
(2018) 11 GAU CK 0023
In the Gauhati High Court
Case No : Writ Appeal No.184 Of 2018

Sri Ashim Kumar Dey

APPELLANT

Vs

State Bank Of India And 3 Ors

RESPONDENT

Date of Decision : 15-11-2018

Acts Referred:

State Bank of India Rule 1992 — Rule 68(2)
Constitution Of India, 1950 — Article 14

Citation : (2018) 11 GAU CK 0023

Hon'ble Judges : Arup Kumar Goswami, J;Ajit Borthakur, J

Bench : Division Bench

Advocate : K K Mahanta, S S Sharma

Final Decision : Dismissed

Judgement

1.Heard Mr. K. K. Mahanta, learned Sr. counsel appearing on behalf of the appellant/writ petitioner. Also heard Mr. S. S. Sharma, learned senior counsel appearing on behalf of the respondents/State Bank of India.

2. Perused the records.

3. The substance of challenge in this Writ Appeal is against the direction given in the judgment & order, dated 22.02.2018, in the connected writ

petition viz. WP(c) No.5068/2010, whereby, the learned Single Judge directed the respondent/State Bank of India to pay the appellant, herein, only

25% of the back wages on his re-instatement.

4. Brief facts of the case is that, the appellant is a former Branch Manager and was serving in the cadre of Junior Grade Service-I of the

respondent/State Bank of India. He was posted as Branch Manager at Kanubari Branch in the Tirap District of Arunachal Pradesh, on 16.05.2002

and continued to serve in the said Branch until his transfer on 24.06.2006.

5. On 05.01.2007, he was put under suspension vide order, dated 11.01.2007, when he was serving as the then Branch Manager of the State Bank of

India of Mawnai Branch, West Khasi Hills, Meghalaya, pending drawal of departmental proceedings. Thereafter, on 04.03.2008, a Charge-Sheet was

submitted against the appellant by the disciplinary authority regarding the misappropriation of funds from the accounts of the borrowers while

sanctioning and disbursing loans of and misuse of bank funds by sanctioning loan amount in excess of the scheme. Subsequent thereto, he submitted

his reply on 29.04.2008 stating his innocence before the disciplinary authority.

6. However, the authorities concerned initiated the Departmental Inquiry against him, vide order, dated 05.07.2008, and fixing the date of the

proceeding on 23.07.2008 at Tinsukia. After completion of the proceeding, the Inquiry Officer, one Sri J. K. Pator, submitted his report, dated

08.11.2008, holding that all allegations levelled against the appellant to be proved except allegations No. 2 & 5. The Officer also held the allegation No.

8 to be partially proved. Though the appellant submitted objection against the said Inquiry Report, the respondent No. 2/General Manager, State Bank

of India, Guwahati, dismissed the appellant from service vide order, dated 17.08.2009. Being highly aggrieved by the order of dismissal, he preferred

an appeal before the respondent No. 3, Chief General Manager, State Bank of India, Guwahati, which was also rejected by the said respondent, vide

order, dated 08.12.2009, affirming the order of dismissal.

7. Being highly aggrieved, the appellant challenged the legality and validity of the above-mentioned two orders, dated 17.08.2009 and 08.12.2009, by

way of filing the writ petition i.e. WP(c) 5068/2010 before this Court, and the learned single Judge, while disposing of the said writ petition, directed

the respondents to reinstate the petitioner (appellant, herein) and further, balancing the interest of both parties, his reinstatement was ordered on

payment of 25% back wages.

8. The appellant being aggrieved by the judgement & order, dated 22.02.2018, passed by the learned single Judge, in WP(c)5068/2010, so far as it

relates to the direction for payment of 25% back wages, has preferred the instant appeal, primarily, seeking 100% back wages.

9. Mr. Mahanta, learned Sr. counsel, appearing on behalf of the appellant,

submitted that the learned single Judge while passing the impugned judgment & order, dated 22.02.2018, erred in law and facts, while directing for payment of 25% back wages to the appellant as the Court had held that the departmental proceeding and punishment awarded to him, was illegal.

10. Mr. Mahanta further submits that when the learned single Judge held that the appellant's dismissal was wrongful, direction ought to have

issued for payment of 100% back wages on reinstatement instead of 25% as directed. Not having done so and denying the appellant of getting his

legitimate entitlements, the impugned judgment & order, directing payment of only 25% back wages, is arbitrary, unjust, unfair and contrary to the

established principles of service jurisprudence. Therefore, the impugned direction, directing the respondents to make payment of 25% back wages to

the appellant, may be interfered with, by this Court, for the ends of justice. In support of his argument, Mr. Mahanta has relied upon the judgments,

rendered by the Hon'ble Supreme Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) & Ors, reported in

(2013) 10 SCC 324; Pawan Kumar Agarwala Vs. General Manager-II and Appointing Authority, State Bank of India & Ors., reported in (2015) 15

SCC 184.

11. Per contra, Mr. S. S. Sharma, learned Sr. Standing counsel appearing for the respondents/State Bank of India submitted that the learned Single

Judge exercising judicial discretion over the facts stated in the charges and the evidence led by the bank in their support had come to a logical

conclusion that the appellant is entitled to 25% back wages on his reinstatement in service consequent upon quashing of order imposing penalty. Mr.

Sharma submitted that the back wages cannot be awarded by the Court as of right consequent upon setting aside of the dismissal order. Mr. Sharma

further submitted that the appellant did not plead and prove by evidence that during the intervening period, he was not gainfully employed anywhere

and that he had no earning to maintain himself or his family. Mr. Sharma relied upon the propositions of law enunciated by the Hon'ble Supreme

Court in Management of Regional Chief Engineer, P.H.E.D, Ranchi Vs. Their Workmen Rep. by District Secretary vide civil Appeal No. 9832 of

2018 and in Rajasthan State Road Transport Corporation, Jaipur Vs. Shri Phool Chand (Dead) through L.Rs. in Civil Appeal No. 1756 of 2018.

Therefore, Mr. Sharma submitted that no interference in the impugned judgment and order of the learned Single Judge is called for.

12. The short question, which arises for consideration in this appeal, is whether the learned Single judge was justified in awarding 25% back wages on

reinstatement in service, to the appellant, after quashing his dismissal order, dated 17.08.2009, holding that the disciplinary action taken against him is

wholly unsustainable. For better appreciation of the issue, the operative portion of the order of the learned Single Judge is hereinbelow extracted:-

“the order of dismissal dated 17.08.2009 (Annexure-6) is found to be unmerited and the same is thus quashed. The respondents are

directed to reinstate the petitioner. However, considering the wrongful dismissal and the fact that the State Bank of India did not receive any service

from the delinquent during the intervening period, balancing the interest of both parties, the reinstatement is ordered on payment of 25% back wages.

The liberty is however given to the disciplinary authority, if so advised, to conduct a legally permissible inquiry.”

13. From a perusal of the whole text of the judgment, we find that the learned Single Judge had come to the above conclusion and decision basically

for the Inquiry Officer’s failure to observe due procedure in conducting the Disciplinary Proceeding, more particularly the procedure prescribed by

the Sub-clause (s), under Rule 68 (2) of the SBI Service Rules and non-consideration of the case of the delinquent/ appellant herein. The reason for

granting 25% back wages, on reinstatement of the appellant is that during the intervening period till his reinstatement, he did not render any service to

the respondent/SBI, keeping the option open to the authority to conduct afresh a legally permissible inquiry, if so advised. Thus, in substance, the

learned Single Judge’s above directions followed from the procedural perspective which occasioned gross failure to observe the principles of

natural justice embodied in Article 14 of the Constitution of India, not purely on merit of the charges brought against the appellant.

14. In Deepali Gundu Surwase (supra), the Hon’ble Supreme Court held that in case of reinstatement in service of an employee due to his

wrongful/ illegal termination, he is normally entitled to full back wages. However, if the employer wants to deny back wages to the employee or

contest his entitlement to get consequential benefits, then it is for him to specifically plead and prove that during the intervening period, the employee

was gainfully employed and was getting the same emoluments. In Pawan Kumar Agarwala (supra), the Honâ??ble Supreme Court reiterated the

same view and held that in absence of evidence of being gainfully employed elsewhere, order of reinstatement without full back wages is unjustified.

In the backdrop of facts, however, the Honâ??ble Court directed the employer to pay full back wages minus the pension amount drawn from the

date of the employee attaining the age of superannuation on the basis of periodical revisions of salary. The Honâ??ble Supreme Court in Shobha

Ram Raturi (supra) also reiterated the same principle that the employee is entitled to all consequential benefits and that the fault of not having utilised

his service for the intervening period lies with the employer.

15. We find that in Deepali Gundu Surwase (supra), the Honâ??ble Supreme Court, after rendering a threadbare analysis of the relevant cases in

Para-38 summarized the following propositions on the subject: â??â?|..38.1 In cases of wrongful termination of service, reinstatement with continuity

of service and back wages is the normal rule; 38.2â?| 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; 38.3â?|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; 38.4â?|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; 38.5â?|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 employerâ??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; 38.6â?|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 penalized. 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-Ã -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); 38.7â?|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/

workmanâ??.

16. In the Case of Management of Regional Chief Engineer, P.H.E.D., Ranchi (supra), the Honâ?ble Supreme Court observed that a workman has

no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order and directed his reinstatement in

service. The Honâ?ble Court, however, held that it is necessary for the workman in such cases to plead and prove with the aid of evidence that

after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer

is also entitled to prove it otherwise against the employee that the employee was gainfully employed during the relevant period and hence not entitled

to claim any back wages. Initial burden is, however, on the employee.

17. On perusal of the rival contentions made in WP(c) No. 5068/2010, it appears to us that none of the parties to the said proceeding pleaded the issue

of gainful employment of the appellant during the intervening period although they were under an obligation to address the issue. In such

circumstances of the case, to balance the competing equities and to sub-serve the ends of justice, the appellant ought to be awarded 50% of back

wages. Ordered accordingly.

18. The respondents will pay the appellant 50% of the back wages after deducting the amount already paid, if any.

19. Accordingly, we modify the impugned judgment and order, so far it relates to the quantum of back wages payable to the appellant.

20. Let the amount be worked out and be paid by the respondent/SBI to the appellant, within 3 (three) months from the date of this judgment.