The Management Of Vs. Sureshkumar

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Court : Karnataka Dharwad

Decided On : Nov-25-2021

Judge : S.Sunil Dutt Yadav and S Rachaiah

Appeal No. : WA 100019/2020

Appellant : The Management Of

Respondent : Sureshkumar

Judgement :

R1IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH DATED THIS THE25H DAY OF NOVEMBER, 2021 PRESENT THE HONBLE MR.JUSTICE S. SUNIL DUTT YADAV AND THE HONBLE MR.JUSTICE S. RACHAIAH W.A. No.100019/2020 c/w W.A. No.100022/2020 (L-TER) IN W.A. No.100019/2020: BETWEEN: THE MANAGEMENT OF SRI DHARMASTHALA MANJUNATHESHWARA EDUCATION SOCIETY, REP. BY ITS SECRETARY, DHAVALANAGAR, SATTUR, DISTRICT: DHARWAD-580 001.-. APPELLANT (BY SRI S.A. SONDUR, ADVOCATE) AND: SURESH KUMAR S/O CHANDRANATH IJARI, AGED ABOUT58YEARS, OCC:-NIL, R/O C/O Y.M. VEERESH, DOOR No.2907, UPSTAIRS, SRIRAM NILAYA, 3RD MAIN, 5TH CROSS, MCC B BLOCK, DAVANAGERE-577 002.-. RESPONDENT (BY SRI RAVI HEGDE, ADVOCATE) 2 THIS WRIT APPEAL IS FILED UNDER SECTION4OF THE KARNATAKA HIGH COURT ACT, 1961, AGAINST THE

ORDER

PASSED BY THE LEARNED SINGLE JUDGE DATED1312.20119 IN W.P. No.75525/2013 & ETC. IN W.A. No.100022/2020: BETWEEN: SURESH KUMAR S/O CHANDRANATH IJARI, AGED ABOUT59YEARS, OCC:-NIL, R/O C/O Y.M. VEERESH, DOOR No.2907, UPSTAIRS, SRIRAM NILAYA, 3RD MAIN, 5TH CROSS, MCC B BLOCK, DAVANAGERE PRESENTLY RESIDING AT C/O SATISHKUMAR IJARI, 98/AM SUMANA, 1ST FLOOR, 3RD MAIN, 9TH CROSS, NEAR HOYSALA CIRCLE, NEXT TO ANDRA BANK, KS TOWN, BENGALURU-560 060.-. APPELLANT (BY SRI RAVI HEGDE, ADVOCATE) AND: THE MANAGEMENT OF SRI DHARMASTHALA MANJUNATHESHWARA EDUCATION SOCIETY, R/BY ITS SECRETARY, DHAVALANAGAR, SATTUR, DISTRICT: DHARWAD-580 004.-. RESPONDENT (BY SRI S.A. SONDUR, ADVOCATE) THIS WRIT APPEAL IS FILED UNDER SECTION4OF THE KARNATAKA HIGH COURT ACT, 1961, AGAINST THE

ORDER

PASSED BY THE LEARNED SINGLE JUDGE DATED1312.20119 IN W.P. No.75525/2013 & ETC. THESE WRIT APPEALS COMING ON FOR FURTHER HEARING THIS DAY, S.SUNIL DUTT YADAV J., DELIVERED THE FOLLOWING:

3.

JUDGMENT

S. SUNIL DUTT YADAV. J This Judgment has been divided into the following Sections to facilitate analysis : I Preamble 4 - 9 II Contentions of the Management 9 - 11 III Contentions of the Workman 11 - 12 IV Consideration :

12. A) Finding of the Labour Court regarding 13 - 17 delay in seeking reference of dispute B) Abandonment of Inquiry 17 - 19 C) Stigmatic Termination 19 - 22 22 - 30 D) Award of Back Wages V Order 31 - 32 4 PREAMBLE: The management of Sri Dharmasthala Manjunatheshwara Educational Society has filed W.A.No.100019/2020 calling in question the correctness of the order passed in W.P.No.75525/2015 whereby the learned Single Judge has set aside the award of the Labour Court dated 12.09.2012 passed in Reference No.10/2012 and had further directed that the petitioner is entitled for reinstatement with consequential

benefits from the date of service till reinstatement with 50% back wages. The employee-Sri Suresh Kumar Ijari has filed W.A.No.100022/2020 calling in question the order of the learned Single Judge only insofar as it relates to denial of back wages to the extent of 50% and has sought for direction for payment of full back wages. The parties are referred to as Workman and Management for the purpose of convenience. 5

2. The workman is admittedly an employee of the management and was appointed as Accountant/ Internal Auditor on 30.05.1999. The workman was terminated from service by a letter of termination dated 21.06.2006 with retrospective effect from 01.06.2006, which was preceded by an order dated 13.09.2004 keeping him under suspension.

3. The admitted facts also point out that the workman was involved in a criminal case and a FIR came to be registered against him. During the course of investigation he was arrested on 11.09.2004 and was in custody till 08.08.2005. On 08.12.2005 the workman approached the management and had sought for revocation of his suspension which was, however, not considered. On 04.05.2010, the workman was acquitted from the charges in the criminal case that was registered against him by way of a judgment of acquittal. It was thereafter on 25.02.2011 that the workman is stated to have submitted his letter of 6 resignation to the management and had requested for releasing his service benefits. However, it is not in dispute that the said resignation was not accepted by the management. It is stated that on 18.04.2011 the workman has sought for making of a reference in the conciliation proceedings. On 14.03.2012 the Government has referred the dispute raised by the respondent to the Labour Court, Hubballi. The Government while making a reference under Sec. 10(1)(c) of the Industrial Disputes Act, 1947 (for short the Act) had referred the dispute on two points. The points framed by the Labour Court for consideration is in Kannada language and is translated and reproduced in English language as hereunder:

1. Whether the dispute raised challenging the punishment imposed by the management of Sri Dharmasthala Manjunatheshwara Education Society, Ujire, Dhaval Nagar, Sattur, Dharwad-9 to its workman-Sri Suresh Kumar Chandranath

Ijari, aged 50 years, accounts section, care of Y.M. Veeresh, door No.2907 Upstairs, Sriram 7 Nilayam, 3rd cross, MCC B Block, Davanagere- 577 004, by order dated 21.06.2006 dismissing the workman from service to take effect from 01.06.2006 after a delay of four years and ten months, is valid?.

2) If it is valid, whether the punishment imposed by the management of Sri Dharmasthala Manjunatheshwara Education Society, Ujire, Dhaval Nagar, Sattur, Dharwad-9 to its workman Sri Suresh Kumar Chandranath Ijari, aged 50 years, accounts section, care of Y.M. Veeresh, door No.2907 Upstairs, Sriram Nilayam, 3rd cross, MCC B Block, Davanagere-577 004, by order dated 21.06.2006 dismissing the workman from service to take effect from 01.06.2006, is valid?.

3) If not, to what relief the workman is entitled to?. - - - 4. The Labour Court after a detailed consideration and inquiry wherein parties had let in evidence has rejected the reference as being devoid of merits. The Labour Court has answered the point no.1 by holding that there was delay in 8 seeking for a reference and as regards the validity of termination, has answered the said point in the affirmative, thereby upholding the termination.

5. The said order came to be challenged before the Learned Single Judge in W.P. No.75525/2013 by the workman and the learned Single Judge has set aside the order of the Labour Court and directed reinstatement with consequential benefits including 50% back wages. The learned Single Judge has found that the termination from service without resorting to domestic inquiry to be bad in law taking note of the non adherence to the procedure in terms of the Employees Service Rules, 2003 of Sri Dharmasthala Manjunatheshwara Education Society. The learned Single Judge had recorded a finding that the allegations made against the workman were serious and that he was charge sheeted on 01.12.2004 and the disciplinary authority without completion of the inquiry had resorted to terminating the services of the petitioner on 9 21.06.2006 invoking the clause 25(a) and 58 of the Employees Service Rules.

6. It is further observed that there was no provision for short circuiting process of termination and that before taking recourse to clause 25(a) and 58 of the Employees Service Rules, 2003, the competent authority had not withdrawn

proceedings of the domestic inquiry. Accordingly, it was held that the initiation of domestic inquiry was in tact and the disciplinary authority ought not to have sidetracked the process and terminated the services asserting that it was a termination simpliciter. Accordingly, the award of the Labour Court was set aside and direction was issued for reinstatement of the workman. CONTENTIONS OF THE MANAGEMENT7 The management has assailed the said order of the learned Single Judge contending that the management was empowered to take recourse to termination in terms of Rule 10 25(a) and 58 of the Rules and the said aspect has not been properly considered. It is further contended that question of holding regular inquiry was not possible as the employee was in custody, that there was inordinate delay in seeking reference as, though the workman was terminated from service in the year 2006 he kept quiet till 2012 and has slept over the matter.

8. It is also contended that the workman had submitted his letter of resignation and all of these facts would indicate the intention to abandon employment on the part of the workman. It is contended that the learned Single Judge did not record any finding as regards the point no.1 recorded by the Tribunal rejecting the reference finding that the reference was made belatedly, and accordingly without having recorded any finding as regards to the order of the Labour Court on such point, granting relief of reinstatement by setting aside the order of the Labour Court, was impermissible. It is further submitted that the Court while 11 exercising jurisdiction under Article 227 of the Constitution of India, could not have reappreciated the evidence and arrived at the conclusion as arrived at by the learned Single Judge. CONTENTIONS OF THE WORKMAN9 The workman, on the other hand, has challenged the same order of the learned Single Judge by filing a separate writ appeal and has assailed portion of the order of the learned Single Judge whereby the back wages has been granted only to the extent of 50% while denying back wages in its entirety upon reinstatement. It is contended by the workman that the termination amounted to capital punishment of dismissal and such dismissal without holding an inquiry is bad in law and the employee who suffers such an illegal order must be reinstated and granted all reliefs as a matter of course. 12

10. It is also asserted that the workman was not gainfully employed after dismissal and in the absence of the management placing any material to show gainful employment there was no justification for denial of entire back wages by the learned Single Judge. CONSIDERATION11 The employment of the workman and the nature of employment is not in dispute. It is clear from the proceedings on record that the workman was arrested in connection with a criminal case and was in custody from 11.09.2004 to 08.08.2005. It is also relevant to note that the workman approached the employer on 08.12.2005 for revocation of his suspension which admittedly has not been considered. The order of termination came to be passed on 21.06.2006 and employee was acquitted in the criminal case on 04.05.2010. It is also relevant to note that on 25.02.2011 the letter of resignation came to be made, 13 however, a close perusal of the said document would indicate that the employee was constrained to fall back upon his service benefits for survival of himself and his dependents, as despite being acquitted as he was not recalled to services and was seeking to tender his resignation for the purpose of release of service benefits. However, it is also admitted by the management that there is no material forthcoming as to its acceptance or otherwise. The letter of resignation not having been acted upon, the management falls back on the letter of termination on 21.06.2006, while opposing the grant of any relief. Keeping in mind such factual matrix the matter requires to be decided. Finding of Labour Court regarding delay in seeking reference of dispute 12. Insofar as the contention of the management that the finding of the Labour Court on the question of delay in seeking for reference is concerned, it ought to be noted that 14 while this Court is of the opinion that the conclusion of the learned Single Judge in arriving at the finding that the workman was entitled for reinstatement requires affirmation, the said order of the learned Single Judge deserves to be sustained and for that purpose the limited finding as regards to the correctness of the conclusion in point no.1 made by the Labour Court is to be made in the present proceedings.

13. It must be noted that admittedly the workman was in custody from 11.09.2004 to 08.08.2005. The representation of the employee on 08.12.2005 shortly after he was released on bail, seeking for revocation of his suspension, has not been considered and accordingly after being acquitted on 04.05.2010, the employee

has sought for assailing the illegality of his termination. The question of delay in seeking for reference is a matter that needs to be looked into from the factual matrix on hand and keeping in mind the rejection of his request for revocation of 15 suspension made immediately after his release on bail, the employee having waited till his acquittal and then having moved to challenge his termination cannot be said to be an act of willful abandonment of his right or that he had slept over his rights.

14. In the claim petition filed by the employee there is a detailed narration of the events in paragraph No.5 and a and reading of the claim petition in its entirety would indicate that the workman had waited till he was cleared of the charges and then approached the appropriate authority seeking for reference. It has been asserted that he and all his family members were in custody for eight months and only thereafter he was granted bail on 08.08.2005. It is specifically averred that the workman had sought for revocation of the order of suspension by a request on 08.12.2005 which was not considered. Accordingly it is stated that he waited till the disposal of the criminal case. 16

15. The finding of the Labour Court as regards delay does not assign any reason for not accepting the grounds as made out in the claim petition as noted above being reason for delay. The conclusion The grounds urged in the claim petition regarding delay caused in raising the dispute in my considered view are not at all sufficient so as to condone the delay is a conclusion without application of mind and without expressing an opinion as regards to the reason put forth by the employee for the delay and such a conclusion is a perverse conclusion, that called for interference.

16. Such time spent cannot be treated to be willful inaction and accordingly the finding of the Labour Court on point No.1 deserves to be set aside. Though the learned Single Judge has not dealt with that aspect but dealt with the merits of the matter, this Court while being in agreement with the conclusion arrived at by the learned Single Judge in order to uphold such order, it would be 17 competent to deal with the correctness or otherwise of the finding on point no.1 as recorded by the Labour Court.

17. It must also be noticed that the claim of the employee must be a live dispute and in light of the workman being acquitted in the year 2010 soon thereafter without much delay efforts are made by the workman to challenge termination by seeking for reference which cannot result in construing that there was no dispute as on the date the reference was made. It also needs to be clarified, that every delay would not defeat the right to claim reference. However, such delay could be taken for moulding of eventual relief while considering grant of back wages if reinstatement is to be granted. ABANDONMENT OF INQUIRY18 As regards the other finding on merits by the learned Single Judge that the management ought not to have abandoned the inquiry proceedings and short circuited 18 termination process by resorting to termination as per Sec.25(a) and 58 also requires acceptance. The applicable service rules at rule 61 provides for imposition of penalty only after an inquiry. There are no legally acceptable reasons assigned by the management which at the first instance having taken recourse to a regular inquiry and charge sheet having been issued, has abandoned such inquiry and recourse is taken to termination under rule 25(a). Rule 25(a) reads as follows: The competent authority is at liberty to terminate the services of the employee whose services are not required by the institution at any time without assigning any reason. Such a rule cannot be invoked without assigning reasons for abandoning an inquiry that has been initiated. The explanation that he was in custody cannot be accepted as a reason enough to dispense with the inquiry. In fact the 19 workman was out on bail after being in custody for about 11 months. STIGMATIC TERMINATON19 A perusal of the letter of termination at page No.154 would prima facie indicate the nature of termination. The letter of termination dated 21.06.2006 is extracted as below: Whereas Mr. Suresh Kumar Ijari, Accountant involved in a criminal case and he was detained in custody for 08 months. In terms of his appointment order, Clause No.4 and as per the employees service rules 25(a) and 58(a), his services to SDME Society are liable for termination. Hence, his services to the SDME Society have been terminated w.e.f. 01.06.2006.

20. The letter starts by referring that Sri Suresh Kumar Ijari, Accountant was involved in a criminal case and he was detained in custody for eight months. Clearly such a 20 statement made in the letter of termination amounts to a termination which was stigmatic and if such termination was to be made,

procedure for holding a domestic inquiry as provided under the service rules ought to have been followed and such finding by the learned Single Judge is not open for challenge.

21. In fact, the apex Court in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and others reported in (1980) 2 SCC593(Bench of 3 judges) has laid down the relevant consideration to determine as to whether termination is stigmatic or simpliciter. The observation made at paragraph No.53 to 55 are of relevance and are reproduced below: 53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the 21 order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinized, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non- injurious terminology is used. (emphasis supplied) 22. Clearly taking note of the observation of the apex Court, the abandonment of disciplinary proceedings after issuing of charge sheet and resorting to termination by 22 invoking the service rules which provided for termination simpliciter would be impermissible. In fact, it is not necessary to go to the extent of lifting the veil to find out whether the termination was in effect stigmatic and not simpliciter as in the present case the recital in the order of termination referring to involvement in a criminal case and that he was detained in custody for eight months, is by itself stigmatic. If that were to be so, the only

recourse available to the management was to hold a full fledged domestic inquiry in terms of its service rules as mandated under rule 61 and the letter of termination taking recourse to Sec. 25(a) and 58 was impermissible as rightly held by the learned Single Judge. AWARD OF BACK WAGES23 Insofar as the award of back wages is concerned, the counsel for the appellant would contend that the burden is on the employee to have demonstrated that he was not in 23 gainful employment and that the employee has not discharged burden placed upon him and reliance is placed on the judgment of the apex Court in Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand reported in AIR ONLINE 2018 SC363 However, counsel for the workman has relied on the judgment of the apex Court in Deepali Gundu Surwase V. Kranti Junior Adhyapak Mahavidyalala (D.ED.) and others reported in (2013) 10 SCC324 It must be noted that the apex Court in the case of M/s Hindustan Tin Works Pvt. Ltd., Vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd., and others (AIR1979S.C. PAGE75 which is the judgment by a bench consisting of three judges, has considered the aspect in detail as to the entitlement of back wages and has observed at paragraph No.9 as follows: When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for 24 the same. If the workmen 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. The Apex Court however at paragraph No.18 has provided for scaling down of the back wages as follows: It may well be that in appropriate cases the court may, in the spirit of labour and management being partners in the industry, direct scaling down of back wages with some sacrifice on the managements part too.

24. Insofar as the question of burden of proof is concerned, at the outset it must be noted that the workman in paragraph No.7 of his claim petition has specifically observed that it is submitted that after termination from the service, the first party workman has not been employed anywhere and he has no source of income to maintain himself and his family members. As rightly observed by the apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC324 25 the primary burden is on the employer to plead and prove that the

employee was gainfully employed. The relevant extract of 38.3 reads as follows: 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 averment 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. 26 25. It is clear that the apex court has contemplated of the situation where the employee pleads or makes a statement that he was not gainfully employed and then considers the situation where despite such assertion by the workman, the management seeks to avoid payment of full back wages which could be resorted to only if the management places evidence to prove that the employee was gainfully employed. In the present case, noting the specific assertion of the claim of the workman in his statement of objections that he was not gainfully employed and its reassertion in the evidence by way of affidavit dated 16.07.2004 filed by the workman at paragraph No.6, it could be stated that the workman has acquitted himself of his obligation of any further proof by such assertion. The primary burden of proof of assertion of the fact that employee was gainfully employed would always remain on the employer and if the employee asserts as in the present case that he was gainfully employed, unless the employer 27 places some evidence to indicate that the employee was in gainful employment, there could be no onus on the employee to prove the negative. The onus if at all shifts on the employee if there was some material to indicate prima facie that he was gainfully employed and proof of such facts was solely within the knowledge of the employee which he is required to prove in terms of Sec. 106 of the Evidence Act, which is not so in the present case.

26. Insofar as the extent of back wages that is required to be awarded is concerned, the apex Court in the case of Hindustan Tin Works case has considered the said aspect and has no doubt voiced that the relief of reinstatement with continuity of service had to be granted but has specified at paragraph no 18 regarding discretion upon courts in appropriate cases to, scaling down of back wages.

27. The apex Court in the case of Prabhakar Vs. Joint Director, Sericulture Department and another (2015) 28 15 SCC Page No.1, has also observed that where there may have been delay in making a reference in terms of Sec. 10 of the Industrial Disputes Act, there could be appropriate moulding of relief. The observations made at paragraph No.43 are apt and could be applied in the present case also. 43. We may hasten to clarify that in those cases where the court finds that dispute still existed, though raised belatedly, it is always permissible for the court to take the aspect of delay into consideration and mould the relief. In such cases, it is still open for the court to either grant reinstatement without back wages or lesser back wages or grant compensation instead of reinstatement. We are of the opinion that the law on this issue has to be applied in the aforesaid perspective in such matters.

28. In the present case taking note of the nature of activities of the management and its field of activity the delay on the part of the workman in seeking for a reference though does not defeat the right of the workman to seek for reference of the dispute and its adjudication, yet it could be 29 an aspect to be taken note of while granting of back wages. The nature of termination as made out being stigmatic and as held by this Court as being impermissible and the workman having been terminated without inquiry, such termination being per se illegal, back wages would follow as such termination was for no fault of the workman. In fact even after acquittal in criminal case it would have been open for the management to have inquiry and impose punishment of termination if breach of the relevant rules was demonstrated or found to be correct during an inquiry. Such option of termination after an inquiry as per the prevailing rules, not having been exercised, the termination is illegal and back wages are to follow upon reinstatement. If reinstatement is only a concessional redressal whether back wages ought to have

been awarded, is a different question. However, in the present case reinstatement is a logical consequence of the illegal termination and in so far as back wages are concerned, while the award of 50% back 30 wages with consequential benefit is to be upheld, however, it would be reasonable to exclude award of back wages for the period of delay from 21.06.2006 to 18.04.2011 taking note of the grievance on delay in seeking for reference.

29. Taking note of the observation of the Apex Court relating to scaling down of back wages, the plea of the workman for grant of 100% back wages cannot be considered, as noticed various considerations need to be taken note of while awarding back wages including the nature of the activity of the management, the fact that the employee was not working for the said period and in order to maintain an appropriate balance between the rights of the workman and that of the management and being conscious that management ought not to be fastened with an undue financial burden while still granting an appropriate relief of reinstatement with appropriate back wages, no further enhancement of back wages as sought for by the workman is called for. 31

ORDER

30 For the foregoing reasons, the writ appeals are disposed of. Consequently, the order of the learned Single Judge is confirmed subject to modification insofar as exclusion of back wages for the period from 21.06.2006 to 18.04.2011. It is clarified that as the workman has retired and as question of reinstatement will not arise, grant of back wages at 50% can be said to be a conservative relief. 50% of the back wages to be paid within a period of three months as specified by the learned Single Judge and back wages to be calculated at 50% of the last paid wages while keeping open the quantification of the remaining back wages after taking note of the continuity of service to be adjudicated in an appropriate proceedings. 32 In view of disposal of the appeals on merits, all pending IAs in both the appeals are disposed off as not calling for any further orders. SD JUDGE SD JUDGE bvv