

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4320 OF 1997

Kamalabai Rajaram Devre

... Petitioner

vs.

Bal Vidya Prasarak Mandal & Ors.

... Respondents

Mr.T.R. Yadav i/b Mr. K.S. Bapat for the Petitioner.

Mr. A.R. Metkari, AGP for the Respondent No.2/State.

Coram : **A.A.Sayed, J.**

Date : 22 December 2016

P.C. :

1 This Petition challenges that part of judgment and order dated 14 August 1995 passed by the School Tribunal, Nashik in an Appeal filed under section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 whereby the relief of payment of back-wages to him was rejected.

2 In para 10 of the impugned judgment and order, the School Tribunal has held as follows:

“10 From the appeal I do not find the age of the appellant. Even it is nowhere mentioned by the Appellant and her advocate that she is of such and such age. Admittedly from her presence I find that she might be about 55 years or about that. Admittedly she is not working with the respondents/management from 17.4.1989. Admittedly management has appointed other

employees. Admittedly management is paying salaries of these employees who are working in place of the appellant. Admittedly respondent/management is not getting aid and it has to meet the expenses by collecting funds from people. When appellant is not working with the respondents/management from the date of her termination i.e. from 17.4.1989 and when management has appointed other employees in my opinion it will not be justifiable if I allow backwages as those will be of round about for a 6 years which will definitely affect on the financial position of the Respondent No.1 Management and certainly will affect on its educational programmes. So to avoid that and to protect the legal rights of the appellant if I reinstate the appellant with directions to pay her salary from the date of her reporting on duty till she is legally entitled to work on that post without back-wages, I think it will meets the ends of justice. Accordingly I pass the following order:

O R D E R

- (a) Appeal is partially allowed with no order as to its costs;*
- (b) Respondents/Management is directed to reinstate the appellant on her original post and allow her to work on that post till she is legally entitled to work on that post;*
- (c) prayer of the appellant for payment of back-wages is rejected.”*

3 The only contention urged on behalf of the Petitioner is that once there was a finding by the School Tribunal that the action of termination

taken by the Management was illegal, the order of back-wages follows as a natural consequence. Learned Counsel for the Petitioner relied upon the judgment of the Supreme Court in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.), (2013) 10 SCC 324.**

4 I have heard the learned Counsel and perused the record and the aforesaid judgment of the Supreme Court. In my view, the contention of the learned Counsel for the Petitioner cannot be accepted. The Supreme Court in the aforesaid judgment has in paragraph 38 culled out the following principles in respect of grant of back-wages after reviewing the earlier judgments on the issue of back-wages:

“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 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.

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 concerned 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 be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a 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. vs. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53.

38.7. *The observation made in J.K. Synthetics Ltd. vs. K.P. Agrawal (2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651 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 (1979) 2 SCC 80 : 1979 SCC (L&S) 53 and Surendra Kumar Verma vs. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16 referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”*

5 On being asked by the Court to show a single averment in the Memo of Appeal or in the present proceedings that the Petitioner was not gainfully employed elsewhere, the learned Counsel fairly stated that there is no such averment on record. The Memo of Appeal and the Written Statement/Reply has curiously not been annexed to the Writ Petition. What is annexed to the Writ Petition is only a copy of the impugned judgment and order.

6 The initial burden at least in the form of a statement or averment would always be on the employee stating that he is not gainfully employed elsewhere, inasmuch as, if the said employee is gainfully employed elsewhere (drawing equivalent or more salary) he would not be entitled back-wages. Only when such statement/averment is made, that the burden would shift upon the Management to show that the employee was as a matter of fact gainfully employed elsewhere. In absence of such statement/averment, in my view this would not be a fit case to interfere with the discretion exercised by the School Tribunal rejecting the prayer for back-wages in the impugned order.

7 The Petition shall accordingly stand dismissed. No order as to costs.

(A.A. Sayed, J.)