

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

LPA No.470 of 2015

Date of decision: 25.03.2015

Smt. Roop Kala

.....Appellant

VERSUS

The Head Master, Govt. Primary School,
Sekhpura, Tehsil Hansi, District Hisar and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Ms. B. Jeet Sheoran, Advocate for the appellant.

S.S. Saron, J.

The letters patent appeal has been filed by the appellant Smt. Roop Kala against the judgment and order dated 01.12.2014 passed by the learned Single Judge in CWP No.6859 of 2012. Along with the appeal, civil miscellaneous application has been filed seeking condonation of 82 days' delay in filing the appeal.

We have heard learned counsel for the appellant and with her assistance perused the records of the case.

The appellant was employed as a cook at Government Primary School, Shekhpura, Tehsil Hansi, District Hisar ('School' – for short) under the "Mid-day Meal" Scheme of the Government on 15.07.2004. Her appointment was on daily wages basis of Rs.75/- per day. According to the appellant, she also worked as a peon in the School. Her services, it is alleged, were illegally

terminated by the Head Teacher of the School on 01.08.2005 without any notice, charge sheet or compensation. While terminating her services, the respondent it is alleged did not comply with the principles of natural justice or the provisions of Section 25 F of the Industrial Disputes Act, 1947 ('Act' – for short). The respondents in fact had engaged and taken Smt. Sheela in service in place of the appellant. This according to the appellant was against the provisions of the Act. It is stated that while the appellant was in service, there was no complaint against her.

The appellant served a demand notice dated 26.10.2005 against her illegal termination from service. Conciliation proceedings were carried out in pursuance of the demand notice but these remained unsuccessful. The dispute was thereafter referred by the State government for adjudication to the learned Presiding Officer Industrial Tribunal Labour Court, Hisar ('Tribunal' – for short) vide order dated 27.10.2006. It was received by the learned Tribunal on 07.12.2006. The appellant filed her claim statement dated 08.08.2007 (Annexure P-3).

The respondent - Management in its reply dated 23.08.2007 (Annexure P-4) submitted that the appellant does not fall under the definition of a 'workman' and neither does the respondent - Management fall within the definition of an 'Industry' under the Act. The appellant was given the work of mid-day meal on job basis i.e. 20 paisa per student or minimum of Rs.30/- and in excess of 100 students 30 paisa per student for additional students. She undertook the job work on 02.09.2004

and in fact the mid-day meal Scheme itself was effective from 15.08.2004. The appellant had not completed more than 240 days of continuous service in any preceding calendar year. She had in fact worked only for 134 days in the previous calendar year. Therefore, according to the respondent she was not entitled to any protection under the Act.

The respondent – Management submitted that the job work in respect of the appellant during the months of September, 2004 was for 21 days, October, 2004 was for 14 days, November 2004 was for 20 days and December 2004 was for 20 days. Thereafter, in January, 2005 it was for 14 days, February 2005 was for 21 days, March, 2005 it was for 10 days and May 2005 it was for 14 days. This came to 134 days in nine months. After the summer vacations, it is submitted that the appellant did not come for work. It is denied that the appellant was appointed on daily wages at the rate of Rs.75/- per day. It is also denied that the appellant used to do work as Peon in the School. It is also denied that her services were illegally terminated.

It is submitted that the work of the appellant was dissatisfactory. She did not cook the meals properly and not only this, she used to steal meals. She was working on job basis and she herself had left the work. The respondent waited for the appellant to join work upto 01.07.2005 i.e. till opening of the School after summer vacations. Thereafter, the Gram Panchayat of village Shekhpura passed resolution No.16 dated 10.07.2005 and the work of the mid-day meal Scheme was given to Sheela

Devi widow of Ram Kishan.

The learned Labour Court vide its award dated 16.08.2011 (Annexure P-5) found no substance in the claim of the appellant. It was held that the appellant had not proved that after her appointment on 15.07.2004, she had continuously worked upto 01.08.2005. Rather the stand of the respondent that the appellant had worked only for 134 days during the period from September, 2004 to May, 2005 was held to be proved. Since the appellant had not completed 240 days of service in the preceding 12 months from the date of her termination from service, it was held that she was not entitled to the benefit of the provisions of Section 25 F of the Act.

The violation of the provisions of Section 25 H of the Act was, however, held to be proved. It was held to be the admitted position that Smt. Sheela Devi was appointed in place of the appellant on the recommendations of the Gram Panchayat without affording the appellant an opportunity of re-employment. No substance was found in the stand of the respondent – Management that the appellant had left the job on her own. It was observed that had she left the job on her own, she would not have raised an Industrial Dispute by serving a demand notice dated 26.10.2005 i.e. merely after three months of the appointment of Smt. Sheela. Another reason to disbelieve the stand of the respondent-Management was that had the appellant left the job of her own, then the respondent at the same time would not place on record document Ex.MW1/A to show that her work and conduct was not up to mark and it was for the said

reason that Sheela Devi was appointed. If the appellant was removed by way of punishment, then the said fact, it was held, ought to have been proved by producing the officer concerned who had conducted an inquiry and found the work of the appellant to be unsatisfactory.

It was noticed by the learned Tribunal that Om Parkash Head Teacher MW-1 had stated that an inquiry was conducted by the Block Education Officer, Hansi, however, he was not examined. Therefore, the claim of the respondent on the said point too could not be accepted. As regards the relief, it was held that for the violation of Section 25H of the Act, the appellant was entitled to relief of reinstatement but without back wages.

The respondent Management aggrieved against the award dated 16.08.2011 (Annexure P-5) of the learned Tribunal filed civil writ petition No.6859 of 2012 in this Court. It was inter alia contended by the learned counsel for respondent-Management before the learned Single Judge that even if there was a violation of Section 25 H of the Act, the services of the appellant had been disengaged in pursuance of an inquiry having been conducted and the Management having lost confidence in the employee.

The learned Single Judge vide its impugned order dated 01.12.2014 insofar as violation of Section 25 H of the Act was concerned, noticed that Smt. Sheela had been appointed in place of the appellant on the recommendations of the Gram Panchayat. The said appointment of Smt. Sheela was without affording opportunity of re-employment as per mandate of

Section 25 H of the Act. The stand of the respondent-Management that the employee had left the job of her own, it was noticed had been disbelieved by noticing that as per document, Ex.MW1/A, the work and conduct of the employee was not up to mark and it was the reason to employ Smt. Sheela in her place.

The testimony of Om Parkash, Head Teacher of the School (MW-1) was also noticed, he had deposed that an inquiry had been conducted by the Block Education Officer, Hansi against the appellant. The learned Single Judge did not find any basis to warrant interference as regards the view taken by the learned Tribunal regarding violation of Section 25 H of the Act. It was, however, held that the learned Tribunal erred in granting the relief of reinstatement in service to the appellant, who was admittedly engaged purely on daily wages basis.

The learned Single Judge after consideration of the matter held that a daily wages employee is not entitled to reinstatement even if there has been violation of Section 25 F of the Act but would be entitled to compensation of Rs.50,000/-.

Learned counsel for the appellant has strongly contended with reference to the provisions of Section 25 H of the Act that as to whether any workman is retrenched and the employer proposes to take into his employment any other persons, the retrenched employee is to be given an opportunity for re-employment. The said provision it is submitted has been totally ignored by the learned Single Judge. Learned counsel for the appellant has placed reliance on the case of **Harjinder Singh**

v. Punjab State Warehousing Corporation, (2010) 3 SCC 192; besides, the cases Central Bank of India v. S. Satyam and others, (1996) 5 SCC 419; Assistant Engineer, Rajasthan Development Corporation and another v. Gitam Singh, 2013 (2) SCT 30 and State of Haryana through Executive Engineer, PWD, Public Health Division No.2, Sonipat v. Ishwar Singh and another, 2008 (3) SCT 788, which have been referred to by the learned Single Judge as well.

We have given our thoughtful consideration to the matter.

The learned Labour Court vide its award dated 16.08.2011 (Annexure P-5), as already noticed, has held that the appellant was appointed on 15.07.2004. However, it was not proved that she had worked continuously till 01.08.2005. Rather the claim of the respondent that she had worked only for 134 days during the period from September, 2004 to May, 2005 was proved. The appellant, therefore, admittedly had not completed 240 days in service in the preceding 12 months from her services being dispensed with and consequently it was held that there had been no infraction of the provisions of Section 25 F of the Act.

It is not shown by the learned counsel for the appellant as to whether there is any illegality or irregularity in the said findings of the learned Single Judge and the learned Tribunal as regards the period of service rendered by the appellant.

The question, however, that requires consideration is whether the provisions of Section 25 H of the Act are infringed and, if so, its effect. Section 25 H of the Act reads as under:-

"25 H. Re-employment of retrenched workmen.-

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workman who offer themselves for re- employment shall have preference over other persons."

The learned Single Judge insofar as Section 25 H of the Act was concerned observed that one Smt. Sheela had been appointed in place of the appellant. The stand of the respondent-Management that the employee had left the job, it was observed, had been disbelieved while noticing that as per document Ex. MW-1/A, the work and conduct of the employee was not upto mark and it was the reason to employ Smt. Sheela in her place. The testimony of MW-1 Om Parkash Head Teacher of the School was also noticed who deposed that an inquiry had been conducted by the Block Education Officer, Hansi against the appellant. The Court did not find any basis to warrant interference as regards the view taken by the learned Tribunal regarding violation of Section 25 H of the Act. It was, however, held that the learned Tribunal erred in granting relief of reinstatement in service to the appellant who was engaged purely on daily wages basis. A reference was made to a Division Bench of this Court in **State of Haryana through Executive Engineer, PWD, Public Health Division No.2, Sonipat v.**

Ishwar Singh and another (supra) wherein this Court held that a daily wages employee is not entitled to reinstatement even if there is violations of Section 25 F, 25 G and 25 H of the Act but would be entitled to compensation. A reference was also made to the judgment of the Hon'ble Supreme Court in **Assistant Engineer, Rajasthan Development Corporation and another v. Gitam Singh (Supra)** and applying the dictum in the said case, the impugned award dated 16.01.2005 (Annexure P-5) was set aside and a compensation of Rs.50,000/- was awarded to the appellant who had worked on daily wages basis as a Cook for a period of 134 days. The same was held to be adequate to meet the ends of justice.

In the case of **Harjinder Singh v. Punjab State Warehousing Corporation** (supra) now referred to by the learned counsel for the appellant, this Court had modified the award of the Labour Court and directed reinstatement in service of the workman in the said case with 50 per cent back wages. In the said case, the appellant therein was a work charge Motor Mate in the Punjab State Warehousing Corporation ('Corporation' – for short). After seven months, the Executive Engineer of the Corporation issued an order whereby the appellant in the said case was appointed as Work Munshi in the pay scale of Rs.350-525 for a period of three months. Another order was issued by the same officer whereby the appellant therein was appointed as Work Munshi in the pay scale of Rs.400-600 for a period of three months. The tenure specified in the second order though had ended but the appellant therein continued in service till he was

issued a one month's notice seeking to terminate his services by way of retrenchment. The implementation of the notice was, however, stayed by this Court on a writ petition filed by the appellant therein. The writ petition was finally dismissed as withdrawn with liberty to the appellant to avail remedy under the Act. After two months, the Managing Director of the Corporation issued a notice for retrenchment of the appellant by giving him one month's pay and allowances in lieu of notice as per the requirement of Section 25 F (a) of the Act. The said appellant then raised an industrial dispute and pleaded that the action of termination of his services by way of retrenchment was contrary to the mandate of Sections 25 F and 25 M of the Act inasmuch as there had been a violation of the rule of 'last-come-first go' and persons junior to him were retained in service. In the reply filed by the Corporation it was stated that the services of the appellant therein had been terminated by way of retrenchment because the projects on which he was employed had been completed. The action it was pleaded was taken after complying with Section 25F of the Act. However, it was not denied that persons junior to the appellant were retained in service.

The learned Labour Court in the said case found that though the appellant was retrenched after complying with Section 25 F of the Act, however, the principle of equality as enshrined in Section 25 G of the Act was violated and persons junior to the appellant were allowed to continue in service. The Corporation assailed the award of the Labour Court urging that the dispute raised by the appellant therein could not be treated as an

industrial dispute because the termination of his services was covered by Section 2 (oo) (bb) of the Act; that the appellant was not a regular employee and he was not working against any sanctioned post; that the appellant had not worked for a period of 240 days and that there was no post against which he could be reinstated.

A learned Single Judge of this Court rejected the plea that the termination of the services of the appellant therein was covered by Section 2 (oo) (bb) of the Act by observing that from the evidence produced before the Labour Court, it was clearly established that the work against which the appellant therein was engaged was still continuing. The learned Single Judge also agreed with the Labour Court that the action of the Corporation was contrary to Section 25 G of the Act. However, the award of reinstatement was not approved on the premise that initial appointment of the appellant was not in consonance with the statutory regulations and Article 14 and 16 of the Constitution and accordingly substituted the award of reinstatement with 50 per cent back wages by directing that the appellant shall be paid a sum of Rs.87,582/- by way of compensation.

The Hon'ble Supreme Court held that the learned Single Judge substituted the award of reinstatement of the appellant therein with compensation of Rs.87,582/- by assuming that the appellant was initially appointed without complying with the equality clause enshrined in Articles 14 and 16 of the Constitution of India and the relevant regulations. While doing so, it was held that the learned Single Judge failed to notice that

in the reply filed on behalf of the Corporation before the Labour Court, the appellant's claim for reinstatement with back wages was not resisted on the ground that his initial appointment was illegal or unconstitutional and that neither any evidence was produced nor any argument was advanced in that regard. Therefore, it was held that the Labour Court did not get an opportunity to consider the issue whether reinstatement should be denied to the appellant by applying the new jurisprudence developed by the superior Courts in recent years that the Court should not pass an award which may result in perpetuation of illegality. This being the position, it was held that the learned Single Judge was not at all justified in entertaining the new plea raised on behalf of the Corporation for the first time during the course of arguments and over turn an otherwise well reasoned award passed by the Labour Court and deprived the appellant of what may be the only source of his sustenance and that of his family. Another serious error it was noticed by the Supreme Court committed by the learned Single Judge was that he decided the writ petition by erroneously assuming that the appellant was a daily wager employee. This was ex facie contrary to the averments contained in the statements of claim filed by the workman that he was appointed in the scale of Rs.350-525 and the orders issued by the concerned Executive Engineer appointed the workman as Work Munshi in the pay scale of Rs.355-525 and then in the scale of Rs.400-600. This was not even the case of the Corporation that the appellant was employed on daily wages. It was also held that it was not open to the Corporation to

contend that the appellant had not completed 240 days service. It was further held that it was settled law that for attracting the applicability of Section 25G of the Act, the workman was not required to prove that he had worked for a period of 240 days during 12 calendar months preceding termination of his service and it was sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. A reference was made to the case **Central Bank of India v. S. Satyam and others** (1996) 5 SCC 419 in which the Supreme Court considered an analogous issue in the context of Section 25 H of the Act which, it was held, casts a duty upon the employer to give an opportunity to the retrenched workmen to offer themselves for re-employment on a preferential basis. It was held that Section 25 H of the Act provides for re-employment of retrenched workmen and it says that when the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who offer themselves for re-employment and such retrenched workmen who are citizens of India who offer themselves for re-employment shall have preferences over other persons. It was held that the learned Single Judge committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,532/- by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the regulation.

The ratio of the said judgment in Harjinder Singh's case (supra) referred to by the learned counsel for the appellant is inapplicable to the facts and circumstances of the present case. In the present case, it may be noticed that the nature of work of the appellant is such that she is a cook who was to cook meals under the Mid-day Meal scheme for the School running in the village. The Mid-day Meal is served for the children of the School. The Head Teacher of the School in his reply (Annexure P-4) clearly stated that her work was not satisfactory. She did not cook the meals properly and not only this she used to steal the meals; besides, she was working on job basis and had herself left the work. The fact that the appellant herself left the work though has not been accepted by the learned Tribunal by holding that had she left the job of her own, she would not have raised an industrial dispute by filing a demand notice dated 26.10.2005 i.e. merely after three months of the appointment of Smt. Sheela. This by itself may not be a sufficient ground as after the appellant failed to join duty another lady was appointed in her place as a cook. The said lady was not appointed by the respondent on its own but on a resolution passed by the Gram Panchayat of Village Shekhpura on 10.07.2005. The fact that the appellant did not cook meals properly and used to steal had not been controverted by the appellant in the reply.

The act of cooking meals for the children is quite sensitive and it is expected that the meals are properly cooked for the school children. The cooking of meals for school children under the Mid-day meal Scheme is an important function so as to

make the said Scheme effective in its implementation and the children are provided well cooked meals. The cooking of proper meals is in the nature of a contract of personal service which, in the absence of statutory provisions is not normally specifically enforceable.

Therefore, in the facts and circumstances, the findings of the learned Single Judge by adverting to the observations in **Assistant Engineer, Rajasthan Development Corporation and another v. Gitam Singh** (supra) are just and proper. In Gitam Singh's case (supra), the award of the Labour Court directing reinstatement of daily wager who had hardly worked for eight months along with continuity of service and 25 per cent back wages was set aside even though the same had been affirmed by the learned Single Judge as well as a Division Bench of the High Court and instead compensation of Rs.50,000/- had been awarded. We find no infirmity with the order passed by the learned Single Judge.

For the reasons recorded, we find no merit in the appeal. In view of there being no merit in the appeal, the question of delay in filing the same is only academic.

Consequently, the appeal and the application seeking condonation of delay in filing the appeal are dismissed. No Costs.

(S.S. SARON)
JUDGE

25.03.2015
A.Kaundal

(SURINDER GUPTA)
JUDGE

Note: Whether to be referred to the reporter: Yes.