

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.1078 of 2015
In
Civil Writ Jurisdiction Case No.16148 of 2013**

Karoo Sao, Son of Bhulan Sao, resident of village- Korut, P.O.- Gunjarchak,
Police Station- Chandi, District- Nalanda at Biharsharif.

... .. Appellant

Versus

1. The State of Bihar
2. The Chief Secretary, Bihar, Patna
3. The Secretary-cum-Commissioner, Health Department, Government of Bihar, Patna.
4. The Additional Director, Health Services, Bihar, Patna
5. The District Magistrate, Nalanda (Biharsharif)
6. The Civil Surgeon-cum-Chief Medical Officer, Nalanda (Biharsharif)
7. The Incharge, Medical Officer, Referral Hospital, Asthawan, Nalanda (Biharsharif)

... .. Respondents

Appearance :

For the Appellant : Mr. Bindhyachal Singh, Advocate
Mr. Satya Prakash, Advocate
For the Respondents : Mr. Ranjan Kumar Singh, AC to PAAG-2

**CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE JUSTICE SMT. NILU AGRAWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)**

Date : 11-09-2018

This intra-court appeal arises from the judgment and order dated 17.11.2014, passed by the learned Single Judge of this Court in CWJC No. 16148 of 2013 whereby even while allowing the writ petition and holding the restoration of the service of the appellant/petitioner by the respondents as a 'reinstatement' and not a case of 're-appointment' and even while allowing him the benefit



of past service of 21 years for the purpose of superannuation benefits, the learned Single Judge has denied the benefit of back wages to the appellant/petitioner and the reasons are missing therefor. This denial of back wages to the appellant/petitioner for the period he was kept out of service i.e. from 28.02.2003 until his reinstatement on 04.05.2012 by the learned Single Judge, which has aggrieved the appellant/ petitioner to move this Court through this present intra-court appeal which is limited to the issue of back wages.

2. We have heard Mr. Bindhayachal Singh, learned counsel appearing for the appellant/petitioner and Mr. Ranjan Kumar Singh, learned AC to PAAG-2 on behalf of the State and we have perused the record.

3. Before we would proceed to record our opinion on the rival contentions advanced on the issue, we deem it proper to record the bare essential facts which would be necessary for disposal of this appeal.

4. The appellant/petitioner was appointed as a Male Welfare Worker under the Civil Surgeon cum Chief Medical Officer, Singhbhum (now in the State of Jharkhand) vide Memo No. 125 dated 03.02.1982 after going through a selection process initiated following an advertisement published bearing No.



18/1980. Vide Memo No. 968 dated 04.04.1984 the appellant/petitioner was transferred to the Primary Health Center, Chenari in the district of Rohtas where he joined on 14.06.1984. The appellant/petitioner was again transferred from Primary Health Center, Chenari, Rohtas to Primary Health Center, Barh in the district of Patna vide Memo No. 486 dated 02.05.1986 where he joined on 14.06.1986. Vide Memo No. 1431 dated 27.12.1986 appellant/petitioner was transferred from Primary Health Center, Barh to the Referral Government Hospital, Rajgir in the district of Nalanda where he joined on 26.02.1987. Vide Memo No. 2089 dated 23.10.1997 of the Civil Surgeon cum Chief Medical Officer, Nalanda, the appellant/petitioner was posted in Asthawan Block where he joined as Incharge Medical Officer, Asthawan. During his service career the appellant/petitioner has earned time bound promotion as well as pay revision took place from time to time.

5. It is while the appellant/petitioner was posted in the district of Nalanda that he was directed to produce relevant documents in respect of his appointment and suddenly with effect from August 2002, the payment of salary to the appellant/petitioner was stopped. The appellant/petitioner was put to show cause vide Memo No. 331 dated 07.02.2003 in support of his appointment. The appellant/petitioner filed his show cause



reply but not being satisfied, that vide Memo No. 691 dated 28.02.2003 of the Civil Surgeon cum Chief Medical Officer, Nalanda, the appellant/petitioner was terminated from service.

6. Feeling aggrieved, the appellant/petitioner moved this Court in CWJC No. 3247 of 2003, which was heard and allowed vide judgment and order dated 08.09.2003. Feeling aggrieved, the State moved in appeal giving rise to LPA No. 1005 of 2003, which was heard analogous with other cases and disposed of with direction to the authorities in the State Government in its Health Department, to reconsider the case of the appellant/petitioner and others. It is following the order passed in LPA by the Division Bench that a Committee was constituted headed by the Director-in-Chief, who found that the appointments were forged.

7. The appellant/petitioner again approached this Court in CWJC No. 12431 of 2008, which was allowed on 06.10.2009. Feeling aggrieved, the State again moved in appeal giving rise to LPA No. 196 of 2010. The Letters Patent Appeal was disposed of vide order passed on 11.02.2010 constituting a One Man Committee under the Chairmanship of Hon'ble Mr. Justice Uday Sinha (retired) for examining the contesting claims and for submission of report. The claim of the appellant/petitioner was



examined by One Man Committee and was upheld and his termination was held not justified.

8. The report of the One Man Committee is enclosed as Annexure-12 to the writ petition and it is following the opinion of the One Man Committee that the appellant/petitioner was reinstated by way of 're-appointment' vide order dated 04.05.2012 enclosed as Annexure-13 to the writ petition. Since, even after the One Man Committee had recorded its opinion that the termination was illegal and yet, the respondents in the Directorate of Health Services instead of reinstating the terminated employees including the appellant/petitioner on their post, issued order of 're-appointment' bearing No. 709 dated 04.05.2012, which has been enclosed as Annexure-13 to the writ petition, thereby denying them the benefit of past service and other benefits, that feeling aggrieved, the appellant/petitioner approached this Court through the writ petition in question, which has been heard and allowed by the learned Single Judge by allowing all reliefs so prayed by the writ petitioner in his writ petition except the benefit of back wages. It is this denial of past wages which has aggrieved the appellant/petitioner to move this Court in this intra-court appeal. The operative portion of the judgment and order of the learned Single Judge reads thus :



“From a reading of the Division Bench directive contained in clause ‘(o)’ quoted above coupled with the finding given by the One man Committee contained in Annexure-12, the removal of the petitioner was held to be wrong or erroneous hence not justified. If this is so then obviously the decision to remove the petitioner was set to knot and that formed the basis for the petitioner to get a foothold back into service. Petitioner was appointed on 03.02.1982. He had rendered good 21 years of service before he was removed. Those years of service in the above stated background cannot vanish. The petitioner, therefore, has to be treated as a case of reinstatement than a case of reappointment.

The Court, however, is not willing to give the benefit of payment of back wages and salary to the petitioner in the given factual matrix but his continuance in service will not be a matter of dispute henceforth from his initial appointment in the year 1982 till he reaches the age of superannuation. In view of the above order, the petitioner will get other benefits of service like seniority as well as pension etc. as and when time for such consideration arises”

9. Mr. Bindhyachal Singh, learned counsel for the appellant/petitioner has referred to two judgments of the Supreme Court to question the denial of back wages by the learned Single Judge rendered in the case of ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others*** since



reported in **(2013) 10 SCC 324**, more particularly paragraphs 21 and 22 and the judgment in the case of **Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited** since reported in **(2014) 11 SCC 85**, paragraphs 35 to 40.

10. The arguments advanced by learned counsel is contested by the learned State counsel in placing reliance on the Full Bench judgment and order of this Court in the case of **Malti Kumari vs. The State of Bihar & Ors.** since reported in **2013(2) PLJR 677**, paragraph 8.

11. We have consciously discussed the bare essential facts for it demonstrates that there is no dispute on the sequence of events that the appellant/petitioner was appointed after following a selection process and his termination was accepted as erroneous albeit after several rounds of litigation before this Court, nonetheless, which realisation has resulted in the order of ‘re-appointment’, which on being questioned before the learned Single Judge has been treated as an order of ‘reinstatement’, thus, making the appellant/petitioner eligible for all consequential benefits of past service except the benefit of back wages.

12. In the undisputed circumstances noted, we shall limit our discussion only to the issue of back wages because the other expression of the learned Single Judge neither aggrieves the



appellant/petitioner nor the State has chosen to question the opinion on any other ground. The issue of back wages has been a subject matter of a catena of decisions, but the two judgments, which has been relied upon by Mr. Singh sets at rest all issues arising therefrom because the Supreme Court after discussing the judgments relevant on the issue, has concluded in each of the two judgments that the claim of back wages cannot be denied where the termination is held illegal. It is held that in such circumstances a claim of back wages would be allowed in normal course unless, the State is able to demonstrate that the incumbent was gainfully employed. The Supreme Court has again been rather emphatic on the issue of gainful employment by holding that a vague allegation by the State to deny this benefit to an incumbent, would not hold good.

13. We do take notice of the statement made by the appellant/petitioner in the writ petition as well as in this appeal that he was not in gainful employment and which statement of the appellant/petitioner before the learned Single Judge and before this Court goes uncontested. Meaning thereby, there is no contest to the specific averment of the appellant/petitioner that he was not in gainful employment all through his termination period. Once this hurdle is crossed by the appellant/petitioner, he sails into the relief



granted by the Supreme Court in the judgment(s) referred to above and for the sake of convenience, we are persuaded to reproduce the opinion expressed by the Supreme Court in the case of ***Deepali Gundu Surwase*** (supra) at paragraphs 21, 22 and 38, which summarises the issue and reads as follows :

“21. The word “reinstatement” has not been defined in the Act and the Rules. As per *Shorter Oxford English Dictionary*, Vol. 2, 3rd Edn., the word “reinstatement” means to reinstall or re-establish (a person or thing in a place, station, condition, etc.); to restore to its proper or original state; to reinstate afresh and the word “reinstatement” means the action of reinstating; re-establishment. As per *Law Lexicon*, 2nd Edn., the word “reinstatement” means to reinstall; to re-establish; to place again in a former state, condition or office; to restore to a state or position from which the object or person had been removed and the word “reinstatement” means establishing in former condition, position or authority (as) reinstatement of a deposed prince. As per *Merriam-Webster Dictionary*, the word “reinstatement” means to place again (as in possession or in a former position), to restore to a previous effective state. As per *Black’s Law Dictionary*, 6th Edn., “reinstatement” means:

“To reinstall, to re-establish, to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed.”

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.

.....
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.

.....”

14. We are also persuaded to reproduce the opinion expressed by the Supreme Court in the case of **Bhuvnesh Kumar Dwivedi** (supra) in paragraph 40, which is after taking note of the opinions expressed by the Supreme Court from time to time on this issue present at paragraphs 35 to 39. Paragraph 40 of the judgment reads as follows:

*“40. Therefore, on the basis of the legal principle laid down by this Court in **Deepali Gundu Surwase** case, the submission of the respondent that the appellant did not aver in his plaint of not being employed, does not hold since the burden of proof that the appellant is gainfully employed post termination of his service is on the respondent. The claim of the respondent that the appellant is gainfully employed somewhere is vague and cannot be considered and accepted. Therefore, we hold that the appellant is entitled to full back wages from the date of termination of his service till the date of his reinstatement.”*

15. Having noted the legal position settled by the Supreme Court on the issue of back wages, we would certainly not shy away in dealing with the Full Bench judgment relied upon by Mr. Singh, learned State Counsel, to contest the claim of the



appellant/petitioner for back wages. The foundational facts drawing the attention of the Full Bench in the case of **Malti Kumari** (supra) which formed the basis for the opinion so expressed is present at paragraph 2 of the judgment. It is a matter of record that the cases which fell for consideration before the Full Bench, were concerning regularisation and which was given effect prospectively to the said writ petitioner even after her reinstatement on the post. The Full Bench taking note of the stipulations present in the order of regularisation which did grant the benefit of past service but denied back wages on principles of no work no pay, upheld the order of regularisation along with its stipulations.

16. Learned State counsel has tried to equate the case of the present petitioner with that of Malti Kumari (Supra). In our opinion the parity sought to be drawn is misplaced because while the case of Malti Kumari (Supra) is a case of regularisation, the present case is where the termination was found illegal and learned Single Judge has modified the order of restoration of service of the appellant/petitioner from 're-appointment' to 'reinstatement' with past benefit of service but sans back wages.

17. In our opinion the two situations are at a different pedestal for while the legal position in a case of regularisation is



long settled and it normally operates prospectively unless the scheme under which regularisation is ordered, allows retrospective benefits of past service. The law governing issue of reinstatement on quashing of the termination order on its illegality by itself, accompanies past benefits.

18. It is undisputed that the appellant/petitioner was substantively appointed after going through a selection process and it is because some doubts arose as to the procedure adopted by the Selection Committee which led to the termination of his service which was not the case before the Full Bench.

19. Having noted thus, we have absolutely no doubt to record our opinion that the denial of past wages to the appellant/petitioner by the learned Single Judge is not resting on any reason nor any expression is found in the opinion of the learned Single Judge to deny the appellant/petitioner the benefit of past wages even when the learned Single Judge has allowed him the benefit of past service of 21 years for the purpose of superannuation benefits.

20. As we have noted above, the only ground on which the past wages could have been denied to the petitioner is, if, the State Government would have raised objection with supportive documents that the petitioner was gainfully employed which is not



the case here. As observed above, the specific assertion to such effect made by the appellant/petitioner goes uncontested.

21. We are, thus, persuaded by the argument of Mr. Bindhayachal Singh to allow this appeal and modify the judgment and order of the learned Single Judge passed in CWJC No. 16148 of 2013 to the extent where it denies past wages to the appellant/petitioner for the period he was out of service i.e. from 28.02.2003 to 04.05.2012, and consequentially allow the claim of the appellant/petitioner to direct the concerned respondent authorities in the Health Department to take steps for payment of arrears of salary of the appellant/petitioner, as found admissible for the period 28.02.2003 to 04.05.2012 within a period of three months form the date of receipt/production of a copy of this order.

22. The Appeal is accordingly, allowed but with no order as to costs.

(Jyoti Saran, J)

(Nilu Agrawal, J)

Rajesh/Pragya

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