



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: September 25, 2023

+ W.P.(C) 1078/2018

VINOD KUMAR

..... Petitioner

Through: Mr. K.C. Mittal, Mr. Yugansh
Mittal & Mr. Vaibhav Yadav, Advs.

versus

G.N.C.T. OF DELHI AND ORS.

..... Respondents

Through: Mrs. Avnish Ahlawat, SC with
Mr. Nitesh Kumar Singh,
Ms. Tania Ahlawat, Ms. Palak
Rohmetra, Ms. Laavanya Kaushik
& Ms. Aliza Alam, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed assailing the order dated November 2, 2017 passed by the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', for short) whereby the Tribunal had dismissed OA No. 605/2016 filed by the petitioner herein.

2. At the outset, we note that the petitioner Mr. Vinod Kumar had expired on February 02, 2018 while on duty. The legal heirs of the



deceased petitioner have been brought on record *vide* order dated May 29, 2018.

3. The petitioner, a Constable in Delhi Police, was arrested on November 18, 1996 for his involvement in a case bearing FIR No. 1132/1996 dated November 14, 1996, under Section 379 and 420 of the Indian Penal Code, 1860 ('IPC', for short). In connection with the said crime, he was placed under suspension w.e.f. November 18, 1996 *vide* order dated November 21, 1996. He was dismissed from service under Article 311 (2)(b) of the Constitution of India *vide* order dated December 12, 1996, and his suspension period from November 18, 1996 till the date of dismissal was treated as period not spent on duty. The petitioner challenged this dismissal order before the Tribunal in OA 685/2010. Pursuant to order dated December 24, 2010 of the Tribunal, the petitioner was reinstated in service, but deemed to be under suspension from the date of dismissal *vide* order dated February 15, 2011. It was also ordered that he is not entitled to any back wages and the intervening period from the date of issue of reinstatement order to the date of joining was treated as leave of kind due. A regular departmental inquiry was initiated and the petitioner was awarded punishment of forfeiture of five years' approved service permanently *vide* order dated June 4, 2012, and remained under suspension in view of the pendency of the criminal case against him. Though it was decided that the issue of his suspension period would be decided after the decision of the criminal case, he was reinstated in service *vide* order dated July 17, 2012.

4. In the criminal proceedings, the petitioner was found guilty



and was sentenced to simple imprisonment for a period of five months along with a fine of ₹1,000/- *vide* order dated May 30, 2014 by the Court of Ms. Jasjit Kaur, MM-1, New Delhi. Pursuant thereto, on August 14, 2014, he was dismissed from service in terms of Rule 11 of the Delhi Police (Punishment and Appeal) Rules, 1980 ('Rules of 1980', hereinafter). It was also ordered that the period of his suspension from November 18, 1996 to July 16, 2012 be treated as period not spent on duty for all intents and purposes. The departmental appeal filed by the petitioner was also dismissed.

5. The criminal appeal filed by the petitioner against his conviction and sentence was allowed by the Court of Additional Sessions Judge-01, Patiala House Courts, New Delhi, *vide* order dated June 30, 2015, and he was acquitted from all the criminal charges. The order has become final as no further appeal or revision was filed. In view of the acquittal, the respondents re-visited the dismissal order dated August 14, 2014 and the petitioner was reinstated in service on November 26, 2015 with notional benefits, but without any arrears or back wages for the period of dismissal.

6. Mr. K. C. Mittal, learned counsel for the petitioner has submitted that the period of suspension cannot be held as period not spent on duty in view of the honourable acquittal of the petitioner and therefore, he is liable to be granted back wages, seniority, promotion and other benefits for the said period. According to him, the Tribunal erred in dismissing the OA on the basis of the judgment of the learned MM-1, though the said judgment was reversed by the learned ASJ and the petitioner has been acquitted of all charges. From November 18,



1996 to July 16, 2012, the petitioner was kept under suspension and was not allowed to discharge his duties by no fault of his. In these circumstances, there is no justification in denying back wages and consequential benefits including promotion to him. The period of suspension was held as period not spent on duty based on the principle of 'no work no pay'. However the petitioner was not absenting himself from work, but was prevented from working by the authorities.

7. The petitioner was also deprived of promotions which he would have normally received in the course of his service. Grave prejudice has been caused to the petitioner as his batchmates have now become his seniors, and as such promotional benefits also need to be granted to him.

8. He also submitted that the petitioner has not been paid any salary or any subsistence allowance during the period of his suspension which he was liable to be granted. It is settled law that non-payment of subsistence allowance / salary as per rules would violate the right to life guaranteed by under Article 21 of the Constitution of India.

9. He has placed reliance on the judgments of the Supreme Court in the cases of *Sharda Singh v. State of UP and Ors.*, (2009) 11 SCC 683; *Gowranna C (Dead) by LRs v. Manager (Personnel) HAL and Ors.*, Civil Appeal Nos. 1575-1576 of 2022; *Chief Regional Manager, United India Insurance Company Limited v. Siraj Uddin Khan*, (2019) 7 SCC 564; of the Allahabad High Court in *Brijendra Prakash Kulshreshtha v. Director of Education and Ors*, 2007 (3) ADJ 1; and this Court in *Union of India v. Chhedi Lal*, WP(C) 810/2010, in support of his contention that the petitioner is entitled to receive back



wages/salary and subsistence allowance for the period of suspension.

10. A counter-affidavit has been filed on behalf of the respondents wherein a detailed timeline of the events leading up to the suspension, dismissal, acquittal and reinstatement of the petitioner has been provided.

11. Mrs. Avnish Ahlawat, learned Standing Counsel appearing for the respondents would state that the plea put forth by the learned counsel for the petitioner cannot be accepted as the competent authority has decided the case on merits. It is a matter of record that the petitioner involved himself in a case of moral turpitude, tarnished the image of the disciplined organization. He was rightly dismissed from the organization under Rule 1 of the Rules of 1980, and pursuant to his acquittal, has been reinstated in service with all notional benefits as per rules. He has been granted all permissible reliefs including reinstatement in service pursuant to his acquittal. However the fact remains that during the period of dismissal, the petitioner has not served the department in any manner, and as such the release of monetary benefits for the said period cannot be allowed.

12. Mrs. Ahalawat has referred to the judgment of the Supreme Court in the case of ***Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) and Ors., 1996 (11) SCC 603***, wherein it was held that when an employee was involved in a crime even if later acquitted, he had disabled himself from rendering services on account of conviction, and as such he is not entitled to payment of back wages. She has also placed reliance upon the judgments in ***Union of India and Ors. v. Jaipal Singh, 2004 (1)***



SCC 121 and **Baldev Singh v. Union of India & Ors., 2005 (8) SCC 747** to buttress her argument that since the petitioner has not worked for the period he was out of service due to his conviction in the criminal case, the competent authority has rightly treated the period as not spent on duty for all intent and purposes. She has sought dismissal of the petition.

13. Mr. Mittal in rejoinder to the arguments of Mrs. Ahlawat has referred to a catena of judgments to substantiate his case that the petitioner is entitled to receive back wages, promotion which would bring him at par with his batchmates, suspension / subsistence allowance for the period between November 18, 1996 to July 16, 2012. The judgments on which he has relied upon are the following:

1. **Andhra Bank v. W.T. Seshachalam, (2004) 2 SCC 287**
2. **Brahma Chandra Gupta v. Union of India, (1984) 2 SCC 433**
3. **Deepali Gundu Surwase v. Kranti Junior Adhyapak and Ors., (2013) 10 SCC 324**

14. He has also invited our attention to the order dated September 14, 1978 issued by the Department of Personnel and Administrative Reforms, bearing OM No. 11012/7/78-Ests.(A) which reads as under:

“Instances have come to notice in which Government servants continued to be under suspension for unduly long periods. Such unduly long suspension while putting the employee concerned, to undue hardship, involves payment of subsistence allowed without the employee performing any useful service to the Government”

15. A reference is also made to the order dated October 6, 1976 by



the Cabinet Secretariat (Department of Personnel and Administrative Reforms) wherein OM No 110212/10/76-Estt. (A) and order dated October 28,1985 by Department of Personnel and Training ('DoP&T', for short) bearing OM. No. 11012/17/85-Estt. (A) which reads as under:

"It may be impressed on all authorities concerned that they should make timely payment of subsistence allowance to Government servants who are placed under suspension so that they may not be put to financial difficulties. It may be noted that, by its very nature, subsistence allowance is meant for the subsistence of a suspended Government servant and his family during the period he is not allowed to perform any duty and thereby earn a salary. Keeping this in view, all concerned authorities should take prompt steps to ensure that after a Government servant is placed under suspension, he receive subsistence allowance without any delay."

16. Further he has referred to the order dated September 14, 1992 by DoP&T bearing OM No. 22011/4/91-Estt.(A) which reads as under:

"3. On the conclusion of the disciplinary case / criminal prosecution which results in dropping of allegations against the Govt. servant, the sealed cover or covers shall be opened. In case the Government servant is completely exonerated, the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover / covers and with reference to the date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the juniormost officiating person. He may be promoted notionally with reference to the date of promotion of his junior.

5.3..... In case the Government servant could have normally got his regular promotion from a date prior to the date of his ad-hoc promotion with reference to his placement in the DPC proceedings kept in the sealed cover (s) and the actual date of



promotion of the person ranked immediately junior to him by the same DPC, he would also be allowed his due seniority and benefit of notional promotion”.

17. Mr. Mittal has prayed that the order of the Tribunal be set aside and the reliefs as claimed in the OA be granted.

ANALYSIS AND CONCLUSION

18. Having heard the learned counsel for the parties and perused the record, three issues arise for consideration of this Court; (i) whether the petitioner is entitled to subsistence allowance for the period between November 18, 1996 to July 16, 2012, (ii) whether the petitioner is entitled to receive back wages for the said period, and (iii) whether the petitioner is entitled to seniority/promotion in line with his batch-mates and consequential benefits thereof.

19. Before we deal with the submissions made by the learned counsel for the parties, we shall reproduce the order of reinstatement November 26, 2015 passed by the competent authority reinstating the petitioner in service.

Order of reinstatement dated November 26, 2015

“...Whereas Ex. Const. Vinod Kumar, No.1853/DAP, 841/DAP (PIS No.28824737) on having been involved in case FIR No. 1132/96 dated 14.11.1996 u/s 379/420 IPC, PS Connaught Place, New Delhi was placed under suspension w.e.f 18.11.1996 vide Order no.11409-11439/HAP/II Bn. DAP dated 21.11.1996. He was dismissed from police force under the provision of Article 311 (2)(b) of the Constitution of India vide order no. 11925-12025/HAP-II Bn. DAP dated 12.12.1996 & his suspension period from 18.11.1996 to till date was treated



as period not spent on duty. He was reinstated in service from the date of dismissal in pursuance of Hon'ble Central Administrative Tribunal's judgment dated 24.12.2010 in O.A. No.685/2010 but deemed to be under suspension from the date of dismissal i.e. 12.12.1996 vide order no. 1491-1560/HAP/SED (P-1) dated 15.02.2011 and it was also ordered that he is not entitled for any back wages. The intervening period from the date of issue of this order to the date of joining was treated as leave of kind due (LKD). A parallel DE was initiated against him vide this office order no.13490-525/HAP (P-1)/Ist Bn. DAP dated 19.09.2011 which was decided vide this office order No.9541-69/HAP (P-1)/Ist Bn. DAP dated 04.06.2012 and he has been awarded punishment forfeiture of 05 years approved service permanently and remained under suspension. It was also ordered that his suspension period will be decided after the decision of criminal case. He was reinstated from suspension vide this office order No. 11500-11530/HAP (P-1)/Ist Bn. DAP dated 17.07.2012.

Whereas, case FIR No. 1132/96 dated 14.11.1996 u/s 420/379/411/34 IPC, PS Connaught Place, New Delhi was decided by the Hon'ble Court of Ms. Jasjeet Kaur, MM-I, New Delhi vide its judgment dated 06.07.2012 and the Hon'ble Court had held him guilty for the offences punishable u/s 379/411/34 IPC and sentenced him vide Order dated 30.05.2014. On his conviction in this case he was dismissed from service of Delhi Police under amended Rule 11(1) of Delhi Police (Punishment & Appeal) Rules, 1980 vide this office order No.12781-880/HAP (P-III)/Ist Bn DAP dated 14.08.2014 and his suspension period from 18.11.1996 to 16.07.2012 was decided as period not spent on duty for all intents & purposes. He had filed appeal against the punishment of dismissal which has been rejected by the Appellate Authority vide order No.689-92/P. Sec./Addl. CP/AP dated 23.03.2015.

Whereas Ex. Const. Vinod Kumar, No.1853/DAP, 841/DAP had filed Criminal Appeal No.51/2014 in the Hon'ble Court of ASJ, Patiala House Courts, New Delhi against judgment dated



06.07.2012 regarding conviction and order on sentence dated 30.05.2014 passed by the Hon'ble Court of Ms. Jasjeet Kaur, MM-I, New Delhi. His criminal Appeal No.51/2014 has been decided by the Hon'ble Court of Ms. Neena Bansal Krishna, ASJ-01, Patiala House Courts, New Delhi vide Judgment dated 30.06.2015 and the Hon'ble Court has set aside the sentence order passed by Ld. MM and acquitted the appellant. No criminal Appeal has been filed against judgment dated 30.06.2015 passed by the Hon'ble Court of Ms. Neena Bansal Krishna, ASJ-01, Patiala House Courts, New Delhi as per report received from Addl. DCP/New Delhi Distt. New Delhi vide memo No.7924/Legal Cell/NDD dated 16.11.2015.

Whereas the case was referred to Legal Advisor to C.P., Delhi who opined that Department may re-visit the dismissal order dated 14.08.2014 as the judicial verdict would have precedence over the decision in departmental proceedings and the sub-ordinate rank would be restored to his status with consequential reliefs. Accordingly, the judgment has been examined and found that the Ex. Constable has been acquitted in the above case and the Hon'ble Court vide its judgment dated 30.06.2015 has observed that as per statement of PW-5 (I.O. Sushil Kumar), Rs.70,000/- belonging to the complainant were recovered from the house of accused Mukhtiyar Alam at the instance of Ex. Constable Vinod Kumar No.1853/DAP, 841/DAP, PW-5 has also stated that this Rs.70,000/- were identified to be those belonging to the complainant from the slip of Bank of America that was present on the bundle of notes. To corroborate this PW-7 Sh. V. Bhaskar, Operation Manager, Bank of America, Sansad Marg, New Delhi had appeared and the deposed that as per their record Rs.75,000/- were withdrawn through cheque which was in favour of D. N. Singh and the same was in the denomination of 100x500 and 50x500. The Hon'ble Court has also stated that the case property i.e. the bundles of notes were not shown to this witness. There may have been a slip of Bank of America on the bundles but that in itself is not sufficient to conclude that the money allegedly recovered at the instance of the appellant was



the same that belonged to the complainant. It is unfortunate that the evidence in the present case has been recorded in a slip shod manner and the evidence on material aspects in regard to the identity of the case property by the complainant, is missing. The Hon'ble Court has further finally stated that the prosecution has not been able to prove the recovery of Rs.70,000/- at the instance of the appellant beyond reasonable doubt. Also, it has not been able to show that this alleged recovery at the instance of appellant was of the money that was stolen from the complainant. In the circumstances, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt against the appellant u/s 411 IPC. The benefit of the same has to be extended to the appellant.

Therefore, keeping in view all facts and circumstances of the case, it is crystal clear that though the incident had taken place but the prosecution failed to prove the case and Hon'ble Court acquitted the appellant (Ex. Constable Vinod Kumar, No.1853/DAP, 841/DAP) on the basis of above discussion. As such, taking into account all aspects of the case Ex. Constable Vinod Kumar, No.1853/DAP, 841/DAP is hereby reinstated in service from dismissal from the date of dismissal i.e. 14.08.2014 by re-visiting dismissal order No. 12781-880/HAP (P-III/Ist Bn. DAP dated 14.08.2014 with notional benefit in view of the opinion of LA to C.P. Delhi. However, he will not be entitled for any arrear/back wages on the principle of 'no work no pay' as he has not served the department in any manner during dismissal period. However, the period from date of issuance of this order to the date of his joining will be treated as leave of kind due (LKD). His name is also deleted from the list of criminal cases. ...

20. On the aspect of payment of subsistence allowance, it is quite surprising that though the petitioner was put under suspension, as is clear from the order dated February 15, 2011, he not been paid subsistence allowance. The very nomenclature of subsistence



allowance demonstrates that the same is given to an employee to sustain himself and his family during the period of suspension. Subsistence allowance is not a largesse, but the statutory right of an employee, and any denial of the same would amount to violation of Article 21 of the Constitution of India. The law in this regard is very well settled in terms of a catena of judgments, including the decision of the Supreme Court in *M. Paul Anthony v. Bharat Gold Mines Ltd., (1999) 3 SCC 679*. If the subsistence allowance was not paid to the petitioner, he shall be entitled to the same at the rate applicable under the rules, along with interest for the period for which he was denied the same.

21. Insofar as the issue of back wages for the period between November 18, 1996 and July 16, 2012 is concerned, the law is no more *res integra* in view of the judgment of the Supreme Court in *Ranchhodji Chaturji Thakore (supra)*. In that case, the petitioner was charged with the offence under Section 302 read with Section 34 IPC. The Session Judge convicted him and sentenced him to undergo imprisonment for life. Consequently, the petitioner was dismissed from service since he was working as a Junior Clerk in the Electricity Board. In appeal, the Division Bench acquitted him vide order dated October 14, 1992. The learned Single Judge directed his reinstatement into the service with continuity of the service, but denied back wages. The Letters Patent Appeal thereto was dismissed by the Division Bench. The Supreme Court in paragraph 3 of the judgment held as under:-

“3. The reinstatement of the petitioner into the service has already been ordered by the High Court. The only



question is whether he is entitled to back wages. It was his conduct of involving himself in the crime that was taken into account for his not being in service of the respondent. Consequent upon his acquittal, he is entitled to reinstatement for the reason that his service was terminated on the basis of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in its own backdrop. In this case, since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail. Under these circumstances, the petitioner is not entitled to payment of back wages. The learned Single Judge and the Division Bench have not committed any error of law warranting interference.

(emphasis supplied)

22. In **Baldev Singh (supra)**, the Supreme Court was considering identical facts wherein the appellant who was enrolled in the Indian Army was arrested in a criminal case for an offence punishable under Section 302/34 and 452 of the Indian Penal Code. The appellant was convicted by the Trial Court. However, the appeal was accepted by the High Court and he was acquitted vide order dated March 26, 1992. It was the case of the appellant that he was released on April 04, 1992 and had reported to his unit along with a copy of the judgment on the next day. It was his case that he should be reinstated on the strength of such acquittal and continued in service, but his pay and allowances



were not fixed or released. On September 30, 1993 he was discharged from the service. He claimed to have completed the requisite period of service from the date of enrolment to the date of discharge and claimed entitlement to the release of arrears of salary for the period from March 30, 1987 to September 30, 1993 as also pension for the subsequent periods. The High Court rejected the claim of the appellant on the ground that the appellant avoided to join duty and his conduct established a clear motive for only getting arrears of salary and pension. It was held that he was entitled to salary for the period for which the writ petitioner actually rendered service and not for earlier periods. It was found that between March 30, 1987 to September 30, 1993 the appellant had neither worked nor offered to work. In fact, he was in custody up to March 1992 facing trial. He had rendered service for the period from September 1978 to the end of March 1987. He had not completed actual fifteen years of service and, therefore, was not entitled to pension. The Supreme Court has in paragraph 7 held as under:-

“7. As the factual position noted clearly indicates, the appellant was not in actual service for the period he was in custody. Merely because there has been an acquittal does not automatically entitle him to get salary for the period concerned. This is more so, on the logic of no work no pay. It is to be noted that the appellant was terminated from service because of the conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service. The aforesaid position was clearly stated in Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board.”



23. The aforesaid position has been followed in the case of ***Jaipal Singh (supra)***, wherein the Supreme Court has in paragraph 4 held as under:-

“4. On a careful consideration of the matter and the materials on record, including the judgment and orders brought to our notice, we are of the view that it is well accepted that an order rejecting a special leave petition at the threshold without detailed reasons therefor does not constitute any declaration of law by this Court or constitute a binding precedent. Per contra, the decision relied upon by the appellant is one on merits and for reasons specifically recorded therefor it operates as a binding precedent as well. On going through the same, we are in respectful agreement with the view taken in Ranchhodji [(1996) 11 SCC 603 : 1997 SCC (L&S) 491] . If prosecution, which ultimately resulted in acquittal of the person concerned was at the behest of or by the department itself, perhaps different considerations may arise. On the other hand, if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges a person convicted of an offence to be so kept out and not to be retained in service. Consequently, the reasons given in the decision relied upon, for the appellants are not only convincing but are in consonance with reasonableness as well. Though exception taken to that part of the order directing reinstatement cannot be sustained and the respondent has to be reinstated in service, for the reason that the earlier discharge was on account of those criminal proceedings and conviction only, the appellants are well within their rights to deny back wages to the respondent for the period he was not in service. The appellants cannot be made liable to pay for the period



for which they could not avail of the services of the respondent. The High Court, in our view, committed a grave error, in allowing back wages also, without advertng to all such relevant aspects and considerations. Consequently, the order of the High Court insofar as it directed payment of back wages is liable to be and is hereby set aside.”

24. In the case of ***Mithilesh Kumar v. Union of India, (2020) 12 SCC 423***, the appellant was convicted under a criminal case under Section 302/324/148/149 of the Indian Penal Code and was awarded life imprisonment by the Trial Court and consequentially was removed from service by the Chief of Air Staff on March 22, 1994. In appeal, the High Court set aside the conviction. On his representation he was reinstated in service with effect from April 09, 1994 vide order dated October 30, 2007 without back wages. The grievance of the petitioner was that along with reinstatement he should have been given back wages and consequential relief. The Supreme Court by referring to the judgment in ***Ranchhodji Chaturji Thakore (supra)*** and ***Jaipal Singh (supra)***, opined that where after initial conviction by the Trial Court, a person gets acquitted on appeal, the department / employer cannot in any manner be found fault with for having kept him out of service, since the law obliges a person convicted of an offence to be so kept out and not to be retained in service. The Supreme Court found that the appellant is not entitled to back wages and dismissed the petition.

25. Mr. Mittal had relied upon ***Chhedi Lal (supra)***, wherein the employee was placed under suspension. The inquiry proceedings were initiated, resulting in the government servant being exonerated. The



sealed cover was opened and being recommended for promotion, the government servant was promoted. The Court held that under the circumstances, the suspension not being justified, the rule of '*no work no pay*' is inapplicable. The said judgment is clearly distinguishable.

26. In ***Sharda Singh (supra)***, the issue which arose for consideration of the Supreme Court was identical to ***Chhedi Lal (supra)***, wherein it was held that a government servant exonerated of the charges framed against him cannot be deprived of any portion of his pay for the period of suspension except according to relevant rules applicable to him. In the said case, the salary was denied for the period of suspension on the reasoning that he has not rendered any work during suspension period. The Supreme Court remanded the matter back to the District Magistrate, Sitapur to consider the claim of the appellant for payment of back wages/salary for the period October 22, 1998 to October 31, 2003 in accordance with law and also the rules / regulations which govern the parties. Suffice to state, the judgment is in the context where the employee was convicted in the criminal case which resulted in his acquittal and the back wages are denied for the period when the appellant was under conviction.

27. In ***Brijendra Prakash Kulshreshtha (supra)*** the issue was whether the petitioner was entitled to retire at the age of 58 years or 60 years. Despite opting to retire at the age of 60 years, no order was passed on the said option by the concerned authority and the petitioner retired on attaining the age of 58 years. Though the Division bench was of the view that the employee could not discharge any duty due to such retirement being forced upon him by the employer, the Apex



Court held that such employee is entitled to full salary and granted the same to the petitioner in the judgment. The said judgment is clearly distinguishable to the facts.

28. In *Gowranna C (Dead) by LRs (supra)*, the issue which arose for consideration before the Supreme Court was that the deceased employee was working as a Staff Nurse with the respondent. An enquiry was initiated against him on the charge that the employee had falsely represented to belong to the Scheduled Caste community. The Tehsildar verified the caste certificate and it was found that the employee did not belong to the community 'Adi Karnataka' which is a Scheduled Caste. The employee challenged the order of the Tehsildar before the High Court and the learned single Judge repelled the challenge to the order vide judgment dated December 29, 2009. Following the said judgment, the Disciplinary Authority, by order dated October 08, 2010, dismissed the employee from service relying upon the order of the Tehsildar. The judgment was challenged before the Division Bench, which allowed the appeal filed by the appellant vide its judgment dated June 28, 2011 and found that the power to rule on Caste status does not lie before the Tehsildar but with another authority. The verification of caste certificate was directed to be made over to the Bangalore District Caste Verification Committee. The said authority verified the caste status of the appellant and found that the appellant, in fact, belonged to the Scheduled Caste in question. There upon the appellant gave a representation and on April 12, 2014, the appellant was reinstated without any consequential benefits. The challenge to the order resulted in Single Judge allowing the writ



petition and directing the first respondent to give promotion notionally and 50 per cent of the back wages and the retirement benefits on the basis of the last pay cheque that she would be entitled to, in case, she was granted any notional promotion. The writ appeals were filed, which culminated in the impugned order, affirming the judgment of the learned Single Judge. The Supreme Court while considering the issue took the following view in paragraph 12 of the judgment, which we reproduce as under:-

“12. The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee. In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case. As we have already noticed, this is a case where apart from the charge of the employee having produced false caste certificate, there is no other charge. Therefore, we would think that interests of justice, in the facts of this, would be subserved, if we enhance the back wages from 50% to 75% of the full back wages, which she was otherwise entitled. The appeals are partly allowed. The impugned judgments will stand modified and the respondents shall calculate the amount which would be equivalent to 75% of the back wages and disburse the amount remaining to be paid under this judgment within a period of six weeks from today to the additional appellants.”

29. Suffice to state, the Supreme Court held that the employee was not at all at fault and she was kept out of work because of the fault of



the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee. In these circumstances, the Supreme Court enhanced the back wages from 50% to 75% of the full back wages. Suffice to state, the judgment is also distinguishable on facts.

30. Similarly, in ***Chief Regional Manager, United India Insurance Company Limited (supra)***, the respondent was proceeded departmentally for unauthorized absence for the period between February 02, 2007 to June 07, 2007 for which disciplinary proceedings were initiated. The disciplinary proceedings resulted in the respondent being found guilty and penalty of “reduction of basic pay by two steps” was imposed on the respondent. The second charge-sheet was issued alleging unauthorised absence of 663 days. The inquiry was conducted *ex parte*. In the meantime, the respondent attained the age of superannuation. The proceedings resulted in the termination of respondent vide order dated June 20, 2012. The departmental appeal against the said order was also dismissed. A Writ Petition was filed by the respondent which was decided by the learned Single Judge whereby the order of termination dated June 26, 2012 was set aside on two grounds; firstly, the chargesheet was never served upon the respondent and secondly, the respondent had already retired on June 20, 2012. The SLP filed by the department was dismissed. The respondent filed a writ petition being Writ Petition No.61102 of 2017 praying for salary for the period from January, 2007 to June, 2012 with interest and all consequential benefits, such as, promotion, arrears, medical bills, lump sum medical reimbursement and re-fixation of



pension. The said writ petition has been partly allowed by impugned judgment dated July 03, 2018. The learned Single Judge held that the punishment having been set aside by the Division Bench of the High Court vide order dated February 15, 2016, the appellant is entitled to salary with effect from February 2, 2007 to May 14, 2009. The Supreme Court in paragraphs 22 and 23 has held as under:-

“22. In the present case, as noted above, the respondent was not kept away from work by any order of the appellant. The order of termination of his services/dismissal was passed on 26-6-2012, after his retirement on 20-6-2012, which in no manner prohibited the respondent from working. The respondent during submission has submitted that he was illegally transferred to Branch Office, Jaunpur from Allahabad. He was suffering from a disability of more than 40 per cent and he could not have been transferred to another place. There is nothing on record to indicate that transfer of respondent from Branch Office, Allahabad to Branch Office, Jaunpur was at any time set aside or withdrawn. The salary up to 14-5-2009 was allowed to the respondent on account of setting aside of the order dated 14-5-2009, which was with all consequential benefits but with regard to entitlement of salary after 14-5-2009 to 20-6-2012, there has been no adjudication by the High Court, which is apparent from judgment of the High Court dated 3-7-2018, as extracted above.

23. The learned Single Judge having itself not determined the entitlement of respondent to receive salary after 14-5-2009 to 20-6-2012, it ought to have directed the appellant to consider the entitlement and take a decision thereon. We are of the view that ends of justice be served in setting aside the direction of the High Court directing the appellant to make payment of salary after 14-5-2009 till 20-6-2012, with a direction to the appellant to consider the claim of respondent for



back wages after 14-5-2009 to 20-6-2012 and pass appropriate orders giving reasons within three months from today. It shall also be open for the respondent to submit an appropriate representation along with relevant materials regarding his entitlement for salary for the period 15-5-2009 to 20-6-2012 to the appellant within a period of one month from today.”

31. In **Deepali Gundu Surwase (supra)**, the issue was with regard to payment of back wages during the period when the petitioner's service was terminated and till reinstatement pursuant to departmental enquiry initiated against her. The decision to terminate the appellant service was preceded by her suspension albeit without any rhyme or reason and despite direction of the Division Bench of the High Court that she will be deemed to have rejoined her duty on March 14, 2007 and entitled to consequential benefits, the management neither allowed her to join the duty nor paid wages. Without holding inquiry, the management terminated her services vide order dated June 15, 2007 which was found to be wholly arbitrary and was vitiated by the Tribunal. 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. The Supreme Court set aside the order of the learned Single Judge and restored order of the Tribunal by granting full back wages to the appellant therein. The propositions that has been culled out by the Supreme Court are the following:-



- 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 other similar 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 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.

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 victimising the employee or workman, then the court 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.

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

vii. 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 in *Hindustan Tin Works (P) Ltd. (supra)*, *Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443* 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. Suffice to state, the judgment was with regard to termination pursuant to initiation of disciplinary proceedings, which were later set aside, and not in the context of conviction of an employee being set aside by the appellate Court and pursuant thereto the employee being reinstated denying the back wages. The judgment is clearly distinguishable.

33. We may state here that Mr. Mittal has relied upon the judgment in the case of *Andhra Bank (supra)* to contend that reinstatement on acquittal by an appellate Court, the employee was granted back wages is concerned, the same was in the context where the Supreme Court was interpreting the provisions of Sastry Award, Desai Award and the Bipartite Agreement wherein rule contemplates reinstatement on acquittal and back wages. The facts in the instant petition are substantially different and as such the ratio of this judgment would not be applicable herein.

34. Suffice to state, from the bedrock of the aforesaid enunciated law laid down by the Supreme Court in *Ranchhodji Chaturji Thakore (supra)* and *Jaipal Singh (supra)* it is clear that when a person (employee) gets involved in a crime, disabling himself from rendering his services on account of conviction or incarceration, even if he is



acquitted subsequently on appeal and re-instated in service, he cannot, as a matter of right, claim back wages for the period when he was not in service.

35. Now the question would be whether the petitioner is entitled to seniority in line with his batch-mates. The stand taken by the respondents is that as his period of suspension was treated as '*period not spent on duty*' for all intents and purposes, the petitioner cannot be granted seniority and consequential benefits. Such a stand, if accepted, would have serious consequences, inasmuch as, the period between November 18, 1996 and July 16, 2012 would be written off in the career of the petitioner, significantly impeding his career advancement. Such a situation cannot be allowed to happen, more so when the petitioner has been acquitted by the Appellate Court and reinstated in service from the date of his initial dismissal. A necessary corollary of such reinstatement shall be that even the period treated as '*not spent on duty*' will be counted for the purpose of seniority, and also for all consequential benefits. The period treated as '*not spent on duty*' must be construed for the purposes of back wages only and not for the purposes of seniority, promotion etc.

36. On account of the foregoing, we are of the view that the period from November 18, 1996 to July 16, 2012 cannot be treated as period not spent on duty for all intents and purposes. The period shall be counted for assessing and granting seniority and consequential benefits including promotion to the petitioner. However, on the basis of the principle of '*no work, no pay*', he would not be entitled to any pay or allowances except subsistence allowance that is to be granted to him



on the strength of this order.

37. In view of our above conclusion, we pass the following directions:

- i. Subsistence allowance for the period between November 18, 1996 and July 16, 2012 shall be paid, along with interest of 8% per annum.
- ii. The deceased employee shall be entitled to seniority and consequential benefits including promotion at par with the last junior of his batch. His case shall be considered in accordance with rules.
- iii. If found fit, the consequential benefits shall be released to the legal representatives of the deceased, who have come on record.

38. The aforesaid directions shall be implemented within a period of six months from today.

39. Consequently, the orders dated August 14, 2014, March 25, 2015 and November 26, 2015 passed by the respondents are set aside to the extent they deny seniority and consequential benefit thereof to the petitioner. The petition is disposed of accordingly.

V. KAMESWAR RAO, J

ANOOP KUMAR MENDIRATTA, J.

SEPTEMBER 25, 2023/jg/ds