

(2014) 04 BOM CK 0138

In the Bombay High Court

Case No : Writ Petition Nos. 8324 and 9297/2011

Namdeo Vanji Bachav

APPELLANT

Vs

Dhule District Central Cooperative Bank Limited
 The
Dhule and Nandurbar District Central Cooperative Bank Ltd.
Vs Namdeo Vanji Bachav

RESPONDENT

Date of Decision : 02-04-2014

Acts Referred:

Citation : (2014) 5 ALLMR 548 : (2015) 1 ESC 152 : (2014) 143 FLR 43 :
(2014) 2 LLJ 432 : (2014) 2 LLN 416 : (2014) LLR 857 : (2014) 4 MhLj 768

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : S.R. Choukidar, Advocate in Writ Petition No. 8324/2011 Shri S.S. Patil, Advocate in Writ Petition No. 9297/2011, Advocate for the Appellant; S.S. Patil, Advocate in Writ Petition No. 8324/2011 Shri S.R. Choukidar, Advocate in Writ Petition No. 9297/2011, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Ravindra V. Ghuge, J.—Heard the learned advocates for the respective sides. Both these petitions are being heard together.

2. The petitioner in the first petition is the employee. The respondent is the employer. In the 2nd petition, the petitioner is the employer bank and the respondent is the employee. Since both these petitions challenge the same judgments of the Labour Court, Dhule and the Industrial Court, Dhule the petitions can be heard together.

3. By orders dated 13th of December 2011, both these petitions were admitted. The statement of the employer that the employee has already been reinstated in service was recorded by this Court. Since back wages were denied by the Industrial Court, no interim relief was granted to the employer.

4. After hearing the learned advocates for the employer and the employee, the

facts of the case can be summarised as follows;-

(a) The employee had joined the employer in 1990 as an Assistant in the Clerical grade.

(b) On 28th May 2005, the employee submitted a leave application for a period of 13 days from 28th May 2005 to 11th June 2005. The said application was submitted since the employee was not feeling well.

(c) On 15th of June 2005, the employee approached the employer for resuming duties. It is claimed that the officers of the bank prevented the employee from reporting for duties.

(d) On 18th of October 2005, the employee was served a chargesheet.

(e) Shri A D Patel was appointed as Enquiry Officer by the employer.

(f) The employee claims to have been harassed since his father had lodged a criminal complaint of atrocities against some of the Directors and the Manager of the Bank.

(g) Upon conclusion of the enquiry and after following the procedure, the employee came to be dismissed from service by order dated 6th March 2006.

(h) The employee filed Complaint (ULP) No. 23 of 2006 against the employer challenging the order of punishment.

(i) The employer filed its Written Statement for opposing the complaint.

(j) The complaint filed by the employee was allowed by the judgment and order dated 6 March 2008.

(k) The employer challenged the said judgment before the Industrial Court at Dhule by filing Revision Petition No. 7 of 2008.

(l) By its judgment and order dated 24th of May 2009, the Industrial Court, Dhule allowed the revision petition filed by the employer by quashing and setting aside the order passed by Labour Court dated 6.3.2009 and remanded the matter back to Labour Court for decision on the complaint afresh after framing proper issues.

(m) The employee, being aggrieved by the judgment of the Industrial Court preferred Writ Petition before this Court. The said petition was allowed by this Court and the judgment of the Industrial Court was set aside.

(n) While deciding the Revision Petition afresh, the Industrial Court considered the records and proceedings and was pleased to confirm the judgment of the labour Court to the extent of reinstating the employee in service along with continuity. However, the relief of back wages granted to the employee was quashed and set aside.

(o) The employee upon being aggrieved by the refusal of the Industrial Court to

grant back wages has preferred this writ petition.

(p) The employer in view of the order of reinstatement and continuity of service granted to the employee, challenged the said judgment by filing this writ petition.

(q) Therefore, since common questions of law and facts are involved in both these petitions, they are being heard together.

5. The contention of the employee is that the order of dismissal having been termed to be illegal, reinstatement with continuity of service needs to be accompanied with back wages. It is submitted that the backwages should be granted as a matter of course since the dismissal of the employee has been set aside by law. The Labour Court and the Industrial Court having concluded that the order of dismissal was unsustainable, backwages should have been granted along with reinstatement and continuity of service. The employee takes a serious exception to the judgment of the Industrial Court as it has resulted in taking away the entire backwages that were earlier granted by the Labour Court.

6. The contention of the employer is that the employee was unauthorisedly absent for 13 days. By the charge sheet dated 18th of October 2005, four charges were levelled upon the employee. The 1st charge is with regard to the unauthorised absenteeism on the part of the employee. The 2nd charge is as regards failure on the part of the employee to get his leave sanctioned and then proceed on leave. The 3rd charge is with regard to negligence while on duty. The 4th charge is as regards failure to submit an explanation to the notice dated 19 July 2005.

7. It is therefore canvassed by the employer that the charges are grave and serious in nature and any interference in the action taken by the employer is rendered unsustainable in law. It is further stated that the employee has been reinstated by the employer only to avoid the disobedience of the orders passed by the Labour Court and the Industrial Court at Pune.

8. I have, with the assistance of the learned advocates, gone through the petition paper book and the impugned judgments of the Labour Court as well as the Industrial Court. The enquiry was held to be unfair and the findings of the Inquiry officer were held to be perverse. However the Industrial Court has set aside the said findings of the Labour Court and has concluded that the enquiry was conducted in a fair and proper manner and the findings of the Inquiry officer cannot be said to be perverse. I am not interfering with these findings of the Industrial Court for being sustainable in law. Charges are, therefore, held to be proved against the employer.

9. The Labour Court in its judgment came to the conclusion that the punishment of dismissal on account of 13 days absenteeism amounts to being shockingly disproportionate to the gravity and seriousness of the misconduct. It is the case of the employee that the charge against him was of minor nature. The Labour Court upheld the said contention and granted all the reliefs prayed for in the

complaint. However, the Industrial Court noted that the past service record of the employee was blemished. The employee had put in 15 years of service with the employer bank. The Industrial Court therefore concluded that though the punishment of dismissal for 13 days absenteeism was disproportionate punishment, he deserves to be deprived of backwages. I do not find that these conclusions need any interference since the Industrial Court was right in so concluding.

10. The Labour Court based its order, that the employee deserves to be reinstated in service with continuity and full backwages, on the conclusion that the enquiry findings were perverse and no charge was proved against the employee. As such, the employee was held to be exonerated by the Labour Court of all the charges levelled upon him. The Industrial Court set aside these findings of the Labour Court and concluded that the findings of the Enquiry Officer are neither perverse nor unsustainable. Therefore, though the punishment awarded is held to be disproportionate, the conclusions of the Enquiry Officer that the charges levelled upon the employee are proved, are held to be sustainable. In this backdrop, on the one hand, the order of dismissal was required to be set aside. On the other hand, since the charges were held to be proved, relief of backwages with reinstatement and continuity of service could not be granted. In my view, for the misconduct held to be proved against the employee, depriving the employee of the backwages is a sufficient punishment. As such, the Industrial Court was right in modifying the judgment of the Labour Court by denying backwages to the employee. I, therefore, conclude that the backwages deserve to be denied to the employee by way of a punishment for the misconduct proved against him.

11. The learned advocate for the employer placed reliance upon the judgment of the Honourable Supreme Court in the case of *Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma*, . In the said judgment, the Apex Court concluded that the initial burden lies on the employee to show that he was not gainfully employed. The burden of proof is, therefore, on the employee. The employee in the said case had neither pleaded nor placed any material on record to prove that he was not gainfully employed and that he was entitled to full back wages.

12. The employer also relied upon the judgment of the Supreme Court in the case of *Amrit Vanaspati Co. Ltd. Vs. Khem Chand and Another*, . Reliance is also placed upon the judgment of the Supreme Court in the case of *Bank of India and Others Vs. T. Jogram*, . The learned advocate for the employer, therefore, states that when charges are proved against an employee, there cannot be an order of reinstatement

13. The employee relied upon the judgment of the Supreme Court in the case of *J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another*, . The Apex Court in the said judgment on the point of backwages concluded that it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. An award of back wages was neither automatic nor consequential.

The learned advocate for the employee, therefore, submitted that in the instant case, the employee had pleaded that he was not gainfully employed.

14. Reliance is also placed on the judgment of the Supreme Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, . In the said Hindustan Tin Works judgment (supra), the Apex Court has observed in paragraph 9 as follows;-

It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The specter of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to the work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer...

15. The employee has relied upon a judgment of the Division Bench of the Himachal Pradesh High Court in the case of Telecom District Manager, Telecommunication Vs. Shashi Kamal and Another, . In the said case, it was noted that the Labour Court and the learned Single Judge of the High Court had exercised discretion in allowing full back wages to the workman. It was further held that there was no conflict in exercising such discretion with law. It was also held that it cannot be said that as a principle of law the workman is not entitled to full back wages. It depends upon the facts of each case to what extent back wages are to be given while allowing the reinstatement.

16. In the instant case, while deciding the entitlement of the employee to back wages, either in part or in full, the Labour Court has adduced hardly any

justification for granting full back wages. A cryptic observation appears in the judgment of the Labour Court in paragraph 43, with reference to the entitlement to back wages. It is concluded by the Labour Court that since it was held that the dismissal is bad in law and the findings of the Enquiry Officer are held to be perverse, the employee is entitled for reinstatement and he was granted full back wages along with allowances.

17. There is no observation in the judgment of the Labour Court as to whether the employee led any evidence to prove that he was not gainfully employed and that he made a strenuous effort to secure employment, but in vain. In the absence of evidence to that effect, it can hardly be suggested that the employee has made a serious effort to acquire employment and had failed to get employment. In the absence of evidence, it cannot be said that the employee has discharged the burden of proving that he was not gainfully employed. In view of this factual position, I am unable to accept the contention of the employee that he was entitled for full back wages. The Industrial Court was therefore right in setting aside the judgment of the Labour Court to the extent of granting full back wages and allowances to the employee as it was held that the findings of the Enquiry Officer are not perverse.

18. In the light of the above and in view of the fact that the punishment awarded to the employee is clearly unjustified and shockingly disproportionate to the gravity and seriousness of the misconduct, I do not find that the impugned judgment of the Labour Court and the Industrial Court granting reinstatement in service with continuity to the employee, could be said to be perverse and unsustainable.

19. As such, I do not find any merit in both these Writ Petitions preferred by the employer as well as the employee. The judgment of the Industrial Court in upholding the conclusion drawn by the Labour Court of granting reinstatement with continuity of service to the employee is sustainable in law. So also, the conclusion drawn by the Industrial Court in depriving the employee of the back wages, is neither perverse nor erroneous. As the Industrial Court has held that the findings of the Enquiry Officer are not perverse, the charges, therefore, stand proved against the employee. Since the punishment of dismissal was held to be disproportionate, depriving the employee of backwages, in my view is a proper punishment. Notwithstanding these conclusions, I have still gone into the contention of the employee in the foregoing paragraphs, that he should have been granted full backwages on the premises that he is not guilty and stands exonerated. I have, thus, held in the foregoing paragraphs that even if that would have been the situation, the employee would not have been automatically entitled for backwages. I, therefore, conclude that he deserves to be denied backwages by way of punishment for the misconduct proved against him. In the result, both the petitions are dismissed for being devoid of merit. Rule is discharged. No order as to costs.