

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No.22044 of 2001

ORDER:

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

The present writ petition came to be filed questioning the order dated 18-04-2000 passed in M.P.No.66 of 1997 on the file of Labour Court-II, Hyderabad.

The facts, which lead to filing of writ petition are as under:

The respondent was appointed as a daily wage driver in the petitioner-Corporation. It is their case that the respondent was put-off on duty from 31-08-1994 to 04-11-1994 and thereafter, he was reinstated into service with continuity of service without back wages as per award passed in I.D.No.87 of 1995 before the Labour Court. The services of the respondent were regularized by Divisional Manager, Secunderabad vide his order dated 28-10-1994 subject to the condition that in case if any disciplinary action is pending, the regularization orders shall not be given effect to. In view of the above, the respondent was put off duty from 31-08-1994 to 04-11-1994, as on that day his services were not regularized. After obtaining clarification from the competent authority, the services of the petitioner were regularized from 1994. It is stated in the counter that since services of the petitioner were regularized since 1994, he is not entitled for time scale and also for subsistence allowance during the put off duty period i.e. from 31-08-1994 to 04-11-1994. The record also discloses that the petitioner was removed from service on 04-11-1994 and reinstated on 10-01-1997. Seeking compensation for the period he was on off duty, the writ petition is filed.

After analyzing the material on record, the Tribunal passed the following order:

“In the result, the petition is allowed in part. The

respondent is directed to pay a sum of Rs.34,803/- to the petitioner towards the difference of wages by 25-11-2000 failing which, the petitioner will be entitled to recover the said amount with interest @ 9% p.a. from the date of this order". Though, learned counsel for the Corporation alleged to contend that the respondent is not entitled for the relief as sought for, but he was not in a position to substantiate as to how the respondent is entitled for the relief awarded by the Tribunal".

The issue as to whether the petitioner is entitled for back wages on being reinstated into service with continuity of service came up for consideration before the Apex Court in ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyala and others***^[1].

The Apex Court after referring to all the judgments on the subject including the judgments of the Apex Court in ***J.K.Synthetics Ltd. V. K.P.Agrawal***^[2] and ***Zilla Parishad, Gachiroli v. Prakash***^[3] held as under:

- 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.

Since the respondent is directed to be reinstated with continuity in service, he is entitled to all the benefits including the period for which he was not in service. Hence, the petitioner is entitled to claim all allowances/increments during the period while he was out of service i.e. from 04-11-1994 to the date of reinstatement. Hence, this Court is of the view that the finding of the Tribunal in holding that the petitioner is entitled to difference amount of Rs.40,309/- warrants no interference and accordingly, the writ petition is dismissed. No order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

20-08-2015

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[\[1\]](#) (2013) 10 SCC 324

[\[2\]](#) (2007) 2 SCC 433

[\[3\]](#) (2009) 4 Mah.LJ 628