
(2016) 12 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 4136 of 2016

Sanjivani Gramin Shikshan Sanstha

APPELLANT

Vs

Dipesh Bhaurao Pardeshi

RESPONDENT

Date of Decision : 02-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) MCR 438

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

Bench : Single Bench

Advocate : Mr. V.D. Hon, Senior Counsel H/f Mr. A.V. Hon, Advocate, for the Petitioners; Mr. A.S. Deshpande H/f Mr. V.P. Patil, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

Ravindra V. Ghuge, J. (Oral)—Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment and order dated 29/02/2016 passed by the College and University Tribunal in Appeal No.5/2015.

3. Mr. Hon, the learned Senior Advocate appearing on behalf of the petitioner/ Establishment has extensively canvassed his submissions, which can be summarized as under :

(a) The respondent No.1/Lecturer in Engineering College has been terminated w.e.f. 06/04/2015.

(b) The first ground on which he has been terminated is that he does not possess the qualification of Master in Engineering and therefore cannot continue as an Asst. Professor.

(c) Because there was a fall in the workload, the said employee being junior most, had to be terminated.

- (d) The petitioner does not have any animosity against the said employee.
- (e) He had to be disengaged since an unqualified person cannot be continued as an Asst. Professor.
- (f) When the workload has reduced, the junior most teacher has to be terminated.
- (g) The respondent/employee can neither be reinstated, nor can he be continued in service.
- (h) He is not entitled to back wages since he has not worked from the date of his termination, there is no workload and he is an under qualified teacher.
- (i) An enquiry was also initiated against him for certain misdemeanors though the same has now been kept in abeyance as there is no employer/employee relationship between the two after the termination of the said employee.

4. Mr. Deshpande, learned Advocate for respondent No.1/Asst. Professor who was the appellant before the University Tribunal, has supported the impugned judgment. His submissions can be summarized as under :

- (a) Respondent No.1 initially joined as a "Lecturer" on 16/08/2005
- (b) On the ground of alleged frequent absenteeism, he was terminated on 26/04/2007.
- (c) His appeal was allowed and he was reinstated in service after the order of this Court dated 13/06/2011 passed in WP No.2259/2010.
- (d) This Court has stayed the back wages in the above said writ petition.
- (e) The contention of the Management that he has not acquired any qualifications in 5 years is baseless and the undertaking extracted from him on 16/08/2005 is insignificant.
- (f) The order dated 06/05/2015 terminating respondent No.1 as an "Assistant Professor", Department of Electronics and Tele Communication" would indicate that the termination is a result of the misconception of the petitioner that he has not acquired M.E. qualification and that there is no workload available to continue him in service.
- (g) The said order of termination would indicate that the enquiry already initiated on the basis of the charge sheet dated 31/01/2013, would remain unaffected.
- (h) He preferred an Appeal No.5/2015 and challenged his termination.
- (i) The Tribunal has concluded in paragraph No.6 that when respondent No.1 was appointed as a "Lecturer", he was to possess either a First Class M.E. degree or M.E. (by Research) or a First Class Bachelor's Degree.
- (j) The Tribunal has also take a note of the fact that if the employee does not

acquire M.E. degree in First Class in the first 5 years of his service, he would cease to earn further increments till he acquires M.E. First Class.

(k) The Tribunal, therefore, concluded that it was not mandatory for the employee to acquire M.E. as a condition to continue in employment and that he would only be deprived of further increments till he acquires M.E. in First Class.

(l) The Tribunal also considered the second contention of the petitioner as regards he being surplus owing to fall in workload and concluded that the workload had not fallen and that the employee was at Sr.No.2 in the list of the staff members for the Electrical Engineering Department.

(m) It needs mention that the respondent/employee belongs to the N.T. (B) category and the teachers at Sr.No.3 and 5 below the respondent/employee belong to the Open Category and are obviously junior to respondent/employee.

(n) In so far as the back wages are concerned, the said employee is entitled to full back wages considering the fact that the Management has developed animosity towards him and is waiting for opportunities to strike at his employment so as to deprive him of service and source of earning.

(o) The earlier termination having been set aside and the second termination again being set aside by the Tribunal, are the factors indicating that the Management has developed a bias against the said employee.

(p) Reliance is placed upon the following judgments in support of the claim for full back wages

(1) Raj Kumar Dixit v. Vijay Kumar Gauri Shanker, Kanpur Nagar, [(2015) 9 SCC 345]

(2) Tapash Kumar Paul v. BSNL and another, [(2014) 4 SCR 875],

(3) Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others, [(2013) 10 SCC 324],

(4) Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, [(1999) 3 SCC 60].

5. I have considered the submissions of the learned Advocates and have gone through the petition paper book and the reports cited.

6. It is evident that the petitioner has terminated the services of the respondent/employee only on 2 grounds. Firstly, that he had undertaken to acquire M.E. qualification on 16/08/2005 and based on the said undertaking, he was appointed. He has violated his undertaking and condition No.5 set out in the appointment order dated 10/08/2005. Secondly, as the workload had reduced, being the junior most Assistant Professor, he deserves to be terminated on the ground of surplusage.

7. Before the University Tribunal, it was contended by the petitioner that since

the minimum required qualification for appointment of a Lecturer is M.E. First Class or M.E. (by Research), the employee could not be continued. It was further contended that if he was holding a Bachelor's Degree in First Class, he has to acquire M.E. in First Class within 5 years after joining employment.

8. A cursory glance at the prescribed qualifications would clearly indicate and leave no room for doubt that if the respondent/employee had failed to acquire M.E. in First Class within 5 years of joining, he would be deprived of increments till he acquires the said qualification. I do not find that the said minimum qualifications as prescribed by the A.I.C.T.E. could be interpreted to mean that the employee has to be terminated from service upon failing to acquire M.E. in First Class.

9. For the sake of clarity, the qualifications prescribed by A.I.C.T.E. are reproduced herein below :

Lecturer (Engg. & Technology)

A first class Master's degree in Technology appropriate branch of Engineering/Technology.

OR

M.E. (by research) in appropriate branch of Engineering or Technology.

OR

A First Class Bachelor's degree in appropriate branch of engineering/technology provided, that the person acquires Master's degree in First Class in the appropriate branch of Engineering/Technology in 5 years after joining failing which he will cease to earn further increments till he acquires First Class Master's degree.

10. The issue as regards the undertaking executed by the employee is concerned, the same has been executed at the time of seeking employment. A candidate seeking employment has hardly any bargaining power. Any opposition expressed against the desire of the employer would have probably cost the said candidate an opportunity to earn entry in service. So also, the petitioner cannot prescribe qualifications by itself since the Nodal Body of A.I.C.T.E. is the only entity which is empowered to prescribe qualifications. Any condition set out in the appointment order which has no sanctity of law, cannot be enforced against a candidate.

11. The petitioner has failed in its first attempt of terminating the employee. After his reinstatement, he has then been terminated in 2015 which is practically 10 years from his induction in employment on the ground of lack of qualifications. Nevertheless, failure to acquire qualifications cannot lead to his termination as long as the qualifications prescribed by a competent authority and the Rules mandate that failure to acquire such qualifications would result in disengagement of the employee.

12. The petitioner has placed reliance upon the letter received from the University of Pune dated 28/07/2011 indicating that the A.I.C.T.E. Regulations, 2010 has led to a revision in the requisite qualifications for appointment to the post of Assistant Professor. It is strenuously canvassed that the revised qualification mandate B.E./B.Tech and M.E. /M.Tech in the relevant subjects with First class or equivalent either in B.E./B.Tech or M.E./M.Tech. I am not convinced by the contention of the petitioner that on the strength of the revised qualifications, the respondent/employee could be terminated. In service jurisprudence, the service conditions made applicable to an employee at the time of his appointment would continue to apply as long as they are not revised to the prejudice of the said candidate. Relaxation of requisite qualifications could be permitted in a given case with retrospective effect. Revision of requisite qualifications leading to a requirement of higher qualifications is also permitted, but prospectively. Service conditions of an employee cannot be altered in a manner as would be prejudicial to his interest. Therefore, the subsequent revision in the service conditions cannot affect the continuance of the respondent/employee.

13. It is informed by Mr. Deshpande, learned Advocate for the respondent/employee that he has recently acquired his M.E. qualifications and he has received a communication to that effect. He has passed the said examination in the first division as per the results dated 22/11/2016, from the Govt. College of Engineering, Aurangabad.

14. The second issue raised by the petitioner is that since the respondent/employee was junior most, due to the fall in workload, he had to be disengaged. It is indicated vide the affidavit in reply dated 21/01/2016 filed by the respondent/employee in his appeal before the Tribunal that the intake capacity in the Department of Electronics and Tele Communication Engineering is maintained at 120 for the last 3 consecutive years. Though the admission of students is 117 out of 120, the workload has remained the same for the 1st and 2nd year B.E. in the year 20152016 as it was in 20122013 till 20142015. This aspect was considered by the Tribunal which concluded that the workload had not reduced.

15. Notwithstanding the above, it needs to be considered as to whether the respondent/employee was actually the junior most person amongst the teachers teaching in the Department of Electrical Engineering. The chart placed on record and which is undisputed, indicates that Mr. Bhalchandra Kulkarni joined on 27/07/1988 and the respondent/employee joined on 16/08/2005. 3 other employees namely Mr. P.V. Thokal, Mr. R.N. Hajare and Mr. G.G. Akotkar have joined on 01/02/2008, 20/04/2014 and 01/08/2014 respectively. Moreover, the respondent/employee belongs to the N.T. (B) Reserved Category and was appointed on a post which was reserved for this category. The junior most employee Mr. Akotkar is from the Open Category. As such, even if the contention of the petitioner is accepted that the workload was less in 2015, Mr. Akotkar, who joined on 01/08/2014 and from the open category, would have been required to

be retrenched. On this count as well, this petition has to fail.

16. Mr. Deshpande submits that despite the various shocks suffered by the respondent/employee at the hands of the petitioner /Management and facing all odds, the respondent/employee concentrated on enhancing his qualifications and acquired the M.E. Degree in First Class, as stated above. This would indicate his dedication and his desire to enhance his educational qualifications for the betterment of the Institution.

17. It appears from the affidavit in reply dated 30/10/2014 filed by the petitioner in WP No.9091/2013 filed by the respondent/employee, that the petitioner itself had declared in paragraph No.7 that if the said employee did not acquire M.E. in First Class within 5 years, he would be deprived of his increments under the 6th Pay Commission as long as he does not possess the prescribed qualification. This would, therefore, make it evident that though the petitioner was aware of the said position in the light of the qualifications prescribed by A.I.C.T.E., the petitioner has ventured to terminate the services of the respondent/employee.

18. In the light of the above, this petition fails as regards the issue of termination of the respondent/employee on all counts.

19. To the extent of the back wages, Mr. Deshpande places reliance upon the judgment of the Hon"ble Supreme Court in the matter of Raj Kumar Dixit v. Vijay Kumar Gauri Shanker [(2015) 9 SCC 345] to support his contention that the Hon"ble Supreme Court set aside the judgment of the High Court granting 50% back wages and enhanced the said quantum of back wages upto 100% full back wages by restoring the award of the Labour Court.

20. Further reliance is placed on the judgment of the Apex Court in the matter of Tapash Kumar Paul v. B.S.N.L. And another [(2014) 4 SCR 875] wherein the Hon"ble Apex Court has observed in paragraph No.3 as under :

"3. However, it is pertinent to mention that the recent decision of this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Ors. took a contrary view. The Court in this case, opined as under:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum

decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works (P) Ltd. v. Employees of M/s Hindustan Tin Works Pvt. Ltd. & Ors. in the context of termination of services of 56 employees by way of retrenchment due to alleged nonavailability of the raw material necessary for utilisation of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held:

"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 spectre 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 work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the 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 litigative activity of the

employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practise. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

* * * In the very nature of things there cannot be a straitjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular."

(emphasis supplied)

After enunciating the above noted principles, this Court took cognizance of the appellant's plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled to 75% of the back wages."

21. As such, the judgment delivered by the 3 judges bench of the Hon'ble Supreme Court in Hindustan Tin Works Pvt.Ltd. v. Employees of M/s Hindustan Tin Works Pvt. Ltd. And others [(1979) 2 SCC 80] has been followed in the Tapash Kumar Paul case (supra) as can be seen from paragraph No.23 reproduced above.

22. In the instant case, considering the chequered history of litigation between the petitioner/Management and the respondent/employee, I do find a semblance of animosity and antipathy developed by the petitioner against the respondent/employee. His first termination was set aside and he was granted reinstatement. In the writ petition filed by the Management challenging the first decision of the Tribunal, this Court has stayed the back wages by order dated 13/06/2011. This was followed by the second termination dated 06/04/2015 on the grounds which I have dealt with in the foregoing paragraphs.

23. It is apparent from the record that a vexatious and frivolous stand was taken by the petitioner/Management and the same apparently was unsustainable in the light of the affidavit that was filed by the same Management in the Writ Petition No.9091/2013 preferred by the respondent/employee. This ongoing litigation over a period of almost 9 years must have cost the respondent/employee time, energy and money. In these peculiar circumstances and considering the law laid down by the Hon'ble Apex Court in the judgments referred herein above, I find this to be a fit case for grant of full back wages from the date of termination 06/04/2015 till the respondent is actually reinstated. The Tribunal has granted full back wages and said order is sustainable. This petition is dismissed. Rule is discharged.

24. Mr. Deshpande submits that after the Management vindictively initiated an enquiry against the respondent/employee, he had approached this Court in WP No.3217/2013. By the first order dated 16/08/2013, the learned Division Bench permitted the Management to proceed with the enquiry, but was prevented from passing final orders. In order to overcome the directions of this Court, a false stand was taken and the respondent was terminated from 06/04/2015. Mr. Hon, has vehemently refuted the said contention by contending that the said aspect is subject matter of the said writ petition. The enquiry initiated against the respondent/employee pursuant to the charge sheet dated 31/01/2013 would be subject matter of Writ Petition No.3217/2013.

25. Considering the above, I am not required to deal with the said issue as the respondent/employee is protected by the learned Division Bench in so far as the departmental enquiry is concerned.

26. At this juncture, Mr. Hon submits that the grant of full back wages should not mean that the respondent/employee is entitled to all increments and pay scale prescribed under the 6th Pay Commission recommendations. He, therefore, requests that this Court may clarify on this aspect in this judgment so as to avoid any confusion. Mr. Deshpande submits that he would be entitled to the salary as is payable to all Assistant Professors who have not acquired M.E. qualifications in the light of the G.R. dated 28/08/2010.

27. Considering the above, it is made clear that as per the A.I.C.T.E. prescription, the respondent/employee would be entitled for such scale as is admissible to an "Assistant Professor" who has not acquired M.E. qualifications. He would be

entitled for increments from the date of acquiring his M.E. Degree.

28. At this juncture, Mr. Hon prays for a stay to this judgment for a period of 8 (eight) weeks. Mr. Deshpande has opposed the request. I find that the respondent/employee has succeeded before the Tribunal and has also succeeded in these proceedings. The judgment of the Tribunal was not stayed by this Court. As such, the direction of reinstatement and payment of full back wages was never stayed or kept in abeyance till this petition is decided. Hence, the request for stay is rejected.