

**CM-4924-C-2022 in/and
RSA No. 2200 of 1995**

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(268)

**CM-4924-C-2022 in/and
RSA No. 2200 of 1995
Date of Decision : 22.02.2023**

Subhash Chander

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Ms. Vibha Nagar, Advocate for
Mr. Deepak Singh Saini, Advocate for the appellant.

Ms. Vibha Tewari, Assistant Advocate General, Haryana.

Harsimran Singh Sethi J. (Oral)

CM-4924-C-2022

Present application has been filed for fixing the RSA No. 2200 of 1995 to an early actual date of hearing.

Notice of the application to the counsel opposite.

Ms. Vibha Tewari, learned Assistant Advocate General, Haryana, who is present in court, accepts notice on behalf of appellants-State and raises no objection for the grant of prayer as raised in the present application.

Keeping in view the above, application is allowed and the RSA No. 2200 of 1995 is taken up for hearing today.

RSA No. 2200 of 1995

In the present appeal, the only grievance of the appellant-plaintiff is that though he has been reinstated in service on the post of Fitter but only ₹15,000/- has been paid as back wages, whereas full back wages should have been allowed in favour of the appellant-plaintiff.

Learned counsel for the appellant-plaintiff has raised an argument that once the order dated 05.11.1985 terminating the services has been held to be bad, appellant-plaintiff was entitled for full back wages to be paid with effect from the date when the services were terminated and by restricting of the said back wages by the lower appellate court is without any justification and hence, the order of the lower appellate court dated 15.06.1995 be modified to the extent that the appellant-plaintiff held entitled for full back wages for the period he remained out of service.

Learned counsel for the respondents-defendants submits that though the order dated 05.11.1985 terminating the services of the appellant-plaintiff was held to be bad but as the appellant-plaintiff never pleaded that while he was out of service, he was not gainfully employed, restricting the back wages by the lower appellate court to a sum of ₹15,000/- is perfectly valid and legal.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

In the present appeal, the appellant-plaintiff has claimed full back wages for the period he remained out of service. Whether the denial of the said benefit by the lower appellate court is valid or not depends upon the evidence, which came on record and the pleadings of the case. The lower

appellate court in paragraph 11(ix) of the judgment dated 15.06.1995 has held that there is no averment that the appellant-plaintiff remained unemployed while he was out of service from the post of Fitter. Further, the job of the appellant-plaintiff was of a motor mechanic and once there is no averment that he was not gainfully appointed, whether under these circumstances also, full back wages were liable to be paid, is to be decided keeping in view the evidence, which had come on record, a lump-sum wages for the period the appellant-plaintiff remained out of service was directed to be paid to him.

It is a settled principle of law that upon reinstatement, in case the order terminating services found to be illegal, the employee is to get back wages but the said relief of back wages will depend upon the fact that the said employee was not gainfully employed during the period he/she was out of service. In this regard, the judgment of the Hon'ble Supreme Court of India in **Allahabad Bank and others Vs. Avtar Bhushan Bhartiya**, 2022 Live Law (SC) 405, decided on 22.04.2022 is cited. Relevant paragraph of the said judgment is as under :-

“31. As a matter of fact, the propositions elucidated in Deepali Gundu Surwase (supra), read 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 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 (1979) 2 SCC 80.

38.7 The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (2007) 2 SCC 433 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.”

32. Even if we apply the propositions enunciated by this Court in Deepali Gundu Surwase (supra), the Officer-employee may not be entitled to full back wages. This is for the reason that there is nothing on record to show whether he was gainfully employed after his dismissal from service. A careful look at the pleadings in the writ petition W.P. No.1403 of 2013 would show that he has not pleaded about his non-employment. Though in paragraphs 36 to 38 of his writ petition, the employee has pleaded about the sudden set back to his health in the year 2011 and the financial hardships he was facing, there was no assertion about his non-employment. The employee had his pleadings amended after the dismissal of his appeal during the pendency of the writ petition. Even in the

amended pleadings, there was no averment relating to his nonemployment. Therefore, 9 even if we apply the ratio in Deepali Gundu Surwase (supra), the employee may not satisfy the third proposition found in para 38.3 thereof.

33. The reliance placed upon the decision in Pawan Kumar Agarwala vs. General Manager-II and Appointing Authority, State Bank of India and Others⁵ may not also be of help to the employee. It is a case where this Court applied the propositions laid down in Deepali Gundu Surwase (supra). This Court found that there was nothing to show that the employee was gainfully employed after the date of dismissal. It is needless to point out that in the first instance, there is an obligation on the part of the employee to plead that he is not gainfully employed. It is only then that the burden would shift upon the employer to make an assertion and establish the same.”

Keeping in view the above, once, it was not pleaded by the appellant-plaintiff that he was not gainfully employee and no evidence has come on record to substantiate the said factum that the appellant-plaintiff was not gainfully employed during the period he was out of service so as to claim 100% back wages, the denial of the same by the lower appellate court and restricting the said benefit of back wages to ₹15,000/- cannot be faulted with. Learned counsel for the appellant-plaintiff has not pointed out any fact and evidence, which suggest that appellant-plaintiff was not gainfully employed so as to get the full backwages. This court in the second appeal, is not appreciating the fact again so as to come to a different conclusion.

No perversity in the findings of the lower appellate court in restricting back wages to ₹15,000/- has been pointed out by the learned

the present case, no interference is called for by this court in the present regular second appeal.

Dismissed.

Any application pending, if any, is also disposed of.

February 22, 2023
kanchan

(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No