

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8987 OF 2016

Sunanda Kisan Jagtap (Kambekar)

Age-38 years, Occu-Service,

R/o Musalgaon MIDC,

Tq.Sinnar, Dist.Nashik

– PETITIONER

VERSUS

Shri Saibaba Sansthan Viswasth Vyavashta,

Shirdi, Tq.Rahata,

Dist.Ahmednagar,

Through its Chief Executive Officer

– RESPONDENT

Mr.P.V.Barde, Advocate for the petitioner.

Mr.N.R.Bhavar, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 13/06/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the denial of back wages by the Labour Court vide judgment and award dated 24/11/2015 by which Ref.(IDA) No.39/2012 has been partly answered in the affirmative.

3. I have considered the strenuous submissions of Mr.Barde and

Mr.Bhavar, learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

4. The Labour Court has delivered the following award :-

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AWARD

1. *Reference is answered partly in the affirmative as under.*
2. *It is declared that the act of first party terminating the services of second party by order dated 14.06.2010 being illegal is quashed and set-aside.*
3. *The first party is directed to reinstate the second party in service with continuity of services w.e.f. 14.06.2010, but without back wages.*
4. *Four copies of Award be sent to Dy. Commissioner of Labour, Nashik Division, Nashik for publication thereof.*
5. *Parties shall bear their own costs.”*

5. The respondent/Establishment has not challenged the award before this Court and has implemented it by reinstating the petitioner in service. Issue is as regards back wages.

6. The Hon'ble Apex Court in the matter of J.K.Synthetics Ltd., Vs. K.P.Agrawal and another, [(2007) 2 SCC 433] has observed in paragraph Nos. 18 and 19 as under :-

18. *Coming back to back-wages, 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 (supra) and Udai Narain Pandey (supra). 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.

19. But the cases referred to above, where back-wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the court found that the termination was motivated or amounted to victimization. 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.

7. Mr.Bhavar, learned Advocate has strenuously defended the impugned award and prays that this petition be dismissed with costs. He submits that the principal of 'no work no wages' would be attracted in this case and the petitioner deserves to be deprived of the back wages. He further submits that the Labour Court has applied its mind to the facts of the case and after considering the oral and documentary evidence, has rightly concluded that the petitioner does not deserve back wages. He refers to paragraph No.26 of the impugned judgment and paragraph No.7 of the examination in chief of the petitioner. He, therefore, contends that as the petitioner had applied for employment in different establishments, the presumption is that she has been employed and was working.

8. Considering the law laid down in the J.K.Synthetics case

(supra), it is expected that an employee who has challenged the termination, has to step into the witness box and lead evidence with regard to the efforts taken for securing alternate employment during the pendency of the proceedings. In the instant case, the petitioner has applied to 3 different establishments for seeking employment so as to survive the starvation that she was suffering. Exhibit U-11, U-12 and U-13 are the applications that were placed on record before the Labour Court indicating the efforts put in by the petitioner. Contention is that she has failed to secure employment.

9. The submissions of the respondent that the presumption is that the petitioner is in employment, cannot be accepted. The initial onus and burden lies on the employee to plead unemployment and establish efforts taken to seek an alternate employment. Once the onus is discharged, the burden would then shift on to the respondent to prove that the petitioner was gainfully employed. There cannot be a presumption of employment in this backdrop, is the settled position in law.

10. The Hon'ble Apex Court in the matter of Dipali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others [2013 AIR SCW 5330] has recently concluded that once the termination is

held to be illegal and the employer has the monetary capacity to pay the back wages, full back wages need to be awarded.

11. The petitioner, upon being orally terminated on 14/06/2010, raised an industrial dispute on 11/06/2012. The Hon'ble Apex Court in the matter of Raghubir Singh Vs. General Manager, Haryana Roadways, Hissar [2014 AIR SCW 5515] has held that while considering the payment of back wages, the delay caused by the employee in raising an industrial dispute for challenging the termination should be excluded while computing the period for back wages.

12. In so far as the financial capacity of the respondent is concerned, there is no dispute that the respondent is believed to be the second richest temple trust in India. Mr.Bhavar strenuously submits that the hospital is run on charity basis and the patients are not being charged. The last drawn wages of the petitioner were @ Rs.20,000/- p.m. and the issue is of back wages to the extent of July 2012 till November 2015. I am depriving the petitioner of the back wages for the period of 2 years keeping in view the law laid down by the Hon'ble Apex Court in the Raghubir Singh case (supra).

13. Keeping in view that the petitioner is a lady worker and who has delivered a child just prior to her oral termination and is to nourish the child who is about 6 years old, I deem it proper to follow the view taken by the Hon'ble Apex Court in the Raghubir Singh and Dipali Surwase case (supra) by awarding full back wages to the petitioner for the period July 2012 till November 2015.

14. This petition is, therefore, partly allowed. The direction of the Labour Court depriving the petitioner of back wages in clause 3 of the award is quashed and set aside and is replaced by the direction to pay the back wages as above. If the respondent pays the said back wages within 3 (three) months from today, there shall be no interest on the said amount, failing which, the said amount shall attract interest @ 6% p.a. from November 2015 till it is actually paid.

15. Rule is made partly absolute in the above terms.

(Ravindra V.Ghuge, J.)