IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
(Sr. No. 224)

(1) **CWP-4634-2012 (O&M)**
Date of Decision : 24.03.2025

The Doraha Co-operative Marketing Society Ltd.

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

(2) **CWP-11602-2013 (O&M)**

Vir Narpinder Singh

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

(3) **CWP-11692-2013 (O&M)**

Raghbir Singh

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

(4) **CWP-11705-2013 (O&M)**

Pritam Singh

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

(5) CWP-4639-2012 (O&M)

The Doraha Co-operative Marketing Society Ltd.

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

(6) CWP-4644-2012 (O&M)

The Doraha Co-operative Marketing Society Ltd.

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Ludhiana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. I.P.S. Doabia, Advocate for the petitioner
in CWP-4634-2012, CWP-4639-2012 and CWP-4644-2012 and for respondent No. 2 in CWP-11602-2013, CWP-11692-2013 and CWP-11705-2013.

Mr. Sharwan Sehgal, Advocate for the petitioner in CWP-11602-2013, CWP-11692-2013 and CWP-11705-2013 and for respondent No. 2 in CWP-4634-2012, CWP-4639-2012 and CWP-4644-2012.

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Harsimran Singh Sethi J. (Oral)

1. In the present bunch of petitions, the only issue raised is whether, upon reinstatement in service, the private respondents-Workmen will be entitled for the grant of back wages as has been awarded by the Labour Court vide Award dated 19.10.2011 (Annexure P-1). The said Award is also under challenge at the hands of the Workmen that only 50% back

wages have been awarded to them instead of 100% back wages and the same Award is under challenge at the hands of petitioner-employer that the grant of 50% back wages to the respondent-workmen is without noticing or recording any evidence as to whether the Workmen were gainfully employed or not.

2. Learned counsel appearing on behalf of the Workmen submits that as the Workmen were not gainfully employed after termination of their services, they were entitled for 100% back wages whereas, learned counsel appearing on behalf of the Employer submits that the Workmen, namely, Vir Narpinder Singh and Raghbir Singh were gainfully employed while they had gone to Canada and were working there and, therefore, it cannot be said that these two Workmen were not gainfully employed while staying in Canada. With regard to the Workman Pritam Singh, he was having a Ration Depot, which he was operating and, therefore, he was also gainfully employed having due engagements, hence, could not have been granted the back wages.

3. Learned counsel appearing on behalf of the Workmen contradicts the said averment and submits that the Workmen were not gainfully employed even while in Canada. Learned counsel for the Workmen further submits that the onus is upon the petitioner-Employer to prove that the respondent-workmen were gainfully employed in Canada and the burden of proof to prove the same is on the Employer and not on the Workmen, which is even clear from the judgment of the Division Bench in a lis between the present parties, wherein, the onus has been put upon the

Employer to prove that the Workmen were not gainfully employee and petitioner-Employer have failed to prove so.

4. I have heard learned counsel for the parties and have gone through the record with their able assistance.

5. Firstly, the law on the issue as to under what circumstances, the back wages are to be granted needs to be enumerated. The back wages are only granted in case, it is alleged by a Workman that during the period when service of workman was terminated and till he got reinstated, the said Workman remained out of the service, he/she was not gainfully employed so as to be granted back wages for the said period so as to compensate the illegal termination of the services. The averment has to be made by the Workmen before claiming the benefit of back wages and prove the same.

6. Further, the said issue has been decided in RSA No. 2200 of 1995 titled as ***Subhash Chander Vs. State of Haryana,*** decided on 22.02.2023. The relevant paragraph 11 of the said judgment is as under :-

> *It is a settled principle of law that upon reinstatement, in case the order terminating services found to be illegal, the employee is to get back wages but the said relief of back wages will depend upon the fact that the said employee was not gainfully employed during the period he/she was out of service. In this regard, the judgment of the Hon'ble Supreme Court of India in* ***Allahabad Bank and others Vs. Avtar Bhushan Bhartiya,*** *2022 Live Law (SC) 405, decided on 22.04.2022 is cited. Relevant paragraph of the said judgment is as under :-*
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> > *"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.

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, 9 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 Others5 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."

7. According to the law mentioned here-in-before, it is the duty of the Workman to make an averment that he/she was not gainfully employed after his/her illegal termination and then prove the said averment, which statement/evidence can be contradicted by the Employer and that the benefit of back wages is not automatic upon the grant of benefit of reinstatement in

service. By the application of the said settled principle of law by the Hon'ble Supreme Court of India, the net result is that it is the Workman who has to aver and prove that he/she was not gainfully employed, which fact can be rebutted by the Employer, hence, it is to be seen whether, there is any averment by the Workmen in the present case that they were not gainfully employed so that their claim for the grant of 100% back wages could be decided.

8. A bare perusal of the record which has been produced before this Court including the Claim Petition filed by the Workmen before the Labour Court under Section 33-C(2) to claim the benefit, no averment has been made by the claimant/Workmen that they were not gainfully employed. In the absence of any such averment, the grant of benefit of 50% back wages by the Tribunal vide its impugned order, is incorrect.

9. Further, nothing has come on record to show as to on what basis, benefit of 50% back wages have been granted by the Tribunal vide its impugned order. It may be noticed that for the grant of benefit of back wages, not only the averments are to be made but the reasons also need to come that as the order terminating the services of Workmen was bad, due to which order the Workmen have been prejudiced and therefore, in order to compensate the Workmen for his suffering, the back wages are being granted.

10. Learned counsel for the Workmen has not been able to rebut that any such factual averment had been made by the Workmen or the necesssary

reasoning has been given by the Labour Court while awarding 50% back wages to the respondent-Workmen.

11. Keeping in view the said fact, when there is no averment that the Workmen were not gainfully employed, the grant of even 50% back wages in favour of Workmen by the Labour Court vide its impugned Award is not correct and cannot be sustained.

12. Further, it has come on record on behalf of the Employer that two of the Workmen were living in Canada and one Workman was operating a Ration Depot. These facts have also gone un-rebutted. Once, this fact becomes crystal clear that the respondent-Workmen were living in Canada, it cannot be said that they were only there on a vacation rather than on an employment. Further, the fact that the Workmen were not working in Canada, has not been rebutted by the respondent-Workmen. Once, the said facts have also come on record that the Workmen were living in Canada after the termination of their services, the grant of 50% back wages by the Labour Court without considering the said fact cannot be sustained.

12. With regard to the Workman Pritam Singh, he was already having a Ration Depot which he used to run. Learned counsel for the Workman submits that the Ration Depot was allotted to him much later after he was dismissed from service. Nothing has come on record to show on which date the said Ration Depot was allotted to the said Workman. Further, nothing has come on record to show that the profit from the said Ration Depot was in any way less than the wages which the Workman would have gained if he were in service with the petitioner. In the absence of any such

fact brought on record, the grant of back wages to the tune of 50% to the respondent-Workman cannot be sustained and the impugned Award dated 19.10.2011 is accordingly set-aside. The Workmen will be entitled for benefit of reinstatement in service but without back wages.

13. Writ petitions are allowed in above terms.

14. Pending miscellaneous application, if any, also stands disposed of.

15. A photocopy of this order be placed on the file of connected cases.

March 24, 2025 **(HARSIMRAN SINGH SETHI)**
kanchan **JUDGE**

Whether speaking/reasoned : Yes
Whether reportable : No