Tapash Kumar Paul vs Bsnl & Anr on 28 January, 2014

Equivalent citations: 2014 AIR SCW 5816, 2014 (15) SCC 313, (2014) 3 SCT 106, (2014) 6 SERVLR 538, (2016) 1 SCALE 92, (2014) 4 ESC 654, (2015) 1 SERVLJ 94, (2014) 4 ALL WC 3643, 2014 (10) ADJ 60 NOC, AIR 2015 SUPREME COURT 357, 2014 AIR SCW 5816 2014 LAB. I. C. 4486, 2014 LAB. I. C. 4486

Bench: V. Gopala Gowda, Gyan Sudha Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPEALLATE JURISDICTION

CIVIL APPEAL NO. 4980 OF 2014
(Arising out of SLP (C) No. 15357 of 2013)

TAPASH KUMAR PAUL .... Petitioner(s)

VERSUS

BSNL & ANR. .... Respondent(s)

O R D E R

Leave granted.

This appeal has been preferred by the appellant who succeeded in getting an order of reinstatement in his favour by the Central Government Industrial Tribunal at Calcutta in Reference No. 27 of 1997 dated 13th May, 2002, by which the order of reinstatement was passed in his favour. However, the Tribunal declined to grant back wages to the appellant except Rs.20,000/- to be paid by the respondent as compensation towards back wages. This Award was passed by the Tribunal since the Management had failed to produce relevant documents to disclose the actual number of days for which appellant has worked and so his termination was held to be in violation of Section 25F of the Industrial Disputes Act, 1947.

The respondent-Management of the BSNL, however, appealed against the Award passed by the Tribunal by way of a Writ Petition in the High Court before the Single Judge whereby the learned

Single Judge affirmed the Award passed by the Tribunal and dismissed the writ petition filed by the respondent- Management. The respondent was not satisfied with the order passed by the Single Judge and refused to give effect to the Award in favour of the appellant and preferred a further appeal before the Division Bench.

The Division Bench, however, was pleased to allow the appeal by setting aside the Award passed in favour of the appellant and in lieu of reinstatement, passed an order directing that the amount of Rs.20,000/- be paid by way of compensation to the appellant which in any case had been passed by the Tribunal as compensation towards back wages. Thus, in effect, the compensation which has been ordered to be paid was legally due to the appellant towards back wages and the High Court set aside the entire Award passed by the Tribunal which in effect can be construed that no amount was paid by way of compensation. Although the High Court recorded that Rs.20,000/- be paid by way of compensation, as aforesaid, the same was towards back wages as per the Award passed by the Tribunal.

It is no doubt true that a Court may pass an order substituting an order of reinstatement by awarding compensation but the same has to be based on justifiable grounds viz. (I) where the industry is closed; (ii) where the employee has superannuated or going to retire shortly and no period of service is left to his credit; (iii) where the workman has been rendered incapacitated to discharge the duties and cannot be reinstated and / or (iv) when he has lost confidence of the Management to discharge duties. What is sought to be emphasised is that there may be appropriate case on facts which may justify substituting the order of reinstatement by award of compensation, but that has to be supported by some legal and justifiable reasons indicating why the order of reinstatement should be allowed to be substituted by award of compensation.

In the instant matter, we are not satisfied that the appellant's case falls in to any of the categories referred to hereinbefore which would justify compensation in lieu of reinstatement. We thus find no justification for the High Court so as to interfere with the Award passed by the Tribunal which was affirmed even by the Single Judge, but the Division Bench thought it appropriate to set aside the order of reinstatement without specifying any reasons whatsoever, as to why it substituted with compensation of a meagre amount of Rs.20,000/- to the appellant.

In view of this we set aside the judgment and order of the High Court and restore the Award of the Tribunal and the order of the Single Judge affirming the same.

The appeal accordingly is allowed but without cost.

.....J. (GYAN SUDHA MISRA) NEW DELHI;

JANUARY 28, 2014 REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPEALLATE JURISDICTION CIVIL APPEAL NO. 4980 OF 2014 (Arising out of SLP (C) No. 15357 of 2013) TAPASH KUMAR PAUL .... APPELLANT VERSUS BSNL & ANR. .... RESPONDENTS O R D E R V. Gopala Gowda, J. (Concurring)

1. While concurring with the finding and reasons recorded by my sister Justice Gyan Sudha Misra in allowing the Civil Appeal by setting aside the impugned judgment of the High Court of Calcutta and restoring the award of the Labour Court with consequential benefits of awarding backwages, I am giving my additional reasons after distinguishing decisions of this Court upon which reliance has been placed by the learned senior counsel appearing on behalf of the appellant.

2. The learned counsel on behalf of the respondent has relied upon the decision of this Court in the case of Senior Superintendent Telegraph (Traffic), Bhopal v. Santosh Kumar Seal and Others[1] to contend that in the last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if the termination of employee has been found illegal or is in contravention to the prescribed procedure. The learned counsel has further relied upon the Santosh Kumar Seal's judgment (supra) which hold as under:

> "10. In a recent judgment authored by one of us (R.M. Lodha, J.) in Jagbir Singh v. Haryana State Agriculture Mktg. Board & Anr.[2], the aforesaid decisions were noticed and it was stated:
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> 7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow.

However, in 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 relief by way 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 in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

* * *

14. 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." The learned senior counsel has further relied upon the decision of this Court in Civil Appeal No.107 of 2014 titled BSNL & Ors. Vs. Kailash Narayan Sharma to hold that reinstatement may not be a natural consequence of termination of service of a work in contravention to Section 25 F of the ID Act. The relevant para reads as under:

> "The decisions of this Court referred to above, in no uncertain terms hold that in case of termination in violation of Section 25-F of the I.D. Act, relief of reinstatement may not be the natural consequence. It will depend upon the facts and circumstances of

each case. It is not automatic. In the facts of a given case, instead of reinstatement, monetary compensation can be granted. The cases in hand clearly fall within the ratio of the decisions of this Court, referred to above."

3. However, it is pertinent to mention that the recent decision of this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Ors.[3] took a contrary view. The Court in this case, opined as under:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, 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. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three-Judge Bench in Hindustan Tin Works (P) Ltd. v. Employees of M/s Hindustan Tin Works Pvt. Ltd. & Ors.[4] 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 utilisation 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 straitjacket 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 abovenoted 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.

24. Another three-Judge Bench considered the same issue in Surendra Kumar Verma & Ors. v. Central Government Industrial Tribunal-cum-

Labour Court, New Delhi & Anr.[5] 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) Therefore, in the light of the decision of this Court in Deepali Gundu's case (supra) which has correctly relied upon higher bench decisions of this Court in Surendra Kumar Verma's case (supra) and Hindustan Tin Works Pvt. Ltd. (supra), I am of the opinion that the appellant herein is entitled to reinstatement with full back wages since in the absence of full back wages, the employee will be distressed and will suffer punishment for no fault of his own.

4. The Division Bench of the High Court has gravely erred in law that the Tribunal and learned single Judge found that the order of the termination is bad in law for non-compliance with the above statutory provisions of the ID Act and therefore, following the normal Rule of Award of reinstatement is awarded but erroneously denied full back wages in the absence of proof of gainful employment of appellant-workman.

5. For the foregoing additional reasons, the impugned judgment and order of the Division Bench is set aside and the Award of the Tribunal and the order of the learned single Judge are restored. The appeal is accordingly allowed, but without costs.

.....J. (V. GOPALA GOWDA) New Delhi, January 28, 2014 IN THE SUPREME COURT OF INDIA CIVIL APPEALLATE JURISDICTION CIVIL APPEAL NO. 4980 OF 2014 (Arising out of SLP (C) No. 15357 of 2013) TAPASH KUMAR PAUL .... APPELLANT VERSUS BSNL & ANR. .... RESPONDENTS O R D E R Leave granted.

In view of the two orders giving separate reasons, though concurring, the appeal is allowed.

.....J. [GYAN SUDHA MISRA] .....J. [V. GOPALA GOWDA] NEW DELHI;

JANUARY 28, 2014

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[1] (2010) 6 SCC 773
[2] (2009) 15 SCC 327
[3] (2013) 10 SCC 324
[4] (1979) 2 SCC 80
[5] (1980) 4 SCC 443