

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.6076 of 2012

O R D E R:

Petitioner was appointed as a Wire Drawing Machine Operator on 01.06.1990 by the 1st respondent. His services were abruptly terminated on 14.05.2005 without following Section 25(F) of the Industrial Disputes Act, 1947 (for short 'the Act').

2. On 28.07.2008 petitioner filed an application under Section 2(A)(2) of the Act, which was numbered as I.D.No.100 of 2008, seeking reinstatement with back wages and continuity of service and all consequential benefits, before the Industrial Tribunal-cum-Labour Court, Visakhapatnam (for short "Tribunal").

3. The 1st respondent contested the same and alleged that the petitioner himself stopped attending duties from 04.07.2005 and it had not terminated his services. It also took a plea that he could not have approached the Tribunal under Section 2(A)(2) of the Act when conciliation proceedings were not initiated.

4. Before the 2nd respondent-Tribunal, petitioner examined WWs.1 and 2 and marked Exs.W1 to W52, while the 1st respondent examined MWs.1 to 4 and marked Exs.M1 to M11.

5. The 2nd respondent-Tribunal, after considering the oral and documentary evidence, concluded that the 1st respondent had terminated the services of the petitioner without following the procedure contemplated under Section 25(F) of the Act; that the

said termination of services of the petitioner was illegal; though normally petitioner would be entitled to reinstatement with back wages and continuity of services, since he kept quite for three years without approaching any conciliation authority or the 2nd respondent for redressal, he is not entitled to any back wages.

6. Challenging non-grant of back-wages by the 2nd respondent-Tribunal, petitioner filed this Writ Petition.

7. Counsel for petitioner contended that no valid reason has been given by the 2nd respondent-Tribunal for denying him back wages and that he also entitled to full back wages. Counsel for petitioner placed reliance on the judgment of the Supreme Court in **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others**¹ where the Supreme Court held that in cases of wrongful termination of services, reinstatement with continuity of service and back wages is the normal rule. It observed that:

“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

¹ 2013(10) SCC 324

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.”

8. Petitioner’s counsel pointed out that before the 2nd respondent-Tribunal in para 3 of petitioner’s application filed under Section 2(A)(2) petitioner had specifically pleaded that he could not secure suitable alternative employment, and 1st the respondent, not having adduced any evidence that petitioner did secure such employment, petitioner cannot be denied back wages.

9. Sri D.Sethuram Reddy, Standing Counsel appearing for 1st respondent refuted the above contentions and supported the order passed by the 2nd respondent-Tribunal. He stated that since the petitioner approached the 2nd respondent-Tribunal only on 28.07.2008, though his services were allegedly terminated on 14.09.2005, 2nd respondent-Tribunal had rightly denied him back-wages. He also relied upon the judgment of the Supreme Court in **Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand(Dead) through his LRs.**².

10. I have noted the contentions of both sides.

² 2018 LawSuit (SC) 912

11. Admittedly, the services of the petitioner were found to have been terminated by the 1st respondent on the ground of violation of Section 25(F) of the Act and the Tribunal had granted him reinstatement with continuity of service but denied him back-wages on the ground that he kept quiet for three years without approaching any authority or the 2nd respondent-Tribunal for redressal.

12. Admittedly, the petitioner approached the 2nd respondent-Tribunal on 28.07.2008, though he was allegedly terminated on 14.09.2005 and the 2nd respondent-Tribunal rendered award on 07.12.2011.

13. According to the 1st respondent, petitioner was re-instated into service on 07.03.2012.

14. It is not in dispute that petitioner specifically pleaded in his application under Section 25(F) of the Act that he could not get alternative employment during the period between 14.09.2005 and 28.07.2008, and the 1st respondent could not place any material before the Tribunal or before this Court to establish that the petitioner had been gainfully employed during the said period.

15. In my considered opinion, when the petitioner did not immediately approach the 2nd respondent-Tribunal challenging his alleged termination from service on 14.09.2015, petitioner cannot claim back-wages for the said period of 14.09.2005 to 28.07.2008.

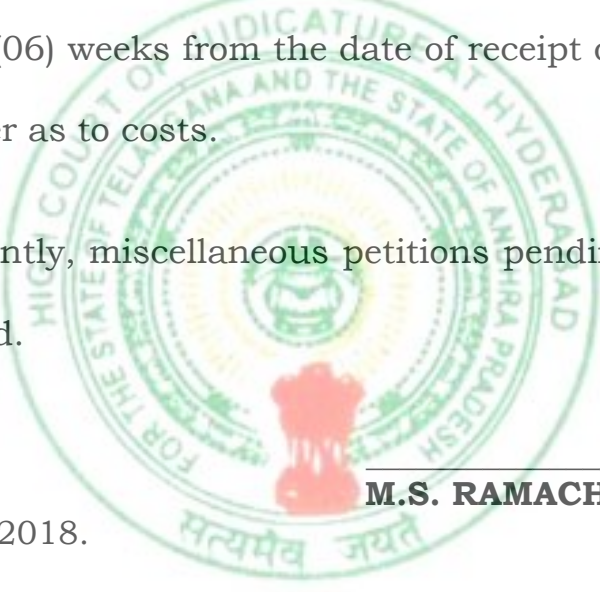
16. However, for the period from 28.07.2008 to 07.03.2012, the petitioner would be entitled to back-wages in view of the decision in **Deepali Gundu Surwase's** case(1 supra) which was reiterated in **Rajasthan State Road Transport Corporation's** case(2 supra), since there is no evidence adduced by the 1st respondent that the petitioner was gainfully employed during that period.

17. Therefore, the Writ Petition is allowed to the above extent only and the 1st respondent is directed to pay to the petitioner back-wages for the period from 28.07.2008 to 07.03.2012 within a period of six (06) weeks from the date of receipt of a copy of this order. No order as to costs.

18. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

12th December, 2018.

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M.S. RAMACHANDRA RAO, J