

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

CWP No.8296 of 2017
Date of Decision: 24.4.2017

Jullundur Gymkhana

... Petitioner

Versus

Rajinder Kumar and another

... Respondents

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

Present: Mr.Sanjay Tangri, Advocate for the petitioner

RAJIV NARAIN RAINA, J. (Oral)

1. By way of this petition, the petitioner- Jullundur Gymkhana assails the award dated 20th September, 2016 passed by the Industrial Tribunal, Jalandhar reinstating the first respondent with continuity of service and full back-wages.

2. The facts necessary for disposal of this case are to the effect that the first respondent, Rajinder Kumar was employed by the petitioner- Gymkhana as a Computer Operator in 1993. He drew salary @ ₹ 10,551/- per month till his services were terminated by the Honorary Secretary of the Management vide letter dated 20th May, 2009. The reason recited in the order of termination is that his services are no more required. Together with the termination order, the Management enclosed two cheques in a sum of ₹ 5861/- and ₹ 10,551 each representing salary upto date and one month's wages in lieu of notice period. The sum due towards retrenchment compensation under Section 25F of the Industrial Disputes Act, 1947 (for short "the Act") was not paid. The workman had served with the Management for 16 long years.

3. Aggrieved by the sudden loss of employment, the workman raised an industrial dispute with the Management and claimed reinstatement with all consequential benefits. His case was that the order was vindictive in nature and he was made a victim of internal politics of Gymkhana since the Management wanted to induct their own man in his place. He received the cheques under protest. The termination was not preceded by any show-cause notice, charge-sheet or enquiry on account of any misconduct committed during the course of employment. Persons, junior to him were retained in service and hence there was violation of Section 25G of the Act as well apart from breach of mandatory provisions of Section 25F of the Act. Not only that, and worse still, new persons were employed in his place which was action in violation of Section 25H of the Act, the right to be offered re-employment. The termination was illegal and deserved to be set aside.

4. When the dispute could not be settled by the Conciliation Officer despite attempts, he made a report to the appropriate government in the Labour Department, Punjab. This led to the reference to the Industrial Tribunal, Jalandhar from where this case arises. The workman presented a statement of claim and did not depend solely on his demand notice as a substitute which law permitted. He asserted that despite his best efforts to find a job, he remained unemployed after uncalled for retrenchment.

5. On notice, the Management appeared and put in its written statement. They denied that the termination was illegal. They claimed that the workman be estopped by his own act and conduct to raise a dispute after he has received all his dues from the Management without protest.

₹ 10,101/- per month as basic pay. If the claimant desired to work with the Management, then they asked why he accepted the two amounts in full and final settlement of the dues. The dispute was raised with the intention of extracting money by exploiting labour laws. They refuted the assertion of the workman that he accepted cheques without protest and they stuck to the plea in the trial. The Management averred that the discharge from service does not amount to retrenchment as alleged by the workman.

6. The workman filed a rejoinder to the written statement filed on behalf of the Management. He re-asserted his pleas that he never received the money in full and final settlement and the objection raised by the Management was *mala fide* and liable to be rejected.

7. After the pleadings were exchanged, the learned Tribunal set about adjudicating the dispute after framing five issues, one of which was whether claimant is estopped by his act and conducts from raising the dispute. Evidence was adduced by the parties both oral and documentary. The pleas taken by the workman were re-affirmed in oral deposition and cross-examination.

8. The learned Tribunal returned findings on jurisdictional facts in favour of the workman. Employment relationship was established. The conditions precedent to retrenchment mandated by Section 25F of the Act were not complied with since retrenchment compensation in terms of the formula adopted in the Act was not discharged. The Management witness had admitted during cross-examination that apart from balance wages and one month's notice pay, no other benefit was given. A finding was returned that persons junior to the workman were retained in service since it was admitted by the Management Witness during cross-examination that

there was violation of the provisions of Section 25G of the Act. The Tribunal applied the law in Gaur Shankar vs. State of Rajasthan, 2016 (1) SCC (L&S) 546 that non-compliance of the mandatory requirements as provided under the provisions of Sections 25F Clauses (a) and (b), 25G and 25H of the Act read with Rules 77 and 78 of the relevant Rajasthan Industrial Dispute Rules, 1958 had rendered the order of termination passed against the workman *void ab initio* in law. The Tribunal also applied the law in Jasmer Singh vs. State of Haryana and another 2015 (2) SCT 91 (SC) on the results of non-compliance of Section 25F Clauses (a) and (b) of the Act. The authority of the Supreme Court cited by the Management in 2006 (108) FLR 193 was distinguished as not applicable to the facts of the present case.

9. In assailing the award on merits, learned counsel for the petitioner-Management put forth the contention that the workman was employed after termination and proof of this fact was based on bank statements Mark 'A' to Mark 'E' which showed in the accounts of the workman large balance upto to ₹ 1.00 lakh or so and other entries in the bank statement which according to the management confirmed that the workman was employed elsewhere, otherwise how would have access of such money credited into his account. It was the further contention that the Tribunal was remiss in thinking that the workman had proved that he was not gainfully employed since his days after termination despite his best efforts and has wrongly put the burden on the Management for not producing cogent evidence to prove that the workman was gainfully employed. The Tribunal was correct in thinking that the bank statements Mark A to Mark E are not conclusive proof of gainful employment or

10. In this respect I find no infirmity or perversity in the findings of the Tribunal placing the burden on the Management when the initial onus was discharged by the workman asserting in the statement of claim presented in 2009 and subsequent deposition that despite his best efforts he could not obtain gainful employment. So far as violation of Section 25F of the Act is concerned, the Tribunal drew its attention to the reasoning in paragraph 13 of *Jasmer Singh's* case which is abstracted in the award and is re-produced below and promotes the cause of the workman:-

“The said relief in favour of the appellant-workman, particularly the full back wages is supported by the legal principles laid down by this Court in the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) & Ors.*[6], wherein the Division Bench of this Court to which one of us was a member, after considering three-Judge Bench decision, has held that if the order of termination is void ab initio, the workman is entitled to full back wages. The relevant para of the decision is extracted hereunder:-

"22. 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.”

11. Accordingly, the first issue regarding termination being justified or not was decided in favour of the workman and against the Management. The Tribunal did not agree with the Management pleas on issue no.2 that the reference was not maintainable. That contention was found without merit by the learned labour court in the grim face of violation of the safeguards in Sections 25F and 25G of the Act designed to protect workmen from rain, hail and snow.

12. On issue No. 3, the learned Tribunal noticed the argument of the Management that the workman is estopped by his act and conduct from filing the case as he has failed to hand over the charge despite letter dated 20th August, 2009. I have read to satisfy myself the statement of claim filed by the Management and I find that nowhere therein is it pleaded or disclosed that the workman failed to hand over the charge despite letter dated 20th August, 2009. Therefore, no evidence can be led of fact not pleaded. Mere sending of letter dated 20th August, 2009 is no ground to

hold that the services of the workman were terminated legally and he is estopped by his act and conduct from seeking the relief under the provisions of the Act. Moreover, the workman was not terminated/retrrenched/dismissed from service of the Gymkhana due to any misconduct and as such the letter has no bearing on his rights or on the merits of the case in hand and deserves to be ignored and ruled out of consideration.

13. Then learned counsel for the petitioner submits that the Tribunal has not touched on the defence of the Management and opined that cheques were received by the workman at the time of retrrenchment without protest. Sad to say, no such evidence was led by the Management to prove in writing that the respondent workman did not receive the amounts under protest. This argument was not raised before the Tribunal and is, therefore, liable to be rejected as it cannot be introduced for the first time in writ proceedings while reviewing the award of the Tribunal. Even assuming *arguendo* that the workman had received the amounts they were far short of compliances prescribed in Section 25F of the Act, and therefore the termination would still remain illegal and void *ab initio* and the Management cannot be heard to act in violation of the law or contract out of it. Therefore, even assuming that the workman had received the two cheques without demur or protest, he could still raise an industrial dispute and maintain the application. On issue no.4, the Management failed to lead any evidence and the argument is dropped from further consideration.

14. I have considered the arguments advanced by Mr. Sanjay Tangri in challenge to the impugned award and find that none of them has impressed me to intervene in the matter and undo the work of the learned

September, 2016 endorsed on 30th September, 2016 after the moratorium period was over in view of Section 17 of the Act. The award suffers from no infirmity or perversity. I find no error apparent on the face of the record to quash the award. I would, therefore, refuse to entertain this petition under Articles 226/227 of the Constitution of India. The award must stand as it is just and proper on the evidence. I am at pains to locate any fundamental flaw in the award read with the evidence in a case of violation of all three protections in the ID Act, that is, the trioka of Sections 25F, 25G and 25H merging in a confluence.

15. For the foregoing reasons, I find total lack of merit in this petition which is accordingly dismissed.

24.4.2017
MFK

(RAJIV NARAIN RAINA)
JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

No