

(2017) 01 UK CK 0011
In the Uttarakhand High Court
Case No : 1235 of 2011

Shambhu Prasad

APPELLANT

Vs

Presiding Officer & others

RESPONDENT

Date of Decision : 07-01-2017

Acts Referred:

[Industrial Disputes Act, 1947](#), [Section 25\(f\)\(a\)](#), [Section 25\(f\)\(b\)](#), [Section 25\(f\)\(c\)](#) - Prohibition of financial aid to illegal strikes and lock-outs - Prohibition of financial aid to illegal strikes and lock-outs
[Uttar Pradesh Industrial Disputes Act, 1947](#), [Section 6\(n\)](#) - Awards and action to be taken thereon

Citation : (2017) 01 UK CK 0011

Hon'ble Judges : Rajiv Sharma

Bench : Single Bench

Advocate : M.C. Pant, R.C. Arya

Judgement

1. The present petition is instituted against the award dated 23.08.2010, passed by Presiding Officer, Labour Court, Haridwar in Adjudication Case No.95 of 2005, whereby the claim of the petitioner for reinstatement has been rejected.
2. "Key facts" necessary for adjudication of this petition are that the petitioner was engaged as a daily wage employee in the respondent- Irrigation department on 01.12.1989. He worked in the department upto 30.03.1992.
3. He was retrenched from his services without following the provisions of Section 6(N) of the U.P. Industrial Disputes Act, 1947. The petitioner raised the industrial dispute.
4. Learned Labour Court declared the retrenchment of the petitioner illegal but instead of ordering reinstatement, a lump sum amount of Rs.1.00 lakh was ordered to be paid to the petitioner. Hence, this writ petition seeking modification of award with a prayer of reinstatement instead of lump sum compensation.

5. The workman was engaged on 01.12.1989 and his services were retrenched on 30.03.1992. He raised the industrial dispute and the matter was referred to learned Labour Court vide Government Order dated 09.03.2005.

6. The employer has not challenged the order dated 09.03.2005. The workman has conclusively proved that he had completed 305 days" in a block of 12 calendar months.

7. Learned Labour Court has rightly come to the conclusion that Sundays and paid holidays are to be included while determining continuous service.

8. The employer has admitted that neither any notice nor any compensation was paid to the petitioner/workman at the time of his retrenchment.

9. The sum and substance of the plea raised by the employer is that the workman has abandoned the job. There is no material available on record that the workman was ever issued any notice to rejoin his duties, in case, he has abandoned the job. The plea of abandonment is required to be proved like any other fact.

10. Their Lordships of the Hon"ble Supreme Court in AIR 1979 SC (582) in the case of "G.T. Lad & others vs. Chemicals and Fibres India Ltd." have held as under on the issue of reinstatement of workman: "6. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah and Ors. : (1964)4 SCR 265: (AIR 1964 SC 1272) it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case.

Re.-Question No. 2: This takes us to the consideration of the second question, namely, whether in the circumstances of the instant case, it could be said that the appellants had voluntarily abandoned the service of the Company. It may be recalled that the appellants had along with 229 other workmen gone on indefinite and peaceful strike which ended on October 22, 1972) in response to the strike notice given by the union to the Company to press its demand for re-instatement of its three dismissed leaders and had not only by their letters dated September 21, 1972 and September 26, 1972 unequivocally intimated to the Company that they did not intend to abandon the service but had also returned the cheques sent to them by the Company on account of their leave salary gratuity etc. The appellants stand that the letter of the Company dated September 7, 1972 was

received by them on September 20, 1972 and not earlier was never denied or refuted by the Company in the correspondence that passed between the parties. Thus, there was nothing in the surrounding circumstances or the conduct of the appellants indicating or suggesting an intention on their part to abandon service which in view of the ratio of Gopal Chandra Misra's case (1978) 2 SCC 301: (AIR 1978 SC 548) , can be legitimately said to mean to detach, unfasten, undo or untie the binding knot or link which holds one to the office and the obligations and privileges that go with it. Their absence from duty was purely temporary and could by no stretch of imagination be construed as voluntary abandonment by them of the Company's service. In *Express Newspaper (P) Limited v. Michael Mark* (1963) 3 SCR 405: (AIR 1963 SC 1141) which is on all fours with the present case, it was held that if the employees absent themselves from the work because of strike in enforcement of their demands, there can be no question of abandonment of employment by them. In the present case also the appellant's absence from duty was because of their peaceful strike to enforce their demand. Accordingly, we are of the view that there was no abandonment of service on the part of the appellants.

Re.-Question No. 3: Let us now advert to the last but the most crucial question, namely, whether the action of the Company in removing the names of the appellants from its rolls during the pendency of the proceedings before the Labour Court in respect of the industrial dispute on the presumption that they had abandoned Company's service constituted an alteration in the conditions of service applicable to them immediately before the commencement of the said proceedings which prejudicially affected them. Although the learned Counsel appearing on behalf of the respondent has taken us through the certified standing orders as applicable to the appellants, he has not been able to point out anything therein to indicate that the company could terminate the services of the appellants on the ground of abandonment of service because of their going on strike in enforcement of their demands. Thus, their being no provision in the certified standing orders by virtue of which the Company would have terminated the services of the appellants in the aforesaid circumstances, the impugned action on the part of the Company clearly amounted to a change in the condition of service of the appellants during the admitted pendency of the industrial dispute before the Labour Court which adversely affected them and could not be countenanced. We are fortified in this view by the aforesaid decision of this Court in *Express Newspapers (P) Limited v. Michael Mark and Anr.* (Supra) where repelling an identical contention to the effect that the failure of the workmen to return to work by a notified date clearly implied abandonment of their employment, it was held that the management cannot by imposing a new term of employment unilaterally convert the absence of work into abandonment of employment. It was further held in that decision that if the strike was in fact illegal, the management could take disciplinary action against the employees under the standing orders and dismiss them. If that were done, the strikers would not have been entitled to any compensation under standing orders but

that was not what the appellants purported to do and the respondents were, therefore, entitled to relief."

11. Since, the retrenchment of the petitioner/workman was void ab initio, hence, the petitioner-workman was entitled for reinstatement instead of a lump sum compensation.

12. Their Lordships of Hon"ble Supreme Court in (2013)10 SCC 324, titled as "Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.)", have held as under on the issue of reinstatement of workman:- "37. After noticing several precedents to which reference has been made hereinabove, the two Judge Bench observed:

"17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed.

18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in Rudhan Singh and Uday Narain Pandey. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.

19. But the cases referred to above, where back wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view

that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.

20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination.

21. In this case, the Labour Court found that a charge against the employee in respect of a serious misconduct was proved. It, however, felt that the punishment of dismissal was not warranted and therefore, imposed a lesser punishment of withholding the two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all.

38.7 . The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal 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.

40. The learned Single Judge agreed with the Tribunal that the action taken by the management to terminate the Appellant's service was per se illegal but set aside the award of back wages by making a cryptic observation that she had not proved the factum of non-employment during the intervening period. While doing so, the learned Single Judge not only overlooked the order passed by the Division Bench in Writ Petition No. 8404/2006, but also Rule 33 which prohibits an employee from taking employment elsewhere. Indeed, it was not even the pleaded case of the management that during the period of suspension, the Appellant had left the Headquarter without prior approval of the Chief Executive Officer and thereby disentitling her from getting subsistence allowance or that during the intervening period she was gainfully employed elsewhere.

41. In view of the above discussion, we hold that the learned Single Judge of the High Court committed grave error by interfering with the order passed by the Tribunal for payment of back wages, ignoring that the charges levelled against the Appellant were frivolous and the inquiry was held in gross violation of the rules of natural justice.

42. In the result, the appeal is allowed, the impugned order is set aside and the order passed by the Tribunal is restored. The management shall pay full back wages to the Appellant within four months from the date of receipt of copy of this order failing which it shall have to pay interest at the rate of 9% per annum from the date of the Appellant's suspension till the date of actual reinstatement. It is also made clear that in the event of noncompliance of this order, the management shall make itself liable to be punished under the Contempt of Courts Act, 1971."

13. Their Lordships of Hon''ble Supreme Court in (2015) 9 SCC 345, titled as "Raj Kumar Dixit Vs. Vijay Kumar Gauri Shanker," have held as under on the question of reinstatement of workman after his retrenchment is declared void ab initio:- 20. The High Court has exceeded in its jurisdiction in setting aside the Award passed by the Labour Court in awarding reinstatement of the Appellant-workman in his post along with 50% back wages which is erroneous in law as the High Court has not noticed the fact that the appropriate Government has referred the dispute to the Labour Court for its adjudication on the points of dispute referred to it. Since, there was non-compliance of the mandatory requirements as provided under the provisions of the Act by the Respondent-firm at the time of passing an order of termination against the Appellant-workman, therefore, the same has been held to be bad in law and as such it should have awarded full back wages to the workman from the date of termination till the date of passing the Award unless the employer proves that the workman was

gainfully employed during the aforesaid period which fact is neither pleaded nor proved before the Labour Court.

21. Therefore, the impugned judgment of the High Court is bad in law as the normal rule to be followed by the Respondent-firm with regard to the termination of the services of the workman has not been done in the present case and further, the High Court has once again exceeded in its supervisory jurisdiction in exercise of its judicial review power Under Article 227 of the Constitution of India by setting aside the Award of reinstatement with 50% back wages passed by the Labour Court and has instead awarded Rs. 2 lakhs as compensation to the Appellant-workman which is contrary to the law laid down by this Court. The High Court cannot exercise its supervisory jurisdiction and act as either original court or appellate court to set aside the finding of fact recorded on the points of dispute referred to the Labour Court on proper appreciation of pleadings and evidence on record in favour of the workman as has been done in the instant case. The Award of compensation of Rs. 2 Lakhs awarded in place of reinstatement with 50% back wages as awarded by the Labour Court has been modified by the High Court without assigning any cogent and valid reason which is not only erroneous in law but suffers from error in law as well, as the same is contrary to the catena of decisions of this Court. On this ground itself, the impugned judgment of the High Court is liable to be set aside and we pass an order to restore the Award passed by the Labour Court

27. The grounds urged by the Appellant in this case are well founded and we accordingly pass the following order:

27.1. The Appeal is allowed. The impugned judgment and order passed by the High Court of Judicature at Allahabad in Writ Petition No. 19573 of 2010 dated 02.07.2014 is hereby set aside and the Award passed by the Labour Court in awarding reinstatement with 50% back wages from the date of termination till the date of passing the Award by the Labour Court is restored.

27.2. We further direct the Respondent-firm to pay full back wages to the workman from the date of passing of the Award by the Labour Court till the date of his reinstatement in service. The order shall be complied with by the Respondent-firm within six weeks from the date of receipt of copy of this order.

14. Their Lordships of Hon"ble Supreme Court in (2016) 6 SCC 541, titled as "Raj Kumar Vs. Director of Education and others", have ordered that retrenchment of the service of the workman was in violation of Section 25(F) (a), (b) & (c) of the Industrial Disputes Act, 1947 and have ordered the reinstatement of the petitioner with full back wages. Their Lordships have held as under :- "57. For the reasons stated supra, we are of the view that the impugned judgment and order dated 28.07.2008 passed by the Delhi High Court is liable to be set aside and accordingly set aside, by allowing this appeal. The retrenchment of the appellant from his service is bad in law. The respondent-Managing Committee is directed to reinstate the appellant at his post. Consequently, the

relief of back wages till the date of this order is awarded to the appellant, along with all consequential benefits from the date of termination of his services. The back wages shall be computed on the basis of periodical revision of wages/salary. We further make it clear that the entire amount due to the appellant must be spread over the period between the period of retrenchment and the date of this decision, which amounts to 13 years, for the reason that the appellant is entitled to the benefit under Section 89 of the Income Tax Act. The same must be complied with within six weeks from the date of receipt of the copy of this judgment.

15. It has come on record that the workman had submitted various representations to the authorities for his reinstatement from time to time.

16. Learned counsel for the petitioner has also drawn the attention of this Court towards the letter dated 24.09.1997, issued by the Government of Uttar Pradesh, which is annexed by the petitioner as Annexure No.1 to the rejoinder affidavit. According to the contentions of this letter, the workmen who had completed 240 days" before 01.04.1993 were entitled for absorption in work charge establishment.

17. The employer on its own should have given the benefit of Government Order dated 24.09.1997 to the workman instead of forcing him to raise the industrial dispute.

18. The employer has not led any evidence that the petitioner/workman was gainfully employed w.e.f. 1992 till the passing of award.

19. Learned counsel for the respondents has vehemently argued that there is a delay in raising the industrial dispute. However, the fact of the matter is that the employer has not challenged the reference made by the State Government. Moreover, the question of delay can be seen at the time of moulding the relief.

20. Accordingly, the writ petition is allowed. The award dated 23.08.2010, passed by Presiding Officer, Labour Court is modified by declaring the retrenchment of the petitioner void ab initio. He shall be deemed to be in service with all consequential benefits including the back-wages to be paid to him within eight weeks from today.