Deepali Gundu Surwase vs Kranti Junior Adhyapak & Ors on 12 August, 2013

Author: G.S. Singhvi

Bench: V. Gopala Gowda, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6767 OF 2013
(Arising out of SLP (C) No.6778 of 2012)

Deepali Gundu Surwase …Appellant

versus

Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others …Respondents

J U D G M E N T

G.S. SINGHVI, J.

1. Leave granted.

2. The question which arises for consideration in this appeal filed against order dated 28.9.2011 passed by the learned Single Judge of the Bombay High Court, Aurangabad Bench is whether the appellant is entitled to wages for the period during which she was forcibly kept out of service by the management of the school.

3. The appellant was appointed as a teacher in Nandanvan Vidya Mandir (Primary School) run by a trust established and controlled by Bagade family. The grant in aid given by the State Government, which included rent for the building was received by Bagade family because the premises belonged to one of its members, namely, Shri Dulichand. In 2005, the Municipal Corporation of Aurangabad raised a tax bill of Rs.79,974/- by treating the property as commercial. Thereupon, the Headmistress of the school, who was also President of the Trust, addressed a letter to all the employees including the appellant requiring them to contribute a sum of Rs.1500/- per month towards the tax liability. The appellant refused to comply with the dictate of the Headmistress. Annoyed by this, the

management issued as many as 25 memos to the appellant and then placed her under suspension vide letter dated 14.11.2006. She submitted reply to each and every memorandum and denied the allegations. Education Officer (Primary) Zilla Parishad, Aurangabad did not approve the appellant's suspension. However, the letter of suspension was not revoked. She was not even paid subsistence allowance in terms of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, 'the Rules') framed under Section 16 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, 'the Act').

4. Writ Petition No.8404 of 2006 filed by the appellant questioning her suspension was disposed of by the Division Bench of the Bombay High Court vide order dated 21.3.2007 and it was declared that the appellant will be deemed to have rejoined her duties from 14.3.2007 and entitled to consequential benefits in terms of Rule 37(2)(f) of the Rules and that the payment of arrears shall be the liability of the management. Paragraphs 4 and 5 of that order read as under:

> "4. Considering the order we intend passing it is not necessary for us to deal with the rival contentions of the parties. That will be for the Inquiry Committee to decide. In view of the apprehensions expressed regarding the inquiry being dragged on unnecessarily, it is necessary to safeguard the interests of the petitioner as well.

5. In the circumstances, Rule is made absolute in the following terms.

> i) The Inquiry Committee shall conclude the proceedings and pass a final order on or before 31.5.2007.
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> ii) The petitioner shall be at liberty to have her case represented by Smt.Sulbha Panditrao Munde.
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> iii) The petitioner/her representative shall appear, in the first instance, before the Inquiry Committee at 11 a.m. on 26.3.2007 and, thereafter, as directed by the Inquiry Committee.

iv) The petitioner is entitled to the benefit of Rule 37 (2)

(f) of Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, as specified in paragraph 11 of the order and judgment of the Division Bench in the case of Hamid Khan Nayyar s/o Habib Khan v. Education Officer, Amravati and others (supra). The petitioner shall be deemed to have rejoined the duties from 14.3.2007 and entitled to consequential benefits that would flow out of Rule 37 (2)

(f). The payment of arrears shall be the liability of the management."

5. In the meanwhile, the management issued notice dated 28.12.2006 for holding an inquiry against the appellant under Rules 36 and 37 of the Rules. The appellant nominated Smt. Sulbha Panditrao Munde to appear before the Inquiry Committee, but Smt. Munde was not allowed to participate in

the inquiry proceedings. The Inquiry Committee conducted ex parte proceedings and the management terminated the appellant's service vide order dated 15.6.2007.

6. The appellant challenged the aforesaid order under Section 9 of the Act. In the appeal filed by her on 25.6.2007, the appellant pleaded that the action taken by the management was arbitrary and violative of the principles of natural justice. She further pleaded that the sole object of the inquiry was to teach her a lesson for refusing to comply with the illegal demand of the management.

7. The management contested the appeal and pleaded that the action taken by it was legal and justified because the appellant had been found guilty of misconduct. It was further pleaded that the inquiry was held in consonance with the relevant rules and the principles of natural justice.

8. By an order dated 20.6.2009, the Presiding Officer of the School Tribunal, Aurangabad Division (for short, 'the Tribunal') allowed the appeal and quashed the termination of the appellant's service. He also directed the management to pay full back wages to the appellant. The Tribunal considered the appellant's plea that she had not been given reasonable opportunity of hearing and observed:

> "Now let us test for what purpose and for what subject inquiry was initiated in what manner inquiry was conducted, which witnesses have been examined and how injury was conclude. I have already demonstrate above that starting point against this appellant is calling upon staff members collection of fund for payment for tax dues page 54 of appeal memo. All the staff members have objected this joining hands together page 58 of appeal. Fact finding committee have submitted its report Exhibit
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> 62. Report of Education Officer (Primary) in regard to the proposal of appointment of Administrator page 71. If we see issuance of memo by Head Mistress, I observe that language which is used to revengeful against this appellant. It seems that attitude towards this appellant was of indecent and I also observed that behaviour of the appellant have also instigated Head Mistress for the same. Language is of law standard use in the letter by imputing defamed language and humiliation to the appellant.

If we see memos, we can find that some memos are of silly count i.e. late for 3 minutes page 95, query about the examination page 93 to which appellant have replied that when no examinations were held where is the question of getting inquiry by the parents page 96. In regard to the memo, in regard to the black dress on 15.08.2005 and 06.12.2005 and about issuance of show cause notice for issuing false affidavit page 143.

We can find attitude of this Head Master towards appellant. Three minute late is very silly ground query about examination which was not at all held, wearing of black dress during course of argument there was argument on photograph, however, no such photograph is submitted on record. In this regard during course of argument, it was brought to my notice that on 15.08.2005 this appellant have wore black colour blouse, however, she had wore white sari on her person. First thing is that there is no such rule about so called colour that it is bogus colour or this colour is being used

for protesting or otherwise. How and why Head Mistress and Management have made issue of this black colour blouse I cannot understand. I have gone through the whole record but I do not find any circular issued by Head Mistress by which all the staff members have been called upon to come in dress for this function. So in the absence of such circular, how it can be an issue of inquiry.

Another aspect is that one of the staff Vijay Gedam have lodged appeal before this Tribunal in favour of him, this appellant and one another staff teacher have swear affidavit. I do not find how this issue can be a subject of inquiry that appellant have swear false affidavit. Is Head Mistress having authority to say that this appellant have swear false affidavit. Here I find 5 to 6 staff members have supported this appellant, at the same time some teachers have also come forward this Head Mistress. They were in dilemma to whom they may favour. So over all attitude of this Head Mistress against this appellant is revengeful with ulterior motive to drag this appellant in inquiry proceeding.

I gone through the statement recorded of the witnesses. I find that all the statements are general in nature and it is repetition of statement of first witness Surajkumar Khobragade. Nobody has made statement specifically with date and incident. The deposition is a general statement which is already in memos which have been issue by the Head Mistress to the appellant.

More important in this regard that no cross examination of witnesses by the appellant. In the statement of witnesses, I do not find any endorsement that appellant was absent or appellant is present, she declined to cross examine or otherwise. These statements have been concluded that witnesses have stated before inquiry committee, that is all. If we read first statement of first witnesses we can find carry forward of the statement for other witnesses by some minor change in the statement.

One crucial aspect in regard to the proceeding is that this Head Mistress who had issued more than 25 bulky memos against this appellant and on whose complaint or grievances this inquiry was initiate, have not been examined by the inquiry committee. I am surprised that why such a key witness is not examined. In reply this appellant have put her grievances against Head Mistress. By taking advantage of this Chief Executive Officer of the inquiry i.e. Sonia Bagale called upon written explanation from Head Mistress to cover up complaint and grievances of the appellant. It is on 21.05.2007, page 777, 778 and 781 by this explanation again one issues have been brought which were not subject matter of the chargesheet. So it is serious lacuna in this inquiry proceeding that witnesses Head Mistress have not been examined." The Tribunal then adverted to the charges levelled against the appellant and held:

> "It is also demonstrated in the course of argument that permission was not granted as per letter dated 22.11.2006 of Education Officer. So naturally suspension of this appellant was in question. It is another aspect that on persuasion appellant have been paid subsistence allowance. However, remaining subsistence allowance till today is not paid to the appellant. So it can be another ground for vitiating inquiry.
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> 204(1)Mh. L.J. page 676 in case of Awdhesh Narayan K. Singh vs. Adarsh Vidya Mandir Trust and another, (a) Maharashtra Employees of Private Schools

(Conditions of Service) Rules 1981, R.R. 35 and 33- Failure to obtain prior permission of Authority under Rule 33(1) before suspending an employee does not affect the action of suspension pending inquiry- If prior permission is obtained, Rule 35(3) is attracted and the suspended employee is entitled for subsistence allowance under the scheme of payment through Cooperative Banks for a period of four months after which period the payment is to be made by the Management. If an employee is suspended without obtaining prior approval of the Education Authority, payment of subsistence allowance for entire period has to be made by the Management. So if considered all these aspects, we can find that appeal deserves to be allowed by quashing inquiry held against appellant." The Tribunal finally took cognizance of the fact that the appellant was kept under suspension from 14.11.2006 and she was not gainfully employed after the termination of her service and declared that she is entitled to full back wages. The operative portion of the order passed by the Tribunal reads as under:

"1) Appeal is allowed.

2) The termination order dated 15.06.2007 issued by Respondent on the basis of inquiry report is hereby quashed and set aside.

3) The appellant is hereby reinstated on her original post and Respondents are directed to reinstate the appellant in her original post as Asst. Teacher Nandanvan Vidyamandir (Primary School), Aurangabad with full back wages from the date of termination till date of reinstatement.

4) The Respondent Nos.1 to 3 are hereby directed to deposit full back wages i.e. pay and allowances of the appellant from the date of her termination till the date of her reinstatement in the service, within 45 days in this Tribunal from the date of this order.

5) The appellant will be entitled to withdraw the above amounts from this Tribunal immediately after it is deposited."

9. The management challenged the order of the Tribunal in Writ Petition No. 10032 of 2010. The learned Single Judge examined the issues raised by the management in detail and expressed his agreement with the Tribunal that the decision of the management to suspend the appellant and to terminate her service were vitiated due to violation of the statutory provisions and the principles of natural justice. While commenting upon the appellant's suspension, the learned Single Judge observed:

"It has also come on record that the appellant was suspended by suspension letter dated 14.11.2006. The appellant made representation to the Education Officer. The Education Officer refused to approve suspension of the appellant as per his letter

dated 22.11.2006. From careful perusal of the material brought on record, I do not find that, there arose extraordinary situation to suspend services of the appellant without taking prior approval of the Education Officer, as contemplated under Rules. No doubt, the Management can suspend services of an employee without prior approval of the Education Officer, but for that there should be extraordinary situation. However, in the facts of this case, nothing is brought on record to suggest that there was extraordinary situation existing so as to take emergent steps to suspend services of the appellant without taking prior approval of the Education Officer (Primary), Zilla Parishad, Aurangabad. It is also not in dispute that the Education Officer declined to approve suspension of the appellant as per his letter dated 22.11.2006.

Therefore, taking into consideration facts involved in the present case, conclusion is reached by the School Tribunal that the Management of the petitioner-school/Institution is dominated by the members of Bagade family." The learned Single Judge then considered the finding recorded by the Tribunal that the Inquiry Committee was not validly constituted and observed:

"In the present case, admittedly petitioners herein did not file any application or made prayer for reconstituting the inquiry committee and to proceed further for inquiry by newly reconstituted committee. On the contrary, from reading the reply filed by the petitioners herein before the School Tribunal, it is abundantly clear that the petitioners went on justifying constitution of the Committee and stating in the reply that no fault can be attributed with the constitution of the Committee. Therefore, in absence of such prayer, the School Tribunal proceeded further and dealt with all the charges which were levelled against the appellant i.e. Respondent No.3 herein. Therefore, in my opinion, further adjudication by the Tribunal on merits of the matter cannot be said to be beyond jurisdiction or powers of the School Tribunal. In the facts of this case, as it is apparent from the findings recorded by the School Tribunal, that as the case in hand is a case of victimization and petitioner Management as well as the Inquiry Committee having joined hands against the delinquent right from the beginning, no premium can be put over the action of the petitioner-Management and Inquiry Committee who threw the principles of natural justice in the air. It would be a travesty of justice, in these circumstances, to allow the petitioner- Management to once again hold inquiry in such a extreme case." However, the learned Single Judge set aside the direction given by the School Tribunal for payment of back wages by relying upon the judgments in J.K. Synthetics Ltd. v. K. P. Agrawal and another (2007) 2 SCC 433 and Zilla Parishad, Gadchiroli and another v. Prakash s/o Nagorao Thete and another 2009 (4) Mh. L. J. 628. The observations made by the learned Single Judge on this issue are extracted below:

"Bare perusal of above reproduced para 40 of the judgment of the School Tribunal would make it abundantly clear that, the advocate for the appellant, in the course of arguments, argued that the appellant was kept under suspension from 14.11.2006 till

the appeal is finally heard. It was argued that the appellant was not gainfully employed anywhere during the period of suspension and termination and therefore, she is entitled to back wages from the date of her suspension. The Tribunal has observed that no rebuttal argument by other side. Therefore, it appears that, the School Tribunal has considered only oral submissions of the Counsel appearing for the appellant, in the absence of any specific pleadings, prayers and evidence for payment of back wages. There was no application or pleadings before the School Tribunal on oath by the appellant stating that she was not gainfully employed from the date of suspension till reinstatement. Therefore, in my considered opinion, finding recorded by the Tribunal in clauses 3 to 5 of the operative order, in respect of payment of back wages, cannot be sustained, in the light of law laid down by this Court and Honourable Supreme Court in respect of payment of back wages."

10. Learned counsel for the appellant relied upon the judgments of this Court in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (1979) 2 SCC 80, Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (1980) 4 SCC 443, Mohan Lal v. Management of Bharat Electronics Limited (1981) 3 SCC 225, Workmen of Calcutta Dock Labour Board and another v. Employers in relation to Calcutta Dock Labour Board and others (1974) 3 SCC 216 and argued that the impugned order is liable to be set aside because while the appellant had pleaded that she was not gainfully employed, no evidence was produced by the management to prove the contrary. Learned counsel submitted that the order passed by the Tribunal was in consonance with the provisions of the Act and the Rules and the High Court committed serious error by setting aside the direction given by the Tribunal to the management to pay back wages to the appellant on the specious ground that she had not led evidence to prove her non-employment during the period she was kept away from the job. He emphasized that in view of the embargo contained in Rule 33(3), the appellant had not taken up any other employment and argued that she could not have been deprived of full pay and allowances for the entire period during which she was forcibly kept out of job.

11. Learned counsel for the respondent supported the impugned order and argued that the High Court did not commit any error by setting aside the direction given by the Tribunal for payment of back wages to the appellant because she had neither pleaded nor any evidence was produced that during the period of suspension and thereafter she was not employed elsewhere.

Learned counsel relied upon the judgments in M.P. State Electricity Board v. Jarina Bee (2003) 6 SCC 141, Kendriya Vidyalaya Sangathan v. S.C. Sharma (2005) 2 SCC 363, U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey (2006) 1 SCC 479, J. K. Synthetics Ltd. v. K.P. Agrawal and another (supra), The Depot Manager, A.P.S.R.T.C. v. P. Jayaram Reddy (2009) 2 SCC 681, Novartis India Ltd. v. State of West Bengal and others (2009) 3 SCC 124, Metropolitan Transport Corporation v. V. Venkatesan (2009) 9 SCC 601 and Jagbir Singh v. Haryana State Agriculture

Marketing Board and another (2009) 15 SCC 327 and argued that the rule of reinstatement with back wages propounded in 1960's and 70's has been considerably diluted and the Courts/Tribunal cannot ordain payment of back wages as a matter of course in each and every case of wrongful termination of service. Learned counsel submitted that even if the Court/Tribunal finds that the termination, dismissal or discharge of an employee is contrary to law or is vitiated due to violation of the principles of natural justice, an order for payment of back wages cannot be issued unless the employee concerned not only pleads, but also proves that he/she was not employed gainfully during the intervening period.

12. We have considered the respective arguments. The Act was enacted by the legislature to regulate the recruitment and conditions of service of employees in certain private schools in the State and to instill a sense of security among such employees so that they may fearlessly discharge their duties towards the pupil, the institution and the society. Another object of the Act is to ensure that the employees become accountable to the management and contribute their might for improving the standard of education. Section 2 of the Act contains definitions of various words and terms appearing in other sections. Section 8 provides for constitution of one or more Tribunals to be called "School Tribunal" and also defines the jurisdiction of each Tribunal. Section 9(1) contains a non obstante clause and provides for an appeal by any employee of a private school against his/her dismissal or removal from service or whose services are otherwise terminated or who is reduced in rank. The employee, who is superseded in the matter of promotion is also entitled to file an appeal. Section 10 enumerates general powers and procedure of the Tribunal and Section 11 empowers the Tribunal to give appropriate relief and direction. Section 12 also contains a non obstante clause and makes the decision of the Tribunal final and binding on the employee and the management. Of course, this is subject to the power of judicial review vested in the High Court and this Court. Section 16(1) empowers the State Government to make rules for carrying out the purposes of the Act. Section 16(2) specifies the particular matters on which the State Government can make rules. These include Code of Conduct and disciplinary matters and the manner of conducting inquiries.

13. Rule 35 of the Rules empower the management to suspend an employee with the prior approval of the competent authority. The exercise of this power is hedged with the condition that the period of suspension shall not exceed four months without prior permission of the concerned authority. The suspended employee is entitled to subsistence allowance under the scheme of payment (Rule 34) through Co-operative Bank for a period of four months. If the period of suspension exceeds four months, then subsistence allowance has to be paid by the management. In case, the management suspends an employee without obtaining prior approval of the competent authority, then it has to pay the subsistence allowance till the completion of inquiry. A suspended employee can be denied subsistence allowance only in the contingencies enumerated in clauses (3) and (4) of Rule 33, i.e., when he takes up private employment or leaves headquarter without prior approval of the Chief Executive Officer.

14. For the sake of reference, Sections 2(7), 9, 10, 11 and 16 of the Act are reproduced below:

> "2(7) "Employee," means any member of the teaching and non teaching staff of a recognized school and includes Shikshan Sevak;

9. Right of appeal to Tribunal to employees of a private school.

(1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school,-

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management; or

(b) who is superseded by the Management while making an appointment to any post by promotion;

and who is aggrieved, shall have a right to appeal and may appeal against any such order or supersession to the Tribunal constituted under section 8.

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July, 1976.

(2) to (4) xxxx xxxx xxxx

10. General Powers and procedure of Tribunal.

(1) For the purpose of admission, hearing and disposal of appeals, the Tribunal shall have the same powers as are vested in an Appellate Court under the Code of Civil Procedure, 1908, and shall have the power to stay the operation of any order against which an appeal is made on such conditions as it may think fit to impose and such other powers as are conferred on it by or under this Act.

(2)The Presiding Officer of the Tribunal shall decide the procedure to be followed by the Tribunal for the disposal of its business including the place or places at which and the hours during which it shall hold its sitting.

(3) xxxx xxxx xxxx

11. Powers of Tribunal to give appropriate relief and direction.

(1) On receipt of an appeal, where the Tribunal, after giving reasonable opportunity to both parties of being heard, is satisfied that the appeal does not pertain to any of the matters specified in section 9 or is not maintainable by it, or there is no sufficient ground for interfering with the order of the Management it may dismiss the appeal.

(2) Where the Tribunal, after giving reasonable opportunity to both parties of being heard, decides in any appeal that the order of dismissal, removal, otherwise termination of service or reduction in rank was in contravention of any law (including any rules made under this Act), contract or

conditions of service for the time being in force or was otherwise illegal or improper, the Tribunal may set aside the order of the Management, partially or wholly, and direct the Management,-

(a) to reinstate the employee on the same post or on a lower post as it may specify;

(b) to restore the employee to the rank which he held before reduction or to any lower rank as it may specify;'

(c) to give arrears of emoluments to the employee for such period as it may specify;

(d) to award such lesser punishment as it may specify in lieu of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be;

(e) where it is decided not to reinstate the employee or in any other appropriate case, to give to the employee twelve months' salary (pay and allowances, if any) if he has been in the services of the school for ten years or more and six months salary (pay and allowances, if any) if he has been in service of the school for less then ten year, by way or compensation, regard being had to loss of employment and possibility of getting or not getting suitable employment thereunder, as it may specify; or

(f) to give such other relief to the employee and to observe such other conditions as it may specify, having regard to the circumstances of the case.

(3) It shall be lawful for the Tribunal to recommend to State Government that any dues directed by it to be paid to the employee, or in case of an order to reinstate the employee an emoluments to be paid to the employee till he is reinstated, may be deducted from the grant due and payable, or that may become due and payable in future, to the Management and be paid to the employee directly.

(4) Any direction issued by the Tribunal under sub-section (2) shall be communicated to both parties in writing and shall be complied by the Management within the period specified in the direction, which shall not be less than thirty days from the date of its receipt by the Management.

16. Rules.

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) to (c) xx xx xx xx

(d) the other conditions of service of such employees

including leave, superannuation, re-employment and promotions;

(e) the duties of such employees and Code of Conduct and disciplinary matters;

(f) the manner of conducting enquiries;

(g)	xx	xx	xx	xx
(2A) to (4)		xx	xx	xx ”

15. Rules 33 (1) to (4), 34(1), (2) and 35, which have bearing on the decision of this appeal read as under:

> “33. Procedure for inflicting major penalties.
>
> (1) If an employee is alleged to be guilty of any of the grounds specified in sub-rule (5) of rule 28 and if there is reason to believe that in the event of the guilt being proved against him, he is likely to be reduced in rank or removed from service, the Management shall first decide whether to hold an inquiry and also to place the employees under suspension and if it decides to suspend the employee, it shall authorise the Chief Executive Officer to do so after obtaining the permission of the Education Officer or, in the case of the Junior College of Educational and Technical High Schools, of the Deputy Director.

Suspension shall not be ordered unless there is a prima facie case for his removal or there is reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case. If the Management decides to suspend the employee, such employee shall, subject to the provisions of sub-rule (5) stand suspended with effect from the date of such orders.

(2) If the employee tenders resignation while under suspension and during the pendency of the inquiry such resignation shall not be accepted.

(3) An employee under suspension shall not accept any private employment.

(4) The employee under suspension shall not leave the headquarters during the period of suspension without the prior approval of the Chief Executive Officer. If such employee is the Head and also the Chief Executive Officer, he shall obtain the necessary prior approval of the President.

34. Payment of subsistence allowance.

(1) (a) A subsistence allowance at an amount equal to the leave salary which the employee would have drawn if he had been on leave on half pay and in addition, Dearness allowance based on such leave salary shall be payable to the employee under suspension.

(b) Where the period of suspension exceeds 4 months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first 4 months as follows, namely :-

> (i) The amount of subsistence allowance may be increased by a suitable amount not exceeding 50 per cent of the subsistence allowance admissible during the period of first 4 months, if in the opinion of the said authority, the period of suspension has been prolonged for reasons, to be recorded in writing, not directly attributable to the employee.
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> (ii) The amount of subsistence allowance may be reduced by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of the first 4 months, if in the opinion of the said authority the period of suspension has been prolonged due to reasons, to be recorded in writing directly attributable to the employee.
>
> (iii) The rate of Dearness allowance shall be based on the increased or on the Decreased amount of subsistence allowance, as the case may be, admissible under sub-clauses (i) and (ii).
>
> (2) Other compensatory allowances, if any, of which the employee was in receipt on the date of suspension shall also be payable to the employee under suspension to such extent and subject to such conditions as the authority suspending the employee may direct:
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> Provided that the employee shall not be entitled to the compensatory allowances unless the said authority is satisfied that the employee continues to meet the expenditure for which such allowances are granted:
>
> Provided further that, when an employee is convicted by a competent court and sentenced to imprisonment, the subsistence allowance shall be reduced to a nominal amount of rupee one per month with effect from the date of such conviction and he shall continue to draw the same till the date of his removal or reinstatement by the competent authority :
>
> Provided also that, if an employee is acquitted by the appellate court and no further appeal or a revision application to a higher court is preferred and pending, he shall draw the subsistence allowance at the normal rate from the date of acquittal by the appellate court till the termination of the inquiry if any, initiated under these rules :

> Provided also that, in cases falling under sub-rules (1) and (2) above, where the management refuses to pay or fails to start and continue payment of subsistence allowance and other compensatory allowances, if any, to an employee under suspension, payment of the same shall be made by the Education Officer or Deputy Director, as the case may be, who shall deduct an equal amount from the non-salary grant that may be due and payable or may become due and payable to the school.

35. Conditions of suspension.

(1) In cases where the Management desires to suspend an employee, he shall be suspended only with the prior approval of the appropriate authority mentioned in rule 33.

(2) The period of suspension shall not exceed four months except with the prior permission of such appropriate authority.

(3) In case where the employee is suspended with prior approval he shall be paid subsistence allowance under the scheme of payment through Co-operative Banks for a period of four months only and thereafter, the payment shall be made by the Management concerned.

(4) In case where the employee is suspended by the Management without obtaining prior approval of the appropriate authority as aforesaid, the payment of subsistence allowance even during the first four months of suspension and for further period thereafter till the completion of inquiry shall be made by the Management itself.

(5) The subsistence allowance shall not be withheld except in cases of breach of provisions of sub-rules (3) or (4) of rule

33."

16. The word "reinstatement" has not been defined in the Act and the Rules. As per Shorter Oxford English Dictionary, Vol.II, 3rd Edition, the word "reinstate" 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 "reinstate" means 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 and the word "reinstatement" means establishing in former condition, position or authority (as) reinstatement of a deposed prince. As per Merriam Webster Dictionary, the word "reinstate" means to place again (as in possession or in a former position), to restore to a previous effective state. As per Black's Law Dictionary, 6th Edition, "reinstatement" means '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.'

17. 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.

18. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd. (supra) in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilization 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 practice. 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 strait-jacket 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.

19. Another three Judge Bench considered the same issue in Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (supra) and observed:

> "Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted." (emphasis supplied)

20. The principle laid down in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra) was reiterated in P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (2001) 2 SCC 54. That case makes an interesting reading. The respondent had worked as helper for 11 months and 18 days. The termination of his service was declared by Labour Court, Chandigarh as retrenchment and was invalidated on the ground of non-compliance of Section 25-F of the Industrial Disputes Act, 1947. As a corollary, the Labour Court held that the respondent was entitled to reinstatement with continuity of service. However, only 60% back wages were awarded. The learned Single Judge of the Punjab and Haryana High Court did not find any error apparent in the award of the Labour Court but ordered payment of full back wages. The two Judge Bench of this Court noted the guiding principle laid down in the case of Hindustan Tin Works Private Limited and observed:

> "While it is true that in the event of failure in compliance with Section 25-F read with Section 25(b) of the Industrial Disputes Act, 1947 in the normal course of events the Tribunal is supposed to award the back wages in its entirety but the discretion is left with the Tribunal in the matter of grant of back wages and it is this discretion, which in Hindustan Tin Works (P) Ltd. case this Court has stated must be exercised in a judicial and judicious manner depending upon the facts and circumstances of each case. While, however, recording the guiding principle for the grant of relief of back wages this Court in Hindustan case, itself reduced the back wages to 75%, the reason being the contextual facts and circumstances of the case under consideration.
>
> The Labour Court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons

in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect. In the event, however the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law which can be corrected by a writ of certiorari. The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material evidence adduced before the Labour Court was insufficient or inadequate though, however, perversity of the order would warrant intervention of the High Court. The observation, as above, stands well settled since the decision of this Court in Syed Yakoob v. K.S. Radhakrishnan AIR 1964 SC 477.

Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. As regards the decision of this Court in Hindustan Tin Works (P) Ltd. be it noted that though broad guidelines, as regards payment of back wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back wages only.

The issue as raised in the matter of back wages has been dealt with by the Labour Court in the manner as above having regard to the facts and circumstances of the matter in the issue, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. In the event, however, the High Court's interference is sought for, there exists an obligation on the part of the High Court to record in the judgment, the reasoning before however denouncing a judgment of an inferior Tribunal, in the absence of which, the judgment in our view cannot stand the scrutiny of otherwise being reasonable. There ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the Labour Court and it is only upon recording therewith the High Court has the authority to interfere. Unfortunately, the High Court did not feel it expedient to record any reason far less any appreciable reason before denouncing the judgment."

21. The aforesaid judgment became a benchmark for almost all the subsequent judgments. In Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya (2002) 6 SCC 41, the Fifth Industrial Tribunal, West Bengal had found that the finding of guilty recorded in the departmental inquiry was not based on any cogent and reliable evidence and passed an award for reinstatement of the workman with other benefits. The learned Single Judge allowed the writ petition filed by the employer and quashed the award of the Industrial Tribunal. The Division Bench of the High Court reversed the order of the learned Single Judge. This Court issued notice to the respondent limited to the question of back wages. After taking cognizance of the judgments in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra) and P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra), the Court observed:

> "As already noted, there was no application of mind to the question of back wages by the Labour Court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the Labour Court or the High Court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to supra in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long-drawn litigation, it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatement. The amount already paid as wages or subsistence allowance during the pendency of the various proceedings shall be deducted from the back wages now directed to be paid. The appellant will calculate the amount of back wages as directed herein and pay the same to the respondent within three months, failing which the amount will carry interest at the rate of 9% per annum. The award of the Labour Court which has been confirmed by the Division Bench of the High Court stands modified to this extent. The appeal is disposed of on the above terms. There will be no order as to costs." (emphasis supplied)

22. In Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579, this Court was called upon to consider whether the services of the respondent could be terminated by dispensing with the requirement of inquiry enshrined in Indian Railway Construction Co. Ltd. (Conduct, Discipline and Appeal) Rules, 1981 read with Article 311(2) of the Constitution. The learned Single Judge of the Delhi High Court held that there was no legal justification to dispense with the inquiry and ordered reinstatement of the workman with back wages. The Division Bench upheld the order of the learned Single Judge. The two Judge Bench of this Court referred to the judgments in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra) and P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra) and held that payment of Rs.15 lakhs in full and final settlement of all claims of the employee will serve the ends of justice.

23. In M.P. State Electricity Board v. Jarina Bee (Smt.) (supra), the two Judge Bench referred to P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra) and held that it is always incumbent upon the Labour Court to decide the question relating to quantum of back wages by considering the evidence produced by the parties.

24. In Kendriya Vidyalaya Sangathan v. S. C. Sharma (supra), the Court found that the services of the respondent had been terminated under Rule 19(ii) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 on the charge that he was absconding from duty. The Central Administrative Tribunal held that no material was available with the disciplinary authority which could justify invoking of Rule 19(ii) and the order of dismissal could not have been passed without holding regular inquiry in accordance with the procedure prescribed under the Rules. The Division Bench of the Punjab and Haryana High Court did not accept the appellants' contention that invoking of Rule 19(ii) was justified merely because the respondent did not respond to the notices issued to him and did not offer any explanation for his willful absence from duty for more than two

years. The High Court agreed with the Tribunal and dismissed the writ petition. The High Court further held that even though the respondent- employee had not pleaded or produced any evidence that after dismissal from service, he was not gainfully employed, back wages cannot be denied to him. This Court relied upon some of the earlier judgments and held that in view of the respondent's failure to discharge the initial burden to show that he was not gainfully employed, there was ample justification to deny him back wages, more so because he had absconded from duty for a long period of two years.

25. In General Manager, Haryana Roadways v. Rudhan Singh (2005) 5 SCC 591, the three Judge Bench considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment. The factual matrix of that case was that after finding the termination of the respondent's service as illegal, the Industrial Tribunal- cum-Labour Court awarded 50% back wages. The writ petition filed by the appellant was dismissed by the Punjab and Haryana High Court. This Court set aside award of 50% back wages on the ground that the workman had raised the dispute after a gap of 2 years and 6 months and the Government had made reference after 8 months. The Court then proceeded to observe:

> "There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

26. In U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey (supra), the two Judge Bench observed:

> "No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is

> automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act."

27. The Court also reiterated the rule that the workman is required to plead and prima facie prove that he was not gainfully employed during the intervening period.

28. In Depot Manager, Andhra Pradesh State Road Transport Corporation v. P. Jayaram Reddy (supra), this Court noted that the services of the respondent were terminated because while seeking fresh appointment, he had suppressed the facts relating to earlier termination on the charges of grave misconduct. The Labour Court did not find any fault with the procedure adopted by the employer but opined that dismissal was very harsh, disproportionate and unjustified and accordingly exercised power under Section11-A of the Industrial Disputes Act, 1947 for ordering reinstatement with back wages. This Court referred to the judgments in P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (supra) and J.K. Synthetics Ltd. v. K. P. Agrawal (supra) and held that the Labour Court was not justified in awarding back wages.

29. In Novartis India Limited v. State of West Bengal (supra), the services of the workman were terminated on the charge of not joining the place of transfer. The Labour Court quashed the termination of services on the ground of violation of the rules of natural justice and passed an award of reinstatement of the workman with back wages. The learned Single Judge of the High Court dismissed the writ petition filed by the appellant but the letters patent appeal was allowed by the Division Bench on the ground that the State of West Bengal was not the appropriate Government for making the reference. The special leave petition filed by the workman was allowed by this Court and the Division Bench of the High Court was asked to decide the letters patent appeal on merits. In the second round, the Division Bench dismissed the appeal. This Court referred to shift in the approach regarding payment of back wages and observed:

> "There can, however, be no doubt whatsoever that there has been a shift in the approach of this Court in regard to payment of back wages. Back wages cannot be granted almost automatically upon setting aside an order of termination inter alia on the premise that the burden to show that the workman was gainfully employed during interregnum period was on the employer. This Court, in a number of decisions opined that grant of back wages is not automatic. The burden of proof that he remained unemployed would be on the workmen keeping in view the provisions contained in Section 106 of the Evidence Act, 1872. This Court in the matter of grant of back wages has laid down certain guidelines stating that therefor several factors are required to be considered including the nature of appointment; the mode of recruitment; the length of service; and whether the appointment was in consonance with Articles 14 and 16 of the Constitution of India in cases of public employment, etc. It is also trite that for the purpose of grant of back wages, conduct of the workman concerned also plays a vital role. Each decision, as regards grant of back wages or the quantum thereof, would, therefore, depend on the fact of each case. Back wages are ordinarily to be granted, keeping in view the principles of grant of

damages in mind. It cannot be claimed as a matter of right."

30. In Metropolitan Transport Corporation v. V. Venkatesan (supra), the Court noted that after termination of service from the post of conductor, the respondent had acquired Law degree and started practice as an advocate. The Industrial Tribunal declared the termination of the respondent's service by way of removal as void and inoperative on the ground that the Corporation had not applied for approval under Section 33(2)(b) of the Industrial Disputes Act. At one stage, the High Court stayed the order of the Industrial Tribunal but finally dismissed the writ petition. The workman filed application under Section 33-C(2) of the Industrial Disputes Act claiming full back wages. The Labour Court allowed the claim of the respondent to the extent of Rs.6,54,766/-. The writ petition filed against the order of the Labour Court was dismissed by the learned Single Judge and the appeal was dismissed by the Division Bench. This Court referred to the earlier precedents and observed:

> "First, it may be noticed that in the seventies and eighties, the directions for reinstatement and the payment of full back wages on dismissal order having been found invalid would ordinarily follow as a matter of course. But there is change in the legal approach now.
>
> We recently observed in Jagbir Singh v. Haryana State Agriculture Mktg. Board that in the recent past there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that the relief of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is held to be in contravention of the prescribed procedure.
>
> Secondly, and more importantly, in view of the fact that the respondent was enrolled as an advocate on 12-12-2000 and continued to be so until the date of his reinstatement (15-6- 2004), in our thoughtful consideration, he cannot be held to be entitled to full back wages. That the income received by the respondent while pursuing legal profession has to be treated as income from gainful employment does not admit of any doubt. In North-East Karnataka RTC v. M. Nagangouda this Court held that "gainful employment" would also include self-employment. We respectfully agree.

It is difficult to accept the submission of the learned Senior Counsel for the respondent that he had no professional earnings as an advocate and except conducting his own case, the respondent did not appear in any other case. The fact that he resigned from service after 2-3 years of reinstatement and re- engaged himself in legal profession leads us to assume that he had some practice in law after he took sanad on 12-12-2000 until 15-6-2004, otherwise he would not have resigned from the settled job and resumed profession of glorious uncertainties."

31. In Jagbir Singh v. Haryana State Agriculture Marketing Board (supra), this Court noted that as on the date of retrenchment, respondent No.1 had worked for less than 11 months and held:

> "It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.
>
> Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages."

32. We may now deal with the judgment in J.K. Synthetics Ltd. v. K.P. Agrawal and another (supra) in detail. The facts of that case were that the respondent was dismissed from service on the basis of inquiry conducted by the competent authority. The Labour Court held that the inquiry was not fair and proper and permitted the parties to adduce evidence on the charges levelled against the respondent. After considering the evidence, the Labour Court gave benefit of doubt to the respondent and substituted the punishment of dismissal from service with that of stoppage of increments for two years. On an application filed by the respondent, the Labour Court held that the respondent was entitled to reinstatement with full back wages for the period of unemployment. The learned Single Judge dismissed the writ petition and the Division Bench declined to interfere by observing that the employer had willfully violated the order of the Labour Court. On an application made by the respondent under Section 6(6) of the U.P. Industrial Disputes Act, 1947, the Labour Court amended the award. This Court upheld the power of the Labour Court to amend the award but did not approve the award of full back wages. After noticing several precedents to which reference has been made hereinabove, the two Judge Bench observed:

> "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.
>
> 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.

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. 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.

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."

33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) 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.

iii) 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.

iv) 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.

v) 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 employer'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.

vi) 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 penalised. 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-à-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).

vii) 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/workman.

34. Reverting to the case in hand, we find that the management's decision to terminate the appellant's service was preceded by her suspension albeit without any rhyme or reason and even though the Division Bench of the High Court declared that she will be deemed to have rejoined her duty on 14.3.2007 and entitled to consequential benefits, the management neither allowed her to join the duty nor paid wages. Rather, after making a show of holding inquiry, the management terminated her service vide order dated 15.6.2007. The Tribunal found that action of the management to be wholly arbitrary and vitiated due to violation of the rules of natural justice. The Tribunal further found that the allegations levelled against the appellant were frivolous. The Tribunal also took cognizance of the statement made on behalf of the appellant that she was not gainfully employed anywhere and the fact that the management had not controverted the same and ordered her reinstatement with full back wages.

35. 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.

36. 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.

37. 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.

38. It is also made clear that in the event of non-compliance of this order, the management shall make itself liable to be punished under the Contempt of Courts Act, 1971.

.....J. (G.S. SINGHVI) .....J. (V. GOPALA GOWDA) New Delhi;

August 12, 2013.
