATED 9.8.06.

EXT.P34: COPY OF APPLICATION SUBMITTED BY THE 5TH RESPONDENT BEFORE THE SECRETARY OF PETITIONER SOCIETY ON 12.9.06.

WP(C).No. 10156 of 2014 (T)

EXT.P35: COPY OF APPLICATION SUBMITTED BY THE 5TH RESPONDENT BEFORE THE SECRETARY OF PETITIONER SOCIETY ON 6.10.06.

EXT.P36: COPY OF TELEGRAM SENT BY 5TH RESPONDENT TO THE SECRETARY OF PETITIONER SOCIETY ON 18.10.06.

EXT.P37: COPY OF THE APPLICATION SUBMITTED BY THE 5TH RESPONDENT BEFORE THE SECRETARY OF PETITIONER SOCIETY ON 15.11.06.

EXT.P38: COPY OF THE APPLICATION SUBMITTED BY THE 5TH RESPONDENT BEFORE THE SECRETARY OF PETITIONER SOCIETY ON 22.9.07.

EXT.P39: COPY OF WRITTEN STATEMENT FILED BY SECRETARY OF PETITIONER SOCIETY BEFORE THE ARBITRATION COURT ON 9.10.09.

EXT.P40: COPY OF THE ADDITIONAL WRITTEN STATEMENT FILED BY SECRETARY OF PETITIONER SOCIETY BEFORE THE ARBITRATION COURT ON 5.2.13.

EXT.P41: COPY OF PROOF AFFIDAVIT FILED BY 5TH RESPONDENT BEFORE THE ARBITRATION COURT ON 21.8.12.

EXT.P42: COPY OF FRONT PAGE AND PAGE NOS.24 TO 27 OF THE BALANCE SHEET OF THE PETITIONER SOCIETY FOR THE PERIOD 2011-12.

EXT.P43: COPY OF FRONT PAGE AND PAGE NOS.24 TO 27 OF THE BALANCE SHEET OF THE PETITIONER SOCIETY FOR THE PERIOD 2012-13.

EXT.P44: COPY OF FRONT PAGE AND PAGE NOS.23 TO 27 OF THE BALANCE SHEET OF THE PETITIONER SOCIETY FOR THE PERIOD 2013-14.

EXT.P45: COPY OF STATEMENT OF ACCOUNTS REGARDING THE AMOUNTS DUE FROM 5TH RESPONDENT TO THE PETITIONER SOCIETY.

EXT.P46: COPY OF STATEMENT SHOWING THE DETAILS OF PAYMENT TO BE MADE BY AN EMPLOYEE IN SERVICE TO THE PETITIONER SOCIETY.

RESPONDENTS' EXHIBITS:-

EXT.R5(a) COPY OF THE INTERIM ORDER IN W.P.(C)No.9431/2015.

EXT.R5(b) COPY OF THE PLAINT IN ARC No.138/2009 (A.R.C.No.104/2011) FILED BY THE 5TH RESPONDENT DTD.16.9.2009.

EXT.R5(c) COPY OF THE WRITTEN STATEMENT IN ARC No.138/2009 (A.R.C.No.104/2011) FILED BY THE PETITIONER SOCIETY DTD.5.2.2013.

EXT.R5(d) COPY OF THE RELEVANT PAGES OF THE REPORT AND ACCOUNTS OF THE SOCIETY IN THE YEAR 2013-14.

ANIL K.NARENDRA, J.

W.P.(C)No.10156 of 2014

Dated this the 8th day of October, 2015

JUDGMENT

The petitioner, a Co-operative Society registered under the Travancore Cochin Co-operative Societies Act, 1952, which is an Industrial Co-operative Society with the General Manager, District Industries Centre, Thrissur, as its Registrar, has filed this writ petition seeking a writ of certiorari to quash Ext.P6 award passed by the Co-operative Arbitration Court, Kozhikode and Ext.P10 judgment of the Kerala Co-operative Tribunal, Thiruvananthapuram.

2. Going by the averments in the writ petition, the 5th respondent was an employee of the petitioner Society. On the ground that 5th respondent unauthorizedly absented from duty, he was imposed with a punishment of removal from service based on an order dated 7.7.2009. The said order of removal was under challenge before the 3rd respondent in A.R.C. No.104/2011, which was disposed of by Ext.P6 award. By the aforesaid order, the order of removal from service was converted as one of compulsory

retirement with effect from 01.10.2008, i.e., the date on which the 5th respondent wants to rejoin duty. It was also ordered that the 5th respondent will be eligible for back-wages under the Rules of the Society.

3. Against Ext.P6 award passed by the 3rd respondent, the 5th respondent filed Appeal No.62/2013 before the 2nd respondent. By Ext.P10 judgment dated 25.10.2011, the 2nd respondent allowed the aforesaid appeal by setting aside Ext.P6 award of the 3rd respondent. In Ext.P10 judgment, the 2nd respondent has held that the 5th respondent is entitled to get reinstatement of service and also back-wages from 01.10.2008 till the date of reinstatement. It is aggrieved by the aforesaid orders, the petitioner Society is before this Court in this writ petition.

4. The 5th respondent has filed a counter affidavit dated 09.07.2015, which was followed by an additional counter affidavit dated 19.07.2015, contending, inter alia, that the reasoning of the 2nd respondent in Ext.P10 judgment is perfectly legal and no interference of this Court is called for.

5. By order dated 07.04.2014, this Court granted an interim stay of Ext.P10 judgment for a period of three months on condition

that the execution Court shall disburse an amount of ₹2,00,000/- to the 5th respondent and retain the balance amount with the Court without disbursing the same. It was also made clear that the amount disbursed in terms of the aforesaid order would be set off against the amounts finally found to be given to the 5th respondent.

6. I heard arguments of the learned counsel for the petitioner, the learned Government Pleader appearing for respondents 1 to 4 and also the learned counsel appearing for the 5th respondent.

7. The issue that arises for consideration in this writ petition is as to the legality of Ext.P6 award passed by the 3rd respondent and Ext.P10 judgment of the 2nd respondent.

8. As far as the challenge made against Ext.P6 award of the 3rd respondent is concerned, I notice that by the aforesaid award, the disciplinary proceedings initiated against the 5th respondent was interfered with. A reading of Ext.P6 award would show that the 3rd respondent, after analysing the pleadings, documents and evidence on record came to a specific conclusion that the removal of the 5th respondent from the service of the petitioner Society was not proper and it was after making such a finding, the order of removal from service was set aside. Regarding the question of reinstatement of

the 5th respondent, the 3rd respondent in Ext.P6 came to the conclusion that the 5th respondent has not succeeded in proving that he was very vigilant in getting reinstatement in service. The 3rd respondent has also noticed that, even after publication of notice in the Newspaper, the 5th respondent has not cared to inquire about the said fact with the petitioner Society. It was after making such a finding, the request for reinstatement was declined and the punishment was converted as one for compulsory retirement from service with effect from 01.10.2008, the date on which the 5th respondent wants to rejoin duty. It was also ordered in Ext.P6 that, the 5th respondent is eligible for back-wages as per the Rules and Regulations of the petitioner Society.

9. The petitioner Society has not chosen to challenge Ext.P6 award passed by the 3rd respondent by filing an appeal before the 2nd respondent. The aforesaid award of the 3rd respondent was under challenge in Appeal No.62/2013 filed by the 5th respondent, to the extent he was denied reinstatement in service with back-wages. Rule 108 of the Co-operative Societies Rules deals with the procedure for cross objection. The aforesaid rule provides that, the provisions relating to an appeal/application shall apply mutatis

mutandis to cross objections also, except that it shall not be necessary to assign a separate serial number to it. Though on receipt of notice from the 2nd respondent, the petitioner Society entered appearance and contested appeal, they have not chosen to file a cross objection challenging the finding in Ext.P6 award of the 3rd respondent to the extent it is against the said Society. Therefore, in the absence of any such cross objection filed before the 2nd respondent, the petitioner Society cannot challenge those findings in Ext.P6 award, in the present writ petition filed under Article 226 of the Constitution of India. Therefore, the challenge made in this writ petition against Ext.P6 award can only be repelled and I do so.

10. Now the next question that has to be considered is as to the legality or otherwise of Ext.P10 judgment of the 2nd respondent. Ext.R5(b) is the application filed by the 5th respondent before the 3rd respondent. To the aforesaid application, the petitioner Society filed Ext.P39 written statement. Thereafter, the 5th respondent filed an application for amendment, based on which the pleadings in Ext.R5 (b) application was amended in order to incorporate the plea that he is entitled for reinstatement with back-wages. Thereafter, the petitioner Society filed Ext.P40 additional written statement. A

reading of Ext.P6 award passed by the 3rd respondent would make it explicitly clear that, though the 5th respondent was examined as PW1 and Exts.A1 to A8 documents were marked, the petitioner Society has not chosen to adduce any evidence either oral or documentary in support of their contentions. It was based on the materials on record, the 2nd respondent came to the conclusion that the proceedings initiated against the 5th respondent, which culminated in the order of removal from service is legally unsustainable. The aforesaid finding of the 3rd respondent was also confirmed by the 2nd respondent in Ext.P10 judgment.

11. During the pendency of this writ petition, the petitioner Society has filed I.A.No.9840 of 2015 seeking an order to amend the writ petition by incorporating additional statement of facts and grounds. Along with aforesaid application, the petitioner Society has also produced Exts.P13 to P46, as additional documents in order to substantiate its contention that proceedings initiated against the 5th respondent, which is culminated in the order of removal from service, is perfectly legal and that, even if it is found to be illegal on procedural aspects, the 5th respondent is not entitled for reinstatement with backwages. By order dated 11.8.2015 the

aforesaid I.A. was allowed and the petitioner has also filed the amended writ petition. Relying on the documents produced along with the amended writ petition, the learned counsel for the petitioner would contend that, the findings in Ext.P6 award and Ext.P10 judgment are perverse and patently illegal, which can be interfered with by this Court in exercise of the discretionary jurisdiction under Article 226 of the Constitution of India.

12. As I have already noticed, a reading of Ext.P6 award passed by the 3rd respondent would make it explicitly clear that, while the matter was pending consideration before the said authority, the petitioner Society has not chosen to adduce any oral or documentary evidence in support of its contention. Similarly, when the matter was pending before the 2nd respondent, which is the appellate authority, no such evidence was produced either by relying on any additional materials or seeking an opportunity to adduce any oral or documentary evidence. Sub-rule (1) of Rule 115 of the Co-operative Societies Rules provides that, the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Tribunal in circumstances other than those enumerated in clauses (a) to (c) thereunder. A reading of Clause (b)

of Sub-rule (1) of Rule 115 makes it clear that, the power of the Tribunal to accept additional evidence can be exercised only on a subjective satisfaction that such evidence, notwithstanding the exercise of due diligence, was not within the knowledge of the party, who seeks permission to adduce additional evidence or that it could not be produced by him at or before the time of the order under appeal was passed. The petitioner Society has not chosen to file such an application before the 2nd respondent, by filing an application under Rule 115. Having failed to do so, the petitioner Society cannot rely on the additional documents produced in the present writ petition.

13. Regarding the proceedings initiated against the 5th respondent, which originally culminated in an order of removal from service, the finding of the 3rd respondent in Ext.P6 award is that, the aforesaid proceedings was legally unsustainable in the absence of a valid notice enumerated under sub-rule (2) of Rule 198. Rule 198 deals with disciplinary action by a Co-operative Society. Going by sub-rule (1) of Rule 198, any member of the establishment of a Co-operative Society may, for good and sufficient reasons, be punished by imposing any of the penalties including the penalty enumerated

in clause (h) of sub-rule (1). Sub-rule (2) of Rule 198 mandates that, no kind of punishment shall be awarded to an employee unless he has been informed in writing of the grounds on which it is proposed to take action against and has been afforded an opportunity including a personal hearing to defend himself. Sub-rule (2) provides further that, every order awarding punishment shall be communicated to the employee concerned in writing stating the grounds on which the punishment has been awarded.

14. It is relying on Ext.P4 notice dated 23.5.2009 the petitioner Society is contending that, there is sufficient compliance of sub-rule (2) of Rule 198 in as much as the 5th respondent who is the delinquent employee, has been informed in writing the grounds on which it is proposed to take action against him. In Ext.P4 notice issued by the petitioner Society it is stated that, the 5th respondent is on unauthorized absence and as such a registered notice was issued on 27.1.2009 to appear before the Sub-Committee in order to re-join duty. But he failed to appear before the Sub-Committee. Therefore a notice was published in Mathrubhoomi daily dated 5.5.2009 requesting the 5th respondent and other similarly situated employees to appear in person at the Head Office of the petitioner

Society and furnish sufficient explanation. Since the 5th respondent failed to do so, the Sub-Committee arrived at a conclusion that, he is no more interested in rejoining duty. In such circumstances, it was decided to terminate him from service and he was issued with Ext.P4 notice to show-cause why the aforesaid punishment should not be imposed.

15. A reading of Ext.P4 notice issued by the petitioner Society dated 23.5.2009 would make it clear that, it would not fall within the sweep of notice as contemplated under sub-rule (2) of Rule 198. Further the specific finding by the 3rd respondent in Ext.P6 award is that Ext.P4 notice is one with wrong address and as such the entire proceedings initiated against the 5th respondent is one without proper notice. It was in such circumstances, the order of removal from service was interfered with in Ext.P6 order. A reading of Ext.P4 notice would show that it is a notice addressed to the 5th respondent, in which his address is mentioned as "(Mutharavalavil Veedu), Kizhakkettil Veedu, P.O.Nedupuzha, Thrissur." Ext.P5 is the envelope in which Ext.P4 notice was sent to the 5th respondent in the aforesaid address. As evident from the endorsement made by the postal authority on Ext.P5 envelope, the said envelope reached the

concerned post office on 25.5.2009. However, the 5th respondent could not be traced out, which is evident from the endorsements made by the postal authority on Ext.P5 envelope on 25.5.2009, 26.5.2009, 27.5.2009 and 28.5.2009 as "enquiry". Thereafter, on 29.5.2009 the said envelope was returned with an endorsement "addressee left Nedupuzha and his present address is not known".

16. Relying on the endorsement made on Ext.P5 envelope, the learned counsel for the petitioner Society would contend that, since Ext.P5 envelope containing Ext.P4 notice reached the address of the 5th respondent, it could be treated as proper service of notice on him in terms of sub-rule (2) of Rule 198. Relying on Ext.A7 document marked before the 3rd respondent, which is the order of removal issued by the petitioner Society dated 7.7.2009, a copy of which is produced before this Court along with the memo filed by the 5th respondent dated 5.10.2015, learned counsel for the petitioner Society would contend that, the address of the 5th respondent shown in Ext.P4 is his correct address. In Ext.A7 the address of the 5th respondent is shown therein as "Kizhakkottil veedu, P.O.Nedupuzha, Thrissur." It is not in dispute that, the 5th respondent received Annexure-A7 letter in his letter referred to above. But that is not

sufficient to arrive at a conclusion that, the address of the 5th respondent shown in Ext.P4 notice is his correct address. Therefore, the contention of the learned counsel for the petitioner Society that the order of punishment of removal from service imposed on the 5th respondent is after due compliance of sub-rule (2) of Rule 198 can only be rejected and I do so.

17. Now the next question to be considered is as to the legality of Ext.P10 order of the 2nd respondent to the extent the 5th respondent is ordered to be reinstated in service with full backwages. As I have already noticed, after amendment of the application there is sufficient pleadings in Ext.R5(b) application filed by the 5th respondent before the 3rd respondent that he is not gainfully employed and is entitled for backwages. After the amendment of Ext.R5(b) application, the petitioner Society has filed Ext.P40 additional written statement in which they have made only a vague denial of the aforesaid averment in Ext.R5(b) application. A reading of the additional written statement would make it clear that, the petitioner Society has no specific case that, the 5th respondent is gainfully employed elsewhere and as such he is not entitled for reinstatement with backwages. In such circumstances, the finding to

that effect in Ext.P10 judgment of the 3rd respondent cannot be termed either perverse or patently illegal warranting any interference of this Court under Article 226 of the Constitution of India.

18. It is trite law that, in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule and that 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. The Apex Court has held in categorical terms that in the case of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. It is so held by the Apex Court in the decision in **Deepali Gundu Surwase Vs. Kranti Junior (2013 (10) SCC 324)**. Paragraph 38 of the judgment reads thus:

“**38.** The propositions which can be culled out from the aforementioned judgments are:

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 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.

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 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.

38.6. 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).

38.7. 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.”

19. It is not in dispute that, the 5th respondent was an employee having more than 30 years of service with the petitioner Society. It was in the year 2008 proceedings were initiated against him on the ground of unauthorized absence. As rightly found in

Ext.P6 award and Ext.P10 judgment, the proceedings initiated against the 5th respondent, which culminated in the order of removal is one without following the rules, especially the mandate of sub-rule (2) of Rule 198 of the Co-operative Rules. After referring Ext.P10 judgment of the 2nd respondent, the learned counsel for the petitioner Society would contend that before ordering backwages, the Tribunal has not applied its mind to the factual scenario and also the facts and circumstances of the case and arrived at a conclusion that this is a fit case in which the delinquent employee can be reinstated in service with full backwages, and that, no valid reasons have been stated by the 2nd respondent to hold that the delinquent employee is entitled for backwages for the entire period.

20. In **Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Ltd. (2014 (11) SCC 85)**, the Apex Court, following the principle laid down in Deepali Gundu Surwase's case (supra) held that the burden of proof that the employee is gainfully employed post termination of his service is on the employer. Paragraphs 39 and 40 of the judgment read thus:

“**39.** In the present case, the respondent has made a vague submission to the extent that:

“the conduct of the workman throughout the

proceedings before the High Court during 2002 to 2011 shows that he is continuously gainfully employed *somewhere*. Admittedly even in the counter-affidavit in the said writ petition, it has not been stated that the workman was not employed."

40. Therefore, on the basis of the legal principle laid down by this Court in *Deepali Gundu Surwase case*, the submission of the respondent that the appellant did not aver in his plaint of not being employed, does not hold since the burden of proof that the appellant is gainfully employed post termination of his service is on the respondent. The claim of the respondent that the appellant is gainfully employed somewhere is vague and cannot be considered and accepted. Therefore, we hold that the appellant is entitled to full back wages from the date of termination of his service till the date of his reinstatement."

21. In the case on hand, it has to be noticed that, even going by Ext.P40 additional written statement filed by the petitioner Society, the petitioner has no specific case that, the 5th respondent is employed gainfully and as such he is not entitled for backwages in case he is ordered to be reinstated in service. Further the petitioner Society has not adduced any oral or documentary evidence either before the 3rd respondent or before the 2nd respondent to show that, the 5th respondent is not entitled for backwages. In the absence of

any such contention raised before the 2nd and 3rd respondents, the petitioner Society cannot be permitted to raise such a contention before this Court. Further, when the disciplinary proceedings initiated against the 5th respondent was found to be in violation of the mandate contained in Sub-rule (2) of Rule 198, in order to disallow the 5th respondent the benefits of backwages, there should be cogent and convincing materials. Therefore, in the absence of any such materials this Court cannot find fault with the 2nd respondent in ordering reinstatement of the 5th respondent with full backwages.

22. As I have already noticed, in the absence of a cross objection filed in terms of Rule 108, the petitioner Society cannot successfully challenge Ext.P6 award of the 3rd respondent. As far as Ext.P10 judgment of the 2nd respondent is concerned, as I have noticed, the reasoning made therein is neither perverse nor patently illegal, warranting any interference of this Court.

In the result, this Writ Petition fails and the same is dismissed.
No order as to costs.

ANIL K.NARENDRAN, JUDGE

jv/skj