

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT APPEAL No. 71 of 2016

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JUDGMENT: (*Per VRS,J*)

Aggrieved by the order of the learned single Judge, allowing the writ petition filed by the respondent-employee and directing reinstatement with full backwages and all attendant benefits up to the date of retirement, the Management of a State Public Sector Undertaking, namely, Non-Conventional Energy Development Corporation of Andhra Pradesh, has come up with the present writ appeal.

2. Heard Mr. Pochaiah Dorishetti, learned standing counsel for the appellants, and Smt. B. Niraja Sudhakar Reddy, learned counsel representing Mr. T. Venkat Reddy, learned counsel for the respondent.

3. The respondent was first appointed as a Technician in a public limited Company, by name, Agro Pump sets & Implements Limited, on 13.04.1983 and his services were regularized with effect from 15.05.1985. The

Management of the said Company was taken over by a State-owned Corporation known as Non-Conventional Energy Development Corporation of Andhra Pradesh, coming under the control of the Department of Energy. The name of the Corporation subsequently changed.

4. On 28.09.1992, the respondent applied for casual leave for a period of three days, on the ground that he had pain in the knee. Upon the expiry of the period of three days, for which he applied for casual leave, the respondent made a request for extension of leave by six months from 01.10.1992. The leave application was neither sanctioned nor rejected, as a consequence of which, the respondent did not attend the office, for a full duration of the calendar year 1993.

5. On 19.01.1994, the respondent submitted an application for sending him on medical invalidation. Unfortunately for the Management, they did not consider the application for medical invalidation favourably, but chose to issue a notice dated 29.03.1994 for his dismissal from service.

6. Challenging the notice for dismissal, the respondent filed a writ petition in W.P.No.8394 of 1994. But, the same

was dismissed for default on 08.04.2004.

7. But in the meantime, the respondent was actually dismissed from service, forcing him to come up with a writ petition in W.P.No.11784 of 1994. The said writ petition was allowed by a learned Judge of this Court, by an order dated 26.03.2004, on the ground that neither the procedure contemplated by the Civil Services (Classification, Control and Appeal) Rules nor the principles of natural justice were followed before imposing a major penalty upon the respondent.

8. After the said order, the appellants framed charges on 07.06.2004 and appointed an Enquiry Officer. Before the Enquiry Officer, the Management examined only one witness. After he was cross-examined by the respondent, the enquiry was closed without any opportunity to the respondent to lead evidence.

9. The Enquiry Officer submitted a report holding the charges proved, resulting in a second order of dismissal being passed on 19.02.2005. The said order was challenged in a fresh writ petition in W.P.No.6333 of 2005. This writ petition was allowed by the learned Judge, by an order dated 13.10.2015, forcing the

Management to come up with the above writ appeal.

10. Two issues, in our considered opinion, would arise for consideration. The first relates to the validity of the order of dismissal and the order of the learned Judge setting aside the same. The second aspect would revolve around the relief that the respondent would be entitled to.

11. In so far as the first issue is concerned, the charges framed against the respondent, as seen from a copy of the enquiry report, are two-fold, namely, (a) that he remained unauthorizedly absent from duty from 28.09.1992 to 31.03.1994, and (b) that during his unauthorized absence, he was engaged in the activities of a
Non-Governmental Voluntary Organization in his Village.

12. The fact that the respondent remained absent from duty for the periods specified in the first part of the charge, cannot be denied by the respondent. But, the stand taken by the respondent is that he was suffering from illness, which made him disabled from attending duty, and that since there was no rejection of his leave application, he could not attend duty. In so far as the second charge is concerned, the explanation of the respondent is that he

was doing voluntary service on part time basis for the upliftment of the downtrodden people, and that the same was not a cause for his absence from duty. What has happened in this case is that before the Enquiry Officer, the Management chose to examine only one witness. That witness, by name, P. Ramchander Reddy, was actually employed as an Office Assistant. He was not entitled to speak either about the nature of the leave taken by the respondent or about his involvement in a voluntary organization. As a matter of fact, the only Management witness expressed unwillingness to be a part of the enquiry. The answers given by him in the cross-examination show that the Management could have done well not to examine him at all. By examining one witness, who was not competent to speak about the very charges, the Management brought upon itself the natural consequence of what would follow.

13. In the first instance, the Management witness stated before the Enquiry Officer that he was threatened by the District Manager to go and serve a letter upon the respondent. The Management witness also submitted that at the time when he went to the respondent to serve the letter, the respondent was sick and was on his bed, and that he was not even in a position to take the letter.

For another question as to what was the atmosphere prevailing in the office, the Management witness reported that the District Manager was very vindictive and was treating all his employees cruelly.

14. We do not know how, on the basis of such statements made by the only witness on their behalf, either the Enquiry Officer or the Management could have held the charges proved against the respondent. The Enquiry report, holding the charges proved on the basis of such statements on the part of the Management witness, is completely perverse as perversity would ever be. Therefore, we have no hesitation in confirming the finding of the learned Judge that the termination was wholly illegal, especially in the light of the enquiry report. As a matter of fact, the learned Judge found from the records that no enquiry worth a pinch of salt was conducted by the Management. Though some enquiry has been conducted, no opportunity was given to the respondent to lead any evidence. On the contrary, the Management witness conceded that the respondent was unwell at the time when he went to serve the letter on behalf of the Management. Therefore, the finding of the learned Judge that the order of penalty was vitiated and was liable to be

set aside, does not call for any interference.

15. Coming to the second aspect of the matter, namely, the relief to be given to the respondent, it is submitted on both sides that the respondent has already reached superannuation on 08.04.2016, considering the age of retirement as 58 years. Therefore, the question of physical reinstatement of the respondent into service may not arise, unless and until the question relating to the increase in the age of retirement, which is subjudice, reaches finality. Therefore, we shall take it for the present that the age of retirement is 58 years and the respondent has already reached superannuation.

16. While allowing the writ petition of the respondent, the learned Judge has awarded full backwages. Therefore, the question that arises is as to whether this is a fit case for the grant of full backwages or not.

17. Relying upon the decisions of the Supreme Court in ***Hindustan Tin works Private Limited Vs. The Employees of M/s. Hindustan Tin Works Private Limited and others***^[1], ***Surendra Kumar Verma and others Vs. Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another***^[2], ***Deepali***

Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others^[3], and Rajkumar Dixit Vs. Vijay Kumar Gauri Shanker, Kanpur Nagar^[4],

it is contended by Smt. Niraja Sudhakar Reddy, learned counsel for the respondent, that when the Management was wholly at fault, and that when the Management did not even make use of one opportunity granted to them in the previous round of litigation, the denial of any part of the backwages would only tantamount to putting a premium on the wrongdoer rather than rewarding an employee who suffered for no fault of him.

18. We have carefully considered the above submissions. We do not have to elaborate the law on the point, as the Supreme Court in ***Deepali Gundu Surwase (3 supra)*** has elicited, in paragraph 38 of its judgment, the broad principles that would govern the question of quantum of backwages as follows:

“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 averments 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 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 sufferer is the employee/workman and there is no justification to give 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 Private Limited V. Employees.

38.7 The observation made in J.K.Synthetics Ltd. V.K.P.Agrawal (supra) 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 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.”

19. It is true that in the first round of litigation, the order of termination was set aside, on the ground that no enquiry was conducted. In the second round, the order of dismissal was set aside on the very same ground. Therefore, the principle laid down in paragraph 38.5 of the decision in **Deepali Gundu Surwase (3 supra)**, may appear to be applicable squarely.

20. But, we cannot overlook three important facts in this case. The first is that before the order of termination in

1994, the respondent had rendered service only for a period of 11 years. A period of 22 years from 1994 to 2016 has been lost in litigation. In other words, the period of non-employment of the respondent is actually twice to that of the period of employment. In such circumstances, the award of full backwages from 1994 onwards up to 2016 may not be in public interest, since the appellant is a Public Sector Undertaking wholly owned by the Government. The second is that in all cases where the Supreme Court had confirmed the award of full backwages, the litigation arose from the awards of Labour Courts. The standard principle that the Supreme Court has applied in all those cases, is that when the Labour Court or the Industrial Tribunal had exercised its special jurisdiction under Section 11-A, it would not be open to the superior Courts to reduce the quantum of backwages. If the respondent had actually gone to the Labour Court and secured an award for full backwages, we would have resorted to the switch off mode. But, the respondent chose to invoke the jurisdiction under Article 226. The third reason, why we may not be able to give full backwages for the period of 22 years to a person, who rendered service for 11 years, is that the respondent himself sought to go on medical invalidation way back on

19.01.1994. If the employer had been prudent enough, they could have accepted the said request. The respondent was fortunate to have bosses who could not apply their mind to the fact situation. Therefore, the respondent cannot seek full backwages in a case of this nature.

21. In the above circumstances, the Writ Appeal is partly allowed, confirming the order of the learned Judge in so far as setting aside the order of penalty is concerned, but modifying the same to the extent that the respondent would be entitled to 50% of the backwages with all other attendant benefits. The appellants shall calculate all the benefits payable, as a result of this order, and disburse the same to the respondent, within a period of two (2) months.

Consequently, miscellaneous petitions if any pending in the writ appeal shall stand dismissed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J

A. SHANKAR

NARAYANA, J.

14th July, 2016
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[\[1\]](#) (1979) 2 SCC 80

[\[2\]](#) (1980) 4 SCC 443

[\[3\]](#) (2013) 10 SCC 324

[\[4\]](#) (2015) 9 SCC 345