

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

WRIT PETITION NO.1027 OF 2013

Aadiwasi Vividh Karyakari Sahakari
 Sanstha Ltd., Markanda, Registration
 No.516 Taluka Chamorshi, District
 Gadchiroli, through its Authorized Member **...PETITIONER**

---VERSUS---

1. Gajanan Bhanayya Bitpalliwar
 R/o Markanda (K), Taluka Chamorshi,
 District Gadchiroli
2. Assistant Registrar,
 Cooperative Societies, Chamorshi,
 Dist. Gadchiroli. **...RESPONDENTS**

WITH
WRIT PETITION NO.2912 OF 2013

Gajanan Bhanayya Bitpalliwar
 Aged 54 years, Occ: Nil,
 R/o Markanda (K), Tq. Chamorshi,
 Dist. Gadchiroli **...PETITIONER**

---VERSUS---

1. Aadiwasi Vividh Karyakari Sahakari
 Sanstha Ltd., Markanda, Regd. No.516
 Tah. Chamorshi, Dist. Gadchiroli, through
 its Authorized Member
2. Assistant Registrar,
 Cooperative Societies, Chamorshi,
 Dist. Gadchiroli. **...RESPONDENTS**

 Shri V.N. Marande, Advocate for the Society.
 Shri S.M. Bhirwar, Advocate for Employee.
 Ms H.N. Jaipurkar, AGP for Assistant Registrar

CORAM : AMIT B. BORKAR, J.
DATED : 30th JUNE, 2022.

ORAL JUDGMENT :

1. **Rule.** Rule is made returnable forthwith. Heard finally by consent of the parties.

2. Since both petitions arise out of same judgment, these are being disposed of by this common judgment.

3. Writ Petition No.1027 of 2013 is filed by the employer challenging the order of reinstatement granted by the Labour Court. Writ Petition No.2912 of 2013 is filed by the employee against denial of backwages.

4. Relevant facts giving rise to the present petitions, in short, are as under:

a) The petitioner is an employee and respondent no. 1 is an employer. They are referred hereinafter to as employee and employer as per title in Writ Petition no.2912 of 2013.

b) The petitioner was appointed on 31.03.1991 by the respondent on the post of Center Incharge. On 27.04.1993,

the respondent terminated services of petitioner undisputedly without following due procedure of law. In February 1996, the petitioner raised dispute before Deputy Commissioner of Labour, Nagpur. The said dispute was referred to Labour Court, Chandrapur, which was registered as Reference I.D. No.2 of 1996. The Labour Court, Chandrapur by order dated 09.01.1997 decided the said reference *ex parte* against the respondents directing respondents to reinstate the petitioner on original post and pay full backwages. The respondents therefore filed an application for setting aside *ex parte* award. The said application was allowed and the respondents filed their written statement contesting the claim of petitioner.

c) The Labour Court, Chandrapur on 08.01.2007 passed an award in favour of petitioner directing respondents to reinstate the petitioner with full backwages. The respondent no.1 challenged the said order by filing Writ Petition No.3300 of 2007. This Court by order dated 20.06.2012 remanded the matter back to the Labour Court, Chandrapur for fresh disposal. The learned Presiding Officer by judgment and order dated 22.10.2012 directed respondents to reinstate the

petitioner with payment of 25% backwages.

d) As stated earlier, therefore the petitioner filed present petition challenging the order of 25% backwages instead of 100% and the respondent no.1 challenging order of reinstatement in Writ Petition No.1027 of 2013.

5. The learned Advocate for respondent no.1-employer submitted that the manager of employer society has specifically stated in his examination-in-chief that petitioner had received various amounts from its members which were not deposited with the society and therefore the petitioner misappropriated said amounts. He submitted that audit report dated 31.03.1999 is sufficient to prove charge of misappropriation against the petitioner. According to him, therefore the Labour Court was not justified in recording finding that misconduct against the petitioner is not proved.

6. *Per contra*, learned Advocate for the petitioner-employee submitted that date of termination is 27.03.1993. The audit report has been prepared after award of Labour Court in first round of litigation i.e. on 30.09.1997. According to him, audit report prepared after six years of the date of termination could not have

been basis for proving charge of misappropriation against the petitioner. According to him, audit report raises objection against two persons only and is not in the usual form. He submitted that since the petitioner has discharged burden by stating in his examination-in-chief that he was not gainfully employed anywhere else during the pendency of proceedings, he is entitled to 100% backwages. He placed reliance on judgment in the case of **Tapash Kumar Paul Vs. Bharat Sanchar Nigam Limited and another**¹.

7. I have carefully considered the submission made on behalf of both sides. It is undisputed that the order of termination dated 27.04.1993 was without following due procedure. It is also undisputed that no enquiry was conducted before terminating the service of the petitioner. Therefore, it was necessary on the part of employer-society to prove the charge of misappropriation before the Labour Court. In order to prove the charge of misappropriation, the respondent-society has placed reliance upon audit report dated 31.03.1999 and oral evidence of Manager of the society.

8. I have carefully scrutinized audit report. On perusal of

¹ (2014) 15 SCC 313

the audit report it appears that first three pages of the audit report is cyclostyle copy of the statements which were prepared in format with details of amount and dates are mentioned by pen. Under the caption serious lapses, the names of two persons including the petitioner are mentioned. On perusal of the audit report, I do not find any material to show that the petitioner had accepted any amount as alleged. In the absence of credible evidence to prove charge of misappropriation, in my opinion, the audit report placed on record is not sufficient to prove the said charge. The oral evidence of Manager of Society also suffers from same defects. The receipts and material placed on record by the Manager of the Society do not implicate the petitioner. There is no material to connect the receipts produced on record with the petitioner. Therefore, in my opinion, the Labour Court was justified in recording the finding in paragraph 13, that respondent-Society has failed to prove misconduct against the petitioner.

9. Insofar as denial of backwages of petitioner is concerned, Labour Court while denying 75% of the backwages has observed that the petitioner has stated in his evidence he was not in gainful employment since termination of service. It is also held by the Labour Court that respondent-society has failed to furnish

or bring any evidence to show that charge no.2 i.e. petitioner no.2 was in gainful employment after his termination. Once the burden placed on the petitioner is discharged that he was not in gainfully employed anywhere else after termination, it was on the employer/society to place on record material to show that the petitioner was gainfully employed anywhere else. In the case of Tapash Paul (supra), the Hon'ble Supreme Court has held that justifiable grounds to award compensation are (i) where the industry is closed; (ii) where the employee has superannuated or going to retire shortly and no period of service is left to his credit; (iii) where the workman has been rendered incapacitated to discharge the duties and cannot be reinstated and /or (iv) when he has lost confidence of the Management to discharge duties. The back wages need to be granted to the employee when it is proved, that service has been illegally terminated and the employer fails to prove that the employee was gainfully employed after the termination. It is also held that full back wages would be normal rule and the party to adopt exceeding circumstances necessitating departure. In my opinion, the respondent-society has failed to bring on record the circumstances necessity departure from the appellant of full backwages.

10. I am therefore of the considered view that the Labour Court was justified in passing the order of reinstatement of petitioner and had committed error apparent on the face of record by directing payment of 25% back wages instead of 100% back wages. I, therefore, pass the following order:

11. Writ Petition No.1027 of 2013 is dismissed.

12. Writ Petition No.2912 of 2013 is allowed.

13. The respondent-Society/employer is directed to pay 100% back wages to the petitioner from 27.04.1993 till 28.06.2016.

14. Both writ petitions are disposed of accordingly. Rule is made absolute in above terms. No costs. Pending civil application (s), if any, stand disposed of.

JUDGE

Wagh