

(2014) 12 PAT CK 0051

In the Patna High Court

Case No : LPA No. 928 of 2014 in CWJC No. 10977 of 2012

The Managing Director and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 1 PLJR 419

Hon'ble Judges : I.A. Ansari, Acting C.J.;Anjana Mishra, J

Bench : Division Bench

Advocate : Rajendra Kumar and Nilanjan Chatterjee, Advocates for the Appellant; Lalit Kishore, Advocates for the Respondent

Judgement

I.A. Ansari, Actg. C.J.

1. This letters patent appeal arises out of an order, Narendra Kumar Yadav Vs. The State of Bihar, , whereby the learned single Judge of this Court has allowed the said writ petition and quashed the impugned order, dated 24.4.2012. The Court directed the Managing Director, Bihar Industrial Area Development Authority, Patna (respondent No. 3 of the writ petition-appellant No. 1 herein) to pay to the writ petitioner-respondent No. 3 herein salaries and allowances for the period of his suspension, commencing from 31.7.2007 and ending on 30.12.2009, with interest at the rate of 6% per annum and further directed to pay the salary of 22 days, with the interest aforementioned, which had been deducted from his salary in the month of June, 2007, by the order of the Managing Director, Bihar Industrial Area Development Authority, Patna. In the undivided State of Bihar, the State Government, under Section 3 of the Bihar Industrial Area Development Authority Act, 1974 (in short, "BIADA Act"), established as many as six Industrial Area Development Authorities. Out of the six Industrial Area Development Authorities, so established, three of the Authorities, established at Bokaro, Ranchi and Adityapur, on bifurcation of the State of Bihar, fell, with effect from 15th of November, 2000, within the territorial

jurisdiction of the State of Jharkhand; whereas Industrial Area Development Authorities, established at Patna, Muzaffarpur and Darbhanga, remained within the territorial jurisdiction of the State of Bihar. The three Industrial Area Development Authorities, namely, Patna Industrial Area Development Authority, Patna, North Bihar Industrial Area Development Authority, Muzaffarpur, and Darbhanga Industrial Area Development Authority, Darbhanga, were merged in the year 2007 and all these three Industrial Area Development Authorities were reconstituted as Bihar Industrial Area Development Authority (hereinafter referred to as "the BIADA"), which is, in the light of the provisions of Section 3 of the BIADA Act, 1974, a body corporate.

2. Under Section 14 of the BIADA Act, Bihar Industrial Area Development Authority Rules, 1981, was framed by the State Government and under Rule 8 thereof, appointment and promotion to the posts, carrying a maximum salary of Rs. 840/- and above, shall not be made by BIADA except with prior approval of the State Government.

3. The writ petitioner-respondent No. 3 herein, namely, Narendra Kumar Yadav, was appointed, in the year 1974, on the post of Technical Officer (Mechanical), by Patna Industrial Area Development Authority and he was posted at Barauni Industrial Area Development Authority, which was within the jurisdiction of North Bihar Industrial Area Development Authority, Muzaffarpur (in short, "NBIADA").

4. Under Memorandum No. 41, dated 15.1.1976, NBIADA abolished the post of Technical Officer (Mechanical) and created a post of Assistant Development Officer (Mechanical). The writ petitioner, namely, Narendra Kumar Yadav, was appointed on the post of Assistant Development Officer (Mechanical) with effect from 1.10.1975. In course of time, the writ petitioner-respondent No. 3 herein was promoted, with effect from 9.5.1983, as Deputy Development Officer and he was further promoted to the post of Development Officer by letter, dated 28.6.1995, the promotion of the writ petitioner-respondent No. 3 herein, on the post of Development Officer, being with effect from 15.6.1995.

5. A preliminary enquiry was initiated against the writ petitioner-respondent No. 3 herein in the year 2003 and a Two-Member Committee, having enquired into the allegations made against the writ petitioner-respondent No. 3, held that out of 10 (ten) charges, 3 (three) of the charges stood proved. Pursuant to the findings, so recorded, no further action was taken against the writ petitioner-respondent No. 3. However, yet another preliminary enquiry was made, in the year 2005, by a One-Member Committee and, based on the findings of the preliminary enquiry, a consolidated charge-sheet was served on the writ petitioner-respondent No. 3 herein on 28.5.2007 and he was directed to submit his response thereto. On the basis of the reply of the writ petitioner-respondent No. 3 herein to the charges framed against him, the Managing Director, who is, admittedly, the disciplinary authority, held that Charge Nos. 2, 3, 5, 7 and 10 had been established. Consequent upon the findings, so recorded, the Managing Director, BIADA, issued an order on 12.7.2007, whereunder the writ petitioner-

respondent No. 3 was made to compulsorily retire from service with effect from 31.7.2007.

6. Before proceeding further, it may be pointed out, at this stage, that with the approval of the State Government, the BIADA, in exercise of its powers conferred by Section 15 read with Section 5 of the BIADA Act, has made regulations, namely, Bihar Industrial Area Development Authority (Financial, Service & Technical) Regulations, 2007 (hereinafter referred to as "the Service Regulations"), which has been notified on 27.12.2007. Under Clause 2.8 of the Service Regulations, an appeal shall lie from any original order made by the Managing Director, BIADA, to the Chairman, BIADA.

7. The writ petitioner-respondent No. 3 herein came to this Court with a writ petition, made under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No. 13038 of 2007, putting to challenge the said order of compulsory retirement.

8. While the writ petition was pending, the writ petitioner chose to withdraw the writ petition on the ground that an appeal would lie, before the Principal Secretary, Department of Industries, Government of Bihar, against the order of compulsory retirement. Having withdrawn the writ petition, the writ petitioner-respondent No. 3 filed a departmental appeal addressed to the Principal Secretary, Department of Industries, Government of Bihar. The appeal, so preferred, came to be numbered as Appeal No. 53 of 2008.

9. This Court, therefore, made an order, dated 5.5.2009, disposing of the writ petition mentioning therein to the effect that liberty is granted to the petitioners to file additional material grounds/memos on the first date of hearing, when the petitioners appear before the appellant authority after the fixation of date for hearing.

10. In his departmental appeal, the writ petitioner-respondent No. 3 herein prayed for reinstatement in service; but no relief was sought for as regards payment of back wages/salary. By its order, dated 21.12.2009, passed in Appeal No. 53/2008, the appellate authority set aside the order, dated 12.7.2007, whereby the writ petitioner-respondent No. 3 herein had been compulsorily retired, the reason, for setting aside the order, dated 12.7.2007, aforementioned, being that no departmental proceeding had been conducted before passing the order of compulsory retirement.

11. After the order of the appellate authority, the writ petitioner-respondent No. 3 herein submitted his joining report on 31.12.2009. His joining report was accepted and he was posted, vide Memo No. 416 dated 28.1.2010, at the Regional Office, Muzaffarpur. The writ petitioner-respondent No. 3 accordingly submitted his joining, at Muzaffarpur, on 29.1.2010 itself and the same was accepted.

12. What may, now, be pointed out is that the only ground for interfering with

the penalty of compulsory retirement by the appellate authority was that the penalty of compulsory retirement had been imposed without holding a disciplinary proceeding against the writ petitioner-respondent No. 3. However, the charge-sheet, served on the writ petitioner-respondent No. 3, was not quashed and, therefore, remained pending against the writ petitioner-respondent No. 3.

13. What also needs to be pointed out is that the appellate authority was neither requested nor did he allow the back wages/salary to the writ petitioner-respondent No. 3. The writ petitioner-respondent No. 3 did not challenge the Order of the appellate authority, whereby no direction for payment of back wages/salary had been given.

14. Thus, without any protest or demur, the writ petitioner-respondent No. 3 herein had accepted the order of the appellate authority; but two weeks before his retirement, the petitioner made a representation, dated 17.2.2012, seeking from the authorities of BIADA back wages for the period of his suspension. The writ petitioner also, in his representation, claimed salary for 22 days, which had been deducted from his salary in the month of June, 2007, by the order of the Managing Director, BIADA.

15. By letter, dated 24.4.2012, the Secretary, BIADA, communicated to the writ petitioner that the appellate authority, in his order, had not allowed back wages and the writ petitioner was, therefore, not entitled to claim back wages for the period from 31.7.2007 to 30.12.2009.

16. The writ petitioner-respondent No. 3, then, came to this Court with a second writ petition, which gave rise to C.W.J.C. No. 10977 of 2012, seeking a writ of mandamus to be issued to the authorities of the BIADA to pay back wages to the writ petitioner for the period, when the writ petitioner had remained under suspension with effect from 31.7.2007 to 30.12.2009. The writ petitioner also prayed for a writ of mandamus to be issued to the respondent-authorities to make payment of salary of 22 days, which had not been paid in the month of June, 2007, pursuant to the order passed by the Managing Director, BIADA.

17. The second writ petition, namely, C.W.J.C. No. 10977 of 2012, was resisted by the appellants herein, who were respondents in the writ petition, on the ground that the writ petitioner had not raised any claim, before the appellate authority, for payment of back wages, in question, and, hence, the writ petitioner cannot claim back wages as he had chosen not to challenge the order, dated 21.12.2009, passed by the appellate authority, whereby the appellate authority, while setting aside the order, dated 12.7.2007, of compulsory retirement passed by the disciplinary authority, had not directed payment of back wages/salary to the writ petitioner and, thus, when the writ petitioner-respondent No. 3 herein had, once, accepted the order of the appellate authority (which had not directed payment of back wages), the claim for back wages stood barred by the principle of *res judicata* or constructive *res judicata*.

18. In his writ application, the writ petitioner-respondent No. 3 herein relied upon Sub-rule (2)(ii) of Rule 12 of Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (hereinafter referred to as "the CCA Rules"), which lays down as under:--

"12. Treatment of service on reinstatement and admissibility of pay and allowances after dismissal, removal or compulsory retirement as a result of appeal.--

(1) xxx xxx xxx

(a) xxx xxx xxx

(b) xxx xxx xxx

(2) The Government Servant shall, subject to the provisions of sub-rule (6) be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, in cases--

(i) xxx xxx xxx

(ii) where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate authority solely on the ground of non-compliance of the requirement of these Rules and no further inquiry is proposed to be held:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government Servant, it may, after giving him an opportunity to make his representation and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government Servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such proportion of such pay and allowances as it may be determined by him.

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx

(8) xxx xxx xxx "

19. From a bare reading of the provisions, embodied in sub-rule 2(ii) of Rule 12 of the CCA Rules, it would be clear that a Government servant becomes automatically entitled to payment of full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the

case may be, if the order of dismissal, removal or compulsory retirement from service is set aside by the appellate authority solely on the ground of non-compliance of the requirement of the CCA Rules and no further inquiry is proposed to be held.

20. Referring to, and relying upon, sub-rule (2)(ii) of Rule 12 of the CCA Rules, it is contended, on behalf of the writ petitioner (respondent No. 3 herein), that since the order of compulsory retirement passed against the writ petitioner has been set aside by the appellate authority for omission to hold any departmental proceeding before imposing penalty of compulsory retirement and since departmental proceeding was, thereafter never held and the writ petitioner (respondent No. 3 herein) was allowed to superannuate, the writ petitioner (i.e., respondent No. 3 herein) became automatically entitled to payment of full pay and allowances to which he would have been entitled, had he not been compulsorily retired without holding an effective departmental proceeding.

21. Acceding to the submissions made, on behalf of the petitioner (i.e., respondent No. 3 in the writ petition), the Court directed payment of back wages and also payment of salary for 22 days, which had been deducted, as already indicated above, by the order of the Managing Director, BIADA. The relevant observations, appearing in this regard, in the order, dated 12.3.2014, read as under:--

"Mr. Bindhyachal Singh, learned counsel appearing on behalf of the petitioner contended that the petitioner was kept out of service during the period in question by virtue of an order of compulsory retirement, which was held to be illegal, subsequently by a competent Appellate Authority. After the said order of compulsory retirement was set aside by the Appellate Authority, the BIADA neither initiated any disciplinary proceeding against the petitioner on the ground of any misconduct nor it chose to question the legality of the order of the Appellate Authority in accordance with law. He contends that there cannot be any valid and justifiable reason to deny the petitioner's back wages for the period during which he was kept out of service, because of an illegal order of compulsory retirement."

22. In the order, dated 12.3.2014, aforementioned, the learned Single Judge held that the order of the Managing Director, BIADA, keeping the writ petitioner (i.e., respondent No. 3 herein) out of service, was wholly unauthorized, illegal and without jurisdiction and held, on the conclusion so reached, that the impugned order, dated 24.4.2012, refusing to pay to the writ petitioner back wages, for the period from 31.7.2007 to 30.12.2009, was not sustainable and, therefore, quashed the order, dated 24.4.2012, aforementioned and directed, as already indicated above, the present appellants to pay to the writ petitioner (i.e., respondent No. 3 herein) all salaries and allowances, for the period from 31.7.2007 to 30.12.2009, which the writ petitioner (i.e., respondent No. 3 herein) would have received, had there been no order of compulsory retirement passed against him. The learned Single Judge, by the order, dated 12.3.2014,

aforementioned, also directed payment of interest on the back wages at the rate of 6 per cent per annum. The writ petitioner (i.e., respondent No. 3 herein) was further held entitled to the salary for 22 days, which was deducted without any authority and procedure, and was accordingly directed to be paid salary for the said 22 days with interest, at the rate of 6 per cent per annum, making it clear that the interest shall be calculated from the date the amount had become due till actual payment thereof. The payment of salary, as indicated hereinbefore, was further directed to be made within a period of six months from the date of receipt/production of a copy of the order, dated 12.3.2014, aforementioned passed in the writ petition.

23. Aggrieved by the quashing of the order, dated 24.4.2012, aforementioned and the direction to pay to the writ petitioner all salaries and allowances for the period aforementioned with interest, as mentioned hereinbefore, the authorities of the BIADA have preferred this appeal.

24. We have heard Mr. Rajeev Ranjan Prasad, learned counsel for the appellants, and Mr. Prashant Sinha, learned counsel for respondent No. 3. We have also heard Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing for the State.

25. It is contended, on behalf of the appellants, that the writ petitioner having not raised any claim for back wages before the appellate authority, when he had impugned the order of his compulsory retirement from service, he must be treated to have had no grievance against nonpayment of back wages, more so, when he never objected or protested to the order, dated 21.12.2009, passed by the appellate authority, whereby he had not been directed to be paid his back wages/salary.

26. Resisting the appeal, it is contended, on behalf of the writ petitioner-respondent No. 3 herein, that the writ petitioner-respondent No. 3 is governed by the CCA Rules and under Rule 12(2)(ii) thereof, an employee is automatically entitled to payment of back wages on his reinstatement in service if no departmental proceeding is held against him subsequent to setting aside the order of compulsory retirement.

27. The contention, so raised, on behalf of the writ petitioner-respondent No. 3 herein, is opposed by the appellants by pointing out that the CCA Rules are not applicable to the employee of BIADA and, therefore, the writ petitioner-respondent No. 3 was not automatically entitled to payment of back wages on his reinstatement in service.

28. What needs to be carefully noted is that there is no dispute that Rule 12(2) (ii) of the CCA Rules does provide for payment of back wages to a State Government employee if the order of his compulsory retirement is set aside by the appellate authority on non-compliance of the requirement of the CCA Rules and if no further enquiry is proposed to be held. What is in dispute is the applicability of Rule 12(2)(ii) of the CCA Rules to an employee of BIADA, such as,

the writ petitioner-respondent No. 3 herein.

29. Without entering into the debate as to whether an employee of BIADA is governed by the CCA Rules or not, let us take into consideration the sustainability of the plea of the appellants that the writ petitioner-respondent No. 3, having not sought for direction for payment of back wages, while seeking direction for setting aside the order, dated 12.7.2007, passed against him compulsorily retiring him from service, stood barred from re-agitating the issue of payment of back wages, more so, when he had not challenged the order, dated 21.12.2009, of the appellate authority, who, while setting aside the order of compulsory retirement of the writ petitioner, did not direct for payment of back wages to him.

30. In order to determine if the claim of the petitioner for back wages stood barred by the principle of res judicata or constructive res judicata, it is pertinent to note, once again, in the light of what has been discussed above, that the appellate authority, in its, order, dated 21.12.2009, held that since no departmental proceeding was conducted before passing the order of compulsory retirement and no opportunity of explaining his case and adducing evidence had been given to the writ petitioner (i.e., respondent No. 3 herein), the imposition of penalty of compulsory retirement was not legally sustainable and, therefore, set aside the order of compulsory retirement passed, on 12.7.2007, by the Managing Director, BIADA.

31. True it is that the appellate authority, in his order, dated 21.12.2009, had not directed for payment of back wages. The fact, however, remains that the appellate authority had, in effect, held that the imposition of penalty of compulsory retirement was wholly illegal and void inasmuch as no disciplinary proceeding was held against the writ petitioner, he was not given any opportunity of placing his case before the enquiring authority nor was he given any opportunity to adduce his evidence.

32. Situated thus, it becomes abundantly clear that the order, dated 21.12.2009, passed by the appellate authority setting aside the order of compulsory retirement did not decide, or comment upon, the guilt or otherwise of the writ petitioner-respondent No. 3 herein. Though there was no direction from the end of the appellate authority for reinstatement of the writ petitioner-respondent No. 3 in service, the authorities of BIADA reinstated the petitioner in service consequent upon the order, dated 21.12.2009, passed by the appellate authority and did not place the writ petitioner-respondent No. 3 under suspension for the purpose of completing the disciplinary proceeding.

33. Coupled with the above, it is worth noticing that since the charges had not been quashed, it was open to the disciplinary authority to initiate, conduct and conclude departmental enquiry against the writ petitioner; however, the same was not done.

34. It becomes, therefore, apparent that the writ petitioner-respondent No. 3

herein has, admittedly, not been punished. He is neither held guilty of the charges nor has he been punished. When the writ petitioner-respondent No. 3 herein has not even been found guilty and is not, consequently, punished or penalized, the question of applying the doctrine of res judicata or constructive res judicata does not arise. When the appellate authority had quashed the penalty of compulsory retirement from service on the ground that no departmental proceeding was held at all, the consequence was that the petitioner was not only entitled to reinstatement, but also payment of back wages unless upon his reinstatement, he had been proceeded against, found guilty and punished.

35. However, the disciplinary authority never pursued the charges nor did the disciplinary authority ever claim that the writ petitioner-respondent No. 3 had been gainfully employed during the period, when he was out of service.

36. The present one is not a case, wherein the petitioner had been found guilty by the appellate authority; rather, the case at hand is one, wherein despite the fact that the writ petitioner-respondent No. 3 had denied the charges levelled against him, no enquiry was ordered as against the writ petitioner-respondent No. 3 to place his case or adduce his evidence.

37. Considered thus, it is clear that the writ petitioner-respondent No. 3 herein was never found guilty in accordance with law and no punishment, legally sustainable, was ever imposed on him. When the penalty, in the facts and circumstances of the present case, was, admittedly, illegal and void, the question of withholding of back wages did not arise, especially, when he has not claimed to have remained gainfully employed during the period, when he remained out of service.

38. No doubt, back wages could have been withheld, had the writ petitioner-respondent No. 3, on his reinstatement in service, been placed under suspension and had he been found guilty of the charges, which had been levelled against him. To put it a little differently, when, subsequent to the order, dated 21.12.2009, passed by the appellate authority, no finding, on the merit of the charges, has been reached by holding an enquiry, he could not have been held, and he has, in fact, not been held, guilty of any of the charges levelled against him.

39. In the face of the facts of the present case and attending circumstances, the writ petitioner-respondent No. 3 could not have been denied payment of full back wages in the absence of any claim that he had remained in gainful employment during the period, when he was out of service.

40. It is, therefore, not incorrect to hold, as was held by the learned Single Judge, that it was wholly impermissible in law to withhold the salary and allowances of the writ petitioner-respondent No. 3 herein for the period, when he was kept out of employment illegally, irrationally, unreasonably and arbitrarily by dint of imposition of punishment of compulsory retirement, which stood set aside.

41. With regard to the above, one can also not avoid pointing out that the writ petitioner-respondent No. 3 herein has made specific averment, in his representation before the authorities, that he was not gainfully employed elsewhere during the period he remained out of service, because of the order of compulsory retirement, which finally came to be set aside by the appellate authority. This statement was made at paragraph 22 of the writ application too; but this assertion was never denied in the counter affidavit filed on behalf of the BIADA.

42. We may, at this stage, pause and point out as to what does the expression reinstatement convey in service jurisprudence. According to the Shorter Oxford English Dictionary, Vol. -II (3rd Edition), the word "reinstatement" means to reinstall or re-establish (a person or thing in a place, station, condition, etc.); to restore to its proper or original state; to reinstate afresh and the word "reinstatement" means the action of reinstating; re-establishment. As per Law Lexicon, (2nd Edition), the word "reinstatement" means to reinstall; to reestablish; to place again in a former state, condition or office; to restore to a state or position from which the object or person had been removed and the word "reinstatement" means establishing in former condition, position or authority. As described by Merriam Webster Dictionary, the word "reinstatement" means to place again (as in possession or in a former position), to restore to a previous effective state. Black's Law Dictionary (6th Edition) defines "reinstatement" to mean "to reinstall, to re-establish, to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed. [See Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, .

43. It needs to be borne in mind that the case of Deepali Gundu Surwase (supra) was a case, wherein the employee was exonerated of the charges brought against him. It is in this context that the law has been discussed and the law, as laid down in Deepali Gundu Surwase (supra), may be summed up thus: reinstatement of an employee means restoration of the employee to the position, which he held before he was dismissed or removed or terminated from service implying thereby that the employee would be put in the same position, which he would have occupied, had he not been dismissed from service. With the passing of an order dismissing, removing or terminating the service of an employee, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. At times, the family has to borrow from the relatives and other acquaintances to avoid starvation and such 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 was ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages and if the employer, in such a case, wishes to deny payment of back wages to the employee, then, it is for employer to specifically

plead and prove that during the intervening period, the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer, would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of his obligation to pay back wages and other emoluments.

44. The relevant observations, appearing, at paragraph No. 22, in Deepali Gundu Surwase (supra), with regard to the above position of law, run 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 concerned employee, 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. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

(Emphasis is added)

45. While considering the case of Deepali Gundu Surwase (supra), it needs to be noted that the Court, in Deepali Gundu Surwase (supra), was dealing with a case of reinstatement in service of an employee, who was, as already indicated above, exonerated of the charges brought against him. Where reinstatement is ordered on exoneration of the employee of the charge brought against him, the employee will, ordinarily, be entitled to payment of full back wages unless it is shown by the employer that the employee remained gainfully employed during the period he did not work for the employer and had been receiving, at least, same emoluments, which the employee had been receiving under the employer. Conversely, when an employee is not fully exonerated, reinstatement in service of such an employee will not be a necessary corollary. Thus, the question of

payment of back wages, on reinstatement, would depend on the facts of a given case.

46. The Supreme Court has further pointed out, in *Deepali Gundu Surwase* (supra), that ordinarily, an employee or a 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 had been drawing prior to the termination of service.

47. What, thus, surfaces from the law laid down, in *Deepali Gundu Surwase* (supra), is that when the disciplinary proceeding is remanded, reinstatement of the employee is for the purpose of completing inquiry and, on reinstatement, the employee will not be entitled to payment of back wages and would only be entitled to receive subsistence allowance. If the enquiry is not held or if the enquiry exonerates the employee, the employee will, in either case, be entitled to payment of full back wages unless the same can be validly denied on the ground that he remained gainfully employed during the period of suspension.

48. Coupled with the above, what is also worth pointing out is that subsequent to the quashing of the penalty of compulsory retirement, which had been imposed on the writ petitioner, though the writ petitioner was reinstated in service, his reinstatement was never claimed on completion of the enquiry, in fact, no enquiry was held before his reinstatement.

49. What surfaces from the above discussion is that after the disciplinary proceeding was quashed by the appellate authority, the disciplinary proceeding had never been resumed, guilt of the writ petitioner having never been established and no fresh penalty having been imposed on him, he was entitled to full back wages when he had specifically claimed that he had not been gainfully employed during the period of suspension. The reference, in this regard, may be made to the case of *Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others*, . The relevant observation, made in *Anania Saha* (supra), read as follows:--

"46. In the last, the delinquent has submitted that this Court must issue directions for his reinstatement and payment of arrears of salary till date. Shri Bandopadhyay, learned Senior Counsel appearing for the appellants, has vehemently opposed the relief sought by the delinquent contending that the delinquent has to be deprived of the back wages on the principle of "no work-no pay". The delinquent had been practising privately i.e. has been gainfully employed, thus, not entitled for back wages. Even if this Court comes to the conclusion that the High Court was justified in setting aside the order of punishment and a fresh enquiry is to be held now, the delinquent can simply be

reinstated and put under suspension and would be entitled to subsistence allowance as per the service rules applicable in his case. The question of back wages shall be determined by the disciplinary authority in accordance with law only on the conclusion of the fresh enquiry.

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

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

(Emphasis is supplied) "

50. In short, thus, in Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, , which was a case relating to reinstatement subject to completion of the disciplinary enquiry, the Supreme Court laid down that in such a case, the employee would be reinstated and placed under suspension for the purpose of completing the enquiry and, during the period of suspension, he would be paid subsistence allowance alone and that the question of back wages shall be determined by the disciplinary authority, in accordance with law, only on the conclusion of the fresh enquiry.

51. In the backdrop of the law, which we have discussed above, what follows is that reinstatement in service does not automatically entitle an employee to payment of back wages unless he is completely exonerated of the charges brought against him or if he is allowed to superannuate without holding departmental enquiry and upon his superannuation, no enquiry is held.

52. At the cost of repetition, what needs to be borne in mind is that after the

order of compulsory retirement was quashed by the appellate authority on the ground that no departmental proceeding had been held against the writ petitioner-respondent No. 3 herein before passing of the order, dated 12.7.2007 (imposing penalty of compulsory retirement on the writ petitioner-respondent No. 3), BIADA did not elect to hold any departmental proceeding and allowed the writ petitioner-respondent No. 3 to retire upon attaining the age of superannuation.

53. What emerges from the above discussions, if we may reiterate, is that the writ petitioner-respondent No. 3 herein has not, till date, been found guilty of any of the charges levelled against him by holding departmental proceeding in accordance with law. Consequently, no penalty has been imposed on him after the penalty of compulsory retirement, imposed on him, was quashed by the appellate authority and when the writ petitioner-respondent No. 3's assertion was never denied that he was not gainfully employed during the period, which he spent on being compulsorily retired, the question of not paying back wages to the writ petitioner (respondent No. 3 herein) would be nothing, but imposing, upon the writ petitioner, illegally and arbitrarily, a penalty, which he cannot be legally made to suffer by resorting to the doctrine of res judicata or constructive res judicata. As a necessary corollary, the writ petitioner must be paid, and ought to have been paid, back wages.

54. Upon quashing of the penalty of compulsory retirement by virtue of the order, dated 21.12.2009, passed by the appellate authority, BIADA could have held necessary enquiry by allowing the writ petitioner-respondent No. 3 herein to place his case, but no such opportunity was afforded to him and when he has not even been found guilty of any charge of his due negligence and no penalty has been imposed on him, withholding or denying payment of back wages to him would be wholly illegal, irrational, arbitrary and without jurisdiction.

55. Because of the conclusions, which we have reached above, we do not find that the order, dated 12.3.2014, passed in C.W.J.C. No. 10977 of 2012, impugned in this appeal, suffers from infirmity, legal or factual.

56. The appeal, therefore, fails and shall, accordingly, stand dismissed. No order as to costs.

Anjana Mishra, J.

I agree