

(2012) 05 KAR CK 0009

In the Karnataka High Court

Case No : Writ Petition No. 17014 and 17451 of 2006 (L-TER) C/W W.P. No. 13386 of 2005 (L-TER)

Karnataka State Printing Press Workers Association

APPELLANT

Vs

Management of Jai Dayal Kapoor Industries

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 10 (4), 25 F, 25 FFF
Industrial Disputes Rules, 1957 — Rule 10B (1), 10B (2)

Citation : (2012) 4 LLJ 493

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : K.S. Subrahmanya, for the Appellant; Somashekar and S.N. Murthy, for the Respondent

Judgement

Mr. Justice Aravind Kumar

1. Writ Petition No. 17451/2006 and Writ Petition No. 13386/2005 are filed by workman and management respectively questioning award dated November 22, 2004 passed by Additional Labour Court, Bangalore, in I.D. No. 48/1996, whereunder dispute raised by workman has been allowed in part by setting aside order of termination dated February 22, 1996 (date of dismissal) and directing the management to pay 60% of back wages from February 22, 1996 till January 31, 2000 date of closure and pay all other consequential benefits @60% and pay the closure compensation as on January 31, 2000 as per Section 25-FFF of the Industrial Disputes Act. Writ Petition No. 17014/2006 is preferred by Workers Association against award dated April 23, 2005 passed by I Additional Labour Court, Bangalore in Reference No. 9/2000, whereunder reference has been accepted in part and order of dismissal dated January 31, 2000 is set aside by directing the management to pay workman only 60% of back wages from date of Exhibit W-3 till January 31, 2000 and pay all other consequential benefits at 60% and also pay closure compensation as on January 31, 2000 as u/s 25-FFF of the Industrial Disputes Act.

Re: Writ Petition No. 17014/2006.

2. The appropriate government by its order dated May 30, 2000 referred the issues as stated in its order for adjudication by the jurisdictional Labour Court. After service of notice, both parties appeared and filed their respective pleadings. It was the contention of the Workers Association before Labour Court that management was not paying statutory, minimum wages nor giving statutory benefits such as P.F., ESI, Bonus, O.T. and initially management evinced interest to resolve the dispute in view of letter submitted by the Workers Association but started harassing and victimising the workers and suspended the Workers Association President Sri R. Venkatesh. On account of which, workers observed a day's token strike. It was also contended that management demanded and forced the workmen to resign and declare an illegal and unjustified lockout w.e.f. February 1, 2000 and simultaneously dismissed Sri R. Venkatesh without holding an enquiry and in spite of request to lift the lockout, management did not yield to the request of the workers association. Hence, dispute was raised before the Conciliation Officer and on failure of conciliation efforts, reference was made by appropriate Government as stated hereinabove. However, management denied the averments made in claim statement by contending: Petitioner-Workers Association is not a recognised Workers Association and it has not declared lock-out and it has closed down its operation from February 1, 2000 permanently after issuing closure notice dated January 30, 2000; 16 employees agree for amicable settlement and accordingly, claims were settled in respect of those 16 workmen and only few employees refused to accept the settlement. It was also contended that some of the employees are not employed by the management at any point of time and there is no relationship of employer" and "employee"; other averments made in the claim petition was denied.

3. Labour Court while examining issue No. 1 made in reference: As to whether management was justified in declaring lock out w.e.f. February 1, 2000? considered rival contentions, namely the contention of the Workers Association that it was a lock-out and the contention of the management that it was a closure and after analysing the evidence on record, Labour Court found that as per the notice dated January 31, 2000 marked as Exhibit M-28 issued by the management there was no lock-out and further held that the workman R. Venkatesh had been dismissed from service without any enquiry and there was no compliance of Section 25-F of the Industrial Disputes Act, and accordingly, set aside the order of dismissal and directed the management to pay 60% back wages and also pay closure compensation. It is to be observed at this juncture that management has not challenged or questioned the award of the Labour Court in so far as the award of the Labour Court holding order of dismissal of Sri R. Venkatesh as illegal and as such award to the extent of declaring the dismissal of Sri R. Venkatesh is concerned has become final.

4. It is the contention of Sri K.S. Subramanya, that as per the order of reference dated May 30, 2000 (Annexure-B), the Labour Court ought to have confined its

finding to the said reference and it could not have enlarged the scope of reference namely Labour Court ought to have held as to whether the management was justified in declaring lock out from February 1, 2000 and should not have considered any other issue. He would draw the attention of this court to the order made by appropriate government dated May 30, 2000 at Annexure-C, whereunder respondent has been directed to remove lock-out forthwith and as such he contends that Labour Court could not have imported the findings given in another reference namely in Ref. No. 48/1996 to enlarge the scope of reference and answer the same contrary to the order of reference. He submits that Labour Court erred in relying upon the order passed in I.D. No. 48/1996, which is impermissible in law. In support of his submission he has relied upon the judgment in the case Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, in particular paragraphs 16 and 18. He would elaborate his submissions by contending that Labour Court erred in restricting the award of back wages to 60% and contends that it could not have withheld the balance of 40% that was payable to the workman atleast till October 31, 2000 and as such he contends that workmen was entitled for 100% back wages till the date of reinstatement or January 31, 2000 as the case may be. On this ground he seeks for allowing of the Writ Petition No. 17014/2006.

5. Though respondent is served and represented, none have appeared on behalf of the respondent. The statement of objections filed is perused, wherein it has been contended by the respondent-management that on account of employees unrest, strike, it was not able to deliver the orders on time to its customers and as such, it was forced to issue closure notice; 16 employees received closure compensation and other service benefits; however, Sri Venkatesh and Sri Chikkanna did not accept the closure compensation and management is ready to pay the same and they have been dismissed from service after holding enquiry and as such reinstatement or payment of back wages or any other benefits does not arise; it was also contended that 50% of closure compensation has been paid to Sri Venkatesh and Sri Chikkanna as per the directions of the Labour Court and these employees have duly received the compensation and accordingly, has sought for dismissal of the writ petition.

6. A perusal of the pleadings as well as the evidence tendered by the parties with reference to the point of reference made by the appropriate Government dated May 30, 2000 would go to show that bone of contention was: As to whether there was lock out declared illegally by the "management on February 1, 2000 or not? To rebut this contention, management has raised a plea that there was no such lock-out declared, but there was closure of the factory, which was done after issuing notice on January 31, 2000. At this juncture, it would be necessary to delve upon the contention of Sri K.S. Subramanya that reference Court could not have travelled beyond the scope of reference and it should have restricted its answer to the point of reference made viz., as to whether there was lock-out or otherwise and it could not have relied upon the award passed in I.D. No. 48/1996 dated November 22, 2004 while answering the reference in the instant

case i.e. Reference No. 9/2000. A perusal of the impugned award would go to show that the Labour Court in the instant case has not relied upon the award passed by it in I.D. No. 48/1996 while answering the Point/Issue No. 1 referred by the appropriate Government to it i.e., As to whether the management had illegally declared lock-out? On the other hand, Labour Court has looked into the closure notice dated January 31, 2000 which came to be marked as Exhibit M-28 and answered the issue by holding there was no lock-out declared by the management. In fact, Labour Court has rightly observed that it cannot go beyond the scope of reference as observed by it vide paragraph 11 of impugned award while arriving at such a conclusion. The Labour Court has relied upon the very judgment now relied upon by the learned counsel appearing for the Workers Association viz., Delhi Cloth & General Mills Co. Ltd. v. Workmen and Others (supra) to hold that there is no reference made by the appropriate Government with regard to closure and as such, it cannot enlarge the scope of reference by deciding something which is not referred to it for adjudication. And as such, it has rightly not decided as to whether closure is justified or not since no such issue was referred to by the appropriate Government for being answered by the Labour Court.

7. It would be of benefit to extract the finding given by the Labour Court in this regard which reads as under:

That is to say the court xxx declared closure. This court cannot embark upon deciding whether the closure is justified or not that is foreign to the scope of this case as rightly contended. The entire evidence lead by both the parties is with respect to the closure. That cannot be considered. In the sense, whether the closure is justified or not cannot be considered here as stated by the learned counsel for the first party in his arguments. Here, there is no declaration of lock-out made.

8. It is also necessary to observe at this juncture that witness examined on behalf of the Workers Association Sri R. Venkatesh -WW1 has himself admitted in his cross-examination dated October 20, 2004 that he has taken a stand that management has declared lock out on the basis of Exhibit M-28 (vide paragraph 19 of the cross-examination). Whereas, Exhibit M-28 is a closure notice dated January 31, 2000, notifying the closing down of the factory w.e.f. February 1, 2000. In that view of the matter also the Labour Court has rightly held there is no lock out much less illegal lock out declared by respondent-management. In view of the same, the order of the Labour Court in holding that there is no lock-out declared by the respondent-management cannot be found fault with as it does not suffer from any infirmity whatsoever.

9. As per order of dismissal dated January 31, 2000 issued to Sri R. Venkatesh, which came to be marked before the Labour Court as Exhibit W-3, said workman has been removed from service, without holding any Domestic Enquiry. However, in paragraph 7 of the statement of objections filed by the respondent-management it has been contended that Sri R. Venkatesh has been dismissed

from service after holding enquiry by complying the principles of natural justice and said order of dismissal has not been challenged by him. In fact, the very reference dated May 30, 2000 issue No. 2 relates to the validity or otherwise of the order of dismissal dated January 31, 2000 passed against workman by the management is justified and legal. The Labour Court has rightly held that without conducting enquiry, without issuing charge sheet and without following due process of law management had terminated the services of Sri R. Venkatesh. Evidence of MW-1 would not go to show that allegations made in the dismissal order is proved. Labour Court has rightly come to a conclusion that no enquiry was held and order of dismissal is liable to be set aside and said award does not suffer from any infirmity particularly when the management failed to establish that Sri R. Venkatesh was dismissed after due enquiry. No records were produced in this regard. In view of the same, order of the Labour Court does not call for interference and it is hereby affirmed.

10. Learned counsel appearing for petitioner has contended that Labour Court ought to have ordered for reinstatement of workman with full back wages, continuity of service and all other consequential benefits and it is also contended that Labour Court erred in restricting award of back wages to 60% till January 31, 2000 on the ground that management had closed the factory on that day. It is at this juncture Sri K.S. Subramanya, learned counsel appearing for workers association contends that finding arrived at by the Labour Court in I.D. No. 48/1996 should not have been taken into consideration for awarding back wages. I do not see any infirmity in the finding of the Labour Court since the Labour Court has only used the award passed in I.D. 48/1996 as a yardstick to award the relief of back wages in the instant case since the workman therein (Ref: 48/1996) had also been awarded 60% back wages after holding order of termination as illegal. In the instant case, Labour Court has held from the date of Ex-W-3 till January 31, 2000 Sri R. Venkatesh is entitled for 60% of back wages. Admittedly, Exhibit W-3 is dated January 31, 2000 the date of dismissal, the date of closure is February 1, 2000 and Labour Court having held there is no lock out declared on January 31, 2000, question of awarding back wages for one day does not, arise in as much as it has been held in Ref. No. 48/1996, that management has closed down its undertaking on February 1, 2000. As such award of the Labour Court requires to be clarified to the said extent only. In other words it means that workman is not entitled for any back wages. Hence, the award of the Labour Court does not require any further modification or variation except to this extent of clarification only. Accordingly Writ Petition No. 17014/2006 stands dismissed with this observation.

Re: W.P. 13386/2005 c/w W.P. 17451/2006:

11. It is the contention of Sri K.S. Subramanya, learned counsel appearing for petitioner that Labour Court erred in framing an additional issue on March 31, 2003 that too on the basis of an order passed on December 20, 2002 whereunder application filed by respondent-management to amend its counter

statement by adding/inserting additional paragraphs with regard to closure had been erroneously allowed and same was impermissible and contrary to Section 10(4) of the Industrial Disputes Act, read with sub-rule (1) and (2) of Rule 10(b) of the Industrial Disputes (Central) Rules, 1957. He contends that when a workman has been dismissed without any order of enquiry and said order having been held to be illegal, consequential relief which the Labour Court ought to have granted was award of 100% back wages from the date of dismissal to the date of reinstatement and it could not have restricted the payment of backwages to 60% till January 31, 2000 (alleged closure). He would also submit that Labour Court erred in adjudicating the issue of closure in the present dispute since it was not the subject matter for consideration and such a plea could not have been allowed to be raised and adjudicated at all. He would also contend that issue regarding closure raised after a gap of 4 years could not have been adjudicated and workmen cannot be expected to prove the said fact and as such orders of the Labour Court is erroneous. On these grounds, he seeks for setting aside the older dated February 17, 2003 (Annexure-A) and award dated November 22, 2006 (Annexure-B).

12. Per contra, Sri Somashekar, learned counsel appearing for respondent-management would contend that workman had not reported to duty even after filing memo dated August 9, 1986 at Annexure-B (WP 13386/2005) and contends that workman is not entitled for backwages that too from February 22, 1996 upto March 31, 2000. By way of alternate plea, he would submit that even otherwise, the workman was entitled to the relief only upto August 9, 1996 i.e. till filing of memo by management under which workman was called upon to report to duty. He would contend that admission made by the workman in his evidence that he had not reported to duty though offered employment has not been taken into consideration by the Labour Court and as such award is liable to be set aside. He would further contend that Labour Court has not taken into consideration the admission of the workman about being gainfully employed and as such it erred in awarding backwages at the rate of 60% from the date of termination till date of closure. He would further contend that management has offered employment by filing a memo before the Labour Court on August 9, 1996 and on account of not reporting to duty, another memo was filed on December 2, 1996 which came to be replied by the workman by filing objections on December 2, 1996 contending inter alia that management should not initiate any action against the workman which itself goes to show that reasonable offer made by the management has been rejected by the workman without any justifiable cause and as such workman was not entitled for any backwages. On these grounds, he seeks for setting aside the award and dismissing the claim petition by allowing the writ petition filed by the management.

13. A perusal of the award and the records secured from the Labour Court would disclose that as per communication dated February 22, 1996 which came to be marked as Exhibit M-4 before the Labour Court, services of the workman came to be terminated for the reason that management had lost confidence on the

grounds stated herein-below.

- (1) Not submitting the accounts properly inspite of our repeated warnings
- (2) Not attending the office without giving any prior information
- (3) Not attending the work as per the instructions given in spite of our repeated warnings.

On account of such termination order being issued, workman filed an application before the Labour Court u/s 10(4-A) of the Industrial Disputes (Karnataka Amendment) Act, 1987 and Section 2(a) of Industrial Disputes Act, 1947 to set aside the order of termination dated February 22, 1996 as illegal and unjustified and for reinstatement with full back wages, continuity of service and all other consequential benefits. During the pendency of claim petition, management filed an application seeking permission of the Labour Court to amend the counter statement by inserting paragraph 3(a) whereunder, management proposed to place certain subsequent events which have taken place namely closure of the establishment and for framing additional issue in this regard. Said application has been allowed by the Labour Court by order dated February 17, 2003 (Annexure-A to W.P. 17451/2006) which is also sought for being quashed by workman. A perusal of the said plea would go to show that plea of closure having been put forward by the management, was a subsequent event having taken place during the pendency of the depute raised by the workman and same has been rightly allowed, since the said issue had a direct bearing and impact on the consequential reliefs that Labour Court would grant in the event of the workman's prayer being granted. Issue of closure being incidental to the claim of the workman no prejudice or injustice was caused to the workman more particularly when evidence i.e. examination in chief on behalf of the workman had not yet commenced. Hence, I do not find any infirmity in the order dated February 17, 2003 (Annexure-A to W.P. 17451/2006) passed by the Labour Court calling for interference by this court. Hence, said prayer is hereby rejected.

14. Now, turning my attention to the merits of the rival claims, as noticed hereinabove, services of the workman came to be terminated for certain misconduct or in other words the management having lost confidence on account of certain acts of the workman. The acts alleged in the termination letter dated February 22, 1996 (Exhibit W-4) came to be replied by workman on March 4, 1996 (Exhibit W-5) whereunder workman has denied the allegations made against him. On receipt of this reply, management has refused to reinstate the workman by assigning the following reasons:

- (1) We have received lot of complaints against you during your service and you have committed lot of mistakes and we have got all the evidences for that and you have a bad record in our office.
- (2) We have terminated your services vide our letter No. JDKI/206/96-96 dated February 22, 1996 and we have paid the compensation and all the dues to you

legally and you have accepted the same.

15. This exchange of correspondence between the management and the workman would clearly go to show, that no enquiry was conducted against the workman before he was discharged/terminated from service. Management has utterly failed to prove before the Labour Court of any alleged misconduct committed by the workman. Thus, Labour Court has rightly come to a conclusion that the order of dismissal/termination is to be set aside. I do not find any infirmity in the said finding which calls for interference.

16. When the order of dismissal is set aside, the consequential order would be to direct the management to reinstate the workman into service with backwages and continuity of service. In this regard, the law laid down by the apex court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, requires to be noticed whereunder, the issue regarding entitlement of "continuity of service" and/or consequential benefits as also "award of backwages" came to be considered and answered as under:

13. Surendra Kumar Verma (supra) related to retrenchment of several workmen in violation of Section 25-F of the Industrial Disputes Act, 1947 ("ID. Act" for short). This Court held that when the order of termination is set aside as being invalid and inoperative, it must ordinarily lead to reinstatement as if the order of termination was never made and that would necessarily lead to back-wages too. This Court, however, observed that there may be exceptional circumstances which may make it impossible or wholly inequitable vis-a-vis employer and workmen to direct reinstatement with full back wages as for example, when the industry might have closed down or might be in severe financial doldrums or where the concerned employee might have secured other employment elsewhere and in such situations, the court has the discretion to deny full back wages. In the concurring judgment PATHAK, J. (as he then was), held as follows:

Ordinarily, a workman who has been retrenched in contravention of the law is entitled to reinstatement with full back wages and that principle yields only where the justice of the case in the light of the particular facts indicates the desirability of a different relief. It has not been shown to us on behalf of the respondent why the ordinary rule should not be applied.

14. Mohan Lal (supra) also related to retrenchment not in consonance with Section 25-F of I.D. Act This Court held:

As pre-condition for a valid retrenchment has not been satisfied the termination of service is ab initio void, invalid and inoperative. He must be in continuous service.... If the termination of service is ab initio void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. Undoubtedly, in some decisions of this Ruby General Insurance Co. Ltd. Vs. Shri P.P. Chopra, and Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, was held that the court before granting reinstatement must

weigh all the facts and exercise discretion properly whether to grant reinstatement or to award compensation. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the courts in the field of social justice and we do not propose to depart in this case.

15. But 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. We may refer to the latest of a series of decisions on this question. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, this Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, and Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, held as follows:

A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

.... although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the courts realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched..... The changes (were) brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatization and outsourcing, is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6N of the UP. Industrial Disputes Act... While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full backwages cannot therefore be the natural consequence.

In General Manager, Haryana Roadways Vs. Rudhan Singh, this Court observed:

There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of

the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily wage employment though it may be for 240 days in a calendar year.

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In *Kendriya Vidyalaya Sangathan v. S.C. Sharma* (supra), this Court held:

...When the question of determining the entitlement of a person to back wages 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.

In *U.P. State Brassware Corpn. Ltd. v. Udai Narain Pandey* (supra), this Court observed:

It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

17. 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.

We may in this behalf refer to the decisions of this Court in *A.P.S.R.T.C. and Another Vs. S. Narsagoud, Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, and Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta*,

18. Coming back to back wages, 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, in addition to the several factors mentioned in *General Manager, Haryana Roadways v. Rudhan Singh* (supra) and *U.P. State Brassware Corpn. Ltd. v. Udai Narain Pandey* (supra). 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. Be that as it may.

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 related to cases where the court found that the termination was motivated or amounted to victimisation. 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 a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (for any other similar provision) is exercised by any Court to interfere with the punishment on the ground that it is excessive. Since 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 power 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 a nominal lump sum 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 to be 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 a consequence of imposition of lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the 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.

17. A perusal of the dicta laid down by Apex Court would go to show that a departure has been made for grant of full back wages on a declaration that order of termination as invalid on the ground that various circumstances would be prevalent like the workman having apparently contributed little or nothing at all to the industry for a period that was spent; unproductively resulting in the employer being compelled to a situation which prevailed when the workman was retrenched and as such it has been held that it depends on facts and circumstances of each case. In the instant case, without there being any enquiry and without charge being levelled against the workman and the order of termination being couched with imputations not being proved the order of termination/dismissal cannot be sustained on any ground whatsoever. The consequential question would be whether the workman is entitled for full back wages from the date of termination till reinstatement. As held by the Hon"ble Apex Court in *J.K. Synthetic Ltd. v. K.P. Agarwal* (supra), the intervening factor namely whether the workman was gainfully employed is a factor which requires to be taken into consideration while awarding backwages.

18. Keeping this in mind, the facts on hand is required to be examined. In the instant case, a memo came to be filed by the management on August 9, 1996 calling upon the workman to join for duty and this was followed by another memo filed on December 2, 1996. In the first memo, management sought to reserve its right to initiate disciplinary action against the workman for the

misconduct/mistakes pointed out to the workman by the management in communication dated February 22, 1996 (Exhibit W-4) and March 9, 1996 (Exhibit W-7). This conditional offer came to be objected to the workman by contending in his reply dated December 2, 1996 that if charges levelled against him are withdrawn and if workman is given normal work, he is ready and willing to join duty at any time. Thus, reading of the memo dated August 9, 1996 and the reply dated December 2, 1996 would go to show that management intended to initiate disciplinary action and workman sought for reinstatement without any conditions being imposed. Labour Court was of the view that management was bound to prove the charges since it was seized of the matter and as such workman was justified in not reporting to duty. This finding of the Labour Court is erroneous in as much as Labour Court at the first instance, ought to have directed the management to take the workman to duty and consider the second aspect namely as to whether liberty should have been given to the management to initiate disciplinary proceedings against the workman or not in order to test the bona fides of the workman also. However, without embarking upon such an exercise, Labour Court has straightaway proceeded to sustain the objections of the workman. In the event of the management having initiated any proceedings against the workman at a later date, it would have been an independent and separate issue required to be adjudicated in such proceedings. The only prime issue which was required to be considered in the present dispute was:

Whether the order of termination dated February 22, 1996 terminating the services of the workman was justified or not?

19. The question of proving the charges in the instant case did not arise. Question of the parties undergoing the ordeal of Domestic Enquiry, cannot be a ground to accept or sustain the act of workman in not reporting to duty. As noticed hereinabove, if any action were to be initiated by the management, the workman was at full liberty to question the same in appropriate forum in accordance with law. Thus, the workman though being offered, employment has refused to accept the same. This factual matrix when read along with evidence of the workman i.e. cross examination dated October 1, 2004, whereunder workman has admitted that he has purchased a tempo by borrowing loan from Karnataka State Finance Corporation and from his friends and is repaying the same by paying instalment of Rs. 4,000/- every month would clearly go to show that workman was employed and earning and, was not without employment.

20. In view of the above circumstances namely, the order of termination dated February 22, 1996 (Exhibit W-4) being illegal continued, as such till the workman was offered employment by the management by filing a memo before the Labour Court on August 9, 1996, I am of the view that workman is entitled for 100% back wages from February 22, 1996 till August 9, 1996.

21. However, it is to be further examined as to what percentage of back wages, the workman is entitled to from August 9, 1996 till the date of reinstatement or closure. In the instant case the Labour Court has found an additional issue by

scrutinizing the evidence namely Exhibit M-4 to M-6 i.e. closure notice, order dated March 17, 2004 of the Provident Fund Authorities to arrive at a conclusion that management had closed its establishment w.e.f. February 1, 2000. In the absence of any other material having been placed before the Labour Court by the workman, I am of the considered view that Labour Court has rightly held that the management has closed its operation from January 31, 2000. It means that if at all workman is entitled for any back wages it would be from August 9, 1996 to the date of closure i.e. January 31, 2000. Now, coming back to the issue of percentage of back wages as held by the Hon"ble Apex Court in J.K. Synthetic Ltd. v. K.P. Agarwal (supra), it would depend on facts and circumstances of each case. In the instant case, Labour Court has found that workman was carrying on some work by way of self employment and not earning a regular salary income, and held that it cannot be said it is a gainful employment. This finding can be termed as fallacy. The fact that workman had purchased tempo as per Exhibit M-7 which is certified copy of registration certificate relating to LMV Goods Carrier Truck, registered in the name of the workman on August 23, 1998 is not in dispute that offer made by the management to the workman was rejected as reflected in the reply filed by workman to the memo filed by the management and this would clearly go to show that workman was carrying on the avocation of running a goods truck and as such he has turned down the offer made by management. In fact, workman in his cross examination dated October 1, 2004 at paragraph 7 has admitted these facts. Thus, the workman was not idle or it cannot be construed or held the workman was without any income at all. However, this Court cannot lose sight of the fact that such income cannot be construed as either as constant or perennial in nature. It would definitely vary. However, the Labour Court having noticed this fact has restricted the award of backwages to 60% which is slightly on higher side and same requires to be scaled down by restricting it to 50%. In other words, the award of the Labour Court granting 60% backwages is reduced to 50%.

In that view of the matter, I pass the following:

ORDER

- (1) Writ Petition No. 17014/2006 is hereby dismissed subject to observations made in paragraph (11) hereinabove.
- (2) W.P. No. 13386/2005 is hereby allowed in part and award of the Labour Court in so far as it relates to award of 60% backwages is modified and held that respondent-workman is entitled for 50% of backwages from August 9, 1996 to January 31, 2000.
- (3) Writ Petition No. 17451/2006 is hereby allowed in part and the award of the Labour Court granting 60% back wages from February 22, 1996 till August 9, 1996 is hereby set aside and management is directed to pay 100% backwages from February 22, 1996 till August 9, 1996.
- (4) In all other respects, the award of the Labour Court passed in I.D. No.

48/1996 dated November 22, 2004 stands affirmed except to the extent modified herein above.

(5) Parties are directed to bear their respective costs.

Ordered accordingly.