

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 43 OF 1995

1 The President/ Chairman,
Khandesh College Education Society,
M.J.College, Jalgaon-425002.

2 The Principal,
Khandesh College Education Society,
Industrial Training Institute (I.T.I.),
Jalgaon-425002.

...PETITIONERS

-VERSUS-

1 Gajendra Kashinath Shahane,
Age : 28 years, Occupation : Service,
R/o N-9/P-G-2/20/3, Old CIDCO,
Nasik-422009.

2 The Member of the School Tribunal,
Nasik Region, Nasik.

3 The State of Maharashtra.

...RESPONDENTS

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Advocate for Petitioners : Shri V T Chaudhary.
Advocate for Respondent No.1 : Shri N.K.Kakade.
AGP for Respondent 3 : Shri PN.Kutti.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 06th October, 2016

Oral Judgment :

1 Respondent Nos.2 and 3 being formal parties, stand deleted
from these proceedings.

2 The Petitioner/ Management is aggrieved by the judgment dated 30.04.1994 delivered by the School Tribunal, Nashik in Jalgaon Appeal No.3/1991 by which the Petitioner is directed to reinstate Respondent No.1/ Employee with continuity and all benefits w.e.f. 31.07.1989.

3 While admitting this petition, this Court has not stayed the impugned judgment. Pursuant to the impugned judgment, the Petitioner has reinstated the Respondent/ Employee in service. However, from 07.06.1999, the Respondent/ Employee is untraceable and has not reported for duties. Despite this matter being on the board for 14 months for final hearing on several occasions in between 18.06.2015 till today, the learned Advocate for the Respondent/ Employee submits that no contact could be established with the Respondent/ Employee and there are no further instructions.

4 Considering the fact that this Court did not stay the impugned judgment and the Respondent/ Employee was reinstated in service, I do not find it appropriate to cause any interference in the impugned judgment to the extent of the order of reinstatement. At the same time, the statement of the Petitioner/ Management is recorded in the light of

page 96-W of the petition paper book that the Respondent/ Employee is not reporting for duties and is absconding from 07.06.1999. This, therefore, would amount to abandonment of service.

5 Insofar as the payment of 100% back wages granted by the School Tribunal is concerned, Shri Chaudhary, learned Advocate for the Petitioner/ Management, strenuously submits that the Respondent/ Employee had not filed any affidavit before the School Tribunal to contend that he was unemployed after his purported oral termination w.e.f. 31.07.1989 and that he failed to acquire alternate employment despite making efforts to secure such employment. Yet, the School Tribunal has mechanically granted the back wages.

6 Shri Kakade, learned Advocate for the Respondent/ Employee, submits that once the termination is held to be illegal, grant of back wages is a natural relief which the Employee cannot be deprived of. He further submits that it is an admitted position that the Respondent/ Employee was kept out of employment orally and there was no termination order. If the act of the Management of keeping the Employee away from work illegally is established, the back wages should be naturally granted.

7 The Honourable Supreme Court, in the matter of *J.K. Synthetics Limited vs. K.P.Agrawal*, 2007(2) SCC 433, has observed in paragraph 18 as under:-

“18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *Rudhan Singh [(2005) 5 SCC 591, G.M. Haryana Roadways vs. Rudham Singh]* and *Uday Narain Pandey [(2006) 1 SCC 479, U.P.State Brassware Corpn. Ltd. vs. Uday Narain Pandey]*. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.”

8 It is, therefore, evident from the observations reproduced above that unless an employee leads evidence or steps into the witness box to plead unemployment and establishes that he was unable to earn anything, the back wages cannot be granted. As such, taking into account that there was no pleading or evidence before the School Tribunal to the

extent of supporting the claim for back wages and considering the fact that the School Tribunal has not adduced even a single sentence in support of granting back wages, the impugned judgment to the extent of grant of back wages deserves to be quashed and set aside.

9 In the light of the above, this Writ Petition is partly allowed. The direction of the School Tribunal to the extent of payment of back wages is quashed and set aside. In the event, the Respondent/ Employee is entitled for any retiral benefits till 07.06.1999 from which date he has abandoned employment and considering that he had joined service on 22.08.1986, the Management shall make the said payment of retiral benefits in the event the Respondent/ Employee appears and makes a request to the Management by way of staking a claim.

10 Rule is made partly absolute in the above terms.

11 It is made clear that the issue as to whether, the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 is applicable to the Industrial Training Institute, has not been dealt with by this Court in this petition considering the peculiar facts as recorded above.