METROPOLITAN TRANSPORT CORPORATION

v.

V. VENKATESAN

(Civil Appeal No. 5167 of 2009)

AUGUST 7, 2009

[TARUN CHATTERJEE AND R.M. LODHA, JJ.]

Industrial disputes Act, 1947: s.33C(2) – Back wages – Reinstatement of terminated employee – During period of termination, he was enrolled as an advocate and practiced till date of reinstatement – Labour court allowed claim of employee to the extent of Rs.6.54 lacs towards full back wages – Challenged – Held: Employee not entitled to full back wages – Income received from profession has to be treated as income from gainful employment – Reasonable deductions to be made while determining back wages – In the ends of justice, employee awarded back wages of Rs.4 lacs instead of 6.54 lacs.

The question which arose for consideration in the present appeal was whether the respondent-employee is entitled to claim full back wages from December 12, 1996 the date on which he was removed from service till the date of his reinstatement on June 15, 2004 although he was enrolled as an advocate on December 12, 2000 and thereby gainfully employed.

Partly allowing the appeal, the Court

HELD: 1.1. The relief 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 held to be in contravention to the prescribed procedure. In view of the fact that respondent was enrolled as an advocate on December 12, 2000 and

A **continued to be so until the date of his reinstatement (June 15, 2004), he cannot be held to be entitled to full back wages. The income received by the respondent while pursuing legal profession has to be treated as income from gainful employment. Gainful employment** B **would also include self employment. [Para 10 and 12] [593-C; 594-E-F]**

U.P. State Brassware Corporation v. Uday Narain Pandey **(2006) 1 SCC 479;** *J.K. Synthetics Ltd. v. K.P. Agrawal and Anr.* **(2007) 2 SCC 433;** *G.M. Haryana* C *Roadways v. Rudhan Singh* **(2005) 5 SCC 591;**. *S.M. Saiyad v. Baroda Municipal corporation, Baroda* **(1984) Supp) SCC 378;** *Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.* **JT(2009) 9 SC 396;** *North East Karnataka Road Transport Corporation v. M. Nagangouda* **(2007) 10** D **SCC 765, relied on.**

1.2. It is difficult to accept the submission for the respondent that he had no professional earnings as an advocate and except conducting his own case, the E **respondent did not appear in any other case. The fact that he resigned from service after 2-3 years of reinstatement and re-engaged himself in legal profession shows that he had some practice in law after he took sanad on December 12, 2000 until June 15, 2004, otherwise he** F **would not have resigned from the settled job and resumed profession of glorious uncertainties. In this view of the matter, reasonable deduction needs to be made while determining the back wages to which respondent may be entitled. Taking overall facts and circumstances of the case and all other aspects including the aspect that** G **he was enrolled as an advocate from December 12, 2000 to June 15, 2004, demand of justice would be met if the respondent is awarded back wages in the sum of Rs. 4 lacs instead of Rs. 6,54,766/-. [Para 13] [594-G; 595-A-C]**

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Case Law Reference:

(2006) 1 SCC 479	**relied on**	**Para 7**
(2007) 2 SCC 433	**relied on**	**Para 8**
(2005) 5 SCC 591	**relied on**	**Para 9**
(1984) Supp) SCC 378	**relied on**	**Para 10**
JT (2009) 9 SC 396	**relied on**	**Para 11**
(2007) 10 SCC 765	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5167 of 2009.

From the Judgment & Order dated 24.06.2008 of the High Court of Judicature at Madras in Writ Appeal No. 682 of 2008.

Mohan Parasaran, ASG, T. Harish Kumar, Prasanth P., V. Vasudevan, for the Appellants.

K.V. Viswanathan, P.V. Yogeswaran, for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The question that falls for determination in this appeal by special leave is: is the respondent entitled to claim full back wages for the period from December 12, 1996 the date on which he was removed from service till the date of his reinstatement on June 15, 2004 although he was enrolled as an advocate on December 12, 2000 and thereby gainfully employed?

3. Facts are these, briefly put. V. Venkatesan, respondent, was initially employed as conductor on May 7, 1980 by Pallavan Transport Corporation. On formation of Metropolitan Transport Corporation (for short, "Corporation"), the appellant, became

A its employee. The respondent was promoted as Junior Assistant and subsequently as an Assistant by the Corporation. The respondent seems to have acquired Law degree and he was selected for the post of Superintendent (Legal) as trainee. But during the training period his performance was not found B satisfactory and he was reverted back to the post of Assistant. On January 31, 1995, the respondent was transferred to Poonamallee Depot but he did not join his duties there and remained absent for about three months without any prior sanction of leave or intimation. The case of the Corporation is C that on March 28, 1995, a memo of charge was issued to the respondent to which he filed his written response but as his reply was not found satisfactory and a domestic inquiry was instituted to inquire into his misconduct. The respondent did not attend the domestic inquiry despite repeated letters and D notices including a notice published in local newspaper. Ultimately, by an order dated December 12, 1986, the Corporation removed the respondent from its service.

4. The respondent filed a complaint before the Industrial Tribunal, Chennai under Section 33(2)(b) of the Industrial E Disputes Act, 1947 (for short, "ID Act") alleging the contravention of the provisions of Section 33A of the ID Act in removing him from service although the Industrial Dispute No. 62/82 concerning the entire transport workers was pending before the Industrial Tribunal, Chennai. The complaint was opposed by the F Corporation on diverse pleas. The Industrial Tribunal by its order dated July 11, 2003 held the order of removal void and inoperative as the Corporation did not apply for approval. The Industrial Tribunal also declared that the complainant is deemed to have continued in service and he was entitled to all benefits G available. The Corporation challenged the order dated July 11, 2003 passed by the Industrial Tribunal before the High Court. By an interim order, initially, the High Court granted stay of the order dated July 11, 2003 subject to the Corporation depositing the entire backwages as awarded by Industrial Tribunal and H compliance of the provisions of Section 17B of the ID Act. The

Corporation instead of paying last drawn wages to the respondent, reinstated him on June 15, 2004 without prejudice to the pending writ petition. The said writ petition came to be dismissed on August 30, 2006 and, thus, the order dated July 11, 2003 passed by the Industrial Tribunal attained finality. A

5. Since the backwages for the period from December 12, 1996 until June 15, 2004 was not paid by the Corporation, the respondent approached the concerned Labour Court under Section 33C(2) of the ID Act claiming a sum of Rs. 8,08,698/- as the sum due and payable by the Corporation. The Corporation contested the application under Section 33C(2). After hearing the parties, the Labour Court allowed the claim of the respondent to the extent of Rs. 6,54,766/- towards full back wages vide its order dated December 22, 2006. The Corporation challenged the said order by filing a writ petition before the Madras High Court; the principal ground being that having been enrolled as an advocate on December 12, 2000, the respondent was gainfully employed and not entitled to back wages. The respondent also filed a writ petition before the High Court seeking enforcement of the order dated December 22, 2006. The Corporation failed in its writ petition while in the writ petition filed by the respondent, the learned single Judge directed the Labour Department to take necessary steps in recovering the due sum from the Corporation. The Corporation challenged the order of the learned single Judge whereby its writ petition came to be dismissed, by filing a writ appeal which came to be dismissed on June 24, 2008 giving rise to the present appeal by special leave. B C D E F

6. In the backdrop of the aforenoticed facts, we now examine the question set out above. G

7. In *U.P. State Brassware Corporation vs. Uday Narain Pandey*[1], this Court on consideration of a question whether the direction to pay back wages consequent upon declaration that

1. (2006) 1 SCC 479. H

A a workman has been retrenched in violation of the provisions of Section 6N of the U.P. Industrial Disputes Act, 1947 (equivalent to Section 25F of the ID Act, 1947) as a rule was proper exercise made the following observations:

B "**41.** The Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly C improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.

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42. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

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43. The changes brought about by the subsequent decisions of this Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident.

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44. .....

45. The Court, therefore, emphasised that while granting relief, application of mind on the part of the G Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence."

8. In the case of *J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another*[2], while dealing with the question whether an employee

H 2. (2007) 2 SCC 433.

is entitled to back wages from the date of termination to the date of reinstatement when the punishment of dismissal is substituted by a lesser punishment (stoppage of increments for two years), this Court held:

> "15. But the manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey* (2006)1 SCC 479, this Court following *Allahabad Jal Sansthan v. Daya Shankar Rai* (2005) 5 SCC 124 and *Kendriya Vidyalaya Sangathan v. S.C. Sharma* (2005) 2 SCC 363 held as follows: (Uday Narain Pandey case, SCC p. 480d-g)
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> "A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.
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> Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident.

A No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be B granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. C Payment of full back wages cannot be the natural consequence."

In *G.M., Haryana Roadways v. Rudhan Singh* (2005) 5 SCC 591 this Court observed: (SCC p.596, para 8)

D "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. 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 F 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 G 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 H

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."

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan this Court held: (SCC p.366, para 16)

"When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In U.P. State Brassware Corpn. Ltd. this Court observed: (SCC p. 495, para 61)

"61. It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."

17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of

course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. We may in this behalf refer to the decisions of this Court in *A.P. SRTC v. S. Narsagoud* (2003) 2 SCC 212, *A.P. SRTC v. Abdul Kareem* (2005) 6 SCC 36 and *Rajasthan SRTC v. Shyam Bihari Lal Gupta* (2005) 7 SCC 406.

18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *Rudhan Singh* and *Uday Narain Pandey*. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may."

9. In *J.K. Synthetics Ltd.*[2], the Court extensively considered

U.P. State Brassware Corporation[1] and *G.M. Haryana Roadways vs. Rudhan Singh*[3]. Pertinently, it has been held that any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages in addition to several other factors.

10. The learned Senior Counsel for the respondent although did not dispute that the respondent was enrolled as an advocate on December 12, 2000 and continued to be so until the date of his reinstatement but he submitted that the respondent had no earnings from the profession and, therefore, no amount should be deducted from the back wages. In this regard he relied on a decision of this court in the case of S.M. Saiyad vs. Baroda *Municipal corporation, Baroda*[4] wherein this Court observed:

> **"6.** Appellant enrolled himself as an advocate after taking requisite educational qualification on January 20, 1972. It was pointed out to us that the appellant admitted that he was earning Rs 150 p.m. since he started his legal practice. It was therefore, urged that no back wages for the period January 20, 1972 to October 26, 1976 should be awarded. We are not impressed. Undoubtedly the respondent will be entitled to deduct the amount which the appellant was admittedly earning from the back wages payable to him. The question is from what date deduction at the rate of Rs 150 p.m. should be permitted.
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> **7.** Appellant contended and in our opinion rightly that deduction at the rate of Rs 150 p.m. should not commence from the very day he was enrolled as an advocate because it is common knowledge that no one earns from the first day and therefore a reasonable period must be set apart from finding a footing in the profession. The contention deserves consideration. The appellant himself has been

3. (2005) 5 SCC 591.

A rather loose in his statement. It would be reasonable to hold that he must have at least started earning at the rate of Rs 150 p.m. as stated by him after the lapse of one year from the date he was enrolled as an advocate."

B 11. First, it may be noticed that in seventees and eighties, direction for reinstatement and payment of full back wages on dismissal order having been found invalid would ordinarily follow as a matter of course. But there is change in legal approach now. We recently observed in *Jagbir Singh vs. Haryana state Agriculture Marketing Board & Anr.*[5] that In C 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 the relief 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 held to be in D contravention to the prescribed procedure.

12. Secondly, and more importantly, in view of the fact that respondent was enrolled as an advocate on December 12, 2000 and continued to be so until the date of his reinstatement E (June 15, 2004), in our thoughtful consideration, he cannot be held to be entitled to full back wages. That the income received by the respondent while pursuing legal profession has to be treated as income from gainful employment does not admit of any doubt. In the case of *North East Karnataka Road* F *Transport Corporation vs. M. Nagangouda*[6], this Court held, that "gainful employment" would also include self-employment. We respectfully agree.

13. It is difficult to accept the submission of the learned senior counsel for the respondent that he had no professional G earnings as an advocate and except conducting his own case, the respondent did not appear in any other case. The fact that he resigned from service after 2-3 years of reinstatement and

5. JT 2009 (9) SC 396.

H 6. (2007) 10 SCC 765.

re-engaged himself in legal profession leads us to assume that he had some practice in law after he took sanad on December 12, 2000 until June 15, 2004, otherwise he would not have resigned from the settled job and resumed profession of glorious uncertainties. In this view of the matter, reasonable deduction needs to be made while determining the back wages to which respondent may be entitled. Taking overall facts and circumstances of the case and all other aspects including the aspect that he was enrolled as an advocate from December 12, 2000 to June 15, 2004, in our considered view, demand of justice would be met if the respondent is awarded back wages in the sum of Rs. 4 lacs instead of Rs. 6,54,766/-. We order accordingly.

14. The appeal is, therefore, allowed to the aforesaid extent. The impugned judgments of the division bench as well as the learned single Judge stand modified accordingly. Time of eight weeks is granted to the Corporation to make payment of Rs. 4 lacs to the respondent, if not paid so far, failing which it shall carry simple interest @ 6 per cent per annum from June 15, 2004 until the date of payment. The parties will bear their own costs.

D.G. Appeal partly allowed.