

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1011 OF 2002

Shri. Shamsundar Sakharam Mandhara }*Petitioner*

: *Versus* :

The Executive Engineer & Anr. }....*Respondents*

Mr. Rutwij Bapat *i/by. Mr. Avinash Fatangare, for the Petitioner.*

Ms. Vaishali S. Nimbalkar, *AGP for the State.*

CORAM : SANDEEP V. MARNE, J.

Dated : 4 July 2024.

P.C. :

1) By this petition, the Petitioner has challenged the Award dated 10 April 2001 passed by the Presiding Officer, Labour Court, Kolhapur answering the Reference partly in affirmative and directing the Respondents to reinstate the Petitioner in service on the post of 'Mukadam' with continuity but without backwages. This petition is filed only to the extent of denial of backwages to the Petitioner. It appears that cross petition being Writ Petition No. 5790 of 2001 was filed by the Respondent challenging the Award dated 10 April 2001 which is apparently dismissed for non-prosecution by order dated 22 June 2018. It is for the Respondents to take steps for restoration of the said petition. I have heard Mr. Bapat, the learned counsel appearing for the Petitioner and Ms. Nimbalkar, the learned AGP appearing for Respondent No.2-State. None appears on behalf of Respondent No.1. After having heard the submissions canvassed by the

learned counsel appearing for the parties and after going through the award passed by the Labour Court, it is seen that the Labour Court has granted the relief of reinstatement to the Petitioner without backwages. Mr. Bapat, submits that once the termination is set aside and reinstatement is granted, payment of backwages need to be automatic. He has also relied upon judgment of the Apex Court in **Deepali Gundu Surwase V/s. Kranti Junior Adhyapak Mahavidyalya (D.ED) and Ors.**¹ 2013 10 SCC 324, in which the Apex Court has summed up the propositions relating to payment of backwages :

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

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 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.

1 (2013) 10 SCC 324

38.4. 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.

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 victimizing 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 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.

38.6. 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*, (1979) 2 SCC 80.

38.7. 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 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.

2) Mr. Bapat, submits that the termination of the Petitioner is attributed to the mischief played by the concerned officer of the Respondents and that since the termination is effected without any fault on the part of the Petitioner, he must be paid compensation in the form of payment of backwages. Perusal of the Award passed by the Labour Court would indicate that the Petitioner did not complete 240 days of service during the period of 12 calendar months prior to his termination on 31 May 1990. The Labour Court has therefore held that no retrenchment compensation was payable under Section 25-I of the Industrial Disputes Act, 1947. Despite this, the Labour Court has proceeded to grant the relief of reinstatement only on account of violation of the principle of '*last come first go*' under Section 25-G of the I.D. Act.

3) It appears that the Petitioner has rendered services in various spells. From various spells, it appears that his services were not continuous. He initially worked as Mukadam during the years 1981 to November 1982. His fresh engagement as Mukadam was made on 28 December 1983 and he worked as such till 11 January 1988.

4) The service Certificate annexed by the Petitioner at Exhibit-A to the petition would indicate three spells of service, from 28 December 1983 to

31 May 1984, 7 November 1984 to 20 October 1985 and 21 November 1985 to 20 December 1988. It appears that another statement has been placed on record in respect of the wages drawn by the Petitioner from time to time to demonstrate that he continued to work till 31 May 1990. Even the said Certificate would indicate that services of the Petitioner were not continuous.

5) Considering the length and nature of services rendered by the Petitioner, I am of the view that no case was made out for grant of backwages after finding the termination to be illegal. Infact in *Deepali Gundu Surwase* (supra), the Apex Court has held that length of service rendered by the employee is one of the factors for deciding his entitlement for payment of backwages. In the present case, the Petitioner did not even complete 240 days of service during 12 calendar months prior to his termination. I therefore do not find any serious error in the Award passed by the Labour Court. The Writ Petition being devoid of merits is **dismissed** with no order as to costs. Rule is discharged.

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[SANDEEP V. MARNE, J.]