



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9904 OF 2019**

M/s. D.S.L.Haydrowalt Ltd. ... Petitioner
versus
P. Unnikrishnan ... Respondent

Mr. Yogendra Pendse with Ms. Shraddha Chavan for Petitioner.
Mr. S.S.Nikam i/by Mr. Vaibav Jagdale, for Respondent.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 10 APRIL 2023
PRONOUNCED ON : 4 JULY 2023**

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.
2. The legality, propriety and correctness of an Award dated 4 February 2019 passed by the learned Presiding Officer, Labour Court, Mumbai, in Reference IDA No.147 of 2016 is called in question by the Petitioner-employer. By the said award, the Petitioner-first party has been directed to reinstate the Respondent-second party in service with full backwages and continuity of service with effect from 16 May 2015.
3. The Petitioner is a Company incorporated under the Companies Act, 1956. The Petitioner claims, on 18 March 2023 Respondent was employed as a Secretary to its director. On account of unsatisfactory performance, the services of the

Respondent were terminated by an order dated 15 May 2015. The Respondent raised an industrial dispute. Upon failure of conciliation, the Appropriate Government made a Reference for adjudication of the industrial dispute to the Labour Court, Mumbai.

4. The Respondent filed a statement of claim. The Petitioner put forth resistance by filing a written statement. The Respondent examined himself. The Petitioner adduced evidence of Mr. Shridhar M. Bele, its Manager (HR). After appraisal of the evidence, the learned Presiding Officer, Labour Court was persuaded to answer the Reference in the affirmative and return a finding that the second party was a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 (the Act); his services had been illegally terminated by the first party with effect from 15 May 2015 and, consequently, the second party was entitled for relief of reinstatement in service with full backwages and continuity of service from the date of termination. Being aggrieved, the Petitioner approached this Court.

5. I have heard Mr. Yogendra Pendse, learned Counsel for the Petitioner, and Mr. Nikam, learned Counsel for the Respondent, at some length. The learned Counsel took the Court through the pleadings and the evidence adduced before the Labour Court and the material on record.

6. Mr. Pendse mounted a two-pronged challenge to the impugned award. First, the Labour Court was in error in returning a finding that the Respondent was a workman under Section 2(s) of the Act, 1947. Amplifying the challenge, Mr Pendse

would submit that, incontrovertibly, the Respondent was appointed as a Secretary to the Director of the Petitioner. The duties which the Respondent performed were of administrative and supervisory nature. The Respondent attended to confidential work and communication. The learned Presiding Officer, Labour Court, misdirected himself in holding that the duties discharged by the Respondent were clerical in nature.

7. Second, the Labour Court grossly erred in ordering the reinstatement of the Respondent with full backwages and continuity of service, though the Respondent had hardly put in a couple of years of service. In the totality of the circumstances, the order of reinstatement with full backwages and continuity of service errs on the side of unjustified recompense.

8. In opposition to this, Mr. Nikam, the learned Counsel for the Respondent, would urge that the nomenclature of the post is of no significance. Though the Respondent was given the designation of Secretary, yet the core duties which the Respondent discharged were of clerical nature. The mere fact that, at times, the Respondent received confidential correspondence or addressed letters, by itself does not amount to discharge of administrative or supervisory work. Mr. Nikam laid emphasis on the fact that the Respondent had clearly mentioned the nature of the duties in the affidavit of evidence and nothing material could be elicited to discard his claim. In the absence of the attributes of supervisory duties, the learned Presiding

Officer, Labour Court committed no error in holding that the Respondent was a workman.

9. Mr. Nikam further submitted that the impugned action of termination was not at all preceded by any memo or notice, nor was it accompanied by compliance envisaged by the Section 25-F of the Act, 1947. The termination being wholly illegal, and the unchallenged claim of the Respondent that despite making efforts he could not get a gainful employment, especially having regard to his advanced age, the award of reinstatement in service with full backwages and continuity of service, does not deserve to be interfered with. At any rate, the impugned Judgment and Award, according to Mr. Nikam, cannot be said to be suffering from such perversity as to warrant interference in exercise of extra ordinary writ jurisdiction.

10. The primary question which crops up for consideration is whether the Respondent was a workman within the meaning of Section 2(s) of the Act, 1947. The Petitioner claimed, Respondent was working as a Secretary having administrative, managerial and supervisory functions and was discharging the following duties :

- “1. Secretarial & Confidential work of Company and Directors;
2. Personal work of Directors
3. Finalizing letters
4. Handling emails related to company and also confidential and independently replying the same.”

11. In contrast, in the statement and the Affidavit in lieu of examination in

chief, the Respondent claimed that the duties he was called upon to discharge included the following :

- “(a) Taking dictation and transcription.
- (b) Typing on computer / data entry / preparing application to Govt. authorities
- (c) Drafting of letters
- (d) Filing and maintaining of papers
- (e) Online Rail/Air ticket booking
- (f) Browsing net for information
- (g) Sending emails
- (h) Personal work of directors
- (i) Writing Registers of Board meetings
- (j) Work related to other Group Companies and the Schools run by the Company.
- (k) Any other work as demanded from time to time.”

12. A perusal of the definition of workman under Section 2(s) of the Act, 1947 would indicate that a person would come within the purview of the definition of workman if he is employed in any industry and performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work. The definition also contains four exclusions. In view of the Constitution Bench Judgment of the Supreme Court in the case of H.R. Adyanthaya etc. V/s. Sandoz (India) Ltd. Etc.¹ the position in law is settled that a person to be a workman under the Act, 1947 must be employed to do work of any of the category, namely, manual, unskilled, skilled,

1 1994 II CLR 552

technical, operational, clerical or supervisory and it is not enough that he is not covered by either of the four exceptions incorporated in the definition under Section 2(s) of the Act, 1947.

13. In the case at hand, upon evaluation of the evidence adduced, the learned Presiding Officer, Labour Court, has returned a finding that the duties discharged by the Respondent were of clerical and manual in nature. The learned Presiding Officer was not prepared to accede to the submission on behalf of the Petitioner that the Respondent performed administrative or supervisory duties. Whether the aforesaid approach of the Labour Court is justifiable ?

14. It is trite the question as to whether the employee answers the description of a workman or not is required to be determined on the basis of the evaluation of material and upon full consideration of all the aspects which bear upon the said determination. The nomenclature of the post is not decisive. What matters is the dominant nature of the duties which the employee discharged. Addition of one or two functions, which are of incidental nature, also does not change the pre-dominant nature of the duties discharged by the employee. In the very nature of the things, the question as to whether the employee satisfies the description of a workman is rooted in facts and deserves to be decided upon the appraisal of the material which obtains in the given case.

15. The manner in which the Respondent fared in the cross-examination

deserves to be considered. The Respondent conceded that he was doing confidential and secretarial work of the company and its directors. He was attending the personal work of the directors, receiving emails and finalizing drafts. He used to draft letters independently. He was doing railway and airlines bookings on line. He used to send emails as per the instructions of the superiors.

16. Banking upon the aforesaid admissions, it was urged on behalf of the Petitioner that the Respondent was performing administrative or supervisory duties. At the first blush, the manner in which the Respondent fared in the cross-examination may lend support to the submission on behalf of the Petitioner. However, upon judicious scrutiny, the gloss evaporates.

17. It is pertinent to note that the Respondent categorically asserted that vide letter dated 1 April 2014, the designation of the Respondent was changed from Secretary to the Stenographer. Controverting the said case of the Respondent, it was contended on behalf of the Petitioner that the word 'Stenographer' mentioned in the letter dated 1 April 2014 was a typographical mistake and the Respondent continued to be a Secretary. In the cross-examination of Mr. Shridhar M. Bele, a witness for the first party, it was elicited that the Petitioner never addressed any communication to the Respondent that the designation of the Respondent mentioned in the letter dated 1 April 2014 was a typographical error. He went on to concede that the Respondent would take dictation whenever senior/director would call him. He admitted that

there was no record to show that the Respondent was independently replying to the letters/emails.

18. The situation which, thus, obtains is that the primary and principal duties of the Respondent were to take dictation and transcript the same, do the typing, data entry and draft letters and send emails. The fact that, at times, confidential communications were entrusted to the Respondent or the Respondent performed the personal work of the directors would not change the dominant purpose of employment. It is well recognized that where an employee has multifarious duties and the status of such employee as a workman is put in contest, it is necessary to find out what are the primary and basic duties of the employee and where the employee is incidentally asked to discharge some other duties, those additional duties do not change the character of the employment. To put in other words, the dominant purpose of employment deserves to be taken into account and gloss of additional duties should not be permitted to hide the true nature of the employment.

19. A useful reference in this context can be made to a judgment of the Supreme Court in the case of **Management of M/s. Sonapat Co-operative Sugar Mills Ltd. V/s. Ajit Singh**² where the Supreme Court expounded the nature of the clerical work in the following words :

“16. Thus, a person who performs one or the other jobs mentioned in the aforementioned provisions only would come within the purview of

2 2005 II CLR 66

definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regard the dominant nature thereof. With a view to give effect to the expression to do “any annual, unskilled, skilled, technical, operational, clerical or supervisory work”, the job of the concerned employee must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, *ipso facto* he would be a workman.”

20. On the aforesaid touchstone, re-adverting to the fact of the case, the learned Presiding Officer, Labour Court, was justified in drawing an inference that the Petitioner could not demonstrate that the Respondent was performing such duties which were of such a character as to bind the Petitioner by those decision. The functions of taking dictation and entering into correspondence at the instance of directors and/or superiors, had no element of independent decision making. I am, therefore, persuaded to hold that the learned Presiding Officer, Labour Court, committed no error in holding that the Respondent satisfied the description of a workman.

21. The issue of illegal termination does not present much difficulty. The services of the Respondent were terminated without assigning any reason. Nor the compliance of the provisions contained in Section 25-F of the Act, 1947 was made. It was conceded in no uncertain terms that the Petitioner did not pay retrenchment

compensation to the Respondent. Thus, the finding recorded by the learned Presiding Officer, Labour Court that the Respondent's services were illegally terminated appears impeccable.

22. Mr. Pendse, learned Counsel for the Petitioner, assailed the impugned award primarily on the ground that the direction for reinstatement with full backwages and continuity of service was wholly unwarranted in the facts of the case. It was urged that the Respondent had hardly rendered two years service. It is not an immutable rule that whenever the termination of the service is found to be illegal, the employee must be reinstated with full backwages. The attendant factors deserve to be taken into account. Thus, the learned Presiding Officer, Labour Court, was in error in directing reinstatement with full backwages and continuity in service, urged Mr. Pendse.

23. The learned Presiding Officer was of the view that the termination of the Respondent was wholly arbitrary and illegal. There was not an iota of fault on the part of the Respondent. The latter had put oath behind the statement that despite making efforts, he could not secure employment. Hence, there was no justification to deny the full backwages.

24. Ordinarily, a workman whose services has been illegally terminated would be entitled to full backwages, except to the extent he was gainfully employed during the enforced idleness. There can be a departure from the normal rule where the circumstances warrant exercise of a judicious discretion. Over a period of time,

the position in law has emerged that a declaration that the termination of service of an employee was invalid need not automatically lead to reinstatement with full backwages as a matter of course. The Court / tribunal is called upon to exercise the discretion based on well recognized principles.

25. A profitable reference can be made to a decision of the Supreme Court in the case of **Deepali Gundu Surwase V/s. Kranti Junior Adhyapak Mahavidyalaya**³ wherein the principles which govern the payment of backwages were culled out as under :

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

3 (2013) 10 SCC 324

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 Private Limited V. Employees of Hindustan Tin Works Private Ltd.⁴

38.7 The observation made in J.K.Synthetics Ltd. V/s. K.P.Agarwal⁵ 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.”

26. In the case at hand, two factors are of critical salience. First, the Respondent had rendered service to the Petitioner for two years and two months only. Second, a direction for reinstatement came to be issued in the year 2019, by which time the Respondent was on his own showing, on the verge of retirement. With the passage of further time, as of date, the direction for reinstatement in service may not be in order. Instead, in my view, dictate of justice would be met if the Petitioner is

4 (1979) 2 SCC 80

5 (2007) 2 SCC 433

directed to pay a reasonable compensation.

27. What should be the quantum of compensation ? There is material on record to indicate that the last drawn salary of the Respondent was Rs.62,150/-. The annual remuneration apart from other admissible perquisite would be in the range of Rs.7,20,000/- p.a. The Respondent would have, in the normal course, superannuated after rendering four years of service from the date of termination. The Respondent has categorically asserted that he could not get re-employment on account of his relatively advanced age i.e. 56 years. Conversely, the Petitioner did not place on record any material to show that the Respondent was gainfully employed.

28. In the aforesaid view of the matter and the attendant circumstances, especially the length of actual service rendered by the Respondent to the Petitioner and the period of service which the Respondent would have otherwise rendered, had he not been terminated, in my view, a direction for payment of compensation of Rs.15 lakhs would be just and reasonable.

29. I am, therefore, inclined to partly allow the Petition and modify the impugned award. Hence, the following order :

ORDER

- (i) The Writ Petition stands partly allowed.
- (ii) The impugned Award stands modified as under :
 - (a) The direction for reinstatement of the Respondent –

second party with full backwages and continuity of service with effect from 16 May 2015 stands quashed and set aside.

(b) The Petitioner – first party is instead directed to pay compensation in the sum of Rs.15 Lakhs to the Respondent – second party within a period of three months from today.

(c) In the event of default, the said amount shall carry interest @ 9% p.a. till payment and/or realization.

(iii) The rule made absolute to the aforesaid extent.

(iv) No costs.

(N.J.JAMADAR, J.)