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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.3517/2005

Sushil s/o Gangaram Waghmare,
age 48 yrs., occu.Senior Clerk
in Department of Archives,
Government of Maharashtra,
N-8, Bajrang Chowk, Aurangabad.
...Petitioner..

Versus

- 1] The Director of Archives,
Government of Maharashtra,
Elphinstone College Building,
Fort, Mumbai.
- 2] Archivist,
Maharashtra Archives,
Department of Archives,
Government of Maharashtra,
N-8, Bajrang Chowk, CIDCO,
Aurangabad.
- 3] The State of Maharashtra,
Through Secretary,
Government of Social Welfare and
Cultural Affairs,
Mantralaya, Mumbai-32.

...Respondents...

.....

Shri A.S. Shelke, Advocate for petitioner.
Smt.S.S. Raut, AGP for respondent nos.1 to 3.

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**CORAM: S.V. GANGAPURWALA &
K.L. WADANE, JJ.**

DATE: 01.12.2016

ORAL JUDGMENT (Per S.V. Gangapurwala, J.) :

1] The petitioner, at the relevant time, was working as a Junior Clerk. On 20.8.1987, the petitioner was terminated on various charges, such as using abusive language, absenteeism, intimidation and temporary misappropriation. The petitioner assailed the said order of termination by filing Writ Petition No.1363/1987. This Court transferred the said writ petition to the Maharashtra Administrative Tribunal, Aurangabad. The same was numbered as Transferred Application No.73/1993 before the Tribunal. On or about 7.8.2001, the Tribunal allowed the application of the petitioner, set aside the order of termination, but denied the back wages. The petitioner assailed the said order by filing Writ Petition No.5494/2002 to the extent of denial of back wages. This Court set aside the order of the Tribunal to the extent of denial of back wages and remitted the matter back to the Tribunal. On remand of the matter by this Court to the Tribunal, the Tribunal rejected the claim of the petitioner seeking back wages. The said order is impugned in the present petition.

2] Mr.Shelke, learned counsel for th petitioner

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states that the order of termination is held to be illegal by the Tribunal as without conducting an enquiry, the order of termination was passed. This Court allowed the respondents to conduct an enquiry. Upon enquiry being conducted, the petitioner was given punishment. The petitioner assailed the same before the State Government and the State Government imposed punishment to the extent of reducing one increment. The learned counsel submits that the petitioner is not at fault. The petitioner has made a specific averment in the affidavit filed before the Tribunal that during the period 1987 to 2001, the petitioner was not gainfully employed anywhere. The said averment has not been controverted by the respondents. As the order of termination was set aside on the ground that without enquiry, the petitioner was terminated, the petitioner would be entitled to the full back wages. The learned counsel relies on the judgment of the Apex Court in the case of *M/s Hindustan Tin Works Pvt.Ltd. v. The Employees of M/s Hindustan Tin Works Pvt. Ltd. & others* reported in **AIR 1979 SC 75** so also another judgment of the Apex Court in a case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* reported

in 2014 (2) Mh.L.J., 480. The learned counsel further submits that the petitioner has already been punished by order of the State Government reducing one increment. If the petitioner is denied back wages, it would amount to dual punishment.

3] Learned AGP submits that only on technical ground, the termination order of the petitioner is set aside. The petitioner is found guilty of the charges leveled against him and as such, the punishment was imposed. As on technical ground, the termination order was set aside, the petitioner is not entitled for the back wages. The learned AGP relies on the judgment of the Apex Court in the case of *Zila Sahakari Kendriya Bank Maryadit v. Jagdishchandra* reported in (2001) 3 SCC 332.

4] We have considered the submissions canvassed by the learned counsel for the respective parties so also have gone through the judgment of the Tribunal.

5] Payment of back wages has a discretionary element and it has to be dealt with in the facts and circumstances of each case and no straight jacket formula can be laid down in this regard. The Courts are required to consider all the attending circumstances, the facts of

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each case, the ground for termination and the reason for setting aside the termination order. Even the length of litigation and the reason for prolonging the said litigation also have to be considered.

6] The petitioner no doubt was a permanent employee and was terminated without holding an enquiry. The petitioner filed writ petition in this Court, which eventually was required to be transferred to the Maharashtra Administrative Tribunal in the year 1993 and in 2001, the said proceedings came to be decided. Upon enquiry being conducted, the petitioner was found guilty and was again terminated from service. The said order is set aside in appeal by the State Government and punishment of stoppage of one increment was passed. The petitioner as would appear is found guilty.

7] Rule 71(2) of the Maharashtra Civil Service (Joining Time, Foreign Service and Payments during Suspension, Dismissal and Removal) Rules, 1981, would be relevant to be considered. It lays down that where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of non-compliance with requirement of Clause

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(2) of Article 311 of the Constitution and where he is not exonerated on merits, the Government servant shall, subject to the provisions of Sub-rule (7) of Rule 70 be paid such amount (not being the whole), of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determinate after giving notice to the Government servant of the quantum proposed and after considering the representation, if any. Sub-rule (7) of Rule 70 lays down that the amount determined under Proviso to Sub-rule (2) or (4) shall not be less than the subsistence and other allowance admissible under Rule 68. Meaning thereby that he would be paid the amount equivalent to the subsistence allowance which is normally half of the salary. Though it is submitted that the said Sub-rule would not apply as further enquiry was directed, still the said Sub-rule can be considered while considering the claim of back wages.

8] Considering the fact that the petitioner was not totally exonerated even after conducting the enquiry so

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also considering the length of litigation and the factual matrix involved in the present matter, we are inclined to award 50% of the back wages to the petitioner from 20.8.1987 till 13.9.2001. The same shall be paid to the petitioner expeditiously and preferably within a period of six months.

9] Rule is accordingly made absolute in above terms, however, with no order as to costs.

(K.L. WADANE, J.)

(S.V. GANGAPURWALA, J.)