
(2014) 12 SHI CK 0073
In the High Court Of Himachal Pradesh
Case No : CWP No. 7432/2010-H

Om Parkash Murarka

APPELLANT

Vs

Controller and Auditor General of India

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 227
Industrial Disputes Act, 1947 — Section 11A

Citation : (2014) 12 SHI CK 0073

Hon'ble Judges : Mansoor Ahmad Mir, C.J.; Dharam Chand Chaudhary, J

Bench : Division Bench

Advocate : Lovneesh Kanwar, Advocate for the Appellant; Ashok Sharma, Assistant Solicitor General of India, Advocate for the Respondent

Judgement

Mansoor Ahmad Mir, C.J.—Petitioner, by the medium of this writ petition, has questioned the order made by the Central Administrative Tribunal, Chandigarh Bench (Circuit Bench at Shimla) dated 5th November, 2009 (Annexure P-9) read with the order dated 13th June, 2008, (Annexure P-6) made by respondent No. 2, on the grounds taken in the memo of the writ petition.

2. The respondents have filed the reply and the petitioner has also filed the rejoinder.

3. It appears that the petitioner was working as Senior Accountant in the office of the Accountant General, H.P. He applied for voluntary retirement on 30.9.2004, by giving three months notice for such retirement, w.e.f. 1.1.2005, due to his family circumstances. Vide letter dated 1.10.2004, he was informed that his request for voluntary retirement w.e.f. 1.1.2005, has been accepted and necessary steps for preparation of pension papers had been initiated. The petitioner, however, due to changed circumstances and settlement in the family, withdrew the said notice for voluntary retirement vide letter dated 22.12.2004, but vide letter dated 27.12.2004, he was informed that his request has been rejected and it was made clear that the petitioner would be treated as voluntary

retired with effect from 1.1.2005, constraining the petitioner to file a representation to reconsider the decision made by the respondents and allow him to withdraw his notice for voluntary retirement. The said request of the petitioner for withdrawing the notice of voluntary retirement and the representation was not considered by the respondents and vide order dated 30.12.2004, the petitioner was retired from service, constraining him to approach the Central Administrative Tribunal.

4. The Tribunal declared the order of retirement as illegal and held the petitioner in continuous service right from 1.1.2005 and also directed the petitioner to return/deposit all the retiral benefits received by him with the respondents, within three months and competent Authority-respondents were directed to consider his regularization in service, pay and allowances etc. vide order dated 28.9.2006 (Annexure P1). It is apt to reproduce para 6 of the said order herein:

"6. In view of the aforesaid position under the law, we declare the orders, dated 27.12.2004 (A-2) and 30.12.2004 (A-3) as illegal. We declare that the applicant has a right to continue in service w.e.f. 1.1.2005 from which he was ordered to be voluntarily retired. In case, the applicant deposits back all the retiral benefits, received by him, with the respondents within three months from the date of presentation of a copy of this order to the respondents, his continuation in service shall be given to him, ignoring the fact that he was ordered to retire w.e.f. 1.1.2005. The competent authority to take a decision for the period w.e.f. 1.1.2005 onwards till his resuming duties, for grant of regularization in service, pay and allowances etc. etc."

5. The petitioner complied with the said mandate by depositing entire service benefits, which he had received and requested to pay him the salary and other allowances for the period 1.1.2005 to 28.12.2006, but respondent No. 2, vide letter dated 13.6.2008, rejected the claim of the petitioner for pay, allowances and back-wages w.e.f. 1.1.2005 to 28.12.2006, stating that the period 1.1.2005 to 28.12.2006, has been treated as leave of the kind due, constraining him to again approach the Central Administrative Tribunal, Chandigarh Bench.

6. The Central Administrative Tribunal dismissed the Original Application of the petitioner vide its judgment and order dated 5.11.2009 (Annexure P9). It is apt to reproduce para 5 of the said judgment herein:

"5. After hearing the learned counsel for the respondents and perusal of the record, particularly directions earlier issued by this Court, we find that the Court had directed the competent authority to take a decision for the period w.e.f. 1.1.2005 onward till his resuming duties for grant of regularization in service, pay and allowances etc. etc. There was no direction to treat this period in a particular manner. Even otherwise also it is within the domain of the competent authority to decide as to how the period during which applicant remained out of employment is to be regulated as provided under the rules and after perusal of the chart with the written statement, we find no error in the orders passed by

the respondents as most of the period has been regulated as EOI with pay and allowances and HPL with pay and allowances, therefore, in our considered view nothing survives in the O.A. as the respondents have fully implemented the orders passed by this Court in letter and spirit."

7. Admittedly, the order of retirement of the petitioner w.e.f. 1.1.2005 was held by the Tribunal as illegal vide order dated 28.9.2006, the relevant portion stands quoted supra and he was treated to be in service w.e.f. 1.1.2005. Thus, the petitioner was entitled to back-wages also.

8. The respondents have not averred that the petitioner was gainfully employed, during the period 1.1.2005 to 28.12.2006. The authorities have wrongly denied the relief of back-wages to the petitioner and the order made by the Tribunal dated 5.11.2009, thus is illegal.

9. The apex Court in case titled Srikantha S.M. Vs. Bharath Earth Movers Ltd., , held that when the order of termination/retirement is illegal and the employee has been kept out of job illegally, is entitled to back-wages. It is apt to reproduce paras 20 and 30 of the judgment herein:

"20. The Court added in Balram Gupta Vs. Union of India (UOI) and Anr, .

in the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the Government must conduct itself with high probity and candour with its employees.

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"30. For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The action of the respondent Company in accepting the resignation of the appellant from 4.1.1993 and not allowing him to work is declared illegal and unlawful. It is, therefore, hereby set aside. The orders passed by the learned Single Judge and the Division Bench upholding the action of the Company are also set aside. The respondent Company is directed to treat the appellant in continuous service up to the age of superannuation i.e. 31.12.1994 and give him all benefits including arrears of salary. The Company may adjust any amount paid to the appellant on 15.1.1993 or thereafter. The appeal is accordingly allowed with costs."

10. The apex Court in case titled Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, has discussed the issue when the relief of back-wages can be granted. It is apt to reproduce paras 47 and 48 of the said

judgment herein:

"47. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide: U.P.S.R.T.C. Vs. Mitthu Singh, ., Secretary, Akola Taluka Education Society and Another Vs. Shivaji and Others, ; and M.D., Balasaheb Desai Sahakari S.K. Ltd. Vs. Kashinath Ganapati Kambale, .

48. In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh inquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled for subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry. With these observations, the appeal stands disposed of. No costs."

11. The apex Court also in case titled Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, has discussed that in which circumstances an employee is entitled to back-wages. it is apt to reproduce para 33 of the said judgment herein:

"33. The propositions which can be culled out from the aforementioned judgments are:

(i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

(ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

(iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the

employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

(iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

(v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

(vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the

employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

(vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

12. Applying the test, the petitioner was entitled to back-wages.

13. The apex Court in a recent judgment titled Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Ltd., , the facts of which are similar to the facts of the case in hand, held that how and in which circumstances an employee is entitled to back wages. It is apt to reproduce paras 18, 33 and 35 of the said judgment herein:

"18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant.

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33. In the present case, the respondent has made a vague submission to the extent that:

"the conduct of the workman throughout the proceedings before the High Court during 2002 to 2011 shows that he is continuously gainfully employed somewhere. Admittedly even in the counter affidavit in the said Writ Petition, it has not been stated that the workman was not employed."

Therefore, on the basis of the legal principle laid down by this Court in the Deepali Gundu Surwase case (supra), the submission of the respondent that the appellant did not aver in his plaint of not being employed, does not hold since the burden of proof that the appellant is gainfully employed post termination of his service is on the respondent. The claim of the respondent that the appellant is gainfully employed somewhere is vague and cannot be considered and accepted. Therefore, we hold that the appellant is entitled to full back wages from the date of termination of his service till the date of his reinstatement.

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35. We therefore conclude and hold that the Labour Court was correct on legal and factual principles in reinstating the appellant along with full back wages after setting aside the order of termination. The High Court on the other hand, has erred by exceeding its jurisdiction under Article 227 of the Constitution of India in holding that the appellant has in fact, resigned by not joining his duty as a Badly worker and also awarding that retrenchment compensation to the tune of Rs. 1,00,000/- will do justice to the appellant without assigning reasons which is wholly unsustainable in law.

14. Having said so, the order dated 13.6.2008, (Annexure P-6), made by the respondents is quashed and consequently, the order made by the Central Administrative Tribunal dated 5.11.2009, (Annexure P-9) is also quashed with direction to the respondents to pay salary, i.e., back-wages and other allowances, to the petitioner, w.e.f., 1.1.2005 to 28.12.2006, the date of his joining, with 6% interest per annum.

15. With the aforesaid observations, the writ petition is disposed of alongwith pending applications, if any.