IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

...

LPA No. 263/2023

Reserved on: 02-07-2025
Pronounced on: 11.07.2025

1. Managing Director,
   J&K Road Transport Corporation,
   M. A. Road, Srinagar.
2. General Manager,
   J&K Road Transport Corporation,
   M. A. Road, Srinagar.
3. In-Charge Administration,
   J&K Road Transport Corporation,
   M. A. Road, Srinagar

...Appellant(S)

Through: - **Mr. Altaf Haqani, Sr. Advocate with**
Ms. Asif Wani, Advocate.

Vs.

1. Shareefa
   W/O Late Mohammad Ayoub Shah,
2. Imtiyaz Ahmad Shah,
   S/O Late Mohammad Ayoub Shah,
3. Nawazmad Shah
   S/O Late Mohammad Ayoub Shah,
   Legal heirs of Mohammad Ayoub Shah
   All residents of Utrarsoo, Kothar Anantnag.

...RESPONDENT(S)

Through:- Ms. Asma Rashid, Advocate.

CORAM:

HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR JUSTICE SANJAY PARIHAR, JUDGE.

JUDGMENT

Sanjeev Kumar J:

1. This intra-Court appeal by the appellants arises from an order and judgment dated 31.08.2023 passed by the learned Single Judge ['the Writ Court'] in SWP No. 1888/2016 titled 'Shreefa and ors vs. State of J&K and Ors', whereby the writ petition filed by the Original Writ Petitioner has been allowed.

FACTUAL MATRIX:

2. The husband of the respondent no.1 and father of respondents No. 2&3, late Mohammad Ayoub Shah assailed an order issued by the appellants vide No. JKSRTC/EC/IV/658 dated 05.09.2016 before the writ Court whereby and where under late Mohd. Ayoub Shah, an employee of the appellants, was denied the wages/ salary for the period between 21.08.1987 (the date of termination of his services) to 22.07.1999 (the date of his reinstatement in service) on the principle of 'no work no wages'. During the pendency of the writ petition, Mohammad Ayoub Shah passed away and respondents herein were substituted in his place as his legal representatives.

3. The writ petition was filed and the back wages for the aforesaid period were claimed by late Mohammad Ayoub Shah in the backdrop of following facts projected in the petition.

That the original petitioner, who was working as Conductor with the appellant- Corporation, was placed under suspension on the charge that in as many as 22 passengers were found travelling without tickets in the Bus in which he was performing his duties as a Conductor. This happened on Anantnag- Chattergul road. The appellants, vide order No. JKSTRC/IV/259 dated 01.06.1998, terminated the services of the original writ petitioner in the writ petition. Feeling aggrieved, the original petitioner challenged the order of the appellant- Corporation in SWP No. 269/1999. The Writ petition was disposed of by a Bench of this court vide order dated 18.12.1997 with a direction to the appellants herein to hold a fresh enquiry into the misconduct of the original petitioner within a period of six weeks from the date of judgment. It was further provided that in case the inquiry was not initiated within the stipulated period, the original petitioner would be taken back into the service. A further direction was issued to the appellants to associate the original petitioner with such inquiry by providing him a reasonable opportunity of being heard. The order of termination was, however, neither set aside nor the original petitioner was put back into the service.

4. Pursuant to the aforesaid directions, the appellant-Corporation got an inquiry conducted through its Deputy General Manager (P&S), who, upon inquiry, recommended the reinstatement of the original writ petitioner giving the delinquent the benefit of doubt. On the basis of the recommendations made by the inquiry officer, the appellant-Corporation reinstated the original petitioner back in service vide order dated 22-07-1999. The period of

absence, i.e. from the date of termination dated 21.08.1987 to the date of reinstatement i.e. 22.07.1999 was treated as *dies non.* This order was also challenged by the original writ petitioner to the extent of treating the period of his absence from duty due to his termination as *dies non* in SWP 1317/2004. The writ petition was disposed of by a learned Single Bench of this Court vide order dated 02.12.2015. The order dated 22.07.1999, impugned in the writ petition, was set aside to the extent of prospective reinstatement and without any past service benefits. The order treating the period w.e.f 21.08.1987 till the date of passing of order of reinstatement as *dies non* was also quashed and the appellant-authorities were directed to pass fresh order regarding the wages of the original writ petitioner for the period with effect from 21-08-1987 to 22-07-1999 and settle all his claims. The appellant-Corporation considered the issue of payment of wages to the original writ petitioner and passed an order bearing No. JKSRTC/EC-IV/658 dated 05-09-2016 whereby the intervening period between 21-08-1987 to 22-07-1999 was treated as ***'no work no wages'*** without any break in service. It is this order of consideration passed by the appellants which was called in question by the original petitioner in SWP No. 1888/2016. The writ Court has accepted the contention of the original writ petitioner raised in the writ petition and has granted the relief prayed for.

Submissions of the learned counsel for the appellants:-

5. The impugned judgment of the writ Court is assailed by the appellants primarily on the ground that back wages of an employee upon his

reinstatement is not automatic but depends upon the facts and circumstances of each case and host of other factors. The writ Court has failed to appreciate that the reinstatement of the original writ petitioner back in service by the appellant-Corporation did not confer upon him an absolute right to claim wages for the period he had remained out of action and had not performed any services to the Corporation.

6. Mr. Altaf Haqani, learned senior counsel appearing for the appellants, would further argue that the onus to prove that during the period of his ouster from service the employee was not gainfully employed, is on the employee and it is only after the initial burden is discharged by the employee, the employer may be called upon to conduct an inquiry in this regard. He would argue that the original petitioner did not make even a whisper in the writ petition in this regard. He did not claim that during the period of his ouster i.e. from 21-08-1987 to 22-07-1999, he was totally idle and had nothing to earn for his livelihood. Mr. Haqani would place strong reliance upon the latest judgment of Hon'ble the Supreme Court in ***"Ramesh Chand Vs Management of Delhi Transport Corporation 2023 LiveLaw (SC) 503"*** and submit that in the instant case the original writ petitioner having failed to prove that he was not gainfully employed during period of his ouster, is not entitled to full back wages merely on the ground that he was later reinstated in service.

Submissions of the learned counsel for the respondents:-

7. *Per contra* Ms. Asma Rashid, learned counsel appearing for the respondents, would argue that since the original writ petitioner was exonerated in the inquiry and was reinstated in service, as such, as a matter of course, he was entitled to the payment of back wages. She would argue that the original petitioner was prevented from performing his duties because of the illegal and unjustified order of termination passed against him, and, therefore, cannot be punished indirectly by denying him the wages for the period he was forcibly kept out of services by the appellants. She would place reliance upon the judgment of Hon'ble Supreme Court in case of **"*Chief Regional Manager, United India Insurance Company Limited Vs. Siraj Uddin Khan, (2019) 7 SCC 564*"**

Analysis of the Arguments and the view of this Court:-

8. Having heard learned counsel for the parties and perused material on record, the only question that arises for determination in this appeal can be stated as under:-

> *"Whether an employee, whose termination from services either by dismissal, discharge or even retrenchment, is either held invalid by a competent court of law or forum or withdrawn by the employer itself, is reinstated with continuity of service, is entitled to back wages i.e; the wages for period with effect from his termination till his reinstatement in service."*

9. The question, which we have formulated hereinabove, has already been dealt with by Hon'ble the Supreme Court in umpteen judgments. As a matter of fact there are two lines of views emerging from the reading of the

judgments on the point. It is though well settled that an employee, on reinstatement in service after quashing or withdrawal of termination order, is not entitled to back wages automatically, yet the circumstances under which the full back wages of such an employee can be denied are not very well identified or defined. The denial of full wages on the ground that the employee, during the period of his ouster from service was gainfully employed, is also well settled. However, there is some confusion with regard to the onus of proof of such gainful employment of the employee during the period of his ouster from his service. One line of judgments would suggest that the initial burden to prove that he was not gainfully employed rests on the employee and it is only on discharge of this burden, the onus shifts to the employer to prove that his employee during the period of his ouster on termination was gainfully employed. There is other line of judgments from Hon'ble the Supreme Court which would suggest that the onus to prove that the employee was gainfully employed is on the employer and the employee who was denied of performing his duties due to his termination shall be presumed to be idle and without any source of income. With a view to resolving this ticklish issue presented before us, we have ventured to survey the case Law on the subject.

10. We began with the judgment of a three-Judge Bench of Hon'ble the Supreme Court in ***Hindustan Tin Works Pvt. Ltd. Vs. The Employees AIR (1979) SC 75***. In the aforesaid case the wages of 56 employees, who were terminated by way of retrenchment due to non-availability of raw material

necessary for utilization of full installed capacity by the employer, were denied. The dispute raised by the employees landed before the Labour Court, which passed an award of reinstatement with full back wages in favour of the retrenchment employees. The employer challenged the award by way of Special Leave Petition filed directly before the Hon'ble Supreme Court. The SLP was rejected with regard to the relief of reinstatement but was granted in respect of question of grant of full back wages to the employees. The question was considered by a Three-Judge Bench headed by the then Justice V. R. Krishna Iyer. What was held by Hon'ble the Supreme Court can be found from reading of paragraph nos. 7,8,9 10 and 11 of the judgment which reads thus:-

> "7. The question in controversy which fairly often is raised in this Court is whether even where reinstatement is found to be an appropriate relief, what should be the guiding considerations for awarding full or partial back wages. This question is neither new nor raised for the first time. It crops up every time when the workman questions the validity and legality of termination of his service howsoever brought about, to wit, by dismissal, removal, discharge or retrenchment, and the relief of reinstatement is granted. As a necessary corollary the question immediately is raised as to whether the workman should be awarded full back wages or some sacrifice is expected of him.
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> 8. Let us steer clear of one controversy whether where termination of service is found to be invalid, reinstatement as a matter of course should be awarded or compensation would be an adequate relief. That question does not arise in this appeal. Here the relief of reinstatement has been granted and the award has been implemented and the retrenched workman have been reinstated in service. The only limited question is whether the Labour Court in the facts and circumstances of this case was justified in awarding full back wages.
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> 9. 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 reaslistically, 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 workman'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 workman. In breach of the statutory obligation the services were terminated and the termination is found to the invalid; the workman 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 and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workman 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 workman were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workman were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in ***Dhari Gram Panchayat v. Safai Kamdar Mandal, (1971) 1 Lab LJ 508*** and a Division Bench of the Allahabad High Court in ***Postal Seals Industrial Co-operative Society Ltd. v. Labour Court, Lucknow, (1971) 1 Lab LJ 327*** have taken this view and we are of the opinion that the view taken therein is correct.

10. The view taken by us gets support from the decision of this Court in ***Workman of Calcutta Dock Labour Board v. Employers***

> ***in relation to Calcutta Dock Labour Board, (1974) 3 SCC 216.*** In this case seven workman had been detained under the Defence of India Rules and one of the disputes was that when they were released and reported for duty, they were not taken in service and the demand was for their reinstatement. The Tribunal directed reinstatement of five out of seven workman and this part of the Award was challenged before this Court. This court held that the workman concerned did not have any opportunity of explaining why their service should not be terminated and, therefore, reinstatement was held to be the appropriate, relief, and set aside the order of the Tribunal. It was observed that there was no justification for not awarding full back wages from the day they offered to resume work till their reinstatement. Almost an identical view was taken in ***Management of Panitole Tea Estate v. The Workman, (1971) 3 SCR 774.***
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> 11. 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 (See ***Susannah Sharp v. Wakefield, 1891 AC 173 at p. 179).***

11. From careful reading of the three-Judge Bench judgment of Hon'ble the Supreme Court, in particular the reproduced portion thereof, it can be deducible as a principle that where the termination of service is found to be invalid, the reinstatement is a necessary consequence or in the appropriate cases adequate compensation too would be possible. Where the relief of reinstatement in service is granted, the payment of full back wages would be a normal rule and the party objecting to it must establish the circumstances necessitating departure. There could not be a cast iron or straight jacket formula for awarding relief of back wages. All relevant considerations will

enter the decision making. In a nutshell, the view of the three-Judge Bench in case of **Hindustan Tin Works** (*Supra*) is that grant of back wages on reinstatement of an employee is in the discretion of the Court or the Tribunal adjudicating the validity of termination. The discretion to be exercised must be both judicial and judicious informed by cogent and convincing reasons. The Hon'ble Supreme Court has clearly held that ordinarily the workman whose services have been illegally terminated would be entitled to full back wages on reinstatement except to the extent he was gainfully employed during his forced idleness. It is thus clarified that if a workman was always ready to work but was kept away therefrom on account of some invalid and unjustified actions of the employer, there is no justification for not awarding the full back wages which were very legitimately due to him. However the issue as to how the factum of gainful employment of the employee during the period of his forced idleness has to be proved and who would be the right person to be called upon to discharge this onus was not considered in the aforesaid judgment.

12. The issued confronted by the Hon'ble Supreme Court in the **M/S Hindustan Tin Works** (*supra*) again came up for consideration before another three-Judge Bench of Hon'ble the Supreme Court in **Surendra Kumar Verma vs. Central Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443**. Para 6 of the judgment is relevant and is set out below:-

> "6…….Plain common sense dictates that the removal of an order terminating the services of workman must ordinarily lead to the reinstatement of the services of the workman. 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-a-vis the employer and workman to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums: the workman 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 workman if the relief is denied than to the employer if the relief is granted."

13. In the judgment rendered in **Surendra Kumar Verma** (*supra*) Hon'ble the Supreme Court identified the following exceptional circumstances where it would be inequitable to direct reinstatement with full back wages:-

(i) The industry must have closed down or might be in severe financial crisis;

(ii)The workman/employee concerned might have secured better or other employment elsewhere;

(iii) That the industry has been closed down making it impossible to reinstate an employee and pay him the back wages;

(iv) The Court may deny the award of full back wages where that would place an impossible burden on the employer.

14. Later, a two-Judge Bench of Hon'ble the Supreme Court followed the guiding principles laid down in **Hindustan Tin Works** (*supra*) in **P.G.I of Medical Education and Research vs. Raj Kumar, (2001) 2 SCC 54** and held in para 8-9 and 12-14 as under:-

> "8. 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 Pvt. Ltd. case (supra) 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 Hindustans Case, itself reduced the back wages to 75%, the reason being the contextual facts and circumstances of the case under consideration.
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> 9. 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 Vs. K.S. Radhakrishna (AIR 1964 SCC 477).

…….

12. 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 Pvt. Ltd. (supra) 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.

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14. 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 Courts 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."

15. From reading of the reproduced portion of the judgment in **Raj Kumar** (*supra*) it transpires that Hon'ble Supreme Court reiterated its view that the 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 that no straight jacket formula can be evolved to determine the issue of back wages. Taking into consideration host of factors dictating discretion in the matter, the Court has to take the view as to whether the reinstated employee/worker is entitled to back wages and if so, to what extent.

16. In the year 2005 the issue again cropped up before the Hon'ble Supreme Court in the case of **Kendriya Vidalaya Sangathan vs S.C. Sharma, (2005) 2 SCC 363,** wherein the Hon'ble Supreme Court, while dilating on the issue of back wages held that, since the employee in the aforesaid case had failed to discharge the initial burden to show that he was not gainfully employed, there was ample justification to deny him back wages, more so he had absconded from duty for a long period of two years.

17. In the same year the issue was again considered by a three-Judge Bench of the Hon'ble Supreme Court in **Haryana Roadways vs. Rudhan Singh 2005 (5) SCC 591**. Para 8 of the judgment is worth taking note of and is, therefore, set out below:-

> " 8. 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.

18. In **Rudhan Singh** (*supra*) the Hon'ble Supreme Court introduced few more matters, like manner and method of employment, nature of appointment. whether *ad hoc*, short term, daily wage, temporary or

permanent in character and length of services etc. etc. to be considered for deciding the award of back wages. In **UP State Brassware Corporation Ltd. Vs Uday Narain Pandey, (2006) 1 SCC 479**, a two-Judge Bench reiterated the rule that the workman can be denied the back wages if he is found gainfully employed during the intervening period and that it was for the workman to plead and *prima facie* prove that he was not gainfully employed.

19. In the case of **Talwara Cooperative Credit and service society Vs. Sushil Kumar, 2008 (9) SCC 489**, the Hon'ble Supreme Court noticed the paradigm shift in the matter of burden of proof as regards the gainful employment on the part of the employer, holding that having regard to the provisions contained in Section 106 of the Indian evidence Act, the burden though negative, would be on the workman and if only the same is discharged, the onus of proof would shift to the employer to show that the concerned employee was in fact gainfully employed. Reliance was placed on the earlier judgment of Hon'ble the Supreme Court **Surendra Kumar** (supra).

20. All these judgments, which we have taken note of and many more were considered at length by Hon'ble the Supreme Court in the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyala, (2013) 10 SCC 32**4 and the principles those were culled out by Hon'ble the Supreme Court are contained in Para 38 of the judgment which reads thus:-

> **" 38.** The propositions which can be culled out from the aforementioned judgments are:

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

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.

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 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.

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 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.

38.6. 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.
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> 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).
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> **38.7**. 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."

21. The judgment rendered in **Deepali Gundu** (*supra*) makes a little departure and lays down vividly that ordinarily an employee, whose services have been terminated and is seeking his reinstatement and is desirous to get his back wages, is required to either plead or at least make a statement before the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. The judgment further lays down that if the employer wants to avoid payment of full back wages, then it has to plead with cogent evidence that the employee/workman was gainfully employed and was getting wages equal to the wages that he/she was drawing prior to the termination to the services. The aforesaid observation of Hon'ble Supreme Court is premised on the settled law that the burden of proof of existence of a particular fact lies on the person who makes a positive statement about its existence. Para 38.3 of the judgment, highlighted

hereinabove, states the legal position vividly. The latest view of the Hon'ble Supreme Court in the case of **Ramesh Chand** (*supra*) is also in tune with the view taken by the Hon'ble Supreme Court in case of **Deepali Gundu** (*supra*). Para 7 of the judgment in **Ramesh Chand** (*supra*) states the legal position on the subject and is reproduced here under:-

> "The only question before us is whether the Labour Court was justified in denying relief of back wages. In the case of National Gandhi Museum v. Sudhir Sharma, this Court held that the fact whether an employee after dismissal from service was gainfully employed is something which is within his special knowledge. Considering the principle incorporated in Section 106 of the Indian Evidence Act, 1872, the initial burden is on the employee to come out with the case that he was not gainfully employed after the order of termination. It is a negative burden. However, in what manner the employee can discharge the said burden will depend upon on peculiar facts and circumstances of each case. It all depends on the pleadings and evidence on record. Since, it is a negative burden, in a given case, an assertion on oath by the employee that he was unemployed, may be sufficient compliance in the absence of any positive material brought on record by the employer."

22. Close on heels is a recent judgment of Hon'ble the Supreme Court in **Maharashtra State Road Transport Corporation Vs. Mahadeo Krishna Naik, (2025) 4 SCC 321,** wherein also the same issue came up for consideration and in paragraph Nos. 43 and 44 it has been held as under:-

> "**43**. We cannot but endorse our wholehearted concurrence with the views expressed in the aforesaid decisions. Taking a cue therefrom, it can safely be concluded that ordering back wages to be paid to a dismissed employee - upon his dismissal being set aside by a court of law – is not an

automatic relief; grant of full or partial back wages has to be preceded by a minor fact-finding exercise by the industrial adjudicator/court seized of the proceedings. Such exercise would require the relevant industrial court or the jurisdictional high court or even this Court to ascertain whether in the interregnum, that is, between the dates of termination and proposed reinstatement, the employee has been gainfully employed. If the employee admits of any gainful employment and gives particulars of the employment together with details of the emoluments received, or, if the employee asserts by pleading that he was not gainfully employed but the employer pleads and proves otherwise to the satisfaction of the court, the quantum of back wages that ought to be awarded on reinstatement is really in the realm of discretion of the court. Such discretion would generally necessitate bearing in mind two circumstances : the first is, the employee, because of the order terminating his service, could not work for a certain period under the employer and secondly, for his bare survival, he might not have had any option but to take up alternative employment. It is discernible from certain precedents, duly noticed in Deepali Gundu Surwase (supra), that the courts are loath to award back wages for the period when no work has been performed by such an employee. Such a view is no doubt debatable, having regard to the ratio decidendi in Hindustan Tin Works (P) Ltd. (supra), Surendra Kumar Verma (supra) and Deepali Gundu Surwase (supra). Though the latter decision was cited before the coordinate bench when it decided Phool Chand (supra), any thoughtful discussion appears to be absent.

44. There is one other aspect that would fall for consideration of the court. In certain decisions, noticed in Deepali Gundu Surwase (supra), it has been opined that whether or not an employee has been gainfully employed is within his special knowledge and having regard to Section 106 of the Evidence Act, 1872, the burden of proof is on him. What is required of an employee in such a case? He has to plead in his statement of claim or any subsequent pleading before the industrial tribunal/labour court that he has not been gainfully employed and that the award of reinstatement may also grant him back wages. If the employee pleads that he was not gainfully employed, he cannot possibly prove such negative fact by adducing positive evidence. In the absence of any contra-material on record, his version has to be accepted. Reference in this connection may be made to Section 17-B of the Industrial Disputes Act, 1947, which confers a right on an employee to seek “full wages last drawn” from the employer while the challenge of the employer to an award directing reinstatement in a higher court remains pending. There too, what is required is a statement on affidavit regarding non-employment and with such statement on record, the ball is

> in the court of the employer to satisfy the court why relief under such section ought not to be granted by invoking the proviso to the section. We see no reason why a similar approach may not be adopted. After the employee pleads his non-employment and if the employer asserts that the employee was gainfully employed between the dates of termination and proposed reinstatement, the onus of proof would shift to the employer to prove such assertion having regard to the cardinal principle that 'he who asserts must prove'. Law, though, seems to be well settled that if the employer by reason of its illegal act deprives any of its employees from discharging his work and the termination is ultimately held to be bad in law, such employee has a legitimate and valid claim to be restored with all that he would have received but for being illegally kept away from work. This is based on the principle that although the employee was willing to perform work, it was the employer who did not accept work from him and, therefore, if the employer's action is held to be illegal and bad, such employer cannot escape from suffering the consequences. However, it is elementary but requires to be restated that while grant of full back wages is the normal rule, an exceptional case with sufficient proof has to be set up by the employer to escape the burden of bearing back wages."

23. On the conspectus of the judicial opinion emerging from the judgments taken note of herein above, the legal position that stands today is more or less clear. To sum up, it may be stated that in case of wrongful termination of services, reinstatement with continuity of service and back wages though is a normal rule but not automatic. Whether or not and to what extent the employee would be entitled to back wages is left to be determined by the adjudicating authority or the Court by taking into consideration host of factors like length of services of an employee/ workman, the nature of misconduct if any found proved against him, the financial condition of the employer as also whether the workman was gainfully employed or was employed on a lesser wages during the intervening period. The initial burden to prove that the workman was not gainfully employed is on the workman

who is required to discharged the same by either pleading or at least making a statement before the adjudicating authority or the court of first instance, as the case may be, that he was not gainfully employed or was employed with lesser wages. Once such a statement is made by the workman, the onus shifts to the employer, who is seeking to avoid payment of the back wages, to plead and demonstrate by leading cogent evidence that the workman was gainfully employed and was getting wages equal to the wages he was trying prior to the termination of his services.

24. After stating the legal position, let us now turn to the facts of the instant case. We need to bear in mind that in the instant case an inquiry was conducted by the appellant-Corporation into the alleged misconduct of the original writ petitioner, who, at the relevant time was engaged as a Conductor/Ticket Collector with a passenger vehicle of the appellant - Corporation. The said passenger vehicle was found carrying in as many as 22 passengers without tickets. The inquiry conducted by the Inquiry Officer ended into making a recommendation for reinstatement of the original writ petitioner, giving him benefit of doubt. It would mean that the Inquiry Officer did not find adequate evidence to indict the original writ petitioner but found material sufficient enough to doubt, at least, the failure of the original writ petitioner to perform his duties. To put it short, the original writ petitioner was reinstated in service by the appellant-Corporation, giving him the benefit of doubt and, therefore, cannot be said to have been full exonerated of the charge. That apart, the original writ petitioner has also

failed to discharge his initial burden of at least pleading before the writ Court that during the period of ouster from service he was not gainfully employed. This relieved the appellant-Corporation also of the pleading and proving that during the intervening period the original writ petitioner was not gainfully employed and had received or earned wages equal to the wages which he had been receiving prior to his termination. As a matter of fact, the pleadings from both the sides are deficient.

25. Having regard to the legal position on the point adumbrated by the Hon'ble Supreme Court in a long line of judgments, we are put in a tight spot as to whether in the given facts and circumstances of the case the original writ petitioner could be entitled to the back wages and, if yes, to what extent.

26. The appellants have pleaded that the financial health of the appellant-Corporation is in doldrums and burdening the corporation with the payment of huge arrears of the salary to the original writ petitioner, who has not rendered any work during the intervening period of almost 12 years, would be against public interest and tell upon heavily on the financial health of the corporation. This averment of the appellant has gone un-rebutted. Admittedly it is one of the factors to be taken into consideration while taking a decision with regard to grant of back wages.

27. Having regard to the legal position on the subject being little fluid, we cannot put the entire blame on the workman for not pleading and claiming that he was not gainfully employed during the intervening period. Mere fact that he filed the writ petition seeking back wages raises the presumption that

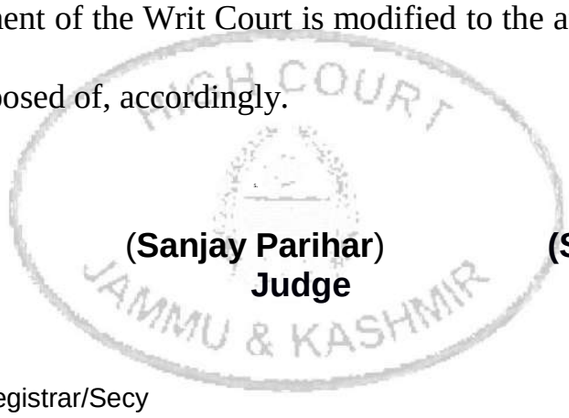
the original writ petitioner was not gainfully employed or that he could not earn the wages equal to the wages he was being paid at the time of his termination from service. The appellant-Corporation too has not gone into this aspect of the matter but has denied the back wages only on the ground that the financial health of the appellant-Corporation does not permit payment of huge arrears of wages/salary to the original writ petitioner for an intervening period of 12 years. The appellant-Corporation has thus invoked the principle of 'no work no wages'.

28. We are aware that the principle of 'no work no wages' cannot be invoked in a case were the person has been forced to sit ideal because of illegal and an unjustified order of termination. The original petitioner could not work in the corporation, for, he was not permitted to do so because of termination of his services and severance of master/servant relationship.

29. In the given facts and circumstances explained above, we were initially of the view that it would be in consonance with the principles of justice and equity to remand the case back to writ Court with liberty to parties to supplement their pleadings so that the issue, as to whether the original writ petitioner was gainfully employed during the intervening period, could be adequately addressed and conclusively determined. However, having regard to the fact that the original writ petitioner having litigated in the Courts for more than 34 years has passed away during the pendency of SWP No. 1888/16, it would be too late in the day to send the case for re-determination of this issue.

30. Having regard to the facts and circumstances of the case and dictated by the principles of justice, equity and good conscience, we hold the original writ petitioner entitled to 50% of back wages for the intervening period in question i.e. with effect from 21.08.1987 to 22.07.1999. The appellant-Corporation is directed to release the back wages to the aforesaid extent in favour of the respondents within a period of three months from the date of this judgment failing which the entire arrears shall become payable along with interest at the rate of 6% per annum, to be reckoned from three months after passing of this judgment.

31. The judgment of the Writ Court is modified to the aforesaid extent and the appeal is disposed of, accordingly.



(**Sanjay Parihar**)
Judge

(Sanjeev Kumar)
Judge

SRINAGAR:
11.07.2025
Anil Raina, Addl. Registrar/Secy

Whether the order is reportable: Yes/No