

(2016) 01 GUJ CK 0092

In the Gujarat High Court

Case No : Special Civil Application Nos. 12500 to 12504 of 2007

A.K. Joshi and Others

APPELLANT

Vs

The Executive Engineer

RESPONDENT

Date of Decision : 13-01-2016

Acts Referred:

Constitution of India, 1950 — Article 136, Article 14, Article 16, Article 226
Industrial Disputes Act, 1947 — Section 10, Section 10A, Section 11A, Section 11-A,
Section 2(j), Section 2(oo), Section 25F, Section 25-F, Section 25-F(a), Section

Citation : (2016) 01 GUJ CK 0092

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Vidhi J. Bhatt, Advocate, for the Appellant;

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.—1. In this group of petitions, the petitioners have prayed for similar relief.

2. Learned advocate for the petitioners has clarified and declared that all five petitions are identical and the applicants have prayed for identical relief.

2.1 In that view of the matter, the details mentioned in Special Civil Application 12500 of 2007 and the relief prayed for in the said petition and record of the said petition are taken as specimen for all five petition in this group of petitions.

3. The petitioners have prayed, inter alia, that:--

"15 (a) This Hon''ble Court be pleased to issue an order, writ in the nature of mandamus and/or certiorari or other appropriate writ, order or direction, declaring the impugned award of the Hon''ble Labour Court, Valsad qua rejecting the prayer of reinstatement with full backwages and continuity of service of the petitioners, as arbitrary, illegal, unjust and violative of Articles 14 and 16 of the Constitution of India and be pleased to direct the respondent to reinstate the petitioners in service with full backwages and with continuity of services and with

all consequential benefits, with 18% interest."

4. The petitioners have, by way of present petitions, challenged the award dated 27.06.2006 passed by Learned Labour Court at Valsad in Reference (LCB) No. 348/2001, whereby Learned Labour Court partly allowed the reference and instead of granting relief by way of direction to reinstate the petitioners, granted compensation of Rs. 25000/- to each claimants and Rs. 1000/- towards cost. The petitioners are aggrieved by the said direction and have preferred present petitions with the claim that the relief of reinstatement with backwages ought to have been granted by the Learned Labour Court, more particularly, when the learned Labour Court reached to the conclusion that the action of terminating service of the petitioners was illegal and in contravention of Section 25F of the Industrial Disputes Act, 1947 [hereinafter referred to as "the Act"].

5. The petitioners, in this group of petitions claim, that by setting aside the award, benefit of reinstatement in service and consequential benefits of backwages, etc. may be granted.

6. So as to consider the grievance of the petitioners and the relief prayed for by the petitioners, it is necessary to take into account the factual background.

6.1 After their service came to be terminated w.e.f. 20.8.1985, an industrial dispute was raised by present petitioners who were working as Class IV employees with present respondent. The said industrial dispute was referred for adjudication to learned Labour Court. After order of reference was passed, it was registered as Reference No. 51 of 1986 (old number which was subsequently re-registered/renumbered as Reference (LCS) No. 348 of 2001).

6.2 The said reference was partly allowed vide award dated 26.4.1988 whereby the learned Labour Court directed the respondent to pay legal dues of the petitioners, but the demand with regard to reinstatement and backwages was rejected.

6.3 The said award dated 26.4.1988 was challenged in Special Civil Application No. 6854 of 1988.

6.4 The said petition came to be disposed of vide order dated 20.4.2001 whereby this Court remanded the matter for fresh decision.

6.5 After the said order dated 20.4.2001 passed in Special Civil Application No. 6854 of 1988, the reference was re-numbered as Reference No. 348 of 2001.

During fresh hearing of the reference, an application raising preliminary objection against maintainability of the reference was filed on the ground that the respondent department is not and cannot be said to be industry as defined under Section 2(j) of the Act. The said issue was decided as preliminary issue.

6.6 The learned Labour Court accepted the said objection and rejected the reference holding that the respondent department is not an industry.

6.7 Aggrieved by the said decision, the petitioner preferred writ petition, i.e. Special Civil Application No. 4420 of 2003. This Court considered the said petition in light of the decision in case of Gujarat Forest Producers, Gatherers & Forest Workers Union v. State of Gujarat [, 2004 (2) GLR 1488].

6.8 This Court allowed the petition and set aside the decision of the learned Labour Court holding, inter alia, that the respondent department falls within the meaning of the term defined under the Act. With the said conclusion, the Court set aside the award dated 26.12.2001 and remanded the matter for reconsideration vide order dated 18.11.2005. After the judgment in Special Civil Application No. 4420 of 2003, learned Labour Court conducted the proceedings of reference No. 348 of 2001 afresh.

6.9 When the reference with its original number i.e. Reference No. 51 of 1986 was considered and adjudicated by the learned Labour Court, the petitioners herein had filed a statement of claim wherein the petitioners claimed that they were working as helper with the respondent department since last four years on daily wage basis and they were being paid wages at the rate of Rs. 15 per day. The petitioners claimed that they had worked for four years with the respondent department and thereafter, abruptly without any reason or justification and without following procedure prescribed by law, their service came to be terminated w.e.f. 20.8.1985. The petitioners alleged that at the time when they were terminated, inquiry for any alleged misconduct was not conducted and any notice was not issued and salary in lieu of notice was not paid and retrenchment compensation was also not paid. The petitioners claimed that they had met the superior officer, however, their request to continue them in service was not considered. The petitioners claimed that their termination from service was illegal and arbitrary.

7. The respondent department opposed the reference by filing written statement wherein the respondent department denied the claim that the petitioners were working since 1981 and/or that their service was illegally and abruptly and arbitrarily terminated. The respondent department claimed that the petitioners were engaged for work which was temporary, casual and ad-hoc in view of the fact that it was project based work. The respondent department also claimed that since it was project based work where the petitioners were engaged, their engagement was purely temporary, casual and ad-hoc and the petitioners were working on daily wage basis in the store which was set up for providing spare parts etc. for execution of the project. The respondent department also claimed that the petitioners were not engaged after following procedure prescribed for selection and recruitment and their engagement was irregular and illegal. The respondent also claimed that the petitioners were junior most amongst the persons who were engaged and working on daily wage basis.

8. During the proceedings before the learned Labour Court, depositions of the claimants were recorded at Exh. 34, 30, 31, 32 and 33. From the award, it appears that on behalf of the respondent department, the said claimants/

petitioners were not subject to any cross-examination.

8.1 It also emerges from the award that after the matter was remanded by order dated 18.11.2005 in Special Civil Application No. 4420 of 2003, one of the claimants i.e. Mr. A.K. Joshi had filed affidavit in lieu of chief examination (Exh. 64). The said witness/claimant was subjected to cross-examination on behalf of the respondent department and vide Exh. 66, the respondent department had declared that the said cross-examination may be treated as cross-examination of all claimants whose oral evidence was recorded. Thereafter, the respondent department examined one Mr. Shailesh K. Patel as witness whose evidence was recorded at Exh. 73.

8.2 From the narration of the details related to proceedings in the impugned award, it also emerges that the respondent department had placed certain documents on record of the Court and the documents submitted by the respondent department included statement reflecting details of attendants of the claimants, correspondence by the respondent department with the claimants, the intimation to relieve the petitioners, the statement containing details of attendants and certain other documents. The learned Labour Court considered the said material as well as documents placed on record by the claimants, the depositions of the witness and the rival submissions and passed the award dated 27.6.2006 which is impugned in present petition.

9. In the impugned award, learned Labour Court has recorded that:--

"[a] the service of the claimants were terminated w.e.f. 20.8.1985;

[b] the service of the claimants/petitioners were terminated because instruction was received from the head office that the persons who were engaged from and after 1981 must be relieved. Consequently, the respondent department relieved the claimants/petitioners;

[c] before or while relieving the petitioners/claimants, the procedure prescribed by law i.e. by Section 25F was not followed.

So as to support and justify the said conclusion, learned Labour Court relied on the deposition of the witness of the respondent (Exh. 73) wherein the respondent's witness accepted that when the petitioners/claimants were relieved from service, any compensation or any other amount was not paid and the service of the petitioners/claimants were terminated as part of austerity drive;

[d] the petitioners/claimants had worked with the respondent department continuously and during preceding 12 months, the petitioners/claimants had worked for more than 240 days;

[e] since the petitioners/claimants had worked for more than 240 days in the preceding 12 months, the provision under Section 25F were attracted and applicable, however, the respondent did not comply the said conditions;

[f] the learned Labour Court also recorded as specific conclusion and finding of

fact that breach of Section 25F of the Act in terminating the service of the claimants was clearly established."

9.1 Having reached to such conclusion and findings of fact, learned Labour Court observed and recorded that in view of such facts and the legal position with regard to Section 25F, it was appropriate and necessary to hold that the action of the respondent of terminating the service of the petitioners/claimants w.e.f. 20.8.1985 and the order relieving the petitioners w.e.f. 20.8.1985 was illegal.

9.2 After recording the said finding, learned Labour Court proceeded to consider the issue with regard to the relief which ought to be and could be granted in the facts of the case. The learned Labour Court examined the said issue in light of the conclusion that the respondent's action was taken in breach of Section 25F of the Act. The learned Labour Court took into account that (i) when the petitioners/claimants were engaged the procedure of selection and recruitment was not followed; (ii) that appointment letters were not issued by the respondent department and (iii) the petitioners/claimants were working on temporary and daily wage basis; (iv) besides the above mentioned aspects, learned Labour Court also took into consideration the fact that the service of the petitioner was terminated before almost 20 years; and (v) the project work for which the petitioners/claimants were engaged was over and closed.

9.3 Having reached to above mentioned findings and on considering other aspects of the case, the Court concluded that reinstatement would not be justified. Of course, the applicants claim and insist that the work at the said station still continue. The learned Labour Court also considered the claimants submission that the work was available and while considering the said submission, the learned Labour Court observed that even if it is assumed that the said work is still available, it cannot be overlooked that the petitioners were not engaged after following selection procedure and their appointment was irregular and they were working on daily wage basis and if the direction to reinstate the petitioner was granted, it would amount to granting back-door entry to the petitioners. On the said ground, the learned Labour Court recorded the decision to decline the relief of reinstatement and instead considered it appropriate to mould the relief and thereby passed order directing the respondents to pay compensation in lieu of reinstatement and backwages. The learned Labour Court quantified the compensation at Rs. 25,000/- per claimant/petitioner.

10. Mr. Mehta, learned Senior Counsel for the petitioners, submitted that the respondents have not challenged the award by the learned Labour Court. Thus, the respondents have accepted the conclusion by the learned Labour Court that the action of terminating the service of the petitioners/claimants w.e.f. 20.8.1985 is illegal and in violation of Section 25F of the Act. The learned Senior Counsel for the petitioners submitted that once the Court comes to the conclusion that the action of terminating the service is contrary to and in violation of Section 25F of the Act, then, the direction for reinstatement should automatically follow,

though the direction for backwages would depend on the evidence available on record with regard to gainful employment of the concerned persons. The learned Senior Counsel for the petitioners also submitted that merely because long time was consumed in concluding the proceedings, the benefit of reinstatement should not be denied when breach of statutory condition is established. The learned Senior Counsel for the petitioners to support his submissions relied on the decisions in case of Balubhai G. Makwana v. State of Gujarat & Ors. [, 2002 (3) GLH 290], Gujarat Housing Board v. Meenakshiben Bhanushankar Bhatt [, 2002 (2) GLH 324], [2002(1) GLH 717], Haryana Urban Development Authority v. Om Pal [, (2007)5 SCC 742], District Red Cross Society v. Babita Arora & Ors. [, (2007) 7 SCC 366], Hindustan petroleum Corporation Ltd. v. Ashok Ranghba Ambre [, (2008) 2 SCC 717], Anoop Sharma v. Executive Engineer, Public Health Division No. 1, Panipat (Haryana)[, (2010) 5 SCC 497] and R.M. Yellatti v. Asst. Executive Engineer [, 2005(9) Scale 139].

11. Per contra, learned AGP for the respondent department submitted that the learned Labour Court has taken into consideration relevant aspects and factors and has not committed any error in declining the direction to reinstate the claimants. Learned AGP submitted that in the facts and circumstances of the case, the direction to pay compensation by moulding relief in appropriate manner is justified and do not warrant any interference. Learned AGP also submitted that the project is closed and the work is not available and the claimants were engaged without following selection procedure and that the persons were engaged only on temporary and daily wage basis and therefore also, the claim for reinstatement is not justified. Learned AGP submitted that the petitions may be rejected.

12. I have considered the material on record and the submissions by learned counsel for the contesting parties.

13. Before dealing with the contentions and examining the impugned award in light of the rival contentions, it is necessary to mention that there are certain undisputed facts in present case which deserve to be taken into account since they have substantial and material bearing on the petitioners" claim.

13.1 It is not in dispute that:--

"[a] the findings of fact recorded by the learned Tribunal including the finding of fact that the petitioners/claimants had worked continuously and that they had worked continuously for about 4 years before their service were terminated and that in the preceding 12 months period, the claimants had worked for more than 240 days, are not challenged by the respondent department and the said findings of fact are not in dispute,

[b] when the petitioners/claimants were engaged selection procedure was not followed,

[c] the petitioners/claimants were engaged on daily wage and temporary basis,

[d] the petitioners/claimants were working in the supply store at the site from where the machinery/spare parts etc. were supplied for execution of the work,

[e] when the award was passed almost 25 years had rolled by since the date of the termination of the petitioners and by now, almost 30 years have passed since the petitioners' termination,

[f] the findings of fact that at the time when the petitioners were relieved from service their service was not terminated on the ground of misconduct and any amount either towards or by way of notice pay or towards retrenchment compensation was not paid to the petitioners.

[g] the service of the petitioners were terminated after receiving instructions from the head office with a view to reducing the strength of the workmen employed on daily wage basis.

[h] the service of the petitioners were terminated before the work came to an end and/or before the supply store came to be closed. Differently put, the petitioners termination from service was not simultaneous with the closure of the work (which undisputedly took place after the termination of the petitioners)."

13.2 The legality and justification of the impugned award has to be examined in light of the above-mentioned undisputed facts and in light of the findings of fact recorded by learned Labour Court with regard to violation of Section 25F of the Act.

13.3 It is pertinent that the learned Labour Court has recorded the conclusion that the respondent's action of terminating the service of the petitioners is in violation of Section 25F of the Act.

13.4 The said conclusion is not under challenge and therefore, the Court has to proceed on the said premise and determine as to whether the learned Labour Court's decision to decline relief by way of direction to reinstate the petitioners is justified or it deserves to be sustained or it deserves to be modified.

14. At this stage, it would be appropriate to take into account the observations by Hon'ble Apex Court in certain decisions which are referred to and relied on by the learned Senior Counsel and have also been referred to by learned Labour Court.

14.1 In the decision in case of R.M. Yellatti (supra), after considering the findings of fact with regard to breach of Section 25F, Hon'ble Apex Court observed, inter alia, that:--

"18. This Court has used different expressions for describing the consequence of terminating a workman's service/employment/engagement by way of retrenchment without complying with the mandate of Section 25-F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an

employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Section 25-F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service was not terminated.

25. The judgment of the Constitution Bench in *Secretary, State of Karnataka v. Uma Devi* (supra) and other decisions in which this Court considered the right of casual, daily wage, temporary and ad hoc employees to be regularised/continued in service or paid salary in the regular time scale, appears to have unduly influenced the High Court's approach in dealing with the appellant's challenge to the award of the Labour Court. In our view, none of those judgments has any bearing on the interpretation of Section 25-F of the Act and employer's obligation to comply with the conditions enumerated in that section.

26. At the cost of repetition, we consider it necessary to mention that it was not the pleaded case of the respondent before the Labour Court and even before the High Court that the appellant was engaged/employed without following the statutory rules or Articles 14 and 16 of the Constitution and that was the basis for discontinuing his engagement. Therefore, the High Court was not justified in relying upon the alleged illegality of the engagement/employment of the appellant for upsetting the award of reinstatement.

(emphasis supplied)

14.2 It is pertinent that from the above observation in paragraph No. 26 of the said decision, it emerges that termination of workman in breach of Section 25F is considered nullity as if the workmen was not terminated.

14.3 In the decision in case of *Surendra Kumar Verma v. The Central Government Industrial Tribunal* (, AIR 1981 SC 422) Hon''ble Apex Court observed, inter alia, that the employer's action of terminating service of an employee in breach of Section 25-F renders the action ab initio void and in such circumstance the employee would be entitled, unless exceptional circumstances are established, reinstatement and consequential benefit. In paragraph No. 6 and 10 of the decision Hon''ble Apex Court observed that:--

"6. We do not propose to refer to the cases arising under S. 33 and 33A of the Industrial Disputes Act or to cases arising out of references under Ss. 10 and 10A of the Industrial Disputes Act. Nor do we propose to engage ourselves in the unfruitful task of answering the question whether the termination of the services of a workman in violation of the provisions of S. 25F is void ab initio or merely invalid and inoperative, even if it is possible to discover some razor's edge distinction between the Latin "void ab initio" and the Anglo-Saxon "invalid and inoperative". Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.

"Void ab initio" invalid and inoperative" or call it what you will, the workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services of, the workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the Court may mould the relief but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted.

10. In the result all the appeals are allowed and the workmen-appellants are directed to be reinstated with full back wages. We, however, super-impose the condition that the salary on reinstatement of the workmen will be the salary which they were drawing when they were retrenched (subject of course to any revision of scales that might have been made in the meanwhile) and the period from the date of retrenchment to the date of reinstatement will not be taken into account for the purpose of reckoning seniority of the workmen among temporary employees. The respondent is free to deal with its employees, who are temporary, according to the law. There will be no order regarding costs."

14.4 In the decision in case of *Devinder Singh v. Municipal Council, Sanaur*, (2011) 6 SCC 584 where the claimant was engaged on contract basis and his service was terminated after he worked for about 2 years and the labour Court passed award directing the employer to reinstate the workman without backwages, Hon''ble Apex Court, relying on the decision of High Court of setting aside the award of labour Court on the ground that reinstatement could not have been directed because his appointment was contrary to the recruitment rules and it would not be in public interest to sustain award of reinstatement after long time, Hon''ble Apex Court observed, after referring to the decision in case of *Rs. Robert D'Souza v. Southern Railway* that even daily rated workman would be entitled to protection of Section 25-F if he had worked contentiously for period of one year or not. Hon''ble Apex Court observed that:--

"18. This Court has repeatedly held that the provisions contained in Section 25-F(a) and (b) are mandatory and termination of the service of a workman, which amounts to retrenchment within the meaning of Section 2(oo) without giving one month's notice or pay in lieu thereof and retrenchment compensation is null and void/illegal/inoperative - State of Bombay v. Hospital Mazdoor Sabha, Bombay Union of Journalists v. State of Bombay, State Bank of India v. N. Sundara Money, Santosh Gupta v. State Bank of Patiala, Mohan Lal v. Bharat Electronics Ltd., L. Robert D'Souza v. Southern Railway, Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, Gammon India Ltd. v. Niranjan Dass, Gurmail Singh v. State of Punjab and Pramod Jha v. State of Bihar.

20..... Notwithstanding this, the High Court set aside the direction given by the Labour Court for reinstatement of the appellant by assuming that his initial appointment/engagement was contrary to law and that it would not be in public interest to approve the award of reinstatement after long lapse of time. In our view, the approach adopted by the High Court in dealing with the award of the Labour Court was ex facie erroneous and contrary to the law laid down in Syed Yakoob v. K.S. Radhakrishnan, Swaran Singh v. State of Punjab, P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar, Surya Dev Rai v. Ram Chander Rai and Shalini Shyam Shetty v. Rajendra Shankar Patil.

(emphasis supplied)

14.5 Thereafter in the decision in case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya , (2013) SCC 324 Hon"ble Apex Court considered case of termination of teacher. In the said decision it was noticed that the termination of the service of the teacher in primary school was effected in wrongful and illegal manner and the learned tribunal had set aside the order of termination and directed employer to reinstate the teacher on her original post and pay backwages. The said award with regard to backwages came to be set aside by High Court. Matter was carried before Hon"ble Apex Court and after considering other decision by Apex Court including decision in case of J.K. Synthetics Ltd. v. K.P. Agrawal , (2007) 2 SCC 433 Hon"ble Apex Court observed, inter alia, that:--

"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 Articles 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-?-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* (, AIR 1979 SC 75) (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."

14.6 So far as said decision is concerned, it is relevant to mention that in the said decision the claimant - teacher was not engaged irregularly or illegally or without complying procedure for selection and recruitment but she was appointed in regular manner and on existing vacancies.

14.7 In the decision in case of *Asst. Engineer Rajasthan Development Corporation v. Gitam Singh* , (2013) 5 SCC 136 where the claimant was engaged on daily wage basis and before his service came to be terminated he had worked for about 8 months, labour Court had, after holding that his termination was effected in contravention of Section 25-F, directed the employer to reinstate the claimant workman and to pay him 25% backwages. The said matter reached Hon"ble Apex Court wherein Court considered above referred decision in cases of *Devinder Singh and Harjinder Singh* and observed, inter alia, that:--

"24. In *Harjinder Singh*, this Court did interfere with the order of the High Court which awarded compensation to the workman by modifying the award of reinstatement passed by the Labour Court. However, on close scrutiny of facts it transpires that that was a case where a workman was initially employed by Punjab State Warehousing Corporation as work-charge motor mate but after few months he was appointed as work munshi in the regular pay-scale for three months. His service was extended from time to time and later on by one month"s notice given by the Managing Director of the Corporation his service was brought to end on 05.07.1988. The workman challenged the implementation of the notice in a writ petition and by an interim order the High Court stayed the implementation of that notice but later on the writ petition was withdrawn with liberty to the workman to avail his remedy under the ID Act. After two months, the Managing Director of the Corporation issued notice dated 26.11.1992 for retrenchment of the workman along with few others by giving them one month"s pay and allowances in lieu of notice as per the requirement of Section 25-F(a) of the ID Act. On industrial dispute being raised, the Labour Court found that there was compliance of Section 25-F but it was found that the termination was violative of Section 25-G of the ID Act and, accordingly, Labour Court passed an award for reinstatement of the workman with 50 per cent back wages. The Single Judge of that High Court did not approve the award of reinstatement on

the premise that the initial appointment of the workman was not in consonance with the statutory regulations and Articles 14 and 16 of the Constitution and accordingly, substituted the award of reinstatement with 50 per cent back wages by directing that the workman shall be paid a sum of Rs. 87,582/- by way of compensation. It is this order of the Single Judge that was set aside by this Court and order of the Labour Court restored. We are afraid the facts in Harjinder Singh are quite distinct. That was not a case of a daily-rated worker. It was held that Single Judge was wrong in entertaining an unfounded plea that workman was employed in violation of Articles 14 and 16. Harjinder Singh turned on its own facts and is not applicable to the facts of the present case at all.

27. In our view, Harjinder Singh and Devinder Singh do not lay down the proposition that in all cases of wrongful termination, reinstatement must follow. This Court found in those cases that judicial discretion exercised by the Labour Court was disturbed by the High Court on wrong assumption that the initial employment of the employee was illegal. As noted above, with regard to the wrongful termination of a daily wager, who had worked for a short period, this Court in long line of cases has held that the award of reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute."

14.8 Hon"ble Apex Court further observed that:--

"28. We may also refer to a recent decision of this Court in Bharat Sanchar Nigam Limited v. Man Singh. That was a case where the workmen, who were daily wagers during the year 1984-85, were terminated without following Section 25-F. The industrial dispute was raised after five years and although the Labour Court had awarded reinstatement of the workmen which was not interfered by the High Court, this Court set aside the award of reinstatement and ordered payment of compensation. In paragraphs 4 and 5 (pg.559) of the Report this Court held as under:

"4. This Court in a catena of decisions has clearly laid down that although an order of retrenchment passed in violation of Section 25-F of the Industrial Disputes Act may be set aside but an award of reinstatement should not be passed. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

5. In view of the aforementioned legal position and the fact that the respondent workmen were engaged as "daily wagers" and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet the ends of justice."

29. In light of the above legal position and having regard to the facts of the

present case, namely, the workman was engaged as daily wager on 01.03.1991 and he worked hardly for eight months from 01.03.1991 to 31.10.1991, in our view, the Labour Court failed to exercise its judicial discretion appropriately. The judicial discretion exercised by the Labour Court suffers from serious infirmity. The Single Judge as well as the Division Bench of the High Court also erred in not considering the above aspect at all. The award dated 28.06.2001 directing reinstatement of the respondent with continuity of service and 25% back wages in the facts and circumstances of the case cannot be sustained and has to be set aside and is set aside. In our view, compensation of Rs. 50,000/- by the appellant to the respondent shall meet the ends of justice. We order accordingly. Such payment shall be made to the respondent within six weeks from today failing which the same will carry interest @ 9 per cent per annum."

14.9 So far as the said decision is concerned, it is relevant to note that the claimant - workman in the said case had worked only for 8 months and that the dispute was raised after delay of about 5 years and it was after taking into account the said factual background that Hon''ble Apex Court passed order directing payment of compensation.

14.10 In the decision in case of Bhuvnesh Kumar Dwivedi v. M/s. Hindalco Industries Ltd. (, AIR 2014 SC 2258) Hon''ble Apex Court examined the challenge against the decision by labour Court and record, inter alia, in light of the fact that the employee had resorted artificial break and the employer was engaged in project related work and the claimant - workman was employee in construction division. In the said decision finding of fact was recorded that the service of the claimant was effected in violation of Section 25-F of the Act and claimant - workman in the said case had worked for period of 6 years. In the said decision Hon''ble Apex Court observed that the claimant would be entitled to the reinstatement. Hon''ble Apex Court also observed that:--

"27..... Where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement..... "

14.11 In case of Hari Nandan Prasad v. Employer I/R to Management of FCI [, 2014 (2) SCALE 399] the workmen were engaged in daily wages basis and they had worked for 2/3 years and where the Court had reached to the conclusion that their service was terminated in breach of Section 25-F, Hon''ble Apex Court, after considering the decision in case of Jagbir Singh v. Haryana State Agriculture Mktd, U.P. Power corporation, decision in case of Umadevi etc. observed, inter alia that:--In cases where it is established that claimant worked for more than 240 days and that while terminating service of such workman the condition under Section 25-F is not complied rendering termination illegal and the workman had worked for 3 years and was out of service for last 30 years, it

would be difficult to grant relief of reinstatement to the person who was engaged as daily wager and was terminated in distant past. In the said decision Hon"ble Apex Court also observed that:--

"It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

14.12 In the said decision Hon"ble Apex Court observed that:--

"It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice."

14.13 In the said decision Hon"ble Apex Court further observed that:--

"Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: State of Karnataka v. Uma Devi , (2006) 4 SCC 1. Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were

retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied".

(emphasis supplied)

14.14 In the case of *Bharat Sanchar Nigam Limited v. Bhurumal*, (2014) 7 SCC 177 where the workman was engaged on daily wage basis and after his service was terminated he raised industrial dispute wherein it was found that his service was terminated in violation of Section 25-F of the Act, Hon"ble Apex Court, in the said decision, observed that:--

"33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: *State of Karnataka v. Uma Devi*, (2006) 4 SCC 1). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose."

14.15 Thus, in the said decision Hon"ble Apex Court observed that in cases where the termination, though in violation of Section 25-F, is not affected by way of victimization or unfair labour practice and it is not malafide, then ordinarily

principle of granting reinstatement and backwages when termination is found illegally should not be followed mechanically.

14.16 In paragraph No. 7 of the decision in case of Haryana Urban Development Authority v. Om Pal , (2007) 5 SCC 742 Hon"ble Apex Court observed, inter alia, that:--

"7. Moreover, it is now also well-settled that despite a wide discretionary power conferred upon the Industrial Courts under Section 11A of the 1947 Act, the relief of reinstatement with full back-wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors; one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any."

14.17 In the decision in case of Naresh Kumar Thakur v. Principal/Executive Director Civil Aviation Training College , 2015 (2) SCALE Hon"ble Apex Court considered the case wherein claimant workman was engaged for the purpose of project as computer operator and worked from 1994 to 1999. In paragraph No. 16 Hon"ble Apex Court observed that:--

"16. That apart, we have also been taken through the Award passed by the CGIT and we find no reason to set it aside inasmuch as we do not find any perverse conclusions having been arrived at by the CGIT. However, we are of the opinion that given the nature of the work the appellants were performing as computer operators and that they had been paid some amounts under the orders of the High Court with effect from 15th May, 2007, the interest of justice would be served if a simple order of reinstatement is made, but without any further amounts to be paid to the appellants, either as back wages or otherwise. We do so accordingly. While ordering reinstatement of the appellants, we make it clear that they would be entitled to continuity of service."

14.18 In the decision in case of Mackinnon Mackenzie and company Ltd. v. Mackinnon Employees Union , (2015) SCC 544 service of the workman was terminated in contravention of Section 25-F wherein Hon"ble Apex Court observed that:--

"53. Further, it is urged by the learned senior counsel on behalf of appellant-Company that there is no question of reinstatement of the concerned workmen and payment of back wages to them since the concerned department/unit of the appellant-Company in which they were employed no longer exists and therefore, requested this Court to mould the relief granted by the courts below. The said contention is rightly rebutted by the learned senior counsel on behalf of the respondent-Union by placing reliance on the case of Workmen of Sudder Workshop (supra), wherein this Court held that the Court cannot sympathise with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. The said contention urged on behalf of the respondent-Union must be accepted by us as the same is well

founded. Therefore, we hold that moulding of the relief is not permissible in this case at this stage when the matter has reached this Court keeping in mind the legal principle laid down by this Court on this aspect of the matter in the case referred to supra.

54. Further, with regard to reinstatement of the concerned workmen and back-wages to be paid to them, the learned senior counsel on behalf of the workmen has rightly placed reliance upon the case of *Anoop Sharma v. Executive Engineer*, wherein it was held that since termination of employment is in breach or violation of the mandatory provisions of Chapter V-A or V-B of the I.D. Act is void ab initio in law and ineffective and suffers from nullity, in the eyes of law and in the absence of very strong and compelling circumstances in favour of the employer, the Court must grant a declaration that the termination was non est and therefore the employees should continue in service with full back wages and award all the consequential benefits. Further, with respect to payment of back wages and consequential benefits, reliance was rightly placed on the decisions of this Court in the cases of *Deepali Gundu Surwase v. Adhyapak Mahavidyala* and *Bhuvnesh Kumar Dwivedi v. Hindalco*."

14.19 In the decision in case of *Senior Superintendent Telegraph (Traffic), Bhopal v. Santosh Kumar Seal*, (2010) 6 SCC 773 Hon"ble Apex Court observed, inter alia that:--

"9. In last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate, (See *U.P. State Brassware Corpn. Ltd. and Anr. v. Uday Narain Pandey*; *Uttaranchal Forest Development Corpn. v. M.C. Joshi*; *State of M.P. and Ors. v. Lalit Kumar Verma*; *Madhya Pradesh Administration v. Tribhuban*; *Sita Ram and Ors. v. Moti Lal Nehru Farmers Training Institute*; *Jaipur Development Authority v. Ramsahai and Anr.*; *Ghaziabad Development Authority and Anr. v. Ashok Kumar and Anr.* and *Mahboob Deepak v. Nagar Panchayat, Gajraula*).

10. In a recent judgment authored by one of us (R.M. Lodha, J.) in the case of *Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.*, the aforesaid decisions were noticed and it was stated :

"7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact-situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of

reinstatement has been held to meet the ends of justice.

14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice. In our considered view, the compensation of Rs. 40,000/- to each of the workmen (respondent Nos. 1 to 14) shall meet the ends of justice. We order accordingly. Such payment shall be made within 6 weeks from today failing which the same shall carry interest at the rate of 9 per cent per annum."

15. In present case the claim of the workman is required to be examined in light of the evidence and other material on record and above quoted observations by Hon'ble Apex Court. In present case, it has emerged that undisputedly the petitioners were engaged without following procedure for selection and recruitment and that they were working on daily wage basis.

15.1 However, so far as the employer's plea that they were engaged for project work is concerned, it is relevant to note that except raising said plea, factual aspect was not substantiated and proved by the respondent department. Any material to establish that the persons were engaged only for project work was not placed before the labour Court and the said fact was not established before learned labour Court.

15.2 Besides this, relevant and pertinent aspect is that the service of the petitioners was not terminated on stoppage or closure of the project work but according to the evidence by employer's witness they were terminated while the project work was in progress.

15.3 From the evidence of the employer's witness it has come on record that the service of the petitioners were terminated only because the concerned officer received instruction from the Head Office that all persons who were engaged in and after 1986 should be relieved.

15.4 It has also come out on record from the evidence of the employer's witness that before service of the petitioners was terminated, seniority list (even of the employees in the category of daily wage workers) was not prepared and that therefore there was nothing on record to establish that the petitioners were

junior most employee and their service were terminated after following the principle "last come first go".

15.5 Learned tribunal proceeded on the premise that the petitioners were working on project and project came to an end. However, learned Court lost sight of the fact that there was no material on record to establish that the petitioners were appointed only for the project work and with clear intimation to the workman that they were engaged only for project work.

15.6 Even if it is to be assumed that they were engaged only for project work, then service could have been brought to an end only on and only with closure of the project but in present case the petitioners service was terminated orally while project work was going on. The evidence given by the petitioners to the effect that their junior were retained and their service was terminated is not controverted by the evidence of the respondent department.

15.7 At the same time it is not possible for this Court to overlook that the termination was effected in 1985 and by now almost 30 years have passed.

15.8 By now the age of the petitioners must be 50 years or above 50 years. Long time has passed since their termination.

15.9 In the interregnum the proceedings were remanded twice. It has also emerged from the evidence that the employer's witness admitted before the labour Court that all daily wagers were not relieved and that after project was completed, the work was shifted to other station/site (at Viramgam).

16. On examination of the evidence on behalf of the claimants it is noticed that the witness on behalf of the claimants has not said anything during his cross examination with regard to the gainful employment. The award of the labour Court also does not reflect any discussion with regard to gainful employment of the petitioners during interregnum. There is virtually no evidence or material on record which would show anything with regard to gainful employment.

16.1 In this view of the matter coupled with the fact that almost 30 years have passed it is not possible to assume that the petitioners might have stayed unemployment during this period of 30 years.

17. Under the circumstances in view of this Court any case for backwages is not made out.

18. Having regard to the observations by Hon"ble Apex Court in above referred decision to the effect that delay in the proceedings cannot be made ground for denying the relief which would ordinarily follow in cases where the termination is found to be void and without compliance of statutory condition, it appears that following direction would serve interest of justice.

18.1 The decision of the labour Court holding that the termination of the petitioners was in violation of Section 25-F of the Act and therefore illegal and unsustainable is not disturbed and is confirmed.

18.2 However decision by labour Court that though the action is found to be illegal and in contravention of Section 25-F the relief of reinstatement should not be granted, is set aside and the respondents are directed to reinstate the petitioners.

18.3 Having regard to the fact the petitioners were engaged on and they worked on daily wage basis and total tenure of work with the respondent was of 4 years, it is directed that the petitioners reinstatement will be in their original capacity/ category i.e. as daily wage employees without continuity of service.

19. So far as the issue related to backwages is concerned, in view of the fact that workman did not even claim before the learned labour Court that they were unemployed during entire interregnum and having regard to the fact during entire interregnum of 30 years the petitioner could not have stayed unemployed, the request and relief for backwages is denied.

19.1 The reinstatement would be simplicitor reinstatement as daily wage employees. To that extent the decision and direction by learned labour Court is set aside and instead of direction for payment of compensation, the respondents are directed to reinstate the petitioners on their original post (i.e. on daily wage employees) without backwages and without continuity of service.

The petitions are accordingly partly allowed. Rule is made absolute to the aforesaid extent.

Orders accordingly.