

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**REVIEW APPLICATION (CIVIL) NO. 2 OF 2022
IN WRIT PETITION/5339/2018**

**BHAGWAN PRATISTHAN THROUGH ITS EXECUTIVE TRUSTEE AND
ANOTHER
VERSUS**

BANDU DHRUPATRAO DHAKNE AND ANOTHER

...

Advocate for the Applicant : Mr. S. S. Randive
Advocate for the Respondent No. 1 : Mr. R. I. Wakde
A.G.P. for the Respondent No. 2 : Mr. S. N. Morampalle

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**REVIEW APPLICATION (CIVIL) NO. 3 OF 2022
IN WRIT PETITION/7374/2018**

**BANDU DHRUPATRAO DHAKNE
VERSUS
BHAGWAN PRATISTHAN AURANGABAD THROUGH EXECUTIVE
TRUSTEE AND OTHERS**

...

Advocate for the Applicant : Mr. R. I. Wakade
Advocate for the Respondent Nos. 1 & 2 : Mr. S.S. Randive
Advocate for the Respondent No. 3 : Mr. S. N. Morampalle.

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 15.07.2022
PRONOUNCED ON : 19.07.2022

PER COURT :

Heard the learned advocates of both the sides in both the review applications finally.

2. The employee had preferred an appeal under Section 9 of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977 (hereinafter 'the M.E.P.S. Act) challenging the termination order issued by the management dated 28.02.2017. By the judgment and order dated 27.12.2017 the Tribunal allowed the

employee's appeal partly. The termination was set aside. The management was directed to reinstate him and he was also found entitled to but only 30% of the back wages from the date of termination till he was reinstated. Aggrieved by such decision both the sides filed two separate writ petitions. By a common judgment both the writ petitions were dismissed.

3. Admittedly, the management challenged the judgment and order of this Court before the Supreme Court but the Special Leave Petition was dismissed.

4. The management has filed Review Application No. 2/2022 and has prayed for modifying/reviewing the order of this Court confirming the decision of the School Tribunal directing it to pay 30% of the back wages. Whereas, the employee has preferred Review Petition No. 3/2022 and has requested to allow his writ petition to the extent of his claim for 100% back wages.

5. I have heard the learned advocates of both the sides in *extenso*.

6. Admittedly, the management had made an unsuccessful attempt to challenge the judgment and order sought to be reviewed by preferring a Special Leave Petition before the Supreme Court. It was dismissed. Once having challenged the judgment and order by preferring an appeal, the management is not entitled to seek any review. Even no liberty was solicited and obtained from the Supreme Court while the Special Leave Petition was being dismissed, to apply to this Court for a review. It is indeed unbecoming of a party to take such a recourse. The Review Petition No. 2/2022 is, therefore, frivolous and liable to be dismissed.

7. So far as the employee's review petition is concerned, his learned advocate would submit that grant of full back wages is the norm. The parameters have been elaborately considered and laid down in the

matter of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others**; 2014(2) Mh.L.J. 480.

8. The learned advocate would further submit that this Court had refused to grant full back wages and confirmed the order of the School Tribunal regarding granting only 30% of the back wages by making factually erroneous observations. The sole ground mentioned in paragraph No. 24 of the judgment is that the employee had not made any specific pleading to the effect that he was not gainfully employed from the date of suspension till the date of reinstatement. The learned advocate would refer to the rejoinder filed before the School Tribunal and particularly paragraph No. 17 wherein it was specifically averred that he was not gainfully employed from the date of termination till date that is till the date the rejoinder was filed and also specifically asserted his claim for full back wages. The learned advocate would submit that in view of such specific pleadings before the Tribunal, the Tribunal should have, while setting aside the termination and directing reinstatement, awarded full back wages. There was absolutely no whisper in the judgment of the Tribunal as to why the claim was restricted to 30%. This Court having refused to cause any interference in the order of the Tribunal under an erroneous belief of absence of claim is a matter which is a formal defect and is required to be corrected by undertaking a review.

9. The learned advocate for the employee would further submit that as laid down in the matter of **Deepali (supra)** the onus was on the management to refute the specific averments in the rejoinder regarding the employee being not gainfully employed. It having failed to controvert such pleadings, it had miserably failed to discharge the onus and the employee should have been awarded full back wages.

10. The learned advocate for the management would submit that in

the appeal memo filed by the employee before the School Tribunal there was absolutely no whisper about he having remained unemployed since the date of termination. As laid down in the matters of **U.P. State Brassware Corpn. Ltd and Anr. Vs. Udai Narain Pandey; A.I.R. 2006 Supreme Court 586** and **Talwara Co-Operative Credit Service Society Ltd. Vs. Sushil Kumar; 2008 A.I.R. SCW 6532** an employee is not automatically entitled to claim back wages. Onus is on him to prove that he was not gainfully employed. In the matter in hand the respondent having failed to discharge the onus, irrespective of the reasoning given by this Court in the order under review he is not entitled to make request for review.

11. The law as regards back wages in cases of wrongful termination of services has been culled out by the Supreme Court by referring to catena of judgments including the decision in the matter of **U.P. State Brassware Corpn. Ltd (supra)**, in the matter of **Deepali (supra)**. The principles laid down in paragraph No. 33 and particularly in clause 1 to 3 are as under :

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.

12. It is to be borne in mind that unlike the matters before the Labour Court and Industrial Tribunal where a question under Section 11 A of the Industrial Disputes Act, 1947 crop up which are original proceedings where there would be pleadings and even the parties would be required to lead evidence, oral as well as documentary. In the matter in hand the parties were before the School Tribunal in a statutory appeal under Section 9 of the M.E.P.S. Act. Going by the nature of the proceeding, the parties were only expected to file appeal memo, replies and rejoinders and may be surrejoinder. Bearing in mind such state of affairs, when admittedly, though not in the appeal memo but in the rejoinder the employee had specifically pleaded that he was not gainfully employed since the date of termination and had also put up a claim for entire back

wages, the observation of this Court in paragraph No. 24 of the judgment are certainly factually incorrect.

13. However, simultaneously, it is to be borne in mind that though in the matter of **Deepali (supra)** it has been recognized that claim for full back wages is a norm or rule, there are several other factors which are required to be looked into apart from the bare pleadings. In adjudicating the issue regarding back wages, length of service, nature of misconduct, financial condition of the employer and few such similar factors are also to be required to be taken into consideration. Though to the extent of pleadings, it can be said that the employee in the matter in hand in his rejoinder had made a specific pleading and claimed full back wages, the rest of the factors have not been addressed either before the Tribunal or apparently even before this Court when the writ petitions were decided.

14. If such is the state of affairs, in my considered view, with a limited power in exercise of review, it would be inappropriate rather difficult even to undertake any review and reconsider the request of the employee for full back wages. Therefore, the Review Petition of the employee is also liable to be dismissed.

15. The Review Petition No. 2/2022 is dismissed with costs of Rs. 5000/- (Rs. Five Thousand only).

16. The Review Petition No. 3/2022 is dismissed.

(MANGESH S. PATIL, J.)

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