

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.1780 of 2015

Date of Decision: 12.02.2015

M/s The Divisional Wildlife Officer,
Forest Department, Kothi No.69,
Chankya Puri, Delhi Bye Pass, Near
Railway Crossing Rohtak

... Petitioner

Versus

Kalawati and another

... Respondents

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

Present: Mr. Raj Kumar Makkad, DAG, Haryana.

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.

Employment part-time as a Sweeper was admitted by the management and that the respondent served them from January 1997 to February 2011. Trouble started when the respondent was served with the notice Ex.MW-1/2 conveying decision that part-time workers would henceforth be appointed on contract basis from March 01, 2011 and those who were willing to work on contract basis may apply for part-time jobs. It is said that the workman never applied for leave nor reported for duty and from this it was facilely inferred by the management that she had abandoned her services. The Labour Court read notice Ex.MW-1/2 and found in it stated that from March 01, 2011 till February 29, 2012 part-time Sweepers would be appointed only through the agency of labour contractors. The notice did not say that the services of existing part-time Sweepers would be dispensed with while implementing the new system.

It is argued by the management in the present petition that the Labour Court erred in reasoning that the notice did not entitle the management to invite applications of willing candidates and it was the contractor alone who could have invited applications of willing candidates and from this the Court *a quo* inferred that the management had failed to make out a case of abandonment of services. The reasoning may not be absolutely correct or might be a tad fallacious but to my mind that would not impact the final decision in this case that relief of reinstatement and back wages, though granted partially, is pre-eminently accordable. For the future, it was open to the management to field workers by adopting any other method of employment but so as not to change their conditions of service to their detriment unilaterally.

It is settled position that abandonment is a matter of intention of the party and every absence is not abandonment. The push-factors will come into play immediately and be required to be closely examined by labour courts to discern whether the worker was ready and willing to work and was being pushed out unceremoniously. But that apart, what seals the fate of the stand of the management *vis-à-vis* abandonment is that the respondent had worked for 16 long years when the axe fell and her services were terminated/retrenched/disengaged on March 01, 2011 under colour of the notice Ex.MW-1/2 but to the contrary the respondent-workperson raised a demand notice for justice soon enough on April 25, 2011 thus feeling aggrieved by the abrupt severance from continued gainful employment on daily wages, which cannot be seen as raising of the dispute belatedly or for it to cast a reasonable shadow of doubt of the intention to abandon service

for all times to come. The respondent elected her remedy close at heels of unlawful retrenchment which act does not suggest abandonment of services and hence it would not be possible to return a finding in favour of the management as sought by it that this is a case of abandonment. Neither is there anything on record to suggest that in conciliation proceedings the respondent was offered reinstatement either with the management or with the alleged contractor and, therefore, this Court finds nothing remiss in the impugned award dated August 06, 2014 holding the termination illegal for want of compliance of the mandatory provisions of Section 25-F of the Industrial Disputes Act, 1947 (for short "the Act"). The length of continuous service of 16 years eminently tilts the question of relief in favour of the worker for the court *a quo* to rightly hold this case as a fit one for award of reinstatement with continuity of service. However, the question of 50% back wages is kept open so as not to prejudice or curtail the rights of the worker *ex parte* in case she approaches this Court for enhancement, in which event, the issue will be decided on merits and nothing can be said for the present in absence of challenge. Consequently, the award in its relief is upheld even though the reasons supporting it, to the extent indicated above, may not be true logically.

However, the contention of the learned Deputy Advocate General, Haryana appearing for the petitioning management, that the present is not a case of retrenchment within the definition of Section 2(oo) of the Act but of abandonment and therefore compliance of the provisions of Section 25 F of the Act was not fatal to the action is liable to be rejected. Retrenchment encompasses termination of services by definition "for any reason

whatsoever" which includes most types of severance of employment relationships. Besides, the management did not plead or show that the worker was gainfully employed during the intervening period of her forced idleness which might disentitle her to back wages. I can only remind the labour court for its continued guidance, the trenchant observations of the Supreme Court in **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya & Ors**, (2013) 10 SCC 324 which ruling should ever be kept in mind while dealing with moulding relief in labour matters. To quote:

" The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an

employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

The more famous words of the Supreme Court which have resounded in the ears of labour lawyers for the years to come are found in the classic precedent, namely, the **Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited**, AIR 1979 SC 75: (1979) 2 SCC 80, [V.R.Krishna Iyer, D.A.Desai and O.Chinnapa Reddy, JJ.] where it was observed with such emphatic poetic and social justice as in the following words of Desai, J speaking for the Court:

"It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to the work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just

sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workman's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation upto the apex Court and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workman were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workman were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat v. Safai Kamldar Mandal, [1971] 1 LLJ 508 and a Division Bench of the Allahabad in Postal Seals Industrial Co-operative Society Ltd. v. Labour Court-II, Lucknow & ors., [1971] 1 LLJ 327

have taken this view and we are of the opinion that the view taken therein is correct."

This Court finds no substantial question of law involved or arising in this petition warranting interference in writ jurisdiction under Articles 226 and 227 of the Constitution or to accept the possibility of forming a different opinion from the one taken by the tribunal. There is, therefore, a greater need in the labour courts and tribunals to form just and appropriate opinions while moulding relief in passing awards. Their opinions should be broad based on a fuller understanding of the law attaching to reinstatement and back wages from the social angle since there is a discretionary element in exercise of such authority which requires sensitivity in handling labour matters where poor sections of society crave for justice and have been wronged by an employer both public and private. For this end, the words of the Supreme Court in *Deepali Gundu Surwase* may be made the worksheet on the drawing board of an award in the making, given the severe limitations and restrictions placed on this court in jurisdiction provided in Articles 226 and 227 of the Constitution while testing awards of labour courts and tribunals within the precepts laid down in the binding precedents of the Supreme Court in **Syed Yakoob v. K.S.Radhakrishnan**, AIR 1964 SC 477 [CB] and **Surya Dev Rai v. Ram Chander Rai**, (2003) 6 SCC 675. What I mean to say is that the purest form of relief should come from the court of fact, the labour court itself, which should not be seen or viewed as a penny-pincher, but a dais from where real justice can be had at low cost and within reasonable time. When substantial justice is done wholesomely by the primary adjudicator, its decisions are more likely than not, endorsed when they do not suffer from any of the vices pointed out in *Syed Yakoob*

and the line of cases and the exhaustive guidelines laid down in *Surya Dev Rai* and by applying those principles in everyday decision-making processess, thus the good work should continue keeping in view the limitations placed on this Court, which make the work of labour courts even more onerous and sacred. Denial of relief in appropriate cases by the labour court makes it more difficult to repair in writ jurisdiction because of the nature of the discretionary jurisdiction provided by the constitution. It must be remembered that there is no full-fledged appeal against awards of labour courts which makes their work even more sacroscant and unique. It is this philosophy that we need to embed in labour law thinking to promote social justice and not just by looking at the size of the employer's pocket which can never be seen to accommodate injustice. In the present case I find that substantial justice was done in the court *a quo* by the impugned award and by all means it deserves to stand. To return, a quote from *Deepali Gundu Surwase* would be apt as a hands-on tool in industrial adjudication:

"38.5 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 victimising the employee or workman, then the court or tribunal concerned 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a 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.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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 the workman who can ill-afford the luxury of spending money for a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd v. Employees" [supra].

This was a view which was reiterated in **Post Graduate Institute of Medical Education and Research v. Raj Kumar**, (2001) 2 SCC 54 etc even though back wages may not follow automatically, cf. **Assistant Engineer, Rajasthan Development Board & Anr.v. Gitam Singh**, (2013) 5 SCC 136. What may follow automatically as far as reinstatement and back wages is concerned is for labour courts to see carefully on a case to case basis keeping in view; not the principles of administrative service law but essentially rules of labour jurisprudence and the objects and reasons which are enshrined in the Industrial Disputes Act, 1947, till it is the law.

In **Y.A. Mamarde v. Authority under the Minimum Wages Act**, (1972) 2 SCC 108, this Court, while interpreting the provisions of

Minimum Wages Act, 1948, observed and which can be profitably quoted in the present context:

"The anxiety on the part of the society for improving the general economic condition of some of its less favoured members appears to be in supersession of the old principle of absolute freedom of contract and the doctrine of laissez faire and in recognition of the new principles of social welfare and common good. Prior to our Constitution this principle was advocated by the movement for liberal employment in civilised countries and the Act which is a pre-constitution measure was the offspring of that movement. Under our present Constitution the State is now expressly directed to endeavour to secure to all workers (whether agricultural, industrial or otherwise) not only bare physical subsistence but a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure. This Directive Principle of State Policy being conducive to the general interest of the nation as a whole, merely lays down the foundation for appropriate social structure in which the labour will find its place of dignity, legitimately due to it in lieu of its contribution to the progress of national economic prosperity."

In **Harjinder Singh v. Punjab State Warehousing Corporation**, (2010) 3 SCC 192, the Supreme Court painfully exhorted:

"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."

Resultantly, the petition stands dismissed at the threshold as not meriting admission for regular hearing.

A copy of this order be sent to labour courts within the jurisdiction of this court, for support and guidance.

(RAJIV NARAIN RAINA)
JUDGE

12.02.2015
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