IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
INDIRA BANERJEE; V. RAMASUBRAMANIAN, JJ.
April 22, 2022
ALLAHABAD BANK & ORS. *VERSUS* **AVTAR BHUSHAN BHARTIYA**

Labour Law - 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- In the first instance, there is an obligation on the part of the employee to plead that he is not gainfully employed. It is only then that the burden would shift upon the employer to make an assertion and establish the same. *[Para 31-33]*

SPECIAL LEAVE PETITION (CIVIL) NO. 32554 OF 2018 WITH SPECIAL LEAVE PETITION (CIVIL) NO. 9096 OF 2019 (Arising out of impugned final judgment and order dated 01-10-2018 in SB No. 1403/2013 passed by the High Court of Judicature at Allahabad, Lucknow Bench)

For Petitioner(s) Mr. Rajesh Kumar Gautam, AOR Mr. Anant Gautam, Adv. Mr. Nipun Sharma, Adv. Mr. Sachin Singh, Adv. Mr. Rahul Shyam Bhandari, AOR G. Priyadharshni, Adv. Mr. Konark Tyagi, Adv.

For Respondent(s) Mr. Rahul Shyam Bhandari, AOR G. Priyadharshni, Adv. Mr. Konark Tyagi, Adv. Mr. Rajesh Kumar Gautam, AOR Mr. Anant Gautam, Adv. Mr. Nipun Sharma, Adv. Mr. Sachin Singh, Adv.

O R D E R

1. Aggrieved by an order of reinstatement with 50% back-wages, but all other consequential benefits in full, passed by the High Court of Judicature at Allahabad, the Management of the Allahabad Bank has come up with one Special Leave Petition and the delinquent Officer has come up with the other Special Leave Petition.

2. We have heard the learned Counsel for the parties.

3. Since one of these Special Leave Petitions is by the Management of the Bank and other SLP is by the delinquent Officer, we shall refer to the parties as “the Bank” and “the Officer-employee”.

4. The Officer-employee was first appointed as a Clerk way back in the year 1974. He was promoted to the post of Junior Manager GradeII in 1982 and to the post of Manager in 1987. In July, 1988 he was issued with a charge memorandum, comprising of 3 articles of charges. A departmental enquiry followed and the Enquiry Officer held the charges proved. After finding that the Report of the Enquiry Officer was not very happily drafted, the disciplinary authority analysed the evidence on record independently and passed an order of penalty of dismissal from service on 31.03.1989.

5. The Officer-employee filed a departmental appeal under Regulation 17 of the Allahabad Bank Officer Employees (Discipline and Appeal) Regulations, 1976,

contending among others, that the findings of the Enquiry Officer were not even enclosed to the final order of penalty.

6. The appellate authority, by an order dated 28.02.1990 dismissed the appeal, despite recording a finding that the copy of the enquiry report was not enclosed to the final order of penalty. However, the Appellate Authority attempted to overcome this defect by holding that after the Officer-employee filed the statutory appeal, a copy of the enquiry report was sent to his address on 02.06.1989 and that the same returned undelivered.

7. After filing a petition for Review and getting it dismissed, the Officer-employee moved the High Court with a writ petition in W.P.No.29426 of 1990. After referring to Regulation 9 of the Allahabad Bank Officer Employees (Discipline and Appeal) Regulations, 1976 which provides for a supply of the copy of the enquiry report, the High Court allowed the writ petition by an order dated 27.04.2011 , directing the Management to supply a copy of the enquiry report within one month and giving liberty to the Officer-employee to file a fresh Appeal with a further direction to the appellate authority to decide the appeal expeditiously.

8. The Bank filed a Special Leave Petition (C) CC No. 13418 of 2011 and the same was dismissed by this Court by an Order dated 26.08.2011. The Bank then sought a review before the High Court but the same also got rejected.

9. In an interesting twist, the Bank sent a letter dated 8.05.2012 to the Officer-employee, claiming that the copy of the enquiry report was not traceable and that he will be free to submit a statutory appeal, raising all issues. Aggrieved by the stand so taken, the Officer-employee filed a fresh Writ Petition in W.P No.1403 of 2013. The said Writ Petition was allowed by the High Court of Judicature at Allahabad, setting aside the order of penalty and directing reinstatement with 50% of the back wages, but with all consequential benefits including post retirement benefits to which he would have been entitled had he not been dismissed from service. This was for the reason that the employee attained superannuation on 28.02.2013. The operative portion of the Order dated 01.10.2018 passed by the High Court of Judicature at Allahabad is reproduced as follows:

"... Resultantly, the writ petition is allowed.

The order dated 31.03.1989 whereby the punishment of dismissal has been imposed upon the petitioner is hereby quashed. We also quash the order dated 15.09.2016 rejecting the statutory appeal preferred by the petitioner against the order of dismissal.

The petitioner will thus be entitled to be given all consequential benefits, including the post retirement benefit to which he would have been entitled had he not been dismissed from service of the bank, for the reason that he has since attained the age of superannuation. We, however, direct that so far as the back wages, including the wages to be determined by giving notional promotions to the petitioner, if any, are concerned, he shall be entitled only to 50% of total back wages. The consequential benefits arising out of this judgment and order shall be made available to the petitioner within a period of two months from the date a certified copy of this order is furnished to the competent authority.

Having regard to the entire facts and circumstances of the case and also considering that the petitioner has been litigating since the year 1990, we also direct cost to be paid by the respondent-bank to the petitioner which we quantify to be Rs.50,000/-."

10. It is against the aforesaid order that the Bank has come up with Special Leave Petition (C) No.32554 of 2018. On 03.01.2019, this Court directed the issue of notice in the said Special Leave Petition limited to the quantum of back wages. The order dated 03.01.2019 passed by this Court reads as follows:-

"Heard.

We are not inclined to interfere with the impugned order of the High Court insofar as the petitioner-Bank has been directed to pay all the retiral dues to the first respondent.

Issue notice limited to the quantum of back-wages.

In the meanwhile, there shall be stay of the impugned order so far as the back-wages are concerned."

11. Thereafter the Officer-employee came up with Special Leave Petition (C) No.9096 of 2019, challenging that portion of the impugned order whereby he was deprived of 50% of the back wages. Therefore, on 5.04.2019, this Court ordered the issue of notice in the said Special Leave Petition also and directed the matter to be tagged along with the Special Leave Petition of the Bank.

12. In view of the order passed by this Court on 3.01.2019, the only question that we are called upon to decide is, whether the Officer-employee is not entitled to back wages at all or whether he is entitled only to 50% of the back wages as held by the High Court or whether he is entitled to full back wages.

13. For finding an answer to the above question, we have to see primarily, as to who was at fault.

14. Admittedly, the Bank initiated disciplinary proceedings in terms of Allahabad Bank Officer Employees' (Discipline and Appeal) Regulations 1976, for a major misconduct. The three articles of charges framed against the Officer-employee were as follows:-

"ARTICLE OF CHARGE I

While posted and functioning as Manager, Nighasan Branch during the year 1986-87 Shri Avtar Bhushan Bhartiya failed to maintain integrity and devotion to duty and did not act with diligence in as much as he allowed advances to several borrowers in an indiscriminate manner without observing the norms of the Bank and the spirit of the scheme under which such advances were allowed at a grave risk and has thereby violated regulation 3(1) of Allahabad Bank Officer Employees' (Conduct) Regulations amounting to a misconduct under regulation 24 of the aforesaid regulations.

ARTICLE OF CHARGE II

While posted and functioning as Manager, Nighasan Branch during the year 1986-87 Shri Avtar Bhushan Bhartiya has failed to maintain integrity and devotion to duty in as much as he allowed indiscriminate advances for patthar udhyog in village Jhandi & Khairani in complicity with one Shri Raj Kumar with intent to misutilise the subsidy availed on such advances by not observing the norms of the Bank and the rules of the scheme under which advances were allowed. Shri Bhartiya has

thereby violated regulation 3(1) of Allahabad Bank Officer Employees' violated Regulation, 1976 amounting to a misconduct under regulation 24 of the aforesaid regulations.

ARTICLE OF CHARGE III

While posted and functioning as Manager, Tikonia Branch in Distt. Lakhimpur during the year 1985, Shri Bhartiya has failed to act with diligence and devotion to duty in as much as he failed to conduct appraisal and verification of the identity of Shri Tarsem and has thereby violated regulation 3(1) of Allahabad Bank Officer Employees' (Conduct) Regulations amounting to a misconduct under regulation 24 of the aforesaid regulations."

15. The departmental enquiry commenced on 21.11.1988 and concluded on 09.01.1989. The enquiry report dated 09.03.1989 was forwarded to the disciplinary authority *vide* letter dated 13.03.1989. The disciplinary authority passed an order of penalty on 31.03.1989. It is obvious from the order of penalty dated 31.03.1989 that the copy of the enquiry report was neither sent beforehand nor even enclosed to the order of penalty. Interestingly, the disciplinary authority agreed with the conclusions reached by the enquiry officer but felt that the reasoning was deficient. Therefore, the disciplinary authority chose to analyse the evidence on record independently. The relevant portion of the order of the disciplinary authority reads as follows:-

"From the enquiry officer's report I find that while holding the charges leveled against Shri Bhartiya in the aforesaid charge sheet dated 26.7.88 as proved against him he has not analysed the facts brought on the records of the enquiry proceedings and has also not highlighted the merits/demerits of the evidences brought on the records of enquiry proceedings. Accordingly evidences on records of the proceedings would first be discussed and analysed by me chargewise separately each here under as the same exercise has become necessary for the reasons mentioned above."

16. In the statutory appeal filed by the Officer-employee, he raised a specific contention that the enquiry report was not furnished. Despite recording a finding that the copy of the enquiry report was not even enclosed to the final order of penalty, the Appellate Authority attempted to overcome the same on the ground that after the appeal was filed, the copy of enquiry report was sent by post and that the same returned undelivered. The relevant portion of the order of the Appellate Authority reads as follows:-

Also, a copy of the Enquiry Officer's report/findings, although not enclosed with the Disciplinary Authority's Order, has been subsequently provided to the appellant. However, the same, which was sent at the recorded address of the appellant on 2.6.1989, has been returned undelivered by the Post Office with the remark: "Pane wale bar bar jane par nahi milte, intezar ke bad wapas."

17. At the time when the final order of penalty dated 31.03.1989 was passed and at the time when the appeal was dismissed by the order dated 28.02.1990, the law in this regard was actually in a state of flux. After the decision of the Constitution Bench of this Court in ***Union of India and Another*** vs. ***Tulsiram Patel***[1]***,*** a two member Bench doubted its authenticity or applicability to cases where a copy of the enquiry report was not supplied. Therefore, in ***Union of India And Others*** vs. ***E. Bashyan***[2]***,*** [3]a reference was made,

[1] (1985) 3 SCC 398
[2] AIR 1988 SC 1000
3 (1991) 1 SCC 588
[3] SCC Supp. (2) 391

which led to the decision in ***Union of India and Others*** vs. ***Mohd. Ramzan Khan[3].*** The position became very clear after the decision in ***Managing Director, ECIL , Hyderabad*** vs. ***B. Karunakar[4]*** .

18. Therefore, by the time the writ petition challenging the final order of penalty was decided on 27.04.2011, the law in this regard was no longer *res integra*.

19. *Dehors* the development of law as aforesaid, the Officeremployee had an advantage in the form of Regulation 9 of the Allahabad Bank Officer Employees (Discipline and Appeal) Regulations 1976. This Regulation 9 reads as follows:-

"9. COMMUNICATION OF ORDERS:

Orders made by the Disciplinary Authority under Regulation 7 or Regulation 8 shall be communicated to the officer employee concerned, who shall also be supplied with a copy of the report of enquiry, if any."

20. Therefore, by the order dated 27.04.2011, the High Court allowed the writ petition of the Officer-employee, on the basis of the above Regulation. The operative portion of the order of the High Court dated 27.04.2011 reads as follows:-

"In view of above, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned appellate order dated 28.2.1990 and the order dated 3.7.1990 (Annexure-8) passed on the review petition. A cost of Rs.50,000/- is imposed upon the respondents which shall be deposited in this Court within a period of two months. The respondents shall supply a copy of the enquiry report within one month from today. Thereafter, the petitioner may prefer an appeal setting up grounds and pointing procedural illegality including the plea raised before this Court within the next one month. The appellate authority shall decide the appeal, expeditiously say within a period of two months from the date of filing of fresh appeal. In case the cost is not deposited, the same shall be realised through the District Magistrate as arrears of land revenue. It shall be open for the petitioner to withdraw an amount of Rs.25,000/- and the rest shall be remitted to the Mediation Centre of this Court at Lucknow. Registry to take follow-up action."

21. The aforesaid order of the High Court has attained finality with the dismissal of the SLP on 26.08.2011. The order of dismissal of the SLP reads as follows:-

"Delay condoned.

Having considered the pleadings in the case, the materials placed on record and the submissions of the learned counsel, we do not find any merit in the Special Leave Petition and hence the special leave petition is dismissed."

22. The Bank thereafter took a chance by filing a petition for review before the High Court, but the same also got dismissed on 29.02.2012. Thereafter, the Bank took a very strange position by holding out that the copy of the enquiry report was not traceable. The communication dated 08.05.2012 sent by the Bank to the Officer-employee in this regard reads as follows:-

"In reference to the captioned matter we have to advise that the copy of the finding of Enquiry Officer is not traceable and this fact has been brought to the notice of Hon'ble High Court in the writ petition, and also to you vide letter No.ZOLK/INSPECTION/693 dated 08.09.2011. You are requested to submit your statutory appeal and the same will be considered and you will be provided all reasonable opportunity to put forth your case even personal hearing, if required, will also be afforded to you, but since the copy of finding of Enquiry Officer is not traceable we are unable to provide the same.

Kindly bear with us and submit your appeal which will be considered by the Bank on the basis of records available."

23. In view of the aforesaid turn of events, the Officer-employee moved a contempt petition before the High Court. Finding that the Management of the Bank cannot be penalized for not being able to trace the copy of the enquiry report, the High Court closed the contempt petition with liberty to the employee to re-agitate the issue on the basis of the subsequent cause of action. The relevant portion of the order dated 21.05.2013 passed by the High Court in the contempt petition filed by the employee reads as follows:-

"…Since by the letter dated 8.5.2012, the respondents had communicated that inquiry report is not available in absence of inquiry report, cause of action arose contrary to finding recorded by the judgment and order dated 27.4.2011 . It is open for the petitioner to approach this Court again to ventilate his grievance on the basis of subsequent cause of action…"

24. Therefore, the Officer-employee was driven to the necessity of filing a fresh writ petition in W.P.No.1403(S/B) of 2013. During the pendency of the said writ petition, an order was passed by the High Court on 03.08.2016 holding that the stand of the Bank was unacceptable and that in any case an appeal may be preferred and the same may be decided by the Appellate Authority. Accordingly, an appeal was preferred. The Appellate Authority considered the appeal once again but obviously without the copy of the enquiry report and rejected the appeal. This fact is borne out by the impugned order itself, the relevant portion of which reads as follows:-

"…During pendency of this writ petition, an order was passed by the Court in these proceedings on 03.08.2016 wherein it has been observed that the stand of the respondent-Bank that enquiry report was not available, cannot be accepted in view of the finding of this Court recorded earlier i.e. the finding recorded in the judgment and order dated 27.04.2011. It was further observed that the obligation cast upon the respondent-Bank has not been carried out on the lame excuse. The Court further observed that the Bank may, however, decide the appeal preferred by the petitioner taking into consideration the direction issued earlier, vide judgment and order dated 27.04.2011…"

25. In the light of the aforesaid facts, no great deal of research was necessary on the part of the High Court to arrive at the conclusion that the Management of the Bank was clearly at fault. Therefore, the High Court allowed the writ petition. The operative portion of the impugned order is already extracted earlier.

26. It is not as though the High Court proceeded solely on the basis of the failure of the Management to supply the copy of the enquiry report. The High Court found that the charges related to a Government sponsored Scheme and that the beneficiaries were identified and were short-listed by a Government agency, namely the District Rural Development Agency. The High Court also found that no bad motive was either attributed to the employee nor proved in the departmental proceedings.

27. On the basis of the aforesaid findings, the High Court could have granted all the reliefs in full, including full back-wages. But considering the fact that from the date of his dismissal namely, 31.03.1989, upto the date of his superannuation on 28.02.2013, a period of nearly 24 years had passed, the High Court thought it fit to limit the back-wages to 50%. In such circumstances, we do not think that the Management can make out any grievance, especially ***(i)*** after having violated Regulation 9; ***(ii)*** after their failure to point

out to the High Court in the first round of litigation that the copy of the enquiry report was not available; and ***(iii)*** after their inability to comply with the order of the High Court passed in the first round of litigation, which was also confirmed by this Court.

28. Therefore, the Special Leave Petition filed by the Bank deserves to be dismissed.

29. Having dealt with the SLP filed by the Management, let us now come to the SLP filed by the Officer-employee with regard to the grant of back wages only to the extent of 50%.

30. The learned counsel for the Officer-employee places heavy reliance upon the decision of this Court in ***Deepali Gundu*** **Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.)** ***& Ors***.[4], in support of his contention that the grant of full back wages is a normal rule in cases of wrongful termination of service. But the ratio laid down in the said decision cannot be pressed into service by the Officer-employee in this case. This is for the reason that the Officer-employee in this case was originally appointed as a Clerk way back in the year 1974. He was promoted to the post of Junior Management Grade-II in the year 1982 and as Branch Manager in the year 1987. This is why he was governed by the Allahabad Bank Officer Employees (Discipline and Appeal) Regulations, 1976. Courts should always keep in mind the different yardsticks to be applied in the cases of workman category employees and managerial category employees. In appropriate cases, the distinction between labour law and service law may also have to be kept in mind. Many times, Courts wrongly apply, in matters arising under service law, the principles laid down in matters arising under labour laws.

31. As a matter of fact, the propositions elucidated in ***Deepali Gundu Surwase*** (supra), read as follows:-

"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 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.

[4] (2013) 10 SCC 324

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 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.

38.6 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 (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 and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

32. Even if we apply the propositions enunciated by this Court in ***Deepali Gundu Surwase*** (supra), the Officer-employee may not be entitled to full back wages. This is for the reason that there is nothing on record to show whether he was gainfully employed after his dismissal from service. A careful look at the pleadings in the writ petition W.P. No.1403 of 2013 would show that he has not pleaded about his non-employment. Though in paragraphs 36 to 38 of his writ petition, the employee has pleaded about the sudden set back to his health in the year 2011 and the financial hardships he was facing, there was no assertion about his non-employment. The employee had his pleadings amended after the dismissal of his appeal during the pendency of the writ petition. Even in the amended pleadings, there was no averment relating to his nonemployment. Therefore,

even if we apply the ratio in ***Deepali Gundu Surwase*** (supra), the employee may not satisfy the third proposition found in para 38.3 thereof.

33. The reliance placed upon the decision in Pawan Kumar Agarwala vs. General Manager-II and Appointing Authority, ***State Bank of India and Others***[5] may not also be of help to the employee. It is a case where this Court applied the propositions laid down in ***Deepali Gundu Surwase*** (supra). This Court found that there was nothing to show that the employee was gainfully employed after the date of dismissal. It is needless to point out that in the first instance, there is an obligation on the part of the employee to plead that he is not gainfully employed. It is only then that the burden would shift upon the employer to make an assertion and establish the same.

34. The decision in Fisheries Department, State of Uttar ***Pradesh*** *vs.* ***Charan Singh***[6] arose out of an award of the Industrial Tribunal under the U.P. Industrial Disputes Act, 1947. Therefore, the same has no relevance to the case on hand.

35. In ***Jayantibhai Raojibhai Patel*** *vs.* ***Municipal Council, Narkhed and Others***[7], this Court referred to the principles laid down in ***Hindustan Tin Works (P) Ltd.*** *vs.* ***Employees***[8] and to the propositions culled out in the ***Deepali Gundu Surwase*** (supra). Though this Court held that the denial of back wages in entirety was not justified, this Court awarded only a lump-sum compensation in that case.

36. Therefore, even applying the ratio laid down in various decisions, we do not think that the employee could be granted anything more than what the High Court has awarded.

37. As we have pointed out at the beginning, the total period of service rendered by the Officer-employee before his dismissal from service, was about 15 years, from 1974 to 1989 and he attained the age of superannuation in February, 2013, meaning thereby that he was out of employment for 24 years. The High Court has taken this factor into consideration for limiting the back wages only to 50% and we find that the High Court has actually struck a balance. We do not wish to upset this balance. Therefore, the Special Leave Petition of the Officer-employee is also liable to be dismissed.

38. Accordingly, both the Special Leave Petitions are dismissed, no costs.

---

[5] (2015) 15 SCC 184
[6] (2015) 8 SCC 150
[7] (2019) 17 SCC 184
[8] (1979) 2 SCC 80