BEFORE THE PUBLIC SERVICES TRIBUNAL
UTTARAKHAND, DEHRA DUN

Present: Hon'ble Mr. Justice J.C.S.Rawat

------ Chairman

&

Hon'ble Mr. D.K.Kotia

------- Vice Chairman (A)

CLAIM PETITOIN NO 31/DB/ 2013

Const. No. 28 CP. Sushil Kumar, S/o Sri Sumer Singh, presently posted at P.S. Nuriya District, Piliphit, R/o Village Rithani (West) P.O. Partapur, Delhi Road, Meerut.

……Petitioner

VERSUS

1. State of Uttarakhand through Principal Secretary, Home Department, Subhash Road, Dehradun,
2. Director Inspector General of Police, Pauri Region, Pauri (Uttarakhand).
3. Superintendent of Police, Pauri Garhwal (Uttarakhand).

…..…Respondents

Present: Sri J.P.Kansal, Ld. Counsel
for the petitioner

Sri Umesh Dhaundiyal, Ld. A.P.O.
for the respondents

JUDGMENT

DATED: AUGUST 08, 2014

(Hon'ble Mr. Justice J. C. S. Rawat, Chairman):

1. This claim petition has been filed for seeking the following reliefs:

"Therefore, the petitioner most humbly prays this Hon'ble Tribunal;

(a) That *the above impugned orders Annexure A1, Annexure –A2, Annexure A3 and Annexure A-4 to this Claim petition be kindly held*

against fundamental, constitutional and civil rights of the petition, wrong, illegal, against law, rules and principles of natural justice and accordingly the same be kindly quashed and set aside.;

(b) That the respondents be kindly ordered and directed to pay to the petitioner pay, allowances and other consequential benefits including selection grade, pay, promotional benefits for the period 16.02.1999 to 20.10.2010 together with interest thereon @12% per annum from the date of accrual till the actual date of payment to the petitioner;

(c) Any other relief, in addition to, modification or substitution of the above relief, which this Hon'ble Tribunal deem fit and proper in the circumstances of the case and facts on record, be kindly allowed to the petitioner against the respondents; and

(d) *Rs. 20,000/- as costs of this petition be allowed to the petitioner against the respondents.*"

2. It is admitted case of the parties that the petitioner was removed from service allegedly on the ground of unauthorized absence. Thereafter, a departmental enquiry was directed by the punishing authority and appointed the enquiry officer. The enquiry officer submitted a report against the petitioner holding him guilty for unauthorized absence and placed the petitioner under suspension. The petitioner was given a show cause proposing the punishment of dismissal and thereafter, the punishment order was passed. Thereafter, the said dismissal order was challenged before the Hon'ble High Court in the writ petition. The Hon'ble High Court relegated the petitioner to seek alternative remedy before the Tribunal. Thereafter, the petitioner filed the petition before this Tribunal. The Tribunal after hearing the entire petition delivered the judgment on 18.06.2009. The relevant portion of the judgment reads as under:

"In view of the foregoing discussion, we find it to be fit case for setting aside the punishment order and for remitting the matter back to the disciplinary authority for passing appropriate order in accordance with law and consistent with principles of natural justice."

3. The perusal of the order clearly reveals that the punishment of the petitioner was set aside by the Tribunal vide its judgment dated 18.06.2009 and also, further remitted the matter to the disciplinary authority for taking appropriate action expeditiously. We have also summoned the enquiry file of the petitioner from the department.

4. That after receipt of the judgment of the Tribunal, S.P., Pauri started the enquiry from the stage of preliminary enquiry. Pursuant to the order of this Tribunal, S.P., Pauri appointed Additional Superintendent of Police, Pauri Garhwal, Mr. Jaswant Singh, A.S.P., who held the preliminary enquiry about the absence of the petitioner. The Additional S.P., Pauri submitted his report on 29.05.2010 holding that the medical certificates submitted by him is of no avail to the petitioner and he is found guilty for his duties in remaining absent from the period as enumerated in the report. After receiving the report, the S.P., Pauri issued a show cause notice for recording an adverse and censure entry in his record as the S.P., Pauri opted not to hold a regular enquiry against the petitioner. After considering all the circumstances of the case, he issued a notice for the minor punishment as provided under the U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991. The petitioner was asked to show cause against the said punishment within a stipulated period. Strangely the petitioner did not reply within the stipulated period and he sought time on the ground that his file regarding the matter is with his Advocate in CAT, Delhi and his counsel, due to vacation, has gone out of station. Though, we are not making any comments on the merits of the application, but at the same time, we would like to mention that earlier petition was decided by the State Public Services Tribunal sitting at Dehradun, which is not a part of the CAT. However, the S.P., Pauri granted him time and ultimately, he submitted his reply denying all the allegations made in the notice and requested that his medical certificates may be granted. After going through the reply against the show cause notice, S.P., Pauri vide order dated 07.07.2010 passed the impugned order, which is the subject matter of the challenge before us. The necessary statutory remedies were

preferred by the petitioner, which were rejected by the concerned authorities. These orders are also under challenge before this Tribunal.

5. We have heard learned counsel for the parties and perused the record carefully.

6. The learned counsel for the petitioner contended that the Tribunal while setting aside the punishment order has held at para-11 that the punishing authority held that petitioner is guilty of unauthorized absence without finally deciding about the factum of illness. The Tribunal further opined that the petitioner has not received a fair treatment and absence in the available set of circumstances, could not be said to be without information and unauthorized. The learned counsel for the petitioner further contended that the Tribunal further held that the act of the appointing authority while granting the punishment, appears to be a case of unreasonable exercise of power by the disciplinary authority. Learned counsel for the petitioner further contended that the punishing authority has not given a proper right of hearing to defend the petitioner before him. He also contended that the allegations made against him are totally false. As a matter of fact he was sick and submitted medical certificates to the department concerned and it was the duty of the department to allow the said leave, if he was found ill. He further contended that the respondents had not taken any opinion from the CMO on the said certificates as to whether the said certificates are fake and not reliable. Learned counsel further contended that the petitioner had not given the salary and other consequential benefits of selection grade from 06.02.1999 to 20.10.2010 and the authority has illegally passed an order against him holding to be not entitled for the same on the ground that he did not discharge any work, so he cannot claim the monetary benefits thereof. Learned counsel for the petitioner further contended that if the certificate has been submitted to the department concerned, there was no absence on the part of the petitioner; hence the punishment awarded to him is liable to be set aside.

7. Learned A.P.O. refuted the contentions and contended that the petitioner has been given proper opportunity to defend himself before

awarding minor punishment. The petitioner is not entitled to get salary and other benefits for the period as claimed by him. He further contended that the order of the punishing authority is inconsonance with law and it cannot be held to be void or voidable at all.

8. The main thrust of the learned counsel of the petitioner was that the report of the preliminary enquiry, which was conducted by Additional S.P., was not given to the petitioner. The perusal of the record reveals that the said preliminary enquiry was conducted by the Additional S.P. on 29.05.2010, which is on the original file of the department. The petitioner claims that copy of the said preliminary enquiry report should have been given to him. He has been deprived from the said report; hence the entire punishment is liable to be quashed. The learned A.P.O. refuted the contention. A preliminary enquiry is for the purpose of collection of facts in regard to the conduct and work of a Govt. servant in which he may or may not be associated so that the authority concerned may decide whether or not to subject the servant to the enquiry necessary under Article 311 of the Constitution of India for inflicting the punishments mentioned in the rules. Such a preliminary enquiry may even be held ex-parte, for it is merely for the satisfaction of the punishing authority, though unusually for the sake of fairness, explanation is taken from the Government servant even at such an enquiry. But the settled position of law is that he has no right to be heard during the enquiry or after the enquiry and also he cannot claim copy of this report because it is for the satisfaction of the punishing authority. It is only when the authority decides to hold regular departmental enquiry for the purposes of inflicting any punishment and all the rights that protection applies provided under Article 311 of Indian Constitution. That is why the motive or the inducing factor which influences the departmental authority to take action under the terms of the contract of employment or the specific service rule is irrelevant. The mere fact that some kind of preliminary enquiry is held against a Govt. Servant, the delinquent cannot claim copy of it as of right. The said report can only be taken into account for the satisfaction of the appointing authority either to initiate the enquiry or to drop the enquiry. Neither the punishing authority nor

the delinquent took the benefit of the said enquiry report unless it is produced during the course of enquiry by the enquiry officer and also it finds place in the charge sheet as supporting evidence in case it is cited in the charge sheet. The delinquent is entitled to get the copy thereof.

9. The enquiry officer usually holds to determine the prima facie case in the formal departmental enquiry. It is very necessary that two should not be confused even where the punishing authority does not intend to take action by way of punishment against the Govt. servant on a complaint of bad work or misconduct, a preliminary enquiry is usually held to justify the punishing authority that the regular departmental enquiry should be initiated or not. The regular departmental enquiry as held thereafter, after framing of the charges by the punishing authority and to proceed further with the enquiry against the delinquent on the charges levelled against him.

10. In the case of **Nirmla Jhala Vs. State of Gujrat, 2013 (4) SCC, 301**. The Hon'ble Supreme Court has held that the preliminary enquiry has no relevance till it is made a part of the charge sheet as evidence against the delinquent. Before the Hon'ble Supreme Court, the matter came up for consideration that a witness cited in the preliminary enquiry before the vigilance officer, the enquiry officer placed a heavy reliance on the said statement without furnishing the copy of the enquiry report or copy of the statement. Then the question cropped up to consider in the case of Nirmla Jhala Vs. State of Gujrat (Supra) para 41 to 50 are quoted as under:

> *"41. In the aforesaid backdrop, we have to consider the most relevant issue involved in this case. Admittedly, the Enquiry Officer, the High Court on Administrative side as well on Judicial side, had placed a very heavy reliance on the statement made by Shri C.B. Gajjar, Advocate, Mr. G.G. Jani, complainant and that of Shri P.K. Pancholi, Advocate, in the preliminary inquiry before the Vigilance Officer. Therefore, the question does arise as to whether it was permissible for either of them to take into consideration their statements recorded in the preliminary inquiry, which had been held behind the back of the appellant, and for which she had no opportunity to cross-examine either of them.*

42. A Constitution Bench of this Court in Amlendu Ghosh v. District Traffic Superintendent, North-Eastern Railway, Katiyar, AIR 1960 SC 992, held that the purpose of holding a preliminary inquiry in respect of a particular alleged misconduct is only for the purpose of finding a particular fact and prima facie, to know as to whether the alleged misconduct has been committed and on the basis of the findings recorded in preliminary inquiry, no order of punishment can be passed. It may be used only to take a view as to whether a regular disciplinary proceeding against the delinquent is required to be held.

43. Similarly in Chiman Lal Shah v. Union of India, AIR 1964 SC 1854, a Constitution Bench of this Court while taking a similar view held that preliminary inquiry should not be confused with regular inquiry. The preliminary inquiry is not governed by the provisions of Article 311(2) of the Constitution of India. Preliminary inquiry may be held ex-parte, for it is merely for the satisfaction of the government though usually for the sake of fairness, an explanation may be sought from the government servant even at such an inquiry. But at that stage, he has no right to be heard as the inquiry is merely for the satisfaction of the government as to whether a regular inquiry must be held. The Court further held as under:

"12……There must, therefore, be no confusion between the two inquiries and it is only when the Government proceeds to hold a departmental enquiry for the purpose of inflicting on the government servant one of the three major punishment indicated in Article 311 that the government servant is entitled to the protection of that Article.

44. In Naryan Dattatraya Ramteerathakhar v. State of Maharashtra & Ors., , (1997)1 SCC 299, this Court dealt with the issue and held as under:

……..a preliminary inquiry has nothing to do with the enquiry conducted after issue of charge-sheet. The preliminary enquiry is only to find out whether disciplinary enquiry should be initiated against the delinquent. Once regular enquiry is held under the Rules, the preliminary enquiry loses its importance and, whether preliminary enquiry was held strictly in accordance with law or by observing principles of natural justice of nor, remains of no consequence.

45. In view of above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.

46. In Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & Ors., AIR 2013 SC 58, this Court while placing reliance upon a large number of earlier judgments held that cross-examination is an integral part of the principles of natural justice, and a statement recorded behind back of a person wherein the delinquent had no opportunity to cross- examine such persons, the same cannot be relied upon.

47. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry.

48. "A prima facie case, does not mean a case proved to the hilt, but a case which can be said to be established, if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.

49. The issue, as to whether in the instant case the material collected in preliminary enquiry could be used against the appellant, has to be considered by taking into account the facts and circumstances of the case. In the preliminary enquiry, the department placed reliance upon the statements made by the accused/complainant and Shri C.B. Gajjar, advocate. Shri C.B. Gajjar in his statement has given the same version as he has deposed in regular enquiry. Shri Gajjar did not utter a single word about the meeting with the appellant on 17.8.1993, as he had stated that he had asked the accused/complainant to pay Rs. 20,000/- as was agreed with by Shri P.K. Pancholi, advocate. Of course, Shri C.B. Gajjar, complainant, has definitely reiterated the stand he had taken in his complaint. The charge sheet served upon the appellant contained 12 charges. Only first charge related to the incident dated 17.8.1993 was in respect of the case of the complainant. The other charges related to various other civil and criminal cases. The same were for not deciding the application for interim reliefs etc.

50. The charge sheet was accompanied by the statement of imputation, list of witnesses and the list of documents. However, it did not say that so far as Charge No. 1 was concerned, the preliminary enquiry report or the evidence collected therein, would be used/relied upon against the appellant."

11. Now we have to consider that the petitioner has been awarded minor punishment as provided under Section 4(1) of the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991 (herein after referred as punishment Rules, 1991) as applicable in State of Uttarakhand or not. The procedure for awarding the punishment has been given under Section 5 read with Section 14. The Sub-Section 2 provides as under:

> *"(2) Notwithstanding anything contained in sub-rule (1) punishments in cases referred to in sub-rule (2) of Rule 5 may be imposed after informing the police officer in writing of the action proposed to be taken against him and of the imputations of act or omission on which it is proposed to be taken and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal."*.

12. Thus the procedure for imposing of minor penalty is very simple, if the punishing authority proposes to impose minor penalty against a delinquent, the Police Official should be informed in writing of the proposal to take action against him and the imputation of the misconduct or behavior on which it is proposed to be taken and he should be given a reasonable opportunity to make such representation as he may wish to make against the proposal. The preliminary enquiry may be held, if the disciplinary authority considers necessary before serving the proposed show cause notice to the delinquent. It is not necessary that in every case he will hold preliminary enquiry. Thereafter, the service of show cause notice shall be made upon the delinquent and the reply will be sought within stipulated period and the disciplinary authority will consider the representation submitted by the delinquent and the record of the enquiry, if any, and the record of finding on each imputations or misbehaviour and orders given reasons thereof. In the instant case, the show cause notice provides the imputations against the petitioner and the punishment has been proposed and thereafter, considering the representation of the petitioner, awarded punishment by the impugned

order. Thus, there was no necessity to give the copy of the preliminary report to the petitioner.

13. The main thrust was given upon the medical certificates, which have been submitted by the petitioner. Learned counsel for the petitioner pointed out that he submitted four medical certificates, which are as under:

i. 02.01.1999 to 1.02.1999 by Medical Officer I/C NPHC, Govindpuri, District Ghaziabad (UP),

ii. 2-2-1999 to 01.04.1999, by Medical Officer I/C NPHC, Govindpuri, District Ghaziabad (UP),

iii. 2-4-1999, by Medical Officer I/C NPHC, Govindpuri, District Ghaziabad (UP),

iv. 2-6-1999 to 30-06-1999, by Medical Officer I/C NPHC, Govindpuri, District Ghaziabad (UP),

Other medical certificates are also in the original file. Learned counsel for the parties could not demonstrate us as to whether any application was sent along with the medical certificates for leave or not. The main thrust of learned counsel for the petitioner was at para-11 of the judgment of the Tribunal. It is true that the judgment of the Tribunal reflects that the punishing authority has not considered the medical certificates, which have been submitted by the delinquent and had not been verified by him. The certificates, which have been submitted by the petitioner are of NPHC Hospital. Learned counsel for the petitioner admitted that this is not a State Govt. Hospital or Civil Hospital. Rule 382 provides as under:

> *"382. Under-officers and constables who fall ill when on duty or who are ill when due to return to duty, must apply for admission to the district police hospital or for treatment at the nearest dispensary, if the police hospital is out of easy reach. The fact of their admission or treatment must be reported to the local Superintendent of Police who unless they are his own subordinates will take immediate steps to communicate the fact to the Superintendent of Police whose subordinates they are. Officers of higher rank are not compelled to apply for admission to police*

hospitals, but are not relieved of the responsibility, while on leave of intimating their intension of obtaining medical certificate to the Superintendent of Police as prescribed above."

14. It is obligatory on the part of the petitioner that he was making treatment at Ghaziabad or so. The Police Hospital is also situated at Ghaziabad. He should have contacted the Civil Hospital or dispensary thereof in Ghaziabad and would have intimated the leave to the SSP, Ghaziabad. However, this procedure was not adopted by the petitioner. The Tribunal while making the observation in para 11, quashed the punishment only and did not quash the whole enquiry against the petitioner, it is reflected from the order of the Tribunal at para-12 quoted above. If the Tribunal would have exonerated the petitioner on the ground that the petitioner was not absent from duty, the petition would have been allowed and the entire proceedings should have been quashed. The Tribunal while discussing the point of punishment, held the factum that the certificates should be verified from the CMO. It is revealed from the Annexure-II of the claim petition got verified from the Hospital. The opinion of the CMO, Pauri is annexed at page-10, has opined as under:

"Opinion: As per old documentary evidence Sushil Kumar (candidate) was suffering from Low backache ark, radiating pain in lower limes. He might need so much duration for recovery his health."

The Additional S.P., Mr. Jaswant Singh has given its reasoning for not relying upon the medical certificates that the medical certificates reveal that the petitioner was suffering form sciatica and other alike pain. If he was suffering from alike pain, he should have joined at Pauri and thereafter, he could have made his treatment in the Civil Hospital, Pauri. Pauri is also Commissionery Headquarters, where the good civil hospital was available.

15. It will not out of place to mention that the petitioner had been working in a police department and he is a constable in Civil Police Constabulary. It is also an admitted fact that district Pauri is situated in hill terrain of the State and Saharanpur is situated in the plane area where all types of facilities are available. It has generally been seen that in State

of Uttarakhand, Govt. officials and Police Officers/officials avoid the postings in the hill terrain and they always want to remain in the plane districts of Uttarakhand. When the State of Uttarkahand carved out, Udham Singh Nagar, Hardwar and Dehradun were considered to be the whole plane areas districts and Nainital and Pauri were considered semi-hill districts because in Nainital district, Haldwani, Ramnagar and Kaladungi are situated in plane adjoining to Udham Singh Nagar. Most of the police personnel are confined to these districts, whereas the Pauri is concerned, there is only one Kotdwar the plain area Tehsil falls within the ambit of district Pauri. In this background while deciding the cases of the employees, we have come across such cases that the people who are transferred in the hill terrain districts from the plain area, they avoid the posting one or the other pretext. Whereas, a person who is posted in the hill terrain and is transferred to the plane area, he comes and joins immediately. It cannot be ruled out due to above tendency of the officials, the hill districts have no sufficient staff to resume the duties. We cannot overlook the fact that the petitioner is a constable and a part of the disciplined constabulary.

16. As we have pointed out that the petitioner is a member of uniformed force remaining absent from duties without any reasonable explanation, cannot be ignored and cannot be taken on a liberal side. We have seen whenever an action is taken, the usual plea taken, having been ill or some such false pretext on or some false medical certificate are produced in support of such plea. Had the matter not been a case of a Constable belonging to a civil Police remaining absent for few days, members of uniformed force cannot absent themselves on frivolous pleas having regard of the nature of duties enjoyed in these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the force. In such forces desertion is serious matter. The cases of this nature in whatever manner described, are case of desertion particularly when there is apprehension of the member of the force, being called upon to perform onerous duties in different terrain. We cannot take such matters lightly particularly it relates to a uniformed force of the State. A member of uniformed force,who overstays at leave or who absents himself for few

days, must be able to give a satisfactory explanation. In the instant case as we have pointed out earlier, the reply submitted after show cause notice more or less has admitted the misconduct. His unauthorized absence shows his indiscipline manner of leaving duties from the duty place. The Hon'ble Supreme Court had occasion to deal with such matter in case of **Union of India & others Vs. Ghulam Mohd. Bhat (2005)INSC 575** and held as under:-

> *"-This Court had occasion to deal with the cases of overstay by persons belonging to disciplined forces. In* ***State of U.P. v. Ashok Kumar Singh*** *[1995] INSC 654; (1996 (1) SCC 302) the employee was a police constable and it was held that an act of indiscipline by such a person needs to be dealt with sternly. It is for the employee concerned to show how that penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show as to how the punishment could be characterized as disproportionate and/or shocking. (See Mithilesh Singh v. Union of India and Ors. (2003 (3) SCC 309). It has been categorically held that in a given case the order of dismissal from service cannot be faulted. In the instant case the period is more than 300 days and that too without any justifiable reason. That being so the order of removal from service suffers from no infirmity. The High Court was not justified in interfering with the same. The order of the High Court is set aside. The appeal is allowed but under the circumstances there shall be no order as to costs."*

The Hon'ble Apex Court in **Government of India and Others Vs. George Philip 2013 SCC Pg. 1** has held as under:-

> *"In a case involving overstay of leave and absence from duty, granting six months time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organization. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same*"

In the case of **Chennai Metropolitan Water Supply & Sewerage Board Vs. T. T. Murali (2014) INSC 83** the Junior Engineer was

dismissed from the service on the ground that he remained absent for a long time without any sufficient cause. The said dismissal order was challenged before the High Court and the Hon'ble High Court held that the punishment awarded to the petitioner was too harsh and directed to reinstate the petitioner with continuity of service, but without backwages within a period of 4 weeks from the date of receipt of the order. Thereupon the matter came up before the Hon'ble Supreme Court in appeal. The Hon'ble Supreme Court set aside the judgment of the Hon'ble High Court and allowed the appeal and also held in Paragraphs 30,31, 32 & 33 as under:-

"After so stating the two-Judge Bench proceeded to say that one of the tests to be applied while dealing with the question of quantum of punishment is whether any reasonable employer would have imposed such punishment in like circumstances taking into consideration the major, magnitude and degree of misconduct and all other relevant circumstances after excluding irrelevant matters before imposing punishment. It is apt to note here that in the said case the respondent had remained unauthorisedly absent from duty for six months and admitted his guilt and explained the reasons for his absence by stating that he neither had any intention nor desire to disobey the order of superior authority or violated any of the rules or regulations but the reason was purely personal and beyond his control. Regard being had to the obtaining factual matrix, the Court interfered with the punishment on the ground of proportionality. The facts in the present case are quite different. As has been seen from the analysis made by the High Court, it has given emphasis on past misconduct of absence and first time desertion and thereafter proceeded to apply the doctrine of proportionality. The aforesaid approach is obviously incorrect. It is telltale that the respondent had remained absent for a considerable length of time. He had exhibited adamantine attitude in not responding to the communications from the employer while he was unauthorisedly absent. As it appears, he has chosen his way, possibly nurturing the idea that he can remain absent for any length of time, apply for grant of leave at any time and also knock at the doors of the court at his own will. Learned counsel for the respondent has endeavoured hard to impress upon us that he had not been a habitual absentee. We really fail to fathom the said submission when the respondent had remained absent for almost one year and seven months. The plea of absence of habitual absenteeism is absolutely unacceptable and, under the obtaining circumstances, does not commend acceptation. We are disposed to think that the respondent by remaining unauthorisedly absent for such a long period with inadequate reason had not only shown indiscipline but also made an attempt to get away with it. Such a conduct is not permissible and we are inclined to think that the High Court has erroneously placed reliance on the authorities where this Court had interfered with the punishment.

We have no shadow of doubt that the doctrine of proportionality does not get remotely attracted to such a case. The punishment is definitely not shockingly disproportionate.

> 31. Another aspect needs to be noted. The respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers in indiscipline in an organization. In this context, we may fruitfully quote a passage from Government of India and another v. George Philip[18]: - â€œIn a case involving overstay of leave and absence from duty, granting six monthsâ€™ time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organization. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same.
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> 32. We respectfully reiterate the said feeling and re-state with the hope that employees in any organization should adhere to discipline for not only achieving personal excellence but for collective good of an organization. When we say this, we may not be understood to have stated that the employers should be harsh to impose grave punishment on any misconduct. An amiable atmosphere in an organization develops the work culture and the employer and the employees are expected to remember the same as a precious value for systemic development.
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> 33. Judged on the anvil of the aforesaid premises, the irresistible conclusion is that the interference by the High Court with the punishment is totally unwarranted and unsustainable, and further the High Court was wholly unjustified in entertaining the writ petition after a lapse of four years. The result of aforesaid analysis would entail overturning the judgments and orders passed by the learned single Judge and the Division Bench of the High Court and, accordingly, we so do.''

The petitioner has been given a punishment of awarding censure entry in his character roll for such misconduct. The punishing authority has already taken a very lenient and convenient view in favour of the petitioner, though the petitioner was entitled to a higher punishment

17. After going through the entire record, the petitioner was found to be absent from duties without any sufficient cause with effect from 07.01.1999 to 16.02.1999. The petitioner was suspended on 16.2.1999 by S.P., Pauri. The petitioner has continuously wandered from Ghaziabad to Meerut after his relieving from Saharanpur. It is revealed from the medical certificates, which are on the original file. This shows that he had been taking rest in the said cities during the whole period. It cannot be

ruled out that if the petitioner was in a moving condition, he could have joined the duties for taking treatment in Pauri Hospital. Learned counsel for the petitioner could not demonstrate that he has alleged anywhere in the pleading or in any document he could not walk without help. In these circumstances, the S.P. Pauri has rightly punished the petitioner. The right of judicial review is very limited and this court is not sitting as a court of appeal against the order of the punishing authority and the court can only taken the manner in which the enquiry has been conducted. The S.P., Pauri has initiated the preliminary enquiry and thereafter, agreeing with his findings, issued a show cause notice and thereafter, he was punished by the S.P., Pauri. There is no procedural fault in the punishment order.

Now the question arises as to whether the petitioner is entitled the back wages or salary as claimed by him or not. After the punishment order passed by the S.P., Pauri and issued a show cause notice for withholding the salary for that period when he was dismissed to the date he was reinstated. The reply of the petitioner was considered and S.P., Pauri held that the petitioner is not liable to get the salary for the said period on the basis of 'no work no pay'. The petitioner has also claimed the wages/salary for the entire period by this petition.

18. Learned counsel for the petitioner relies upon the rule 54 of the Fundamental Rules, which reads as under:

> *"54-A(1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a court of Law and such Government servant is reinstated <u>without holding any further inquiry</u>, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule(2) or (3) subject to the directions, if any, of the court.*
>
> *[(2)(i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the court solely on the ground of non-compliance with the requirement of clause(1) or clause(2) of Article 311 of the Constitution , and where he is not exonerated on merits, and no further inquiry is proposed to be held, the Government servant shall, subject to the provisions of sub-rule (7) of Rule 54, be paid such amount not being the whole" of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the*

case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, subjected by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.]

(ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding dismissal removal or compulsory retirement, as the case may be, and the date of judgment of the court shall be regularized in accordance with the provisions contained in sub-rule(5) of Rule 54.

(3) If the dismissal removal compulsory retirement of a Government servant is set aside by the court on the merits of the case, the period intervening servant is set aside by the court on the merits of the case, the period intervening between the date of dismissal removal or compulsory retirement including the period of suspension preceding such dismissal, removal, or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purpose and he shall be paid of the full pay and allowances for the period, to which he would have been entitled, had he not been suspended, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

19. Perusal of the rule 54A (1) and 54(2) (i) are very clear. Rule-1 can only by invoked, where earlier order has been set aside by a court of law and he has been directed to be reinstated without holding any further enquiry and rule-2 also provides that if the dismissal, removal has been set aside on the ground of Article 311(1) and (2) of the Constitution and no further enquiry is to be proposed, the delinquent would get the whole salary for the said period. In the case in hand, the Tribunal set aside the order of punishment remitting the matter back to the disciplinary authority for taking appropriate action as expeditiously as possible not beyond a period of three months. Thus, it is apparent that the enquiry remained subsisting against the petitioner. Both the rules clearly emphasize that if the punishment order would have been set aside and there is no proposal for further enquiry then Fundamental Rule 54A would be applicable in that case. In this background, it would also be seen that the petitioner had been simply wandering in Ghaziabad and Meerut. As we have stated earlier, he has not visited even Pauri for a day. Learned counsel for the petitioner could not demonstrate either in the pleading or from the original file that he has ever visited Pauri during the

period when he remained out of service. In the case of **Raje Ram Singh Vs. State of U.P. and others, 2009 (2) U.D., 608**, a matter came up for consideration before the Hon'ble High Court in the case of suspension under F.R. 54(b). In that case, a police constable committed a crime under Section 332, 307 and 395 out of the State when he was on leave and he was arrested and suspended by the S.S.P, Dehradun. The petitioner in that case after giving the benefit of doubt was acquitted and the S.S.P. after issuing a show cause notice held up the remaining salary except the salary already paid during the period of suspension. The Hon'ble High Court in **Raje Ram Singh Vs. State of U.P. and others** (Supra) has held in para-5, as under:

> *"Before further discussions, this Court thinks it just and proper, to mention here that the release of salary for the period of suspension is governed by the Fundamental Rules applicable to the government servants. Under Fundamental Rule 54B, it is provided that when a government servant who has been suspended is reinstated the authority competent to order reinstatement shall make a specific order as to whether the pay and allowances to be paid to the government servant for the period of suspension ending with reinstatement or not and as to whether the period of suspension be treated spent on duty or not. In passing such order the principle which applies is that whether there was any justification for placing the employee under suspension or not. Normally, after a person is exonerated in the departmental inquiry, remaining part of salary of the period of suspension is directed to be paid. But in the present case, the Petitioner was posted at Dehradun. While he was on leave in his village in Moradabad, a first information report was lodged against him relating to offences punishable under Section 395, 332 and 307I.P.C., in which a charge sheet was also filed against him and he had to face a trial in the court. He appears to have been arrested. In the circumstance, it cannot be said that there was no justification to place him under suspension. It has come on the record that the Petitioner was acquitted by the court giving him benefit of reasonable doubt."*

We could lay our hands on other decisions referred by the Division Bench comprising of Mr. Justice M. Katju and Mrs. Justice Umeshwar Pandey, in the case of **Sharad Chandra Shukla Vs. State of U.P. & others, MANU/UP/0039/2004, 2004 2 AWC1055All, (2004)1UPLBEC768**, A matter came up before the Hon'ble Allahabad High Court in which the Block Development Officer of District Banaras was involved on certain financial irregularities in utilization of grant. A charge sheet was served upon him and thereafter, a supplementary charge

sheet was also served upon him. After going through the entire departmental proceedings, the petitioner was dismissed from service by the appointing authority. The said order was challenged before the Hon'ble Allahabad High Court. The Hon'ble High Court setting aside the dismissal, remitted back the matter to the disciplinary authority to pass a fresh order in accordance with law and in accordance with the observation made in the judgment and the Court also directed to the authorities to pass orders in respect of payment of pension and other retrial benefits to the petitioner as he has retired during this period. The SLP was preferred by the State Government, which was rejected by the Hon'ble Supreme Court. Pursuant to the judgment of Hon'ble High Court, the respondents were called upon to submit his explanation from the petitioner, passed the punishment order and simultaneously issued an order for the payment and no additional amount of suspension period payable to the petitioner. Later on, the State Govt. on the representation of the petitioner passed an order to pay certain amount, but no additional salary and allowances to the petitioner. The said order was again challenged and the order came before the Division Bench of Allahabad High Court and the Hon'ble High Court had an occasion to make the interpretation of Rule 54A also. The Hon'ble High Court held that the court did not exonerate of all the charges levelled against the petitioner and only remitted back the matter to the disciplinary authority to pass fresh order in the light of the observation made in the judgment. The petitioner was not exonerated, but awarded same punishment. During the said period, the petitioner remained suspended and he claimed the benefit of full salary under **Rule 54A (2) and Sub-rule-5 and Rule 54B of U.P. Fundamental Rules Part II to V**. We have already quoted two provisions of Rule 54A (1, 2 and 3) in the preceding paragraphs. Now we are reproducing Rule 54 B(5), which reads as under:

> *"54-B(5) In cases other than those failing under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules(8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in*

> *no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.*"

The Hon'ble High Court came to the conclusion after going through the entire facts under law of the case as under:

> *"11. In the aforesaid two sub-rules, it is provided that if a suspended Government servant would have been reinstated in the service who has retired on superannuation while under suspension, he shall be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled, had he not been suspended, as the competent authority may determine.*
>
> *13. The petitioner remained under suspension for a very long period, but after full enquiry he could not be exonerated and minor punishment has been awarded to him. If the respondents under the aforesaid sub-rules of the U.P. Fundamental Rules have decided that only 75% of the pay and allowances of that period of suspension would be payable to him, the same does not appear to be arbitrary and against any provisions of law or rules for the time being in force. The said order cannot be held to be illegal and based upon that if the impugned order Annexure-12 to the writ petition, rejecting the representation of the petitioner for payment of full salary and allowances, has been passed by the respondents. It also cannot be said violatlve to any statutory law or rules. Obviously the order dated 31.10.2001 in Annexure-12 cannot be challenged. The mere mention in the Government order dated 19.2.2001 vide Annexure-10 to the writ petition that the suspension period of the petitioner would be deemed to be his service period does not amount to be interpreted as a period spent on duty. This is simply for the purpose to show the continuity of his service. Even after passing of the order dated 21/24.11.1990 whereby he was dismissed from the service, if the suspension period has been treated as service period, that cannot be deemed to be the period spent on duty, as to entitle the petitioner for full salary. Since the petitioner, in the enquiry, has not been completely exonerated of the charges either by the Court or by the disciplinary authority, his suspension period under rules cannot be treated as period spent on duty."*

The Hon'ble High Court also held that the provisions of Rule 54A(2) is not applicable in the case of the petitioner. The petitioner is not entitled the salary on the said ground also.

20. The grant of back wages & salaries depends upon the case to case. There are very facets, which have to be considered. Some times, in a case of departmental enquiry, it depends upon the authorities to grant full back-wages/arrears of salary or 50% back-wages/arrears of salary or

less than 50% back wages/arrears of salary looking into the nature to the facts of each case. It is also well established that there is also a misconception that whenever reinstatement is directed "continuity of service" and "consequential benefits" should follow, as a matter of course. But this principle of automatic removal of the service or consequential benefits, is not fall out of the reinstatement of the employee. Whenever, courts or Tribunal direct reinstatement, the court should apply its judicial mind to the facts and circumstances to decide whether 'continuity of service' or 'consequential benefits' should also be directed. At the same time, the principle of 'No work No pay' cannot be accepted as a rule of thumb. There are exceptions whether courts have granted monetary benefits also. It is true that earlier there was a trite of law articulated in many decisions by the Hon'ble Supreme Court reflected the legal preposition that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, the Hon'ble Apex Court has shifted the legal propositions. The Hon'ble Apex Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. The **Hon'ble Supreme Court in the case of Uttaranchal Forest Development Corporation Vs. M.C. Joshi, 2007(9) SCC, 353** has held that relief reinstatement with full back wages were not being granted automatically only because it would be lawful to do so and even several factors have to be considered, few of them being as to whether appointment of the employee had been made in terms of the statue/rules and the delay in raising the dispute.

21. In the case of **Kendriya Vidyalaya Sangathan & another Vs. S.C.Sharma (2005) 2 Supreme Court Cases, 363**, the petitioner in the said case was a Principal of Kendriay Vidyalaya and his application for leave as well as permission to go abroad was rejected by the authorities on the ground that disciplinary proceedings were to be contemplated against him. Thereafter, the Principal did not report the duties, the departmental proceedings were initiated against him, his services were

terminated. Thereafter, he preferred a petition before the Central Administrative Tribunal and the Central Administrative Tribunal quashed the order of punishment and the Hon'ble High Court concurred with the view taken by the C.A.T. The Hon'ble High Court directed that back wages to be paid to the Principal from the date of dismissal. The Hon'ble High Court though held the Principal had neither pleaded nor placed any material that he was not gainfully employed, back wages cannot be denied because it was not necessary to place any material as payment of back wages was natural and consequential corollary whenever a termination is set aside. In this matter, a question regarding to a direction for payment of back wages from the date of his termination to the reinstatement came before the Hon'ble Apex Court. Hon'ble Apex Court came to the conclusion that the petitioner was not entitled to full back wages because the reinstatement is not the natural consequences of the reinstatement and set aside the order of the Hon'ble High Court to the extent allowing the full salary during the termination period. The Hon'ble Apex Court has held as under:

> *"13. The residual question relates to direction for back wages.*
>
> *14. In P.G.I. of Medical Education and Research Vs. Raj Kumar this court found fault with the High Court in setting aside the award of Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus (SCC p. 57, para 9)*
>
> *"9. The Labour Court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect."*
>
> *Again at para 12, this court observed: (SCC p. 58)*
>
> *"12. Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety."*
>
> *15. The position was reiterated in Hindustan Motors Ltd. V. Tapan Kumar Bhattacharya, Indian Rly. Construction Co. Ltd. V. Ajay Kumar and M.P. SEB Vs. Jarina Bee.*

> *16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.*"

22. Now it is well settled that both the principles either of the payment of salary or back wages are concerned from the date of termination to the date of reinstatement or 'No work No pay' are not absolute principles or they cannot be accepted as a rule of thump and each case has to be examined in its entirety. The above Kendriya Vidyalaya case (Supra) has been considered by the Hon'ble Apex Court upholding the above principle of law in **Metropolitan Transport Corporation Vs. V.Venkatesan, 2009(5) SLR, 775**.

23. When the question of determining the entitlement of a person to back wages or arrears of salary is concerned, the employee has to show that he was not gainfully employed during such period. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the petitioner's counsel could not demonstrate that he had pleaded & placed any materials in this regard. The above proposition of law has been laid down in G.M. Haryana Roadways Vs. Rudhan Singh. The above judgment has been considered and affirmed by the **Hon'ble Apex Court in Metropolitan Transport Corporation's case.** The Hon'ble Apex Court has held as under:

> *45 . The Court, therefore, emphasized that while granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence."*
>
> *8. In the case of J.K. Synthetics Ltd. V. K.P.Agarwal and Another, (2007) 2 SCC 433: [2007(2) SLR 42(SC)] while dealing with the question whether an employee is entitled to back wages from the date of termination to the date of reinstatement when the punishment of dismissal is substituted by a lesser punishment (stoppage of increments for two years), this Court held:*

"15. But the manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement."

We may refer to the latest of a series of decisions on this question. In U.P. State Brassre Corpn.Ltd. v. Uday Narain Pandey (Supra), this Court following Allabahad Jal Sansthan V Daya Shankar Rai, (2005) 5 SCC 124 and Kendriya Vidyalaya Sangathan V.S.C.Sharma, (2005) 2 SCC 363: [2005 (2) SLR 1(SC)] held as follows: (Uday Narain Pandey case, SCC P. 480d-g)

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

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

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

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

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

In U.P. State Brassware Corp. Ltd. this court observed: (SCC p. 495, para 61)

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

17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" t a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever, courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. We may in this behalf refer to the decisions of this Court in ***A.P.SRTC Vs. Rarasagoud, (2003)2 SCC 212, Shyam Bihari Lal Gupta, (2005)7 SCC 406****.*

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

9. In J.K. Synthetics Ltd.2, the Court extensively considered U.P. State Brassware Corporation 1 and G.M.Haryana Roadways V. Rudhan Singh (Supra). Pertinently, it has been held that any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages in addition to several other factors."

24. In the instant case, the learned counsel for the petitioner could not demonstrate us from the record that the petitioner has pleaded that he had not been employed anywhere from the date of the dismissal to

the date of reinstatement and any other material in this regard from the record. According to the above settled position of law, if the petitioner did not plead this fact, it cannot be held that he is entitled full wages or the salary as claimed. On the other hand, the petitioners' pleading clearly indicates that he is entitled for his salary and other service benefits on the ground that his reinstatement only. Thus, as we have held above, it is not an automatic right to get the salary on the reinstatement.

25. In the backdrop of the above principle initiated by Hon'ble Supreme Court, we have to see whether he completes the parameters for getting the salary for the period he has claimed. The petitioner had been appointed in the police constabulary and he had been serving in the State of U.P. and thereafter, was sent to the State of Uttarakhand

26. The Hon'ble Apex Court in the **Metropolitan Transport Corporation's case (Supra)** as under:

> *In **G.M. Haryana Raodways Vs. Rudan Singh, (2005…5 SCC 591: [2005(5) SLR 51(SC)]** this Court observed: (SCC p. 596, para 8)*
>
> *"8. There is no rule of thump that in every case where the Industrial Tribunal give a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy on inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he maybe awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, whether the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important fact, which requires to be taken into consideration, is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year. "*

27. The parameter which have been indicated in the aforesaid judgment, does not favour the petitioner and if the petitioner's case is considered on the above parameter, the petitioner is not entitled to get any back wages with salary from the employer.

28. After awarding minor punishment to the petitioner, the S.P., Pauri passed an order under Rule 54 B (Clause 5 of U.P. Fundamental Rules II to IV) provides that the appointing authority in the case other than those falling under sub-rules (2) & (3), the Government servant would be subject to the provisions of sub Rule (8) & (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled and had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, passed the order. The punishing authority after considering the entire scenario of the matter passed the order that the petitioner would be deprived of his wages except the amount which has been paid to him as the suspension allowance. Thus, the order of S.P., Pauri was well within his jurisdiction. Whereas the order, which has been passed by the S.P., Pauri regarding no back wages and salary from the period of dismissal to the period of reinstatement is concerned, the petitioner could not show before the Court any material or evidence that he had not been employed anywhere or he had not earned any money during the said period. The burden of proof of this fact was also on the petitioner. Ld. Counsel for the petitioner could not demonstrate the above fact before us during the course of arguments. In the absence of such material, the Court would presume that the petitioner is not entitled to get the entire salary during the aforesaid period. In view of the above the order of the punishing authority was well within his jurisdiction and it is not liable to be judicially reviewed on any ground.

29. A question arose as to whether the period of absence of the appellant has not been regularized by the punishing authority after awarding the punishment, the charge of unauthorized absence would still hold good or not. It is no doubt that the S.P. had passed an order after

awarding the punishment that the petitioner's absence could be treated on leave without pay. It is settled law that such period, if regularized by the authority after awarding the punishment, it is passed for maintaining a correct record of the service of the delinquent officer. The Hon'ble Apex Court in Para 10, 11, and 12 in **Om Prakash Vs. State of Punjab & others (2011) 14 SCC 682** has held as under:

> *"10. The next contention that is raised is that the period of absence of the Appellant having been regularised, the aforesaid charge of unauthorised absence would fall through and, therefore, the order of punishment is required to be set aside and quashed. We are unable to accept the aforesaid contention as period of the unauthorised absence was not condoned by the authority but the same was simply shown as regularised for the purpose of maintaining a correct record.*
>
> *11. A similar issue came to be raised in this Court several times. In the case of **State** of M.P. v. Harihar Gopal 1969 SLR 274 (SC), this Court noticed that the delinquent officer in failing to report for duty and remaining absent without obtaining leave had acted in a manner irresponsibly and unjustifiedly; that, on the finding of the enquiry officer, the charge was proved that he remained absent without obtaining leave in advance; that the order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service and adjustment of leave due to the delinquent officer and for regularising his absence from duty. This Court in the said decision held that it could not be accepted that the authority after terminating the employment of the delinquent officer intended to pass an order invalidating that earlier order by sanctioning leave so that he was to be deemed not to have remained absent from duty without leave duly granted.*
>
> *12. Our attention is also drawn to the decision of this Court in Maan Singh v. Union of India and Ors. : 2003 (3) SCC 464 wherein a similar situation and proposition has been reiterated by this Court. There are a number of decisions of this Court where it has been held that if the departmental authorities, after passing the order of punishment, passes an order for maintaining a correct record of the service of the delinquent officer and also for adjustment of leave due to the delinquent officer, the said action cannot be treated as an action condoning the lapse and the misconduct of the delinquent officer."*

30. Prior to above judgment, the Hon'ble Apex Court **in the State of U.P. & others Vs. Mahadev Prasad Sharma** on 10.1.2011, bench comprising of Hon'ble Mr. Justice P. Sathasivam & Hon'ble Mr. Justice B.S.Chauhan in para 11 has held as under *:*

> *"*In the case of State of Punjab & Ors. Vs. Bakshish Singh, AIR 1999 SC 2626=(1998) 8 SCC 222**, t***his court has dealt with a case wherein the Trial Court as well as the First Appellate Court and the High Court had taken the view that in case unauthorized absence from duty had been regularized by treating the period of absence as leave without pay, the charge of misconduct did not survive. However, without examining the correctness of the said legal proposition, this court allowed the appeal on other issues. As the said judgment gave an impression that this Court had laid down the law that once unauthorized absence has been regularized, the misconduct would not survive. The matter was referred to the larger bench in Mann Singh's case (Supra) wherein this Court clarified that the earlier judgment in Bakshish Singh (Supra) did not affirm the said legal proposition and after following the judgment of this court in State of M.P. V. Hari Har Gopal & amp; Ors., (1969) 3 SLR 274 (SC) disposed of the case clarifying that this court in Bakshish Singh (Supra) dealt with only on the issue of remand by the High Court as well as by the Ist Appellate Court to the punishing authority for imposing the fresh punishment*. This court held as under:
>
> *Bakshish Singh's case is not an authority for the proposition f that the order terminating the employment cannot be sustained inasmuch as in the later part of the same order the Disciplinary authority also regularized unauthorized absence from duty by granting an employee leave without pay.*"

31. In view of the above, we found no merit in the proposition raised that the petitioner's absence has been regularized, so his absence has been condoned and he cannot be punished.

32. In view of the above, we do not find any force in the petition and is devoid of merit and liable to be dismissed.

ORDER

The claim petition is hereby dismissed. The petitioner is not entitled to any back wages or salary except which has been granted by the competent authority for the suspension period. The parties shall bear their own costs.

Sd/- Sd/-

D.K.KOTIA **JUSTICE J.C.S. RAWAT**
VICE CHAIRMAN (A) CHAIRMAN

DATED: AUGUST 08, 2014
DEHRADUN

KNP