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W.A.No.4339 of 2019 and
W.A.No.1185 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2023

CORAM

THE HON'BLE MR. JUSTICE S. S. SUNDAR

AND

THE HON'BLE MR. JUSTICE K. RAJASEKAR

W.A.No.4339 of 2019 and
W.A.No.1185 of 2021
and
C.M.P.Nos.27937 of 2019 and
C.M.P.No.8227 of 2023

W.A.No.4339 of 2019:

1. Mahindra Holidays & Resorts India Ltd.,
Rep. by its Vice President – Human Resources,
No.17/18, Mahindra Towers, 2nd Floor,
Patullos Road, Chennai – 600 020.

2. Mahindra Holidays & Resorts India Ltd.,
Rep. by its Head Resort – HR Operations,
No.17/18, Mahindra Towers, 2nd Floor,
Patullos Road, Chennai – 600 020.

... Appellants/ Petitioners

Vs

1. Appellate Authority under Tamil Nadu Shops
and Establishment Act-1947,
Special Deputy Commissioner of Labour
DMS Compound, Teynampet,
Chennai – 600 006.



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2. Bindu Jacob

Residing at D2, Krishna Residency Gardens,
1st Main Road, Adyar, Chennai – 600 020. ...Respondents/Respondents

Writ Appeal filed under Clause 15 of the Letters Patent Act,
against the impugner order passed by this Court in W.P.No.16398 of 2017,
dated 04.11.2019.

For Appellants : Mr.Sanjay Mohan
For M/s. Ramasubramaniam & Associates

For R1 : Mr.P.Ganesan,
Government Advocate

For R2 : Ms.Bindu Jacob (Party-in-Person)

W.A.No.1185 of 2021:

Bindu Jacob,
D2, Krishna Residency Gardens,
1st Main Road, Adyar,
Chennai – 600 020.

... Appellant / 2nd Respondent

Vs

1. Mahindra Holidays & Resorts India Ltd.,
Rep. by its Vice President – Human Resources,
No.17/18, Mahindra Towers, 2nd Floor,
Patullos Road, Chennai – 600 020.

2. Mahindra Holidays & Resorts India Ltd.,
Rep. by its Head Resort – HR Operations,
No.17/18, Mahindra Towers, 2nd Floor,
Patullos Road, Chennai – 600 020.

... Respondents/Petitioners



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3. The Appellate Authority under Tamil Nadu Shops
and Establishment Act-1947,
Special Deputy Commissioner of Labour
DMS Compound, Teynampet,
Chennai – 600 006.

... Respondent / 1st Respondents

Writ Appeal filed under Clause 15 of Letters Patent Act, against
the impugned order passed by the learned Single Judge of this Court in
W.P.No.16398 of 2017, dated 04.11.2019.

For Appellant	:	Ms.Bindu Jacob (Party-in-Person)
For R1 & R2	:	Mr.Sanjay Mohan For M/s. Ramasubramaniam & Associates
For R3	:	Mr.P.Ganesan, Government Advocate

COMMON JUDGMENT

[Judgment of the Court was delivered by K.RAJASEKAR,J.,]

Writ Appeal No.4339 of 2019 has been preferred by the
Management/Writ Petitioner against the order of a learned Single Judge of
this Court in W.P.No.16398 of 2017, dated 04.11.2019, confirming the
award of the Appellate Authority under Tamil Nadu Shops and
Establishments Act, 1947 [in short Appellate Authority] directing the
appellant/Management to reinstate the respondent/employee in service with
all consequential benefits and modification of back wages from 100% to



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2. Writ Appeal No.1185 of 2021 has been filed by the second respondent/employee (hereafter referred as employee), challenging the order in W.P.No.16398 of 2017, dated 04.11.2019, wherein, the reduction of back wages from 100% to 50%.

3. The employee in W.P.No.16398 of 2017 was appointed in the Management/Company as Corporate Manager – Business Strategy in February 2007. She was assigned to attend the core function of building strong business relationships with external and internal departments with minimum conflicts. As a part of her role, she had to interact with external benefits communities and had to act as a point of contact on behalf of the Management Company. By virtue of a designation, she was expected to develop standard operating procedures across all resorts and departments in the Management Company and she was required to ensure that these procedures could be implemented in all the resorts of the Management. Subsequently, she was re-designated as the Corporate Manager – SPA operations and was to report directly to the Chief Resort Officer, who heads the resort operations of the Management Company. Every year, she got good performance bonus and in the year 2011, she was described as a



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Strong Performer. Her performance appraisal was due on 30.04.2012. On 23.04.2012, she has attended the office as usual and about 5.00 p.m., she was called for a meeting in which, she was informed by Narasimha Rao, Head resort, HR operations to submit her resignation letter. She had refused to give any resignation letter and returned to her work place. The Head Resort, HR operations had threatened her in the presence of other staffs, to give the resignation letter, failing which, she will be thrown out of the Company and her photographs will be put in the newspapers. She was put to further humiliation for her refusal. Thereafter, she received a Termination Order issued by the Head Resort, HR operations, dated 23.04.2012, by citing Clause 5 of the appointment order.

4. Aggrieved over the Termination Order, the employee had approached the Appellate Authority by invoking Section 41(2) of the Tamil Nadu Shops and Establishment Act, 1947, to set aside the order of termination, dated 23.04.2012.

5. In the enquiry before the Appellate Authority, the Management relied on two grounds for terminating the employee as follows:

(1) The employee had an incompatible attitude and behaviour;



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(2) Her performance had declined since September 2011, which constituted reasonable cause for the termination and that there was no misconduct and therefore no domestic, inquiry was necessitated.

6. During enquiry, the employee has not adduce oral evidence but marked Exs.P1 to P20. On the side of the respondents R.W.1 and R.W.2 were examined and Exs.R1 to R14 were marked.

7. After enquiry, the first respondent/Appellate Authority had set aside the order of termination, on the ground that the grounds for termination has not been made out and the termination is invalid. Accordingly, the Appellate Authority has ordered reinstatement, continuity of service with all attendant benefits, with back wages.

8. The Management has filed Writ Petition No.16398 of 2017, challenging the order of the Appellate Authority and to set aside the same.

9. It is the contention of the Management that by invoking Clause 5 of the appointment order, the Management has terminated the service of the employee by giving her three months basic salary in lieu of



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notice, which was paid later dated 26.05.2012. The attitude of the employee with the other officials of the Company was not satisfactory. Frequently she used to pick up quarrels with the staffs of the Company and her sudden emotional outburst used to create some issues in the development of the business, which forced the Management to take a decision for termination.

10. Before the Appellate Authority, to prove the incompatible behaviour, the Management has marked e-mails sent between the officials of the Company containing the complaints against the appellant herein. But the officials who are having direct knowledge about the e-mails have not been examined before the Appellate Authority and also the victims of ill-treatment alleged against the employee herein not examined at the time of enquiry. The Management had also adduced evidence of two witnesses namely, Prashant Khullar and Mary Angelina but their evidence was found to be not specific and insufficient evidence. This finding of the fact has been accepted by the Writ Court.

11. Before the Appellate Authority, the employee is able to establish that she has had meritorious record of service and was able to establish that at no point of time she was under performer.



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12. In the writ proceedings, the Management prayed for payment compensation in lieu of reinstatement, on the ground that the employee had an incompatible attitude. The allegations of under performance was once again considered by the learned Single Judge in the order dated 04.11.2019, in Paragraph Nos.24 to 26 held that the employee was able to establish that she performed her duties and responsibilities with regular appraisals and she was granted with performance bonus and appraisals certificate increment etc. The allegations of incompatible was rejected and confirmed the order of the Appellate Authority with modification by reducing back wages from 100% to 50%. Paragraph Nos.24, 25 and 26 reads as follows:

“24. The order impugned states that “regarding the issue of incompatible behaviour and attitude, the petitioner has marked e-mails sent by Mr.Peter Martin to Monhit Bhatia alleging complaints on the 2nd respondent and one Ms.Rochelle (Ex.R2 to Ex.R8). However, the person namely, Peter Martin has not let in any evidence before the authority, nor the persons mentioned in the complaints viz., Latha and Moorul Hussain were produced before the Court for enquiry. The employees, whom the 2nd respondent alleged to have ill-treated, that is, the Chief Resort Officer's Secretary, was not produced before that forum for enquiry. However, the writ petitioner company had not produced any complaint received by the Complaint Committee from any employee against the 2nd respondent, nor the Complaint Committee conducted any enquiry in this regard. Two Management witnesses viz., (i) Prashant Khullar



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and (ii) Mary Angelina have in general deposed about the attitude and behaviour of the 2nd respondent without quoting any specific incident or producing any substantial evidence. Moreover, the witness Mr.Prashant Khullar, in the cross examination, had mentioned that the 2nd respondent was terminated on account of certain indiscipline, late attendance, prolonged lunch breaks and bad mouth with superiors. The authority came to a conclusion that such general submissions cannot be a ground to terminate the employee from services and such allegations regarding misconduct have to be established by conducting a proper enquiry and admittedly, no such domestic enquiry was conducted, nor the 2nd respondent was provided with an opportunity to defend her case in respect of such allegations. In the absence of any such allegations to the delinquent employee, the Management cannot plead about the misconducts.

25. Misconduct, undoubtedly, is a stigma against an employee and in the event of attaching any such stigma, then a proper enquiry is mandatory and, in the event of not conducting such an enquiry, the entire actions are in violation of the principles of natural justice. Regarding the incompatibility or otherwise or behaviour of the employees, it may depend upon the likes and dislikes of the person concerned. However, mere statement in this regard, is insufficient to terminate an employee. A behaviour of one person may not be compatible to another person and may be compatible to a third person. It all depends upon the way in which persons react with each other and in case of indiscipline, then the employer is bound to frame charges with specific allegation and conduct an enquiry and thereafter, initiate action by following the procedures contemplated.



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26. Mere statement or mere opinion formed by the Management is insufficient in this regard. Undoubtedly, if an employee is in probation period and if the superior authority has found that such misbehaviour is affecting the business development of the company, then they can invoke the terms and conditions of the appointment and discharge the services, as the employee was in probation. However, the 2nd respondent was a permanent employee of the writ petitioner company and she has served for a considerable length of time and she could able to establish that she performed her duties and responsibilities with may appraisals and she was granted with performance bonus and appraisal certificate, increments etc., and under these circumstances, the statement made is not only unacceptable, but false and incorrect.”

13. It is submitted by Mr.Sanjay Mohan, Senior Counsel for the Management that the employee was terminated from service on 21.04.2012, she was out of service for more than 10 years and reinstatement after lapse of long time is not equitable. The position/vacancy for which, the reinstatement is directed is not in-existence at Chennai but now it is available only at Mumbai.

14. He relied on various Judgements of the Apex Court ordering compensation in lieu of reinstatement of employee, and contended that to maintain industrial peace and to avoid conflict to the interest of the



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industry, instead of reinstatement awarding compensation is desirable. He also relied on paragraph No.13 of the counter affidavit of the second respondent to support of his contention that there is a strained relationship with her boss namely Mr.Peter Martin.

15. The following Judgments are relied on by the Management:

1. In *Hindustan Steels Ltd., Rourkela vs. A.K.Roy and Others* reported in *MANU/SC/0315/1969*;
2. *Anil Kumar Chakraborty and Another vs. M/s. Saraswatipur Tea Company Limited and Others* reported in *1982 (2) SCC*;
3. *O.P.Bhandari vs. Indian Tourism Development Corporation Ltd., and Others* reported in *1986 (4) SCC 337*;
4. *Workmen and Others vs. Bharat Fritz Werner (P) Ltd., and Others* reported in *MANU/SC/0470/1990*;
5. *Allahabad Jai Sansthan vs. Daya Shankar Rai and Others* reported in *MANU/SC/0349/2005*.

16. The employee appeared as party-in-person has submitted that Mr.Peter Martin, Head of operation is not working with the Company now and many other senior officials had already left the Company. Now the



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Company is being administered by new officials and there is no problem to continue services in the event of reinstatement. She also contended that the ground of incompatible with the Management is concocted one and she was continuously maintained good relationship with the Management including the senior boss of the Company. She is now aged about 53 years and she had worked as a permanent employee in a higher position and was awarded with performance bonus, appraisal certificate and other incentives increments. The allegation of incompatibility has not been substantiated either before the Appellate Authority or before this Court, except citing averments made in the counter made against one of the officer of the Management, who is not in service. Hence, there is no strained relationship between the Management and the employee. She relied on the Judgment of the Hon'ble Supreme Court in ***Jayantibhai Raojibhai Patel vs. Municipal Council, Warkhed & Others*** reported in ***Civil Appeal No.6188 of 2019 (Arising out of S.L.P (C).No.8112 of 2019), 21 August 2019*** and to prays grant full back wages and to set aside the order of modification.

17. The Hon'ble Apex Court in ***Hindustan Steels Ltd., Rourkela vs. A.K.Roy and Others*** reported in ***MANU/SC/0315/1969*** cited above in paragraph No.10 held as follows:



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*“10. As exceptions to the general rule of reinstatement, there have been cases where reinstatement has not been considered as either desirable or expedient. These were the cases where there had been strained relations between the employer and the employee, where the post held by the aggrieved employee had been one of trust and confidence or where, though dismissal or discharge was unsustainable owing to some infirmity in the impugned order, the employee was found to have been guilty of an activity subversive of or prejudicial to the interests of the industry. These cases are to be found in *Assam Oil Co. Ltd. v. Workmen* [1960 (3) SCR 457] *Workmen of Charottar Gramodhar Sahakari Mandali Ltd. v. Charottar Gramodhar Sahakari Mandali Ltd.* [CA 382 of 1966, decided on August 14, 1967], *Doomur Dulung Tea Estate v. Workmen* [CA 516 of 1966, decided on October 26, 1967] and *Ruby General Insurance Co. Ltd. v. P.P. Chopra* [1969 (3) SCC 653]. These are, however, illustrative cases where an exception was made to the general rule. No hard and fast rule as to which circumstances would in a given case constitute an exception to the general rule can possibly be laid down as the Tribunal in each case, keeping the objectives of industrial adjudication in mind, must in a spirit of fairness and justice confront the question whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice.”*

18. In *Anil Kumar Chakraborty and Another vs. M/s.*

Saraswatipur Tea Company Limited and Others reported in 1982 (2)

SCC, the Hon'ble Apex Court has held that the employee who was worked



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as “Compounder”, who was entrusted with drugs and medicines, and had bad career records, instead of reinstatement, ordering lump sum payment is just fair compensation for the claim of wrongful dismissal from service.

19. In ***O.P.Bhandari vs. Indian Tourism Development Corporation Ltd., and Others*** reported in ***1986 (4) SCC 337*** considered the case of Manager of Hotel, under the administration of ITDC, and held in paragraph No.7 as follows:

“7. It is in public interest that such undertakings or their Boards of Directors are not compelled and obliged to entrust their Managements to personnel in whom, on reasonable grounds, they have no trust or faith and with whom they are in a bona fide manner unable to function harmoniously as a team working arm-in-arm with success in the aforesaid three-dimensional sense as their common goal. These factors have to be taken into account by the court at the time of passing the consequential order, for the court has full discretion in the matter of granting relief, and the court can sculpture the relief to suit the needs of the matter at hand. The court, if satisfied that ends of justice so demand, can certainly direct that the employer shall have the option not to reinstate provided the employer pays reasonable compensation as indicated by the court.”

20. In ***Workmen and Others vs. Bharat Fritz Werner (P) Ltd., and Others*** reported in ***MANU/SC/0470/1990*** in paragraph Nos.21 and 22

as follows:



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“21. Reinstatement has not been considered as either desirable or expedient in certain cases where there had been strained relations between the employer and the employee, when the post held by the aggrieved employee had been one of trust and confidence, or when though dismissal or discharge was unsustainable owing to some infirmity in the impugned order, the employee was found to have been guilty of an activity subversive or prejudicial to the interests of the industry (Hindustan Steel Ltd. v. A.K. Roy MANU/SC/0315/1969 : (1970)ILLJ228SC . In cases where it is felt that it will not be desirable or expedient to direct reinstatement the workman is compensated monetarily by awarding compensation in lieu of reinstatement for loss of future employment.

22. The misconduct that has been found established against these five workmen involves threatening the highest executive, viz; the President of Company, with dire consequences, wrongfully confining him in his room and compelling him to withdraw the notice. These acts of misconduct involve acts subversive of discipline on the part of these workmen. Three of these workmen were office bearers of the Union. It cannot be said that these workmen had acted at the instigation of somebody. Taking into consideration the facts and the circumstances of the case, we are of the opinion that, keeping in view that interests of the industry, this is a case where it can be said that it is not desirable and expedient to direct reinstatement of these workmen. In our view, therefore, the direction with regard to reinstatement of these workmen cannot be sustained and in lieu of reinstatement they may be paid compensation for loss of future employment.”



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21. Decisions of the Hon'ble Apex Court cited supra, laid down the law that if the post held by the aggrieved employee, had been one of the trust and confidence, and the employee was found to have been guilty of an activity subversive or prejudicial to the interest of the industry as an exemption to the general rule, compensation would meet the ends of justice.

22. Admittedly, without any enquiry, on the basis of allegations, the employee herein was terminated from service and before the Appellate Authority, the Management has availed the opportunity to adduce evidence to prove the allegations that (1) she had an incompatible attitude and behaviour with the Management and (2) Her performance had declined.

23. The allegation of incompatible attitude, behaviour with the Management was put to trial by recording evidence before the Appellate Authority. In the counter, the Management had pleaded that the appellant/employee was required to discharge her functions with the utmost standards of professionalism and efficiency, while maintaining good working and professional relationships with her superiors, co-workers and subordinates. But the appellants inability to maintain peaceful and healthy



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working relationships with her superiors, co-workers and subordinates contributed largely to the rapid deterioration of her performance in her position. The allegations that she is not in a position to have good relationship with the Management and she was not able to maintain the peaceful working conditions was considered by the Appellate Authority. After appreciating the evidence produced on both sides, the Appellate Authority has held that they have failed to prove the allegations by adducing substantial and strong evidence. After unsuccessful before the Appellate Authority regarding the strained relationship which was cited as a ground for termination, now once again very same submission has been made in this appeal.

24. The Management has relied on paragraph No.13 of the counter filed by the employee wherein, in the appeal petition filed before the Appellate Authority, in which, she has stated that one Peter Martin, in-charge of Head of operations of the respondent Organisation was unfortunately her boss and he did not enjoy much of a reputation. The appellant/employee despite doing her best, became a victim to his whimsical behaviour. It is admitted case that subsequent to the termination of employee herein, Mr.Peter Martin and Latha, Secretary Operations have



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resigned from the post and new team is in the Management. She has been tasked to work on the performance basis throughout her service period with the Management. She has been declared as best performer and was continuously receiving performance bonus, appraisal certificate, increment, etc. Hence putting her back in the original position in the very same post would no way disturb the peace and a learned Single Judge has also considered the submission of the Management to order lump sum compensation in lieu of reinstatement and rightly rejected the same and warrant no interference in this appeal.

25. It is contended by the employee that the Writ Court has wrongly held that since she has not contributed for the development of the Company for the past six years, during the pendency of the litigation, she is not entitled for 100% back wages and reduced to 50% which is against the settled law. This interference with the order of the Appellate Authority relating to back wages is to be set aside since granting of back wages has not been properly appreciated, in view of the Judgments passed by the Apex Court in *Jayantibhai Raojibhai Patel vs Municipal Council, Narkhed & Others* cited supra. Recently, Hon'ble Supreme Court in *Pradeep S/o Rajkumar Jain vs. Manganese Ore (India) Limited* reported



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in **2022 (3) SCC 683** has considered earlier Judgments relating to entitlement of back wages to the employee wherein, the dismissal or termination of the employee was held to be illegal. In paragraph No.6 the Bench has considered the Judgment in ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others*** reported in **2013 (10) SCC 324** as held as:

“6. The Bench of two learned Judges in the said case has, after reviewing of case law which included survey of two earlier three Judges Benches of this Court, concluded as follows:

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



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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 averment 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 victimising the employee or workman, then the court*



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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 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 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. 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*



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suggested in Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53].

39. Reverting to the case in hand, we find that the Management's decision to terminate the appellant's service was preceded by her suspension albeit without any rhyme or reason and even though the Division Bench of the High Court declared that she will be deemed to have rejoined her duty on 14-3-2007 and entitled to consequential benefits, the Management neither allowed her to join the duty nor paid wages. Rather, after making a show of holding inquiry, the Management terminated her service vide order dated 15-6-2007. The Tribunal found the action of the Management to be wholly arbitrary and vitiated due to violation of the rules of natural justice. The Tribunal further found that the allegations levelled against the appellant were frivolous. The Tribunal also took cognizance of the statement made on behalf of the appellant that she was not gainfully employed anywhere and the fact that the Management had not controverted the same and ordered her reinstatement with full back wages.

40. The learned Single Judge agreed with the Tribunal that the action taken by the Management to terminate the appellant's service was per se illegal but set aside the award of back wages by making a cryptic observation that she had not proved the factum of non-employment during the intervening period. While doing so, the learned Single Judge not only overlooked the order passed by the Division Bench in Deepali Gundu Surwase v. Kranti Junior Adyapak Mahavidyalaya [Deepali Gundu Surwase v. Kranti Junior Adyapak Mahavidyalaya, WP No. 8404 of 2006, order dated 21-3-2007 (Bom)] , but also Rule 33 which prohibits an employee from taking employment elsewhere. Indeed, it was not



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even the pleaded case of the Management that during the period of suspension, the appellant had left the headquarters without prior approval of the Chief Executive Officer and thereby disentitling her from getting subsistence allowance or that during the intervening period she was gainfully employed elsewhere.”

26. In Paragraph No.14 it is contended that,

“14. In case where it is found that the employee was not at all at fault and yet, he was visited with illegal termination or termination which is actually activated by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal/malafide termination. The effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The nature of the charges, the exact reason for the termination as evaluated and, of course, the question as to whether the employee was gainfully employed would be matters which will enter into the consideration by the Court.”

27. In this case in hand, the employee/party-in-person has already filed her affidavit that she has not been gainfully employed and the Management has not contended that she is gainfully employed and hence she is not entitled to back wages.



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28. A learned Single Judge in Paragraph No.35 of the order in

W.P.No.16398 of 2017 held as follows:

“35. As far as the back wages are concerned, the competent authority awarded 100% back wages. However, this Court is inclined to consider the quantum of back wages, as the 2nd respondent was holding a senior position and was drawing a salary of more than 1.5 lakhs. In the event of awarding 100% back wages, the same may not be appropriate. The 2nd respondent was holding a senior position and she was not performing her duties and responsibilities or contributed for the development of the company for the past about six years, during the pendency of the litigation. However, this Court cannot brush aside the contention of the 2nd respondent, as she was unnecessarily terminated from service without any valid reason. She was deprived of her livelihood without conducting any enquiry. Therefore, this Court has to adopt a balancing approach in awarding back wages, as the mitigating factors are the 2nd respondent admittedly had not contributed to the development of the company for the past six years and the 2nd respondent was denied an opportunity to serve in the company and on account of that extent, she was deprived of her livelihood also.”

29. Admitted case of the Management that, they have not conducted any enquiry before terminating the service of the employee herein. Management has availed the opportunity to adduce evidence and prove their case before the Tribunal. But failed to prove the case for



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termination, resulted in order of Appellate Authority that, the allegation levelled against the employee were false. After taking cognizance of the statement of the employee that she was not gainfully employed anywhere, ordered reinstatement with full back wages. Denying of 50% back wages to the employee and reasons stated for reduction of back wages would give premium to the employer for his wrong doings and cause grave injustice to the employee as observed by the Hon'ble Apex Court in various Judgments and reiterated in *Pradeep S/o Rajkumar Jain vs. Manganese Ore (India) Limited* cited supra.

30. Across the bar it is reported by the counsel for Management that, the Management has already deposited a sum of Rs.21,66,600/- is now lying in the Court deposit. The employee has also filed C.M.P.No.8227 of 2023, under Section 41-A of the Tamil Nadu Shops and Establishment Act, 1947, seeking payment of wages during the pendency of Writ Appeal and she has also arrived the calculation for payments to be paid by the Management from the date of Writ petition, from the date of disposal and from the date of pendency of this appeal.



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31. Section 41-A of the Tamil Nadu Shops and Establishments

Act, 1947 is reads as follows:

“Section 41-A is a beneficial provision so as to enable the employee to draw the last drawn wages by him, when the employer has preferred any proceedings against the decision of the appellate authority ventilating grievance of the employee, as against the order of termination. Such a provision can also be construed as analogous to payment of subsistence allowance to a Government servants, placed under suspension, on the registration of any crime or case, pending on the file of a criminal Court, the only safeguard provided to the employer under S. 41(A) of the Tamil Nadu Shops and Establishments Act, 1947 to deny payment of last drawn wages inclusive any maintenance allowance admissible to an employee is that the employer should prove to the satisfaction of the High Court or Supreme Court, that such person is employed and received adequate remuneration during the period in which the proceedings against such decision in the High Court or Supreme Court, as the case may be Pendency of a case in the criminal Court would not amount to guilt of the respondent, unless and until the court of competent jurisdiction records guilt and presumption is always in favour of the respondent”.

32. This Court in ***Udangudi Primary Agricultural Co-operative Credit Society vs. Deputy Commissioner of Labour, Tirunelveli and Others reported in*** MANU/TN/4330/2016 : 2016 (III) CLR 223 E.E.423, has held in paragraph No.6 that,



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“6. Admittedly, in TNSE No. 1 of 2012, dated 31.12.2014, the prayer of the respondent for reinstatement has been allowed. Section 41-A is a beneficial provision so as to enable the employee to draw the last drawn wages by him, when the employer has preferred any proceedings against the decision of the appellate authority ventilating grievance of the employee, as against the order of termination. Such a provision can also be construed as analogous to payment of subsistence allowance to a Government servants, placed under suspension, on the registration of any crime or case, pending on the file of a criminal Court, the only safeguard provided to the employer under S. 41(A) of the Tamil Nadu Shops and Establishments Act, 1947 to deny payment of last drawn wages inclusive any maintenance allowance admissible to an employee is that the employer should prove to the satisfaction of the High Court or Supreme Court, that such person is employed and received adequate remuneration during the period in which the proceedings against such decision in the High Court or Supreme Court, as the case may be Pendency of a case in the criminal Court would not amount to guilt of the respondent, unless and until the court of competent jurisdiction records guilt and presumption is always in favour of the respondent”.

33. As per Section 41-A of the Tamil Nadu Shops and Establishments Act, 1947, the employee is entitled to get last drawn wages including any maintenance allowance admissible to the employee.

34. The Employee herein has filed the Revised Salary Structure with effect from 1st April 2011 payable to her, and it shows that she is



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entitled for Gross Salary for a sum of Rs.1,44,440/- per month. This revised salary was taken into consideration as last drawn wages of the employee and the Management has deposited a sum of Rs.21,60,600/- which is 25% of 5 years Gross Income and this calculation was made by the Management while depositing the back wages as per order of this Court in W.M.P.No.17726 of 2017, dated 30.06.2017. This Gross monthly income of Rs.1,44,440/- has been accepted by both parties. This Revised Pay Structure also shows that the employee is entitled for Leave Travel Allowance, Medical reimbursement and Assets reimbursement and since, those allowances are reimbursements the same could not be claimed as a Last Drawn Wages by the employee herein. However, the Management is liable to pay their contribution to the Provident Fund and also Gratuity to the employee till the date of this Judgment.

35. Accordingly, the Management is directed to pay the Last Drawn Wages as claimed by the appellant in W.A.No.1185 of 2021 from the date of award passed by the Appellate Authority till the disposal of this Writ Appeal. The employee is permitted to withdraw the wages already deposited during the pendency of the Writ Appeal, in terms of Section 41-

A of the Shops Act and the Management is directed to deposit the



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remaining amount from the date of the Order of the Appellate Authority i.e.,
from 17.04.2017, till today.

36. In the result,

(1) (a) The Writ Appeal filed by the employee in W.A.No.1185
of 2021 is allowed and the employee is entitled to full back wages including
all benefits, accrued to the employee from the date of dismissal passed by
the Appellate Authority, till today.

(b) The Management is directed to implement the order of
Appellate Authority including the deposit of back wages within a period of
one month from the date of receipt of a copy of this Judgment.

(c) On such deposit, the employee is entitled to withdraw
entire back wages.

(2) The Writ Appeal filed by the Management in W.A.No.4339
of 2019 is dismissed and the Order of the learned Single Judge in
W.P.No.16398 of 2017, dated 04.11.2019 is hereby confirmed. However, in



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Clause (i) of Paragraph 36, insofar as it relates to reduction in back wages, this Court holds that the employee is entitled to full back wages as awarded by the Appellate Authority.

(3) The Civil Miscellaneous Petition filed by the employee in C.M.P.No.8227 of 2023 is allowed.

(4) No costs.

(5) Consequently, the connected miscellaneous petition stands closed.

**(S.S.S.R., J.) (K.R.S., J.)
.12.2023**

ssi
Index :Yes/No
Speaking Order :Yes/No
Neutral Citation Case : Yes/No

To

1. Appellate Authority under Tamil Nadu Shops
and Establishment Act-1947,
Special Deputy Commissioner of Labour
DMS Compound, Teynampet, Chennai – 600 006.



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S. S. SUNDAR,J.,

AND

K. RAJASEKAR,J.,

Pre-delivery Judgment in
W.A.No.4339 of 2019 and
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.12.2023