

**2022 LiveLaw (SC) 377**

**IN THE SUPREME COURT OF INDIA**  
EXTRA-ORDINARY APPELLATE JURISDICTION

***M.R. SHAH; B.V. NAGARATHNA; JJ.***

**SPECIAL LEAVE TO APPEAL (C) NO. 5218/2022; APRIL 04, 2022**

**Salim Ali Centre for Ornithology & Natural History, Coimbatore & Another**

*Versus*

**Dr. Mathew K. Sebastian**

**Labour Law - Employee is not supposed to prove the negative that he was not gainfully employed during the period he was out of employment- Once he asserts that he is not gainfully employed, thereafter the onus will shift to the employer positively and it would be for the employer to prove that the employee was gainfully employed. (Para 6)**

**Summary - Appeal against Madras HC judgment directing payment of backwages to an employee - Dismissed - Employee/writ petitioner cannot be denied the back wages for no fault of his and the principle of "no work no pay" shall not be applicable.**

(Arising out of impugned final judgment and order dated 27-07-2021 in WA No. 35/2021 passed by the High Court of Judicature at Madras)

*For Petitioner(s) Ms. Madhvi Divan, ASG. Mr. V. Balachandran, Adv. Mr. Siddharth Naidu, Adv. M/S. Ksn & Co., AOR*

**J U D G M E N T**

**M.R. SHAH, J.**

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 27.07.2021 passed by the High Court of Judicature at Madras in Writ Appeal No. 35/2021, by which the Division Bench of the High Court has dismissed the said appeal and has confirmed the judgment and order dated 25.02.2020 passed by the learned Single Judge of the High Court allowing writ petition No. 29201 of 2020 preferred by the respondent herein and has directed the petitioners – management to pay back wages along with interest @ 9% per annum to the respondent herein – original writ petitioner for the period from 23.08.2002 to 30.04.2007, during which time he was out of employment, the management has preferred the present special leave petition under Article 136 of the Constitution of India.

2. The facts leading to the present special leave petition in a nutshell are as under:

That the respondent herein – original writ petitioner (hereinafter referred to as the 'writ petitioner') was dismissed from service on 30.01.1996. The order of termination was challenged. The writ petitioner succeeded before the learned Single Judge. By judgment and order dated 23.08.2002, the learned Single Judge directed his reinstatement with all consequential benefits, except back wages. Against the judgment and order dated 23.08.2002 passed by the learned Single Judge, the management preferred an appeal before the Division Bench. There was a stay against reinstatement in the appeal at the instance of the management. The appeal came to be dismissed, consequent to which,

the writ petitioner was reinstated in his original post on 16.12.2010. Since, there was a stay in the appeal preferred by the management, the writ petitioner could not join the services and he remained out of employment from 23.08.2002 to 30.04.2007, and was in some other employment from 01.05.2007 to 20.01.2011. He submitted representations for the back wages for the period during which he remained unemployed, i.e., from 23.08.2002 to 30.04.2007. Thereafter, the writ petitioner preferred the writ petition before the High Court praying for tangible benefits including back wages from the date of order of reinstatement passed by the learned Single Judge till the reinstatement. However, he claimed back wages from 23.08.2002 to 30.04.2007 only, the period during which he remained out of employment.

2.1 The learned Single Judge allowed the said writ petition and directed the petitioners – management to pay to the writ petitioner back wages along with interest @ 9% per annum for the period from 23.08.2002 to 30.04.2007, during which time he was out of employment.

2.2 Feeling aggrieved and dissatisfied with the judgment and order passed by the learned Single Judge ordering back wages for the period from 23.08.2002 to 30.04.2007, the management preferred an appeal before the Division Bench. By the impugned judgment and order, the Division Bench of the High Court has dismissed the said appeal and has confirmed the judgment and order passed by the learned Single Judge ordering back wages along with interest @ 9% per annum for the period from 23.08.2002 to 30.04.2007.

2.3 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the Division Bench of the High Court along with interest @ 9% per annum to the writ petitioner for the period from 23.08.2002 to 30.04.2007, the management has preferred the present special leave petition.

**3. Ms. Madhvi Divan, learned Additional Solicitor General of India has appeared for the petitioners.**

3.1 Ms. Madhvi Divan, learned ASG has made the following submissions, in support of her submission against awarding/granting back wages to the writ petitioner for the period from 23.08.2002 to 30.04.2007:

i) that the writ petitioner has not established and proved and/or produced any documentary evidence to prove that during the period from 23.08.2002 to 30.04.2007, he was not gainfully employed;

ii) that as per the settled position of law, it is the employee who has to prove by leading evidence that he was not gainfully employed during the period he remained out of employment. Reliance is placed upon the decisions of this Court in the cases of *State of U.P. v. Atal Behari Shastri*, 1993 Supp (2) SCC 207; *Kendriya Vidyalaya Sangathan v. S.C. Sharma*, (2005) 2 SCC 363; *J.K. Synthetics Ltd. v. K.P. Agrawal*, (2007) 2 SCC 433; *P. Karupiah v. General Manager, Thruuvalluvar Transport Corpn. Ltd.*, (2018) 12 SCC 663; and *M.P.State Electricity Board v. Jarina Bee*, (2003) 6 SCC 141;

iii) that even on the principle of “no work no pay”, the writ petitioner shall not be entitled to any back wages for the period from 23.08.2002 to 30.04.2007, during which time he never worked and he was out of employment.

4. Having heard Ms. Madhvi Divan, learned ASG and considering the facts and circumstances narrated hereinabove, we are of the firm view that the High Court has not committed any error in ordering back wages along with interest @ 9% per annum to the writ petitioner for the period from 23.08.2002 to 30.04.2007 during which time he was out of employment.

4.1 It is required to be noted that this is a case where the writ petitioner – respondent herein was claiming back wages on quashing and setting aside the order of termination. This is case where he remained out of employment, despite the order of reinstatement granted by the learned Single Judge, in view of the stay in the appeal preferred by the management – petitioners herein, which ultimately came to be dismissed in the year 2010. The back wages which are awarded to the writ petitioner are for the period the learned Single Judge in the earlier round of litigation ordered reinstatement. If there would not have been any stay order in the appeal preferred by the management, in that case, the writ petitioner would have been reinstated in service in the year 2002 itself, pursuant to the judgment and order passed by the learned Single Judge. What was denied by the learned Single Judge in the earlier round of litigation was the back wages from the date of termination (1996) till the order of reinstatement (2002). In the present case, the writ petitioner is claiming the back wages for the period subsequent to the order of reinstatement passed by the learned Single Judge and the writ petitioner remained out of employment even thereafter due to the order of stay passed in the appeal preferred by the management. Therefore, as such, on dismissal of the appeal of the management and the stay being vacated, the judgment and order passed by the learned Single Judge, setting aside the termination and ordering reinstatement came to be confirmed, as a natural consequence, the writ petitioner – employee shall be entitled to back wages during the period he remained unemployed in view of the order of stay granted by the appellate court, which was at the instance of the management, subject to the management proving or producing any material on record that even during the said period the employee was gainfully employed.

5. Now so far as the submission on behalf of the management that the writ petitioner has not established and proved by leading cogent evidence that he was not gainfully employed during the period he was out of employment and therefore he shall not be entitled to the back wages is concerned, at the outset, it is required to be noted that as such the learned Single Judge in the earlier round of litigation ordered reinstatement vide order dated 23.08.2002 and in fact the appeal came to be dismissed and the writ petitioner was reinstated in service on 16.12.2010. Therefore, as such, he was entitled to back wages for the period between 23.08.2002 to 16.12.2010, subject to proving that he was otherwise gainfully employed. However, the writ petitioner himself came out with a case and claimed back wages only for the period from 23.08.2002 to 30.04.2007 by specifically averring and submitting that he was in some other employment for the period from 01.05.2007 to 20.01.2011. By submitting so, it can be said that the writ petitioner has discharged the initial burden. Thereafter, the onus shifted to the employer to disprove and establish that the employee was gainfully employed throughout the aforesaid period.

6. Now so far as the submission on behalf of the petitioners herein that the writ petitioner had not established and proved by leading cogent evidence that he was not gainfully

employed is concerned, it is to be noted that once the writ petitioner came out with a specific case that he remained out of employment for the period from 23.08.2002 to 30.04.2007 and that he was gainfully employed during the period from 01.05.2007 to 20.01.2011, meaning thereby, that he was not gainfully employed for the period between 23.08.2002 to 30.04.2007, thereafter, he was not required to lead any further evidence to prove the negative. Even in the case of **J.K. Synthetics v. K.P. Agrawal** (supra), it is specifically observed by this Court that an employee cannot be asked to prove the negative. However, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Thereafter the employee is not supposed to prove the negative that he was not gainfully employed. There cannot be any evidence to prove the negative to the effect that he is not gainfully employed. Once he asserts that he is not gainfully employed, thereafter the onus will shift to the employer positively and it would be for the employer to prove that the employee was gainfully employed. Therefore, in the facts and circumstances of the case, none of the decisions relied upon by the learned ASG, referred to hereinabove, is of any assistance to the petitioners, considering the facts and circumstances, narrated hereinabove.

7. As far as the submission on behalf of the petitioners that even on the principle of “no work no pay”, the writ petitioner shall not be entitled to back wages is concerned, the said principle shall not be applicable to the facts of the case on hand, where the employee remained unemployed due to the stay order granted by the appellate court. It was the management who preferred the appeal and at the instance of the management, there was an order of stay against reinstatement as ordered by the learned Single Judge and the appeal came to be dismissed and consequently the stay came to be vacated in the year 2010. Therefore, the employee/writ petitioner/respondent herein cannot be denied the back wages for no fault of his. Therefore, the principle of “no work no pay” shall not be applicable in such a situation.

8. In view of the above discussion and for the reasons stated above, we see no reason to interfere with the impugned judgment and order passed by the Division Bench as well as the judgment and order passed by the learned Single Judge ordering back wages for the period from 23.08.2002 to 30.04.2007 along with interest @ 9% per annum. The special leave petition stands dismissed accordingly. Now the Petitioners - management shall pay the amount due and payable to the Respondent - Original Writ Petitioner within a period of eight (8) weeks from today.