A M.D. BALASAHEB DESAI SAHAKARI S.K. LTD.

v.

KASHINATH GANAPATI KAMBALE

(Civil Appeal No. 7249 of 2008)

DECEMBER 12, 2008

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[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Labour laws: Back wages – Workman found guilty of indiscipline at work place, unauthorisedly absent without C *leave, misbehaviour with superiors, leaving place of work early without permission – Dismissal from service – Award of re-instatement with 50% back wages – Held: Since charges were serious in nature, forfeiture of 50% back wages was not adequate punishment – No back wages awarded in his favour.*

D *Industrial Disputes Act, 1947: s.11A – Power under – Scope of.*

Evidence Act, 1872: s.106 – Burden of proof of gainful employment – Held: Is on workman.

Respondent-workman was found guilty of E **misconduct including being absent without leave, late attendance and for leaving the work place without permission etc. A departmental proceeding was held and he was dismissed from service. He filed an application praying for re-instatement with continuity of service and** F **full back wages. Before labour court, appellant-employer examined several witnesses to establish that respondent was running a footwear shop.**

Labour court, while holding that the respondent was found guilty of committing the misconduct, passed an G **award of re-instatement with continuity of service with 50% back-wages on the premise that the punishment of termination from service was disproportionate to the charges of misconduct levelled against him. The appellate authority upheld the order of labour court.**

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Appellant filed writ petition before High Court. It held that labour court and appellate authority were right in holding that the lesser punishment of forfeiture of 50% of back wages was adequate punishment and accordingly dismissed the writ petition. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The labour court while exercising its jurisdiction under Section 11A of the Industrial Disputes Act is entitled to consider as to whether the punishment awarded is wholly disproportionate to the delinquent employee or not. However, the discretion vested in it must be exercised in a judicious manner. The labour court ordinarily should not interfere with the discretion exercised by the employer unless the same is found to be inconsistent with the provisions of a statute or otherwise perverse or unjust. It may be true that in terms of the Model Standing Order framed under the Industrial Employment Standing Orders Act, 1946, ordinarily fine for wrongful absence was to be imposed but in this regard the number of occasions on which the workman had remained on unauthorized absence was also required to be taken into consideration. In the instant case, apart from remaining unauthorizedly absent without leave, the respondent was found guilty of indiscipline at the work place, misbehaviour with his superiors, leaving place of work early without permission and without leave, signing the muster for showing presence although he was absent. Forfeiture of 50% back wages, thus, was not an adequate punishment. In a case of such nature, he should have been awarded some punishment in lieu of the order of dismissal. [Paras 15 and 16] [453-D-G; 454-A]

2. Having regard to the principles contained in Section 106 of the Evidence Act, the burden of proof to show that the workman was not gainfully employed is not on the employer. In this case, the burden of proof had wrongly been placed upon the appellant-employer. Some materials were brought on record to show that the

respondent was gainfully employed. The evidence adduced by the appellant on that behalf, were not considered on its proper perspective. The Industrial Court while holding that no licence is necessary to run a footwear shop in a small town committed a serious illegality in arriving at his finding that the respondent must have been doing so, to meet his both ends. It may be correct that a person cannot afford to remain unemployed for a long time but for arriving at a conclusion that the respondent was gainfully employed or not, a large number of factors are required to be taken into consideration. [Paras 12 and 14] [452-C; 453-B-C]

U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey **(2006) 1 SCC 479, relied on.**

3. No back-wages should have been awarded in favour of the respondent. A sum of Rs.60,000/- has already been paid to the respondent. It is, therefore, directed that any amount paid to the respondent, if any, shall not be recovered. The impugned judgment of the High Court is modified to that extent. [Paras 18 and 19] [454-E-G]

U.P. SRTC v. Mitthu Singh **(2006) 7 SCC 180, relied on.**

Case Law Reference:

(2006) 1 SCC 479	**relied on**	**Para 13**
(2006) 7 SCC 180	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7249 of 2008.

From the final Judgment and Order dated 23.4.2007 of the High Court of Judicature at Bombay in Letters Patent Appeal No. 62 of 2007.

Shivaji M. Jadhav for the Appellant.

Manish Pitale, Vinay Navare and Abha R. Sharma for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Appellant herein is a Cooperative Society. It runs a sugar factory. Respondent was appointed as a peon in July 1974. On or about 1.12.1983, a show cause notice was issued seeking an explanation from him as regards some alleged misconduct on his part. He was placed under suspension. A charge sheet dated 29.12.1983 was issued against him, inter alia, in respect of the following charges:

"(i) Late attendance between 2.7.1983 to 20.12.1983 on 16 occasions.

(ii) Absence without leave between 6.10.1983 to 22.12.1983 for 20 days.

(iii) Leaving the place of work without permission and without seeking leave and attempt to obtain wages between 23rd to 30th November, 1983.

(iv) Leaving premises without permission and leave between 2.12.1983 to 20.12.1983 on 6 occasions.

(v) Signing the muster without remaining present and attempting to seek wages between 16.9.1983 to 16.11.1983 for 9 days.

(vi) Signing the muster for showing presence on 1.12.1983 on next day.

(vii) Disobeying order of Shri Mahadik regarding storage of water on 12.12.1983, refusing to deliver letter as directed by Shri Chavan clerk on 19.12.1983 not attending the office on 14.12.1983 though asked to attend for the purpose of audit."

3. A departmental proceeding was held in which he was found guilty of the said charges. He was dismissed from services by the appellant by an order dated 5.7.1984.

Respondent filed an Application under Sections 78 of the Bombay Industrial Relations Act, 1946 before the Labour Court, Sangli praying for his reinstatement with continuity of service and full back wages, which was registered as B.I.R. No. 16 of 1984.

4. A preliminary issue as regards validity or otherwise of

A the said disciplinary proceeding, which appears to have been decided against the respondent, had been framed.

Apart from the said preliminary issue, the Labour Court framed the following issues:

B "1. Whether the applicant proves that the opponent terminated him from service illegally and wrongfully?

2. Whether the enquiry conducted by the opponent against the applicant is legal proper and valid?

C 3. Whether the termination of the employment is a grossly disproportionate punishment?

4. Whether the applicant is entitled to reinstatement, continuity of service and full back wages?

5. Appellant examined some witnesses to establish that D the respondent had been running a footwear shop under the name and style of Amol Footwear. The Labour Court did not place any reliance thereupon holding that the appellant had not produced any licence on record to show that the respondent was running the said shop.

E The Labour Court, while holding that the respondent had been found guilty of committing the misconduct, passed an award of reinstatement with continuity of service with 50% back-wages on the premise that the punishment of termination from service was disproportionate to the charges of misconduct F leveled against him.

6. An appeal preferred thereagainst by the appellant was dismissed. On the question as to whether the respondent was gainfully employed or not, the Appellate Authority while holding that the provisions of Shops and Establishments Act were not G applicable at Patan where the said footwear shop was being run, opined that the Labour Court was correct in denying 50% of back wages on the premise that the respondent had been carrying on the said business to meet his both ends. It was held:

"Moreover, the Respondent has produced reasonable H evidence to show special circumstances which may justify

denial of 50% of back wages. In these circumstances, I find no reason to allow full back wages to original petitioner in his appeal. Consequently, I hold that the labour court was correct in awarding 50% back wages."

7. A writ petition filed by the appellant was dismissed by a learned single judge of the Bombay High Court stating:

"....The Labour Court, in exercise of its jurisdiction under this Section, has concluded that the punishment imposed was disproportionate. Both, the Labour Court and the Industrial Court were of the opinion that a lesser punishment of forfeiture of part of the back wages was the punishment which was adequate. Both the courts below have exercised their discretion fairly and judiciously.

9. In my view, therefore, there is no need to interfere with the orders of the Courts below."

8. By reason of the impugned judgment, an intra court appeal preferred by the appellant has been dismissed.

Hence this Appeal by special leave.

9. A notice was issued by this Court only on the quantum of back wages.

10. Mr. Shivaji M. Jadhav, learned counsel appearing on behalf of the appellant would submit that the Industrial Court as also the High Court committed a serious error in granting reinstatement with continuity of service and half back wages in favour of the respondent by wrongly placing the onus of proof on the appellant. Leaned counsel would contend that it is now well settled that back wages ought not to be automatically granted and keeping in view of the fact that the services of the respondent were terminated in the year 1984 and the award of the labour court having been rendered in the year 1991, the grant of 50% back wages was wholly unjustified.

11. Mr. Vinay Navare, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgments contending that in terms of the provisions of the Industrial Employment Standing Orders Act, 1946 only a

A fine could be imposed on the respondent for his alleged unauthorized absence. Our attention was further drawn to the fact that while passing the order of termination, records of past service of the respondent had not been taken into consideration.

B 12. Charges against the respondent as noticed hereinbefore were serious in nature. During the period between July 1983 and December 1983, he not only absented himself from work without leave but also had been reporting to the work place late and leaving factory premises without permission early. He was also found guilty of indiscipline.

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It is now well settled by a catena of decisions of this Court that having regard to the principles contained in Section 106 of the Indian Evidence Act the burden of proof to show that the workman was not gainfully employed is not on the employer. In this case, the burden of proof had wrongly been placed upon the appellant.

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13. This Court in *U.P. State Brassware Corpn. Ltd. vs. Uday Narain Pandey* [(2006) 1 SCC 479] held:

> 61. It is not in dispute that the Respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.
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> 62. In *Kendriya Vidyalaya Sangathan v. S.C. Sharma* [(2005) 2 SCC 363], this Court held: (SCC p. 366, para 16)
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> "...When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the

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claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard." A

{See also *Allahabad Jal Sansthan vs. Daya Shankar Rai* [(2005) 5 SCC 124], para 6}"

14. Furthermore, some materials had been brought on record to show that the respondent was gainfully employed. The evidence adduced on behalf of the appellant in that behalf, in our opinion, had not been considered on its proper perspective. The Industrial Court while holding that no licence is necessary to run a footwear shop in a small town committed a serious illegality in arriving at his finding that the respondent must have been doing so, to meet his both ends. It may be correct that a person cannot afford to remain unemployed for a long time but for arriving at a conclusion that the respondent was gainfully employed or not, a large number of factors are required to be taken into consideration. B C D

15. Indisputably, the labour court while exercising its jurisdiction under Section 11A of the Industrial Disputes Act was *entitled* to consider as to whether the punishment awarded is wholly disproportionate to the delinquent employee or not but it is well known that the discretion vested in it must be exercised in a judicious manner. The Labour Court ordinarily should not *interfere* with the discretion exercised by the employer unless the same is found to be inconsistent with the provisions of a statute or otherwise perverse or unjust. It may be true that in terms of the Model Standing Order framed under the Industrial Employment Standing Orders Act, 1946, ordinarily fine for wrongful absence was to be imposed but in this regard the number of occasions on which the workman had remained on unauthorized absence was also required to be taken into consideration. In this case, apart from remaining unauthorizedly absent without leave, the respondent had been charged with indiscipline at the work place. He not only was found guilty of remaining unauthorizedly absent but also guilty of misbehaviour with his superiors, leaving place of work early without permission and without leave, signing the muster for showing presence although he was absent. E F G H

16. Forfeiture of 50% back wages, in our opinion, thus, was not an adequate punishment. In a case of this nature, he should have been awarded some punishment in lieu of the order of dismissal and furthermore the question as to whether the respondent was entitled to the full back wages or not should have been considered on the basis of the materials brought on record by the parties.

17. We may notice that in *U.P. SRTC vs. Mitthu Singh* [(2006) 7 SCC 180], this Court has held:

> "12. Since limited notice was issued with regard to payment of back wages, we do not enter into the larger question whether the action of terminating the services of the respondent was legal, proper and in consonance with law. But we are fully satisfied that in the facts and circumstances of the case, back wages should not have been awarded to the respondent workman. In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised by a court/tribunal keeping in view the facts in their entirety and neither straitjacket formula can be evolved nor a rule of universal application can be laid down in such cases."

18. We are, therefore, of the opinion that in this case, no back-wages should have been awarded in favour of the respondent.

We have been, however, informed by the Bar that a sum of Rs.60,000/- has already been paid to the respondent. It is, therefore, directed that any amount paid to the respondent, if any, shall not be recovered.

19. For the aforementioned reasons, the impugned judgment of the High Court is modified to the aforementioned extent. The appeal is allowed in part. There shall, however, be no order as to costs.

D.G. Appeal partly allowed.