



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1840 OF 2022

M/s OMR Bagla Automotive Systems
India Ltd. ...Petitioner

Versus

Shivaji Pundlik Parkale ...Respondent

WITH

WRIT PETITION NO. 3407 OF 2023

Shivaji Pundlik Parkale ...Petitioner

Versus

M/s OMR Bagla Automotive Systems
India Ltd. ...Respondent

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Mr. B. R. Kawre and N. L. Dhoble, Advocate for
Petitioner in WP/1840/2022 & for Respondent in
WP/3407/2023

Mr. G. S. Telangare, Advocate for Respondent in
WP/1840/2022 & for Petitioner in WP/3407/2023

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CORAM : R.M. JOSHI, J

DATE : JULY 18, 2024

PER COURT :

1. By consent of both sides, heard finally at
admission stage.

2. In both Petitions Petitioners i.e., employer
and workman are aggrieved by the impugned judgment of
the Labour Court in Reference IDA No. 36/2015.

3. Parties are referred to as employer and workman for the sake of convenience.

4. It is the case of the workman that he was working as the operator in the production department since January, 2008. He was issued with notice-cum-charge-sheet dated 09.03.2011 wherein it is alleged that during the period of October, 2010 and January, 2011 he indulged in misconduct of slowing down the production, which has resulted in causing loss to the employer and absenteeism. A departmental enquiry was conducted against him wherein it is held that the employer has proved misconduct of the workman for work slow and absenteeism. Pursuant to the said enquiry report, second show cause notice was issued to the workman and finally he was dismissed from services with effect from 05.12.2014. Workman raised Reference IDA No. 36/2015 challenging the departmental enquiry, report of enquiry and order of dismissal. Claim was filed before the Labour Court, which was opposed by the employer by filing written statement. Learned Labour court by order dated 11.01.2015 has held that enquiry conducted against the workman is not fair and proper.

An opportunity was given to the employer to prove misconduct of the workman before Labour Court. Employer as well as workman laid evidence. Learned Labour Court by passing impugned award dated 10.03.2021 directed reinstatement of the workman in the service without backwages but with continuity of service. Employer is aggrieved by order of reinstatement and continuity of service, whereas workman is aggrieved by refusal of backwages. Hence, these Petitions.

5. Learned Counsel for the Employer submits that the employer has specifically alleged against workman about misconduct committed by him which is serious in nature that is of adopting go slow tactics resulting into causing of loss to the employer. In support of his submissions that dismissal is proper punishment for such misconduct, he relied upon following judgments:

Mr. Zaikh vs. Firestone Tyre and Rubber Company Ltd and Another, (Bombay High Court, Appeal No. 76/1953, dated 19-10-53), The Dunlop Rubber Co (India) Ltd vs. Their workman, 1965 AIR (SC) 1392, Vasant Govind Madhavrao vs. Gujrat Rubber Work Ltd, 1956 (I) LLJ 731, Carona Sahu Company Ltd vs. Mansoor Ahmed Noormiya and Ors,

1997 (I) CLR 769, Krishnakumar Tukaram Erondkar vs. Nicholoas Laboratories (I) Ltd, 1997 (2) CLR 324, P J Gangadharan vs. IInd Additional Labour Court, 1997 (1) CLR 917 & Biswanath Sarkar vs. M/s Uranium Corporation of India Ltd, 2014 (2) AIR Jhar 812.

6. It is thus his submission that when the employer has proved that the workman has adopted go slow tactics, the Labour Court ought to have held that misconduct is proved against him and that punishment is not disproportionate. As far as refusal of backwages is concerned, it is his submission that workman has admitted in his cross-examination that he is gainfully employed and refusal of backwages is perfectly justified. To support this submission, he placed reliance on following judgments: North East Karnataka Road Transport Corporation vs. M. Nagangouda, 2007 (112) FLR 887 & Shankar Chakrawarthy vs. Britaniya Biscuit, 1980 (II) LLJ 78.

7. At the outset, learned Counsel for the workman submits that the charge-sheet issued against the workman is vague and as such, no action of termination from services on the basis of such vague charge-sheet

can be maintained. To substantiate the said contention, he placed reliance on judgment in case of Miraj Taluka Girni Kamgar Sangh vs. Manager, Shree Gajanan Weaving Mills and Others, (Bombay High Court, WP/5532/1989, dated 13.09.1991). He supported the impugned order to the extent it is held that the employer has failed to prove misconduct. It is his submission that in order to hold that there is less production, there has to be evidence at first instance to the effect that the production norms are fixed. It is only then it can be considered whether there is an act of go slow in production. On the point of backwages, it is his submission that mere admission of the workman that he was earning some income during intermitting period, is not sufficient to deny him backwages.

8. Undisputedly, the workman is issued with the show cause notice-cum-charge-sheet wherein specific allegations are made against him that for the period from October, 2010 to January, 2011 he has indulged in act of go slow of production and which has resulted into loss of production. Perusal of the charge-sheet shows that a Schedule is annexed to the charge-sheet

disclosing details in respect of the production during the relevant period. Having regard to these facts, this Court is not convinced to accept the contention of the learned Counsel for the workman that the charge-sheet is vague and, therefore, on the basis of said vague charge-sheet misconduct cannot be said to be proved.

9. As far as the evidence led by the Employer before the Labour Court is concerned, perusal of the same indicates that there is not continuous decrease in the production and the same is scattered for a period of about three months. The entries in the logbook indicates that there was a supply failure of metal with endorsement "**no metal**". Similar incidents seems to have been repeated on 03.10.2010, 13.10.2010, 14.10.2010 and 16.10.2010. Though there is no such remark in the logbook of these dates. However, on 16.10.2010 a remark is found to that effect "less supply of metal". In the backdrop of this evidence, learned Labour Court has held that from the said record it appears that due to some technical difficulty the requisite quantify of metal could not be supplied. Learned Labour Court has also held that on going through entire logbook for the

relevant period, no doubt it is found that there are instances of low supply of metal on the part of employer. Similarly, the remarks appearing in the column thereof indicate that due to some technical or mechanical fault it has so happened. It is also observed that from logbook it cannot be held that the workman was continuously and consistently slowing down his performance.

10. In order to hold that workman has not given requisite production, there has to be at first instance evidence about production norms fixed which are required to be adhere to by the workman. In this regard, evidence of the witness of the employer shows that he was unable to state as to whether there was any agreement between the employer and the workman about fixed production to be given by the workman. The employer has not brought on record any evidence to show that there has been agreement or any other term of contract with the workman which would mandate him to give fixed production on each working day. Unless this aspect is proved, question of holding that slow production is given by the workman does not arise.

11. Learned Trial Court has held that if the workman had engaged into go slow activities it is not possible that management would tolerate the same for a period of three months, though this cannot become a sole ground to reject the contention of the employer but is certainly an attending circumstance. Having regard to the evidence on record, findings recorded by the learned Labour Court while rejecting the contention of employer about misconduct do not deserve interference in exercise of writ jurisdiction. Since it is not proved that workman had involved in go slow action, judgments cited supra on this point have no application to present case.

12. As far as refusal of backwages by the learned Labour Court is concerned, in the evidence of workman in examination-in-chief he has never disclosed about intermitting getting employment or another work done by him to earn income. It is only in the cross-examination it has come on record that he has worked in Pawan and Gorakh Engineering and had earned Rs. 8,000/- to 10,000/- per month. It is sought to be argued that the said employment is not inconsistent to deny backwages.

He has further accepted in the cross-examination that he has income from his agriculture land to the extent of Rs. 80,000/- to 90,000/- p.a. It is specifically suggested to him that he has filed false affidavit before the Court.

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 Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and another, (2013) 10 Supreme Court Cases 324 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 backwages is the normal rule.

38.2 The aforesaid rule is subject to the rider that while deciding the issue of backwages, 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 backwages 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 backwages, 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 backwages. 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 backwages.

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 backwages 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 backwages.

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 backwages 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 at least 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 aforesaid 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 such statement is believed to be bona fide. The workman is expected to make all material disclosures related to issue of gainful employment, which has bearing on determination of backwages.

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 Raod Transport Corporation (supra), 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."

15. In the instant case, as admitted by the workman that he earns Rs. 80,000/- to 90,000/- p.a. from his agriculture field. Apart from this, it is admitted in the cross-examination that he is employed in two different complaint during said period and was paid salary of Rs. 8,000/- to 10,000/- per month. This evidence is more than sufficient to show that the workman was gainfully employed for the said period. Thus, there is no reason or justification to cause interference in the order of denial of backwages to the workman.

16. In view of the above discussion, this Court finds no merit in both Petitions. In the result, Petitions stand dismissed. Pending application(s), if any, stand disposed of.

(R. M. JOSHI, J.)

Malani