



2026:AHC:179620-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD

SPECIAL APPEAL No. - 391 of 2015

Mohd. Mustafa Siddiqui

.....Appellant(s)

Versus

District Basic Education Officer and 4 Ors.

.....Respondent(s)

Counsel for Appellant(s)	: Hritudhwaj Pratap Sahi, S.k. Rao, Sankalp Narain
Counsel for Respondent(s)	: C.S.C., Manish Kumar Maurya, P.k. Mishra, Rudra Pratap Mishra, Shriprakash Mishra, Sunil Kumar Singh

Reserved
A.F.R.

Court No. - 2

HON'BLE J.J. MUNIR, J.
HON'BLE INDRAJEET SHUKLA, J.

Delivered by Indrajeet Shukla, J.

1. Heard Mr. Sankalp Narain, learned counsel for the appellant, Mr. Shriprakash Mishra, learned counsel appearing on behalf of respondent nos. 4 and 5 and Mr. Akhilesh Kumar Tripathi, learned Standing Counsel on behalf of respondents nos. 1 to 3.
2. This intra-court appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules questions the validity and correctness of the order dated 23.04.2015, whereby the writ petition preferred by the appellant was dismissed with the following observation:

“The answer to the aforesaid argument of the learned counsel for the petitioner can be found in the Full Bench decision where it was held that the State Government was slow in its action in amending the Act.

Since the notification dated 23.8.2010 has been issued in the exercise of power conferred under the Central Legislation, the State Government was bound to amend the Act immediately and failing to do so would not render the notification dated 23.8.2010 redundant. It came into force on 23.8.2010 and from that date on-ward 'TET' was essential qualification for a teacher to possess who is seeking appointment in primary school . Therefore, the petitioner on the date of his appointment did not possess the qualification of TET . He was not entitled to be appointed as Assistant Teacher in the said institution. But so far as the question with regard to the order of the committee of management terminating the service of the petitioner is concerned, the same has been taken care of by the order of the BSA dated 28.11.2014 by which no approval has been granted to such termination and a direction has been issued to allow the petitioner to join. By this writ petition what is being asked for is right to continue in the institution and also for payment of salary although apparently the order of committee of management is illegal and has been take care of by the BSA . Now, to invoke the jurisdiction of this Court for continuance , the petitioner has to satisfy his eligibility to continue in the institution. As stated above on the date of his appointment he was not qualified to be appointed as Assistant teacher in view of Notification dated 23.8.2010, as such I decline to interfere in this writ petition.

It would be proper to note certain further facts which are relevant . The petitioner continued in the institution from 10.8.2011 to 2.8.2014. The petitioner has now obtained certificate of TET dated 24.5.2014 for the session 2013-14. Therefore, Sri I.R.Singh submits that the petitioner since has now obtained the qualification he should not be disturbed at this stage only on account of the fact that initially at the time of his appointment he did not possess the requisite qualification as required by the notification dated 23.8.2010. Sri Singh further submits that even otherwise the petitioner was entitled for appointment under the Dying-in Harness Rules of 1974. The petitioner's father died in the year 2010 and the State Government has power to grant relaxation even beyond a period of five years and , therefore, he is still within the zone of consideration for being appointed under the dying in harness provision. Therefore, it is submitted that now his claim if considered, he is fully qualified to be appointed as Assistant Teacher in the institution and , therefore he should not be precluded from continuing in the institution for an illegality committed at the time of his initial appointment stood cured by his gaining qualification of TET subsequently.

I am unable to agree. If at the initial stage the petitioner was not qualified to be appointed, by subsequent gaining qualification his initial appointment cannot be validated. However, it is always open for the petitioner to apply under the Rules of 1974 in the institution as he is still under the eligibility zone for being considered under the Rules of 1974.

With the aforesaid observations, the writ petition is dismissed.”

3. The factual matrix necessary for the adjudication of the instant appeal is recapitulated hereunder:

3.1. The appellant-petitioner was offered appointment to the post of Assistant Teacher in Bal Bari Junior High School, Kasya, Kushinagar (hereinafter referred to as the “Institution”) under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the “Rules, 1974”). Pursuant to the resolution of the Committee of Management/4th respondent dated 25.12.2010, and upon taking note of the appellant-petitioner’s qualifications, i.e., (M.A. in Geography) coupled with B.Ed., requisite approval under the Rules was accorded by the District Basic Education Officer, Kushinagar vide order dated 30.07.2011. Thereafter, upon verification of the testimonials, the appointment letter was issued on 08.08.2011. Pursuant to the aforesaid exercise, the petitioner assumed charge on 10.08.2011 and has since been discharging his duties without any interruption.

3.2. In the meantime, the petitioner passed the requisite Teacher Eligibility Test (for short, ‘TET’) on 22.02.2014, as evident from page 144 of paper book of the instant appeal, a requirement under the notification dated 23.08.2010 issued by the National Council for Teacher Education in exercise of the powers conferred by sub-section (1) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (for short, ‘Act, 2009’), and in pursuance of the notification dated 31.03.2010 issued by the Department of School Education and Literacy, Ministry of Human Resource Development, Government of India.

3.3. The requisite minimum qualification for appointment as Assistant Teacher in an Upper Primary School, as laid down in the notification dated 23.08.2010 issued by the National Council for Teacher Education, was amended vide notification dated 29.07.2011, whereby passing the Teacher Eligibility Test was made mandatory for Assistant Teachers of Upper Primary Schools.

The qualification as set out in notification aforesaid is reproduced hereinbelow:

“(ii) Classes VI-VIII

(a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

Graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A./B.Sc.Ed. or B.A. Ed./B.Sc.Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

AND

(b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the guidelines framed by the NCTE for the purpose.”

4. The notification dated 23.08.2010 issued by the NCTE was not given effect to in the State of U.P. at the initial stage. The same was implemented, vide Government Order dated 05.12.2012, granting a concession to teachers who were already discharging their duties without having qualified the TET, by stipulating a period of five years from the date of commencement of the Act, 2009, i.e., 01.04.2010, to acquire the requisite qualification. Thus, teachers who were discharging their duties in Upper Primary Schools in the State of U.P. prior to the issue of the Government Order dated 05.12.2012 were required to qualify the ‘TET’ on or before 31.03.2015. Thereafter, the U.P. Basic Schools (Junior High School) Conditions of Teachers Recruitment and Service (6th Amendment) Rules, 2012 was introduced, making the qualification of

passing the 'TET' a mandatory requirement. The relevant extract of the Government Order dated 05.12.2012 is reproduced hereinbelow:

“3- प्रदेश के मान्यता प्राप्त, सहायता प्राप्त अथवा गैर सहायता प्राप्त जूनियर हाईस्कूलों में कार्यरत ऐसे अध्यापक जो निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम-2009 के प्रवृत्त होने के समय उ.प्र. निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार नियमावली-2011 के नियम 15 एवं अधिनियम-2009 की धारा-23 (1) के अधीन निर्धारित न्यूनतम शैक्षिक अर्हताएं नहीं रखते है, को अधिनियम-2009 के प्रारम्भ होने के 05 वर्ष की अवधि के अन्दर अर्थात् दिनांक 31.03.2015 तक ऐसी न्यूनतम अर्हताओं के योग्य बनाने के संबंध में निःशुल्क और अनिवार्य बाल शिक्षा का अधिकार नियमावली-2011 में विहित प्राविधानों के अन्तर्गत नियमानुसार कार्यवाही सुनिश्चित की जाय।”

5. The admitted factual matrix emerging from the record is that the petitioner was duly qualified with effect from 22.02.2014, having cleared the TET. However, the Manager of Management/respondent No. 4, in a rather unusual manner, and perhaps for extraneous reasons, proceeded to terminate the services of the appellant-petitioner.

6. The appellant-petitioner, being a teacher in an aided Junior High School managed by the Committee of Management, could have been terminated only by way of a valid resolution of the Committee. However, the Manager of the Committee of Management unilaterally proceeded to terminate the services of the petitioner vide letter dated 02.08.2014, indicating certain phrases such as concealment, forgery, etc., without specifying the particulars of the forged document allegedly relied upon by the petitioner for securing his appointment. The termination order dated 02.08.2014 is cryptic and does not disclose any material particulars regarding the alleged forged document(s). The termination order verbatim reads:

"जिला बेसिक शिक्षा अधिकारी, कुशीनगर के पत्रांक / 1544-47/2011-12 दिनांक 30.07.2011 द्वारा श्री मुहम्मद मुस्तफा सिद्दीकी पुत्र स्व० नूर मुहम्मद की मृतक आश्रित के रूप में सहायक अध्यापक के पद पर नियुक्ति आदेश जारी करने हेतु निर्देशित किया गया है। जिला बेसिक शिक्षा अधिकारी, कुशीनगर के उक्त सन्दर्भित पत्र में दिए गए निर्देशानुसार श्री मुहम्मद मुस्तफा सिद्दीकी पुत्र स्व० नूर मुहम्मद को सहायक अध्यापक के पद पर नियुक्ति पत्र निर्गत किया गया और मुहम्मद मुस्तफा सिद्दीकी ने कार्यभार भी ग्रहण किया। श्री मुहम्मद मुस्तफा सिद्दीकी के नियुक्ति के उपरान्त श्री मुहम्मद मुस्तफा सिद्दीकी के पत्रोत्तरों अभिलेखों एवं दस्तावेजों का परीक्षण एवं जांच कराया गया। **श्री मुहम्मद मुस्तफा सिद्दीकी द्वारा तथ्यों को छिपाकर, कूटरचित दस्तावेजों के आधार पर जिला बेसिक शिक्षा अधिकारी,**

कुशीनगर द्वारा विधि विरुद्ध नियुक्ति आदेश जारी करा लिया। गया। श्री मुहम्मद मुस्तफा सिद्दीकी के फर्जी दस्तावेजों के आधार पर की गयी विधि विरुद्ध नियुक्ति निरस्त कर सेवा समाप्त की जाती है। सेवा समाप्ति की तिथि श्री मुहम्मद मुस्तफा सिद्दीकी को प्राप्त पत्र की तिथि से प्रभावी मानी जायेगी।"

7. The order of termination dated 02.08.2014 passed by the Manager of the Committee of Management was bereft of jurisdiction. Accordingly, when the same was placed before the District Basic Education Officer, Kushinagar, for approval, it did not find favour and, ultimately, the order of termination dated 02.08.2014, whereby the services of the appellant-writ petitioner were terminated, was disapproved by the District Basic Education Officer, Kushinagar, vide order dated 28.11.2014. The order of disapproval of termination of services of the petitioner dated 28.11.2014 passed by the District Basic Education Officer, Kushinagar, reads:

"कृपया अपने पत्र दिनांक 18.09.2014 का संदर्भ ग्रहण करें, जो कार्यालय से निर्गत पत्र पत्रांक 1186-87/2014-15 दिनांक 4 सितम्बर, 2014 के सम्बन्ध में है। उक्त के क्रम में आप अवगत है कि आप द्वारा प्रस्तुत आख्या एवं कार्यवाही के आधार पर ही दिनांक 25.06.2011 को राजाज्ञा सं० 231/15-6-97-28 (66) / 90 दिनांक 31 जनवरी 1997 में निहित व्यवस्था के अनुसार श्री मु० मुस्तफा सिद्दीकी पुत्र स्व नूरमुहम्मद सहायक अध्यापक बालबाड़ी जू०हा०स्कूल कसया का मृतक आश्रित के रूप में सहायक अध्यापक के पद पर नियुक्ति हेतु मण्डलीय समिति द्वारा सहमति दी गई थी। सहमति पत्र में यह भी अंकित किया गया था कि श्री मु० मुस्तफा सिद्दीकी द्वारा प्रस्तुत अभिलेखों/प्रमाण पत्रांक की जाँच करा कर नियमानुसार कार्यभार ग्रहण करावें। तत्कम में आप द्वारा अपने आदेश दिनांक 08.08.2011 द्वारा श्री मु० मुस्तफा सिद्दीकी को नियुक्ति पत्र भी निर्गत किया गया है। इस प्रकार आप द्वारा लगभग तीन वर्ष बाद अपने आदेश दिनांक 02.08.2014 द्वारा श्री मु० मुस्तफा सिद्दीकी सहायक अध्यापक की सेवा समाप्त किया जाना उचित प्रतीत नहीं हो रहा है तथा पत्र में वर्णित आरोप अपुष्ट है।

अतः शासनादेश संख्या-1447/79-6-2012 दिनांक 05 दिसम्बर, A SPLA 391 2015 23-8-2026 updated2012 के आलोक में आप द्वारा लगाये गये आरोप निराधार है। अतः आपके आदेश दिनांक 02.08.2014 द्वारा श्री मु० मुस्तफा सिद्दीकी सहायक अध्यापक की की गई सेवा समाप्ति को निरस्त किया जाता है।"

8. The glaring feature of the present case, is that the order disapproving the termination of the petitioner's services, passed by the competent authority, i.e., the District Basic Education Officer, in exercise

of the powers conferred under Rule 15 of the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (for short, 'Rules, 1978'), was never challenged by the Committee of Management/4th respondent. Consequently, the said order has attained finality and until date continues in force. Rule 15 of the Rules, 1978, reads:

"[15. Termination of service. - No Headmaster or Assistant Teacher of a recognised school may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the District Basic Education Officer."]"

(emphasis by Court)

9. The appellant-writ petitioner received salary for a considerable period of three years, i.e., from the date of his joining pursuant to his appointment on 10.08.2011 until the date of his termination on 02.08.2014. After his termination was disapproved, he again represented his cause vide application dated 06.12.2014, seeking resumption of duties by treating his service as uninterrupted and claiming payment of salary. However, no heed was paid to his representation.

10. Being embittered by the inaction of the respondents in not paying his salary or allowing his resumption of his duties, the appellant-petitioner instituted writ proceedings by means of Civil Misc. Writ Petition No.7322 of 2015, with following principal relief:

"Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1-District Basic Education Officer, Kushinagar to ensure the continuance of petitioner on the post of Assistant Teacher in Bal Bari Junior High School, Kasya Kushinagar and to pay salary on the said post along with arrears within stipulated time as may be fixed by the Court."

11. The pleadings in the writ proceedings were exchanged, and it was for the first time in their counter-affidavit that the Management put forward its principal defence, pleading that, at the time of his initial appointment, the appellant-writ petitioner did not possess the requisite

TET certificate and was, therefore, ineligible for appointment as an Assistant Teacher in the Institution. It was contended that the said defect existed at the inception of his appointment dated 08.08.2011 and that such ineligibility could not subsequently be cured by acquiring the requisite qualification, which, according to the respondents, was obtained on 22.12.2014.

12. What emerges from the pleadings before the learned Single Judge is that the initial defence of the Committee of Management, namely, that the documents/testimonials submitted by the appellant-writ petitioner at the time of his initial appointment were forged, was subsequently abandoned and an altogether new case was set up by pleading that the appellant-writ petitioner did not possess the requisite Teacher Eligibility Test certificate. The relevant paragraph of the counter-affidavit filed on behalf of respondent No. 4/Committee of Management is extracted hereunder:

3. That, before giving parawise reply to the writ petition, it is necessary in the interest of justice in the certain out to bring out certain relevant facts to the notice of this Hon'ble Court. It is pertinent to point out that as per direction of the respondent no. 1, the answering respondent had got completed an audit in between 12.9.2013 to 20.9.2013. In the aforesaid report, it has been stated that in view of the order issued by the respondent no.1 dated 30.7.2011, the approval for appointment of Mohammad. Mustafa Siqui S/o Late Noor Mohammad, was given by the Registrar concerned on 10.8.2011. The institution has later on disclosed that aforesaid Siddqui could succeed the minimum qualification. Thus it was concluded that in view of U.P. Fee and Compulsory Bal Shiksha Ka Adhikar Niyamawali 2011, Uttar Pradesh Shiksha Anubhag-5, No. 2510/79-5-2011- 29/2009 dated 27.7.2011, a notification has been notified dated 27.7.2011 to the effect that since 27.7.2011 for appointment as Assistant Teacher along with minimum educational qualification further the Adhyapak Patrata Pariksha organized by the State of Uttar Pradesh or Union of India, will have to be passed. It has further been contemplated thereat that without getting minimum Adhyapak Patrata Pariksha the appointment of Sri, Mustafa or Assistant Teacher, is irregular.

13. The undisputed fact that emerges from the record is, the absence of eligibility having not passed TET examination does not find place in the order of termination dated 02.08.2014 and it is for the first time in the counter affidavit that a new ground is sought to be added to defend

the illegal termination of services of the appellant-writ petitioner. The said endeavour is in the teeth of judgment of Supreme Court in case of **Mohinder Singh Gill and another vs Chief Election Commissioner (1978) 1 SCC 405**, In aforesaid dictum Hon'ble Supreme Court held that orders bad in the beginning cannot get validated by additional grounds, explanations or fresh reasons, brought out later in the shape of affidavit or otherwise; an order must stand or fall on the text of the reasons explicit within itself.

14. The Supreme Court in case of *Mohinder Singh Gill* (supra) held in paragraph no.8 (as opined by His Lordship Hon'ble Mr. Justice V.R. Krishna Iyer):

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088 : AIR 1952 SC 16] :

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

15. Thus, it is fairly settled that an administrative order must stand on its own stated reasons and cannot be later improved via affidavit.

16. The introduction of a new ground to defend the initial termination order cannot be permitted, as every order would be attempted to be salvaged by introducing new grounds and the basic character of the initial order would be changed, frustrating the power of judicial review exercise by the Constitutional Courts.

17. The Committee of Management miserably failed to defend the initial order of termination, based/grounded on filing of incorrect and

forged testimonials by the appellant. Moreover, the initial termination of the petitioner's services having been disapproved under the shield of procedural safeguard provided under Rule 15 of the Rules, 1978, the continuance of service ought to have been honoured by the respondents. But, the malice on the part of the respondent no.4 is so apparent that the said respondent wrote a letter on 16.12.2014 (part of counter affidavit filed as Annexure No.CA-3 at pages 122-127) to the District Magistrate, saying there that the order of disapproval of termination of services may be directed to be recalled by the District Basic Education Officer, otherwise an unpleasant situation would arise, which is nothing but an attempt to hijack the entire system governed by the rule of law in a democratic set up. The relevant excerpts from the letter dated 16.12.2014 are extracted hereinbelow:

"अतः आपसे निवेदन है कि अपने स्तर से जिला बेसिक शिक्षा अधिकारी कुशीनगर को आदेशित करने की कृपा करें कि वे अपने आदेश दिनांक 28.11.2014 में पारित आदेश को निरस्त करें। यदि उनके द्वारा दिनांक 28.11.2014 का आदेश निरस्त नहीं किया जायेगा तो विवाद की स्थिति उत्पन्न होगी तथा सरकारी धन का दुरुपयोग होता रहेगा।"

18. It is apposite to take note of two provisos appended to Section 23 of the Act, 2009. Section 23 of the Act, 2009, as on the statute book reads as under:

"23. Qualifications for appointment and terms and conditions of service of teachers.—(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years:

[Provided further that every teacher appointed or in position as on the 31st March, 2015, who does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of four years from the date of commencement of the Right of Children to Free and Compulsory Education (Amendment) Act, 2017 (24 of 2017).]

(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed.”

19. The first proviso, which formed part and parcel of Section 23 at the time of promulgation of the Act, 2009, takes care of the interests of teachers who were in the institutions without qualification of TET and their interest is safeguarded by providing life to their continuance of extending five years' period by permitting to acquire minimum qualification within period of five years i.e. till 31.03.2015, as the Act was promulgated on 01.04.2010.

20. The second proviso safeguards the interests of teachers who were functioning in institutions as on 31.03.2015. As such, the second proviso is alien to the controversy in question since the petitioner had already acquired the TET eligibility on 22.12.2014 itself.

21. Having heard learned counsel for the parties, it comes out that the learned Single Judge was seized with the determination of the issue of continuance of the petitioner after the order of termination was disapproved by the statutory authority i.e., the District Basic Education Officer, Kushinagar, in exercise of the powers under Rule 15 of the Rules, 1978. The disapproval wiped out the effect of termination of services of the petitioners. Thus, was no valid cause to discontinue the services of petitioner and consequently, he was entitled to salary, including arrears.

22. The learned Single Judge was examining the issue of termination and its subsequent disapproval and after effects. As such, the learned Judge could not have permitted the respondents to take the plea of absence of a TET certificate, which was not a part of the order of termination, disapproved later in point of time by the competent authority.

23. An error of principle has crept in the order of learned Single Judge by permitting the raising of the issue of absence of a TET certificate, which was not part of the decision of the primary adjudicating authority/Committee of Management, in its decision dated 02.08.2014 terminating the services of the appellant-petitioner, the same being in the teeth of the mandate of the Supreme Court in *Mohinder Singh Gill (supra)*.

24. The learned Single Judge further erred in not considering the Government Order dated 05.12.2012, which validated the appointment of the petitioner by bringing requisite amendment in the U.P Right to Free and Compulsory Education Rules, 2011 (for short 'Rules 2011'). Once concession was granted for making the initial ineligibility in the absence of the TET certificate by bringing rules, within five years i.e., till 31.03.2015 and the appellant-petitioner having completed his TET qualification well before scheduled time on 22.02.2014, the ignorance of the same, is an error apparent on the face of record which has crept in the order of the learned Single Judge.

25. It cannot be lost sight for a fact that the petitioner's appointment under the Dying in Harness Rules, 1974, has never been annulled, even in writ proceedings, and his right of continuance has already been acknowledged by permitting him to apply under the Rules of 1974, but for a different post other than a teacher. The only point is whether the initial appointment of the petitioner as a Teacher could be saved by the virtue of the proviso appended to Section 23 of the Act, 2009, read with the amendment brought in by the Rules, 2011 by virtue of the Government Order dated 05.12.2012, which gives breathing time for acquiring TET qualification till 31.03.2015 and the petitioner- appellant had admittedly qualified the same.

26. The respondents have proceeded to appoint with open eyes after acknowledging the educational qualifications and no material concealment or fraud has been found in the academic testimonials of the appellant. It is abundantly clear that the respondent authorities offered

appointment with open eyes, and thus, the view adopted by the learned Single Judge cannot receive our approval.

27. The learned Single Judge misread the Government Order dated 05.12.2012, permitting the breathing time of five years till 31.03.2015, resulting in an erroneous conclusion that initial appointment of the appellant writ-petitioner was invalid. It also escaped attention of the learned Single Judge that the proviso appended Section 23 (1) of the Act, 2009, itself mandates a time span till 31.03.2015, to acquire the TET certificate. Similarly, the Full Bench of this Court in **Shiv Kumar Sharma and others Vs. State of U.P. and others, 2013 (6) ADJ 310**, failed to take note of the proviso appended to Section 23(1) of the Act, 2009, read with amendment brought in the Rules 2011, as well as the notification dated 05.12.2012, permitting the period of acquiring TET qualification for existing teachers and the appointment of such teachers could not have been annulled as the notification dated 23.08.2010 which is the foundation for termination of petitioner's services stems from the Act, 2009, where the proviso appended to section 23(1) of the said Act, saves such appointments.

28. The proviso appended to Section 23(1) of the Act, 2009 saves the appointment of teachers who were discharging functions on 01.04.2009, i.e., at the time of promulgation of the Act, whereas the petitioner has been appointed on 08.08.2011. At that time, the State Government did not incorporate the TET as an essential qualification in the Rules, 1978, which has been later on brought into the picture by means of the Government Order dated 05.12.2012, and, subsequently, by means of the same Government Order, Rule 4 of the Rules, 1978, has been amended. On account of amendment, Rule 4, as existed in the Rules 1978, now reads:

“4. Minimum Qualifications-(1) The minimum qualifications for the post of Assistant Teacher of recognized school shall be a Graduation Degree from a University recognized by U.G.C., and a teachers training course recognized by the State Government or U.G.C. or the Board as follows-

1. Basic Teaching Certificate.

2. *A regular B.Ed. degree from a duly recognized institution.*
3. *Certificate of Teaching.*
4. *Junior Teaching Certificate.*
5. *Hindustani Teaching Certificate*

And

Teacher eligibility test passed conducted by the Government of Uttar Pradesh or by the Government of India.

(2) The minimum qualifications for the appointment to the post of headmaster of a recognized school shall be as follows-

- (a) A degree from a recognized University or an equivalent examination recognized as such.*
- (b) A teacher's training course recognized by the State Government U.G.C. or Board as follows-*
 1. *Basic Teaching Certificate.*
 2. *A regular B.Ed degree from a duly recognized Institution.*
 3. *Certificate of Teaching.*
 4. *Junior Teaching Certificate.*
 5. *Hindustani Teaching Certificate.*
- (c) Five years teaching experience in a recognised schools.”*

29. Learned counsel for the respondents has relied upon the judgment of the Supreme Court in **R.Vishwanatha Pillai Vs. State of Kerala and others, (2004) 2 SCC 105**, by emphasizing that a false certificate renders the appointment *void ab initio*.

30. The ratio of the said authority with all due regard, is not attracted to the instant case, as the respondents have failed to point out any flaw or forgery in the academic testimonials and qualifications relied upon by the appellant-petitioner at the time of his initial appointment, either before the District Basic Education Officer or before this Court. The absence of a TET certificate at the time of initial appointment was subject to a concession given by the statutory rules and the proviso appended to Section 23 of the Act, 2009. Thus, the judgment in **R.Vishwanatha Pillai (supra)** does not render any assistance to the respondent's case.

31. Consideration of some glaring sequence of events would assist this Court to thrash out the controversy in its true spirit, i.e., Right to

Free and Compulsory Education for children, 2009, was enacted by the Parliament (Central legislation) and came into force on 01.04.2010, followed by the notification of the National Council Teacher Education, dated 23.08.2010 mandating the qualification of TET, which has been followed by another notification dated 29.07.2011, with a modification of the qualification for certain other posts, but for Assistant Teacher in an Upper Primary School, the requisite TET certificate remained unaltered. Subsequently, on 05.12.2012, the Government resolved to protect the Assistant Teachers appointed pursuant to the Government Order then prevailing, requiring amendment of the Rules of 1978, to give effect to such protection.

32. Protecting the teachers appointed after 01.04.2010 giving a breathing period of acquiring qualification of TET which is *pari materia* to the provisions contained in the First Proviso appended to Section 23(1) of Act, 2009. Thus, the *pari materia* provision already available in the Central legislation was sought to be introduced in the Rules of 1978, through proposed amendment, but surprisingly, the amendment *qua* saving the appointment and continuance of teachers not having TET, giving them 5 years period i.e., till 31.03.2015 could not be incorporated inadvertently in the Statue Book i.e. the Rules of 1978, by way of amendment. But, other provisions requiring TET qualification were incorporated in Rule 4 of the 1978 Rules. Thus, the anomaly remained to perpetuate. The learned Single Judge, while pointing out that the notification dated 23.08.2010 mandating TET as an essential qualification having been issued in pursuance of Right to Free and Compulsory Education for children, Act, 2009, a Central legislation was binding upon the State Government from the date of such notification, which in the present case is 23.08.2010. This is the only cause the writ petition failed. The relevant portion of order passed by the learned Single Judge is reproduced herein below:

“This Court in the case of Prabhakar Singh and others Vs. State of U.P. & others 2013 (1) ADJ 651 and Full Bench decision in the case of Shiv Kumar Sharma and others Vs. State of J.P. and others 2013 (6) ADJ 310 has held that for any appointment in primary school up to the standard of 8th class every teacher must pass TET test. It has also held that

notification issued by the NCTE pursuant to the provision of Right of Children to Free and Compulsory Education Act, 2009 which is a Central Legislation is binding on the State Government from the day such notification was issued which in the present case is 23.8.2010.”

33. If the notification dated 23.08.2010 issued in pursuant to Act, 2009 being a Central legislation is binding on the State Government and that could be a cause/foundation for termination of services, there is no reason why the statutory protection available in the same Act i.e. Act 2009, particularly the first proviso appended to Section 23 (1) therein, would not come to the petitioner's rescue. It is settled law that no one can be permitted to approbate and reprobate i.e., blowing hot and cold in the same breath by making the notification dated 23.08.2010, requiring the TET without implementation/adoption by the State Government by amending Rules 1978 mandatory for termination of services of petitioner on one hand and denying the statutory protection available under the Central legislation Act, 2009 on the other. The doctrine of approbate and reprobate is a species of estoppel and is well recognized under service jurisprudence. {See: **Bhagwat Sharan vs. Purushottam and others**, (2020)6 SCC 387, **Cauvery Coffee traders vs. Hornor Resources (International) Companies Ltd**, (2011) 10 SCC 420, **Union of India vs. Murlidhar Menon**, (2009) SCC, 304}.

34. It is really amazing to notice the chronology of events here. The petitioner was appointed on 08.08.2011 when there was no amendment brought to the Rules, 1978, bringing TET as one of the eligibility requirements for appointment of Assistant teachers by the State Government but declaring the appointment as illegal only on the strength of the Notification dated 23.08.2010, which was brought on the Statute book, vide amendment to the Rules of 1978 in the year 2012. Thus, at the time of appointment of the petitioner- appellant Rules of 1978 did not lay TET as an eligibility qualification. If the notification dated 23.08.2010 is permitted to be give effect to for treating TET as eligibility qualification for appointment of Assistant Teacher, 'Education' being a subject in the concurrent List or List III under entry No.25 of the Seventh Schedule to the Constitution of India, then without bringing a

change to the Rules qua extending protection by giving breathing time of five years from 01.04.2010 (date of promulgation of act, 2009) till 31.03.2015 would also be available to protect the appointment of appellant-petitioner. The notification dated 23.08.2010 issued in exercise of power conferred by the central legislation being binding upon state government if allowed to be used for the purpose of termination of services of the petitioner despite the petitioner acquiring qualifications well in advance before the time limit fixed by the central legislation expired i.e., 31.03.2015, the Proviso appended to Section 23 of the Act, 2009 would work to protect petitioner's appointment.

35. The stubborn attitude of the respondents in not permitting the petitioner to discharge his duties despite the disapproval of his termination by the competent authority in exercise of the power under Rule 15 of the Rules, 1978, attracts the doctrine of malice in law.

36. It is equally well settled that the doctrine of malice in law is attracted where an authority exercises its power for an unauthorised purpose, on considerations extraneous to the statutory scheme, or in a manner which is arbitrary and contrary to law; proof of personal ill-will or spite is not an indispensable requirement. The principle is rooted in Article 14 of the Constitution, which, as explained by the Constitution Bench in **E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3**, strikes at arbitrariness in State action, arbitrariness being antithetical to equality. In the present case, the subsequent conduct of the Management has to be examined in this constitutional perspective. The petitioner was appointed after the competent authority had considered his qualifications and granted approval, and he continued to discharge his duties from 10.08.2011; the alleged termination dated 02.08.2014 was not only passed without jurisdiction but subsequently disapproved by the District Basic Education Officer under Rule 15 of the Rules, 1978, and that order of disapproval was never challenged by the Management. Yet, instead of accepting the statutory consequence of such disapproval, the Management sought to introduce, for the first time in its counter-

affidavit, an altogether new ground relating to absence of qualification of TET, although that ground did not form part of the termination order itself. Such conduct, particularly when the termination had already been disapproved by the competent statutory authority and the petitioner had subsequently acquired the TET qualification within the period contemplated by the statutory scheme, cannot be regarded as a bona fide exercise of power. It constitutes an arbitrary attempt to defeat the protection afforded by law.

37. The Supreme Court's doctrine in **E.P. Royappa** (*supra*), therefore, squarely applies: where power is exercised not to advance the purpose of the statute but to circumvent its safeguards and to perpetuate an otherwise unsustainable action, such exercise is vitiated by malice in law and is liable to be struck down as arbitrary and violative of Article 14. The circumstances of the present case are all the more significant because this Court itself has recorded that the malice on the part of respondent no. 4 was apparent from its attempt, even after the disapproval of termination, to procure recall of the competent authority's order.

38. The inescapable conclusion is that the initial appointment of the petitioner is saved by the virtue of the statutory amendments brought in the Rules, 2011 read with the first proviso to Section 23 of the Act, 2009 and the intention of the Government Order dated 05.12.2012 expressed therein. Consequently, the termination of services of the petitioner has no sanction of law, more so when it has been disapproved by the statutory authority in exercise of power under Rule 15 of the Rules, 1978 (procedural safeguard). Thus, the order passed by the learned Single Judge dated 23.04.2015 merits to be aside with all consequential monetary benefits and continuity of service.

39. Now after setting aside the order of the learned Single Judge, the question that cropped up before this Court is whether the appellant is entitled for back wages, particularly arrears of salary, and, if so, to what extent. The appellant-writ petitioner relied upon the judgment of the Supreme Court in **Raghubir Singh Vs. General Manager, Haryana**

Roadways, Hisar, (2014) 10 SCC 301. The relevant paragraphs of the judgement read thus:

“42. Now, it is necessary for this Court to examine another aspect of the case on hand, whether the appellant is entitled for reinstatement, back wages and the other consequential benefits. In Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya [(2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184], this Court opined as under: (SCC pp. 344-47, paras 22-24)

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three-Judge Bench in Hindustan Tin Works (P) Ltd. v. Employees [(1979) 2 SCC 80 : 1979 SCC (L&S) 53] : (SCC pp. 85-86, paras 9 & 11)

‘9. ... 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 realistically, 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 workmen'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.

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.'

24. Another three-Judge Bench considered the same issue in Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court [(1980) 4 SCC 443 : 1981 SCC (L&S) 16] and observed: (SCC p. 447, para 6)

'6. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. ... 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 workmen if the relief is denied than to the employer if the relief is granted.”

(emphasis supplied)

43. The above critical analysis of law laid down by this Court in the case referred to supra, is very much relevant to the case on hand, which is neither discussed nor considered and examined by the courts below while answering the reference made by the State Government and passing the award, judgments and orders in a cavalier manner. Thus, the lives of the appellant and his family members have been hampered. Further, on facts, we have to hold that the order of termination passed is highly disproportionate to the gravity of misconduct and therefore shocks the conscience of this Court. Hence, we hold that the appellant is entitled for the reliefs as prayed by him in this appeal.”

40. Further reliance has been placed by the appellant-writ petitioner on the judgment of the Supreme Court in **Shiv Nandan Mahto Vs. State of Bihar, (2013) 11 SCC 626**. The relevant extract of the judgment is reproduced hereinbelow:

6. The learned Single Judge of the High Court, upon noticing the entire fact situation, accepted the plea of the appellant that he had been duly appointed as Clerk and wrongly shown as a Librarian. Consequently, directions were issued to reinstate the appellant forthwith. It was also noticed that the removal of the appellant from service was not for any fault of his. He was also directed to be given the benefit of continuity of service and other benefits. However, surprisingly, the learned Single Judge directed that he will not be entitled to any remuneration for the period when he was not in service on the ground that he had not worked. The respondent did not challenge the finding of fact recorded by the learned Single Judge. In fact, it was the appellant who challenged the judgment of the learned Single Judge on the ground that he ought to have been granted full back wages for the period he had been kept out of service.

8. Having heard the learned counsel for the parties, we are constrained to observe that the High Court failed to examine the matter in detail in declining the relief to the appellant. In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the appellant was entitled to be paid full back wages for the period he was kept out of service.”

41. Further, the appellant-writ petitioner has relied upon the authority of the Supreme Court in **State of Kerala and others Vs. E.K. Bhaskaran Pillai, (2007) 6 SCC 524**. The relevant observation in **E.K. Bhaskaran Pillai** (*supra*) reads:

“4. Learned counsel for the State has submitted that grant of retrospective benefit on promotional post cannot be given to the incumbent when he has not worked on the said post. Therefore, he is not entitled to any benefit on the promotional post from 15-6-1972. In support thereof, the learned counsel invited our attention to the decisions of this Court in Paluru Ramkrishnaiah v. Union of India [(1989) 2 SCC 541 : 1989 SCC (L&S) 375] , Virender Kumar v. Avinash Chandra Chadha [(1990) 3 SCC 472 : 1991 SCC (L&S) 62 : (1990) 14 ATC 732] , State of Haryana v. O.P. Gupta [(1996) 7 SCC 533 : 1996 SCC (L&S) 633] , A.K. Soumini v. State Bank of Travancore [(2003) 7 SCC 238 : 2003 SCC (L&S) 1041] and Union of India v. Tarsem Lal [(2006) 10 SCC 145 : (2007) 1 SCC (L&S) 63] . As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in Union of India v. K.V. Jankiraman [(1991) 4 SCC 109 : 1991 SCC (L&S) 387] , State of A.P. v. K.V.L. Narasimha Rao [(1999) 4 SCC 181 : 1999 SCC (L&S) 841] , Vasant Rao Roman v. Union of India [1993 Supp (2) SCC 324 : 1993 SCC (L&S) 590 : (1993) 24 ATC 363] and State of U.P. v. Vinod Kumar Srivastava [(2006) 9 SCC 621 : 2006 SCC (L&S) 1940] . We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle “no work no pay” cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also.”

42. This Court is privileged to examine certain more authoritative pronouncement on the question of back wages, if discontinuance of an employee is found to be unsustainable, such as the Division Bench

decision of this Court in **Indrajeet Kumar Vs. Union of India, 2023: AHC: LKO:11656-DB**. Relevant paragraphs of the judgement are reproduced hereinbelow:

*“(15) It is true that 'no work no pay' is a principle which is apposite in circumstances where the employee does not work but it is not an absolute principle, which does not admit of exceptions. In this regard, we deem it apt to refer the judgment of the Apex Court in *State of Kerala v. E.K. Bhaskaran Pillai* : 2007 (6) SCC 524, wherein the Apex Court has held as under:*

“...There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also.”

(Emphasis supplied)

(19) The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and he/she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of his/her being vindicated at the end of the day would be unfair to the employee. In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case.

(20) Examining the aforesaid facts and circumstances in the light of law laid down by the Apex Court regarding payment of back-wages, it is significant to note that although in the writ petition, it has been stated that the petitioner was not gainfully employed after his illegal discharge from service, neither copy of the petition filed before the Tribunal has been annexed with the writ petition nor has it been pleaded that the plea that petitioner was not gainfully employed since his discharge from army, was pleaded before the Tribunal. In these circumstances, we are of the considered view that the equities can be balanced by awarding 50%

of the back-wages payable to the petitioner since his discharge from the army w.e.f. 16.04.2002 till the date he was retired on notional basis.”

43. It is profitable to take note of the recent pronouncement of the Supreme Court in **Maharashtra State Road Transport Corporation Vs. Mahadeo Krishna Naik, 2025 INSC 2018 (Civil Appeal No.13834 of 2024)**, on the issue of award of back wages, wherein the Supreme Court, speaking through Hon’ble Mr. Justice Dipankar Datta, has held:

“42. There have been decisions of this Court rendered thereafter where a shift in approach on awarding full back wages is clearly discernible. However, a coordinate bench of this Court in Deepali Gundu Surwase (supra) considered a dozen precedents on award of back wages upon reinstatement (referred to in paragraphs 13 and 14). Speaking through Hon’ble G. S. Singhvi, J. (as His Lordship then was), the legal position was neatly summed up in the following words:

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter’s source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.”

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 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.

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 victimising the employee or workman, then the court or tribunal concerned 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a 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 finalisation 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.

Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees [(1979) 2 SCC 80].

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal [(2007) 2 SCC 433] 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 [Hindustan Tin Works (P) Ltd. (supra) and Surendra Kumar Verma (supra)] and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

(emphasis supplied)

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.

45. We hasten to add that the courts may be confronted with cases where grant of lumpsum compensation, instead of reinstatement with back wages, could be the more appropriate remedy. The courts may, in such cases, providing justification for its approach direct such lumpsum compensation to be paid keeping in mind the interest of the employee as well as the employer.”

44. This Court in *Sachindra Kumar Pandey Vs. Gorakhpur Kshetriya Gramin Bank and others*, 2026:AHC:166892-DB to which, one of us is party (J.J. Munir, J.) opined:

26. In the totality of circumstances that the appellant was placed jobless as he was, it is apparent that he prosecuted his remedies with promptitude and diligence, faltering only on the last steps, and, that too marginally. Regarding the claim to back-wages in a case of removal or dismissal from service, there are various factors to be taken into consideration, and, there is good authority to guide on the point. The recent authority of the Supreme Court in Constable Uma Shankaran v. Union of India, 2026 SCC OnLine SC 1115 is illuminating. It has been held in Constable Uma Shankaran (supra):

“8. We are conscious of the law 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 and, ordinarily, is dependent on the employee being not employed in the interregnum. However, the general rule is 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 [Maharashtra SRTC v. Mahadeo Krishna Naik, (2025) 4 SCC 321].

9. In the light of the afore-stated legal position, the High Court ought to have undertaken an exercise to ascertain whether the writ petitioner was gainfully employed in the interregnum before denying arrears of salary/back wages. However, this exercise was not done. In our view, as already sufficient time has elapsed since the date of High Court's order and the order of reinstatement with benefit of continuity in service has attained finality, we do not consider it

appropriate to remand the matter for such an exercise. Consequently, we have examined the counter affidavit of the respondent to ascertain whether any plea has been taken that the appellant was gainfully employed elsewhere in the interregnum. On perusal of the counter affidavit, we find that the counter affidavit emphasizes more on the plea that there should not have been a direction for reinstatement than on providing any material to show that the appellant was gainfully employed elsewhere. As the plea to deny reinstatement has already been rejected by the High Court, and its direction for reinstatement has attained finality, in absence of any plea that the appellant was gainfully employed elsewhere in the interregnum, in our view, there appears no good reason to deny back wages/arrears of pay.

10. Besides that, the charge of dispatch of Bank Drafts of an amount which, prima facie, is within the known sources of income ought not to have been a basis for removal from service, particularly, when the source of money was duly proved. In consequence, the action of the respondent(s) is nothing short of being arbitrary. Thus, when the High Court held charge(s) were not proved, there had to be a cogent reason for denial of arrears/back wages. We do not find any such cogent reason to deny those benefits.

11. As far as the previous conduct of the appellant is concerned, the appellant has already been punished and therefore, denial of back wages on that ground would amount to double punishment.”

27. In this case, there is nothing of a charge to consider or a finding entered by this Court about the charges not being proved. Nevertheless, the order of termination, being one simpliciter, has been found to be passed under a Regulation, that has been adjudged unconstitutional, rendering the order utterly illegal. To add to it, is the fact that the appellant has been vigorously pursuing his remedies to re-gain his employment, a fact of which we take due note. Normally, in a case like this, reinstatement should have been with full back-wages. In Subhash Chandra v. State of U.P. and others, 2018 (11) ADJ 433 (DB), a Bench decision of this Court, the misconduct not having been proved against the employee, the order of the Public Service Tribunal, granting 25% back-wages, was not approved and full back-wages for the period of time that the employee remained out of service were ordered together with the reinstatement directed by the Tribunal. Still, there is one factor, that weighs with us, not to grant full back-wages. The appellant had worked for a negligible period of time, though for no fault of his. He remained out of the Bank's employ for the most part of his life, again not on account of his own fault. But, as matters stand, we are of opinion that quashing the order of termination, while we cannot grant reinstatement to the appellant, we think that ends of justice would be met by granting him 50% back-wages and all consequential benefits, which would

include all superannuation benefits to be duly worked out by the Bank in accordance with law and the Rules applicable within a period of one month of receipt of a copy of this judgment.

28. In the result, this appeal succeeds and is allowed with costs of Rs.10,000/-. The impugned judgment and order passed by the learned Single Judge is set aside and the writ petition allowed. There shall be an order quashing the impugned order dated 11.03.1983 passed by the Chairman of the Bank (now represented by the Uttar Pradesh Gramin Bank, Lucknow through its Chairman). A mandamus shall issue to the Chairman, Uttar Pradesh Gramin Bank, Lucknow, the General Manager, Uttar Pradesh Gramin Bank, Lucknow and the Branch Manager, Uttar Pradesh Gramin Bank, Branch Paniyara, Gorakhpur to ensure amongst themselves payment of 50% back-wages to the appellant from the date of his termination from service, to wit, 11.03.1983 until the date of his superannuation and post-retiral benefits due, in accordance with law, all to be paid within a period of one month from the date of receipt of a copy of this judgment by the respondent-Bank.

45. It has not been pleaded by the appellant writ petitioner that he was not gainfully employed in the interregnum that is between disapproval of the order of termination till today, but at the same time, no fault of the appellant-writ petitioner could be established. It was the respondent who kept the appellant out of service jeopardizing the most pious cause of imparting education. Moreover, it is not the case of the respondent that appellant was not waiting for decision of this case but was in gainful employment. Thus, both the parties failed to advance any submission /pleadings with respect to the question of gainful employment of the appellant.

46. This Court, after examining various precedents of this Court as well as the Supreme Court on the question of back wages, comes to the conclusion that if an employee is deliberately restrained from discharging his duties with *mala fide* intention to set the democratic norms and statutory rules at naught then, this Court, in its extraordinary writ jurisdiction, is required to restore the position of the employee which he was enjoying prior to his illegal termination or discontinuance from service. The protracted litigation has given rise to such a situation that, just to repose faith in the justice delivery system, the damage and injury merits compensation and any other view would amount to giving

premium to the illegal action and hostile discrimination which petitioner met for a long period of time, something alien to the rule of law. This attracts the Latin maxim *Nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong) in its letter and spirit. The mental agony and physical discomfort due to ouster from service for a pretty long period cannot be compensated in monetary terms. However, what has been lost must be repaired not merely in principle but also *de facto*. The injustice which the appellant petitioner suffered is to be compensated by this Court.

47. At this juncture, this Court is not equipped to examine the factum whether for the long period of 12 years, the appellant-petitioner was in gainful employment or not, particularly in absence of pleadings by both parties in this regard; more so, as this is a fact which cannot be determined on affidavits. It is a case where deliberately the order disapproving the termination has been dishonored by keeping the petitioner out of employment. Hence it cannot be equated with wrongful termination/ dismissal, where there may be at least an iota of *bona fides*, but here the arbitrariness is writ large, defeating the statutory procedure and orders of the competent authority passed under the rules. In place of examining this case on touchstone of parameters setup by precedents of this Court as well as the Supreme Court it is in the fitness of things to order payment of the entire arrears of salary along with interest. In our equitable writ jurisdiction we save the appointment of writ petitioner as on the date of appointment there was no amendment in the Rules of 1978, bringing TET as a mandatory qualification which ought to have been done in pursuant of the notification dated 23.08.2010 issued under the Act, 2009, a Central legislation and binding upon the State Government. At the same time the protection envisaged under the proviso appended to Section 23 (1) of the Act, 2009, which was resolved to be followed vide the Government Order dated 05.12.2012, inadvertently could not be implemented; more so, going by same analogy that notification dated 23.08.2010 requiring TET is mandatory

than the protection engrafted by the Act, 2009 is also available to the petitioner.

48. We are not quantifying the magnitude of back wages. Rather, we find that the petitioner is entitled to his legitimate salary, as he was arbitrarily prevented by the respondents from discharging his duties. This is not a case where the dismissal or removal of the petitioner was held to be illegal or unjustified, where there may be some bona fide defence available to the respondents for inflicting a major penalty in the exercise of disciplinary jurisdiction.

49. Thus, the impugned judgment passed by the Learned Single Judge is not sustainable in the eyes of law, and is, therefore, hereby set aside. The writ petition is allowed. The appellant-writ petitioner shall be reinstated in service forthwith along with consequential monetary benefits, including arrears of salary. The arrears of salary shall carry 6% simple interest to be computed and paid within next two months from the date of communication of this order.

50. The Special Appeal is accordingly **allowed** in the aforesaid terms. Costs made easy.

51. Registrar (Compliance) is directed to communicate this order to the respondent no.1/District Basic Education Officer, Kushinagar for immediate compliance.

(Indrajeet Shukla,J.) (J.J. Munir,J.)

August 25, 2026

Mohit

Whether the order is speaking : Yes
Whether the order is reportable : Yes