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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : **28.03.2019**

CORAM:

THE HONOURABLE MR.JUSTICE **N.KIRUBAKARAN**
AND

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

W.A. (MD) No.356 of 2019
and
CMP (MD) No.2977 of 2019

The Management,
Sree Meenakshi Mills,
Paravai, Madurai.

: Appellant/2nd Respondent

Vs.

1. P.Perumal : Respondent/Writ Petitioner

2. The Presiding Officer,
Labour Court, Madurai. : Respondent/1st Respondent

PRAYER: Writ Appeal is filed under Clause 15 of Letters Patent against the order dated 04.01.2019 passed in W.P.(MD) No.2186 of 2009.

Prayer in WP(MD). 2186/ 2009 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a writ of Certiorarified Mandamus, calling for the records of the first respondent in connection with the impugned award dated 22.12.2008 passed in I.D.No.65/1998 and quash the same so far as it has denied backwages and other monetary benefits payable to the petitioner for the period of non-employment and consequently direct the second respondent to pay the petitioner backwages and all other consequent benefits.

For Appellant : Mr.T.Ravichandran

For Respondents 1 : Mr.I.Pinaygash

JUDGMENT

(Judgment of the Court was delivered by **S.S.SUNDAR, J.**)



of the learned Single Judge partly allowing the Writ Petition.

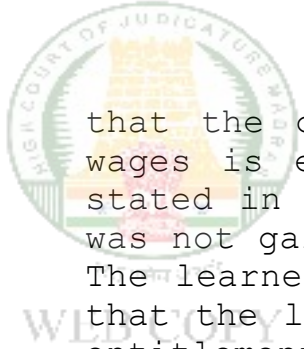
2.The brief facts that are necessary for the disposal of this appeal are as follows:

2.1.The appellant is running a Spinning Mill. The first respondent in this appeal, who is the writ petitioner in W.P.(MD) No.2186 of 2009, was working as a Watchman in the appellant mill. It is not in dispute that the first respondent joined in service in 1981 and was working for a long period. However, a charge memo was issued by the management to the first respondent. As per the charge memo, the first respondent who was supposed to watch the loading of bundles in a particular transport van permitted two more bundles than that was supposed to be loaded in the van. Since the first respondent failed to note the two yarn bundles enabling some third parties to smuggle out those two yarn bundles the responsibility was fixed on the first respondent who was the then Watchman of the appellant mill. After conducting domestic enquiry, the first respondent was dismissed from service by order dated 27.05.1997. The first respondent raised an industrial dispute which was taken on file in I.D.No.65 of 1998. The Labour Court by award dated 22.12.2008, came to the conclusion that the order of termination was bad. Though the Tribunal set aside the order of dismissal, it was observed that there was some negligence on the part of the first respondent. The Tribunal, assuming that the first respondent would have been gainfully employed elsewhere during the period of his non-employment, while directing reinstatement of the first respondent, denied back wages to the first respondent. It is this order of Tribunal that is challenged by the first respondent in the Writ Petition.

2.2.The learned Single Judge after going through the facts noticed that the Tribunal was under the erroneous impression that the first respondent would serve for some more years. It is admitted that the first respondent reached the age of superannuation on 12.10.2008 and the award of the labour Court came to be passed subsequently on 22.12.2008. However, the fact that the first respondent workman retired even before the award of the Tribunal was neither noticed by the Tribunal nor brought to the notice of the Tribunal. The learned Judge also found that there is no basis for Tribunal's conclusion that the employee must have been gainfully employed. Though the order of reinstatement was not feasible of compliance, the learned Single Judge, however, held that the first respondent is entitled to some benefit as *ex gratia*. The learned Single Judge therefore directed the appellant management to pay 25% of the back wages as *ex gratia* to the first respondent. Aggrieved by the direction to pay 25% of the back wages as *ex gratia* to the first respondent, the above appeal has been filed in the management.

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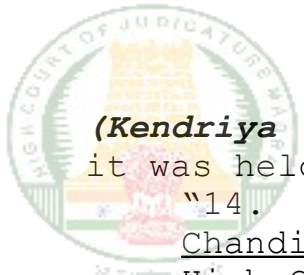
3.The learned Counsel appearing for the appellant submitted



that the order directing the management to pay 25% of the back wages is erroneous inasmuch as the first respondent has neither stated in the petition nor produced any material to show that he was not gainfully employed, after he was discharged from service. The learned Counsel appearing for the appellant further submitted that the learned Single Judge has failed to consider the scope of entitlement of back wages especially in the case where the allegation against the first respondent are proved. The learned Counsel appearing for the appellant further pointed out that the learned Single Judge has passed the order based on sympathy and he further submitted that the first respondent does not deserve any sympathy having regard to the misconduct of the first respondent in the course of employment as a Watchman.

4. The learned Counsel relied upon the award of the Labour Court and submitted that the first respondent has not pleaded that he was not gainfully employed.

5. A reading of the entire award of the Labour Court would show that the order of termination passed against the first respondent is by way of victimisation. The charge against the first respondent that he allowed illegal transportation of two bundles of yarn without proper document, unauthorisedly is based on the statement of two employees of the mill at the time of enquiry. It is surprising to note that the evidence of the witnesses who were examined on behalf of the management would disclose that they are also equally responsible to prevent such unauthorised hijacking of the products manufactured by the appellant mill. Despite an admission by the witnesses, no action has been taken against those employees who allegedly witnessed the incident and the inaction of the first respondent as Watchman of the appellant mill alone was complained. No explanation is sought for by the management and no action was taken or initiated against those who have admitted their guilty at least to the extent that they had not prevented the materials to go out of the factory unauthorisedly despite they knew that the bundles were removed unauthorisedly. Hence, the Labour Court has given proper reason to hold that the order of termination is unsustainable and that the enquiry was totally in derogation and violation of fundamental principle of law. Having regard to the specific finding of the Labour Court, the Labour Court ought to have granted monetary benefits instead of reinstatement. Only on the assumption that the first respondent could have been gainfully employed, back wages was denied to the first respondent. The order of the Tribunal was not challenged by the appellant. In such circumstances, the learned Single Judge was right in holding that some indulgence should be shown to the first respondent who is out of employment for more than twelve years. The learned Counsel appearing for the appellant relied upon the same judgment which he cited before the learned Single Judge namely **C.D.J., 2005 SC 157**



(**Kendriya Vidyalaya Sangathan and another v. S.C.Sharma**) wherein it was held as follows:

"14. In P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar this Court found fault with the High Court in setting aside the award of the Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus:

"The Labour Court being the final Court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect."

Again at paragraph 12, this Court observed:

"Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety."

15. The position was reiterated in Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Anr. Indian Railway Construction Co. Ltd. v. Ajay Kumar and M.P. State Electricity Board v. Jarina Bee (Smt.) .

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

6. It is to be seen that in the judgment of Supreme Court in **P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar [(2001) 2 SCC 54]** the Tribunal awarded back wages restricting to 60%. However, the High Court directed payment of full back wages. The Hon'ble Supreme Court in the factual context held that payment of back wages is discretionary and no straight jacket formula can be evolved. Similarly, in **Hindustan Motors Ltd., v. Tapan Kumar Bhattacharya and another** reported in **(2002) 6 SCC 41**, the Hon'ble Supreme Court after finding that there was no pleading or evidence



whatsoever on the aspect whether the respondent was employed elsewhere during the interregnum awarded 50% of back wages. Para 16 of the said judgment is extracted below for convenience:

"16. As already noted, there was no application of mind to the question of back wages by the Labour Court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the Labour Court or High Court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to supra in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long drawn litigation, it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatement. The amount already paid as wages or subsistence allowance during the pendency of the various proceedings shall be deducted from the back wages now directed to be paid. The appellant will calculate the amount of back wages as directed herein and pay the same to the respondent within three months, failing which the amount will carry interest at the rate of 9% per annum. The award of the Labour Court which has been confirmed by the Division Bench of the High Court stands modified to this extent. The appeal is disposed of on the above terms. There will be no order as to costs.

7. The Hon'ble Supreme Court in **Kendriya Vidyalaya Sangathan** has quoted **Hindustan Motors Ltd** and approved. However, the Hon'ble Supreme Court in **Hindustan Motors** case has held that the relief of back wages is discretionary and even in a case when there is no plea or material regarding non-employment 50% back wages can be directed.

8. In the peculiar circumstances, where the employee has attained superannuation when the tribunal passed the award, granting 25% of back wages by learned Single Judge is appropriate especially when termination of service was found illegal. Hence, this Court approve the view of learned Single Judge. As a result, we find no merit in this appeal and hence, this appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Crl. Side)

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To

The Presiding Officer,
Labour Court, Madurai.

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+1 CC to M/s.T.RAVICHANDRAN, Advocate (SR-57673[F] dated
29/03/2019)

**ORDER MADE IN
W.A. (MD) No.356 of 2019
28.03.2019**

srm

AE/(19.08.2019) 6P 3C