

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

W.P.A. No. 5958 (W) of 2012
with
CAN 1 of 2014
(Old CAN 965 of 2014)

The Ganges Manufacturing Company Limited & Anr.
v.
The State of West Bengal & Ors.

For the petitioner : Mr. Partha Bhanja Chowdhury,
Mr. Rabi Kumar Dubey.

For the respondent No. 3 : Mr. Balaram Patra.

Hearing concluded on : 04.01.2021
Judgment on : 28.01.2021

Shampa Sarkar, J.:-

1. Being aggrieved by the award dated August 29, 2011 passed by the learned Judge, First Labour Court, West Bengal at Kolkata, in Case No. 02 of 2000, the employer-company and one its officers have preferred this writ petition under Article 226 of the Constitution of India. By the said award, the court below had, inter alia, held that the service of the applicant, was terminated illegally by the Company and the workman who is the respondent no.3 herein, was entitled to get back his service with full back wages and other consequential benefits. The company had been further directed to reinstate the respondent no.3 with immediate effect and to pay him the full back wages from the date of termination till the actual date of reinstatement.

2. The facts leading to the filing of the writ petition are that the respondent no. 3 while working as a pair spinner had been allotted work in the 'B' Shift. On December 13, 1998, at about 8.30 p.m., the respondent no. 3 was found working in an inefficient manner. When the superintending shift assistant questioned the respondent no. 3, he shouted back at his superior in abusive language and threatened to kill him by pointing a knife. A charge-sheet was issued by the competent authority of the petitioner no. 1 dated December 14, 1998 and the respondent no. 3 was also suspended on and from the said date. The respondent no. 3 submitted his objection to the said charge-sheet. A domestic enquiry was initiated by appointment of an Enquiry Officer. Upon completion of the domestic enquiry, the respondent no. 3 was found guilty and was dismissed from service by a letter dated October 28, 1999. The respondent no. 3 raised an industrial dispute. The respondent no. 3 challenged the domestic enquiry as also the order of dismissal before the Deputy Labour Commissioner, Government of West Bengal, Chandannagar which subsequently led to filing of a case under Section 10(1)(b) of the Industrial Disputes Act, 1947, before the learned First Labour Court, New Secretariat Building at Kolkata being case No. 2 of 2000.

3. The petitioner no. 1 contested the proceeding. By an order dated May 5, 2008 the learned Judge, First Labour Court set aside the domestic enquiry on the ground of violation of the principles of natural justice. It was held that sufficient evidence had not come forth to charge the employee with the allegations of riotous or disorderly behaviour, habitual negligence and frequent repetition of such act or omission for which fine could be imposed

as a punishment. The petitioner no. 1 was directed to reinstate the respondent no. 2 with full back wages from the date of termination till the date of reinstatement with consequential benefits. It was further held that as the employer had not pleaded that the respondent no. 3 was gainfully employed before any other concern since termination of service and as no documents had been put forward by the employer with regard to allotment of a shop to the applicant from where he was selling 'Chatu' and 'Bhujiya', the contention of the petitioners that the respondent No.3 gainfully employed during the intervening period was baseless. There was no evidence of any income of the respondent no. 3 from any other source after his termination from service. The learned Court held that under such circumstances the respondent no. 3 was entitled to full back wages.

4. The petitioners preferred the writ petition challenging the above award of the First Labour Court on various grounds, inter alia, non-consideration of both oral and documentary evidence with regard to past conduct of the respondent no. 3, own admission of the respondent no. 3 of the fact that there was misunderstanding and altercation on the day of the incident, the Court having travelled beyond the pleading and the evidence while allowing full back wages. It was submitted that there was no pleading of the workmen of not being employed during the interim period in the petition filed by the respondent no. 3 and as such the petitioners did not get an opportunity to deal with the issue and lead evidence. It was the contention of the petitioners that an opportunity should have been given to the petitioners to produce documents showing gainful employment of the

respondent No.3 by the learned Court, and the learned Court erred in disbelieving such contention of the petitioners regarding allotment of a shop in the mill premises from which a 'Chatu', 'Bhujiya' and 'Neem Sticks' business was being run by the respondent No.3 which was subsequently converted to a bicycle repairing shop.

5. The petitioners contented that the award was erroneous and suffered from serious irregularity apart from being unreasonable in so far as full back wages was granted.

6. By an order dated August 30, 2012 the application under Section 17B of the Industrial Disputes Act was disposed of by this Court with a direction upon the petitioners to pay wages at the same rate at which it was last drawn by the respondent No.3 at the time of termination. Such payment was directed to be made month by month within the 7th of each succeeding month payable on and from August 20, 2012. The arrears were directed to be paid in two equal monthly instalments, independent of the monthly payments. On the above conditions the award impugned to the writ petition was stayed.

7. The respondent no. 3 reached the age of superannuation and retired in 2013, i.e., during the pendency of the writ petition and while the order of stay of operation of the award was subsisting. It is submitted on behalf of the petitioners by Mr. Bhanja Chowdhury, that the salary and all consequential benefits as also retiral benefits were paid to the respondent no. 3 but, the petitioners were aggrieved by the award of back wages which was not paid in view of the stay. He submitted that the award was obtained

by fraud, inasmuch as, the respondent no. 3 had suppressed the fact that he was running a business from the mill premises after his termination. According to Mr. Bhanja Chowdhury, the onus was on the respondent no. 3 to plead unemployment in order to claim back wages. Only when the employee makes a pleading to that effect in the petition and proves the same, the onus would shift upon the employer to deny the same and lead evidence to that effect. He urged that the documents showing employment of the respondent no. 3 should be allowed to be placed in evidence as the award of back wages was obtained by fraud. The learned Court below erred in awarding back wages on a presumption that such pleading was apparent from the records and the employer had not filed any document in support of their contention.

8. Mr. Bhanja Chowdhury submitted that as the petitioner had suppressed the factum of allotment of a shop in the mill premises, the award, insofar as it related to granting back wages to the respondent no. 3 was obtained by fraud and the same was a nullity. He submitted that the petitioners ought to be given an opportunity to adduce evidence and produce documents with regard to gainful employment of the petitioner after his termination from service. He relied on the following decisions, namely **North Eastern Railway Administration, Gorakhpur v. Bhagawan Das** reported in **(2008) 8 SCC 551**, **S.P. Chengal Varaya Naidu v. Jagannath & ors.** reported in **(1994) 1 SCC 1**, **Sube Singh v. State of Haryana & ors.** reported in **(2002) 10 SCC 121** and **A.V. Papayya Sastry & ors. v. Govt. of A.P. & ors.** reported in **(2007) 4 SCC 221**.

9. Mr. Bhanja Chowdhury next submitted that in the decision of **U.P. State Brassware Corpn. Ltd. & anr. v. Uday Narain Pandey** reported in **(2006) 1 SCC 479**, it had been held that initial burden was on the employee to show that he was not gainfully employed during the period for which back wages had been claimed. He also relied on the decision of **Novartis India Limited v. State of West Bengal & ors.** reported in **(2009) 3 SCC 124**, in support of his contention that back wages could not be claimed as a matter of right. These wages should ordinarily be granted keeping in view the principle of awarding damages. Even if some income was derived by the employee during the interregnum period, the same should be taken into account for purpose of consideration of grant of entire back wages. Back wages could not be granted automatically upon setting aside an order of termination on the premises that the burden to show that the workman was not gainfully employed during the interregnum period was on the employer. The last decision on this point relied upon by Mr. Bhanja Chowdhury was in the matter of **Jagbir Singh v. Haryana State Agriculture Marketing Board and anr.** reported in **(2009) 15 SCC 327**.

10. Mr. Bhanja Chowdhury contended that the question in this case as to whether it was incumbent upon the respondent no. 3 to plead that he was not gainfully employed was a question of law and the petitioners were entitled to raise this point of law before the High Court and advance argument on the said question. Mr. Bhanja Chowdhury referred to the decisions of **Indore Malwa United Mills Ltd. v. CIT** reported in **AIR 1966**

SC 1466 and **Bhanwar Lal v. T.K.A. Abdul Karim** reported in **1993 Supp (1) SCC 626**.

11. Mr. Patra, learned advocate appearing on behalf of the respondent no. 3 employee submitted that the factum of unemployment was pleaded in the prayer of the petition. He pointed to the relevant paragraphs of the award to assert before this Court that the learned labour court had considered the relevant judgments on this point. He submitted that in the written statement, the employer did not plead employment of the respondent no. 3 in the interregnum period. He submitted that the learned labour court proceeded to do substantial justice and did not give any importance to technicalities. According to him, a quasi judicial authority could not be bound by technicalities. He referred to the evidence-in-chief of the respondent no. 3, where the respondent no. 3 deposed that a plot was allotted in the name of his wife to open a shop. Cross-examination on this point was also done and the learned labour court considered the evidence and the law on the issue and granted full back wages. According to him, new documents placed for the first time in the writ petition could not be taken into consideration. Judicial review of the award was not permissible in this case as there was no defect in the decision making process and the learned labour court had dealt with the evidence and the law and had made the award. He submitted that as the documents relied upon by the petitioners in this writ petition were not with the workman, question of committing fraud did not arise. Mr. Patra relied on the decisions, namely, **Rajinder Kumar Kindra v. Delhi Administration through Secretary**

(Labour) & ors. reported in **1986 LAB I.C. 374, Deepali Gundu Surwase v. Kranti Junior Adhyapak & ors.** reported in **2013 (139) FLR 541** and **Bhuvesh Kumar Dwivedi v. Hindalco Industries Limited** reported in **(2014) 11 SCC 85.**

12. Heard the parties. Admittedly, the petition filed before the learned Labour Court did not contain any pleading that the respondent no. 3 was not gainfully employed in any other concern and did not have any income from other sources during the interregnum period. The respondent no. 3 mentioned in his prayer that he was entitled to arrear wages for the period as he had been kept out of employment illegally. For convenience the prayers are quoted below:

"i. Compelling the Company to reinstate the workman immediately in service treating the period of his out of employment as on duty with all service benefits;

ii. Directing the Company to pay all arrear wages for the period he has been kept unemployed illegally i.e. from the date of dismissal to the date of reinstatement;"

13. In the written statement the petitioners dealt with and denied and disputed each and all statements and allegations made by the respondent no. 3 in his petition filed before the learned Court. However as there was no specific pleading with regard to the petitioner being unemployed during the interregnum period, the petitioners did not aver in their written statement that the respondent no. 3 was in gainful employment or had income from other sources during the interregnum period. By order dated May 5, 2008 the learned Labour Court framed the following issues:

"1) Whether the domestic enquiry is valid and whether the result of the domestic enquiry is binding upon the applicant?"

2) Is the order of dismissal valid and if not, what relief the appellant is entitled to?"

14. Issue no. 1, was decided against the petitioners by the learned Court inter alia, holding that the domestic enquiry against the respondent no. 3 was not validly held and the procedure adopted by the Enquiry Officer was in violation of the principles of natural justice. The entire enquiry proceeding was set aside and the learned Court fixed June 10, 2008 for hearing of the case on merits. In the examination-in-chief one Ashok Kumar Tewari, the Senior Assistant of Spinning and Winding Department of the Company deposed that the respondent no. 3 was running a business of 'Chatu' and 'Bhujiya' in a shop allotted by the Company. In his cross-examination, the said witness however stated that no documents had been filed by the company to show that the shop had been allotted to the respondent no. 3.

15. In the examination-in-chief of the respondent no. 3 held on June 2, 2011, he stated that he had not worked for gain in any concern; Cross-examination was also conducted on this issue. Yet, I do not find from the order dated May 5, 2008 that any issue had been framed by the learned Labour Court on the question whether the respondent no. 3 was entitled to full back wages during the interregnum period. The respondent no. 3 had admittedly not pleaded such fact, although, the law mandates that the initial onus is on the employee to plead and prove that he was not gainfully employed or did not have any income from any other source. The prayer was

not a part of the pleading. Moreover, the respondent no.3 prayed for a direction for payment of arrear wages for the period he was kept unemployed illegally by the Company, but this cannot be treated as a pleading with regard to the fact that the employee was not gainfully employed and did not have any income during the interregnum period. Thus the respondent no. 3 did not discharge his onus. Moreover, as there was no pleading, the petitioners did not get a chance to deal with this aspect and make specific averment to the effect that the respondent no. 3 was employed and had some income during the said interregnum period. The company generally denied that the respondent no. 3 was not entitled to the prayers as made in the petition.

16. The learned Court below dealt with the claim of full back wages and came to the finding that the prayer for back wages was sufficient to discharge the initial onus by the employee. The learned Court below further held that it was for the employer to plead and prove that the employee was gainfully employed. The learned Court held that the fact that the witnesses for the company had stated that a shop was allotted to the respondent no. 3 from which he was selling 'Chatu' and 'Bhujia' but failed to file documents in support of such contention was sufficient for the Court to hold that the contention was baseless and accordingly the First Labour Court disbelieved the petitioners and granted full back wages.

17. With regard to the law on this question the decision of the Apex Court in **Bhagawan Das** (supra) is referred to, wherein, the Apex Court held that if the documents on record were found to be correct and were likely to

affect the core issue, then a decree obtained by concealing such materials fact by playing fraud on the Court would be a nullity and non-est in the eye of law. In **S.P. Chengal Varaya Naidu** (supra) the Apex Court defined fraud as an act of deliberate deception with the design of securing something by taking unfair advantage of another. A litigant, who approached the court, was bound to produce all the documents executed by him which were relevant to the litigation. If any vital document or information was withheld from the Court, then he would be guilty of playing fraud on the Court as well as on the opponent. In the matter of **A.V. Papayya Sastry** (supra) the Apex Court held that it was a settled proposition of law that a judgment and decree or order obtained by fraud on the Court was a nullity. It could be challenged in any Court at any point of time in appeal or revision or writ or even collateral proceedings. Mr. Bhanja Chowdhury has drawn the attention of this Court to several documents annexed to the writ petition showing applications written by the respondent no. 3 to the officials of the Company for permission to run his shop in the mill market. A site plan has also annexed to the writ petition which depicted that some construction had been made by one Sabitri Devi, allegedly the daughter of respondent no. 3 who also sought permission to run the said shop. Photographs have been annexed which would show that the petitioner was running a cycle repairing shop. These documents have been produced before this Court in the writ proceedings for the first time. However, perusal of these documents reveal that the learned Labour Court did not have an opportunity to deal with these evidence with regard to the question whether the respondent no. 3 was gainfully employed or not during the interregnum period although, the

said documents were vital for a decision on the issue of granting full back wages. These facts were suppressed by respondent No.3. Whether these documents were enough for the learned Court to arrive at a conclusion that the same did not reflect that the respondent No.3 had an income during the period is a different matter but, these documents were relevant in disposal of the proceedings.

18. In the decision of **Indore Malwa United Mills Ltd.** (supra) the Apex Court held that even points not argued before the Tribunal could be raised for the first time in the High Court. Thus, this Court cannot refuse to look into documents annexed to the writ petition by the petitioners in support of their contention that the respondent no. 3 was gainfully employed during the interregnum period.

19. In the decision of **Jagbir Singh** (supra) the Apex Court held as follows:

“7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

8. In U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey¹, the question for consideration before this Court was whether direction to pay back wages consequent upon a declaration that a workman has been retrenched in violation of the provisions of the Section 6-N of the U.P. Industrial Disputes Act, 1947 (equivalent to Section 25F of the Act, 1947) as a rule was proper exercise of discretion. This Court considered a large number of cases and observed thus :

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45. The Court, therefore, emphasised that while granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence.'

9. This Court in the case of *Uttaranchal Forest Development Corpn. V. M.C. Joshi*² held that relief of reinstatement with full back wages were not being granted automatically only because it would be lawful to do so and several factors have to be considered, few of them being as to whether appointment of the workman had been made in terms of statute/rules and the delay in raising the industrial dispute. This Court granted compensation instead of reinstatement although there was violation of Section 6-N of the U.P. Industrial Disputes Act, 1947 (equivalent to Section 25F) of the Act, 1947. This is what this Court said:"

20. In the decision of **Novartis India Limited** (supra) the Apex Court held as follows:

"37. Back wages in a situation of this nature had to be granted to respondents by way of compensation. If the principle of grant of compensation in a case of this nature is to be applied, indisputably having regard to the fact situation obtaining herein, namely, that they were doing a specialized job and were to reach their age of superannuation within a few years, grant of back wages was the only relief which could have been granted. It was furthermore not expected that they would get an alternative employment as they were superannuated. Burden of proof was undoubtedly upon the workmen. The said burden, however, was a negative one. Once they discharged their burden by deposing before the Tribunal, it shifted to the employer to show that their contention that they had not been employed, was incorrect. No witness was examined on behalf of the employer. Even there was no pleading in that behalf."

21. In the decision of **Uday Narain Pandey** (supra), the Apex Court held as follows:

"61. It is not in dispute that the Respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

62. In Kendriya Vidyalaya Sangathan (supra), this Court held:

'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'."

22. In the decision of **Deepali Gundu Surwase** (supra), the Apex Court culled out the proposition of law with regard to payment of back wages and burden of proof on the employee. The relevant points are quoted below:

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

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

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."

23. Admittedly, the learned Court did not frame any issue as to whether the respondent no. 3 was entitled to full back wages, not having been employed in the interregnum period. The learned Labour Court proceeded on the basis that the respondent no. 3 had discharged his burden by praying for arrear salary during the period he was kept out of employment. This finding of the learned Court is erroneous and contrary to the law settled by the afore-mentioned decisions. The learned Labour Court proceeded on the basis that the employer should have produced documents to prove that the petitioner was gainfully employed during the interregnum period as if the initial burden was on the employer. This point was neither urged in the pleading by the respondent No.3 nor was there any occasion for the employer to lead evidence on this issue.

24. The award is set aside to the extent of grant of full back wages as directed by the learned First Labour Court. The matter is remanded back to the learned Labour Court for a decision only on the point of payment of full back wages. A separate issue shall be framed by the learned First Labour Court and the parties will be allowed to adduce evidence both oral and documentary in support of their claims and counter claims and there after the learned First Labour Court will decide this issue independently, based on the evidence as would be led before him. It is made clear that this Court

has not expressed any opinion either on the evidentiary value of the documents or on the merits of the claims and counter claims of the parties in this regard. The learned First Labour Court is directed to pass an order on merit accordingly, within two months from the date of communication of this order.

25. The writ petition and connected application are disposed of accordingly.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(SHAMPA SARKAR, J.)