

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 13156 OF 2016**

Late Gunduram Raniji Ghatage Charitable Trust ... Petitioners
through President and anr.

versus

Shivaji Tamanna Nandiwale and anr. Respondents

With
WRIT PETITION NO. 12714 OF 2016

Late Gunduram Raniji Ghatage Charitable Trust ... Petitioners
through President and anr.

versus

Shabana Nijam Mujawar and anr. Respondents

Mr. Saurabh Pakale i/b. Mr. Shankar Katkar, Advocate for the Petitioners
in both petitions.

Mr. Satyajeet A. Rajeshirke, Advocate for the Respondent No.1 in both
petitions.

Ms. A. A. Nadkarni, AGP for the State.

CORAM : R. M. JOSHI, J.

DATE : 12th AUGUST, 2024.

P.C. :

1. Since facts and law involved in both petitions are common, by
consent of both sides, heard finally at the stage of admission.

2. Respondent No.1 in Writ Petition No.12714 of 2016 was
headmistress of the school run by the petitioner No.1. She was appointed
in the school in the year 2005. For two years, her services were
continued on probation. After completion of probation period, she was

issued fresh appointment letter in July 2007. She continued in the service on approval granted by the Divisional Commissioner, Pune, on 31st December 2013. There is no dispute about the fact that till termination of her services, she continuously worked with the petitioners. On 18th March 2014, a decision was taken by the petitioners to relieve her from service and was orally informed to have been discharged from service. Being aggrieved by this order, an appeal came to be filed under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977 (for short “the Act”) before the School Tribunal, Kolhapur on 15th April 2014. The petitioners appeared before the said authority and filed reply. By passing the impugned judgment and order dated 11th March 2016, the termination of respondent No.1 was held to be illegal and she was granted reinstatement in service with 20% back-wages.

3. In Writ Petition No.13156 of 2016, respondent No.1 was appointed in the year 2001. He continued in the services of the petitioners after approval of his employment by the Divisional Commissioner, Pune on 31st December 2013. By order dated 18th March 2014, he was communicated the decision to relieve him from his service. It is claimed by the respondent No.1 that he was orally terminated. Being aggrieved by the said order, an appeal came to be preferred under the Act before the School Tribunal, Kolhapur. By the impugned judgment and order dated 11th March 2016, the appeal was allowed directing

reinstatement of respondent No.1 with continuity of service and 20% back-wages.

4. At the outset, learned counsel for the petitioners, on instructions makes statement that the petitioner No.1 has reinstated both the respondents. He also makes further statement that these petitions are restricted to the challenge of grant of back-wages to respondent No.1 in both petitions. This statement is accepted. This Court, therefore, is not required to go into the correctness of order of reinstatement.

5. It is the contention of learned counsel for the petitioners that without there being any statement made by respondent No.1 in both petitions before the School Tribunal about they being not gainfully employed, it was not be open for the Tribunal to pass order granting back-wages even to the extent of 20%. In support of his submission, he placed reliance on the judgment of the Supreme Court in **Ramesh Chand versus Management of Delhi Transport Corporation reported in 2023 LiveLaw (SC) 503.**

6. Learned counsel for the respondent No.1 supported the order of grant of back-wages on the ground of its reasonability. It is his contention that since the termination is effected in March 2014 and within a month, appeal was filed, there was no occasion for the respondent No.1 to make statement to the effect of not being gainfully employed. It is his submission that in the peculiar facts and circumstances, such statement

has been made before the execution court so also before this Court by filing affidavit which is sufficient to enable respondent No.1 of relief of back-wages.

7. The Hon'ble Supreme Court in case of **Ramesh Chand (Supra)** in paragraph 7 has observed as under :

"7. The only question before us is whether the Labour Court was justified in denying relief of back wages. In the case of National Gandhi Museum v. Sudhir Sharma¹, this Court held that the fact whether an employee after dismissal from service was gainfully employed is something which is within his special knowledge. Considering the principle incorporated in Section 106 of the Indian Evidence Act, 1872, the initial burden is on the employee to come out with the case that he was not gainfully employed after the order of termination. It is a negative burden. However, in what manner the employee can discharge the said burden will depend upon on peculiar facts and circumstances of each case. It all depends on the pleadings and evidence on record. Since, it is a negative burden, in a given case, an assertion on oath by the employee that he was unemployed, may be sufficient compliance in the absence of any positive material brought on record by the employer."

8. There cannot be dispute made with regard to the fact that there is a shift in the view of Hon'ble Supreme Court while deciding issue of grant of back-wages. Earlier the setting-aside of termination would result into automatic grant of full back-wages. This view has been changed to

say that in order to become entitled to receive any back-wages, it is obligatory on the part of the workman to take a plea/to make statement that he was not gainfully employed during intervening period. A statement on oath or otherwise would be sufficient to discharge burden to prove that he was not gainfully employed and the onus would shift upon the employer to prove otherwise.

9. The Hon'ble Supreme Court in case of **Deepali Gundu Survase versus Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and ors. (2013) 10 SCC 324** in paragraph 38.3 has observed as under :

“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. “

In the said case the Hon'ble Supreme Court has held that such statement needs to be recorded before the Court at first instance. The obvious reason for making such statement to be made at that stage is to enable the employer to lead evidence to prove gainful employment of the workman. If no such statement is made before the Court of first instance, employer would not get an opportunity to prove that the workman was gainfully employed during relevant period. Permitting, such statement at any later stage, would not be sufficient compliance as no opportunity of leading evidence can be granted to employer.

10. In the instant case, the appeal has been filed within a period of one month from the termination, and therefore the question did not arise for respondent No.1 to make such statement. However, the appeal has been decided in the year 2016. It was thus possible as well as necessary for respondents to make such statement in order to discharge the initial burden on them that they were not gainfully employed during the period of termination. Apart from this, even perusal of the memo of appeal filed before the Tribunal does not indicate that any back-wages were claimed, specifically, by the respondent No.1 herein. It is thus clear that the petitioner-employer did not get an opportunity to lead any opportunity in order to show gainful employment of the respondents.

11. Since there is no statement made by the respondent No.1 with regard that they being not gainfully employed during the period of termination till the order of the reinstatement, the order of grant of back-wages to the respondent No.1 in both petitions cannot be sustained. As a result of this, the petitions stands partly allowed.

12. The impugned judgments/orders passed by the School Tribunal are set-aside to the extent of grant of back-wages.

(R. M. JOSHI, J.)