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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-11098-2014

Reserved on: January 25, 2024

Pronounced on: February 29, 2024

M/S ABHITEX INTERNATIONAL

.... Petitioner

Versus

**PRESIDING OFFICER, INDUSTRIAL TRIBUNAL-CUM-LABOUR
COURT AND ANOTHER**

....Respondents

CORAM:HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Sunil Panwar, Advocate,
for the petitioner.

Mr. Ashok Tyagi, Advocate,
for respondent No. 2.

SANJAY VASHISTH, J.

1. Petitioner-M/s Abhitex International has filed the present writ petition seeking quashing of the award dated 08.10.2013 (Annexure P-7), whereby Industrial Tribunal-cum-Labour Court, Panipat (hereafter referred to as, 'the Tribunal'), has answered reference No. 52 of 2008 under Section 10 (1) (C) of the Industrial Disputes Act, 1947 (hereafter referred to as 'the Act'), in favour of respondent No.2-Shri Jamshed (workman).

2. The Tribunal held that the workman was terminated by the management in violation of Section 25-F of the Act and action of the management is illegal and arbitrary. Thus, the Tribunal concluded that the

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workman is entitled to reinstatement with continuity of service alongwith 50% back wages from the date of demand notice dated 30.07.2007.

3. Brief factual matrix of the case is that respondent No. 2-workman through a demand notice dated 30.07.2007, alleged that he was appointed as Assistant Master on 27.09.1999 with the Management on a fixed monthly salary of Rs.3,000/-. He continuously worked with the management from the period 27.09.1999 to 21.07.2007 without their being any complaint against him. Workman pleaded that many times, gate keeper of the management was directed not to allow the workman to enter the premises of the industry, i.e. M/s Abhitex International, and ultimately, services of the workman were terminated on 21.07.2007 without any notice and salary of 20 days, i.e. 01.07.2007 to 20.07.2007, was also withheld by the management. Thus, workman pleaded that there being complete violation of Section 25-F of the Act, he be reinstated in service with continuity and full back wages.

4. In the written statement, petitioner-management pleaded that workman was initially appointed as Assistant Master w.e.f. 27.07.1999 and was drawing a monthly salary of Rs.3,000/-. In fact, on account of the lean season and exigency of the work, workman was directed to report on the same status and job at the Boiler Department. Said direction was not followed by the workman and thus, he remained absent. Management pleaded that workman has raised a false dispute and no date has been disclosed by the workman that when he was present at the factory gate and who stopped him from entering the factory premises.

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Thus, broadly pleaded that the demand notice was completely baseless.

5. After evaluating the evidence led by both sides, the Tribunal found substance in the pleading raised by the workman and lastly, accepted the claim raised in the demand notice. However, relief qua the back wages was granted only to the extent of 50%.

Said award dated 08.10.2013, has been assailed by the petitioner-management before this Court.

6. On the very first date, it was submitted by the petitioner-management that in pursuance of the award, the workman has been reinstated and is drawing his salary. Thus, the only issue agitated before this Court is with regard to the award of 50% back wages, on the ground that the workman cannot take advantage of his own wrong.

7. For the sake of convenience, order dated 29.05.2014, passed by Co-ordinate Bench of this Court, is reproduced hereinbelow:

“Present: Mr. Sunil Panwar, Advocate for the petitioner.

Contentends that the workman was sent notice dated 31.7.2007 (Annexure P/5) to join his duties and he replied on 3.8.2007 (Annexure P/6) that he was not being allowed to enter but did not come to join. It is submitted that even before the Labour Court the stand taken was that the management was ready to take him back. It is further submitted that in pursuance of the award the workman has been reinstated and is drawing his salary and only issue is regarding the award of 50% back wages as the workman cannot take advantage of his own wrong.

Notice of motion for 14.10.2014.

In the meantime, recovery of amount of back wages shall remain stayed.”

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Thereafter, once again on 16.01.2020, petitioner-Management reiterated its stand by further clarifying that in all circumstances, workman would be allowed to continue to work in accordance with law uptill the date of superannuation, after his reinstatement in service. Order dated 16.01.2020 passed by the Co-ordinate Bench of this Court, is reproduced here-in-below:

*“Present: Mr. Sunil Panwar, Advocate
for the petitioner.*

*Mr. S.S. Kharb, Advocate
for respondent No.2.*

Present petition has been filed by the petitioner-M/s Abhitex International, inter alia, with the prayer to quash the award dated 08.10.2013 (Annexure P-7).

Learned counsel for the petitioner has drawn the attention to relevant clause of the order dated 08.10.2013 (Annexure P-7) whereby reinstatement with continuity of service and 50% back wages from the date of Demand Notice, i.e.30.07.2007 was awarded. Learned counsel further submits that reinstatement was allowed and the workman has been continuing in job since then and in all circumstances, would continue to work in accordance with law uptil the date of superannuation. The only issue left is regarding 50% of back wages.

Learned counsel for respondent No.2 submits that he will seek instructions from the workman that in case the Management is ready not to press the challenge to the reinstatement and restrict the challenge only to the back wages, he may forego the whole or some part of the back wages.

Adjourned to 01.04.2020.”

The impugned award to the extent of the order of reinstatement has already been accepted and implemented and the same is no more under challenge before this Court also.

8. Thus, the only dispute for its adjudication is regarding the entitlement of the workman to 50% back wages as already awarded by the

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Tribunal. There is no dispute that the workman was appointed on 27.09.1999 and his date of termination is 21.07.2007. Therefore, 50% back wages as awarded by the Tribunal would pertain to the period from 21.07.2007 to the date of the award i.e. 08.10.2013. Even, counsel for the petitioner-management has informed this Court that the total amount of 50% back wages would be less than Rs. 1,00,000/- because as stated in the demand notice, the workman was drawing fixed monthly salary of Rs.3,000/-.

9. Despite recording of the aforementioned statement of the petitioner-management, there is an attempt to challenge the findings on merits by submitting that, in fact, it is a case of voluntary abandonment and not the violation of Section 25-F of the Act. While arguing so, learned counsel for the petitioner-management relies upon the written statement filed by it before the Tribunal, whereby in paragraph No.2, it has been pleaded that due to some exigency of the work, the workman was transferred to another department but he did not report there. Thus, he left the service voluntarily by remaining absent. Still, petitioner-management took a stand in the written statement that the said offer exists till date and, therefore, the claim statement of the workman is liable to be rejected.

10. In the replication filed to the stand taken by the petitioner-management, it was clearly stated that many times, gatekeeper did not allow the workman to come into the premises of M/s Abhitex International. Further, it was pleaded in replication that on account of the alleged absence of the workman, no show cause notice or charge sheet was ever issued to the workman.

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11. To controvert the said stand, learned counsel for the petitioner-management refers to the letter dated 31.07.2007 (Ex.WW3/A)[appended with the writ petition as Annexure P-5), issued by the Personnel Manager working with the management. The said letter is addressed to the workman-Jamshed by stating that *“you are continuously absent from your duty without any prior intimation and permission, since 23.07.2007. Therefore, you are directed that you should report for duty without any delay and submit written explanation for your absence in this office.”*

12. Immediately thereafter, letter issued by the petitioner-management was responded by the workman, vide his reply dated 03.08.2007 (Ex.WW2/A)[appended with the writ petition as Annexure P-6], sent through his Advocate, wherein, it was clearly stated that the notice dated 31.07.2007 had been received and it was stated that the workman went on 21.07.2007, to join the duty, but the gatekeeper did not allow him to enter the premises of the factory. On being asked by the workman, why he cannot be allowed to enter the factory, gatekeeper told that the Manager had directed him not to allow the workman to enter the factory premises. Thus, the fact was clarified that the workman has never absented himself from duty on his own. Rather, it is the conduct of the Management itself that has restrained him from joining the duty.

13. This Court finds that the petitioner-management is taking a plea time and again, by relying upon the letter dated 31.07.2007, i.e. firstly in the written statement filed before the Tribunal and now before this Court, that the management never opposed joining of duty by the workman. However, there being no satisfactory answer available on record or reference in the

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impugned award, nor even during the course of hearing before this Court that if there was absence by the workman because of his own conduct, and that the management is still ready to allow him to join, than why the actual conduct of the management reflecting on the record, is otherwise. The demand notice is dated 30.07.2007, and vide letter dated 31.07.2007 (Ex. WW3/A), management asked the workman to join the service, but after the reply dated 03.08.2007 (sent by the workman), no further correspondence is done by the management to express its readiness and willingness to allow the workman-respondent No. 2, to join service.

14. Even the industrial dispute was forwarded, as Reference No.52, in the year 2008 and the award was passed on 08.10.2013. From a threadbare analysis of the complete award, from no angle it is reflected that before the Tribunal, any such stand was ever taken by the petitioner-management, which otherwise is tried to be projected through written statement or the letter dated 31.07.2007, before this Court. Even no such Zimni order of the Tribunal, in regard to the making of an offer to the workman to rejoin the service, has been produced before this Court. Therefore, this Court finds that before passing of the impugned award dated 08.10.2013 by the Tribunal, no such offer or willingness was ever expressed by the management for reinstatement or allowing the workman to join the duty in the factory.

15. Broadly speaking, it appears to be a concocted stand of the petitioner-management just to throw the impression through the submissions. During the course of hearing before this Court only, the petitioner-management has taken back the workman in service in

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compliance to the award dated 08.10.2013. Still, petitioner is making halfhearted attempt before this Court by arguing that in the case in hand, it is the workman who abandoned the job. Therefore, this Court has no hesitation to hold that conduct of the management is of dual nature with a motive to throw out the workman from the office of the petitioner-management.

16. While addressing the submissions on the issue of 50% back wages, counsel for the petitioner-management submits that as per the settled law, firstly, onus is upon the workman to plead that after termination from service, he never remained gainfully employed anywhere. He submits that once, the workman has not discharged the onus upon him, there is no question of his entitlement for any amount of back wages, leave aside 50% back wages.

17. While relying upon the judgment dated 29.10.1974, passed by this Court (Punjab and Haryana High Court) in CWP No. 2772 of 1972, titled as, '*Hindustan Machine Tools Ltd., Pinjore v. State of Haryana and others*', counsel for the petitioner submits that an employee, whose service has been terminated, is the only person, knowing how he used the time after the period of termination and if he got himself employed somewhere, what wages had been earned by him. Therefore, by virtue of Section 106 of the Indian Evidence Act, 1972, such a fact is expected to be only in the knowledge of the employee. Thus, the law would expect that at the first instance, it is the employee/workman, who has to plead of his not being gainfully employed anywhere after the period of termination.

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18. Counsel for the petitioner also relies upon the judgment passed by the Hon'ble Apex Court, titled as, 'Kendriya Vidyalaya Sangathan and another v. S.C. Sharma', (2005) 2 SCC 363, and refers to paragraph Nos. 13, 14 and 16. For the sake of convenience, concluding paragraph No. 16 of the said judgement is reproduced here-in-below:

"16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set d aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

19. Counsel for the petitioner further relies upon the judgment of Hon'ble Apex Court, titled as, 'Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and others', (2013) 10 SCC 324,' and refers to paragraph No. 38.3 and submits that the workman is required to either plead or atleast make a statement before the adjudicating Authority or the Court of First Instance that he was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, it has to plead and also to lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages. For the sake of convenience, paragraph No. 38.3 is reproduced here-in-below:

"38.3. Ordinarily, an employee or workman and who is de-sirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first h 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

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gainfully employed and was getting getting wages equal to 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 b 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.”

20. On the other hand, Mr. Ashok Tyagi, learned counsel for respondent No. 2 - workman relies upon the judgment of Hon’ble the Supreme Court in the case of **“The Management of Regional Chief Engineer P.H.E.D., Ranchi v. Their Workmen Rep. by District Secretary”, 2018 (4) S.C.T. 427**, and while referring to paragraph Nos.15, 16, 17, 18 and 19, submits that the grant of 50% back wages in that case has been held to be genuine by the Hon’ble Apex Court. Paragraph Nos. 15 to 19 are reproduced here-in-below:

“15. Coming now to the facts of the case at hand, we find that neither the Labour Court and nor the High Court kept in consideration the wre and that either the. Similarly, no party to the proceedings either pleaded or adducere to prove the material facts required for award of the back wages enabling the Court to award the back wages.

16. On the other hand, we find that the Labour Court in one line simply directed the appellant (employer) to pay full back wages for a long period to 37 workmen while directing their reinstatement in service.

17. We, however, find that the High Court in para 9 of the order placed reliance on the decision of this Court in Deepali Gundu Surwase (supra) for holding that the question of back wages is covered by this decision. In our view, the High Court erred in so observing. It should have seen that in the case of Deepali Gundu Surwase (supra) itself, this Court referred decisions, which we have mentioned in para 13 above and then in para 38 of Deepali Gundu Surwase, this Court culled out the ratio of all the cited cases. Thereafter, this Court in Deepali Gundu Surwase' case granted relief to the concerned workers

on the facts involved in that case. In our opinion, the High Court did not apply the ratio of the decision in Deepali Gundu Surwase (supra) to the facts of this case properly and only quoted one para of the judgment in Deepali Gundu Surwase (supra) which contained general observations. Those observations had to be read in juxtaposition with para 38 which culled out the ratio of all the case law on the subject.

18. *We cannot, therefore, concur with such direction of the Courts below awarding full back wages to the workman which, in our opinion, has certainly caused prejudice to the appellant (employer).*

19. *However, having regard to the facts and circumstances of the case, we consider it just and proper and in the interest of justice to award to these 37 workmen 50% of the total back wages.”*

21. Learned counsel for respondent No. 2 also refers to paragraph No. 33(v) of the judgment of Hon’ble Apex Court rendered in **Deepali Gundu Surwase’s case (supra)**, and submits that even the said judgment holds the law that while exercising power under Article 226 or 136 of the Constitution, there should not be any interference in the relief of back wages ordered by the Labour Court in its original jurisdiction.

22. I have heard learned counsel for the parties at length and also gone through the complete record available before this Court including the appended documents as well as the law cited by both the sides.

23. First of all, on the record of the present case, if we go by the demand notice, it is clear that said notice was issued just a week after the date of termination of the workman from service, so no question arises to consider the issue of taking of a plea in demand notice that the workman was not gainfully employed anywhere after termination. In the claim statement, each and every aspect has been mentioned by the workman and

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reinstatement with continuity of service alongwith the remaining salary has been prayed for.

24. In the written statement dated 12.03.2010, filed by the petitioner-management, nowhere it has been pleaded that the workman is employed anywhere. In the replication dated 25.08.2010, it has been specifically pleaded that workman be reinstated with continuity of service and to pay the remaining salary with bonus, gratuity, and other service benefits from 21.07.2007 till the final disposal of the case.

This Court finds that nowhere, at any stage, petitioner-management has raised the issue regarding disentitlement of back wages on the ground that the workman was gainfully employed somewhere else.

25. Moreover, neither any provisions from the Act has been referred by the petitioner-management, nor any proof has been brought on record of the Tribunal or produced before this Court regarding a provision of law, whereby, firstly it is the workman who has to plead before the Tribunal regarding he being gainfully employed in some other job after the termination/ any action taken by the management is in question before it. Otherwise also, what the counsel for the petitioner-management is arguing is that the workman has to plead and prove at first instance that “he is not gainfully employed anywhere after the order of termination”. But such a pleading would be of negative character and in case, no such fact exists, there is no question of the existence of any evidence for proving of a fact which is of a negative character/non-existent. Any piece of evidence would always be available, only if, the alleged fact exists in any form. Therefore, if this Court holds that such a plea is to be pleaded and then to be substantiated

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with some evidence, the burden would lie on the side which so alleges and in that situation, as in present case, it would always be for the employer/management to firstly plead or make statement in that regard and that too with support of a piece of evidence.

26. While further stretching out the question raised before this Court, it is realized that once, continuity in service and complete back wages are pleaded, the burden should be upon the employer to file a particular piece of evidence before the pronouncement of the award/final decision that the employee workman was actually working somewhere else after the alleged termination and, therefore, he is neither entitled for continuity of service, nor any amount of back wages, being gainfully employed.

27. While taking this stand, this Court is further guided by the proposition culled out by the Hon'ble Apex Court in **Deepali Gundu Surwase's case** (supra), that once, an employer has been held to have acted in gross violation of the statutory provisions and/or the principle of natural justice or is guilty of victimising the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. It has further been observed that the Court would always keep in mind that once, wrongdoer is found to be employer and on the other hand, workman/employee as sufferer, there would not be any justification to give a premium to the employer by relieving him of the burden to pay the dues for his wrongdoing, in the form of full back wages to the victimized workman.

28. Being fully fortified and also guided by the principles of equity and natural justice, this Court is bound to follow the dictum of Hon'ble Apex

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Court, and finds that the learned Tribunal in paragraph No.24 has held in specific that “the workman has been given a raw deal by the Management and termination of his services by the Management is in violation of Section 25-F of the Act, as in an illegal and arbitrary manner, on a false pretext of workman having remained absent from duty, he has shown the door.” Once, there is a finding in that regard and such a situation has been guided by the Hon’ble Apex Court in **Deepali Gundu Surwase’s case** (supra) in paragraph No.33(v), this Court does not find any reason to deviate from the findings given by the learned Tribunal.

29. As a sequel to above discussion, present writ petition sans merit and while upholding the impugned award dated 08.10.2013 (Annexure P-7), passed by the Tribunal, the same is hereby dismissed.

(SANJAY VASHISTH)
JUDGE

February 29, 2024
rashmi/Pkapoor

Whether speaking/reasoned	✓ Yes/No
Whether reportable?	✓ Yes/No