

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

LPA No.703 of 2021 (O&M)
DECIDED ON: 27th MAY, 2022

SOMA DEVI

.....APPELLANT

VERSUS

PRINCIPAL, SENIOR SECONDARY SATISH PUBLIC SCHOOL,
REWARI & OTHERS

.....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH.
HON'BLE MR. JUSTICE SANDEEP MOUDGIL.

Present: Mr. Bhisham Kumar Majoka, Advocate
for the appellant.

SANDEEP MOUDGIL, J.

CM-1743-LPA-2021:

Present application under Section 5 of the Limitation Act read with
Section 151 Cr.P.C is seeking condonation of delay of 592 days in re-filing the
present appeal.

The reasons stated in the application as before this Court read as
under:-

“ *That the appeal was initially filed on 22.10.2018. However,
the same was returned with certain objections by the Registry
regarding paper-book.*

*That somehow the brief pertaining to the present appeal got
misplaced. It was only in the month of December 2019 that the
Counsel for the appellant, while shifting his office from one room*

to another came across the brief of the case and it was discovered that due to inadvertence, the appeal could not be re-filed.

That in the process, delay of 461 days has been caused in re-filing the present case on 18.03.2020 and due to the Covid-19 pandemic further delay of 131 days has been caused. It will be in the interest of justice that delay of 592 days in re-filing the present case may kindly be condoned and the appeal be heard on merits.”

In the peculiar circumstances as narrated hereinabove, we are convinced that there is sufficient cause which was beyond the control of the applicant-appellant and therefore accept the prayer. The application is allowed and delay of 592 days in re-filing the appeal is condoned.

LPA-703-2021:

In the instant Intra-Court Appeal, the appellant has challenged order dated 27.05.2022, passed by the learned Single Bench, vide which the writ petition filed by the appellant has been dismissed, holding that no effort was made for requisitioning of record and the fact having completed 240 days of continuous service in the preceding one year from the date of termination, was not proved and also to the effect that the case of the appellant-petitioner was covered under clause (c) of Section 2 (oo) (bb) of the Industrial Disputes Act, 1947 (hereinafter referred to as ‘Act of 1947’).

2. The facts leading to the present appeal are that an industrial dispute was raised at the instance of deceased husband of the appellant-petitioner, namely, Lekhraj, alleging therein that he joined respondent No.2 as Waterman on 01.08.1991 and his services were terminated on 31.12.2004 without complying with the mandatory provisions of Section 25-F of the Act of 1947.

3. This appeal raises a question for adjudication before us to the effect that if the termination is on account continuous ill-health would attract the application of Section 25-F of the Act of 1947.

4. The case set up by the appellant-petitioner is that her husband namely Lekhraj, worked as Waterman from 01.08.1991 till 31.12.2004 continuously. It is further argued that the Workman-husband of the appellant has thus continuously work with the management for more than 240 days in the preceding one calendar year from the date of his termination. It is also contended on behalf of the appellant that no show cause notice was served and neither compliance to Section 25-F of the Act of 1947 was made who was getting the wages as per DC rates. The submissions were concluded to assail the findings of the learned Single Judge as well as the Award of the Labour Court with the averment that there was an ample evidence on record to show that the Workman had completed 240 days in the preceding calendar year putting reliance on the affidavit of Exhibit PW-1/1 of the appellant-petitioner and in fact adverse inference ought to have been drawn against the management who was custodian of entire record but choose not to produce the same.

5. Having heard learned counsel for the appellant and after perusing the record, it is evident that the Workman-husband of the appellant unfortunately was facing ill mental health and only that account it was his wife-present appellant Smt. Soma was examined as PW-1. Though it has been fairly conceded on behalf of the respondent-management in its written statement before the learned Single Judge that the Workman was being paid wages on DC

rates but he was working on part time basis and not on daily wage basis. Even the demand notice dated 17.01.2006 was served after more than one year of termination of service on 31.12.2004. The record further reveals that there is specific stand taken by the management that there is no sanctioned post of Waterman with the management and therefore, the question of appointment of the Workman to the post of Waterman does not arise.

6. Now coming to the question of as to whether the termination of Workman from service would amount to retrenchment and consequent thereof be violative of Section 25-F of the Act of 1947, the ill-health of the Workman-husband of the appellant is apparent from the record itself who choose not to come into the witness box and substituted himself with his wife as PW-1 while tendering her affidavit as Ex.PW-1/1. In this regard a glance on the provisions of Section 2 (oo) (bb) clause (c) is very material which reflects as under:-

“(oo) retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(bb) termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill- health;]”

Looking at the facts of the appeal in hand and the provisions reproduced hereinabove, on an examination leaves no doubt in the mind of this Court that the Workman-husband of the appellant was suffering from mental ill-

health and therefore, termination from service does not amount to retrenchment and as such, the management has no obligation to meet out with the mandatory provisions of Section 25-F of the Act of 1947.

7. The second question with regard to the onus to prove the completion of 240 days of continuous service in the preceding calendar year also do not find favour for the Workman-husband of the appellant who failed to produce any appointment letter or record pertaining to the employment. There is no effort in the form of any application even before the Tribunal for summoning the record relating to the working days. This view of our has the support of the judgment rendered by the Supreme Court in **Surender Kumar Sharma vs. Vikas Adhikari and another;** (2003) 5 SCC 12 wherein, it was held that no fault to be found with the management if the job was with the limited object and if directions are issued being considerate or sympathetic, such judicial sympathy could boomerang in the largest context by denying the benefit to the eligible unemployed. Such directions would also lead to pernicious consequences.

We are sanguine of the fact that if the Workmen employed for fulfilling the need of such passing phase were to become a liability on the employer by too liberally interpreting the labour laws in favour of the Workmen than the same may well act as a disincentive to the employer which also may discourage the employer/State to stay away from initiating such projects even in times of dire need. When a post temporarily created for a particular duration which comes to an end either because the need was fulfilled or the project had to be abandoned for want of funds, the employer cannot by a writ of mandamus be

directed to continue employing such workmen as has been dislodged because such a direction would amount to requisition for creation of post though not required by the employer and funding such post though the employer did not have funds available for the purpose.

The reliance by the learned Single Judge on another case law- **Vijay Kumar vs. The Presiding Officer, Industrial Tribunal-cum-Labour Court Gurgaon and another, 2009 (6) SLR 673** is also well founded wherein, it was held that if no efforts were made on behalf of the Workmen to requisition the record and could not prove the working of 240 days of continuous service, the initial onus can not be shifted upon the employer.

8. Even the Supreme Court with a categoric finding in case- **Superintending Engineer TWAD Board & Another Vs. M. Natesan Etc., 2019 (3) Service Cases Today- 50**, held that the initial burden is upon Workman to adduce evidence showing that he had worked continuously for 240 days in preceding calendar year and once the initial burden is discharged by the Workman, the onus can be shifted upon the employer. Relevant paragraph No.9 of the aforesaid judgment is reproduced hereunder:-

“9. In the judgment passed in the writ petition, the learned Single Judge has pointed out that the respondents-workmen have not produced any documents to prove that they have worked continuously for 240 days. For temporary worker like NMR respondents, it is mandatory to show that they have continuously worked for 240 days in a year. This aspect, in our view, ought to have been taken note by the Division Bench before affirming the order of reinstatement of the respondents. In the impugned

judgment, the Division Bench has observed that the attendance register, salary certificates and other relevant documents were in the possession of the appellant-Board and the same were not marked as documents. It is to be pointed out that the initial burden is upon the respondents-workmen to adduce evidence showing that they have worked continuously for 240 days. Only when the initial burden is discharged by the respondents-workmen, the burden can be shifted upon the appellant-Board. Both the Single Judge as well as the Division Bench were not right in placing the burden upon the appellant-Board to prove that the respondents-workmen had not worked continuously for 240 days in a year. However, in the peculiar facts and circumstances of the case, we are not inclined to go into this question any further. The reason being that most of the respondents have attained the age of superannuation therefore, there is no question of reinstatement.”

In this appeal as well, besides affidavits by the appellant-petitioner and one Dalip Singh, a co-workman, no effort was made for calling upon the employer to produce the records pertaining to services of the workman. Thus, the initial burden of proof regarding completion of 240 days of service in preceding calendar year was never discharged by the appellant-petitioner.

9. We are, therefore, of the considered view that the case of Workman is fully covered with clause (c) of Section 2 (oo) (bb) of the Act of 1947 who was mentally ill continuously and was seasonal worker and also on the aspect of 240 days working in the preceding one year from the date of termination, the Workman has failed to prove the case.

In the light of these facts and discussions made hereinabove, we do not find any force in this appeal to interfere with the findings of the learned Single Judge, hence, the appeal is dismissed.

Ordered accordingly.

(SANDEEP MOUDGIL)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

27th MAY, 2022
sham

Whether speaking/reasoned Yes/No
Whether reportable Yes/No