REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5951 OF 2008
[Arising out of SLP (Civil) No. 336 of 2005]

Talwara Coop. Credit & Service Society Ltd. …Appellant

Versus

Sushil Kumar …Respondent

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. This appeal is directed against a judgment and order dated 17.08.2004 passed by the Punjab and Haryana High Court in C.W.P. No. 9147 of 2002 whereby and whereunder the writ petition filed by the appellant questioning the validity of an award dated 14.03.2002 directing it to reinstate the respondent – workman with full back wages was dismissed.

3. Appellant is a cooperative society. It appointed the respondent on 1.07.1987 on the post of clerk. His services were terminated in the year 1990. Questioning the said order of termination, an industrial dispute

was raised. An award was made on 3.11.1995 directing the appellant to reinstate the respondent – workman. Appellant – Society, however, had been suffering losses. Till 1996, it suffered a loss of Rs. 18.95 lakhs. The Board of Directors held a meeting on 21.02.1997 wherein a resolution was passed to the effect that the services of some of the employees should be dispensed with. Pursuant thereto or in furtherance thereof, the services of the respondent amongst others were dispensed with on payment of one month's salary.

Yet again, an industrial dispute was raised. By an award dated 14.03.2002, the Industrial Tribunal – cum – Labour Court directed:

> "21. Sequal to the findings on above issues, this reference is hereby answered accordingly against the respondents Society and in favour of the workman, to the effect that termination of services of Sushil Kumar was neither in order, nor justified. He is entitled to reinstatement with full back wages, with continuity and with all other consequential service benefits."

4. A writ petition preferred thereagainst has been dismissed by reason of the impugned judgment.

5. Mr. Dinesh Kumar Garg, learned counsel appearing on behalf of the appellant, at the outset drew our attention to an interim order passed by the High Court on 22.10.2002 which is to the following effect:

> "In the meantime, execution of the award shall remain stayed subject to the provisions of Section 17-B of the Industrial Disputes Act."

6. The learned counsel pointed out that the said order has been complied with. The contention of the learned counsel is that having regard to the financial position of the cooperative society which was on the verge of closure and furthermore in view of the fact that the respondent – workman was in the services of the cooperative society only for the period 1987-1990 and again from 1995-1997, award of reinstatement with full back wages should not have been passed.

It was contended that even if there was a technical violation of the provisions of Section 25F of the Industrial Disputes Act, 1947, as has been held by the High Court, the Industrial Tribunal as also the High Court ought not to have directed reinstatement of the respondent with full back wages.

8. Ms. Shikha Roy Pabbi, learned counsel appearing on behalf of the respondent, on the other hand, submitted that the cooperative society has merged with apex body and the latter has earned a huge profit and in that view of the matter this Court may not exercise its discretionary jurisdiction. It was submitted that even after the termination of services of the respondent – workman, some other workmen had been appointed who were in fact junior to him.

9. The fact that the respondent was employed for a very short time is not in dispute. He admittedly was appointed in 1987 and was in service till 1990. Only on or about 3.11.1995, the award directing reinstatement was passed. The said award has been implemented.

10. Neither the learned Industrial Court nor the High Court arrived at a finding that the resolution passed on 21.02.1997, wherein a total loss of Rs. 18.95 lakhs was shown to have suffered by the cooperative society, was incorrect. It is furthermore not in dispute that rightly or wrongly a decision was taken to terminate the services of some of the employees, pursuant whereto only the services of the respondent had been terminated. The fact that the appellant society was financially in bad shape is also not in dispute.

11. Grant of a relief of reinstatement, it is trite, is not automatic. Grant of back wages is also not automatic. The Industrial Courts while exercising their power under Section 11A of the Industrial Disputes Act, 1947 are required to strike a balance in a situation of this nature. For the said purpose, certain relevant factors, as for example, nature of service, the mode and manner of recruitment, viz., whether the appointment had been made in accordance with the statutory rules so far as a public sector undertaking is concerned etc., should be taken into consideration.

For the purpose of grant of back wages; one of the relevant factors would indisputably be as to whether the workman had been able to

discharge his burden that he had not been gainfully employed after termination of his service.

Some of the other relevant factors in this behalf have been noticed by this Court in G.M. Haryana Roadways v. Rudhan Singh, [(2005) 5 SCC 591], stating:

> **"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."

[See also Correspondent, St. Michael's T.T.I. v. V.N. Karpaga Mary and Ors. 2008 (6) SCALE 621]

In U.P.S.R.T.C. Ltd. v. Sarada Prasad Misra and another, [(2006) 4 SCC 733], this Court held :

> **"16.** From the above cases, it is clear that no precise formula can be adopted nor "cast-iron rule" can be laid down as to when payment of full back wages should be allowed by the court or tribunal. It depends upon the facts and circumstances of each case. The approach of the court/tribunal should not be rigid or mechanical but flexible and realistic. The court or tribunal dealing with cases of industrial disputes may find force in the contention of the employee as to illegal termination of his services and may come to the conclusion that the action has been taken otherwise than in accordance with law. In such cases obviously, the workman would be entitled to reinstatement but the question regarding payment of back wages would be independent of the first question as to entitlement of reinstatement in service. While considering and determining the second question, the court or tribunal would consider all relevant circumstances referred to above and keeping in view the principles of justice, equity and good conscience, should pass an appropriate order."

In Municipal Council, Sujanpur v. Surinder Kumar [(2006) 5 SCC 173], this Court observed:

> "Apart from the aforementioned error of law, in our considered opinion, the Labour Court and consequently the High Court completely misdirected themselves insofar as they failed to take into consideration that relief to be granted in terms of Section 11A of the said Act being discretionary in nature, a Labour Court was required to consider the facts of each case therefor. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.
>
> For the said purpose, the nature of the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration."

12. In the instant case, the Industrial Court failed and/ or neglected to take the aforementioned factors into consideration. The High Court also fell into the same error. In fact the Industrial Court has placed the burden of proof on the management to show that the workman was not gainfully employed after his termination of service.

13. This Court in a large number of cases noticed the paradigm shift in the matter of burden of proof as regards gainful employment on the part of the employer holding that having regard to the provisions contained in Section 106 of the Indian Evidence Act, the burden would be on the workman. The burden, however, is a negative one.

If only the same is discharged by the workman, the onus of proof would shift on to the employer to show that the concerned employee was in fact gainfully employed.

In Surinder Kumar (supra), this Court held:

> "The Labour Court and the High Court also proceeded wrongly on the premise that the burden of proof to establish non-completion of 240 days of work within a period of twelve months preceding the termination, was on the management. The burden was on the workman. [See U.P. State Brassware Corporation & Ors. v. Udit Narain Pandey, JT 2005 (10) SC 344 and State of M.P. v. Arjan Lal Rajak, (2006) 2 SCC 610].
>
> Equally well settled is the principle that the burden of proof, having regard to the principles analogus to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. [See Manager, Reserve Bank of India, Bangalore v. S. Mani & Ors., (2005) 5 SCC 100]
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> It is also a trite law that only because some documents have not been produced by the management, an adverse inference would not be drawn against the management. [See S. Mani (supra)]"

14. When the question arises as to how and in what manner balance should be struck, it is necessary for the Industrial Courts also to consider as to whether the industry has been sick or not. If it is found that the industry is not in a position to bear the financial burden, an appropriate

award, as a result whereof the equities between the parties can be adjusted, should be passed.

15. We have noticed hereinbefore that the respondent was employed for a short period and that too in two different spells, viz., from 1987 to 1990 and from 1995 to 1997. Having regard to the fact that the respondent has not worked for a long period and the appellant does not have any capacity to pay as it is a sick unit, interest of justice would be subserved if in stead and place of an award of reinstatement with full back wages, a compensation for a sum of Rs. 2,00,000/- (Rupees two lakhs only) is directed to be paid. The said sum would be over and above the amount which the appellant has deposited in terms of the order of the High Court under Section 17-B of the Industrial Disputes Act.

16. The appeal is allowed with the aforementioned directions. No costs.

…….J.
[S.B. Sinha]

..……J.
[Cyriac Joseph]

New Delhi;
October 01, 2008