Pradeep S/O Rajkumar Jain vs Manganese Ore(India) Limited on 10 December, 2021

Author: K. M. Joseph

Bench: Pamidighantam Sri Narasimha, K.M. Joseph

'REPOR

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7607 OF 2021
(Arising out of SLP (C)No. 21346 of 2017)

PRADEEP S/O RAJKUMAR JAIN Appellan

VERSUS

MANGANESE ORE(INDIA) LIMITED & ORS. Responde

O R D E R

K. M. JOSEPH, J.

(1) Leave granted.

(2) The appellant is a qualified Chartered Accountant. He was appointed as Manager (Finance) by order dated 22.10.1997. Thereafter, he was posted in 2005 at the Balaghat Mines as the Deputy Chief (Finance). In certain circumstances, which were on account of the death of his father, he had to report late for work on three days. He was served with a show cause and it was followed up by yet another show cause. It was replied to. He came to be suspended on 05.10.2007. He was served with a charge memo on 27.10.2007. Thereafter, he was dismissed on 12.08.2008. The appeal carried by him was dismissed. He filed a writ petition. The writ petition filed was partly allowed by the CIVIL APPEAL NO. 7607 OF 2021 Division Bench and this has resulted in the present appeal. (3) The controversy lies in a very narrow compass. While the Division Bench has ordered reinstatement of the appellant, the Court has denied him the benefit of backwages. In other words, this Court is called upon to decide whether there is justification to deny backwages to the appellant.

(4) We have heard learned counsel for the appellant and learned counsel for the respondent.

(5) The respondent is, undoubtedly, State under Article 12 of the Constitution. The contention of the appellant is that the appellant as a Chartered Accountant has been victimised. There was no justification at all in law, or in facts in launching the disciplinary proceedings against the appellant and it has been so held by the High Court as well in the impugned order. The High Court, however, has proceeded to take the view that the appellant is not entitled to backwages. The reason given is as follows 'specially when the appellant has not worked during the said period'.

(6) Learned counsel for the respondent would oppose the appeal by pointing out that the burden lay with the employee, if the appellant wished to show that he had not worked during the period that he was kept out of the CIVIL APPEAL NO. 7607 OF 2021 employment. The appellant's counsel joins issue with this proposition. He points out that judgments of this Court establish the principle that all that is required is that the workman/appellant must plead that he had not worked during the period when he was kept out of employment by illegal termination. In this regard, the appellant drew support from a large body of case law. In particular, he drew our attention to the judgment of this Court in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors. (2013) 10 SCC 324. The Bench of two learned Judges in the said case has, after reviewing of case law which included survey of two earlier three Judges Benches of this Court, concluded as follows:

> "38. The propositions which can be culled out from the aforementioned judgments are:
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> 38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
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> 38.2. 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.
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> 38.3. 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 CIVIL APPEAL NO. 7607 OF 2021 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 averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. 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 victimising the employee or workman, then the court or tribunal concerned 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have CIVIL APPEAL NO. 7607 OF 2021 interfered with the award of the primary adjudicatory authority on the premise that finalisation 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 (P) Ltd. v. Employees [(1979) 2 SCC 80 : 1979 SCC (L&S) 53] .

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

K.P. Agrawal [(2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] 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 [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 :

1979 SCC (L&S) 53] , [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] 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. "42. In the result, the appeal is allowed, the impugned order [Kranti Junior Adhyapak Mahavidyalaya v. State of Maharashtra, (2012) 1 Mah LJ 370] is set aside and the order passed by the Tribunal is restored. The management shall pay full back wages to the appellant within four months from the date of receipt of copy of this order failing which it shall have to pay interest at the rate of 9% per annum from the date of the appellant's suspension till the date of actual reinstatement. It is also made clear that in the event of non-compliance with this order, the management shall make itself liable to be punished under the Contempt of Courts Act, 1971." CIVIL APPEAL NO. 7607 OF 2021 (7) Learned counsel for the respondent, on the other hand, sought support from another line of decisions which represent the later view adopted by this Court in Talwara Cooperative Credit and Service Society Ltd. v. Sushil Kumar (2008) 9 SCC 486. He also sought support from the judgment in Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand (Dead) Through Legal Representatives (2018) 18 SCC 299.

(8) Learned counsel for the appellant on being faced with this line of decisions, would, in the first place, point out that this Court in Talwara Cooperative Credit and Service Society Ltd. (supra) has adverted to Section 106 of the Evidence Act and therefore, the burden lay on the employee for which reference was made to an earlier judgment and he would point out that, in fact, in the earlier judgment, there is no reference to Section 106 of the Evidence Act. (9) We notice that it is true that in Talwara Cooperative Credit and Service Society Ltd. (supra), this Court has held inter alia:

> "13. This Court in a large number of cases noticed the paradigm shift in the matter of burden of proof as regards gainful employment on the part of the employer holding that having regard to the provisions contained in Section 106 of the Evidence Act, the burden would be on the workman. The burden, however, is a negative one. If only the same is discharged by the workman, the onus of proof would shift on to the employer to show that the employee concerned was in fact gainfully employed. In Surinder Kumar [(2006) 5 SCC 173 : 2006 SCC (L&S) 967] , this Court held : (SCC p. 177, paras 12-14) CIVIL APPEAL NO. 7607 OF 2021 "12. The Labour Court and the High Court also proceeded wrongly on the premise that the burden of proof to establish non-completion of 240 days of work within a period of twelve months preceding the termination, was on the management. The burden was on the workman. (See U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey [(2006) 1 SCC 479 : 2006 SCC (L&S) 250 : JT (2005) 10 SC 344] and State of M.P. v. Arjunlal Rajak [(2006) 2 SCC 711 : 2006 SCC (L&S) 429].)
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> 13. Equally well settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. (See RBI v. S. Mani [(2005) 5 SCC 100 : 2005 SCC (L&S) 609].)

> 14. It is also a trite law that only because some documents have not been produced by the management, an adverse inference would not be drawn against the management. (See S. Mani [(2005) 5 SCC 100 : 2005 SCC (L&S) 609].)"" In fact, the said judgment has made reference to the judgment reported in Manager R.B.I. Bangalore v. S. Mani & Ors. (2005) 05 SCC 100 for what is stated in para 13.

(10) We do not find, in fact, any reference to Section 106 of the Evidence Act being made in Manager R.B.I. Bangalore (supra). It is true, however, that in the judgment reported in Municipal Council Sujanpur v. Surinder Kumar (2006) 5 SCC 173, there is a reference made to Section 106 of the Evidence Act and in the manner in which it is stated in paragraph 13 it is quoted also in Talwara Cooperative Credit and Service Society Ltd. (supra).

There is an earlier judgment of this Court rendered by a Bench of three learned Judges which is reported in Shambhu CIVIL APPEAL NO. 7607 OF 2021 Nath Goyal v. Bank of Baroda and Others (1983) 4 SCC 491 which has dealt with the issue in the following words:

> "……
> ……
> The management is thus seen to have been taking steps periodically to see that the dispute is not disposed of at an early date one way or the other. The blame for not framing an issue on the question whether or not the workman was gainfully employed in the intervening period cannot be laid on the Tribunal alone. It was equally the duty of the management to have got that issue framed by the Tribunal and adduce the necessary evidence unless the object was to rake up that question at some later stage to the disadvantage of the workman as in fact it has been done. The management appears to have come forward with the grievance for the first time only in the High Court. There is no material on record to show that the workman was gainfully employed anywhere. The management has not furnished any particulars in this regard even before this Court after such a long lapse of time. The workman could have been asked to furnish the necessary information at the earliest stage. The management has not resorted to that course. The workman was not expected to prove the negative. In these circumstances, we do not think that it would be in the interest of justice to prolong any further the agony of the workman whose power to endure the suffering of being out of employment for such a long time and to oppose the management Bank, a nationalised undertaking with all the money power at its disposal in this prolonged litigation is very limited by allowing the Bank to have the advantage belatedly sought in the application dated February 8, 1979 in an industrial dispute which arose so early as in 1965.
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> ……
> ……"
> It is, undoubtedly, true when the question arises as to whether the backwages is to be given and as to what is to be the extent of backwages, these are matters which will depend on the facts of the case as noted in Deepali Gundu CIVIL APPEAL NO. 7607

OF 2021 Surwase (supra). In a case where it is found that the employee was not at all at fault and yet, he was visited with illegal termination or termination which is actually activised by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal / malafide termination. The effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The nature of the charges, the exact reason for the termination as evaluated and, of course, the question as to whether the employee was gainfully employed would be matters which will enter into the consideration by the Court.

(11) As far as the present case is concerned, the reason given by the High Court in the impugned order for denying backwages clearly does not appeal to us. According to the appellant, the appellant has indeed stated that he was not working. The case of the respondent is that he was a Chartered Accountant and that he was indeed earning. The learned counsel for the appellant does not deny that the appelant was indeed earning some amount from doing accountancy related work and he had filed returns under the Income Tax Act. This means as things stand before us, it is a case where the appellant must be treated as not having been without any income at all during the period. He was earning. We have also, however, noticed that there was CIVIL APPEAL NO. 7607 OF 2021 hardly any worthwhile reason for the respondent to terminate the services. The impugned order itself shows that there was no basis for termination of the services of the appellant. When the appellant was qualified and particularly, when the appellant also has a case that all this was done for the reason that he had taken up certain issues relating to the manner in which the affairs of the respondent was being run, we would think that the High Court was in error in not making appropriate order relating to backwages.

(12) As regards the quantum of backwages, there are conflicting claims. According to the respondent, if what is described as performance allowance is not added, 100 per cent of the backwages which the appellant would be entitled to would be in the region of about Rs.66 lakhs. The appellant's claim is for over Rs.3 crores. However, he would, after getting instructions from his client state that the appellant may be given a sum of Rs.1.5 crores. He, particularly, points out that this is without taking into consideration the benefits of notional promotion.

We are not delving more into this issue as it is stated that litigation relating to right to notational promotion is pending consideration before the High Court. (13) On a conspectus of all facts and circumstances, we are of the view that the interest of justice would be CIVIL APPEAL NO. 7607 OF 2021 sufficiently served if we direct the appellant be paid a total sum of Rs.80 lakhs as the backwages for the entire period for which the termination operated. Accordingly, the appeal is partly allowed. The impugned order is modified and we direct the respondent to pay a sum of Rs.80 lakhs to the appellant within a period of six weeks from today.

No orders as to costs.

....., J.

[K.M. JOSEPH] ....., J.

[PAMIDIGHANTAM SRI NARASIMHA] New Delhi;

December 10, 2021.