

(2010) 03 JH CK 0059
In the Jharkhand High Court

Bhubaneshwar Mallick

APPELLANT

Vs

Employer in relation to the Management of Central Coal
Fields Limited and The Presiding Officer, Central Government
Industrial Tribunal (No. 2)

RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Citation : (2010) 03 JH CK 0059

Hon'ble Judges : Amareshwar Sahay, J

Bench : Single Bench

Judgement

Amareshwar Sahay, J.—Heard the parties.

2. The petitioner, i.e. the concerned workman has filed this writ petition challenging that portion of the award of the Central Government Industrial Tribunal, Dhanbad, dated 15th May 2001, whereby, the Industrial Tribunal after holding the dismissal of the concerned workman to be not justified and directed for his reinstatement but did not allow the privilege of back wages. In other words (the refusal of the Industrial Tribunal to award back wages in under challenge in this writ application.

3. In view of the limited question involved in this writ application, it is not necessary to state in detail the facts of the case. Suffice is to say that the petitioner, who was dismissed from the employment of the Central Coalfields Limited after domestic enquiry, has been ordered to be reinstated in service by the Industrial Tribunal, holding that the petitioner was not found guilty of misconduct and, consequently, his order of termination was set aside.

4. The learned Counsel appearing for the petitioner submitted that the Tribunal has not assigned any reason for refusal to award back wages to the petitioner. According to him, if the termination of a workman is held to be illegal and consequently such termination from service is set aside then in that case the award of back wages is consequential and it has to be made therefore, the

Industrial Tribunal ought to have awarded consequential relief of full back wages to the petitioner. In support of such submissions, the learned Counsel for the petitioner relied on the decisions of the Supreme Court in the cases of Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 ", "Union of India and Ors. v. Ramchander and Anr. reported in (2005) 9 SCC 365", General Manager, Haryana Roadways Vs. Rudhan Singh, , Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, ", U.P.S.R.T.C. Ltd. Vs. Sarada Prasad Misra and Another, " and in the case of "Mahendra Harizan v. State of Jharkhand and Ors. reported in 2006(2) JLJR, 591

5. On the other hand, Mr. Ananda Sen, learned Counsel appearing for the respondents CCL submitted that the condition prevalent for awarding compensation is that the workman has to prove first that he was not gainfully employed anywhere during the period he was out of service and this burden of proof is on the concerned workman. If the workman does not prove the said fact by cogent evidence then no back wages can be allowed. He further submitted that before awarding back wages the Tribunal has to come to the conclusion that the workman was unemployed during the period he was out of service. Therefore, the findings in this regard is must whereas in the present case neither the petitioner adduced any evidence before the Tribunal to the effect, that he was not employed gainfully during the period he was out of service nor there is any finding of the Tribunal in that regard and, therefore, the petitioner's claim for back wages cannot, be allowed.

6. I have gone through the decisions cited by the respective parties and after going through the said decisions it appears to me that no doubt earlier the view of the Supreme Court was that once the termination is found to be illegal, consequential order for grant of back wages was must except for the reasons justifying a departure from normal order, as was held in the case of "Manorma Verma (Smt) v. State of Bihar and Ors. reported in (1994) Supp (3), SCC, 671". But, subsequently, in the case of General Manager, Haryana Roadways Vs. Rudhan Singh, ", the Supreme Court has held that there is no rule of thumb that in every case where Industrial Tribunal gives finding that termination of service was bad, entire back wages should be awarded. Order for payment of back wages should not be passed in mechanical manner but a host of factors have to be considered.

Same view was taken by the Supreme Court in the case of Muir Mills Unit of N.T.C. (U.P) Ltd. Vs. Swayam Prakash Srivastava and Another, ", wherein it was held that payment of full back wages is not a natural consequence of setting aside an order of termination of services.

In the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, ", the Supreme Court held as follows:

The manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or

natural consequence of reinstatement. There has also been a noticeable shift in placing the burden of proof in regard to back wages. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed.

Even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment.

7. In view of the aforesaid decisions of the Supreme Court noticed

above, there is no doubt in my mind that awarding back wages full or part depends on the facts and circumstances of the each case. There is no hard and fast rule that only because the termination is set aside holding to be illegal the award of full back wages as consequential benefit is must.

It is for the workman to plead first in his pleading that he was not gainfully employed anywhere during the period he was out of service and if such statements on behalf of the workman are made then the onus to rebut the said plea of the workman shifts on the employer.

8. In the present case, from the pleadings of the concerned workman, i.e. the petitioner before the Industrial Tribunal, which has been annexed with this writ petition, I do not find that the petitioner has stated anything that he was not gainfully employed at any place during the period he was out of service. Even otherwise from the side of the Management also nothing has been brought on record that the workman was gainfully employed somewhere. From the impugned award of the Industrial Tribunal also it appears that he has also not assigned any reason for not awarding back wages.

9. Considering the above facts as well as the fact that the concerned workman has now retired from service in June 2009 during the pendency of this writ

petition and he was reinstated in service in 2005-2006, in my view for the ends of justice, the petitioner should be awarded 25% of the back wages for the period he was out of service, i.e. from the date of his termination till the date of his reinstatement in service. Accordingly, the respondents are directed to pay 25% of the back wages to the petitioner within a period of one month from today.

With the above modification in the impugned order, the writ petition stands disposed of but without any cost.