

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION Nos.16727 & 16833 of 2011

DATED : 17.07.2017

W.P.No.16727 of 2011 :

Between :

Ch.Suresh Babu S/o.Venkateswarlu,
E.46139, Leading Hand, Bapatla Depot,
H.No.25-1-133, R.Agraharam,
Guntur.

.. Petitioner

And

The Depot Manager, APSRTC,
Bapatla Depot, Guntur District & others.

.. Respondents

W.P.No.16833 of 2011 :

Between :

K.Narasaiah S/o.Late Samuel,
Aged 44 yrs, Occu : Driver,
E.No.675657, R/o.1-74, Ameenapur,
Post : Lakkora, Mandal : Velpur,
Nizamabad District.

.. Petitioner

And

APSRTC, rep., by its Managing Director,
Musheerabad, Hyderabad & others.

.. Respondents

This court made the following :

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION Nos.16727 & 16833 of 2011

COMMON ORDER :

W.P.No.16727 of 2011 :

Petitioner was initially appointed on 08.01.1974. While he was working as leading hand, he applied for medical leave from 03.10.2001 to 10.10.2001. While reporting to duty he submitted a sick certificate and also fitness certificate. Without considering his sickness, disciplinary proceedings were initiated holding that petitioner was unauthorisedly absent. He was served with charge memo dated 11.10.2001. The disciplinary proceedings initiated against the petitioner resulted in imposing punishment of removal from service by order dated 23.07.2002. The appeal as well as revision filed by the petitioner were rejected. Aggrieved thereby petitioner raised industrial dispute in I.D.No.204 of 2004 on the file of Labour Court, Guntur. Petitioner contested the removal on the ground that it was illegal and contrary to Regulation 12 of the APSRTC Employees' (CC&A) Regulations, 1967. The Labour Court held in favour of the petitioner and set aside the order of removal from service holding the same as illegal. However, the Labour Court denied the back wages by applying the principle of 'no work no pay'. Aggrieved by the order of Labour Court, to the extent of denial of back wages, this writ petition is filed.

2. To complete the narration, based on the Award passed by the Labour Court, petitioner was reinstated into service on

07.07.2008 and retired from service on 28.02.2011, on attaining the age of superannuation.

W.P.No.16833 of 2011 :

3. Petitioner joined service on 06.03.1997 as driver. He was placed under suspension from service on 29.03.2005 on the allegation that he caused accident on 30.01.2005 on the route from Hanamkonda to Nizamabad. On the same day he was served charge sheet alleging rash and negligent driving and lack of anticipation whereby hitting a tractor trolley resulting in heavy damage to the bus, endangering the lives of travelling public, causing injuries to the passengers and death of service conductor and one RTC staff travelling in the bus. Disciplinary proceedings resulted in removal from service by order dated 02.09.2005. The appeal and review preferred by the petitioner were rejected. Aggrieved thereby, petitioner raised industrial dispute in I.D.No.63 of 2008 on the file of Labour Court-II at Hyderabad. In the meanwhile, crime was registered against the petitioner and he was shown as accused in C.C.No.262 of 2005 on the file of Judicial Magistrate of First Class, Kamareddy. On conducting full trial, petitioner was acquitted of the charge levelled in C.C.No.262 of 2005 vide judgment dated 16.07.2009.

4. The Labour Court considered the issue extensively and having regard to the acquittal granted by the criminal Court and on analysing the allegations and the material on record, Labour Court found that the allegations levelled against the petitioner were not proved and observed that when the employee denied of causing accident by rash and negligent driving, burden is on the employer

to prove that the petitioner drove the bus in a rash and negligent manner and hit the tractor trolley. Labour Court observed that the respondent-employer did not produce sufficient material to prove that the petitioner drove the bus in rash and negligent manner and therefore, held that the findings of the enquiry officer that petitioner drove the bus in rash and negligent manner was not supported by sufficient material to establish the same and therefore, the said finding is perverse. Accordingly the point was answered in favour of the petitioner and declared the removal as illegal.

5. With reference to grant of consequential benefits while rejecting the defence of the respondent that petitioner was an accused in a crime under section 304-A of Indian Penal Code and in view of the principle laid down in **Hyderabad Industries Ltd., Hyderabad Vs Addl. Industrial Tribunal-cum-Addl.Labour Court, Hyderabad and another¹**, petitioner is not entitled to consequential benefits, as the Labour Court held that the respondents did not produce sufficient material to prove the petitioner as guilty, the said stand is not valid. However, the Labour Court denied the back wages and ordered withholding of two annual increments without cumulative effect. Aggrieved by this portion of the Award, wherein the Labour Court directed withholding of two annual increments of petitioner without cumulative effect and denial of back wages, this writ petition is filed.

6. To complete the narration, petitioner was reinstated to service on 08.02.2011.

¹ 2010 (2) ALD 17

7. Heard learned counsel for the petitioners and learned Standing counsel respectively appearing for the respondent-Corporation.

8. Learned counsel Sri A.G.Satyanarayana Rao, submits that once the order of removal is set aside as illegal and held that petitioner is entitled to reinstatement with all consequential benefits, there is no justification to deny the back wages to the petitioner. It is but necessary to grant the consequential benefits including the back wages. He further submits that Labour Court erred in relying on the decision of Supreme Court in ***J.K.Sinthetics Vs K.P.Agarwal***².

9. In support of his contention, he placed reliance on the decision of the Hon'ble Supreme Court in ***Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.ED) and others***³.

10. Sri V.Narasimha Goud also placed reliance on the same judgment and further contended that the said principle is followed and relief is granted by this Court in several subsequent decisions.

11. Learned counsel for the petitioners contend that when once the Labour Court holds that the finding of the enquiry officer is perverse and that there was no material on record to prove that petitioner drove the bus in a rash and negligent manner and that petitioner was also acquitted by the criminal Court on the very same allegation, there is no justification for the Labour Court to

² 2007 (2) SCC 433

³ (2013) 10 SCC 324

substitute the punishment. When once the disciplinary action is held as illegal, all the consequential benefits ought to be granted. He further submits that no reasons are assigned in support of its decision to impose punishment and to deny back wages, more so, when the specific contention of the respondent-Corporation on point No.2 was held against the respondent-Corporation.

12. Learned Standing counsel representing the respondent Corporation submit that as the petitioners are not entitled to the relief granted by the Labour Court *per se*, the orders passed by the Labour Court denying back wages in both cases and in imposing substituted punishment in W.P.No.16833 of 2011 cannot be said as illegal or perverse warranting interference by this Court.

13.1. The point for consideration in these two writ petitions is when once the Labour Court having held that the disciplinary action was illegal and the punishment imposed are not sustainable, is it permissible for the Labour Court to deny back wages.

13.2. In addition, the further issue for consideration in W.P.No.16833 of 2011 is whether the award of the Labour Court in imposing punishment of withholding of two annual increments without cumulative effect is justified when Labour Court declared the finding of the enquiry officer as perverse ?

14. It is not in dispute that in both cases, there is no independent finding by the Labour Court holding the petitioners as guilty and has fully supported the stand of the petitioners in declaring the disciplinary action as illegal and going further from

such declaration, in so far as W.P.No.16833 of 2011 is concerned, by holding the finding of the enquiry officer as perverse.

15.1. With reference to the benefits that are liable to be paid to the workmen consequent to declaring the punishment imposed against them as wholly illegal was considered by the Supreme Court at length in **Deepali Gundu Surwase** (referred supra).

15.2. In **Deepali Gundu Surwase**, on the allegation of refusing to comply with the dictate of the Headmistress, several memos were issued to the appellant; she was placed under suspension; and disciplinary action resulting in termination from service. The appellant contested the termination in the appeal preferred by her. By order dated 20.06.2009, the Presiding Officer of the School Tribunal allowed the appeal and quashed the termination order and directed payment of full back wages to the appellant. The said order of the Tribunal was challenged before the High Court. The learned Single Judge agreed with the view taken by the Tribunal against suspension and termination. However, the direction given by the Tribunal regarding payment of back wages was set aside by relying on the judgment of the Supreme Court in **J.K.Sinthetics** Case (referred supra). Aggrieved by the denial of back wages, the appellant invoked the jurisdiction of the Supreme Court. On review of the entire law on the subject, the Supreme Court delineated the propositions which can be culled out from the precedent decisions.

15.3. Para 38 of the judgment reads as under :

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

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 averment 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.

38.4. 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.

38.5. 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 victimising the employee or workman, then the court or tribunal concerned 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a 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.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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 (P) Ltd., V Employees*.

38.7. The observation made in *J.K.Synthetics Ltd., Vs K.P.Agrawal* 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 [*Hindustan Tin Works (P) Ltd., V Employees. & Surendra Kumar Verma Vs Central Govt. Industrial Tribunal-cum-Labur Court*] 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.”

(emphasis supplied)

15.4. In para 22 the Supreme Court held 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.”

(emphasis supplied)

16. From the law laid down by the Supreme Court, it is clear that in case Labour Court finds that the employer acts in gross violation of the statutory provisions or principles of natural justice, the Court or Tribunal is fully justified in directing payment of back wages and in such case, the superior Court cannot interfere with such direction. The Supreme Court further observed that the denial of back wages merely because there is long delay between the termination of service and finality given to the order of reinstatement would be perpetrating injustice meted out by the employer to such employee by illegally resorting to termination/removal from service.

17. This decision of the Supreme Court was followed in the subsequent judgments.

18. It is seen from the award passed by the Labour Court in these two writ petitions, that there is no discussion by the Labour Court as to why the back wages are denied in both cases and why punishment of withholding of increments was ordered in W.P.No.16833 of 2011.

19. It is the categorical assertion of petitioners in both cases that they were not gainfully employed after their termination. This assertion of the petitioners is not controverted by cogent material. When employees assert that they were not gainfully employed after termination, the burden is on the employer to prove that those employees were gainfully employed and therefore are not entitled to

wages for the period out of employment. Thus, when their removal from service is declared as illegal and employees' assertion that they were not gainfully employed is not controverted by any material on record, denial of back wages to them is wholly unjust. Moreover, the findings of the Labour Court in denying the back wages in both cases respectively has to be treated as perverse as the same is not supported by reasons, more particularly in the light of the law laid down by the Supreme Court in **Deepali Gundu Surwase**. It is appropriate to note at this stage that in **Deepali Gundu Surwase**, Supreme Court declared **J.K.Synthetics** as no more good law.

20. Similarly the direction of the Labour Court in imposing the punishment to petitioner in W.P.No.16833 of 2011 is to be held as perverse, as such finding is not supported by reasons and is against the material on record and the finding recorded by the Labour Court on the substantive issue of validity of removal from service.

21. Thus, both the writ petitions deserve to be allowed and are accordingly allowed. The petitioners are entitled to entire back wages from the date of removal from service till reinstatement. Further in so far as petitioner in W.P.No.16833 of 2011 is concerned, he is also entitled to increments for the entire period without applying the punishment imposed by the Labour Court in the award under challenge. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in these writ petitions shall stand closed.

P.NAVEEN RAO,J

17th July, 2017
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