

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Writ Petition No.4667 of 2016
(Sahdeo Shriram Khade .vs. Mill Manager Simplex Mills Company Ltd. Akola
)
with
Writ Petition No.413 of 2017
(Simplex Mills Company Ltd. Akola .vs. Sahdeo Shriram Khade)

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders or directions
 and Registrar's orders

Court's or Judge's orders.

Mr. P.V. Thakre, Advocate for Petitioner in WP No.4667/2016 and for Respondent in W.P.No.413 of 2017.

Mr. P.K. Mohta, Advocate for Petitioner in W.P. No.413 of 2017 and for Respondent in W.P.No.4667 of 2016.

CORAM : Manish Pitale, J.

DATED : March 28, 2019.

The employee as well as the employer have approached this Court challenging judgment and order dated 29.04.2016 passed by the Industrial Court, Akola. The employee i.e. the petitioner in Writ Petition No. 4667 of 2016 is aggrieved by the said order of the Industrial Court setting aside grant of relief of 50 % back wages, while the employer i.e. the petitioner in Writ Petition No.413 of 2017 is aggrieved by the relief of continuity in service granted to the employee and confirmed by the Industrial Court in the impugned judgment and order. The parties are being referred to as the employee and employer for the sake of convenience.

2. The service of the employee herein was terminated in the year 1986 and aggrieved by the

same, he approached the Labour Court, Akola, by filing a complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, claiming the relief of setting aside of the order of termination of service with consequential benefits. In the first instance, the Labour Court and thereafter the Industrial Court rejected the claim of the employee, as a result of which he approached this Court by way of Writ Petition No.1506 of 2006. By judgment and order dated 05.1.2011, this Court partly allowed the writ petition on the ground that the punishment of dismissal from service was disproportionate and thereupon, this Court remanded the matter back to the Labour Court for reconsideration.

3. Thereafter, on 30.4.2011, the Labour Court partly allowed the complaint of the employee, setting aside the order of termination of service and directed reinstatement of the employee with continuity of service and 50% back wages. The said order was challenged by the employer by filing revision application under Section 44 of the MRTU and PULP Act, 1971, before the Industrial Court.

4. By the impugned judgment and order, the Industrial Court set aside the direction of grant of 50% back wages to the employee, while upholding the other relief granted by the Labour Court.

5. The learned counsel appearing for the employee referred to judgment of the Hon'ble Supreme

Court in the case of **Deepali Gundu Surwase .vs. Kranti Junior Adhyapak Mahavidyalaya** reported in **(2013) 10 Supreme Court Cases 324**, to contend that the Industrial Court had committed an error in insisting upon the employee to produce positive evidence to prove that he was not in gainful employment while setting aside the relief of grant of 50% back wages. It was submitted that the burden was wrongly placed on the employee and that, therefore, the order of the Industrial Court deserved to be set aside and the order of the Labour Court was required to be restored on the question of grant of back wages.

6. The learned counsel for the employer contended that even if the law laid down by the Hon'ble Supreme Court in the aforesaid case of **Deepali Gundu Surwase .vs. Kranti Junior Adhyapak Mahavidyalaya** (supra) was to be applied, as noted by the Industrial Court in the impugned order, the employee had failed to make any averment or statement before the Labour Court about his not being in gainful employment and, therefore, there was no burden on the employer to lead any evidence in the matter. It was further submitted that the Hon'ble Supreme Court in the aforesaid judgment had also directed that while considering the question of grant of back wages, various factors need to be taken into consideration, including the financial status of the employer. In this context, the learned counsel for the employer invited attention of this Court to an award dated 09.04.2014 passed by the Industrial Court in a

reference proceedings, wherein the Industrial Court had granted application of the employer for closing down the establishment wherein the employee was working. It was also pointed out that after the Labour Court in the present case on remand had directed the reinstatement of employee, he was indeed reinstated in the year 2011 and he continued to work with the employer till the establishment was closed down in the year 2014. On this basis, it was contended that the impugned order passed by the Industrial Court did not deserve interference insofar as the question of back wages was concerned.

7. In respect of Writ Petition No. 413 of 2017 filed by the employer, it was contended that the Courts below ought not to have granted the relief of continuity in service in the absence of pleadings and evidence adduced by the employee. On this basis, it was contended that the orders passed by the Courts below to that extent were required to be set aside.

8. Having heard the learned counsel for the parties, it appears that the question of back wages has to be considered in the backdrop of the propositions that have been culled out by the Hon'ble Supreme Court in its judgment in the case of **Deepali Gundu Surwase .vs. Kranti Junior Adhyapak Mahavidyalaya** (supra). The said propositions are stated in paragraph nos. 38.1 to 38.7. Although it has been observed that grant of back wages should be a normal rule if termination of service is found to be wrongful, it is further laid down

that the Courts can take into consideration various factors while deciding the issue of back wages including nature of misconduct as well as the financial condition of the employer. It is laid down that since a negative fact is difficult to be proved, an employee cannot be asked to prove the negative about not having been gainfully employed during the pendency of the litigation and that if an averment or pleading is made on behalf of the employee with regard to the same, the burden is on the employer to adduce evidence to show that the employee was indeed gainfully employed during the period in question.

9. Thus, the first requirement is at least a pleading or statement by the employee and that he or she was not gainfully employed during the relevant period. In the present case, the employee admittedly has not made any such statement and there is no pleading on behalf of the employee in that regard. This, despite the fact that the matter stood remanded by order of this Court to the Labour Court on 05.01.2011. Even after the dispute was remanded to the Labour Court, the employee failed to make any such statement on affidavit or any pleadings by amendment or otherwise before the Labour Court. In such a situation, it could not be said that the Labour Court was justified in granting 50% back wages to the employee. Secondly, it has to be held that the Industrial Court was justified in setting aside the said direction given in favour of the employee. Although the learned counsel for the employee is justified in pointing out that the

Industrial Court committed an error in insisting that the employee should have produced positive evidence to prove that he was not in gainful employment, but at the same time, a perusal of the impugned order shows that the Industrial Court recorded the fact that the employee had nowhere pleaded that he was not in gainful employment. The said absence of pleading or statement is not disputed on behalf of the employee. In these circumstances, it cannot be said that the Industrial Court committed an error while passing the impugned order. Additionally, it has come on record that the establishment of the employer was closed down in the year 2014 and that an award in that regard had been passed by the Industrial Court itself. In this context, the learned counsel for the employer is justified in relying upon the judgment of this Court in the case of **M/s Haldyn Glass Limited .vs. Maharashtra General Kamgar Union** reported in **2014 (5) ALL MR 368** , wherein in the context of grant of back wages, this Court has held as follows:-

“73. From the analysis of the aforesaid precedents, it is clear that there is no straitjacket formula to determine issue relating to award of back wages or compensation. The emphasis now appears to be upon consideration of the totality of circumstances and a host of relevant considerations. Ultimately, in such matters, the Court has to adopt a pragmatic approach to the problems dogging industrial relations. The attempt should be to endeavour to arrive at some golden mean. Considerations like the conduct of the workmen, closure of the industry, financial position of the employer, the

circumstance that the workmen has contributed little or nothing at all for the period of unproductivity, the circumstance that there is no clear evidence as to the status of the workmen after dismissal from services, the wages drawn by the workmen whilst in service, reasonable career advancement prospects, nature of duties discharged by the workmen and possibility of gainful employment are all factors that need to go into the decision making process."

In view of the above position of law and its application to the facts of the present case, it becomes clear that the employee is not justified in claiming that the Industrial Court in the impugned order committed an error in setting aside the direction of grant of back wages.

10. As regards the challenge raised on behalf of the employer to the direction granting continuity of service to the employee, this Court finds that the two Courts below have taken into consideration relevant material to come to the conclusion that the employee deserved relief of reinstatement with continuity of service. The contention that such a pleading was not made on behalf of the employee, is not sustainable because the very complaint of the employee was that the employer had indulged in unfair labour practice by illegally terminating the service of the employee. The two Courts below have found concurrently that the termination of the service of the employee was not justified and, therefore, grant of relief of continuity of

service along with reinstatement cannot be said to be unjustified. Therefore, both the writ petitions filed by the employee as well as employer deserve to be dismissed. Accordingly Writ Petition Nos. 4667 of 2016 and 413 of 2017 are dismissed.

JUDGE

halwai