
(2004) 12 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No's. 963 and 1154 of 1992

Omprakash Shrawan Deshpande and Another

APPELLANT

Vs

Presiding Officer, School Tribunal and Others

RESPONDENT

Date of Decision : 08-12-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Employees of Primary Schools (Conditions of Service) Rules, 1981 — Rule 35(1)

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 11, 11(2)

Citation : (2005) 3 ALLMR 759 : (2005) 2 BomCR 537

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : A.Z., N.M. Jibhkate and S.B. Suryawanshi, for the Appellant;
Mandpe, A.G.P. and M.V. Samarth, for the Respondent

Judgement

Dharmadhikari B.P., J.—Heard Shri Jibhkate, Advocate for the petitioners. Shri Mandpe, A.G.P. for respondents No. 1 and 4 and Shri Samarth, Advocate for respondents No. 2 and 3.

2. Both these writ petitions arise out of a common judgment delivered by the School Tribunal, Nagpur, in Appeal No. STN/144 of 1989 and Appeal No. STN/145 of 1989. The services of both the petitioners were terminated with effect from 19-7-1989 and petitioner in Writ Petition No. 963 of 1992 (Omprakash, Peon) challenged his dismissal in Appeal No. STN/145 of 1989. The petitioner in Writ Petition No. 1154 of 1992 (Alaram, Clerk) challenged his dismissal by filing Appeal No. STN/144 of 1989. Both these appeals have been finally decided on 10-3-1992 and the School Tribunal allowed the same. The orders of termination were set aside and the management was directed to reinstate both these petitioners with continuity with effect from 19-7-1989. The claim of petitioners for arrears of emoluments between 19-7-1989 till 10-3-1992 was disallowed. Both the petitioners have filed the petitions challenging this denial and seeking

direction of payment of back wages in their favour.

3. Advocate Shri Jibhkate argued the matter for the petitioners. He contended that having allowed the appeals denial of back wages was totally unwarranted. He relies upon the judgment in the case of Ex. Engineer, PWD and Anr. v. The Judge, Labour Court, Jaipur and Anr., reported at 1995(II) C.L.R. 393; Amgrez Singh v. State of Punjab and Anr., reported at 2003(II) C.L.R. 308; Nicks (India) Tools v. Ram Surat and Anr., reported at 2004(III) C.L.R. 557 and Chandrapur Dist. Central Co-op. Bank Ltd. v. Industrial Court, Nagpur and Anr., reported at 1995(II) C.L.R. 735, in support of his contention. He contends that grant of back wages must follow automatically when reinstatement is ordered and further states that burden of proof that the petitioners were gainfully employed in the meanwhile was upon the respondent Management. He points out that the School Tribunal has declined to grant back wages mentioning that there is no averment in the appeals that the appellants before it were not gainfully employed anywhere. He states that in the absence of finding that the petitioners were gainfully employed in the intervening period, there is no reason to deny them back wages.

4. As against this, Advocate Shri Samarth, appearing for the respondent Management states that the entire case laws on which reliance has been placed considers the position as under Labour Legislation. He invites attention of the Court to Section 11 of the Maharashtra Employees of Primary Schools (Conditions of Service) Regulation Act, 1977, (hereinafter referred to as MEPS Act), particularly Sub-section (2) of Section 11 of MEPS Act, to contend that the wordings of said sub-section show that in the matter of granting relief to appellants before it, the law has conferred wide discretion upon the School Tribunal. He points out that it is open to the School Tribunal to set aside the impugned order of management either partially or wholly and also it can reinstate the employee on the same post or on a lower post as it may specify. He further points out that in respect of arrears of emoluments, the School Tribunal has been given power to specify the period for which such arrears are to be paid. He points out that Sub-clause (d) empowers the School Tribunal to impose even a lesser punishment and Sub-clause (e) thereof specifies the amount of compensation to be paid to employee if School Tribunal decides not to reinstate him. He says that the said amount is 12 months salary if the employee has put in 10 years or more service in the school and six months salary if his service is less than 10 years. He points out that the amount of compensation has been prescribed after mentioning loss of employment and after considering the possibility of getting or not getting suitable employment thereafter. He, therefore, contends that the provisions of MEPS Act are totally distinct and the rulings delivered by various courts under Labour Court cannot be used as precedent in the matters of School Tribunal. He points out that the misconduct against both the petitioners as alleged then was of beating Assistant Teacher and thereafter remaining absent. He points out that the Departmental Enquiry has been set aside only on technical ground that notice for appearance in it was not

sent by R.P.A.D. and was sent under certificate of posting and considering the defence of petitioners that they never received any such notice. He states that after the School Tribunal passed the impugned order dated 10-3-1992, the respondent management did not challenge it and reinstated both the petitioners and conducted fresh Departmental Enquiry against them in accordance with law and they have been dismissed on 5-8-1992. He points out that this subsequent dismissal was challenged by both the petitioners before the School Tribunal in Appeal Nos. 326 of 1992 and 327 of 1992 respectively and the School Tribunal dismissed the appeals of petitioners on 31-10-2000. He further states that both the petitioners thereafter did not challenge the adverse judgment of the School Tribunal in the High Court and said judgment has become final. He states that the dismissal is for the same mis conduct for which the petitioners were earlier dismissed on 19-7-1989. He, therefore, states that the School Tribunal was aware that it was allowing the appeals of the petitioners on account of only technical contravention and hence it exercised its discretion available to it u/s 11(2) of the MEPS Act and declined to grant back wages to the petitioners. He contends that there is no scope for interference with the said discretion in exercise of writ jurisdiction. He further states that in any case now the correctness of the action of Management is proved and the petitioners have also accepted it and as such the denial of back wages by the School Tribunal should be upheld. He points out that before the School Tribunal the petitioners did not make any averment that they are not gainfully employed and also they did not lead or produce any documentary evidence to show absence of any gainful employment. He points out that before this Court along with affidavit in rejoinder, the respondents have produced a certificate dated 12-10-1996 issued by the Sarpanch of Gram Panchayat, Guradha which reveals that both the brothers i.e. petitioners have been running tea stall and Pan Kiosk since 1989 at Guradha and it was closed for some days between July and August, 1992 and it has been restarted. He points out that Sarpanch has certified that their business is going on well and they are happy. He, therefore, contends that this certificate reveals that the petitioners had alternate source of income when they were out of employment and therefore, they are not entitled to grant of back wages. He relies upon the judgment in the case of North West Karnataka Road Transport Corporation Vs. S.J. Fernandes, to contend that in such circumstances, the burden of back wages should not be cast upon the management. He also relies upon the judgment in the case of Vasantrao Baburao Kharat v. Siddeshwar Shikshan and Ors., reported in 1995(I) C.L.R. 849, to contend that in appropriate circumstances, the School Tribunal can, in exercise of its jurisdiction, deny back wages and even if another view of the matter is possible, this should not be interfered. He relies upon a judgment in the case of Ayyappa Bharampappa Kadiwal v. President, Local Governing Council, Arts & Commerce College and Ors., reported at 2001(I) C.L.R. 243, to contend that burden to show that he was not gainfully employed is always upon the employee. He further points out that in appropriate cases the Court can grant some lumpsum amount to the employees like petitioners and relies upon judgment of the Apex Court in the

case of Collector of Customs, Bombay Vs. M/s. Krishna Sales (P) Ltd., , to show that there the Apex Court granted Rs. 5,000/- to the appellant before it as consolidated amount against his dues for back period. In the alternative and without prejudice to his contentions raised above, he also offered to pay amount of Rs. 5,000/- each to both the petitioners as consolidated amount.

5. In reply, Advocate Shri Jibhkate, appearing for the petitioners states that the certificate issued by the sarpanch was not produced before the School Tribunal and further said certificate which is allegedly obtained in the year 1996 is being produced after 8 years. He, therefore, contends that such a document cannot be looked into for the first time by this Court in writ petition.

6. The cases on which reliance has been placed by the petitioners are all under the provisions of either Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, (M.R.T.U. and P.U.L.P. Act) or Industrial Disputes Act. In the case reported at 1995(II) C.L.R. 735, which is a case under M.R.T.U. and P.U.L.P. Act, the Single Judge of this Court has held that the grant of full back wages by the Labour Court was proper and submission that award of full back wages is not justified as there was no finding that concerned employees were unemployed during the intervening period was turned down. The learned Single Judge in this ruling as held that there is no justifiable reason to deny back wages to the complainants and there is no requirement of law that before back wages could be awarded, a finding is required to be reached that employee was not gainfully employed. The learned Single Judge has further observed that once termination is quashed and set aside, as a consequence employee would be entitled to all reliefs unless a case for exception is made out. Para 30 of said ruling is important and it reads as under :

In Workmen, Silver Sands Employees" Union"s case (supra), the termination took place in the year 1979 and when the matter came up before the High Court, almost after 15 years, the Madras High Court was persuaded by the fact that during such a long period in order to keep their soul intact, the employees could have been profitably employed and on that basis, thought it fit that there was no justification for ordering back wages. In the present case, the termination orders were passed on 21-3-1991, effective from 27-3-1991 and the Labour Court passed the judgment on 19-8-1994 and the Industrial Court disposed of the revision applications on 20-2-1995 and at no stage, the petitioner bank has brought any material to the notice of the courts that the complainants were gainfully employed. In my view, there is no justifiable reason to deny back wages to the complainants and there is no requirement of law that before the back wages could be awarded or declaring the termination order illegal, finding is required to be recorded that the employee was not gainfully employed. Ordinarily, once the termination order is held bad in law, illegal, void, the consequence would be as if such order never came into existence and as a result of such consequence, the employee would be entitled to all the reliefs as if he was in service unless a case for exception can be made out. In the present case,

there is no reason much less a justifiable reason to refuse the complainants award of back wages and the Labour Court as well as the Industrial Court having exercised the discretion in favour of the complainants and the said discretion having been exercised in accordance with law and well settled principles, no interference is called for in the order passed by the Labour Court and" confirmed in revision by the Industrial Court."

7. The second ruling on which reliance has been placed by the petitioners is reported at 2003(II) C.L.R. 308, wherein the learned Single Judge of Punjab & Haryana High Court has held that when termination is found to be bad, denial of back wages amounts to putting premium on the arbitrary decision of the management.

8. Next ruling on which reliance has been placed is reported at 2004(III) C.L.R. 557, and in the said ruling while considering the aspect of grant of back wages, the Apex Court has found that the services of the respondent were wrongfully terminated and therefore, he is entitled to reinstatement. However, back wages were restricted only to 25% for the period from his termination till his reinstatement. The Hon"ble Apex Court noticed that 25% back wages were granted by the Labour Court primarily relying on the judgment of the P. & H. High Court and the Apex Court noticed the fact that the said judgment was reversed by the Division Bench of the very same High Court in the subsequent judgment and, therefore, found that the reliance by the Labour Court on the above cited judgment was not sustainable. The Apex Court found that the basic ground on which the Labour Court reduced the back wages based on a judgment of the High Court which stood overruled and the very foundation of the conclusion of the Labour Court destroyed the inevitable conclusion that every time when a reinstatement is ordered, full back wages must follow.

9. The reliance by the petitioners on the judgment in the case of Veeramani v. The Management of T.N. Electricity Board and Anr., reported at 1993(I) C.L.R. 95, is for the same purposes and there the award of Labour Court granting only 50% back wages and denying remaining 50% was quashed and it was held that the petitioner before the Court was entitled to award of full back wages.

10. As against this, Advocate Shri Samarth has pointed out a ruling reported at 2001(I) C.L.R. 243, where the learned Single Judge has considered the case of an employee governed by MEPS Rules, 1981, and in the absence of any material on record to indicate that employee has not tried to obtain any alternate service and after observing that it was necessary for the employee to show that he was not earning anything, grant of 50% back wages was upheld. The next judgment on which reliance has been placed is reported at North West Karnataka Road Transport Corporation Vs. S.J. Fernandes, , under provisions of Industrial Disputes Act, and the learned Single Judge of Karnataka High Court observed that order of grant of back wages is justifiable when the employee is cleared of the charges totally and completely and same should not be awarded mechanically otherwise it may amount to rewarding misconduct which is not the

objective of law. Para 11 of this ruling reads as under :

Again, this Court needs to lay down very firmly that as far as the award of back wages is concerned that it is only where the employee is cleared of the charges totally and completely that an order for back wages is justifiable. Back wages are not to be awarded mechanically and as a matter of course but even in those of the cases where on sympathetic grounds or for a variety of reasons reinstatement is ordered the payment of back wages may not be justified because the employer has had to pay another employee for performing the job functions right through that period of time. Again, where these proceedings takes several years and an order for payment of back wages emerges, the employer is required to pay to the employee who has misconducted that large amount of money without having got the benefit of employee having worked during that period of time. This is against public interest and more importantly, as the Supreme Court has very rightly observed could amount to rewarding misconduct which is not the objective of the law. It is no justification to assume that the subordinate courts can continue passing wrong orders because the High Court is there to correct them. The correct procedure is for the subordinate courts to refrain from passing such wrong orders and not to continue this incorrect practice in the hope that they are providing more work for the High Court (Registrar General to circulate a copy of this judgment to all the Labour Courts and Tribunals in the State).

11. The next ruling on which Advocate for respondents No. 2 and 3 has placed reliance is reported at 1995(I) C.L.R. 849. It is under provisions of MEPS Regulations Act, 1977. There it appears that the School Tribunal granted relief of reinstatement to a clerk in the school but declined to grant back wages and petition before the High Court was for grant of back wages from the date of termination till the date of reinstatement. Para 6 of the judgment, reads as under :

The Tribunal was conscious of the fact that the petitioner is entitled to back wages the Tribunal has rejected the claim of the petitioner for the following observations which are in para 14 of the impugned order :

"As regards back emoluments in the circumstances on record, I do not think it equitable to direct the respondent to pay the appellant his back salary. It is obvious from the evidence on record that the appellant himself invited trouble by proceeding on leave. The reasons put forth by him for proceeding on leave needs scrutiny. It is obvious from record also that during this period of his absence the appellant was participating on local elections. In these circumstances it will not be just and proper to direct the respondent to pay the appellant his salary for this period. The respondent may consider his leave application in the light of the provisions of the Rules framed by the Government under the Act."

From the above reasoning we find that the Tribunal was conscious of the legal position and rejected the claim for back wages on the ground that the petitioner

had participated in the local elections when he had proceeded on medical leave. The appeal was filed u/s 11 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977. The relevant provisions for our purpose in Section 11(2)(c) which reads as under:

To give arrears of emoluments to the employee for such period as it may specify."

The above provisions show that the discretion given to the Tribunal to mention the period for which official is entitled to the arrears of salary. In the present case the Tribunal, has, on considering the facts of the case, exercised the discretion in not granting the back wages. While deciding the writ petition under Article 226 of the Constitution, normally this Court should not substitute its own discretion in place of the discretion of the Tribunal, if the view taken by the Tribunal is a plausible one. Even if another view is possible, it is well settled that normally the revisional or Appellate Authority should not substitute its own discretion in place of the discretion passed by the Tribunal. In our view the Tribunal has exercised its discretion properly and has rightly rejected the claim of the petitioner for back wages and hence we do not want to interfere with that order.

Thus, from the above, it is clear that the Division Bench of this Court has found that the School Tribunal was conscious of the fact that the petitioner before it was entitled to back wages and by giving reasons, the said claim was denied by the School Tribunal.

12. The last ruling on which reliance was placed by the Advocate for respondents No. 2 and 3 is reported at Rampal Pithwa Rahidas and Others Vs. State of Maharashtra, . There services of a quasi permanent worker were terminated by a simplicitor order and he filed departmental appeal which was dismissed. He challenged this dismissal in the suit which was transferred to Administrative Tribunal and the Administrative Tribunal dismissed the suit on several grounds including that of limitation. This judgment of the Administrative Tribunal was challenged before the Apex Court. While considering the relief which is to be given to the appellant before it, the Apex Court found that he was negligent and repeatedly remained absent for longer period without leave and his service record was not satisfactory. Para 5 of this ruling is important and it reads as under:

"The question now arises as to the relief which should be granted to the appellant at this stage. We have examined the service record of the appellant produced before us, and referred to in the order of Tribunal, which indicates that he was negligent and repeatedly remained absent for long periods without leave. His services were otherwise also not satisfactory. These were the reasons which compelled the authorities concerned to take steps for terminating his services. Although, the manner in which his services were terminated was not in accordance with law, it is clear that the authorities which took decision to terminate his services were acting bona fide and there was justification for them

to have taken up the question as to whether the appellant should be permitted to continue in the service or not. As we are interfering in the present matter purely on a technical ground, we are of the view that the appellant is not entitled to the salary for the past period. However, since he has been involved in this litigation, we direct that a sum of Rs. 5000 (rupees five thousand only) shall be paid to the appellant as consolidated amount against his dues for the back period. Subject to this, he will not be entitled to claim anything for the past period."

The Apex Court, therefore, granted him amount of Rs. 5,000/- as consolidated amount against his dues for the back period and declared that he will not be entitled to claim anything more for the past period.

13. When the facts of present case are considered in this background, I do not find any difference in principles which govern the grant of back wages to the employees. Therefore, the services are regulated by labour legislation and grant of back wages to the teaching and non-teaching staff are subject to provisions of M.E.P.S. Act and Rules thereunder. The perusal of judgment of the School Tribunal reveals that the School Tribunal has declined to grant back wages and reasons thereof are assigned in para 16. The only reason put forth by the School Tribunal is that the appellants before it did not aver during the course of hearing that since the date of his termination they were not gainfully employed and no such averment was made nor any material was produced during the pendency of the appeal. Thus, in the absence of material averment, the School Tribunal has declined to grant back wages. This Court has in ruling reported at 1995(II) C.L.R. 735 taken a view that there is no requirement of law that before back wages could be awarded finding is required to be recorded that employee was not gainfully employed. Ordinarily, once the termination order is held bad in law, the consequence is that the employee would be entitled to all reliefs as if he was in service unless exception is made out.

14. In rulings on which reliance has been placed by Advocate Shri Samarth reported at 2001(I) C.L.R. 243, the question of back wages payable to teacher was considered after the High Court set aside the termination after period of 15 years and in this background it has been held that it was necessary for the petitioner to show that he was not earning anything during these 15 years. But inspite of that considering the delay on account of pendency of the matter in Court, 50% of back wages have been awarded. In the second ruling of Karnataka High Court reported at North West Karnataka Road Transport Corporation Vs. S.J. Fernandes, , the learned Single Judge has observed that back wages are not to be given mechanically and it would amount to rewarding the misconduct which is not the objective. However, in view of the findings recorded by the Apex Court in the judgment reported at 2004(III) C.L.R. 557, it is not possible for this Court to accept this proposition as correct. The view is also directly against the view of this Court as stated above in 1995(II) C.L.R. 735. In another ruling reported at 1995(1) C.L.R. 849, the Division Bench of this Court has found that there was conscious consideration of the factor of grant or

denial of back wages by the School Tribunal and the School Tribunal rejected the claim by observing that the employee himself invited trouble by proceeding on leave and during the period of his absence he was participating in local elections. But later on, the Division Bench has found that after the order of termination was set aside on 18-2-1985 and the employee was directed to be reinstated, he was taken on duty only on 5-7-1985. The Division Bench ordered payment of wages from 1-3-1985 till he was reinstated on 5-7-1985. This order of denial of back wages of the School Tribunal was upheld because of conscious application of mind by the School Tribunal to the aspect of entitlement of back wages.

15. In the facts of the present case as already stated above, the School Tribunal has only found that the material averments are missing and has, therefore, declined to grant back wages. Therefore, this ruling also has no application in the facts and circumstances of the case.

16. The last ruling on which reliance has been placed is reported at Rampal Pithwa Rahidas and Others Vs. State of Maharashtra, . This judgment considers the nature of misconduct and unsatisfactory past record and in view thereof the back wages were declined but a consolidated amount of Rs. 5,000/- awarded to the appellant before it by the Apex Court. In the facts of present case, the School Tribunal ordered reinstatement of both petitioners on 7-3-1992 because it found that the departmental enquiry conducted against them was invalid. No finding about the misconduct was reached during those proceedings. By lapse of time that finding has now become available after subsequent departmental enquiry which was conducted legally. The misconduct has been established and challenge thereto before the School Tribunal has also failed. Thus, it cannot be said that the order of dismissal dated 19-7-1989 was without any basis. It is to be seen that it was found vitiated only on account of technical non-compliance with provisions of Rule 35(1) of the M.E.P.S. Rules, 1981.

17. Considering the situation at hand and the case law cited by both the parties, I do feel that grant of 100% back wages for the period from 19-7-1989 to 10-3-1992 will not be justified. Though the respondent Management was right in taking the action of termination, still the mode and manner in which it was brought out is found to be wrong. Considering the fact that when School Tribunal has scrutinised the entitlement of petitioners to grant of back wages, this position was not obtaining. I hold that both petitioners are entitled to 50% of the back wages for the said period i.e. from 19-7-1989 to 10-3-1992.

18. Thus, both writ petitions are partly allowed. The respondent Management is directed to pay 50% of the amount of back wages to each of the petitioners for the period from 19-7-1989 to 10-3-1992. Rule is made absolute in above terms. No order as to costs.