IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NOS. 619/2007 and 281/2008

WRIT PETITION NO. 619 OF 2007

M/s Thomas Cook (India) Ltd., a Company incorporated under the Companies Act, 1956, having its registered office at Thomas Cook Building, Dr. D. Nauroji Road, Fort, Mumbai – 400 001 and a Branch Office at Alcon Chambers, Dayanand Bandodkar Marg, Panaji-Goa.
Represented through its General Manager Human Resources, Ms. Maharukh M. Dosabhai, major of age, having office at Thomas Cook Building, Dr. D. Nauroji Road, Fort, Mumbai 400 001. …. Petitioner

Versus

1. The Industrial Tribunal-cum-Labour Court I, Shram Shakti Bhavan, 1st Floor, EDC Complex, Patto-Plaza, Panaji-Goa.

2. Mrs. Yvonne Menezes, major of age, resident of House No. 846, Bamdordem, Moira, Bardez-Goa.

3. State of Goa, represented through its Chief Secretary, having his office at Secretariat, Porvorim-Goa. *Deleted as per order dated 14.02.2008*

…. Respondents

Mr. A.V. Nigalye, Advocate for the Petitioner.

Ms. S. Linhares, Additional Government Advocate for Respondent No. 1.

Mr. L. Raghunandan, Advocate for Respondent No. 2.

WRIT PETITION NO. 281/2008

M/s Thomas Cook (India) Ltd., a Company incorporated under the Companies Act, 1956, having its registered office at Thomas Cook Building, Dr. D. Nauroji Road, Fort, Mumbai – 400 001 and a Branch Office at Alcon Chambers, Dayanand Bandodkar Marg, Panaji-Goa.
Represented through its Associate Vice-President Human Resources Ms. Maharukh M. Dosabhai, major of age, having office at Thomas Cook Building, Dr. D. Nauroji Road, Fort, Mumbai 400 001. …. Petitioner

Versus

1. The Industrial Tribunal-cum-Labour Court I, Shram Shakti Bhavan, 1st Floor, EDC Complex, Patto-Plaza, Panaji-Goa.

2. Mrs. Yvonne Menezes, major of age, resident of House No. 846, Bamdordem, Moira, Bardez-Goa.

3. The Commissioner of Labour, Government of Goa, having his office at Shram Shakti Bhavan, Patto Plaza, Panaji-Goa.

4. The Collector of North Goa, having his office at Collectorate, Panaji-Goa.

5. Head of Taluka Revenue Office and Mamlatdar, Tiswadi Taluka, having his office at Collectorate Building, Panaji-Goa. …. Respondents

***

Mr. A.V. Nigalye, Advocate for the Petitioner.

Ms. S. Linhares, Additional Government Advocate for Respondent Nos. 1, 3, 4 and 5.

Mr. L. Raghunandan, Advocate for Respondent No. 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 18th JULY, 2016

PRONOUNCED ON:- 29th JULY, 2016

JUDGMENT:

The contesting parties in, both these petitions are same and as such, the petitions can be conveniently disposed of by this common judgment.

2. The petitioner is a Company incorporated under the Companies Act, 1956 and has a branch office at Panaji, Goa. The respondent no. 2-Mrs. Yvonne Menezes was employed at the branch office of the petitioner at Panaji, Goa, as a 'vocational trainee', for the period from 27.05.1994 to 26.06.1995. She was so appointed by a letter dated 06.05.1994. After the completion of the training, she was appointed as a probationer w.e.f. 01.06.1995. The letter of appointment is dated 25.05.1995. Clauses 1 and 3 of the appointment letter are relevant, which read thus:

> *"1. You will be on probation for a period of six months in the first instance. During this period you will be expected to attain the standard required by the Company as to your work, attendance and conduct and we should also receive satisfactory references. Failing this, the Company may, at its discretion, extend the probationary period for a further term upto three*

months or terminate your services by giving you 24 hours notice.

3. During your probationary period, the Company reserves the right to terminate your services without notice and without assigning any reasons whatsoever and you will not be entitled to claim any compensation or allowance whatsoever."

3. The services of respondent no. 2 came to be terminated by letter dated 28.08.1995, which was served on her on 06.10.1995. According to the petitioner, this termination was in accordance with the terms of the appointment letter and did not cast any stigma on the respondent no. 2. It is contended that the performance of respondent no. 2 during the probation period was not upto the mark and looking to this, an innocuous order of termination was issued, so that the future prospects of the respondent no. 2, are not adversely affected.

4. The respondent no. 2 raised a dispute, which was referred to the Conciliation Officer and on failure of the conciliation proceedings, the following dispute was referred to the Industrial Tribunal.

> *"(1) Whether the action of the management of M/s Thomas Cook (India) Ltd., Panaji, Goa in terminating the services of Mrs. Yvonne Menezes, Cashier-cum-Clerk with effect from 30.09.1995, is legal and justified ?*
>
> *(2) If not, what relief the workperson is entitled to ?"*

5. The respondent no. 2 filed her statement of claim. She claimed that no formal appointment letter was given to her. Though, she was appointed as a vocational trainee, she was performing the duty of Foreign Exchange, Clerk-cum-Cashier. She claimed that after completion of one year, the Manager of

the petitioner had informed her that she has been confirmed in service. However, her services came to be terminated without assigning any reason. She claimed that the letter of termination was served on her on 06.10.1995, whereupon she came to know that the termination was in accordance with clauses 1 and 3 of the appointment letter. By her letter dated 26.12.1995, she requested the petitioner to disclose the reasons for termination, when it was informed that her performance was not satisfactory. She claimed that neither a show cause notice nor a charge sheet was served, before termination of her service. The termination is punitive and stigmatic in nature. It was contended that as she was in urgent need of money and as the petitioner was not ready and willing to pay the terminal dues, she was required to give a letter dated 13.06.1996, when in fact she never intended to resign.

6. The petitioner contested the claim. It was

contended that after the completion of the training, the respondent no. 2 was appointed as Cashier-cum-Clerk w.e.f. 01.06.1995 vide letter dated 25.05.1995. The appointment was initially on probation for a period of six months. It was contended that the respondent no. 2 had submitted a copy of her mark sheet of third year of Bachelor of Arts examination, which on enquiry with Bombay University was found to be doubtful, as the University had informed that the seat number shown in the mark sheet was allotted to somebody else and thus, the mark sheet was a fake mark sheet. It was thus, contended that the respondent no. 2 had misled the petitioner and that she had not completed graduation. It is contended that she did not submit employment form and related papers inspite of repeated instructions and thus, the termination in terms of clauses 1 and 3, was legal and proper.

7. On the basis of rival pleadings, the

Industrial Tribunal framed the following issues:

> *"(1) Whether the Party I proves that the action of the Party II in terminating her services w.e.f. 30.09.1995 is illegal and unjustified ?*
>
> *(2) Whether the Party II proves that the Party I was a probationer and her services were terminated in terms of the letter of appointment ?*
>
> *(3) Whether the Party II proves that the Party I is gainfully employed from the date of termination of her service ?*
>
> *(4) Whether the Party I is entitled to any relief ?*
>
> *(5) What Award ?"*

8. The respondent no. 2 examined herself, while on behalf of the petitioner, its branch manager Aashutosh Akshikar and Ms. Maharukh Dosabhai working

as General Manager (Human Resources) in its Head Office, Mumbai, were examined. Undisputedly, the cross examination of Aashutosh Akshikar could not be completed, as he was not available and hence, the Tribunal only considered the evidence of Ms. Maharukh Dosabhai. The Tribunal came to the conclusion that the termination of respondent no. 2 was not proved to be in terms of clauses 1 and 3, and the action of the petitioner in terminating the services of respondent no. 2 was illegal and unjustified. The Tribunal also found that the respondent no. 2 was not gainfully employed from the date of her termination of services. In that view of the matter, by the impugned award dated 11.07.2007, the Tribunal directed reinstatement of respondent no. 2 with full back wages and consequential benefits, which is the subject matter of challenge in Writ Petition No. 619/2007.

9. A recovery certificate for Rs.12,69,092/-

towards the monetary claim, arising out of the said award, is challenged in Writ Petition No. 281/2008. The record shows that the petitioner has deposited the said amount before this Court on 09.06.2008, which has been invested.

10. I have heard heard Mr. Nigalye, the learned Counsel for the petitioner and Mr. Raghunandan, the learned Counsel for the respondent no. 2.

11. At the outset, it is necessary to mention that it was not disputed on behalf of the petitioner that respondent no. 2 would be a 'workman', within the meaning of Section 2(s) of the Industrial Disputes Act, 1947.

12. It is contended by Mr. Nigalye, the learned Counsel on behalf of the petitioner that the respondent no. 2 was a probationer and was discharged in accordance with clauses 1 and 3 of the

appointment letter and the termination is neither punitive nor stigmatic in nature. The learned Counsel has submitted that the reasons for termination are disclosed in letter dated 26.12.1995 (Exhibit W-5), which cannot make the termination punitive or stigmatic. It is submitted that as regards the verification of the credentials of the mark sheet of graduation of respondent no. 2, the petitioner had only expressed suspicion, stating that the credentials are in doubt. It is contended that the reasons as disclosed in clause no. 3 of the said letter, would only show incompetence and there were no allegations of specific misconduct attributed to the respondent no. 2, requiring holding of a departmental enquiry. The learned Counsel submitted that where, such allegations are only a 'motive' and not 'foundation' of the order of termination, it cannot become vulnerable as being stigmatic or punitive in nature. It is submitted that at the highest, it would be a case of loss of

confidence of the employer, which cannot be equated with an action based on misconduct.

It is next submitted that the Tribunal was in error in placing the burden of issue no. 3 on the petitioner, when it was for the respondent no. 2 to prove that she was not gainfully employed. The learned Counsel submitted that it is not enough that the employee pleads and proves that he/she was not gainfully employed, but has also to show that he/she has made reasonable efforts to get an alternate employment. He therefore submits that the impugned order directing reinstatement/back wages needs to be set aside.

The learned Counsel had placed reliance on the decision in the case of **O.P. Bhandari Vs. Indian Tourism Development Corporation Ltd. and Others**, ***(1986) 4 SCC 337***, in order to submit that in appropriate case, such compensation in lieu of reinstatement can be to the extent of 3.33 years salary including allowances, besides the usual

retirement benefits.

The learned Counsel has also placed reliance on the decision of the Supreme Court in the case of ***Pavanendra Narayan Verma Vs. Sanjay Gandhi PGI of Medical Sciences and Another,*** *(2002) 1 SCC 520;* ***Union of India and Others Vs. A.P. Bajpai and Others,*** *(2003) 2 SCC 433;* ***Dhananjay Vs. Chief Executive Officer, Zilla Parishad, Jalna,*** *(2003) 2 SCC 386;* ***U.P. State Brassware Corporation Ltd. and Another Vs. Uday Narain Pandey,*** *(2006) 1 SCC 479;* ***Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences and Others,*** *(2006) 4 SCC 469;* ***Talwara Co-operative Credit and Service Society Limited Vs. Sushil Kumar,*** *(2008) 9 SCC 486;* ***Bhavnagar Municipal Corporation Vs. Jadeja Govubha Chhanubha and Another,*** *(2014) 16 SCC 130* and the decision of this Court in the case of the ***Saraswat Co-operative Bank Limited Vs. the Saraswat Co-operative Bank Employees Union and Others,*** *2011 LLR 1059.*

13. On the Contrary, it is submitted by Mr. Raghunandan, the learned Counsel for the respondent no. 2 that the reasons as disclosed vide letter 26.12.1995 (Exhibit W-5), would clearly show that the termination is stigmatic and punitive in nature. The learned Counsel submitted that the termination is not referable to clauses 1 and 3 of the appointment letter. Insofar as the issue of back wages is concerned, the learned Counsel for the respondent no. 2 has referred to para 12 of the written statement and para 24 of the evidence of respondent no. 2, in order to submit that there are pleadings and evidence to the effect that the respondent no. 2 was not gainfully employed. He therefore submits that the Tribunal was justified in directing reinstatement with full back wages.

He has placed reliance on the decision in the case of, ***Dr. Mrs. Sumati P. Shere Vs. Union of India and Others,*** *(1989) 3 SCC 311;* ***Babu Lal Vs. State of Haryana and Others,*** *(1991) 2 SCC 335;* ***Radhey Shyam***

Gupta Vs. U.P. State Agro Industries Corporation Ltd. and Another, *(1999) 2 SCC 21;* ***Nehru Yuva Kendra Sangathan Vs. Mehbub Alam Laskar,*** *(2008) 2 SCC 479;* ***Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others,*** *(2013) 10 SCC 324*, and the decision of this Court in the case of, ***Taranjitsingh I. Bagga Vs. Maharashtra State Road Transport Corporation,*** *2008(5) ALL MR 260*.

14. In reply, it is submitted by Mr. Nigalye, the learned Counsel for the petitioner that various factors will have to be considered while awarding back wages, which is not automatic on an order of reinstatement, being granted. He submits that one of such circumstances is the length of service put in by an employee. In the present case, it was only four months. He alternatively submitted that this Court may consider granting of some compensation in lieu of reinstatement, however, without back wages.

15. I have carefully considered the rival circumstances and the submissions made.

16. In view of the rival contentions, the following points arise for my determination:

(i) Whether the impugned termination, by letter dated 28.08.1995, is by way of discharge/termination simplicitor, in accordance with clauses 1 and 3 of the terms of appointment ?

(ii) Whether the termination is punitive and/or stigmatic in nature, and is bad and illegal, as being effected, in violation of the principles of natural justice ?

(iii) If yes, what is the relief, to which the respondent no. 2 is entitled for ?

Point Nos.(i) and (ii)-

17. The principal question is, whether the termination of the respondent no. 2 can be said to be termination simpliciter, in terms of clauses 1

and 3, of the letter of appointment. The Tribunal has held that the termination is illegal and not relatable to the terms of the appointment. The question whether a discharge of a probationer or a termination of an employee, which is styled as an innocuous order, is in fact, punitive or not, has been the subject matter of decisions of the Supreme Court and various High Courts. A reference to few of them would be necessary.

18. In the case of **Babu Lal** (supra), the Supreme Court found on fact that the impugned order of termination was of penal nature, having civil consequences. It has been found that though, the order of termination is innocuous, still the Court for the ends of fair play and justice, can lift the veil and find out the real nature of the order. It has been further held that if the order is of penal nature, it will have to be set aside, though it is couched in an innocuous language.

19. In the case of **Radhey Shyam Gupta** (supra), the appellant was the Branch Manager of the respondent and the allegation was that he had fraudulently taken Rs.2,000/- from the complainant, Jai Chandra Lal. In that case, a preliminary enquiry was conducted by the General Manager, however, no formal charge sheet was issued or departmental enquiry was conducted. This was followed by simple order of termination, which was found punitive. The Supreme Court after noticing the earlier decision has held that if the alleged misconduct is only a 'motive', for the termination, the same is valid, however, if it is a 'foundation', for effecting termination, the termination would be invalid and illegal.

20. In the case of **Nehru Yuva Kendra Sangathan** (supra), it has been held that, mere holding of a preliminary enquiry, where the explanation is called

for from the employee, if followed by an innocuous order of discharge, may not be held to be punitive in nature, but not so, if it is founded on a finding of misconduct.

21. In the case of **Pavanendra Narayan Verma** (supra), the Supreme Court has referred to the 'three factors test', which is referred to in paragraph 21 as under:

> *"(a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present, the termination is held to be punitive irrespective of the form of the termination order. Conversely if any one of the three facts is missing, the termination has been upheld."*

The Supreme Court has referred to the following observations in its earlier decision in

the case of **Samsher Singh Vs. State of Punjab, (1974) 2 SCC 831,** as under:

> *"Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a*

stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection."

22. In the case of **A.P. Bajpai** (supra), it has been held that the grounds as stated in the counter affidavit, are not relevant to infer that the termination order, was stigmatic. In other words, the reasons in the counter affidavit cannot denude the order of termination of its validity if it is otherwise innocuous.

23. In the case of **Dhananjay** (supra), it was held that mere mention in the termination order that the employee was under suspension was held not to constitute a stigma. It was further held that mere acquittal of the employee, does not entitle to

reinstatement automatically.

24. In the case of **Abhijit Gupta** (supra), the termination order made reference to earlier letters, in which the probationer was called as a person of "perverted mind and a dishonest, duffer having no capacity to learn". Although, the language was found to be intemperate, it was held that the order read as a whole, indicated that the reason of termination was the absence of hope for his improvement. It was held that both the references to the earlier letters were unnecessary, but did not reflect any malice or bias.

25. From the various decisions as cited, at the Bar, it is clear that although, the principal governing the determination of the issue, whether a particular order of termination is innocuous or is punitive and stigmatic, are well settled, the real difficulty arises, in application of the said

principles to individual facts of the case. The Court is required to carefully consider the 'form of the termination order' and the attending circumstances and reasons if any, co-laterally recorded, to find out the real nature of the order. It hardly needs to be stated that to a certain extent, every termination would be stigmatic and would be in consequence of an act, which renders the concerned employee unsuitable for the job for which he/she is employed.

26. The question in such cases is whether such termination was, as a result of the allegation and/or finding of a specific misconduct, attributable to the employee, which may invite stigma and other civil consequences and render the order to be stigmatic in nature, though worded innocuously.

27. Coming back to the present case, the

termination letter dated 28.08.1995 reads thus:

> *"Further to our letter dated 25th May, 1995 appointing you as a Cashier cum Clerk in our branch at Goa.*
> *As per clauses (1) and (3) of your letter of appointment, we hereby terminate your services with immediate effect.*
> *Arrangements will be made to settle your dues if any."*

It can thus be seen that if, we go by the form, the termination is innocuous in nature, relatable to clauses 1 and 3 of the letter of appointment. The Tribunal has held that there was no evidence in the form of acknowledgment that the appointment letter was ever served on the respondent no. 2. That apart, the petitioner by its letter dated 26.12.1995 informed the respondent no. 2, the reasons for termination of services, which are as follows:

> *"(1) You have failed to give and also*

not signed the duplicate copy of the appointment letter accepting the terms and conditions of service.

(2) On verification from the Bombay University, the credentials of the TYBA mark sheet submitted by you are in doubt. You were well aware that for your position as Cashier-cum-Clerk in the organization, graduation is a pre-requisite as per Company policy.

(3) During your probationary period, your services were not found to be satisfactory. You have retained a lot of important correspondence in your desk and not handed over the same to the Branch Manager. All correspondence in you matter too was found in your drawers and apparently the letters sent from Head Office never reached the Branch Manager."

28. Now the reason at clause no.1 may appear to be innocuous. However, clause 2 and the later part

of clause 3 shows there are allegations of specific misconduct about respondent no. 2, having retained letters of important correspondence and not having shown to the Branch manager, which amounts to an allegation that the respondent no. 2 was guilty of suppressing material facts, as a result of which, timely action was not taken on vital matters, concerning the Company's interest. Not only that, the said letter further mentions that the petitioner would be constrained to lodge a police complaint to investigate the fraudulent mark sheet. It can thus, be clearly seen that the petitioner had conducted some sort of a preliminary enquiry, in which the verification of the credentials of the TYBA mark sheet, submitted by the petitioner was made with the Bombay University and the said credentials were in doubt. Thus, there could be specific material available against the respondent no. 2. It cannot be accepted that in clause 2 of the letter dated 26.12.1995, there was only a suspicion expressed, as

the petitioner had already verified the credentials from the Bombay University and not only that, the petitioner had stated that they will be constrained to lodge a police complaint to investigate the matter.

29. Thus, in my considered view, the allegations were not merely 'motive', but were 'foundation' for termination. It is trite that while deciding whether a probationer is to be confirmed or not, the employer is entitled to examine the suitability of the probationer. However, if the discharge/ termination is shown to be result of specific misconduct and such allegations, are found to be the foundation of the impugned order, the termination would be rendered vulnerable. I therefore, do not find any reason to take exception to the finding of the Industrial Tribunal that the termination was not legal and hence, the point no. (i) is answered in the negative and the point no. (ii) is answered in

the affirmative.

Point No. (iii)-

30. The Supreme Court in the recent decision in the case of **Deepali Gundu Surwase** (supra), has culled out the relevant principles in paragraph 38 of the judgment, which are reproduced as under :

> *"38. 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.*
>
> *ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.*
>
> *iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the*

adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found

proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the Court or Tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always keeep in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him

of the burden to pay to the employee/workman his dues in the form of full back wages.

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 Private Limited v. Employees of Hindustan Tin Works Private Limited ;(1979)2 SCC 80.

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal; (2007)2 SCC 433 that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/ workman."

It can thus be seen that although, once the termination is found to be wrongful, reinstatement with back wages is the normal rule and there are well known exceptions to the same. Thus, the grant of reinstatement with or without back wages is not automatic on the termination being found to be wrongful. There are several considerations that enter into the judicial determination of the question, one of such considerations being the length of service of the employee/workman, as also the financial condition of the employer and similar other factors. Insofar as back wages is concerned,

it is for the employee concerned to plead or at least make a statement before the adjudicating authority that he/she was not gainfully employed or was employed at a lesser wages.

In the case of **Taranjitsingh I. Bagga** (supra), on which strong reliance is placed on behalf of respondent no. 2, it has been held in paragraph 9 that the question of entitlement to back wages would depend on the facts and circumstances of each case and there would not be any straitjacket formula.

31. Insofar as the reinstatement is concerned, there are decisions to hold that in an appropriate case, the Court may mould the relief and grant compensation in lieu of reinstatement. In the case of **Talwara Co-operative Credit and Service Society Limited** (supra), considering the facts that the respondent-employee had worked for a short period and the appellant was a sick unit, the Supreme Court

had granted compensation of Rs.2,00,000/-, in lieu of reinstatement.

32. In the case of **Bhavnagar Municipal Corporation** (supra), again, considering the short tenure of employment, a lump sum compensation of Rs.2,50,000/- in lieu of reinstatement and back wages was granted.

In the case of **The Saraswat Co-op. Bank Limited** (supra), the learned Single Judge of this Court after placing reliance on the decision, in the case of **Navin J. Surti Vs. Modi Rubber Ltd., 2004 LLR 579**, has held that it is not only necessary on the part of the employee to plead that he/she was not gainfully employed, but also to state the efforts made by him/her to get employment.

33. In the case of **U.P. State Brassware Corporation Ltd.** (supra), it has been held that the award of back wages is not automatic or mechanical

on grant of reinstatement. It has been held that no precise formula can be laid down as to when full back wages should be allowed. It depends on the facts and circumstances of each case.

34. It can thus be seen that various competing considerations are required to be weighed, while deciding, (i) whether the reinstatement is to be granted or compensation in lieu of reinstatement would serve the ends of justice and (ii) whether there is justification for grant of back wages, either full or in part.

35. Coming back to the present case, the respondent no. 2 had alleged that she was not gainfully employed and she has stated so, in her evidence, which has been controverted on behalf of the petitioner. However, no pleadings about any efforts being made by respondent no. 2 to find any alternate employment, is made. It is true that it

is not easy these days that immediately after termination, the employee would find employment. However, some of the cases referred above, do take a view that it is for the employee to plead and show that there were efforts made, to find out alternate employment, which is not there in this case. That apart, I find that an affidavit is sworn by respondent no. 2 on 26.03.2009, in which she has stated that she had taken a job on 19.07.2007 at a Charitable Trust as Assistant Teacher, to teach the street children and a certificate dated 13.03.2009, enclosed alongwith the affidavit shows that she was paid salary of Rs.4,000/- with subsequent increments. There is nothing on record to show that the respondent no.2 has since left the said employment. Thus, in my considered view, the award of back wages may not be appropriate in this case. In my considered view, grant of a lump sum amount towards compensation, in lieu of reinstatement would serve the ends of justice.

36. The next question is what should be the amount of compensation. Before proceeding to consider the same, it would be necessary to mention that in such an exercise, a reasonable guess work and approximation, is inherent and unavoidable. The Supreme Court in the case of **O.P. Bhandari** (supra) has held that the compensation equivalent to 3.33 years service, including allowances besides provident fund and other retirement benefits, as well as costs, would be proper. While holding so, the Supreme Court had noticed that the then prevailing rates of bank interest was 15% p.a. and had found that the award of compensation, equivalent to 3.33 years service, would yield 50% of the annual salary and other allowances to the employee, with four additional advantages as under:

> *"(i) He will be getting this amount without working.*
>
> *(ii) He can work somewhere else and*

can earn annually whatever he is worth over and above, getting 50 per cent of the salary he would have earned.

(iii) If he had been reinstated the would have earned the salary only up to the date of superannuation (upto 55, 58 or 60 as the case may be) unless he dies earlier. As against this 50 per cent he would be getting annually, he would get not only beyond the date of superannuation, for his lifetime (if he lives longer), but even his heirs would get it in perpetuity after his demise.

(iv) The corpus of lump sum compensation would remain intact, in any event."

37. As noticed earlier, the rate of interest assumed in the case of **O.P. Bhandari** (supra) was 15% p.a. and the prevailing rate at present is around 8-9% p.a. The appointment letter of the respondent

no. 2 shows her basic salary as Rs.950/- plus Rs.281.37, by way of fixed dearness allowance. In addition to this, the respondent no. 2 was entitled to variable dearness allowance, which, for the month of May 1995 was Rs.1,799.25. There were certain other perquisites admissible, including H.R.A., L.T.A. (Rs.3,000/- p.a.) and reimbursement of medical expenses to the extent of Rs.2,400/- p.a. The respondent no. 2 was also entitled to receive bonus, as per the Payment of Bonus Act, 1965.

38. Assuming that the respondent no.2 would have earned increments, in the salary over a period of time, an average salary of Rs.8,000/- per month, can be safely reckoned. The said salary can be capitalised for a period of 72 months (looking to the prevailing rate of bank interest). The amount would come to Rs.5,76,000/-. The petitioner has been fighting this litigation from the year 1995. A reasonable amount towards interest and costs can be

allowed. I find that on overall consideration, a total compensation of Rs.7,00,000/- would serve the ends of justice, in this case. In such circumstances, W.P.No.281/2008 will have to be allowed.

39. In the result, the following order is passed:

O R D E R

(a) The Writ Petition No. 619/2007, is partly allowed.

(b) The impugned award dated 11.07.2007, passed by the Industrial Tribunal, is partly modified.

(c) The part of the award declaring the termination of respondent no. 2, as illegal and unjustified, is upheld.

(d) The respondent no. 2 is held to be entitled to Rs.7,00,000/- by way of lump sum compensation, in lieu of reinstatement, without back wages.

(e) The amount of Rs.7,00,000/- shall be paid to the respondent no. 2, from the amount deposited by the petitioner before this Court and the remaining amount alongwith interest, if any, shall be paid to the petitioner.

(f) The order at clause (e) above, shall be given effect to, after a period of eight weeks.

(g) In the circumstances, the Writ Petition No. 281/2008, is allowed and the impugned recovery certificate dated 10.03.2008 and the notice of demand dated 15.04.2008, are hereby set aside.

(h) Rule is made absolute in both the petitions, in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

EV