

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.12463 of 2000

Date of Decision: 26.08.2015

State of Punjab and another

... Petitioners

Versus

Presiding Officer, Labour Court,
Jalandhar and another

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Ashish Sharma, Addl. AG, Punjab.

Mr. Surinder Kapoor, Advocate,
for R-2.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? Yes.

RAJIV NARAIN RAINA, J.

1. Heard Mr. Ashish Sharma, Addl. AG, Punjab and Mr. Surinder Kapoor, learned counsel appearing for Respondent-2 at considerable length and examined various issues in the light of past precedents and the judicial pendulum oscillating since September 9, 1978 when a markedly socialist three Judge Bench consisting of the triumvirate of Hon'ble Justices D.A. Desai, V.K.Krishna Iyer and O.Chinnapa Reddy declaring the law in **Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd.**, (1979) 2 SCC 80: AIR 1979 SC 75 on the legal effect of breach of the provisions of Section 25-F of the Industrial Disputes Act, 1947. The Full Bench of this Court in **Hari Palace, Ambala City vs. The Presiding Officer, Labour Court & another**, ILR 1979 (P&H) 243 applying the law

laid down in **Hindustan Tin Works** for the first time in our High Court on April 2, 1979 speaking through S.S.Sandhawalia, J. introducing the logical derivative from the ratio in *Hindustan Tin Works* that reinstatement to service would follow “unless there are reasons necessitating departure”. The principle was based on the well accepted legal position that when termination of service was brought about by an order passed by the employer or cessation was oral was set aside by court the person had to be put back to the position on the date of termination as though the illegal termination never took place with relief coming by Court creating a fiction of continuity of service. In the departure principle from the ordinary rule of reinstatement were born thousands of decisions in the Supreme Court and in the various High Courts including this Court where compensation in lieu of reinstatement became the order of the day since judicial trends were markedly in favour of denying reinstatement to “retrenched” workmen and considering cases in the light of awarding compensation in lieu of reinstatement since reinstatement was not to be conferred automatically. In this chain of precedents the judicial dilemma became the unruly horse of how much compensation was thought adequate and reasonable in a given case. This was virtually impossible to foretell for both the Bar and the Bench and almost everything depended on Court to Court applying mostly the rule of thumb. The dilemma could only be resolved on various factors and often justifiably so on the yardstick of the number of years of service rendered making the position even more precarious since 240 days of service in the calendar year preceding the cessation was by definition continuous service within the meaning of Section 25-B of the Act. Courts

felt 240 days was too brief for awarding reinstatement compounded by many years of litigation declaring rights in labour courts and the time spent thereafter in further remedies. The courts have continued to struggle in despair looking for the golden mean from case to case. In this trend the mandatory nature of Section 25-F of the Act was emasculated to a point beyond recognition and the social value of the provision in a beneficial piece of legislation became more and more a corporate view expounded in a poor country. The tectonic plates shifted sharply in case **Harjinder Singh vs. Punjab State Warehousing Corporation**, (2010) 3 SCC 192 where the Supreme Court sounded the pealing bell observing at the end of the judgment the following words: “At this critical juncture the judges' duty, to my mind, is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization.” The Supreme Court quoted the lament in Tagore's immortal words:-

“We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, humbled by our own helplessness and overwhelmed by the speed. We agreed to acknowledge that this chariot-drive was progress, and the progress was civilization. If we ever ventured to ask "progress toward what, and progress for whom", it was considered to be peculiarly and ridiculously oriental to entertain such ideas about the absoluteness of progress. Of late, a voice has come to us to take count not only of the scientific perfection of the chariot but of the depth of the ditches lying in its path.”

2. In **Harjinder Singh** the Supreme Court speaking through G.S.Singhvi, J. again lamented on distortion of labour laws and the role of Judges [but in the context of Judges of the Supreme Court], and thus

inversely the High Court, that “[Judges]...of the Court are not mere phonographic recorders but are empirical social scientists and the interpreters of the social context in which they work.” Their Lordships quoted the words of Krishna Iyer, J. in the context of land reform laws in **Authorized Officer, Thanjavur and another v. S. Naganatha Ayyar**, (1979) 3 SCC 466: "the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme." To add to this one may remember the words in **M. Nagaraj v. Union of India** (2006) 8 SCC 212 spoken in the context of the work of judges do in the constitutional scheme:- “Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities, and because of the good sense of the Judges when interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance”. What is true to constitutional law is not untrue while interpreting statutory laws that have social content addressed to basic rights of man.

3. In **Harjinder Singh** these important observations came which have set the tone and tenor for the future by restoring the past judicial thinking:-

“23. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the

present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private.”

The Facts:

4. This writ petition has been filed by the State of Punjab in the Department of Technical Education and Industrial Training, Punjab, Chandigarh in challenge to the award dated February 22, 2000 passed by the Presiding Officer, Labour Court, Jalandhar in Industrial Reference No. 178 of 1998.

5. The Labour Court has set aside the order of termination dated June 06, 1997 and has awarded reinstatement with continuity of service and has granted full back wages. The award was stayed by an interim order of

this court and the respondent has been in receipt of last drawn wages under Section 17-B of the Industrial Disputes Act, 1947 (for short “the Act”) till presently. A clear finding has been returned by the court *a quo* after appreciating the evidence produced on record that the respondent-2 had put in 240 days of continuous service preceding the 12 calendar months prior to the date of termination and the termination itself was brought about flagrant violation of the mandatory provisions of Section 25-F of the Act which are conditions precedent to retrenchment. This was done when neither notice was served on the worker nor one month's wages in lieu of notice period were paid nor retrenchment compensation was made over to her at the time of termination. It may be recorded that during the period of service the respondent-2 had served on 89 days basis with the condition that she could be replaced by a regular candidate reporting for duty against the post on which the respondent-2 was appointed. She was not replaced but was simply turned away. The unfairness of appointments made by government and its agencies engaging workers on 89 days basis has been castigated by this court more than once holding that appointment for 89 days is an unfair labour practice and the mode adopted by Government is only to circumvent the provisions of The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959.

6. Be that as it may, the three jurisdictional facts are satisfied in this case with respect to the respondent falling in the category of “workman” since a clerk falls in the definition in Section 2 (s) of the Act; she having completed continuous service of a year within the meaning of Section 25-B and the employer qualifying as an “industry” and the dispute

between the parties covered by Section 2 (oo) read with Section 2A of the Act. The Full Bench of this court in **Hari Palace, Ambala City** case (supra) has commended the view three decades and six years ago, which holds the field, that when termination is brought about illegally by violating the mandatory procedure of the industrial law in the Act then the person is to be put back in the same position he occupied but for the illegal termination and in such a case a workman would be entitled to reinstatement with full back wages unless there are reasons necessitating departure. It is for the employer to plead and proof reasons which might persuade the court to depart from the normal rule. In the present case, it cannot be said that during the period of forced idleness the worker has served elsewhere since the interim order of this court grants her basic pay during the pendency of this petition as an interim measure.

7. The Full Bench judgment in *Hari Palace* (Supra) has been approved by the Supreme Court in a spate of recent decisions in **Harjinder Singh** (supra), **Anoop Sharma vs. Executive Engineer, Public Health Division No.1, Panipat (Haryana)**, 2010 (3) SLR 663, **Devinder Singh vs. Municipal Council, Sanaur**, (2011) 6 SCC 584 & **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others**, (2013) 10 SCC 324 and the legal position has been restored back to the position of the dicta in the three Judge Bench in **Hindustan Tin Works** (supra) in **Devinder Singh** case (Supra). In **Surwase** case the Supreme Court indicated the guidelines to be followed as are culled out in para. 33 of the report which read:-

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

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

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

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

iv) xxx [not relevant to present context]

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a

possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in [Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited](#) (supra).

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

8. This is how the life of **Hindustan Tin Works** has been brought out of the intensive care unit and restored to its pristine glory in beneficial social legislation cast in public policy. The tide has been turned. It will no longer be fashionable to tilt the balance back and it becomes the bounden duty of the court to take the ideas forward with care and caution avoiding the many pitfalls on the way by measuring relief to be granted. The balance has to be maintained in a just and equitable manner so the rights of the proletariat and capital are kept even, neither overshadowing the other.

9. Recently, the Supreme Court in **Jasmer Singh v. State of Haryana**, (2015) 4 SCC 458 has continued with the winds of change approving an award of the Labour Court by setting aside the decision of this Court and upholding an awarding reinstatement and full back wages in a case of employment of only 240 days of service rendered with the employer who breached Section 25-F of the Act. It is not that reinstatement and back wages follow automatically. There is sufficient body of law for that proposition but in the confines of jurisdiction under Article 226 of the Constitution of India while reviewing the award of the Labour Court which has exercised its judicial discretion fairly and properly to award reinstatement with continuity of service and full back wages howsoever brief the tenure which was illegally truncated it would hardly be justified for this court in proceedings under Art. 226 to take a different view, unless the view is wholly irrational, perverse and suffers from a fundamental flaw of reasoning in law and in fact. While exercising jurisdiction the Court remains informed by the principles of interference in awards of Tribunal indicated by the Supreme Court in **Syed Yakoob v. K.S.Radhakrishnan**, AIR 1964

SC 477 which is the lighthouse guiding the subject matter.

10. Mr. Ashish Sharma, learned Addl. AG, Punjab argues that reinstatement should not mean that the respondent should be treated as a regular worker. It is not the scope of the inquiry presently as to the rights of the respondent-2 to regularization in case the writ fails. However, grant of continuity of service by the Labour Court is affirmed and that would take the respondent-2 back to the date of appointment i.e. February 26, 1996 with continuity and in case her case falls in one of then extant policies of regularization of the State Government by virtue of continuity of service awarded by the labour court then her claim deserves to be considered in terms of earlier prevailing policies, failing which the immediately next, which may apply to her case subject to eligibility. But the legal fiction of continuity created by court will remain as though she had always served throughout the intervening period. The Full Bench dicta of this Court in **Radha Ram v. Municipal Committee, Barnala**; 1983 PLR 21 is a durable ruling in point as to rights flowing from reinstatement. The Full Bench held that once the relief of setting aside or quashing the order of termination has been granted it necessarily follows that the employee in the eye of law continues to be in service and as a necessary consequence thereof would be entitled to all the emoluments flowing from declaration of that status. He must be deemed to be in a position identical with that existing prior to the passing of the order of termination of his service. The emoluments of the post are a logical consequence of setting aside the order of termination.

11. It is the last contention of the learned State counsel that liberty granted to the Department to retrench the services of the respondent-2

authorizes the State to again dispense with her services after by adopting the procedure laid down by Section 25-F of the Act. This liberty is always available to all employers but the employer in the present case is a State-Department which should not be seen in abusing its power to appoint or dismiss as it must at all times act in a fair and just manner as is expected of it as a model employer for other employers to emulate and follow. I would not read such perverse power flowing from the last sentence of the award. The same is therefore pruned and trimmed by constitutional values and boundaries in reasonableness, fairness-in-action, and non-discriminatory actions. The purpose of creating a right to continuity of service would be defeated if the interpretation placed by the learned State counsel is accepted to grant the State a carte blanche of doing as it pleases because the Court order may not be to its liking, if it is not, remedy of appeal lies. The State Government may have forgotten but the Court has seen the respondent-2 in Court during the hearing of the case that she walks on crutches.

12. Mostly for these reasons recorded above, the petition stands dismissed. The award is upheld except the liberty granted in its last sentence because it is not the business of the labour court to remind the State on the remedies it may have in avoidance of court orders by circumventing them anyhow and defeat the labour court and presently the writ directions. The award be implemented forthwith.

13. Since the respondent -2 is a differently abled person, the State is directed to consider adjusting her against a post earmarked or lying vacant in terms of policies promulgated by the Punjab Government in making compliances of the beneficial provisions of **The Persons with**

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) either in the parent department or in any other department subject to requirements of qualifications and eligibility prescribed under the rules. It is also clarified that back wages awarded would be computed by adjusting the basic pay disbursed under the interim orders of this Court and accordingly the difference be worked out and paid to the respondent-2 within three months from the date of receipt of a certified copy of this order. No costs.

(RAJIV NARAIN RAINA)
JUDGE

26.08.2015
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