

## IN THE HIGH COURT OF JUDICATURE AT MADRAS

|                      |           |
|----------------------|-----------|
| Judgment Reserved on | 11/2/2010 |
| Pronounced on        | 18/2/2010 |

CORAM

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE  
AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Appeal No.1946 of 2019

The Management of Addison & Company Limited  
rep. By its Company Secretary  
Mr.M.P.Muthukumaraswamy  
4, 8 and 19 Smith Road  
Chennai 600 002.

..Appellant/Petitioner

Vs.

1. The Presiding Officer  
II Additional Labour Court  
Chennai 600 001.

2. M. Abdul Slam

..Respondents/Respondents

Prayer:- Appeal filed under Clause 15 of the Letters  
Patent against the order dated 14/3/2019 made in W.P.No.29975  
of 2017.

WP.No.29975 of 2017 : Writ Petitions filed under Article 226  
of the Constitution of India praying for a writ of Certiorari  
calling for records connected with I.D.No.230 of 1998 and quash  
the award dated 31.08.2017 passed by the 1<sup>st</sup> respondent i.e., The  
Presiding Officer, II Additional Labour Court, Chennai.

For appellant

...

Ms.Safura Amin

for Mr.S.Ramasubramaniam

For respondents

...

R.1 - Labour Court

Mr.Balan Haridas for R.2

JUDGMENT

SUBRAMONIUM PRASAD, J

The writ petitioner is the appellant in the instant writ  
appeal. Challenge is to the order, dated 14/3/2019, passed in  
W.P.No.29975 of 2017. The second respondent was working as a  
Typist/Clerk with the appellant. The second respondent raised  
an Industrial Dispute in I.D.No.230 of 1998 before the Second  
Additional Labour Court, Chennai, stating that he received a  
letter, dated 11/11/1997, served on him on 19/11/1997 stating

that the resignation tendered by him by letter, dated 3/9/1997 has been accepted and he is being relieved from service. The second respondent prayed for reinstatement in service. The second respondent further claimed that he had withdrawn the resignation immediately. The Labour Court, by an award, dated 23/2/2006 came to a conclusion that the second respondent had voluntarily resigned from service and therefore, there was no ground to claim reinstatement. The said award was challenged by the second respondent workman by filing W.P.No.29975 of 2017. A learned Single Judge of this Court upheld the award stating that the resignation was voluntary and the subsequent withdrawal of the second respondent cannot be believed. The matter was taken up in Writ Appeal No.2631 of 2012. A Hon'ble Division Bench of this Court, set aside the judgment of the Labour Court, stating that the letter, dated 3/9/1997 which is the resignation letter, cannot be relied on and the same cannot be treated as a request for voluntary retirement on medical grounds or as a letter of resignation. The learned Division Bench, remanded the matter to the labour Court to be heard by the labour Court afresh by treating a case as one for termination of service and decide the same on merits. The relevant portion of the learned Division Bench reads as under:-

"Therefore, we are of the firm view that the letter dated 3/9/1997 cannot be relied on, as the same cannot be treated either as request for voluntary retirement on medical grounds or as the letter of resignation. Consequently, the entire matter needs to be decided by the Labour Court afresh by treating the case as the one of termination of service and decide the same on merits and in accordance with law."

A review was filed against the said order of the Division Bench which was dismissed by an order, dated 23/9/2016. The judgment of the Division Bench has therefore, attained finality.

2. On remand, a fresh affidavit was filed by the second respondent. Fresh evidence was let in. The Labour Court, by an award, dated 31/8/2017, came to a conclusion that even assuming that resignation had been given voluntarily and the same had been accepted, it has not been accepted by the competent authority and hence the acceptance is not a valid acceptance. The Labour Court, disbelieved the letter of resignation and awarded full backwages to the second respondent.

3. This order was challenged by the Management Appellant by filing W.P.No.29975 of 2017. The learned Single Judge

observed that in view of the fact that the order of the Division Bench had attained finality and the only question that was to be answered was as to whether the termination was in accordance with law or not. It was observed by the learned Single Judge that the submissions made before the learned Single Judge turned entirely on the quantification of the backwages and therefore, it was not open to the appellant to argue that the writ petitioner had voluntarily retired from the organization. The learned Single Judge had observed that in the affidavit dated 29/12/2017, filed by the second respondent, before the labour Court after remand, at paragraph No.10, the second respondent had specifically averred that he had been without employment for the entire period from the date of termination till date and is living without any employment. The Management did not chose to file any document of the labour Court, and since the Management had not let in any evidence on the aspect of backwages, but the learned Single Judge dismissed the writ petition and confirmed the order awarding full backwages. The order of the learned Single Judge is under challenge before the Division Bench.

4. Heard Ms.Safura Amin learned counsel for the appellant and Mr.Balan Haridas, learned counsel for the second respondent.

5. Ms.Safura Amin, learned counsel appearing for the Management vehemently contended that cessation was voluntary and that the second respondent had chosen to resign from the employment on the ground of his ill health. She would rely on the signature made in the letter of resignation, copy of the letter, dated 4/9/1997 sent by the second respondent and the signatures in the petition filed under Section 2 A of the Industrial Disputes Act to show that it was the second respondent only who had signed the letter of resignation and that therefore, the finding of the Labour Court that resignation letter is not believable on account of variation of signature is perverse. Learned counsel for the appellant would also vehemently urge that it cannot be believed that the second respondent was without employment for eighteen years and was sustaining his family.

6. On the other hand, Mr.Balan Haridass would state that there was no question of resignation on the ground of ill heath as the same is contrary to the Standing Order 21 of the appellant Company. He would also state that the issue regarding resignation has been concluded by the findings of the learned Division Bench which had attained finality and on the only issue

that was to be considered was whether there was cessation of work on the ground of termination. He would also contend that despite categorical statement made in the affidavit filed in the labour Court and in the writ Court that the second respondent was not gainfully employed elsewhere and in the view of the fact that this averment has not been controverted by letting in evidence, the second respondent is entitled to full backwages.

7. We have gone through the records. As contended by Mr. Balan Haridas, in view of the finding of the learned Division Bench in its order, dated 25/7/2014, made in W.A.No.2631 of 2012, quoted supra, the issue regarding voluntary resignation as a ground for cessation of work is completely closed and cannot be reopened. In fact, as noted by the learned Single Judge, the entire discussion of the learned Single Judge is only on the question of payment of backwages. The second respondent in the affidavit filed in the labour Court, after remand has made the following averments:-

"10. I submit that from the date of my termination, I am without employment. I am the only earning member in my family and my entire family is virtually starving. My wife due to poverty has become very sick and both her kidney have failed. But for the illegal termination, I would have worked and earned my wages and retired on 12/4/2015. From the date of illegal termination, viz., 19/11/1997 to 12/4/2015, I am without employment and I am living in abject poverty."

No material has been let in by the appellant to disprove the same. In fact, even in the writ Court, the second respondent in its counter affidavit has specifically stated that he was without any employment for the entire period. Paragraph 9 reads as under:-

"I state that I was arbitrarily denied employment from 19/11/1997. I state that I am suffering without any employment for the last more than 21 years. My termination is totally without any basis. My termination is entirely due to the unilateral action of the Management. Therefore, the Labour Court as I have already attained the age of superannuation has rightly directed the petitioner Management to pay me full back wages from 19/11/1997 till I attained the age of superannuation with continuity of service and all other attendant benefits. I have suffered untold suffering due to the illegal act of denying employment. I humbly

submit that the same does not call for any interference. Hence I respectfully submit that the writ petition may be dismissed."

There is no material to show that the above mentioned averment was denied and no material has been adduced by the appellant to show that second respondent was gainfully employed elsewhere.

8. In view of the above, the only issue which requires consideration is as to whether the order of the labour Court granting 100% backwages as affirmed by the learned Single Judge requires interference by this Court in exercise of its appellate jurisdiction. We have also perused the cross-examination of the second respondent. Nothing has been elicited from second respondent and in fact, there is not even a suggestion that the second respondent was gainfully employed elsewhere which would dis-entitle him with full backwages.

9. There is no straight jacket formula for awarding the relief of backwages. If a person has been wrongfully terminated and prevented to work and he does not get any other employment, then normal rule is payment of full backwages. Unless there are circumstances which would compel the labour Court to deviate from the normal rule. The idea of reinstatement in case of wrongful/illegal termination is to restore an employee to the position which he held before dismissal. This implies that the Courts must ensure that employee must be restored to the same position and this can be done only if the internal backwages are paid provided the employee was not gainfully employed elsewhere whereby he was able to sustain himself and was not really affected monetarily by the termination of service. Courts never intended to give double advantage to an employee which would enable him to earn from two sources. The learned Single Judge, has placed reliance on the judgment of the Hon'ble Supreme Court in DEEPALI GUNDU SURWASE V. KRANTI JUNIOR ADHYAPAK MAHAVIDYALAYA, (2013) 10 SCC 324, wherein the Hon'ble Supreme Court has laid down the parameters of granting backwages. Paragraph 22 and 38 which are relevant read as under:-

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which

has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

38. The propositions which can be culled out from the aforementioned judgments are:

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 [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53].

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal [(2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] 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 : 1979 SCC (L&S) 53] , [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] 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.

10. The judgment of the Hon'ble Supreme Court made in DEEPALI GUNDU SURWASE V. KRANTI JUNIOR ADHYAPAK MAHAVIDYALAYA, (2013) 10 SCC 324, has been quoted with approval in a subsequent judgment of the Hon'ble Supreme Court in JASMER SINGH Vs. STATE OF HARYANA AND ANOTHER (2015) 4 SUPREME COURT CASES - 458.

11. In view of the fact that there has been a categorical statement by the second respondent that he was not gainfully employed and in view of the fact that the appellant has not controverted, the above statement and has not let any kind of evidence, to rebut the same, the judgment of the learned Single Judge ordering reinstatement with full backwages, does not warrant any interference.

12. In the result, Writ Appeal is dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar(C.S.III)

/True Copy/

Sub Assistant Registrar

To

The Presiding Officer,  
II Additional Labour Court, Chennai 600 001.

+1 cc to M/s.S.Balasubramaniam & Associates, Sr.No.13432  
+1 cc to M/s.Balan Haridas, Advocate Sr.No.13658

AKM/05.03.2020/9P- 4C /

order made in  
W.A.No.1946 of 2019

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