GAHC010015992017

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1574/2017

Sri Bibhu Bhusan Deb Roy,
S/o Late Beni Bhushan Deb Roy,
C/o Late Madhu Sudhan Choiudhury,
Resident of Samshan road (College Road),
P.O. Silchar, P.S. Silchar Sadar,
District-Cachar, Assam.

…..**Petitioner .**

Versus

1. The State of Assam,
Represented by the Labour Commissioner,
Labour & Employment Department, Gopinath Nagar,
Guwahati-781016, Kamrup (Metro) Assam.

2. M/s Schlumberger Asia Service Limited,
A Company registered under Companies Act, 1956,
Having its registered office at Nazira, near ONGC Complex,
P.O. Nazira, District-Sibsagar, Pin-785685, Assam.

……**Respondents.**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. M. Nath …. Senior Advocate.
Ms. D.L. Deka. .... Advocate

For the respondents : Mr. K.N. Choudhury …. Senior Advocate.
Mr. D. Borah .... Advocate.

Dates of hearing : 18.06.2024

Date of Judgment : 28.06.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. M. Nath, learned Senior Counsel assisted by Ms. D.L. Deka, learned counsel for the petitioner. Also heard K.N. Choudhury, learned Senior Counsel assisted by Mr. D. Borah, learned counsel for the respondent no.2.

2. The petitioner's case is that pursuant to the order dated 11.02.2013 passed by the Industrial Tribunal, Silchar, Cachar in Reference Case No.3/2008, the petitioner was reinstated back into service w.e.f. 18.04.1990 with full back wages. However, the petitioner's grievance is with regard to the calculation made by the respondents while awarding him the back wages, inasmuch as, the same has been calculated on the basis of a petitioner's basic pay at the time of his termination from service, i.e. @ Rs.390/- per month.

3. The brief facts of the case is that the petitioner was appointed as Junior Operator Grade-III in M/s Schlumberger Asia Service Limited, registered under

the Laws of Hong Kong. The petitioner was appointed on 10.07.1988 and on 01.01.1990, he was placed under suspension followed by his termination from service w.e.f. 18.04.1990. The dispute between the petitioner and the respondent no.2 was referred to the Industrial Tribunal, Silchar, Cachar for adjudication, wherein it was registered as Reference Case No.3/2008. Reference Case No.3/2008 was disposed of vide order dated 11.02.2013, by reinstating the petitioner w.e.f. 18.04.1990 and granting him full back wages. Subsequent to the above, the respondent no.2 paid Rs.4,75,084.70 to the petitioner as full and final settlement of the wages. Being aggrieved, the petitioner approached the Assistant Labour Commissioner for payment of full back wages amounting to Rs.2,26,78,177.30, by taking the stand that the respondent no.2 did not include any increment/allowance or revision of pay while paying the petitioner Rs.4,75,084.70.

4. The Assistant Labour Commissioner thereafter directed the Certificate Officer, Sivasagar to recover an amount of Rs.2,26,78,177.30 with interest from the respondent no.2, vide Certificate dated 14.10.2014.

5. Being aggrieved, the respondent no.2 approached this Court vide WP(C) 6842/2014, praying to set aside the notices and proceedings in Bakijai Case No.70/2014 initiated on the basis of the said order dated 30.09.2014 issued by the Assistant Labour Commissioner, for recovery of Rs.2,26,78,177.30.

6. This Court disposed of WP(C) 6842/2014, vide order dated 13.02.2015, by holding that it was an admitted position that in the adjudication process made by the Assistant Labour Commissioner, wherein the respondent no.2 was made

liable to pay to the petitioner Rs.2,26,78,177.30, the respondent no.2 was not associated in the adjudication process. This Court thereafter disposed of the writ petition by setting aside the two notices dated 03.12.2014 issued by the Recovery Officer, Certificate dated 30.09.2014 issued by the Assistant Labour Commissioner and Bakijai Case no.70/2014. This Court in it's order dated 13.02.2015 also recorded the fact that the petitioner had undertaken to file an application under Section 33(C)(2) of the Industrial Disputes Act, 1947 (hereinafter referred to as "1947 Act") with regard to non-payment of the entire back wages.

7. The petitioner thereafter filed a petition under Section 33(C)(2) of the 1947 Act, for recovery and realisation of unpaid back wages and also prayed for computation of the same before the Labour Court, Guwahati. The petition was registered as Case No.2/2015. Case No.2/2015 was dismissed by the learned Labour Court, vide Award dated 16.06.2016, by holding that there was no documentary evidence with regard to the petitioner's claim for field allowance and no specific direction was made with regard to the notional increment payable to the petitioner. Paragraph nos.10, 11 and 12 of the Award dated 16.06.2016 passed in Case No.2/2015 by the Labour Court is reproduced hereinbelow, as follows :

> "*10. Claimant while adduceing evidence has altogether exhibited 13 documents. However except 13 other documents are photostate copies. Ld. counsel for the opposite party has disputed the genuineness of Ext.13 as there are some correction without seal and signature. As per Ext.13 net pay of the petitioner at the time of dismissal was Rs.4174/-. Even if the aforesaid amount is considered to be the salary of petitioner at the time of dismissal for computing back wages or as to consider his Basic Salary, D.A., HRA and Field Allowance which has been accepted by management*

side and management has computed the back wages on the aforesaid fact and salary.

Petitioner has claimed that he is entitled for Field Allowance. However there is no documentary evidence that he is entitled for Field Allowance. In the pay slip also there is no mention that he is entitled for Field Allowance. Apart from that there is no calculation sheet from the side of petitioner as to how much he is entitled as back wages in different heads.

11. Ld. Labour Court while passing the award has made it clear that petitioner is entitled for reinstatement with full back wages from the date of dismissal. However there is no specific direction as regard the notional increment of the petitioner. In absence of such specific direction the requirement of law is that the Executing Court cannot determine increment notionally. In such circumstances petitioner is not entitled increment. From the claim petition as well as evidence on record the admitted position is that petitioner has already received an amount of Rs.4,52,738/- (Rupees four lakhs fifty two thousand seven hundred & thirty eight) only as back wages. The said back wages was paid by the management as follows.

SR. No.	*Wage components as on 18.04.1990*	*Amount in Rs.*
1.	*Basic*	*390*
2.	*DA*	*312*
3.	*HRA*	*550*
4.	*Field allowance*	*331*
	Total (per month)	*1583*

Therefore, Rs.1583x23 years and 08 months

= Rs.4,52,738/- (Approx).

The computation made by management is in accordance with pay slip issued to petitioner and the same is acceptable in view of the facts and law."

8. The petitioner's counsel submits that back wages includes the benefit of revised wages or salary and revision of yearly increments, revised Dearness Allowance and other benefits. In support of the said submission, the learned Senior Counsel has relied upon the judgment of the Supreme Court in the case of ***State Bank of India & Others vs. T.J. Paul,*** reported in ***(1999) 4 SCC 759*** and in the case of ***Gammon India Limited vs. Niranjan Dass,*** reported in ***(1984) 1 SCC 509.***

9. The petitioner's counsel submits that petitioner's back wages has been calculated as per wage components given to him as on 18.04.1990. He submits that the wage components given to the petitioner on 18.04.1990 could not have been the same in the year 2014. There had to be a revision of pay and payment of increments during the period of 24 years that he was not in service.

10. The petitioner's counsel thus prays that the Award dated 16.06.2016 passed by the learned Labour Court, Guwahati in Case No.2/2015 should be set aside. A direction should also be issued directing the respondent no.2 to pay back wages to the petitioner, after computing the increments and allowances due and admissible to the petitioner along with interest w.e.f. 18.04.1990, till his reinstatement.

11. The petitioner's counsel submits that on being reinstated into service he was directed to join in Mumbai. However, on reaching Mumbai he was threatened with bodily harm and assaulted by workers of the respondent no.2, due to which he fled from Mumbai and filed an FIR in the Silchar Police Station, Cachar, Assam. The Silchar Police Station sent the FIR to the concerned Mumbai

Police Station for taking up necessary follow-up action. Thereafter the petitioner did not pursue the FIR submitted by him.

12. Mr. K.N. Choudhury, learned Senior Counsel for the respondent no.2 submits that there should be an existing dispute between the parties regarding the determined amount payable by the respondent No.2, prior to the submission of a petition under Section 33(C)(2) of the 1947 Act. However, there being no existing dispute with regard to the amount payable by the respondent no.2, the petition filed by the petitioner before the Labour Court was misplaced. He also submits that the learned Labour Court having found no materials to prove the case of the petitioner that there was revision of pay or increment payable to the petitioner, there was no infirmity in the decision to dismiss the petition under Section 33(C)(2) of the 1947 Act. He also submits that in the absence of any specific direction as regard the notional increment payable to the petitioner, it was not possible for the Executing Court to determine the increment notionally payable to the petitioner. He also submits that the respondent no.2's demand for wage revision/salary increment would purely depend on the following factors :

> "*(a) Schlumberger Annual Performance appraisal (in short '**Schlumberger Appraisal**')*
>
> *(b) Fix Step Training Program (Promotion)*
>
> *(c) Overall performance of the Schlumberger group at a global level"*

13. Mr. K.N. Choudhury submits that wage revision/salary increment are given as a result of evaluation of an employee's performance as per the company Policy and on an individual basis. He submits that the same is not given across the board to every employee. As such, there could be no revision of

salary/increment in the petitioner's case, as he did not work for the company for more than 23 years.

14. The learned Senior Counsel for the respondent no.2 further submits that the petitioner being absent from duty, he cannot claim the benefit of notional increment during the period of his absence. The petitioner cannot claim increments only because he has been reinstated into service with benefit of continuity in service. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***A.P.S.R.T.C. & Another vs. S. Narsagoud,*** reported in ***(2003) 2 SCC 212*** and in the case of ***Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) & Others vs. Abdul Kareem,*** reported in ***(2005) 6 SCC 36.***

15. The learned Senior Counsel for the respondent no.2 submits that whenever a workman is entitled to receive from his employer, any money or benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit, the workman can approach the Labour Court under Section 33(C)(2) of the 1947 Act. The benefit sought to be enforced under Section 33(C)(2) of the 1947 Act requires a pre-existing benefit flowing from a pre-existing right. However, in the present case, the petitioner not having shown any document to show that he is entitled to some pre-existing benefit or pre-existing right, there is no infirmity with the dismissal of petitioner under Section 33(C)(2) of the 1947 Act. In this regard, he had relied upon the judgment of the Supreme Court in the case of ***State of Uttar Pradesh & Another vs. Brijpal Singh,*** reported in ***(2005) 8 SCC 58.*** The learned Senior Counsel also submits that where a decision has to

be made with regard to whether back wages should be awarded, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination, only then the burden will shift to the employer. The learned Senior Counsel submits that as far as he has been informed, the FIR filed by the petitioner has been quashed by the Mumbai High Court. Further, after taking the full wages of Rs.4,75,084.70 without protest, the petitioner, who went to Mumbai, never joined his work, on the plea that his wife was ill.

16. I have heard the learned counsels for the parties.

17. In the case of ***Gammon India Limited vs. Niranjan Dass (supra),*** the Supreme Court has held that the respondent therein would be entitled to all back wages including the benefit of revised wages or salary, if during the period there is revision of pay scales with yearly increment, revised Dearness Allowance or variable Dearness Allowance and all terminal benefits if he has reached the age of superannuation, such as Provident Fund, Gratuity etc. Back wages should be calculated as if the respondent therein continued in service uninterrupted. The respondent therein would also be entitled to leave encashment and bonus if other workmen in the same category were paid the same.

18. In the case of ***State Bank of India & Others vs. T.J. Paul (supra),*** the Supreme Court has held that while setting aside the order of removal by the High Court was sustained and the directions to pay back wages, granting promotions and monetary benefits by way of salary etc. would also remain.

19. In the case of ***A.P.S.R.T.C. & Another vs. S. Narsagoud (supra),*** the Supreme Court has referred to the case of ***State Bank of India vs. Ram Chandra Dubey and Others***, reported in (2000) IILLJ1660SC, wherein the Supreme Court held that when a reference is made to an Industrial Tribunal to adjudicate the question not only as to whether the termination of a workman is justified or not but to grant appropriate relief, the same would consist of an examination of the question whether the reinstatement should be with full or partial back wages or none. Such a question is one of fact depending upon the evidence to be produced before the Tribunal. Such questions can be appropriately examined only in a reference. When a reference is made under Section 10 of the Act, all incidental questions arising thereto can be determined by the Tribunal.

20. In the case of ***Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) & Others vs. Abdul Kareem (supra),*** the Supreme Court held that it would be incongruous to suggest that an employee, having been held guilty and remained absent from duty for a long time, continued to earn increments though there is no payment of wages for the period of absence.

21. In the case of ***Brijpal Singh (supra),*** the Supreme Court held that a workman can proceed under Section 33C(2) only after the Tribunal has adjudicated on a complaint made under Section 33A or under a reference under Section 10C, that the order of dismissal was not justified and has reinstated the workman. Further, in the case of ***Punjab Beverages Pvt. Ltd. vs. Suresh ChandMANU/SC/0273/1978,*** the Supreme Court has held that the right to the money which is sought to be calculated or to the benefit which is sought to

be computed must be an existing one, that is to say already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the Industrial workman and his employer. The Supreme Court further held that it is not competent to the Labour Court exercising jurisdiction under Section 33C(2), to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an existing right, but which may appropriately be made the subject matter of an industrial dispute in a reference under Section 10 of the Act.

22. As can be seen from the various judgments referred to above, the petitioner would be entitled to revision of his pay and increment etc., provided there was revision of pay scales made for similarly placed employees. However, in the present case, the respondents have taken a stand that revision of salary and increments are given on the basis of an individual employee's performance. In the present case, there has been no revision or any increment given to the petitioner, as he had not worked for more than 23 years. Further, even after he had been asked to work in the year 2014, the petitioner did not join his post on the ground that he had been threatened with physical harm by his co-workers in Mumbai. There is nothing to show that the petitioner's allegation is true. No document has been submitted by the petitioner to show that there has been revision of pay and increments applicable to him.

23. In the Award dated 16.06.2016, passed by the Labour Court, Guwahati in Case No.2/2015 [under Section 33C(2)], the learned Labour Court has after going through the evidence recorded, held that there was no document or calculation sheet from the side of the petitioner, showing as to how he was entitled to be paid back wages in different heads. Further, while the learned

Labour Court had reinstated the petitioner in service in Reference Case No.3/2008, there was no specific direction as regards the notional increments payable to the petitioner. In the absence of specific direction, it was not possible to come to a finding that the petitioner was to be given any revision of his pay or any increment was payable to him. As such, the learned Labour Court found no merit in the petition made by the petitioner under Section 33C(2). In the present writ petition also, there is nothing produced by the petitioner to show that there was any revision of pay.

24. On considering the facts of this case, this Court is of the view that basic pay of Rs.390/- that has been given to the petitioner as Junior Operator Grade-III could have increased with passage of time. However, no documents have been furnished by the petitioner to show as to how he is entitled to be given a higher pay or increments. The only document that appears to slightly favour the petitioner is Ext.-13, which is supposedly a pay slip, has been disputed by the respondents. A perusal of Ext.-13 shows that a name has been scratched out and another added by pen and no signature with seal recognizing the said change is discernible. There is no seal and date, except for the month "December" and the year "1989." This Court does not find any infirmity with the learned Labour Court not acting upon Ext.-13, as the genuineness of the contents of the same is not proved. Though the learned Labour Court was to make a finding with regard to Ext.-13, no finding has been made by it. The earnings of the petitioner as per Ext.-13, which is the pay slip for December, 1989, states as follows-

"*EARNINGS FACTORS AMT-(Rs.) DEDUCTIONS AMT-(Rs.)*

BASIC SALARY 390.00

DEARNESS ALLOWANCE 312.00 CO'S CONT. TO PPF 70.00

*HRA * 1 550.00 EMP'S CONT. TO PPF 230.00*

PPF COMPANY'S SHARE 70.00 INCOME TAX 0.00

FILED ALL 331.00

GEOGR BONUS 1.2 140.00

OVERTIME (NORMAL) 182.00 1,389.00

RFT-WST-TCP 450.00 ----------

*ANNUAL BONUS * 1 842.00 TOTAL DEDUCTIONS 300.00*

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*---------- **** NET PAY: 4,174.00*

*GROSS EARNINGS 4,474.00 * PAYMENT METHOD-CHEQUE*

25. The above shows that the basic salary of the petitioner was Rs.390/- and his DA was Rs.312/-. He was also entitled to HRA @Rs.550/- and field allowance of Rs.331/-. There cannot be payment for over time, in view of the fact that the petitioner never worked after his dismissal from service. There is also no question of annual bonus or other bonuses being paid to the petitioner for the same reason. Further, the question of bonuses, overtime etc. cannot be an everyday affair and would depend upon the actual work done. As such, this Court does not find any infirmity in the learned Labour Court having accepted the computation of the petitioner's back wages in terms of-

1.	*Basic*	*390*
2.	*DA*	*312*
3.	*HRA*	*550*
4.	*Field allowance*	*331*
Total (per month)		*1583*

26. As stated earlier, no other document is there to prove or compute the back wages payable to the petitioner, except the amounts indicated above.

27. We have to realize that the appeal made to this Court against a judicial or quasi judicial Tribunal or body and the control exercised by this Court would be limited to a supervisory capacity. It cannot act as an appellate authority by reviewing or reweighing the evidence. In the case of ***Hari Bishnu Kamath vs. Ahmed Ishaque and Ors.,*** reported in ***AIR 1955 SC 233,*** this Court held in paragraph 21 and 23 as follows :

> "*21. … On these authorities, the following propositions may be taken as established: (1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous. This is on the principle that a court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence, and substitute*

its own findings in certiorari. These propositions are well-settled and are not in dispute.

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23. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. … The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

(Emphasis supplied)

28. In the case of ***Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra and Ors.,*** reported in ***AIR 1957 SC 264,*** the Supreme Court has held that the decision of a Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution, unless at the least it is shown to be fully unsupported by evidence.

29. In the case of ***Management of Madurantakam Coop. Sugar Mills Limited Vs. S. Viswanathan,*** reported in ***(2005) 3 SCC 193,*** the Supreme Court in Para 12 held as follows:-

"12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these types of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence

the High Court exercising a power either under Article 226 or under Article 227 of the Constitution can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon.…"

30. In the case of ***Central Council for Research in Ayurvedic Sciences & Another vs. Bikartan Das & Others, Civil Appeal No.3339/2023,*** the Supreme Court has held that there are two cardinal principles of law governing the exercise of extraordinary jurisdiction under Article 226 of the Constitution. The first being that when it comes to the issue of a writ of certiorari, the High Court does not exercise the powers of an Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous, but does not substitute it's own views for those of the Tribunal. A writ of certiorari can be issued if an error of law is apparent on the face of the record and the same being a prerogative writ, it should not be issued on the mere asking. The second cardinal principle is that even if some action or order challenged is found to be illegal and invalid, the High Court can refuse to upset it with a view to doing substantial justice between the parties under Article 226, which is essentially discretionary, although founded on legal injury.

31. Paragraph 61 and 62 of the above said judgment are reproduced hereinbelow, as follows :

"*61. At this stage, it may not be out of place to remind ourselves of the*

*observations of this Court in **Syed Yakoob** (supra) on this point, which are as follows:*

> "*Where it is manifest or clear that the conclusion of law recorded by an inferior court or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or something in ignorance of it, or may be even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. Certiorari would also not lie to correct mere errors of fact even though such errors may be apparent on the face of the record. The writ jurisdiction is supervisory and the court exercising it is not to act as an appellate court. It is well settled that the writ court would not re-appreciate the evidence and substitute its own conclusion of fact for that recorded by the adjudicating body, be it a court or a tribunal. A finding of fact, howsoever erroneous, recorded by a court or a tribunal cannot be challenged in proceedings for certiorari on the ground that the relevant and material evidence adduced before 52 the court or the tribunal was insufficient or inadequate to sustain the impugned finding. It is also well settled that adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal and these points cannot be agitated before the writ court.*"

*62. In the aforesaid context, it will be profitable for us to refer to the decision of this Court in the case of **Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another**, reported in **AIR 2000 SC 1508**. This Court observed as under:*

> "*… The findings of fact recorded by a fact-finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient*

or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon such materials which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly undertaken. …"

32. The above being said, the cross-examination of the petitioner shows that he has admitted to the fact that he does not have any document or mode of calculation to back his claim that he is entitled to payment of back wages amounting to more than Rs.2 Crores. The petitioner has not submitted any document to back his claim that he is entitled to back wages of above Rs.2 Crores. He has also admitted in his cross-examination as follows:-

"*No calculation sheet backing my claim has been submitted."*

The Labour Court has accepted the computation of the petitioner's wages only in respect of the Basic Pay, DA, HRA and Field Allowance.

33. On considering the fact that this Court cannot act as an appellate authority unless the reasoning of the learned Labour Court is found to be perverse, this Court does not find any reason to interfere with the Award passed by the learned Labour Court, in the absence of evidence/documents proving the case of the petitioner that he is entitled to back wages above Rs.2 Crores.

34. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant