

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Writs No. 10458/2016

Administrator Jaipur Mahla Andanr

-----Petitioner

Versus

Manavendra Sharma

-----Respondent

Connected With

S.B. Civil Writs No. 20662/2017

Manvendra Sharma

-----Petitioner

Versus

Administrator Jaipur Mahila And Anr

-----Respondent

S.B. Civil Writs No. 10452/2016

Administrator Jaipur Mahla Andanr

-----Petitioner

Versus

Manavendra Sharma

-----Respondent

For Petitioner(s)	:	Mr. Harshal Tholia, Adv.
For Respondent(s)	:	Mr. Jugal Kishore Agrawal, Adv.

HON'BLE MR. JUSTICE ASHOK KUMAR GAUR

Order

03/08/2018

IN SBCWP NO.10458/2016

The matter comes up on the misc. application No.20522/2018 filed by the respondent-employee under Section 17B of the Industrial Disputes Act, 1947. The respondent-employee has submitted in his application that the Labour Court while passing the award dt.12.04.2016, has directed reinstatement with full back wages to him and the award is under

challenge before this Court by the employer-petitioner in the present writ petition SBCWP No.10458/2016.

Learned counsel for the respondent-employee has submitted that there is stay granted by this Court on execution of the award of the Labour Court and the respondent-workman is unemployed from the date of his termination, and as such he is not receiving any remuneration.

Learned counsel has submitted that the employee-workman is entitled to receive last wages drawn to maintain his family and further details of last drawn salary is given at para 5 of the said application wherein following amount has been claimed i.e. Rs.3804/- per month (basic salary Rs.1125/-, dearness allowance Rs.2059/-, interim relief Rs.325/-, house rent Rs.250/- and c.c.a. Rs.45/-).

Learned counsel has further submitted that affidavit has also been filed in support of the application as per requirement of Section 17-B, wherein it has been specifically stated that respondent-workman is unemployed and the employer is bound to pay the last wages drawn from the date of termination i.e. 03.02.1999, till pendency of the writ petition.

Learned counsel for the respondent-workman has submitted before this Court that the Apex Court in the case of **Rajinder Kumar Kindra Vs. Administration through Secretary (Labour) & Ors.** reported in **AIR 1984 Supreme Court 1805** has held that if the respondent-workman is not gainfully employed and even if he is earning some money as he is forced to maintain his family by helping his father-in-law, the same cannot be said to be a gainful employment. Para 21 of the said judgment is quoted hereunder:-

"It was next contended on behalf of the appellant that reinstatement with full backwages be awarded to him. Mr. P.K. Jain, learned counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service and therefore he was not entitled to back-wages.

In support of this submission Mr. Jain pointed out that the appellant in his cross-examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his family by helping his father-in-law Tara Chand who owns a coal depot, and that he and the members of his family lived with his father-in-law and that he had no alternative source of maintenance. If this is gainful employment, the employer can contend that the dismissed employee in order to keep his body and soul, together had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case has left us stunned. If the employer after an utterly unsustainable termination order of service wants to deny back-wages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in-law Tara Chand who had a coal-depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment E so as to reject the claim for back-wages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore, the appellant would be entitled to full back-wages and all consequential benefits."

Learned counsel has further relied upon the judgment of Division Bench of this Court i.e. **D.B. Special Appeal (Writ)**

No.1330/2014 [Bank of Baroda & Ors. Vs. Presiding Officer, Central Government Industrial Tribunal Cum-Labour Court, Jaipur & Anr.] reported in **2015 (147) FLR 1107**) decided on **08.09.2014**. Learned counsel has submitted that the Division Bench of this Court has interpreted Section 17B and has held that the object of depriving the workman from back wages from employer is to avoid double payment and not to ask him to prove that he was sitting idle and was living on borrowings, begging or had starved during the relevant period. Such an approach to the matters brought before the Court for considering payment of back wages or in interpreting Section 17B, will be wholly inhuman and unreasonable.

Learned counsel has further relied upon judgment of the Division Bench of this Court in **D.B. C.S.A. (W) No.59/2006** decided on 14.05.2007 **[Union of India Vs. Bhagawan Giri & Anr.]** reported in **2008-ILLJ-925 (Raj.)**. Learned counsel has submitted that if the affidavit of the workman is filed to the effect that he was not gainfully employed, elsewhere, onus shifts on the employer to prove that he is gainfully employed. No person can be asked to prove the non-existence of a fact. The employee-workman cannot be called upon to prove that he is not gainfully employed. That is why filing of affidavit to that effect is treated as sufficient. The fact that the employee has survived for two decades does not mean that he is disentitled to seek direction for payment of last wages.

Learned counsel has further placed reliance on the judgment passed by the Apex Court in the case of **Employers Management Central Plan and Design (I) Ltd. Vs. Alleged Workman representing G.S.N.C. workers & Anr.** reported in

(2007) 15 SCC 677 dt.13.03.2003. Learned counsel has submitted that the Hon'ble Supreme Court in the said case has allowed the current wages to the workman and not last wages drawn by him and as such learned counsel has made a request to grant current wages to the petitioner.

Learned counsel has further relied upon the judgment passed by this Court in **D.B. Civil Special Appeal (W) No.1035/2014** decided on 18.05.2016 reported in **2017(1) WLC (Raj.) 61**. Learned counsel has submitted that on the application filed under Section 17B of the Industrial Disputes Act, payment of last wages drawn is required to be made from the date of award.

Learned counsel for the employer-petitioner has filed reply to the application filed by the respondent-workman under Section 17B of the Industrial Disputes Act, 1947. The petitioner along with said application has filed the documents marked as (Annex.-1 i.e. licences collectively), (Annex-2 affidavit of wife of the employee-workman/Sarita) and (Annex.3 affidavit of the respondent-employee).

Mr. Harshal Tholia, counsel for the petitioner-employer has submitted that the applicant is admittedly working as a licensed registered pharmacist at a medical store, running under the name and style of Sharma Medical and General Store situated at 187 B, Murlipura, 200 Feet Road, Jaipur. Learned counsel has submitted that the licence of the petitioner has been time and again renewed and it cannot be said that the respondent is not gainfully employed. Learned counsel has submitted that wife of the respondent-workman has filed an affidavit wherein she has clearly mentioned in para four of the affidavit that her husband-respondent-workman is employed by her on full time basis at

Rs.500/- per month, and she is paying pocket money to him. Learned counsel further referred to affidavits of the respondent-workman wherein he said to have deposed that he is working as qualified person on the shop and he is getting Rs.500/- pocket money.

Learned counsel has placed reliance on a judgment passed by the Apex Court in the case of **North East Karnataka Road Transport Corporation Vs. M. Nagangouda** reported in **AIR 2007 SC 973**. Learned counsel has submitted that the Apex Court has discussed the definition of "gainful employment" and the Court has come to the conclusion that income either from employment in an establishment or from self-employment, if the income is earned from any other source, the same would amount to dis-entitle the person to get the back wages. The relevant para 12 of the said judgment is quoted hereunder:-

"On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some account from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment."

Learned counsel has also placed reliance on a judgment of the Apex Court in the case of **Shriram Institute for Industrial**

Research Vs. Rajesh Kumar Gandhi reported in **AIR 2013(136) FLR 12** dt.03.09.2012. Learned counsel has submitted that Delhi High Court has considered the scope of 17B of the Industrial Disputes Act and the Delhi High Court has also considered the judgment of Rajasthan High Court in **Municipal Council, Sikar Vs. Rawat Singh & Anr.** reported in **2009 LLR 104**. Learned counsel has submitted that the word "gainful employment" includes self-employment wherefrom income is generated and as such the respondent-employee is not entitled for any relief under Section 17B of the ID Act.

Learned counsel has submitted that the respondent-employee has further received any amount in compliance of order dt.02.05.2018 in SBCWP No.10452/201.

I have heard counsel for the parties and perused the material available on record.

This Court finds that the in the application filed under Section 17B of the ID, Act it has specifically been mentioned by the respondent-employee that he is not gainfully employed elsewhere and further he is out of job after termination of his services. This Court further finds that application of the respondent-employee clearly mentions the fact that respondent-employee is unemployed and he is not receiving any remuneration. This Court finds that the requirement of Section 17B of the ID Act, is to file an affidavit to the effect that the person is not gainfully employed. The respondent-employee on an affidavit has submitted that he is not gainfully employed.

The plea of the learned counsel for the petitioner that since respondent is working with his wife @ Rs.500/- p.m., cannot said to be gainfully employed for the purpose of scope of Section 17B

of the ID, Act. This Court finds that even in affidavit filed by the petitioner, respondent-employee and his wife, give details of payment of Rs.500/- as pocket money. The said amount cannot be said to be sufficient enough to bring the same within the scope of gainful employment.

This Court considering the law laid down by the Apex Court finds that the petitioner's alleged working even with his wife in the shop, cannot be said to be a gainful employment.

The judgment cited by the learned counsel for the petitioner in the case of **North East karnataka Road Transport Corporation Vs. M. Nagangounda** (supra), the Apex Court was considering the scope of gainful employment in respect of 'back wages' which was part of the award passed by the Labour Court.

In the opinion of this Court, the scope of Section 17B has not been discussed or taken into account by the Apex Court in the said judgment and the same cannot be of any assistance to the petitioner.

In the judgment cited by the counsel for the petitioner in the case of **Shriram Institute for Industrial Research Vs. Rajesh Kumar Gandhi** (supra), this Court finds that in para 14 of the said judgment, Delhi High Court has referred the judgment passed by the Rajasthan High Court in the case of **Municipal Council, Sikar Vs. Rawat Singh** (supra). The perusal of the said judgment also clearly reveals that if the person gets an adequate income, the same can be termed as 'gainful employment.' Delhi High Court after considering the facts of that particular case came to the conclusion that if the incumbent was earning by way of self-employment, even by showing income from agricultural pursuits, the same was held to be in compliance of the Section 17B of the

ID, Act. The said judgment will not govern the principle of the present case.

Accordingly, the application filed by the respondent-employee is allowed. The respondent-employee shall be entitled to get the last wages drawn of Rs.3804/- from the date of filing of the present application. The arrears so calculated will be paid to the respondent-employee within a period of one month.

The respondent employee would be paid the monthly amount of Rs.3804/- each month regularly till disposal of the writ petition.

The application stands disposed of.

(ASHOK KUMAR GAUR),J

A.Kumar/52-54



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