

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No.22246 of 2012

Date of decision: 27.11.2015

Sudha Rani

... Petitioner

Versus

The Presiding Officer and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mrs.Abha Rathore, Advocate,
for the petitioner.

Mr.Rakesh Gupta, Advocate,
for respondent No.2.

Mr.Gaurav Goyal, AAG., Haryana.

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

RAJIV NARAIN RAINA, J.

1. On February 19, 2013, this Court put the respondents to notice on the submission of Mrs.Abha Rathore appearing for the petitioner-worker that this case is covered by the ratio of the judgment in cases **Bhiku Ram v. the Presiding Officer, Industrial Tribunal-cum-Labour Court, Rohtak** 1998 (1) RSJ 703 and **Simla Devi v. Presiding Officer, Labour Courts, Bhatinda**; 1998 (2) SCT 72. The respondents were granted time to file a reply to the submission. Thereafter, the second respondent started taking

time to make a statement whether this a covered matter and the hearing was deferred twice to obtain instructions and respond till the matter was heard today for final disposal.

2. The facts of the case are these; the petitioner was appointed as a Gram Sevika in January, 1998 for a period of 89 days on a consolidated salary. She worked up to June 21, 1998. On expiry of the first period, her services were continued by issuing repeated orders passed each for a period of 89 days with notional break of two days which mostly fell on holidays i.e Saturdays and Sundays. She worked in this way continuously up to October 10, 2001. She approached this Court in CWP No.11944 of 2001 claiming regularization of her services and for grant of regular pay scale. The petition was disposed of on August 14, 2001 with a direction to the respondents to decide her legal notice within 3 months and if she is found entitled to monetary benefits, then those were to be restricted to 3 years and 2 months prior to the filing of the writ petition.

3. It is the case of the petitioner that this litigation sparked off annoyance in the higher ranks of the management and sanction against her post was not extended which led to her termination from service. The petitioner again approached this Court in CWP No.17638 of 2001 challenging the termination order claiming reinstatement, regularization and regular pay scale. This Court did not agree with the petitioner in the writ jurisdiction in the matter of grant of relief and on August 9, 2005 she was relegated to her alternative remedy before the Labour Court. This brought the petitioner to raise dispute. She filed a demand notice under Section 2-A of the Industrial Disputes Act, 1947 on the management seeking

reinstatement with continuity of service and full back wages. The demand notice was served on August 22, 2005. The matter was taken up by the Conciliation Officer to forge a settlement which effort failed and the Haryana Government referred the industrial dispute to the Labour Court, Gurgaon for adjudication. The petitioner produced evidence before the Labour Court to show that the work of Gram Sevika is a continuing need in the management. Meanwhile, a number of Gram Sevikas who were retained in service on 89 days basis were made regular by the Government. She also produced evidence to show that after she was removed, the additional charge was given to another Gram Sevika in her place. The Labour Court, Gurgaon did not agree with the petitioner and passed the award dated May 14, 2012 dismissing the reference on the ground that her services were contractual in nature and she had no subsisting right to the post in view of the declaration of law in **Secretary, State of Karnataka and others v. Umadevi**, (2006) 4 SCC 1 [Umadevi (3)]. Against the impugned award, the petitioner is before this Court assailing it and praying for full relief.

4. I have heard learned counsel for the parties at length and have perused the record with their assistance.

5. In the written statement filed before the Labour Court, the management *inter alia* took the plea that the worker was appointed as a Gram Sevika on contractual basis as per the decision taken by the Financial Commissioner, Secretary to Government of Haryana, Development of Rural Department and Panchayats, Chandigarh in its minutes dated September 26, 1993 taken at Karnal. In terms of the decision, the petitioner was appointed as Gram Sevika to serve at Karnal for a period of 6 months though her

services were liable to be terminated at any time without any notice. She accepted the post on the terms and conditions stipulated in the order. Management admitted that she served them from January 22, 1998 to November 10, 2001. Her services were never regularized and her employment was terminated as per contract issued from time to time. To start with the appointment had been handed down by the Additional Deputy Commissioner, Karnal.

6. On a consideration of the matter it cannot be said that the worker was appointed *de hors* the rules since she was appointed under a valid decision of the Government and in accordance with it. It was not the case of the management in the pleadings that she was appointed through the back door and the defence was limited to demonstrate that the appointment was contractual in character and, therefore, without really saying as much, they averred that the case fell within the exception clause (bb) of Section 2 (oo) of the Industrial Disputes Act, 1947 or at least such reasoning would flow from the defence. Since the positive defence was pleaded that the case fell in the exceptions to retrenchment, it followed naturally that the provisions of Section 25-F of the ID Act were not to be complied with, as this was inherent in the stand and the risk taken by the management. In case the management is unable to prove that the case falls under Section 2(oo) (bb) of the Act, then the vices of non-compliance of Section 25-F of the ID Act would emerge in the foreground of the *lis* and govern the termination as illegal and *ab initio* void since it is a well settled position in law that the term “retrenchment” in the ID Act enjoys a wide meaning and can be the result of termination “for any reason whatsoever”.

7. The Presiding Officer, Labour Court, Circle-2, Gurgaon while declining the reference has held the petitioner not to be entitled to any relief. It has been held that she has no accrued right to the post so she cannot claim any benefit flowing from her appointment and resulting disengagement from work. Reliance in this regard has been placed by the court below on the rulings of the Supreme Court in **Umadevi (3)** case [supra] and **Post Master General Kolkata and others v. Buta Das (Dutta)**; (2007) 5 SCC 317 and **Principal Mehar Chand Polytechnic etc. v. Anu Lamba etc.**, (2006) 7 SCC 161 being on the question of the effect of illegal appointment to service. The award was passed on May 14, 2012 when the decision of the Supreme Court in **Maharashtra State Road Transport Corporation Ltd. v. Casteribe Rajya Parivahan Karamchari Sanghalana**; (2009) 8 SCC 556 was available but was not noticed but which explained **Umadevi (3)** which was not an authority on the question of applicability to labour laws which stood on a different footing altogether. The Supreme Court in **Casteribe** has explained that **Umadevi (3)** is a decision guiding the constitutional courts not to grant regularization of service to *ad hoc*, temporary, daily wage employees etc. when service is secured from the back door in violation of the constitutional scheme of appointments to public service preserved in Articles 14 and 16 of the Constitution of India.

8. The Labour Court looked into Ex.P7, being the copy of the order dated January 30, 2002, whereby the additional charge of the post of Gram Sevika was given to some other Gram Sevikas to do the same work as the petitioner did while in employment. If this was the position, then the petitioner had been replaced by a similar entry to service and she thus stood

at par with her counterparts retained or appointed fresh in service which made her suffer privation.

9. It is the contention of Mrs.Rathore that the nature of successive appoints on 89 days basis over a period of time beyond the initial period stipulated is not to be viewed when the axe falls as non-renewal of the contract of appointment or in terms of the stipulations contained in the appointment letter/s. The burden of proof is on the employer who resists the claim of the worker by invoking Section 2(oo) (bb) and lies heavily on the management to show that though an employee has worked for 240 days in the preceding 12 months prior to termination of services, such termination of service is not to be treated as “retrenchment” because it is in accordance with terms of a contract of employment or on account of non-renewal of the contract of employment on the expiry of the period mentioned therein. It has also to be shown by the employer that the worker had been employed for a specific work and a particular job which was being performed by the employee and such person is no longer required. She relies on the law laid down by this Court in **Bhikhu Ram** [supra] which is in favour of her client. If the work against which the person is engaged is not of a specified nature or of a fixed duration and the service is continued by operation of successive appointment orders, then this method of appointment leads to the assumption that the employer has not exercised his right to terminate the service of the petitioner in good faith. Merely because the petitioner accepted the oppressive, unreasonable and arbitrary conditions of service, she cannot be denied relief despite the fact that the respondents committed a patent violation of Section 25-F of the Act. In such case, the award passed

by the Labour Court suffers from an error of law and deserves to be set aside. The law has to be examined from the point of view of social welfare legislation and the welfare statutes must receive the construction which advances the object of the statutes and protects the weaker sections of society who are disorganised labour with hardly any bargaining power to remedy the mischief.

10. Learned counsel fortifies her contention citing the law in **Simla Devi** [supra] which is to the same effect and in the similar strain as **Bhikku Ram** case.

11. The issue before the Labour Court was not one of regularization of service or demand for payment of regular pay scales, of which there was a history, but the spinal lis was reference based to the effect whether the termination was justified or not and in case, the reference is answered in favour of the worker, she would only be put back to the original position held of the date of termination.

12. The written statement filed by the respondent State before this Court remains restricted to the defence taken before the Labour Court. The defence before the Labour Court was not that the appointment was illegal. There is sufficient legal flavour in the defence of the State as against the assertion of the worker that entry in service was through the transparent portals of a decision taken by the Financial Commissioner to Government of Haryana in the department concerned that employment offer was legally secure. The petitioner was not a rank usurper of the post.

13. Accordingly, this Court finds sufficient merit in the submission of Mrs. Abha Rathore that this is a fit case for interference in the award of

the Labour Court which suffers from a fundamental flaw of law both on point of applicability of Section 2(o)(bb) of the Act and on the touchstone of **Umadevi (3)**. The ratio in **Umadevi (3)** does not apply to this case when the defence of the management was not that the appointment was illegal. A plea not taken in the court *a quo* is not open to be heard or debated in the writ proceedings in view of the law laid down in **Harjinder Singh v. Punjab State Warehousing Corporation**; (2010) 3 SCC 192. It is equally well settled that what is not pleaded is not open to evidence and any consideration beyond pleadings is of no moment.

14. In view of the above discussion, the award of the Labour Court is not liable to be maintained and deserves to be interfered with as it wreaks injustice. The error of reasoning is a grave error apparent on the face of record. The labour court should not have blindly applied the law relied upon without understanding their *ratio decidendi* and the scope of the very special jurisdiction possessed by it as an industrial adjudicator and no other, as so lucidly and elaborately explained by the Supreme Court sitting *en banc* in **The Bharat Bank Ltd, Delhi v. Employees of The Bharat Bank.**, AIR 1950 SC 188 : 1950 Supp SCR 317. The labour court should have cared to carefully read the decisions in **Buta Das** and **Anu Lamba** cases [supra] heavily relied on by it and it would have seen that those cases did not arise out of labour court proceedings but arose out of orders passed either in a writ petition by the High Court or from the Central Administrative Tribunal on the issue of regularization. Therefore, a fallacious reasoning adopted has led to denial of relief altogether and a miscarriage of justice. It cannot be forgotten that the petitioner was

protected by 16 successive orders as recorded in para. 3 of the award and the service continued from January 22, 1998 till November 10, 2001 when sanction was refused to continue her in service. It is also not the case that no candidate was offered appointment after the petitioner's exit or that the work of Gram Sevikas had come to an end in the district concerned and this aspect has not been dwelt upon, discussed or thrashed out by the Labour Court in the impugned award.

15. For the foregoing reasons, this petition is allowed and the impugned award is set aside. The petitioner is reinstated to service as a Gram Sevika with continuity and all consequential benefits flowing therefrom except that the arrears of back wages, to serve the ends of justice, will remain restricted to 50% of the total amount of back pay calculated from the date of demand notice with a view to balance the rights of the parties by restoring the past to the worker and putting a cut on back wages benefitting the State Government-management. However, the parties would bear their own costs.

(RAJIV NARAIN RAINA)
JUDGE

November 27, 2015

Paritosh Kumar