

In The High Court At Calcutta
Civil Appellate Jurisdiction

Present:

The Hon'ble Justice Harish Tandon.
&
The Hon'ble Justice Prasenjit Biswas

W.P.C.T. 79 of 2022

Pankaj Kumar
v.
Union of India & Ors.

For the Petitioner	:	Mr. Pradip Kumar Roy, Mr. Joydeep Roy, Ms. Suparna Shyam, Ms. Ariyanjali Imran Ali.
For the Respondents.	:	Mr. Kushi Prasun Chatterjee.

Heard on : January 18, 2023.

Judgment on : January 18, 2023.

The Court:- The litigant beleaguered between the specter of common law and the nuances of law relating to service jurisprudence has approached this Court with the instant writ petition, although the substantive relief has already been granted in his favour.

The order of termination was held by the Tribunal to be invalid, bad and contrary to law and, in fact, set aside the same. Despite the substantial relief having been granted, the writ petitioner continued his journey to this Court in pursuit of something more, which he expected from the Tribunal invoking the provisions contained under Article 226 of the Constitution of India.

The pivotal issue, which is raised before us, pertains to the benefit of full-wages consequent upon setting aside the order of termination issued by the authority. In pursuit of such journey extensive argument is advanced, sometime emotionally, sometime sentimentally, sometime on the proposition of law, which needs threadbare scrutiny and introspection in order to deduce the ratio decidendi. The sympathy, empathy and compassion has no role in the dispensation of justice, as the law is immuned of the same and applies to all sections of the society irrespective of cast, creed and religion or the economic position. The service jurisprudence is not an exception and is guided by the source of law and the judicial decisions incorporating the provisions in the statute extending the benefit to the weaker section of the society. It is difficult to get employment and more difficult to exit therefrom on the basis of an illegal termination at the behest of the employer.

The tribunal application was allowed holding that the order of termination passed by the respondent authorities is bad in law, which necessarily implies certain consequences to follow. The moment the Tribunal did not grant an express relief after quashing and/or setting aside the order of termination, the question, which boils down is what would be the consequences that would follow therefrom? It is beyond scintilla of doubts that awarding full-wages after setting aside the order of termination is a normal rule, but not immune to any exception. It is a discretion of the

Court or Tribunal to award full-wages or partial wages after setting aside the order of termination depending upon the facts discerned in course of the journey of adjudication; obviously based upon the materials unearthed in this regard.

Though it is sought to be contended that the service law stands on a different pedestal than that of the common law, but for both the cases the pleading has an important role in the adversarial adjudication system and the importance of the pleading cannot be ruled out simply because the case comes within the circumference of service law. The procedure of adjudication cannot be overlooked nor by-passed by taking a circuitous route or a shelter under the service law, but the adjudication is to be made on the basis of the pleadings of the respective parties and the documents in support thereof.

Learned Advocate appearing for the petitioner is very much vocal on his contention that the moment several reliefs have been claimed before the Tribunal, mere granting one relief is a dereliction of duty on the part of the Tribunal and the aggrieved person can approach the higher forum treating the other reliefs to have not been addressed. In other words, it is sought to be contended that there is neither any finding returned on the other reliefs nor such reliefs have been granted by the Tribunal and, therefore, the order of the Tribunal per se is untenable and unsustainable.

It admits no ambiguity that if the Court grants one relief out of many, it is logically inferred that the other reliefs are impliedly denied. There is no fetter on the part of the aggrieved person to approach the higher forum complaining of implied denial of the other reliefs or the approach can be made to the same Court complaining of such error being apparent on the face of the record. The moment higher forum is

approached, we do not find any impediment on the part of it to consider the aforesaid prayer on the basis of the pleadings as well as the supporting documents.

The reliance is heavily placed upon the judgement rendered in case of *Hindustan Tin Works Pvt. Ltd. vs. The Employees of Hindustan Tin Works Pvt. Ltd. & Ors* reported in (1979) 2 SCC 80. The dispute involved in the above Report pertains to the retrenchment of workmen under the Industrial Law and the order of retrenchment was the centre of challenge before the appropriate forum. It appears that the order of retrenchment was set aside and a further question that evolved therefrom was a further appropriate relief in the form of awarding full-wages or partial wages. In the backdrop of the aforesaid factual matrix the Apex Court held that there cannot be a strait-jacket formula for awarding a relief of back-wages. Various factors are involved in embarking the journey of providing full or partial wages to be discerned from the pleadings filed by the respective parties and the discretion to be exercised.

It is no longer res-integra that the discretion vested upon the Court or the Tribunal is to be exercised judicially and pragmatically as opposed to capriciously and whimsically. Normally the exercise of discretion is seldom interfered by the higher forum provided such discretion appears to be reasonable, rational and in tune with the fabric of social aspect. Even if there is a possibility of two views, the one adopted by the Court or Tribunal does not invite any interference even the higher forum thinks that the other should have been adopted.

It is thus manifest from the aforesaid judgement that granting full wages or partial wages upon quashing the termination order is not imperative, mandatory or in other words the rule of rigidity, but depends

upon various factors and the fact, which runs in varied shades and forms. The judgement of *Hindustan Tin Works Pvt. Ltd* (supra) has been accepted and reiterated in a recent decision of the Apex Court in case of *Jayantibhai Raojibhai Patel vs. Municipal Council, Narkhed & Ors.* reported in (2019) 17 SCC 184. The said case relates to initiation of a disciplinary proceeding against a Headmaster, who alleged to have committed misconduct i.e. embezzlement of monetary fund. Though the first assessment of the enquiry does not find the charges to have been proved, but the authority decided to appoint another enquiry officer and a contrary view was expressed by him. Ultimately it resulted into termination / removal from service. The matter traveled to the High Court and it was found that the order of the disciplinary authority is per se illegal and, therefore, quashed and set aside the same. Then the matter reached to the Apex Court and taking into consideration the aforesaid facts having involved therein the Apex Court restated the principle of law enunciated in *Hindustan Tin Works Pvt. Ltd.* (supra) in the following:

“ 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 specter 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 the relief is granted. More so in our system where the law's 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 litigating activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workman's 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. Article 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 upto the apex Court and 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 invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat v. Safai Kamdar Mandal MANU/GJ/0120/1970, and a Division Bench of the Allahabad High Court in Postal Seals Industrial Co-operative Society Ltd. v. Labour Court II, Lucknow and Ors. [1971] 1 L.L.J. 327, have taken this view and we are of the opinion that the view taken therein is correct.”

The Bench further took note of the subsequent judgement of the Apex Court rendered in case of *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya* reported in (2013) 10 SCC 324. In the said judgement the Apex Court held that though the awarding of back wages is the normal rule upon setting aside the termination order, but the same is not free from any exception. It was held that while granting the back wages the Court must bear in mind various factors including that during the period between the date of termination and the date of the order of setting aside the order of termination the employee was not in gainful employment nor have the adequate monetary means for his sustenance in the following:

- 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 averment 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.*

Further reliance is made to a judgement rendered in case of *Dipti Prakash Banerjee vs. Satvendra Nath Bose National* reported in AIR 1999 SC 983 for the proposition that in absence of any counter-pleading from the employer that the petitioner is in gainful employment, the back wages cannot be denied.

In the said Report, in fact, three questions were framed having involved therein and the 4th question appears to be omnibus. The 1st question pertains to termination from probationary service on misconduct

and 2nd question was whether the order of termination contains any stigma and the 3rd question is intertwined with the 2nd question. While considering the aforesaid points holding that the order of termination has contained a stigma requiring adherence of the principles of natural justice, the 4th omnibus question was considered whether any further benefit can be granted. It was categorically observed that in the facts of the said case there was no departmental enquiry ever held before the authority proceeded to terminate the service and in such perspective it was observed that since there is no material forthcoming that the employee was employed in the meantime, the back wages ought to have been extended to the delinquent therein.

As indicated above, the exercise of discretion depends upon the facts involved in the given case and the specific pleading is made in this regard. The moment one of the reliefs relates to back wages, there must be supporting pleadings and materials, as the reliefs cannot be claimed nor the reliefs can be granted in isolated manner without being corroborated by any fact in the pleadings itself. In absence of any factual foundation in the pleadings, it is not necessary that there must be an express finding to be recorded in support of each of such reliefs, as there is no material forthcoming to arrive at the decision whether to grant or not to grant such reliefs. There is a complete silence in the pleadings filed before the Tribunal as to whether the petitioner is still unemployed and not in any gainful employment and, therefore, there is no necessity that the Tribunal should venture to decide such reliefs. The decision is what emerged from the reasons and the facts discerned from the respective pleadings. It cannot be granted by a *ipsi dixit* of the reliefs claimed in the pleadings when sufficient facts are lacking.

We thus do not find any merit in the instant writ petition. The same is hereby dismissed.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)