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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.09.2021
PRONOUNCED ON : 27.01.2022

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.23798 of 2013

The Director,
Hindustan Institute of Engineering
& Technology,
St. Thomas Mount,
Chennai-600016.

...Petitioner

Vs.

1. The Presiding Officer,
III Additional Labour Court,
City Civil Court Buildings,
High Court Compound,
Chennai-600 104.

2. A.E.Rajendran

...Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the award passed in I.D.No.925 of 2001 dated 15.02.2013, on the file of the first respondent herein and to quash the same.

For Petitioner : Mr.D.Veda
For Respondent-2 : Mr.S.Sathish Kumar
for M/s.Row & Reddy

O R D E R

Heard the learned counsel for the parties.

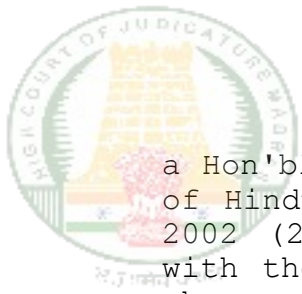
2. The second respondent herein, was appointed as an Accounts Officer in the petitioner's College on 28.09.1996. When he had challenged the order of dismissal before the Labour Court under Section 2A of the Industrial Disputes Act, 1947 [hereinafter referred to as "ID Act"], the main objections raised by the petitioner- Management was that he was not a "workman" as defined under Section 2(s) of the ID Act. The Labour Court overruled the objections, by holding that the



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4. The 'Test' to determine whether an employee is a "workman" or not, as defined under Section 2(s) of the ID Act, has been consistently dealt by the Hon'ble Supreme Court in various decisions, whereby it has been held that the designation of the post held by the employee is insignificant and what would be relevant is the nature of duties performed. In the case of Anand Regional Co-operative Oil Seedsgrowers' Union Ltd., Vs. Shaileshkumar Harshadbhai Shah reported in 2006 (6) SCC 548, such a proposition was held in the following manner:-

5. In this background, the next question that arise for consideration is as to whether the Management had established the nature of work performed by the second respondent before the Labour Court or not? Unfortunately, the Management herein had not let in any oral or documentary evidence at all. On the contrary, the second respondent herein had examined himself as W.W.1 and marked seven documents to substantiate his case. Before the Labour Court, there was a duty cast on the Management to prove that the nature of duties performed by the second respondent would not fall under the definition of a workman and



a Hon'ble Division Bench of this Court in the case of Management of Hindustan Motors Ltd., Vs. Lakshmiah and another reported in 2002 (2) L.L.N. 725, had held that such burden of proof lies with the Management. As stated earlier, the Management has not chosen to let in a single evidence, either oral or documentary, to substantiate their claim that the nature of duties would not qualify the second respondent to be a "workman". When the burden of proving such a fact lies with the Management and they having failed to do so, this Court exercising its powers under Article 226 of the Constitution of India, will not be justified in considering any of the grounds raised by the Management to evaluate the nature of duties of the second respondent to determine his status. Such an exercise is also impermissible in law.

6. When the Management had failed to establish the status of the second respondent herein, the corollary is that the second respondent is deemed to be a "workman". The Labour Court, while holding the second respondent is a workman, had held that the procedure for terminating such a workman, as contemplated under Section 25(F), was not followed and hence the action of termination would amount to unfair labour practice and victimization.

7. The charge against the second respondent herein was that, he was absent from 26.04.2000, without sanction of the Management and thereby he was dismissed from 04.05.2000. Admittedly, the second respondent had submitted a leave application on 02.05.2000, seeking leave from 27.04.2000 to 31.05.2000. In spite of the leave application, the Management had chosen to dismiss him, without extending any opportunity or calling for his explanation. Apparently, such a course of action is clearly in violation of Principles of Natural Justice, apart from being, in violation of the procedure under Section 25 (F) of the Act. This method of termination would also amount to an act of victimization, as well as unfair labour practice, as held by the Hon'ble Supreme Court in the case of Colour-Chem Ltd., Vs. A.L. Alaspurkar and others reported in 1998 (3) SCC 192, in the following manner:-

"... There can be in addition legal victimisation and it is this type of victimisation which is contemplated by the decision of this Court in Hind Construction (supra). It must, therefore, be held that if the punishment of dismissal or discharge is found shockingly disproportionate by the Court regard being had to the particular major misconduct and the past service record of the delinquent or is such as no reasonable employer could ever impose in like circumstances, it would be unfair labour practice by itself being an instance of victimisation in law or



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legal victimisation independent of factual victimisation, if any. Such an unfair labour practice is covered by the present Act by enactment of Clause (a) of Item 1 of Schedule IV of the Act as it would be an act of victimisation in law as clearly ruled by this Court in the aforesaid decision. On the same lines is a latter decision of this Court in the case of Bharat Iron Works v. Bhagubhai Balubhai Patel & Ors. [(1976) 2 SCR 280] wherein a Bench of three learned Judges speaking through Goswami. J. laid down the parameters of the term 'victimisation' as understood in labour laws and as contemplated by industrial jurisprudence. It has been observed that ordinarily a person is victimised if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own. If actual fault or guilt meriting punishment is established. Such action will be rid of the taint of victimisation. The aforesaid observations obviously refer to factual victimisation. But then follows further elucidation of the term 'victimisation' to the following effect :

"Victimisation may partake of various types, as for example, pressurising all employee to leave the union or union activities, treating an employee in a discriminatory manner or inflicting a grossly monstrous punishment which no national person would impose upon an employee and the like...."

The aforesaid observations in this decision fall in line with the observations in the earlier decision of this Court in Hind Construction (supra). Consequently it must be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissed or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimisation."

8. When the order of termination is per se illegal and such a termination is considered to be an act of victimization, amounting to unfair labour practice, the Hon'ble Supreme Court in the case of Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) and others reported in 2013 (10) SCC 324,



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held that such a workman would be entitled for payment of full back wages. The relevant portion of the order reads as follows:-

"18. 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.

19. 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



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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



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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.

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21. 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."

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

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

38.2) 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.

38.3) 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



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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.

38.4) 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."

9. Since this Court had found that the dismissal order is per se illegal and in the light of the decision rendered by the Hon'ble Supreme Court cited above, the workman would be entitled for full back wages.

10. In the background of the above observations, I do not find any merits in the present Writ Petition. Accordingly, the Writ Petition stands dismissed. Consequently, there shall be a direction to the Management to reinstate the second respondent back into service, if he had not already reached the age of superannuation, together with continuity of service and full back wages from the date of termination/date of retirement, within a period of four weeks from the date of receipt of a copy of this order. There shall be no orders as to costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

DP



To

The Presiding Officer,
III Additional Labour Court,
City Civil Court Buildings,
High Court Compound,
Chennai-600 104.

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+1cc to M/s.Row and Reddy, Advocate, S.R.No.4801

W.P.No.23798 of 2013

GPL (CO)
KKV/04/02/2022