
(2006) 03 BOM CK 0007

In the Bombay High Court

Case No : Writ Petition No. 1279 of 1991

Bahujan Vikas Education Society and Another

APPELLANT

Vs

Mrs. Vidya Devi Raut and Others

RESPONDENT

Date of Decision : 24-03-2006

Acts Referred:

Citation : (2006) 4 ALLMR 281 : (2006) 44 MhLj 124

Hon'ble Judges : D.S. Zoting, J;A.H. Joshi, J

Bench : Division Bench

Advocate : H.A. Deshpande, for the Appellant; C.K. Sable Advocate for respondent No. 1 and A.D. Sonak, Asstt. Government Pleader, to 4, for the Respondent

Judgement

A.H. Joshi, J.—Heard learned Advocates for the parties.

2. This is a Petition by the Society who is aggrieved by the decision of the Deputy Director of Education communicated by letter, dated 23rd April, 1991, that the Management was responsible to pay the salary and allowances of Smt. Vidya Devi Raut who is present respondent No. 1, and consequential order issued by Education Officer, dated 23rd April, 1991, informing that salary and allowances towards period of unemployment of Smt. Vidya Devi Raut be paid by the Management, and if not paid, the arrears be recovered from the Non-salary Grants payable to the School.

3. The brief background of the case, which needs to be adverted to, is narrated hereinafter.

4. Present respondent No. 1 was appointed by the petitioner-Management as Assistant Teacher. Her services were terminated by notice, dated 2nd April, 1986, as the approval for appointment was for only one year. After six months from the termination, the Education Officer modified the approval and ordered it to be for two years. When the modified approval was issued, the respondent No. 1 herein had already ceased to be an employee of the petitioner. Petitioner did not

reinstate the respondent No. 1.

5. Aggrieved by the notice of termination, respondent No. 1 preferred an appeal before the School Tribunal. The appeal was filed after expiry of period of limitation. The School Tribunal dismissed the appeal on account of delay by Order, dated 20th January, 1988.

6. The respondent No. 1, who was aggrieved by the judgment of the School Tribunal, preferred Writ Petition No. 548 of 1988, which was heard and decided by this Court (Coram: M.S. Ratnaparkhi and M.B. Ghodeswar, JJ.) by Judgment and Order, dated 19th April, 1990. This Court passed the following order:

9. The order passed by the School Tribunal, Nagpur, therefore, deserves to be quashed and set aside. The petition deserves to be allowed. Accordingly the order passed by the School Tribunal, Nagpur, is quashed and set aside. The notice of termination issued by the respondents 1 and 2 to the petitioner is bad. Rule is made absolute in terms above. There shall, however, be no order as to costs.

[quoted from Para 9 at page 24 of the Petition].

7. It is pertinent to note that School Tribunal had not heard the appeal on merits, and was dismissed on the point of delay only. It seems that this Court, however, thought it fit to set aside the order without explicitly stating as to whether:

(i) upon setting aside order, the delay was condoned and appeal was to be re-admitted, heard and decided according to law;

(ii) whether the notice or order of termination, which was subject matter of appeal before the School Tribunal, was set aside, and reinstatement was granted, and

(iii) if order of reinstatement was granted, whether it was with or without back-wages.

8. While the things are left as they exist, parties have proceeded on the common understanding-that present respondent No. 1 has been reinstated.

The respondents, however, construed the order to be of reinstatement as well as of back wages.

9. Due to failure of Management to pay the back-wages, the respondent No. 1 is seen to have given a notice of hunger strike. Consequent thereto, the Deputy Director of Education (respondent No. 3) held some meeting and discussion with Education Officer - respondent No. 2 and issued the communication, dated 23rd April, 1991, which is Annexure "C to the Writ Petition. Contents of this letter, when freely translated, read as follows:

The matter has been discussed in detail with Education Officer (Secondary) about salary payable to Sau. Vidyadevi Raut on 23rd April, 1991. Education Officer has been instructed to release salary and allowances by fixing the liability towards

illegal termination on the Management. Education Officer (Secondary), Zilla Parishad, Nagpur, has accordingly issued appropriate orders.

10. In compliance with the decision referred in above quoted letter, Education Officer - respondent No. 2 issued his communication, dated 23rd April, 1991, which is Annexure-D to the Writ Petition, in which he has issued consequential directions wherein he has fixed the liability on the Management to pay the salary and allowances of the period of unemployment, attributing to the Management the illegality in termination.

11. Management has filed present petition challenging the communications (Exhs.C and D) issued by respondent Nos. 3 and 2 respectively.

Grounds of challenge, as pressed into service, which can be summarized, are as follows:

(a) The judgment of this Court, dated 19th April, 1990, (Exh.B to the petition) rendered in Writ Petition No. 548 of 1988, can, at the most, be construed to order reinstatement and has been so acted upon, however, cannot be construed to award back-wages;

(b) order of back-wages has to be explicit, and can never be by implication;

(c) the Education Officer had no authority or jurisdiction to sit in interpretation and construe the order to include therein what was not included;

(d) the Education Officer or the Deputy Director of Education cannot supplant the direction or a text, which is not present in the order, since such lack of direction will have to be considered to be a conscious judicial action, and not due to clerical error or omission;

(e) the directions issued by Deputy Director of Education as well as Education Officer are without following principles of natural justice.

(f) in view of the law as is laid down by Their Lordships of Supreme Court, reinstatement by setting aside an order of termination is not in itself a self-sufficient order of payment of back-wages, as such payment has to be a conscious judicial act. Moreover, the fact of the employee concerned not being gainfully employed, was required to be proved and could not be presumed.

12. Learned Advocate for petitioners placed reliance on following judgments:

(i) Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, , (ii) Rajasthan S.R.T.C. and Another Vs. Ladulal Mali, , (iii) Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta, , (iv) General Manager, Haryana Roadways Vs. Rudhan Singh, , (v) Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, , (vi) M.P. State Electricity Board Vs. Smt. Jarina Bee, , and (vii) Hindustan Motors Ltd. v. Japan Kumar Bhattacharya and Anr (2003) 6 SCC 41

13. Learned Advocate for the petitioners urged that since the back-wages were not payable under the orders, however, by virtue of order of Education Officer

had become payable. Petitioner had prayed for stay of letters (Annexs. C and D). This Court ordered payment of backwages as condition for stay.

Consequently, arrears in a sum of Rs. 1,12,000-00 were deposited in this Court and the sum of Rs. 01,12,000-00 was paid to the respondent No. 1 against the respondent No. 1's furnishing surety and affidavit. Learned Advocate for petitioner prayed that the amount be ordered to be refunded with interest thereon at 10 per cent per annum.

14. Learned Advocate Mr. C.K. Sable, who opposed the petition, urged that the order passed by the Education Officer is based on plain reading of, the Order of this Court passed in earlier Writ Petition. According to Mr. Sable, when the order of termination was set aside, essential consequence of reinstatement with full back-wages was the only fallout therefrom. He further urged that Education Officer and Deputy Director of Education are the authorities on whom the orders of the School Tribunal and this Court are binding. He, therefore, urged that no interference was called for in the Writ Petition.

15. Learned Advocate Mr. C.K. Sable further and alternatively submitted that the act of withdrawal of amount by the respondent No. 1 was a bona fide act. Respondent No. 1 did not herself commit any overtact. It is only after this Court passed an order directing the deposit of the amount, the respondent No. 1 was permitted to withdraw the amount, instead of the amount to lie in the Court. He further pleaded that a proper latitude should be given to the fact that the respondent No. 1 is a poor teacher.

Learned Advocate further submitted that if at all recovery is to be ordered, it should be ordered without interest and only with sober instalments of Rs. 1000-00 or around that. Learned Advocate Mr. Sable, however, is not in a position to make a statement as to what is the exact carry-home salary and what shall be the monthly deduction.

16. This Court has given anxious consideration to rival submissions. Upon perusal of the precedents - reported judgments cited by the learned Advocate, this Court finds that in the ratio that has been ultimately laid down by the Lordships of Supreme Court in *Kendriya Vidyalaya Sangathan and Anr. v. S.C. Sharma* (supra), the Supreme Court held in Paras 14 to 16, which reads as follows:

14. In *P.G.I, of Medical Education and Research v. Raj Kumar* this Court found fault with the High Court in setting aside the award of the Labour Court which restricted the back wages to 60% and directing payment of full backwages. It was observed thus:

9. The Labour Court being the final Court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and

there is an existing limitation on the High Court to that effect.

Again at para 12, this Court observed: (SCC p. 58)

12. Payment of backwages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of backwages in its entirety.

15. The position was reiterated in *Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya*, *Indian Rly. Construction Co. Ltd. v. Ajay Kumar* and *M.P. SEB v. Jarina Bee*.

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full backwages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to backwages 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.

The ratio that now emerges is that upon setting aside termination, full backwages to follow is not the rule of law or precedent at present.

17. Omission on the part of any Court or Tribunal to incorporate a direction to pay the back-wages cannot be later on filled in any execution proceedings, or by any other executing authority who has not been vested by law any power to supplant any order or direction by denoting such deficiencies or omissions assuming that some such order ought to exist. In view that the position of law as reiterated in recent judgment in case of *Kendriya Vidyalaya Sangathan* (supra), which reiterates the clear proposition of law relying upon three earlier judgments, is a matter of binding precedent.

18. After hearing the case and before delivering the judgment, we had adjourned the case for a hearing on the aspect, for enabling the learned Advocate Mr. Sable to take instructions and to find out as to whether some settlement is possible where the Management can be asked to forgo part of the amount paid by it, however, learned Advocate Mr. Sable has informed the Court that the respondent No. 1 is not ready for any compromise on refund of amount.

19. The proposition advanced by learned Advocate that the order of back-wages has to be express, and cannot be considered or construed to be passed by interpretation and necessary implication, is liable to be accepted. In view of this position, present petitioners' plea that the order of reinstatement, as can be read from the judgment of this Court, cannot be read to include order of back-wages is correct and deserves acceptance by this Court.

Moreover, this Court is not sitting in review at the behest of the teacher in the

judgment passed in Writ Petition No. 584 of 1988 in 1990. The said judgment, which does not expressly grant back-wages, has to be respected and acted upon as it stands.

20. This Court finds that the submission of learned Advocate for the petitioner that an order has to be read as it stands, and none can read it to include something which is in its mind is acceptable. On the submission of learned Advocate that an order of backwages has to be explicit, and it cannot be inferred by implication, this Court finds that the ratio laid down by the Hon"ble Supreme Court in various cases supports the plea raised by the petitioner. In the result, on facts, this Court finds as follows:

(a) That the judgment of this Court on which the respondent No. 1 has relied for the relief of reinstatement does not spell out that this Court has ordered "reinstatement with full backwages.

(b) Absence of mention of payment of full backwages has to be read as a conscious judicial act.

(c) The authorities of the Education Department are not competent to infuse something in the operative order of this Court, and in the result, Annexures-B and C are illegal and without jurisdiction.

(d) Respondent No. 1 was not entitled to receive backwages.

(e) The amount received by the respondent No. 1 under the order of Court is liable to be refunded.

21. Considering the various aspect of the matter, this Court finds that the petition must succeed. However, insofar as recovery is concerned, considering the financial status, i.e., the respondent No. 1 is a Teacher, some latitude can be given. This could be in the nature of ordering recovery by monthly instalments of Rs. 2,500-00 (rupees two thousand five hundred only) per month from the salary and allowances, and in the event, the respondent No. 1 retires, before the recovery is completed, the balance be recoverable at once from the retiral benefits. The amount of Rs. 01,12,000-00 (rupees one lakh twelve thousand only) be paid by the respondent No. 1, and respondent No. 1 shall refund to the petitioner-Management the said amount along with simple interest thereon at the rate of six per cent per annum from the date of deposit of amount in this Court till the amount is fully recovered on the reducing balance basis.

22. In the result, Rule is made absolute in terms of Prayer Clause (i) which reads as follows:

(i) quash and set aside the impugned orders dated 23-4-1991 issued by the Education Officer and the Deputy Director of Education at Annexures C and D by a writ of Certiorari and/or any other appropriate writ, order or direction.

Petitioner shall be entitled for recovery which be caused as indicated in foregoing para No. 21 which be got done by the respondent Nos. 2 to 4.

23. Parties shall bear respective costs.