

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.3599 of 2012

Date of Decision: 25.08.2015

Rajesh Kumar

... Petitioner

Versus

Presiding Officer, Industrial
Tribunal-cum-Labour Court,
Hissar and others

... Respondents

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

Present: Mr. Abhimanyu Tiwari, Advocate,
for the petitioner.

Mr. J.S. Bedi, Addl. AG, Haryana.

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

RAJIV NARAIN RAINA, J.

Reference No.9 of 2007 has been partially allowed by the Presiding Officer, Labour Court, Hisar in the award made on December 02, 2011. Compensation of Rs.50,000/- in lieu of reinstatement has been awarded to the workman. The claim to reinstatement has been denied even while a finding of fact has been recorded that the termination was illegal and stands vitiated on account of non-compliance of the conditions precedent to retrenchment in section 25-F of the Industrial Disputes Act, 1947 ("the Act"). The termination was brought about by an oral order and no order was passed despite the fact that the workman engaged as a Computer Operator in the office of the Executive Engineer, Public Health, Tosham. The management did not dispute before the Labour Court that the

workman was engaged as a Computer Operator and worked from July 07, 2001 till April 30, 2006. The State pleaded in the court *a quo* that workman was engaged through contractor and was not a regular employee of the department. It transpired that when one Bir Singh Clerk joined the office he was found to have sound knowledge of computer applications and, therefore, the services of the workman were terminated being longer required. The Labour Court culled out the question for determination which was whether the workman was engaged directly or through a contractor.

In order to substantiate the assertion that the workman was employed by a contractor and, therefore, there was no direct relationship of master and servant between the parties, the management produced N.R. Rana, Sub Divisional Engineer as MW-1. In his evidence by way of affidavit MW-1/A he deposed by supporting the version of the State in its written statement. He deposed that the workman did not approach the contractor after April 30, 2006 and there was thus no occasion for terminating his service w.e.f. May 01, 2006. However, he made a revealing statement in his cross-examination that though the workman was appointed against the post of Beldar but the work of Computer Operator was taken from him. This position remained throughout the period of engagement. With a view to understand this Beldar business I asked the learned counsel to take me to the written statement filed by the State before the Labour Court and from there find the sum total of the defence of the State which requires noticing. It reads:-

“As such the petitioner worked in O/O The Executive Engineer, Water Supply and Sanitation Division, Tosham (Respondent No. 3) as there was no regular employee who

could work as a Computer Operator. But when one Shri Bir Singh Clerk joined in the O/O The Executive Engineer, PWD Water Supply and Sanitation Division, Tosham and was having a sound knowledge of Computer, the services of the petitioner were not required in the O/o the Executive Engineer, PWD Water Supply and Sanitation Division, Tosham (Respondent No. 3). Therefore, the petitioner was engaged as Computer Operator in the O/o the Sub Divisional Engineer, PWD Water Supply and Sanitation Sub Division, Badhra through contractor. Since then he is continuously working as Computer Operator in the O/O the Sub Divisional Engineer, PWD Water Supply and Sanitation Sub Division, Badhra. It is worth mentioning here that the O/O the Sub Divisional Engineer, PWD Water Supply and Sanitation Sub Division, Badhra also comes under the jurisdiction of Respondent No. 1 & 2 i.e. under the same management.”

There was no Beldar mentioned in the written statement. I, therefore, again asked the learned counsel to take me to the statement of claim filed by the workman to see his story in it and from para.5 I find the following:-

“The wages of the petitioner was paid through muster rolls by showing the petitioner as Beldar, while the petitioner has worked as Computer Operator.”

Therefore, the substantive post available was of Beldar lying vacant in the office of the Executive Engineer, Public Health, Bhiwani. It then became clear that the State profited from utilizing the workman's skill as a Computer Operator and he was thus made to shoulder the duties and responsibilities of the higher post for six years while justifying his wages drawn on the vacant post of Beldar through the muster rolls system. The relationship of employer and employee is now apparent between the parties which continued for six years. This arrangement remained in progress when

the workman's seat was replaced by Bir Singh, Clerk. However, that did not put an end to the relationship at Tosham since admittedly the petitioner was deputed to work in the Sub Division at Badhra which is now being urged as an employment through contractor. The workman continued to serve at Badhra till the oral termination took place but there is no clue that the work of Computer Operator came to an end at Badhra or that any other person replaced him to perform those duties as had happened at Tosham.

No evidence by way of documentary record was adduced in evidence by the management before the Labour Court. Not even the name the contractor under whom the workman is said to have worked was brought on record either at Tosham or at Badhra. In these circumstances, the Labour Court correctly concluded by way of adverse inference that there was direct employment relationship between the parties in absence of evidence to the contrary and the Labour Court even went to the extent of recording a finding that the theory of employment through contractor was “fabricated” with a view to deprive him of his rights under the industrial laws.

The Labour Court drew its attention to the Contract Labour (Regulation and Abolition) Act, 1970 which law was enacted to regulate employment of contract labour in certain establishments in which 20 or more workman were employed on any day in the preceding 12 months. There is a prohibition against contract employment except in terms of the 1970 Act which is based on registration and licence to regulate man power provided by a contractor for the work of the employing establishment. The court *a quo* found that respondent-Management did not disclose the name of the contractor through whom the workman was employed or that he held a

licence as provided under the CLRA Act. When the basic ingredients to establish contractual relationship the Labour Court correctly held that employment through contractor was not proved as a fact.

On the above facts the Labour Court returned a logical finding that the workman is directly employed by the respondents and the record, or whatever was produced of it, pertaining to his employment through contractor was fabricated to suit the defence. If the story of engagement through contract failed, the question of compliance of section 25-F of the Act would immediately arise. The court held that oral termination of service was in breach of the mandatory provisions of section 25-F of the Act inasmuch as retrenchment was caused without notice, notice pay and payment of retrenchment compensation. However, the case of the workman set up under section 25-G & 25-H of the Act was not proved nor is pressed in the present petition.

Having arrived at both the conclusions that there was direct relationship of employment by the department and violation of section 25-F of the Act the Labour Court noticed a large many judgments to deny relief of reinstatement and instead awarded compensation in lieu of reinstatement quantified at Rs.50,000/-. The judgments referred to were of the Supreme Court and are noted:-

“Senior Superintendent Telegraph (Traffic) Bhopal vs Santosh Kumar Seal and others – 2010 LLR 677. U.P. State Brassware Corpn. Ltd. & Anr. vs Uday Narain Panday (2006) 1 SCC 479, 2006 LLR 214 (SC), Uttranchal Forest Development Corpn. vs M.C. Joshi (2007) 8 SCC 353, State of M.R. & others vs. Lalit Kumar Verma (2007) 1 SCC 575, Madhya Pradesh Administration vs Tribhuban (2007) 9 SCC 748, 2007 LLR 785 (SC), Sita Ram & others

vs Moti Lal Nehru Farmers Training Institute (2008) 5 SCC 75, 2008 LLR 549 (SC), Jaipur Development Authority vs Ram Sahi and Another, (2006) 11 SCC 684, 2007 LLR 92 (SC), Ghaziabad Development Authority & another vs Ashok Kumar & Another, (2008) 4 SCC 261, 2008 LLR 555 (SC), Mahboob Deepak vs Nagar Panchayat, Gajrula & Another (2008) 1 SCC 575, 2008 LLR 117(SC), Jagbir Singh vs Haryana State Agriculture Marketing Board and another (2009) 15 SCC 327:2009 LLR 1254.”

The workman has as result been non-suited on the ground that the appointment of the workman was de hors the rules since applications were not invited from the general public to fill up the post of Computer Operator nor the names of eligible candidates were called from the employment exchange. The Labour Court was conscious of the principle that reinstatement follows illegal termination ordinarily accompanied by payment of full back wages but in deference to the rulings the legal position was applied by the precedents cited supra relief of reinstatement was denied as such relief would not follow automatically and may be wholly inappropriate in the given fact situation even though the termination of the employee was illegal and in contravention of the prescribed procedure under the I.D.Act. Apparently, the weight of the judgments sat heavily on the mind of the Labour Court but the view cannot be faulted to be seen treading a new path and the line of least resistance.

In coming to the conclusion, the Labour Court lost a significant fact that on paper the workman drew his salary during the period of engagement from the post of Beldar on muster rolls and even if he was made to perform duties of a Computer Operator, that would not give him an automatic right to hold the post of Computer Operator in the office

concerned. The workman did not hold the post of Computer Operator but only worked on it and his status in reality is that of a Beldar. The work of Beldar is an engagement on the muster rolls. Muster roll employees ordinarily do not hold posts under the State or in connection with the affairs of the State.

If there was a “shift” in the judicial trend in the judgments relied upon by the Labour Court then there has been a paradigm shift in the philosophy underling labour laws when major judicial decisions were handed down by the Supreme Court in 2010 and onward in the cases of **Harjinder Singh vs. Punjab State Warehousing Corporation**, (2010) 3 SCC 192, **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 and **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others**, (2013) 10 SCC 324 and **Jasmer Singh V. State of Haryana**, (2015) SCC. These decisions turn the tide and revive the decision in **Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd.**, (1979) 2 SCC 80. The petitioner was no more than a Beldar acting as Computer Operator at the behest of the management and has to be treated as a Beldar for intents and purposes of the I.D.Act. He can make no legitimate claim on the post of Computer Operator which is governed by rules. Nor has Mr. Tewari appearing for the petitioner pressed his case from any other point of view and would be satisfied if awarded reinstatement to service of the respondent department as a Beldar being the original and realistic position. In view of gray areas presented in this case with respect to status

of the petitioner dithering between the two possibilities and the posts being disparate in nature and content, Mr. Tiwari on instructions from his client present in Court gives up the right to back wages and continuity of service from the date of engagement in the year 2006 and submits that in case reinstatement is ordered by setting aside the impugned order the appointment may be treated as a fresh appointment with effect from December 02, 2011 when the award was passed.

To be fair to Mr. Bedi learned Addl. AG appearing for the State of Haryana it is recorded while opposing the petition he has also relied on un-exhibited documents to show that the petitioner is earning well from contracts in his line of work related to computer applications and appears well settled in life. Mr. Tewari explains that such loose papers in photocopy cannot be introduced for the first time at the hearing to take him by surprise and they are not open to be read by the Court as evidence when not introduced before the labour court by proper mode of proof. In any case they do not certify gainful employment. I cannot disagree with the contention since he is right. A new matter cannot be heard which was not before the court *a quo*. Mr. Bedi's contention is thus rejected.

Consequently, in order to serve the ends of justice the prayer made at the hearing surrendering claims as aforesaid the petition is partially allowed and the award is set aside as suffering from a fundamental flaw in reasoning based on rules of service law and to bring it in tune with the law enunciated in ***Harjinder Singh*** and other similar cases noticed above, the petitioner is held entitled to reinstatement for admitted illegal termination in breach of law but without back wages or right to past service for all intents

and purposes. The petitioner will on reinstatement be treated as a fresh appointment as above indicated. The award of Rs. 50,000/- is affirmed but not as compensation in lieu of reinstatement but instead as a solatium.

The petition stands disposed of in the above terms.

(RAJIV NARAIN RAINA)
JUDGE

25.08.2015
manju