

HON'BLE SRI JUSTICE SANJAY KUMAR
AND
HON'BLE SRI JUSTICE P. KESHAVA RAO

WRIT APPEAL No.767 of 2017

JUDGMENT: (Per the Hon'ble Sri Justice P. Keshava Rao)

Heard the learned standing counsel for the appellants and the learned counsel appearing for the respondent.

The present writ appeal is filed aggrieved by the orders passed in W.P.No.17895 of 2001 dated 22.09.2015, allowing the writ petition holding that the respondent herein/writ petitioner is entitled to back wages for the period he was out of service.

The facts of the case are that originally the respondent herein joined as a Conductor in the year 1984 in the Andhra Pradesh State Road Transport Corporation (hereinafter referred to as "the Corporation"). Since the date of joining in service the respondent was discharging his duties to the utmost satisfaction of all the concerned and without any blemish. He was elected as Deputy Secretary of the National Mazdoor Union of the Corporation. Because of the activities of the respondent in the union, the then Depot Manager said to have been bore grudge resulting in lodging a false report against him on 05.06.1997. In the said report it was stated that the respondent abused one B.Kodandapani in filthy language in drunken state. The concerned police investigated the same and filed a charge sheet against the respondent for the offences under Sections 353 and 510 IPC. The Court below,

after taking cognizance of the offences, taken on file as C.C.No.151 of 1997. When the said criminal proceedings were pending, the Depot Manager, Warangal, issued a charge sheet against the respondent levelling three charges. After enquiring into the allegations, the respondent was removed from service vide proceedings No.APSRTC 01/34(3)/97 dated 25.11.1997. In fact, questioning the said orders of removal, the respondent filed W.P.No.298 of 1998 before this Court. However, after hearing, this Court was pleased to dispose of the said writ petition asking the respondent to approach the Labour Court. Accordingly, the respondent raised a dispute before the Industrial Dispute-cum-Labour Court, Anantapur (for short, "the Tribunal"), vide I.D.No.145 of 1998. In the said I.D., the respondent has specifically pleaded that the charges framed in the departmental enquiry and the charges in the criminal case are one and the same and got acquittal in the criminal proceedings. It is further pleaded that the Enquiry Officer did not issue any notice and did not provide an opportunity of hearing to the respondent and as such the whole enquiry is vitiated as it is against the principles of natural justice. That from the date of removal the respondent did not secure any alternative employment. From the record it is revealed that no oral or documentary evidence was adduced in the above said I.D. However, having regard to the facts and circumstances of the case and after hearing both the

parties and based on the record available, the Tribunal in its award dated 02.01.2001 allowed the I.D. directing the appellants herein to reinstate the respondent in to service with continuity of service, but without any back wages. Aggrieved by the said award as far as denying the back wages from the date of termination till the date of reinstatement is concerned, the respondent filed W.P.No.17895 of 2001 before this Court. In the said writ petition, the respondent has categorically pleaded that the charges framed in the departmental enquiry and the criminal case are one and the same and he got a clean acquittal in the criminal case. That apart, the respondent also raised a plea that no notice was issued and the enquiry officer did not provide any opportunity of hearing and that the whole enquiry is vitiated as it amounts to violation of principles of natural justice. The respondent was also not gainfully employed with any alternative employment during the period of termination of his services. Finally, he has also raised a plea that the punishment awarded is disproportionate to the charges levelled against him.

Per contra, the appellants filed a counter affidavit denying the averments made in the affidavit filed in support of the writ petition and contended *inter alia* that the writ petition as filed does not disclose any cogent reasons for interference of this Court in the well considered award of the Labour Court. There are no merits and as such the same is liable to be

dismissed. The appellants have denied that the respondent was discharging his duties sincerely since he was involved in several assault cases against his superiors. Though the enquiry officer has sent three notices to the respondent asking him to attend enquiry duly informing the date and time, the said notices were returned un-served. As the respondent did not turn up even for the final notice issued on 29.08.1997, the enquiry officer conducted an enquiry and submitted the report holding that the respondent is guilty of charges levelled against him. Thereafter, the appellants after perusing the enquiry report and the connected records placed before them came to an independent conclusion that the removal of the respondent from service is just and proper for the approved misconduct and accordingly issued the final orders of removal on 25.11.1997 after following the due procedure as contemplated under the disciplinary proceedings, apart from other aspects. Therefore, the appellants sought dismissal of the writ petition.

The learned Single Judge, after hearing, was pleased to allow the writ petition holding that the respondent is entitled to back wages for the period he was out of service by orders dated 22.09.2015. Aggrieved by the said order, the present appeal is filed.

The learned standing counsel appearing for the appellants reiterated the submissions made by him in the

grounds of appeal duly emphasizing on the aspect that the respondent failed to place any material on record to show that he was not gainfully employed during the period of removal from service till he was reinstated into service. In fact, material was placed before the domestic enquiry. Therefore, the question of again placing the very same material before the Tribunal may not arise. As the notices sent to the respondent were returned un-served, there was no violation of principle of natural justice while conducting a domestic enquiry and the respondent is not entitled for the back wages since the findings recorded in criminal proceedings will have no effect on the previously concluded domestic enquiry. Further, as the respondent was acquitted on the ground of benefit of doubt, he is not entitled for the back wages and lastly this Court while exercising the Certiorari jurisdiction under Article 226 of the Constitution of India, has only supervisory jurisdiction and not as an appellate Tribunal and cannot review or re-appreciate the evidence upon which the Tribunal laid the base and the conclusions.

Learned counsel appearing for the respondent supported the orders of the learned Single Judge relying on the aspects that no notice was issued to the respondent and no opportunity of being heard was given during the course of domestic enquiry resulting in violation of principles of natural justice. He also contended that for denying the back wages,

it is for the appellants to specifically plead and prove that the respondent was gainfully employed during the period of termination till reinstatement. It is further contended that having ordered reinstatement of the respondent with continuity of service, denial of back wages is illegal.

The short question that falls for consideration in the present writ appeal is whether there is any irregularity or illegality in the orders passed by the learned Single Judge while holding that the respondent is entitled for back wages for the period he was out of service?

As far as the acquittal of the respondent in criminal proceedings is concerned, he was charged for the offences under Sections 353 and 510 IPC. However, from the judgment of the trial Court, it is evident that after appreciating the evidence of PWs.1 to 4 and Exs.P-1 to P-3 produced on behalf of the prosecution and also the evidence of defence through DWs.1 and 2 and Exs.D-1 to D-4, it was held as to whether the respondent has committed any assault or used any criminal force against the complainant is doubtful. It was also held that Ex.P-1 report is prepared after discussion with the police officers and as such the accused is entitled for benefit of doubt. That apart, after appreciating the evidence on record, the Court below was also of the opinion that the occurrence of the incident is not believable as it was not corroborated by any independent witnesses. As far as the offence under Section 510 IPC is concerned, PW-3 who is a medical officer, categorically deposed that the respondent consumed alcohol, but

the incident did not occur under its influence. Therefore, the Court below held that the prosecution miserably failed to prove the guilt of the accused beyond all reasonable doubt. Now coming to the offence under Section 353 IPC, the Court below acquitted the respondent on benefit of doubt. In this regard, it is to be observed that when the main offence under Section 510 IPC was not proved beyond reasonable doubt by the prosecution, the commission of offence under Section 353 IPC is doubtful. That apart, the prosecution also has not produced the evidence of any independent witness assaulting PW-1 and therefore, it is not believable.

Even on the aspect of issuance of notice, the Labour Court while giving the award held that the appellants, have not issued any notice and no opportunity of being heard is given to the respondent and thereby violated the principles of natural justice. However, only reinstatement with continuity of service was awarded but without any back wages. This issue came up for consideration before the Apex Court in *DEEPAJI GUNDU SURWASE v. KRANTI JUNIORADHYAPAK MAHAVIDYALA AND OTHERS*¹.

The Apex Court while dealing with the above said issue, referred to all the judgments on the subject including the judgments of the Apex Court in *J.K. SYNTHETICS LTD. v. K.P.AGRawal*² and *ZILLA PARISHAD, GACHIROLI v. PRAKASH*³ and held as under:

- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

¹ (2013) 10 SCC 324

² (2007) 2 SCC 433

³ (2009) 4 Mah.LJ 628

- ii) 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.
- iii) 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 averments 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.
- iv) 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.
- v) 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 victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages.

The argument of the learned Standing Counsel appearing for the appellants is that the respondent herein has not pleaded and not placed any material on record to show that he was not gainfully employed during the removal period from service till he was reinstated into service. When an employee whose services are

terminated and who is desirous of claiming back wages is required either to plead or at least to make a statement before the adjudicating authority or the Court of first instance that he was not gainfully employed. If the employer wants to avoid payment of full back wages, then it is for the employer to plead and also to lead cogent evidence to prove that the employee was gainfully employed and was getting wages equal to the wages he was drawing prior to the termination of service. It is settled law that the burden of proof of existence of a particular fact lies on the person who makes a positive averment about its existence. However, the existence of a fact cannot be proved negatively. Therefore, once the employee takes a plea that he was not gainfully employed during the period of termination till reinstatement, automatically the onus lies on the employer to specifically plead and prove that the employee was gainfully employed. Even this issue is also considered by the Apex Court in the above said judgment.

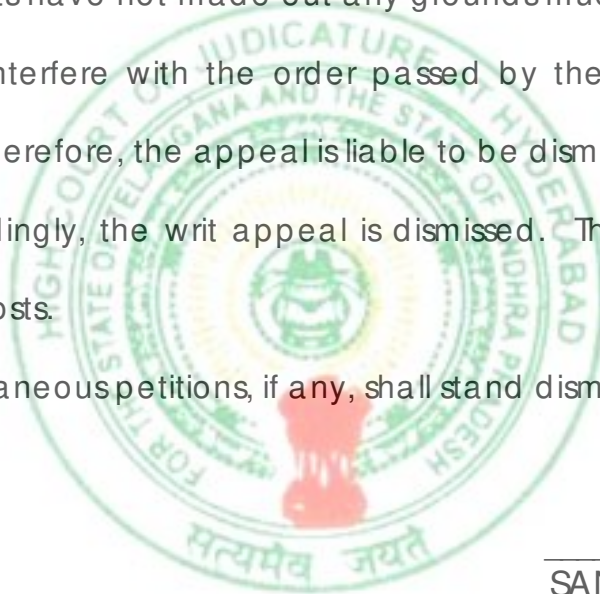
In the case on hand, the respondent has pleaded that from the date of removal of service till reinstatement, he did not secure any employment. The said aspect is not disputed by the appellants nor they have produced any evidence to rebut the said statement by leading cogent evidence regarding the respondent was gainfully employed when he was out of service. That apart, the Labour Court while allowing I.D. held that the appellants have not followed the principles of natural justice. The appellants have not challenged that finding and the same has become final. Therefore, at this stage, it is not open for the appellants to contend that notices were issued to the respondent but they were not received

and as such, there is no violation of principles of natural justice. Thus, viewing from any angle, it cannot be said that there is any irregularity or illegality in the orders passed by the learned Single Judge. Even the Apex Court in the judgment referred above, held that where there is a gross violation of principles of natural justice, the Court or Tribunal is justified in appreciating the payment of full back wages. Hence, the respondent is entitled for the relief as sought in the writ petition.

For the above said reasons, this Court is of the opinion that the appellants have not made out any grounds much less any valid grounds to interfere with the order passed by the learned Single Judge and therefore, the appeal is liable to be dismissed.

Accordingly, the writ appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, shall stand dismissed.



SANJAY KUMAR, J

P. KESHAVA RAO, J

Date: 27.04.2018
CCM/ES

HON'BLE SRI JUSTICE SANJAY KUMAR
AND
HON'BLE SRI JUSTICE P. KESHA VA RAO



WRIT APPEAL No.767 of 2017

Judgment of the Bench delivered by the
Hon'ble Justice Sri P. Keshava Rao

Date:27.04.2018

CCM/ES