



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 391 OF 2013

The Asst. General Manager,
State Bank of India

.. Petitioner

versus

Subhash Anantgir Gosavi

.. Respondent

Mr. T. K. Prabhakaran, Advocate for Petitioner.

Mr. S. V. Dankh, along with Ms. Shrutika Deshpande, Advocate for
Respondent.

WITH

WRIT PETITION NO. 6220 OF 2015

Subhash Anantgir Gosavi

.. Petitioner

versus

The Asstt. General Manager
State Bank of India

.. Respondent

Mr. S. V. Dankh, with Ms. Shrutika Deshpande, Advocate for Petitioner.

Mr. T. K. Prabhakaran, Advocate for Respondent.

CORAM : R. M. JOSHI, J.

RESERVED ON : 4th JULY, 2024.

PRONOUNCED ON : 8th JULY, 2024.

JUDGMENT :

1. Writ Petition No. 391/2013 is filed by State Bank of India taking exception to the judgment and order passed in Reference IDA no. 77/2007

dated 03.08.2012 whereby the reference is answered partly in affirmative and the action of bank discharging the workman from service by order dated 30.09.2002 and 27.01.2004 is quashed and set aside and that he is directed to be paid retiral benefits with continuity but without backwages. Whereas Writ Petition No. 6220/2015 is filed by workman against denial of backwages by Labour Court by said judgment. Since both the Petitions involve common questions of facts and law, by consent of both sides, heard and decided together.

2. Parties are referred to as Workman and Bank for the sake of convenience.

3. The facts which led to filing of the present Petitions can be narrated in brief as under :-

Workman joined service of bank as a Clerk on 11.01.1979 and was promoted to the post of Electronic Machine Operator. A criminal complaint came to be lodged against him for the offences punishable under Section 407, 420 read with Section 103 of Indian Penal Code and RCC No. 195/1992 resulted into his acquittal. Upon said acquittal, he was re-instated in service as Clerk Typist and was posted at Shahada. He was transferred from Shahada to Ashti by order dated 29.11.1996. He was thereafter

transferred to Aurangabad (now Chhatrapati Sambhajinagar). On 27.3.2000, a show cause notice came to be issued to him. Thereafter one more show cause notice was issued on 15.01.2001 which was followed by another show cause notice dated 27.02.2001. On 17.03.2001, revised charge-sheet was issued against him with following charges :

- (i) Not replying the queries raised against the TE bill by the controllers letter dtd. 16/09/1997.
- (ii) Claiming Truck charges Rs. 4750/- without transporting family hold kits from Shahada to Ahmednagar.
- (iii) Shifting family at Ahmednagar instead of place of posting i.e. Ashti without seeking permission from controlling authority.
- (iv) Preferring claim of Rs. 439/- for bus fare from Shahada to A'nagar for self & family without evidence in support of expenditure.
- (v) Preferring double claim for amount of Rs. 682/-.
- (vi) Unauthorised absence, violation of leave rules and disobedience of controllers instructions.

4. Workman responded to the show cause notice as well as charge-sheet. An enquiry was conducted against him. After conclusion of departmental enquiry, Enquiry Officer held that all charges i.e. Charge Nos. 1 to 6 except 3 (partly) are proved against the workman. A show cause notice came to be issued against him on 22.02.2002 which was replied by him on

14.03.2002. Punishment of discharge was proposed with superannuation benefits and without being disqualified for future employment. Final order came to be passed after giving personal hearing to the workman on 30.09.2002. Workman, in accordance with service rules, preferred appeal before the appellate authority on 16.11.2002. Appellate Authority dismissed the appeal on 29.01.2004. It is thereafter the workman raised dispute with regard to his discharge from service. Reference (IDA) No. 77/2007 was registered pursuant to the same being referred by appropriate Government for its decision to the Labour Court.

5. Learned Labour Court decided the issue of fairness of enquiry as a preliminary issue. This order came to be challenged before the this Court in Writ Petition No. 7759/2009. In the said Writ Petition, by consent of both sides, an order came to be passed whereby it is held that the said finding on the fairness of enquiry is treated as preliminary finding and that the bank was permitted to lead evidence to prove mis-conduct of the workman before the Labour Court. Pursuant to the said order, all the issues were determined by the impugned order in Reference IDA No. 77/2007 whereby action of discharging workman from service is held to be bad in law and the same is set aside. Since the workman had attained age of superannuation, bank was directed to calculate and pay consequential benefits as if the workman was in

service and had attained age of superannuation with continuity. However, backwages were denied.

6. Learned counsel for bank submits that the learned Labour Court has committed error in considering the evidence led by the bank before it though a positive finding is recorded that the enquiry conducted by the bank is fair and proper and as per the principles of natural justice. It is his contention that it is settled position of law that an employer would be permitted to prove mis-conduct before the Court only in the event when the enquiry is held to be not fair and proper and where findings are held to be perverse and hence evidence led before Court ought not to have been considered. According to him, in any case, Labour Court should have given preference to the evidence led in the enquiry as the same was led at the relevant time and ought not to have relied upon the evidence led before it which was after lapse of considerable period. It is his submission that owing to the lapse of memory of witness, in the evidence recorded after long period, inconsistencies are bound to occur and therefore Labour Court ought not to have taken into account said evidence. Instead was bound to rely upon the evidence led in the enquiry since it is held to be fair and proper. As far as claim of travelling expenses from Shahada to Ahmednagar, it is submitted that workman was transferred to Ashti and hence was not entitled to claim

transport charges to Ahmednagar. It is further argued that the Labour Court has committed error in holding that the bank has failed to prove other misconduct except absentism. It is his submission that the charges against the workman were serious in nature which did call for his discharge from service. On the point of refusal of backwages he contended that there is delay in making reference after termination and in overall facts and circumstances of case, order of refusal of backwages is just and proper. It is submitted that in the facts and circumstances, the order of setting aside of discharge requires interference whereas the order of refusal of backwages deserves confirmation.

7. Learned counsel for workman opposed the said submission by contending that once the bank has conceded the position before this Court in Writ Petition No. 7759/2009 to lead evidence before Labour Court and an order was obtained by consent of both sides to that effect, it is not open for the bank now to claim that the evidence led pursuant to the said order should be ignored. It is his submission that in any case no prejudice is caused to the bank by leading of such evidence. According to him, the only charge which is proved against the workman is about absentism of 10 days which in view of service conditions of the workman particularly, in view of Shastri Award paragraph No. 521(6) (a), (b) and (c), this does not amount to major misconduct and hence the same would not attract punishment of discharge

from service. It is his submission that it is settled position of law that once termination is held to be illegal, the normal rule would be re-instatement of the workman from service with full backwages. It is argued that the workman had filed affidavit before the Labour Court specifically stating that he was not gainfully employed during the entire period from the date of discharge and hence by following judgment of the Hon'ble Supreme Court in case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and another, (2013) 10 Supreme Court Cases 324, the workman is entitled to get full backwages.

8. At the outset, this Court would like to deal with the issue raised by learned counsel for bank that there ought not to have been any order directing the bank to lead evidence in absence of the enquiry being held not to be fair and proper. There cannot be any dispute made with regard to the said preposition of law canvassed on behalf of learned counsel. However, attending facts and circumstances in which such evidence is led, and more particularly order passed by this Court in Writ Petition No. 7759/2009 dated 14.10.2010 cannot be ignored. Relevant portion of the said order is reproduced below :-

“1. Heard both the learned Counsel. The petitioner was a Clerk in the respondent Bank and got regular promotion. He was prosecuted and subsequently he was acquitted on 17.11.1995. He was reinstated by respondent in the employment. He was slapped with a show cause notice seeking explanation for lapses committed by him. Six charges were levelled against him. In the long drawn history of litigation, the matter ultimately landed before the learned Judge, Labour Court at Aurangabad. The learned Judge, Labour Court, Aurangabad, on 2.7.2009, held that the inquiry conducted against the petitioner is fair, proper and as per the Rules of natural justice and the findings of the Inquiry Officer were not perverse. These observations of the learned Judge certainly being prima facie in nature, the learned Judge shall not be influenced by the same. The issues as 1-A and 1- being preliminary issues, will be considered by the learned Judge along with other issues. This arrangement is accepted by both the learned Counsel. In view of this situation, the order under challenge dt. 2.7.2009 is set aside and the observations of the learned Judge about conduct of inquiry to be legal, fair and proper and even perversity of the findings will not be having any influence on him, as above.

Undevitably, this order is passed by the consent of both parties. Pursuant to this order, Bank and workman led evidence before Labour Court. Thus, both sides are bound by the said order and would be estopped

retracting from the same. In any event, this order could not have been challenged since was obtained by consent of both sides and as such it has attained finality. It would also not be open for this Court to hold that said order does not bind parties nor can it be varied. The question arises before this Court is as to whether in the circumstances as they prevail in this case, more particularly order being passed with consent of both sides by this Court in aboveresferred Writ Petition, whether the bank would be justified in asking the Court to keep the evidence led before the Labour Court out of consideration and call upon Labour Court decide reference on evidence led in enquiry. A candid answer to the said question would be in negative for the reason that the said order was obtained with consent of the bank and hence now the bank is estopped from claiming that the said order is not binding upon it. Even otherwise, the Labour Court has held that the findings recorded by the Enquiry Officer are partly perverse. In such circumstances, it was always required by the employer to prove and substantiate the charges by leading evidence. In such circumstances, it is not allowed to bank to claim that the Labour Court could not have considered the evidence led before it. Considering peculiarity of circumstances involved in this case and also having regard to the fact that parties are litigating since 2007 before Labour Court in respect of termination effected in year 2002, this Court is not inclined to turn clock back.

9. On the point of fairness of enquiry learned Labour Court has duly considered the proceedings of enquiry and it is held that enquiry conducted against workman is fair and proper. But it is held that findings are partly perverse. Having regard to the material evidence on record, no fault can be found with said finding.

10. Learned Labour Court at first instance has taken into consideration evidence led by the Bank in the Departmental Enquiry and observed that Enquiry Officer has recorded findings without assessing the evidence led through 6 witnesses in the enquiry. After thorough consideration of the entire evidence on record it is held that the charges are not proved on the basis of available evidence in the enquiry proceeding. It is therefore Labour Court took into account evidence led before it by Bank. Evidence of Presenting Officer and one more witness is is assessed to record findings on merit of the case to draw conclusion that other charges except charge No. 6 are not proved.

11. Labour Court considered the gravity of the said charge No. 6, absentism for 10 days and held that the said charge is minor misconduct. As rightly been pointed out by learned counsel for workman that in view of the relevant rules, absentism for 10 days of leave without pay is a minor mis-

conduct which would never attract punishment of discharge. Punishment of discharge therefore imposed upon the workman is rightly held to be disproportionate and interfered with by the Labour Court.

12. Having regard to the aforestated facts and evidence on record, this Court is of considered view that for want of any perversity in the findings recorded by the Labour Court, order of setting aside discharge of workman from service deserves to be upheld. No interference therefore called in the judgment to the effect of setting aside punishment of discharge and passing consequential order.

13. As far as claim of workman for full backwages is concerned, record indicates that the workman had filed affidavit of evidence before the Labour Court wherein specific plea is raised about he being not gainfully employed after termination of his service. The Hon'ble Supreme Court in case of Deepali Surwase (supra) has culled out propositions with regard to payment of backwages. It would be useful to make reference of the same which reads as under :-

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 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 case 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 or tribunal concerned will be fully justified in directing payment of full backwages. 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-a-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.

38.7 The observation made in J.K. Synthetics Ltd. v. K. P. Agrawal 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.

In view of law laid down by the Hon'ble Supreme Court, it is clear that in case of wrongful termination of service, the workman would be reinstated with continuity of service and backwages. The same is however with a rider that the workman is required to either plead or atleast make a statement before the adjudicating authority that he was not gainfully employed or was employed on lessor wages during the intervening period. Once the workman makes such statement, the onus would shift upon the employer to show that the workman was gainfully employed in order to deny backwages. The observation made by the Hon'ble Supreme Court in aforestated judgment indicates that there is a shift in the view in respect of grant of backwages. Earlier in case of any termination being held as illegal, re-instatement in service with backwages was a rule. However, now a rider is added thereto whereby the workman is required to plead or make a statement before the Court at first instance that he was not gainfully employed. The nature of burden on the workman would not be so strict that he is called upon to prove by leading positive evidence that he was not gainfully employed. Since it would not be possible to prove negative and hence statement made by workman is accepted by Court and so such statement is believed to be bonafide. The workman is expected to make all material disclosures related to issue of gainful employment, which has bearing on determination of back wages.

14. It is settled law that term 'gainful employment' would not restrict to the employment but also self employment or any other source of income which helps workman for his survival. A useful reference can be made in this regard to the judgment of Hon'ble Supreme Court in case of North East Karnataka Road Transport Corporation vs. M. Nagangouda, AIR 2007 SC 973, wherein it is held thus :

"12. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment."

This mandates the workman herein present case to make all sort of disclosures which have relevance for decision of issue of back wages. Perusal of record before Labour Court indicates that the bank has placed on record documents issued by Liquidator of Ahmednagar Nagri Sahakari Pat

Sanstha to show that the workman was Director thereof. The cross-examination conducted by the workman of witness of the Bank Shri Sunildatta Kulkarni indicates that there is no dispute about the fact that the workman was concerned with the said society. The relevant portion of the cross-examination of this witness is reproduced thus :-

The second party/workman has suppressed following material facts :

1. *Criminal case filed against him.*
2. *Another criminal case regarding assault made to the watchman of the bank.*
3. *The second party/workman had floated co-operative credit society at Ahmednagar without taking prior permission of the Bank.*

I am not aware whether second party/workman had been charge sheeted by the Bank in respect of his violent & unlawful activities, as quoted by me. It is true that the second party/workman was acquitted by the Court and subsequent to that he came to be reinstated. It is not true that in order to take revenge of the reinstatement of second party and falsely dismissed him.

It is true that contents of para no. 6 to 9 of my Affidavit are regarding RCC No. 73/1985 before C.J.M. Dhule . It is true that in the present charge sheet against the second party/workman, there is no concerned about his acquittal from the criminal case and allegations therein. Said reinstatement was along with back wages and continuity. I have no record regarding joining Dhule branch by the second party/workman as a Clerk.

It is true that the allegations made in para no. 26 regarding forming of co-operative society by the second party/workman have no nexus with the charges involved in the present case. It is true that the forming of co-operative society affair of second party is having no bearing upon charges in the present case. It is true that para no. 26 & 28 are not related with the present case.

15. Learned counsel for workman submits that the workman after his reinstatement in service in the year 1996 has ceased to be Director of the said society. It is his further contention that in the year 1995 wife of the workman founded the said society and only upto 1996 the workman was Director thereof. It is his submission that there is no suppression of fact on the part of the workman while filing affidavit of evidence before the Labour Court. Though such explanation is now sought to be given, there is absolutely no material on record to indicate that the workman had resigned from directorship of the said society as claimed. From the above evidence, it can be clearly seen that the workman has suppressed material facts from the Court. It was incumbent on the part of the workman to disclose about he being Director of the said society and as to the date when he resigned from the said post. This fact is relevant as a Director of credit society may receive emoluments/honorarium etc. and amounts so received if are regular in nature, it would affect the determination of back wages.

16. Thus there is evidence on record before the Labour Court to hold that after his termination from service workman had formed co-operative credit society viz., Ahmednagar Nagari Sahakari Pat Sanstha and became Director of the said society. Letter dated 15.04.2002 placed on record received by the bank from the liquidator of the said Credit Co-operative Society indicates that the workman was the founder of the said society and also was a Director thereof and that there is allegation against him about misappropriation of funds of the society. This Court does not wish to go into the correctness of the said allegation against the workman but suffice to say that there is some material on record to indicate that the workman was Director of the said society. There is nothing on record to indicate that the said post was honorary and the workman was not earning any income therefrom. This fact has been suppressed by the workman before the Labour Court. It was obligatory on his part to disclose the factum of being Director of society, period thereof and other particulars such as honorarium/emoluments etc. received therefrom. The workman however chose not to disclose and explain the said vital facts. Hence, his statement on oath regarding not gainfully employed during intervening period is not free from doubt and since it being appearing not truthful, cannot become basis to grant back wages. One more additional factor would be relevant to deny workman back wages for period upto year 2007 is that statement of claim does not specify the details about

the claim raised by him with Bank. There is vague averment in regard to steps taken by him. Thus, this Court finds substance to some extent in submission made on behalf of Bank that the period from decision of appeal till reference, workman would not get right to claim back wages.

17. In the peculiar facts and circumstances of the case, this Court is not inclined to interfere with the impugned order of refusal of back wages. In the result, Writ Petition No. 6220/2015 also stands dismissed.

18. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb

LATER ON :

1. At this stage, learned counsel for workman prays for withdrawal of balance amount deposited in this Court with accrued interest.

2. Learned counsel for bank records no objection for the same.

3. In view of this, the workman is permitted to withdraw the amount deposited in this Court along with accrued interest.

(R. M. JOSHI)
Judge

dyb