2007 eGLR_HC 10005329,2007 (3) GCD 1931 ,2007 Fac LR (114)1146

Before the Hon'ble MR H K RATHOD, JUSTICE

GOPAL NANDKISHOR SHARMA - PETITIONER Vs. MANAGER - RESPONDENT

SPECIAL CIVIL APPLICATION No: 11593 of 2006 , Decided On: 29/06/2007

Y.V.Shah, Nanavati associates

MR.H.K.RATHOD

1. Heard learned Advocate Mr. YV Shah for the petitioner and Mr. Joshi for Nanavati Associates for respondent.

2. Through this petition under Article 227 of the Constitution of India, the petitioner has challenged the award made by the labour court, Valsad in reference no. 98 of 1995 dated 22.2.2006 qua denial of back wages for the intervening period.

3. Learned Advocate Mr. YV Shah for the petitioner submitted that the relevant factors have not been taken into consideration by the labour court while denying back wages for the intervening period. He submits that the petitioner was permanent qualified employee working on the post of welder vendor for more than 26 years continuously and ex parte departmental inquiry was conducted against the petitioner and the labour court gave finding that it was a first misconduct and occupying quarter subsequently allotted by the company as the petitioner was wrongfully dismissed based on ex parte inquiry which was rightly quashed by the labour court and, therefore, being normal and natural consequence, petitioner is entitled for full back wages for intervening period. In support of his submissions, he placed reliance on the following decisions :

(1) 2007 (1) GLR 45 Jindarsing Bahra & Another v. Cargo Motors Ltd.

(2) 2007 (1) SCC 566 in case of Jasbir Singh versus Punjab & Sind Bank and others.

(3) 2007 (1) SCC L&S 651 in case of JK Synthetics Ltd. Versus KP Agarwal and Another.

(4) 1998-I-GLR 110 para 5 in case of Veternary Officer & Anr. v. Rajendrasinh R. Jhala.

(5) 2005 (5) SCC 591 Para 8 in case of General Manager, Haryana Roadways versus Rudhan Singh.

4. Relying upon the aforesaid decisions, he submits that before the labour court, gainful employment of the petitioner was not proved by the respondent and, therefore, petitioner is entitled for full or part of back wages for intervening period.

5. As against that, it is submitted by the learned Advocate Mr. Joshi appearing for Nanavati Associates for the respondent that in deposition of the petitioner, one fact was admitted by the petitioner that he has not made any efforts to find out work or employment during the interim period and, therefore, learned advocate Mr. Joshi submits that in absence of the efforts for securing work or employment, presumption is that the workman is working somewhere else or engaged in some work and, therefore, gainful employment is proved.

6. I have considered the submissions made by the learned Advocates for the parties. I have also perused the award in question.

7. From perusal of the award made by the labour court, it appears that the order of dismissal has been set aside by the labour court not only on the ground that the charge levelled against the petitioner is not found to be proved but the order of punishment namely dismissal order has been set aside while considering the gravity of misconduct and as it was found that the punishment of dismissal is disproportionate, therefore, it has been modified in exercise of the powers under section 11A of the ID Act, 1947 by the labour court. In para 13 of the award in question, finding given by the labour court is to the effect that the misconduct is not completely serious in nature but looking to the past record of the workman, this being the first misconduct committed by the petitioner, the labour court has considered length of service of the workman and first misconduct committed by the workman and also came to the conclusion that behaviour of the workman is partly serious in nature and, therefore, petitioner has to suffer some punishment which will be considered to be reasonable and proper. Labour court has considered in para 14 of the award that vide purshis exh. 69 the workman had remained present before the labour court on 12.8.2005 for withdrawal of the matter and at that time, when inquired, it was stated that there has been settlement in the matter of Approval Application NO.11 of 1995 before the Industrial Tribunal, Surat and therefore, based upon the said settlement, there has been settlement in this matter also and, therefore, request was made for withdrawal of the matter. Then, it was observed by the labour court that thereafter, for some unknown reasons, workman had sent letter dated 18.8.2005 by post wherein it was stated that he is not agreeing with the settlement and thus, the labour court has observed that the conduct of the workman during the pendency of the matter was not found to be ordinary and healthy. Such conduct on the part of the workman was noted by the labour court. Petitioner workman reached the age of superannuation on 30.9.2005 and, therefore, question of reinstatement does not arise. When the petitioner was dismissed from service, his elder son was gainfully employed and accordingly, family was maintained by him. This statement was made by the workman before the labour court and it was considered by the labour court and ultimately the labour court came to the conclusion that the petitioner was not interested in job but voluntarily decided not to work and remain unemployed so that he can claim back wages for intervening period without doing work. This modus operandi of the workman has been considered by the labour court while considering the aspect of back wages for intervening period and, therefore, in this back ground, total back wages for intervening period has been denied by the labour court by way of punishment in exercise of the powers under section 11A of the ID Act, 1947. Section 11A of the ID Act, 1947 reads as under:

"11A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen.-Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a labour court, tribunal or national tribunal for adjudication and in the course of adjudication proceedings, the labour court, tribunal or national tribunal as the case may be is satisfied that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require; Provided that in any proceeding under this section, the labour court, tribunal or national tribunal as the case may be, shall rely only on the material on record and shall not take any fresh evidence in relation to the matter."

8. Thus, as per section 11A of the ID Act, 1947, when labour court is satisfied that order of dismissal or discharge was not justified, labour court may by its award set aside order of discharge or dismissal and direct reinstatement of workman on such terms and conditions if any as it thinks fit or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Therefore, labour court is having discretionary power to pass appropriate orders when it is found that the order of punishment is not justified by the employer or when the labour court is not satisfied with such punishment but ultimately, these are the discretionary powers vested in the labour court to grant proper relief in accordance with the facts and circumstances of each case. The labour court has exercised the discretion vested in it under section 11-A of the ID Act, 1947 by denying back wages for interim period by way of punishment. Labour Court is empowered to deny back wages by way of punishment under section 11A of the ID Act, 1947 which is supported by the decision of the apex court in case of Jitendra Singh Rathor v. Shri Baidyanath Ayurved Bhavan Ltd., reported in AIR 1984 Supreme Court 976. In para 3 and 4 of the said decision, the apex court considered the said aspect, therefore, said para 3 and 4 thereof are reproduced as under:

"3. Wide discretion is vested in the Tribunal under this provision and in a given case on the facts established the Tribunal can vacate the order of dismissal or discharge and give suitable directions. It is a well settled principle of law that where an order of termination of service found to be bad and reinstatement is directed, the wronged workman is ordinarily entitled to full back wages unless for any particular reason the whole or a part of it is asked to be withheld. The Tribunal while directing reinstatement and keeping the delinquency in view could withhold payment of a part or the whole of the back wages. In our opinion, the High Court was right in taking the view that when payment of back wages either in full or part is withheld it amounts to a penalty. Withholding of back wages to the extent of half in the facts of the case was, therefore, by way of penalty referable to proved misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty.

4. Under S. 11A of the Act, advisedly wide discretion has been vested in the Tribunal in the matter of awarding relief according to the circumstances of the case. The High Court under Art. 227 of the Constitution does not enjoy such power though as a superior court, it is vested with the right of superintendence. The High Court is indisputably entitled to scrutinise the orders of the subordinate tribunals within the well accepted limitations and, therefore, it could in an appropriate case quash the award of the Tribunal and thereupon remit the matter to it for fresh disposal in accordance with law and directions, if any. The High Court is not entitled to exercise the powers of the Tribunal and substitute an award in place of the one made by the Tribunal as in the, case of an appeal where it lies to it. In this case, the Tribunal had directed reinstatement, the High Court

vacated the direction of reinstatement and computed compensation of Rupees 15,000/- in lieu of restoration of service. We are not impressed by the reasoning of the High Court that reinstatement was not justified when, the tribunal in exercise of its wide discretion given under the law found that such relief would meet the ends of justice. The Tribunal had not recorded a finding that there was loss of confidence of the employer. The job of a librarian does not involve the necessity of enjoyment of any special confidence of the employer. At any rate, the High Court too did not record a finding to that effect. Again there is no indication in the judgment of the High Court as to how many years of service the appellant had put in and how many years of service were still left under the Standing Orders. The salary and other service benefits which the appellant was receiving also did not enter into the consideration of the High Court while computing the compensation. We are, therefore, of the view that the High Court had no justification to interfere with the direction regarding reinstatement to service and in proceeding to substitute the direction by quantifying compensation of Rupees 15,000/- it acted without any legitimate basis."

9. The apex court has, thus, observed that, "In our opinion, the High Court was right in taking the view that when payment of back wages either in full or part is withheld it amounts to a penalty. Withholding of back wages to the extent of half in the facts of the case was, therefore, held by way of penalty referable to proved misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty".

10.In view of the aforesaid observations made by the apex court and considering the provisions of section 11A of the ID Act, 1947, the labour court has power to impose punishment while exercising powers under section 11A of the ID Act, 1947 and while exercising such powers, labour court can deny the back wages for interim period by way of punishment and that has been done by the labour court in the case before hand wherein no error has been committed by the labour court as per the opinion of this court. Finding has been given by the labour court that the misconduct against the workman is proved but it is not so serious and it was the first misconduct of the workman and conduct of the workman is partly serious in nature and, therefore, it require some punishment by way of denial of total back wages for interim period. Labour court has exercised discretion vested in it based on the discussion in para 14 while noting the conduct of the workman to remain unemployed and not to make any efforts for securing any job or work or employment during the interim period because elder son of the petitioner is working and receiving wages. Therefore, labour court has rightly denied back wages for the interim period and in doing so, no error has been committed by the labour court warranting interference of this court in exercise of the powers under Art.227 of the Constitution of India. It is the discretionary jurisdiction of the labour court which has been exercised by the labour court by giving cogent and convincing reasons for not awarding back wages for intervening period. Therefore, as per my opinion, labour court was right in denying the back wages to the petitioner and therefore, award does not require any interference of this court.

11.The decisions referred to above cited by the learned Advocate Mr. YV Shah have been considered by this court. Said decisions are not applicable to the facts of the case before hand because there is no straight jacket formula to grant back wages for interim period. Each case depend upon its own facts and circumstances. In the said decisions, question examined was whether the award of back wages for interim period would be normal consequence or not when the order of dismissal or discharge is set aside on merits. Here the case is totally different because

here the dismissal is not set aside on the ground that charge levelled against the petitioner is not proved but considering the reasoning of Labour Court, it is clear that it has been modified by considering that punishment of dismissal is disproportionate and thus labour court has not completely exonerated the workman from the charges levelled against him and therefore, in view of the peculiar facts of the case before hand, those decisions are not applicable to this case. Therefore, decisions referred to by the learned Advocate Mr. YV Shah are not helpful to the petitioner in the facts of this case. In view of that, the contention of learned Advocate Mr. Shah that labour court has not considered relevant circumstances while denying back wages to petitioner cannot be accepted and same is therefore rejected.

12.Further, even if the workman would have been absolutely exonerated from the charges levelled against him, then also, that itself would not entitle the workman to claim the back wages for the interim period. Here, the petitioner has in terms stated that he has not made any efforts to secure any job or employment during the interim period. For claiming back wages for interim period, it is necessary for the workman to depose on oath that he has remained unemployed inspite of his earnest assiduous efforts to secure job or employment. If the workman makes such statement in his deposition, then, it becomes necessary for the employer to controvert it. Therefore, on that ground also, labour court was justified in rejecting the claim of workman for back wages for interim period since he has not deposed before the labour court that he has remained unemployed during the intervening period. Therefore, contention raised by learned Advocate Mr. Shah that the respondent has not proved gainful employment of the workman and, therefore, workman is entitled for back wages for interim period cannot be accepted and same is therefore rejected.

13.In this case, punishment of dismissal was not set aside by exonerating the workman from the charges levelled against him but it was merely modified. Recently, this aspect has been examined by the apex court in JK Synthetics Ltd. Versus KP Agrawal and another reported in (2007) 1 SCC L&S 651 which decision is also relied by learned Advocate Mr. Shah that when the punishment is modified, then, labour court should not have to grant back wages automatically and it is not a natural and normal consequence. Relevant observations made by the apex court in para 19, 20 and 21 of said decision are reproduced as under:

"19. But the cases referred to above where back wages were awarded, related to termination / retrenchment which were held to be illegal and invalid for non compliance with statutory requirements or relating to cases where the court found that the termination was motivated or amounted to victimization. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or section 11A of the Industrial disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such powers is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for nominal lumsum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such

substitution of punishment (in which event there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held tobe illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is consequence of imposition of a lesser punishment, neither back wage nor continuity of service nor consequential benefit follow as a natural or necessary consequence of such reinstatement. IN cases where misconduct is held to be proved and reinstatement is itself a consequential benefit arising from imposition of lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding delinquent employee and punishing employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly in such cases, even where continuity of service is directed, it should only be for purposes of pensionary / retirement benefits and not for other benefits like increments, promotions etc.

20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages etc. will be the same as those applied in the cases of an illegal termination.

21. In this case, the labour court found that a charge against the employee in respect of serious misconduct was proved. It however held that the punishment of dismissal was not warranted and, therefore imposed a lesser punishment of withholding two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all. "

See : GSRTC versus Kadarbhai J. Suthar, 2007-3- SCALE 39. This legal position decided by three Judges of Apex Court in case of Noida Enterprises Association versus Noida and others.

14.Looking to the finding and reasoning given by the labour court in para 13 and 14 of the award, and observations made by the apex court in aforesaid decisions, according to my opinion, relevant facts and circumstances have been considered and rightly appreciated by labour court for denying back wages for interim period and such award does not warrant any interference of this court in exercise of the powers under Article 227 of the Constitution of India. Therefore, there is no substance in this petition and the same is required to be dismissed.

15.In result, this petition is dismissed. Notice is discharged. No order as to costs.

Petition dismissed.