

HON'BLE SRI JUSTICE M.S.K. JAISWAL

WRIT PETITION No.14243 of 2004

ORDER:

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This writ petition is filed under Article 226 of the Constitution of India, challenging the Award dated 18.10.1995 in I.D.No.275 of 1993 passed by the 1st respondent-Labour Court, Warangal, whereby and whereunder the Labour Court directed reinstatement of the writ petitioner with continuity of service, but without back wages.

2. The case of the writ petitioner, in brief, is that the petitioner was appointed as Conductor in October, 1999. On 20.06.1992, while he was conducting Bus on the route Kothagudem, he was found to have committed certain cash and ticket irregularities and consequently, the following charge has been framed against him:

“For having failed to collect the fare and issue tickets to two individual passengers who boarded your bus at Super Bazar and found alighting without tickets at Kothagudem bus stand ex-stages 2 to 3 (FNC) and on sighting the checking officials, you have removed two tickets bearing No.063/344145 to 146 of Rs.0-60ps deno, from your hand tray and punched in tickets on stage No.4 and the same tickets were treated as top punch which is a misconduct under Reg.28(vi)(a) of APSRTC Employees (Conduct) Regulations 193”

3. The Enquiry Officer, having considered the explanation given by the petitioner-conductor and the material placed by the Corporation held that the charge framed against the petitioner was proved. Basing on the enquiry report, the petitioner was issued show cause notice of removal for which, the petitioner submitted his explanation. The 2nd respondent finally issued termination proceedings dated 17.10.1992. The appeal filed by the petitioner was rejected. Thereafter, the petitioner approached the 1st respondent-

Labour Court in I.D.No.275 of 1993. The Labour Court by its award dated 18.10.1995, set aside the termination proceedings and directed the petitioner to be reinstated with continuity of service, but, without back wages. Questioning the denial of back wages, the present writ petition is filed.

4. The learned counsel for the petitioner submits that the learned Labour Court having observed that the negligence on the part of the petitioner/conductor is proved to some extent and having directed his reinstatement by setting aside the punishment of removal, has erred in withholding the back wages and the attendant benefits. The learned Labour Court has directed the reinstatement with continuity of service without giving the above two reliefs. Therefore, the learned counsel for the petitioner submits that a direction may be given to pay the back wages to the writ petitioner and also treat the continuity of service with attendant benefits.

5. On the other hand, the learned counsel for the respondent Corporation submits that the Labour Court has granted the relief out of humanitarian consideration and even though the writ petitioner is not absolved of the charge and is not exonerated, the Labour Court having taken into consideration the tender age of the writ petitioner and the fact that he has put in 1½ years service before his suspension, directed reinstatement with continuity of service and has rightly refused to order back wages and consequently attendant benefits. The learned counsel further submits that when the charge as such against a delinquent employee stands proved and if the Authority out of humanitarian consideration grant certain relief and refused to grant other benefits, the employee cannot seek restoration of all the benefits negated by the Authority in a writ petition. In support of his contention, the learned counsel for the respondent Corporation has placed reliance on the decisions of the Hon'ble Supreme Court, which shall be referred to hereinafter.

6. The point for consideration is as to whether the writ petitioner is entitled to back wages and consequential attendant benefits.

Point:

7. Admittedly, the writ petitioner was found guilty during the course of enquiry of the charge of having failed to collect fare and issue tickets to two individual passengers. The writ petitioner was unsuccessful in his appeal as well as revision before the statutory authorities. However, when approached the Labour Court, the learned Presiding Officer, Labour Court, Warangal in his Award dated 18.10.1995 in I.D.No.275/1993 held as under:

“Having regard to all the facts and circumstances of the present case, the learned counsel for the RTC has fairly conceded the case of the petitioner that the charge is not established beyond doubt, but the top punched tickets have shown the wrong punching on stage No.4 instead of stage No.3 any amount of negligence can be attributed to the petitioner. Having regard to all the circumstances obtaining in this case and in view of the fact that the wrong punching was there on stage No.4 and there were no punch on stage No.2, the negligence of the conductor is proved to some extent, but having regard to the tender age of the petitioner as he completed service of 1½ years, on humanitarian approach the conductor is directed to be reinstated into service, but without back wages.”

8. It is apparent from the above that the learned Labour Court has not exonerated the delinquent employee of the accusation and taken into consideration the totality of the facts and circumstances and taking humanitarian approach, the learned Labour Court directed reinstatement with continuity of service, but did not order for payment of back wages and consequential attendant benefits during the period of his suspension which was for about 3 years i.e. from 1992 to 1995. The learned counsel for the petitioner submits that having directed reinstatement with continuity of service, the learned Labour Court

ought not to have denied the back wages and the consequential benefits.

9. Once an employee has been found guilty and negligent in discharge of his duties, it is for the Authorities to adjudicate as to what is just and reasonable punishment that can be inflicted. When the Authorities take a view that a particular punishment will be sufficient and will be proportionate to the gravity of the accusation, interference thereof in exercise of writ jurisdiction should not be resorted to lightly and it should be only when exceptional circumstances are shown to exist. This is what is the submission of the learned counsel for the respondent Corporation is and in support of his contention, reliance is placed upon the following Authorities:

10. In ***Hindustan Tin Works v. Employees***^[1] a 3-Judge Bench of the Hon'ble Supreme Court in para-11 held as under:

“11. In the very nature of things there cannot be a straight jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (See *Susannah Sharn v. Wakefield* [1891] AC 173)”

11. In ***Deepali Gundu Surwase v Kranti Junior Adhyapak Mahavidyalaya***^[2], the Hon'ble Supreme Court after referring to

various authorities on the subject has held as under:

“The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) 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.

iii) 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.

iv) 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.

v) 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.

vi) 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 of Hindustan Tin Works Private Limited (supra).

vii) 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.

12. In ***APSRTC v. S.Narsagoud***^[3] the Hon'ble Supreme Court held as under:

“There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorised absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with benefit of continuity in service.”

"We find merit in the submission so made. There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which

necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorized absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorized absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service."

13. In ***APSRTC v Abdul Kareem***^[4] the Hon'ble Supreme Court held as under:

"11. Reverting to the facts of the case at hand, as already noticed, the Labour Court specifically directed that the reinstatement would be without back wages. There is no specific direction that the employee would be entitled to all the consequential benefits. Therefore, in the absence of specific direction in that regard, merely because an employee has been directed to be reinstated without back wages, he could claim a benefit of increments notionally earned during the period when he was not on duty or during the period when he was out of service. It would be incongruous to suggest that an employee, having been held guilty and remained absent from duty for a long time, continues to earn increments though there is no payment of wages for the period of absence."

14. In ***J.K.Synthetics Ltd. V. K.P.Agrawal***^[5] the Hon'ble Supreme Court held as under:

"The manner in which 'back-wages' is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. There has also been a noticeable shift in placing the burden of proof in regard to back wages. 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.

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} and *Udai Narain Pandey* {(2006) 1 SCC 479}. 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.

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.

But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back-wages etc. will be the same as those applied in the cases of an illegal termination.

In this case, the Labour Court found that a charge against the employee in respect of a serious misconduct was proved. It, however, felt that the punishment of dismissal was not warranted and therefore, imposed a lesser punishment of withholding the two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all.”

15. Bearing in mind the above authoritative pronouncement of judgments of the Hon’ble Supreme Court on the subject, I have no hesitation in holding that once the Industrial Tribunal-cum-Labour Court has exercised the discretion of directing reinstatement of a delinquent employee with continuity of service, but without back wages and attendant benefits, more particularly, having upheld the charge against the delinquent employee, the same cannot be interfered with nor the benefit that has been specifically denied while granting some relief to the delinquent employee can be granted unless it is shown to be shocking the conscience of the judicial adjudication.

16. In the instant case, as already stated, the Enquiry Officer, the Disciplinary Authority, the Appellate Authority and the Revisional Authority and also the Industrial Tribunal-cum-Labour Court have held that the charge against the writ petitioner stood proved and the relief that is granted by the Tribunal instead of removal from service he was directed to be reinstated with continuity of service and without back

wages on the ground that dereliction of the delinquent employee was not so grave warranting the capital punishment of removal from service. Considering the facts and circumstances of the case, I have no hesitation to hold that substantial justice has been done to the writ petitioner by the learned Labour Court and the said award do not warrant any interference. There are no merits in the writ petition and the same is liable to be dismissed.

17. The Writ Petition is accordingly dismissed. In the circumstances, there shall be no order as to costs.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: 09.02.2016

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[\[1\]](#) (1979) 2 SCC 80

[\[2\]](#) (2013) 10 SCC 324

[\[3\]](#) (2003) SCC 212

[\[4\]](#) (2005) 6 SCC 36

[\[5\]](#) (2007) 2 SCC 433