

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2969 OF 1997

Vrunda d/o Jeevanrao Dahitankar,
Age : 27 years, Occup.: Service,
Telephone Operator,
Shri Tuljabhavani College of
Engineering, Tuljapur,
Dist.: Osmanabad

.. PETITIONER

VERSUS

1. Shri Tuljabhavani Temple Trust,
Tuljapur, Dist.: Osmanabad,
Through its Chairman
2. The Principal,
Shri Tuljabhavani College
of Engineering, Tuljapur,
Dist.: Osmanabad
3. Dr.Babasaheb Ambedkar
Marathwada University,
Aurangabad, through its
Registrar.
4. The State of Maharashtra
5. The Presiding Officer,
University, College Tribunal,
Dr.Babasaheb Ambedkar Marathwada
University, Aurangabad
6. The Advocate General,
Maharashtra State,
Bombay

.. RESPONDENTS

AND

WRIT PETITION NO. 2974 OF 1997

Maleshappa s/o Hanumantappa Ghattargi,
age : 34 years, Occup: Service,
Telephone Operator,
Shri Tulja Bhavani College of
Engineering, Tuljapur,
Dist.: Osmanabad

.. PETITIONER

VERSUS

1. Shri Tulja Bhavani Temple Trust,
Tuljapur, Dist.: Osmanabad,
Through its Chairman
2. The Principal,
Shri Tulja Bhavani College
of Engineering, Tuljapur,
Dist.: Osmanabad
3. Dr.Babasaheb Ambedkar Marathwada
University, Aurangabad,
through its Registrar
4. The State of Maharashtra
5. The Presiding Officer,
University, College Tribunal,
Dr.Babasaheb Ambedkar Marathwada
University, Aurangabad
6. The Advocate General,
Maharashtra State,
Bombay

.. RESPONDENTS**AND****WRIT PETITION NO. 634 OF 1998**

Gurunath s/o Irrappa Koshti,
age : 57 years, Occup: Service,
Security Inspector,
Shri Tuljabhavani College of
Engineering, Tuljapur,
Dist.: Osmanabad

.. PETITIONER**VERSUS**

1. Shri Tuljabhavani Temple Trust,
Tuljapur, Dist.: Osmanabad,
Through its Chairman

2. The Principal,
Shri Tuljabhavani College
of Engineering, Tuljapur,
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3. Dr.Babasaheb Ambedkar Marathwada
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5. The Presiding Officer,
University College Tribunal,
Dr.Babasaheb Ambedkar Marathwada
University, Aurangabad
6. The Advocate General,
Maharashtra State,
Bombay

.. RESPONDENTS

Mr. S.R. Barlinge, Advocate for the Petitioners in all
the Writ Petitions

Mr. Amol Gandhi, Advocate holding for Mr. P.V. Mandlik,
Senior Advocate for respondent nos. 1 and 2, in all the
Writ petitions

Mr. S.B. Joshi, A.G.P. for respondent no.4/State in all
the Writ Petitions

None for respondent nos. 3, 5 and 6

**CORAM : V.M. KANADE AND
SANGITRAO S.PATIL, JJ.**

**RESERVED ON : 12th JANUARY, 2017
PRONOUNCED ON : 2nd FEBRUARY, 2017**

JUDGMENT (PER : SANGITRAO S. PATIL, J.):

Rule, returnable forthwith. With the consent of the parties, heard finally.

2. Common questions of law and facts are involved in these Writ Petitions. Hence, they are being decided by this common judgment.

3. The petitioners, vide orders dated 15.07.1991 came to be appointed by respondent no. 1 as Telephone Operator, Telephone Operator and Security Inspector, respectively, on regularly basis to officiate the said posts on probation for a period of one year from the respective dates of their joining the said posts. As per Clause 6 of their appointment orders, it was made clear that they would be governed by Conduct, Discipline, etc. Rules of the Government of Maharashtra and that of Shri Tulja Bhavani Temple Trust College of Engineering. Accordingly, the petitioners joined the said posts. The services of the petitioners came to be terminated as per the orders dated 11.08.1993. They challenged the said orders before the University and

College Tribunal. The learned Presiding Officer of the University and College Tribunal, allowed their appeals on 24.04.1996 and directed respondent nos. 1 and 2 to reinstate the petitioners with continuity in services. Accordingly, the petitioners continued their services with respondent no.1. However, their services again came to be terminated as per the orders dated 27.01.1997, on the ground that they were appointed temporarily on probation and that their performance being unsatisfactory, their services were no more required by respondent no.1. The petitioners filed appeals before the University and College Tribunal, Aurangabad against the said termination orders. The learned Presiding Officer of the University and College Tribunal, Aurangabad, passed a common judgment on 30.06.1997 and dismissed their appeals. Being aggrieved by the said common judgment and being aggrieved by the termination of their services, the petitioners presented the above-numbered writ petitions praying that the common judgment dated 30.06.1997 delivered by the University and College Tribunal, may be quashed and set aside and they may be ordered to be reinstated with

continuity in services and all other consequential benefits.

4. The petitioners had further claimed the relief that Rule 7 of the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standards Code (Terms and Conditions of Services of Non-Teaching Employees) Rules, 1984 (for short, "the Rules of 1984") might be declared *ultra vires* to the Constitution of India. However, the learned counsel for the petitioners submits that the petitioners do not wish to press the said claim. As such, the said claim stood abandoned.

5. Indisputably, the petitioners are governed by Rule 7 of the Rules of 1984, which reads as under :

"7. Probation : (1) The employee appointed to a permanent post by selection shall be on probation for a period of two years. The Competent Authority may, in exceptional circumstances, reduce the period of probation upto one year, after reviewing his confidential reports:

Provided that the employee appointed to officiate in higher post for a temporary period

shall not be considered to be on probation.

(2) During the period of probation, the employee shall comply with conditions of successful completion of probation, prescribed by the Competent Authority from time to time.

(3) The Head of the Department/Section (Assessing Authority) under whom the employee on probation is working shall send to the Registrar or the Principal his report in Form 3 appended to these rules about his work and conduct, after every six months from the date of his joining. The deficiencies, if any, mentioned in the report shall be conveyed to the employee on probation for the guidance.

(4) The Assessing Authority under whom the employee on probation is working, shall send to the Registrar or the Principal at least three months before the expiry of probationary period, a report about the work and conduct of the employee with specific recommendations for his confirmation in service or otherwise. If the Assessing Authority recommends that the employee should be confirmed in the service within less than two years or probationary period, he should substantiate his recommendation. When he recommends action other than confirmation, he should furnish sufficient particulars about the probationer's performance

and conduct in support of his recommendation.

(5) On receipt of each report, the Registrar or the Principal, shall place the report and the recommendations of the Assessing Authority before Competent Authority for consideration. The Competent Authority may -

- (a) Confirm the probationer in service, from a specific date, or
- (b) extent his probationary period, maximum by one year, six months at a time, on expiry of which he shall either be confirmed or his service shall be dispensed with, or
- (c) terminate his service, or
- (d) revert him to the post held by him, if any, under the University or the same Management, prior to his appointment on probation.

Provided if the person on probation enjoys leave, his probationary period shall be deemed to have been extended to the extent of leave taken by him.

(6) If on the opinion of the Appointing Authority the work or behaviour of any probationer or during the period of the probation is not satisfactory the appointing authority may without assigning any reason terminate the services of the probationer at any time during the period of his probation, after giving him one month's notice.

6. The learned counsel for the petitioners submits that the petitioners were appointed on regular basis to the above-mentioned posts. They were on probation for a period of one year as per their respective appointment orders dated 15.07.1991, though sub-rule (1) of Rule 7 prescribes the period of probation for two years. He, then, submits that as per sub-rule (4), the Assessing Authority under whom the petitioners were working, was under an obligation to send to the Registrar or Principal, at least three months before the expiry of the probationary period assessment report about working and conduct of the petitioners with specific recommendations for confirmation of their services or otherwise. On receipt of such report it was necessary for the Registrar or the Principal, as contained in sub-rule (5), to place such report with the recommendations of Assessing Authority before the Competent Authority for consideration, whereon it was open for the Competent Authority to confirm the petitioners from any particular dates or extend their probationary period

maximum by one year (six months at a time), on expiry of which they were liable either to be confirmed or their services were liable to be dispensed with or terminated. He then submits that as per sub-rule (6), if in the opinion of the Appointing Authority, the work or behaviour of the petitioners during the period of probation was not satisfactory, the said authority was empowered to terminate the services of the petitioners without assigning any reasons, at any time during the period of their probation only after giving them one month's notice. He submits that the petitioners served with respondent no.1 from July/August 1991 to 02.01.1997 i.e. for about 5 ¹/₂ years. As per sub-rule (5) (b) the period of probation of the petitioners was liable to be extended for a maximum period of one year after their initial period of probation of one year. The period of probation of the petitioner in Writ Petition No. 2969 of 1997 alone was extended by three months. The period of probation of the remaining two petitioners was not extended at any point of time. They continued to serve with respondent no.1. Relying on the judgment in the case of **Karnataka State Road Transport**

Corporation and another Vs. S. Manjunath (2000) 5 SCC 250, he submits that after expiry of the period of probation of the petitioners they were deemed to have been confirmed on the posts held by them. According to him, respondent no.1 had no authority under the law to terminate the services of the petitioners without holding regular departmental disciplinary proceedings against them. He submits that the learned Presiding Officer, University and College Tribunal did not consider this legal position and wrongly upheld the orders of termination of services of the petitioners. He, therefore, prays that the impugned orders terminating services of the petitioners may be quashed and set aside. The petitioners in Writ Petition No. 2969 of 1997 and Writ Petition No.2974 of 1997 may be ordered to be reinstated with continuity in services and all other consequential benefits. As far as the petitioner in Writ Petition No. 634 of 1998 is concerned, since he has attained the age of superannuation after filing of the petition, the learned counsel submits that he may be ordered to be given continuity in the service from the date of his

termination till the date of his retirement on attaining the age of superannuation, with all pensionary benefits.

7. As against this, the learned counsel appearing for respondent nos.1 and 2, relying on the contents of the affidavits-in-reply filed on their behalf submits that as per Rule 7 of the Rules of 1984, the services of the petitioners were not liable to be confirmed until specific orders to the effect were passed. They were not entitled to claim deemed confirmation on completion of their probation period. The learned counsel submits that the performance and behaviour of the petitioners was not satisfactory. They were issued memos from time to time, but there was no improvement on their part. Since no specific orders were passed by respondent no.1 confirming their services, they continued to be on probation. Therefore, respondent no.1 terminated their services by serving one month's notices. He submits that the termination of services of the petitioners was according to sub-rule (6) of Rule 7 of the Rules of 1984. The termination of services of

the petitioners has rightly been upheld by the University and College Tribunal. Relying on the judgments in the cases of **Sanjeev L. Tatuskar Versus Secretary, Pune Institute of Computer, 2011 (Supp.1), Bom.C.R. 278, Solapur University Vs. Radhika Nadhukar Yele & Anr. 2015 (2) ALL MR 686** and **Shaikh Farheen Sultana Abdul Samad Versus President Dayanand Shikshan Sanstha Latur and others, 2016 (2) Bom.C.R. 217**, the learned Counsel submits that the termination of services of the petitioners being legal, the writ petitions may be dismissed.

8. In paragraph 12 of the judgment in the case of **Karnataka State Road Transport Corporation and another** (supra), cited by the learned counsel for the petitioners, there is reference of paragraphs 15, 16 and 17 of the judgment in the case of **Wasim Beg Vs. State of U.P. (1998) 3 SCC 321** taking review of the entire gamut of the law of probation, which read as under :-

"15. Whether an employee at the end of the probationary period automatically gets

confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant service rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless rules provide to the contrary. This is the line of cases starting with *State of Punjab v. Dharam Singh*², *M.K. Agrawal v. Gurgaon Gramin Bank*⁴, *Om Prakash Maurya v. U.P. Coop. Sugar Factories Federation*¹⁰, *State of Gujarat v. Akhilesh C. Bhargav*¹¹.

16. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place *Samsher Singh v. State of Punjab*⁹ which

was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of *Municipal Corpn. v. Ashok Kumar Misra*¹². In *Satya Narayan Athya v. High Court of M.P.*¹³ although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

17. The other line of cases deals with rules where there is no maximum period prescribed for probation and either there is a rule providing for extension of probation or there is a rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put *Sukhbans Singh v. State*

*of Punjab*¹⁴, *State of U.P. v. Akbar Ali Khan*¹⁵, *Kedar Nath Bahl v. State of Punjab*¹⁶, *Dhanjibhai Ramjibhai v. State of Gujarat*¹⁷ and *Tarsem Lal Verma v. Union of India*¹⁸, *Municipal Corpn. v. Ashok Kumar Misra*¹² and *State of Punjab v. Baldev Singh Khosla*⁶. In the recent case of *Dayaram Dayal v. State of M.P.*⁷ (to which one of us was a party) all these cases have been analysed and it has been held that where the rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the rules."

9. In view of the above mentioned position of law, it will have to be seen under what category the cases of the petitioners would fall. As mentioned in the appointment orders of the petitioners, they were to be on probation for a period of one year from the respective dates of their joining. There is no mention in the appointment orders that the period of probation would be liable to be extended. Indisputably, the Rules

of 1984 are applicable to the petitioners. As per sub-rule (1) of Rule 7, the employee appointed to a permanent post by selection was to be on probation for a period of two years. As per sub-rule (5) (b), the Competent Authority was authorised to extend the probation period maximum by one year, six months at a time, on expiry of which, the employee should either be confirmed or his services should be dispensed with or terminated under sub-rule (5)(c). Thus, as per sub-rule (1) read with sub-rule (5)(b) of Rule 7, it would be clear that maximum period of probation of the petitioners was three years (two years + extended one year), beyond which the period of probation was not liable to be extended. If that be so, in view of the above referred legal position, after expiry of the said period of three years, there would be deemed confirmation of the petitioners. Moreover, as per sub-rule (6) of Rule 7, if in the opinion of the Appointing Authority, the work or behaviour of any probationer during the period of probation was not satisfactory, the Appointing Authority was authorised to terminate the services of such probationer without assigning any

reason, at any time during the period of his probation after giving him one month's notice. From this provision, it is made clear that such termination could have been effected at any time during the period of probation only and not thereafter.

10. In the present cases, the period of probation of the petitioner - Smt.Daithankar in Writ Petition No.2969 of 1997, was extended only by three months after expiry of the period of probation of one year of her joining service. Thereafter, she continued to be in the service. The probation of the petitioners in the remaining two petitions was never extended at any point of time. The services of the petitioners came to be terminated after they had rendered services for more than 5 ½ years, on the ground that their performance/behaviour was not satisfactory. The orders of termination of services of the petitioners obviously were not passed during the period of their probation, as contemplated under sub-rule (6) of the Rule 7. Thus, the said orders, which are of punitive nature, could not have been passed without holding regular

disciplinary proceedings against the petitioners.

11. The learned Counsel for respondent nos.1 and 2 cited the judgments in the cases of **Sanjeev L. Tatuskar** (Supra) and **Shaikh Farheen Sultana Abdul Samad** (supra), wherein the petitioners were terminated during the period of their respective probation. Consequently, the said judgments would be of no help to respondent nos.1 and 2. The third judgment in the case of **Solapur University Vs. Radhika Nadhukar Yele & Anr.** (supra), cited by respondent nos.1 and 2 also will be of no assistance to advance their case, since it was in respect of the employees appointed temporarily for 11 months on contract basis, whereas the petitioners herein have been appointed on regular basis.

12. In view of the above facts and circumstances of the case, we are of the considered opinion that the orders terminating the services of the petitioners, much after the expiry of their period of probation without holding any regular disciplinary proceedings against them, are illegal and unsustainable. The learned Presiding Officer of the University and College

Tribunal, Aurangabad, did not consider properly the facts of the case and the legal position pertaining to probation and has wrongly held that the termination of services of the petitioners was valid. The orders terminating the services of the petitioners are liable to be quashed and set aside. Consequently, the judgments and orders passed by the Presiding Officer, University and College Tribunal, Aurangabad, also are liable to be quashed and set aside and accordingly, quashed and set aside.

13. Now it will have to be decided, whether the petitioners are liable to be reinstated and if yes, whether they are entitled to get back wages, either fully or partly, or compensation. For deciding these questions, it would be necessary to consider the legal position enunciated by the Hon'ble Supreme Court on these issues in various judgments, which indicates that if termination of an employee is found to be illegal, the reliefs of reinstatement or reinstatement with full back wages would not be automatic. It would be worthwhile to reproduce here paragraphs 7, 15 and part

of paragraph 16 of the judgment in the case of ***Jagbir Singh Vs. Haryana State Agriculture Marketing Board and anr., AIR 2009 SC 3004***, which read as under :-

7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

15. It would be, thus, seen that by catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of

reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wages has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation.

16. While awarding compensation, the host of factors, inter alia, manner and method of appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances....

14. In paragraphs 21 and 22 of the judgment in the case of ***India Limited Vs. State of West Bengal and ors., (2009)3 SCC 124***, the circumstances under which back wages could be granted to the employee on his reinstatement have been discussed as under :-

"21. There can, however, be no doubt whatsoever that there has been a shift in the approach of this Court in regard to payment of back wages. Back wages cannot be granted almost automatically upon setting aside an order of termination inter alia on the premise that the burden to show that the workman was gainfully employed during interregnum period was on the employer. This Court, in a number of decisions opined that grant of back wages is not automatic. The burden of proof that he remained unemployed would be on the workman keeping in view the provisions contained in Section 106 of the Evidence Act, 1972. This Court in the matter of grant of back wages has laid down certain guidelines stating that therefor several factors are required to be considered including the nature of appointment; the mode of recruitment; the length of service; and whether the appointment was in consonance with Articles 14 and 16 of

the Constitution of India in cases of public employment, etc.

22. It is also trite that for the purpose of grant of back wages, conduct of the concerned workman also plays a vital role. Each decision, as regards grant of back wages or the quantum thereof, would, therefore, depend on the fact of each case. Back wages are ordinarily to be granted, keeping in view the principles of grant of damages in mind. It cannot be claimed as a matter of right."

15. Entitlement of an employee to get back wages, either partially or fully, has been considered in the case of **General Manager, Haryana Roadways Vs. Rudhan Singh, (2005)5 SCC 591** in the following words :-

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment

exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, whether the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

16. In the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., (2013)10 SCC 324**, after taking into consideration various judgments of the Hon'ble Supreme Court, certain propositions on the point of reinstatement with continuity of service and back wages have been carved out by the Hon'ble Supreme Court. The propositions which are material for the decision of these petitions are as under :-

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.

17. In the case of ***Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and anr., (2002)6 SCC 41***, there was no pleading or evidence on the point, whether the respondent/employee was employed elsewhere during the period after his termination till the date of the order of his reinstatement. However, the Hon'ble Supreme

Court directed the employer to pay 50% of the back wages in respect of that period. The observations of the Hon'ble Supreme Court in paragraph 16 of the judgment read thus :-

"16. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the Labour Court or High Court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to supra in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long drawn litigation, it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatement. The amount already paid as wages or subsistence allowance during the pendency of the various proceedings shall be deducted from the back wages now directed to be paid. The appellant will calculate the amount of back wages as directed herein and pay the same to the respondent within three

months, failing which the amount will carry interest at the rate of 9% per annum."

18. In view of the legal position enunciated by the Hon'ble Supreme Court, the facts of the present case will have to be considered. So far as the petitioner in Writ Petition No.634 of 1998 Shri. Gurunath s/o. Irrappa Koshti, who is an ex-serviceman (since retired from Armi as Subhedar) is concerned, admittedly he was due for retirement on attaining the age of superannuation on 11.08.1998. He was appointed as Security Inspector by respondent no.1 vide order dated 15.07.1991. He served with respondent no. 1 for about 5½ years. He attained the age of superannuation during pendency of this petition. In the circumstances, he is not entitled to get reinstated. Had he not been terminated, his total span of service prior to and after his termination till his attaining the age of superannuation, would have been 7 years and 26 days only. Thus, he would not have even completed the minimum qualifying service for grant of pensionary benefits. In the circumstances, we are of the view that

petitioner Shri. Gurunath s/o. Irrappa Koshti will have to be awarded compensation only. Had the petitioner Shri. Koshti not been terminated, he would have continued to be in the service of respondent no.1 from 27.01.1997 (date of termination) to 11.08.1998 (date of retirement on superannuation). Thus, he would have served with respondent no.1 for 1 year, 6 months and 21 days. Being an ex-serviceman, the petitioner Shri Koshti must be getting pension on account of his previous service in military. In the circumstances, in our view, the interest of justice would be served if respondent nos.1 and 2 are directed to pay to petitioner - Shri.Koshti equal to 50% of the amount of his salary from 27.01.1997 to 11.08.1998 as compensation. Accordingly, we direct respondent nos.1 and 2 to calculate 50% of the salary of the petitioner - Shri.Koshti in respect of the said period, as payable to him at the relevant time and pay the same to the petitioner within three months, failing which, respondent nos.1 and 2 would be liable to pay interest at the rate of Rs.9% per annum on the said amount from today, till payment of the entire amount.

19. The petitioners in Writ Petition Nos.2969 of 1997 and 2974 of 1997 namely, Vrunda d/o. Jeevanrao Dahitankar and Maleshappa s/o. Hanumantappa Ghattargi, respectively, also served with respondent nos.1 and 2 for a period of 5½ years prior to their termination. They were aged about 27 years and 34 years, respectively, at the time of filing of the Writ Petitions in the year 1997. In all probabilities, their present ages must be 46 years and 53 years, respectively. As seen from their appointment order dated 15.07.1991, they were appointed on regular basis on probation for a period of one year. As stated above, they were deemed to have been confirmed since their services were not terminated during probation. The cases of these two petitioners are quite distinguishable from that of the petitioner Shri.Gurunath Koshti. Had these two petitioners not been terminated, they would have further served with respondent nos.1 and 2 for a period of 31 years and 24 years, respectively. They were illegally deprived of their right to work with respondent nos.1 and 2. No serious allegations were made against these two

petitioners. Respondent nos.1 and 2 have illegally deprived these petitioners of their earnings. The orders terminating these petitioners are found to be invalid. In the circumstances, we are of the considered view that these two petitioners are entitled to get reinstated.

20. Now, the question is whether these two petitioners would be entitled to get back wages, and if yes, to what extent. As stated in the case of **Novartis India Limited** (supra), the burden to prove that the employee remained unemployed during interregnum would be on the employee keeping in view the provisions of Section 106 of the Evidence Act, 1972. Even in the case of **Deepali Surwase** (supra) also, it has been observed that 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 the 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. 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.

21. In the present case, the above-named two petitioners have not at all pleaded in their appeals before the University and College Tribunal that they were not gainfully employed after termination of their service at any point of time. Since initially the burden to plead and prove the said fact has not been discharged by these two petitioners, the question of placing burden on respondent nos.1 and 2 to prove that these petitioners were gainfully employed after termination of their services, would not arise.

22. As stated above, these two petitioners were appointed on regular basis. They served with respondent

nos.1 and 2 for about 5½ years. They were entitled to be continued in the service of respondent nos.1 and 2 for a considerably long a period. However, respondent nos.1 and 2 have illegally taken away their right to work contrary to the relevant laws and deprived them of their earnings. In the circumstances, considering the long span of period i.e. from 1997 till 2017, during which, these two petitioners were not in the service of respondent nos.1 and 2 and considering the fact that they did not plead and prove that they were not gainfully employed during this long interregnum, we are not inclined to award full back wages to these two petitioners while directing their reinstatement. In our view, the interest of justice would be served if these two petitioners are directed to be paid 50% of the back wages from the date of termination of their services till the date of reinstatement. Since these two petitioners have not worked with respondent nos.1 and 2, they would not be entitled to get increments or promotional pay scales. Respondent nos.1 and 2 would be liable to pay back wages to these two petitioners at the rate prevailing at the time of termination of their

services and also as revised from time to time. Respondent nos.1 and 2 shall calculate the amount of back wages of these two petitioners accordingly and pay the same to them within three months from today, failing which the amount payable to these petitioners would carry interest at the rate of Rs.9% per annum. These two petitioners are entitled to get continuity of service for the purpose of calculating their qualifying service for getting pensionary benefits.

23. For the reasons stated above, the impugned common judgment and order dated 30.06.1997 delivered by the learned Presiding Officer, University and College Tribunal, Aurangabad, are quashed and set aside.

24. Rule is made absolute in the above terms and the Writ Petitions are disposed of. No costs.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

Sd/-
[**V.M. KANADE**]
JUDGE