

Neutral Citation No. - 2023:AHC:223892

RESERVED

Court No. - 5

(1) Case :- WRIT - C No. - 39334 of 2022

Petitioner :- Nagar Nigam, Kanpur

Respondent :- Sri Mohammad Sagir And Another

Counsel for Petitioner :- Yashwant Singh

Counsel for Respondent :- C.S.C., Sanjai Singh

With

(2) Case :- WRIT - C No. - 39381 of 2022

Petitioner :- Nagar Nigam Kanpur

Respondent :- Nisar Ahmad And 2 Others

Counsel for Petitioner :- Yashwant Singh

Counsel for Respondent :- CSC, Sanjai Singh

and

(3) Case :- WRIT - C No. - 39979 of 2022

Petitioner :- Nagar Nigam

Respondent :- Presiding Officer, Labour Court And Another

Counsel for Petitioner :- Yashwant Singh

Counsel for Respondent :- C.S.C, Sanjai Singh

HON'BLE PIYUSH AGRAWAL, J.

1. Heard Shri M.C. Chaturvedi, learned Senior Advocate, assisted by Shri Yashwant Singh, learned counsel for the petitioners and Shri Sanjeev Singh & Shri Sanjai Singh, learned counsel for the private respondents.
2. Since the issue involved in the connected writ petitions are similar, therefore, the same are being decided by the common order. WRIT - C No. - 39334 of 2022 is taken as a leading case for deciding the controversy involved in all the matters.

WRIT - C No. - 39334 of 2022

3. The instant writ petition has been filed challenging the impugned award dated 28.04.2022 (published on 08.07.2022) passed by the respondent no. 2 allowing the claim of the respondent no. 1 and directing the petitioner to reinstate the workman – respondent no. 1 in service.

4. Learned Senior Counsel submits that as per the need and exigencies of work or in temporary arrangement or in leave vacancy of permanent Switchman, the respondent no. 1 has been engaged from time to time in road light department not for more than 10 days in a month, which would not mean that the respondent no. 1 became regular employee as the respondent no. 1 never worked for 240 days in a calendar year. He further submits that the respondent no. 1 cannot be treated as an employee of the petitioner and therefore, he cannot claim relationship of employee and employer with the petitioner. He further submits that the respondent no. 1 does not come under the definition of 'workman' as per section 2(z) of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as '**the Act**'). He further submits that the engagement of respondent no. 1 was not as per the provisions of the U.P. Nagar Sewa Niyamawali, 1962. He further submits that the in his written statement, the respondent no. 1 has stated that he neither got any appointment letter, nor got any interview letter, but the respondent no. 2 has failed to considered the said aspect of the matter while passing the impugned award. He further submits that in the impugned award although the respondent no. 2 has observed that the respondent no. 1 accepted that his work was taken as and when required for some time, but has directed to reinstate the respondent no. 1 in service. He further submits that the respondent no. 2 has erred in shifting the burden of proof upon the petitioner regarding the working days of the respondent no. 1. He further submits that the respondent no. 1 has not filed any document or material which proves that after 2006, he has not worked anywhere, but the respondent no. 2 has failed to consider the same and passed the impugned award. He further submits that the respondent no. 2 has failed to consider the written statement of the petitioner as well as other evidence produced by the petitioner while passing the impugned award. In support of his submissions, he has placed reliance upon judgements of the Apex Court in

Municipal Corporation, Faridabad Vs. Siri Niwas [2004 (0) AIR (SC) 4681], *Rajasthan State Ganganagar S. Mills Limited Vs. State of Rajasthan & Another* [2004 Supreme (Raj.) 856] and *The Superintending Engineer TWAD Board & Another Vs. M. Natesan Etc.* [2019 (0) Supreme (SC) 576] as well as this Hon'ble Court in *State of U.P. & Another Vs. Rajesh Kumar Awasthi & Another* [2020 (2) ADJ 126] and *The Joint Director Agriculture Extension & Others Vs. Sri Chhote Lal* [2023 (0) Supreme (All.) 351].

5. Per contra, learned counsel for the respondent supports the award and submits that the respondent no. 1 was the regular employee of the petitioner and served more than 14 years and payments were being made to him. He further submits that the court below has considered each and every issue while passing the impugned award. In support of his submissions, he has placed reliance on the judgements of the Apex Court in *Bank of Baroda Vs. Ghemarbai Harjibhai Rabari* [2005 (2) Supreme 628], *Allahabad Bank & Others Vs. Avtar Bhushan Bhartiya* [2022 (0) Supreme (SC) 374] as well as of this Court in *Smt. Vidya Rawat Vs. State of U.P. & Others* [Writ C No. 11692 of 2007, decided on 08.08.2023] and *Umesh Chandra Yadav Vs. State of U.P. & Others* [Special Appeal No. 96/2018, decided on 23.09.2022].
6. After hearing learned counsel for the parties, the Court has perused the record.
7. Admittedly, the respondent no. 1 was engaged as switchman on temporary arrangement from time to time in the road light department. The record reveals that the respondent no. 1 has not adduced any evidence in support of his claim that he has worked for more than 240 days in a calendar year with the petitioner. The respondent no. 1 relied upon some payment slips, which show that the payment has been made for 10 days only. While passing the

impugned award, no such finding has been recorded. The Apex Court in the case of ***The Superintending Engineer TWAD Board*** (supra) has held as under:-

9. In the judgment passed in the writ petition, the learned Single Judge has pointed out that the respondents-workmen have not produced any documents to prove that they have worked continuously for 240 days. For temporary worker like NMR respondents, it is mandatory to show that they have continuously worked for 240 days in a year. This aspect, in our view, ought to have been taken note by the Division Bench before affirming the order of reinstatement of the respondents. In the impugned judgment, the Division Bench has observed that the attendance register, salary certificates and other relevant documents were in the possession of the appellant-Board and the same were not marked as documents. It is to be pointed out that the initial burden is upon the respondents-workmen to adduce evidence showing that they have worked continuously for 240 days. Only when the initial burden is discharged by the respondents-workmen, the burden can be shifted upon the appellant-Board. Both the Single Judge as well as the Division Bench were not right in placing the burden upon the appellant-Board to prove that the respondents-workmen had not worked continuously for 240 days in a year. However, in the peculiar facts and circumstances of the case, we are not inclined to go into this question any further. The reason being that most of the respondents have attained the age of superannuation therefore, there is no question of reinstatement.

8. Further, in this Apex Court in ***Rajasthan State Ganganagar S. Mills Limited*** (supra) has held as under:-

6. It was the case of the workman that he had worked for more than 240 days in the concerned year. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in *Range Forest Officer Vs. S.T. Hadimani* (2002 (3) SCC 25). No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a

particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. Even if that period is taken into account with the period as stated in the affidavit filed by the employer the requirement prima facie does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15 = days in November 1991, 15= days in January 1992, 24 days in February 1992, 20= days in March 1992, 25 days in April 1992, 25 days in May 1992, 7= days in June 1992 and 5= days in July 1992. The Labour Court demanded production of muster roll for a period of 17.6.1991 to 12.11.1991. It included this period for which the muster roll was not produced and come to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable.

9. This Court in **Rajesh Kumar Awasthi** (supra) has held as under:-

15. Moreover, in the impugned award, there is no clear cut finding that respondent No.1 had worked for 240 days in twelve calendar months preceding the termination of his service. The Tribunal had merely observed that there is evidence to show that respondent No.1 had worked as daily wager continuously between November 1985 to 31.5.1990. The Tribunal thereafter referred to Section 6-N and then jumped to the conclusion that there is violation of the said provision. On this ground also the impugned award cannot be sustained in law.

16. In consequence and as a result of discussion made above, the impugned award dated 21.9.2016 is quashed. The petition is allowed. However, in case any payment has already been made to respondent No.1 in pursuance of interim order of this Court, it shall not be recovered.

10. Once no finding of fact is recorded after due perusal of the evidence on record, the impugned award cannot be sustained. Further, for granting compensation, without recording that the respondent no. 1 was not gainfully employed after his removal from service, the same cannot be granted. This Court in **Sri Chhote Lal** (supra) has held as under:-

24. Learned Standing Counsel for the petitioners has argued that the Labour Court, in the impugned award, has not recorded any finding that the respondent workman was not gainfully employed during the aforesaid period of 11 years

and, therefore, direction for reinstatement with other relief, is contrary to law.

42. Further, The Supreme Court in several authorities some of which are mentioned below has held that if the only defect in the termination order is non payment of retrenchment compensation as required by Section 25 F of Industrial Dispute Act (or Section 6 N of U.P.I.D. Act) then it is not always necessary to direct reinstatement with full back wages and that in such situation more often than not proper relief may be to award consolidated damages/compensation particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment.

- Nagar Mahapalika v. State of U.P., AIR 2006 SC 2113

- Haryana State Electronics Devpt Corpn v. Mamni, AIR 2006 SC 2427

- Sita Ram v. Moti Lal Nehru Farmers Training Institute, AIR 2008 SC 1955

- Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another, AIR 2009 SC 3004

45. Keeping in view the law laid down in the aforesaid authorities as well as the undisputed factual position that reference was made at a very belated stage of 10-11 years after the termination and there being no finding by the Labour Court in the impugned award as to whether the respondent was or was not gainfully employed during the intervening period or thereafter, I find that the reinstatement with 25% back-wages along with continuity in past service was not justified.

- 11.** In view of the aforesaid facts & circumstances of the case as well as the law laid down by the Apex Court aTherefore, the judgements relied upon by the learned counsel for the respondent no. 1 will be of no help to him. nd this Court, referred to above, the impugned awards passed by the Presiding Officer, Labour Court (IV), U.P., Kanpur in all the three writ petitions cannot be sustained in the eyes of law. The same are hereby quashed.
- 12.** Consequently, the consequential recovery proceedings pursuant to the impugned awards are also hereby quashed.
- 13.** The writ petitions succeeds and are allowed.

Order Date :-28/11/2023

Amit Mishra