



**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/LETTERS PATENT APPEAL NO. 1512 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 10898 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2019
In R/LETTERS PATENT APPEAL NO. 1512 of 2019**

=====

CARGO MOTORS (GUJARAT) LIMITED
Versus
KRITIKANT SHIVAJIRAV JADAV

=====

Appearance:

MR DG CHAUHAN(218) for the Appellant(s) No. 1
RONAK D CHAUHAN(7709) for the Appellant(s) No. 1
for the Respondent(s) No. 2
MR SUBRAMANIAM IYER(2104) for the Respondent(s) No. 1

=====

**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA
AGARWAL**
and
HONOURABLE MR. JUSTICE N.V.ANJARIA

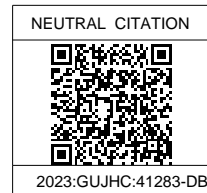
Date : 07/08/2023

ORAL ORDER

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

Heard the learned advocates for the respective parties.

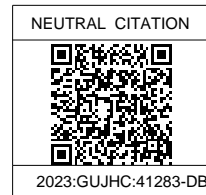
2. This Letters Patent Appeal is directed against the judgment and order dated 12.3.2019 passed by the learned single Judge affirming the Labour Court's award dated 3.1.2018 for grant of relief of reinstatement with full back wages. A categorical finding has been returned by the learned single Judge in para Nos. 5, 13 and 14 of the impugned judgment that the manner in which the departmental inquiry was conducted by the appellant employer on the allegations of misconduct, it was a case of victimisation of the workman. The departmental inquiry conducted by the employer was found to be vitiated for not providing opportunity to the workman to cross-examine the witnesses of the employer and not giving opportunity to produce his own witnesses.



2.1 In addition to above, it may be noted that challenging the termination order dated 3.8.2001, the Reference was made by the workman in the year 2001, which came to be decided after a period of 17 years. The writ petition challenging the award was filed on 21.6.2018, after about five months of the making of the award. The workman was reinstated only on 2.8.2019, after a period of 1 year and 7 months, for which no explanation could be offered before us. The instant appeal challenging the order of the learned single Judge has been filed on 10.5.2019.

3. On a query made by the Court, the learned counsel for the appellant could not place before us as to whether there was any interim order in the writ petition. There is no challenge to the award of the Labour Court except that the award of 100% backwages. Further that there is no explanation in not reinstating the workman for a period of about 1 year and 7 months.

4. Having noted the above facts and circumstances of the instant case, we are required to note the argument of the learned counsel for the appellant, seeking to challenge the order passed by the learned single Judge affirming the award of the Labour Court for grant of 100% back wages. Reliance is placed on the decisions of the Apex Court in **P.V.K. Distillery Limited vs. Mahendra Ram [(2009) 5 SCC 705]** and **Kanpur Electricity Supply Company Ltd. vs. Shamim Mirza [(2009) 1 SCC 20]** to assert that with the award of reinstatement, direction for payment of 100% back wages is not automatic. The Labour Court and the learned Single Judge has ignored that the facts and circumstances of the individual case have to be examined to decide as to what would be the amount of back wages admissible to the workman. In a case where termination is set aside, back wages cannot be paid as a matter of course.



4.1 Learned counsel for the respondent, on the other hand, referred to the findings returned by the Labour Court and the learned single Judge, noted above, to assert that the workman had been deprived the employment at the instance of the employer. The employer cannot be allowed to take benefit of its own wrong.

4.2 In **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others [(2013) 10 SCC 324]**, the Apex Court has held that in case of wrongful termination of services, reinstatement with continuity of service and back-wages, is normal rule. The propositions which have been culled out after consideration of various decisions of the Apex Court therein noted in paragraph-33 are as under :

“33. The propositions which can be culled out from the aforementioned judgments are:

- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*
- ii) 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.*
- iii) 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 averments 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.

iv) 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.

v) 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 victimizing the employee or workman, then the concerned Court or Tribunal 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 be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give 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.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization 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 Private Limited v. Employees of Hindustan Tin Works Private Limited](#) (supra).

vii) The observation made in [J.K. Synthetics Ltd. v. K.P. Agrawal](#) (supra) 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 and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

5. In light of the above legal principles, we are required to note that in the facts and circumstances of the instant case, it is established that the workman was illegally terminated. The inquiry was vitiated, as it was conducted without providing opportunity of hearing. The Labour Court took around 17 years in deciding the Reference and it is not before us as to who was at fault. Whether there was delay in deciding the Reference attributed to the employer. In absence of all these information and in view of the findings returned by the Labour Court, as noted by the learned single Judge in the order impugned, it is more than clear that it is a case of victimisation of workman. It is settled law that in a case of termination of employment, though award of backwages is not automatic with the award of reinstatement, but in case the fault is found on the part of the employer, 100% wages can be provided. The fundamental principle is that no one can take benefit of its own wrong.



6. In the above view, we do not find any good ground to challenge the findings returned by the Labour Court and affirmed by the learned single Judge. The appeal is dismissed. The Civil Application also stands disposed of, accordingly.

(SUNITA AGARWAL, CJ)

C.M. JOSHI

(N.V.ANJARIA, J)