IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present :-
The Hon'ble Justice TAPABRATA CHAKRABORTY
And
The Hon'ble Justice PARTHA SARATHI SEN

MAT 954 of 2024

Sri Man Mohan Kumar Shahu
Vs
Union of India and Ors.

For the writ petitioner: Mr.Achin Majumdar, Adv.,
Ms. Ananya Neogi, Adv.

For the UOI: Mr. Anirban Mitra, Adv.

Hearing concluded on: 29.11.2024.

Judgment on: 05.12.2024.

PARTHA SARATHI SEN, J. : –

1. In this appeal the judgement dated 10th April, 2024, as passed in WPA 18298 of 2013 by the learned Single Bench is impugned. By the said judgement the learned Single Bench while allowing the said writ petition was pleased to set aside and quash the finding of the disciplinary authority as well as the appellate authority and also found that the penalty of compulsory retirement as imposed upon the writ petitioner/appellant is not in accordance with law and thus directed the respondents/authorities to grant all consequential notional benefits as

would be available to him, had he continued in service till the actual date of his superannuation.

2. While disposing the said writ petition the learned Single Bench, however, declined to pass an order upon the respondents/authorities for payment of back wages to the writ petitioner. The writ petitioner/appellant thus felt aggrieved with the said portion of the order of the learned Single Bench in not passing any order for payment of back wages and preferred the instant appeal.

3. For effective adjudication of the instant appeal some admitted facts are required to be narrated and those are as under:-

i. The writ petitioner/appellant while posted as an Assistant Sub-Inspector of RPF post, Howrah I, goods-shed was arrested on 19.09.2009 in connection with a criminal case, under Sections 304B/497/498A IPC.

ii. The writ petitioner/appellant was released on bail on 29.10.2010.

iii. The writ petitioner/appellant was placed on suspension on 17.02.2010 with effect from 19.09.2009.

iv. Charge sheet along with statement of article of charge under Rule 153 of RPF Rules, 1987 along with statement of allegation was submitted against the writ petitioner/appellant on 16.02.2012.

v. The writ petitioner/appellant was awarded punishment of compulsory retirement on 23.11.2012.

vi. The statutory appeal preferred by the writ petitioner/appellant was rejected on 17.04.2013.

vii. Challenging the finding of the disciplinary authority as well as the appellate authority, the writ petitioner/appellant filed the writ petition which was affirmed on 14.06.2013.

viii. The writ petition was disposed of by the impugned judgement on 10.04.2024.

ix. During the pendency of the writ petition the writ petitioner/appellant had crossed his actual date of superannuation i.e. 31.10.2023.

4. In course of his argument, Mr. Majumdar learned advocate for the writ petitioner/appellant at the very outset draws attention of this Court to the impugned judgment dated 10.04.2024. It is submitted by him that while passing the impugned judgment the learned Single Bench duly noticed that Rule 143.2 of the RPF Rules, 1987 (hereinafter referred to as the said 'Rules' in short) is *ultra vires* since the same is violative of Articles 14 and 19 (1)(d) of the Constitution of India as has been observed and has been struck down by a Co-ordinate Bench of this Court in the case of ***Suresh Chowdhury vs. Union of India and Ors*** *reported in* ***2008 (2) SLR 426*** and therefore the suspension as imposed upon the writ petitioner/appellant could not have been enforced for the said reason and thus the very basis of the charge sheet as submitted against the delinquent has become defective and therefore the punishment as inflicted upon the writ petitioner/appellant cannot be sustained. It is

further submitted by Mr. Majumdar that despite such finding in favour of the writ petitioner/appellant the learned Single Bench for no reason whatsoever has failed to visualize that there cannot be any embargo in granting payment of back wages to the writ petitioner/appellant especially when the writ petitioner/appellant was suspended and/or charge sheeted for no fault of his own. It is submitted further that before the learned Single Bench there were sufficient materials to come to a finding that the respondents/authorities are guilty of victimizing the writ petitioner/appellant.

5. In course of his argument, Mr. Majumder further submits that the learned Single Bench has also failed to visualize that the writ petitioner/appellant was not at all responsible on account of long pendency of the litigation and therefore the writ petitioner cannot be blamed and/or penalized by depriving him of the back wages to which he is lawfully entitled.

6. It is further submitted by Mr. Majumder that since the entire service career of the writ petitioner/appellant has been jeopardized and/or spoiled on account of baseless charge as framed by the respondents/authorities, grant of the back wages is the adequate remedy to the writ petitioner.

7. Mr. Majumdar submits that considering the principle of natural justice and/or the immense suffering of the writ petitioner /appellant on account of vindictive attitude of the respondents/authorities the instant appeal may be allowed by modifying the impugned judgement thereby

directing the respondents/authorities to pay the entire back wages to the writ petitioner/appellant from the date of his suspension till his actual date of retirement (31.10.2023) upon adjusting subsistence allowance as received by the writ petitioner/appellant during the period of his suspension.

8. It is also submitted by Mr. Majumder on instruction that in the mean time the writ petitioner/ appellant was acquitted from the charges in connection with the criminal trial as initiated against him. In this regard Mr. Majumder draws attention of this Court to paragraph 7 of the impugned judgement wherein the learned Single Bench has also observed that the criminal case as initiated against the writ petitioner /appellant in connection with the unnatural death of the writ petitioner's wife resulted in an order of acquittal and the writ petitioner/appellant has been set at liberty.

9. It is lastly submitted by Mr. Majumder on instruction that even on the day of hearing the writ petitioner/appellant has not received any amount from the respondents/authorities as directed to be paid by the learned Single Bench while disposing the said writ petition.

10. In course of his argument Mr. Majumder places his reliance upon the following three reported decisions namely:-

i. ***Union of India vs. Madan Lall Ram*** *reported in* ***1997 (1) CLJ 411;***

ii. ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Ors.*** *reported in* ***(2013) 10 SCC 324; and***

iii. ***Pradeep s/o Rajkumar Jain vs. Manganese Ore (India) Ltd. and Ors.*** *reported in* ***(2022) 3 SCC 683.***

11. Per contra, Mr. Mitra, learned advocate for the respondents/authorities at the very outset submits that admittedly challenging the impugned judgement the respondents/authorities though have not preferred any cross-appeal before this High Court however, he supports the finding of the learned trial court as mentioned in paragraph 17 of the impugned judgement.

12. It is submitted by Mr. Mitra that while disposing the writ petition learned Single Bench duly noticed that in the writ petition as filed by the writ petitioner/ appellant there was no averment that during suspension the writ petitioner was not gainfully employed anywhere and in the prayer portion of the said writ petition no specific prayer has been made for the disbursement of the back wages. It is thus submitted that in view of such, the learned Single Bench is quite justified in not passing any order for payment of back wages upon the respondents/ authorities.

13. It is further submitted by Mr. Mitra that the reported decisions as cited from the side of the appellant are distinguishable from the facts and circumstances as involved in the present *lis* and thus the said three reported decisions have got no bearing at all in the instant appeal.

14. It is lastly submitted by Mr. Mitra that the writ petitioner/appellant by issuing a letter dated 06.11.2010 specifically stated to the respondents/authorities that at that material time he was suffering from mental illness and immediately after his recovery he would join his service. It is submitted by Mr. Mitra that even after issuance of such letter the writ petitioner/ appellant made no prayer to the respondents/ authorities expressing his willingness to join for duty.

15. It is thus submitted that for the aforementioned reasons the instant appeal may be dismissed.

16. We have meticulously perused the entire materials as placed before us in course of hearing of the instant appeal. We have also gone through the impugned judgement as passed by the learned Single Bench while disposing WPA 18298 of 2013. We have given our due consideration over the submissions of the learned advocates for the contending parties.

17. Since in the instant appeal the writ petitioner/appellant has only impugned the finding of the learned Single Bench in not allowing the writ petitioner's/appellant's prayer for grant of back wages, we propose to confine our discussion to the said limited question especially when admittedly no appeal has been preferred by the respondents/authorities impugning the judgement dated 10th April 2024 as passed by the learned Single Bench.

18. In course of his argument Mr. Majumder has drawn our attention to page no.38 of the paper book which is a photo copy of the letter of suspension dated 17.02.2010 whereby and whereunder the

respondents/authorities placed the writ petitioner/appellant in suspension with effect from 19.09.2009 with a direction to the writ petitioner to present himself to RPF HWG post for attendance daily with a further direction to stay at his head quarters on release from his judicial custody. Admittedly from the statement of the article of charge it has been noticed by the learned Single Bench as well as by us that on account of non-compliance of the said direction as contained in the letter of suspension dated 17.02.2010 charge sheet followed by charges were framed against the writ petitioner/appellant which the learned Single Bench rightly found was violative of Articles 14 and 19(1)(d) of the Constitution of India pursuant to the dictum in the case of ***Suresh Chowdhury (supra)*** as passed by a Co-ordinate Bench of this Court.

19. Mr. Majumdar in course of his argument put much emphasis upon paragraph 38.5 of the reported decision of ***Deepali Gundu Surwase (supra).*** It has been submitted by him that while passing the impugned judgement learned Single Bench though considered the propositions of law as laid down in ***Deepali Gundu Surwase (supra)*** but for the reason best known to the learned Single Bench, he has taken a contrary stand while denying full back wages to the writ petitioner/appellant without visualizing that while submitting charge sheet and/or while framing charge against the writ petitioner/appellant the respondents/authorities have failed to follow the established procedures of law.

20. Since in paragraph 17 of the impugned judgement the learned Single Bench had come to a specific finding that since the writ

petitioner/appellant made no specific averment in the writ petition he is not entitled to any back wages, we propose to look to the law of land in this regard for effective disposal of the instant appeal.

21. Though in course of his argument Mr. Majumder put much emphasis upon paragraph nos.38.5 and 38.6 of the reported decision of ***Deepali Gundu Surwase (supra)*** but in our considered view for better appreciation of the subject matter of dispute as involved in the instant *lis*, the entire paragraph no.38 of the said reported decision is required to be looked into and thus the same is quoted below in verbatim:-

> *"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 (supra).

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) 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."

22. On perusal of paragraph no.38 more specifically sub para 38.3 of the reported decision of the Hon'ble Apex Court in the case of ***Deepali Gundu Surwase (supra)*** it appears to us that in the said reported decision the Hon'ble Apex Court in no uncertain terms had held that an employee/workman whose service has been terminated and who is desirous of taking back wages is mandatorily required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he was not gainfully employed or was employed on

lesser wages elsewhere. It has been further held by the Hon'ble Apex Court that in the event the employer wants to avoid payment of full back wages it is equally mandatory to plead and to lead cogent evidence to prove that the employee/workman was getting wages equivalent to the wages he was drawing prior to termination of his service.

23. Admittedly, as rightly noticed by the learned Single Bench as well as by us that within the four corners of the writ petition there is no whisper at all by the writ petitioner that since the day of his termination from service till the date of imposition of his punishment or even at the time of filing of the writ petition he was not employed anywhere gainfully or on lesser wages. In fact, in the writ petition we noticed that no specific prayer has also been made by the writ petitioner for grant of back wages. In further considered view of us in the reported decision of ***Pradeep (supra)*** the Hon'ble Apex Court practically relied upon the reported decision of ***Deepali Gundu Surwase (supra).*** In the other reported decision namely; ***Madan Lall Ram (supra)*** as cited from the side of writ petitioner/appellant though the Principles of Law regarding illegal termination of an employee has been duly discussed but nowhere in the said reported decision it has been stated that there is no requirement of any specific pleading in the writ petition that during the period of suspension the writ petitioner is not gainfully employed anywhere while claiming back wages.

24. On perusal of the entire materials as placed before us and on consideration of the reported decision of the Hon'ble Apex Court as cited

from the side of the Bar it appears to us that the legal position is fairly settled by a catena of decisions that direction to pay back wages in its entirety is not an automatic consequent upon the declaration of dismissal order bad in law. The concept of discretion is in-built in such exercise. The court is required to exercise such discretion reasonably and judicially keeping in view the facts and circumstances of the case. Each case, of course, would depend on its own facts.

25. During the period from 19.09.2009 till 29.10.2010 the writ petitioner was in custody. Upon having released on bail on 30.10.2010 till the date of imposition of punishment on 23.11.2012, he did not report on the ground of ailments as reported by a letter dated 06.11.2010 nor did he express any desire to join.

26. It is no more *res integra* that direction towards payment of back wages is a discretionary power which has to be exercised by a court keeping in mind the facts in their entirety and neither a strait jacket formula nor a rule of universal application can be laid down in such cases.

27. We have noticed that the writ petitioner was served with the letter of suspension on 17.02.2010 but the writ petitioner made no venture to challenge the said letter of suspension in any court of law. Subsequently on account of alleged violation of the conditions of the suspension notice by the writ petitioner/appellant charge sheet was submitted against the writ petitioner/appellant. The writ petitioner/appellant again did not challenge such charge sheet as well as charge as framed against him and

on the contrary he participated in the disciplinary proceeding though in the said disciplinary proceeding as well as in the appellate proceeding he raised the point of legality and correctness of the charge as framed against him. It further appears to us that during the pendency of the writ petition the writ petitioner made no endeavour for early disposal of the instant writ petition.

28. In view of the facts as stated above and keeping in mind the chronology of events and especially considering the fact that the writ petitioner/appellant has miserably failed to produce any material on record to prove that during the entire period of his suspension he remained unemployed, we are not inclined to exercise our discretion in favour of the appellant.

29. In our considered view the instant appeal is devoid of merit and is thus dismissed. The impugned judgement dated 10th April, 2024 as passed in WPA 18298 of 2013 is thus upheld.

30. There shall be however no order as to costs.

31. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(PARTHA SARATHI SEN, J.) **(TAPABRATA CHAKRABORTY, J)**