

CM-1555-CWP-2024 IN/AND
CWP-21948-2014

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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CM-1555-CWP-2024 IN/AND
CWP-21948-2014
Decided on : 22.02.2024

M/s Roop Polymers Ltd.

. . . Petitioner(s)

Versus

Mukesh Kumar and another

. . . Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

PRESENT: Mr. Alok Jain, Advocate
for the applicant/petitioner(s).

Mr. Rakesh Gupta, Advocate
for respondent No.1.

SANJAY VASHISTH, J. (Oral)

CM-1555-CWP-2024

I. Applicant-petitioner has moved present application under Order 9 rule 13 read with Section 151 CPC and Rule 32 of the Writ Jurisdiction (Punjab and Haryana High Court) Rules, 1976, for recalling the order dated 09.01.2024, and to seek restoration of the writ at its original status for its disposal on merits.

II. On 12.02.2024, following order was passed:-

*“Present: Mr. Alok Jain, Advocate
for the applicant-petitioner.*

-.-

Present application has been filed under Order IX Rule 13 read with Section 151 C.P.C., and Rule 32 of the Writ Jurisdiction (Punjab and Haryana) Rules, 1976 for seeking recalling of the order dated 09.01.2024 passed by this Court, whereby on account of absence of the petitioner, the writ petition was dismissed for non-prosecution.

Learned counsel for the applicant-petitioner submits

that since a short issue qua payment of back wages is involved, the writ petition be listed for its hearing in the urgent list.

Notice of the application be issued to the non-applicants-respondents for 16.02.2024.

Registry is directed to inform learned counsel for non-applicants/respondents telephonically also about the next date fixed before this Court.

To be taken up in the urgent list.”

III. Mr. Rakesh Gupta, Advocate, puts in appearance on behalf of the non-applicants/respondents and raises no serious objection in allowing the prayer made by the applicant-petitioner, and disposal of the writ petition by considering the challenge made by the applicant-petitioner to the awarding of 40% back-wages to the Workman.

III. Besides, to avoid further pendency of the writ petition, both the counsel for the parties have agreed to argue the main case itself, subject to the recalling of the order dated 09.01.2024, and restoration of the writ petition.

IV. After going through the contents of the application and hearing the submissions from both the sides, prayer made in the application is accepted and consequentially, order dated 09.01.2024 is hereby recalled and the writ petition is ordered to be restored to its original number, and main case is also taken up for hearing today itself.

CM stands disposed of.

CWP-21948-2014

1. Present writ petition is being taken up for its final decision after recalling of order dated 09.01.2024, whereby, writ petition was dismissed for want of prosecution.

2. Petitioner - M/s Roop Polymer Pvt. Ltd., Plot No.27, Industrial Area, Mehrauli Road, Gurugram, has filed present writ petition by challenging the award dated 09.09.2014 (Annexure P-17), whereby, learned Industrial Tribunal-cum- Labour Court-I, Gurugram (for brevity, 'learned Tribunal'), decided reference No.279/2006, referred to it under Section 10(1)(C) of the Industrial Disputes Act, 1947 (in short, 'ID Act') in favour of the workman.

3. While answering the reference in favour of the workman – Mukesh Kumar (respondent No.1 herein), learned Tribunal found that the termination of the workman, is without holding of any departmental inquiry, and therefore, such an action of the Management is in violation of the statutory provisions of Section 25-F of the ID Act. Hence, Learned Tribunal held the workman entitled to Reinstatement w.e.f. his date of termination i.e. 23.06.2005 along with back wages to the extent of 40%.

4. Although, while challenging the said award by way of present writ petition before this Court, petitioner – Management prayed for quashing of the award in its entirety, yet, at the time of preliminary hearing, Counsel for the petitioner-management confined his prayer to challenge the awarding of the back-wages only. Further expressed willingness of the management to reinstate the workman. In this regard, order dated 29.10.2014, passed by the Coordinate Bench, is reproduced herein-below:-

“ ***M/s Roop Polymers Ltd. Vs. Mukesh Kumar & Others***

Present: Mr. Alok Jain, Advocate for the petitioner.

.....

Challenge in the instant petition is to the award dated 09.09.2014 at Annexure P-17 passed by the Industrial Tribunal-cum-Labour Court-I, Gurgaon, whereby, the reference has been

answered in favour of workman/respondent No.1 and he has been ordered to be reinstated along with continuity of service and backwages to the extent of 40%.

Learned counsel appearing for the management would make a statement that he is confining the scope of the instant petition only as regards award of backwages and is ready and willing to reinstate the workman.

Notice of motion, returnable for 02.02.2015.

29.10.2014

**(TEJINDER SINGH DHINDSA)
JUDGE”**

5. After allowing the workman to join the service, on 18.03.2016, counsel representing the petitioner – Management, got his statement recorded, and consequently, following order was passed:-

*“Present: Mr. Alok Jain, Advocate,
for the petitioner.*

*Mr. Vishawjit Singh, Advocate,
for Mr. Ashish Gupta, Advocate,
for respondent No.1.*

Learned counsel for the petitioner has submitted that respondent No.1 has been allowed to join duty in pursuance to the impugned award and has prayed that operation of the award with regard to payment of back wages to respondent No.1 be stayed.

Accordingly, the recovery of backwages shall remain stayed till further orders.

List again on 22.11.2016.

March 18, 2016

**(SABINA)
JUDGE”**

Thus, present writ petition would deal, only with the issue with regards to the entitlement of the workman towards back-wages, granted by the learned Tribunal.

6. Factual matrix is as under:-

- Workman joined the petitioner – Management/Company on 01.04.1993, on the post of ‘Press Operator’. Firstly, his services were terminated on 23.04.2005, and at that time, he was getting salary of Rs.5,200/- p.m. Post his termination, a demand notice dated 09.05.2005, was sent by the workman. Thereupon, the dispute raised by the workman was settled in conciliation proceedings, and workman was taken back in the service w.e.f. 30.05.2005, but without any salary for the intervening period on the principle of ‘no work, no pay’ (Annexure P-3).
- Only after few days, workman was terminated on 23.06.2005 again, and this time, industrial dispute was referred as Reference No.279/2006, for its decision by the learned Tribunal.
- Claim statement was filed on 13.09.2006, and due to conducting of *ex-parte* proceedings against the Management, award dated 30.10.2008 (Annexure P-5), was passed against it.
- Later on, said *ex-parte* award was set-aside and the Management filed its written-statement to the claim statement on 05.05.2009, and thereupon, the proceedings of the learned Tribunal were conducted, as per the stand and the evidence led by the respective parties. After a long time i.e. on 22.04.2014, Management moved an application for leading

additional evidence pleading that the workman is gainfully employed with M/s Pratap Filling Station, kaliawas, Harsaru, District Gurgaon, and to prove the said fact, prayed for an opportunity to lead additional evidence. Reply to the said application was filed, wherein; the dismissal of the application was prayed. The relevant extracted part of the reply along with its prayer is reproduced here-under:-

“ **Reply to the Application to adduce additional Evidence**

Sir,

It is respectfully submitted as under:-

1. *Contents of Para no .1 is admitted to be correct.*
2. *Contents of para no. 2 as made out are wrong, incorrect and are denied. It is vehemently that petitioner is gainfully employed with M/s Pratap Filling Station vill & P.O. Kaliawas, Harsaru, Distt. Gurgaon after leaving the job.*
3. *Contents of para no. 3 as made out are wrong, incorrect and are denied. It is vehemently that it is necessary to adduce the additional evidence of M/s Pratap Filling Station to prove that the applicant is gainfully employed. The matter is fixed for argument. Hence it is not proper stage to allow the application of the respondent.*
4. *Contents of para no. 3 as made out are wrong, incorrect and are denied. A vague submission has been made out by the applicant without disclosing specific date and source of information.*
5. *Contents of para no. 5 as made out are wrong, incorrect and are denied.*
6. *The present application is liable to be dismissed on the following grounds:*
 - a) *A false baseless and vague submission has been made out by the petitioner. It is further submitted that the present application of to adduce additional evidence*

is not maintainable at all. The respondent has not taken any plea of gainfully employment in written statement. Accordingly he cannot lead any evidence on the issue of gainfully employment of the petitioner.

B) It is pertinent to mention here that the signatory of the applicant is not authorized to sign the application.

c) The present application has not been supported by any affidavit or document. Hence the application is liable to be dismissed on this score alone.

In the light of submission made above it is humbly prayed that the application to adduce additional evidence is liable to be dismissed with heavy cost.”

- Said application was dismissed by learned Tribunal vide its order dated 19.05.2014.
- Again at a belated stage and the fag end of the proceedings, Management made another attempt by moving an application dated 13.07.2014, for seeking amendment in the written statement. Said application was also dismissed on 05.08.2014 by the learned Tribunal.
- Petitioner-Management has failed to produce any document to show that order dated 19.05.2014 (dismissing the application for additional evidence), and order dated 05.08.2014 (dismissing the application for seeking amendment in the written statement), were ever challenged. Even, both these orders have not been assailed in the prayer clause of the present writ petition. Thus, present writ petition is being argued after both the said orders have attained finality.
- Thus, after passing of the award dated 09.09.2014; same is being challenged by the Management before this Court by way of filing the writ petition under Article 226 of the Constitution of India.”

7.

Initially, counsel for the petitioner – Management made an

attempt to challenge the findings given by the learned Tribunal on merits. Certain facts were addressed for the purpose of challenging the findings on facts given by learned Tribunal. But, on being reminded of the orders dated 29.10.2014 (supra) and 18.03.2016 (supra) passed by this Court, counsel was asked to be stick to the arguments only *qua* the entitlement of the workman to the back- wages.

Learned Tribunal has not awarded full back-wages, rather has awarded 40% back-wages from the date of termination i.e. 23.06.2005.

8. While addressing the submissions, the prime argument addressed by the Counsel for the petitioner – Management is that it was mandatory/obligatory for the workman to firstly plead in his claim statement that he is not gainfully employed anywhere and only then, he would have been entitled to back-wages.

9. In support of his submissions, counsel relies upon the judgment of Hon'ble the Apex Court in **U.P. State Brassware Corpn. Ltd. and another v. Uday Narain Pandey, (2006) 1 Supreme Court Cases 479**. In the said cited case, learned Tribunal vide its award dated 31.10.1991, held that the workman is entitled to be reinstated w.e.f. the date of retrenchment i.e. 01.04.1987, along with entire back-wages, with any other allowances. Said observation was upheld by the Hon'ble the Allahabad High Court.

Primarily, the Management challenged the findings of the learned Tribunal on three grounds:-

- (i) Workman has not pleaded that he is not gainfully employed,
- (ii) Principle of “No Work – No Pay”; and
- (iii) The factory has been closed down on 26.03.1993 by the Government order.

In the said factual aspect, Hon'ble the Apex Court in paragraphs No.17, 22 & 61 observed that there cannot be any universal definite criteria, to make order of entitlement of complete back-wages. Undisputedly, it depends upon the facts and circumstances of each and every case.

Further observed that by virtue of Section 106 of the Indian Evidence Act, 1872 (in short, 'Act of 1872'), such a plea should be raised by the workman. For the sake of convenience, observations made in paragraphs No.17, 22 & 61, are reproduced hereinbelow:-

“17. Before advertng to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

XXXXX-----XXXXX-----XXXXX-----XXXXX-----XXXXX

22. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section [6N](#) of the U.P. Industrial Disputes Act.

XXXXX-----XXXXX-----XXXXX-----XXXXX-----XXXXX

61. It is not in dispute that the Respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of section [106](#) of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.”

After observing the circumstances, as detailed herein, Hon'ble the Apex Court awarded the back-wages to the extent of 25% only.

10. Counsel for the petitioner – Management also relies upon the judgment of the Hon'ble the Apex Court rendered in **Rajasthan State Road Transport Corporation, Jaipur v. Phool chand (Dead) Through Legal Representatives, (2018) 18 Supreme Court Cases 299**, and refers to paragraph No.12 of the same, which says as under:-

*“12. It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, namely, that the employee was gainfully employed during the relevant period and hence not entitled to claim any back wages. **Initial burden is, however, on the employee.**”*

11. Thus, learned counsel for the petitioner – Management, submits that in the case at hand, the workman has already been taken back in service and in view of the judgment cited herein-above, the only question before this Court is whether the impugned award is required to be set-aside to the extent of awarding of 40% back-wages to the workman.

12. On the other hand, counsel representing respondent No.1 – (workman – Mukesh Kumar) counters this argument of the petitioner – Management, by submitting:-

- (i) That there is no hard and fast rule that it is only the workman, who will firstly plead in the claim statement, that he is not gainfully employed anywhere at the time of filing of the claim.

- (ii) That the material appended with the writ petition before this Court, is sufficient to plead that for the first time, argument that respondent – workman is gainfully employed was raised by the petitioner – Management only in the application for leading additional evidence and the said contention has been categorically denied by the workman in reply to the said application.

Thus, the argument addressed by the counsel for petitioner - Management before this Court, is completely misconceived and against the record.

- (iii) That even before this Court, at the time of filing of writ petition or even thereafter, for the last 9/10 years, no material has been placed to indicate even on *prima facie* basis that petitioner was gainfully employed anywhere during the period for which, he has been awarded 40% back-wages.

13. This Court has deeply examined the complete available record, heard the submissions from both the sides and is of the view that there is no substance in the submissions addressed before this Court by counsel for the petitioner – Management for the reasons as recorded below.

Firstly, there is no provision in the ID Act, mandating the workman to plead in specific about his status that he is not gainfully employed anywhere. If the law of pleading is applied, only the fact which exists is required to be pleaded. In case, any such fact does not exist, pleading thereof is of no purpose because there cannot be any existing material/evidence to corroborate the non-existing facts. Therefore, in case,

there is any such knowledge of existence of a fact regarding the gainful employment of the workman, same requires to be pleaded at the first instance by the employer i.e. Management, in the present case.

Secondly, once a workman has pleaded in the claim statement, his/her entitlement to the complete back-wages, to the mind of this Court, it impliedly fulfills the obligation, if any, casted upon the workman, to plead that he is not gainfully employed. Therefore, once complete back-wages are claimed, it is the responsibility of the employer- Management to rebut such claim by raising a specific plea along with evidence in that regard, as to why the workman is not entitled for the claimed relief i.e. the back-wages.

Thirdly, once, any such issue is raised by the Employer, undoubtedly, it would require an answer along with some material/*prima facie* evidence, and thus, onus would shift to the workman to share his/her true status/position in that regard with the Court. Such an answer disclosing the fact which is in the exclusive knowledge of the person (workman in the present case) shall discharge his/her onus under Section 106 of the Act of 1872.

14. To sum up, in short, in the present case, in the claim statement, there is a specific prayer by the workman for reinstatement along with awarding of back-wages in his favour, by treating him in service continuously.

After the first termination on 23.04.2005, demand notice dated 09.05.2005, was forwarded with following prayer:-

“I, therefore, request you take me back in service along with back-wages and continuity of past service, failing which, you shall be responsible for the consequences and expenses.”

Thereafter, workman was taken back in service, because of

settlement between the parties before the Conciliation Officer. But on being terminated again (second time), on 23.06.2005, dispute was referred to the learned Tribunal, vide reference No.279 of 2006, in which, claim statement dated 13.09.2006, was filed with the following prayer:-

“It is, therefore, respectfully prayed that award be pronounced in my favour along with back-wages by treating me on service continuously.”

Reply/written statement to the said claim statement dated 13.09.2006 was filed after about three years on 05.05.2009. In the said written statement, petitioner – Management nowhere mentioned the reason as to why the workman would not be entitled for complete back-wages and that after the date of termination i.e. during the period of previous four years, the workman has been gainfully employed anywhere. Simply, dismissal of the claim statement has been prayed for. Said prayer is reproduced here-under:-

“In view of the above, it is prayed that the above case may please be dismissed and filed.”

Not only this, at the time of leading of the evidence, workman – Mukesh Kumar (respondent No.1), submitted his notarized affidavit dated 01.12.2009, and again claimed that the award be pronounced in his favour along with back-wages by treating him in service continuously.

In the cross-examination of the workman – Mukesh Kumar, conducted at the instance of the petitioner – Management, nowhere, said part of the claim raised in the demand notice, claim statement, and thereafter, on affidavit before the learned Tribunal, has been challenged by way of said cross-examination.

Complete cross-examination of the workman – Mukesh Kumar
(PW-1) is reproduced here-under:-

*“PW-1 Statement of Mukesh Kumar son of Ram Kumar, age 40 yrs, resident of Village Kaliawas, Post Office Garhi, Harsaru, Tehsil Farukhnagar, District Gurgaon
On SA*

Stated that I am submitting my Affidavit in evidence as Exhibit P-1 and produced documents Exhibit P-2 to Exhibit P-5 and Mark-A and the same be read in my evidence.

Xmn By Sh. HL Dang, AR for Mgt.

I have proof regarding my appointment w.e.f. 01.04.1993 and the Pay Slip is Exhibit P-6. It is correct that my salary is Rs.3266/- p.m.

I cannot tell as to when Demand Notice was sent to the Management. I cannot tell as to when the same was received. Again said, Demand Notice was given on 27.05.2005. It is incorrect that I was absent from duty w.e.f. 23.06.2005. But I was on leave. I had sent leave application but I cannot tell as to for which period, I had obtained the leave. Volunteered that leave was taken for the month of June. My leave application was not taken by the Company. I had appeared before the Labour Inspector. It is correct that Management has offered to take me back on service. Today also, I am ready to go back but only alongwith the Back Wages. It is correct that earlier also I remained absent from 09.05.2005 and the Management has taken me back on service as per Exhibit P-4. It is incorrect that I had not fallen ill w.e.f. 17.06.2005. It is incorrect that I am deposing falsely.

ROA&C

Sd/- (04.06.2010)
Presiding Officer
”

Sd/- (04.06.2010)

15. Besides, there is another aspect to look into in order to consider
the question of raising pleading *qua* not being gainfully employed by the

workman.

Undisputedly, facts in most of the cases before the Courts are altogether different. There is no dispute that at different times, divergent views are taken by the courts in regard to the entitlement of the workman for back-wages, because of the uncertainty in the law of pleading in regard to the claim of the back-wages.

But, in the present case, said part is also complete. In the application dated 22.04.2016, for leading additional evidence, Management has alleged a fact that the workman is employed with M/s Pratap Filling Station, Kaliavas Harsaru, District Gurugram. In reply filed to the said application (as reproduced in the initial paragraphs/foregoing paragraphs of the present judgment) broadly, it is found that the workman answered in his reply that *“a false, baseless and vague submission has been made by the petitioner/management, and the application for additional evidence is not supported by an affidavit or document.”*. Both these aspects are detailed in paragraph No.6 (a) and (c) of the reply to the application for additional evidence.

16. As already noted herein-above, order dated 19.05.2014, whereby the application for leading additional evidence was dismissed and the order dated 05.08.2014, whereby, the application for making changes in the written statement was dismissed, were never assailed before the next Court. Even, said orders are not under challenge in the prayer clause of the present writ petition also.

Thus, present writ petition is completely misconceived, and any of the submissions addressed before this Court carry no substance. Even, the judgments relied upon by the petitioner – Management, cannot come to

its rescue, for the reasons already recorded in the foregoing paragraphs of the present judgment.

17. Before parting with the judgment, this Court cannot lose sight of the fact that it is not a case of awarding of complete back-wages and only a partial claim to the extent of 40% qua back-wages has been accepted. Therefore, in consonance with the reasons recorded here above, this Court reaches to a conclusion that petitioner – Management has failed to discharge the onus upon it and has taken vague pleas at different times and thus, the present writ petition filed by the petitioner-management is liable to be dismissed.

Hence, present writ petition *sans merit* is **hereby dismissed** and the award of the Tribunal is **affirmed**.

(SANJAY VASHISTH)
JUDGE

February 22, 2024
J.Ram

Whether speaking/reasoned: ✓ *Yes/No*
Whether Reportable: ✓ *Yes/No*