IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 13296 of 2006

An application under Articles 226 & 227 of Constitution of India.

AFR **Madhusmita Dutta ..... Petitioner**

-Versus-

State of Orissa & others ..... Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner : M/s. Supriyo Ranjan Mahapatra, P.C. Mahapatra, S. Mishra & K. Dey, Advocates.

For Opp. Parties : Mr. A.R. Dash, Addl. Government Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
9th May, 2024

SASHIKANTA MISHRA, J.

The short point that falls for consideration in the present application is, whether the petitioner is entitled to back wages consequent upon her reinstatement in service after the order of termination was declared illegal by the competent authority.

2. The facts, shorn of unnecessary details are as follows:

2.1 The petitioner was appointed as Lecturer in History against the 1st post in Joda Women's College, Joda on 05.09.1988. Her services were terminated by the governing body of the College by order dated 23.09.1995. She challenged the order of termination in an appeal before the Director, Higher Education, Odisha. By order dated 12.08.1996, the appeal was allowed by holding that proper procedure had not been followed before terminating her services. The governing body was directed to take back the petitioner in her former service granting liberty to it to take action against her in accordance with the Rules.

2.2 The order of the Director was not complied with by the governing body for which the petitioner approached this Court in OJC No. 14838 of 1996. Said writ petition was disposed of by order dated 16.09.1995 directing the concerned authority to take effective steps for implementation of the appellate order of the Director.

2.3. The governing body also filed writ application being OJC No. 4024 of 1997, which came to be dismissed by order dated 22.09.2005 as this Court did not find any infirmity in the order passed by the Director.

2.4. Under such circumstances and as instructed by the office of the Director vide letter dated 23.12.2006, the petitioner was allowed to join in the College on 10.01.1996. Since that date she performed her duties continuously till 01.08.2018, when she was transferred to Siddheswar College, Amarda Road, Balasore from where she retired on attaining the age of superannuation on 31.01.2023.

2.5. The petitioner claims that neither her current salary for the period from 10.01.2006 was paid nor the period during which she was illegally terminated i.e. 23.09.2005 to 09.01.2006 was regularized. On the above facts, the petitioner has filed the present writ application with the following prayer:

> *"Under these circumstances, the petitioner most humbly prays that this Hon'ble Court may be*

graciously pleased to issue a Rule Nisi calling upon the opp.parties to show cause as to why;

(i) the opp.parties shall not be directed to release the current salary of the petitioner with effect from 10.01.2006.

(ii) The opp.parties shall not be directed to regularize the service of the petitioner the illegal termination period from 23.09.1995 to 09.01.2006 and provide all other consequential benefit.

If the opp.parties fail to show cause or show insufficient cause, the Rule be made absolute.

And for this act of kindness, the petitioner shall as in duty bound ever pray."

3. Counter affidavit has been filed on behalf of the Director, Higher Education, Odisha. It is stated that in compliance of the direction of this Court, the provisional differential salary amounting to Rs.8,61,343/- for the period from 10.01.2006 to 29.02.2012 was released as per letter dated 13.03.2012, which the petitioner has received on 14.03.2012. As regards the prayer of the petitioner for regularization of her service from 23.09.2005 to 09.01.2006, it is stated that the petitioner has not performed any duty during such period due to inaction on the part of the governing body and therefore, is not entitled to claim any financial benefit from the Government, but it is the sole responsibility of the

governing body to regularize the said period. Accordingly, the Director vide letter dated 25.07.2006 has sought for guidelines from the Government and at the same time directed the governing body to do the needful.

4. Despite sufficient notice, there was no appearance on behalf of the governing body of the College (opposite party No.5), Principal (opposite party No.3) and Secretary (opposite party No.4) of the College.

5. Heard Mr. Supriyo Ranjan Mahapatra, learned counsel for the petitioner and Mr. A.R. Dash, learned Addl. Government Advocate for the State.

6. Mr. Mahapatra would argue that the order of termination of services of the petitioner having been held to be illegal by the Director in appeal and said order having been confirmed by this Court as per order passed in OJC No. 14838 of 1996 and OJC No. 4024 of 1997, it was incumbent upon the governing body of the College to comply with such order without any delay. The petitioner had to run from pillar to post requesting her reinstatement. Ultimately, because of the intervention by

the office of the Director she was reinstated in service after a long gap of nearly 10 years, i.e. on 10.01.2006. Her current salary was also not paid for long time thereafter. Since her termination has been declared unlawful by the competent authority, she being reinstated is entitled to full back wages for the period during which she was kept out of employment. Mr. Mahapatra has relied upon certain judgments in support of his contentions which would be referred to later.

7. Mr. A.R. Dash, learned Addl. Government Advocate would submit that grant of back wages consequent upon reinstatement is not automatic as it depends on several factors. The petitioner has not proved that she was not gainfully employed during such period. In any case, the governing body being guilty of non-compliance of the order of the Director, the burden of paying back wages is on it and not the Government.

8. The facts of the case are not disputed inasmuch as the services of the petitioner were terminated on 23.09.1995, which was held to be illegal by the

Director, Higher Education in his order dated 12.08.1996. Admittedly, the order was not complied with till as late as 10.01.2006. In between, both the petitioner and the management approached this Court. While the petitioner prayed for direction to the governing body to implement the order, the governing body sought to challenge the order of the Director. This Court, as already stated, directed the concerned authority to take effective steps for implementation of the order in the writ petition filed by the petitioner. In so far as the other writ petition is concerned, this Court found no infirmity in the order of the Director so as to interfere. The wit petition was thus, dismissed. It is common ground that the order passed by this Court dismissing the writ application filed by the governing body was not challenged further and as such it became final. Under such circumstances, there was no justification whatsoever for the governing body to not comply with the order of the Director. The petitioner had to file contempt application being CONTC No. 829 of 2007, pursuant to which the opposite parties released her salary amounting to Rs.1,23,746/- in the pre-revised scale.

Further, the provisional differential salary amounting to Rs.8,61,343/- for the period from 10.01.2006 to 29.02.2012 was also released. In the meantime, the petitioner retired from service on attaining the age of superannuation. The period during which she was illegally terminated however remains non-regularized.

9. Facts narrated above show a sorry state of affairs reflecting the trials and tribulations of a lady Lecturer, who has had to knock the doors of the Director and this Court multiple times seeking her legitimate dues. Significantly, despite sufficient service of notice, the College authorities including the governing body have chosen to stay away from the present proceeding.

10. As regards the law relating to grant of back wages consequent upon reinstatement, the basic principle as has been laid down by the Supreme Court in a plethora of judgments is that, while reinstatement is normally granted when termination is held to be illegal, granting of back wages is not automatic. Several factors including an assertion by the concerned employee that he was not

gainfully employed during the relevant period are also to be considered. Reference may be had in this regard to the judgments of this Court in the case of **J.K. Synthetics Ltd. v. K.P. Agrawal**[1], and **State Bank of India v. Ram Chandra Dubey and others**[2]. Notwithstanding the above line of decisions, in several other cases, the Supreme Court has also held that the principle of no work no pay cannot be applied in all cases and particularly where, the fault lies with the employer in not utilizing the services of the concerned employee. Reference may be had to the judgment of the Supreme Court in the case of **Shobha Ram Raturi v. Haryana Vidyut Prasaran Nigam Ltd**[3], where the following observations are noteworthy.

> *"3. Having given our thoughtful consideration to the controversy, we are satisfied, that after the impugned order of retirement dated 31-12-2002 was set aside, the appellant was entitled to all consequential benefits. The fault lies with the respondents in not having utilised the services of the appellant for the period from 1-1-2003 to 31-12-2005. Had the appellant been allowed to continue in service, he would have readily discharged his duties. Having restrained him from rendering his services with effect from 1-1-2003 to 31-12-2005, the respondent cannot be allowed to press the self-serving plea of denying*

[1] (2007) 2 SCC 433
[2] AIR 2000 SC 3734 :2001(1) SCC 73: 2000 (2) JT (Supp.) 590
[3] (2016) 16 SCC 663

him wages for the period in question, on the plea of the principle of "no work no pay".

11. In a relatively recent decision, the Supreme Court in the case of **Pradeep S/o Rajkumar Jain v. Manganese Ore (India) Ltd[4].**, held as follows:

> *"6. The Bench of two the learned Judges in the said case has, after reviewing of case law which included survey of two earlier three Judges Benches [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] , [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] of this Court, concluded as follows : (Deepali Gundu Surwase case [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] , SCC pp. 356-59, paras 38 & 42)*
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> *"38. The propositions which can be culled out from the aforementioned judgments are:*
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> *38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*
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> *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.*
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> *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.*

[4] (2022) 3 SCC 683

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 [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] .

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal [J.K. Synthetics Ltd. v. K.P. Agrawal, (2007) 2 SCC

433 : (2007) 1 SCC (L&S) 651] 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 [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53], [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] 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.

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42. In the result, the appeal is allowed, the impugned order [Kranti Junior Adhyapak Mahavidyalaya v. State of Maharashtra, 2011 SCC OnLine Bom 1296 : (2012) 1 Mah LJ 370] is set aside and the order passed by the Tribunal is restored. The management shall pay full back wages to the appellant within four months from the date of receipt of copy of this order failing which it shall have to pay interest at the rate of 9% p.a. from the date of the appellant's suspension till the date of actual reinstatement. It is also made clear that in the event of non-compliance with this order, the management shall make itself liable to be punished under the Contempt of Courts Act, 1971."

12. Keeping the settled position of law as referred to in the preceding paragraphs in the perspective, this Court finds that no valid reason has been cited for not reinstating the petitioner in service after the order of termination was held unlawful by the Director and confirmed by this Court. True, the petitioner has not specifically stated in so many words that she was not gainfully employed but then it has been her consistent case that despite repeated entreaties made before the Director as well as the governing body she was not allowed to join. Nothing has been brought on record to

show that she was gainfully employed, rather from the very fact that she had been continuously approaching the concerned authorities as well as this Court in multiple litigations it can be safely presumed that she was not gainfully employed for which she was diligently pursuing her case for reinstatement in her former post. That apart, the order of termination of service issued by the governing body was held unlawful by the Director as proper procedure had not been followed. Thus, taking an overall view of the matter this Court is of the considered view that the petitioner having been reinstated after an inordinate delay of nearly 10 years without any valid or justified reason and that too because of intervention by the Director, no fault can be attributed to her for not discharging duties during the relevant period. As such, the principle of "no work no pay" cannot be applied as it would afford a premium to the authorities and the governing body for their illegal inaction.

13. Having held that the petitioner's service during the period of her termination deserves to be

regularized with all consequential benefits as admissible in law, the question that now arises is, who shall be responsible to do so. It is quite unfortunate that the State appears to have passed on the buck to the governing body forgetting perhaps the fact that the College in question is not a strictly private institution but one already brought under the grant-in-aid fold w.e.f. 01.06.1994. The State being a model employer cannot remain indifferent to the travails of one of its citizens compounded by the continued and inexplicable inaction of the governing body of the College. Obviously, the State cannot plead helplessness in this regard. This Court therefore, holds that it is the responsibility of all the opposite parties to ensure that the order of the Director is complied with in letter and spirit. In other words and as already held by this Court in the order passed in OJC No. 14838 of 1996, the opposite parties should take immediate effective steps for implementation of the order.

14. Thus, from a conspectus of the analysis of facts and the law involved, this Court is of the view that

the services of the petitioner for the period from 23.09.1995 to 09.01.2006 need to be regularized and all consequential service and financial benefits as admissible in law disbursed in her favour. It shall be the primary responsibility of the State authorities (opposite party Nos. 1 and 2) to ensure that this order is complied with by the governing body of the College without any further delay. The salary as admissible from 10.01.2006 consequent upon regularization of her service shall also be released after adjusting the amount already paid to her along with fixation and disbursement of her full pension.

15. In the result, the writ petition is allowed. The opposite parties are directed to pass necessary orders in terms of paragraph-14 of this judgment within two months from the date of receipt of copy of this order or on production of certified copy thereof by the petitioner.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 9th May, 2024/ A.K. Rana