

(2012) 08 BOM CK 0004

In the Bombay High Court

Case No : Letters Patent Appeal No. 258 of 2012

Maharashtra State Road Transport Corporation

APPELLANT

Vs

Abdul Gani and Another

RESPONDENT

Date of Decision : 03-08-2012

Acts Referred:

Citation : (2013) 2 ABR 490

Hon'ble Judges : Vasanti A. Naik, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : R.S. Charpe, for the Appellant; B.M. Khan, for the Respondent

Judgement

A.B. Chaudhari, J.—Heard. Admit. Taken up for final disposal with the consent of the learned counsel for the rival parties. This intra-Court appeal is directed against the judgment and order dated 15.10.2010 in Writ Petition No. 2135/2001, passed by the single Judge of this Court, whereby the learned single Judge refused to interfere with the order of reinstatement and award of back wages.

2. In support of the appeal, learned counsel for the appellant vehemently argued that this Court had granted stay in the writ petition filed in this Court, with the result, respondent No. 1 employee was not reinstated. Thereafter, since he attained the age of superannuation on 6.9.2001 during the pendency of the writ petition and in the wake of the said stay order, he retired from service on superannuation. The writ petition came up before the Court for final hearing and was heard on 7.9.2010. During the pendency of the writ petition, respondent No. 1 filed an affidavit on the record of writ petition before the learned single Judge, copy of which was given to the appellant. The affidavit was to the effect that respondent No. 1 employee had not been gainfully employed anywhere after his services were terminated. The learned counsel for the appellant submits that the appellant was not given sufficient time to rebut the contents of the said affidavit and at any rate, according to him, such a procedure in the writ jurisdiction only to meet the deficiencies of leading the proof for claiming back wages could not

have been adopted. He, thus, submits that the appeal is mainly concerned with the award of back wages since respondent No. 1 employee went out of service having attained the age of superannuation. The learned counsel for the appellant thereafter cited various Supreme Court decisions on the question of award of back wages and contended that the burden of proof to show that he was not gainfully employed is on the workman and as earlier pointed out wrong procedure having been adopted in the writ petition, no order of award of back wages could have been passed.

3. Per contra, the learned counsel for respondent No. 1 workman opposed the appeal and argued that there was nothing wrong with the learned single Judge in taking an affidavit on record since the litigation would have been delayed had the matter being remanded to find out whether the workman was gainfully employed or not during the period of his unemployment. Therefore, in the interest of justice, the learned single Judge relied on the affidavit that was filed by respondent No. 1 in the petition. He then argued that there was a stay order made by this Court and that is why respondent No. 1 workman could not be reinstated and the net result is that from 26.12.1992 i.e. after his termination till the date of his superannuation, namely 6.9.2001, he could not get any benefit of the judgment and order made by the Courts below.

4. Advocate Shri Khan for respondent No. 1 submits that at any rate modifying the award of back wages made by the Courts below would amount to serious injustice to respondent No. 1 since the entire litigation for him would be a fruitless exercise. In that context, Advocate Shri Khan supports the impugned judgment and order of the learned single Judge as well. He, therefore, prayed for dismissal of the appeal.

5. We have perused the impugned judgment and order made by the learned single Judge. We have perused the record. We have heard the learned counsel for the rival parties. It is not in dispute that respondent No. 1 workman had not proved whether he was gainfully employed or not nor any finding was recorded by the Courts below about his gainful employment. Thus, then in the light of the judgment of the Supreme Court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, and the other judgments, the legal position having been changed was required to be applied. In that context, it appears that respondent No. 1 filed an affidavit before the learned single Judge in the pending writ petition. At the time of final hearing, he had stated that he was not re-employed after his termination from service and the learned single Judge relied on the said affidavit and confirmed the award of back wages. In our opinion, such procedure of filing an affidavit by respondent No. 1 and then the learned single Judge relying on the affidavit to confirm the finding of award of back wages could not have been undertaken. In the writ petition, the evidence and the pleadings which were before the lower Court alone could be seen and not the additional evidence by way of affidavit much later in the pending writ petition. Be that as it may, since respondent No. 1 workman retired from service upon attaining the age of

superannuation and there was a stay order made by this Court, fact remains that he could not get reinstatement nor could earn the salary on the basis of the orders of the reinstatement made by the lower Courts. In such a situation, question is whether there should be any award of back wages and if yes. what should be the award in the fact situation? It is an undisputed fact that in respect of respondent No. 1 employee findings are recorded that the enquiry held against him was fair and proper. It is further undisputed fact that the misconduct alleged against him was duly proved and those findings were also confirmed. However, the Courts below ordered reinstatement only on considering the doctrine of proportionality and thus considering the case on humanitarian point of view. In other words. the Courts below did not find any illegality in respect of termination of service of respondent No. 1, but applying the doctrine of proportionality only reinstatement was ordered. It is, thus, clear that the termination as such was not held to be illegal in that sense and therefore, in that case there could be no award of "full" back wages. However, we find that this Court granted stay order to the reinstatement order that was made and respondent No. I workman superannuated during the course of pendency of the writ petition. We have also examined the award and the charge proved against respondent No. 1 and looking to the nature of the charge and application of doctrine of proportionality, we surely find that he cannot be awarded full back wages. At the same time, the charge which is proved, to our mind, does not appear to be such that he should be completely deprived of the back wages. Thus, balancing the case of both appellant and respondent No. I, we are of the view that the litigation will have to be ended by awarding 15% back wages for the entire period i.e. almost nine years from the date of his termination till the date of his superannuation, which would subserve the ends of justice. In the result, we make the following order.

ORDER

(i) Letters Patent Appeal No. 258/2012 is partly allowed. The impugned judgment and order dated 15.10.2010. passed by the learned single Judge in Writ Petition No. 2135/2001 is modified.

(ii) By modifying the said judgment, we grant 15% of the back wages for the said period i.e. from 27.12.1992 till 5.9.2001 to respondent No. 1. which shall be paid by the appellant-Corporation within a period of four months from today, failing which the same shall carry interest @ 6% per annum till the actual payment is made.

No order as to costs.