

17. *In view thereof, the petitioners are also covered by the aforesaid interpretation of Section 2 of the Act of 2021 as given in the present judgment. Orders impugned in different writ petitions on the grounds stated above are covered by the earlier judgments as well as by findings given above in this judgment and, hence, petitioners are held to be entitled for counting of their services rendered as daily wagers for pensionary benefits. All impugned orders are set aside."*

9. The present Rules of 1981 are parallel to the Rules of State Government which have been read down by the Supreme Court in the case of Prem Singh (supra), being held violative of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wager employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their daily wage services. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra) and Dr. Shyam Kumar (supra).

10. Hence, the writ petition is *allowed*.

11. Respondent no.2-Mukhya Nagar Adhikari, Nagar Nigam, Bareilly is directed to ensure regular payment of pensionary and other retiral benefits to the petitioner under the Rules of 1981, counting their entire service including the duty performed as daily wager employee of the Nagar Nigam within a period of three months.

(2023) 5 ILRA 1577

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.04.2023

BEFORE

**THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.**

Special Appeal No. 344 of 2021

**Chairman & Managing Director, Central
Bank Of India, MumbaiAppellant
Versus
Vijay Agarwal ...Respondent**

Counsel for the Appellant:
Sri Vishnu Pratap, Sri Vijay Kumar

Counsel for the Respondent:
Sri Ajay Rajendra

Civil Law - Service Matter – Back wages - When dismissal order quashed on ground of quantum of punishment and not on merit – In the instant case the employee was out of service pursuant to order of dismissal dated 04.08.2006 until his reinstatement on 24.08.2013. Aggrieved by the dismissal order, the employee filed a writ petition, which came to be allowed only on the quantum of punishment. Writ Court was of the opinion that the punishment imposed was not commensurate with the guilt. Termination of the employee was not held to be wrongful by the writ Court. Rather, the writ Court was of the opinion that a lesser punishment would suffice, having regard to the guilt of the employee. The employee nowhere pleaded that he was not gainfully employed or employed on lower wages during the period of dismissal of service. Held: It cannot be said that the guilt of the employee stood wiped off; rather, reinstatement was directed as a consequence of the imposition of a lesser punishment. The employee would not be entitled to back wages for the period he has not performed

his duties nor consequential benefits, as a consequence of such reinstatement. Having regard to the fact that the employee was out of employment for eight long years, 30% of back wages was directed to be paid to the employee for the period he was out of employment. (Para 12, 13, 14)

Allowed. (E-5)

List of Cases cited:

1. Pradeep S/o Raj Kumar Jain Vs Manganese Ore (India) Ltd. & ors., (2022) 3 SCC 683
2. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Vishnu Pratap learned counsel appearing for the appellants/respondents and Sri Ajay Rajendra, learned counsel appearing for the respondent/petitioner.

2. Petitioners, herein, a bank, by the instant intra court appeal has raised challenge to the judgment and order dated 26 July 2021, passed by the learned Single Judge in Writ-A No. 43450 of 2014 (Vijay Agarwal vs. Chairman and Managing Director Central Bank of India and others) to the extent that the impugned order has directed appellants to pay arrears of salary and consequential benefits for the period of dismissal until reinstatement.

3. The respondent/petitioner was out of service pursuant to an order of dismissal dated 4 August 2006 until his reinstatement 24 August 2013. Aggrieved, by the dismissal order the respondent/petitioner filed a writ petition being Writ-A No. 17804 of 2007, which came to be allowed

only on the quantum of punishment imposed on the respondent/petitioner. The writ Court was of the opinion that the punishment imposed is not commensurate to the guilt, accordingly, a lesser punishment would suffice. The operative portion of the order reads thus:

"Hence, the punishment awarded against the petitioner is disproportionate to the charges against him. Hence, the order dated 4.8.2006 passed by the disciplinary authority, respondent no. 3, the order dated 19.12.2006 passed by appellate authority, respondent no. 2 and the charge sheet dated 6.6.2005 (Annexures No. 1,2 and 3 respectively to the writ petition) are hereby quashed. The disciplinary authority will consider the matter afresh for awarding any lesser punishment apart from dismissal or removal from service and will pass an appropriate order as expeditiously as possible preferably within two months after furnishing of the certified copy of this order.

Accordingly, the present petition is hereby allowed. No order as to cost."

4. It appears that the appellant-respondent filed a review petition being Review Application No. 380227 of 2011, seeking review of the writ Court order dated 20 November 2012. The writ Court disposed of the review application clarifying that the writ Court order is required to be complied after reinstating the petitioner/employee, thereafter, consider the matter afresh for awarding lesser punishment. Relevant portion of the order reads thus:

"In view of fact the judgment and order which charge sheet dated 6.6.2005 annexure-3 to the writ petition was

quashed. It is clarified that by judgment and order dated 20.11.2012 only orders passed by the disciplinary authority and appellate authority dated 4.8.2006 and 19.12.2006 are quashed.

The respondents will ensure the compliance of the judgment and order dated 20.11.2012 firstly by reinstating the petitioner employee and subsequently by considering the matter afresh for awarding lesser punishment.

Accordingly, the review petition is finally disposed off."

5. In other words, the writ Court clarified that the appellant/bank is required to award a lesser punishment other than dismissal/removal. The writ Court, however, did not return a finding that the disciplinary enquiry was vitiated or that the petitioner was not found guilty of the charge levelled against him. Thereafter, in compliance, respondent/petitioner came to be reinstated in service and from the stage of charge-sheet a fresh enquiry was conducted, finally the disciplinary authority imposed punishment vide order dated 11 June 2014, bringing down two lower stages of scale of pay permanently w.e.f. 31 July 2013 (order passed on the correction application filed by the appellant) to the order passed on the review petition. Aggrieved by the punishment order, respondent/petitioner again approached the writ Court, wherein, the impugned order has been passed.

6. The appellant/respondents are aggrieved that the writ Court while upholding the order of the disciplinary authority partly, allowed the writ petition, insofar, it deprived the respondent/petitioner arrears of salary for

the period for which the order of dismissal was operative. The relevant portion of the impugned order reads thus:

It becomes relevant to note that upon the matter being remanded all that remained for the respondents to consider was what punishment in substitution was liable to be imposed other than dismissal or removal from service. Once the order of dismissal came to be set-aside by the Court, the only punishment which could have been imposed and was in fact imposed by the respondents themselves was of the petitioner being brought down to two lower stages in the pay scale. The Court has not been shown any power vesting in the respondents to deprive the petitioner of emoluments for the period during which the order of dismissal operated. In view of the aforesaid discussion and to that limited extent, the Court finds itself unable to sustain the decision of the respondents.

The additional submission of Sri Tiwari that on the principle of "no work no pay", the petitioner must be deprived of arrears during the period when the order of dismissal operated, is noticed only to be rejected for the following reasons. The principle of "no work no pay" would apply where a workman or employee on his own chooses not to work or discharge his duties. However, it can have no application to a case where the employer by his own action has prevented the employee from discharging duties. In the present case, the petitioner stood dismissed from service. It is therefore not a case where the petitioner of his volition chose not to discharge duties.

Accordingly, the writ petition is partly allowed. The impugned order insofar as it deprives the petitioner of arrears for

the period from which the order of dismissal operated stands set aside. The petitioner shall be entitled for all consequential benefits.

7. In the aforementioned backdrop, it is submitted that the earlier punishment order of dismissal/removal from service was not set aside by the writ Court on merit. No finding was returned that the findings returned in the enquiry was per se perverse or is not based on the rules applicable to the respondent/petitioner. In other words the findings returned by the enquiry officer with regard to the guilt of the respondent/petitioner was upheld. The writ Court merely remanded the matter to the disciplinary authority to award a lesser punishment as in the opinion of the Court, having regard to the facts and circumstances of the case, the punishment of dismissal/removal from service awarded to the respondent/petitioner was not commensurate to the guilt.

8. This fact was duly clarified by the writ Court in the review petition filed by the appellant/respondent. Thereafter, since the order of dismissal was set aside and the court had directed the appellant/bank to reinstate the respondent, thereafter, pass an order of punishment, it would certainly not mean that the order of dismissal would relate back to the date on which it was passed. The opinion of the writ Court that while setting aside the dismissal order, it would be taken that it had never existed in the eye of law, therefore, the respondent/petitioner is entitled to back-wages is not tenable. The order of punishment was only set aside on technical grounds being not commensurate to the guilt but the enquiry against the respondent/petitioner holding him guilty was upheld and the disciplinary authority

was directed to pass a fresh order of punishment lesser than that of dismissal/removal. In the circumstances it cannot be said that by setting aside the dismissal order the status quo ante would stand restored with all consequential effect. It was subject to outcome of imposition of the penalty to be imposed by the disciplinary authority. The disciplinary authority was within his competence to pass separate order with regard to back wages.

9. In **Pradeep S/o Raj Kumar Jain vs. Manganese Ore (India) Limited and others (2022) 3 SCC 683**, the question before the Supreme Court was as to whether the High Court directing reinstatement of the respondent/petitioner was justified in denying him the benefit of backwages. Reliance was placed on a three Judge Bench decision rendered in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324**, wherein, the principles for entitlement to backwages upon wrongful termination of service was restated. The Court held that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. Para 38.1 reads thus:

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule."

10. Further, the Court held that the aforesaid rule is subject to the rider that while deciding the back wages, other factors have to be taken into consideration that is the nature of misconduct, the financial condition of the employer and similar other factors. It is required for the 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. Para 38.2 and 38.3 are extracted:

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. ...

11. Applying the principles in the facts and circumstances of this case, termination of the respondent/petitioner was not held to be wrongful by the writ Court. Rather, the writ Court was of the opinion that a lesser punishment would suffice having regard to the guilt of the respondent/petitioner. Further, respondent nowhere pleaded that he was not gainfully employed or employed on lower wages during the period of dismissal of service. Accordingly, it cannot be said that the guilt of the respondent/petitioner stood wiped off while he was punished, rather, reinstatement was directed as a consequence of imposition of a lesser punishment, the respondent/petitioner would not be entitled to back wages, nor, consequential benefits as a consequence of such reinstatement.

12. On specific query, learned counsel for the respondent/petitioner fairly submits that the respondent has not assailed the impugned writ Court order, to the extent the learned Single Judge upheld the enquiry and the guilt of the petitioner.

13. In the circumstances, while imposing lesser punishment, in the opinion of the disciplinary authority the respondent is not entitled to wages for the period he has not performed his duties would be justified in view of Deepali Gundu (supra).

14. The impugned order is, accordingly, set aside to the extent it directs payment of back wages with all consequential benefits. Having regard to the fact that the respondent/petitioner was out of employment for eight long years, it would be equitable that 30% of back wages be paid to the respondent/petitioner for the period he was out of employment. The same shall be computed and released by the appellant-bank within three months from the date of filing of certified copy of this order.

15. No cost.

(2023) 5 ILRA 1581
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 1078 of 2023

Imran Khan **...Petitioner**
State of U.P. & Ors. **...Respondents**
Versus

Counsel for the Petitioner:
 Sri Akhilesh Kumar, Sri Akhilesh Chandra Shukla