

(2016) 01 GUJ CK 0120
In the Gujarat High Court

Case No : Special Civil Application No. 1820 of 2006

Gujarat Electricity Board

APPELLANT

Vs

Vinodbhai Batukbharthi and Others

RESPONDENT

Date of Decision : 18-01-2016

Acts Referred:

Constitution of India, 1950 — Article 136, Article 137, Article 226, Article 227
Industrial Disputes Act, 1947 — Section 10(1)(c), Section 11-A, Section 25F, Section 25G, Section 25H

Citation : (2016) 01 GUJ CK 0120

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

Bench : Single Bench

Advocate : Lilu K. Bhaya, Advocate, for the Appellant; T.R. Mishra, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

K.M. Thaker, J.—1. In present petition, the petitioner has challenged an award dated 19.3.2005 passed by the learned Labour Court, Jamnagar in Reference (LCJ) No. 4 of 1996 whereby the learned Labour Court has directed the petitioner to reinstate the respondent on his original post with continuity of service, however, the relief for direction to pay backwages which was prayed for by the respondent is refused.

2. So far as the factual background is concerned it has emerged from the record that:

"2.1 Upon feeling aggrieved by his termination from service by an oral order on 30.6.1987, the respondent raised an industrial dispute which came to be referred by an order of reference passed by appropriate Government on 10.10.1995. The said order of reference was registered as Reference (LCJ) No. 4 of 1996.

2.2 In the statement of claim the respondent claimed that he was engaged by the petitioner board with effect from 18.2.1985 and from 18.2.1985, he had

worked regularly till 30.6.1987 as Helper. The respondent also claimed that prior to 18.2.1985 he had worked with the petitioner in 1984 as well. The respondent claimed that during the period from 18.2.1985 to 13.6.1987 he worked regularly and continuously on the post of Helper on Nominal Muster Roll (NMR) basis. The respondent also claimed that his service was abruptly and illegally terminated by an oral order with effect from 30.6.1987. The respondent claimed that his service was terminated by Deputy Engineer and at the time of termination, any notice was not issued nor any notice pay was paid and retrenchment compensation was also not paid. The respondent also claimed that his service was not terminated on account of any misconduct but his service was terminated without any justification. The respondent also claimed that the action of the respondent of terminating his service is in breach of section 25F and in December 1992, he had issued and a served notice and demand reinstatement, however, the said demand was not accepted by the petitioner. The respondent also alleged breach of section 25G.

2.3 The petitioner opposed the reference by filing written statement. In the written statement, the petitioner disputed the claim of the respondent and denied that his service was terminated with effect from 30.6.1987 by an oral order. The petitioner opposed maintainability of reference on the ground that the reference was initiated about 10 years after the date of termination. The petitioner claimed that the respondent had worked 179 days and since the respondent worked on NMR basis, request for reinstatement and/or backwages was not justified or sustainable.

2.4 During the proceedings before the learned Labour Court, deposition of the respondent was recorded at Exh. 21.

2.5 The respondent had also placed document on record which was accepted and registered at Exh. 13 to 20. The documents placed on record by the respondent included the document which demonstrated that the workman junior to the respondent, i.e. one Mr. Abbas Akbar Ali was granted status of permanent workman and the respondent had also produced a document at Exh. 19 to demonstrate and establish that other junior workmen were engaged by the petitioner.

2.6 At Exh. 28, a statement containing details about the calculation about total number of days for which the respondent had worked, was placed on record. At Exh. 23, some attendance registers for the period from 1.4.1985 to 31.12.1986 were placed on record.

2.7 After the stage of evidence was concluded, the learned Labour Court heard the submissions on behalf of the petitioner and the respondent and thereafter upon considering material on record passed the award with above-mentioned direction.

2.8 The petitioner felt aggrieved by the award and filed present petition."

3. After considering the submissions on behalf of the petitioner, the Court passed below quoted order dated 10.2.2006 and admitted the petition. The order reads thus:

"Rule. Mr. K.M. Paul waives service of rule for respondent. Ad interim stay against continuity of service. Reinstatement will be subject to the result of the petition. The matter shall be fixed for hearing in January 2007."

3.1 The respondent filed an affidavit on record of present petition. Under the affidavit dated 18.9.2013, the respondent placed on record relevant documents which were placed on record before the learned Labour Court which the petitioner did not place on record along with the petition.

4. Before proceeding further, it is relevant and appropriate to mention that though any interim relief against the petitioner to reinstate the respondent was not granted by the Court when the petition came to be admitted vide order dated 10.2.2006 and despite the fact that the Court granted interim relief only so far as the direction confirming the benefit of continuity of service, the petitioner did not reinstate the respondent for very long time, i.e. for almost 4 years. Despite the fact that the interim relief against the direction for reinstatement was expressly denied, the petitioner reinstated the respondent on 25.3.2010 and thereby for almost 4 years the petitioner did not comply the award and this Court's order.

5. During the hearing of the petition, Ms. Bhaya, learned advocate for the petitioner submitted that the learned Labour Court failed to appreciate that the reference was made after delay of 10 years and that, therefore, the respondent's claim was not maintainable and should have been rejected by the learned Labour Court. She also submitted that the respondent had worked only for 179 days. She also submitted that the petitioner had placed on record a statement containing details of the total number of days for which the respondent had worked and most of the muster roll were also on record before the learned Labour Court. She submitted that any specific application demanding any particular document was not filed by the respondent and that, therefore, any inference with regard to total number of days should not have been drawn. She also submitted that system of engaging NMR was discontinued with effect from 1980 and that, therefore, reinstatement ought not to have been granted. Ms. Bhaya, learned advocate for the petitioner placed reliance on the oral evidence of the witness examined before the learned Labour Court. In support of her submission on ground of delay in taking out the reference, Ms. Bhaya, learned advocate for the petitioner relied on the decision in the case of Assistant Engineer, C.A.D., Kota v. Dhan Kunwar [, AIR 2006 SC 2670]. Ms. Bhaya, learned advocate for the petitioner also relied on the decision in the case of M/s. Shalimar Works Limited v. Their Workmen [, AIR 1959 SC 1217].

6. Per contra, Mr. Mishra, learned advocate for the respondent submitted that the learned Labour Court has dealt with the contention of delay in preferring the reference and for reasons recorded in the order, the learned Labour Court has

rejected the said contention. He also submitted that the respondent was representing before the petitioner to reinstate him and had made oral and written representations before the competent authority/officer of the petitioner and when his efforts to get reinstated in the service failed, the respondent ultimately initiated the reference proceedings. Mr. Mishra, learned advocate for the respondent to justify the said request relied on the document annexed to the affidavit made by the respondent (Exh. 13). Mr. Mishra, learned advocate for the respondent also relied on the documents placed on record along with the affidavit to demonstrate that while his service was terminated, juniors were retained and after the respondent's termination, not only other persons were engaged, some of the persons junior to the respondent who were also working on NMR were granted permanency in service.

7. I have heard Ms. Bhaya, learned advocate for the petitioner and Mr. Mishra, learned advocate for the respondent and I have considered the award and other material on record.

8. At the outset, it is relevant to mention that the petitioner in its written statement claimed that the respondent had worked with the petitioner, but he had worked intermittently and had not worked for 240 days in any year during the period for which he worked with the petitioner.

8.1 From the said stand taken by the petitioner from its written statement, it becomes clear that in present case one is undisputed fact, is that the respondent was engaged by the petitioner and he had worked with the petitioner.

8.2 In this context, it is relevant to note that in the statement of claim which the respondent filed before the learned Labour Court, he claimed that he joined the service in February 1985 and worked till June 1987 before he was abruptly and arbitrarily terminated by an oral order.

8.3 On this count, it is relevant to mention that in the written statement, the petitioner has not mentioned the date on and from which the respondent was employed by it.

8.4 While the petitioner admitted that the respondent was relieved and his service was put to an end on 30.6.1987, the petitioner board has maintained very convenient silence with regard to the date of joining of the respondent.

8.5 It is pertinent that the respondent mentioned exact and precise date (i.e. 18.2.1985) on and from which he was employed by the petitioner board, however, except general and bald denial of the said claim, any specific detail with regard to the respondent's date of joining is not mentioned by the petitioner either in the written statement or in the deposition on behalf of the petitioner board.

8.6 It is in backdrop of above-mentioned facts that the date of joining of the respondent and the observations and conclusions in the award and the final directions issued by the learned Labour Court are required to be considered.

9. At this stage, it would be appropriate to take into account certain undisputed facts involved in the matter:

"[a] It is not in dispute that the service of the respondent came to be terminated w.e.f. 30.6.1987.

[b] It is also not in dispute that any order terminating the respondent's service was not passed which translates into the fact that the service of the respondent was terminated by an oral order.

[c] It is also not in dispute that the respondent, in his oral evidence, specifically mentioned the name of the officer, who terminated his service by oral order.

The said aspect is taken into account by the learned Labour Court in the award (paragraph No. 7 of the award) and it is recorded by the learned Labour Court that according to the respondent, his service was terminated by Mr. Gohil.

[d] It is also not in dispute that the service of the respondent was not terminated on account of any misconduct.

[e] It is also not in dispute that when the service of the respondent came to be terminated w.e.f. 30.6.1987, any notice was not issued and/or notice in lieu of salary was not paid and retrenchment compensation was also not paid.

[f] It is not in dispute that the claimant asserted that he had joined the service w.e.f. 18.2.1985 and the petitioner did not mention any specific date of joining of the respondent and did not place any material on record to demonstrate that the respondent had joined the service w.e.f. some other date/year and not 18.2.1985.

[g] It is also not in dispute that the respondent placed on record a statement reflecting total number of working days for which the respondent worked and in the said statement the petitioner mentioned the details w.e.f. April-1985.

Meaning thereby, the details of the working days put-in by the respondent from 18.2.1985 to 1.4.1985 were not placed on record by the petitioner.

[h] The learned Labour Court has recorded finding of fact that the respondent had worked from 16.4.1985 to 15.8.1985.

[i] It is also not in dispute that the statement and some of the nominal muster roll which were placed on record by the petitioner reflected that the respondent had worked for 179 days for the period from April-1985 to June-1987. Even in the written statement which the petitioner filed, it had claimed that the respondent had worked for 179 days.

However, the witness examined by the petitioner after verifying the record, more particularly the nominal muster roll, expressly and specifically stated on oath, during his deposition that the respondent had worked for 192 days (excluding the weekly off which was not taken into account while calculating the days for which the respondent had worked) and that the figure of 179 days is incorrect,

and actually, the respondent had worked for 192 days.

He also admitted that in the said total 192 days, Sundays or days of weekly off, were not considered. He also emphasized that the figure of 179 days (mentioned by the Board in its written statement) was incorrect."

10. The learned Labour Court has taken into account the deposition of the respondent and the witness of the petitioner. The learned Labour Court has discussed at length the oral and documentary evidence, available on record before it as well as the facts which emerged from the said documents and oral evidence.

10.1 On the basis of the said material on record and the oral evidence, learned Labour Court has reached to its conclusions and findings which are also recorded in the impugned award.

10.2 The conclusions and findings which are recorded by the learned Labour Court are supported by reasons which in turn, are based on material on record. In this view of the matter, the findings of fact recorded by the learned Labour Court do not warrant any interference.

11. On this count, it would be appropriate to refer to the observation by Hon"ble Apex Court in case of Mohd. Yunus v. Mohd. Mustaqim & Ors. [, AIR 1984 SC 38]. In the said decision, Hon"ble Apex Court observed that:

"7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority", and not to correct an error apparent on the face of the record, much less an error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision."

12. In this view of the matter, this Court would not enter into the process of re-appreciation of evidence and would not interfere with the findings of fact recorded by the learned Labour Court, more particularly when it is noticed that the findings which are recorded by the learned Labour Court are based on examination of and consideration of oral evidence and documents.

13. As mentioned earlier, the learned advocate for the petitioner assailed the impugned award on the ground that learned Labour Court erred in not rejecting the reference on the ground of delay. On this count, it is relevant to note that the respondent claimed that his service was terminated in 1987.

13.1 The respondent had also claimed that after his service was terminated, he was making representation before the competent authority and at certain point of time, he had also made written statement/requests to the authority to reinstate him.

13.2 The respondent has also claimed that when the competent authority did not accept his request/representation, ultimately, upon being defeated in his efforts, he raised industrial dispute.

13.3 From the record, it has emerged that the respondent workman had approached the conciliation officer somewhere in 1994 and before the conciliation officer, he had also submitted an application to condone delay while considering his request to pass order of reference and the appropriate Government passed the order of reference on 10.10.1995.

14. As mentioned earlier, learned advocate for the petitioner relied on the decision in case of Assistant Engineer, C.A.D., Kota v. Dhan Kunwar [, AIR 2006 SC 2670]. in the said decision, Hon''ble Apex Court considered the decision in case of Nedungadi Bank Ltd. v. K.P. Madhavankutty & Ors. [, 2000 (2) SCC 455] and the decision in case of M/s. Shalimar Works Limited v. Their Workmen [, AIR 1959 SC 1217]. In this context, it is relevant to note that in the said decision in case of Assistant Engineer, C.A.D., Kota (supra), Hon''ble Apex Court referred to the decision in case of S.M. Nilajkar & Ors. v. Telecom District Manager, Karnataka [, 2003 (4) SCC 27] wherein it is observed, inter alia, that:--

"8.... The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87.... On 18.12.1990 they initiated the proceedings under the Industrial Disputes Act..... "

(Emphasis supplied)

14.1 Thus, what emerges as the relevant observation by Hon''ble Apex Court is that in cases where delay may not have caused any prejudice to the employer, then, it should not be treated as fatal or culpable.

14.2 In present case prejudice is neither pleaded nor proved.

14.3 Further, it is not the case even of the petitioner that evidence was lost. Actually, the petitioner placed on record of reference convenient material (Muster Roll). In absence of any prejudice there was no justification to dismiss the reference on ground of delay.

14.4 The other decision relied on by learned advocate for the petitioner i.e. the decision in case of M/s. Shalimar Works Limited (supra) is considered by Hon''ble

Apex Court in the decision in case of Assistant Engineer, C.A.D., Kota, and that therefore it is not necessary to separately deal with the said decision on which learned advocate for the petitioner relied.

15. On the other hand, Mr. Mishra learned advocate for the respondent workman relied on the decision in case of Raghubir Singh v. General Manager, Haryana Roadways, Hissar [2014 III CLR 522]. In the said decision, Hon"ble Apex Court considered the decision in case of S.M. Nilajkar & Ors. (supra) (which was referred to and relied on in the decision cited by and relied on learned advocate for the petitioner, i.e. in case of Assistant Engineer, C.A.D., Kota). In the decision in case of Raghubir Singh (supra), Hon"ble Apex Court also referred to the decision in case of Ajaib Singh v. The Sirhind Cooperative Marketing-Cum-Processing Service Society Ltd. & Anr. [, (1999) 6 SCC 82]. In the said decision in case of Raghubir Singh (supra), Hon"ble Apex Court observed that:--

"13. In the case on hand, no doubt there is a delay in raising the dispute by the appellant; the Labour Court nevertheless has the power to mould the relief accordingly. At the time of adjudication, if the dispute referred to the Labour Court is not adjudicated by it, it does not mean that the dispute ceases to exist. The appropriate government in exercise of its statutory power under Section 10(1)(c) of the Act can refer the industrial dispute, between the parties, at any time, to either the jurisdictional Labour Court/Industrial Tribunal as interpreted by this Court in the Avon Services case referred to supra. Therefore, the State Government has rightly exercised its power under Section 10(1)(c) of the Act and referred the points of dispute to the Labour Court as the same are in accordance with the law laid down by this Court in Avon Services & Sapan Kumar Pandit cases referred to supra.

14. Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of S.M. Nilajkar & Ors. v. Telecom District Manager, Karnataka 2003 II CLR 233 SC it was held by this Court as follows-

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree..... In Ratan Chandra Sammanta and Ors. v. Union of India and Ors. (supra)1993 AIR SCW 2214, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief..... "

(Emphasis laid by the Court)

In view of the legal principles laid down by this Court in the above judgment, the reference of the Industrial dispute made in the case on hand by the State

Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer.

14. In the case of Ajaib Singh v. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited & Anr. this Court has opined that relief cannot be denied to the workman merely on the ground of delay, stating that:--

"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages..... "

(Emphasis laid by the Court)

16. Hence, we are of the opinion, having regard to the fact and circumstances of the case that there is no delay or laches on the part of the workman from the date of his acquittal in the criminal case. Thereafter, upon failure of the respondent in adhering to the assurance given to the workman that he would be reinstated after his acquittal from the criminal case, the workman approached the conciliation officer and the State Government to make a reference to the Labour Court for adjudication of the dispute with regard to the order of dismissal passed by the respondent. Keeping in mind the date of acquittal of the appellant and the date on which he approached the conciliation officer by raising the dispute, since the respondent had not adhered to its assurance, the State Government had rightly referred the dispute for its adjudication. Therefore it cannot be said that there was a delay on the part of the appellant in raising the dispute and getting it referred to the Labour Court by the State Government."

(Emphasis supplied)

16. Now, so far as present case is concerned, learned Labour Court has dealt

with the said contention in the award and having regard to the fact that reference was taken out after delay and after taking into account the fact that the petitioner had placed on record the copies of nominal muster roll for the relevant period (barring period of four months), the learned Labour Court has found that the delay did not cause any prejudice to the petitioner board.

16.1 Besides this, learned Labour Court has also denied to grant benefit of backwages to the respondent in view of the delay caused in preferring the reference.

16.2 In this view of the matter, this Court does not find any justification in interfering with the conclusion by the learned Labour Court that there was no justification to reject the reference on the ground of delay.

16.3 This Court also does not find any reason or justification to interfere with the said conclusion by the learned Labour Court. Therefore, the said contention is hereby rejected.

17. Now, so far as the relevant factual aspects, more particularly with regard to the total number of days for which the respondent worked with the petitioner are concerned, it is relevant to mention that the petitioner board had placed on record a statement containing details of total number of working days for which the respondent had worked.

17.1 However, in the said statement, the petitioner took into account the details from the month of April-1985 to June-1987 and did not consider the details of total number of working days for the period from 18.2.1985 to 31.3.1985.

17.2 Moreover, learned Labour Court also found that the petitioner board did not place on record the muster roll or relevant details with regard to the total number of days for which the respondent had worked during the period from 16.4.1985 to 15.8.1985.

17.3 Differently put, the learned Labour Court has taken into account four factors and relevant aspects while dealing with the contention about the total number of working days for which the respondent worked, they are:--

"[a] the witness of the respondent asserted that the respondent had worked for 192 days;

[b] that while calculating the total number of days for which the respondent had worked, the weekly off or Sundays were not taken into account;

[c] that any details or documents which would give out the details related to the number of days for which the respondent worked from 18.2.1985 to 31.3.1985 were not placed on record; and

[d] even the details/documents for the relevant period i.e. from 16.4.1985 to 15.8.1985 (i.e. for about four months) was not placed on record."

17.4 Having taken into account the above-mentioned facts coupled with the fact

that according to the witness of the petitioner, the respondent had worked for 192 days (without considering weekly off days), the learned Labour Court reached to the conclusion that if the days of work for which any material was not placed on record by the petitioner are taken into account along with the total number of working days mentioned by the petitioner, then, the respondent's claim that he had worked for 240 days had to be accepted and the claim of the petitioner that the respondent had not worked for 240 days cannot be accepted.

17.5 On this count, it is also relevant to recall that the petitioner originally came out with the contention that the respondent had worked only for 179 days (as mentioned in the written statement filed before the learned Labour Court).

17.6 Even in the statement which was placed on record by the petitioner before the learned Labour Court, the petitioner insisted that the respondent had worked for 179 days.

17.7 However, its own witness stated in his deposition/assertion that the respondent had worked for 179 days was incorrect.

17.8 He also mentioned that the correct fact with regard to total number of days for which the respondent worked is 192 days and not 179 days.

17.9 From the said evidence by the petitioner's witness, it comes out that at the first instance, the petitioner did not place correct details and facts before the learned Labour Court and it was when the witness of the petitioner mentioned further details, the fact that the respondent had worked for 192 days according to the petitioner came on record.

17.10 On the other hand, the respondent had right from inception insisted that he had worked with the petitioner from 18.2.1985.

17.11 The petitioner failed to establish that the respondent joined the service only in April-1985 and not in February-1985 as claimed by him.

17.12 Under the circumstances, this Court is of the view that there is no justification to interfere with the findings of fact by the learned Labour Court that the respondent had worked from 18.2.1985 to 30.6.1987.

18. In this view of the matter, this Court does not find any justification to interfere with the findings of fact recorded by the learned Labour Court that the respondent had worked with the petitioner from 18.2.1985 to 30.6.1987 and during the preceding 12 months, he had worked for 240 days.

19. It is in background of said findings of fact that the petitioner's action of relieving the respondent is to be examined.

20. As mentioned earlier, from 30.6.1987 the respondent was abruptly terminated by oral order. The said finding of fact is recorded by the learned Labour Court.

20.1 Even the petitioner has not disputed the fact that the service of the

respondent was terminated w.e.f. 30.6.1987 and that any order terminating the service was not passed.

21. As mentioned earlier, it is undisputed fact that before terminating service of the respondent, the petitioner had not issued any notice and/or not paid salary in lieu of notice and also did not pay the retrenchment compensation.

21.1 Thus, the findings of fact recorded by learned Labour Court that the petitioner's action was in violation of Section 25F of the Industrial Disputes Act, cannot be faulted and the said conclusion also does not warrant any interference.

21.2 Hon'ble Apex Court has observed that termination of service of an employee in violation of Section 25F would be void ab initio.

22. In present case, the pertinent aspect of the case is that the respondent also asserted that while he was terminated, certain junior persons were retained in service.

22.1 It is undisputed fact that the petitioner had not published the seniority list [as mandated by Rule 81 of Industrial Dispute (Gujarat) Rules, 1961] and seniority list of NMR employees was also not placed on record before the learned Labour Court.

22.2 In addition to this, the respondent has placed on record certain documents along with his affidavit to establish that he had demonstrated before the learned Labour Court that not only certain junior persons were retained but they were even granted benefit of permanency and some other persons were engaged by the petitioner after he was terminated.

22.3 The petitioner has not been able to controvert, and it has not even controverted, the said documents.

22.4 Thus, the said aspect is established. This would also prove breach of sections 25G and 25H of the Act.

23. In this view of the matter, the conclusion and decision by the learned Labour Court that the action of the petitioner of terminating the respondent was in violation of provisions under the Industrial Disputes Act, more particularly Section 25F and Section 25G are justified and cannot be faulted.

23.1 The petitioner has failed to demonstrate any material or any fact from the documents on record that the said findings and conclusion by the learned Labour Court are contrary to the evidence which was available on record before the learned Labour Court and/or that the conclusions recorded by the learned Labour Court are perverse.

24. In this view of the matter and for the foregoing reasons, this Court does not find any justification to interfere with the findings and conclusions by the learned Labour Court.

24.1 The petitioner has failed to point out any material or any ground from the

record to convince this Court to set aside the conclusions by the learned Labour Court and to take different view. In view of this Court, the findings and conclusions recorded by the learned Labour Court do not suffer from any infirmity.

25. In this context, it is appropriate to refer to the judgment by Hon''ble Apex Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors. [, (2013) 10 SCC 324], wherein Hon''ble Apex Court has 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 Article 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-à-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* (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."

26. Thus, when this Court has, after detailed examination of the award impugned in present petition, found that the conclusion recorded by the learned Labour Court, i.e. that the termination of the service of the respondent was effected in violation of statutory provisions cannot be faulted, it would not be just or proper or permissible for the Court to interfere with the final direction passed by the learned Labour Court.

27. This brings in picture the last aspect related to this matter viz. the rejection of the request for backwages and the petitioner's objection against the direction to consider respondent's service with continuity.

27.1 So far as the request for backwages is concerned, the learned Labour Court has rightly rejected the said request.

27.2 In view of the fact that the respondent initiated the proceedings after delay, the said request does not deserve to be granted.

27.3 So far as direction for continuity of service is concerned, it is obvious that in view of the direction by learned Labour Court to reinstate the respondent on his original post, the respondent would be entitled for being reinstated in his original cadre and that, therefore, so far as continuity of service is concerned, he would be adjusted at appropriate place in the list of employees which he was engaged prior to termination and such adjustment would satisfy the direction for continuity in service. The said direction cannot be construed to mean that the respondent should be treated as permanent workman.

With the aforesaid clarification, the petition is disposed of. Rule is discharged.