

C.N. MALLA

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v.

STATE OF JAMMU AND KASHMIR & ORS.

(Civil Appeal No. 5770 of 2009)

AUGUST 24, 2009

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

Service Law – Back wages – Award of – Employee absent unauthorisedly – Dismissal from service – Set aside by Single Judge of High Court and award of full back wages from date of filing writ petition upto date of superannuation – Set aside by Division Bench – On appeal, held: Direction to pay back wages in its entirety is not automatic consequent upon declaration of dismissal order bad in law – Court is required to exercise discretion reasonably and judiciously – Division Bench refused back wages on the ground of unauthorised leave which was not established – Division Bench also held that payment of back wages would be against public interest and would drain public exchequer – Not founded on legal premise – In the interest of justice, employee awarded 50% back wages from the date of filing writ petition until he attained the age of superannuation – Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956.

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The question which arose for consideration in this appeal is whether the Division Bench of the High Court was justified in setting aside the order of the Single Judge of High Court awarding back wages to the appellant from the date of filing writ petition upto the date of superannuation.

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Partly allowing the appeal, the Court

HELD: 1.1. The direction to pay back wages in its

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A entirety is not automatic consequent upon declaration of dismissal order bad in law. The concept of discretion is inbuilt in such exercise. The court is required to exercise discretion reasonably and judiciously keeping in view the facts and circumstances of the case. Each case would
B depend on its own facts. The Division Bench was mainly influenced by two reasons in denying the appellant back wages - unauthorised leave and delay in approaching the court. The two reasons noticed by the Division Bench neither collectively nor individually justify denial of back
C wages to the appellant in its entirety. The allegation of unauthorised absence has not been established as no enquiry was held; and the case of the appellant was that he had sent several applications for extension of leave for undergoing further training. The Single Judge took
D note of the delay aspect and it was for this reason that back wages were not awarded to him for the period from date of termination until date of filing writ petition. The observation of the Division Bench that if the court orders payment of back wages to the petitioner-appellant, it will
E be against the public interest and also will drain the public exchequer is not founded on legal premise. [Para 12] [485-B-F]

1.2. Having regard to all relevant facts and circumstances, particularly the fact that the appellant is
F a doctor by profession and must not have remained idle even after filing writ petition, full back wages from the date of filing writ petition until date of superannuation may not be justified. The demand of justice would be met if the appellant is awarded 50% back wages from the
G date of filing writ petition until he attained the age of superannuation. [Para 13] [485-G-H; 486-A]

PGI of Medical Education and Research, Chandigarh vs. Raj Kumar 2001 (2) SCC 54; U.P. State Brassware

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→ Corporation vs. Uday Narain Pandey 2006 (1) SCC 479; A
Metropolitan Transport Corporation vs. V. Venkatesan Civil
Appeal No.5167/2009 decided on August 7, 2009 by S.C.,
referred to.

Case Law Reference:

2001 (2) SCC 54 Referred to. Para 9 B

2006 (1) SCC 479 Referred to. Para 10

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From the Judgment & Order dated 26.03.2008 of the High
Court of Jammu & Kashmir at Jammu in Latters Patent Appeal
No. 372 of 2000.

→ P.S. Patwalia, Jagjit Singh Chhabra, A.S. Rahi, S. Vijay
Singh, Jaswant for the Appellant. D

Anis Suhrawardy, Shamama Anis, Syed Mehdi Imam,
Tabrez Ahmad for the Respondents.

The Judgment of the Court was delivered by E

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

2. In this appeal by special leave, the only question that is
required to be considered is whether the Division Bench of the F
High Court was justified in setting aside the order of the single
Judge awarding back wages to the appellant from the date of
filing writ petition upto the date of superannuation.

3. Facts are these, very briefly put. The appellant joined
the service of the State of Jammu & Kashmir as Assistant G
Surgeon in 1970. He held various posts in the Directorate of
Health Services and was promoted first as Lecturer and then
as Assistant Professor in 1981. He was sent on deputation to
Stanely Medical College, Madras for undergoing specialized H

- A training in Microvascular and Hand Surgery from January, 1986. Thereafter, the appellant proceeded on 30 days leave with effect from March, 1986. According to him, he had sent several applications for extension of leave for undergoing further training and seeking service in foreign country but his representations
- B were not responded to by the state government and his services were illegally terminated without following the procedure prescribed in Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 (for short 'Rules 1956') on September 18, 1987. On the other hand, the stand of the
- C respondents is that after the period of sanctioned leave expired, the appellant did not join duty despite letters and reminders and continued to remain absent. Finally, by a notice dated July 16, 1987, the appellant was asked to show cause why his services should not be terminated for having remained absent
- D unauthorisedly and, thereafter, by order September 18, 1987, his services were brought to an end.

4. The appellant challenged the order of termination by filing writ petition on May 16, 1994 before Jammu & Kashmir High Court. The writ petition was opposed by the present

E respondents on diverse grounds.

5. The learned single Judge after hearing the parties held that the termination order was violative of the principles of natural justice and the prescribed procedure. Vide order dated

F December 16, 1998, the learned single Judge set aside the order of termination dated September 18, 1987 and awarded full back wages to the appellant from the date of filing writ petition. The operative order passed by the single Judge reads thus:

G "As a result of aforesaid discussion this writ petition be allowed. Government Order No.400-HME of 1987 dated 18.9.1987 terminating the services of the petitioner is hereby quashed to set aside and the petitioner shall be deemed to have been in service from the date of his

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termination. Now arises the question of back wages. A
Petitioner is a Doctor by profession and in the background
of this case it is ordered that he would only be entitled to
back wages from the date he filed the writ petition i.e.
16.6.1994 (sic 16.5.1994) subject of course, to his fulfilling
other condition as required under law so as to claim such B
wages. No costs."

6. The State of Jammu & Kashmir and its functionaries
challenged the order of the single Judge in intra court appeal.
The Division Bench concurred with the view of the single Judge
that the procedure established in Rules 1956 as well as C
provisions of section 126 of the Constitution of the State were
not followed nor any enquiry was held before terminating the
services of the appellatant. This is what the Division Bench said:

"We are of the considered view that before termination of D
services of a Government servant, the procedure
established under the Jammu and Kashmir Civil Services
(Classification, Control and Appeal) Rules, 1956 as well
as the provisions of Section 126 of the Constitution of the
State have to be followed. We also concur with the view E
of learned Single Judge that it was not a case where no
enquiry could have been conducted before terminating the
services of the petitioner."

7. However, the Division Bench set aside the order of the
learned single Judge directing payment of back wages to the F
appellant.

8. On May 12, 2009, when the matter came up before this
Court, learned counsel appearing on behalf of the respondents
was requested to take instructions whether back wages could G
be agreed to be paid to the appellatant and the matter was
adjourned to the month of August, 2009. Mr. Anis Suhrawardy,
learned counsel for the respondents today appeared before us
and submitted that he took up the matter with the state
functionaries but has not been able to get any positive response H

A from the state government.

9. In *PGI of Medical Education and Research, Chandigarh vs. Raj Kumar*,¹ this Court stated:

B “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 strait-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety.”

C 10. In *U.P.State Brassware Corporation vs. Uday Narain Pandey*,², this Court while dealing with aspect of payment of back wages to a workman by an Industrial Court whose retrenchment was held illegal, held:

D “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.”

E 11. Recently, in the case of *Metropolitan Transport Corporation vs. V. Venkatesan*, (Civil Appeal No.5167/2009 decided on August 7, 2009), we took note of recent approach of the courts in the matter of direction for payment of back wages where dismissal order is found illegal and invalid. We said:

F “11. Firstly, 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.*{JT 2009 (9) SC 396} that in recent past there has been a shift in the legal position and in a long line of

1. (2001) 2 SCC 54.

H 2. (2006) 1 SCC 479.

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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 contravention to the prescribed procedure.”

12. The legal position is fairly settled by catena of decisions that direction to pay back wages in its entirety is not automatic consequent upon declaration of dismissal order bad in law. The concept of discretion is inbuilt in such exercise. The court is required to exercise discretion reasonably and judiciously keeping in view the facts and circumstances of the case. Each case, of course, would depend on its own facts. Insofar as the present case is concerned, the Division Bench was mainly influenced by two reasons in denying the appellant back wages viz., (one) unauthorised leave and (two) delay in approaching the court. The two reasons noticed by the Division Bench neither collectively nor individually justify denial of back wages to the appellant in its entirety. The allegation of unauthorized absence has not been established as no enquiry was held; the case of the appellant was that he had sent several applications for extension of leave for undergoing further training. As regards the second reason viz., delay, suffice it to say that this aspect was clearly taken note of by the single Judge and it was for this reason that back wages were not awarded to him for the period from date of termination until date of filing writ petition. The observation of the Division Bench that if the court orders payment of back wages to the petitioner (appellant herein), it will be against the public interest and also will drain the public exchequer is founded on no legal premise.

13. Regard being had to all relevant facts and circumstances, particularly the fact that the appellant is a doctor by profession and must not have remained idle even after filing writ petition, full back wages from the date of filing writ petition until date of superannuation may not be justified. In our considered view, the demand of justice would be met if the

A appellant is awarded 50% back wages from the date of filing writ petition until he attained the age of superannuation.

B 14. Consequently, appeal is allowed to the aforesaid extent. The payment of due amount shall be made by the respondents to the appellant within one month from today failing which it will carry simple interest at the rate of 9% per annum from May 16, 1994 till the date of actual payment. Parties will bear their own costs.

N.J.

Appeal partly allowed.