



IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA

CWP No.1747 of 2016

Date of Decision: 24.10.2019

Himachal Pradesh State Electricity Board Ltd. & Anr.

.....Petitioners

Versus

Sanjay Kumar

... Respondent

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? ¹ Yes.

For the Petitioners : Mr. Vikrant Thakur, Advocate

For the Respondent: Mr. Rahul Mahajan, Advocate

Sandeep Sharma, Judge (oral):

Instant petition filed under Article 226 of the Constitution of India, is directed against the award dated 7.10.2015, passed by the Presiding Judge, Labour Court-cum- Industrial Tribunal, Kangra at Dharamshala, Himachal Pradesh, in Ref. No.196 of 2012, whereby learned Tribunal below partly allowed the reference made to it by the appropriate Government and held the respondent

¹ Whether the reporters of the local papers may be allowed to see the judgment?

(hereinafter referred to as the 'workman') entitled for reinstatement alongwith seniority and continuity in service from the date of his illegal termination except back wages.

2. Before advertng to the factual matrix of the case, it may be noticed that aforesaid impugned award has been accepted by the workman since he has not laid any challenge to the same in any of the proceedings, whereas petitioners-Department *(hereinafter referred to as the 'employer')* being aggrieved and dissatisfied with the impugned award of reinstatement passed by the learned Tribunal below, has approached this Court in the instant proceedings, praying therein to set aside the aforesaid impugned award.

3. Briefly stated facts, as emerge from the record are that the workman filed a claim petition before the learned Labour Court-cum- Industrial Tribunal, Kangra at Dharamshala, H.P., *(hereinafter referred to as the 'Tribunal')*, stating therein that he was engaged vide muster roll No.35 as daily waged beldar w.e.f. 25.4.1997

and in this capacity, he worked till 8.7.1998. The workman claimed that though he served Department with utmost sincerity as beldar, but vide verbal order dated 8.7.1998 his services were terminated. Workman claimed that since his services came to be disengaged without compliance of the provisions contained under Industrial Disputes Act (**for short 'Act'**), he is entitled to be reinstated. He alleged that employer-Department while terminating his services neither served him with notice under Sections 25-F & 25-H of the Act, nor employer-Department complied with the provisions contained under Section 25-G of the Act, because principle of **"last come First go"** was never complied with. Workmen specifically claimed that person namely, Partap Chand, who joined on 25.6.1997 was allowed to remain in service when his services were disengaged. He further alleged that even after his termination several new persons were appointed without affording an opportunity of reemployment to him and as such, employer has violated the provisions of Section 25-H of the Act. Workman further alleged that since some

persons engaged after his termination are still working on work charge/ regular basis, he is also entitled for regularization from the date of his juniors have been regularized. In the claim petition, workman specifically stated that one person namely, Piar Chand son of Sh. Sohan Singh, who was engaged by the employer-Department on 25.2.1999, was terminated on 21.4.1999. Above named person Piar Chand was subsequently reinstated alongwith 50% back wages pursuant to order dated 4.8.2005, passed in Reference No.401/2002 (RBT No.493/2004), further upheld by this Court vide judgment dated 29.11.2005, passed in CWP No.1166 of 2005.

4. Employer-Department contested the aforesaid claim of the workman on the ground that he never served the Department continuously for 240 days in a calendar year. Employer claimed before the learned Tribunal below that workman was engaged for specific work for different spells as per availability of work as well as funds and his claim petition being time barred deserves to be rejected outrightly. Employer further claimed that employment of the

workman was purely on casual basis and he has abandoned the job of his own and as such, there was no requirement, if any, for the employer to serve notice under Section 25-F of the Act upon the workman before his termination. Though, employer admitted in the learned Tribunal below that as per availability of funds as well as work, workman was employed on 18.5.1998 and he worked upto 7.7.1998 but claimed that thereafter workman himself abandoned the job.

5. Learned Tribunal below on the basis of the evidence led on record by the respective parties though arrived at a conclusion that since workman has failed to prove that he worked continuously 240 days in a calendar year preceding his termination, there was no requirement for the employer to serve him with notice under Section 25-F of the Act, but having taken note of the fact that after disengagement of the workman, number of persons came to be employed, learned Tribunal below found employer-Department to have violated Sections 25-G and 25-H of the Act and accordingly held workman entitled for

reinstatement with seniority and continuity in service, but without back wages.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court is not in agreement with Mr. Vikrant Thakur, learned counsel representing the employer-Department that learned Tribunal below has erred while holding the workman entitled for reinstatement because bare perusal of evidence led on record though suggests that workman had worked only for 52 days in two years i.e. 1997 & 1998, but there is overwhelming evidence available on record suggestive of the fact that after disengagement of workman, number of new persons came to be appointed that too without affording an opportunity to the workman for reemployment and as such, learned Tribunal below rightly found employer-Department to have violated the provisions contained under Sections 25-G and 25-H of the Act. Evidence available on record clearly suggests that person namely, Piar Chand had been engaged by the employer-Department on muster roll basis on 25.2.1999, whereas workman was engaged on 25.4.1997.

Ex.PW1/C i.e. service record of daily waged beldar as stood 30.9.2007, clearly depicts said Piar Chand at Sr. No.60, who has been shown to have joined on 25.2.1999, whereas workman though worked for 52 days, as reflected in mandays chart Ex.PW1/D, had joined prior to the joining of above named Piar Chand and as such, learned Tribunal below has rightly arrived at a conclusion that employer-Department while retrenching/terminating the services of the workman retained the services of a person junior to him.

7. RW-1, Sh. B.R.Rana, Executive Engineer, HPSEB though has categorically admitted in his cross-examination that workman was senior to Piar Chand, but claimed that workman himself abandoned the job of his own.

By now it is well settled that plea of abandonment cannot be taken in air, rather cogent and convincing evidence with regard to abandonment is required to be led on record in this regard. Neither notice, if any, issued by the employer-Department ever came to be placed on record suggestive of the fact that after alleged abandonment of job by the

workman, Department issued notice to him calling upon him to join duties, nor inquiry, if any, ever came to be instituted.

8. It is settled law that plea of abandonment taken by employer may not be sufficient to prove abandonment, rather it is necessary for the employer to place on record that specific notice was issued to the workman before alleged abandonment asking the workman to join duty within a stipulated period. In this regard, reliance is placed upon the judgment passed by Bombay High Court in case titled **Ocean Creations Vs. Manohar Gangaram Kamble** 2013 SCC Online Bom 1537:2014)140 FLR 725. It is profitable to reproduce paras No.8,9 and 10 of the judgment herein:-

“8. The legal position is also settled that ‘abandonment or relinquishment of service’ is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.

9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the case of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Ltd. Observed thus:

“.....it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service..... It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to believe that he would refuse the offer of work when it was given to him before the Labour Officer....”

10. Again a learned Single Judge of this court R.M.Lodha, J(as he then was) in the case of Mahamadsha Ganishah Patel v. Mastanbaug Consumers' Co-op. Wholesale & Retail Stores Ltd. Observed thus:-

“....The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then pass appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the

absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-I, Schedule IV of the MRTU & PULP Act.....”

9. In **Samishta Dube Vs. City Board, Etawah &**

Another, 1999 LLR 460 (SC), the Hon’ ble Apex Court has

categorically held that principle of “ **Last come First go**”

even applies to daily waged employees and for invocation of

principle, no particular period of continuous service is

required to be proved. True, it is that employer-Department

in the case at hand was not required to serve notice under

Section 25-F of the Act upon the workman since he had not

completed 240 days in a calendar year preceding his alleged

termination, but definitely he is entitled to protection as

envisaged under Section 25-H of the Act on account of

violation of principle of “**Last come First go**”. Apart from

above, it stands duly proved on record that number of persons after termination of the workman came to be reemployed by the employer-Department, as has been taken note hereinabove. RW-1 Sh. B.R.Rana, Executive Engineer, HPSEB has categorically admitted in his cross-examination that workman was senior to Piar Chand, if it is so, employer-Department in the event of availability of work ought to have dispensed with the services of Piar Chand prior to alleged termination of the workman. Interestingly, in the case at hand, services of Piar Chand were also terminated, but his services were taken back pursuant to award passed by the learned Labour Court, which was affirmed by this Court and as such, this Court finds no justification in rejecting the claim of workman in the case at hand.

10. Another contention raised by Mr. Vikrant Thakur, learned counsel representing the employer-Department that since there was considerable delay in raising demand by the workmen, learned Tribunal below ought to have dismissed his claim on the ground of delay

and laches, has no substance. Though, material available on record reveals that workman had raised dispute after a considerable time, but definitely that could not be a ground for learned Tribunal below to reject the claim, specifically in view of the fact that it was bound to answer the specific term of reference, made to it by the appropriate Government, under Section 10(2) of the Act. Objections, if any, with regard to raising of demand after considerable delay, could be taken by the employer before framing of term of reference. Term of reference framed in the instant case for adjudication nowhere suggests that the learned Tribunal below was required to decide issue of delay in raising demand. Rather, learned Tribunal below was called upon to answer reference that “whether removal of the workman by the employer was legal and justified”.

11. In **Mukand Ltd. v. Mukand Staff & Officers’ Assn.** reported in (2004) 10 SCC 460, the Hon’ble Apex Court has held as under:

“22. We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings,

documents, records and also with reference to the judgments cited. The Reference is limited to the dispute between the Appellant-Company and the 'workmen' employed by it.

23. We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant-Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the 'non- workmen'.

95. The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non-workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed that the Division Bench has erred in holding that there is community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non-workmen.”

12. Apart from above, it is not in dispute that term of reference made to the learned Tribunal below by the appropriate Government under Section 10(2) of the Act never came to be laid challenge on behalf of the employer-Department on the ground of delay, rather it accepted the term of reference and thereafter contested the claim of the workman on its own merits.

13. The Hon' ble Apex Court in ***Karan Singh Vs. Executive Engineer, Haryana State Marketing Board***, (2007) 14 Supreme Court Cases 291, has held that Industrial Tribunal cannot invalidate the reference on the ground of delay. If the employer claims that the workman has made stale claim then the employer must challenge the reference by way of writ petition and say that since claim is belated there was no industrial dispute. It would be profitable to reproduce paras No.11 and 12 of the aforesaid judgment herein:-

“11. ***In Express Newspapers (P) Ltd. Vs. Workers***, AIR 1963 SC 569, it has been held that the jurisdiction of the Tribunal in dealing with industrial disputes is limited to the points mentioned in Section 10(4).

12. In ***National Engg. Industries Ltd. V. State of Rajasthan (2000) 1 SCC 371***, it has been held vide para 24 that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10. This is because existence of the industrial dispute is a jurisdictional fact. Absence of such jurisdictional fact results in the invalidation of the reference. For example, even under the Income Tax Act, 1961 as it stood earlier, the Income Tax Officer must have reason to believe escapement of income. Thus “reason to believe” is a jurisdictional fact, therefore, writ petitions were maintainable in cases where the High Court found absence of basic facts for reopening the assessment. The Industrial Tribunal under Section 10 gets its jurisdiction to decide an industrial dispute only upon a reference by the appropriate Government. The Industrial Tribunal cannot invalidate the reference on the ground of delay. If the employer says that the workman has made a stale claim then the employer must challenge the reference by way of writ petition and say that since the claim, is belated, there was no industrial dispute. The Industrial Tribunal cannot strike down the reference on this ground.”

14. Mr. Vikrant Thakur, learned counsel representing the employer-Department was unable to dispute that no proceedings, if any, ever came to be initiated

on behalf of the employer-Department qua the term of reference framed by the appropriate Government under Section 10(2) of the Act and as such, it is now estopped from raising the issue of delay and laches.

15. Having carefully perused the impugned award, which is based upon the correct appreciation of evidence adduced on record by the respective parties, this Court has not hesitation to conclude that there is no illegality and infirmity in the same.

16. This Court is in agreement with the arguments having been made by the learned counsel representing the workman that this Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India and it has a limited scope to re-appreciate the findings of fact recorded by the Court below.

In this regard, reliance is placed upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** 2014 AIR SCW 3157.

17. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the workmen, clearly suggests that error of law, which is apparent on the face of record, can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be regarded as error of law, which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of

certiorari can be issued, if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

“16.The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioning in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing

with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

18. In the instant case, learned counsel representing the employer was unable to point out any error of law committed by the Tribunal while allowing claim of the workman. Similarly, learned counsel representing the employer was unable to point out any illegality committed by the learned Tribunal below, while recording findings of fact, as such, this Court sees no perversity or illegality in the award passed by the learned Tribunal below.

19. Accordingly, the writ petition is dismissed. Impugned award passed by the learned Tribunal below is upheld. Pending applications are disposed of.

**(Sandeep Sharma),
Judge**

24th October, 2019
(shankar)