

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.-4415 OF 2021

Habibullah L. Khan ...Petitioner

Vs.

M/s. Formac Engineering Ltd ...Respondent

WITH

WRIT PETITION NO.-5159 OF 2021

Shri. Shrikrishna Babaji Warang ...Petitioner

Vs.

M/s. Formac Engineering Ltd ...Respondent

WITH

WRIT PETITION NO.-4416 OF 2021

Dilip Ganpat More ...Petitioner

Vs.

M/s. Formac Engineering Ltd ...Respondent

WITH

WRIT PETITION NO.-4417 OF 2021

K. Ramachandra Suvarna ...Petitioner

Vs.

M/s. Formac Engineering Ltd ...Respondent

Mr. Ravindra B. Nair a/w Mr. C.M. Lokesh, for Petitioner.

Mr. Mahesh Shukla i/b Mr. Niraj Prajapati, for Respondent.

CORAM:- N. J. JAMADAR, J.

DATE:- 10th JULY, 2023.

JUDGMENT:-

1) Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties heard finally.

2) The petitioners, who were the employees of the respondent, have preferred these Petitions being aggrieved by the awards passed in the respective References under the Industrial Disputes Act, 1947 ("the Act, 1947"), whereby the learned Presiding Officer, Labour Court at Mumbai answered the References partly in the affirmative holding, *inter alia*, that dismissal of the petitioners was illegal and bad in law and, instead of directing reinstatement in service with full back wages and continuity of service, awarded a lump sum compensation of Rs.1,50,000/- only.

3) The facts in Writ Petition No.5159 of 2021, which is considered as a representative case, can be stated in brief as under:-

(a) The petitioner was employed as a Turner with the respondent. The enterprise was afflicted with industrial unrest. The Mazdoor Congress Union, of which the petitioner was a member, had submitted a charter of demands. Respondent-employer had resorted to lockout from 7th December, 1993 to

28th January, 1994. Mazdoor Congress Union had given a call for strike with effect from 26th December, 1993.

(b) In the meanwhile, another Union, Bharatiya Kamgar Karmachari Mahasangh (BKKM) entered the fray. The petitioner alleged the respondent-employer to break the bargaining power of the workmen made many a workmen to join BKKM. Eventually in order to avoid the conflict, after the lockout was lifted, Mazdoor Congress Union withdrew the strike call. Industrial peace was thus restored.

(c) It was the claim of the petitioner that the respondent did not allow members of Mazdoor Congress Union to resume duty. Charge sheets leveling false accusations of alleged 'gherao' on 25th November, 1993 and reduction of production and, 'go slow' agitation were served on the petitioner on 29th January, 1994, the petitioner came to be suspended. Eventually, by resorting to a farce of enquiry the petitioner was dismissed from service with effect from 29th October, 1998.

(d) Reference (IDA) No. 182 of 2006 was made by appropriate government. By Part-I award dated 18th April, 2017, the learned Presiding Officer, Labour Court declared that the enquiry held against the petitioner was not fair and proper and the findings of the Inquiry Officer perverse.

(e) Availing the liberty, the respondent led evidence to substantiate the misconduct attributed to the petitioner, before the Labour Court.

(f) After appraisal of the evidence and material on record, by the impugned award dated 15th May, 2019, the learned Presiding Officer returned the finding that the termination of the petitioner was illegal. However, since the petitioner had crossed the age of superannuation, instead of directing reinstatement in service with full backwages, the learned Presiding Officer was persuaded to award lump sum compensation of Rs.1,50,000/-.

4) The facts in rest of the Petitions are almost identical with change being that of the designation of workmen, the number of years of service rendered by each of the workmen, before the suspension and dismissal, and the dates of the award passed by the Labour Court.

5) In Writ Petition No. 4415 of 2021, the petitioner was suspended by an order dated 28th January, 1994. He came to be dismissed on 21st October, 1998. Part-I award holding that the enquiry was not fair and proper was passed on 18th April, 2017 and the impugned award, on 15th May, 2019. The petitioner attained the age of superannuation on 23rd June, 2012.

6) In Writ Petition No. 4416 of 2021, the petitioner was suspended on 28th January, 1994 and dismissed on 29th October, 1998. The petitioner attained age of superannuation on 23rd June, 2018. Part-I award was passed on 27th April, 2017 and the impugned award on 4th June, 2019.

7) In writ Petition No. 4417 of 2021, the petitioner was suspended on 17th October, 1993 and dismissed on 29th October, 1998. Part-I award was passed on 27th April, 2017 and the impugned award on 25th June, 2019. The petitioner attained the age of superannuation in the month of June, 2018.

8) Being aggrieved by quantum of compensation, in lieu of reinstatement with full backwages, the petitioners have preferred these Petitions. The amount awarded by the Labour Court, according to the petitioners, is wholly inadequate and does not compensate the petitioners for the trial and the tribulations faced by the petitioners since their unjustified suspension in the year 1993-1994. Despite having returned the finding that the action of the employer was wholly unjustified, the learned Presiding Officer refrained from awarding a just and reasonable compensation.

9) I have heard Mr. Ravindra Nair, the learned Counsel for the petitioners, and Mr. Mahesh Shukla, the learned Counsel for

the respondent, at some length. The learned Counsel for the parties took the Court through the pleadings before the Labour Court, evidence led by the parties, impugned award and the material on record.

10) Mr. Nair strenuously submitted that the learned Presiding Officer, Labour Court, did not keep in view the principles which govern the determination of quantum of compensation where the Court decides to award of compensation in lieu of an order of reinstatement and backwages. The length of service of the workmen, the long period for which the workmen were deprived of the employment, prolonged period of suspension without payment of the subsistence allowance, patently false nature of the accusation and the attendant circumstances were not at all adverted to by the learned Presiding Officer.

11) Mr. Nair further submitted that the petitioner had categorically asserted that since the date of dismissal they could not get any employment despite diligent search and the petitioners and their families were made to suffer financial crisis and strive had to sustain themselves. In contrast the respondent did not discharge the burden of establishing that the workmen were gainfully employed. In this view of the matter,

the award of a sum of Rs.1,50,000/- errs on the side of being wholly inadequate recompense, urged Mr. Nair.

12) In opposition to this, Mr. Shukla would urge that the learned Presiding Officer, Labour Court has taken into account the evidence which indicated that the petitioners were gainfully employed in the interregnum. Once such evidence was led, there was no justification for claiming backwages and, resultantly, the quantum of compensation in lieu of reinstatement and backwages cannot be questioned. Mr. Shukla strenuously submitted that in view of the admissions in the cross-examination of each of the petitioners, the respondent was not at all required to lead evidence aliendu in proof of the fact that the petitioners were gainfully employed. Mr. Shukla further submitted that, in any event, the determination of quantum of compensation is not such that this Court would be justified in exercising the writ jurisdiction.

13) There is not much controversy on facts. Employer-employee relationship is incontestable. The factum of service of charge sheets and consequent suspension of each of the petitioners are not in dispute. Nor the fact that, post disciplinary proceedings, each of the petitioners came to be dismissed from service. The Labour Court found the enquiry not

fair and legal. The findings of the Inquiry Officer were also found to be perverse. Indisputably, the Part-I award has not been challenged. Evidently, the endeavor of the employer to prove the misconduct by adducing evidence before the Labour Court did not succeed and categorical findings have been recorded that the employer failed to bring home the charge to the petitioners. Incontrovertibly, each of the petitioners attained the age of superannuation before passing the impugned award.

14) In the backdrop of the aforesaid facts, the learned Presiding Officer, Labour Court was well within his rights in awarding compensation in lieu of reinstatement. It is the quantum of compensation over which the parties are at issue. The Labour Court proceeded on the premise that the last drawn salary each of the petitioners was Rs.3,000/- per month and thus a compensation of Rs.1,50,000/- was just and equitable.

15) Mr. Nair was justified in canvassing the submission that the learned Presiding Officer, Labour Court did not advert to the principles which govern the determination of the quantum of compensation. Only the factors of the length of service and last drawn wages of each of the petitioners, were taken into account.

16) It is trite whenever an order of termination of service is declared illegal, reinstatement is not the inevitable consequence.

A variety of factors came into play in the matter of determination of the relief to be granted to workman who has been illegally terminated. Normally an employee is entitled to be reinstated in service where no other circumstance bears upon passing of such order. On the aspect of backwages as well, the attendant factors play a significant role. Those attendant factors include the length of service, the nature of indictment, nature of the proved misconduct, the financial position of the employer, the continuity of the employer's enterprise as a running concern, gainful employment of the employee, in the intervening period, and the like. The nature of the finding recorded by the Industrial adjudicator as regards the charge on the strength on which the employee's services were terminated also plays a pivotal role.

17) It would suffice to make a profitable reference to the decision of Supreme Court in the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others¹** in which the propositions which bear upon the relief to be granted to an employee who has been wrongfully terminated, were illuminatingly postulated. They read as under:-

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

1 (2013) 10 SCC 324

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 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.

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 victimizing the employee or workman, then the concerned Court or Tribunal 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 be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of 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 finalization 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. He 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) Limited v. Employees*⁷(supra).

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal*⁵ (supra) 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 referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.....”

18) On the aforesaid touchstone, reverting to the facts of the case, first and foremost, it is of critical salience to note that the Labour Court has recorded categorical findings that the disciplinary proceedings against each of the petitioners was an exercise to break the Union activity and amounted to victimisation. Since the respondent-employer has not assailed the impugned award, the aforesaid finding of the Labour Court deserves to be taken into account as it stands.

19) The Labour Court found that none of the charges of misconduct were proved by the employer. In such a situation, the claim for full backwages gains credence as the action of the employer can be termed to be wholly unjustifiable and an instance of unwarranted exercise of managerial authority.

20) Secondly, in the evidence adduced by each of the petitioners, there was a categorical statement that since the date of dismissal the petitioner could not get gainful employment despite making efforts. Ordinarily, in view of the assertion that the workman was not gainfully employed, the onus shifts on the employer to plead and lead cogent evident to prove

that the workman was gainfully employed and was getting wages comparable to the wages which the workman was drawing at the time of termination.

21) In the case at hand no endeavor was made on behalf of the respondent-employer to positively assert and establish that the petitioners were gainfully employed. Instead the respondent relied upon the purported admissions in the cross examination of each of the petitioners especially to the effect that the petitioners discharged the responsibility to maintain their respective families and incurred expenses to maintain family. For instance in the cross-examination of Mr. Shrikrishna Babaji Warang, petitioner in Writ Petition No. 5159 of 2021, it was elicited that he had incurred expenses of Rs.1,000/- to 1,200/- per month towards maintaining the family. He further conceded that he maintained his family doing some labour and agriculture work and that he had agricultural land at his native place. He admitted to have discharged his responsibility as the head of his family. Mr. Habibullah L. Khan, the petitioner in Writ Petition No. 4415 of 2021, also conceded that he had discharged his responsibility as the head of the family and incurred Rs.4,000/- to Rs.5,000/- towards the maintenance of the family. He had withdrawn his Provident Fund, post

termination. Mr. Dilip Ganpat More, the petitioner in Writ Petition No. 4416 of 2021, also admitted that till his elder son got employed, he incurred expenses of Rs.10,000/- towards maintaining his family including educational expenses of the children. Mr. K. Ramachandra Suvarna, the petitioner in Writ Petition No. 4417 of 2021, also admitted to have incurred expenses of Rs.10,000 to Rs.12,000/- per month for maintaining his family. He went on to admit that as of the year 2019, a Quality Controller normally earned Rs.30,000/- to Rs.35,000/- as a salary.

22) Banking heavily upon the aforesaid admissions, Mr. Shukla would urge that since each of the petitioners conceded to have incurred expenses to maintain the family, the fact that they were gainfully employed stands established beyond cavil. I am afraid the evidence can not be appraised in such formal manner. The totality of the circumstances, can not be lost sight of. The fact that the petitioners, after being unjustifiably deprived of the services, made effort to somehow sustain themselves, cannot be equated with a secure gainful employment with equivalent remuneration which the respective petitioner was drawing at the time of termination. It would amount putting a premium on the wrongful conduct on the part

of the respondent-employer, to deny just and reasonable compensation to the workman on the premise that the workman admitted that he had the responsibility of the family and incurred expenses to maintain the family.

23) In the case at hand, the learned Presiding Officer ought to have taken into account the fact that the petitioners were placed under suspension for four years before their services were terminated. The petitioners continued to wage the legal battle for vindication of their legitimate rights. By the time final award could be passed, each of the petitioners had passed the age of superannuation. Precious creative and productive years of the life the petitioners, were lost in litigation.

24) Computation of compensation by merely taking into account the last drawn salary by the petitioners, without considering the benefits of wage revision, which the petitioners would otherwise have had, over the period of two decades, may not be justifiable. Though an element of guesswork in determination of lump sum is inevitable, yet, in my view, in the totality of the circumstances, a compensation of Rs.4,00,000/- would be just and reasonable compensation. Hence, the Petitions deserve to be allowed by modifying the impugned award to the extent of the quantum of compensation.

25) Hence, the following order.

:-ORDER:-

- i)** The Petitions stand partly allowed.
- ii)** The impugned award in each of the Petitions stand modified as under:-
- iii)** The respondent do pay to each of the petitioners a sum of Rs.4,00,000/- by way of compensation in lieu of reinstatement and back wages.
- iv)** If the amount of Rs.1,50,000/- in terms of the impugned awards is already paid and/or deposited, the balance amount be paid to the respective petitioners within a period of one month; if not the entire amount of Rs.4,00,000/- be paid within the said period.
- v)** In default the amount shall carry interest at the rate 9% p.a. till payment and/or realisation.
- vi)** Rule made absolute to the aforesaid extent.
- vii)** No costs.

[N. J. JAMADAR, J.]