

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WP227 No. 5280 of 2010

Surendra Singh Rajput S/o Late Shri Bansi Singh, Gram Dongari, Post Gandai, Tahsil Chuikhadan, Distt. Rajnandgaon (CG)

---- Petitioner

Versus

1. Principal Judge (under the Industrial Dispute Act), Labour Court, Rajnandgaon (CG)
2. Divisional Forest Officer, Khairagarh, Post And Tahsil Khairagarh, Distt. Rajnandgaon (CG)
3. Circle Officer, Office Of Circle Officer, Gandai Circle, Rajnandgaon (CG)

---- Respondents

WP227 No. 2763 of 2011

Shri Shankar S/o Shiv Prashad Patel, aged about 35 years, R/o Village Bhaji Dongari Post Salhewar Distt. Rajnandgaon (CG)

---- Petitioner

Versus

1. Principal Judge (under the Industrial Dispute Act) Labour Court, Rajnadgaon (CG)
2. Divisional Forest Officer Khairagarh Post & Tah. Khairagarh Distt. Rajnandgaon (CG)
3. Circle Officer, Office Of Circle Officer, Gandai Circle Rajnandgaon (CG)

---- Respondents

WP227 No. 3249 of 2011

Banshi Lal S/o Babu Ram Marar, aged about 45 years, R/o Vill. Jiratola Post Ataria Tah Chhuikhadan, Distt. Raipur, (CG) (first party)

---- Petitioner

Versus

1. Principal Judge (under the Industrial Dispute Act), Labour Court, Rajnandgaon (CG)
2. Divisional Forest Officer Khairagarh, Post & Tah Khairagarh, Distt. Rajnandgaon, (CG) (second party)
3. Circle Officer, Office Of Circle Officer, Gandai Circle, Distt. Rajnandgaon, (CG)

---- Respondents

WP227 No. 3254 of 2011

Mohit Ram Patel S/o Janau Ram Patel, aged about 40 years, R/o Vill. & Post Rampur, Tah Chhuikhadan, Distt. Rajnandgaon, (CG) (first party)

---- Petitioner

Versus

1. Principal Judge (under the Industrial Dispute Act), Labour Court, Rajnandgaon (CG)
2. Divisional Forest Officer Khairagarh, Post & Tah Khairagarh, Distt. Rajnandgaon, (CG) (second party)
3. Circle Officer, Office Of Circle Officer, Gandai Circle, Distt. Rajnandgaon, (CG)

---- Respondents

For Petitioners	:	Shri Pawan Kesharwani, Advocate
For Respondent/State	:	Shri Satish Gupta Govt. Advocate and Shri D.R. Minj, Dy.Govt. Advocate

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

15/10/2015

Heard.

1. By this common order, above four writ petitions are being disposed off as they involve similar issue for consideration based on almost similar facts.
2. The petitioners herein are the Daily Wage Employees who were working in the forest of the Forest Department.
3. Following are the details of the period of their work as per the award.

<u>Name of the petitioners</u>	<u>Period</u>
1. Surendra Singh Rajput	1994 to 2000
2. Shri Shankar	1992 to 2000
3. Banshi Lal	1981 to 1995
4. Mohit Ram Patel	1983 to 1999

4. The petitioners were retrenched from service. This led to dispute raised and reference made to the Labour Court. In each of the cases, the Labour Court, having recorded finding that there has been violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "*the Act of 1947*"), held that retrenchment was illegal. However, reinstatement has been ordered only upon availability of work and that too without back wages. It is this part of the order which is under challenge before this Court at the instance of every workmen/petitioner.
5. Learned counsel for the petitioners submits that the Labour Court having held that retrenchment was illegal on account of violation of Section 25-F of the Act of 1947, reinstatement would be automatic and it could not be made conditional upon availability of work even if the petitioners were engaged on daily wage basis. It is next contended that in the absence of there being any evidence on record led by the employer that the petitioners, during period of their termination, were gainfully employed, the petitioners were entitled to back wages.
6. On the other hand, learned counsel for the respondent opposed the prayer and submitted that the petitioner were daily wage employee and they were not working on any sanctioned post. Therefore, even if it is found that there was violation of Section 25-F of the Act of 1947, reinstatement would not be automatic and unconditional. He submits that in the very nature of employment, engagement of daily wage employee is only on the basis of availability of work. It is next contended that in the matter of grant of back wages, Labour Court has exercised its discretion not to award any back wages because the petitioners have failed to establish by leading appropriate evidence so as to draw a presumption to shift the onus on the employer to prove that the petitioners were gainfully employed during the period of

termination.

7. I have considered the rival submissions made by the learned counsel for the parties and perused the records of the case.
8. In the factual premises of the present case as are extracted from the records of this case, the entitlement of the employees to un-conditional reinstatement with full back wages cannot be denied in view of authoritative pronouncement of the Supreme Court in the case of **Bhuvnesh Kumar Dwivedi Vs. Ms. Hindalco Industries Ltd.** 2014 AIR SCW 3157 and **Ajaypal Singh Vs Haryana Warehousing Corporation**, (2015) 6 SCC 321.
9. In these cases neither before the Labour Court nor before this Court, it could be justified by the respondents- employer that the termination of the petitioners- employee was in accordance with the procedure prescribed under Section 25-F of the Act of 1947. Once the retrenchment is held to be illegal, the reinstatement cannot be made conditional upon availability of work. There is no provision contained under the Act of 1947 much less Section 25- F which leaves discretion in the hands of the Labour Court to reinstate or not to reinstate. Once retrenchment is found illegal, reinstatement has to follow.

In exceptional cases where the employer has come out with an offer of payment of lump-sum compensation as one time measure in lieu of non -availability of work and need of daily wage employee or temporary employee, in appropriate case, instead of reinstatement lump-sum compensation can be awarded, but it cannot be done as a matter of course.
10. There is no material on record to show that employees were gainfully employed so as to avoid back wages. Moreover, the period during which they worked before their termination cannot be said to be small tenure so as to disentitle them to award of backwages from the date of termination till the date of award. Each of the employee has remained in service for fairly long time. In the above factual scenario, the judgment of the Supreme Court in the case of **Bhuvnesh Kumar Dwivedi** (supra) would squarely apply wherein the Supreme Court, examining issue of backwages, has held as under:

“30. On the issue of back wages to be awarded in favour of the appellant, it has been held by this Court in *Shiv Nandan Mahto v. State of Bihar* that if a workman is kept out of service due to the

fault or mistake of the establishment/company he was working in, then the workman is entitled to full back wages for the period he was illegally kept out of service. The relevant paragraph of the judgment reads as under:

“5. ... In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the appellant was entitled to be paid full back wages for the period he was kept out of service.”

31. Further, in *Haryana Roadways v. Rudhan Singh*, the three-Judge Bench of this Court considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment. The relevant paragraph reads as under:

“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 ser-

vices 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.”

11. In that case (Bhuvnesh Kumar Dwivedi), the Supreme Court also referred to its earlier decision in the case of *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya*, (2013) 10 SCC 324, in following words:

“32. Subsequently, in the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* it was held by this Court as under:

“The propositions which can be culled out from the aforementioned judgments are:

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

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the em-

ployee/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.

* * *

vi) In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised.

It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-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.* (supra).....”

12. The factual background of the aforesaid case and the conclusion thereon as recorded by the Supreme Court in para-33 of the judgment is extracted herein-below:

“33. In the present case, the respondent has made a vague submission to the extent that:

“the conduct of the workman throughout the proceedings before the High Court during 2002 to 2011 shows that he is continuously gainfully employed *somewhere*. Admittedly even in the counter-affidavit in the said writ petition, it has not been stated that the workman was not employed.”

Therefore, on the basis of the legal principle laid down by this Court in *Deepali Gundu Surwase case*, the submission of the respondent that the appellant did not aver in his plaint of not being employed, does not hold since the burden of proof that the appellant is gainfully employed post termination of his service is on the respondent. The claim of the respondent that the appellant is gainfully employed somewhere is vague and cannot be considered and accepted. Therefore, we hold that the appellant is entitled to full back wages from the date of termination of his service till the date of his reinstatement.

Answer to Point No. 4”

13. It is thus clear that in the present case also similar facts exist. The employees remained in employment for fairly long time when they were terminated. The Management has failed to place on record any foundation to prove that during the period the employees were out of employment, they were gainfully employed so as to deny them full or partial back wages.
14. Therefore, in the result, all the petitions are allowed. The petitioners are entitled to reinstatement with full back wages.

Sd/-
(Manindra Mohan Shrivastava)
Judge