

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Writ Petition No.16337 of 2013

Date of Decision: March 20, 2015

Ram Niwas

...Petitioner

Versus

Presiding Officer, Industrial Tribunal-cum-Labour Court, Hisar & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.M.S.Kathuria, Advocate,
for Mr.Rakesh Nehra, Advocate,
for the petitioner.

Mr.Keshav Gupta, AAG, Haryana,
for the State.

AMIT RAWAL, J. (Oral)

The petitioner has approached this Court for seeking modification of the award of the Labour Court dated 3.12.2012, whereby the relief qua back wages with continuity of service and other consequential benefits has been declined, though the petitioner has been ordered to be reinstated.

Learned counsel appearing for the petitioner-workman contends that the Labour Court ought to have taken into consideration the fact that the petitioner was not gainfully employed and the onus was on the employer to prove this fact and, therefore, the order of the Labour Court qua declining the back wages is erroneous and perverse.

Learned counsel appearing for the State contends that the averment that the petitioner-workman had not gainfully employed during the period of termination is absent in the demand notice (Annexure P-2), which had been treated to be the claim petition.

I have heard the learned counsel for the parties, appraised the paper book and the impugned award, which is sought to be modified and am of the view that the claim of the petitioner-workman qua back wages is not sustainable in view of the law laid down by the Hon'ble Supreme Court in **Deepali Gundu Surwase Versus Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others, (2013) 10 SCC 324.** The Hon'ble Supreme Court had an occasion to ponder upon the principles of granting the back wages. The principles culled out in paragraph 38 of the judgment are extracted herein below:-

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 Court or Tribunal concerned 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 keep 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 (P) Ltd. v. Employees*

38.7 The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal** 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

* (1979) 2 SCC 80

** (2007) 2 SCC 433

and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

The principles culled out in paragraph 38.3 of the judgment would be applicable in the present case as admittedly the workman has not pleaded that during the period of termination, he was not gainfully employed and, therefore, for want of the pleadings, there is no occasion for the Labour Court to decide the issue qua granting of back wages.

In view of what has been observed above, there is no substance, much less, merit in the present petition. The award of the Labour Court is, thus, upheld.

The writ petition is accordingly dismissed.

March 20, 2015
ramesh

(AMIT RAWAL)
JUDGE