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W.A.No.1511/2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 20-02-2023

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

W.A.No.1511 of 2022

The Managing Director,
Essem Technologies Private Limited....

Appellant

-VS-

1.The Presiding Officer,
Labour Court,
Puducherry.

2.Mrs.R.Varalakshmi

...

Respondents

Appeal is filed under under Clause 15 of the Letters Patent against the order, dated 28.02.2022, passed in W.P.No.16121 of 2013, on the file of this Court.

For Appellant : Mrs.S.Harinyi

For Respondent 2 : Mr.Balan Haridas

**JUDGMENT**

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This appeal has been preferred by the appellant management, challenging the order of the learned single Judge, dated 28.02.2022, passed in W.P.No.16121 of 2013, setting aside the non-awarding of back-wages from 01.02.2006 till the date of reinstatement i.e., 19.03.2013. The learned single Judge has, however, deprived back-wages from 11.08.2005 to 31.01.2006, on the ground of unauthorised absence.

2. The facts of the case are that the second respondent-woman employee, who joined the service of the appellant management, was deprived employment with effect from 01.02.2006, which was questioned by her in conciliation, and the failure of which resulted in an award by the Labour Court, Puducherry, in I.D.No.4 of 2008, dated 17.01.2013. The fact that the employee was on maternity leave from 11.08.2005 till 31.01.2006 is not in dispute. The employer contended that they were not aware of the employee going on maternity leave, as there was no information about the leave, and, even thereafter, from 01.02.2006, the employee did not report for work. According to them, they offered employment to the respondent employee before the Conciliation Officer, stating that there was no termination; the employee was not reporting for work and that she was unauthorisedly absent and abandoned the services. The recordings of the Conciliation Officer during conciliation on 14.03.2007, 30.03.2007 and 09.05.2007 are extracted below :



"Enquiry on 14.03.07 at 12.00 noon

Management was represented by Thiru A.Venkataraman, Asst.Manager Accounts and Petitioner Varalakshmi were present. Similarly Management informed LO (C) to rein-instate the petitioner without backwages provided the petitioner has to give undertaking for regular attendance petitioner requested Management for life settlement or record LO (C) for failure. Adjourned to 30.03.07 at 11.00 a.m.

Enquiry on 30.03.07 at 12.00 noon

Petitioner Tmt.Varalakhmi was present.

Management was represented by Thiru D.Gnanasegaran, Executive Accounts, without authorisation, he was informed the next meeting.

Petitioner submitted the same plea i.e., Reinstatement with backwages or life settlement or failure.

Adjourned to 19.04.07 at 11.00 AM

Enquiry on 09.05.07 at 11.00 AM

Management was represented by Thiru A.Venkataraman, Asst.Manager (Accounts)

Petitioner Tmt.Varalakshmi was present.

Management informed LO (C) that they are ready to reinstatement without backwages provided the petitioner has to give undertaking for regular attendance. Since Management not terminated or dismissed the Petitioner.



Since both parties stood on their own stand, no amicable settlement could be arrived. Therefore, this I.D. ended in failure."

3. Before the Labour Court, the management filed a counter statement, .2011, stating that the question of reinstatement did not arise, as there was no absence of the employee at all, and that the employee was staying away from duty. In the counter, the management has also categorically stated before the Labour Court that it was ready to admit the employee in service and, from the date of reinstatement, they pay wages to the employee for the work done, but the employee



demanded Rs.10.00 lakhs as compensation, which she was not eligible to.

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4. The Labour Court, after taking evidence of both the parties and marking of documents, by the order, dated 17.01.2013, came to the conclusion that the employee took leave from 11.08.2005 to 31.01.2006, without informing the management well in advance. The employee has filed various exhibits to show that she was under maternity treatment and produced evidence to show that he was taking treatment in ESI Hospital as an in-patient. The Labour Court also held that the employer did not inform the employee to resume work or show cause as to why her services should not be terminated. The case of voluntary abandonment or staying away from work was not accepted. Since the employee availed leave from 11.08.2005 to 31.01.2006, which was failed to be proved by the employee, and that the leave was taken without the permission of the management, the Labour Court deprived back-wages and directed reinstatement with continuity of service. Questioning the said award, the management has not preferred any Writ Petition. Instead, the Writ Petition was filed by the employee, questioning that portion of the award in depriving back-wages.

5. The learned single Judge, in Paragraph 5 of the order, which is extracted below, has deprived back-wages from 11.08.2005 to 31.01.2006, the maternity leave period, holding that the employee was unauthorisedly absent from duty, but, however,



interfered with the award of the Labour Court, setting aside the same in so far as denial of back-wages and directed the management to pay back-wages from 01.02.2006 till the date of reinstatement on 19.03.2013, within a period of eight weeks, against which order, the present appeal has been preferred by the management. Paragraph 5 of the order of the learned single Judge reads as under :

"5. The aforesaid extract is self-explanatory. Since the Labour Court in paragraph 14 of the Award has held the termination to be bad in law, the petitioner would be entitled for payment of full back wages. However, since the Labour Court has found the period between 11.08.2005 to 31.01.2006 to be unauthorised absence, this Court is of the view that the back wages can be restricted from 01.02.2006 onwards. Incidentally, the petitioner herein was reinstated back into service on 19.03.2013, which fact is not disputed by the second respondent/management."

6. The main contention of the respondent employee is that the finding of the Labour Court has been accepted by the appellant employer and no Writ Petition filed, whereas, it is against the portion of the award depriving back-wages, the Writ Petition was filed by the respondent and the same allowed. Therefore, according to the respondent, the appellant cannot question the order in Writ Petition, when the finding of the Labour Court has not been tested by them. Learned counsel for the respondent also drew the attention of this Court to a decision of the Supreme Court in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* , 2013 (10) SCC 324, wherein in



<https://www.mhc.tn.gov.in/judis>



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 by relieving him of the obligation to pay back wages including the emoluments.

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 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 Private Limited v. Employees of Hindustan Tin Works Private Limited (supra)*.

38.7. 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 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."

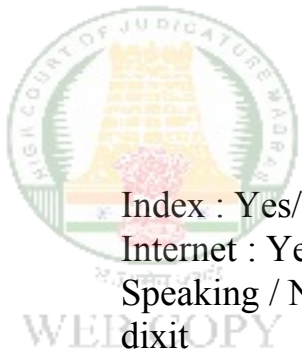
7. Learned counsel for the appellant management would contend that the respondent employee was offered employment during the conciliation proceedings on the ground that there was no termination, whereas she abandoned the services and not reported for work.

8. Strictly speaking, technicalities stand in the way of granting or depriving relief, more so with regard to grant of back-wages, in labour matters. In the present case, throughout, the respondent employee contended that there was denial of employment and that she had neither absented herself without any information to the management nor abandoned the service. The conciliation proceedings, which have been extracted supra, would make it clear that the appellant had offered employment to the respondent before the Conciliation Officer. Even before the Labour Court, the management stated that the respondent would be provided with job. After the award of the Labour Court, the respondent was reinstated in service on 19.03.2013. Whether the respondent would be entitled to back-wages for the period from 11.08.2005 till the date of reporting for work is the primary question. Though the respondent has not preferred any appeal in so far as the finding of the learned single Judge depriving back-wages for a period of five months, we are of the view that the respondent must be paid the said



wages, as the woman employee cannot be deprived of wages for the maternity leave period. As for back-wages from 01.02.2006 till the date of reporting for work i.e., 19.03.2013, we are of the view that the factum of management's offer to the respondent is not in dispute and the respondent should have reported for work and questioned her grievance after joining the service. The management, on the other hand, has not proved gainful employment of the respondent. In order to strike a balance to back-wages, while interfering with the finding of the learned single Judge in Paragraph 5 that the respondent would not be entitled to back-wages for the period of five months and restricting the same from 01.02.2006 till the date of her joining duty in 2013, we quantify the same at Rs.2.00 lakhs. While awarding the said quantum, we have not taken into account any revision of wages or other benefits, which the respondent would be otherwise entitled to. Since the Labour Court has awarded reinstatement with continuity of service, which has been affirmed by the learned single Judge, and the same is not questioned by the management, we are of the view that once the respondent employee is reinstated, she should be paid on par with other employees. The amount of Rs.2.00 lakhs, determined by us supra, has to be paid by the appellant to the respondent within a period of three months from the date of receipt of a copy of this order.

9. Writ Appeal is disposed of accordingly. No costs. Consequently, the connected C.M.P.No.9874 of 2022 is closed.



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Index : Yes/No

Internet : Yes/No

Speaking / Non-speaking Order
dixit

(S.V.N.,J.)

(R.K.M.,J.)

20-02-2023

To

The Presiding Officer,
Labour Court,
Puducherry.



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S.VAIDYANATHAN,J.
AND
R.KALAIMATHI,J.

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