

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.431 of 2011

Arising out of

Civil Writ Jurisdiction Case No.17382 of 2009

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Sandeo Hari, S/o Late Sri Sarju Hari R/o Gangdori, P.S.-Dhoraiya, Distt.-Banka.

... .. Appellant/s

Versus

1. Prasar Bharti Broadcasting Corporation of India, All India Radio, Bhagalpur, P.S.-Kotwali, Distt.-Bhagalpur through its Station Director.
2. The Presiding Officer, Industrial Tribunal, Shram Bhawan, Bailey Road, Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Purushottam Kumar Jha, Advocate
		Mr. Avanindra Kumar Jha, Advocate
For the Respondent/s	:	Mr. Umesh Narayan Dubey, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 14-09-2017

Seeking exception to an order dated 11.01.2011

passed by the learned Writ Court in C.W.J.C. No. 17382 of 2009, this appeal has been filed by the workman concerned under Clause 10 of the Letters Patent and challenge in the appeal is made limited to the extent whereby the learned Writ Court instead of granting reinstatement with back wages, as was originally awarded by the Industrial Tribunal, Patna, even though upheld the Award, so far as it finds the termination to be illegal, modifies the relief by only granting a compensation of Rs. 50,000/-. It is the case of the appellant before us and the only question which requires consideration is as to whether



once the retrenchment of the employee concerned is found to be illegal and in violation to the provisions of Section 25F of the Industrial Disputes Act, 1947, in the facts and circumstances of the case, the learned Writ Court was right in substituting the relief granted by only awarding compensation of Rs. 50,000/-.

Facts in brief which are necessary for consideration of the aforesaid question goes to show that the appellant was engaged as a Safai Karmachari (Sweeper) in the office of All India Radio, Bhagalpur. For the purpose of his selection, names were called for from the District Labour Employment Exchange, Bhagalpur and an interview letter was issued to the appellant asking him to appear for interview and undergoing a selection process which was to be held sometimes in September, 1985. In pursuance to the same, he appeared and participated in the process of selection and was appointed after interview and joined immediately in the year 1985 and continued to work as such when all of a sudden on 31.10.1999 his services were terminated without indicating any reason and without following the due process of law. It was the case of the appellant that in pursuance to the Government circulars and orders including an order issued by the Headquarters of All India Radio on 14.01.1999 he was entitled to be regularized



after he had attained the temporary status and instead of regularizing him, for which he had made various demands, his services were terminated. Immediately after the aforesaid action took place, the appellant initially approached the Central Administrative Tribunal, Patna but the Tribunal held that it had no jurisdiction to deal with the matter and the appellant should take recourse to the remedy available under the Industrial Disputes Act. Accordingly, a dispute was raised and on failure of conciliation, the appropriate Government referred the dispute for adjudication to the Central Government Industrial Tribunal, Patna and the Tribunal in Reference Case No. 42(C)/2008 by an Award passed on 14.03.2009 found that the termination amounts to retrenchment. It has been brought about without following the mandatory provisions as contemplated under Section 25F and consequently directed for reinstatement with full back wages. Challenging the Award in question, the writ petition in question was filed by the Prasar Bharti Broadcasting Corporation, the employer in question, in the year 2009 and the impugned order by the learned Writ Court on 11.01.2011.

Learned counsel appearing for the appellant argues that once it was held by the learned Writ Court that the termination is illegal on account of violation of the provisions



of Section 25F of the Industrial Disputes Act and once the Award of the Tribunal, so far as it pertains to declaring the termination as illegal, is concerned, was not interfered with, the only consequence which was required to be followed was to uphold the order of reinstatement with full back wages. It is argued that instead of doing so, the learned Writ Court placed heavy reliance on two judgments of the Supreme Court, namely, **Secretary, State of Karnataka Vs. Umadevi (3)- (2006) 4 SCC 1** followed in the case of **State of Karnataka Vs. M.L. Kesari- (2010) 9 SCC 247** to hold that the employee cannot be granted regularization in view of the aforesaid judgment and in the absence of there being any vacancy, he cannot be reinstated. According to learned counsel for the appellant, this finding and principles laid down by the learned Writ Court was wholly unsustainable for the simple reason that the law laid down in the case of **Uma Devi** (supra) and thereafter followed in the case of **M.L. Kesari** (supra) will not apply in the case of industrial adjudication undertaken under the Industrial Disputes Act or various industrial enactments and in support thereof he invites our attention to a judgment of the Supreme Court in the case of **Durgapur Casual Workers Union & Ors. Vs. Food Corporation of India** in Civil Appeal No. 10856 of 2014 decided on 9th of



December, 2014. He also invites our attention to the principle laid down in the case of **Ajaypal Singh Vs. Haryana Warehousing Corporation** in Civil Appeal No. 6327 of 2014 decided on 9th of July, 2014 which has been relied upon by the Hon'ble Supreme Court in the case of **Durgapur Casual Workers Union** (supra). Accordingly, learned counsel submits that once the principle laid down in the case of **Umadevi** (supra) and **M.L. Kesari** (supra) was not applicable in the case of an industrial adjudication, the Writ Court committed an error in making it a ground for denying consequential benefit of reinstatement and back wages to the appellant. That apart, learned counsel invites our attention to the judgments of the Supreme Court in the case of **Tapash Kumar Paul Vs. B.S.N.L. & Anr.**-(2014) 4 Supreme Court Reporter 875, **Deepali Gundu Surwase Vs. Kranti Junior Adhyaypak Mahavidyalaya (D.Ed) and Ors.**-(2013) 10 SCC 324 and various other judgments on the subject particularly the judgment in the case of **Hindustan Tin Works(P) Ltd. Vs. Employees of M/s Hindustan Tin Works Pvt. Ltd. & Ors.**-(1979) 2 SCC 80 and **Surendra Kumar Verma & Ors. Vs. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr.**-(1980) 4 SCC 443 to canvass the contention that once the termination is found to be illegal,



that is an illegal retrenchment in view of violation of Section 25F of the Industrial Disputes Act, the only consequence is reinstatement with full back wages and the exception carved out by the Supreme Court in all these cases are that there should be exonerative circumstances available on record which indicates that reinstatement in the facts and circumstances of the particular case is not possible and the exceptions are closing down of the industry, the industry's financial position being precarious or various other considerations made therein, like the employee is at the verge of retirement and, therefore, the normal rule of retrenchment with back wages is not possible. It is argued that in this case, none of these eventualities are present and, therefore, by ignoring the law laid down in these cases, the impugned action taken is unsustainable.

Learned counsel for the respondents refuting the aforesaid contention argues that merely because the termination is found to be illegal that *ipso facto* will not result in the consequential relief of reinstatement with back wages being granted. In a given set of case, instead of granting reinstatement with back wages, compensation can be granted and this principle is approved by the Supreme Court in the case of **Jagbir Singh Vs. Haryana State Agriculture Marketing Board & Anr.-**



A.I.R. 2009 Supreme Court 3004, Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal & others- (2010) 6 SCC 773 and Madhya Pradesh Administration Vs. Tribhuban- (2007) 9 SCC 748. Accordingly, learned counsel submits that no case is made out for interference into the matter.

That apart, during the course of hearing today on behalf of the appellant a supplementary affidavit has been filed wherein a document (Annexure-6) has been produced to say that as per information received by the appellant under the Right to Information Act on 09.07.2007 two vacancies were available in the department in question and, therefore, the contention that was raised before the Writ Court that vacancies were not available was not correct.

We have heard learned counsel for the parties at length and we have considered the rival contention. The first and the foremost reason that weighed with the learned Writ Court in holding that once there is no vacancy and when the engagement of the employee is in the daily wages category, his reinstatement cannot be permitted in view of the law laid down in the case of **Umadevi** and **M.L. Kesari** (supra), in our considered view, is not correct. The question as to whether the concept of regularization and the law laid down in the case of



Umadevi and **M.L. Kesari** can be applied to industrial adjudication has been considered by the Hon'ble Supreme Court in the case of **Ajaypal Singh** (supra) and **Durgapur Casual Workers Union** (supra) and it has been held that the law laid down in these cases are based on the jurisdiction available to a High Court under Article 226 of the Constitution for directing regularization of an employee and such a concept will not apply in the case of industrial adjudication, particularly, in cases pertaining to retrenchment and violation of Section 25F. In the case of **Durgapur Casual Workers Union** (supra) in Paragraphs 18, 19 and 21 the concept has been discussed in detail and after considering the law laid down in the case of **Ajaypal Singh** (supra) it has been held by the Hon'ble Supreme Court that in industrial adjudication and cases under the Industrial Disputes Act, the law laid down in the case of **Umadevi** and **M.L. Kesari** (supra) will not apply. That being so, we have no difficulty in holding that the reasons that weighed with the learned Writ Court for denying benefit to the workman in this case based on the law laid down in the case of **M.L. Kesari** and **Umadevi** (supra) is wholly unsustainable. That cannot be a ground now in this case for denying the benefit to the appellant. Having held so, we are now required to consider as to whether in the facts



and circumstances of the case, award of compensation of Rs. 50,000/- in lieu of reinstatement with back wages is a proper relief which has been granted by the learned Writ Court.

Admittedly, the employee in question was retrenched. He had been in continuous service for a period of one year as contemplated under Section 25B of the Industrial Disputes Act, his termination amounts to retrenchment as laid down under Section 2(oo) of the Industrial Disputes Act and the same was not preceded by following the procedure laid down under Section 25F and, therefore, both the Industrial Tribunal and the learned Writ Court have held the termination to be illegal. As far back as in the year 1981 in the case of **Mohan Lal Vs. The Management of M/s Bharat Electronics Ltd.- A.I.R. 1981 Supreme Court 1253** it has been held by the Supreme Court that once a workman is retrenched in violation to the requirement of Section 25F, the retrenchment in question for the termination becomes void *ab initio* and *non est* in the eye of the law. Once a termination is not only found to be illegal but is void *ab initio* and *non est* in the eye of the law, Hon'ble Supreme Court in the case of **Mohan Lal's** case that it has to be assumed under law that such an order was never passed and the employee continued in service even though in real sense he was not in



service. The Hon'ble Supreme Court says that by operation of law he is deemed to have continued in service. If that being the position and if a retrenchment is found to be illegal, the normal consequence would be reinstatement with all consequential benefits as the workman was deprived from working by virtue of the illegal order passed. However, the Hon'ble Supreme Court in the cases of **Jagbir Singh** and **Santosh Kumar Seal** (supra) relied upon by learned counsel for the respondents has laid down certain principles which goes to show that even though initially the concept of law was that if the retrenchment is found to be illegal, the consequence would be reinstatement with all consequential benefits, the same has undergone certain changes and now the concept has developed that instead of granting reinstatement with full back wages, compensation can also be granted. Both these judgments in the case of **Santosh Kumar Seal** and **Jagbir Singh** have been considered again by the Supreme Court both in the cases of **Deepali Gundu Surwase** (supra) and recently in the case of **Tapash Kumar Paul** (supra). After considering the aforesaid judgments, the Hon'ble Supreme Court refers to the judgment in the case of **Deepali Gundu Surwase** Paragraphs 22 and 23 thereof which reads as under:-



“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.



23. A somewhat similar issue was considered by a three-Judge Bench in Hindustan Tin Works (P) Ltd. v. Employee of M/s Hindustan Tin Works Pvt. Ltd. & Ors. (1979) 2 SCC 80 in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilisation of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held:

“It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law’s proverbial delay has become stupefying. If after such a protracted



time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Article 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were



always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

In the very nature of things there cannot be a straitjacket 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.”

(emphasis supplied)

After enunciating the abovenoted principles, this Court took cognizance of the appellant's plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled to 75% of the back wages.”

The Supreme Court finally came to the conclusion that in the case before the Supreme Court because the Company was facing financial loss, the award of full back wages was



reduced to reinstatement with 75% back wages. However, if the principles laid down and approved by the Supreme Court is taken note of, it is to the effect that the idea of restoring an employee to the position he held before dismissal, removal or termination is a normal rule but deviation from the same is permissible if there are circumstances to show that it is impossible or wholly inequitable vis a vis the employer and the employee to direct reinstatement with full back wages or there are other circumstances like hardship to the employer on reinstatement, financial crisis, closing down of the establishment or the employee having attained the age of superannuation and, therefore, physical reinstatement being impossible. A complete reading of the law laid down by the Supreme Court in the case of **Tapash Kumar Paul** and **Deepali Gundu Surwase** would show that now for denying the benefit of reinstatement with full back wages circumstances, as are detailed in the aforesaid judgment, should be available because of which under normal circumstances reinstatement cannot be granted and, therefore, it is a case where now we are required to examine as to whether in the facts and circumstances of the present case the exceptional circumstances carved out by the Supreme Court as discussed hereinabove are available.



Nothing has been brought to our notice in this appeal which goes to show that in the case of the present employer, namely, Prasar Bharti Broadcasting Corporation any of these circumstances are available. It is not the case of the respondent employer that they are facing financial crisis and, therefore, reinstatement is not permissible. They also do not say that they are in the hardship or it is impossible for them to reinstate the employee. It is only stated that vacancies were not available and, therefore, reinstatement is not possible. The learned Tribunal has only held that the termination of the employee, who was working as a casual/temporary employee, was illegal. There is nothing either in the award to the Tribunal to show that he has to be granted regular appointment. That apart, even in the case of a Government employee, non-availability of vacancy cannot be a ground for non-complying with an award passed by the Industrial Tribunal or a judicial order passed by a Court of law. In such cases, the fundamental rule always contemplates the provision for creating a supernumerary post for adjustment of an employee and, therefore, even if vacancies are not available, that cannot be a ground for denying benefit to an employee. Accordingly, having found that no exceptional circumstances are available in this case and keeping in view the



law laid down in the case of **Deepali Gundu Surwase** and **Tapash Kumar Paul**, we are of the considered view that it is a fit case where the appeal should be allowed and the consequential benefit of reinstatement with back wages should be awarded to the employee concerned.

That apart in this case the information supplied to the appellant under the Right to Information Act on 09.07.2009 does indicate that in the year 2009 vacancies were available and therefore, even this ground is not available to the respondents.

Accordingly, we allow this appeal and modify the order passed by the learned Writ Court by holding that as a consequence of illegal termination, the appellant herein shall be entitled to be reinstated with full back wages till the date of reinstatement.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

P.K.P.

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