

HIGH COURT OF CHHATTISGARH, BILASPUR**WP No.1304 of 2002**

- Shyam Ratan Tiwari

---- Petitioner**Versus**

- M.P.S.R.T.C. & Ors.

---- Respondent

Shri B. D. Guru, counsel for petitioners.
Shri Avinash Mishra, counsel for respondent No.2.

S.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****08/12/2016**

Heard.

2. The short issue arising for consideration in this petition is whether the petitioner, upon reinstatement, was entitled to backwages.

3. Shorn of unnecessary details, the petitioner while working as Booking Clerk in the services of respondent-Madhya Pradesh State Road Transport Corporation (In short "the MPSRTC"), now succeeded by Chhattisgarh State Infrastructure Development Corporation, was proceeded against in a departmental enquiry on the allegations of certain misconduct and removed from service. The said order was challenged before the Labour Court, successfully. The Labour Court passed an award of reinstatement with backwages. The order was challenged by filing an appeal before the Industrial Court by the Employer. Vide order dated 08-04-1991, the Industrial Court set aside the order passed by the Labour Court and remanded the case for decision

afresh, after affording the parties, opportunity of hearing and to lead evidence. Thereafter, the Labour Court again passed an order on 29-03-1993 directing reinstatement of the petitioner, holding that the charges against the petitioner were not found proved. However, in the second round of litigation, the Labour Court did not pass any order with regard to payment of backwages meaning thereby that the backwages for the period, during which, the petitioner remained out of employment, were impliedly rejected.

4. It is noted that when the petitioner was earlier reinstated by the order of the Labour Court, he was working and not removed from service until order was passed by the Labour Court on 29-03-1993 in the second round of litigation. Therefore, as far as backwages is concerned, the period under consideration would be from 24-12-1984, when the petitioner was initially terminated from service till his date of reinstatement vide order dated 05-02-1988 passed by the Labour Court in the First round of litigation.

5. The contention of learned counsel for the petitioner is that once the petitioner has been reinstated in service by holding that the management failed to prove charges of misconduct, grant of backwages would be a normal rule. Reliance has been placed on recent judicial pronouncement of the Supreme Court in the cases of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., (2013) 10 SCC 324** and **Bhuvnesh Kumar Dwivedi vs. Ms. Hindalco Industries Ltd., 2014 AIR SCW 3157** as also **Ajaypal Singh v. Haryana Warehousing Corporation, (2015) 6 SCC 321**.

6. On the other hand, learned counsel for respondent No.2 submits that the petitioner was reinstated in service on technical ground that the management could not prove the charges. The Management had, in fact, filed an appeal before the Industrial Court, but the Industrial Court did not go into the aspect,

swayed by the fact that the petitioner by that time retired from service upon attaining the age of superannuation. He submits that though the matter has been set at rest in so far as reinstatement is concerned, yet this aspect would be relevant in deciding whether the petitioner should be awarded full backwages.

7. Legal position with regard to payment of backwages is no longer res integra and has been firmly established by the Supreme Court in the aforesaid three recent pronouncements. Two of the aforesaid decisions were taken into consideration by this Court while deciding WP(227) No.5280/2010 and batch of petitions vide order dated 15/10/2015. Relying upon decisions of the Supreme Court, this Court held in the case of **Surendra Singh Rajput vs. Principal Judge and others**, as below -

“9. In these cases neither before the Labour Court nor before this Court, it could be justified by the respondents - employer that the termination of the petitioners- employee was in accordance with the procedure prescribed under Section 25-F of the Act of 1947. Once the retrenchment is held to be illegal, the reinstatement cannot be made conditional upon availability of work. There is no provision contained under the Act of 1947 much less Section 25-F which leaves discretion in the hands of the Labour Court to reinstate or not to reinstate. Once retrenchment is found illegal, reinstatement has to follow.

In exceptional cases where the employer has come out with an offer of payment of lump-sum compensation as one time measure in lieu of non-availability of work and need of daily wage employee or temporary employee, in appropriate case, instead of reinstatement lump-sum compensation can be awarded, but it cannot be done as a matter of course.

10. There is no material on record to show that employees were gainfully employed so as to avoid back wages. Moreover, the period during which they worked before their termination cannot be said to be small tenure so as to disentitle them to award of backwages from the date of termination till the date of award. Each of the employee has remained in service for fairly long time. In the above factual scenario, the judgment of the Supreme Court in the case of

Bhuvnesh Kumar Dwivedi (supra) would squarely apply wherein the Supreme Court, examining issue of backwages, has held as under:

“30. On the issue of back wages to be awarded in favour of the appellant, it has been held by this Court in *Shiv Nandan Mahto v. State of Bihar* that if a workman is kept out of service due to the fault or mistake of the establishment/company he was working in, then the workman is entitled to full back wages for the period he was illegally kept out of service. The relevant paragraph of the judgment reads as under:

“5. ... In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the appellant was entitled to be paid full back wages for the period he was kept out of service.”

31. Further, in *Haryana Roadways v. Rudhan Singh*, the three-Judge Bench of this Court considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment. The relevant paragraph reads as under:

“There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should

be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate.

Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.”

11. In that case (Bhuvnesh Kumar Dwivedi), the Supreme Court also referred to its earlier decision in the case of *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya*, (2013) 10 SCC 324, in following words:

“32. Subsequently, in the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* it was held by this Court as under:

“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.

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 averment 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.

* * *

vi) In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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.*
(supra).....”

8. In view of above legal position, unless it is proved by the management that the petitioner was gainfully employed during the period he was out of service or for any other substantial reason, ordinarily, the backwages will be required to be paid. I also find that the management was granted opportunity twice, but they failed to prove the charges against the petitioner before the Labour Court. Therefore, there is no reason why the petitioner should be made to suffer for the illegal order of termination passed by the management.

9. Accordingly, the petition is allowed. The petitioner shall be entitled to full backwages in respect of the period from 24-12-1984 to 05-02-1988, during which, he remained out of employment, after adjusting the amount of retrenchment compensation paid to him. Considering that the petitioner is a retired employee, the respondent shall do well to pay the amount of backwages within an outer limit of three months.

SD/-
(Manindra Mohan Shrivastava)
Judge