

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12785 OF 2019

Shri Arvind Bhaurao,
Age : 71 years, Occ. : Retired,
R/o : Behind Oxford English School,
Nutan Vasahat, At post and Dist. Jalna
State Maharashtra.

..Petitioner

Versus

1. The Union of India
Through the General Manager,
South Central Railway,
Rail Nilayam, Secunderabad,
Andhra Pradesh.
2. The Additional Divisional Commissioner
South Central Railway,
Nanded, Maharashtra.
3. The Divisional Mechanical Engineer,
(Power) South Central Railway,
Hyderabad, (A.P).
4. The Assistant Mechanical Engineer
(Power) South Central Railway,
Hyderabad, (A.P).

...Respondents

...
Advocate for Petitioner : Mr. Yashodeep Deshmukh h/f Mr. A.D.
Kaware

Advocate for Respondent Nos.1 to 4 : Mr. Manish N. Navandar

...
**CORAM : S.G. MEHARE AND
SHAILESH P. BRAHME, JJ.**

RESERVED ON : JANUARY 14, 2025

PRONOUNCED ON : JANUARY 31, 2025

JUDGMENT :- (PER S.G. MEHARE, J.)

1. Rule. Rule made returnable forthwith. Heard finally
with the consent of the parties.

2. The petitioner being a Shunter in railways has impugned the order partly of the learned Central Administrative Tribunal, Mumbai dated 23.09.2013 passed in Original Application No.202 of 2008 to the extent of not granting him back-wages by applying the doctrine of 'no work no pay'.

3. The facts are not disputed. The petitioner was booked for duty at Mudkhed Station. However, before he reached there, another employee for discharging the same duty was available. Therefore, he left the station signing the register. On these allegations, the petitioner was suspended. The inquiry was initiated against him. The disciplinary authority had terminated him from services. The petitioner had impugned the said order. The Divisional Mechanical Engineer, Hyderabad, he allowed his appeal partly and converted his removal to compulsory retirement. He then preferred the revision before the Divisional Railway Manager (DRM). He also rejected it. Lastly, he filed the original application before the Central Administrative Tribunal by which the order of his compulsory retirement has been quashed and set aside. However, the learned Central Administrative Tribunal find it appropriate to apply the doctrine of 'no work no pay' and denied the back-wages.

4. In pursuance to the undisputed facts about quashing and setting aside the termination and revocation for compulsory retirement, a small question that has been raised is, whether in given

circumstances, the doctrine of 'no work no pay' would apply to the case of the petitioner.

5. Learned counsel for the petitioner referring to the findings of the Central Administrative Tribunal has vehemently argued that the doctrine has been applied with predetermined mind. It was passing in the mind of the Presiding Officer of the Central Administrative Tribunal that no relief of back-wages should be granted to the petitioner. To bolster his arguments, he referred to the findings of the Central Administrative Tribunal about the confession that he did not sign the appearance register before returning to Purna and due to his failure, the goods train was detained and the blame for such acts were not rebutted. He would also refer to the findings in para 15, that since the applicant has admitted in the inquiry as also borne out by the Appellate order that he has not taken permission of the RSS at Mudkhed while finally leaving from Mudkhed to Purna, he is guilty of absconding in the sense that the Railway administration uses the term and to that extent the charges remains proved. He also referred to the findings of the Central Administrative Tribunal that since the petitioner has not worked for the entire period from 22.10.1999 to 31.08.2008, the principle of 'no work no pay' would apply. He has strenuously argued that the petitioner is a Class-IV and low paid employee. His back-wages are not heavily burdened the employer. The employer never denied that after the suspension was

revoked, he deliberately did not join. On the contrary, the petitioner was ever ready to join and discharge the duties. However, the employer did not allow him. He further submitted that there was nothing on record to establish that during the period of his not discharging the services, he was in another employment. The employer also did not raise any objection as such in the entire petition. Therefore, the doctrine of 'no work no pay' would not have been applied. To bolster his arguments, he relied on the case of Shobha Ram Raturi Vs. Haryana Vidyut Prasaran Nigam Limited and Others of the Hon'ble Supreme Court passed in Civil Appeal No.11325 of 2011 dated 09.12.2015. To his fairness, he also provided the celebrated judgment of the Hon'ble Supreme Court on the doctrine of 'no work no pay' of Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ed) and Others, (2013) 9 SCR 1. Lastly, he would submit that the petitioner was not at fault. It was the employer who deliberately did not allow him to join even after revocation of suspension. Therefore, the doctrine of 'no work no pay' has been incorrectly applied. The petition deserves to be allowed with back-wages.

6. Per contra, learned counsel for the contesting respondents/employer has vehemently opposed the arguments of the learned counsel for the petitioner. He would submit that the Central Administrative Tribunal did not pass the order of reinstatement. He

never asked for discharging the duties. The case laws relied upon by the petitioner's counsel are distinguishable on facts. Hence, it would not apply. He would further argue that there is nothing on record to *prima facie* believe that the petitioner ever attempted to join the service and he was out of employment throughout the period from his termination till the impugned order is passed. To bolster his arguments, he relied on the case of State of Haryana and Others Vs. O.P. Gupta, AIR 1996 SC 2936 and Shri Jaysing Rangarao Raut Vs. Maharashtra State Electricity Board, (2004) 4 Mh.L.J. 115. In the facts and circumstances of the case and the ratio laid down by the Hon'ble Supreme Court in Deepali Gundu Surwase (supra), he supported the impugned judgment and order of the Central Administrative Tribunal.

7. The case of Deepali Gundu Surwase (supra) is a landmark judgment on the application of doctrine of 'no work no pay'. In this case, many other case laws have been considered in the said case on the point of application of the said doctrine. Finally, the Hon'ble Supreme Court laid down the law under which circumstances, the doctrine of no work no pay would apply. Para 33 is relevant. For ready reference, the said paragraph is reproduced which reads thus :

“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.”

8. In the case of *O.P. Gupta* (supra), the dispute was about not granting the timely promotions. By the Courts order, the seniority list was prepared and finally, 90 employees were promoted and given the scale to which they were eligible in the promoted posts. The respondents/employee were claiming the payment of arrears. The High Court directed the payment of arrears from the deemed date given in the seniority list to the date of their posting in the promotional posts. Under these premise, it has been observed that unless the seniority list is prepared and finalised and promotions are made in accordance with the rules on the basis of seniority list, the the question of entitlement to work in the promotional posts does not arise. Consequently, the question of payment of arrears of salary does

not arise since admittedly, the respondents had not worked during that period. The judgment and order of the High Court was set aside. The facts of that case were altogether different from the facts involved in this case. Hence, with due respect to the Hon'ble Supreme Court, we say that it does not assist the respondents/employer.

9. The next case law relied upon by the respondents is of Shri Jaysing (supra). In that case, the petitioner was prosecuted both under the Criminal Procedure Code and also was subjected to departmental inquiry on the charge that the petitioner had participated in an illegal strike. Pursuant to the departmental inquiry, his services were terminated essentially, on the ground that he was convicted and sentenced in the criminal prosecution. The order of termination was challenged before the Industrial Tribunal. The Industrial Tribunal quashed and set aside the order of termination and directed reinstatement with continuity of service and consequential benefits. He resumed his duty. He was qualified for the promotion to the post of Divisional Accountant in 1984. According to the petitioner, he became entitled to the promotion of Divisional Accountant as per the date of his next junior in Upper Division Clerk. The Labour Court gave him a deemed date to the promotion of Assistant Accountant w.e.f. 01.10.1969 with pay fixation. However, in the said order it was clarified that the petitioner will not be entitled to any arrears of back-wages on the basis of such

deemed date promotion. The petitioner made various representations to get the back-wages. Ultimately, he failed. Hence, he had filed the writ petition. Under these premise, the Bombay High Court held that the petitioner is not entitled to any benefits of arrears of salary and back-wages on the basis of the deemed date promotion since he has admittedly not performed and/or worked on a higher post.

10. In the case of Shobha Ram Raturi (*supra*), the facts were that the petitioner was retired in ordinary course on superannuation. He had assailed his retirement order dated 31.12.2002 in a writ petition. The learned Single Judge of Punjab and Haryana High Court had allowed it. The High Court has clarified that since the petitioner has not worked on the post, maxim of 'no work no pay' shall apply and consequential benefits shall only be determined towards terminal benefits. Under these premise, the Hon'ble Supreme Court observed that the fault lies with the respondents in not having utilized the services of the appellant for the period from 01.01.2003 to 31.12.2005. It appears that 'no work no pay' doctrine was not applied in the facts that the employer failed to utilize the services of the employee and accordingly, granted him back-wages.

11. Each case has to be dealt with by its facts. The landmark judgment of Deepali Gundu Surwase (*supra*) laid down the facts and circumstances when the above doctrine is to be applied or not. Learned counsel for the petitioner took us through the evidence in the

departmental inquiry and vehemently argued that the employer acted in gross violation of the statutory provisions and he was victimized. Though he had been to the employer for joining the service, he was never allowed. Therefore, clause (v) of para 33 reproduced above is squarely applicable to the facts of the case. We have examined the record to find whether the petitioner has a case anytime that he had been to the employer to allow him to discharge the services and the employer did not allow him. We do not find any such documents on record. We had granted an opportunity to the petitioner to produce some representations/applications requesting the employer to allow him to join. The petitioner did not produce any document. This seems to be the case of the petitioner for the first time. Therefore, we are not agreeable with the arguments of the learned counsel for the petitioner that the employer did deliberately not allowed him to join and render the services. Therefore, the employer is guilty of victimizing the petitioner. Clause (iii) of para 33 reproduced above appears more relevant, which shows that 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. Learned counsel for the petitioner could not satisfy us that before the Court of first instance, any claim was raised and

atleast it was pleaded. In the absence of any such pleadings or statement before the adjudicating authority or the Court of first instance, we are of the view that the learned Central Administrative Tribunal has correctly applied the doctrine of 'no work no pay'. In the absence of any such pleadings or statement, we say that this is an afterthought case of the petitioner without any pleadings. We do not find any error of law in applying the 'no work no pay' doctrine in the facts and circumstances of the case.

12. For the above reasons, the petition deserves to be dismissed and accordingly, the petition stands dismissed.

13. No order as to costs.

14. Rule stands discharged.

(SHAILESH P. BRAHME, J.)

(S.G. MEHARE, J.)