

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11263 OF 2015
(Kokilabai Subhash Patil Vs. The Sarpanch, Gram Panchayat Warad,
Tq.Chopada and others)

Mr.M.M.Bhokarikar, Advocate for the petitioner.
Mr.N.S.Choudhary, Advocate for respondent Nos. 2 and 3.
Respondent No.1 served.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 06/02/2017

PER COURT :-

1. While issuing notice, this Court had observed in its order dated 08/02/2016 as follows :-

“1] The petitioner is aggrieved by the denial of back wages by the Industrial Court vide its judgment dated 23.9.2011 in Complaint (ULP) No.57/2005 and the judgment of the Industrial Court dated 23.9.2013, by which Revision (ULP) No.26/2011 has been dismissed.

2] Shri Bhokarikar, learned Advocate, submits that once the termination is set aside, an employee is automatically entitled for full back wages. It is a matter of course that full back wages have to be granted and denial of such back wages renders the impugned judgments erroneous to that extent.

3] Shri Bhokarikar further submits that the burden lies on the employer to prove that the employee is in gainful employment.

4] I am unable to concur with the submissions of Shri

Bhokarikar. It is trite law that the employee has to first discharge the burden since the employee claims full back wages. Evidence should be brought on record to indicate that the employee was compelled to be unemployed despite attempts to seek alternative employment and being unable to secure an alternative employment. It is only after the employee discharges the burden that it would shift to the employer to prove that the employee was in gainful employment.

5] The Apex Court in the case of Gauri Shankar v. State of Rajasthan (2015 Vol.2 CLR 497) has considered a similar situation and has concluded that award of 25% back wages would meet the ends of justice for reducing the hardships and the rigors of litigation suffered by the employee.

6] In the light of the above, I am inclined to issue notice to the respondents only to consider this petition to the extent of whether 25% back wages could be granted to the petitioner.

7] Issue notice before admission to the respondents returnable on 4.3.2016.”

2. I have considered the submissions of the learned Advocates for the respective sides. Though served, none has entered an appearance on behalf of respondent No.1.

3. It is apparent from the record that the respondents did not conduct a departmental enquiry and also did not lead evidence to prove any charge against the petitioner before the Labour Court. The

petitioner was charged with mis-utilising of the food grains which were supplied for the preparation of mid-day meals for the students working in the *Anganwadi*. As the charges were not proved, the Labour Court granted reinstatement with continuity of service. However, the Labour Court deprived the petitioner of the back wages.

4. After the petitioner approached the Industrial Court, the prayer for back wages was rejected. Contention of the petitioner is that since no charge has been proved against her, she was entitled for full back wages. Reliance is placed upon the judgment delivered by the Hon'ble Apex Court in the matter of Mackinon Mackenzie and Company Ltd., Vs. Mackinnon Employees Union [AIR 2015 SC 1373] and K.S.Ravindran Vs. Branch Manager, New India Assurance Co.Limited [AIR 2015 SC 2369].

5. The strenuous contention of respondent No.3 / Zilla Parishad is that since the charges levelled upon the petitioner are with regard to misappropriation, no leniency can be shown and the back wages ought not to be granted merely out of sympathy. Reliance is placed on the judgment of the Hon'ble Apex Court in the matter of J.K.Synthetics Ltd., Vs. K.P.Agrawal and another [(2007) 2 SCC 433].

6. There is no dispute that as no enquiry was conducted and the charges were not proved before the Labour Court, the petitioner has been granted reinstatement with continuity. In so far as the back wages are concerned, it does not appear that the petitioner stepped into the witness box to contend that after termination, she had tried her best to acquire an alternate employment and despite her efforts, she did not fetch any employment and hence remained unemployed.

7. The Hon'ble Apex Court in the case of J.K.Synthetics Ltd. (supra) has observed in paragraph Nos. 17 and 18 as under :-

“17. 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. We may in this behalf refer to the decisions of this Court in A.P.S.R.T.C. v. S. Narasagoud [2003 (2) SCC 212], A.P.S.R.T.C. v. Abdul Kareem [2005 (6) SCC 36] and R.S.R.T.C. v. Shyam Bihari Lal Gupta [2005 (7) SCC 406].

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.”

8. It was in the above backdrop that the Labour Court and the Industrial Court have deprived the petitioner of any back wages.

9. Learned Advocate for the respondent/Zilla Parishad points out that the judgment of the Hon'ble Apex Court in the matter of J.K.Synthetics Ltd., (supra) was not cited before the Hon'ble Apex Court in the matters of Mackinon Mackenzie and K.S.Ravindran

(supra). He further submits that the employer in the cases of Mackinon Mackenzie and K.S.Ravindran (supra) were cash rich companies. Considering the facts in those cases, the Hon'ble Apex Court had granted 50% back wages in K.S.Ravindran case (supra).

10. It is evident that the Hon'ble Apex Court has observed in J.K.Synthetics Ltd., case (supra) that the employee claiming back wages must step into the witness box and mention the efforts taken for seeking alternate employment so as to indicate that the employee was not sitting idle at home without making any efforts for seeking alternate employment. The view taken by the Hon'ble Apex Court in the matter of J.K. Synthetics Ltd., (supra) was not cited in the cases of Mackinon Mackenzie and K.S.Ravindran (supra). Nevertheless, I am of the view that considering that the respondent has not challenged the grant of reinstatement to the petitioner, 25% back wages so as to reduce the hardships of litigation suffered by the petitioner would meet the ends of justice.

11. Considering the same, this petition is partly allowed. The direction of the Labour Court as well as the Industrial Court in the impugned judgments to the extent of denial of back wages is modified. The respondent / Zilla Parishad is directed to pay 25% of

the back wages from the date of termination 18/05/2005 till her reinstatement in service, at the rate of the last drawn gross wages at the time of her termination, within 8 weeks from today.

(RAVINDRA V. GHUGE, J.)