

(2020) 07 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 1107, 2754 Of 2019

Solan District Co-operative (Marketing & Consumer)
Federation Ltd. And Others

APPELLANT

Vs

Ram Lal And Others

RESPONDENT

Date of Decision : 31-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 136, 226, 227
Himachal Pradesh Co-Operative Societies Act, 1968 — Section 61, 72, 91(1), 94
Industrial Disputes Act, 1947 — Section 2(OO), 10, 10(1)(d), 10(4), 11A, 25F
Code Of Civil Procedure, 1908 — Section 11

Citation : (2020) 07 SHI CK 0005

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Sameer Thakur, Rohit Sharma, Anuj Gupta

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Since both the above captioned petitions filed under Articles 226 and 227 of the Constitution of India, lay challenge to award dated 6.4.2019

(Annexure P-11), passed by the Industrial Tribunal-cum-Labour Court, Shimla, Camp at Solan, in Ref. No. 42 of 2009, same are being taken up

together for hearing and final disposal.

2. For having bird's eye view, certain undisputed facts, which may be relevant for adjudication of the petitions at hand are that the petitioner-

employee namely Ram Lal was appointed as Helper in August, 1989 and was subsequently, promoted to the post of Salesman on 29.11.1991 by the

respondent-Federation. On 27.1.2005 petitioner was charge-sheeted on account of alleged mis-appropriation of funds. Though, petitioner filed reply to

the charge-sheet denying all the charges, but on 31.3.2015, services of the petitioner were terminated. Petitioner-employee challenged the aforesaid termination order passed by the respondent-Federation before the Deputy Registrar, Cooperative Societies, who vide order dated 3.5.2005, stayed the termination order, whereafter petitioner-employee submitted his joining report on 6.5.2005, but fact remains that he was not allowed to join the duties.

It further emerges from the pleadings adduced on record by the respective parties that eventually on 11.8.2005, order of termination dated 31.3.2005, passed by the respondent-Federation was quashed and set-aside by the Deputy Registrar, Cooperative Societies and respondent-Federation was directed to reinstate the petitioner and initiate fresh inquiry against the petitioner while affording due opportunity of being heard to him. Despite there being order setting aside termination order passed by the Deputy Registrar, respondent-Federation did not allow the petitioner to resume his services, rather preferred a review/revision under Section 94 of the HP State Cooperative Societies Act, 1968 before the Deputy Registrar, Cooperative Societies, Eastern Division, Shimla. The Deputy Registrar vide order dated 30.11.2006, dismissed the review/revision filed by respondent-Federation and ordered that the respondent-Federation shall act upon the order of Deputy Registrar Cooperative Societies in its letter and spirit to facilitate conduction of proper Inquiry on each article of charge against the petitioner. Pursuant to aforesaid order passed by the Deputy Registrar, respondent-Federation instead of initiating fresh enquiry issued memorandum intimating the petitioner-employee therein that Board of Directors has tentatively decided to impose the punishment of dismissal from service on petitioner w.e.f. 31.3.2005. Along with aforesaid memorandum, respondent-Federation also supplied copy of inquiry report dated 15.3.2005 submitted by the inquiring Authority and called upon the petitioner employee to file representation, if any, against the proposed punishment. Vide communication dated 21.4.2007 (Annexure P-6), the petitioner-employee filed detailed reply specifically stating therein that since inquiry report dated 15.3.2005 has been already set-aside by the appellate Court, no punishment can be inflicted upon him on the basis of such report, however, fact remains that respondent-Federation ignoring the aforesaid reply passed order dated 16.5.2007 (Annexure P-7) dismissing the petitioner from service w.e.f. 16.5.2007.

3. Being aggrieved with the aforesaid order passed by the respondent-Federation, petitioner-employee approached the Additional Registrar

(Administration) Cooperative Societies, Himachal Pradesh, by way of petition under Section 72 of the HP Cooperative Societies Act, 1968. Learned

counsel for the respondent-Federation raised question with regard to maintainability of the petition under Section 72 of the Act, accordingly, on

6.11.2007, learned counsel for the petitioner prayed before the court below that petition having been filed by the petitioner-employee under Section 72

of the Act may be treated as an appeal under Rule 23 of the Service Rules of Federation. However, perusal of order dated 2.1.2008, passed by the

Additional Registrar (Administration) Cooperative Societies reveals that petition having been filed by the petitioner under Section 72 of the Act, which

was sought to be treated as appeal under Rule 23 of Service Rules of Federation was dismissed being not maintainable.

4. Being aggrieved with aforesaid order passed by the respondent-Federation, petitioner filed revision petition under Section 94 of the Act, before the

Joint Secretary (Cooperation) to the Government of Himachal Pradesh, exercising power of State Government under HP Cooperative Societies Act,

1968. On 6.11.2008, Joint Secretary Cooperation after having heard learned counsel for the parties and perused averments contained in

review/revision petition permitted the petitioner employee to withdraw the petition reserving liberty to him to approach the appropriate forum for

appropriate remedy.

5. After passing of aforesaid order, petitioner-employee raised a demand before the appropriate Government under the Industrial Disputes Act. Since

conciliation proceedings failed, appropriate Government made following reference under Section 10 of the Industrial Disputes Act, 1947, to the

Industrial Tribunal cum Labour Court:

â??Whether termination of the services of Shri Ram Lal S/o Shri Mathu Ram Salesman w.e.f. 16.5.2007 by the Manager, The Solan District Co-

operative Marketing and Consumer Federation Ltd. Saproon District Solan, HP without holding any enquiry and without complying with the orders

dated 11.8.2005 passed by the Deputy Registrar, Co-operative Societies, Eastern Division, Shimla, H.P. is legal and justified? If not, what back-wages,

seniority, service benefits and relief Shri Ram Lal S/o Shri Mathu Ram, Salesman

is entitled to?â??

6. Vide award dated 21.9.2011, the Tribunal decided the reference in favour of the petitioner and held him entitled for reinstatement alongwith seniority and continuity in service.

Aforesaid award was laid challenge by the respondent-Federation in the High Court by way of CWP No. 11482 of 2011, titled The Solan District Co-

operative (Marketing & Consumer) Federation Ltd v. Ram Lal and ors. Vide judgment dated 16.5.2012, this High Court while allowing the petition

filed by respondent-Federation remanded the reference back to the Tribunal with direction to implead the Solan District Co-operative (Marketing &

Consumer) Federation Ltd as party respondent and decide the matter afresh. Respondent-Federation being aggrieved with the aforesaid award filed

LPA No. 337 of 2012 before the Division Bench of this Court, but said appeal was dismissed vide judgment dated 7.8.2018. In the aforesaid

background, terms of reference, as reproduced herein above, came to be adjudicated afresh by the labour Court below vide award dated 6.4.2019

(Annexure P-1), whereby Tribunal though set-aside the termination of the petitioner w.e.f. 16.5.2007 and directed the respondent-Federation to re-

instate the petitioner forthwith alongwith seniority and continuity in service, but held the petitioner-employee not entitled to any back wages. In the

aforesaid background, both petitioner-employee and respondent-Federation have approached this Court by way of two separate CWPs, laying therein

challenge to aforesaid impugned award. Petitioner-employee is aggrieved on account of nonpayment of back wages, whereas respondent-Federation

has approached this Court against reinstatement order passed by the Tribunal below.

7. I have heard learned counsel for the parties and gone through the records of the case.

8. Close scrutiny of material available on record reveals that petitioner employee at the first instance laid challenge to his termination order before the

Deputy Registrar (Cooperative Societies), by way of an appeal under Section 72 of the HP Cooperative Societies Act, 1968, on the ground that he has

been condemn unheard. Aforesaid authority after having carefully scanned the record arrived at a conclusion that inquiry officer in his report neither

submitted the detailed finding on each article of charge nor disciplinary authority

supplied the copy of the inquiry report to the delinquent official.

Perusal of order dated 11.8.2005, passed by the aforesaid authority i.e. Deputy Registrar (Cooperative Societies) reveals that termination order dated

31.3.2005, passed by the respondent-Federation was quashed and set-aside with direction to the respondent-Federation to conduct fresh inquiry on

each article of charge. Aforesaid order though was sought to be reviewed by the respondent-Federation by way of review petition, but perusal of

order dated 31.11.2006, passed by the Deputy Registrar, clearly reveals that review petition was dismissed and respondent Federation was directed to

complete the enquiry afresh within a period of three months after affording an opportunity of being heard to the petitioner-employee. However, after

passing of aforesaid order, respondent Federation instead of constituting fresh inquiry issued memo dated 19.4.2017, intimating therein decision of the

Board of Directors to impose punishment of dismissal from service on petitioner. Vide aforesaid memo, respondent Federation called upon the

petitioner to file reply to the proposed penalty, but at no point of time, fresh inquiry ever came to be constituted in terms of directions issued by the

Deputy Registrar in its order dated 11.8.2005. Aforesaid order was laid challenge by way of appeal before the Additional Registrar (Administration)

Cooperative Societies by the petitioner-employee, but same came to be opposed on the ground of jurisdiction by the respondent- Federation. In those

proceedings, respondent-Federation claimed that as per judgment rendered by the Honâ??ble Supreme Court in case titled Morinda Coop. Sugar

Mills Ltd v. Morinda Coop Mills Workers Union, (2006) 6 SCC 80, service matters of the employee do not lie under the provisions of Arbitration as

the conditions of service of the workman employed by the society cannot be held to be a dispute touching the business of the society. In light of the

aforesaid objection raised by the respondent-Federation, appeal filed by the petitioner-employee came to be dismissed being not maintainable under

Section 72 of the Act. Secretary (Cooperation) Govt. of HP., having taken note of the specific bar contained under Rule 23 of Service Rules of

Consumer Federation Ltd., Saproon District Solan, permitted the petitioner-employee to withdraw the review/revision petition having been filed by him

against the order dated 2.1.2008, passed by the Additional Registrar (Administration).

9. Since appeal filed by the petitioner under Section 72 read with Rule 23 of the bye-laws of the society, laying therein challenge to his termination

order passed by the respondent-Federation, was not held maintainable and he was permitted to withdraw the same with liberty to file appropriate

proceedings before appropriate court of law, this Court finds no force in the submission made by the Mr. Sameer Thakur, learned counsel representing

the respondent- Federation that petitioner is/was subsequently estopped from raising dispute under the Industrial Disputes Act, 1947. Since the

petitioner was permitted to withdraw the appeal filed by him under Section 72 read with Rule 23 of the bye-laws of the Society by the Joint Secretary

(Cooperation) to the Government of Himachal Pradesh, with liberty to file appropriate proceedings before appropriate court of law, subsequent dispute

raised by him under the Industrial Disputes Act, 1947, cannot be said to be barred by the principle of resjudicata.

10. Though for the reasons stated herein above, this Court is of the definite view that in view of the liberty reserved to the petitioner to file appropriate

proceedings before appropriate court of law, he was well within his rights to raise dispute under the Industrial Disputes Act, but even otherwise also,

principle of resjudicata as enshrined under Section 11 of the Civil Procedure Code, cannot be made applicable in the present case because after

passing of order dated 16.5.2007, whereby service of the petitioner was ordered to be terminated w.e.f. 16.5.2007, no findings, if any, ever came to be

rendered on record on merits qua the legality and validity of the aforesaid order by any of the authority prescribed under the HP Cooperative Societies

Act, rather appeal having been filed by the petitioner-employee, laying therein challenge to his termination order came to be dismissed on the ground of

maintainability. Leaving everything aside, aforesaid order passed by the Joint Commissioner (Cooperation), permitting the petitioner-employee to avail

appropriate remedy in appropriate forum, never came to be laid challenge by the respondent-Federation.

11. It is not in dispute that after failure of conciliation proceedings, appropriate authority framed terms of reference under Section 10 of the Industrial

Disputes Act and sent the same to the Industrial Tribunal for adjudication. Respondent Federation subjected itself to the jurisdiction of labour Court

cum Industrial Tribunal and contested the claim of the petitioner. Since the industrial Tribunal failed to adjudicate the objections raised by the

respondent-Federation, supported by written submissions filed on record, CWP bearing No. 11482 of 2011 having been filed by the respondent-

Federation, laying therein challenge to award dated 21.9.2011, came to be allowed. Vide judgment dated 16.5.2012, this Court remanded the case

back to the Tribunal with direction to decide the case afresh.

12. Being aggrieved with aforesaid order passed by the Single Bench of this Court, respondent filed LPA, which was also dismissed. Careful perusal

of averments contained in aforesaid CWP, record whereof has been summoned by this Court, reveals that in those proceedings, specific objection

with regard to jurisdiction of Conciliation Officer/Industrial Tribunal cum Labour Court was raised. In those proceedings, respondent-Federation

claimed that only course available for assailing the validity of order dated 2.1.2008 passed by the Deputy Registrar was by way of seeking expeditious

remedy under Article 226 of the Constitution of India. Besides above, respondent-Federation also claimed before this Court in those proceedings that

once petitioner opted to file proceedings under various provisions of HP Cooperative Societies Act and having legitimately lost in those proceedings,

could not have resorted to the provisions contained in the Industrial Disputes Act. However, careful perusal of judgment dated 16.5.2012, passed by

the Single Judge of this Court in CWP No. 11482 of 2011 clearly reveals that such aforesaid pleas raised on behalf of the respondent was not

accepted by the court, rather court having taken note of the fact that all the objections raised by the respondent-Federation have not been adjudicated

by the Tribunal remanded the case back. Since ground with regard to jurisdiction of the Industrial Tribunal was negated by the learned Single Judge,

matter was taken to appeal by way of LPA as referred above, but same was also dismissed and as such, respondent-Federation now at this stage

cannot be allowed to raise these questions again, which otherwise have attained finality.

13. Though in view of the aforesaid detailed discussion, this Court is of the definite view that petitioner employee was well within his right to raise

industrial dispute in terms of provisions contained under the Disputes Act after having availed remedies available to him, but even otherwise,

Honâ??ble Apex Court in Morinda Coop Sugar Mills Ltdâ??s supra, has held that dispute relating to the change in service conditions of a workman

is not covered in the definition of a dispute regarding the business of the society and therefore, consequent to the withdrawal of proceedings before the

Registrar and upon being granted liberty to approach appropriate forum, the petitioner employee had option to approach the labour court. Relevant

paras of the judgment supra are as follows:

9.This Court in O.N. Bhatnagar v. Smt. Rukibai Narsindas and Others (AIR 1982 SC 1097) observed inter alia as follows:

In the present case the society is a tenant co- partnership type housing society formed with the object of providing residential accommodation to its

co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the

society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for

removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of

the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in

occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in an unauthorized occupation, as it is the concern of

the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after

the termination of the licence.

It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having

become a nominal member thereof, upon revocation of licence, is a dispute falling within the purview of Section 91(1) of the Act." (Underlined for

emphasis)

10.In Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain (1969 (1) SCR 887) it was held as follows :

Five kinds of disputes are mentioned in sub-section:

First, disputes touching the constitution of a society: secondly, disputes touching election of the office bearers of a society: thirdly, disputes touching the

conduct of general meeting of a society: fourthly, disputes touching the management of a society: and fifthly disputes touching the business of a

society. It is clear that the word "business" in this context does not mean

affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word ""business"" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorized to enter into under the Act and the Rules and its bye-laws.

11. In Co-operative Central Bank Ltd. and others etc. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and others etc. [1969 (2) SCC

43] it was held that alteration of the conditions of the service of the workman would not be covered by the expression ""touching the business of the society"". It was held inter alia as follows :

7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could

not possibly be referred to decision to the Registrar under Section 61 of the Act. The dispute related to alterations of a number of conditions of service

of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the

provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act

itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of

conditions of service of the employees of a registered society: but the meaning given to the expression ""touching the business of the society"". In our

opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered this expression. Since the

word ""business"" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it

would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its

objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to

conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society." (Underlined for

emphasis)

14. Moreover, by now, it is well settled that labour Court cannot travel beyond

the terms of reference. In the case at hand, Tribunal was specifically called upon to determine whether termination of service of the petitioner w.e.f. 16.5.2007 by the Manager, Solan District Federation without holding any inquiry and without complying with the order dated 11.8.2005, passed by the Deputy Registrar Cooperative Societies, is legal and justified and as such, it had no scope, whatsoever to go into the question of entitlement and competence, if any, of the petitioner to raise the industrial dispute under the Industrial Disputes Act after having availed remedy, if any, available to him under HP Cooperative Societies Act.

15. Hon'ble Apex Court in case titled Oshiar Prasad and Ors v. Employers in Relation to Management of Sudamdih Coal Washery of M/s Bharat coking coal limited, Dhanbad, Jharkhand, (2015) 4 SCC 71, has held that Tribunal while answering reference has to confine its inquiry to the question referred and has no jurisdiction to travel beyond the question or/and the terms of the reference. Relevant paras of the aforesaid judgment are reproduced herein below:-

18. One of the questions which fell for consideration by this Court in Delhi Cloth and General Mills Co. Ltd. vs. The Workmen and Others (AIR 1967 SC 469) was that what are the powers of the appropriate Government while making a reference and the scope and jurisdiction of Industrial Tribunal under Section 10 of the Act.

19. Justice Mitter, speaking for the Bench, held as under:

(8)Under S. 10(1)(d) of the Act, it is open to the appropriate Government when it is of opinion that any industrial dispute exists to make an order in writing referring "the dispute or any matter appearing to be connected with, or relevant to the dispute,.....to a Tribunal for adjudication" under s.

10(4)

10. (4) where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto.

(9) From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be

connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other

words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and

anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary : ""happening or likely to happen as a

result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated :

Something incidental to a dispute"" must therefore mean something happening as a result of or in connection with the dispute or associated with the

dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the

root of the main thing to which it is an adjunct to it.....

20. The same issue came up for consideration before three Judge Bench in a case reported in Pottery Mazdoor Panchayat vs. Perfect Pottery Co.

Ltd. and Another, (1979) 3 SCC 762. Justice Y.V. Chandrachud - the learned Chief Justice speaking for the Court laid down the following proposition

of law:

10. Two questions were argued before the High Court: Firstly, whether the tribunals had jurisdiction to question the propriety or justification of the

closure and secondly, whether they had jurisdiction to go into the question of retrenchment compensation. The High Court has held on the first

question that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters

incidental thereto and that the Tribunal cannot go beyond the terms of the reference made to it. On the second question the High Court has accepted

the respondent's contention that the question of retrenchment compensation has to be decided under Section 33-C(2) of the Central Act.

11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its

view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its

business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were

expressed to say whether the proposed closure of the business was proper and

justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references [pic]being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management.

21. The abovesaid principle of law has been consistently reiterated in M/s Firestone Tyre & Rubber Co. of India (P) Ltd. vs. The Workmen

Empoloyed, represented by Firestone Tyre employees' Union AIR 1981 SC 1626, National Engineering Industries Ltd. vs. State of Rajasthan & Ors.,

(2000) 1 SCC 371, Mukand Ltd. vs. Mukand Staff & Officers' Association, (2004) 10 SCC 46 0and State Bank of Bikaner & Jaipur vs. Om Prakash

Sharma, (2006) 5 SCC 123.

22. It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when ""Industrial dispute

exists"" or ""is apprehended between the parties"". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to

the question(s) referred and has no jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A

fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference.

23. Coming now to the facts of this case, it is an admitted case that the services of the appellants and those at whose instance the reference was

made were terminated long back prior to making of the reference. These workers were, therefore, not in the services of either Contractor or/and

BCCL on the date of making the reference in question. Therefore, there was no industrial dispute that ""existed"" or ""apprehended"" in relation to

appellants' absorption in the services of the BCCL on the date of making the reference.

24. Indeed a dispute regarding the appellants' absorption was capable of being referred to in reference for adjudication, had the appellants been in the

services of Contractor or/and BCCL. But as said above, since the appellants' services were discontinued or/and retrenched (whether rightly or

wrongly) long back, the question of their absorption or regularization in the services of BCCL, as claimed by them, did not arise and nor this issue

could have been gone into on its merits for the reason that it was not legally possible to give any direction to absorb/regularize the appellants so long as

they were not in the employment.

25. It is a settled principle of law that absorption and regularization in the service can be claimed or/and granted only when the contract of employment

subsists and is in force inter se employee and employer. Once it comes to an end either by efflux of time or as per the terms of the Contract of

employment or by its termination by the employer, then in such event, the relationship of employee and employer comes to an end and no longer

subsists except for the limited purpose to examine the legality and correctness of its termination.

26. In our considered opinion, the only industrial dispute, which existed for being referred to the Industrial Tribunal for adjudication was in relation to

termination of appellants' employment and - whether it was legal or not? It is an admitted fact that it was not referred to the Tribunal and, therefore, it

attained finality against the appellants.

27. In our considered opinion, therefore, the reference, even if made to examine the issue of absorption of the appellants in the services of BCCL, the

same was misconceived.â??

Also see judgment dated 20.5.2009 passed by this Court in CWP No. 9659 of 2011 16. Since the Industrial Tribunal could not have gone beyond the

terms of reference as has been taken note herein above, Mr. Rohit Sharma, learned counsel for the petitioner-employee is right in contending that

there was no occasion for the Tribunal to go into the question â??whether termination of the petitioner on account of disciplinary proceedings, can be

held to be â??retrenchmentâ?? as defined under Section 2(OO) of the Act or notâ?. Mr. Sameer Thakur, vehemently argued that since termination

of the petitioner-employee was an outcome of disciplinary proceedings initiated against him, such termination of service would not amount to

retrenchment as defined under Section 2 (OO) of the Industrial Disputes Act and as such, there was no necessarily to comply with provisions of Rule

25 (F) of the Act, but since aforesaid question/proposition was never referred to the Tribunal for adjudication, it rightly not ventured to answer the

aforesaid question raised by the respondent Federation. By way of terms of reference, Tribunal was under obligation to answer whether

termination of the petitioner employee w.e.f. 16.5.2007, by the Manager, District Consumer Federation Ltd. Saproon District Solan, H.P., without

holding enquiry and without complying with order dated 11.5.2005 passed by the Deputy Registrar Cooperative Societies is legal and justified?

Careful perusal of terms of reference made by the appropriate Government under Section 10 of the Act, nowhere suggests that Industrial Tribunal

had an occasion or scope to go into the question whether termination of the petitioner would amount to retrenchment in terms of Section 2(OO) of

the Act or not?

17. As far as the question with regard to grant of back wages to the petitioner in the instant case is concerned, this Court is of the view that once

Tribunal found the petitioner employee entitled for reinstatement alongwith seniority and continuity in service, it ought to have held the petitioner

entitled for back wages. Needless to say, before holding the petitioner entitled for reinstatement, Tribunal arrived at a definite conclusion that no fair

and reasonable inquiry was conducted by the respondent-Federation while holding the petitioner-employee guilty of misappropriation of funds of the

society. FIR was also lodged against the petitioner and it is not in dispute that the petitioner stands absolved in two criminal cases initiated against him

Ex.P23 and Ext.P24. Interestingly, one person namely Om Prakash, who was also charge-sheeted for the same mis-conduct was allowed to continue

in service, whereas petitioner despite having repeated orders passed by the Deputy Registrar Cooperative Societies in his favour was not allowed to

join. Despite there being specific direction issued by the Deputy Registrar Cooperative Societies to hold fresh inquiry, no enquiry worth the name was

conducted, rather respondent Federation on the basis of same inquiry report, which was virtually set-aside by the Deputy Registrar while passing order

dated 2.1.2008, imposed penalty of dismissal upon the petitioner. Though Tribunal below in the totality of material available before it proceeded to hold

that respondent acted in gross violation of the statutory provisions and principle of natural justice while imposing the punishment of dismissal, but yet

failed to award back wages while ordering reinstatement of the petitioner. Petitioner was out of job for no fault of him, rather he despite having

specific orders in his favour passed by the Deputy Registrar was not allowed to join his duties by the respondent-Federation and as such, Tribunal held

him entitled for reinstatement with continuity and seniority in service. While answering issue No.2, Tribunal below has fallen in grave error, for no

specific reason has been assigned while denying back wages to the petitioner. There is no material worth the name available on record suggestive of

the fact that respondent-Federation was able to demonstrate on record any adversity or hindrance in the grant of aforesaid relief. Once Tribunal while

answering reference arrived at the conclusion that action of the respondent-Federation in terminating the service of the petitioner is bad and dehors

the rules, natural consequence was to order for reengagement/reinstatement of the petitioner from date of termination alongwith back wages.

Otherwise also Section 11 A of the Industrial Disputes Act empowers the Industrial Tribunal to award consequential relief, if any. Section 11-A of the

Act is reproduced as under:-

“Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal

for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is

satisfied that the order of discharge or dismissal was not justified, it may, by its awards, set aside the order of discharge or dismissal and direct

reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any

lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.” Provided that in any proceeding under this

section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh

evidence in relation to the matter.”

18. The Hon'ble Apex Court in case titled *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* (2013) 10 SCC 32 4 has held that

reinstatement entitles an employee to claim full back wages and denial of back wages would amount to indirectly punishing the employee and

rewarding the employer by relieving him of the obligation to pay back wages including the emoluments. If the employer wants to deny back wages to

the employee or contest his entitlement to get consequential benefits, then it is

for him/her to specifically plead and prove that the employee was gainfully employed during the intervening period.

19. Honâ??ble Apex Court in case bearing Civil Appeal No. 6188 of 2019, titled Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors,

decided on 21.8.2019, has also held as under:-

â??9. Several judgments of this Court have laid down the principles pertaining to the grant of back wages. In Hindustan Tin Works, a three-judge

Bench of this Court adjudicated on the criterion for grant of back-wages where a termination has been held to be illegal. The appellant in that case

was a private limited company with an industrial unit. The Labour Court held that the retrenchment of employees by the appellant was not bona fide

and awarded full back wages to the employees, which was challenged before the Supreme Court. This Court made the following observations:

9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the

workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the

doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where

termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the

relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a

result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has

been deprived of by the illegal or invalid action of the employer.

Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his

capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is

granted. More so in our system where the law's proverbial delay has become stupefying.

If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that

though he will be reinstated, he will be denied the back wages which would be

due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness.

That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages...

(Emphasis supplied)

The Court further clarified that while the payment of full back wages would be the normal rule, there can be a departure from it where necessary circumstances have been established:

11. In the very nature of things there cannot be a straightjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner.

The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour.

It is not to be arbitrary, vague and fanciful but legal and regular (see *Susannah Sharp v. Wakefield* [(1891) AC 173, 179])."

Taking note of the financial problems of the appellant company, the Court granted compensation to the extent of 75% of back wages. The principle laid down in

Hindustan Tin Works has been followed by other decisions of this Court.⁴

10. In *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court*⁵, the termination of the services of the appellants was

held to be in contravention of Section 25-F of the Industrial Disputes Act by the

Labour Court, but the appellants were denied the payment of back wages. In appeal, a three-judge bench of this Court observed:

6... 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.

11. In *Deepali Surwase*, the appellant had been employed as a teacher in a primary school run by a trust. The services of the appellant had been terminated by the management of the school pursuant to an ex-parte inquiry proceeding. The School Tribunal quashed the termination of the appellant's services and issued a direction for the grant of full back wages. In appeal, the High Court affirmed the view of the Tribunal that the termination was illegal, but set aside the direction for grant of back wages. In appeal, a two-judge Bench of this Court laid down the following principles:

22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for

the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money...The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages.

If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments.

The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emolument.

(Emphasis supplied)

The Court laid down the following principles to govern the payment of back wages:

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 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.

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 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 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the 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.

38.6. 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-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 (P) Ltd. v. Employees* [*Hindustan Tin Works (P) Ltd. v. Employees*, (1979) 2 SCC 80 : 1979 SCC (L & S) 53] .

12. In the present case the first inquiry resulted in a report which came to the conclusion that the charge of misconduct was not substantiated. Upon finding that the convening of a fresh inquiry without recording reasons was contrary to law, the High Court would have ordinarily granted liberty to the Municipal Council to take a fresh decision after due notice to the appellant. Such a course of action was, however, rendered impracticable by supervening events. The writ petition instituted by the appellant before the High Court in 1996 remained pending for nearly eighteen years. The appellant had been removed from service on 29 June 1996. Considering the lapse of time, reopening the proceedings would not be expedient in the interest of justice particularly when the appellant had, in the meantime, attained the age of superannuation in 2005. Relegating the appellant to a protracted course of action by restoring the proceedings before the disciplinary authority would also not be fair and proper after a lapse of nearly fourteen years since his retirement.

13. Having due regard to the principles which have been enunciated in *Deepali Surwase* by this Court, the High Court was not, in our view, justified in denying the back-wages to the appellant altogether. Bearing in mind the circumstances which have been noted above, a lumpsum compensation should be directed to be paid.â??

20. In the aforesaid judgment, it has been clearly held that in the cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule, but such rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court

must 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. 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 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. In the case at hand, there is nothing on record suggestive of the fact that respondent-Federation was able to prove that the petitioner-employee was gainfully employed and was getting same and similar emoluments during the period of termination and as such, Tribunal below ought to have awarded back wages while holding the petitioner entitled for reinstatement alongwith continuity and seniority in service.

21. Consequently, in view of the detailed discussion made herein above as well as law relied upon, CWP No. 1107 of 2019 having been filed by the respondent-Federation is dismissed being devoid of any merits, whereas CWP No. 2754 of 2019 having been filed by the petitioner-employee is allowed and petitioner-employee is held entitled to back wages from the date of his termination from service. Pending application(s), if any, also stand disposed of accordingly.