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

917 WRIT PETITION NO. 9889 OF 2017

1. The Manager, **...Petitioners**
Dhule & Nandurbar Zilla Parishad Employees'
Co-operative Credit Society Limited, Dhule
2. The Chairman,
Dhule & Nandurbar Zilla Parishad Employees'
Co-operative Credit Society Limited, Dhule
Address of both-Nagai Colony, Dhule
Dist. Dhule

VERSUS

1. Yuvraj Kalu Patil **...Respondents**
Deceased through Legal Representatives
- (1-A) Amol S/o. Yuvraj Patil,
Age-28 years, Occu-Service,
- (1-B) Sau. Alka W/o. Sanjay Patil
Age-30 years, Occu-Household,
Both R/o. 31, A, Babu Netaji Colony
Infront of Dhandai Nagar Board,
Gondur Road, Deopur
Dhule, Dist. Dhule

Mr. Sandesh R. Patil, Advocate for the petitionerss
Mr. S. S. Patil, Advocate for respondentss

CORAM : ARUN R. PEDNEKER, J.

DATE : 27th FEBRUARY, 2024

P. C.

1. The petitioners are challenging the the order dated 20-04-2017 in Revision Application ULP No.24/2016 passed by the learned Industrial Court, Dhule and order dated 15-07-2016 in Complaint ULP No. 45 of 2007 passed by the learned Labour Court.

2. Brief facts of the case are as under:-

3. The respondent was the employee of the petitioners society since 14-06-1980 on the post of a Clerk till 1989. In the year 1989 he was promoted as Accountant. The petitioners dismissed the respondent employee from service after conducting enquiry against him for the charges of misconduct and misappropriation of funds by the order dated 01-10-2007. The said order was challenged by the respondents before Learned Labour court. Learned Labour Court formulated preliminary issue as regards enquiry being fair and proper. The issue was held against the employee by the learned labour court.

In Revision filed by the employee by the order dated 02-11-2012 the learned Industrial Court held that the enquiry conducted against the employee is not fair and proper and further directed to decide the complaint ULP NO. 45/2007 in accordance with law. Order of the revisional court was challenged before this court and same was dismissed by observing that the liberty is available to the petitioners to lead the evidence before the learned Labour Court. In pursuance thereto evidence was laid before the learned labour court. The learned Labour Court framed issues as under:

1. Whether respondents prove misconduct of complainant as alleged?
2. Whether complainant proves that he is an employee as per Sec. 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971?
3. Whether complainant proves that respondents have engaged in unfair labour practices within the meaning of Schedule-IV Item 1(a) to (g) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971?
4. Whether complainant proves that punishment of the dismissal imposed by the respondents is shockingly disproportionate to the gravity of the misconduct?
5. Whether complainant proves that he is not gainfully employed from the date of termination?
6. Whether complainant is entitled to set aside dismissal order dated 01-10-2007?
7. Whether complainant is entitled for declaration of unfair labour practice as sought.
8. Whether complainant is entitled to permanent injunction as sought?
9. Whether complainant is entitled to full back-wages and all consequential benefits from 01-10-2007 till 28-02-2012?

10. What order

4. Learned Labour court on consideration of the evidence held as regards issue No.3 and 4 that the Management has engaged in unfair labour practices within the meaning of schedule IV item A to G and thus set aside the order of dismissal. Learned Labour Court also formulated the issue of backwages and by order dated 15-07-2016 held that the employee is entitled for the backwages from 01-10-2007 to 28-02-2012 i.e. the date of his termination / till his retirement. The learned labour court held that the employee was not employed after termination although he made attempts to get employment. However, he was not able to gainfully employ himself. As such there is finding that the employee was not employed from the date of his termination/ till his retirement. In view of the same, the learned labour court granted full backwages to the employee.

5. Said order dated 15-07-2016 of the learned Labour Court was challenged before the learned Industrial Court in

Revision Application ULP NO.24/2016. The learned Industrial Court by the impugned order dated 20-04-2017 dismissed the revision petition filed by the petitioners. The petitioners have challenged the order of the learned Industrial Court dated 20-04-2017 before this court by filing the present writ petition. It is the contention of the petitioners that employee had given admission in the course of enquiry before the enquiry officer that if on enquiry it is found that there is misappropriation then he would repay the same. Learned counsel for petitioners relies on the admission given by the employees in the course of enquiry held by the petitioners. He relied upon the judgment of the Hon'ble Apex Court in the case of Mihir Kumar Hazara Choudhari Vs Life Insurance Corporation reported in (2017) SCC 404 and the judgment of this court in the case of Employees' State Insurance Corporation New Delhi and others Vs A. V. Tungare and others reported in 2014 (5) Mh.L.J. 219 to contend that once there is unequivocal and unconditional admission no further evidence is necessary to prove misconduct. The learned counsel further submits that evidence is necessary

to be laid by the employee for claim of backwages. Learned advocate relies upon the judgment of the Supreme Court in the case of Rajasthan State Road Transport Corporation, Jaipur Vs Phool Chand (Dead) through Legal Representatives reported in (2018) 18 SCC 299 to contend that it is necessary for the workman to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed. He submits that there is no pleading to the effect by the respondent that he was not employed after his termination and as such relying upon the above referred judgment of the Hon'ble Supreme Court in the case of Rajasthan State Road Transport Corporation, Jaipur Vs Phool Chand (supra) he submits that respondents employee is not entitled to backwages as directed by the labour court and Industrial Court.

6. Per contra learned counsel appearing for the respondents relied upon the judgment of this court in the case of Maharashtra General Kamgar Union Vs USV Ltd and Anr reported in 2001 III CLR 306, wherein, this court has held in

para No. 13 that once domestic enquiry is discarded, no admission made before the enquiry officer can be relied upon and opportunity is granted to the employer /respondent to lead the evidence before the labour court and the labour Court can only consider the evidence available before it. He further submits that there is evidence on record that after the termination, the respondent made attempts for getting employment, but since he was terminated at the age of 53 years, after having continuous service of 29 years, he was not able to get any employment as is evident from record. He submits that the petition was immediately filed after the termination, as such, there can be no pleadings initially after the termination that he is not gainfully employed. The attempts to gain employment was made during pendency of the proceedings and evidence to that effect has been filed before the Court that he was not employed during the pendency of proceedings.

7. He relies upon the judgment of the Hon'ble Supreme Court in the case of Deepali Gundu Surwase Vs Kranti Junior

Adhyapak Mahavidyalaya reported in 2014 AIR (SC) 121 at para 13.

8. On perusal of the admission made before the enquiry officer, it appears that there is no clear admission that he has misappropriated certain amount. He only states that in the course of enquiry if it is found that any amount is missing that he would repay. He has not stated that he has misappropriated any amount. He has stated that if there is any error in the computation, he would responsible for the same. Apart from that the admission is not equivocal, and the enquiry conducted is set aside by the learned Industrial Court being not fair and proper. In view of the judgment of this court in the case of Maharashtra General Kamgar Union Vs USA Ltd and another (supra). The evidence before the enquiry officer cannot be relied upon. In the case of Maharashtra General Kamgar Union (supra) this court at para 13 has held as under:-

13. *In Neeta Kaplish V. Presiding Officer, Labour Court and Anr. (1999 I LLJ 95) a Bench consisting of two Learned Judges of the Supreme Court considered the question as to whether the evidence which was recorded before the Enquiry Officer in a disciplinary enquiry can be relied upon before the Labour Court once the enquiry*

has been held to be vitiated. The Supreme Court held that once the enquiry has been held to be defective or in a case where no enquiry has been held, it is on the basis of the fresh evidence which is laid by the employer before the Labour Court, that the court has to decide as to whether the charge of misconduct has been established. In the case before the Supreme Court the Labour Court had come to the conclusion that the enquiry had not been fairly and properly held. There-upon, the Labour Court had called upon the Management to lead evidence on merits. No evidence was adduced by the management. Since the Management did not produce any evidence on merits, the workman also did not produce any evidence. The Labour court dismissed the claim of the workman and a writ petition filed by the workman was also rejected by the High Court. The Supreme Court held that the evidence produced in the domestic enquiry could not have been relied upon before the Labour Court once the enquiry was held to be vitiated. In paragraphs 24 and 27 of its Judgment the Supreme Court held thus:

24.If the management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If, however, the opportunity is availed of and the evidence is adduced by the management, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidenced.

27. The record pertaining to the domestic enquiry would not constitute “fresh evidence” as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute “material on record”, as contended by the counsel for the respondentss, within the meaning of section 11-A as the enquiry proceedings, on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry could be, and, were, in fact, relied upon the management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and that full opportunity of hearing was given to her in consonance with the principles of natural justice. This contention has not been accepted by the labour court and the enquiry has been held to be bad. In view of the nature of objections raised by the appellant, the record of enquiry held by the management ceased to be “material on record” within the meaning of section 11-A of the Act and only course open to the management was to justify its action by

leading fresh evidence as required by the Labour Court, if such evidence has not been led, the management has also to suffer the consequences”.

In the circumstances, the Supreme Court remanded the matter back to the Labour Court to decide the case afresh after requiring parties to lead fresh evidence on merits.

9. Judgment relied upon by the petitioners in the case of Employees’ State Insurance Corporation (supra) is not applicable as it related to the judgment where the enquiry was not set aside and in view of the judgment of Maharashtra General Kamgar Union (supra) the evidence before the enquiry officer cannot be looked into. In view of the same, findings of the labour Court that the petitioners have indulged into unfair labour practice cannot be faulted. Coming to the findings of the court on the aspect of backwages the Hon’ble Supreme Court in the case of Rajasthan State Road Transport Corporation Jaipur (supra) in para 12 has observed as under:-

12. *It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, mainly, that the employee was gainfully employed during the relevant period and hence not entitled to claim any backwages. Initial burden is however, on the employee.*

10. In the above judgment, it is necessary to plead and prove with the aid of the evidence that after dismissal from service he was not gainfully employed anywhere and had no earning to maintain himself or his family. Learned counsel appearing for the respondents has not disputed the proposition and submits that he has lead evidence to show that despite his best efforts to get employment he could not get employment on account of his age and that he has lead evidence to that effect before the Labour Court. Labour Court has considered the evidence of the respondents that he was not gainful employed. The Hon'ble Supreme Court on the law of grant of backwages in the case of Deepali Surwase (supra) has observed as under:-

33. The propositions which can be culled out from the aforementioned judgments are:

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 similar other 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 averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

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 victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under [Article 226](#) or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to

grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame.

Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) 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.

11. The Supreme Court in the case of Deepali Surwase (Supra) has laid down parameters for grant of backwages. The Hon'ble Supreme Court in the case of wrongful termination of service has held that reinstatement with continuity of service and backwages is normally to be granted. In the instant case there is evidence on record that employee despite his best efforts was not gainful employed and findings to that effect is recorded by the courts below and also finding is rendered that the petitioners were involved in unfair labour practice in terms of clauses-A to G of the schedule IV of MRTU and PULP Act and thus the order passed by the Industrial court cannot be faulted.

The petition is accordingly dismissed.

12. Learned counsel for the petitioners has submitted that certain part of the the backwages have been deposited with the labour court. The employee would be entitled for backwages as directed by the labour court excluding payments already made before the Industrial court.

[ARUN R. PEDNEKER, J.]

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