



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Writ Petition No. 5579 of 2021

Sanjay s/o Zadbaji Meshram,
Aged about 45 years,
R/o Ambedkar Ward,
Tq. Pandhan Road, Bela,
District – Bhandara.

... Petitioner

- Versus -

(1) Maharashtra State Road
Transport Corporation, through
its Divisional Traffic Officer,
Bhandara Division, Bhandara.

(2) Maharashtra State Road
Transport Corporation, through
its Divisional Controller,
Bhandara Division, Bhandara.

... Respondents

Mr. C. V. Jagdale, Advocate for the petitioner
Mr. R. S. Charpe, Advocate for the respondents

CORAM : ANIL L. PANSARE, J.

DATED : 30-09-2024

ORAL JUDGMENT

Heard.

2. Rule. Rule made returnable forthwith. Heard finally with
consent of learned counsel appearing for the parties.

3. The only question that requires answer is whether the Industrial Court has committed error of law in refusing to grant back wages to the petitioner.

4. The petitioner was working as Driver with the respondent - Corporation. Both the Labour Court and Industrial Court have rendered a concurrent finding that the respondent has committed unfair labour practice by way of victimization which was not in good faith, but in colourable exercise of employer's right and for patently false reasons. The punishment of dismissal was held to be illegal. The Labour Court, on the aforesaid ground, not only directed the respondents to reinstate the petitioner with continuity in service but also to pay full back wages. The Industrial Court upheld the finding of dismissal, however, refused to grant back wages on the count that the petitioner has neither pleaded nor proved that he was not in gainful employment during the intervening period.

5. Learned counsel for the petitioner has invited my attention to the judgment of Hon'ble Supreme Court in the case of *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors. [2014 II CLR 813]* wherein the Court, after taking into consideration various judgments, culled out the proposition of law in following terms.

“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.”

6. As could be seen, the Supreme Court has held that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. The Supreme Court also held that in ordinary course, 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 in gainful employment or was employed on lesser wages.

Thus what is required is either to plead or to make a statement of not in gainful employment after dismissal, before the adjudicating authority or the Court of first instance.

7. In the present case, such statement is found at two places, one is in the application filed by the petitioner under Section 30(2) of

the Maharashtra Act No. 1 of 1972 in which a categorical statement has been made that the petitioner was not in gainful employment during the dismissal period despite trying his level best to get employment elsewhere. Another statement is in the chief-examination wherein the petitioner deposed that he was out of employment since the date of his dismissal.

8. Learned counsel for the petitioner submits that the aforesaid two statements were sufficient compliance of what has been stated by the Hon'ble Supreme Court. He further submits that the Industrial Court has not even referred to these statements and has, therefore, committed serious error of law.

9. As against, learned counsel for the respondents submits that there has to be pleading in terms of the Supreme Court verdict. He submits that the statement which the petitioner has made, has been made in the application filed under Section 30(2) of the Act of 1972 and not in the complaint and thus, there were no pleadings in the complaint and, therefore, petitioner is not entitled for back wages. As regards, evidence on oath, learned counsel for the respondents submits that this statement is not in tune with what has been stated by the Supreme Court. He submits that the petitioner deposed that he was out of employment since the date of dismissal. This, according to him, is

the consequence of dismissal and not a statement that he was not in gainful employment.

10. I do not find any substance in the aforesaid submissions. As stated earlier, the petitioner may plead in the complaint that he was not in gainful employment after the dismissal or may make such statement before the adjudicating authority or the Court of first instance. Thus, there are two ways of making a point, one is, by appropriate pleading in the complaint and the other by making a statement. The statement can be made by way of application or by way of evidence. As noted earlier, the petitioner had made such statements at two places, one in an application filed under Section 30(2) and another in his affidavit of chief-examination. The evidence that he was out of employment since the date of dismissal is nothing but the evidence to show that he was not in gainful employment after dismissal. The interpretation of the counsel for respondents that the aforesaid statement is just a consequence of dismissal is completely erroneous. It is so because it is not necessary that after dismissal, an employee will be always out of employment. He may seek employment elsewhere and, therefore, the Supreme Court says that one has to plead that after dismissal, he was not in gainful employment. Thus, the only inference

that can be drawn from the said statement is that he was not in gainful employment post order of dismissal.

11. Once such statement is made, the employer-Corporation could avoid payment of full back wages only upon making pleadings and upon leading cogent evidence that the employee was in gainful employment and was getting wages equal to the wages he was drawing prior to the termination of service. This has been, admittedly not done by the employer.

12. In the circumstances, once it is held that the dismissal of the petitioner was illegal and was not in good faith and was by way of victimization, the petitioner will be entitled to full back wages. In the present case, the petitioner has in addition also made a statement before the Court of first instance that he was not gainfully employed during the intervening period. The Industrial Court has not even referred to the statement made by the petitioner in his application as also in his evidence. The judgment, therefore, on this point, is unsustainable. The petitioner has made out a case.

13. The petition is accordingly allowed. Judgment and order passed by the Industrial Court, Bhandara in Revision (ULP) No. 27 of 2018 dated 17-1-2019 is quashed and set aside.

14. Judgment and order passed by the Labour Court, Bhandara in Complaint (ULP) Case No. 22/2011 dated 28-11-2017 is restored.

15. Rule is made absolute in aforesaid terms with no order as to costs.

(Anil L. Pansare, J.)

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