Government of Himachal Pradesh
Department of Labour and Employment

NOTIFICATION

No: Shram (A) 6-3/2016 (Awards) Shimla Dated 24-10-2016

In exercise of the powers vested under section 17 (1) of the Industrial Disputes Act,1947, the Governor Himachal Pradesh is pleased to order the publication of awards of the following cases announced by the Presiding Officer, Labour Court Shimla on the website of the Department of Labour & Employment Government of Himachal Pradesh:-

Sr.No:	Case No:	Title of the Case	Date of Award
1.	63/2007	Workers Union V/S Gulshan Chemfill Ltd. Sirmour.	10
2.	53/2014	Sh. Laxman Singh V/s Chitkara University, HIMUDA Education HUB, Barotiwala, Solan.	10
3.	69/2014	Sh. Dhan Dass V/S The Executive Engineer, HPPWD, Division Chopal District Shimla & Anr.	10
4.	117/2007	Smt. Kamal V/S DAV Public School, Sector-IV, BCS, New Shimla, H.P. & Anr.	10
5.	61/2010	Shri Pankaj Talogta V/S M/S Himachal Futurstic Communication Ltd. Chambaghat, Solan.	10
6.	82/2013	Shri Bal Krishan V/S Oyster Pharma (P) Ltd. Kumarhatti, Soaln, H.P.	
7.	53/2012	Shri Mohar Singh & Ors V/S M/S Himshakti Project (P) Ltd. Shimla, H.P.	
8.	27/2016	Shri Liaq Ram V/s The XEN, HPSEB, Shimla.	10
9.	83/2016	Mazdoor Lal Jhanda Union V/S The General Manager/Employer, Marigold Sarovar Portico Shimla.	10
10.	48/2016	Shri Inder Singh V/S The XEN, IPH, Division-II, Shimla.	10
11.	47/2016	Shri Manoj Kumar V/S Senior Executive Engineer, City Electrical Division, Shimla H.P.	10
12.	37/2016	Shri Basti Ram V/S The D.F.O. Renuka, Sirmour.	10
13.	09/2016	Shri Karampal Munda V/S Sacred Heart Convent School, Dhalli, Shimla, H.P.	10
14.	07/2016	Shri Bal Krishan V/S The Ex. Engg. HPPWD, Division No.1, Shimla-3, H.P.	10
15.	16/2016	Shri Daulat Ram V/S The XEN, HPPWD, Shimla.	10

16.	17/2016	Sh. Khema Nand V/S The XEN, HPPWD, Shimla.	10
17.	03/2015	Sh. Bhoj Singh V/S Himachal Tourism Development Corporation, Shimla, H.P.	

By Order,

Pr. Secretary (Lab. & Emp.) to the
Government of Himachal Pradesh.

Endst. No: Shram (A) 6-3/2016 (Awards) Shimla dated 24-10- 2016

Copy forwarded to :-

1. The Labour Commissioner, H.P. Shimla-1.
2. The Presiding Judge, H.P. Industrial Tribunal –cum-Labour Court, Shimla w.r.t. his letter No./LC/IT/Pub/89-764 dated 18-10-2016 for information.

(Dinesh Kumar Sharma)
Deputy Secretary (Lab. & Emp.) to the
Government of Himachal Pradesh
Phone No. 0177-2620182

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P) CAMP AT NAHAN.

Ref. No. 63 of 2007.

Instituted on. 30.7.2007.

Decided on 16.9.2016.

Gulshan Chemical Workers Union through its president Shri Ramkrishan S/o Shri Majha Ram R/o Village and P.O Sainwala, Tehsil Paonta Sahib, District Sirmour, HP.

……Petitioner.

Vs.

Gulshan Chemfill Ltd., through its Manager Village Rampur Majri Dhaula Kaun District Sirmour, HP.

……Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri Virender Pal, Advocate.

For respondent **:** Shri D.C Khanduja, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

"Whether the action of the management of M/s Gulshan Chemfill Ltd., Village Rampur Majri, Dhaula Kuan District Sirmour, HP to lock-out their factory w.e.f. 16.2.2007 without complying with provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation to one hundred one affected workmen (list of workers supplied by the Labour Officer, Nahan is at Annexure-A) are entitled from the above Management?"

2. In nutshell the case of the petitioner union is that all the workers were initially engaged by the respondent company against the posts of helpers, cleaners, fitters, cutting helpers, G.P helpers Micronesia helper, lab helper, carbonator helper, carbonator operator etc., w.e.f. the year, 2003

in the pay scale of ` 3000 to 5000/- per month and during the year, 2003, the total strength of the workers were 140. All the workers kept on discharging their duties to the satisfaction of their superiors from the very date of their engagement in the respondent company and later by the year, 2006 about 31 workers remained on the rolls of the respondent company as permanent workers, who were working with the company till 4.4.2006 when their services were abruptly terminated by the management of respondent without prior notice and justification, hence, on this illegal action of the management, the workers of the petitioner union raised the objection by going on hunger strike as every worker was facing the problem of his livelihood. It is further stated that in spite of requests of the workers, the respondent company did not incline to reengage the services of the workers till 2.11.2006 and during this time on certain occasions, the management had given false assurances to the workers about their re-engagement but of no avail. On 2.11.2006, with the assistance of the Labour-Officer-cum-Conciliation Officer, Sirmour, the respondent management had agreed to take back the services of all 31 workers of the petitioner union and an agreement had taken place between the petitioner union and management whereby it had been resolved that every effort would be made to accommodate the workers in the respondent company. Thereafter the workers were discharging their duties in parlance to the agreement dated 2.11.2006 as well as to the satisfaction of their superiors but once again the respondent company asked the workers of the petitioner union not to come to work w.e.f. 10.2.2007 and consequently terminated their services without issuance of any notice under section 22 (2), 24, 25-A, 25-B and 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) despite the fact that all the workmen of petitioner union had completed more than 240 days in each calendar year preceding their termination. The respondent company had also failed to tender retrenchment compensation on account of service rendered by the workers of petitioner union and even no EPF has been contributed by the company of the workers, hence, the termination of the workers of petitioner union is bad in law. Against this back-ground a prayer has been made that the directions be issued to the respondent company to re-instate the services of entire 31 workers of the petitioner union with retrospective effect along-with all the consequential service benefits with seniority and continuity besides regularization.

3. The respondent contested the claim of the petitioner union by filing reply wherein preliminary objections have been taken qua maintainability, that the petitioner union is not a registered union and that the workers are gainfully employed with various establishments. On merits, it has been asserted that the respondent company is into manufacturing of activated calcium carbonate and commenced its production from 9.11.2005 and the licence under the Factories Act was applied and it was granted for 50 workers and initially 11 workers had been employed on permanent role and 18 workers have been engaged through contractor. It is denied that workers discharged their duties to the entire satisfaction of their superiors. However, it is submitted that in the year, 2006, there were only 29 workers with the respondent company, hence, the list of the workers of petitioner union as appended with the claim petition is fragment of imagination of petitioner union and is totally baseless. The workers who were employed with the respondent company during the year, 2005 and 2006 and again on 10.2.2007 went on illegal strike resultantly the company suffered losses on account of the illegal strike, hence, the lock-out which is declared in consequence of illegal strike is not illegal. It is denied that the services of the workers of petitioner union had been terminated illegally without any prior notice. It is further submitted that as of date out of 12 regular workers of the respondent company, 8 have taken their full & final settlement and even the EPF had been paid by the respondent to the workers employed by it or through the contractor. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder the petitioner union reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 5.11.2008.

1. Whether the action of management of M/s Gulshan Chemfil Ltd., Rampur Majri to lock out their factory w.e.f. 16.2.2007 without complying with provisions of the Industrial Disputes Act, 1947 is improper and unjustified as alleged?

OPP……

2. If issue no.1 is proved to what relief and amount of compensation to one hundred one effected workmen are entitled to?

OPP……..

3. Whether the reference is not maintainable as alleged?

OPR……

4. Relief.

6. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	No.
Issue no.2	Becomes redundant.
Issue no.3	Not pressed.
Relief.	Reference answered in favour of the respondent and against the petitioner union per operative part of award.

Reasons for findings.

Issues no.1.

8. To prove this issue, the petitioner union examined one Shri Ram Krishan, who has stated that he was engaged as helper with Gulshan Chemfil Ltd., Rampur Majri in 2003 and he was made regular in 2005 and continued as such till 10.2.2007 and then his services along-with 100 workers were terminated without notice and without payment of compensation. He is the President of the Gulshan Chemfil workers Union which is a registered union and the registration certificate of their union is Ex. PA and he is also authorized to represent this union vide letter Ex. PB. They have 101 workers who have worked as helper, lab helpers, fitter, cutting helpers, G.P helpers, Micronesia helper, cleaner, carbonator helpers and carbonator operators in the pay scale of ` 3000-5000/-. All 101 workers were terminated on 10.2.2007 and the dispute was earlier compromised on 2.11.2006 in which it was undertaken by the respondent that they would not remove them from service. The unit is still working and when the factory restarted, they made a complaint to the Labour Inspector, Paonta Sahib but no

action was taken on their complaint. In cross-examination, he admitted that on 17.9.2007, no meeting of their union was held and that when the services of workman is engaged, his name is entered in adult workers register and when he leaves the job, it is also entered in the same register. He denied that the payment of wages register of respondent company for the month of April, 2006 to Feb., 2007 shows that there were 11 to 15 workers at the relevant time and that as per the payment register, the salary of workmen were between 2250-2800. He admitted that 8 workers have already taken full & final settlement amount but denied that he was engaged after Sept. 2005. He denied that there were only 11 to 15 workers with the company and about 18 workers were hired though contractor from November, 2005 till Feb., 2007. He further denied that the company was not authorized to engage more than 50 workers. He also denied that they participated in the strike and did not resume their duties and that there was no lock-out in the company.

9. On the contrary, the respondent examined two RWs. RW-1 Shri Atul Rastogi has stated that the respondent company started production in the month of November, 2005 and only 12 workers have been engaged at that time. The copy of attendance register is Ex. RW-1, the copy of wages register of the workers is Ex. RW-2 and the copy of payment register for December, 2006 is Ex. RW-3 and copy of payment register for the month of Jan., 2007 and Feb., 2007 are Ex. RW-4 and Ex. RW-5. Out of 12 workers, one worker namely Shri Sher Singh was promoted as Staff Foreman by the company. Ex. RW-6 is the copy of register of workers and Ex. RW-7 is the copy of production certificate issued by District Industry Centre, Nahan and Ex. RW-8 is the attested copy of form no.1. Out of eleven workers, seven workers have left the job at their own and they also submitted their letters for abandoning their jobs. Letter of Dalbir is Ex. RW-9 along-with full & final payment voucher Ex. RW-10, letter of Dhani Ram Sharma is Ex. RW-11 and full & final voucher is Ex. RW-12, letter of Balbir Singh is Ex. RW-13 and full & final voucher is Ex. RW-14, letter of Ranjeet Singh is Ex. RW-15 and full & final voucher is Ex. RW-16, letter of Rajinder Kumar is Ex. RW-17 and full & final voucher is Ex. RW-18, letter of Kashmiri Lal is Ex. RW-19 and full & final voucher is Ex. RW-20, letter of Papinder Singh is Ex. RW-21 and full & final voucher is Ex. RW-22. He further stated that the factory also engaged 18 workers from contractor Shri Rajesh Ram. Shri Ranjeet Singh was the

President of the workers union and he filed a suit for permanent injunction against the respondent company. The attested copy of complaint is Ex. Ex. RW-23, certified copy of vakalatnama is Ex. RW-24, affidavit of Shri Ranjeet Singh is Ex. RW-25, the copy of resolution dated 8.4.2007 is Ex. RW-26 and certified copy of the judgment passed by Civil Judge, Paonta Sahib is Ex. RW-27. The workers left the job at their own sweet will and the record submitted by the workers union is fake only to grab the compensation amount. In cross-examination, he denied that the company has not authorized him to defend the case. He admitted that as per original register, there were 15 workers deputed in the company. He denied that in Feb., 2007, they had 11 workers in their factory but admitted that as per Ex. RW-6 73 workers are listed. He denied that in the year, 2003 they have 140 workers and that there were 31 workers in the year, 2006. He admitted that the petitioner left the job voluntarily as they had not sent any notice to him.

10. RW-2 Shri Raghu Ram has stated that he was the contractor and worked with the company in the year, 2005 and he used to supply the workers/labourer in the respondent factory. The salary register of the workers from November, 2005 to Feb., 2007 is Ex. RW-2/A, attested copy of payment of wages register from December, 2006 to Feb., 2007 is Ex. RW-2/B and he had provided 18 workers to the factory in the year, 2005. The President of workers union was one Shir Ranjeet Singh and Shri Ram Krishan never remained the employee of the company. In cross-examination, he admitted that in the year, 2005, he had 21 workers with them, 25 workers in the year, 2006 and 14 workers in the year 2007.

11. Shri D.C Khanduja, Advocate for respondent had tendered in evidence the copy of Board resolution Ex. RX and certificate issued by DIC, Nahan Ex. RY.

12. The learned counsel for the petitioner contended that the services of the workers of petitioner union were terminated without complying with the provisions of the Act despite the fact that all of them have completed more than 240 days in each calendar year preceding their termination as such their termination is bad in law.

13. On the other hand learned counsel for the respondent contended that the services of the workers of the petitioner union had not been terminated illegally. He further contended that the issue regarding the illegal termination of the workers was never referred by the appropriate government to this Tribunal and as such this Court cannot travel beyond the terms of reference.

14. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof, it has become clear that the workers of petitioner union before the Conciliation Officer as well as before the appropriate government did not raise any dispute regarding the illegal termination of the workers. They rather claimed in the reference that the action of the management of the respondent to lock-out their factory w.e.f. 16.2.2007 without complying with the provisions of the Act is not proper and justified. The very terms of the reference show that the point of dispute between the parties was not the fact of the termination of the workers by the respondent but the propriety and justification of the respondent company to lock-out their factory w.e.f. 16.2.2007. That is why the reference was expressed to say as to whether the action of the management to lock-out their factory w.e.f. 16.2.2007 without complying with the provisions of the Act is proper and justified. In other words by the reference, this Court was not called upon by the government to adjudicate upon the question as to whether the termination of the workers of petitioner union was illegal and unjustified. The reference is only limited to the narrow question as to whether the action of the management to lock-out their factory w.e.f. 16.2.2007 is proper and justified.

15. It is a settled law that the jurisdiction of the Industrial Court to decide the industrial disputes is determined by the terms of reference. Where in an order referring an industrial dispute to a Tribunal under section 10 (1) of the Act, the appropriate government has specified the points of dispute for adjudication, the Tribunal shall confine its adjudication to those points and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of dispute referred to it but must confine its adjudication to the points specifically mentioned and anything which is incidental thereto. In the statement of claim filed by the petitioner, it has been pleaded that the import of the terms of reference is as to whether the termination of the workers of the petitioner union

w.e.f. 10.2.2007 is proper and justified and in the prayer clause it has been prayed that the respondent be directed to reinstate 31 workers of the petitioner union with all consequential benefits. Nothing precluded the petitioner to raise this plea before the Labour Commissioner for the purpose of including the same in the reference. Therefore, it cannot be said that the import of the terms of reference is regarding the propriety and justification of the termination of the workers of the petitioner union by the respondent. The jurisdiction of the Tribunal is circumscribed by the terms of reference and not by the pleadings or the consent of the parties. In **(2004) 10 SCC 460, Mukand Ltd Vs. Mukand Staff and Officers Association**, the Hon'ble Supreme Court has held that the Labour Court is the creature of the reference and cannot travel beyond the terms of reference. The relevant portion of the aforesaid judgment is reproduced as under:

> "36. We, therefore, hold that the reference is limited to the dispute between the Company and the Workmen employed by them and that the Tribunal, being the creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference.

In the present case also as observed earlier, as per the terms of reference the point of dispute between the parties was not regarding the termination of the workers but was with regard to the propriety and justification of the respondent management to lock-out their factory. Therefore, in view of the law laid down by the Hon'ble Supreme Court, this Court has no jurisdiction to go behind the reference and enquire into the question as to whether the termination of the workers of the petitioner union w.e.f. 10.2.2007 is proper and justified.

16. Now, the next question which arises for consideration before this Court as to whether the action of the management to lock-out their factory w.e.f. 16.2.2007 without complying with the provisions of the Act is proper and justified. However, to prove the aforesaid fact no evidence has been led by the petitioner. The petitioner union only examined one witness i.e PW-1, and except for his statement no other evidence has been led by the petitioner union. Even, in his statement before the Court, he has not stated anything about the lock-out of the factory of the respondent rather he had only stated that the workers be reinstated in service. Hence, in the absence of any material and

evidence on record, it cannot be said that the action of respondent management to lock out their factory w.e.f. 16.2.2007 without complying with provisions of the Industrial Disputes Act, 1947 is improper and unjustified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner union.

Issue no.2

17. Since, the petitioner union has failed to prove issue no.1 above, this issue becomes redundant.

Issue no.3.

18. During the course of arguments, this issue was not pressed by the learned counsel for the respondent. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 16th day of September, 2016.

(Praveen)

(Sushil Kukreja)

Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla

Camp at Nahan.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).

Ref. No. 53 of 2014.

Instituted on. 11.8.2014.

Decided on 8.9.2016.

Laxman Singh S/o Shri Gurbaksh Singh R/o Village Karanpur, P.O Nanakpur, Tehsil Kalka District Panchkula, Haryana.

……Petitioner.

Vs.

Chitkara University HIMUDA Education HUB, Attal Nagar Barotiwala, District Solan, HP through its Registrar/ Dean Administration.

……Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri Niranjan Verma, Advocate.

For respondent **:** Shri Alok Bhardwaj, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

> **"Whether termination of services of Shri Laxman Singh S/o Shri Gurbaksh Singh Village Karanpur, P.O Nanakpur, Tehsil Kalka, District Panchkula Haryana employed as Peon w.e.f. 9.10.2013 by the management of Chitkara University, HIMUDA Education Hub Atal Nagar, Barotiwala District Solan, HP without complying with the mandatory provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what benefits, including reinstatement, amount of back-wages, salary, seniority, past service benefits and compensation the above worker is entitled to from the above management?"**

2. In nutshell the case of the petitioner is that he was working with the respondent as peon since 14.11.2009 till 8.10.2013 and w.e.f. 9.10.2013, his services had been terminated illegally without assigning any lawful reason, issuing any notice and conducting any enquiry and that too without complying with the provisions of the Industrial Disputes Act, 1947

(hereinafter referred as to Act). It is further stated that a show cause notice dated 3.10.2013 had been given to the petitioner which was replied by him on 5.10.2013 wherein false allegation has been leveled against the petitioner. That juniors to the petitioner have been retained and one Shri Gurjant Singh was appointed in his place. The petitioner had completed 240 days in a calendar year. The petitioner requested the respondent for his reengagement but of no avail and even the petitioner was not allowed to enter the main gate of the University. Against this back-drop the petitioner has prayed that his retrenchment be declared improper and unjustified and he be reinstated in service with full back-wages, seniority including other consequential benefits.

3. The respondent contested the claim of the petitioner by filing reply wherein preliminary objections have been taken qua maintainability and suppression of material facts as he was careless towards his duties assigned to him by the respondent and he was also habitual of creating indiscipline with regard to his duties. On merits, it has been asserted that the respondent management had given one month's salary in lieu of one month's notice but the petitioner did not turn up to take his salary after 8.10.2013. It is denied that the services of the petitioner had been terminated illegally but it is asserted that on various point of time the petitioner has been found guilty of serious misconducts and he was also been warned at various levels by the respondent but of no use. It is further asserted that the reply to show cause notice filed by the petitioner on 5.10.2013, was not found satisfactory, hence, his services had been terminated w.e.f. 9.10.2013. The respondent prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Pleadings of the parties gave rise to the following issues which were struck on 2.112015.

5. Whether the termination of the services of the petitioner w.e.f. 9.10.2013 by the respondent is in violation of the provisions of the Industrial Disputes Act, 1947 as alleged?
OPP……

6. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?
OPP……..

7. Whether the petitioner has suppressed material facts from this Court as alleged?
OPR……

8. Whether the petition is not maintainable as alleged?

OPR……

9. Relief.

5. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	Yes.
Issue no.2	Entitled to reinstatement with seniority and continuity but without back wages.
Issue no.3	Not pressed.
Issue no.4	No.
Relief.	Reference answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings.

Issues no.1.

7. To prove this issue, the petitioner examined himself as PW-1 and deposed that he was engaged as peon by the respondent university on 14.11.2009 and worked as such till 8.10.2013. His services had been terminated w.e.f 9.10.2013. He had completed 240 days in each calendar year and his junior Gurjant Singh is still working with the respondent. After his termination, he requested the respondent for his re-engagement but of no avail. Neither any enquiry was conducted nor an opportunity of being heard was given to him and even no notice was issued and no compensation was paid to him before terminating his services. The identity card was issued by the respondent after one year, the copy of which is Ex. P-1. He is unemployed after his termination. In cross-examination, he admitted that his duty as peon was to look-after the premises of the university campus and to lock and

unlock the rooms. He further admitted that a warning letter dated 16.4.2012 Ex. RX-1 was issued to him and that on the same day he had written the apology vide Ex. RX-2. He also admitted that warning letter Ex. RX-3 had been issued to him. He denied that on 8.3.2013, he was absent from the projector room during duty hours and that the projector was stolen from the premises when he was absent from duty. He further denied that on 3.10.2013 show cause notice Ex. RX-4 was issued to him and that the termination letter dated 8.10.2013, Ex. RX-5 was issued to him. He admitted that Gurjant Singh was engaged before him and he is still working with the respondent.

8. On the contrary, the respondent examined two RWs. RW-1 Shri Ripu Daman Singh, Assistant Registrar of respondent university stated that the petitioner was working as peon on the first floor of pie block and his work was not up to the satisfaction and warning letter Ex. RX-1 was issued to him by the security officer. The petitioner tendered apology vide letter Ex. RX-2 and warning letter Ex. RX-3 was also issued to him. Thereafter, show cause notice Ex. RX-4 was issued to the petitioner and then termination letter Ex. RX-5 was issued. Since the work and conduct of the petitioner was not satisfactory, therefore, he is not entitled to any relief. In cross-examination, he admitted that the security remains present on the gate around 24 hours. He denied that the petitioner was assigned duty on 13.9.2013 at old academy block. He admitted that regarding missing of projector no FIR was lodged with the Police. He also admited that no domestic enquiry had been initiated against the petitioner and no chargesheet was issued to him. He denied that only one peon i.e the petitioner was assigned the duty for looking after three blocks. He expressed his ignorance that how many new peons have been engaged and how many juniors to the petitioner have been retained after his termination.

9. RW-2 Shri Harbans Lal, Supervisor of the respondent university stated that he used to supervise the work of peon and other housekeeping staff and the petitioner was working as peon under his supervision. On 1.10.2013, one projector form room no. 12.09 was found missing and at that time the petitioner was on duty to guard room no. 1209 and thereafter the petitioner informed the department of IT but the same was found reinstalled after some time and when he asked the

petitioner about reinstallation of projector, he expressed his ignorance. Earlier also one projector was stolen from room no, 411 where the petitioner was on duty and the same could not be traced. Regarding the theft of the projector, he had also filed one letter Ex. RW-2/A before the Dean of the university. In cross-examination, he denied that on the day when the projector was found missing, the petitioner was on duty at another block. He denied that the petitioner was not on duty at room no. 411 at the relevant time when the projector was stolen. He admitted that at 5:00PM the keys of the rooms are deposited by the respective peons on the main gate but denied that the staff of IT department used to take keys from the main gate for repairing the projectors etc. even after 5:00 PM. He further admitted that the petitioner used to work honestly and that two fresh persons have been engaged after the termination of the petitioner.

10. The learned counsel for the petitioner contended that the services of the petitioner have been terminated illegally by the respondent without following the provisions of the Act and without serving any show cause notice, chargesheet and without holding any enquiry whereas his juniors are still working with the respondent. He further contended that the termination of the petitioner in the aforesaid manner, in violation of the principles of natural justice, tantamount of unfair labour practice, as such, the petitioner is entitled to be reinstated in service.

11. Conversely, the learned counsel for the respondent contended that the services of the petitioner were rightly terminated in view of the gross misconduct on his part and there is no violation of any mandatory provisions of the Act.

12. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof, it has become clear that the petitioner had worked with the respondent as peon from 14.11.2009 till 8.10.2013. It is also not in dispute that the petitioner was the permanent employee of the respondent prior to his termination. Though, the case of the respondent is that his services have been rightly terminated in view of the grave/major misconduct on his part. However, from the perusal of the record it has become clear that the services of the petitioner had been terminated vide termination letter Ex. RX-5 without holding any domestic enquiry and without issuance of any

chargesheet as admitted by the respondent. Now, the question which arises for consideration before this Court as to whether the action of the respondent was illegal and unjustified in terminating the services of the petitioner without holding the domestic enquiry and without following the principles of natural justice on the ground of the misconduct. It is a settled legal proposition that a workman against whom the misconduct is alleged cannot be dismissed unless a proper domestic enquiry is held against him in respect of the alleged misconduct. Even, if there is a proved misconduct against the workman, he cannot be discharged or dismissed from service unless he has been afforded reasonable opportunity of being heard before initiating any action against him by the employer/respondent. In the present case admittedly neither any chargesheet was issued to the petitioner nor any domestic enquiry was held before terminating him from service. In **D. K Yadav Vs. M/s J.M A Industries Ltd. as reported in 1993-1 Supreme Court Service Law Judgments -221**, the Hon'ble Apex Court has held as under:

> *"Reasonable opportunity be given to the employee concerned to put forth his case and proper enquiry be held before terminating his service."*

In a recent judgment of our **Hon'ble High Court in ILR-XLV (VI) 938 titled as Gurcharan Singh Deceased through his LR's Vs. State of HP and ors.** the workman was arrested and was convicted of the offence punishable under section 324 of the IPC and he was terminated without conducting any enquiry. The Hon'ble High Court has held that his termination could not have been ordered without conducting any enquiry as the workman had completed 240 days and was therefore entitled to the enquiry. The relevant portion of the aforesaid judgment reads as under:

> "8. The moot question is whether termination can be ordered without conducting any inquiry? The answer is in the negative for the following reasons:
>
> 9……..
>
> 10. While going through the impugned award and the writ petition, one comes to an inescapable conclusion that the termination of deceased Gurcharan Singh was made without following the mandate of law.
>
> 11……..

12…….

13. In the instant case, deceased Gurcharan Singh had completed 240 days in a calendar year, as discussed and held by the Labour Court, after scanning the evidence, the inquiry was required, not to speak of only issuance of the notice.

In the instant case, admittedly, the petitioner had worked continuously with the respondent from the 14.11.2009 till 8.10.2013 and he was the permanent employee. Therefore, it was incumbent upon the respondent to have conducted the enquiry against the petitioner prior to his termination. However, the petitioner was never asked to answer any charges as no chargesheet was issued to him and no enquiry was held before terminating his services, on the basis of the alleged misconduct. Hence, the termination of the services of the petitioner without conducting any enquiry and without affording reasonable opportunity of being heard to the petitioner is in utter violation of the principles of natural justice.

13. The learned counsel for the respondent contended that the respondent had proved the misconduct committed by the petitioner by leading fresh evidence before this Court. There can be no dispute about the fact that the respondent is entitled to lead evidence on merits before this Court to prove the misconduct of the petitioner in case his dismissal is found to be in violation of the principles of natural justice. **In (2006)-6 S.C.C 325, titled as Amritt Vanaspati Co. Ltd. Vs. Khem Chand and another**, it has been held by the Hon'ble Apex Court that even if no enquiry has been held by the employer or the enquiry held is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and the employee to adduce evidence before it. Now, the next question which arises for consideration before this Court is as to whether the alleged misconduct has been proved by the respondent against the petitioner or not. The case of the respondent is that the petitioner was careless towards his duties assigned to him which resulted in loss of the property to the respondent and that before terminating the services of the petitioner a show cause notice dated 3.10.2013 Ex. RX-4 was issued to him and on 8.10.2013, the services of the petitioner were terminated w.e.f. 9.10.2013 vide letter dated 8.10.2013

Ex. RX-5. The perusal of show cause notice Ex. RX-4 issued to the petitioner shows that on 1.10.2013, one projector was stolen from room no. 1209 and when Mr. Harbans Lal, Supervisor checked the room no. 1209, he found that the projector was missing but while the investigation was being carried out, within two hours it was found that the projector was put back in room no. 1209. It has further been mentioned in the show cause notice that earlier also one projector was stolen from the same academic block due to the negligence on the part of the petitioner due to which loss of 75-80,000/- occurred. The perusal of termination letter Ex. RX-5 shows that the services of the petitioner were terminated on the same grounds as mentioned in the show cause notice. To prove the aforesaid misconduct the respondent examined RW-1 and RW-2. RW-1 admitted in cross-examination that the projector can only be installed by a technical person and the duty of the petitioner was from 9:00 AM to 5:00 PM. It has also been deposed by RW-1 that the petitioner himself informed about the missing of the projector and no FIR was lodged with the Police regarding the same. RW-2 categorically deposed that on 1.10.2013, one projector from room no. 1209 was found missing and the petitioner informed about the same to the department of IT and he used to remain on duty from 8:00 AM to 5:00 PM. However, from the evidence on record it has not been established that on 1.10.2013, the projector was initially removed by the petitioner and later on he placed back the projector at the same place. No evidence has been led by the respondent that it was the petitioner alone who had earlier removed the projector and thereafter placed back the same. RW-1, categorically admitted in cross-examination that the projector can only be installed by a technical person. Since, the petitioner is not a technical person, therefore, the respondent has failed to explain as to how the projector had been placed back in room no. 1209. Regarding the theft of the projector on earlier date, it cannot be said that the petitioner had stolen the projector as it has come in the evidence that there is only one main gate to enter in the University campus and the security remains present on this main gate round the clock for 24 hours. Moreover, no FIR was lodged by the respondent regarding the theft of the projector. Therefore, in the absence of any evidence on record, the theft of the projector cannot be attributed to the petitioner. Except for the aforesaid allegations, no other allegation has been leveled either in the show cause notice Ex. RX-4 or

in the termination letter Ex. RX-5. Hence, from the evidence on record, it cannot be said that the misconduct leveled against the petitioner has been proved by the respondent before this Court.

14. Therefore, in view of the fact that neither any domestic enquiry was conducted against the petitioner nor the misconduct has been proved before this Court by the respondent, it can safely be held that the termination of the services of the petitioner w.e.f. 9.10.2013 by the respondent was illegal and unjustified.

15. Admittedly, the petitioner had completed more than 240 days in each calendar year, preceding his termination. Now, it stands proved on record that the services of the petitioner had been terminated without giving any opportunity of being heard to him. As per the termination letter Ex. RX-5, the petitioner was given one month's salary in lieu of notice period and he was directed to collect the same from Accounts Office. However, the respondents have failed to comply with the conditions (b) and (c) of section 25-F of the Act before terminating the services of the petitioner. At this juncture, it would be relevant to re-produce section 25-F of the Act, which reads as under:

> **25-F. CONDITIONS PRECEDENT TO RETRENCHMENT OF WORKMEN.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-**
>
> **(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;**
>
> **(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent of fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and**
>
> **(c) notice in the prescribed manner is served on the appropriate government (or such authority as may be specified by the appropriate Government by notification in the Official Gazette.)**

16. The provisions of section 25-F of the Act lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case,

the perusal of the record shows that the respondent has not complied with the conditions of section 25-F as enumerated in clause (b) & (c), precedent to the retrenchment of petitioner. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd., Vs. Mackinnon employees Union**, the Hon'ble Apex Court has held as under:

> "34. …….The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law."

17. In the present case also no evidence has been produced by the respondent to prove that the petitioner has been paid retrenchment compensation equivalent to the fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months as per clause (b) of section 25-F. Further, with regard to the provisions of clause (c) of the section 25-F, the respondent has failed to produce any evidence which could go to show that the notice was served in the prescribed manner on the appropriate government. Therefore, it has become clear that the respondent has not complied with the conditions (b) & (c) of the section 25-F, which are mandatory in nature as such the termination of the services of the petitioner by the respondent is illegal and unjustified.

18. Therefore, in view of my forgoing discussion, I have no hesitation in holding that the services of the petitioner have been terminated illegally without conducting of any enquiry and following the provisions of Industrial Disputes Act, 1947. Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue no.2.

19. Since, I have held under issue no.1 above that the termination of services of the petitioner by the respondent without complying with the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

20. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

21. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

"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……."

22. . In the present case, the petitioner has only stated that he is unemployed. Except for his bald statement, no other evidence has been led by the petitioner to prove that he was not gainfully employed. The petitioner has failed to discharge his burden by placing any concrete material

on record and by leading any cogent and satisfactory evidence that he was not gainfully employed after his termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

Issue no.3.

23. During the course of arguments, this issue was not pressed by he learned counsel for the respondent, hence, the same is decided in favour of the petitioner and against the respondent.

Issue no.4.

24. In support of this issue, no evidence has been led by the respondent which could go to show that this petition is not maintainable especially when the same was filed by the petitioner pursuant to reference sent by the appropriate government to this Court for adjudication. Therefore, by holding it to be maintainable, this issue is decided in favour of the petitioner and against the respondent.**Relief.**

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby allowed with the result, the petitioner is ordered to be reinstated in service forth-with with seniority and continuity. However, the petitioner is not entitled to any back-wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 8th day of September, 2016.

(Praveen)

(Sushil Kukreja)

Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA.

Ref no. 69 of 2014.

Instituted on 1.9.2014.

Decided on 28.9.2016.

Dhan Dass S/o Shri Kalam Ram R/o VPO Tikkari, Tehsil Chopal, District Shimla, HP.

……Petitioner

VS.

1. The Executive Engineer, HPPWD Division, Chopal, District Shimla, HP.
2. The Principal Secretary, Labour & Employment to the government of Himachal Pradesh.

……Respondents

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner: Ms. Anu Tuli, Advocate

For respondents: Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

> ***"Whether termination of services of Shri Dhan Dass S/o Shri Kali Ram VPO Tikkari, Tehsil Chopal, District Shimla, HP during September, 1999 by the Executive Engineer, HPPWD Division Chopal, District Shimla HP without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above workman is entitled to from the above employer?"***

2. In nutshell, the case of the petitioner is that during the year, 1992, he was appointed as a daily wager beldar on muster roll basis under the control of SDO/JE Feduj Division Nerwa and was assigned the duties of supervisor which was regularly and continuously performed by him till 4.8.1999 on which date he was marked absent for half day and was ordered verbally about the change of the nature of duty from officiating supervisor to beldar but the petitioner continued to work as supervisor up to 23.8.1999, when the concerned JAE, Fedaj once again ordered the mate Megh Ram

not to mark the presence of petitioner, if he does not work as beldar. It is further stated that the petitioner continued to attend the duty but he was marked absent in the muster roll for the month of September, 1999 issued against the work of Sagroti, Tikkari and Maneoti road and that such act of the respondent no.1 was challenged by the petitioner by way of OA no. 2670 of 1999 which was dismissed in default on 14.3.2006 and this fact came to the knowledge of petitioner in the year, 2010 when a new counsel was engaged and the file was tracked and thereafter on the suggestion of counsel, the petitioner raised demand notice under section 2-A of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is also stated that the respondents have illegally and unlawfully retrenched the petitioner from service without any sufficient cause and reason by ignoring the fact that he had completed more than 240 days in each calendar year preceding his termination and even no opportunity of being heard was afforded to him. The services of one Shri Shiv Dutt had been regularized on 22.1.2007, who joined the department in March, 1996 whereas the services of the petitioner were terminated without issuing any chargesheet and without holding any enquiry and even he had represented to the respondents for his regularization to the post of supervisor after the completion of eight years but of no avail and that he is unemployed after his termination. Against this back-ground a prayer has been made to set aside the termination of the services of the petitioner and he be reinstated in service with seniority and continuity along-with full back–wages.

3. The petition has been contested, on having raised preliminary objections qua maintainability and that the petitioner has not come to this Court with clean hands. On merits, it has been admitted that the petitioner was engaged as daily wages beldar in the month of December, 1992 and remained in service till the year, 1999. However, it is submitted that the petitioner had not completed eight years of continuous service with minimum of 240 days in a calendar year as per the policy of the state government and he had not worked as supervisor. The petitioner had been working as beldar and was found sitting idle on 4th August, 1999 at about 4:00 PM during the inspection of Assistant Engineer, Nerwa and he was advised to work with the labour otherwise he would be marked absent in future and on 23rd August at about 11:30 AM, he was again found sitting idle, hence, he was marked absent by the Junior Engineer of Feduj section and since the services of the petitioner had been

engaged as beldar and was supposed to discharge the duties of beldar as such the question to change his nature of duties does not arise. The petitioner refused to discharge the duties of beldar. It is further asserted that the petitioner left the job at his own will and the respondent never terminated his services. The respondent prayed for the dismissal of the petition.

4. Rejoinder not filed. Pleadings of the parties gave rise to the following issues which were struck on 2.1.2016.

1. Whether the termination of the services of the petitioner during September, 1999 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged?
OPP……..

2. If issue no.1 is proved in affirmative, to what relief of service benefits the petitioner is entitled to?
OPP…….

3. Whether this petition is not maintainable?
OPR……..

4. Whether the petitioner has suppressed material facts from this Court as alleged?
OPR…….

5. Relief.

5. I have heard the learned Counsel for the petitioner and Ld. DDA for respondents and have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	Yes.
Issue no.2	Entitled to reinstatement as beldar with seniority and continuity but without back-wages.
Issue no.3	No.
Issue no.4	Not pressed.
Relief.	Reference answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings.

Issue no.1

7. The learned counsel for the petitioner contended that the services of the petitioner were engaged as daily waged beldar in the year, 1992 whereas he was assigned the duties of supervisor which was regularly performed by him till 4.8.1999 and thereafter his nature of duties had been verbally changed from officiating supervisor to beldar without issuing any order. She further contended that despite having attended the duties by the petitioner, he was marked absent and his services have been terminated illegally without issuance of any notice and payment of compensation. She also contended that juniors to petitioner have been retained by the respondent and the services of the petitioner had been terminated without affording any opportunity of being heard.

8. On the other hand, learned counsel for the respondent contended that the petitioner was engaged as beldar and he had worked as beldar with the respondent and no point of time he was assigned the duties of supervisor. She further contended that the petitioner had refused to work as beldar and abandoned his job at his own. She also contended that the services of the petitioner were never terminated by the respondent.

9. To prove this issue, the petitioner stepped into the witness box as PW-1 to depose that he was engaged as daily wages beldar in the year, 1992 with the respondent no.1 under Fedag Division and he was assigned the work of supervisor and as such he worked w.e.f. 1992 till 1999. His services had been terminated orally in the month of November, 1999 on the ground that he had to work as a beldar and not as a supervisor and he was not given any order in writing about the change of nature of work. Ex. PW-1/A is the copy of legal notice and thereafter he had filed an OA Ex. PW-1/B before the Administrative Tribunal in the year, 1999 and the reply filed by the respondents to the aforesaid OA is Ex. PW-1/C. The copy of demand notice is Ex. PW-1/D. He prayed for his reinstatement in service along-with all consequential service benefits. In cross-examination, he admitted that no appointment letter had been annexed by him with his petition and that he had been

engaged as daily wages beldar. He denied that he had not worked as supervisor but admitted that the respondents had not given anything in writing to him about the nature of his work as supervisor. He admitted that from the year, 1993 to 1998, he had completed 240 days. He denied that on 4.8.1999, when the SDO and JE inspected the spot, he was found absent from his duties but admitted that on 23.8.1999, he had informed the SDO and JE that he would work as supervisor and not as beldar. He denied that he abandoned the job at his own.

10. PW-2 Shri Megh Ram stepped into the witness box to depose that he was working as mate in the respondent department and from the year, 1993 to 1998, he worked in HPPWD Division Nerwa. The petitioner was also working there during the aforesaid period and he used to mark presence of the petitioner and also used to prepare the muster rolls. The work and conduct of the petitioner was satisfactory and no complaint was received against him and one Shiv Dutt as also working as beldar during the aforesaid period and he has been regularized now. In cross-emanation, he admitted that muster rolls Ex. D-1 and Ex. D-2 have been prepared by him and the petitioner was not doing any supervisory work. Shiv Dutt was working from the year, 1995. There was no break in service of the petitioner from 1993 to 1998 and the petitioner never remained absent willfully.

11. Conversely, the respondent examined one Shri Jai Lal Kanta, Junior Engineer as RW-1, who tendered, in evidence, his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence mndays chart of the petitioner Ex. RW-1/B and regularization policy mark RX. In cross-examination, he admitted that muster roll was issued at the instance of XEN and the attendance was marked by the concerned mate. He denied that the petitioner was made to work against the post of supervisor. He has no knowledge that the petitioner supervised the survey of Maneoti-Kahak road along-with other surveyors. He denied that the petitioner had worked for Maneoti Health Centre, Breast wall at Tikkri and Shantha Sub Centre repairing. He further admitted that no

show cause notice was issued to the petitioner in August, 1999 for his alleged sitting idle during working hours. He also admitted that the similarly situated persons like the petitioner have been regularized but denied that the services of the petitioner have been terminated illegally without giving him any opportunity of being heard. He admitted that no enquiry was conducted against the petitioner but denied that the petitioner was intentionally marked absent.

12. RW-2 Shri Ajay Kapoor Executive Engineer has stated that the petitioner had worked as beldar from the year, 1992 to 5th May, 1999 and it has never come in his knowledge that any beldar was allowed to act as supervisor as he had never given any such type of instructions. In cross-examination, he admitted that as per their office rules, an employee can be terminated after the issuance of notice and that an opportunity of being heard is given to the employee prior to his termination. He denied that in March, 1999, measurement of STM Road was conducted by their department.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was engaged as daily rated beldar by the respondent in the year, 1992. No doubt, the case of the petitioner is that he was assigned the work of supervisor and he worked as such till 1999. However, the petitioner had failed to place on record any such document and to lead any evidence which could go to show that he was made to work against the post of supervisor. Even, PW-2 Shri Megh Ram admitted in cross-examination that the petitioner was not doing any supervisory work. Moreover, RW-1 Shri Jai Lal Kanta has denied in his cross-examination that the petitioner was made to work against the post of supervisor. RW-2 also stated that the petitioner had worked as beldar and no beldar was allowed to act as supervisor. Therefore, in the absence of any oral as well as documentary evidence, I have no hesitation in holding that the petitioner has failed to prove that he had worked as supervisor with the respondent.

14. The learned Dy. DA for the respondents first contended that the petition is hopelessly barred by limitation. It is not in dispute that the petitioner had worked till 4.8.1999 with the respondent and he raised the industrial dispute before Labour-cum-Conciliation Officer, Shimla on 15.11.2011 vide demand notice Ex. PW-1/D after a gap of about 12 years. The law on the point is well settled that no limitation is prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the Industrial Dispute. The Hon'ble Supreme Court in its various judgments has held that the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay. It has been held by the Hon'ble Supreme Court in ***in (1999) 6 SCC 82, titled as Ajayab Singh Vs. Sirhind Co-operative Marketing –cum- processing Service Society Limited and Another.*** *that:-*

> ***"The provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone"***

It has also been held by the Hon'ble Supreme Court in **Gurmail Singh Vs. Principal Government College of Education and others, (2009) 9 SCC 496** that mere delay in challenging the termination would not be a bar to the adjudication of the matter but could only deprive the appellant of his back wages for the period of delay in raising the termination issue. In a latest judgment, the **Hon'ble Supreme Court in 2014, 10 SCC 301 titled as Raghubir Singh Vs. General Manager, Haryana Roadways Hissar** has held that Limitation Act has no application to reference made by the appropriate government to Labour Court/Industrial Tribunal for adjudication of existing industrial dispute. The relevant portion of the aforesaid judgment is reproduced as under: "16 **Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of S.M.**

Nilajkar & Ors. v. Telecom District Manager, Karnataka it was held by this Court as follows:

> **"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree..... In Ratan Chandra Sammanta and Ors. v. Union of India and Ors. (supra)1993 AIR SCW 2214, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief....." (Emphasis supplied).**

17 In view of the legal principles laid down by this Court in the above judgment, the reference of the industrial dispute made in the case on hand by the State Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer".

Therefore, the aforesaid law declared by the Hon'ble Supreme Court in various context makes the legal position clear that there is no limitation prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the industrial dispute. The provision of Article 137 of the schedule to the Indian Limitation Act, 1963 is not applicable to the proceedings under the Act and the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay.

15. In the back-ground of the aforesaid legal position, in the instant case, the services of the petitioner were terminated during Sept. 1999 and thereafter the petitioner had filed an OA no. 2670 of 1999 before the Administrative Tribunal which was dismissed in default on 14.3.2006 which fact came to his knowledge in the year, 2010 when he engaged a new counsel. Thereafter, on the advice of the counsel, instead of pursuing the remedy for restoration of the aforesaid OA, the petitioner raised the Industrial Dispute and the matter was referred by the appropriate government to this Court for adjudication. Therefore, the petitioner cannot be blamed for the delay in raising the present dispute who had kept his dispute alive. Moreover, it is not the case of the respondent that due to the delay in raising the industrial dispute, there is any loss or unavailability of material evidence. Hence, it cannot be said that delay in raising the industrial dispute is fatal to the reference and as such the petitioner cannot be debarred from claiming the relief from his employer and mere delay in challenging the termination would not be a bar to the adjudication of the present dispute which has been referred to this Court by the appropriate government.

16. The stand which has been taken by the respondent is to the effect that the services of the petitioner had never been terminated but he himself had abandoned the job without any intimation. However, there is no iota of evidence on record which could go to show that the petitioner had left the job on his own. It is well settled that mere plea of abandonment is not sufficient to prove that the workman had abandoned the job. The abandonment is always a question of intention which cannot be attributed to an employee without adequate evidence in that behalf. In **AIR 1979 SC 582 case titled as G.T Lad and others Vs. Chemicals and Fibers India Ltd.** it has been held as under:

> **"From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah (1964) 4 SC R 265: (AIR 1964 SC 1272), it was observed by this Court that under common law an inference**

that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."

Similarly, in a case titled **Ocean Creations Vs. Manohar Gangaram Kamble 2013 SCC Online Bom 1537:2014)140 FLR 725,** the Hon'ble Bombay High Court held as under:

"8. The legal position is also settled that 'abandonment or relinquishment of service' is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.

9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the cae of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Lted. Observed thus: "…..it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service….. It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to

believe that he would refuse the offer of work when it was given to him before the Labour Officer…."

In the present case, admittedly, no notice had been issued by the respondents to the petitioner calling upon him to resume his duties and no enquiry had been conducted against him before terminating his services. Therefore, in view of the law laid down (supra), and also in the absence of any evidence on record, it cannot be said that the petitioner had left the job at his own.

17. Now, the next question which arises for consideration before this Court is as to whether the services of the petitioner as beldar had been terminated illegally. Admittedly, the petitioner was engaged as beldar on daily wages basis in the year, 1992 and he worked as such till the year, 1999. RW-1 Shri Jai Lal Kanta, Junior Engineer has tendered in evidence the mandays chart of the petitioner Ex. RW-1/B. The perusal of mandays chart Ex. RW-1/B goes to show that the petitioner had worked for 30 days in the year, 1992, 350 days in the year, 1993, 324 days in 1994, 324 days in 1995, 327 days in 1996, 305 ½ days in 1997, 311 days in 1998 and 220 days in the year, 1999 (till 9/99). The perusal of mandays chart Ex. RW-1/B further shows that the petitioner had completed more than 240 days in twelve calendar months preceding his termination. Therefore, before terminating the services of the petitioner, it was incumbent upon the respondent to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondent has failed to comply with the provisions of section 25-F of the Act. It has been held by our own Hon'ble High Court in **Latest HLJ 2007 (HP) 776 titled as State of Himachal Pradesh Vs. Sohan Lal** that the settled law in counting 240 days is that the same has to be calculated preceding the date of retrenchment during twelve calendar months and not a year. The relevant extract of the aforesaid judgment is reproduced as under:

"2**.** I have perused the record and heard the parties. The Labour Court has come to the right conclusion that the workman could not be retrenched without complying with Section 25-F of the Industrial Disputes Act, 1947. Though the petitioner-State has

place on record the copy of man-days to substantiate its plea that the workman has not completed 240 days preceding the date of his retrenchment. The settled law for counting 240 days is that the same has to be calculated preceding the date of retrenchment during 12 calendar months and not a year."

In 2010 (5) SCC 497 titled as Anoop Sharma Vs. Executive Engineer, Public Health division no.1, Panipat (Haryana), the Hon'ble Supreme Court has held that the termination of the services of an employee by way of retrenchment without complying with the provisions of section 25-F of the Act is a nullity. The relevant extract of aforesaid judgment is reproduced as under:

> "16. An analysis of the above reproduced provisions shows that no workman employed in any industry who has been in continuous service for not less than one year under an employer can be retrenched by that employer until the conditions enumerated in Clauses (a) and (b) of Section 25-F of the Act are satisfied. In terms of Clause (a), the employer is required to give to the workman one month's notice in writing indicating the reasons for retrenchment or pay him wages in lieu of the notice. Clause (b) casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.
>
> 17. This Court has repeatedly held that Section 25-F(a) and (b) of the Act is mandatory and non-compliance thereof renders the retrenchment of an employee nullity……..."

18. In the present case also admittedly the respondents had not complied with the conditions precedent to the retrenchment as per section 25-F of the Act which are mandatory in nature. Hence, In view of the law laid down by the Hon'ble Supreme Court and our own Hon'ble High Court (supra) and my foregoing observations, I have no hesitation in holding that the termination of the services of the petitioner during September, 1999, by the respondents without complying with the provisions of section 25-F of the Act, is illegal and unjustified.

19. The learned counsel for the petitioner also contended that at the time of the termination of the petitioner, the respondents had retained his juniors who are still working and besides this even fresh persons have been engaged by the respondents as such the respondents had violated the principles of "last come first go". However, the petitioner as PW-1 nowhere has stated that juniors to

him have been retained and fresh persons have been engaged by the respondents. Thus, in the absence of any evidence on record, the petitioner has failed to prove that his juniors have been retained and are still working with the respondents. Hence, the case of the petitioner does not fall under section 25-G and 25-H of the Act.

20. Therefore, in view of my foregoing discussion, I have no hesitation in holding that the termination of the services of petitioner during September, 1999 by the respondents is illegal and unjustified. Accordingly, this issue is decided in favour of the petitioner and against the respondents.

Issue no.2.

21. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondents without complying the provisions of the Act is illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service as beldar with seniority and continuity.

22. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

23. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is

on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "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……."

24. . In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondents.

Issue No.3.

25. In support of this issue, no evidence has been led by the respondents. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondents.

Issue No.4.

26. During the course of arguments, this issue was not pressed by the learned counsel for the respondents, hence, the same is decided in favour of the petitioner and against the respondents.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages

and as such the reference is answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 28th Day of September, 2016.

(Parveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).

Reference no. 117 of 2007.

Instituted on. 1.10.2007

Decided on 30.9.2016.

Kamal W/o Shri Sukh Dev R/o Shobha Ram Building, New Shimla, Tehsil & District Shimla, HP.

……Petitioner.

Vs.

1. DAV Public School Phase-II, Sector-IV, Below BCS, New Shimla, through its Principal.
2. DAV Management Committee Chitra Gupt Road, New Dehli through its President.

……Respondents.

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Divya Pal Singh, Advocate.

For respondents **:** **Ms. Veena Sood, Advocate vice** Shri Rahul Mahajan, Advocate.

AWARD.

The following reference has been sent by the appropriate government for adjudication:

> **"Whether the action of the Principal DAV Public School Phase-II, Sector-IV, Below BCS, New Shimla-9 to terminate the services of Smt. Kamal W/o Shri Sukh Dev workman w.e.f. 23.8.2005 on the basis of domestic enquiry and without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?**

2. Briefly, the case of the petitioner is that she was appointed as Safai Karamchari by the respondents in their office/school on 1.10.1999 and she was getting ` 4000/- approximately as salary after deduction and that from the date of her appointment till 29.5.2005 she had worked continuously and was discharging her duties with full sincerity, honestly, devotion and missionary zeal and there was no complaint regarding her work and conduct. It is further stated that the petitioner was being harassed by the present Principal and its staff members namely Kumari

Sushma, who is working as maid in the school and the petitioner had reported the matter to the Principal in writing about the incident dated 15.7.2004 which was duly received by the office of respondent no.1 on 16.7.2004 but nothing had been done in this regard and instead the respondents and its staff members started harassing the petitioner by making wild allegations. Thereafter, the petitioner had applied for casual leave on various dates as she was not keeping good health and as such 13 days leave w.e.f. 18.4.2005 to 30.4.2005 had been applied by her which was allowed vide letter dated 19.4.2005. Then, the petitioner suddenly fell ill and she went to the hospital on 4.5.2005 for her medical check-up but the Doctor advised her bed rest till 11.5.2005 and during this period, the Principal issued various letters/show cause notices to the petitioner by leveling wild allegations which caused a lot mental stress and agony to her and thereafter she went to IGMC Shimla where the Doctor advised her complete bed rest till 28.5.2005. Then the petitioner issued a legal notice to Principal whereby she was informed that the petitioner would resume her duties immediately after the expiry of date i.e 29.5.2005 and the said notice was replied by the Principal by leveling wild and serious allegations. The petitioner also informed the respondent no. 1 telephonically about her illness and also deputed some other person in her place so that the work of the school should not hamper. On 29.5.2005, the petitioner went to join her duties by submitting her medical certificate but she was not allowed to resume her duties, hence, the action of the respondents in not allowing the petitioner to resume her duties by terminating her services is illegal and is violative of section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). The petitioner during the proceedings before the Labour-cum-Conciliation Officer, came to know that an enquiry was conducted against her and behind her back with an ulterior motive to camouflage their own misdeeds and such enquiry without associating the petitioner is bad in the eyes of law. Against this back-drop a prayer has been made that respondents be directed to re-instate the services of the petitioner with all consequential service benefits including back-wages.

3. The respondents contested the claim of the petitioner by filing reply wherein preliminary objections have been taken qua maintainability and that the petitioner is gainfully employed On merits, it has been admitted that the petitioner was a habitual absentee and her conduct

and behavior was not good and she used to fight with other co-workers and there were several complaints against her for which show cause notice, charge sheet were also issued. The petitioner used to submit false and frivolous medical certificates after availing leave without any sanction and even on several occasions she created scene in the school by showing herself under the influence of deities which created fear in the minds of students, co-workers and staff. It is denied that the petitioner was harassed by the Principal, staff members and Kumari Sushma. It is asserted that the complaint which was written by the petitioner was found to be false and frivolous as it was the petitioner who had been misbehaving, harassing and abusing the colleagues and several complaints had been made against her and that the management had written a letter on 19/20.4.2005 wherein it has been clearly brought to the notice of the petitioner that the leave w.e.f. 7.4.2005 to 30.4.2005 i.e 24 days would be treated as earned leave. On 1.5.2005, the petitioner came for work but did not do any work as she had told that she is unwell and thereafter the petitioner had also come for work on 2nd and 3rd May, 2005 but her work and conduct was unsatisfactory and thereafter w.e.f. 4.5.2005, she neither came to school nor sent any information. A memorandum dated 6.5.2005 was issued to the petitioner qua unauthorized absence and then show cause notice dated 10/12.5.2005 was issued for remaining absent and thereafter chargesheet dated 19.5.2005 was issued to her and the enquiry officer was appointed by the respondent to conduct the enquiry in to the charges leveled vide chargesheet dated 19.5.2005. The enquiry officer conducted the enquiry by intimating the date of enquiry to the petitioner and respondent but the petitioner failed to participate in the enquiry despite having been in the knowledge of the same and even the petitioner failed to receive the registered notices sent to her and she was also intimated about the date of enquiry by publishing the same in the newspaper “Dainik Bhaskar”, hence, ex-parte enquiry was conducted against her. The enquiry officer followed all the principles of natural justice while conducting enquiry and conducted the same in a fair and proper manner and during the enquiry the respondent management produced their evidence and the charges leveled against the petitioner stood proved. The enquiry report was submitted to the respondent by the enquiry officer and then second show cause notice along-with the enquiry report was sent to the petitioner and thereafter, her

services had been terminated w.e.f. 23.8.2005. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder the petitioner reaffirmed her allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 18.12.2009.

10. Whether the action of the respondent to terminate the services of the petitioner w.e.f. 23.8.2005 on the basis of domestic enquiry and without complying with the provisions of Industrial Disputes Act, 1947 is improper and unjustified as alleged?
OPP……\

11. If issue no.1 is proved, to what relief of service benefits and amount of compensation, the petitioner is entitled to?
OPP……..

12. Whether the claim is neither competent nor maintainable as alleged?
OPR……

13. Whether the petitioner is gainfully employed as alleged?
OPR……..

14. Relief.

6. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	Yes.
Issue no.2	Entitled for reinstatement with seniority and continuity but without back-wages.
Issue no.3	No.
Issue no.4	Decided accordingly.
Relief.	Reference partly answered in favour of the petitioner and against the respondents per operative part of award.

Reasons for findings.

Issues no.1.

8. To prove this issue, the petitioner examined two PWs including herself. The petitioner stepped into the witness box as PW-1 and tendered in evidence her affidavit Ex. PW-1/A wherein she reiterated almost all the averments as stated in the claim petition. She also tendered in evidence the documents annexed with the affidavit Ex. PW-1/A to Ex. PW-1/E. In cross-examination, she admitted that letter Ex. RW-1/D had been received by her through registered post and that she had also received show cause notice Ex. RW-1/E. She denied that letter Ex. RW-1/J had been sent to her through registered post. She admitted that registered letter dated 5.7.2005 Ex. RW-1/L had been sent to her which she refused to receive the same. She admitted that on the first date of enquiry she went to the school. She denied that she had not participated in the enquiry proceedings intentionally. She admitted that she received the termination order Ex. RW-1/R and that she also received letter Ex. RW-1/T. She denied that her services had rightly been terminated by conducting the domestic enquiry.

9. PW-2 Dr. Nalneesh Sharma has stated that Smt. Kamal remained under his treatment during the period from 12.5.2005 to 28.5.2005 as per certificate Ex. PW-1/C and the petitioner was suffering from hematemesis.

10. On the contrary, the respondents examined two RWs. RW-1 Smt. Anuradha Sharma, Principal tendered in evidence her affidavit Ex. RW-1/A wherein she reiterated almost all the averments as made in the reply. She also tendered in evidence show cause notices Ex. RW-1/B to Ex. RW-1/E, Chargesheet Ex. RW-1/F, second show cause notices, Ex. RW-1/G, Ex. RW-1/Q and letters Ex. RW-1/S and Ex. RW-1/T. She also tendered in evidence letter Ex. RA, letter Ex. RB, letter Ex. RC, endorsement Ex. RW-1/P, reply filed by the petitioner to second show cause notice Ex. RD, meeting of Local Managing Committee Ex. RE, dismissal order Ex. RW-1/R, letter dated 22.8.2005 Ex. RF, complaints dated 19.7.2004, 20.7.2004, 12.7.2004 and 19.7.2004 Ex. RG to Ex. RK respectively, reply to legal notice Ex. RM, complaint Ex. RN, reply to demand notice Ex. RO and enquiry report Ex. RP. In cross-examination, she admitted that the petitioner had been working in their

school as Safai Karamchari w.e.f. 1.10.1999 and her gross salary was ` 4447 per month and that since 1999 till 2004 no complaint had been received against her. She denied that with the indulgence of Smt. Sushma, a maid kept for the upkeep of the hostel, other staff members started harassing the petitioner and that she had made a complaint in this respect. She further denied that the petitioner was mentally tortured by the staff with the result that she used to be under mental pressure. She admitted that whenever the petitioner used to fall ill, she was being given casual leaves and that the petitioner had applied for earned leave for 12 days w.e.f. 18.4.2005 till 30.4.2005 which was sanctioned on 19.4.2005 vide letter Ex. PW-1/A. She also admitted that after availing earned leave, the petitioner had joined her duties on 1.5.2005. She denied that when on 1.5.2005, the petitioner joined her duties, she complained that she was ill as she was being mentally tortured by the staff. She further denied that on 4.5.2005, the petitioner had gone for medical examination and she was given medical for seven days. She admitted that on 10.5.2005, show cause notice was issued to the petitioner. She further admitted that on 29.5.2005, the petitioner had come to give her joining along-with medical certificate by making letter. She denied that the petitioner had been wrongly chargesheeted because the dates in the medical certificates were correct. She further denied that the petitioner had only come to know regarding enquiry proceedings during conciliation proceedings before the Labour Officer. She also denied that the enquiry officer illegally issued notice through publication and that the termination order dated 23.8.2005 is illegal, null and void. She denied that the enquiry proceedings are illegal as the same had been conducted in the absence of the petitioner. She further denied that on 23.6.2005, the petitioner had come to school in order to join enquiry proceedings but she was not allowed to do so by the Chowkidar.

11. RW-2 Smt. Archna Panth, Teacher also tendered in evidence her affidavit Ex. RW-2/A wherein she has deposed that she was appointed as an enquiry officer on 10.6.2005 by the Principal to conduct the enquiry into the charges leveled vide chargesheet dated 19.5.2005 regarding unauthorized absence and willful abandonment of job by petitioner. She further stated that on being appointed as an enquiry officer, she informed the petitioner and the respondents to appear before her on 23.6.2005 at 2:40 PM in DAV Public School premises and on 23.6.2005, only presenting officer of

School appeared but the petitioner had not appeared. The petitioner only came at about 3:20 PM when the enquiry proceedings had already been concluded, hence, the next date of enquiry was intimated to the petitioner as 2.7.2005 at 2:30 PM vide letter dated 27.6.2005 and Smt. Asha Mahajan, was appointed the presenting officer vide letter Ex. RA and submitted the list of witnesses and placed relevant papers regarding unauthorized absence and abandonment of job by the petitioner whereas the petitioner did not appear on 2.7.2005. Thereafter, registered letter dated 5.7.2005, Ex. RW-1/C had been issued to the petitioner but the petitioner refused to receive the same. She had also sent registered letter Ex. RW-1/N which was refused by the petitioner and when the petitioner did not join the enquiry, notice of the same was published vide Ex. RW-1/O in newspaper but despite publication, the petitioner did not appear before her, hence, proceeded ex-parte and presenting officer of the respondent examined two witnesses. The charges leveled against the petitioner stood proved. Thereafter, she submitted enquiry report dated 1.8.2005 Ex. RP and she conducted the enquiry as per the principles of natural justice. She also tendered in evidence letter Ex. RA vide which she was appointed as an enquiry officer, letter dated 11.6.2005 Ex. RW-1/H and letter dated 16.6.2005 Ex. RW-1/J, postal receipt Ex. RW-1/K. In cross-examination, she stated that she was the sole enquiry officer and first enquiry proceedings had been conducted on 23.6.2005. She admitted that as per memorandum, she had been appointed as an enquiry officer by the Principal. She expressed his ignorance that the publication in newspaper dated 13.7.2005, intimating the petitioner regarding the date of enquiry, fixed for 18.7.2005, was legal or illegal. She denied that the enquiry proceedings had been carried out against the principles of natural justice and that her enquiry proceedings were biased. She denied that the petitioner was not given opportunity to defend herself.

12. The learned counsel for the petitioner contended that the services of the petitioner have been terminated illegally without following the mandatory provisions of the Act before terminating her services as no notice under section 25-F of the Act was served upon her. He further contended that due to illness, the petitioner did not resume her job and when after recovery, she went to the school along-with medical certificate for joining, her joining was not accepted by the respondents.

13. On the other hand, the learned counsel for the respondents contended that the services of the petitioner had rightly been terminated by holding a domestic enquiry and since the petitioner failed to participate in the enquiry, despite having the knowledge about the same, ex-parte proceedings were initiated against her. He further contended that the enquiry was conducted by the enquiry officer in accordance with principles of natural justice and since the charges leveled against the petitioner stood duly proved, her services had been terminated in accordance with law.

14. I have heard the learned counsel for the parties as well as gone through the written arguments filed by the learned counsel for the parties and closely scrutinized the entire evidence on record. From the closer scrutiny thereof it has become clear that the petitioner was engaged as a safai karmachari by the respondents on 1.10.1999 and her services were terminated w.e.f. 23.8.2005. It is not disputed that the gross salary of the petitioner was ` 4447/- per month. The case of the respondents is that the petitioner was a habitual absentee and w.e.f. 4.5.2005, she neither came to the School nor sent any intimation as such a memorandum dated 6.5.2005 Ex. RW-1/B, was issued to her qua her unauthorized absence. Thereafter, show cause notice dated 10/12.5.2005 was issued to the petitioner for remaining absent un-authorizedly and for abandoning the job and after that chargesheet dated 19.5.2005 Ex. RW-1/F was issued to her. RW-1, the Principal of the respondents school stated in her evidence by way of affidavit Ex. RW-1/A that an enquiry officer was appointed to conduct the enquiry against the petitioner in respect of the charges leveled vide chargesheet dated 19.5.2005 and enquiry officer intimated the dates of enquiry but the petitioner failed to turn up in the enquiry proceedings inspite of being aware about the enquiry and a notice was also published in the newspaper “Dainik Bhaskar” intimating the date of enquiry. Since, the petitioner did not appear in the enquiry she was proceeded against ex-parte, the respondent examined their witnesses and thereafter, the enquiry proceedings were concluded and the enquiry officer submitted her enquiry report in which the charges leveled against the petitioner stood proved. Statement of RW-1 has been corroborated by RW-2 Smt. Archna Panth, the enquiry officer. She also deposed in her affidavit Ex. RW-2/A tendered by way of evidence that she submitted the enquiry report dated 1.8.2005 Ex.RW-1/P and the enquiry was conducted by her as per the principles of natural justice and fair hearing. RW-1 further stated that

second show cause notice was issued to the petitioner and thereafter her services have been dispensed with w.e.f. 23.8.2005. In cross-examination, the petitioner admitted that she had received show cause notices Ex. RW-1/D and Ex. RW-1/E. However, she expressed her ignorance regarding the receipt of the chargesheet Ex. RW-1/F and appointment of enquiry officer. She further admitted that the registered letter dated 5.7.2005 Ex. RW-1/L was sent to her but she refused to accept the same. She also admitted that her address has

been mentioned on letter Ex. RW-1/M and the same was refused to be accepted by her children. It may be pertinent to mention here that letter Ex. RW-1/L is the letter written by the enquiry officer intimating the next date of enquiry as 11.7.2005 and Ex. RW-1/M is the letter dated 27.6.2005 written by the enquiry officer intimating the next date of enquiry as 2.7.2005. The petitioner also admitted in cross-examination that on the first date of enquiry, she went to the school but the school authorities told her to bring somebody along-with her and when she brought her husband she was sent back from the gate. Except for the bald statement of the petitioner there is no evidence on record to suggest that she was sent back from the gate. It is also clear from the evidence on record that thereafter the petitioner never visited the school and participated in the enquiry on subsequent dates. Hence, the aforesaid admissions on the part of the petitioner show that she was well aware about the enquiry proceedings being conducted against her. However, she had failed to participate in the enquiry proceedings inspite of being aware of the same. Now, the question which arises for consideration before this Court is as to whether the petitioner can allege violation of principles of natural justice despite being aware about the enquiry proceedings. The Hon'ble Supreme Court in a catena of judgments held that the employee failing to participate in the enquiry proceedings being aware of the enquiry, cannot complain violation of the principles of natural justice. In **AIR 2008 SC (Supl.) 1542, Board of Directors H.P.T.C Vs. K.C Rahi**, it has been held that if an employee does not participate in the enquiry proceedings being well aware of departmental enquiry, he is estopped from raising the question of non-compliance of the principles of natural justice. The relevant portion of the aforesaid judgment is reproduced as under:

"……..The Tribunal also held that from the representation dated 09.08.1993 and 19.10.1993 it would

clearly show that the respondent was well aware of the departmental enquiry which was initiated against him, however, he intentionally avoided service of notice and did not participate in the enquiry proceedings and, therefore, he was estopped from raising the question of non-compliance of the principle of natural justice……".

Furthermore, **in (2008)-4 SCC 42, Pepsu Road Transport Corporation Vs. Rawel Singh**, it has been held as under:

"15……. We are not entering into correctness or otherwise of the allegations of the Corporation. One thing, however, is certain that in spite of service of show cause notice, the respondent failed to appear at the enquiry and the Enquiry Officer had to proceed with the enquiry in absence of the respondent.

16. Apart from that it is also clear from the record that so far as the charge as to unauthorized absence of the respondent is concerned, the same is duly established from the record. The Enquiry Officer, in our opinion, rightly observed that charges (ii) and (iii) were consequential in nature and based on charge (i) and hence all the charges can be said to have been proved against the respondent. In our judgment, the Labour Court was wholly wrong in holding that enquiry was not fair. To us, it is not a case of not extending an opportunity to the employee but not availing of opportunity by the employee. Therefore, the finding recorded by the Labour Court that the enquiry was vitiated being violative of natural justice and fair play is based on 'no evidence' and must be set aside".

Similarly, **in (1997) 10 S.C.C 386, Ranjan Kumar Mitra Vs. Andrew Yule & Co. Ltd., and others** it has been observed as under:

"1. In view of the fact that the appellant's services were terminated after an enquiry in which the appellant chose not to participate, we are of the view that the appellant cannot assail his termination on merits even assuming that the

writ petition filed by his in the High Court was maintainable. For this reason, it is not necessary to examine the correctness of the High Court's view that the writ petition was not maintainable. The dismissal of the appeal by this Court is, therefore, not to be construed as an expression of any opinion on the merits of the view taken by the High Court on the question of maintainability of the writ petition."

15. Therefore, in view of the aforesaid decisions of Hon'ble Supreme Court, the petitioner is estopped from raising the plea of noncompliance of principles of natural justice as she had failed to participate in the enquiry despite being aware about the enquiry proceedings.

16. RW-2, the enquiry officer categorically deposed that she had conducted the enquiry as per the principles of natural justice and fair hearing and she recorded the statements of the management witnesses namely Smt. Susila Kainth and Ms. Manjeet Kaur and the charges leveled vide chargesheet dated 19.5.2005 stood proved during the enquiry. She further stated that she had submitted the enquiry report Ex. RP. She was cross-examined at length by the learned counsel for the petitioner, however, nothing favorable could be elicited from her cross-examination. Moreover, except for the bald statement of the petitioner, she had failed to lead any evidence on record that the enquiry conducted against her was not fair and the charges leveled against her vide chargesheet dated 19.5.2005 Ex. RW-1/F could not be proved in the enquiry. Therefore, in view of the entire evidence on record and in view of the facts and circumstances of the present case, the charges leveled against the petitioner stood duly proved as per the enquiry report Ex. RW-1/P.

17. Now, the next question which arises for consideration before this Court is as to whether the punishment imposed upon the petitioner is disproportionate to the gravity of the misconduct and

whether this Court can interfere in the punishment imposed by the respondents. The charges leveled against the petitioner vide chargesheet dated 19.5.2005 Ex. RW-1/F shows that the petitioner was charged for remaining absent unauthorizedly w.e.f. 4.5.2005. The dismissal order Ex. RW-1/R shows

that on the basis of the enquiry report submitted by the enquiry officer, the charges leveled against the petitioner stood proved and her services had been dispensed with w.e.f. 23.8.2005. The petitioner in her affidavit Ex. PW-1/A tendered by way of evidence stated that she had applied for casual leaves on various dates as she was not keeping good health and w.e.f. 18.4.2005 to 30.4.2005 she applied for 13 days leave which was sanctioned by granting earned leave vide letter Ex. PW-1/A. RW-1 also admitted in cross-examination that whenever the petitioner used to fell ill, she was given casual leave and the petitioner had applied for earned leave for 12 days w.e.f. 18.4.2005 till 30.4.2005 which was sanctioned on 19.4.2005 vide office order Ex. PW-1/A and after availing earned leave she had joined her duties on 1.5.2005. The further case of the petitioner is that again she suddenly fell ill and she went to the hospital for check-up on 4.5.2005 and on that day the Doctor advised her medical rest vide medical certificate Ex. PW-1/B. She further stated that thereafter again she went to the hospital where the Doctor again advised her complete bed rest till 28.5.2005 as per the medical certificate Ex. PW-1/C. This part of her statement has been corroborated by PW-2, Dr. Nalneesh Sharma, who is the Medical Officer at the DDU Hospital District Shimla which is a government hospital, who deposed that the petitioner remained under his treatment during the period from 12.5.2005 to 28.5.2005 as she was suffering from Hematemesis. Therefore, the perusal of the medical certificates show that the petitioner was not well w.e.f. 4.5.2005 till 29.5.2005. RW-1 also admitted in cross-examination that on 29.5.2005, the petitioner had come to the school to give her joining along-with medical certificate but her joining was not taken as she had already been chargesheeted.

18. In **(2004)-4 SCC 560, Bhagwan Lal Arya Vs. Commissioner of police, Dehli and others**, it has been held by the Hon'ble Supreme Court that absence on medical grounds cannot be regarded as a grave misconduct and dismissal on ground of alleged misconduct of such absence from duty is excessive and disproportionate. It has been observed as under:

> "12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him the punishment of removal from service since their earlier order of termination of appellant's service under Temporary Service Rules did not materialize. No reasonable disciplinary authority would

term absence on medical grounds with proper medical certificates from government Doctors as grave misconduct in terms of Delhi Police (Punishment & Appeal Rules, 1980). Non-application of mind by quasi-judicial authorities can be seen in this case. The very fact that respondents have asked the appellant for re-medical clearly establishes that they had received applicant's application with medical certificate. This can never be termed as willful absence without any information to competent authority and can never be termed as grave misconduct".

Similarly, **in (2008)-4 SCC 42 (supra),** it has been held that the dismissal of a workman on the ground of absence for few days is excessively high. The relevant portion of the aforesaid judgment is reproduced as under:

"17…….. The dismissal of workman on the ground of absence for few days, according to the Labour Court was grossly disproportionate and excessively high. In our judgment, the Labour Court had not

committed error of law in recording such finding. Reinstatement granted to the respondent workman, therefore, needs no interference".

19. In the instant case also, the absence of the petitioner from duty was on medical grounds only for few days which was beyond her control and the same cannot be regarded as an act of grave misconduct. I**n (2005) 3 S.C.C 134, Mahindra and Mahindra Ltd. Vs**. N.B Narawade, it has been held by the Hon'ble Supreme Court that after introduction of section 11 –A in the Industrial Disputes Act certain amount of discretion is vested with the Labour Court/ Tribunal in interfering with the quantum of punishment whereby the concerned workman is found guilty of the misconduct. The relevant portion of the aforesaid judgment is reproduced as under:

"20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is

available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment." (emphasis supplied).

20. In the present case, as observed earlier, the petitioner was not well w.e.f. 4.5.2005 till 29.5.2005 and on 29.5.2005, when she had gone to the school to give her joining along-with medical certificate, her joining was not taken. Moreover, RW-1, the Principal of the respondents school admitted in cross-examination that since 1999 till 2004, no complaint had been received against the petitioner and she had been doing her work sincerely as being asked to do till she remained in service except some minor complaints which were being ignored. She had also volunteered in cross-examination that during conciliation proceedings and even before this Court, the petitioner had been offered fresh appointment in the school of the management at Shoghi but she refused which means that the school management is ready to reinstate her. Admittedly, the petitioner had been engaged in a class-IV post and not in a sensitive post and this is not the case of dishonesty, misappropriation or using abusive language against the superior officers which require an extreme penalty of dismissal. Moreover, the past record of the petitioner is clean and no other misconduct has been pointed out. Hence, in view of the entire evidence led by the parties and also in view of the facts and circumstances of the present case, this Court is of the opinion that the quantum of punishment imposed upon the petitioner was too harsh and wholly disproportionate to her act of misconduct. Therefore, looking to the charge of absentism only for a period of few days and keeping in view her past service record and the offer made by the Principal to give her fresh appointment, the punishment of dismissal of the services of the petitioner w.e.f. 23.8.2005 is hereby set aside and quashed. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondents.

Issues no. 2 &4.

21. Being interlinked and correlated, both these issues are taken up together for discussion and decision.

22. Since, I have held under issue no.1 above that the action of the respondents to terminate the services of the petitioner w.e.f. 23.8.2005 is illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

23. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

24. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the termination of her services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

> "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……."

25. . In the present case, the petitioner has failed to discharge her burden by placing any material on record that she was not gainfully employed after her termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Hence, both these issues are decided accordingly.

Issue No.3.

26. In support of this issue, no evidence has been led by the respondents. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondents.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 30th Day of September, 2016.

(Parveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P) CAMP AT SOLAN.

Ref. No. 61 of 2010.

Instituted on.1.5.2010.

Decided on 9.9.2016.

Pankaj Talogta S/o Shri G.R Talogta R/o Village Kashaini, P.O Tikkar, Tehsil Rohroo District Shimla, HP. Through Shri J.C Bhardwaj, President HPAITUC, HQ, Saproon, Solan, HP.

……Petitioner.

Vs.

M/s Himachal Futuristic Communication Ltd., (wire line/wireless Division), Electronic Complex, Chambaghat Solan. Through the Managing Director.

……Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri J.C Bhardwaj, AR.

For respondent **:** Shri Rahul Mahajan, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

"Whether action of the management of M/s Hiamchal Futuristic Communication Ltd., (Wire line and Wireless Division) Chambaghat Solan, HP to terminate the services of Shri Pankaj Talogta S/o Shri G.R Talogta w.e.f. 12.11.2008 vide letter dated 12.112008 after serving him chargesheets dated 2.2.2008 and 27.5.2008, without holding enquiry to charges of absenteeism is legal and justified? If not to what back-wages, seniority, service benefits and relief the above worker is entitled to?"

2. In nutshell, the case of the petitioner is that at the first instance he was engaged as Junior Operator on 1.2.2004 and thereafter he was appointed as Junior Operator on probation for six months from 1.10.2004 and after successful probation period, his services were confirmed and he was promoted to the post of Operator on 1.4.2005 and continued as such till 29.12.2007 when his services had been transferred illegally from Solan to unknown establishment

named as Nodal centers New Delhi with ill motive to victimize him for his legitimate trade union activities as he was holding the post of senior Vice President in the workmen Trade Union which was duly registered under the trade union Act and also recognized by the management/respondent. Being the senior Vice President of the workmen union, the petitioner was declared protected workman under section 33 (3&4) of the Industrial Disputes Act, 1947 (hereinafter referred to as Act). The termination orders were served on the petitioner during the pendency of the demand notice before the Labour-cum-Conciliation Officer, Solan and even no permission or approval in this regard was obtained by the management. It is further stated that the petitioner had not joined at non-existence establishment at Delhi and raised objection regarding the validity of transfer orders as nodal center at Delhi has no relation with the HFCL Chambaghat, Solan. The transfer orders were deferred till 29.7.2007 by the respondent as 30.12.2007 was Sunday and when the petitioner reached to resume his duties on 31.12.2007, he was not allowed to enter the factory gate and as such his services were practically terminated w.e.f. 31.12.2007 whereas speaking orders of the termination was issued on 12.11.2008 after a long period of one year without affording any opportunity to put forth his explanation. It is also stated that the Deputy General Manager (HR) was not competent authority to terminate the services of the petitioner. The petitioner had also filed an application before this Court for setting aside the transfer order dated 16.11.2007 and 1.12.2007 for staying the operation of the said orders but the same was dismissed on 11.1.2008 and thereafter the petitioner challenged the order passed by this Court by filing CWP no. 22/2008 before the Hon'ble High Court in which a direction has been passed by the Hon'ble High Court to this Court to dispose of the application as early as possible and during the trial it was noticed that no matter can be adjudicated by this Court unless orders of reference has not been issued by the appropriate government for adjudication hence, the petitioner had withdrawn his petition to file demand notice under section 2-A of the Act. The services of the petitioner had been engaged in the factory to operate the machines being operator and as such his services were not liable to be transferred anywhere and the services were to be regulated and governed under the certified standing orders of the company. The services of the petitioner were continuous for the purpose of section 25-B of the Act, who had worked for 240 days during the tenure of his service with in twelve calendar

months preceding to his termination. The respondent had employed new person in place of the petitioner against the prescribed provisions of section 25-G and 25-H of the Act and even new hands had also been employed. The termination was resorted to without compliance of section 25-N of the Act as neither any three months' notice was served not wages paid in lieu of notice. The work and conduct of the petitioner throughout his service tenure was excellent as he was never served with any explanation, warning letter etc. Against this back-drop a prayer for reinstatement with seniority and continuity along-with back-wages has been made.

3. The respondent has contested the claim by filing reply wherein preliminary objections qua maintainability of petition and reference had been raised. On merits, it has been asserted that the petitioner had been engaged as Junior Operator on 1.10.2004 and thereafter he was promoted as Operator w.e.f. 1.4.2005 and on 16.11.2007, he was transferred in terms of appointment letter and standing orders from Solan to Delhi on existing grade pay/pay scale and he was paid project allowance. The petitioner had to join at transferred place by 26.11.2007 but the petitioner had submitted a letter dated 19.11.2007 requesting for cancellation of transfer order dated 16.11.2007, hence, the respondent extended the time of joining at Delhi till 31.12.2007 and thereafter on 11.1.2008 the management again wrote a letter asking the petitioner to join at Delhi by 14.1.2008. The petitioner in the meantime approached the Labour Court and obtained the stay order which was vacated on 11.1.2008 by the Labour Court and as such the management vide letter dated 11.1.2008 asked the petitioner to join at Delhi by 14.1.2008 but the petitioner failed to join at transferred place. Thereafter, chargesheet dated 2.2.2008 for not complying with the transfer order, remaining absent and non-adherence of official orders had been issued to the petitioner but he failed to submit any reply. The management again issued chargesheet dated 27.5.2008 for non-compliance of transfer order. The management also issued another letter dated 29.2.2008 through registered post to the petitioner asking him to submit the explanation regarding absence from duty. Since, the petitioner failed to reply to the letters, reminders, chargesheets issued from time to time, the management had left with no other alternative but to struck off the name of the petitioner from the roll of the company and outstanding dues were also sent to the petitioner as full & final settlement. It is further asserted that at no point of

time the management has obstructed or restrained the petitioner to join his duty and to perform his duties. The Deputy General Manager HR/Admin. was duly authorized and competent to struck off the name of the petitioner from the roll of the company. Since, the petitioner had been transferred in terms of appointment letter as well as standing orders of the company, hence, there is no violation of the provisions of sections 9-A, 25-B, 25-G and 25-H of the Act. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder to the reply, the petitioner reaffirmed the allegations by denying those of the respondent.

5. Pleadings of the parties give rise to the following issues which were struck on 9.5.2011.

15. Whether the action of the management of M/s Himachal Futuristic Communication Ltd., Chambaghat to terminate the services of Shri Pankaj Talogta w.e.f. 12.11.2008 is in violation of the provisions of the Industrial Disputes Act?
OPP……..
16. If issue no.1. is proved in affirmative to what relief the petitioner is entitled to?
OPP……..
17. Whether the reference is neither competent nor maintainable on account of act, conduct, deed and acquiescence?
OPR……..
18. Relief.

6. Besides having heard the AR for the petitioner and learned counsel for the respondent, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1 Yes.

.2 Entitled for reinstatement with seniority and continuity but without back wages.

.3 No.

Reference answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings.

Issue no.1 & 3.

8. Being interlinked and correlated, both these issues are taken up and discussed together for decision.

9. The AR for the petitioner contended that the petitioner being the senior vice president of the workers union had been illegally transferred to Delhi with ill motive in order to victimize him and that the petitioner had not joined at Delhi and raised objection regarding the validity of transfer order as there was no connection or relation with HFCL Chambaghat Solan and Nodal Centre at Delhi. He further contended the services of the petitioner had been terminated in utter violation of the provisions of the Act as neither any enquiry was conducted nor he was afforded any opportunity of being heard.

10. On the other hand, learned counsel for the respondent contended that since the petitioner has failed to join at transferred place despite many letters/reminders, his name was struck off from the rolls of the company. He further contended that the petitioner was transferred in accordance with law and as per terms and conditions of his appointment letter as well as standing orders.

11. To support his case, the petitioner stepped into the witness box as PW-1 and tendered his affidavit in examination-in-chief wherein he reiterated almost all the averments as stated in the claim petition. He also tendered in evidence documents Ex. P-1 to Ex. P-8. In cross-examination, he admitted that the address mentioned in appointment letter Ex. P-1 is his correct address and he accepted the terms and conditions mentioned in the appointment letter. He could have been transferred to any branch of the company in India as per Ex. P-1 and Ex. P-8. He admitted that he was transferred to Nodal Centre Delhi vide order dated 16.11.2007 from Chambaghat with a direction to report for duty before 31.11.2007. He further admitted that he made a request for cancellation of his transfer, which was not allowed and he was given extension to join till 31.12.2007. He denied that he refused to accept the letter dated 11.1.2008 which was sent through RAD on is correct address. He did not report at HFCL, Nodal Centre New Delhi after the transfer. He received letter Ex. P-7 striking off his name. He denied that the management had not violated any of the provisions of the Act. His father have small orchard and gets about one lacs to one lacs twenty five thousand only as annual income.

12. On the other hand, the respondent has examined one Shri M.S Gupta, General Manager, who tendered his affidavit in examination-in-chief wherein he has reiterated almost all the contents of reply filed by the respondent He also tendered in evidence standing orders Ex. RW-2, resolution dated 22.1.2007 Ex. RW-3, minutes of meeting dated 22.1.2007 and 29.1.2007, Ex. RW-4 and Ex. RW-5, appointment letter Ex. RW-6, Transfer order Ex. RW-7, letter dated 22.11.2007 Ex. RW-8, letter dated 1.12.2007 Ex. RW-9, copies of registered AD covers Ex. RW-10 and Ex. RW-11, letter dated 11.1.2008 Ex. RW-12, letter dated 17.1.2008 Ex. RW-13, copies of registered AD covers Ex. RW-14 and Ex. RW-15, chargesheet dated 2.2.2008 Ex. RW-16, letter dated 15.2.2008 Ex. RW-17, copies of registered AD envelopes Ex. RW-18 to Ex. RW-19, copy of letter no. 149 Ex. RW-20, copy of letter dated 7.11.2008 Ex. RW-21 and copy of letter dated 12.11.2008 Ex. RW-22. In cross-examination, he admitted that the factory is registered under the Factories Act in Himachal Pradesh. He denied that the consent of the worker has to be taken before transfer. He admitted that Ex. RW-3 and Ex. RW-5 had not been signed in his presence. He further denied that letter Ex. RH was not delivered to the petitioner. He also admitted that in letters Ex. RD, RG, RC, RA and Ex. RB, different reports have been made regarding the non-delivery of letters to the petitioner. Neither any enquiry had been conducted against the petitioner nor paid any compensation to him. The petitioner was legally transferred to Delhi and he could join at Delhi at any time. He expressed his ignorance regarding the employment of the petitioner these days. Further, volunteered that since the petitioner had failed to report/join duties, his name was struck off from the rolls of the organization. He admitted that the appointment of the petitioner was made by senior vice President. He denied that the petitioner being the senior vice President of the union, for this reason, he was transferred to Delhi.

13. I have gone through the respective contentions of the learned counsel/AR for the parties and also closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that vide appointment letter Ex. P-1, initially the petitioner was appointed as junior operator w.e.f. 1st October, 2004 with certain terms and conditions stipulated in it and thereafter the services of the petitioner have been confirmed and he was promoted as Operator w.e.f. 1st April, 2005, vide Ex. P-2. It is also an admitted fact that vide letter Ex. P-3, the petitioner was

transferred to Nodal Centre, New Delhi w.e.f 26.11.2007 and vide letter dated 29.11.2007 Ex. P-4 the petitioner requested for the cancellation of his transfer order. Vide letter Ex. P-5 the transfer order of the petitioner was extended from 1.12.2007 to 29.12.2007. The petitioner was also issued charge sheet Ex. P-6. Since, the petitioner has not joined at his transferred place and remained absent from his duty his name was struck off from the rolls of the company vide letter dated 12.11.2008 Ex. P-7. Now, this Court is required to ascertain as to whether the transfer of the petitioner from HFCL Chambaghat Solan to Nodal Centre Delhi is legal and justified. On the question of transfer, it has been repeatedly held by the Courts that normally the Courts do not interfere in such matter. However, an order of transfer can be challenged on the following grounds:

(i) the transfer is in violation of conditions of service or contract:

(ii) it is actuated by mala fides or actuated by some other ulterior motive not connected with the business interest of the management : and

(iii) the transfer effects a change in the conditions of service by subjecting the employee to more onerous

conditions."

For examining the factual position in the present case, the appointment letter as well as certified standing orders are relevant. The copy of appointment letter of the petitioner is Ex. P-1 and clause 17 of the same, reads as under:

> "Your services are liable to be transferred/assigned anywhere in India, to any office/establishment/branch/company and /or any member or sister concern of the company."

Clause 14 of the Certified Standing Order Ex. RW/2 provides for the transfers, which reads as under:

> "A workman may be transferred according to the existence of work from one shop or department to another shop or department of the establishment as the case may be or from one station to another station or from one establishment to another establishment under the same employer. Provides that the wages, grade, continuity of service and other conditions of service of the workman shall not be adversely affected by such transfer"

14. The combined reading of transfer clause in the appointment letter and the certified standing orders manifestly makes it clear that the respondent management is having the power to transfer the workman to any office/establishment/branch/company anywhere in India provided that the service conditions of the workman shall not be adversely affected by such transfers. Although the respondent management has the power to transfer its employees anywhere in India yet in the instant case it cannot be said that the transfer of the petitioner did not adversely affect the service conditions of the petitioner. It is not in dispute that the petitioner was working as an operator and drawing a meagre salary of ` 4,990/- per month. It is also not in dispute that the petitioner had been transferred to a distant place i.e from Chambaghat District Solan to Delhi. The case of the petitioner is that he was transferred in an arbitrary manner by the respondent and the place where the petitioner has been transferred is very far from the factory of the respondent company at Solan which would cause him great hardship and financial loss.

15. It is true that transfer is an incidence of service and all cases of transfer should not be interfered by the Court. However, at the same time whenever any transfer is ordered which effects the service conditions/ financial entitlement of the workers, then the Court may consider to interfere with the same.

16. Undisputedly, the petitioner was working as an operator and was a low paid employee and was getting ` 4990/- per month as salary. In the case of **State of Madhya Pradesh Vs. Shankar Lal and others, AIR 1980 SC 643**, the issue of transfer of a low paid employee was considered by the Hon'ble Supreme Court. After considering the provisions of the Act and Rules governing in the field, the court came to the conclusion that unless statutory rules put an embargo for transfer of Class-IV or low pad employees, there can be no bar to transfer the said employees. However, the Court observed that such a power should be exercised sparingly. The relevant observation of the Hon'ble Supreme Court reads as follows:

> "…..Theoretically, therefore, the power does exist in the State Government to transfer them. We must, however, hasten to add that in case of employees getting small

emoluments the power seems to the meant to be sparingly exercised under some compelling exigencies of a particular situation and not as a matter of routine. If it were to be liberally exercised, it will create tremendous problems and difficulties in the way of employees getting small salaries…….”

17. Therefore, the perusal of the aforesaid judgment shows that in case of class-IV employees or low paid employees, the power of transfer should be sparingly exercised when required under some compelling exigencies of a particular situation and not as a matter of routine. In the present case, the perusal of the transfer order shows that the petitioner has been transferred without assigning any reasons and there is nothing on record to show that he has been transferred under any administrative/business exigency. The petitioner is a low paid employee and his transfer to a far distant place that too to a metropolitan city would definitely cause him and his family great hardship and make his survival difficult.

18. The further case of the petitioner is that he has been transferred illegally with an ulterior motive to victimize him for his legitimate union activities as he was holding the post of Senior Vice President in the workmen union which was registered under the Trade Union Act and the transfer order had been issued only to victimize him. Though, the transfer is an incidence of service, taking into consideration the facts and circumstances of the present case, the transfer order Ex. P-3 cannot be treated as an order of transfer simplicitor. The learned counsel for the respondent contended that the petitioner was transferred in terms of appointment letter and certified standing orders. However, the Court can always lift the veil and see the circumstances behind the transfer as the perusal of the evidence on record shows that the petitioner was the senior vice President of workers union and was actively involved in the legitimate union activities thereby espousing the cause of the workers to get their statutory rights and benefits, therefore, he was transferred with an ulterior motive to remove him from service under the garb of the transfer order. The management did not give the reasons as to why he was transferred. The perusal of transfer order Ex. P-3 shows that no reason has been given by the respondent management for the transfer of the petitioner. In the decision **L. Michael Vs. Johnson Pumps India Ltd., AIR 1975 SC 661**, it has been held by the Hon’ble Apex Court that the Tribunal

has the power and duty to X-ray the order and discover its true nature. The relevant portions of the aforesaid judgment reads as under:

> "18……. The law is simply this: The Tribunal has the power and, indeed, the duty to X-ray the order and discover its true nature, if the object and effect, if the attendant circumstances and the ulterior purpose be to dismiss the employee because he is an evil to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simplicitor such action is bad and is liable to be set aside."

In the instant case as observed earlier, the evidence on record established that the petitioner was actively involved in the legitimate union activities and he had been transferred illegally with an ulterior motive to remove him from service under the garb of transfer order. The respondent in the present case had used the device of transfer to dispense with the services of the petitioner by transferring him from Chambaghat District Solan, HP to Delhi who was drawing a meagre salary of ` 4990/- per month.

19. Thus, keeping in view the facts and circumstances of the present case, this Court is of the opinion that the transfer order passed by the respondent was issued for oblique reasons and for victimization of the petitioner which amounted to his implied termination. Therefore, the transfer order Ex. P-3 is set aside and quashed.

20. Moreover, the perusal of termination order Ex. P-7 shows that the services of the petitioner were terminated as he did not report for duty and started absenting from duty unauthorizedly. From its perusal, it has become clear that the name of the petitioner was struck off from the roll of the company without holding any domestic enquiry. Now, the question which arises for consideration before this Court is as to whether the action of the respondent was illegal and unjustified in terminating the services of the petitioner without holding the domestic enquiry on the ground of absenteeism. It is the admitted case of the respondent that when the petitioner had failed to join his duties at transferred place, chargesheet dated 2.2.2008 Ex. P-6 was issued against him for gross misconduct under the certified standing orders and the petitioner was asked to submit his explanation within 72 hours from the date of receipt of the same. It is a settled legal proposition that a

workman against whom the misconduct is alleged cannot be dismissed unless a proper domestic enquiry is held against him in respect of the alleged misconduct. Even, if there is proved misconduct against the workman, he cannot be discharged or dismissed from service unless he has been afforded opportunity of being heard before initiating any action against him by the employer/respondent. The certified standing orders of the respondent Ex. P-8 also provides for conducting of the enquiry for misconduct. Clause 27 & 28 of the aforesaid standing orders provide for the procedure for awarding penalties for misconduct and procedure for enquiry. However, admittedly no enquiry was conducted against the petitioner and he was not afforded any opportunity of being heard before terminating his services. **In (2009) 3 SCC-124, Novartis India Ltd. Vs. State of West Bengal and others** it has been held that when an employee does not join at his transferred place he commits a misconduct and therefore a disciplinary proceeding is required to be initiated. The relevant portion of the aforesaid judgment is reproduced as under:

> "18. When an employee does not join at his transferred place, he commits a misconduct. A disciplinary proceeding was, therefore, required to be initiated. The order of discharge is not a substitute for an order of punishment. If an employee is to be dismissed from services on the ground that he had committed a misconduct, he was entitled to an opportunity of hearing. Had such an opportunity of hearing been given to them, they could have shown that there were compelling reasons for their not joining at the transferred places. Even a minor punishment could have been granted. Appellant precipitated the situation by passing a post haste order of termination of their services".

21. In the present case, though the respondent had issued reminders to the petitioner to join at Delhi and also issued chargesheet dated 2.2. 2008 Ex. P-6 for non-compliance of the transfer orders and for unauthorized absence from duties. However, no enquiry was conducted prior to the termination of the services of the petitioner and no opportunity of being heard was given to him on the charges of absenteeism and non-compliance of the transfer orders.

22. Thus, having regard to my foregoing discussion and in view of law laid down (supra), I have no hesitation in coming to the conclusion that the termination of the services of the petitioner without conducting enquiry and without giving any opportunity of being heard to him is

illegal and unjustified and as such the termination order Ex. P-7 issued to petitioner is set aside and quashed.

23. The learned counsel for the respondent contended that since the petitioner has been transferred to Delhi, this Court has no territorial jurisdiction over the dispute and the reference itself is bad in law as the State of Himachal Pradesh was not the appropriate government and had no jurisdiction to make the reference. However, this submission made on behalf of the respondent management is not sustainable in view of the judgment of the Hon'ble Supreme Court in **(2007) 5 SCC 591, Bikash Bhushan Ghosh and others and Novartis India Ltd., and another** wherein it has been held that the legality of the order of the transfer would have a direct nexus with the order of termination and would constitute cause of action giving the jurisdiction to the Industrial Tribunal/Labour Court where termination was affected. The relevant portion of the aforesaid judgments reads as under:

> "16. Judged in that context also, a part of cause of action arose in Calcutta in respect whereof, the State of West Bengal was the appropriate government. It may be that in a given case, two States may have the requisite jurisdiction in terms of clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act. Assuming that other State Governments had also jurisdiction, it would not mean that although a part of cause of action arose within the territory of the State of West Bengal, it would have no jurisdiction to make the reference.
>
> 17……
>
> 18. Yet again appellants being workmen, their services were protected in terms of the Industrial Disputes Act, 1947. If their services were protected, an order of termination was required to be communicated. Communication of an order of termination itself may give rise to a cause of action. An order of termination takes effect from the date of communication of the said order……."

24. Hence, in view of the judgment of Hon'ble Supreme Court (supra), since the cause of action in the present case arose within the territory of the State of Himachal Pradesh, it cannot be said that the State of Himachal Pradesh was not the appropriate government and had no jurisdiction

to make the reference and as such it cannot be said that this Court has no territorial jurisdiction to over the dispute.

25. Therefore, in view of the law laid down (supra) and in view of my foregoing discussion, I have no hesitation in holding that the action of the management of respondent company to terminate the services of petitioner w.e.f. 12.11.2008 is in violation of the provisions of the Act. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue no.2.

26. Since, I have held under issues no.1 & 3 above that the action of the management of respondent company to transfer and terminate the services of petitioner w.e.f. 12.11.2008 is in violation of the provisions of the Act, hence, the petitioner is held entitled to be reinstated in service at Chambaghat District Solan with seniority and continuity.

27. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

28. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex**

Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma that:

"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……."

29. . In the present case, the petitioner has only stated that he is unemployed. Except for his bald statement, no other evidence has been led by the petitioner to prove that he was not gainfully employed. The petitioner has failed to discharge his burden by placing any concrete material on record and by leading any cogent and satisfactory evidence that he was not gainfully employed after his termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner succeeds and is hereby allowed with the result, the petitioner is ordered to be reinstated in service at Chambaghat District Solan forth-with with seniority and continuity. However, the petitioner is not entitled to any back-wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open court today on this 9th day of September, 2016.

(Parveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla,
Camp at Solan.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).

Ref. No. 82 of 2013.

Instituted on. 1.11.2013.

Decided on 6.9.2016.

Bal Krishan S/o Shri Shonkiya Ram C/o Shri Baldev Thakur R/o Village Anji, P.O Barog, Tehsil & District Solan, HP.

……Petitioner.

Vs.

M/s Oyster Pharma Pvt. Ltd., Barog By-Pass Kumarhatti, District Solan, HP through its Employer/Managing Director.

……Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri R.K Khidtta, Advocate.

For respondent **:** Shri Alok Bhardwaj, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

> **"Whether termination of the services of Shri Bal Krishan S/o Shri Shounkiya Ram C/o Shri Baldev Thakur, Village Anji, P.O Barog, Tehsil & District Solan, HP w.e.f. 14.12.2012 by the Employer/Managing Director M/s Oyster Pharma PVt. Ltd., Barog By Pass Kumarhatti, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"**

2. In nutshell the case of the petitioner is that he was engaged as electrician by the respondent in the year, 2007 and worked as such till 13.12.2012 continuously and his services had been terminated w.e.f. 14.12.2012 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act) as neither any notice had been given to him nor he had been paid retrenchment compensation. The petitioner is a "workman" as defined under the

provisions of the Act as he used to work manually with the respondent company. It is further stated that on 13.12.2012, when the petitioner reached the office of the respondent, he was orally told that his services had been terminated due to misbehavior with accounts officer, thereafter, he immediately went to the office of Labour Inspector, who advised the petitioner to visit the office of the respondent on 14.12.2012 but the respondent refused to take him back on job and he also received the written notice through post from the respondent. It is also stated that the work and conduct of the petitioner was always appreciated by the concerned official and nothing contrary was ever conveyed to him and even no warning or chargesheet was ever conyed/served to him. The petitioner had completed 240 days in each calendar year and junior persons to him are still working with the respondent whereas his services had been terminated against the principle of "last come first go" hence, his termination is illegal and against the mandatory provisions of the Act. It is also stated that after the termination of the services of the petitioner, he is unemployed and is nowhere gainfully employed. Against this back-drop the petitioner has prayed that the termination order dated 14.12.2012 be quashed and set aside and the respondent company be directed to re-engage him with full back-wages, seniority including other consequential benefits.

3. The respondent contested the claim of the petitioner by filing reply wherein preliminary objections have been taken qua maintainability, that the petitioner is gainfully employed, that the petitioner has suppressed material facts from this Court and that the petitioner was habitual of having quarrels. On merits, it has been admitted that the petitioner was engaged as electrician. However, it is asserted that the respondent management had given one month's notice to the petitioner on 14.12.2012 and he was also assured that a fair and proper enquiry in the matter would be conducted but after receiving the notice, the petitioner quarreled with the Managing Director of the company and addressed him in filthy and abusive language and left the factory premises and after 14.12.2012, he did not come to the factory and left the services at his own sweet will. It is denied that the petitioner was orally told that his services have been terminated. It is asserted that on 11.12.2012, the petitioner quarreled with Ms. Shruti Garg Accountant of the company, who wrote a complaint to the Director and on 13.12.2012, the petitioner again went inside the cabin of Ms. Shruti Garg and started

misbehaving with her which was the serious misconduct and thereafter the director of the company enquired the matter with all the workers and officials of the company and found the petitioner guilty of misconduct and as such one month's notice had been served upon the petitioner. It is denied that the petitioner visited the office of the respondent a number of times after his termination and that his work and conduct was always appreciated by the concerned officials. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 14.8.2014.

1. Whether the services of the petitioner w.e.f. 14.12.2012 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged?
   OPP……
2. If issue no.1 is proved to what service benefits the petitioner is entitled to?
   OPP……..
3. Whether this petition is not maintainable as alleged in preliminary objections?

   OPR……

   Relief.

6. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1 No.
.2 Becomes redundant.
.3 No. Relief. Reference answered in favour of the respondent and against the petitioner per operative part of award.

Reasons for findings.

Issues no.1.

8. To prove this issue, the petitioner examined himself as PW-1 and deposed that he was engaged as an electrician by the respondent company in the year, 2007 and worked till 13.12.2012 continuously and his services had been terminated w.e.f. 14.12.2012 without serving any

notice, compensation and without following mandatory provisions of the Act as no show cause notice was issued and no enquiry had been conducted by the respondent before terminating his services. On 13.12.2012, when the respondent company told him not to report for duties w.e.f. 14.12.2012, he visited the office of Labour Inspector and filed the complaint against the respondent. He had completed 240 days in each calendar year and many persons were appointed afresh after his termination and even his juniors are still working with the company. He is unemployed from the date of his termination. In cross-examination, he denied that he is gainfully employed somewhere else and that he used to take private contracts. He admitted that letter dated 13.8.2012 was written by him and was given to the Police Post Dagshai and that he made apology to Shri Sanjay Kumar Sinha. He further admitted that Mr. Sanjay Kumar Sinha had made a complaint against him at Police Post Dagshai. He had no knowledge that on 11.12.2012 Ms. Shruti Garg made a complaint against him regarding misbehavior but denied that on 13.12.2012 Ms. Shruti Garg again made a complaint against him. He admitted that letter Ex. RX was received by him on 16.12.2012 through post. He denied that while discharging his duties, he always remained hot headed and used to misbehave with his superiors and colleagues. He further denied that he left the job at his own as he had got his private contracts as an electrician.

9. On the contrary, the respondent examined three RWs. RW-1 Shri Sanjay Kumar Sinha, Quality Control Manager has deposed that on 29.7.2012, the petitioner opened the door of the lab without permission of any authority and entered there and when he asked him (petitioner) as to how he had opened the door of the lab without permission as all the record and sensitive material was lying there, then he (petitioner) started arguing with him. The petitioner also told him that he was having screw driver with him and would insert the same into his stomach. Thereafter, he informed the director of the company on the same day and also lodged a complaint in the Police Station against the petitioner. In cross-examination, he denied that the petitioner never opened the door of the lab on 29.7.2012 and had never misbehaved with the accountant Ms. Shruti Garg. He denied that complaint mark R-2 was false and for that reason he withdrew the same later on and that the complaint had been

filed at the instance of company. He further denied that fresh hand has been engaged in place of the petitioner.

10. RW-2 Shri Ms. Shruti Garg, Accountant deposed that on 11.12.2012, the petitioner misbehaved with her and threatened her with dire consequences when she asked him to show the generator reading register which he refused to show her. On 13.12.2012, the petitioner came to her cabin and used rough language with her by stating that as to why she deducted his salary and thereafter, she had made a complaint in writing to the Director Mr. Ram Lal Garg vide Ex. RW-2/A. Another complaint Ex. RW-2/B was also filed by her. In cross-examination, she admitted that the petitioner was working prior to her appointment. She further admitted that she had not filed any complaint against the petitioner in Police Station. She denied that she had fabricated the complaints Ex. RW-2/A and Ex. RW-2/B to remove the petitioner from his service at the instance of the company. She admitted that the petitioner never misbehaved with other staff in her presence. She further admitted that she had not given any statement against the petitioner in lieu of the complaints Ex. RW-2/A and Ex. RW-2/B in any proceedings.

11. Shri R.L Garg, Director of the respondent company appeared into the witness box as RW-3 to depose that the petitioner was appointed as an electrician in the year, 2007 and in July, 2012, Shri Sanjay Sinha, Quality Control Manager made a verbal complaint against the petitioner that he misbehaved with him and threatened him to insert screw driver in his stomach and Shri Sanjay Sinha had also filed a complaint against the petitioner in Police Station. Complaints against the petitioner Ex. RW-2/A and ExRW-2/B had been filed before him by Ms. Shruti Garg, Accountant upon which he called the petitioner in his office on 13.12.2012 where he (petitioner) also threatened him by stating that “mera dimag garam na karo” and left the factory premises and on 14.12.2012, termination letter Ex. RX was issued to the petitioner. In cross-examination, he admitted that the petitioner never misbehaved and threatened Mr. Sanjay Sinha and Ms. Shruti Garg in his presence and that he was not under the direct control and supervision of both the aforesaid persons. He further admitted that the company had not issued any show cause notice, chargesheet and conducted any

enquiry against the petitioner on the complaints of Sanjay Sinha and Shruti Garg. He denied that complaints Ex. RW-2/A and Ex. RW-2/B have been fabricated with an intention to remove the petitioner from his service. He denied that fresh hands have been engaged after the termination of the petitioner. He admitted that junior persons to the petitioner are still working and that no enquiry was conducted against the petitioner and no show cause notice/chargesheet was issued to him before issuing the termination letter Ex. RX. He denied that the services of the petitioner had been terminated illegally and false allegations had been leveled against him and that on 13.12.2012, the petitioner never misbehaved with him.

12. The learned counsel for the petitioner contended that the services of the petitioner have been terminated illegally by the respondent without following the provisions of the Act and without serving any show cause notice, chargesheet and without holding any enquiry. He further contended that the termination of the petitioner in the aforesaid manner, in violation of the principles of natural justice, tantamount of unfair labour practice, as such, the petitioner is entitled to be reinstated in service.

13. Conversely, the learned counsel for the respondent contended that the services of the petitioner were rightly terminated in view of the gross/major misconduct on his part and there is no violation of any mandatory provisions of the Act.

14. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof, it has become clear that the petitioner had worked with the respondent from the year, 2007 up to 13.12.2012. It is also not in dispute that the petitioner was the permanent employee of the respondent prior to his termination. Though, the case of the respondent is that his services have been rightly terminated in view of the grave/major misconduct on his part. However, from the perusal of the record it has become clear that the services of the petitioner had been terminated vide letter Ex. RX without holding any domestic enquiry and without issuance of any chargesheet as admitted by the respondent. It is a settled legal proposition that a workman against whom the misconduct is alleged cannot be dismissed unless a proper domestic enquiry is held against him in respect of the alleged

misconduct. However, at the same time, it is also true that the respondent is entitled to lead evidence on merits before this Court to prove the misconduct of the petitioner in case his dismissal is found to be in violation of the principles of natural justice. **In (2006)-6 S.C.C 325, titled as Amritt Vanaspati Co. Ltd. Vs. Khem Chand and another**, it has been held by the Hon'ble Apex Court that even if no enquiry has been held by the employer or the enquiry held is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and the employee to adduce evidence before it. Now, the question which arises for consideration before this Court is as to whether the alleged misconduct has been proved by the respondent against the petitioner or not. The perusal of termination letter dated 14.12.2012 Ex. RX shows that the petitioner was terminated on account of the fact that he used to misbehave with every employee of the company despite repeated warnings. To prove the aforesaid misconduct the respondent examined RW-1 to RW-3. RW-1 Shri Sanjay Kumar categorically stated that on 29.7.2012, the petitioner opened the door of the lab without permission of any authority and entered there and when he asked him as to how he had opened the door without permission then the petitioner started arguing with him and told that he would insert the screw driver into his stomach and also told him that "mera dimag garam na karo". In this respect RW-1 had also made a complaint with the Police Post Dagshahi and later on, on the apology given by the petitioner he withdrew the complaint. RW-2 Ms. Shruti Garg had also stated before this Court that on 11.12.2012 as well as on 13.12.2012, the petitioner misbehaved with her and threatened her with dire consequences and also used rough language with her. She also stated that in this respect, she had filed two complaints Ex. RW-2/A and Ex. RW-2/B in writing to the Director of the company. RW-3 Shri R.L Garg, the Director of the company corroborated the statements of RW-1 and RW-2 by deposing that Mr. Sanjay Kumar had made a verbal complaint against the petitioner and Ms. Shruti Garg filed two written complaints against the petitioner which are Ex. RW-2/A and Ex. RW-2/B. He further deposed that when he called the petitioner in his office on 13.12.2012, he had threatened him and told him that "mera dimag garam na karo" and thereafter he immediately left the factory premises. All the aforesaid witnesses have been cross-examined at length by the learned counsel for the petitioner, however, nothing favorable could

be elicited from their lengthy cross-examination. Rather the petitioner admitted in his cross-examination that he made an apology to RW-1 Shri Sanjay Kumar vide letter dated 13.8.2012 mark R-1 which was written by him and was submitted to the Police Post Dagshahi. Even, no suggestion was put to RW-2 that the incident which took place on 11.12.2012 and 13.12.2012, vide complaints Ex. RW-2/A and Ex. RW-2/B, did not occur in the manner stated by this witness. Similarly, no suggestion has been put to RW-3 that on 13.12.2012, the petitioner had not threatened him and told him that "mera dimag garam mat karo". So, the alleged misconduct of uttering threatening and abusive language against his superiors and Director of the respondent company stands proved against the petitioner. As against the evidence of RW-1 to RW-3, the petitioner had only examined himself and his deposition does not in any way offer a proper defence against the alleged acts of misconduct. In his deposition before this Court, he had admitted his misbehavior and thereafter his apology to RW-1 Mr. Sanjay Kumar Sinha. Though, he had denied that RW-2 Ms. Shruti Garg had made a complaint against him regarding his misbehavior. However, mere denial will not exonerate him. He was interested in denying since it suited him. Even the other incident on 13.12.2012, regarding his misbehavior with RW-3, the Director of the company had not been specifically denied by him in his deposition before this Court. Therefore, in view of the evidence on record, it can safely be held that the misconduct leveled against the petitioner by the respondent stands proved. The protection given to the workman in industrial law is not for his misconduct but against unlawful termination of his services by the management.

15. Now, the next question that arises for consideration is whether the punishment of termination of services imposed upon the petitioner vide termination letter dated 14.12.2012, Ex. RX is commensurate with the gravity of the misconduct proved. In (**2005) 3 SCC 134, Mahindra and Mahindra Ltd., Vs. N.B Narawade,** it has been held by the Hon'ble Apex Court that use of abusive language against the superior officer cannot be termed to be an indiscipline calling for lesser punishment in the absence of any extenuating factor and the Labour Court cannot by way of sympathy alone exercise the powers under section 11-A of the Act and reduce the punishment. It has further been

held that punishment of dismissal for using of abusive language cannot be held to be disproportionate. The relevant portion of the aforesaid judgment is reproduced as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment. As noticed herein above at least in two of the cases cited before us, i.e. Orissa Cement Ltd. (supra) and New Shorrock Mills (supra), this Court held: "punishment of dismissal for using of abusive language cannot be held to be disproportionate." In this case all the forums below have held that the language used by the workman was filthy. We too are of the opinion that the language used by the workman is such that it cannot be tolerated by any civilized society. Use of such abusive language against a superior officer, that too not once but twice, in the presence of his subordinates cannot be termed to be an indiscipline calling for lesser punishment in the absence of any extenuating factor referred to herein above.

In the present case also it stands proved on record that the petitioner had misbehaved with his superiors and colleagues and also used abusive language. The petitioner had used abusive language against none else than the Director of the company as well as against his superiors and lady colleague and that too in his office premises and therefore the aforesaid misconduct having been proved before this Court does not deserve a lenient view. The punishment given to the petitioner is in accordance with the misconduct proved against him before this Court and therefore does not call for any interference. Since, as per the evidence, on record, the petitioner has been found guilty of serious

misconduct, therefore, the action of the respondent in terminating the services of the petitioner, is perfectly justified.

16. Therefore, in view of the law laid down by the Hon'ble Apex Court (supra), and also in view of my foregoing discussion, I have no hesitation in coming to the conclusion that the termination of the services of the petitioner by the respondent w.e.f. 14.12.2012 on account of misconduct is legal and justified. Accordingly this issue is decided in favour of respondent and against the petitioner.

Issue no.2

17. Since, the petitioner has failed to prove issue no.1 above, this issue becomes redundant.

Issue no.3.

18. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed his claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 6th day of September, 2016.

(Praveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).

Ref. No.53 of 2012.

Instituted on. 1.8.2012.

Decided on 30.9.2016.

Mohar Singh S/o Shri Bhim Singh

1. Balvir Singh.
2. Nirmal Singh.
3. Ashwani Kumar.
4. Baru Ram.
5. Yadupati.
6. Ramesh Kumar.
7. Bhim Dutt.
8. Pratap Singh.
9. Inder Singh.
10. Jagat Singh.
11. Naria Ram.
12. Narayan Singh.
13. Gami.
14. Timber Singh.
15. Virender Jaildar.
16. Parma Nand.

All C/o Baru Ram Sharma R/o Village Dhar, P.O Dhar Chandana, Tehsil Chopal, District Shimla, HP.

……Petitioners.

Vs.

The Project Manager M/s Himshakti Project Pvt. Ltd., Sainja Hydroelectric Project, Village Sainj Khad, P.O Dhar Chandna, Tehsil Chopal District Shimla, HP.

……Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947.

For petitioners : Shri Nirnajan Verma, Advocate.

For respondent **:** Shri Rahul Mahajan, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

> **"Whether demands raised by Shri Mohar Singh S/o Shri Bhim Singh and 18 other workers through demand notice dated 9.6.2011 (copy enclosed) to be fulfilled by the Project Manager M/s Himshakti Project Pvt. Ltd., Sainja Hydroelectric Project, Village Sainj Khad, P.O Dhar Chandna, Tehsil Chopal District Shimla, HP are proper and justified? If yes, what monetary and other service benefits the concerned workers are entitled to from the above employer/management?"**

2. In nutshell the case of the petitioners is that they had been working with the respondent since the year 2010 and they have been appointed on various posts after the interviews were conducted and posts were notified through notification dated 8.2.2010 issued by the Central Employment Officer, Employment Exchange, Shimla and that the petitioners were working to the entire satisfaction of the respondent. The workers were provided certain facilities but later on the facilities which were provided earlier were stopped. The workers had submitted the demand notice dated 9.6.2011 to the management of respondent along-with the copy of the same to the Labour Commissioner upon which the Labour Officer conducted many meetings but of no avail. The following demands were raised by the petitioners:

1. To start the mess facility which was stopped by the management of respondent from 1.5.2011 or mess allowances @ ` 2000/- per month be provided to the workers.
2. Annual hike in the salary be paid to the workers.
3. The appointment letters which were not issued to the workers till date be issued.
4. Facilities of medical be provided.
5. The account no. of provident fund and receipt thereof be issued to the workers with immediate effect.
6. Overtime be paid to the workers for the work which the workers do in over time.
7. The double rate payment be paid to the workers for the work which they do on the public holidays.

The respondent management is harassing the workers without any reason and indulging themselves in unfair labour practice and thus violated the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). Against this back-drop a prayer has been made that the petition be allowed.

3. The respondent contested the claim of the petitioners by filing reply wherein preliminary objection qua maintainability has been taken. On merits, it is asserted that the petitioners are working with respondent since 1.5.2010 in different trades and on different rate of wages as per their trade. It is denied that the petitioners are working to the satisfaction of the respondent. It is submitted that no facilities which were part of service condition have been withdrawn after their appointments and the same are granting till now and the demand notice dated 9.6.2011 raised by the petitioners is totally false as during the construction work, the mess facilities and canteen facilities were provided by the contractor to its employees and not by the respondent. Even the respondent is paying ` 200/- per month as food allowance which is included under the head "Special Allowance" and in the meeting held on 3.7.2011 between the petitioners and respondent, the respondent offered hike of ` 400/- per month in lieu of one time working meal or ` 10,000/- per month to run the co-operative mess by the petitioners. As per the agreement dated 16.8.2010, it has been agreed that the wages would be revised only when the minimum wages are revised by the state government as prescribed by the department of Labour and Employment, hence, the petitioners are bound by the agreement and are not entitled to hike of wages. The respondent is paying ` 50/- per month towards medical allowances under the head "special allowances" and also issued medi-claim policy from United Insurance Company. Provident fund of eligible employees under the EPF and MP Act, 1952 is being deducted every month and is being deposited with the EPF Organization, Shimla. It is further asserted that when the petitioners joined in May, 2010, inadvertently appointment letters could not be issued but thereafter the petitioners and respondent mutually decided that appointments letters would be issued from the date of initial appointment i.e 1.5.2010 and as such the respondent issued appointment letters which the petitioners refused to receive. Whenever over time if being done, payment of the same is being made as per the provisions of law and also in case if the workers/petitioners work on public holidays

payment as per law is being made, hence, the demands raised by the petitioners are totally illegal and the respondent has not indulged in any unfair trade practice. The respondent prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Pleadings of the parties gave rise to the following issues which were struck on 21.6.2013.

19. Whether the demands raised by Shri Mohar Singh along-with 18 other workers through demand notice dated 9.6.2011 are proper and justified as alleged?
OPP……

20. If issue no.1 is proved in affirmative to what monetary and other service benefits the concerned workers are entitled to?
OPP……..

21. Whether this petition is neither competent nor maintainable as alleged?
OPR…….

22. Relief.

5. Besides having heard the learned counsel for parties, I have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	No.
Issue no.2	Becomes redundant.
Issue no.3	No.
Relief.	Reference answered in favour of the respondent and against the petitioners per operative part of award.

Reasons for findings.

Issues no.1

7. To prove this issues, the petitioners examined one Shri Babu Ram as PW-1 who has stated that he is working as power house operator with the respondent and is the General Secretary of the workers union and all the petitioners had authorized him to depose on their behalf vide authority letter Ex. PW-1/A. Ex. PW-1/B is the demand notice dated 19.6.2011, copy of which was also sent to Labour-cum-Conciliation Officer upon which conciliation were tried but of no avail. The following demands have been raised by the petitioners:

1. To start the mess facility which was stopped by the respondent from 1.5.2011.
2. Annual hike in the salary be paid to the workers.
3. The appointment letters which were not issued to the workers till date be issued.
4. Facilities of medical be provided.
5. The account no. of provident fund and receipt thereof be issued to the workers with immediate effect.
6. Overtime charges be paid to the workers for the work which the workers do in over time.
7. The double rate payment be paid to the workers for the work which they do on the public holidays.

He also stated that neither the settlement dated 27.2.2014 Ex. PW-1/D nor settlement dated 22.4.2011 Ex. PW-1/C had been implemented by the management. He further stated that the present reference be allowed and all the legal benefits be given to the petitioners. In cross-examination, he admitted that Ex. R-1 to Ex. R13 and Ex. R-15 to Ex. R-18 are the appointment letters issued to the petitioners and that Ex. R-14 is the copy of conciliation proceedings held between the petitioners and management of respondent. He denied that the mess was being run by the contractor and that a sum of ` 200/- per month was being paid as food allowance to the petitioners. He admitted that in the meeting dated 3.11.2011, the respondent had agreed to pay ` 400/- per month in lieu of one time working meal but the same was not given. He further admitted that the respondent had agreed to pay ` 400/- per month in lieu of one time working meal or ` 10,000/- per month to run the co-operative mess by the petitioner but the workers had not agreed to the same. He denied that ` 50/- per month was being paid as medical allowance but admitted that medi-claim policy has been given to them. He further denied that a settlement had taken place to provide minimum wages as per the government rules. He also denied that all the facilities have been provided to them by the management.

8. On the contrary, the respondent examined one Shri Dole Ram, Project Manager as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence the copy of authority letter Ex. RW-1/B, copies of appointment letter issued to the petitioners mark X to mark X-12, the copy of letter dated 16.11.2000 mark X-13, copy of letter dated 4.7.2011 mark X-14, copy of settlement mark X-15, copy of employees code mark X-16, copies of insurance policies of the petitioners mark X-17 to mark X-24, the copy of PF settlement for the year, 2010-11 mark X-25 and the copy of health card detail dated 31.12.2012 mark X-26. In cross-examination, he denied that the respondent company was providing mess facility to its workers and that the mess facility was being provided by the respondent company till 1.5.2011. He admitted that demand notice dated 9.6.2011 was submitted to respondent by the workers. He denied that the respondent company is not paying mess allowances to the workers. He further denied that the respondent is not providing mess facility to the workers. He admitted that the annual increment is being paid to the other employees except the petitioners. He denied that the petitioners are not being paid over time allowances and that appointment letters as well as EPF code have not been issued to the petitioners. He further denied that they have not entered into agreement with the petitioners on 16.8.2010.

9. I have heard the learned counsel for the parties and also scrutinized the entire evidence on record. After the closure scrutiny of the record of the case, it has become clear that the following demands have been raised by the petitioner through demand charter dated 9.6.2011 Ex. PW-1/B:

1. To start the mess facility or in the alternate to pay mess allowance.
2. Annual hike in the salary be paid to the workers.
3. The appointment letters which were not issued to the workers till date be issued.
4. Facilities of medical be provided.
5. The account no. of provident fund and receipt thereof be issued to the workers with immediate effect.
6. Overtime allowance be paid to the workers for the work which the workers do in over time.

7. The double rate payment be paid to the workers for the work which they do on the public holidays.

It is stated by both the learned counsels for the parties at bar that except for demands no. 1 & 2, all the issues have been settled between the petitioners and the respondent, which have been raised vide demand charter dated 9.6.2011 Ex. PW-1/B.

10. Coming to the demand number 1, the petitioners have demanded that mess facility be started or in alternate mess allowance be paid to them. PW-1 stated before this Court that the mess facility was stopped w.e.f. 1.5.2011. In cross-examination, he denied the suggestion that the company had never run the mess and the mess was being run by the contractor. He also denied that the respondent company used to pay ` 200/- per month as Food allowance. RW-1, Project Manager stated in his affidavit Ex. RW-1/A that mess facility was never a part of service condition and the petitioners are being paid ` 200/- per month as food allowance. He further stated that in meeting dated 3.7.2011, the respondent offered to hike a sum of ` 400/- per month in lieu of one time working meal or ` 10,000/- per month to run the co-operative mess by the petitioner. In cross-examination, he denied that the mess facility was being provided by the respondent till 1.5.2011. He also volunteered that ` 200/- per month was being paid to the workers. He further deposed that the company has started a common mess w.e.f. 2.10.2015 with the entire contribution of workers and the company has provided the cook as the petitioners are running the mess w.e.f. 9.7.2015. Since, it has been proved on record that ` 200/- per month is being paid to the petitioners as food allowance under the head special allowance and a common mess has been started w.e.f. 2.10.2015 with the entire contribution of the workers, therefore, in such a situation the petitioners are not entitled to any mess allowance. Moreover, as per section 46 of The Factories Act, 1948, a canteen is only provided in the factory wherein more than 250 workers are ordinarily employed. In the present case, the learned counsel for the respondent stated at bar that there are only about 20 workers who are working with the respondent. No evidence has been led by the petitioners to prove that there are more than 250 workers who are working with the respondent. Therefore, also the petitioners are not entitled to any mess facility as demanded by them.

11. As per demand no.2, the petitioners have demanded to pay the annual hike in the salary. To this effect, PW-1 stated that annual hike in salary be paid to the workers. In cross-examination, he denied that on 16.8.2010, a settlement had taken place that the wages will be given as per the minimum wages. RW-1, stated in his affidavit Ex. RW-1/A that as per agreement dated 16.8.2010, it was agreed that the wages will be revised only when minimum wages are revised by the State Government/Department of Labour and Employment and the petitioners are bound by the agreement. The petitioners are getting wages which are above the wages as prescribed by the State Government, Department of Labour and Employment.

12. In **(1972) 3 S.C.C 532, M/s Unichem Laboratories Ltd. Vs. The workman**, it has been held by the Hon'ble Supreme Court as under:

> "From the decisions, referred to above, it follows that two principal factors which must weigh while fixing or revising wage scales and grades are: (1) How the wages prevailing in the establishment in question compare with those given to the workmen of similar grade and scale by similar establishments in the same industry or in their absence in similar establishments in other industries in the region; and (2) What wage scales the establishment in question can pay without any undue strain on its financial resources. The same principles substantially apply when fixing or revising the dearness allowance."

In the present case, no evidence has been led by the petitioners to prove the amount of wages given to the workmen of the similar grade and scale by similar establishments. No document has been placed on record by the petitioners which could go to show that annual hike in the salary is being paid to the workers working in the similar establishments in the other industries in the State. Though, PW-1 stated that the management had failed to implement settlement Ex. PW-1/C. However, the perusal of the same shows that the same are the minutes of meeting and nothing therein was agreed between the workers union and the management, therefore, no benefit can be derived by the petitioners from the alleged settlement Ex. PW-1/C. Similarly, from settlement Ex. PW-1/D, also no benefit can be derived by the petitioners as nothing has been agreed therein regarding the annual hike in the wages. On the other hand, RW-1 has stated in his affidavit Ex. RW-1/A that as per the agreement dated 16.8.2010 it

has been agreed that the wages will be revised only when minimum wages are revised by the State Government/Department of Labour and Employment.

13. Therefore, in the absence of any cogent and satisfactory evidence on record led by the petitioners and in view of the fact that it was agreed that the wages will be revised only when the minimum wages are revised by the State Government/ Department of Labour and Employment, the demand of the workers regarding annual hike in the salary cannot be accepted. However, the respondent is directed to revise the wages of the workers from time to time as and when the minimum wages are revised by the State Government. Hence, this issue is decided accordingly.

Issue no.2

14. Since, the petitioners have failed to prove no.1, this issue becomes redundant.

Issue no.3.

15. In support of this issue, no evidence has been led by the respondent. However, the petitioners have filed their claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioners and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioners fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioners. However, the respondent is directed to revise the wages of the workers from time to time as and when the minimum wages are revised by the State Government. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 30th day of September, 2016.

(Praveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

29.9.2016.

Present: None for the petitioner.

Shri Ramakant Sharma, Advocate for respondent.

Case called repeatedly but none appeared on behalf of petitioner. For today, the case has been listed for the service of the petitioner. The record reveals that the notices issued for the service of the petitioner on the given address of reference itself, have not been received back either served or un-served. The record further reveals that after the receipt of reference from the appropriate government, the notices were issued to the parties to appear before this Court on 29.4.2016 on which date since none appeared for parties, again notices were sent to the parties to appear before this Court on 3.6.2016 on which date Shri Ramakant Sharma, Advocate appeared for respondent but none appeared for petitionerand thereafter againthe notices have been issued thricefor the service of the petitioner but despite that notices have not been received back either served or un-served. Moreover, the appropriate government has also sent a copy of the reference to the petitioner on the address provided by him during conciliation proceedings which means that he is having the knowledge about the pendency of the reference before this Court but despite that he has failed to appear before this Court. Hence, to issue notice again for the service of the petitioner and to further adjourn the case would be a futile exercise.In the light of aforesaid facts, it appears that at present the petitioner is not interested to pursue his claim arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file

The following reference has been received from appropriate government for adjudication:

> **"Whether alleged termination of services of Shri Liaq Ram S/o Shri BansiLal R/o Village Shawahal, P.O Baldeyan, Tehsil & District Shimla HP during April, 1994 by the Executive Engineer, HPSEB City Division Shimla, HP, who had worked as beldar on daily wages only for 31 days during 1994 and has raised his industrial dispute after about 19 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 31 days and delay of about 19 years in raising the industrial dispute, what amount of back wages, seniority,**

past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner has alleged his termination during April, 1994 to be illegal and unjustified but despite issuance of several notices on the given address of reference, none appeared on behalf of petitioner. The aforesaid reference also makes it clear that the petitioner had only worked for 31 days during the year, 1994 and raised the present dispute after about 19 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during April, 1994. Hence, the reference is answered against the petitioner and the award is passed accordingly. However, liberty is granted to the petitioner to agitate the present matter by filing an application before this Court in order to revive the reference. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced:
29.9.2016.

(SushilKukreja)
Presiding Judge,
Labour Court, Shimla.

Mazdoor Lal Jhanda Union

V/S

The General Manager /Employer, Marigold Sarovar Portico Shimla.

Ref. No. 83/2016.

30-09-2016

Present: Shri O.P. Chauhan, Advocate for Petitioner.
Shri Rahul Mahajan, Advocate, Advocate for respondent.

At this stage it has been stated by Shri Rakesh Kaith, Secretary of Marigold Sarovar Portico Mazdoor Lal jhanda Union (affiliated to CITU) that the union had settled the issues raised in the charter of demand dated 14-05-2016, in terms of settlement dated 06-09-2016, which has been referred to this Court and registered as reference no. 83 of 2016. He further stated that the copy of settlement is Ex. PW-1/A and its Hindi version is Ex. PW-1/B and the award may be passed in terms of the aforesaid settlement. To this effect his statement recorded separately.

Vide separate separate statement, the aforesaid statement of Shri Rakesh kaith has been admitted by Shri Rahul Mahajan, Advocate for respondent and stated that the reference by answered in terms of settlement Ex.PW-1/A and Ex.PW-1/B.

Therefore, in view of the aforesaid statements, since a settlement has been executed between the aforesaid workers union and the respondent, the copy of which is placed on record as Ex.PW-1/A and its Hindi version as Ex.PW-1/B, the present reference is answered in terms of aforesaid settlement which shall from a part of the award. Let a copy of this award/order be sent to the appropriate government for publication in the official gazette. File after completion, be consigned to records.

Announced:
29.9.2016.

(SushilKukreja)

Presiding Judge,
Labour Court, Shimla.

27.9.2016.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

Case called twice but none appeared on behalf of the petitioner. It is 10:30 AM. Be awaited.

(SushilKukreja)

Presiding Judge
Labour Court, Shimla.

Case called again.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 12:50 PM. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called after lunch.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 3:50 PM. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor any person authorized on his behalf had appeared before this Court. On 8.9.2016, the petitioner appeared in person and the case was listed before the National LokAdalat but the petitioner did not appear before the LokAdalat, hence, the notice was issued to the petitioner to appear before this Court for today. However, neither the petitioner nor any person authorized on his behalf had appeared before this Court which clearly shows that the petitioner is not interested to pursue hiscase arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

"Whether alleged termination of services of Shri Inder Singh S/o Shri RuddalDutt Village Katli, P.O Gumma, Tehsil & District Shimla HP during June, 1986 by the

ExecuiveEngineer, I&PH Division no. II, ChauraMaidan, Shimla District Shimla, HP, who had worked as beldar on daily wages only for 44 days in 1986 and has raised his industrial dispute after about 27 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 44 days and delay of about 27 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner has alleged his termination during June, 1986to be illegal and unjustified but he has failed to appear before this Court which clearly shows that he has nothing to say in the matter. The aforesaid reference also makes it clear that the petitioner had only worked for 44 days during June 1986with the respondent and he raised the present dispute after about 27 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any evidence and material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during June, 1986. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

27.9.2016. Presiding Judge,

Labour Court, Shimla.

5.9.2016.

Present: None for the petitioner.

Shri Vinil Thakur, Advocate vice csl.for respondent.

Case called repeatedly but none appeared on behalf of petitioner. For today, the case has been listed for the service of the petitioner. The record reveals that the notices issued for the service of the petitioner on the given address of reference itself, have not been received back either served or un-served. The record further reveals that after the receipt of referencefrom the appropriate government, the notices were issued to the parties to appear before this Court on 28.6.2016 on which date Shri Vinil Thakur, Advocate appeared for respondent but none appeared for petitionerand thereafter againthe notices have been issued for the service of the petitioner but despite that notice has not been received back either served or un-served. Moreover, the appropriate government has also sent a copy of the reference to the petitioner on the address provided by him during conciliation proceedings which means that he is having the knowledge about the pendency of the reference before this Court but despite that he has failed to appear before this Court. Hence, to issue notice again for the service of the petitioner and to further adjourn the case would be a futile exercise.In the light of aforesaid facts, it appears that at present the petitioner is not interested to pursue his claim arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file

The following reference has been received from appropriate government for adjudication:

> **"Whether alleged termination of services of Shri Manoj Kumar S/o Shri MitterDev Village & P.O Shakra, Tehsil Karsog, District Mandi, HP during July, 1994 by the Senior Executive Engineer, City Electrical Division, HPSEB Ltd., M.C Car Parking, Shimla 171001, who had worked as beldar on daily wages only for 213 days in 1994 and has raised his industrial dispute after about 19 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 213 days and delay of about 19 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"**

From the aforesaid reference is the clear that the petitioner has alleged his termination during July, 1994 to be illegal and unjustified but despite issuance of several notices on the given address of reference, none appeared on behalf of petitioner. The aforesaid reference also makes it clear that the petitioner had only worked for 213 days with the respondent and raised the present dispute after about 19 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during July, 1994. Hence, the reference is answered against the petitioner and the award is passed accordingly. However, liberty is granted to the petitioner to agitate the present matter by filing an application before this Court in order to revive the reference. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced:
5.9.2016.

(SushilKukreja)
Presiding Judge,
Labour Court, Shimla.

27.9.2016.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

Case called twice but none appeared on behalf of the petitioner. It is 10:345 AM.. Be awaited.

(SushilKukreja)

Presiding Judge
Labour Court, Shimla.

Case called again.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 12:45 PM. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called after lunch.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 3:45 PM. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor his counsel had appeared before this Court. Which clearly shows that the petitioner is not interested to pursue his case arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

"Whether termination of services of Shri Basti Ram S/O late Shri Jattu Ram R/O Chiyali, P.O. Loja, Tehsil Shillai, District Sirmour, HP during during March, 2008 by the Divisional Forest Officer, Renukaji, Tehsil & P.O. Renukji District Sirmour, HP allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of delay of about six years in raising the

dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner has alleged his termination during march, 2008 be illegal and unjustified but despite the case having been called repeatedly, he has failed to appear before this Court which clearly shows that he has nothing to say in the matter. The aforesaid reference also makes it clear that the petitioner had raised the present dispute after 6 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any evidence and material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during March, 2008. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

27.9.2016. Presiding Judge,

Labour Court, Shimla.

8.9.2016.

Present: None for the petitioner.
Rahul Mahajan, Advocate for respondent.

Case called repeatedly but none appeared on behalf of petitioner. For today, the case has been listed for the service of the petitioner. The record reveals that the notices issued for the service of the petitioner on the given address of reference itself, have not been received back either served or un-served. The record further reveals that after the receipt of referencefrom the appropriate government, the notices were issued to the parties to appear before this Court on 2.4.2.016 on which date Shri Rahul Mahajan, Advocate appeared for respondent but none appeared for petitioner and thereafter again the notices have been issued repeatedly for the service of the petitioner but despite that notice has not been received back either served or un-served. Moreover, the appropriate government has also sent a copy of the reference to the petitioner on the address provided by him during conciliation proceedings which means that he is having the knowledge about the pendency of the reference before this Court but despite that he has failed to appear before this Court. Hence, to issue notice again for the service of the petitioner and to further adjourn the case would be a futile exercise. In the light of aforesaid facts, it appears that at present the petitioner is not interested to pursue his claim arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file

The following reference has been received from appropriate government for adjudication:

> **"Whether termination of services of Shri KarampalMunda R/o Prashanti Hem Kunj, Lower Cemetary, Near Tara Cottage, Sanjauli Shimla-6 HP whowas employed as safaikaramchari by the Principal Sacred Heart Convent School Fleur-de-Lys Dhali, Shimla-12 w.e.f. 12.1.2015 allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what relief including reinstatement, back-wages, seniority, past service benefits and compensation the above aggrieved worker is entitled to from the above employer/school management?"**

From the aforesaid reference is the clear that the petitioner has alleged his termination w.e.f. 12.1.2015 to be illegal and unjustified but despite issuance of several notices on the given address of reference, none appeared on behalf of petitioner. Therefore, in the absence of any evidence/material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent w.e.f. 12.1.2015. Hence, the reference is answered against the petitioner and the award is passed accordingly. However, liberty is granted to the petitioner to agitate the present matter by filing an application before this Court in order to revive the reference. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

8.9.2016. Presiding Judge,

Labour Court, Shimla.

6.9.2016.

Present: None for the petitioner.

Ms. ReenaChauhan, Dy. DA for respondent.

Case called repeatedly but none appeared on behalf of petitioner. For today, the case has been listed for the service of the petitioner. The record reveals that the notices issued for the service of the petitioner on the given address of reference itself, have not been received back either served or un-served. The record further reveals that after the receipt of reference from the appropriate government, the notices were issued to the parties to appear before this Court on 31.3.2016 on which date Shri VinayVerma, ADA appeared for respondent but none appeared for petitioner and thereafter againthe notices have been issued four times for the service of the petitioner but despite that notice has not been received back either served or un-served. Moreover, the appropriate government has also sent a copy of the reference to the petitioner on the address provided by him during conciliation proceedings which means that he is having the knowledge about the pendency of the reference before this Court but despite that he has failed to appear before this Court. Hence, to issue notice again for the service of the petitioner and to further adjourn the case would be a futile exercise.In the light of aforesaid facts, it appears that at present the petitioner is not interested to pursue his claim arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

> **"Whether alleged termination of services of Shri BalKrishan S/o Shri LeelaDass R/o Village Seri, P.O Gumma, Tehsil & District Shimla, HP during March, 1998 by the Executive Engineer, HPPWD Division no.1 Shimla, who had worked as beldar on daily wages only for 31 days and 72 days during 1997 and 1998 respectively and has raised his industrial dispute after about 15 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 31 days and 72 days during 1997 and 1998 respectively and delay of about 15 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"**

From the aforesaid reference is the clear that the petitioner has alleged his termination during March, 1998to be illegal and unjustified but despite issuance of several notices on the given address of reference, none appeared on behalf of petitioner. The aforesaid reference also makes it clear that the petitioner had only worked for 31 days and 72 days during 1997 and 1998 respectively with the respondent and raised the present dispute after about 15 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during March, 1998. Hence, the reference is answered against the petitioner and the award is passed accordingly. However, liberty is granted to the petitioner to agitate the present matter by filing an application before this Court in order to revive the reference. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

6.9.2016. Presiding Judge,

Labour Court, Shimla.

6.9.2016.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

Case called twice but none appeared on behalf of the petitioner. It is 11.10 AM. Be awaited.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called again.

Present: None for the petitioner.
Ms. Reena Chauhan, Dy. DA for respondent.

It is 12:50 PM. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called after lunch.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 3:50 PM. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor his counsel had put in appearance before this Court. For today, the case was listed for filing of claim but the petitioner has failed to file any claim petition despite having been afforded repeated opportunities in this respect which clearly shows that the petitioner is not interested to pursue hiscase arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

"Whether alleged termination of services of Shri Daulat Ram S/o Shri CharanDass R/o Village Sanyan, P.O Thaila, Tehsil Sunni, District Shimla, HP during August 1998 by the Executive Engineer HPPWD Division no.1 Shimla-3, who had worked as beldar on daily wages only for 147 days and 209 days during 1997 and 1998 respectively and has raised his industrial dispute after about 15 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 147 days and 209 days during 1997 and 1998 respectively and delay of about 15 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner has alleged his termination during August, 1998to be illegal and unjustified but despite having been afforded repeated opportunities in order to file the claim, he has failed to file the same which clearly shows that he has nothing to say in the matter. The aforesaid reference also makes it clear that the petitioner had only worked for 147 days and 209 days during 1997 and 1998 respectively with the respondent and raised the present dispute after about 15 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any evidence and material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during August, 1998. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

6.9.2016. Presiding Judge,

Labour Court, Shimla.

6.9.2016.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

Case called twice but none appeared on behalf of the petitioner. It is 11.15 AM. Be awaited.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called again.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 12:55 PM. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SushilKukreja)
Presiding Judge
Labour Court, Shimla.

Case called after lunch.

Present: None for the petitioner.
Ms. ReenaChauhan, Dy. DA for respondent.

It is 3:55 PM. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor his counsel had put in appearance before this Court. For today, the case was listed for filing of claim but the petitioner has failed to file any claim petition despite having been afforded repeated opportunities in this respect which clearly shows that the petitioner is not interested to pursue hiscase arising out of the reference. Hence, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

"Whether alleged termination of services of Shri KhemaNand S/o Shri ThumruRam R/o Village & P.O Gumma, Tehsil & District Shimla, HP during August 1997 by the

Executive Engineer HPPWD Division no.1 Shimla-3, who had worked as beldar on daily wages only for 97 daysin 1997 and has raised his industrial dispute after about 15 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 97 days in 1997 and delay of 15 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner has alleged his termination during August, 1997to be illegal and unjustified but despite having been afforded repeated opportunities in order to file the claim, he has failed to file the claim which clearly shows that he has nothing to say in the matter. The aforesaid reference also makes it clear that the petitioner had only worked for 97 days in 1997 with the respondent and raised the present dispute after about 15 years which seems that the petitioner is not serious about the present dispute. Therefore, in the absence of any material and evidence on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent during August, 1997. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: (SushilKukreja)

6.9.2016. Presiding Judge,

Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).

App. No. 03 of 2015.

Instituted on. 7.1.2015

Decided on 27.9.2016.

Bhoj Singh S/o Shri Jiji R/o Village Bahtlolu, P.O Rajera, Tehsil Chamba, Distrtct Chamba, H.P.

……Petitioner.

Vs.

General Manager, Himachal Pradesh Tourism Development Corporation Ltd., Ritiz Annexe, The Ridge, Shimla, HP.

……Respondent.

Claim petition on behalf of the petitioner.

For petitioner : Shri R.K Khidtta, Advocate.

For respondent **:** Shri Virender Sharma, Advocate.

AWARD/ORDER

In nutshell the case of the petitioner is that he was engaged as utility worker (Masalchi) by the respondent at Goofa Ashiana Restaurant, The Ridge Shimla in the month of May, 2010 on daily wages and worked as such till 5.1.2013 and thereafter he was transferred to HPTDC Head Office Shimla. On 30.3.2013, the petitioner fell ill and was admitted in IGMC Shimla where he remained hospitalized till 3.4.2013 and thereafter he joined his services and worked till 24.4.2013 but suddenly, he again fell ill and remained hospitalized at District Hospital Chamba till 27.1.2014. It is further stated that due to illness, the petitioner could not join his duties and after recovering from the illness he visited the office of the respondent number of times in order to join his duties but he was not allowed to do so and thereafter regarding his re-employment, he gave in writing to the Chairman HP State Co-operative Bank, who forwarded the representation to G.M HPTDC to consider the grievances of the petitioner. Despite submitting the medical, the petitioner was not allowed to join his duties and his services had been terminated w.e.f. 25.4.2013 and even the termination letter was never served

upon the petitioner and his services have been terminated orally without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is also stated that neither any show cause notice had been issued to the petitioner nor conducted any enquiry against him before terminating his services and even no opportunity of being heard was afforded to him. No notice as per the mandatory provisions of the law or compensation in lieu of the notice had been paid to the petitioner before terminating his services which is clear cut violation of the provisions of section 25-F of the Act as the work and conduct of the petitioner was always appreciated by the official and nothing contrary was every conveyed to him during his service tenure. The petitioner had completed more than 240 days in each calendar year and even after the termination of the petitioner, the respondent had also engaged new persons on the same post and his juniors have been retained by the respondent. The petitioner is unemployed w.e.f. 25.4.2013 and is nowhere gainfully employed as such the respondent is bound to pay full salary to him w.e.f. 25.4.2013 till his reengagement and that the petitioner had filed the demand notice before the Labour-cum-Conciliation Officer, Shimla on 28.7.2014 but the appropriate government has failed to send the case of the petitioner as reference to this Court despite the fact that the period of 45 days has already expired. Against this back-ground a prayer has been made that the termination order of the petitioner w.e.f. 25.4.2013 and thereafter again w.e.f. 3.6.2013 be set aside and the respondent be directed to reengage the petitioner with full back- wages and other service benefits.

2. The respondent contested the claim of the petitioner by filing reply wherein preliminary objections have been taken qua maintainability, that no cause of action accrued in favour of the petitioner and that the petitioner had not approached this Court with clean hands. On merits, it has been admitted that the petitioner was engaged initially as utility worker against the seasonal requirement and he was assigned contractual assignment w.e.f. 28.7.2010 and he was deployed at Head Office Canteen Shimla w.e.f. 5.1.2013 and worked as such upto 29.3.2013. The petitioner remained absent from duty w.e.f. 30.3.2013 to 3.4.2013 without any written intimation to the respondent and joined his duties on 4.4.2013 by submitting his discharged slip from IGMC Shimla. The petitioner again remained absent from 24.4.2013 onwards without any intimation and he was

issued notice by the Dy. General Manager (operation) to explain his position and resume his duties within three days but the petitioner neither joined his duties nor submitted any reply and thereafter his services had been discontinued vide letter dated 3.6.2013. It is asserted that as and when the petitioner remained absent from his duties, he never intimated the respondent in writing, hence, his services had legally been terminated vide letter dated 3.6.2013 and the intimation was duly given to the petitioner at his permanent address available with the office of the respondent. It is denied that the work and conduct of the petitioner was always appreciable and he performed his duties honestly. However, it is submitted that as per the report received from Sr. Manager Goofa-Ashiana, restaurant where the petitioner was posted, his work and conduct was not reported satisfactory by his superiors. Since, despite affording ample opportunities to explain his position and resume his duties, the petitioner failed to do so, hence, his services have rightly been terminated by the respondent. The respondent prayed for the dismissal of the claim petition.

3. By filing rejoinder the petitioner reaffirmed his allegations by denying those of the respondent.

4. Pleadings of the parties gave rise to the following issues which were struck on 1.10.2015.

1. Whether the termination of the services of the petitioner w.e.f. 25.4.2013 is in violation of the provisions of the Industrial Disputes Act, 1947 as alleged?

   OPP……

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?

   OPP……..

3. Whether the petition is not maintainable as alleged?

   OPR……

4. Whether the petitioner is estopped to file the present petition due to his own acts, deeds, and conduct?

   OPR……..

5. Whether the petition is bad for mis-joinder of parties as alleged?

OPR……

6. Relief.

5. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1	Yes.
Issue no.2	Entitled to reinstatement with seniority and continuity but without back wages.
Issue no.3	No.
Issue no.4	No.
Issue no.5	No.
Relief.	Petition allowed per operative part of order/award.

Reasons for findings.

Issues no.1.

7. To prove this issue, the petitioner examined four PWs including himself. The petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reitreated almost all the averments as stated in the claim petition. He also tendered in evidence the application for reengagement Ex. PW-1/B, discharge slips mark PX and mark PX-1, prescription slips dated 11.10.2013, 2.12.2013, 30.3.2013, mark PX-2 to mark PX-4, medical fitness certificate mark PX-5, copy of demand notice Ex. PW-1/C and reply to the demand notice Ex. PW-1/D. In cross-examination, he denied that he was engaged by the department for seasonal work as utility worker. He admitted that he had not submitted any leave application to the department regarding his illness. He further admitted that he had worked in the Head Office from 5.1.2013 to 29.3.2013 and from 30.3.2013 to 3.4.2013, he remained absent from work without any intimation. He also admitted that from 24.4.2013 onwards, he remained absent from duty without submitting any application or any intimation. He denied that notices dated 30.4.2013 mark RX, dated 16.5.2013 mark

RY had been issued to him. He denied that during his posting at Head Office Canteen of HPTDC, his behavior towards the superiors and other persons was not cordial and that he used to disobey the orders of his superiors. He admitted that he did not have the original medical record regarding his illness. He denied that termination letter mark RY/1 had been received by him. He admitted that he had worked for 93 days in the year, 2013 and that he had not submitted any application for his joining after his recovery.

8. PW-2 Shri Lekh Ram has stated that the petitioner was engaged by the department on 28.7.2010 on seasonal basis in Goofa/Ashiana Restaurant, Shimla and worked till 30.3.2013 and he was transferred to head Office canteen on 5.1.2013 and worked till 23.4.2013. He further deposed that the department had engaged 43 utility workers w.e.f. the year, 2010 and the detail of the class-IV workers engaged by the corporation after the year, 2010 is Ex. PW-2/A. In cross-examination, he stated that the job of utility worker is multifarious but it does not include the job of sweeper.

9. PW-3 Dr. Ramesh Kumar has stated that the petitioner remained under his treatment and he was examined by him on 11.10.2013 vide prescription slip Ex. PW-3/A and the medical certificate Ex. PW-3/B has been issued and signed by him. In cross-examination, he admitted that as per the prescription slip Ex. PW-3/A, the petitioner was not under his treatment before October, 2013.

10. PW-4 Dr. Dalip Gupta has stated that the petitioner remained admitted under Medicine Unit-3 of which he was the incharge and the discharge slip Ex. PW-4/A had been issued by their unit. The petitioner remained admitted under their unit from 30.3.2013 to 3.4.2013. In cross-examination, he expressed his ignorance that as to whether the petitioner visited their unit after 3.4.2013.

11. On the contrary, the respondent examined one Shri Lekh Ram Verma, Assistant Manager, HPTDC, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated

almost all the averments as stated in the reply. He also tendered in evidence authority letter Ex. RW-1/B, letter dated 30.4.2013, Ex. RW-1/C, letter dated 16.5.2013 Ex. RW-1/D, office order dated 3.6.2013 Ex. RW-1/E and the work and conduct report of the petitioner dated 17.2.2014 Ex. RW-1/F. In cross-examination, he admitted that the petitioner was engaged in May, 2010 and had worked continuously till 5.1.2013 as utility worker and that he was transferred to the Head Office on 5.1.2013 and thereafter he had worked continuously till 24th April, 2013. He further admitted that on 30.3.2013, the petitioner fell ill and remained admitted in IGMC Shimla till 3.4.2013 and that the petitioner submitted the medical certificate Ex. PW-3/B to the department. He denied that the petitioner visited the respondent department personally for joining the duties but admitted that the petitioner had written the letter Ex. PW-1/B for his reengagement. He admitted that the petitioner had completed 240 days in each calendar year before his termination. He further admitted that the respondent had engaged new persons after the termination of the petitioner who are still working with the respondent. He denied that no show cause notice had been issued to petitioner prior to his termination. He admitted that no enquiry had been conducted against the petitioner but denied that letters Ex. RW-1/C and Ex. RW-1/D have been fabricated after the petitioner had filed the case. He denied that termination letter Ex. RW-1/E had not been communicated to the petitioner.

12. The learned counsel for the petitioner contended that the services of the petitioner have been terminated illegally without complying with the provisions of the Act especially when he had completed more than 240 days in twelve calendar months preceding his termination. He further contended that on account of illness, the petitioner could not join his duties but after recovery from illness, he approached the respondent for his reengagement but of no avail. He also contended that after the termination of the petitioner, the respondent engaged fresh persons in violation of the provisions of section 25-G & 25-H of the Act.

13. On the other hand, the learned counsel for the respondent contended that the services of the petitioner had been engaged as utility worker against the seasonal requirement and he was assigned the contractual assignment. He further contended that since the petitioner remained

absent from his duties without any intimation, therefore, his services had rightly been dis-engaged vide termination letter dated 3.6.2013.

14. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was engaged as utility worker by the respondent in the month of May, 2010 and he worked as such till 24.4.2013. It has also not been disputed that the services of the petitioner have been terminated vide termination letter dated 3.6.2013 Ex RW-1/E. The case of the petitioner is that he suddenly fell ill on 30.3.2013 and remained admitted in IGMC Shimla till 3.4.2013 and for this reason he could not attend the office and thereafter he joined the duties and worked till 24.4.2013 but he again fell ill and remained hospitalized at District Hospital Chamba till 27.1.2014. The petitioner as PW-1 has stated that after the recovery, he submitted an application Ex. PW-1/B before the respondent for his reengagement along-with medical fitness certificate but he was not allowed to join his duties. He further stated that the termination letter Ex. RW-1/E was never served upon him by the respondent and he has been terminated without following the mandatory provisions of the Act. On the other hand, RW-1 Assistant Manager, HPTDC has stated that vide letter dated 30.4.2013 Ex. RW-1/C and letter dated 16.5.2013 Ex. RW-1/D, the petitioner was directed to explain his position and to resume his duties within three days but the petitioner neither joined his duties nor submitted any reply, hence, his services had been terminated vide letter dated 3.6.2013 Ex. RW-1/E. However, the respondent has failed to produce any evidence on record to show that letters Ex. RW-1/C and Ex. RW-1/D as well as termination letter Ex. RW-1/E have been served upon the petitioner. In cross-examination, RW-1 expressed his ignorance as to whether the letters Ex. RW-1/C and Ex. RW-/1D have been actually sent to the petitioner and he has also failed to produce the dispatch register before this Court. He also admitted that the address of the petitioner is not mentioned in the termination letter Ex. RW-1/E. The respondent has failed to produce any evidence on record as to whether the termination order has been communicated to the petitioner. RW-1 admitted in cross-examination, that no proof has been annexed showing the communication of the termination order Ex. RW-1/E. Therefore, in view of the entire evidence on record, it cannot be said that the letters Ex. RW-1/C and Ex. RW-1/D as well as termination letter Ex. RW-1/E have been served upon the

petitioner. RW-1 also admitted in cross-examination, that the petitioner had completed 240 days in each calendar year before his termination. Therefore, to prove the alleged willful absence of the petitioner, it was necessary for the respondent to have conducted an enquiry before terminating the services of the petitioner. RW-1 admitted in cross-examination that no enquiry was conducted against the petitioner. There is nothing on record to suggest that any opportunity of being heard was afforded to the petitioner before terminating his services. The petitioner was never asked to answer any charges as no chargesheet was issued to him and no enquiry was conducted before terminating his services. Since, the petitioner had completed 240 days in twelve calendar months preceding his termination, a reasonable opportunity of being heard should have been afforded to him and proper enquiry should have been held before terminating his services. **In *D. K Yadav Vs. M/s J.M A Industries Ltd. as reported in 1993-1 Supreme Court Service Law Judgments -221*, the Hon'ble Apex Court** has held as under:

> *"Reasonable opportunity be given to the employee concerned to put forth his case and proper enquiry be held before terminating his service."*

In a recent judgment of our **Hon'ble High Court in ILR-XLV (VI) 938 titled as Gurcharan Singh Deceased through his LR's Vs. State of HP and ors.** the Hon'ble High Court has held that termination could not have been ordered without conducting any enquiry as the workman had completed 240 days and was therefore entitled to the enquiry. The relevant portion of the aforesaid judgment reads as under:

> "8. The moot question is whether termination can be ordered without conducting any inquiry? The answer is in the negative for the following reasons:
>
> 9……..
>
> 10. While going through the impugned award and the writ petition, one comes to an inescapable conclusion that the termination of deceased Gurcharan Singh was made without following the mandate of law.
>
> 11……..
>
> 12…….

> 13. In the instant case, deceased Gurcharan Singh had completed 240 days in a calendar year, as discussed and held by the Labour Court, after scanning the evidence, the inquiry was required, not to speak of only issuance of the notice.

Since, the petitioner had completed 240 working days in each calendar year preceding his termination, hence, before terminating his services, it was incumbent upon the respondents to have conducted the enquiry regarding his alleged willful absence from duty. The petitioner has placed on record the medical certificate Ex. PW-3/B, the perusal of which shows that he remained under treatment w.e.f. 11.10.2013 to 28.1.2014 in the department of psychiatry IGMC Shimla. PW-3 Dr. Ramesh Kumar, Professor has categorically stated that the petitioner remained under his treatment and the medical certificate Ex. PW-3/B had been issued by him. RW-1 admitted that the petitioner had written letter Ex. PW-1/B for considering him to reengage and he had also submitted the medical certificate Ex. PW-3/B to the department. Hence, the petitioner has proved on record that he remained absent from duty on account of his illness and it cannot be said that the absence of the petitioner was willful. Therefore, keeping in view the facts and circumstances of the present case and also in view of the evidence led by the petitioner, it cannot be said that the absence of the petitioner was willful.

15. Moreover, as observed earlier since the petitioner had completed more than 240 days in twelve calendar months preceding his termination, as such before terminating his services, it was incumbent upon the respondent to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondent has failed to comply with the provisions of section 25-F of the Act and his services have been terminated by issuing office order dated 3.6.2013 without affording any opportunity of being heard to him. **In 2010 (5) SCC 497 titled as Anoop Sharma Vs. Executive Engineer, Public Health division no.1,**

Panipat (Haryana), the Hon'ble Supreme Court has held that the termination of the services of an employee by way of retrenchment without complying with the provisions of section 25-F of the Act is a nullity. The relevant extract of aforesaid judgment is reproduced as under:

> "16. An analysis of the above reproduced provisions shows that no workman employed in any industry who has been in continuous service for not less than one year under an employer can be retrenched by that employer until the conditions enumerated in Clauses (a) and (b) of Section 25-F of the Act are satisfied. In terms of Clause (a), the employer is required to give to the workman one month's notice in writing indicating the reasons for retrenchment or pay him wages in lieu of the notice. Clause (b) casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.
>
> 17. This Court has repeatedly held that Section 25-F(a) and (b) of the Act is mandatory and non-compliance thereof renders the retrenchment of an employee nullity……..."

16. In the present case also admittedly the respondent had not complied with the conditions precedent to the retrenchment as per section 25-F of the Act which are mandatory in law. Hence, In view of the law laid down by the Hon'ble Supreme Court and also in view of my foregoing observations, I have no hesitation in holding that the termination of the services of the petitioner vide termination letter dated 3.6.2013 Ex. RW-1/E, by the respondent without complying with the provisions of the Act, is illegal and unjustified.

17. The learned counsel for the petitioner next contended that number of junior persons have been retained by the respondent and new persons have been engaged without giving an opportunity to the petitioner for re-employment as such the respondent had violated the provisions of sections 25-G & 25-H of the Act.

18. In the instant case, RW-1 has admitted that the respondent had engaged new persons after the termination of the petitioner who are still working with the respondent. Therefore, from the aforesaid admission, it is clear that after the termination of the services of the petitioner, the

respondent had appointed new persons without giving any opportunity to the petitioner for re-employment in violation of section 25-H of the Act.

19. Thus, having regard to the entire evidence on record, I have no hesitation in coming to the conclusion that the termination of the services of the petitioner by the respondent without conducting any enquiry and without complying with the provisions of sections 25-F and 25-H of the Act is illegal and unjustified. Accordingly, this issue is decided in favour of the petitioner and against the respondent. ***Issue no.2.***

20. Since, I have held under issue no.1 above that the termination of services of the petitioner by the respondent without conducting any enquiry and without following the provisions of section 25-F & 25-H of the Act is illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

21. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

22. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex**

Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma that:

> "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……."

23. . In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

Issue No.3.

24. In support of this issue, the learned counsel for the respondent contended that since the petitioner has filed the present application directly before this Court, for this reason, in the absence of reference, the same is not maintainable. However, when regard is given to the entire record, it is an admitted fact that the petitioner had filed a demand notice before the Labour-cum-Conciliation Officer Shimla on 28.7.2014 and the respondent had also filed the reply to the same. Since, the appropriate government had failed to refer the matter to this Court, therefore, after the expiry of 45 days the petitioner had filed the present petition directly before this Court. This fact has also been admitted by the respondent in its reply as such it cannot be said that the present petition is not maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No.4&5.

25. In support of these issues no evidence has been led by the respondent which could go to show that the petitioner is estopped to file the present petition due to his own acts, deeds and conduct and that the petition is bad for mis-joinder of parties. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 5, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However, the petitioner is not entitled to back wages. Let a copy of this order/award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 27th Day of September, 2016.

(Praveen)

(Sushil Kukreja)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.