

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.2079 OF 2016

(FIROZ MAHILA MANDAL SHIKSHAN SANSTHA..VS.. KU. SHAHNAZ BANU ABDUL AJIJ SHEIKH
& OTH)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.P.Palshikar, Advocate for Petitioners.
Shri I.N.Choudhari, Advocate for Respondent No.1.
Shri N.S.Khubalkar, Advocate for Respondent No.2.

CORAM : ANIL S. KILOR, J.
DATED : MARCH 10, 2023.

1. Heard.

2. In this writ petition the judgment and order dated 03/03/2016 passed by the School Tribunal, Nagpur in Appeal No.STN-97 of 2012 is under challenge. The learned Tribunal vide impugned judgment and order set aside the order of termination dated 12/09/2012, of the respondent No.1 and the petitioners were directed to reinstate the respondent No.1 on the same post with continuity in service and full back wages.

The Brief facts of the present case are as under:

3. The respondent No.1 applied for the post of Assistant Teacher in Open Category in pursuance to the advertisement issued by the petitioner No.1 on 10/06/1998. On selection of the respondent No.1 she

was appointed as Assistant Teacher vide appointment order dated 01/07/1998 and accordingly she worked up to 30/04/1999. On 07/06/1999 the petitioners published another advertisement for the academic session 1999-2000 and the respondent No.1 was again selected and appointed on a clear and vacant post in Open Category on probation for two years. The Education Officer granted approval to her appointment and she got confirmed as permanent employee, on completion of probation period.

4. Thereafter on 20/12/2011 the petitioner No.1 issued statement of allegation to which she replied. Thereupon, the petitioners constituted an Enquiry Committee and issued charge-sheet. Thereupon, the Enquiry Committee submitted its report, relying upon which the respondent No.1 was terminated on 12/09/2012.

5. The respondent No.1, feeling aggrieved by the same, preferred an appeal under Section 9 of the Act of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "the Act of 1977"), which was opposed by the petitioners by filing their reply.

6. The learned School Tribunal, after considering the rival submissions and oral as well as documentary evidence, allowed the appeal in favour of the respondent

No.1 and thereby set aside the termination order and directed the petitioners to reinstate the respondent No.1 with continuity and full back wages. Hence, this writ petition.

7. This Court, on 01/04/2016, while issuing notices, granted stay to the impugned judgment and order, to the extent of back wages, however, no stay was granted to the reinstatement. Accordingly, the respondent No.1 was reinstated in the employment and subsequently from 05/10/2018 she joined another school namely Nagar Parishad Hindi Prathmik School.

8. Shri Palshikar, learned counsel for the petitioners submits that as the charges against the respondent No.1 were serious in nature and because the same were proved, directing to pay full back wages by the Tribunal, is therefore, erroneous.

9. The learned counsel for the petitioners submits that as in the enquiry all the charges were proved, the School Tribunal ought not to have granted reinstatement.

10. It is submitted that the respondent No.1 has not pleaded and proved that she was not gainfully employed anywhere during the period she was under termination. It is submitted that in absence of any such evidence that she did not gainfully employed somewhere

else from the date of termination till reinstatement, the respondent No.1 cannot claim back wages. He, accordingly, submits that grant of back wages is therefore, contrary to law.

11. On the other hand, the learned counsel for the respondent No.1 has pointed out that in the enquiry the documents on which the management has relied upon, were not supplied to the respondent No.1, though demanded. It is submitted that in the enquiry report the admissions given by the witnesses of the management in cross-examination were not referred and considered at all and at the same time the evidence led by the respondent No.1 by examining six witnesses, was also not considered by the Enquiry Committee.

12. It is pointed out that accordingly, on merit the School Tribunal has held categorically that the findings recorded by the Enquiry Committee was perverse and no sufficient opportunity was given to the respondent No.1 to defend her case, by supplying all the relevant documents to her though she repeatedly demanded the same.

13. He, therefore, submits that on merits, the Tribunal has held in clear terms in favour of the respondent No.1 and accordingly the termination was set aside. It is, therefore, submitted that in absence of any

evidence to prove any of the charges, only on the ground that the charges were serious, the back wages cannot be denied.

14. He, further submits that in the appeal memo before the School Tribunal the specific pleadings were made by the respondent No.1 to the effect that she was not gainfully employed anywhere. It is submitted that once it is pleaded the burden shifts on the management to prove the fact that the employee was gainfully employed somewhere else and as the petitioners have failed to prove the said fact, the Tribunal has granted 100% back wages, which is a normal Rule of Reinstatement. Accordingly, he prays for dismissal of the present writ petition.

15. In the light of the rival submissions, I have perused the record and the impugned judgment and order.

16. The learned School Tribunal, after appreciating the evidence recorded by the Enquiry Committee and also considering whether the enquiry was fairly conducted, has categorically observed that the admissions given by the witnesses of the management in cross-examination, in favour of the respondent No.1 were not considered by the Enquiry Committee. It is further observed that the evidence led by the respondent No.1 in favour of her case that was also not considered. It has categorically held that despite the repeated requests made by the respondent No.1 to supply the documents on

which the management has placed reliance upon to prove the charges against the respondent No.1, the same have not been supplied to the respondent No.1. Accordingly, it is held that sufficient opportunity was not given to the respondent No.1 to defend her case and the findings recorded by the Enquiry Committee are perverse.

17. The learned counsel for the petitioners has failed to point out from the material available on record that the said findings recorded by the School Tribunal are contrary to record or perverse. Thus, on merit, on the issue of reinstatement, I do not find any illegality or perversity committed by the learned School Tribunal.

18. The Hon'ble Supreme Court of India in the case of *Deepali Gundu Surwase ..vs.. Kranti Junior Adhyapak Mahavidyalaya*, reported in **2013 (11) SCALE, 268** has held thus :

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

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

ii) 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.

iii) 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.

iv) 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.

v) 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.

vi) 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 Limited (supra).

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (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

Benchies 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.”

19. Thus, it is evident that 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 relevant law or in breach of the contract and simultaneously deprived the workman of his earnings. If, thus, 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 if the workman has been deprived of by the illegal and invalid action of the employer.

20. It is further evident that if the employer wants to deny back wages to the employee or contest his/ her entitlement to get consequential benefits then it is for him / her to specifically plead and prove that during the intervening period the employee was gainfully employed getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer of relieving him of the obligation to pay back wages including the emoluments.

21. In the present matter, the Tribunal in paragraph No.18 has categorically held that the management has failed to prove that the respondent No.1 was in gainful employment during the intervening period. The findings recorded by the Tribunal reads thus:

“18. In view of finding on Issue No.1 it appears that, appellant has proved that, an impugned termination order dated 12/09/2012 is illegal and contrary to law. Respondent Nos. 1 and 2 have stated that, appellant has not established that, she is not having gainful employment after her termination and due to that, she is not entitled to get back wages. Learned advocate for appellant has submitted that, her termination is wrongful/ illegal and due to that, appellant is entitled to get back wages. In support of his contention, he has filed citation reported in 2013(11) SCALE 268, Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others. Moreover, it has been held in 2015(5) Mh.L.J. (S.C.) 580 Jasmer Singh vs. State of Haryana and another that, the burden to show that, the petitioner was gainfully employed during the period where his services were terminated will have to be discharged by the Respondent/ Management. Respondent Nos. 1 and 2 have not produced cogent evidence to show that, appellant was gainfully employed during the intervening period and due to that, she is entitled to get full back wages. Hence, I record my finding on Issue No.2 in the affirmative.”

22. Thus, in light of the observations made by the Hon’ble Supreme Court of India in the case of *Deepali Gundu Surwase*(supra) and the findings recorded by the learned trial Court in paragraph No.18 of the impugned

judgment, I am of the opinion that no case is made out by the petitioners to deny full back wages to the respondent No.1.

Accordingly, the Writ Petition is **dismissed**. No order as to costs.

CIVIL APPLN.NO. 1134/2017.

In view of dismissal of the writ petition, the Civil Application seeking direction to the petitioners for payment of salary is **disposed of**.

The respondent No.1 is at liberty to file proceedings for execution of the order of the School Tribunal or she may approach to the Education Officer in the light of the order dated 14/11/2017 passed by this Court.

JUDGE

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