



W.P.No.7131 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	6/3/2024
Delivered on	25/3/2024

C O R A M

THE HONOURABLE Dr.JUSTICE D.NAGARJUN

Writ Petition No.7131 of 2015

A. Rajamani ... Petitioner

Vs

1. The Principal Labour Court
Vellore District.
2. The Management
Vellore District Consumer Co-operative
Wholesale Stores Ltd
Vellore. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamus to call for the records and order of the Principal Labour Court, Vellore, dated 26/11/2014 passed in C.P.No.245 of 2014 and quash the same and direct the second respondent to pay the petitioner arrears for his backwages, bonus 12 (3) Settlement arrears, surrender pay and gratuity, etc., within a stipulated time fixed by this Court.



W.P.No.7131 of 2015

For petitioner

...

Mr.Balan Haridass

For respondents

...

Mr.A.Praveen Kumar
for R.2

Labour Court – for R.1

ORDER

This writ petition is filed seeking to quash the order dated 26/11/2014, passed in C.P.No.245 of 2014, directing the second respondent to pay backwages, bonus, as per 12 (3) Settlement.

2. The facts in brief are that the petitioner was working as a Salesman in second respondent Stores. He was suspended from service on 28/1/2000 and a charge memo was issued by the second respondent. The petitioner gave a detailed explanation on 28/5/2001. Domestic enquiry was conducted, basing on the report of the Enquiry Officer, a show cause notice dated 21/1/2002 was issued. The petitioner has submitted a reply on 9/2/2002. Second show cause notice was also issued in favour of the petitioner on 22/2/2002 proposing the punishment of dismissal from service. The petitioner has submitted his explanation dated 8/3/2002. However, the petitioner was dismissed from service with effect from 23/12/2003. The petitioner has challenged the dismissal order



W.P.No.7131 of 2015

before the Special Deputy Commissioner of Labour, who is the appellate authority under Tamil Nadu Shops and Establishment Act, 1947. On concluding the enquiry, by an order, dated 8/12/2006, the appellate authority has set aside the dismissal order. The second respondent Management has not preferred any appeal, thereby, order of the Appellate Authority has become final and the petitioner was reinstated into service on 25/6/2007. Subsequently, she retired from service on 31/5/2014, on attaining the age of superannuation.

3. The petitioner has requested the second respondent through many representations to pay the backwages with all benefits, bonus, 12 (3) Settlement arrears, surrender pay, gratuity, etc. Since, there was no response from the second respondent, petitioner has filed C.P.No.245 of 2014 before the labour Court to pay the backwages along with continuity of service and all other attendant benefits. After enquiry, the first respondent/Labour Court, by way of an order dated 26/11/2014, dismissed the claim filed by the petitioner in C.P.No.245 of 2014. Aggrieved by the same, the present writ petition is filed.



W.P.No.7131 of 2015

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4. The Joint Registrar/Managing Director of the Vellore District Consumer Cooperative Wholesale Sale Stores Ltd., Vellore/second respondent has filed a counter affidavit stating that the labour Court order dismissing the C.P is a well reasoned order and hence needs no intervention.

5. Heard Mr.Balan Haridass, learned counsel for the petitioner and Mr.A.Praveen Kumar, learned counsel for the second respondent.

6. It is submitted by the learned Senior counsel for the petitioner that once the Special Deputy Commissioner, Labour, Chennai/Appellate authority has passed orders on 8/12/2006 in R.C.No.2006/2000 – 2001/E5, setting aside the dismissal order and once petitioner was reinstated back in service, the petitioner is entitled for backwages from the date of termination to the date of reinstatement.

7. Learned counsel appearing for the petitioner has cited a decision rendered by this Court in ***W.P.No.15960 of 2014 dated 22/6/2023***

(K.SUBRAMANIAN Vs. THE PRESIDING OFFICER, II



W.P.No.7131 of 2015

ADDITIONAL LABOUR COURT, CHENNAI wherein it is observed

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“16. However, Mr.Rankesh, learned counsel appearing for the second respondent would immediately bring to the Judgment of this Court in the Atomic Energy Employees Consumer Co-operative Stores Ltd., Vs. A.K.Chidambaram and Ors., in W.A.Nos. 1759 & 1760 of 2014 dated 10.02.2015. He would point out from the said Judgment that the view taken in E.Senthil Kumar's case had been declared as implied with rule and therefore, there is no question for any automatic payment of the installment of the workman.

17. I have to point out here that subsequently, the Supreme Court had taken a view in Nandkishore Shravan Ahirrao Vs. Kosan Industries Pvt. Ltd., [2021(14) SCC 781] to the effect that where reinstatement is ordered, continuity of service has to follow as a matter of law. Reading the Judgment of the Supreme Court



WEB COPY



W.P.No.7131 of 2015

in conjunction with the view taken by this Court in TISCO's case, I have to necessarily come to the conclusion that once the order is declared as non est, the consequence would be that the person is deemed to be in service and therefore, it would have to be treated as if he was entitled as of a right to receive the benefits of the office in which he is occupying.

18. The learned counsel also bring to my notice an another recent Judgment of the Supreme Court in OM Pal Singh Vs. Disciplinary Authority in Civil Appeal No. 176 of 2020 dated 14.01.2020. He would state that the Supreme Court had approved the view in J.K.Synthetics Ltd., Vs. K.P.Agrawal [(2007) 2 SCC 433]. He would therefore vehemently argue that the shops and establishment authority not having granted the back wages and continuity of service, it should deemed to have been rejected.



WEB COPY



W.P.No.7131 of 2015

19. At the first blush, the arguments seems to be attractive. However, reading J.K.Synthetics Ltd., case, one can note that it does not apply to a case under the Tamil Nadu Shops and Establishments Act, 1947 but relates to cases where Tribunals or Courts have been empowered not only to set aside the order of dismissal and discharge but to further order reinstatement together or without back wages.

20. Further in Deepali Gundu Surwase vs Kranti Junior Adhyapak & Ors [(2013) 10 SCC 324] dated 12 th August, 2013, the relevant portions are extracted hereunder:-

“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



WEB COPY



W.P.No.7131 of 2015

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



WEB COPY



W.P.No.7131 of 2015

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.

21. As pointed out above, Section 41 of the Tamil Nadu Shops and Establishments Act, 1947, prior to the amendment of the year 2017, all that the authority could declare was whether the order suffers from any illegality or whether the order is legal. In such a situation, one cannot expect the authority to pass an order on backwages etc., which he was not specifically empowered under Act to do. Therefore, the Judgment of the J.K.Synthetics Ltd., case also is not applicable to the facts of this case.”



W.P.No.7131 of 2015

8. The learned counsel appearing for the second respondent submitted that the dismissal of the Computation Petition is not erroneous as there is no pre-existing right to the petitioner and that the petitioner had accepted the order of regularization of the period of dismissal and received the monetary benefits without making any whisper. It is further submitted by the learned counsel for the second respondent that in the order passed by the appellate authority under Tamil Nadu Shops and Establishment act , there is no mention that the petitioner is entitled for backwages .However it is to be noted that these orders were passed on 8/12/2006 prior to the amendment of relevant provisions of the said Act in the year 2017 thereby, the appellate authority under the said act cannot direct the management to pay the backwages. The learned counsel for the second respondent management has further submitted that the petitioner has not mentioned either before the special deputy commissioner of labour or in the C.P that he was not gainfully employed in order to consider grant of backwages.

9. The learned counsel for the second respondent has cited an authority of the Hon'ble Apex Court,in ***THE MANAGEMENT OF REGIONAL CHIEF ENGINEER P.H.E.D, RANCHI Vs. THEIR***



W.P.No.7131 of 2015

WORKMEN, REP. BY THE DISTRICT SECRETARY, reported in

LAWS (SC) 2018 – 9 - 65 wherein at paragraph 11, it has been held

thus:-

11. In our considered opinion, the Courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.”

10. He has cited another authority rendered by this Court in ***THE MANAGER, ATOMIC ENERGY EMPLOYEES CONSUMER COOPERATIVE STORES LTD., SHOPPING CENTRE, KALPAKKAM Vs. 1. A.L.CHIDAMBARAM AND 2. THE PRESIDING OFFICER,***



W.P.No.7131 of 2015

PRINCIPAL LABOUR COURT, CHENNAI, (W.A.Nos.1759 and 1760

of 2014), wherein at paragraph 21, it has been held thus:-

“21. With the development of law by judicial interpretations and judicial pronouncements, the traditional view that backwages and other benefits is consequential to quashing of termination order as unlawful, has been metamorphosed in to the recent view that quashing / setting aside the termination order as unlawful does not lead to grant of backwages and other incidental backwages automatically.”

11. The short point that falls for consideration is that whether the second respondent Management is required to pay the backwages to the petitioner on account of the fact that the Special Deputy Commissioner of Labour has set aside the order of dismissal of the petitioner. The petitioner was dismissed by the second respondent on the allegation of mis conduct. When the matter was challenged before the appellate authority under The Tamil Nadu Shops and Establishment Act, 1947, the same was allowed and the second respondent did not chose to take the



W.P.No.7131 of 2015

matter further, thereby, the orders of the appellate authority have become final. While accepting the orders of the appellate authority, the second respondent has also reemployed the petitioner into service. Therefore, it is clear that the second respondent is not having any grievance in respect of the order passed by the appellate authority under the Tamil Nadu Shops and Establishment Act, 1947.

12. It is the case of the petitioner that he was suspended from the service without any basis and the proceedings in respect of dismissal was set aside by the Special Deputy Commissioner of Labour/Appellate Authority under the Tamil Nadu Shops and Establishment Act, 1947 and that having accepted the said finding of the Appellate Authority, the respondent Management has not preferred any Appeal, thereby, finding of the Appellate Authority that the petitioner was illegally dismissed from service has become final.

13 Admittedly, the petitioner has not mentioned in the proceedings before the Special Deputy Commissioner, Labour and also before the Labour Court in C.P.No.245 of 2014 that he was not gainfully employed. However, under the Tamil Nadu Shops and Establishment Act, prior to



W.P.No.7131 of 2015

insertion of Section (2-B) of Section 41, there was no occasion to the appellate authority to specifically mention about backwages.

Accordingly, it was not being specifically pleaded that the petitioner workman to plead that he was not gainfully employed, in order to consider the grant of backwages. Hence the contention of the second respondent that the petitioner has not mentioned that he was not gainfully employed is not a ground to reject the backwages.

14. Considering the facts and circumstances of the case and on considering the law laid down by the Hon'ble Apex Court in various cases referred above, it is clear that in all the cases where the reinstatement was ordered payment of back wages is not mandatory. However, depending upon the facts and circumstances of each and every case, either full wages or half wages or some amount as wages are being granted. The factors that decides grant of backwages include gainful employment, the circumstances under which workman was terminated etc. This Court has already come to the conclusion that the petitioner was not gainfully employed is not a ground for rejection of backwages as it was not mandatory under the said Act. In such a view of the matter, this Court is of the opinion that since the petitioner's termination was illegal and was



W.P.No.7131 of 2015

set aside and it was not contested by the respondent Management, the petitioner is entitled for full backwages.

15. The Hon'ble Supreme Court of India in a three-judge Bench decision, in ***Hindustan Tin Works (P) Ltd.v. Employees of M/s Hindustan Tin Works Pvt. Ltd. And Others (1979) 2 SCC 80***, it is observed that retrenchment of services of 56 employees due to non-availability of the raw material necessary for utilisation of full installed capacity by the employer, was held to be illegal, held that:

‘9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the



W.P.No.7131 of 2015

WEB COPY

workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair



W.P.No.7131 of 2015

labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages.”

16. In another decision, rendered in [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya and Others \(2013\) 10 SCC 324](#), Hon'ble Supreme Court has highlighted as under:-

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till



WEB COPY



W.P.No.7131 of 2015

the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.”

17. In RAJASTHAN STATE ROAD TRANSPORT Vs PHOOL CHAND (D) THROUGH LRS (CIVIL APPEAL No.1756 of 2010), the Hon'ble Supreme Court has observed and held as follows:-



13 .In some cases, the Court may decline to award the back wages in its entirety whereas in some cases, it may award partial depending upon the facts of each case by exercising its judicial discretion in the light of the facts and evidence. The questions, how the back wages is required to be decided, what are the factors to be taken into consideration awarding back wages, on whom the initial burden lies etc., were elaborately discussed in several cases by this wherein the law on these questions has been settled. Indeed, it is no longer res integra. These cases are, [M.P.State Electricity Board vs.Jarina Bee\(Smt.\)](#), (2003) 6 SCC 141, [G.M. Haryana Roadways vs. Rudhan Singh](#), (2005) 5 SCC 591, [U.P. State Brassware Corporation vs. Uday Narain Pandey](#), (2006) 1 SCC 479, [J.K.Synthetics Ltd. vs. K.P. Agrawal &Anr.](#),(2007) 2 SCC 433, [Metropolitan Transport Corporation vs. V. Venkatesan](#), (2009) 9 SCC 601, [Jagbir Singh vs. Haryana State Agriculture Marketing Board & Anr.](#), (2009) 15 SCC 327) and [Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya \(D.Ed.\) & Ors.](#), (2013) 10 SCC 324.

14. The Court is, therefore, required to keep in consideration several factors, which are set out in the aforementioned cases, and then to record a finding as to whether it is a fit case for award of the back wages and, if so, to what extent.

18. In view of the discussion above, considering the facts and circumstances of this case, once the order of dismissal is found to be



W.P.No.7131 of 2015

irregular and was reinstated, under Tamil Nadu Shops and Establishment

Act, the petitioner is entitled for backwages.

19. Accordingly, this writ petition is allowed and the order dated 26/11/2014 passed by the labour Court in C.P.No.245 of 2015 is hereby set aside. No costs.

25/3/2024

mvs.

Index: Yes/No

Neutral Citation: Yes/No

To

1. The Principal Labour Court
Vellore District.

Dr.D.NAGARJUN,J
mvs.



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W.P.No.7131 of 2015

Pre-delivery order made in
W.P.No.7131 of 2015

25/3/2024