IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.15122 of 2012
Date of Decision: 15.09.2015

Dharam Pal

... Petitioner

Versus

Labour Court-cum-Industrial
Tribunal-I, Gurgaon and another ... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. P.R. Yadav, Advocate,
for the petitioner.

Mr. Arun Nehra, Advocate,
for respondent No.2.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

1. The first round of litigation between the employee and the management ended on September 22, 2009 when this Court dismissed the cross petition and upheld the award dated February 15, 2000 passed by the Presiding Officer, Labour Court- I, Gurgaon to the extent of award of 50% back wages but reinstatement granted by the Labour Court was modified since the workman had reached the age of superannuation. The operative part of the common judgment passed in CWP No.7576 of 2000 filed by the management and CWP No.16653 of 2000 filed by the workman reads as follows:-

> *"4. It is conceded by the learned counsel for the workman that if the workman had been service he would have been superannuated by now. All that the workman*

> *would now be entitled to would be merely the monetary benefits of what would to secure to him if he had not been dismissed from service. The award of the Labour Court regarding reinstatement would therefore, require modification. The award relating to 50% of back wages is perfectly justified. The workman has himself filed a writ petition challenging the restriction of his entitlement only to 50% back wages. For a watchmen to be found sleeping was definitely serious but perhaps not serious enough for dismissal, where the action had been taken by the Management belatedly more than three years after the incident.*
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> *5. The writ petition filed by the Management is dismissed and so too, the writ petition filed by the workman. The workman shall be entitled only to 50% of the back wages for the period upto the date when he was liable for superannuation. The workman shall also be entitled to the terminal benefits as would have accrued to him if he had not been removed from service. The amount of the back wages shall be paid within a period of eight weeks and if it is not done within the period prescribed, it shall carry interest at the rate of 9% per annum."*

2. In implementation of the orders passed by this Court, the management sent a cheque for Rs. 46068/- on November 23, 2009 to the petitioner.

3. Dissatisfied with the amount as not representing the monetary benefits accruing from the directions of this Court in the aforesaid writ petitions the petitioner filed an application under section under section 33-C (2) of the Industrial Disputes Act, 1947 ("the Act") to compute the money due under the award as modified by this Court. The petitioner claimed that the terminal benefits have to be calculated from the date he was removed from service on June 01, 1991 as though he had not been lawfully removed from service. Fifty percent back wages had to be calculated from 1991 up

to date when he would normally have superannuated from service. In the application, the workman calculated wages in a graded manner up to January 04, 2004 representing 25 different periods of wages drawn by those who continued to serve under the management as were gradually increased at the rate of wages fixed from time to time. He halved the amount of arrears of wages totalling a sum of Rs.1,19,459/- in terms of the modified award. In addition, he claimed bonus for the years June 06, 1991 to January 04, 2004 in a sum of Rs.19991/- and gratuity for the same period totalling Rs.23304/-. An amount of Rs.2,09,082/- was claimed from which the amount already received i.e. Rs.46,068/- had to be deducted. The prayer was for seeking an order to the management to pay the petitioner-applicant a sum of Rs.1,63,044/- along with 9% interest as awarded. It turned down that during the pendency of the writ petition, the workman was paid last drawn wages for a period of 3 years 6 months and 29 days under section 17-B of the Act. In the application, it was claimed that this amount could not be deducted from the arrears of 50% back wages up to the date of superannuation as they represented irrecoverable subsistence allowance resulting from stay of the operation of the award by this Court in the aforesaid writ petition filed by the management.

4. The management contended before the Labour Court that relief of consequential benefits was not awarded and, accordingly, it was reasoned that the liability of the management was to pay wages at the rate of the last drawn salary even in the presence of the modified award. It was urged that proceedings under section 33-C(2) of the Act are in the nature of execution proceedings as held in **Central Bank of India Ltd v. P.S.Rajagopalan**

etc., AIR 1964 SC 743: 1964 SCR (3) 140 that the Labour Court cannot travel beyond the award as it is required only to compute money due which is a right existing beforehand. In this manner, the management calculated its liability towards the workman under the award as modified by this Court. When calculated on the basis of the last drawn salary the amount worked out to be only Rs.46,068/- which stood paid by cheque on November 23, 2009 and nothing remained due and payable.

5. The Presiding Officer, Labour Court-I, Gurgaon in the impugned order dated June 06, 2012 held that complete payment as per award in accordance with the orders passed by this Court had already been made over to the petitioner and the respondent had not made any illegal deduction from the final settlement account of the workman. The Court held that the claim for bonus was not maintainable since the High Court had not given the relief of consequential benefits and the petitioner even otherwise is not entitled to bonus as per the scheme in the Payment of Bonus Act, 1965.

6. The Labour Court relied on the decision of the Supreme Court in **A.P.S.R.T.C. and another vs. S. Narsagoud**, 2003 LLR 225:(2003) 2 SCC 212 which was a case of misconduct and dismissal after inquiry. The Supreme Court held the view that the notional computation of periodical increments of a workman awarded reinstatement with continuity of service but without back wages will amount to putting premium on the misconduct; hence the High Court had erred in directing grant of periodical increments to the workman for the period when he did not serve the Corporation. On these premises, the application was dismissed and no relief was granted

except endorsing the amount paid by the management as the true payment under court orders.

7. Heard Mr. P.R. Yadav, learned counsel appearing for the petitioner and Mr. Arun Nehra, learned counsel appearing for respondent No.2 at length.

8. It is the contention of Mr. Yadav that there is a grave error in the reasoning of the Labour Court in denying relief and directions issued by this Court on September 22, 2009 while dismissing both the writ petitions and modifying the award to the extent of reinstatement have not been obeyed and implemented in their letter and spirit. He points out to the four directions issued by this Court which in substance are: (i) that the workman shall be paid 50% back wages from 1991 to January 04, 2004; (ii) the workman was held entitled to terminal benefits as would have accrued to him as if he had not been removed from service; (iii) the amount of back wages so worked are to be paid within eight weeks; (iv) if not paid within time the amount will carry interest @9% per annum.

9. What was denied to the petitioner by this Court was interest on arrears of back wages on the amounts computed in accordance with the directions. However, when this Court held the workman entitled to terminal benefits as would have accrued to him had he not been removed from service then it is a sequitur that he would be deemed to be in service with effect from the date of termination. If the legal fiction was created in favour of the workman to run from June 01, 1991 then he would be entitled to periodical revision of wages as were earned by the existing workmen retained in service and he would be deemed to continue to service and

therefore principles of pay parity would apply and be read in the directions, otherwise the directions would not have been issued creating the legal fiction itself which fiction has to be taken to its logical end by the momentum of the writ of mandamus issued by this Court.

10. Therefore, in cases where reinstatement is ordered and the termination order is set aside as illegal then back wages would follow by dint of the legal fiction created by the Court unless it was directed otherwise. This is the plain meaning of the directions issued by this Court which the Labour Court has failed to grasp as the legal principle applicable and which principle was not present in the mind of the Court discernible at least not on the face of the impugned order. The award thus is erroneous in its reasoning as reliance could not have been placed on **S.Narsagoud** case and the question of misconduct does not remain active anymore nor can be applied to decide the case.

11. If the application under Section 33 C (2) of the ID Act is allowed,a as urged, it would not put any premium on misconduct as the thread of misconduct howsoever grave has receded into the woodwork. Since the termination order was based on misconduct, therefore, the Labour Court while setting aside the illegal termination order in the proceeding under Section 10 (1) (c) of the Act had appropriately imposed a cut of 50% on the arrears of back wages as in this dispensation such exercise of power can be traced to Section 11A of the Act by way of awarding a package of lesser punishment. I have not had the benefit of reading of award passed by the Labour Court but this appears to be the position as I read the order of this Court dated September 22, 2009. For this cut in back wages a few

words are necessary on the merits of the previous case litigated before the Labour Court in industrial dispute reference dated September 19, 1991 which culminated in the award dated February 15, 2000 which stands modified by this Court and which has become subject matter of proceedings for implementation in the application under Section 33 C (2) which proceedings are in the nature of execution proceedings of rights which are pre-existing.

12. The facts of the case are that the petitioner was a watchman found sleeping on duty on two desultory occasions on September 16, 1987 and March 20, 1988 and the management raked up those two dates for disciplinary action after three years had gone by from the dates of the incidents. An inquiry was conducted against the petitioner which led to his dismissal from service on June 01, 1991. There was no re-occurrence of the lapse during the three intervening years from where the Court deduced that the petitioner had amended his ways which was a legally acceptable conclusion from the state of facts. Thus, the charge was not only trumped up but the misconduct was waived by conduct of management in not taking any action against the workman for three long years. When raked up belatedly point towards victimization.

13. When the directions issued by this Court on September 22, 2009 are carefully read in the above factual context then 50% of the back wages carry no burden of misconduct since the other half has been factored into the decision to deny 50% back wages to the workman and this reinforces the submission of Mr. Yadav that half of the back wages, as directed by this Court, are to accrue as though the petitioner was not

removed from service. This is how this Court finds weight in the argument of Mr. Yadav and conversely no merit in the contentions advanced by Mr. Nehra that the award/directions have been complied with in toto. There has been a fundamental failure of justice before the Presiding Officer, Labour Court-I, Gurgaon in the making of the order under section 33-C(2) of the Act on the question of entitlement of the workman to back wages graded from time to time as were admissible to the workers who continued in service during the period of the workman's enforced idleness.

14. This Court finds the claim for back wages as computed by the workman fully justified and consequently the directions of this Court remain to the mind of this Court unimplemented in letter and spirit and the breach deserves to be closed.

15. This is not the end of the matter. The claim for statutory bonus has been erroneously held as not maintainable before the Labour Court in proceedings under section 33-C(2) of the Act because of the legal fiction created by this Court while upholding the award of reinstatement but denying reinstatement for the reason that the workman had crossed employable age in the year 2004 when he would normally have superannuated but for the termination. Statutory bonus is claimable before the labour court in an application presented under Section 33 C (2) of the Act as money due by operation of legal fiction of continuity of service granted by the court even though bonus is not contemplated in the order but which would have to be read in so as to finish the proceedings in one go and not the leave the workman to claim bonus in a multiplicity of proceedings for no just cause or legal justification.

16. Therefore, bonus as claimed from June 01, 1991 to January 04, 2004 is an existing right maturing by virtue of the legal fiction granting continuity of service because the petitioner did not withhold his labour. He was illegally deprived of work otherwise he would have earned bonus had he been in service. It is settled law that a legal fiction must be given full effect and all the consequences flowing from the fiction are to be imagined as real unless limitations are placed by the thing which creates it, including court orders. I find no limitations in the order dated September 22, 2009 passed in the two writ petitions.

17. On the issue of bonus Mr. Yadav relies on a decision of the learned Single Judge of this Court in first appeal from order in **Employees State Insurance Corporation, Chandigarh vs. M/s Kelvinator of India Ltd.**, 1997 (2) PLR 499 where this Court dealt with the definition of “wages” as defined in section 2(22) of the Employees State Insurance Act, 1948 to include bonus. Bonus is be treated as part of wages. However, when this Court held that any additional remuneration paid to the employees is to be treated as wages the Court dealt with the term “production bonus” which was found to be connected with or relatable to production over a period of time. The Court relied on several decisions of the Supreme Court and the High Courts on the point under consideration. Payment of bonus represents payment of remuneration and for this proposition, the learned Single Judge relied on **Modella Woollens Limited vs. Employees' State Insurance Corporation and another**, 1994 Supp. (3) SCC 580.

18. The petitioner's claim to gratuity has to be turned down because the Payment of Gratuity Act, 1972 is a special Act with its own

prescribed authority where claims for unpaid gratuity can be lodged and adjudicated. In the broad sense gratuity may have become a statutory right and a "terminal benefit" which also would have to be read in by the legal fiction created by the Court. But it cannot be claimed in proceedings under section 33 C (2) of the ID Act and an independent action would have to be brought before the Authority under the Payment of Gratuity Act, 1972 which is the special law as against the ID Act, 1947 which in its relationship becomes the general law. It is not possible to sustain element of gratuity in the application in view of the authority of the Supreme Court in **State of Punjab v. Labour Court, Jullundur and others**, (1980) 1 SCC 4. The prayer for gratuity would thus have to be rejected as beyond the jurisdiction of the labour court in a section 33C (2) proceeding.

19. Be that as it may, as far as payments already made under Section 17-B of the Act to the workman are concerned the petitioner has no right to carry them in addition to 50% arrears of back wages for the same period and the periodic payments made would have to be adjusted with the principal amount of half the arrears of wages for the same period of 3 years 6 months and 29 days and the principles laid down by the Supreme Court in **Dena Bank vs. Kiritikumar T. Patel**, (1999) 2 SCC 106 are applicable only to the extent of interpretation of the expression "full wages last drawn" which means the wages drawn at the time of termination. It does not represent the rate of wages applicable at the time of reinstatement. Payments made under section 17-B of the Act have been held to be neither refundable nor recoverable irrespective of the result of the writ petition in challenge to award of the Labour Court which is stayed in the interim of the High Court

pending hearing.

20. The Supreme Court held in *Dena Bank* that to read the words "full wages last drawn" to mean wages which would have been drawn by the workman if he had continued in service if the order terminating his services had not been passed it could result in so enlarging the benefit as to comprehend the relief that has been granted under the award that is under challenge. Even if the award in favour of the workman is set aside the amounts paid under section 17-B cannot be regurgitated since they are available in the nature of a subsistence allowance, lost to the cause.

21. In the present case, the writ petition of the management has been dismissed but that does not mean that the wages paid under section 17-B of the Act in such circumstances will not be offset by the wages to be paid to the workman in case of failure of writ petition. There is nothing in the Industrial Disputes Act to take care of the situation, but in the view of this Court, if back salary is granted to the workman for a period of stay that would amount to unjust enrichment and would cause an oppressive burden on the management. Therefore, Mr. Yadav's reliance on **Dena Bank** (supra) is of no assistance since it only deals with the interpretation of the expression "full wages last drawn" and the power of the Supreme Court and the High Court is not deterred and the constitutional courts can vary the amount under section 17-B of the Act according to just and equitable principles. It can even award amounts greater than full wages last drawn in an appropriate case. There is an in-built defence for the management in section 17-B to plead and prove that the workman was gainfully employed when an affidavit is filed by a workman claiming benefit of section 17-B of

the Act.

22. As a result of the above discussion, this petition is allowed in terms of the application filed under section 33-C(2) of the Act. Consequently, the impugned order is set aside as illegal when it deprives petitioner of money due. The petitioner is held entitled to 50% arrears of wages as worked out in periodical revision of wages from 1991 to 2004 as was admissible to those workers in the same position as the petitioner and have received from time to time while they continued to serve the management without the trauma of termination. Similarly, bonus has become a right of the petitioner by fiction of law and remains due and payable as worked out in the application. However, the amounts paid by the management under section 17-B of the Act are to be absorbed in the rates of wages payable to counterpart workmen during the period of 3 years 6 months and 29 days when the stay order operated.

23. It is clarified that when the full last drawn wages stand paid for the aforesaid period in so far as section 17B of the Act is concerned then in consequence of the directions of this Court the calculation will not be based on full wages last drawn but on current wages which were available to other workmen in the factory for the period of 3 years 6 months and 29 days and the offsetting has to be read not on full wages last drawn but on rates of wages actually paid to other workmen for the same job under the same management during the same period.

24. As a consequence of the above discussion, the case is remanded to the Presiding Officer, Labour Court-I, Gurgaon for computing the money due in terms of the above directions. Parties to appear before the labour

court on November 16, 2015 for further proceedings to compute money due in terms of this order.

(RAJIV NARAIN RAINA)
JUDGE

15.09.2015
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