

(2011) 10 AHC CK 0162

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 69720 of 2010

Jagran Prakash Ltd.

APPELLANT

Vs

Principal Secretary, Labour Deptt. and Others

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 311(2)
Evidence Act, 1872 — Section 106

Citation : (2011) 11 ADJ 267

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Sunil Tripathi and Amitabh Trivedi, for the Appellant; Bushra Maryam, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Amitabh Trivedi, learned counsel for the petitioner and Ms. Bushra Mariyam appearing for respondent No. 3 - the contesting respondent and learned Standing Counsel for respondents No. 1, 2 and 4. As agreed by learned counsel for the parties, the Court proceeded to decide the matter finally under the Rules of the Court at this stage. The writ petition is directed against the award dated 4th June, 2010 of Industrial Tribunal (1), U.P., Allahabad (hereinafter referred to as "Tribunal") in adjudication case No. 71 of 2006.

2. An industrial dispute vide notification dated 2.12.2005 was referred for adjudication by Tribunal to the following effect:

3. The claim set up by the workman i.e. respondent No. 3 Kripa Shankar Bajpayee was that he was appointed as Reporter/Sub-Editor by an oral order in December, 1972 and since then he is regularly working with the petitioner, a well known Hindi Newspaper publication namely "Jagran Prakashan Ltd." (hereinafter referred to as "employer"). The employer started publication of its daily newspaper "Dainik Jagarn" from Varanasi in 1982.

4. In regard to the transfer of employees, there was a settlement between Employees' Union and employer on 31st August, 1981 that no employee shall be transferred without his consent and shall not be victimized. It was also settled that main office of employer shall remain at Allahabad.

5. The workman-respondent No. 3 was transferred to Varanasi wherefrom he was transferred to Sonbhadra and other places. On 6/7th December, 2002, when workman-respondent No. 3 went to join duty at Robertsganj, he found one Chandra Kant Pandey working thereat. The workman-respondent No. 3 was not informed where he would work. The employer put pressure upon respondent No. 3 to submit resignation to which he did not agree. As a result whereof, the employer started victimization tactics. A letter dated 11.12.2002 was given to the workman which was replied by him alongwith medical certificate. On 23rd January, 2003, the workman sought to join after getting himself fit for joining whereupon the employer required him to work in Editorial Department at Varanasi, whereat he had to work on Internet. He informed of his unawareness of computer operations for which he sought time to learn. The management leveled certain allegations on him by letters dated 17.2.2003 and 20.3.2003 alleging that he is continuously absent from 28th January, 2003.

6. Later on, a charge-sheet was issued on 9th April, 2003 which was received by the workman on 23rd April, 2003, hence he sought two week's time by letter dated 24th April, 2003 since the charge-sheet required him to submit reply by 19th April, 2003. He submitted explanation on 3rd May, 2003. Later on, a newspaper publication on 20th June, 2003 brought to his knowledge a news item asking him to attend enquiry proceedings before one K.P. Singh, Enquiry Officer, but no address etc. was published in the newspaper, though, he was required to attend enquiry on 8th July, 2003. The workman informed the employer about his inability to attend enquiry on 8th July, 2003 due to his illness vide letter dated 5th July, 2003. Ultimately, 19th July, 2003 was fixed for oral hearing but this information petitioner received on 21st July, 2003 through letter dated 17th July, 2003. The employer, however, dismissed the workman-respondent No. 3 on 16th September, 2003 where against industrial dispute was raised wherein pleadings were exchanged and thereafter Tribunal, by means of impugned award, has held dismissal illegal and in violation of principles of natural justice. Since workman in the meantime had crossed the age of superannuation, the relief of reinstatement was not granted but from the date of dismissal till the date of attaining age of superannuation, he has been allowed entire benefits including arrears of salary, continuity of service and other benefits.

7. The employer had challenged the impugned award on the ground that earlier letters were issued and sent by registered post as also some were published in newspaper but despite receiving information, the workman failed to participate with the enquiry proceedings. Despite all these correspondence, the Tribunal, having held that proceedings are in violation of the principles of natural justice has committed patent error of law apparent on the face of record and therefore,

the award deserves to be set aside. Reliance is placed on Board of Directors, H.P.T.C. and Another Vs. K.C. Rahi, , Pepsu Road Transport Corp. Vs. Rawel Singh, , Chairman, Ganga Yamuna Gramin Bank and Others Vs. Devi Sahai, and S.B.I. Vs. Hemant Kumar, .

8. It is next contended that the continuous absence on the part of workman shows a conduct disentitling relief of full back wages and Tribunal has erred in law by holding that workman was entitled for full back wages for the period he remained out of job. The workman did not plead and prove that he was unemployed throughout and despite his efforts could not get any alternative employment hence also relief of full back-wages could not have been granted. Reliance is placed on the Apex Court's decisions in Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, , U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, , J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, and Novartis India Ltd. Vs. State of West Bengal and Others, .

9. Lastly, it is contended that even if dismissal or retrenchment is held illegal, relief of reinstatement and/or full back wages is not automatic but various aspects have to be considered. The Tribunal in a given case may award a lump sum compensation instead of full back wages or relief of reinstatement etc., and reliance is placed on Madhya Pradesh Administration Vs. Tribhuban, , Ashok Kumar Sharma Vs. Oberoi Flight Services, , U.P. State Electricity Board Vs. Laxmi Kant Gupta, and Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another, .

10. Per contra learned counsel for the respondent-workman, relying on the findings recorded by Tribunal, contended that after relying entire evidence on record, Tribunal has rightly arrived at the conclusion that dismissal of workman was illegal being in violation of principles of natural justice and he was victimized hence no interference is called for on the factual findings recorded by Tribunal with respect to the question of validity of dismissal of the workman. So far as the relief granted by the Tribunal is concerned, counsel for the respondent-workman contended that it was specifically pleaded by workman that he was unemployed throughout and this pleading was not disproved by the employer in any manner, hence with respect to the relief granted by Tribunal, no interference is called for. She also relied on the judgment of this Court in Kishori Lal Vs. Chairman Board of Directors, .

11. I have heard learned counsel for the parties and perused the record as also the authorities cited at the bar.

12. It is nobody's case that termination/dismissal of workman being founded on alleged misconduct, observance of principles of natural justice in holding regular departmental enquiry was not required. Both admits that it was a must. In substance, only two questions have cropped up in this case requiring adjudication by this Court:

a. Whether disciplinary enquiry conducted against workman-respondent No. 3

satisfy requirement of principles of natural justice i.e. adequate opportunity of defence.

b. Whether relief of full back-wages for the period workman remained out of job with all benefits is the proper relief granted by Tribunal to the workman.

13. Coming to the first issue, it is evident from record that charge-sheet was issued to workman on 9th April, 2003 which was replied by him on 3rd May, 2003. Sri Krishna Prasad Singh, Advocate, resident of Village Bakhariya, Post Bankat Newada, District Varanasi practicing in District Court, Varanasi was appointed Enquiry Officer. This information of appointment of Enquiry Officer as also first date of oral enquiry fixed by the Enquiry Officer is contained in employer's letter dated 14th May, 2003 (Annexure 10 to the writ petition). This letter sent to the workman at his address 61-D/11-D, Om Gayatri Nagar, Allahabad by registered post. The place of enquiry was employer's office at Varanasi.

14. Alleging that respondent No. 3-workman had not appeared in oral enquiry on 27th May, 2003 another letter dated 27.5.2003, Annexure 11 to the writ petition, was issued by employer communicating next date of oral hearing being 7th June, 2003. It was also sent by registered post to workman's address at Allahabad.

15. The third letter is dated 9th June, 2003 sent by employer communicating the next date of oral enquiry being 18th June, 2003 observing that despite information on the earlier two occasions, the workman had failed to attend enquiry. This letter was also sent by registered post. The statement of Enquiry Officer, who himself deposed before the Tribunal, copy whereof is filed as Annexure 9 to the writ petition, shows that employer filed a registered envelope, paper No. 11, which was marked as Exhibit E-25 containing an endorsement of postman about return of the registered letter since the addressee despite repeated visit was not found. It shows that aforesaid registered letters were actually not served upon the workman.

16. From the record it has not been clarified as to paper No. 11 i.e. Exhibit E-25 refers to the letter of which date. But, to my understanding, since letter dated 20th June, 2003 and its registry receipt is marked as Exhibit 23 and E-24, the envelope E-25 must have contained letter dated 20.6.2003 which was returned to enquiry officer unserved upon the addressee.

17. In para 11 of the writ petition it is said that receipt of this letter has been admitted by workman in para 21 of the written statement filed before the Tribunal but a careful reading thereof falsify the said stand of the employer. Para 21 of written statement of the workman shows that he has referred to a news item published in daily newspaper Daink Jagran on 20th June, 2003, at page 4 containing information about appointment of Sri K.P. Singh as Enquiry Officer. The workman consequently sent a letter dated 20th June, 2003 himself complaining the employer that till the date he had not received any information regarding appointment of any enquiry officer or conduct of departmental enquiry

and also complained that no address for correspondence with Enquiry Officer was mentioned in the newspaper. The newspaper mentioned 25th June, 2003 as a last date of enquiry for which the workman requested to bring his defence representative.

18. It is not the case of the employer that workman's letter dated 20th June, 2003 was not received by the employer or Enquiry Officer or that it was replied by them at any point of time. On the contrary the enquiry officer in para 4 of his letter dated 26.6.2003 (Annexure 14 to the writ petition) admits receipt of letter dated 20.6.2003 sent by workman and fixed 8th July, 2003 to consider and pass order on this letter dated 20.6.2003. Therefore what transpired from Enquiry Officer's letter dated 26th June, 2003 is that 8th July, 2003 was fixed not for holding oral enquiry with respect to the charge-sheet as such but only for the purpose of considering workman's letter dated 20.6.2003 on which date the employer was permitted to file objection and the same was to be disposed of on 8th July, 2003. The decision taken on 8th July, 2003 is contained in Enquiry Officer's letter dated 11th July, 2003 (Annexure 15 to the writ petition) whereby he fixed 19th July, 2003 for oral enquiry at Varanasi and informed workman that his requests for being represented by Sri Ravindra Srivastava, a defence representative, as also change of venue of enquiry from Varanasi to Allahabad have been rejected. The information of fixation of 19th July, 2003 as next date for oral enquiry is also said to have been published in the newspaper "Daink Jagran" on 12.7.2003, as stated in the enquiry report. The workman had also mentioned in para 24 of written statement before Tribunal that he was unwell and therefore requested for adjournment on 8th July, 2003 vide his letter dated 5th July, 2003. This para has been replied in para 14 of the rejoinder affidavit of the employer filed before the Tribunal wherein receipt of this letter has not been disputed and nothing has been said as to what order was passed on the said application.

19. In the entire pleadings before Tribunal, employer has not doubted even for a moment about the illness of workman, The workman claimed to have sent two more letters on 14th July, 2003 and 21st July, 2003 communications his illness and inability to attend oral enquiry proceedings for some time. Reference of these letters has come in paras 25 and 26 of written statement of workman filed before Tribunal. The employer has replied these averments in para 15 of the rejoinder affidavit filed before the Tribunal but without saying anything regarding correctness of workman's claim about his ill health, the employer simply says that workman's letters were replied by the management and yet he did not participate in the enquiry. The enquiry officer's reply dated 17th July, 2003 referred to in paras 25 and 26 of the written statement which the workman claim to have received on 21st July, 2003 has also not been said to be incorrect in para 15 of the rejoinder affidavit filed before the Tribunal but by a simply vague denial, inquiry officer has proceeded ex parte on 19th July, 2003 and submitted enquiry report on 24th July, 2003. It is also evident from entire proceedings that in ex parte oral enquiry though various dates were fixed but actually only on

19th July, 2003 the oral hearing actually took place. A copy of the enquiry report dated 24.7.2003 was communicated to the workman vide employer's letter dated 20.8.2003.

20. The enquiry report shows that on 19th July, 2003 Enquiry Officer passed an order for ex parte enquiry and recorded statements of Sri Ramendra Kumar Srivastava, Ram Ji Lal and Anwar Ali. It is interesting to note that Anwar Ali was also Presenting Officer of the employer before Enquiry Officer. The employer adduced 21 documents besides oral evidence. It has not come on record at what time the names of witnesses as also the documentary evidence or list of documents was ever apprised to the workman.

21. The alleged charge-sheet dated 9.4.2003, Annexure 18 to the writ petition, after referring to the allegations, require the workman to submit his reply by 19th April, 2003 as to why departmental enquiry be not initiated against him. Meaning thereby, though certain allegations are contained in the alleged charge-sheet dated 9.4.2003 but this by itself is not initiation of departmental enquiry as the employer gave an impression to the workman concerned that he has to submit reply so as to decide why disciplinary proceedings may not be initiated against him. It is well established that departmental enquiry commence with issuance of charge-sheet. The letter dated 9th April, 2003, which is claimed by the employer to be a charge-sheet, is not a charge-sheet as such since the employer themselves did not treat it commencement of departmental enquiry and required workman to explain why it should not be initiated against him. Therefore, after the letter dated 9th April, 2003, employer was under an obligation to pass an order for initiation of departmental enquiry and thereafter, to issue a charge-sheet to the workman concerned containing specific allegations of acts or omissions constituting misconduct on his part and also to apprise him of the evidence sought to be relied in support of those charges.

22. It is not the case of the petitioner that any such procedure was ever followed. The letter dated 14th May, 2003 also shows that the employer told the workman that having found his reply unsatisfactory, management has decided to hold a domestic enquiry against the workman and for that purpose Sri K.P. Singh, Advocate Civil Court Varanasi is nominated as enquiry officer. Thereafter certain dates, as discussed above, were fixed but on 19th July, 2003 the enquiry officer when decided to proceed ex parte, failed to consider that evidence he has admitted on behalf of the employer were never communicated or informed to the workman. He was never granted any opportunity to prepare his matter with respect to the evidence, if any. Admittedly, as is also clear from the oral statement of enquiry officer deposed before the Tribunal, the procedure of enquiry contemplated in the Standing Orders had not been followed by enquiry officer and it was also not placed before the Tribunal.

23. In my view the enquiry officer, in this case, has tried to observe a kind of technical compliance of opportunity without making it, effective and real. He has failed to consider that before imposing drastic punishment of dismissal having

effect of depriving an employee his right to earn livelihood, opportunity of defence must be substantial, effective and real. There is nothing like a technical compliance of principles of natural justice. It is true where the employee is afforded appropriate opportunity, yet he failed, he cannot be heard of complaining of non affording of opportunity but that will not apply to a case where the opportunity afforded to the employee is not real, genuine and substantial.

24. In Board of Directors, Himachal Pradesh Transport Corporation and another (supra) the Tribunal, as a matter of fact, recorded a finding that the employee was well aware of departmental enquiry initiated against him and intentionally avoided service of notice and did not participate the proceedings. In view of the above findings of fact, the Apex Court said that under Article 226 the High Court should not reappreciate evidence recorded by the Court of first instance under Article 226. The power under writ jurisdiction can be exercised only when there is miscarriage of justice or an error of law on the face of record. The Court also observed that the complaint of non observance of principles of natural justice can be sustained when one is able to establish of having been prejudiced for non compliance with principles of natural justice. I do not find the said case helping the petitioner in any manner for the reason that the tribunal in the instant case has recorded findings of fact against the employer and unless it is shown to be perverse at this stage no interference under Article 226 would be called for.

25. Similarly in Pepsu Road Transport Corporation (supra) the Apex Court found that charge-sheet was received by the employee, he filed his reply and also appeared before the enquiry officer but subsequently absented himself. This is evident from para 14 of the judgment:

...he filed his reply, he also appeared before the enquiry officer but subsequently he did not remain present and absented himself.

26. It is in these circumstances, Apex Court found that ex parte enquiry conducted by enquiry officer cannot be followed, Regarding the complaint of non-supply of documents, the Apex Court found:

...the documents had been supplied to the workman and the said fact had been admitted by him (see para 15)

27. The Court further observed that the enquiry officer himself asked the workman whether he required any document to which the workman replied in negative. The Apex Court in these circumstances said, had the employee continued to attend enquiry and participated therein, he could have got documents from the enquiry officer. Further if he had lost documents received earlier for his own fault, he cannot complain of violation of principles of natural justice. Thus the Apex Court said:

....the Labour Court was wholly wrong in holding that enquiry was not fair. To us, it is not the case of extending an opportunity to the employee but not availing of

opportunity by the employee.

28. The aforesaid judgment also would lend no credence to the petitioner.

29. In *Chairman, Ganga Yamuna Gramin Bank (supra)* the question arose whether a second show cause notice was mandatory after receipt of the enquiry report. No such provision contained in the Regulations applicable to the parties but for the said purpose reliance was placed on the guidelines issued by NABARD. It is in this context the Apex Court held in para 19 of the judgment:

Issuance of second show-cause notice for the purpose of obtaining the views of delinquent officer in regard to quantum of punishment is not a part of the common law principles of natural justice. Such a provision could be laid down by reason of a statute. The respondent does not enjoy any status. The service conditions of employees of the Regional Rural Banks are not protected in terms of Article 311(2) of the Constitution of India.

30. It further proceeded when a copy of the enquiry report was given to the delinquent employee but he chose not to submit any reply but contended that before punishment he was not afforded any opportunity, without showing any prejudice, is unacceptable so as to interfere with the order of punishment on the anvil violation of principles of natural justice. In this context the Apex Court also held that guidelines of NABARD are only for the guidance of Regional Rural Bank and the same is not mandatory in character. This decision also does not help the petitioner.

31. In *Bank of India Vs. Apurba Kumar Saha*, , a judgment relied in *Chairman, Ganga Yamuna Gramin Bank (supra)* the Court found that employee avoided filing of reply to the charge-sheet and refused to participate in disciplinary proceedings for no valid reason. It is in these circumstances the Apex Court said:

A bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct involving his integrity and dishonesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges leveled against him and the disciplinary proceeding conducted against him by the bank employer had resulted in violation of principles of natural justice of fair hearing.

32. Lastly, in *S.B.I. v. Hemant Kumar (supra)* despite communication of dates of earlier enquiry, the employee repeatedly failed to appear and that too without any reason and information to the employer or the enquiry officer. It is in these circumstances, the proceedings held ex parte. The facts justify ex parte enquiry as observed by Apex Court and interference by Tribunal in such proceedings was held bad.

33. In our case, the situation is different. The alleged charge-sheet does not talk of initiation of any proceeding but require the workman to submit reply as to why disciplinary proceedings should not be initiated against him. The workman

submits reply. Thereafter by first letter enquiry officer was appointed and date for oral enquiry was fixed. No charge-sheet, no list of documents or witness was conveyed to the workman concerned. Even the letter fixing date for oral enquiry is not shown to have been served upon the concerned workman and one such letter specifically shown to have been returned by the Postal Department as unserved. Thus up to 25th June, 2003 i.e. first four dates, no culpability on the part of the concerned workman showing his intention of non participation in the oral enquiry can justifiably be inferred.

34. With respect to the date 8th July, 2003 it was fixed for considering petitioner's letter dated 20.6.2003 about defence representative and change venue of enquiry. The petitioner's request was rejected and conveyed to him. The only date of enquiry is 19th July, 2003 on which admittedly workman concerned had communicated the petitioner that due to illness he is not able to attend oral enquiry. This communication of workman concerned is admitted but its rejection is not shown to have been communicated to the workman concerned till 19th July, 2003. The absence of workman on 19th July, 2003 in these circumstances cannot be said to be without any reason whatsoever.

35. Moreover, when the employer intended to rely on several documentary and oral evidence, it was also incumbent to communicate the said documents and list of witnesses to the workman concerned so that he may prepare his case but that appears to have not been done at all. The documents were neither brought to the notice to workman at any point of time nor he had any opportunity to contradict the same. Even when the enquiry report was communicated, it is not the case of petitioner that all the documents and relied on evidence was communicated to the workman concerned. Even Presenting Officer of the employer was made a witness without any information to the employee.

36. In totality of the circumstances, this Court do not find any such error apparent on the face of record in the impugned award so as to warrant interference on the question that dismissal of workman is in utter violation of principles of natural justice and he has been denied adequate opportunity of defence.

37. Now, comes the second question about relief. Admittedly, the workman had pleaded in paras 37, 38, 39 and 40 of his written statement that he remained unemployed throughout. The reasons of his unemployment as he could perceive have also been stated. In para 24 of rejoinder affidavit, these four paragraphs have been simply denied and the employer had contended that workman was gainfully employed after his termination but thereafter no evidence whatsoever was shown to the Court, adduced before the Tribunal to prove that the workman was gainfully employed after his termination.

38. It is true that there is a change in the trend with respect to the relief of reinstatement and back-wages as it used to be granted long back. The approach of the Courts has taken a good degree of deviation therefrom in the recent more

than a decade. In *Novartis India Ltd. (supra)* the Apex Court observed:

21. There can, however, be no doubt whatsoever that there has been a shift in the approach of this Court in regard to payment of back wages. Back wages cannot be granted almost automatically upon setting aside an order of termination *inter alia* on the premise that the burden to show that the workman was gainfully employed during interregnum period was on the employer. This Court, in a number of decisions opined that grant of back wages is not automatic. The burden of proof that he remained unemployed would be on the workmen keeping in view the provisions contained in Section 106 of the Evidence Act, 1872. This Court in the matter of grant of back wages has laid down certain guidelines stating that therefore several factors are required to be considered including the nature of appointment; the mode of recruitment; the length of service; and whether the appointment was in consonance with Articles 14 and 16 of the Constitution of India in cases of public employment, etc.

22. It is also trite that for the purpose of grant of back wages, conduct of the workman concerned also plays a vital role. Each decision, as regards grant of back wages or the quantum thereof, would, therefore, depend on the fact of each case. Back wage are ordinarily to be granted, keeping in view the principles of grant of damages in mind. It cannot be claimed as a matter of right.

39. The reason of such deviation has been attempted to be indicated in *Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another*, as under:

But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.

40. The Court appears to have insisted that in the pleadings, the workman should say something about the manner he has earned or not earned wages after his termination and if such plea is raised and initial onus is discharged, burden shifts on the employer to prove otherwise. This burden on the part of employee cannot be stretched to the extent of unreasonableness.

41. Whether an employee/workman after his dismissal/termination, while perusing remedy in a Court of law can be allowed full back wages or not for the period he remained out of job pursuant to order of termination which is ultimately found illegal by the Court has been considered by this Court in *Kishori Lal Vs. Chairman Board of Directors*, in paras 58 to 63 thereof which reads:

58. Now coming to another important aspect about relief. It is not the case of respondents that petitioner was gainfully employed elsewhere during the period he was out of job. On the contrary, as a result of illegal order of dismissal,

petitioner and his entire family must have suffered a social stigma as also financial hardships. It is quite conceivable that this ignominy is faced by the entire family of petitioner. No amount of money can compensate this social humiliation, illegal torture an outclassed attribute of neighbour and other difficulties. It must have been faced by petitioner and his entire family throughout. An attempt to provide consequential benefits to workman-respondent No. 3 by Labour Court is only a meager compensation for huge loss, which basically cannot be compensated in terms of money. The departmental authorities, in fact must be much more careful and vigilant when they initiate disciplinary proceedings against an employee concerned on certain charges so that effective procedural requirement is observed in words and spirit. They must also ensure that a person should not be unnecessarily harassed as that affects not only individual bread earner but the entire family. This Court can take judicial cognizance of the fact that higher rank officials and employees, if face a small delay in payment of salary, become restless and even resort to observe strike etc. That being so, the severest punishment of dismissal compel the employee and his entire family to stand in a situation of starvation and also denuded the other facilities like health, education, clothing etc, which virtually, if not a death in terms of medical precision, something near to it. Normally the employers, to wriggle out such circumstances, try to invoke principle of "No work No Pay" ignoring the fact that work has not been performed by employee concerned not on account of himself but for the circumstances created by employer. Such a principle in a case like this, if applied would amount to confer a premium upon employer of a fault of his own. This would amount to allowing him (employer) to take advantage of his own wrong, which is not permissible in law particularly in a Court of equity and justice. It is against all canons of justice. It is always open to employer concerned to cover up loss, which it may sustain towards making of payment to such an employee by recovering such amount from those officials who defied statutory requirement as also the procedure and pass illegal order. Instead of penalizing a poor employee, who has no option but not to render service to employer pursuant to illegal order passed by employer the accountability should be shouldered by the responsible officer/authority.

59. Moreover, the concept of gainful employment would be attracted provided employment is easily available. The Court cannot shut its eyes of extraordinary unemployment prevailing in the Country. The people having high qualifications are searching menial employment having limited employment avenues. In such circumstances to suggest that a dismissed employees could have got a gainful employment is nothing but a day dreaming.

60. This aspect can be looked into from another different angle. In these days of extraordinary unemployment it is inconceivable to think that dismissed or removed employee may get easily an alternative employment. Merely because he has been able to survive all through, it cannot be conceived that he was in gainful employment during all this periods. We do not know whether he survived at the charity or support extended by his relatives, friends, neighbour or by

selling his household goods or spending his savings or losing ornaments of his wife or that he survive by incurring debt in the hope of getting success one day in the case challenging order of punishment and then to discharge debt liability.

61. It would not be proper on the part of this Court into enter in this arena of wild goose chase. Only this much is sufficient that he was not unwilling to work but the employer having created a situation where he was compelled not to work, hence ought not be punished despite of winning the case by denying arrears of salary.

62. It is also well known that whenever an order of dismissal or removal is challenged, normally Courts do not grant interim orders and the reason behind is that it amounts to grant of final relief. That being so, in the end when incumbent is successful in demonstrating that order is illegal, if he is denied salary on the ground that he did not work for which judiciary is also responsible, it would be condemning a indefensible litigant for no fault of his own and also for certain reasons which are wholly beyond his control. If this would not be a travesty of justice then what else can be.

63. It is in these facts and circumstances and considering the various aspects of the matter, this Court is of considered view that dismissal of petitioner from service having been found wholly illegal, and it is also having been seen that he was denied work on the post in question by employer in a wholly illegal manner, petitioner should be given relief of reinstatement with benefit of continuity of service with all consequential benefits including arrears of salary. This would be in consonance with the principle that an employee has no right to work but only right to claim salary. In absence of anything to show that employee himself was unwilling to work, principle of "No Work No Pay" ought not to be applied in such a case.

42. A Division Bench of this Court (in which I was also a member) in Brijendra Prakash Kulshrestha Vs. Director of Education, Deputy Director of Education, Agra Region, District Inspector of Schools and Committee of Management, Saraswati Inter College, , also observed:

9.....The cases in which payment of salary is governed expressly by the rules, they do not create much difficulty but the litigation pertaining to service matters had brought a number of circumstances before the Court where the employees are denied benefit of salary or higher salary for one or the other reasons beyond their control or for which they are not responsible or nothing can be attributed to them and such situations not answered by any rule or executive order having force of law necessitating judicial pronouncements time and again for such entitlement. Initially the Courts were of the view that once it is found that the employee was wrongly denied such salary, he is entitled for entire arrears irrespective of the fact whether he actually discharged duties of the post or not. There was a dichotomy of the judicial pronouncements in the matters dealing with labour cases and those dealing with Government service inasmuch as in the

labour matters since the power of discretionary relief was conferred upon the adjudicatory forum under the labour laws, the issue was decided in the light of such provisions and the facts and circumstance of the concerned case but in the matter of Government servants, initially the Courts allowed arrears of salary virtually as a matter of course once it is found that such denial was inconsistent to law, but, subsequently it was noticed that failure on the part of the authorities in observance of or the strict compliance of the statute was more frequent than desired and the consequence of allowing arrears as a matter of course was so drastic that huge public money used to be siphoned off to such employees who have rendered no public duty or have not actually shouldered any responsibility of higher post and therefore a necessity arose to have a balance in two situations so as not to waste the public money for the follies of the authorities who were under the obligations to observe certain procedure, norms and failure whereof may not enrich certain employees being against the interest of the public exchequer but simultaneously the interest of the employees who were not at fault was also to be observed. This gave occasion to consider the question of arrears of salary not as a matter of right but in each case depending upon multifarious reasons and factors which we will be discussing later on.

14.where an employee is not guilty of being away from work but is prevented from doing so by the authorities, the normal rules of "no work, no pay" is not applicable but in such cases considering various complexities of life and the history of the proceedings etc., the departmental authority must decide entitlement of the Government servant about the arrears and the quantum thereof.

30. We may also add one more aspect. Many a times when the employee approaches the Court challenging an order of retirement, dismissal or removal etc, in writ jurisdiction and prays for an interim relief, while entertaining the writ petition the Court normally do not grant any interim relief for the reason that it is treated like granting a final relief to the employee at the stage of admission and also against the well established principle applicable for grant of interim injunction that not only a prima facie case must be shown but the petitioner has to show balance of convenience and irreparable loss lying in his favour. In the aforesaid kind of cases, since the employee can always be compensated while granting final relief by allowing wages for the period he is out of employment, interim relief is normally denied. Therefore, it is a relevant factor as to when the employee has approached the Court. Pendency of the writ petition and non grant of interim order in view of the aforesaid legal principle should not normally result in denial of the ultimate relief of salary to the employee when the impugned order is found to be illegal unless there are certain other factors, a few whereof have already been enumerated hereabove, justifying denial of full salary or arrears otherwise it would amount to denial of an effective relief to a litigant for which he is not at fault and also confer premium upon the other side for passing an illegal order and thereby depriving the employee from discharging any duty. We cannot forget that an employee has no right to work but only a right to get

salary and it is always open to the employer to take work from the employee or not but he has to pay salary so long as the employment is not terminated in accordance with law or in accordance with the terms of his contract.

34. It is important to notice at this stage that conduct of the employee in order to show his readiness by taking such steps as permissible in law to compel the employer to permit him to work is of utmost importance and this includes whether the employee took steps for preventing the employer from retiring him premature wrongfully well in time and where an employee has failed to approach the Court well in time, such relief has been denied on the ground of delay, laches and acquiescence.

43. It is these circumstances, and considering specific pleadings of the workman which could not be dislodged by the employer by adducing any evidence, I do not find any reason to interfere with the award of Tribunal in respect to the relief it has granted to the respondent No. 3. Various judgments referred to by learned counsel for the petitioner have been considered in Novartis India Ltd.'s case (supra) and general principles laid down therein needs no exception but to my mind they have no application to the facts of the present case, as discussed above, and therefore do not support the contention advanced on behalf of the petitioner. In the result, impugned award warrants no interference. The writ petition being devoid of merit, is hereby dismissed. The petitioner shall be entitled to pay cost to respondent No. 3 which I quantify to Rs. 10,000/-.