

(2014) 03 AHC CK 0246

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 24678 of 2011

State of U.P.

APPELLANT

Vs

Raj Kumar

RESPONDENT

Date of Decision : 21-03-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 142, 15, 16

Evidence Act, 1872 — Section 106, 130

Industrial Disputes Act, 1947 — Section 10, 11A, 17A, 25-B, 25F

Uttar Pradesh Industrial Disputes Act, 1947 — Section 2(bb), 2(g), 2(s), 6N, 6-N

Citation : (2014) 4 ADJ 320 : (2015) 1 ALJ 270 : (2014) 4 AWC 4089 : (2015) 1 UPLBEC 746

Hon'ble Judges : Surya Prakash Kesarwani, J

Bench : Single Bench

Advocate : Shekhar Kumar, Advocate for the Appellant; Ramesh Sinha and K.M. Asthana, S.C, Advocate for the Respondent

Final Decision : Allowed

Judgement

Surya Prakash Kesarwani, J.—Hon"ble Surya Prakash Kesarwani, J.--Heard Sri R.K. Pandey, learned Standing Counsel for the petitioners and Sri K.M. Asthana, learned counsel for the respondents. In this writ petition, the State of U.P. (petitioners) have challenged the award dated 29.9.2000 passed in adjudication case No. 174/1999 and published on 23.1.2001, the order dated 1.10.2007 rejecting the recall application and the order dated 7.5.2009 rejecting another recall application, all passed by the Labour Court (2) U.P. Kanpur as well as recovery certificate dated 24.1.2011 and the citation dated 18.3.2011.

2. Briefly stated the facts of the present case are that the respondent No. 1 raised a labour dispute. Thereupon a reference was made to the Labour Court No. (3), Kanpur on 18.6.1997, which was transferred to Labour Court No. (2), Kanpur on 18.3.1999. The reference was made as under:

3. According to the petitioners, the respondent No. 1 was engaged on daily wage

basis as per sanction obtained for the period from 26.3.1993 to 25.9.1993, 20.2.1994 to 11.2.1994, 16.8.1994 to 15.9.1994, 17.9.1994 to 15.10.1994, 21.2.1995 to 20.4.1995 and 21.6.1995 to 20.8.1995. After 20.8.1995, the respondent No. 1 was not engaged as there was no work. The respondent No. 1 was not engaged continuously in a year for 240 days or more. The petitioners filed six documents in support of their stand. However, when the matter was transferred from Labour Court No. (3) to Labour Court No. (2), Kanpur, neither any intimation/notice in this regard was given to them nor the petitioners had any knowledge in respect thereof and as such they could not appear and the impugned award was passed ex parte. When the fact of passing of the award came to the knowledge of the petitioners, they moved a recall application under Rule 16(2) of the U.P. Industrial Disputes Rules, 1957, which was rejected by the respondent No. 3 on 1.10.2007 by the following order:

No response for the O.P. The workman is represented The prayer for review is rejected.

4. Since the petitioners were not having knowledge of the rejection of their application by the aforesaid order and as such, a recall application was moved on 27.5.2009 supported by an affidavit but it was rejected at the time of presentation itself on 27.5.2009 by the following orders:

Heard and rejected.

5. Thereafter, the recovery certificate was issued, followed by a citation issued by the Tehsildar. Aggrieved with the aforesaid award as well as the order dated 1.10.2007 and 27.5.2009, the petitioners have filed the present writ petition.

6. According to respondent No. 1, he was engaged on daily wage basis on muster roll by the petitioner No. 2 from 26.12.1992 to 25.9.1993, during which period he continuously worked on a wage of Rs. 26/- per day. Subsequently, he was engaged from 21.2.1995 to 20.8.1995 on a wage of Rs. 36/- per day. On 21.8.1995, the petitioner No. 2 disengaged him. Against this action the respondent No. 1 moved application before the petitioner No. 2 on 3.4.1996 and 13.8.1996. The petitioner No. 2 paid the wages on 19.6.1996 for the period from 21.6.1995 to 20.8.1995 but did not continue the respondent No. 1 in service. Aggrieved with this, the respondent No. 1 raised industrial dispute and the afore noted reference was made to the Labour Court No. (3), Kanpur, which was subsequently transferred to Labour Court No. (2), Kanpur who passed the impugned award dated 29.9.2000 published on 23.1.2001 to reinstate the respondent No. 1 in uninterrupted service from 21.8.1995 and to pay the entire wages and benefits. Submissions on behalf of petitioners.

7. Sri R.K. Pandey submits as under:

(I) Respondent No. 1 was engaged as a daily wager after due sanction in the need of extra hands to meet the requirement of work for the period from 26.3.1993 to 25.9.1993, 20.2.1994 to 11.2.1994, 16.8.1994 to 15.9.1994,

17.9.1994 to 15.10.1994, 21.2.1995 to 20.4.1995 and 21.6.1995 to 20.8.1995. When extra work was not available, he was disengaged. The respondent No. 1 never remained in continuous service in a year for 240 days or more so as to attract the provisions of Section 6-N of the U.P. Industrial Dispute Act, 1947. The evidences in support of the period of engagement of the respondent No. 1 were filed before the Court below, which have been completely ignored, while passing the impugned award. Thus, the impugned award is ex-facie illegal and the findings recorded therein are perverse.

(II) The respondent No. 1 could not prove his continuous service in a year for 240 days or more and as such it was not open for the Presiding Officer, Labour Court to hold that the respondent No. 1 was in service for 240 days.

(III) Paragraph 5 of the impugned award records the facts that six documents were filed by the petitioners but the same have been completely ignored, while passing the impugned award.

(IV) The case was being heard by the Labour Court No. (3), Kanpur but without any notice or information it was transferred to Labour Court No. (2), Kanpur. In the mean time, the construction Division-III, in which the respondent No. 1 was engaged, was merged with the provincial Division in the year 1998. In the circumstances, the petitioners were completely unaware of the proceedings in Labour Court No. (2), Kanpur.

(V) The respondent No. 1 was disengaged on 20.8.1995 and thus, in the facts and circumstances and even if the period of service as alleged by the respondent No. 1 is considered for arguments sake then also the respondent No. 1 has not completed 240 days continuous service in the preceding year and as such Section 6-N read with Section 2(g) and explanation (2) thereof is not attracted. The above referred explanation clearly shows the clear intention of the legislature that if a workman is engaged after two years then his earlier engagement cannot be considered for the purposes of continuity in service.

(VI) Since, undisputedly the respondent No. 1 was a daily wager temporarily engaged as per sanctions obtained from time to time and as such he cannot be reinstated with full back wages under the provisions of Section 6-N of the Act.

(VII) Primary burden to prove one year continuous service was on the respondent No. 1, which was not discharged by him. No evidence except the pleadings, was produced by the respondent No. 1 to prove the continuous service of 240 days or more and as such the impugned award is contrary to the law laid down by Hon''ble Supreme Court in the case of Manager, R.B.I., Bangalore Vs. S. Mani and Others,

(VIII) The reference made to the labour Court was confined only for compensation. As per the settled law in case of daily wagers, disengaged even in breach of the provisions of Section 6-N of the U.P. Act cannot be awarded reinstatement but the only relief which the labour Court may give, is to award

compensation. In view of this the impugned award directing reinstatement with continuity in service, entire back wages and benefits is wholly illegal and without authority of law.

Submissions on behalf of respondents

8. Sri K.N. Asthana submits that:

(I) The submission of the petitioners that no notice was served after the transfer of the case, is incorrect inasmuch as, a notice dated 8.12.1999 fixing the date for 25.1.2000 was sent by Labour Court No. (2) as evident from Annexure 1 to the supplementary counter affidavit.

(II) The recall application does not say even a word for merger of the Construction Division III in Provincial Division.

(III) Hon"ble Supreme Court has interpreted the provisions of Section 2(g) of the U.P. Industrial Dispute Act, 1947 and held in the case of Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and Others, that the expression "continuous service" as used in Section 6-N read with Section 2(g) of the U.P. Act indicates that a workman in order to be in continuous service may have worked continuously for a period of 240 days in any calender year during his period of service. He also relied upon another judgment of Hon"ble Supreme Court in the case of U.P. Drugs and Pharmaceuticals Company Limited Vs. Ramanuj Yadav and Others,

(IV) Labour Court or Industrial Tribunal is final Court of facts in industrial disputes and its findings can be interfered under Article 226/227 of the Constitution of India only if the findings so recorded is perverse or not based on legal evidence. The findings recorded in the impugned award does not suffer from any perversity and as such, the writ petition is misconceived and the award cannot be interfered with. He relied on the judgment of Hon"ble Supreme Court in the case of Management of Madurantakam, Co-operative Sugar Mills Ltd. Vs. S. Viswanathan,

(V) Since the termination of service of the respondent No. 1 by the petitioners has been found to be illegal and in violation of the provisions of Section 6-N of the Act and as such the respondent No. 1 has been rightly held to be entitled for reinstatement with uninterrupted service from 21.8.1995 and entire back wages and benefits. In support of his submissions, he relied on the judgment of Hon"ble Supreme Court in the case of Management of Maduran Takam Co-operative Sugar Mills (supra), para 19.

(VI) In the case of R.M. Yellatti Vs. The Assistant Executive Engineer, in which Hon"ble Supreme Court laid down the law that the State Government should take steps to maintain proper records of the services rendered by the daily wagers that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of number of days, which the labourer daily wagger has worked.

This system will obviate litigations and pecuniary liabilities for the Government. In view of declaration of this principle of law, it was the duty of the petitioners to produce the records/certificates in support of the services actually rendered by the respondent No. 1.

(VII) The impugned award is wholly valid in view of the law laid down by Hon"ble Supreme Court in the case of Harjinder Singh Vs. Punjab State Warehousing Corporation, Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana), and the Single Judge judgment of this Court in the case of Brij Kishore Choubey v. Presiding Officer, Labour Court and others, 2008 (8) ADJ 616.

9. I have carefully considered the submissions of learned counsel for the parties and perused the records of the writ petition.

Findings

10. Considering the facts and circumstances of the case and the submissions of learned counsel for the parties, following issues arise for consideration:

(I) Whether review/recall applications of the petitioners were illegally rejected?

(II) Whether impugned award has been passed in violation of the principles of natural justice?

(III) Whether continuous service as defined u/s 2(g) read with Section 6-N of the U.P. Act would mean continuous service in the preceding year or any year?

(IV) Whether the findings recorded by the Court below that the respondent No. 1 continuously worked for 240 days or more is perverse?

(V) Whether on the admitted facts of the case that the respondent No. 1 was a daily wager engaged temporarily on muster roll is entitled for reinstatement with continuity in service and entire back wages and benefits?

(VI) Whether the award can travel beyond the reference, which was made only for compensation?

Issues No. 1 and 2

11. The issues No. 1 and 2 are interlinked. The facts of the case as mentioned above, clearly shows that the petitioners received the notice/summon in adjudication case No. 174/99 and participated in the proceedings. The ground for violation of natural justice pleaded by petitioners is that when the case was transferred from Labour Court No. (2), Kanpur to Labour Court No. (3), they were not issued fresh notices. I find no force in the submission. A notice dated 8.12.1999 was issued by the Labour Court No. (2) U.P., Kanpur to the petitioners by registered post fixing 25.1.2000 which has been filed as Annexure 1 to the supplementary counter affidavit and the same is undisputed. The respondent No. 1 has also filed the proof of service of the said registered notice as Annexure 2 to the supplementary counter affidavit. This leaves no manner of doubt to come to

the conclusion that the petitioners were issued due notices but they deliberately not appeared. In the circumstances, the allegation of breach of principles of natural justice is totally baseless.

12. So far as the rejection of recall application is concerned, I find that Rule 16 of the U.P. Industrial Disputes Rules 1957 provides as under:

16. Labour Court or Tribunal or Arbitrator may proceed ex parte.--(1) If, on the date fixed or on any other date to which the hearing may be adjourned, any party to the proceedings before the Labour Court or Tribunal or an Arbitrator is absent, though duly served with summons or having the notice of date of hearing, the Labour Court or Tribunal or the Arbitrator, as the case may be, may proceed with the case in his absence and pass such order as it may deem fit and proper.

(2) The Labour Court, Tribunal or an Arbitrator may set aside the order passed against the party in his absence, if within ten days of such order, the party applies in writing for setting aside such order and shows sufficient cause for his absence. The Labour Court, Tribunal or an Arbitrator may require the party to file an affidavit, setting the cause of absence. As many copies of the application and affidavit, if any, shall be filed by the party concerned as there are persons on the opposite side. Notice of the application shall be given to the opposite parties before setting aside the order.

13. A perusal of the Sub Rule 2 of Rule 16 shows that the petitioners could have moved the recall application within ten days of the impugned award dated 29.9.2000 published on 23.1.2001 but they moved the recall application under Rule 16(2) on 28.7.2001, which has been filed as Annexure 13 to the writ petition. Thus, the application itself was moved by the petitioners beyond time. They deliberately did not appear and as such this recall application was correctly rejected by the impugned order dated 1.10.2007. Another application dated 27.5.2009 was moved by the petitioners for recall of the order dated 17.11.2008, while the order rejecting the earlier recall application was passed on 1.10.2007. Besides this, the only reason for the long delay of about 20 months in filing the second recall application was stated to be because of election. This application dated 27.5.2009 was rejected on the same day. I find no error in the impugned order dated 27.5.2009 rejecting the second recall application for reason of delay as well as reason for delay to be wholly unconvincing.

14. In the case of Sangham Tape Company Vs. Hans Raj, Hon''ble Supreme Court considered the provisions of the Industrial Dispute Act 1947 and held that an award made by labour Court and Industrial Tribunal becomes enforceable u/s 17A of the Act on the expiry of 30 days from the date of its publication. Once the award becomes enforceable, the Industrial Tribunal and/or the labour Court becomes functus officio. Therefore, application for recall of the order must be filed before the expiry of thirty days. A contrary view was taken by another Bench of Hon''ble Supreme Court in the case of Radhakrishna Mani Tripathi Vs.

L.H. Patel and Another, Due to conflicting view taken in two decision, the Hon''ble Supreme Court referred this issue to a larger Bench in the case of Haryana Sugar Malting Ltd. v. Phool Chand, (2012) 8 SCC 579.

Issue No. 3

15. The language of Section 2(g) does not suffer from any ambiguity. Plain reading of Section 2(g) of the U.P. Act does not require a workman to avail the benefit of the deeming provision of completion of one year of continuous service in the industry to have worked for 240 days during the preceding year. Thus, it is not necessary that a workman should have worked for 240 days during the preceding year. This controversy is also concluded by the judgment of Hon''ble Supreme Court in the case of U.P. Drugs and Pharmaceuticals Company Limited Vs. Ramanuj Yadav and Others, wherein Hon''ble Supreme Court considered the provisions of Section 6-N and Section 2(g) of the U.P. Act and the provisions of Chapter VA of the Industrial Dispute Act, 1947 and held in paragraph 10 as under:

10. Under the aforesaid legislative background, the question involved is required to be considered. Section 2(g) of the UP Act does not require a workman, to avail the benefit of the deeming provision of completion of one year of continuous service in the industry, to have worked for 240 days during "preceding" period of 12 calendar months. The word "preceding" has been used in Section 25-B of the ID Act as incorporated in the year 1964. Section 2(g) does not use the word "preceding". The concept of "preceding" was introduced in the ID Act so as to give complete and meaningful benefit of welfare legislation to the working class. The approach to be borne in mind while interpreting the welfare legislation is illustrated in Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, where this Court has observed that semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.

(Emphasis supplied by me)

16. The aforesaid judgment has been followed by Hon''ble Supreme Court in the case of Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and Others, .

17. In view of the above, I have no hesitation to hold that the continuous service as defined u/s 2(g) of the U.P. Act means continuous service for a period of 240 days in any year.

Issue No. 4

18. It is undisputed that the petitioners, during the course of proceedings in adjudication case No. 174 of 1999 clearly stated that the respondent No. 1 was engaged on daily wage basis on temporary muster roll after obtaining sanction for the period from 26.3.1993 to 25.9.1993, 25.2.1994 to 11.3.1994, 16.8.1994

to 15.9.1994, 17.9.1994 to 15.10.1994, 21.2.1995 to 20.4.1995 and 21.6.1995 to 20.8.1995. It is undisputed that the petitioners filed six documents as referred in paragraph 5 of the impugned award. The case of the respondent No. 1 was that he continuously worked from 26.12.1992 to 25.9.1993 as daily wager and thereafter from 21.2.1995 to 20.8.1995. Although, subsequently the petitioners did not appear in the proceedings before the respondent No. 2 yet while passing the impugned award, the respondent No. 2 has neither discussed any of the evidences adduced by the petitioners nor of the respondent No. 1 but held in paras 8 and 9 as under:

Burden of Proof

19. In the case of R.M. Yellatti Vs. The Assistant Executive Engineer, Hon''ble Supreme Court held in para 12, 14, 15 and 17 as under:

12. Now coming to the question of burden of proof as to the completion of 240 days of continuous work in a year, the law is well-settled. In the case of Manager, R.B.I., Bangalore Vs. S. Mani and Others, the workmen raised a contention of rendering continuous service between April, 1980 to December, 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The tribunal based its decision on the management not producing attendance register. In view of the affidavits filed by the workmen, the tribunal held that the burden on the workmen to prove 240 days service stood discharged. In that matter, a three-judge Bench of this Court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that they had worked for 240 days; that no document in support of the said plea was ever produced and, therefore, this Court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the management to produce relevant documents. The Court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this Court set aside the award of the industrial tribunal ordering reinstatement.

14. In the case of Range Forest Officer (supra), the dispute was referred to the labour Court as to whether the workman had completed 240 days of service, vide award dated 10.8.1988, the tribunal held that the services were wrongly terminated without giving retrenchment compensation. In arriving at this conclusion, the tribunal stated that in view of the affidavit of the workman saying that he had worked for 240 days, the burden was on the management to show justification in termination of the service. It is in this light that the division Bench of this Court took the view that the tribunal was not right in placing the burden on the management without first determining on the basis of cogent evidence

that the workman had worked for 240 days in the year preceding his termination. This Court held that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination; that filing of an affidavit is only his own statement in his own favour which cannot be recorded as sufficient evidence for any Court or tribunal to come to the conclusion that a workmen had worked for 240 days in a year. This Court found that there was no proof of receipt of salary or wages for 240 days; that letter of appointment was not produced; that letter of termination was not produced on record and, therefore, award was set aside.

15. In the case of Rajasthan State Ganganagar S. Mills Ltd. (supra), the workman had alleged that he had worked for more than 240 days in the year concerned, which claim was denied by the management. The workman had merely filed an affidavit in support of his case. Therefore, the division bench of this Court took the view that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination. This Court observed that filing of an affidavit was not enough because the affidavit contained self-serving statement of the workman which cannot be regarded as sufficient evidence for any Court or tribunal to come to the conclusion that the claimant had worked for 240 days in a year. Further, this Court found that there was no proof of receipt of salary or wages for 240 days and, therefore, mere non-production of the muster roll for a particular period was not sufficient for the labour Court to hold that the workman had worked for 240 days as claimed. On the facts of that case, the Court found that even if the period for which the workman had alleged to have worked was taken into account, as mentioned in his affidavit, still the said workman did not fulfill the requirement of completion of 240 days of service and, therefore, this Court set aside the award of the labour Court.

17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings u/s 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had

worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour Court unless they are perverse. This exercise will depend upon facts of each case.

20. In the case of R.M. Yellatti (supra), Hon"ble Supreme Court has followed its earlier judgments in the cases of Manager, Reserve bank of Manager, R.B.I., Bangalore Vs. S. Mani and Others, Municipal Corporation, Faridabad Vs. Siri Niwas, , Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan and Another, , The Range Forest Officer Vs. S.T. Hadimani, and Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others,

21. In the case of Talwara Coop. Credit and Service Society Ltd. Vs. Sushil Kumar, Hon"ble Supreme Court held as under:

13. This Court in a large number of cases noticed the paradigm shift in the matter of burden of proof as regards gainful employment on the part of the employer holding that having regard to the provisions contained in Section 106 of the Indian Evidence Act, the burden would be on the workman. The burden, however, is a negative one. If only the same is discharged by the workman, the onus of proof would shift on to the employer to show that the concerned employee was in fact gainfully employed.

In Surinder Kumar (supra), this Court held: (SCC p. 177, paras 12-14)

12. The Labour Court and the High Court also proceeded wrongly on the premise that the burden of proof to establish non-completion of 240 days of work within a period of twelve months preceding the termination, was on the management. The burden was on the workman. [See U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, and State of M.P. v. Arjan Lal Rajak, (2006) 2 SCC 610].

13. Equally well-settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. [See Manager, Reserve Bank of India, Bangalore v. S. Mani.

14. It is also a trite law that only because some documents have not been produced by the management, an adverse inference would not be drawn against the management. [See S. Mani (supra)]

(Emphasis supplied by me)

22. Thus, the general principle of burden of proof as flows from the above noted judgments may be summarised as under:

(I) Initial burden of proof is on the claimant to show that he continuously worked

for 240 days in a given year.

(II) Pleadings do not constitute a substitute for proof that the workman worked continuously for 240 days in a year.

(III) Only because of non response to the complains filed by the workman, it cannot be said that the workman had proved that he had worked for 240 days.

(IV) Mere affidavits and self serving statements made by the claimant/workman will not suffice in the matter of discharge of burden placed by law on the workman to prove that he had continuously worked for 240 days in a given year.

(V) In the case of termination of services of daily wager there will be no letter of appointment or termination and receipt or proof of payment. Therefore, workman can call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register and the attendance register etc.

(VI) Drawing of adverse inference due to non production of above documents would ultimately depend on facts of each case.

(VII) Mere non production of muster rolls or some documents per se without any plea of suppression by the claimant workman will not be the ground for the labour Court or the tribunal to draw an adverse inference against the management.

(VIII) Burden of proof having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, is on the workman.

Scope of interference under Article 226

23. There can be no quarrel with the argument of learned counsel for the respondent No. 1 that the scope of interference under Article 226 of the Constitution of India against the award is limited and the Court cannot go into the question of fact decided by the labour Court or the Tribunal, which is the final fact finding Court. Interference can be made only if a finding of fact is perverse or if the same is not based on legal evidence. In the case of Management of Madurantakam, Co-operative Sugar Mills Ltd. Vs. S. Viswanathan, Hon'ble Supreme Court held in para 12 as under:

12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final Court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ Court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ Court will not enter into the realm of factual disputes and finding given thereon. A consideration of the impugned order of the learned Single Judge shows that nowhere he has come to

the conclusion that the finding of the Labour Court is either perverse or based on no evidence or based on evidence which is not legally acceptable. Learned Single Judge proceeded as if he was sitting in a Court of appeal on facts and item after item of evidence recorded in the domestic enquiry as well as before the Labour Court was reconsidered and findings given by the Labour Court were reversed. We find no justification for such an approach by the learned Single Judge which only amounts to substitution of his subjective satisfaction in the place of such satisfaction of the Labour Court.

24. In the case of Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, Hon"ble Supreme Court held in para 16 as under:

12. On a consideration of all the circumstances, the present case, in our view, was one such case. The Tribunal exercised its discretion mechanically without weighing the circumstances of the case. That was no exercise of discretion-at all. There is ample authority to the effect that if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations, certiorari may properly issue to quash its order. [See S.A. de Smith, Judicial Review of Administrative Action, (2nd ed.) 324-325]. One such relevant consideration, the disregard of which would render its order amenable to interference, would be the well-settled principles laid down in decisions binding on the tribunal to whom the discretion is entrusted. The refusal by the High Court to interfere was equally mechanical and amounted to refusal to exercise, its jurisdiction. Its order, therefore, becomes liable to interference.

(Emphasis supplied by me)

25. In the case of Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, Hon"ble Supreme Court held in para 42 as under:

42. We are aware that the income tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this Court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were was the reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this Court.

26. In the case of Udhavdas Kewalram Vs. Commissioner of Income Tax, Bombay

City I, Hon"ble Supreme Court held that Tribunal must consider with due care all material facts and record its findings on all contentions raised before it and the relevant law.

27. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. Highlighting this rule, Hon"ble Supreme Court held in the case of *The Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and Others*, as under:

31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of Judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. "[Vide *State of Orissa Vs. Dhaniram Luhar*, and *State of Rajasthan Vs. Sohan Lal and Others*,

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide *Raj Kishore Jha Vs. State of Bihar and Others*, *Vishnu Dev Sharma Vs. State of U.P. and Others*, *Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela-I Circle and Others*, *State of Uttaranchal and Another Vs. Sunil Kumar Singh Negi*, *U.P.S.R.T.C. Vs. Jagdish Prasad Gupta*, *Ram Phal Vs. The State of Haryana and Others*, ; *Mohammed Yusuf Vs. Faij Mohammad and Others*, ; and *State of Himachal Pradesh Vs. Sh. Sada Ram and Another*,

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person 23 who is adversely affected may know, as why his application has been rejected.

(Emphasis supplied by me)

28. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon"ble Supreme Court in the case of *Chandna Impex Pvt. Limited Vs. Commissioner of Customs, New Delhi*, held as under:

8. Having bestowed our anxious consideration on the facts at hand, we are of the

opinion that there is some merit in the submission of learned counsel for the appellant that while dealing with an appeal u/s 130 of the Act, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and given its reasons for holding that question is not a substantial question of law. It needs to be emphasised that every litigant, who approaches the Court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the Court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In *State of Orissa v. Dhaniram Luhar*, this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus:

8.....Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;.....

(Emphasis supplied by me)

29. This Court finds that the finding recorded by the respondent No. 2 that the petitioner worked continuously for 240 days from 26.12.1992 to 25.9.1993 is without discussion of any of the evidences filed either by the petitioner or by the respondent No. 1. The respondent No. 2 assumed the continuous service of 240 days by the respondent No. 1 merely on the ground that the petitioner has not proved his document by oral evidences while the respondent No. 1 has proved his documents, but what are these documents and what do they indicate, totally lacked consideration by respondent No. 2 while passing the impugned award. Thus the findings in the impugned award are not based on any legal evidence and also not supported by valid reasons. Principles laid down in the aforesaid judgments clearly apply on the facts of the present case. In the circumstances, the impugned award dated 29.9.2000 passed by the respondent No. 2 cannot be sustained and it deserves to be set aside and remanded for decision afresh.

Issue No. 5

30. From the perusal of the reference as quoted in the impugned award, it is evident that the reference was made as to whether the workman is entitled for compensation. It is undisputed that the respondent No. 1 was engaged as a daily wager on temporary muster roll on the basis of sanctions obtained from time to time. Merely because the respondent No. I was engaged as daily wager and even if it is assumed that he worked for more than 240 days, in my considered view, the relief of reinstatement with full back wages cannot be said to be justified and instead monetary compensation would meet the ends of justice. The

retrenchment made in violation of the provisions of Section 6-N of the U.P. Act would not automatically entitle a daily wager for reinstatement with or without full back wages. The cases of permanent employees are distinguishable from the case of a daily wager who does not hold a post. In the case of *Tulsidas Paul Vs. The Second Labour Court, W.B. and Others*, Hon''ble Supreme Court held in para 9 as under:

9. In *M/s. Hindustan Steels Ltd. v. Roy*, we recently held, after considering the previous case law, that though the normal rule, in cases where dismissal or removal from service is found to be unjustified, is reinstatement, industrial tribunals have the discretion to award compensation in unusual or exceptional circumstances where the tribunal considers, on consideration of the conflicting claims of the employer on the one hand and of the workmen on the other, reinstatement inexpedient or not desirable. We also held that to the general rule can be laid down as the tribunal in each case must, in a spirit of fairness and justice and in keeping with the objectives of industrial adjudication, decide whether it should, in the interest of justice, depart from the general rule.

31. In the case of *L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another*, Hon''ble Supreme Court considered the case of retrenchment of a daily wager who continuously worked for a period over 20 years, held in para 27 as under:

27. There is no dispute that the appellant would be a workman within the meaning of the expression in Section 2(s) of the Act. Further, it is incontrovertible that he has rendered continuous service for a period over twenty years. Therefore, the first condition of Section 25F that appellant is a workman who has rendered service for not less than one year under the Railway administration, an employer carrying on an industry, and that his service is terminated which for the reason hereinbefore given would constitute retrenchment. It is immaterial that he is a daily rated worker. He is either doing manual or technical work and his salary was less than Rs. 500/- and the termination of his service does not fall in any of the excepted categories. Therefore, assuming that he was a daily rated worker, once he has rendered continuous uninterrupted service for a period of one year or more. within the meaning of Section 25F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories. Notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment, the order of termination would be illegal and invalid.

32. There has been a shift in the subsequent judgment of Hon''ble Supreme Court with regard to reinstatement of a daily rated worker and it has been held that a consolidated sum be paid to the workman in lieu of compensation for back wages as well as reinstatement. Reference in this regard may be held to the

judgment of Hon''ble Supreme Court in the case of Rattan Singh v. Union of India and another, (1997) 11 SCC 396, para 3 in which compensation of Rs. 25000/- was found to be just and equitable in lieu of reinstatement and back wages to daily wager who worked for 20 years.

33. In the case of Haryana Tourism Corporation Ltd. Vs. Fakir Chand, etc. etc., , the Hon''ble Supreme Court directed the appellant corporation to pay a sum of Rs. 70,000/- to respondent workman by way of compensation in view of reinstatement.

34. In the case of Executive Engineer ZP Engg. Divn. and Another Vs. Digambara Rao etc. etc., the Hon''ble Supreme Court considered the case of daily wagers for regularization and held in para 20 to 24 as under:

20. It may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order of regularization. It is also not the case of the Respondents that they were appointed in accordance with the extant rules. No direction for regularization of their services was, therefore, could be issued. [See A. Umarani Vs. Registrar, Cooperative Societies and Others, and Pankaj Gupta and Others, etc. Vs. State of Jammu and Kashmir and Others, Submission of Mr. Maruthi Rao to the effect that keeping in view the fact that the Respondents are diploma-holders and they have crossed the date of 40 by now, this Court should not interfere with the impugned judgment is stated to be rejected.

21. In A. Umarani (supra), this Court rejected the similar contention upon noticing the following judgments "68. In a case of this nature this Court should not even exercise its jurisdiction under Article 142 of the Constitution of India on misplaced sympathy.

22. In Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others, it is stated:

We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. It is further trite that despite an extra-ordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order, which would be in contravention of a statutory provision.

23. As early as in 1911, Farewell L.J. in Latham v. Richard Johnson & Nephew Ltd., [1911-13 AER reprint p. 117] observed:

We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous Will O' the Wisp to take as a guide in the search for legal principles.

24. Yet again recently in Ramakrishna Kamat and Others Vs. State of Karnataka and Others, this Court rejected a similar plea for regularization of services stating:

We repeatedly asked the learned counsel for the appellants on what basis or foundation in law the appellants made their claim for regularization and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the appellants have been working for quite some time in various schools started pursuant to resolutions passed by zilla parishads in view of the Government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned single judge and looking to the very directions given a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the Court the Courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment.

(Emphasis supplied by me)

35. In the case of General Manager, Haryana Roadways Vs. Rudhan Singh, Hon"ble Supreme Court held in para 4 that the termination of service of a workman is result of non renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under the stipulation in that behalf contained therein would not amount to retrenchment in view of Section 2(bb) of the Act provided such a plea is taken in the written statement, evidence is led to substantiate the plea and the same is pressed before the Industrial Tribunal or Labour Court. The Hon"ble Supreme Court further observed in para 8 as under:

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment, i.e., whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period, i.e., from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily wage

employment though it may be for 240 days in a calendar year.

(Emphasis supplied by me)

36. A Constitution Bench of Hon''ble Supreme Court in the case of Secretary, State of Karnataka and others v. Uma Devi (3) and others, 2006 (2) ESC 192 (SC), held that direction by Court for absorption and regularization or permanent, continuance of temporary, contractual, casual, daily wage or ad hoc employees appointed/recorded de hors the constitutional scheme of public employment and as such is not permissible.

37. In the case of Municipal Council, Sujapur Vs. Surinder Kumar, Hon''ble Supreme Court reiterated the principles of law laid down in the case of Uma Devi (supra). In the case of M.P. Housing Board and Another Vs. Manoj Shrivastava, Hon''ble Supreme Court held in para 15, 17 and 18 as under:

15. A daily wager does not hold a post unless he is appointed in terms of the Act and the rules framed thereunder. He does not derive any legal right in relation thereto.

17. It is now well-settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularized in service. [See Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., Executive Engineer ZP Engg. Divn. and Another Vs. Digambara Rao etc. etc., Dhampur Sugar Mills Ltd. Vs. Bhola Singh, Manager, R.B.I., Bangalore Vs. S. Mani and Others, and Neeraj Awasthi.

18. In State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, it was held:

The question which now arises for consideration is as to whether the High Court was justified in directing regularization of the services of the Respondents. It was evidently not. In a large number of decisions, this Court has categorically held that it is not open to a High Court to exercise its discretion under Article 226 of the Constitution of India either to frame a scheme by itself or to direct the State to frame a scheme for regularising the services of ad hoc employees or daily wages employees who had not been appointed in terms of the extant service rules framed either under a statute or under the proviso to Article 309 of the Constitution of India. Such a scheme, even if framed by the State, would not meet the requirements of law as the executive order made under Article 162 of the Constitution of India cannot prevail over a statute or statutory rules framed under proviso to Article 309 thereof. The State is obligated to make appointments only in fulfillment of its constitutional obligation as laid down in Articles 14, 15 and 16 of the Constitution of India and not by way of any regularization scheme. In our constitutional schemes, all eligible persons similarly situated must be given opportunity to apply for and receive considerations for appointments at the hands of the authorities of the State. Denial of such a claim by some officers of the State times and again had been

deprecated by this Court. In any view, in our democratic polity, an authority howsoever high it may be cannot act in breach of an existing statute or the rules which hold the field.

(Emphasis supplied by me)

38. In the case of Haryana State Electronics Development Corporation Ltd. Vs. Mamni, Hon''ble Supreme Court held that the relief of reinstatement with full back wages is not to be given automatically and each case must be considered on its own merit and a compensation of Rs. 25,000/- was allowed instead of the order for reinstatement with back wages.

39. In the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, Hon''ble Supreme Court held as under:

15. But the manner in which "back-wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, this Court following Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, and Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, held as follows:

A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the Courts realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes (were) brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatization and outsourcing, is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot therefore be the natural consequence.

In General Manager, Haryana Roadways Vs. Rudhan Singh, this Court observed:

8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In *Kendriya Vidyalaya Sangathan* (supra), this Court held: (SCC p. 366, para 16)

16. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

In *U.P. State Brassware Corpn. Ltd.* (supra), this Court observed: (SCC p. 495, para 61)

61 It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and

functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever Courts or Tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. We may in this behalf refer to the decisions of this Court in A.P.S.R.T.C. and Another Vs. S. Narsagoud, , Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, and Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta,

18. Coming back to back-wages, even if the Court finds it necessary to award back-wages, the question will be whether back-wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back-wages, in addition to the several factors mentioned in Rudhan Singh (supra) and Udai Narain Pandey (supra). Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.

(Emphasis supplied by me)

40. In the case of Jaipur Development Authority Vs. Ram Sahai and Another, , Hon"ble Supreme Court held in para 21 as under:

21. It is one thing to say that the workman is retrenched from his services, but, a daily wager who keeps on coming and going and even has not taken or been given any work on any day on each month, it was not necessary, as had been opined by the Labour Court, to initiate a departmental proceeding against him for his absence from duty. It would have been proper in the aforementioned circumstances for the Labour Court to delve deep into the said question as to whether Appellant deliberately and intentionally did not allow him to join in his duties or Respondent himself did not continue to work since 1.7.1987.

(Emphasis supplied by me)

41. In the case of Uttaranchal Forest Development Corporation Vs. M.C. Joshi, Hon"ble Supreme Court while considering the case of a daily wager u/s 6-N of the U.P. Act, followed the principles laid down in the case of Uma Devi (supra) and held that the relief of reinstatement with full back wages could not be granted automatically only because it would be lawful to do so. For the said purpose, several factors are required to be taken into consideration, one of them being as to whether such an appointment had been made in terms of statutory rules. Delay in raising an industrial dispute is also a relevant fact. Furthermore

"State" within the meaning of Article 12 of the Constitution is under a constitutional obligation to comply with the provisions contained in Article 14 and 16 of the Constitution. In view of the nature and as also the period during which he had worked and the fact that he had raised an industrial dispute after six years, interest of justice would be made if the impugned judgment awarding reinstatement with back wages ARE substituted BY award of compensation for a sum of Rs. 75,000/-.

42. In the case of Ghaziabad Development Authority and Another Vs. Ashok Kumar and Another, , Hon''ble Supreme Court considered the case of a daily wager who worked for a bit more than two years without a sanctioned post and held that the interest of justice would be served if the Ghaziabad Development Authority is directed to pay a sum of Rs. 50,000/- as compensation instead of relief of reinstatement with full back wages granted by the labour Court in favour of the workman.

43. In the case of Talwara Coop. Credit and Service Society Ltd. Vs. Sushil Kumar, Hon''ble Supreme Court held in para 8, 9 and 14 as under:

8. Grant of a relief of reinstatement, it is trite, is not automatic. Grant of back wages is also not automatic. The Industrial Courts while exercising their power u/s 11A of the Industrial Disputes Act, 1947 are required to strike a balance in a situation of this nature. For the said purpose, certain relevant factors, as for example, nature of service, the mode and manner of recruitment, viz., whether the appointment had been made in accordance with the statutory rules so far as a public sector undertaking is concerned etc., should be taken into consideration.

9. For the purpose of grant of back wages; one of the relevant factors would indisputably be as to whether the workman had been able to discharge his burden that he had not been gainfully employed after termination of his service. Some of the other relevant factors in this behalf have been noticed by this Court in G.M. Haryana Roadways v. Rudhan Singh, stating: (SCC p. 596, para 8)

There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of

service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

14. When the question arises as to how and in what manner balance should be struck, it is necessary for the Industrial Courts also to consider as to whether the industry has been sick or not. If it is found that the industry is not in a position to bear the financial burden, an appropriate award, as a result whereof the equities between the parties can be adjusted, should be passed.

(Emphasis supplied by me)

44. In the case of Madhya Pradesh Administration Vs. Tribhuban, Hon''ble Supreme Court noted the distinction between the relief to be granted to a daily wager and a permanent employee by the Industrial Court and held in para 6, 7, 10 and 13 as under:

6. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division Bench of the Delhi High Court should have directed re-instatement of the respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee. It may be that the definition of "workman" as contained in Section 2(s) of the Act is wide and takes within its embrace all categories of workmen specified therein, but the same would not mean that even for the purpose of grant of relief in an industrial dispute referred for adjudication, application for constitutional scheme of equality adumbrated under Articles 14 and 16 of the Constitution of India, in the light of a decision of a Constitution Bench of this Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, and other relevant factors pointed out by the Court in a catena of decisions shall not be taken into consideration.

7. The nature of appointment, whether there existed any sanctioned post or whether the officer concerned had any authority to make appointment are relevant factors. (See M.P. Housing Board and another v. Manoj Shrivastava, State of M.P. and others v. Arjunlal Rajak and M.P. State Agro Industries Development Corpn. Ltd. and another v. S.C. Pandey)

10. We may notice that recently in Muir Mills Unit of N.T.C. (U.P) Ltd. Vs. Swayam Prakash Srivastava and Another, a Bench of this Court opined:

51. With regard to the contention of the respondents that in the present fact scenario retrenchment is bad under law as conditions u/s 6-N, which talks about a reasonable notice to be served on an employee before his/her retrenchment, is not complied with; we are of the view that even u/s 6-N the proviso states that "no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service". In the present case on the perusal of the appointment letter it is clear that no such notice needs to be issued to Respondent No. 1.

52. The respondents had referred to many cases with regard to back wages to be paid to the retrenched workman. The learned counsel cited a string of decisions of this Court in support of this contention. We are however not addressing this plea of the respondents as we have already observed that Respondent 1 is not a workman under the Industrial Disputes Act, 1947 and the U.P. ID Act, 1947 and also that the retrenchment was not illegal and therefore the question of back wages does not arise.

13. We, therefore, are of the opinion that keeping in view the peculiar facts and circumstances of this case and particularly in view of the fact that the High Court had directed re-instatement with full back wages, we are of the opinion that interest of justice would be subserved if appellant herein be directed to pay a sum of Rs. 75,000/- by way of compensation to the respondent. This appeal is allowed to the aforementioned extent.

(Emphasis supplied by me)

45. Similar view has been taken by Hon"ble Supreme Court in the case of C. Balachandran and Others Vs. State of Kerala and Others, Incharge Officer and Another Vs. Shankar Shetty, Hon"ble Supreme Court held in the case of Senior Superintendent Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and Others, as under:

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

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

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

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

(Emphasis supplied by me)

46. In the case of Bharat Sanchar Nigam Ltd. Vs. Man Singh, Hon"ble Supreme Court held in para 4 and 5 as under:

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

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

(Emphasis supplied by me)

47. In the case of Assistant Engineer, Rajasthan Development Corporation and another v. Geetam Singh, 2013 (2) ESC 233 (SC), Hon"ble Supreme Court considered its several earlier decisions holding compensation to be justifiable relating to a daily wager instead of reinstatement with full back wages and held in para 22 and 27 as under:

22. From the long line of cases indicated above, it can be said without any fear of contradiction that this Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of this Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement.

Therefore, the normal rule that dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wagger has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wagger and an employee holding the regular post for the purposes of consequential relief.

27. In our view, Harjinder Singh² and Devinder Singh³ do not lay down the proposition that in all cases of wrongful termination, reinstatement must follow. This Court found in those cases that judicial discretion exercised by the Labour Court was disturbed by the High Court on wrong assumption that the initial employment of the employee was illegal. As noted above, with regard to the wrongful termination of a daily wagger, who had worked for a short period, this Court in long line of cases has held that the award of reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute.

(Emphasis supplied by me)

48. In a recent judgment of Hon"ble Supreme Court in the case of BSNL v. Bhurumal, Civil Appeal No. 10957 of 2013 decided on 11th December, 2013, considered the case of a daily wagger and held in para 9, 23, 24 and 25 while granting compensation instead of reinstatement with full back wages:

9. Even the intra Court appeal filed by the appellant i.e. Letters Patent Appeal (LPA) has been dismissed by the Division Bench of the High Court vide judgment dated November 2, 2011 holding that the concurrent finding of facts recorded by the CGIT as well as learned Single Judge did not warrant any interference.

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

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

25. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied.

(Emphasis supplied by me)

49. The long line of decisions Hon''ble Supreme Court noted above, makes it clear that principle of grant of relief of reinstatement with full back wages, when the termination is found to be illegal cannot be applied mechanically in all cases. Where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimization and unfair labour practice etc. then reinstatement may be justified. But in the case of a daily wage worker where the termination is found illegal because of procedural defect, namely, in violation of the provisions of Section 6-N of the U.P. Act, then in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. However, a workman falling under the circumstances as mentioned in para 25 of the judgment in the case of BSNL (supra) may be reinstated.

50. Applying the principles of law laid down in the afore noted long line decisions of Hon''ble Supreme Court to the facts of the present case, I am of the view that if on adjudication afresh as directed above, the respondent No. 1 is found to be in continuous service in terms of the provisions of Section 6-N read with Section

2(g) of the U.P. Act and his termination is in breach of the provisions of Section 6-N then looking into the fact that as per his own case, he worked merely from 26.12.1992 to 25.9.1993 and then from 21.2.1995 to 20.8.1995, the reinstatement with full or partial back wages would be unjustified. In such an event grant of appropriate monetary compensation shall meet the ends of justice.

Issue No. 6:

51. Since the case is being remanded to the respondent No. 2 for decision afresh, as such I refrain from expressing any opinion on this issue on the facts of the present case. However, it may be noted that Labour Court is a Court of referred jurisdiction and, therefore, it must confine itself to the reference which is before it. It cannot travel beyond the reference. In the case of U.P. State Electricity Board v. Phool Chand and another, 2005 ADJ 286, this Court held in para 7 as under:

The argument as advanced by the learned counsel for the petitioner has substance. The award of the Labour Court thus indeed have a defect and findings recorded by the Labour Court so far as it relates to the Section 6N of U.P. Industrial Disputes Act is wholly illegal and beyond the terms of reference. I am in respectful agreement with the decision in the case of Ram Narain Tiwari (supra). However I may add that it is also established law that a Labour Court, being a Court of referred jurisdiction, cannot extend the scope of reference or travel beyond it. This is the dictum of the Hon''ble Supreme Court as has been held in the case of Pottery Mazdoor Panchayat Vs. Perfect Pottery Co. Ltd. and Another, and followed recently in the case of Mukand Ltd. Vs. Mukand Staff and Officers'' Association,

In result, the writ petition succeeds and is hereby allowed. The impugned award dated 29.9.2000 passed in adjudication case No. 174/1999 published on 23.1.2001 is hereby set aside and the matter is remanded to the respondent No. 2 to decide the case afresh in accordance with law in the light of the observations made in the body of this judgment, as expeditiously as possible preferably within a period of six months from the date a certified copy of this judgment is filed by the petitioner/respondent No. 1 before him.