

**(2014) 03 AHC CK 0146**

**In the Allahabad High Court**

**Case No : Service Single Petition No. 1940 of 2004**

Phoolman Yadav

APPELLANT

Vs

Bhartiya Sanchar Nigam

RESPONDENT

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**Date of Decision : 31-03-2014**

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 10, 11A

**Citation :** (2014) 5 ALJ 9 : (2014) 142 FLR 247 : (2014) 4 LLN 53 : (2014) LLR 950

**Hon'ble Judges :** Suneet Kumar, J

**Bench :** Single Bench

**Advocate :** P.N. Singh and Vinod Kumar Singh, Advocate for the Appellant; B.B. Saxena and Yogesh Kaserwani, Advocate for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Suneet Kumar, J.—Heard Sri Vinod Kumar Singh, learned Counsel for the petitioner-workman and Sri Yogesh Kesarwani appearing for BSNL. This writ petition has been preferred by the workman against the award dated 10.11.2000 passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Lucknow in the case of Phoolman Yadav v. Divisional Engineer, Telephone Faizabad Division Faizabad.

The case of the petitioner-workman is that he was engaged in the year 1973 and worked till 1981 as a casual labour and thereafter he was regularized in 1981 on a Group-D post on 3.8.1981. All of sudden on 7.8.1981 the petitioner developed some mental imbalance and remained absent till 2-6.1992, for more than 10 years and after a lapse of almost 7 years following reference was made on 29.10.1999 by the Ministry of Labour u/s 10 of the Industrial Disputes Act, 1947 "whether the action of the management of Telecom Department in terminating the services of the Phoolman Yadav w.e.f. 3.6.1992 was legal and justified, if not, to what relief the workman is entitled?"

2. The plea of the management is that there is absence of employer-employee relationship, the workman abandoned the service, there was no question of terminating his service. The workman reported after ten years in 1992. He has no right to seek joining. The plea of reinstatement is misconceived after a lapse of 18 years.

3. The learned Labour Court vide award dated 10.11.2000, held that the management in terminating the services of the workman was not legal nor justified and instead of reinstatement a lump-sum award of Rs. 1,50,000/- was awarded.

4. The workman has approached this Court seeking quashing of the award dated 10.11.2000 to the extent the award refuses reinstatement and orders compensation. The petitioner claims that the petitioner be reinstated in service.

5. The respondent-Counsel had also filed writ petition No. 1017 of 2001 challenging the award. The learned Counsel for the respondent states that he does not want to press the said writ petition as the award has already been complied with and compensation has been paid to the petitioner-workman.

6. Learned Counsel for the respondents submits that there is no legal infirmity in the award and the question of reinstatement could not have been ordered, in the facts and circumstances of the case. Admittedly, the workman was out of service for more than 10 years, reference has been made after a gap of 7 years and the present writ petition, challenging the award was filed after a lapse of three years and there is no explanation of laches.

7. Rival submissions fall for consideration.

The learned Counsel for the petitioner in support of this argument submits that the Tribunal has held that the order for termination is illegal then the petitioner is entitled for reinstatement, has relied upon *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others*, The Supreme Court after considering the judgments on reinstatement with back-wages as culled out the following principles:--

"(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 case in which the Labour Court/Industrial Tribunal exercises power u/s 11A 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).....

(vi).....

(vii)....."

8. The facts of the case, cited by the learned Counsel for the petitioner, is entirely different from the facts of the case at hand. In the present case, admittedly, the workman had not worked for 10 years. Reference was made after 7 years and the writ petition has been filed after three years from the date of the award and admittedly, the petitioner is out of employment since 1981, therefore, in the facts and circumstances of the case, the Tribunal was fully justified in awarding lumpsum compensation instead of back-wages.

9. In Samnuggur Jute Factory Co. Ltd. (North Mill) Vs. Workmen of M/s Samnuggur Jute Factory Co. Ltd. (North Mill ) and Others, A three-Judge Bench of the Supreme Court has held that in case, an industrial employee has been improperly dismissed, as a general rule he is entitled to claim reinstatement. There may, however, be cases in which industrial adjudication may take the view that if the case presents certain unusual features reinstatement may not be granted and compensation instead may meet the ends of justice.

10. In State of Punjab and Others Vs. Des Bandhu, The Supreme Court modified the award of reinstatement and back-wages by a lump-sum compensation of 60,000/- The Supreme Court noted that the industrial dispute was raised after 9 years of the alleged termination and in view of these peculiar facts the Supreme Court modified the order of the Labour Court.

11. In Rolston John Vs. Central Government Industrial Tribunal-cum-Labour Court and others, the Supreme Court considering the long lapse of time (18 years), reinstatement was refused and a compensation, in lieu thereof, was awarded.

12. The recent trend is that the reinstatement and back-wages are not automatic and cannot be ordered in a mechanical manner, it will depend on facts and circumstances of each case. (Refer:-- J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, , Asst. Engineer, Rajasthan Dev. Corporation and Another Vs. Gitam Singh, Shiv Nandan Mahto Vs. State of Bihar and Others, Applying the law on the facts of the present case, since the petitioner has been out of service from 1981 and more than 34 years has passed, the award of the learned Tribunal cannot be interfered with.

The writ petition is devoid of merits and accordingly, dismissed.