

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 708 OF 2020**

Mr. Nitin Dinkar Jadhav

....Petitioner

V/s.

Mutha Engineering Pvt. Ltd.

...Respondent

Mr. Vishwanath S. Talkute, for the Petitioner.

Mr. Nitin A. Kulkarni, for the Respondent.

**CORAM : SANDEEP V. MARNE, J.
Resd. On : 6 DECEMBER 2023.
Pron. On : 11 December 2023.**

JUDGMENT :

1. **Rule.** Rule is made returnable forthwith. With the consent of the parties, Petition is taken for final hearing and disposal.
2. The Petition is filed by the Petitioner challenging the Judgment and Order dated 14 October 2019, passed by the Industrial Court, Satara to the extent it has the effect of denial of

backwages to him, consequent to setting aside his termination order and reinstatement.

3. Petitioner claims to have been employed with the Respondent- employer since the year 1989 and was working on the post of 'Turner'. It is Petitioner's case that he was being repeatedly harassed by the employer by making attempts to terminate him from services. Previously, the Petitioner filed Complaint (ULP) No. 63 of 2003, in which stay was granted by virtue of which Petitioner continued himself in service. That he was repeatedly subjected to disciplinary enquiries by issuing chargesheets dated 25 August 2004 and 8 December 2004. That both the enquiries were conducted in a partial manner and he was terminated from service on 21 January 2005. Petitioner filed Complaint (ULP) No. 44 of 2005 before the Labour Court, Satara. His Interim Application for permitting him to work during pendency of complaint was rejected by order dated 23 September 2005. Both the parties led evidence before the Labour Court. The Labour Court delivered Judgment and Order dated 31 October 2014 partly allowing the complaint. The Labour Court set aside the termination order dated 23 January 2005 and directed reinstatement of Petitioner in service from the date of termination. His prayer for backwages was however rejected. Instead, the Labour Court directed payment of compensation of Rs.2,00,000/- to the Petitioner. Both the Petitioner as well as the Respondent-employer got aggrieved by Labour Court's Order dated 31 October 2014 and filed Revisions (ULP) No. 8 of 2015 and 57 of 2014 respectively. By common Judgment and Order dated 18 January 2016, the Industrial Court dismissed Respondent's Revision (ULP) No. 57 of 2014 and allowed

Petitioners Revision (ULP) No.8 of 2015. It modified the operative portion of the Labour Court's Order and directed that the Petitioner shall be entitled for full backwages from 24 January 2005 till 31 October 2014.

4. Respondent-employer filed Writ Petitions No. 5952 of 2016 and 5948 of 2016 and 5948 of 2016 before this Court challenging the decision of the Industrial Court. By Order dated 20 February 2019, this Court set aside the Order passed by the Industrial Court. By consent of both the parties, both the revision applications came to be remanded for fresh hearing before the Industrial Court. The Industrial Court accordingly proceeded to rehear Revision (ULP) Nos. 57 of 2014 and 8 of 2015 and by common Judgment dated 14 October 2019, the Industrial Court has allowed Respondent's Revision (ULP) No. 57 of 2014 by setting aside the Order of the Labour Court for grant of compensation of Rs.2,00,000/-. Petitioners Revision (ULP) No. 8 of 2015 came to be dismissed. The Petitioner is aggrieved by the Judgment and Order dated 14 October 2019 passed by the Industrial Court and has filed the present petition claiming 100% backwages in respect of the intervening period.

5. Mr. Talkute, the learned counsel appearing for the Petitioner would submit that Petitioner has been wrongfully terminated from service. The order setting aside termination is not under challenge. Once the termination is found to be illegal, grant of backwages is a natural consequence. He would submit that the Respondent-employer had attempted to lead evidence about gainful employment of the Petitioner and that the Respondent failed in the attempt. That once the Respondent took

upon itself the task of proving gainful employment on the part of the Workman, the Workman cannot be expected to prove the negative that he was not gainfully employed. In support of the contention, Mr. Talkute would rely upon the judgment of the Apex Court in *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) And Others (2013) 10 SCC 324*.

6. *Per-contra*, Mr. Kulkarni, the learned counsel, appearing for the Respondent-Employer would oppose the petition and support the order passed by the Industrial Court. He would submit that the Labour Court had committed a manifest error in granting compensation after denying payment of backwages. According to Mr. Kulkarni, the Labour Court has to choose between the relief of reinstatement with/without Backwages or compensation. That once backwages are denied, there is no question of grant of compensation. In support of his contention, Mr. Kulkarni would rely upon the judgment of this court in *Maneck Gopal Divekar Vs. Phoenix Mills Limited and Ors. (MANU/MH/0346/1987)*. He would submit that the Petitioner failed to either aver or prove during the course of his evidence that he was not gainfully employed. He would invite my attention to the Affidavit of examination-in-chief filed by the Petitioner to demonstrate that the Petitioner did not depose that he was not gainfully employed. That after completion of the evidence, Petitioner erroneously filed Affidavit contending that he made attempts to secure another job and was unsuccessful. That the affidavit filed by the Petitioner on 13 January 2014 after closure of evidence could not have been taken into consideration by the Labour Court. That the statements made in the Affidavit have

gone uncontroverted on account of non-cross-examination of the Petitioner on the contents of the Affidavit. According to Mr. Kulkarni, Petitioner was repeatedly remaining absent and had become a habitual absentee. That despite remaining unauthorisedly absent, Petitioner has been granted reinstatement and accepting grant of backwages after reinstatement would be like putting a premium on the admitted misconduct committed by the Petitioner. He would pray for dismissal of the petition.

7. I have considered the submissions canvassed by the learned counsel for rival parties.

8. The Labour Court has already set aside Petitioner's termination. That part of the Labour Court's order stands complied with and Petitioner has apparently been reinstated in service. The only issue that remains to be decided is about backwages during the intervening period from the date of termination till the date of reinstatement.

9. The Petitioner faced the charge of remaining unauthorisedly absent from duties on many occasions. The period of absence alleged in the chargesheet is as follows: January 2002 to April 2002 for 17 days, May 2002 to July 2002, the Petitioner for 28 days; August 2002 till December 2002 for 17 days; March 2003 to June 2003 for 43 days and March 2004 to October 2004 for 29 days. Thus it was alleged that the Petitioner unauthorisedly remained absent for about 134 days from January 2002 to October 2004. The Labour Court has proceeded to set aside the termination essentially on account of erroneous

allegation being raised about absence on 23 May 2004 and 16 June 2004. The Labour Court has held that though Petitioner was actually present for duties on 23 May 2004 and 16 June 2004, he was erroneously shown as absent. On account of this factor, the Labour Court has refused to believe the story of the employer about absence on other days. In my view, merely because Petitioner was erroneously marked absent on two days would not *ipso-facto* absolve him in respect of absence about the rest 132 days. It was Petitioner's allegation before the Labor Court that he was being erroneously marked absent for the purpose of creating evidence for his termination. Be that as it may, the direction of the Labour Court to set aside termination and to direct reinstatement is not under challenge before me in the present petition.

10. Turning back to the issue of backwages, it is seen that the Petitioner made an averment in para-15 of the complaint that he was poor and did not have any other source of income except his job. That his entire family was dependent upon his job. Thus, the Petitioner specifically pleaded a case that he does not have any other source of income. However, when Affidavit of Evidence in lieu of examination-in-chief was filed by the Petitioner on 7 January 2013, he did not make any averment about not being gainfully employed. Thus, on his own, Petitioner did not lead evidence that he was not gainfully employed except making an averment about non-availability of any other income source in the complaint. However, it appears that the Respondent-Employer took upon itself the task of proving that Petitioner had source of income and was earning Rs.20,000/- per month through Agriculture, Tractor, JCB and other resources.

Respondent examined Mr. Shirish Anant Marulkar working as Accounts Assistant who stated in his evidence Affidavit as under :-

तक्रारदार हा वरील दोन आरोपपत्रातील कालावधीमध्ये विनापरवाना किंवा मंजूर रजेशिवाय गैरहजर राहिलेला आहे. तसेच, त्यामुळे त्यास चौकशी घेऊन नोकरीतून बडतर्फ केलेले आहे. तक्रारदारचे नोकरीतील पास्ट रेकॉर्ड अतिशय खराब आहे. त्यानंतर लगेचच तक्रारदाराने स्वतःचा व्यवसाय सुरू केलेला आहे. तसेच, तक्रारदारला उत्पन्नाकरीता शेतो, ट्रॅक्टर व जे.सी.बी. व इतर अनेक साधने आहेत. सदर उत्पन्नाच्या साधनांतून तक्रारदारला दरमहा वीस हजार रुपये पेक्षा जास्त इतके उत्पन्न चालू आहे. त्यामुळे तक्रारदार यास जाबदारचे नोकरीची आवश्यकता नाही तरी तक्रारदारची तक्रार ही रद्दबातल करण्यात यावी.

11. In the cross examination, the witness admitted that he did not personally see the Petitioner working on any JCB or Tractor. After closure of the evidence by both the parties, Petitioner filed Affidavit dated 6 January 2014 stating that he attempted to secure another job but was not successful in the same and that he was not gainfully employed after the date of termination of service. Mr. Kulkarni has contended and in my view, rightly so, that the averments made in the Affidavit dated 6 January 2014 are required to be ignored. Petitioner ought to have led evidence about not being gainfully employed by making averments to that effect in the Affidavit of Evidence. Admittedly, Respondent did not have an opportunity to cross-examine the Petitioner about contents of Affidavit dated 6 January 2014. In my view, therefore the statements made in the said Affidavit could not have been relied upon by the Labour Court for deciding the issue of backwages. Thus what the Labour Court could have considered are the following factors for deciding the issue of backwages:

- (i) There is an averment in the complaint that Petitioner did not have any other source of income.

(ii) Petitioner did not lead any evidence while filing Affidavit of examination-in-chief that he was not gainfully employed.

(iii) Respondent-Employer took upon itself the burden of proving that Petitioner was gainfully employed and attempted to lead evidence that he was earning Rs.20,000/- per month from Agriculture, JCB, Tractor etc.

12. The Labour Court after taking into consideration the above evidence held that backwages cannot be awarded to Respondent. However, considering the Petitioner's financial condition, injustice faced by him and the prevailing inflation, the Labour Court thought it appropriate to award compensation of Rs.2,00,000/-. Mr. Kulkarni has relied upon the Judgment of this Court in *Maneck Gopal Divekar* (supra) in which this Court has held as under.

"9.

Therefore, when an Industrial or a Labour Court comes to the conclusion that a party complained against committed an unfair labour practice and if the same is one of dismissal, discharge or termination of service, service, the relief which the Court can grant under Section 30(1)(b) is four fold (i) payment of reasonable reasonable compensation, or reinstatement, or (iii) reinstatement with or without back wages, reasonable compensation in lieu of back wages. These are the four alternatives (ii) or (iv) payment of available to an Industrial or a Labour Court in granting relief to the complainant and when any one of them is granted it would necessarily mean rejection of the other three. Normally, when a relief of reinstatement is granted, it is coupled with the order of back wages whether full, half or otherwise unless there are compelling circumstances in the case for not granting back wages. But the order has to specifically mention granting of back wages when reinstatement is granted otherwise it would necessarily mean reinstatement without back wages. It would not be correct to say that an order of reinstatement without back wages does not exist. If an order of reinstatement is to be construed as an order of reinstatement with full back wages, there was no necessity for the legislature to make provisions of four alternatives in granting the relief to a dismissed or discharged workman. The provisions of Section 30(1)(b) of the MRTU and PULP Act, thus clearly show that when the relief of "reinstatement simpliciter" is granted, it means relief only of

reinstatement and nothing more and certainly not of back wages along with it.”

13. Ordinarily, the relief of lumpsum compensation is granted in lieu of reinstatement and backwages. Once the Labour Court directs reinstatement by setting aside the termination order, it has to decide the next issue about grant or denial of backwages. The Labour Court may either deny backwages altogether or grant 100% or partial backwages. However, once it arrives at a conclusion that backwages are not payable, award of compensation cannot be resorted to. To this extent, the finding and direction of the Labour Court for award of compensation of Rs. 2,00,000/- appears to be erroneous. The Industrial Court has rightly inferred in that regard.

14. Having held that the Labour Court could not award compensation after denial of back wages, the next issue is whether any backwages could have been granted. The Petitioner has challenged the order of the Labour Court to the extent of denial of 100% backwages. In *Deepali Gundu Surwase* (supra), the Apex support has culled out following propositions after discussing the entire precedents of the issue of backwards in paragraph-38 to 38.7 of its judgment :

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 month 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, where 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.

38.5. 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 victimising the employee or workman, then the court or tribunal concerned 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 employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer for his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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. 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 (P) Ltd. v. Employees*.

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* 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^{7.8} referred to hereinabove and cannot be treated as good law. This part the judgment is also against the very concept of reinstatement of an employee/workman.

15. Thus, in *Deepali Gundu Surwase*, the Apex Court has held that the employee or workman has to merely make a statement before the Adjudicating Authority that he/she was not gainfully employed. Once such statement is made, the burden to prove gainful employment by employee/ workman shifts on the employer who has to then lead evidence to prove that he/she was gainfully employed. The Apex Court has held that it is always easier to prove positive fact than to prove negative fact. The Apex Court has further held that once the Labour/Industrial Court finds that employee/workman is not guilty of misconduct or that the employer had foisted a false charge, there would be ample justification for award of backwages.

16. In *Gowamma C. (Dead) By Lrs Vs. Manager (Personal) Hindustan Aeronautical Ltd. And Another* 2022 SCC OnLine SC 310, the Apex Court held in para-13 as under :

13. The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee. In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case. As we have already noticed, this is a case where apart from the charge of the employee having produced false caste certificate, there is no other charge. Therefore, we would think that interests of justice, in the facts of this, would be subserved, if we enhance the back wages from 50% to 75% of the full back wages, which she was otherwise entitled. The appeals are partly allowed. The impugned judgments will stand modified and the respondents shall calculate the amount which would be equivalent to 75% of the back wages and disburse the amount remaining to be paid under this judgment within a period of six weeks from today to the additional appellants.

17. Considering the parameters laid down by the Apex Court in *Deepali Gundu Surwase* and *Gowramma C.* (supra), it is seen that Petitioner had made an averment in the complaint of absence of alternate source of income. True it is that, Petitioner failed to make a statement in his deposition that he was not gainfully employed. However, Respondent voluntarily took upon itself the task of proving that Petitioner was gainfully employed. Except making bare statements, no documentary evidence is shown about any income being earned by the Petitioner. On the other hand, the witness of Respondent-employer has specifically admitted in the cross examination that he never saw the Petitioner using Tractor or JCB machines to earn any income for himself. The employer thus failed to prove that Petitioner was gainfully employed during the relevant period.

18. About the aspect of nature of charge levelled against the Petitioner and the element of truth in it, the charge is of unauthorised absence from duty. As observed above, the

Labour Court has essentially rejected the finding of guilt on account of its observation that Petitioner was erroneously shown absent despite being present on two days. However, no specific findings are recorded by the Labour Court as to how allegations of other 132 days can be held to be false. It is therefore difficult to hold that any false charge was foisted upon the Petitioner. In my view, therefore, grant of 100% backwages in the facts and circumstances of the present case would not be justified. Instead, ends of justice would meet, if Petitioner is awarded 50% backwages during the intervening period from the date of termination from service till the date of the Order passed by the Labour Court. If there is any delay on the part of the employer in reinstating the Petitioner after passing of the Order of the Labour Court, the employer must pay full backwages in respect of such delayed period.

19. I accordingly proceeded to pass the following order.

(i) The Orders dated 31 October 2014, passed by the Labour Court and order dated 14 October 2019, passed by the Industrial Court, shall stand modified to the extent that Petitioner shall be entitled to 50% backwages for the period from 24 January 2005 to 31 October 2014.

(ii) In respect of period from 1 November 2014 till the date of actual reinstatement, the Petitioner shall be entitled for 100% backwages.

(iii) The amount of backwages shall be paid by the Respondent-employee to the Petitioner within a period of two months from today.

20. With the above directions, the petition is partly allowed. Rule is made partly absolute.

SANDEEP V. MARNE, J.