

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2431 OF 2013

1. Dy. Conservator of Forest
West Division, Dhule, now
Dy. Conservator of Forest,
Nandurbar Division, Shahada.

2. Range Forest Officer,
Nandurbar, Dist. Nandurbar.

..Petitioners

Versus

Baliram Vakra More,
Age 60 years, Occ.
R/o Osarli, Post. Koparli,
Tq. and Dist. Nandurbar.

..Respondent

WITH
WRIT PETITION NO. 1875 OF 2015

Baliram Vakra More,
Age 60 years, Occ. Nil
R/o Osarli, Post. Koparli,
Tq. and Dist. Nandurbar.

..Petitioner

Versus

1. Dy. Conservator of Forest
West Division, Dhule,

2. Range Forest Officer,
Nandurbar, Dist. Nandurbar.

..Respondents

...
Advocate for the petitioners in WP/2431/2013 : Shri A.N.Gaddime,
Special Counsel a/w Shri S.D.Kaldate, AGP
Advocate for Respondent : Shri R.M.Deshmukh
Advocate for the petitioner in WP/1875/2015 : Shri A.S.Sawant,
...

CORAM : RAVINDRA V.GHUGE,J.
Dated : September 8, 2016
...

ORAL JUDGMENT :-

1. The petitioner in the first petition, is aggrieved by the judgment of the Industrial Court dated 3.5.2012, by which, the respondent / employee has been granted 50% backwages. Grievance is that the order of reinstatement with continuity of service passed by the Labour Court dated 13.11.2012 has also been sustained.

2. In the second petition, the petitioner is the workman who is respondent in the first petition. He has also challenged the same judgment of the Industrial Court only on the ground that 100% backwages granted by the Labour Court have been reduced to 50%.

3. I have heard the learned Advocates for the establishment and the workman at length.

4. Rule.

5. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

6, In so far as the first petition filed by the establishment is concerned, the learned AGP strenuously submits that the workman was engaged on Employment Guarantee Scheme ("EGS"). He was

never appointed on any project or scheme of the Forest Department. He had never completed 240 days in continuous employment. He used to frequently remain absent, as a result of which, the plantation in one area was burnt because of a fire. The oral and documentary evidence on record has not been properly appreciated.

7. To the extent of the backwages, as granted by the Industrial Court, learned AGP has strenuously submitted that the workman did not lead any evidence as regards being in continued unemployment. In the absence of evidence, backwages cannot be granted. The grant of 50% backwages by the Industrial Court, therefore, deserves to be set aside. He, prays for quashing both the judgments.

8. Shri Deshmukh and Shri Sawant, learned Advocates for the workman in both these petitions, while supporting the judgment of the Industrial Court granting reinstatement with continuity of service, have assailed the denial of 100% backwages. It is strenuously contended that the second petition filed by the workman deserves to be allowed since the workman has been unemployed ever since his termination. Once the termination is held to be bad in law, backwages have to be granted to undo the injustice caused to the workman.

9. Having considered the submissions of the learned Advocates, I

have gone through the petition paper books with their assistance.

10. In so far as the challenge of the establishment to the grant of reinstatement and continuity is concerned, the thrust of the establishment is that the workman was working on EGS and hence his complaint was untenable before the Labour Court. It is settled law that if an employee is working on EGS, a complaint alleging unfair labour practices or an industrial dispute seeking regularization or continued employment would not be tenable. However, the Labour Court as well as the Industrial Court have concluded that besides making a mere averment in the Written Statement that the workman was working on EGS, no material was placed before the Labour Court, so as to prove that the workman was in fact, engaged on EGS. The Labour Court has concluded that besides the written statement, there was no documentary evidence placed before the Labour Court, which would establish that the workman was working on EGS. In this backdrop, I do not find that the judgment of the Labour Court or the Industrial Court could be termed as being perverse or erroneous.

11. The learned AGP has assailed the grant of 50% backwages by the Labour Court. The workman has prayed in his petition for grant of 100% backwages. There has been a shift in the view of the Honourable Apex Court as well as this Court to the extent of grant of 100% backwages. It is no longer a consequential relief. Grant of

backwages is now subject to the evidence being led by the employee so as to establish before the trial Court that he was in continued unemployment and despite his best efforts, he could not secure alternate employment.

12. The Honourable Supreme Court, in paragraph Nos.16 to 19 of its judgment in the matter of J.K. Synthetics Ltd. vs. K.P. Agrawal and Anr. [(2007) 2 SCC 433], has observed as under:-

“16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan (supra), this Court held:

...When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

In U.P. State Brassware Corporation Ltd. (supra), this Court observed:

It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this

Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section [106](#) of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

17. *There is also a misconception that whenever reinstatement is directed, 'continuity of service' and 'consequential benefits' should follow, as a matter of course. The disastrous effect of granting several promotions as a 'consequential benefit' to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever courts or Tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether 'continuity of service' and/or 'consequential benefits' should also be directed. We may in this behalf refer to the decisions of this Court in A.P.S.R.T.C. v. S. Narasa Goud : (2003) 111 J 816 SC , A.P.S.R.T.C. v. Abdul Kareem: (2005) 111 LLJ 477 SC and R.S.R.T.C. v. Shyam Bihari Lal: AIR 2005 SC 3476.*

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 (supra) and Udai Narain Pandey (supra). 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.

19. *But the cases referred to above, where back-wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the court found that the termination was motivated or amounted to victimization. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11A of the Industrial Disputes Act (or any other similar provision) is exercised by any Court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court*

is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back-wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and

not for other benefits like increments, promotions etc.”

13. In the light of the above, I do not find any reason to interfere with the impugned judgment of the Industrial Court dated 3.5.2012. Consequentially, both these petitions are dismissed. Rule is discharged.

14. This Court had directed the establishment to deposit 50% backwages. A portion of the said backwages has been withdrawn by the workman under the order of this Court, dated 21.3.2014.

15. As such, the workman is allowed to withdraw the remainder portion of the deposited amount along with interest, after a period of six weeks from today. In the event the workman withdraws the said amount after six weeks, he shall place on record his address proof, his cellular phone number and a copy of his election identity card at the time and withdrawal of amount.

(RAVINDRA V. GHUGE, J.)

...

akl/d