

**(2016) 07 SHI CK 0085**  
**In the High Court Of Himachal Pradesh**  
**Case No : CWP No. 8705 of 2012.**

**Dhanvir Singh - Petitioner @HASH State of Himachal Pradesh and Others**

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**Date of Decision :** 13-07-2016

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Industrial Disputes Act, 1947 — Section 25F, Section 25H

**Citation :** (2017) 1 CLR 63 : (2017) 152 FLR 300 : (2016) 4 HimLR 2000 :  
(2016) 4 LLJ 309

**Hon'ble Judges :** Chander Bhusan Barowalia, J.

**Bench :** Single Bench

**Advocate :** Mr. V.D. Khidta, Advocate, for the Petitioner; Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for the Respondents

**Final Decision :** Disposed Off

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## Judgement

Mr. Chander Bhusan Barowalia, J. - The present writ petition is maintained by the petitioner against the award of Industrial Tribunal-cum-Labour Court, Shimla, dated 18.08.2012, whereby compensation to tune of Rs. 2,00,000/- (rupees two lac) was awarded to the petitioner and declining reinstatement, back wages seniority and other service benefits with a prayer to order the reinstatement of petitioner with all consequential benefits.

2. As per the petitioner, he was initially engaged as Driver on daily wage basis on 17.06.1983 and he worked with the respondents till 31.03.1985 and has completed more than 240 days in a calendar year. Thereafter his services were terminated by the respondents on 31.03.1985 without following the due procedure of law. The petitioner made a request to the respondents that he may be continued in service, but when respondents did nothing, the petitioner filed a Civil Suit for permanent prohibitory injunction along with application under Order 39, Rules 1 & 2 C.P.C. The learned Civil Court vide order dated 06.06.1985 restrained the respondents from terminating the services of the petitioner. The suit, however, was dismissed by the learned Civil Court and the appeal was allowed by the learned District Judge, consequently, termination of the petitioner

was held to be illegal and the petitioner was held entitled for employment. The respondents preferred regular second appeal against the order of the learned District Judge and the same was dismissed by the Hon"ble High Court on 16.12.1989. As per the petitioner, the respondents again terminated the services of the petitioner w.e.f. 20.10.1993 and again a Civil Suit was filed by the petitioner along with application under Order 39, Rules 1 & 2 C.P.C. The learned Civil Court on 22.10.1993 ordered to maintain status qua, which order was later on vacated for want of jurisdiction.

3. Thereafter the petitioner, by filing original application, approached the Administrative Tribunal against the termination order wherein interim order was passed by the learned Tribunal on 27.05.1994 and the same was vacated on 12.08.1994 and the original application was dismissed as withdrawn by the Hon"ble Tribunal on the ground of jurisdiction. The respondents again terminated the services of the petitioner on 12.08.1994 w.e.f. 13.08.1994 without complying with the mandatory provisions of Industrial Disputes Act, 1947.

4. Thereafter the petitioner raised demand notice before the Labour Inspector-cum-Conciliation Officer. Conciliation proceedings were conducted by the Conciliation Officer and failure report was submitted by him to the Labour Commissioner, Himachal Pradesh. Thereafter the Labour Commissioner made a reference to the Labour Court to adjudicate the dispute and now the order of the Labour Court is under challenge in this petition.

5. The learned Labour Court awarded the payment of compensation of Rs. 2,00,000/- (rupees two lac) to the petitioner after holding that the termination of the petitioner was illegal, conversely the petitioner submits that the compensation is too meager and the Labour Court has not taken into consideration the G.P.F., gratuity, back wages etc. which the petitioner would have got if he would not have been terminated and he had retired after attaining the age of superannuation.

6. Reply to the writ petition was filed by the respondents and it is averred that the petitioner was engaged on daily wage basis as Driver on 17.06.1983 and he joined his duties on 17.06.1983 in the office of respondent No. 3. As per the respondents, the petitioner worked with them w.e.f. 18.06.1983 to 13.12.1983, but he could not be paid the wages for 57 days, viz., w.e.f. 18.10.1983 to 13.12.1983 for want of sanction from the higher authorities. As per the respondents, on 07.12.1983 the petitioner was again appointed after proper interview through Employment Exchange, Nahan, with condition that he will not claim any right for further appointment and his service is liable to be terminated at any time without assigning any reason and without giving any notice. The petitioner joined on 14.12.1983 and he worked till 08.04.1985 with brakes in service.

7. As per the respondents, the petitioner filed a Civil Suit No. 21/1 of 1985 along with application under Order 39, Rules 1 & 2 CPC read with Section 151 CPC

laying challenge to the order of termination, dated 18.03.1985, before the Sub Judge, Nahan, and the learned Judge restrained the respondents from terminating and removing the petitioner from service till disposal of the main suit. However, the main suit was dismissed on 03.06.1988. It is the case of the respondents that the petitioner remained sitting in the office without any work on the basis of the interim order of the Civil Court. Thereafter the suit, in appeal, was decreed by the learned District Judge, Solan and Sirmour District at Nahan and the respondents filed the regular second appeal, which was dismissed. As per the respondents on 18.10.1992 the respondents retrenched the services of the petitioner w.e.f. 20.10.1993 after giving proper notice under Section 25-F of the Industrial Dispute Act, 1947, and compensation of Rs. 11,000/- was paid to the petitioner. As per the respondents, as the petitioner in the month of 1984 was not having requisite qualification, as per the Recruitment and Promotion Rules, he was not interviewed and being ineligible he could not be appointed and so the initial termination took place. Again the petitioner was retrenched after following due procedure of law w.e.f. 20.01.1993.

8. The petitioner filed rejoinder refuting the stand taken by the respondents and reiterated the contents of the petition.

9. I have heard the learned counsel for the petitioner, learned Additional Advocate General for the respondents and have also gone through the record in detail.

10. The learned counsel for the petitioner has argued that when the Labour Court has held that the termination of the petitioner was illegal, the Labour Court should have ordered the reinstatement with all back wages and all consequential benefits considering that the order of retrenchment/termination was not there. To support his contentions, the learned counsel for the petitioner has relied on the case law, i.e., Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others, (2013) 10 SCC 324, Bharat Sanchar Nigam Limited v. Bhurumal, (2014) 7 SCC 177 and Hari Nandan Prasad and another v. Employer I/R to Management of Food Corporation of India and another, (2014) 7 SCC 190. On the other hand, the learned Additional Advocate General has argued that the award passed by the Labour Court is just and reasoned as the Labour Court has come to the conclusion that there is no violation of the provisions of Section 25-F of the Industrial Disputes Act, 1947, and there is no evidence that the petitioner remained unemployed and was not gainfully employed. He has argued that the petitioner has otherwise also attained the age of superannuation and it was not in the interest of justice to order his reinstatement.

11. From the perusal of the record it is clear that indisputably the respondents engaged the petitioner as a Driver on daily wage basis w.e.f. 17.06.1983 till 31.03.1985 when he was terminated from services. It has also come on record that the petitioner approached the Court of learned Civil Judge, Nahan, in 1985, and the learned Court through interim measure restrained the respondents from

terminating the services of the petitioner. However, the main suit was dismissed by the learned Civil Judge and the learned District Judge allowed the appeal preferred by the present petitioner. Subsequently, the respondents filed a regular second appeal in the Hon"ble High Court and the same was dismissed. It has come on record that even after 31.03.1985 the petitioner remained in service and the termination order dated 31.03.1985 was set aside by the Court, thus rendering termination order dated 31.03.1985 unjust and illegal. However, the petitioner was again terminated w.e.f. 13.08.1994 after following the mandatory provision contained in Section 25-F of Industrial Disputes Act, 1947, and resultantly the petitioner again filed a civil suit in the Court of learned Sub Judge, Nahan on 13.08.1994, wherein the respondents took the plea that the petitioner was terminated on 20.10.1993 and not on 13.08.1994. The termination order dated 18.10.1993 reveals that the petitioner was retrenched w.e.f. 20.10.1993.

12. As far as the break in service is concerned, that is notional break, however, the respondents after following due procedure terminated the services of the petitioner w.e.f. 20.10.1993 after complying with the provisions of Section 25F and after giving him compensation as per law. However, the respondents after terminating the services of the petitioner has employed other persons without affording an opportunity to be employed to the petitioner and the same is violation of Section 25H of the Industrial Disputes Act, 1947. Though the case of the respondents is that the petitioner was not devotional to his duties, but no inquiry was ever conducted by the respondents to this effect.

13. From the award of the Court below it is clear that after termination of the petitioner, the respondents have engaged the services of Shri Ami Chand in 1985, Shri Jahid Khan and Shri Nitin Kumar without giving opportunity to the petitioner and the same is violation of Section 25-H of the Industrial Disputes Act, 1947. As per the order of the Tribunal, the petitioner has already attained the age of 58 years and as per the affidavit of the petitioner, he is 59 years of age as on 19th day of August, 2012 and the retirement age if 58 years. So this Court has to consider the validity of the award passed by the Labour Court with respect to award of compensation only viz-a-viz reinstatement.

14. The Hon"ble Apex Court in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others*, (2013) 10 SCC 324, has held as under:

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

(ii) 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.

(iii) 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 averment 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.

(iv) 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.

(v) 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 victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or Article 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. Courts must always keep 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 a 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.

(vi) In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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-a-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 (P) Ltd., (1979) 2 SCC 80."

15. In Bharat Sanchar Nigam Limited v. Bhurumal, (2014) 7 SCC 177, the Hon"ble Supreme Court, vide paras 36 and 37 of the judgment, has held asunder:

"36. Applying the aforesaid principles, let us discuss the present case. We find that the respondent was working as a daily-wager. Moreover, the termination took place more than 11 years ago. No doubt, as per the respondent he had worked for 15 years. However, the fact remains that no direct evidence for working 15 years has been furnished by the respondent and most of his documents are relatable to two years i.e. 2001 and 2002. Therefore, this fact becomes relevant when it comes to giving the relief. Judicial notice can also be taken of the fact that the need of linemen in the Telephone Department has been drastically reduced after the advancement of technology. For all these reasons, we are of the view that ends of justice would be met by granting compensation in lieu of reinstatement.

37. In Man Singh (BSNL v. Man Singh, (2012) 1 SCC 558) which was also a case of BSNL, this Court had granted compensation of Rs. 2 lakhs to each of the workmen when they had worked for merely 240 days. Since the respondent herein worked for longer period, we are of the view that he should be paid a compensation of Rs. 3 lakhs. This compensation should be paid within 2 months failing which the respondent shall also be entitled to interest at the rate of 12% per annum from the date of this judgment. The award of CGIT is modified to this extent. The appeal is disposed of in the above terms. The respondent shall also be entitled to the costs of Rs. 15,000 (Rupees fifteen thousand only) in this appeal."

16. The Hon"ble Apex Court in another case Hari Nandan Prasad and another v. Employer I/R to Management of Food Corporation of India and another, (2014) 7 SCC 190, has held as under:

"39. On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practise the Labour Court would not give direction for regularisation only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such direction for regularisation would be impermissible. In the aforesaid circumstances giving of direction to regularise such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker

concerned does not meet the eligibility requirement of the post in question as per the recruitment rules. However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularisation in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator would be achieving the equality by upholding Article 14, rather than violating this constitutional provision."

17. In the present case, as per the respondent, the petitioner was initially appointed on 17.06.1983 and he served the respondent-department till 31.03.1985 and thereafter he remained in office till 1994 without any work and on 13.08.1994 the services of the petitioner were terminated. As has been held herein above, though the respondents have complied with the provisions of Section 25-F of the Industrial Disputes Act, 1947, and there is no illegality, but the respondents have failed to comply with the requirement of Section 25-H of the Industrial Disputes Act, 1947, which mandates as under:

"24H. Re-employment of retrenched workmen. Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen] who offer themselves for reemployment shall have preference over other persons."

18. In the present case after taking into consideration the fact that the petitioner remained in service for several years, he has attained the age of superannuation, the termination has taken place more than 20 years back and also taking a harmonious reading of the judgments of the Hon"ble Apex Court, this Court finds that at this stage the only appropriate directions which can be issued to the respondents is compensation only. The Hon"ble Supreme Court in *Bharat Sanchar Nigam Limited v. Bhurumal*, (2014) 7 SCC 177, has allowed compensation of Rs. 3,00,000/- (rupees three lac) to the petitioner, which was ordered to be paid within two months failing which the respondent shall also be entitled to interest at the rate of 12% per annum from the date of judgment. In the present case also taking the law on this aspect and the past of the petitioner the award of the Tribunal below is modified only to the extent that the petitioner is entitled to compensation of Rs. 5,00,000/- (rupees five lac) in place of Rs. 2,00,000/- (rupees two lac). The respondents are directed to pay compensation within a period of two months from today, failing which the petitioner shall be held entitled to interest at the rate of 12% per annum from today. However, in the peculiar facts and circumstances of the case, there is no order as to costs.

19. In view of the above, the petition, as also pending application(s), if any, shall

stand(s) disposed of.