BACK WAGES

The Recent Labour Jurisprudential Trends

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The Legal maxim “ubi jus ibi remedium”, means wherever there is wrong, there must be a remedy and which is the guiding principle for all the courts of law. The granting of back wages in the awards passed by the Labour Courts is based on above principle.

It is common prudence that the employer who commits an irregularity or illegality suffers consequences thereof, especially in the cases where the employer terminates an employee under unjustifiable circumstances. It has been the practice of the Labour Courts that if the termination or removal of employee/workman turns out to be illegal, unjust, unfair and opposed to the law, the Labour Courts have been awarding reinstatement along with back wages.

When once an award is passed, the grant of the back wages becomes a very key issue that disturbs the mind of the judge, akin to the predicament of the judge in passing the sentence after holding a person guilty.

Most of the cases dealt by the Labour Courts and Industrial Tribunals are the dismissals or discharge of workmrn. The same lingers on adjudication for many years due to the complex nature of litigation in this country and the procedure adopted in most of the cases where the ingenuity of the workman or his representative or that of contesting party to drag on the matter for years and years. In the result, if the dismissal of the labourer is held to be illegal, the Labour Courts were normally ordering reinstatement along with full back wages.

The recent trend shows that in many cases, the workmen were found misusing this generosity of the Labour Courts in granting the back wages. In the garb of having been not in the gainful employment, the labour class had resorted to plead and derive the benefit. In fact the pleading of “no gainful employment” had become a legal presumption in the hands of the workmen. But over the course of years, this legal presumption has become a rebuttable presumption at the hands of management.

Pleading & Onus

Any workman approaching the Labour court nevertheless pleads and also swears on oath that he has been rendered unemployed due to

the inaction of the management and thereafter despite his best efforts he could not find any gainful job. This assertion itself sufficed to grant him the back wages. The ruling of **Hon'ble Supreme Court in Hindustan Tin Works (Pvt.) Ltd vs. Employee of Hindustan Tin Works (Pvt.) Ltd. AIR 1979 SC 75-** had made the employer to prove otherwise. The onus shifted on the management. This is where the onus is directed to be shifted on the management to prove otherwise immediately upon such pleadings or evidence comingforth from the employee/workman. After this ruling, the Labour Courts in India have been following the ruling where the principle of onus is shifted on the management. Therefore, the managements are now mandated upon to prove that the workman was gainfully employed.

The Hon'ble High Court of Delhi in a recent judgment 2006 (II) AD (DELHI) 225, has after taking into consideration the judgments in cases; **Mohan Lal Vs. The Management of M/s Bharat Electronics Ltd.** AIR 1981 Supreme Court 1253; **Manorma Verma (Smt.) Vs. State of Bihar & Others** 1994 Supp (3) SCC 671; **M/s Gammon India Ltd. Vs. Sri Niranjan Dass** 1984 (1) SCC 509; **Narotam Chopra Vs. Presiding Officer, Labour Court & others** 1989 Supp (2) SCC 1997 and **Hindustan Tin Works Ltd. Vs. Its employees** AIR 1979 Sc 75; **Delhi**

Consumer Cooperative Wholesale Stores Ltd. Vs. Secretary (Labour) and etc. 1983 Labour and Industrial Cases 1652 and **Hridayanand Vs. G.P. Stores, Allahabad & others** 1996 LLR 433; **State Bank of India Vs. Ram Chandra Dubey** and others 2000 VIII AD (SC) 608; **Food Corporation of India Workers Union Vs. The Food Corporation of India and Another** JT 1996 (6) SC 424; **Haryana Urban Development Authority Vs. Devi Dayal** 2002 II AD (SC) 603; **Indian Railway Construction Co. Ltd. Vs. Ajay Kumar** 2003 II AD (SC) 655; **Hindustan Motors Vs. Tapan Kumar Bhattarcharya & Another** 2002 VI AD (SC) 14; **MP State Electricity Board Vs. Smt. Jarina Bee** JT 2003 (5) SC 542 has laid down the following general principle of law as under:

> "*If the workman wants to claim back wages, it is for him to assert that he has remained unemployed after his termination therefore initial burden is upon him. The moment he makes an assertion to this effect, burden of proof would shift to the management as workman cannot give any proof in the negative in support of his assertion. However, if no such averment is made that the workman remained unemployed after his dismissal, it cannot be said still the management has to prove that he was gainfully employed."*

Thereafter the Hon'ble judges have held that

> "*Back wages is the normal rule to follow if a wrongful retrenchment or dismissal is set aside by the court.*
>
> *There is an element of discretion in the grant of back wages which the court has to exercise keeping in view the facts and circumstances not only of the workmen but also of the management.*
>
> *The question whether the workman was or was not employed is a relevant consideration while granting back wages.*
>
> *If the workman was gainfully employed the back wages could be fully or partly denied to him."*

The Hon'ble court has further held that

> "*We have no hesitation to say that the workmen cannot be heard to argue that irrespective of any plea of unemployment during such interregnum period having been raised the workmen is entitled to back wages as a matter of course."*

Circumstances under which the back wages can be granted

The question of entitlement of backwages would depend on the facts and circumstances of each case. The Court cannot be oblivious to the fact that an employee whose services were terminated wrongly, has not only to fight for his survival by getting such odd jobs as he can, but has also to fight a battle for getting himself reinstated in service. Also, no Court can be oblivious to the grim reality of unemployment pervading in all stratus of the society. Therefore, in such a situation, it would be unjust to insist upon a technical requirement of pleading and proof of absence of gainful employment by an employee who is wrongfully dismissed.

The ruling in **J.K.Synthetic Ltd. Vs. K.P.Aggarwal(2007) 2SCC 433** gives a very interesting reading :

> *"Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any Court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the Court is not holding that the employer was in a wrong or that the dismissal was illegal and invalid. The Court is merely exercising its discretion to award*

a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a Court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which even, there can be a consequential direction relating to continuity of service.

What requires to be noted is that dismissal is affirmed and only the punishment is interfered with (as contrast to the cases where termination is held to be illegal or void), is that there is no automatic reinstatement ; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement . In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not

worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purpose of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.

But there are two exceptions. The first is where the Court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the Court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages etc. will be the same as those applied in the cases of an illegal termination".

Whether granting of back wages is automatic?

In the formative years of labour jurisprudence in this country for about five decades, the Labour Courts or Industrial Tribunals were awarding full back wages as a normal consequence in the cases of illegal and unjustified termination of workman. By the dawn of present century in **Ram Ashrey Singh and Anrs Vs. Ram Bux Singh (2003) LLR 415 SC,** the Hon'ble Supreme Court held that grant of back wages is not automatic entitlement. It had held that the same is discretionary depending upon the facts and circumstances of each case. Further in the case of **M.P. State Electricity Board Vs. Jerina Bee (2003) LLR 848 SC**, it was held that when termination of workman is set-aside the award of back wages is not a natural consequence.

When nobody can claim wages for the period of his absence to the employment, without leave or any justification, the principle ' no work no wages' will apply. Therefore, the order for payment of wages for the unauthorised absence of the petitioner for more than 15 years is not justified.

In a recent ruling **2008 -III-LLJ 273, the Division Bench of Bombay High Court in Taranjit Singh Vs Maharashtra SRTC** held that the contention of the management to the effect that the workman

did not have a clean record in the past becomes irrelevant in the matter of granting of back wages, when the termination itself is found to be illegal.

Hon'ble Supreme Court while dealing with the subject in the matter of **Airport Authority of India and Others Vs. Shambhu Nath Das reported as 2008 III-LLJ-353 SC** had held that there was no justification whatsoever to grant any back wages on the general principle that nobody could be directed to claim wages for the period that he remained absent without leave or without justification.

Conclusion: Though many a jurist may suggest that there should be a clear spelling out of the law by the Legislature on the aspect of grant of back wages by Industrial Adjudicative fora, the author is of the humble opinion that the judicial pronouncements by the Hon'ble Supreme Court and various High Court have been taking care of the circumstances to prevent any injustice to any of the parties as could be seen from the latest judgment of Hon'ble Supreme Court where granting of 50% of the back wages have been reduced to 25 % in the case of Executive Engineer, Public Health Division Vs Kamlesh reported as 2008-II-LLJ-826(SC)