

(2018) 10 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 01 Of 2012, IA No. 2127 Of 2011

Ghulam Hassan @APPELLANT@Hash Union of India and others

Date of Decision : 01-10-2018

Acts Referred:

Central Reserve Police Force Act, 1949 — Section 11(1)

Citation : (2018) 10 J&K CK 0007

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Sachin Dogra, Vishal Bharti

Final Decision : Dismissed

Judgement

1. Order dated 18.03.2009 passed by the respondent No.5 is subject matter of challenge in this writ petition.

2. The facts in brief leading to the filing of this petition are that the petitioner was an employee of the Central Reserve Police Force (CRPF in short) and was working as Head Constable when he was placed under suspension by the respondents and subsequently compulsorily retired from the service under Section 11(1) of the CRPF Act. The penalty of compulsorily retirement imposed upon the petitioner was assailed by the petitioner in SWP No. 1891/2000, which was allowed by a Bench of this Court vide its order and judgment dated 08.10.2001. The order of compulsorily retirement was set aside and petitioner was held entitled to re-instatement. The Court, however, left it free to the respondents to pass a fresh order in accordance with law. The respondents assailed the order of Single Bench in LPASW No. 38/2002 and Division Bench of this Court vide its judgment dated 14.09.2007 dismissed the appeal and upheld the judgment of the Single Bench. The petitioner claims that the respondents even approached the Hon'ble Supreme Court by way of Special Leave Petition but the same was also dismissed by the Apex Court on 15.12.2008. With a view to seek implementation of the judgment passed by this Court and upheld upto Supreme Court, the petitioner filed contempt petition. The order of Single Bench was complied with by the respondent No.5, who vide his Order dated 18.03.2009

re-instated the petitioner w.e.f. 18.03.2009 and treated the period of his absence from the date of his compulsory retirement, i.e., 27.02.2000 to the date of reinstatement, i.e., 17.03.2009 as qualifying service for pensionary purpose, but did not allow any pay and allowance for the aforesaid period on the ground that during the said period the petitioner had not performed any duty.

3. The petitioner is primarily aggrieved of the last portion of the order impugned whereby he has been denied the pay and allowance for the period he remained out of service, i.e., from 27.02.2000 to 17.03.2009 and is, therefore, before this Court in the instant petition.

4. The petitioner has claimed writ prayed for on the ground that once the penalty of compulsorily retirement imposed upon the petitioner was set aside by the Court and the petitioner was held entitled to reinstatement, there was no reason or occasion for the respondents to deny him the pay and allowance for the period he remained out of service because of the lapse and illegality committed by the respondents. It is submitted that it is not a case where the petitioner had been offered to perform the duties and he failed to do so that the principle of "no work no pay" could be made applicable.

5. On the other hand, the respondents have filed their reply affidavit. The stand taken by the respondents is that the judgment dated 08.10.2001 passed in SWP No. 1891/2000 has been complied with by the respondents in letter and spirit in terms of the order dated 18.03.2009 impugned in this writ petition. It is stated that this Court while allowing the writ petition SWP No.1891/2000 had only directed the respondents to reinstate the petitioner without giving any direction for payment of wages. It is, thus, urged that the order of compulsory retirement of the petitioner was not set aside by the Court on merit but was on technical grounds, leaving it open to the respondents to hold a fresh inquiry and impose the penalty, which is commensurate to the alleged lapse/mis-conduct attributed to the petitioner.

6. Having heard learned counsel for the parties and perused the record, this Court is of the considered view that the petitioner in the instant case is not entitled to claim back wages upon her reinstatement as a matter of right. It is trite law that a workman cannot claim back wages upon his re-instatement by the Court as a matter of right. It depends upon the facts and circumstances of each case. In case an employee lays a claim for back wages on his re-instatement by the Court, it is necessary for him to plead and prove with the aid of evidence that during the period he remained out of action because of order of his dismissal/discharge or termination, he was not gainfully employed anywhere and had no means to earn and maintain himself and his family. Once this initial burden is discharged, it is then for the employer to show that the employee was not entitled to any back wages on the principle of "no work no pay" as during the period the employee was out of action, he was gainfully employed.

7. The aforesaid question fell for consideration in the recent judgment of Hon'ble

Supreme Court rendered in the case of Rajasthan State Transport Corporation Jaipur v. Shri Phool Chand in Civil Appeal No.1756 of 2010, which was decided by the Hon'ble Supreme Court on 20.09.2018. The Hon'ble Supreme Court after taking note of the case law on the subject in paragraphs 11, 12 and 13 held as under :-

"11. In our considered opinion, the Courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.

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.

13. In some cases, the Court may decline to award the back wages in its entirety whereas in some cases, it may award partial depending upon the facts of each case by exercising its judicial discretion in the light of the facts and evidence. The questions, how the back wages is required to be decided, what are the factors to be taken into consideration awarding back wages, on whom the initial burden lies etc. were elaborately discussed in several cases by this Court wherein the law on these questions has been settled. Indeed, it is no longer *res integra*. These cases are, *M.P. State Electricity Board vs. Jarina Bee(Smt.)*, (2003) 6 SCC 141, *G.M. Haryana Roadways vs. Rudhan Singh*, (2005) 5 SCC 591, *U.P. State Brassware Corporation vs. Uday Narain Pandey*, (2006) 1 SCC 479, *J.K. Synthetics Ltd. vs. K.P. Agrawal & Anr.*, (2007) 2 SCC 433, *Metropolitan Transport Corporation vs. V. Venkatesan*, (2009) 9 SCC 601, *Jagbir Singh vs. Haryana State Agriculture Marketing Board & Anr.*, (2009) 15 SCC 327) and *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya(D.Ed.) & Ors.*, (2013) 10 SCC 324.

8. In *Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd.*, (1979 (2) SCC 80). The three judges Bench of the Hon'ble Supreme Court has laid down as under :-

"In the very nature of things there cannot to a straight jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on of the

face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice? according to law and not humor. It is not to be arbitrary, vague and fanciful but legal and regular (See *Susannah Sharm v. Workfile*).

9. In similar manner, the Hon'ble Supreme Court in *Chairman-Cum-M.D Coal India Ltd and others Vs Ananta Saha & Ors* reported in 2011 (5) SC 142 has held that the issue of entitlement of back wages has been considered by this Court time and again. It has been consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/ court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic.

10. Coming to the facts of the case and applying the aforementioned principles enunciated by the Supreme Court, it is noticed that the charges against the petitioner which ultimately led to his compulsory retirement by the respondents under Section 11(1) of the CRPF Act were that he had committed disobedience of the orders of his superior and thus created indiscipline in his capacity as a member of the force. The other charge against the petitioner was that he had remained unauthorisedly absent from the Camp without intimating or seeking permission from the competent authority. The disciplinary authority after findings the aforesaid charges having proved and also taking note of his past conduct passed an order of compulsory retirement from the service against the petitioner. As stated above, this was challenged by the petitioner before this Court in SWP No.1891/2000. The writ petition was allowed vide judgment dated 08.10.2010. The order of compulsory retirement of the petitioner was set aside and the petitioner was ordered to be re-instated.

11. From the perusal of the judgment passed by a Bench of this Court which was upheld upto the Apex Court, it is abundantly clear that the order of compulsory retirement passed against the petitioner was not set aside by the Court on its merits but on technical grounds. It is because of this reason only the Court while allowing the writ petition of the petitioner permitted the respondents to pass fresh order in accordance with law. The order of compulsory retirement of the petitioner was found fault with by this Court primarily on two counts:-

(i) That the disciplinary authority besides taking note of the charges framed against the petitioner had also relied upon his past conduct without putting the same to the petitioner and therefore, the inquiry was vitiated; and

(ii) That the disciplinary authority had not considered the judicial precedent providing that punishment to be inflicted upon the delinquent should be commensurate with the lapse attributed.

12. In these circumstances, petitioner cannot contend that penalty of compulsory retirement imposed upon him was wholly bad and unsustainable on merits. That apart there is another aspect which cannot be last sight of. It is, that when the writ petition was allowed by this Court, the Court only set aside the penalty of compulsorily retirement and directed re-instatement of the petitioner without providing that on re-instatement the petitioner would also be entitled to back wages. The Court did not even leave this to be determined by the respondents. Instead a liberty was given to the respondents to hold a fresh inquiry. Once a particular relief which was available to a party has been denied in the earlier writ petition, the same cannot be claimed in the subsequent writ petition, in that, it would operate as res-judicata.

13. For the aforesaid reasons and also keeping in view the settled principles of law laid down on the subject, this Court is of the considered opinion that the facts and circumstances of the instant case do not warrant grant of back wages to the petitioner. More so, when this Court does not find any averment in the writ petition that during the relevant period, the petitioner was not gainfully employed anywhere. Recent judgment of the Supreme Court rendered in Rajasthan State Transport Corporation Jaipur V. Shri Phool Chand in Civil Appeal No.1756 of 2010 on 20.09.2018 (supra) clearly lays down that the foundation has to be laid by the employee claiming back wages that during the period he was out of service, he was not gainfully employed. It is only when initial burden is discharged by the employee the burden shifts to the employer. In absence of such pleadings and the denial of aforesaid relief in the earlier round of litigation, this petition for claiming back wages filed by the petitioner is not maintainable.

14. Learned counsel for the petitioner has relied upon the judgment of the Supreme Court rendered in case of Union of India v. K.V.Jankiraman, reported in AIR 1991 SC 2010, Shoba Ram Raturi v. Haryana Vidyut Prasara Nigam Limited and others reported in AIR 2016 SC 157, Bilaspur Raipur Kshetriya Gramin Bank and another v. Madanlal Tandon reported in 2015 (8) SCC 461, Ramesh Kumar v. Union of India and others, reported in AIR 2015 SC 2904, and State of Uttar Pradesh v. Dayanand Charawarti and others reported in 2013 (7) SCC 595. The law on the subject has been summed up by the Hon'ble Supreme Court in a recent judgment dated Rajasthan State Transport Corporation Jaipur v. Shri Phool Chand in Civil Appeal No.1756 of 2010 (supra) and also the Hindustan Tin Works Ltd. and therefore, does not call for any reiteration.

15. Viewed thus, I do not find any merit in this petition. Accordingly, the same is dismissed along with connected MP(s).