

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

WRIT PETITION NO.5624 OF 2009

Ramesh Yeshwantrao Ghatol, aged 36
years, resident of Mahajanpura,
Amravati, tahsil and district Amravati. **Petitioner.**

:: VERSUS ::

1. Jeevan Jyoti Gramin Shikshan and
Samaj Sudhar Samiti, through its
President Shri Hasan Sardarkhan
Pathan, Hanuman Nagar, Amravati
Tahsil and district Amravati.

2. Jivan Jyoti Marathi Primary School,
through its Head Mistress Smt.
Sangita Sharma at Hanuman Nagar,
Amravati, tahsil and district Amravati. **Respondents.**

=====

None for the petitioner.
None for respondents.
=====

CORAM : **VM.DESHPANDE, J.**
DATE : **FEBRUARY 12, 2021**

ORAL JUDGMENT

1. This writ petition is directed against judgment and
order dated 10.7.2009 passed by learned Presiding Officer, School
Tribunal in Appeal No.5/2004 to the extent it denies back wages to
the petitioner.

.....2/-

2

2. This writ petition was listed for admission on 14.1.2010 and on the very said day Rule was given and the petition was admitted for final hearing. Office note shows that respondents were duly served in the year 2010 itself, however they did not appear nor they were represented by any advocate.

Learned counsel for the petitioner was also found to be absent on last couple of dates when this writ petition was taken up for final hearing. Today also, when this writ petition was called out for final hearing, learned counsel for the petitioner chose not to present before the Court.

3. I have gone through copy of the writ petition along with accompanying annexures and the impugned order. Looking to controversy involved in this writ petition, I am of view that the writ petition can be decided even in absence of learned counsel for the petitioner.

4. On 12.7.2000, the petitioner was appointed as Assistant Primary Teacher by respondent No.1 in respondent No.2 school. The approval was given to his appointment by the

3

Education Officer. On 29.12.2003, services of the petitioner were orally terminated. He, therefore, filed an appeal under Section 9(1)(a) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, “the said Act”) before the School Tribunal at Amravati. The said appeal was registered as Appeal No.5/2004. The appeal was dismissed vide judgment dated 8.1.2008 by holding that the appeal filed by the petitioner is not maintainable.

5. The petitioner, therefore, approached before this Court by filing Writ Petition No.722/2008 and on 9.2.2009 this Court allowed the writ petition filed by the petitioner holding that the School Tribunal is having jurisdiction and remitted the matter back to the Tribunal to decide it afresh.

6. After the remand, the Tribunal decided the appeal afresh, after hearing parties to the appeal, vide judgment dated 10.7.2009. The Tribunal recorded a finding that the appointment of the petitioner was made as per provisions under the said Act and Rules thereunder. Also, the Tribunal recorded a specific

4

finding that the appointment of the petitioner was approved by the Education Officer. To issue No.4, as formulated by the Tribunal, the Tribunal recorded a specific finding in favour of the petitioner that the petitioner's services were illegally terminated with effect from 26.12.2003. The Tribunal held that termination of services of the petitioner from the post of Primary Teacher of respondent No.2 school with effect from 26.12.2003 was declared as illegal and void and the said was quashed and set aside. Respondents were directed to reinstate the petitioner within a period of 30 days. The Tribunal also directed respondents to record absence of the petitioner from the date of termination till date of reinstatement in service-book of the petitioner, as a period with continuity in service.

7. Insofar as back wages are concerned, discussion in the Tribunal's order is in issue No.5. In the body of the judgment, regarding issue No.5, it is found that the order of termination is liable to be quashed and set aside and the petitioner is entitled for reinstatement and benefit of continuity of service. For denying back wages, the Tribunal has given following reasons:

5

“However, so far as backwages there has been long duration from the date of termination till this date which is more than 6 years. The respondent management has granted permission to said school on non-granted basis. There is too much delay for one or other reason to final decision in the appeal. Therefore, granting backwages will be definitely injustice to the management. Similarly, applying ration of “no work no salary” as well as, as the appellant has not come with a case that he has never worked anywhere or earned by other way, I am of the view that it is proper and reasonable not to grant backwages. Thus, the appellant is entitled to all other reliefs as claimed by him excluding backwages.”

According to the Tribunal, (i) there was a long duration from the date of termination till the appeal was decided that is six years; (ii) the respondent management granted permission to the school on non-grant basis; (iii) there was too much delay for one or other reason for final decision of the appeal and, therefore, granting back wages will definitely be injustice to the management, (iv) no work no salary, and (v) the appellant has not come with a case that he has never worked anywhere or earned by any other way.

6

8. After the termination, the petitioner immediately approached to the Tribunal by filing a statutory appeal and his appeal was dismissed as not maintainable vide judgment dated 8.1.2008. Therefore, the petitioner was required to approach to this Court in the year 2008 by filing Writ Petition No.722/2008 and his writ petition was allowed by this Court on 9.2.2009 holding therein that the appeal filed by the petitioner before the Tribunal was maintainable and, therefore, the matter was remanded back. In this view of the matter, for period 2004 to 2009 the petitioner was not at fault at all. His appeal was dismissed by the Tribunal as not maintainable and, therefore, he was required to approach to this Court. In the writ petition filed by the petitioner, this Court held that the appeal filed by the petitioner was maintainable before the Tribunal, therefore, the appeal was remanded back. Therefore, in my view, the Tribunal has committed a mistake in observing that long period has elapsed to deny back wages.

9. Paragraph No.7 of the petition, reads as under:

“It is also significant to note that there was no rebuttal by the respondent or any proof was

7

placed before the School Tribunal, about the gainful employment of the petitioner, during the period from 29.12.2003 to 9.7.2009 (absence period due to oral termination). As such, it is most improper for the Tribunal, to have deprived the Appellant petitioner from the claim of back wages during interregnum.

In spite of service, both respondents chose not to appear and to contest the writ petition. The averments made on oath in the writ petition have remained uncontroverted. The averments made in paragraph No.7 would show and suggest that the petitioner was not in gainful employment during the period from 29.12.2003 to 9.7.2009.

10. The law in respect of back wages is well crystallized by the Honourable Apex Court in the case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors, reported at (2013)10 SCC 324. The Honourable Apex Court in paragraph No.38(1) in the case cited *supra* has ruled that, “*in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*”

8

Paragraph No.38(3) of the case cited *surpa* is reproduced hereinunder:

“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.”

In the Tribunal’s judgment, there is no reference of pleadings in respect of gainful employment or its denial. The Tribunal has not recorded any finding that during the period when the petitioner was out of employment he was in any gainful

9

employment. In paragraph No.7 of the writ petition, it is specifically averred that the petitioner was not in gainful employment and it is not controverted by respondents by filing any counter-affidavit. Thus, before the Court at first instance there was statement from the petitioner that he was not having any gainful employment during the period when his services were terminated till his appeal was allowed by the Tribunal. The judgment in the case cited *supra* is also followed in Fisheries Department, State of Uttar Pradesh vs. Charan Singh, reported at (2015) 8 SCC 150. Also, in the case of Jayantibhai Raojibhai Patel vs. Municipal Council, Narkhed and ors, reported at (2019)17 SCC 184 , the Honourable Apex Court has ruled that 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 substantially similar emoluments.

11. Once the Tribunal recorded a finding that petitioner's services were illegally terminated, not granting back wages to him will nothing but giving a premium to the employer/respondents for their illegal action especially when there is nothing on record to

10

show that during the period, when the petitioner was illegally terminated till his appeal was allowed, he was gainfully employed.

In the result, I pass following order:

ORDER

(1) The writ petition is allowed.

(2) Judgment and order dated 10.7.2009 passed by learned Presiding Officer, School Tribunal in Appeal No.5/2004 to the extent it denies back wages to the petitioner is hereby quashed and set aside.

(3) The respondents are directed to pay back wages to the petitioner from 29.12.2003, when he was illegally terminated, till he is reinstated in service. To that extent, the appeal filed by the petitioner before the Tribunal is allowed.

Rule is made absolute in aforesaid terms. No costs.

JUDGE

!! BRW !!

...../-