

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

LPASW no.128/2002

Date of order : 30.4.2014

Bhushan Lal Mawa v. J&K Tourism Dev. Corp. & ors.

Coram:

**Hon'ble Mr. Justice M. M. Kumar, Chief Justice.
Hon'ble Mr. Justice Hasnain Massodi, Judge.**

Appearing counsel:

For the appellant(s) : Mr. R.S.Thakur, Sr. Advocate with
Mr. Ashwani Thakur, Advocate.
For the respondent(s) : Mr. B.S.Bali, Advocate.
Mrs. Seema Shekhar, AAG.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No. |
| ii) | Whether approved for publication
in press: | Yes/No |
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M.M.Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent preferred by the writ petitioner-appellant is directed against judgment and order dated 30.04.2001 rendered by a learned Single Judge of this Court, while rejecting the relief claimed by him. The appellant has claimed that he was entitled to the grant of back wages w.e.f. 31.08.1978 to 02.05.1995 from the date of his termination to that of his reinstatement.

Background facts and previous round of litigation

2. The appellant was appointed as Assistant Manager Incharge Internal Auditing vide order No.215-MD of 1977 dated 03.11.1977 issued by the Managing Director. He was posted as Assistant Manager Incharge Reception Desk and Catering at Tourist Reception Centre, Jammu. On 10.08.1978 his services were terminated on the basis of allegations stated in the order

itself. It would thus be appropriate to read the order of termination, which is set out below *in extenso*:

“Office of the Divisional Manager
J&K Tourism Development Corporation Limited
Srinagar
Order
No.425-DM/TDC of 1978
Dated: 10-8-1978

1. Whereas, upon check of Cold drinks stocks at Char Chinari Cafeteria on 5-8-1978 shortages to the tune of Rs.985.10 have been located.
2. Whereas, from the shortages located in is obvious that the stocks have not been verified from time to time by the officer Incharge.
3. Whereas, the show cause notice was served upon Shri B.L.Mawa under this office letter No.JK TDC/DM/Adm/ 2459 dated 8-8-1978 who held the charge of Officer Incharge, Charchinari.
4. Whereas, in reply to the show cause notice submitted on 9-8-1978 by Shri Mawa it has been stated that he was not aware of the shortages though these would have taken place in 3 ½ months period.
5. Whereas, from the above it is clear that the shortages have taken place due to lack of supervision over the unit and inefficiency of Shri Mawa.
6. Whereas the reply to the show cause notice given by the Mawa on the shortages is far from satisfactory.
7. Whereas, since the pilferages have taken place during the period Shri Mawa held charge the same shall be recoverable from his pending dues in the Corporation. The Corpn., however reserves the right to recover the cost of other shortages as may come to notice subsequently.

Therefore, Shri Mawa is hereby given notice that his services shall no longer be required beyond 31st August 1978 and shall be treated to have been terminated from the said date.

By order.

Sd/-
Syed Iftikhar Jalali
Divisional Manager”

3. It is obvious that the appellant worked from 03.11.1977 to 31.08.1978 and he was merely a probationer. He challenged the order of termination by initiating proceedings before the learned Single Judge of this Court. The learned Single Judge vide his judgment and decree dated 31.08.1989 set aside the order declaring the same to be a nullity. The operative part of the judgment and decree reads thus:-

"For the reasons stated above and in view of the findings on various issues, the plaintiff has succeeded in establishing his claim. The order of his termination is void and constitutionally bad. Therefore such an order is hereby declared a nullity. The plaintiff is entitled to be re-employed with effect from the date of his termination i.e., 31.8.1978. The plaintiff is also entitled to arrears of pay from the date of his termination i.e. with effect from 31.8.1978 and he is entitled to draw pay, emoluments, increments by way of salary etc. which in ordinary course he would have earned and which he could not earn because of the void and illegal order.

The plaintiff shall pay the deficient court fee on Rs.50,000/- on which the suit is valued, within one month. He has paid Rs.12.50 only. The balance amount shall be paid by him, failing which the plaint shall stand rejected under O.7R.11 CPC, rendering this judgment non-est.

The plaintiff shall also be entitled to get the costs of the suit from the defendants. The Registry is directed to prepare a decree sheet accordingly."

4. The judgment and decree passed by the learned Single Judge was challenged before the Letters Patent Bench. The appeal of the J&K Tourism Development Corporation was partially allowed on 10.02.1994 which has attained finality. The operative part of the order reads thus:-

"In view of the above, the appeal is partly allowed. While maintaining the finding of the learned Single Judge in respect of other issues, we direct that that the appellants may hold an inquiry into the arrears of salary to be paid to the respondent. If the respondent is found to have engaged himself in any gainful employment during the period he remained out of service, it will be open to the appellants to deduct the amount earned by the respondent from arrears of salary payable to him. The inquiry shall be concluded within a period of one month from today, subject to the co-operation by the respondent. There shall be no orders as to costs in the present appeal, but the costs of the suit shall be governed by the direction contained in the order of the learned Single Judge." (emphasis added)

5. A perusal of the aforesaid operative para would show that the respondents were directed to hold enquiry for the purpose of finding out whether the arrears of salary were to be paid to the appellant. If the respondents were to find that the appellant had

engaged himself in any gainful employment during the period he remained out of service then the respondents would be entitled to deduct the amount earned by the appellant from the salary payable to him. The respondent-employer was also directed to co-operate.

6. The order of the Division Bench was challenged before the Supreme Court in SLP(Civil) No.9870/94. However, the same has been dismissed on 07.04.1995 upholding the judgment and decree passed by the Letters Patent Bench (Annexure-O).

7. In pursuance of the directions issued by the Letters Patent Bench, the appellant was asked by the Inquiry Officer vide communications dated 15.12.1995 and 23.12.1995 to appear before him and reply various queries with regard to the period he had remained out of service. However, despite service of notice and opportunity given to answer queries as per communication dated 15.12.1995, the appellant did not appear before the Inquiry Officer and refused to reply the queries concerning his status during the period he was out of service w.e.f. 31.08.1978 to 02.05.1995. On account of non co-operation of the appellant as against the directions issued by the Division Bench, the Inquiry Officer submitted the findings to the Managing Director of the Tourism Corporation for further necessary action, who passed order No.85-MD/TDC of 1995 dated 26.12.1995. The Managing Director observed that the appellant had failed to

submit any reply in the form of any documentary or oral evidence despite opportunity given. He did not even file an affidavit that he was not gainfully employed during that period. Therefore, he was presumed to be gainfully engaged during the period he remained out of service of the Corporation and was not entitled to any arrears. Order dated 26.12.1995 was placed before the Contempt Court in COA No.95/1994.

8. The respondent also raised objection in para 3 urging that the petition was not maintainable because the appellant had filed Civil First Appeal No.63/97 before this Hon'ble Court against the order of the learned District Judge, Jammu where the claim for arrears of salary in execution proceedings stood already rejected. Therefore, it is submitted that the principle of *res judicata* enshrined in Section 11 of the Code of Civil Procedure would be attracted and no fresh proceedings could be initiated for recovery of arrears of salary. It has further been clarified in the objections that on the date of termination the appellant was working as Assistant Manager Incharge and his services were regularized vide JKTDC order No.26/MD/TDC of 1978 dated 06.06.1978 in the rank of senior Receptionist. He was not confirmed as Assistant Manager for want of requisite diploma in Hotel Management and Catering. There is no challenge to order dated 06.06.1978 at any forum. Therefore, he was restored the same status in the revised pay scale in terms of judgment and

decree dated 10.02.1994 passed by the Division bench of this Court. He was also given seniority and was to be considered for promotion as per merit, suitability, seniority and performance under the rules as and when it was due.

9. It would be appropriate to mention that an enquiry was held by Sh. Ghulam Qadir Chiloo, Administrative Officer. He had submitted the enquiry report dated 23.12.1995 revealing that an opportunity was given to the appellant to associate and produce documentary evidence in respect of the following queries:-

"a, that during this long period of dismissal, it is unbelievable that anybody would survive without having any financial support to meet the day to day basic needs of human value/domestic requirements. You will give sufficient proof and indicate what was the source of your income for this long period by which you managed the domestic affairs;
b. had you or any member of your family been engaged in any business job or in any beneficial assignment during this period;
c. you will please intimate the strength of your family/dependents with their age group;
d. you will indicate the place of your residence during this period where you actually stayed;
e. do you own any house in Srinagar/Jammu or at any other place in the State, if so please give its location;
f. also please intimate when you have migrated from valley to Jammu and are you getting any migrant relief from the Relief Organization, Jammu, if so the amount received till date of your reinstatement be initiated."

10. The appellant did not submit any information with regard to the queries from (a) to (f) raised by the Enquiry Officer, which led to a reasonable inference that he had nothing to state in reply. He did not even file an affidavit that he was not gainfully employed during the period in question. Accordingly, the Managing Director vide order dated 26.12.1995 presumed that

the appellant was gainfully employed during the period he remained out of service.

Present Litigation and the Results.

11. The order dated 26.12.1995 was challenged by the appellant by filing SWP No.1476/97 relatable to the appeal in hand. The appellant also prayed for quashing order dated 30.07.1996 passed by the General Manager reinstating him by revoking order of termination. It was further held that the appellant would hold the same status as was held by him at the time of termination. It was also clarified that the appellant was holding the status of Senior Receptionist and was placed in the same sanctioned pay scale of the post of Senior Receptionist. The Managing Director also ordered for fixation of pay giving authorization to General Manager (O), J&KTDC, Jammu to issue order in that behalf. Consequently order dated 10.07.1996 was issued by General Manager (Annexure R-8).

12. Learned Single Judge after referring to the pleadings and order dated 31.08.1989 along with order dated 10.02.1994 proceeded to consider as to whether the appellant was entitled to back wages in terms of order dated 10.02.1994 passed by the Division Bench of this Court. Learned Writ Court dismissed the writ petition by concluding as under:-

"The stand taken by the respondents is that an enquiry officer was appointed. He was called upon to submit his report with regard to five questions put to him. These are noticed in order dated 26th of Dec' 1995. The petitioner did not give his reply.

It is submitted that in this situation there was no option but to decline the claim of back-wages.

I am of the opinion, that to the order passed by the respondent-authorities no exception can be taken. The respondents were supposed to go into the question as to whether the petitioner was gainfully engaged elsewhere or not; he was called upon to give requisite information; he failed to do so. If this be the position, then it cannot be said that the direction given by the Division Bench on 27th of Dec' 1995 remains un-complied with. So far as other prayers are concerned, the petitioner stands re-instated. He has to get all consequential benefits minus back wages becoming due during the period from 10th of August 1978 to 2nd of May 1995. Thus the petitioner is not entitled to backwages, but is entitled to all other consequential benefits. If any person junior to the petitioner has been promoted then the same treatment be given to the petitioner.

This petition is accordingly, disposed of with a direction to the respondent authorities that the consequential benefits be allowed to the petitioner. Order dated 26th of Dec' 1995 and order 30th of July 1996 are sustained, subject to the directions given above. Let the claims of the petitioner be settled within a period of three months from the date copy of the order passed by this Court is made available by the petitioner to the respondent-authorities, and also to the counsel who has put in appearance today on behalf of the respondents.

Disposed of as such."

13. Mr. R.S.Thakur, learned senior counsel has challenged the view of the learned Writ Court by arguing that the judgment and decree provided for payment of arrears of wages for the period during which he was out of service. The onus of proof of gainful employment was on the respondents. In that regard reliance has been placed on para 54 of the judgment of Hon'ble the Supreme Court rendered in the case of **In Lokmat Newspapers (P) Ltd. v. Shankarprasad, AIR 1999 SC 2423** and para 24 of the judgment rendered in the case of **Union of India v. K. V. Jankiramna AIR 1999 SC 3265**.

14. Another submission made by Sh. Thakur is that no notice in the eyes of law is deemed to have been served which even

otherwise was issued after expiry of long period prescribed for enquiry in the judgment of the Division Bench. The enquiry is farce and the orders dated 26.12.1995, 30.07.1996 and 23.12.1995 are not based on any enquiry. According to the learned counsel, the Inquiry Officer has raised a presumption which cannot be regarded as a finding of fact.

15. Learned counsel for the respondents has argued that no direction would survive for payment of back wages after the Division Bench has partially accepted the appeal filed by the Corporation granting the respondents liberty to hold an enquiry into the arrears of salary to be paid to the appellant. If the appellant was found to have engaged himself in any gainful employment during the period he remained out of service then the respondents were entitled to deduct the amount earned by the appellant from the arrears of salary payable to him. Therefore, the appellant was required to co-operate with the Inquiry Officer and ought to have answered all queries raised by the Inquiry Officer. Learned counsel has drawn our attention to six queries to which answer was solicited from the appellant and argued that the appellant preferred to maintain silence. It has further been argued that the question of placing onus on the respondents to prove gainful employment in the ordinary course would have been applicable in the cases involving Industrial Disputes Act, but in cases where appellant has invoked the

equitable jurisdiction, it was necessary for him to reveal his status during the period he was out of service particularly when the period is about 17 years.

16. Having heard learned counsel for the parties and perusing the paper book with their able assistance, we deem it necessary to find out reasons for setting aside the termination order passed against the appellant on 10.08.1978. The Learned Single Judge in order dated 31.08.1989 had found that a show cause notice was issued to the appellant on 08.08.1978 informing him that on inspection stock of cold drink was found short which was worth Rs.985.10 paisa. The appellant was not found fit for the post because the shortages have resulted in heavy loss to the Corporation. There were further allegations of joining hands with those who have committed pilferages and he was asked as to why his services should not be terminated. The Corporation appears to have proceeded on the assumption that the appellant was a probationer and no regular departmental enquiry was required to be held. The aforesaid presumption proceeds on the fact that the appellant was appointed on 03.11.1977 and was posted as Assistant manager Incharge Reception Desk and Catering at Tourist Reception Centre, Jammu on 29.11.1977. His services were terminated vide order dated 10.08.1978. He had virtually worked for nine months. However, on the ground that

enquiry was required to be held, learned Single Judge proceeded to set aside the order of termination.

17. Learned Single Judge also awarded back wages holding that the order of termination passed on 10.08.1978 was found *void ab initio*. However, the Letters Patent Bench allowed the appeal filed by the Corporation holding that the arrears of salary would not automatically flows to the appellant and therefore the respondents were asked to hold an enquiry. The Enquiry Officer proceeded to frame six questions and solicited answer from the appellant which were never replied. Even an affidavit was not filed before the Enquiry Officer deposing that he was not gainfully employed during the period in question. Therefore, it was inferred that the appellant did not have anything to answer. Such an inference would be warranted because the posers raised by the Enquiry Officer are very relevant.

18. The principle governing grant of writ which is founded on equitable consideration would warrant answer from the appellant. The appellant was asked to disclose how he managed his day to day basic needs/domestic requirements during the period he was out of service w.e.f. 31.08.1978 to 02.05.1995. What was the number of dependent family members along with their age group and detail of any earning family members, who were actually staying with the appellant. The details of houses at Srinagar or at Jammu or at any place in the State along with

location were also asked. The appellant was also required to disclose whether he was getting any migrant relief from the Relief Organization, Jammu and what was the amount. All those questions have direct bearing on the controversy. The issue needs to be examined in the light of the judgment of Hon'ble the Supreme Court rendered in the case of **JK Synthetics Ltd. v. K.P. Aggarwal, (2007) 2 SCC 433**, which reflects a paradigm shift in the approach of the Court with regard to payment of back wages. In the present case the order of re-instatement flows from the fact that no enquiry into the charges of misconduct was held although he was not ever exonerated of the charges concerning pilferage. The appellant has failed to assert before the Enquiry Officer about the bare minimum that he was not gainfully employed during the period when he was out of service. On the basis of the aforesaid assertion the onus of proof would have shifted on the respondents. Such an assertion has only been made before the Writ Court, which is not the stage because the Writ Court is not to go into the question of facts which are required to be determined by the Enquiry Officer as per the directions of the Letters Patent Bench rendered on 10.02.1994. Another important factor which would affect the payment of back wages is that the civil suit on the original side of the High Court bearing COS No.96/1981 was filed after a period of more than two years which obviated issuance of directions in 1989 to hold

fresh enquiry with regard to allegation of pilferage. Moreover, respondents cannot be blamed for a lapse of long time between the dismissal and reinstatement. Therefore, as per the principles laid down by Hon'ble the Supreme court in the case of **Hardwari Lal v. State of Uttar Pradesh, (1999) 8 SCC 582**, back wages could not be paid to an employee.

17. As a sequel to the above discussion, we are of the considered view that this appeal is devoid of merit and is hereby dismissed. The view of the learned Single Judge is upheld and order dated 26.12.1995 and other consequential orders are also upheld. The view which we have taken would also result in dismissal and disposal of CIA No.63/1997 and Contempt (SWP) No.188-C/2002. Keeping in view the peculiar facts and circumstances of the case, parties are left to bear their own costs.

**(Hasnain Massodi)
Judge**

**(M. M. Kumar)
Chief Justice**

Jammu,
30.4.2014
Vinod.

S.No.	Case No.	Title
1.	LPASW No.128/2002	Bhushan Lal Mawa v. J&K Tourism Dev. Corp. & ors.
2.	CIA No.63/1997	Bhushan Lal Mawa v. J&K Tourism Dev. Corp. and ors.
3.	COA(S) No.188-C/2002	Bhushan Lal Mawa v. Tanveer Jain and anr.

**(Hasnain Massodi)
Judge**

**(M. M. Kumar)
Chief Justice**

Jammu,
30.4.2014

