

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No.2642 of 2011

An application under Section 19 of the State Administrative Tribunal's Act, 1985.

.....

Nalina Kumar Sarangi

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s. Mr.S. D. Routray,
S.K.Samal, S.P.Nath,
S.Sekhar, J.Biswal &
A.K.Das.

For Opp. Parties : M/s. Biplab Mohanty,
Standing Counsel.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing:28.06.2022 and Date of Order:05.08.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. S.D. Routray, learned counsel for the Petitioner and Mr. B. Mohanty, learned Standing counsel for the State-Opposite Parties.
3. This Writ Petition has been filed by the Petitioner with the following relief:-

“(a) Admit the Original Application, call for the records, issue appropriate direction directing the Respondents to regularize the service of the applicant by extending all service benefits including the pensionary benefits and to fix up his pay according to the Time Bound Advancement scale. The Respondents be further directed to pay the full salary of the applicant since the date of his appointment treating his appointment to be regular for all purposes since 15.5.1996.

And further the Respondents be directed to pay all arrear as well as differential salary to the applicant within a reasonable time to be stipulated by this Hon’ble Tribunal.”

- 4.** It is submitted that a panel of unemployed C.T pass candidates of Cuttack-1 circle was prepared for their appointment as Sikshya Karmi in the year 1988.
- 5.** It is submitted that even though the Petitioner was empanelled in the said list prepared in the year 1988, the Petitioner along with others 18 candidates were not appointed out of the said list. It is also submitted that similar panel was also prepared in respect of 617 candidates in the year 1991.
- 6.** Mr. Routray submitted that the present petitioner along with other left out 18 candidates of 1988 panel were provided with appointment as Sikshya Karmi vide order dated 13.02.1992. It is submitted that the appointment from out of panel prepared in the year 1991 was challenged before the learned Tribunal in O.A. No.320(C) of 1997. It is submitted that vide its order dated 09.07.1997, learned

Tribunal while allowing the Original Application held that the appointment from out of the 1991 panel is illegal.

7. Mr. Routray, submitted that the present petitioner was not a party to the said O.A. No.320(C) of 1997. It is submitted that by misinterpreting the order passed by the learned Tribunal on 13.12.1996, the Petitioner was disengaged from his service vide order dated 12.12.1997, even though the Petitioner was appointed as a Regular Primary School Teacher vide order dated 15.05.1996.

8. It is further submitted that the order of termination dated 15.05.1996 was challenged by the Petitioner before this Court in OJC No.18035 of 1997 and this Court while issuing notice of the matter stayed the order of termination and the petitioner was allowed to continue. This court vide its order dated 12.05.2000 under Annexure-2 disposed of the said writ petition along with some other writ petitions with certain clarifications on the order passed by the learned Tribunal on 13.12.1996.

9. It is submitted that after disposal of the OJC No.18035 of 1997 by this Court on 12.05.2000, the Petitioner was terminated from his service vide order dated 06.04.2002 under Annexure-4. It is submitted that subsequent to such order passed under Annexure-4, the Petitioner filed Misc. Case No.5481 of 2002 seeking some modification of the order passed by this Court on 12.05.2000 in OJC No.17911 of 1997 and batch. This Court vide order dated 15.02.2008 under Annexure-3 passed the following order:-

“We, therefore, clarify the said judgment to the extent that if the Government is satisfied that the petitioner was empanelled in 1988 and was given appointment in 1992 pursuant to the said empanelment in 1988, his case may not

be considered in terms of the direction given in the judgment. If it is found that the petitioner was empanelled in 1991 and got the appointment pursuant to empanelment in 1991 the direction contained in the judgment shall operate”.

10. It is further submitted that since the order passed by this Court on 15.02.2008 was not complied with, the Petitioner filed Misc. Case No.239 of 2008 and this Court vide order dated 25.08.2008 directed the Opposite Parties to implement the direction contained in order dated 15.02.2008 within a period of three months from the date of receipt of this order. The order dated 25.08.2008 passed in Misc. Case No.239 of 2008 is quoted herein below:-

“Heard learned counsel for the Petitioner and learned counsel for the State.

This application has been filed for fixation of a time limit to comply with the direction of this Court dated 15.02.2008 passed in Misc. Case No.5481 of 2002. Since six months have elapsed in the meantime, as no order has been passed, we allow the prayer and direct that the direction contained in the order dated 15.2.2008 modifying the judgment dated 12th May, 2000 be implemented within a period of three months from the date of communication of this order. The petitioner is directed to produce the certified copy of this order before the competent authority for compliance”.

11. It is submitted pursuant to the order passed by this Court on 15.02.2008, the Petitioner was ultimately reinstated in service vide order dated 28.02.2011 under Annexure-1 to the writ petition. It is submitted that since the Petitioner without any fault of his own remained out of employment w.e.f. 06.04.2002 till he is reinstated vide order dated 28.02.2011, the Petitioner is eligible and entitled to get service and financial benefits for the said period. The present writ petition has been filed with such prayer and to extend the service and financial benefit w.e.f. from the date of initial appointment of the petitioner as a regular primary school teacher dated 15.05.1996.

12. Mr. B. Mohanty, learned State Counsel made his submission relying on the counter filed by the Opposite Party. It is submitted that pursuant to the order passed by this Court on 12.05.2000 in OJC No.18035 of 1997 and writ petition, the Petitioner was terminated vide order dated 06.04.2002 and pursuant to the modified order passed by this Court on 15.02.2008, the Petitioner was reinstated vide order dated 28.02.2011. Therefore, the Petitioner is not entitled to get the financial benefit for the period he remained out of employment as he has not worked for the said period. But it is fairly submitted that the Petitioner belongs to 1988 panel and since he was left out from being appointed from the said panel, he was initially appointed in February, 1992 as Sikshya Karmi and as a regular teacher vide order dated 15.05.1996.

13. Mr. Routray, in support of his claim also relied on a decision of this Court passed on 20.04.2002 in WPC (OAC) No.3810 of 2014. In the said judgment, this Court in Para-14 has held as follows:-

“14. In view of the decision relied on by the Petitioner in the aforesaid reported cases, this Court is prima facie of the view that the Petitioner was disengaged w.e.f. 17.09.2009 without affording him any reasonable opportunity of hearing and incomplete violation of the principle of natural justice. Therefore, this Court is of the view that the period of service from 17.09.2009 to 30.06.2011 is to be treated as duty. But since, the Petitioner has not discharged his duty for the said period, the Petitioner is not entitled to get any financial benefit and the said period is to be treated notionally for all purposes.”

14. Mr. Routray, also relied on the decision of the Hon'ble Apex Court passed on 12.08.2013 in Special Appeal No.6767 of 2013 in the case of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and**

Ors. In the said Judgment, Hon'ble Court in Paras-18 to 33 held as hereunder:-

“18. A somewhat similar issue was considered by a three Judge Bench in *Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd.* (supra) in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilization of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held: It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the laws proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmens demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us

in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. (emphasis supplied) After enunciating the above-noted principles, this Court took cognizance of the appellants plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled 15 to 75 % of the back wages.

19. Another three Judge Bench considered the same issue in *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi* (supra) and observed: Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be

in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted. (emphasis supplied).

20. *The principle laid down in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra) was reiterated in P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (2001) 2 SCC 54. That case makes an interesting reading. The respondent had worked as helper for 11 months and 18 days. The termination of his service was declared by Labour Court, Chandigarh as retrenchment and was invalidated on the ground of non-compliance of Section 25-F of the Industrial Disputes Act, 1947. As a corollary, the Labour Court held that the respondent was entitled to reinstatement with continuity of service. However, only 60% back wages were awarded. The learned Single Judge of the Punjab and Haryana High Court did not find any error apparent in the award of the Labour Court but ordered payment of full back wages. The two Judge Bench of this Court noted the guiding principle laid down in the case of Hindustan Tin Works Private Limited and observed: While it is true that in the event of failure in compliance with Section 25-F read with Section 25(b) of the Industrial Disputes Act, 1947 in the normal course of events the Tribunal is supposed to award the back wages in its entirety but the discretion is left with the Tribunal in the matter of grant of back wages and it is this discretion, which in Hindustan Tin Works (P) Ltd. case this Court has stated must be exercised in a judicial and judicious manner depending upon the facts and circumstances of each case. While, however, recording the guiding principle for the grant of relief of back wages this Court in Hindustan case, itself reduced the back wages to 75%, the reason being the contextual facts and circumstances of the case under consideration. 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. In the event, however the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law which can be corrected by a writ of certiorari. The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material evidence adduced before the Labour Court was insufficient or inadequate though, however, perversity of the order would warrant intervention of the High Court. The observation, as above, stands well settled since the decision of this Court in *Syed Yakooob v. K.S. Radhakrishnan* AIR 1964 SC 477. 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 straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. As regards the decision of this Court in *Hindustan Tin Works (P) Ltd.* be it noted that though broad guidelines, as regards payment of back wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back wages only. The issue as raised in the matter of back wages has been dealt with by the Labour Court in the manner as above having regard to the facts and circumstances of the matter in the issue, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. In the event, however, the High Courts interference is sought for, there exists an obligation on the part of the High Court to record in the judgment, the reasoning before however denouncing a judgment of an inferior Tribunal, in the absence of which, the judgment in our view cannot stand the scrutiny of otherwise being reasonable. There ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the Labour Court and it is only upon recording therewith the High Court has the authority to interfere. Unfortunately, the High Court did not feel it expedient to record any reason far less any appreciable reason before denouncing the judgment.

21. The aforesaid judgment became a benchmark for almost all the subsequent judgments. In *Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya* (2002) 6 SCC 41, the Fifth Industrial Tribunal, West Bengal had found that the finding of guilty recorded in the departmental inquiry was not based on any cogent and reliable evidence and passed an award for reinstatement of the workman with other benefits. The learned Single Judge allowed the writ petition filed by the employer and quashed the award of the Industrial Tribunal. The Division Bench of the High Court reversed the order of the learned Single Judge. This Court issued notice to the respondent limited to the question of back wages. After taking cognizance of the judgments in *Hindustan Tin Works Private*

Limited v. Employees of Hindustan Tin Works Private Limited (supra) and P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra), the Court observed: 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 the 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. (emphasis supplied).

22. *In Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579, this Court was called upon to consider whether the services of the respondent could be terminated by dispensing with the requirement of inquiry enshrined in Indian Railway Construction Co. Ltd. (Conduct, Discipline and Appeal) Rules, 1981 read with Article 311(2) of the Constitution. The learned Single Judge of the Delhi High Court held that there was no legal justification to dispense with the inquiry and ordered reinstatement of the workman with back wages. The Division Bench upheld the order of the learned Single Judge. The two Judge Bench of this Court referred to the judgments in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra) and P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra) and held that payment of Rs.15 lakhs in full and final settlement of all claims of the employee will serve the ends of justice.*

23. *In M.P. State Electricity Board v. Jarina Bee (Smt.) (supra), the two Judge Bench referred to P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra) and held that it is always incumbent upon the Labour Court to decide the question relating to quantum of back wages by considering the evidence produced by the parties.*

24. In *Kendriya Vidyalaya Sangathan v. S. C. Sharma* (supra), the Court found that the services of the respondent had been terminated under Rule 19(ii) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 on the charge that he was absconding from duty. The Central Administrative Tribunal held that no material was available with the disciplinary authority which could justify invoking of Rule 19(ii) and the order of dismissal could not have been passed without holding regular inquiry in accordance with the procedure prescribed under the Rules. The Division Bench of the Punjab and Haryana High Court did not accept the appellants contention that invoking of Rule 19(ii) was justified merely because the respondent did not respond to the notices issued to him and did not offer any explanation for his willful absence from duty for more than two years. The High Court agreed with the Tribunal and dismissed the writ petition. The High Court further held that even though the respondent-employee had not pleaded or produced any evidence that after dismissal from service, he was not gainfully employed, back wages cannot be denied to him. This Court relied upon some of the earlier judgments and held that in view of the respondents failure to discharge the initial burden to show that he was not gainfully employed, there was ample justification to deny him back wages, more so because he had absconded from duty for a long period of two years.

25. In *General Manager, Haryana Roadways v. Rudhan Singh* (2005) 5 SCC 591, the three Judge Bench considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment. The factual matrix of that case was that after finding the termination of the respondents service as illegal, the Industrial Tribunal- cum-Labour Court awarded 50% back wages. The writ petition filed by the appellant was dismissed by the Punjab and Haryana High Court. This Court set aside award of 50% back wages on the ground that the workman had raised the dispute after a gap of 2 years and 6 months and the Government had made reference after 8 months. The Court then proceeded to observe: There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service

and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year. In *U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey (supra)*, the two Judge Bench observed: No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act.

27. The Court also reiterated the rule that the workman is required to plead and *prima facie* prove that he was not gainfully employed during the intervening period.

28. In *Depot Manager, Andhra Pradesh State Road Transport Corporation v. P. Jayaram Reddy (supra)*, this Court noted that the services of the respondent were terminated because while seeking fresh appointment, he had suppressed the facts relating to earlier termination on the charges of grave misconduct. The Labour Court did not find any fault with the procedure adopted by the employer but opined that dismissal was very harsh, disproportionate and unjustified and accordingly exercised power under Section 11-A of the Industrial Disputes Act, 1947 for ordering reinstatement with back wages. This Court referred to the judgments in *P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra)* and *J.K. Synthetics Ltd. v. K. P. Agrawal (supra)* and held that the Labour Court was not justified in awarding back wages.

29. In *Novartis India Limited v. State of West Bengal (supra)*, the services of the workman were terminated on the charge of not joining the place of transfer. The Labour Court quashed the termination of services on the ground of violation of the rules of natural justice and passed an award of reinstatement of the workman with back wages. The learned Single Judge of the High Court dismissed the writ petition filed by the appellant but the letters patent appeal was allowed by the Division Bench on the ground that the State of West Bengal

was not the appropriate Government for making the reference. The special leave petition filed by the workman was allowed by this Court and the Division Bench of the High Court was asked to decide the letters patent appeal on merits. In the second round, the Division Bench dismissed the appeal. This Court referred to shift in the approach regarding payment of back wages and observed: There can, however, be no doubt whatsoever that there has been a shift in the approach of this Court in regard to payment of back wages. Back wages cannot be granted almost automatically upon setting aside an order of termination inter alia on the premise that the burden to show that the workman was gainfully employed during interregnum period was on the employer. This Court, in a number of decisions opined that grant of back wages is not automatic. The burden of proof that he remained unemployed would be on the workmen keeping in view the provisions contained in Section 106 of the Evidence Act, 1872. This Court in the matter of grant of back wages has laid down certain guidelines stating that therefor several factors are required to be considered including the nature of appointment; the mode of the length of service; and whether the appointment was in consonance with Articles 14 and 16 of the Constitution of India in cases of public employment, etc. It is also trite that for the purpose of grant of back wages, conduct of the workman concerned also plays a vital role. Each decision, as regards grant of back wages or the quantum thereof, would, therefore, depend on the fact of each case. Back wages are ordinarily to be granted, keeping in view the principles of grant of damages in mind. It cannot be claimed as a matter of right.

30. In *Metropolitan Transport Corporation v. V. Venkatesan* (supra), the Court noted that after termination of service from the post of conductor, the respondent had acquired Law degree and started practice as an advocate. The Industrial Tribunal declared the termination of the respondents service by way of removal as void and inoperative on the ground that the Corporation had not applied for approval under Section 33(2)(b) of the Industrial Disputes Act. At one stage, the High Court stayed the order of the Industrial Tribunal but finally dismissed the writ petition. The workman filed application under Section 33-C(2) of the Industrial Disputes Act claiming full back wages. The Labour Court allowed the claim of the respondent to the extent of Rs.6,54,766/-. The writ petition filed against the order of the Labour Court was dismissed by the learned Single Judge and the appeal was dismissed by the Division Bench. This Court referred to the earlier precedents and observed: First, it may be noticed that in the seventies and eighties, the directions for reinstatement and the payment of full back wages on dismissal order having been found invalid would ordinarily follow as a matter of course. But there is change in the legal approach now. We recently observed in *Jagbir Singh v. Haryana State Agriculture Mktg. Board* that in the recent past there has been a shift in

the legal position and in a long line of cases, this Court has consistently taken the view that the relief 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 held to be in contravention of the prescribed procedure. Secondly, and more importantly, in view of the fact that the respondent was enrolled as an advocate on 12-12-2000 and continued to be so until the date of his reinstatement (15-6-2004), in our thoughtful consideration, he cannot be held to be entitled to full back wages. That the income received by the respondent while pursuing legal profession has to be treated as income from gainful employment does not admit of any doubt. In *North-East Karnataka RTC v. M. Nagangouda* this Court held that gainful employment would also include self-employment. We respectfully agree. It is difficult to accept the submission of the learned Senior Counsel for the respondent that he had no professional earnings as an advocate and except conducting his own case, the respondent did not appear in any other case. The fact that he resigned from service after 2-3 years of reinstatement and re-engaged himself in legal profession leads us to assume that he had some practice in law after he took sanad on 12-12-2000 until 15-6-2004, otherwise he would not have resigned from the settled job and resumed profession of glorious uncertainties.

31. In *Jagbir Singh v. Haryana State Agriculture Marketing Board (supra)*, this Court noted that as on the date of retrenchment, respondent No.1 had worked for less than 11 months and held: It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages.

32. We may now deal with the judgment in *J.K. Synthetics Ltd. v. K.P. Agrawal and another (supra)* in detail. The facts of that case were that the respondent was dismissed from service on the basis of inquiry conducted by the competent authority. The Labour Court held that the inquiry was not fair

and proper and permitted the parties to adduce evidence on the charges levelled against the respondent. After considering the evidence, the Labour Court gave benefit of doubt to the respondent and substituted the punishment of dismissal from service with that of stoppage of increments for two years. On an application filed by the respondent, the Labour Court held that the respondent was entitled to reinstatement with full back wages for the period of unemployment. The learned Single Judge dismissed the writ petition and the Division Bench declined to interfere by observing that the employer had willfully violated the order of the Labour Court. On an application made by the respondent under Section 6(6) of the U.P. Industrial Disputes Act, 1947, the Labour Court amended the award. This Court upheld the power of the Labour Court to amend the award but did not approve the award of full back wages. After noticing several precedents to which reference has been made hereinabove, the two Judge Bench observed: There is also a misconception that whenever reinstatement is directed, continuity of service and consequential benefits should follow, as a matter of course. The disastrous effect of granting several promotions as a consequential benefit to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether continuity of service and/or consequential benefits should also be directed. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *Rudhan Singh and Uday Narain Pandey*. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may. But the cases referred to above, where back wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions

relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately

excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination. In this case, the Labour Court found that a charge against the employee in respect of a serious misconduct was proved. It, however, felt that the punishment of dismissal was not warranted and therefore, imposed a lesser punishment of withholding the two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all.

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. iv) 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. v) 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 victimizing the employee or workman, then the concerned Court or Tribunal 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 employers obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give 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. vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization 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 Private Limited v. Employees of Hindustan Tin Works Private Limited* (supra). vii) The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* (supra) 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 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”.

15. Mr. Routray also relied on another decision of this Court passed on 04.07.2014 in W.P.(C) No.22319 of 2011 reported in **Vol-120 (2015) CLT, 1118**. In the said judgment, Paragraphs-15 to 20 is quoted hereunder:-

“15. In *Kumaon Mandal Vikash Nigam Ltd. (supra)*, the apex Court held as follows:

"The word Bias in popular English parlance stands included within the attributes and broader purview of the word malice, which in common acceptation mean and imply spite or ill-will (strouds Judicial Dictionary (5th Ed.) Volume 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice."

16. *The authority who has issued such draft charges had no authority to do so because of lack of resolution passed by the Governing Body. That itself indicates that the authority is biased against the petitioner and proceeded without any authority of law. Therefore, the order of termination has been passed contrary to the provisions of law governing the field.*

17. *The allegation of misappropriation of funds has been based on the audit report. The same has not been done in conformity with the provisions of law. On perusal of the audit report, it appears that no where it has been indicated that the petitioner had misappropriated the money. The audit having been done for the period from 21.7.1987 till 31.7.1998, which is inclusive of unaided and aided period and out of which during the period from 11.4.1997 to 31.7.1998 the college was aided and the petitioner as Principal-in-charge operated the account. But for the period from 21.7.1987 to 10.4.1997, which was unaided period, the account was not operated by the petitioner, rather one Bansidhar Khatua being the Secretary of the Governing Body operated the same and signed the resolution by maintaining the accounts as per law, thereby the entire process of proceeding was continuing with mala fide and biased manner and without application of any mind. As it appears, while causing such enquiry, the provisions of law has neither been taken into consideration nor principle of natural justice has been complied with, rather, the authorities have proceeded in a biased manner with mala fide intention, which is not permissible in the eye of law, consequence thereof, without any application of mind, the Director has approved the termination order under Annexure-25, which is nothing but an arbitrary and unreasonable exercise of power by the Director. The learned Education Tribunal in Appeal did not incline to interfere with the approval of the termination order. That itself also cannot sustain though the order itself indicates that the termination order was passed on 30.5.2005, but in effect, the same was passed on 30.5.2001 without prior approval of opposite party no.3, since the termination order has been approved by the Director contrary to the provisions contained in Section 10-A of the Orissa Education Act. Section 10-A (1)(a) of the Act reads as follows :*

"10-A. Service of teachers of aided institutions not to be terminated without approval- (1) The services of a teacher and other members of the staff of an aided Educational Institution shall not be terminated without obtaining the prior approval in writing of the (a) Director in case of a teacher and other members of the staff of a college; (b) xx xx xx".

18. *On perusal of the above mentioned provisions, it appears that the services of a teacher of aided educational institution shall not be terminated without obtaining prior approval in writing of the Director in case of a teacher of a college. In the present case, the termination order having been passed on 30.5.2001 and decision was taken by the Governing Body regarding termination of his services pursuant to the resolution dated 28.5.2001, which has been approved by the Director vide letter dated 7.5.2005 under Annexure-25, it cannot be construed that there is prior approval with regard to the termination of the services of the petitioner and such order of termination has been passed due to non-compliance of the principle of natural justice.*

19. *The learned Education Tribunal committed gross error apparent on the face of the record by declining to interfere with the approval of the order of termination by the Director under Annexure 25. The learned Tribunal has committed gross error stating that final charges with imputations were served on the petitioner on 21.2.1999 along with relevant documents, basing upon which charges were framed and such statement has been made on the basis of the contentions raised by opposite party no.5. The opposite party no.5 has never filed any affidavit before the learned Tribunal to that extent, which amounts to non-application of mind by the learned Tribunal. The contention raised that the petitioner was supplied with the final charges with imputations with relevant documents on 21.2.1999 are backed by documents or materials available on record. But fact remains, on the basis of the draft charge under Annexure-4, prepared on 24.2.1999 since the documents were not supplied to him as per Rule 22(3) of 1974 Rules, the petitioner called for all the documents pursuant to Annexure-25, but no such documents were supplied to him and on the basis of such draft charges, the proceeding continued. Therefore, without appreciating the facts in proper perspective, the learned Tribunal has passed the impugned order.*

20. *In view of the foregoing analysis, this Court is of the opinion that the impugned resolution of the Governing Body terminating the services of the petitioner under Annexure-19, the subsequent approval made by the Director, Higher Education under Annexure-25 and the order passed by the learned Education Tribunal under Annexure-26 are contrary to the provisions of law and as the same have been passed*

without compliance of the principles of natural justice, the same are hereby set aside”.

16. Heard learned counsel for the Parties.

17. Perused the materials available on record. This Court after going through the same find that the Petitioner without any fault of his own remained out of employment for the period from 6.4.2002 till 28.02.2011. Therefore, the Petitioner is not only entitled to get all service and financial benefit for the period 06.04.2002 to 28.02.2011 but also the Petitioner is entitled to get the said benefit notionally taking into account his initial appointment as regular Primary School Teacher w.e.f. 15.05.1996. This Court while holding so directs the Opposite Parties to extend all such benefits in favour of the Petitioner.

17. Since it is submitted that the Petitioner has retired in the meantime, the Petitioner will also be eligible and entitled to have revision of his pension and pensionary benefits. Accordingly, this Court directs the Opposite Parties to extend all such benefit as due and admissible in favour of the Petitioner within a period of four months from the date of receipt of this order.

18. With the aforesaid observations and directions, the WPC(OAC) stands disposed of. There shall be no order as to costs.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 5th of August, 2022/Subrat