



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9302 OF 2022

THE CHILD DEVELOPMENT PROJECT OFFICER AND ANOTHER
VERSUS
LAXMICHHAYA BABURAO GUDSURKAR AND OTHERS

Mr. N. S. Kadam, Advocate for the petitioners
Mr. U. B. Bilolikar, Advocate for respondent No.1
Mr. S. S. Palnitkar, Advocate for respondent No.2
Mr. C. C. Deshpande, Advocate for respondent No.3

CORAM : R. M. JOSHI, J.

DATE : 24th JULY, 2024

PER COURT :-

1. Petitioners are respondents in Complaint (ULP) No. 27/2014 and is aggrieved by the judgment and order passed dated 16/09/2016 of granting reinstatement and order passed by the Industrial Court in Revision (ULP) No. 50/2016 confirming order of reinstatement and granting the same with full back wages.

2. The facts as they appear from record can be narrated in short as under:

(i) Parties are referred to as workman and Zilla Parishad for the sake of brevity.

(ii) Workman claims to be working in the capacity of '*Mini Anganwadi Sevika*' with Zilla Parishad. She claims to have been terminated from

service from 23/02/2012. It is her case that prior to the termination of her service no inquiry was conducted against her and that the order of termination is illegal. This being unfair labour practice a complaint came to be filed before the Labour Court to challenge the said termination order. The Zilla Parishad appeared in the said proceeding and filed reinstatement contending that the workman was expected to stay at the work place, however, she did not adhere to the said rule. It is also contended that an inquiry was conducted before taking action against the workman and hence termination is not illegal. On these averments the complaint is opposed.

(iii) The learned Labour Court by passing order dated 16/09/2016 partly allowed the complaint granting reinstatement to the workman but refusing back wages. The workman being aggrieved by not payment of back wages preferred Revision (ULP) No. 50/2016 which came to be allowed by order dated 08/04/2022 whereby the workman was granted reinstatement with full back wages and continuity of in service.

3. Learned counsel for the petitioner-Zilla Parishad submits that the order passed by the Labour Court and confirmed by the Industrial Court of granting reinstatement is not sustainable in view of the fact that misconducts are alleged against the workman and in respect of the same inquiry was conducted prior to termination of her service. This contention

is opposed by the learned counsel for the workman on the ground that before terminating service of the workman the conduct of departmental inquiry was necessary and in absence thereof in order of termination cannot be sustained. Learned counsel for the workman has placed reliance the judgment of in case of *Pradeep Vs. Manganese ore (India) Limited and Ors, MANU/SC/1289/2021*.

4. Admittedly, the workman is terminated from service for commission of acts which amounts to employment misconduct. Further admittedly no departmental inquiry is conducted against her. It is thus clear that prior to termination of her service principles of natural justice are not complied with. There cannot be punitive for termination without conduct of departmental inquiry. Moreover, Zilla Parishad has never sought leave from the Labour Court to prove the misconduct by leading evidence. In such circumstances, the question of causing any interference in the order of reinstatement of the workman in the service does not arise.

5. On the point of back wages it is contended on behalf of Zilla Parishad that the workman has not made any statement before the Labour Court about she being not gainfully employed within the intervening period and hence the order of back wages by the Industrial

Court in Revision cannot sustain. According to the learned counsel for the workman such statement was made in the revision before the Industrial Court which according to him is compliance of the said requirement and as such there is no reason or justification to cause interference in the order of payment of back wages.

6. The position of law as it stood few years back was that in case of the illegal termination of service, the back wages would follow. However, Hon'ble Supreme Court in various judgment has taken a view that there could be reinstatement with back wages with a rider that the workman before Court of first instance makes a statement that he/she was not be gainfully employed. Making of such statement is sufficient for the reason that negative burden cannot be placed on workman to prove about not gainfully employed. Thus, after making such statement onus would shift upon the employer prove that workman is gainfully employed. In the instant case, admittedly no such statement is found to have been held before the Labour Court which is the Court of first instance. Making of any such statement before the Revisional Court is of no consequence since employer is denied opportunity to take objection to the said statement and to lead any evidence to prove otherwise.

7. The learned Industrial Court has failed to take into

consideration the law settled by 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 back wages. 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."

8. In the instant case learned Industrial Court has only proceeded to observe that a negative cannot be asked to be proved by the workman, but failed to see that it was necessary for the workman to

make statement about she being not gainfully employed before Labour Court. In absence thereof the workman is not entitled for back wages. The judgment being contrary to law laid down by Hon'ble Supreme Court cannot sustain. In the result, following order:

ORDER

- (i) The order of Labour Court in Complaint (ULP) No. 27/2014 of reinstatement of workman with continuity of service is maintained.
- (ii) The order of grant of back wages passed by Industrial Court in Revision (ULP) No. 50/2016 stands set aside.

(R. M. JOSHI, J.)

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