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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Judgment: 21.05.2018

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WP(C) 5490/2018

RACHNA SAGAR PRIVATE LIMITED & ORS. ...Petitioner
Through: Mr.Rohit Shankar, Advocate along
with Authorized Representative Hemant
Kataria.

versus

GIRISH KUMAR SHARMA Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (Oral)

1. In this writ petition the petitioner has impugned the award dated 26.02.2018 passed by the learned Presiding Officer, Labour Court, South-West District, Dwarka Courts, New Delhi (in short 'Industrial Adjudicator') in a Direct Industrial Dispute No.3358/2016.
2. The facts giving rise to file the writ petition are that the respondent/workman has been working with the petitioner/Management since month of July, 1997. He worked as a Store Keeper for about four years. Thereafter he was posted as Caretaker of Library where he had worked for about 12 years till 2013. The respondent/workman alleged that after

the year 2013, the petitioner/Management started harassing him. He was transferred to work in its godown at Alipur with the intention that it would not be possible for him to attend his duties being the workplace situated at a long distance compelling him to leave the job.

3. Admittedly, on 14.08.2015 the respondent during the course of his employment fell down on the floor and was taken to Sanjeevani Medical Centre where he was admitted. The respondent claimed that the petitioner/Management did not pay even a single penny for his treatment and he was left alone in the hospital. After regaining his consciousness, he called his elder son who deposited Rs.17,424/- with the hospital. The petitioner/Management did not pay him his earned salary for the month of August, 2015. He further claimed that on 03.09.2015 when he went to join his duties he was forcibly thrown out of the office of the petitioner/Management at Daryaganj, Delhi and was not allowed to attend to his duties. It was conveyed to him that his services had been terminated by the petitioner/Management.
4. In its written statement, the petitioner/Management has denied the allegation of the respondent that after the year 2013 the petitioner started harassing him. It is denied that salary for the month of August, 2015 was not paid or that he was not allowed to join his duties. It is pleaded that the respondent did not come to join his duties even when the petitioner/Management contacted him and did not give any response and hence they

deputed another person in his place. The Management has also denied that the services of the respondent were terminated.

5. On the pleadings of the parties, the following issues were framed by the Industrial Adjudicator:-

“(1) Whether the claimant himself left the job by absenting himself? OPM

(2) Whether termination of service of claimant by management on 03.09.2015 is illegal and/or unjustifiable? OPW

(3) Relief.”

6. In support of his case, the respondent/workman examined himself. He had, *inter-alia*, placed on record the copy of his medical papers Ex.WW-1/9 (five pages). The petitioner/Management examined its Transport Manager Shri Shyam Sunder as MW-1.
7. After appreciation of evidence, the Industrial Adjudicator came to the conclusion that the services of the respondent/workman were terminated illegally by the petitioner/Management and that the respondent is entitled to his full back wages with all consequential benefits.
8. It is submitted by the learned counsel for the petitioner that they have never terminated the services of the respondent and that the petitioner/Management has transferred the respondent/workman at Noida vide letter dated 01.09.2015 asking him to join his duties by 07.09.2015 but he failed to join, thus,

remaining absent. He further submits that the cash payment in the hospital was made by the staff of the petitioner/Management at the time of the respondent's admission in private hospital which was adjusted from his salary for the month of August, 2015. He submits that the respondent/workman is covered under ESI and the petitioner had paid contribution to ESI.

9. I have heard the learned counsel for the petitioner.
10. Learned counsel was confronted with the written statement filed by the petitioner before the Industrial Adjudicator wherein no such defence was taken that the respondent/workman was transferred to Noida vide letter dated 01.09.2015 or that the bill of the hospital was paid by its staff and adjusted. Even MW-1 has admitted in his cross-examination that they have never sent any notice to the respondent/workman regarding his absence from duties. He also admitted that the salary of the respondent was not paid for the month of August, 2015. It is noticed that on 05.06.2017 in his cross-examination the respondent/workman has admitted the suggestion of the Management/petitioner that he was offered a compensation of Rs.1,01,647/- by the petitioner/Management which he refused to accept. Admittedly, the workman suffered heart attack during the course of the employment and was admitted to Sanjeevani Medical Research Centre Private Limited, Daryaganj. He was discharged on the same day after making the payment of Rs.17,424/-. The petitioner has taken a new plea of making the payment of the hospital bill of Rs.17,424/- for the respondent and transferring the respondent/workman to

its Noida office vide letter dated 01.09.2015 which cannot be allowed to be taken. I do not find any illegality or perversity in the impugned award holding that the termination of the respondent/workman is illegal and unjustified.

11. There is no force in the argument of the learned counsel that instead of reinstatement with back wages, the Industrial Adjudicator should have awarded lump sum compensation. Recently in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya and others (2013) 10 SCC 324**, the **Hon'ble Supreme Court** after discussing the various case law on the point has culled out the following principles to be considered while granting the back wages and the relevant paragraphs of the judgment read as under:-

“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* (1979) 2 SCC 80.

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* (2007) 2 SCC 433 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*, (1979) 2 SCC 80, *Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court*, (1980) 4 SCC 443 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.”

12. In his pleadings the respondent/workman has pleaded that after termination of his services he remained unemployed and could not get alternative employment despite his best efforts. This fact is not denied specifically by the petitioner/Management in its written statement. The workman has also testified the same in his affidavit tendered in evidence. The petitioner/Management does not dispute this fact in the cross-examination. MW-1 on behalf of the petitioner/Management has also not rebutted this evidence of the workman. Thus, the respondent/workman has discharged his initial burden by stating in his pleadings and in evidence that he remained unemployed after termination of his services by the petitioner, which went unrebutted by the petitioner/management. Therefore, in view of the judgment of the **Hon'ble Supreme Court in Deepali Gundu Surwase's case (supra)**, impugned award of the Industrial Adjudicator directing the management to reinstate the respondent with full back wages cannot be faulted with.
13. Accordingly, the petition is dismissed along with applications being CM No.21386/2018 & CM No.21387/2018.

(VINOD GOEL)
JUDGE

MAY 21, 2018
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