

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL, ADDITIONAL BENCH

ALLAHABAD

Dated: this the 20th day of February, 1997

ORAM : Hon'ble Mr. S. Das Gupta AM
Hon'ble Mr. T. L. Verma JM

ORIGINAL APPLICATION NO. 854/95

Havaldar Yadav, aged about 51 years,
s/o Antu Ram, r/o Village & Post Office
Kharagpur, Tahsil Lalganj,
District Azamgarh - - - - - Applicant

C/A Sri S. A. Ansari

Versus

1. Union of India through Secretary
of Post and Telecommunication,
Union Govt. New Delhi.

2. Director, Postal Services,
U. P. Circle, Lucknow.

3. Chief Post-Master General,
U. P. Circle, Lucknow.

4. Senior Superintendent of Post Offices
Azamgarh - - - - - Respondents

C/R Km Sadhna Srivastava

WL

ORDER

BY HON'BLE MR. S. DAS GUPTA A.M.

This application has been filed under section 19 of the Administrative Tribunals Act, 1985 by Havaldar Yadav, who was appointed as an Extra Departmental Branch Post Master (hereinafter referred to as E.D.B.P.M.) on 23.6.1964. On 4.9.1988 his services were terminated. The applicant preferred an appeal from the order of termination of his services but the same was rejected on 17.5.1969. This led the applicant to file a civil appeal suit before the Court of Munsif, Aligarh for a decree declaring the order of dismissal from services as null and void. The original suit no. 315 of 1969 was dismissed on 21.10.1974. The applicant filed a civil suit no. 156 of 1971 which was also dismissed. He thereafter preferred a Second appeal no. 362 of 1975 before the High court of Judicature at Allahabad. This appeal was allowed by the High court by the order dated 22.2.1993 holding that the order dated 4.9.1968 by which the applicant's services were terminated and also the appellate order dated 17.5.1969 were illegal and both these orders were set aside. The respondents were also directed to reinstate the applicant on the post of E.D.B.P.M. The applicant filed a certified copy of the order of the High court to the appropriate authority but the reinstatement of the applicant on the post of E.D.B.P.M. was postponed on account of a Stay order passed in the O.A.No. 399 of 1993 filed by Smt. Umda Kumari. The said O.A. was dismissed by a bench of this Tribunal by an order dated 27.5.1994. Thereafter on 26.7.1994, the applicant was reinstated in service. The applicant then filed a representation/notice under section 80 CPC dated 10.3.1995, for payment of the back wages. The

representation was rejected by the impugned order dated 22.6.1995. This has led the applicant to file the present application seeking a direction to the respondents to pay to him the back wages with interest since 4.9.1968. till the date of his reinstatement.

2. The applicant's case is that since the order of termination of his services was held to be illegal by the Hon'ble High court, he is entitled to the back wages since 4.9.1968 i.e. the date of termination of his services till 26.7.1994 i.e date of his reinstatement. He has stated that in the earlier Civil suit, the question regarding payment of back wages was not raised and, therefore, the applicant is entitled to file a fresh application claiming arrears of salary.

3. In the counter affidavit filed by the respondents, the facts averred by the applicant have not been disputed. The respondents have, however, explained the circumstances in which the services of the applicant were terminated. It appears therefrom that one Sri Harihar Singh was earlier working as E.D.B.P.M. Kharagpur. The post fell vacant as his services were terminated. On that vacancy, the applicant was appointed purely on a temporary and provisional basis. Meanwhile, however, the earlier incumbent had preferred an appeal against the order of termination of his services. This appeal was allowed and the earlier incumbent was reinstated in service and consequently the services of the applicant were terminated. With regard to the back wages the stand of the respondents is that he is not entitled to the same on the basis of the principle of 'No work no pay'. It has also been submitted that

W

there is no order in the judgment of the High court for payment of back wages. It was the applicant's mistake that he did not claim the relief of back wages in the original suit and, therefore, the present application is not maintainable at this belated stage.

The further averment of the respondents is that the post of E. D. B. P. M. is not ~~a~~ civil post and that it is governed by separate set of rules, i.e. E.D.A. (Conduct & service) Rules, 1964. In these rules, an employee means Extra Departmental Agent (E.D.A.). The services of E.D.A. are in the shape of a contract based on principles of ' non work no pay.'

4. The applicant has filed a rejoinder affidavit, in which he has mainly dwelt upon the legality of the order by which his services were terminated. He has further stated that he was prevented from discharging his duties as E.D.B.P.M. not because of his own fault but due to the reason that the respondents had passed a wholly illegal order of termination of his services and, therefore the principle of ' no work no pay' is wholly inapplicable to the facts and circumstances of the present case. He has further stated that his claim for back wages constituted a recurring cause of action and, therefore, the claim is not barred by limitation. He has also controverted the contention of the respondents that the post of EDBPM is not a civil post stating that the said post is a civil post and, therefore, the holder of such a post is entitled to all the benefits admissible to an employee of the Union of India holding a civil post.

5- We heard the learned counsels for both the parties and carefully perused the pleadings on record.

6. The learned counsel for the respondents urged before us that present application is time barred and, in any case, the applicant, not having claimed the relief of back wages in the original suit, a fresh claim for such back wages would be barred by principle of res-judicata.

7. On the aforesaid submissions, we have for our guidance the principle of law laid down by the Hon'ble Supreme in the case of Maimoona Khat-un Versus State of U. P. AIR 1980 SC 1773 . In this case, the Hon'ble Supreme court inter alia held that :

* where an employee is dismissed or removed from service and is reinstated either by the appointing authority or by virtue of the order of dismissal or removal being set aside by a Civil court the starting point of limitation under Article 102 of the Limitation Act of 1908 would be not the date of order of dismissal or removal but the date when the right actually accrues, that is to say, the date of the reinstatement by the appointing authority where no suit is filed or the date of the decree where a suit is filed and decreed. *

8. In case before us, the applicant's service were no doubt terminated on 4.9.1968. However, the order of termination was set aside by the High court of Judi-

cature at Allahabad only by its order dated 22.2.1993. Thereafter, he was actually reinstated in service on 26.7.1994. Thus the present application which was filed in August, 1995 cannot be considered to be barred by limitation. So far as the question relating the present application being barred by resjudicata is concerned, the matter was considered when ~~the~~ similar controversy arose before this Tribunal in TA no. 335 of 1986(CS no. 53 of 1985) Khwaja Raziul Hasan V/s. Union of India. In that case the applicant was removed from service. He filed civil suit for declaration that order of removal was illegal. The suit was decreed and the declaration sought for was granted. Appeal filed by Union of India was dismissed. Thereafter the applicant was reinstated in service and on refusing to pay the arrear of salary, he filed suit no. 53/85 claiming back wages. The respondents had taken the plea that the application was barred by limitation and also the provision of Order II Rule 2 CPC which provide that where the plaintiff omits to sue in respect of, or intentionally relinquishes, ~~the~~ portion of his claim, he shall ^{not} afterwards sue in respect of ^{the} portion so omitted or relinquished. The bench of the Tribunal relying on the case of Maimoona Khatun (supra) held that the case was not barred by limitation as the cause of action in this case originally had arisen only after the appeal filed by the respondents was finally decided. As regard the omission to claim the back wages the Tribunal relied on the decision of the Hon'ble Supreme court in the case of State of Madhya Pradesh V/s State of Maharashtra 1977 SC 1465 and also the decision of High Court of Judicature at Allahabad in the case of Municipal Board V/s

Smt. Chanerawati AIR 1979 And 101 held that the suit could not be barred by provision of ORDER II ~~to~~ Rule 2 C.P.C.

9. We are in respectful agreement with the aforesaid view. Merely because the applicant did not claim back wages in the declaratory suit he filed before the Civil court, he cannot be ~~restrained~~ from claiming the same by filing a fresh petition after the order of termination of his services was set aside.

10. The learned counsel for the respondents had sought reliance in this regard on a decision of the High court of Judicature at Allahabad in the case of Balkirishna Malik V/s State of U.P. 1989 (1) LBEC 162. This case however was on the question of granting interest on the salary and therefore the decision in this case was rightly held to be not applicable to the controversy in Khwaja Raziul Hasan case by the Allahabad bench of the Tribunal. We are also in respectful agreement .

11. As regards the plea taken by the respondents that the applicant was not the holder of a civil post is wholly untenable. In a catena of decisions by the Hon'ble Supreme court and other subordinate courts, it has been held unequivocally that the Extra departmental agents are the holders of civil post. We may mention in this regard the ~~case of P.K.Rajamma~~ decision of Hon'ble Supreme court in the case of Superintendent of Post Offices V/s. P.K.Rajamma AIR 1977 SC.1677

SC

12. Lastly, the plea taken by the respondents is that no back wages can be paid on the basis of the principle of "No work No pay". In this regard, it is now fairly well settled that if an employee has been prevented from ~~performing~~ his duties for reasons not attributable to him, the principle of "no work no pay" cannot be invoked to deprive him of the salary he would otherwise have been entitled ^{to}. Thus this plea taken by the respondents is also not tenable.

13. The question however remains as to whether the applicant should be granted full back wages from the date his services were terminated. On this question, no hard and fast rule has been laid down, nor there is any thumb rule by which the quantum of back wages payable can be determined. There are, however, several decisions of Hon'ble Supreme court, which would indicate that various factors arise in the facts and circumstances of each case should be taken into consideration to determine the quantum of back wages to be granted. In the case of Managing ~~of~~ Director, U.P. Warehousing Corporation A.I.R. 1980 SC 840 the Hon'ble Supreme court had held that a High court or Tribunal, in the event of dismissal being found illegal, ^{should} simply quash the ~~same~~ and should not give a positive direction for payment to the employee full back wages and that such powers can properly be exercised by an Industrial Tribunal or Labour court, which should consider whether the employee was gainfully employed during intervening period.

14. In the case of Tarlochan Singh Versus Punjab State Warehousing Corporation 1992 SCC (L&S) 242, the Hon'ble Supreme court held that the appellant

in that case would not be entitled to back wages in the facts and circumstances of the case. In that case services of the applicant were terminated by giving him one months salary in lieu of one month's notice on the basis of certain allegation of misappropriation of Corporation fertiliser. In a subsequent criminal case on the same issue, the prosecution failed to produce evidence to substantiate charges against him. On his acquittal, the appellant filed writ petition before the High court of Judicature at Allahabad, challenging the order of termination, seeking relief for reinstatement with back wages. The High court dismissed the writ petition holding that that termination of services was by an innocuous order. The Hon'ble Supreme court held that the order of termination was not sustainable as under the relevant rules, 2 months' notice or pay in lieu thereof should have been granted. Order of termination was, therefore quashed but in the facts and circumstances of the case, back wages were not granted. Similarly in the case of Chairman Governing counsel, Anjuman Arts, Com & Sc V/s Sayyed M_ohd. Shafi JT 1996(1) SC 326 the Hon'ble Supreme court refused to grant back wages in the case where the order of termination was set aside without specific direction for payment of arrear of salary and in a subsequent enquiry it was found that the respondent was gainfully employed.

15. In the case of Surjit Ghosh V/s Chairman Cum-Managing Director, U.C.O bank 1995 SCC(L&S) 529 the Hon'ble Supreme court had ordered payment of compensation of Rs.50,000/- in lieu of claim of arrears of salary, taking into account the fact that back wages claim would come to Rs.20 lakhs and as the money belongs to the public such huge arrears cannot be paid to any one for doing no work during such long period.

WL

16. The aforesaid decisions and various other decisions of the Hon'ble Supreme court were considered by the High court of Judicature at Allahabad. In the case of Banaras Hindu University versus J.N. ~~Pat~~ Tripathi (1996) 3 UPLBC 1976, After considering the ~~various~~ decisions, the High Court ~~at Allahabad~~ sought to ~~enumerate~~ to be the factors which are/kept in mind at the time of award of back wages when an order of termination, removal or dismissal is set aside. These factors are :-

- (a) whether employee was gainfully employed during the period he was not allowed to work ;
- (b) the conduct of the parties;
- (c) Hardship of the parties;
- (d) public interest.

17. In the case before us, services of the applicant ~~were~~ terminated as far back as in 1968. He was actually reinstated in service only in July, 1994. Thus the applicant was out of service for nearly 26 years. Back wages for the entire period would work out to a huge amount. It would not be appropriate to burden the Exchequer with such a huge outgo of funds, ~~especially~~ when the order setting aside the earlier order of termination of service was on a technical ground of not serving the requisit notice ^{before} ~~after~~ termination of his services. The facts which have come out clearly indicate that the applicant was appointed on the vacancy caused by termination of the services of the earlier incumbent. In accordance with E.D. (Conduct and Service) rules, appointment on such

vacancy is provisional and is liable to terminated if the earlier incumbent is restored back to service on appeal or otherwise. In the present case, the earlier incumbent was actually reinstated in service when his appeal was allowed. The present applicant, therefore ~~was~~ necessarily to make way for the earlier ⁱⁿ incumbent. However, under the ~~rule~~, it was necessary that he was granted requisite notice, which was not done. Thus ordering grant of full wages would mean that two persons would ~~have been~~ be paid salary for the same post.

18. We have also, on the other hand, to consider that the applicant has been fighting legal battle starting from the Civil court ending with the Division bench of the High court. He was thus put to considerable expenses to obtain decision in his favour.

19. So far as the question of employment is concerned, there is nothing on record to indicate whether he was otherwise employed during the intervening period. This is not the case of the respondents either.

20. After considering the various factors involved in the case, we are of the view that ends of justice would be served by ordering lumpsum payment of Rs.50,000/- or 50% of the back wages whichever is less.

W.L.

21. We accordingly direct the respondents to pay the applicant Rs.50,000/- (Rupess Fiftythousand) or 50 percent of theback wages, whichever is less, within a period of 3 months from the date of communication of the order. We see no reason to separately order payment of any cost.

Y. P. Verma
MEMBER (J)

W. E.
MEMBER (A)

SOI