Before M.M. Kumar & Jitendra Chauhan, JJ

DEEPAK KUMAR GAUR—*Petitioner*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

LPA No. 547 of 2009 in

CWP No. 5731 of 1999

25th May, 2010

Constitution of India,1950—Art. 226—Industrial Disputes Act, 1947—Ss. 17-B, 25-G & 25-H—Termination of services of a workman—Labour Court ordering reinstatement with continuity of service & full back wages—Single Judge holding workman entitled to compensation in lieu of reinstatement as appointment was only stop gap arrangement—Challenge thereto—Appointment of workman through Employment Exchange after interviewing by Departmental Selection Committee—Whether even if termination is found to be contrary to and in violation of Ss. 25-G and 25-H, workman should only be given compensation and not reinstatement—Held, no—Workman complying with provisions of S.17-B of not gainfully employed—Workman cannot be deprived of benefit of provisions of the Act—Denial would result not only in negation of welfare legislation but would be inconsistent with aims and objectives sought to be achieved by the Constitution and concept of welfare State—Appeal allowed with costs, order of Single Judge set aside and award passed by Labour Court restored.

Held, that the affidavit submitted by the appellant/workman in compliance with Section 17-B of the Act is sufficient and positive proof of his being not in any employment. If the State is to assail the assertion made by the workman, in that eventuality, the onus is upon the State to establish the fact that the appellant had remained in some employment or did not remain un-employed. The State/Management cannot be allowed to trample the rights of citizens, particularly, the workmen and labourers, whose contribution in nation building is substantial, essential and real. The

upward movement of labourers, workers and under privileged is synonym to the growth and development of the nation as laid down under our constitutional scheme.

(Paras 19 and 20)

Further held, that there is nothing on record to suggest that the workman influenced the selection process. We feel that if the official of the State has made selection being not in consonance with the procedure established by law, the State is at liberty to initiate any action against such an official including the damages to which the State has been made to suffer on account of such an action. In cases where violations of the provisions of the Act is established, the workman cannot be deprived of the benefit of the Act which intends to accord to him. Denial would result not only in negation of the welfare legislation but would be inconsistent with aims and objectives sought to be achieved by the Constitution and concept of welfare State.

(Para 21)

Ms. Preeti Khanna, Advocate, *for the appellant.*

Kamal Sehgal, Addl. Advocate General, Haryana.

JITENDRA CHAUHAN, J.

(1) This is a Letters Patent Appeal filed under Clause X of the Letters Patent, directed against the judgment of the learned Single Judge, dated 28th April, 2009, whereby Civil Writ Petition No. 5731 of 2009 filed by the State of Haryana, i.e., respondent No. 1 herein, was allowed.

(2) The brief narration of the facts giving rise to the present appeal is that the State of Haryana filed the above-referred writ petition under Articles 226/227 of the Constitution of India challenging the award dated 22nd October, 1998 (Annexure P-1) passed by the Industrial Tribunal-cum-Labour Court, Gurgaon (hereinafter referred to as 'the Labour Court'). The Labour Court recorded a finding that the workman-Deepak Kumar (appellant herein) had completed more than 240 days in the 12 preceding months from the date of his termination, and his services had been terminated without complying with the provisions of the Industrial Disputes Act, 1974 (for brevity 'the Act'). It was further held that the termination of the services of the workman could not be held to be under the terms of his

appointment. The workman on the basis of these facts had been re-instated with continuity of service with full back wages.

(3) Hon'ble Single Judge, while deciding the writ petition, has placed reliance on condition No. 2 of the appointment letter dated 18th June, 1981, which was Exhibit M-1 (before the Labour Court), reads as follows :

> "2. Your appointment will be temporary for a period of six months or till time candidate recommended by the Subordinate Services Selection Board, Haryana for duty whichever is earlier".

(4) On the basis of the aforementioned condition, Hon'ble Single Judge has concluded that the appointment of the workman was not in consonance with the Statutory Rules governing the service and it was on temporary basis, no right would accrue to the workman to hold the post. Hon'ble Single Judge has further held that even if the services of the workman had been terminated in violation of the provisions as contained in the Industrial Disputes Act or the provisions of the terms of the appointment, the appellant would not still be entitled to reinstatement in service in the light of the judgments of the Hon'ble Supreme Court in the cases of **Ghaziabad Development Authority and another** *versus* **Ashok Kumar and another (1), Mahboob Deepak** *versus* **Nagar Panchayat, Gajraula, (2), M.P. Administration** *versus* **Tribhuwan, (3) State of M.P. and others** *versus* **Lalit Kumar Verma, (4)** and **Secretary, State of Karnataka and others** *versus* **Uma Devi and others, (5).** In conclusion, Hon'ble Single Judge has held that as the appointment of the workman was stop-gap arrangement, therefore, the reinstatement of the workman could not be ordered in the light of the fact that he does not have any right to hold the post. After relying upon the judgment of Hon'ble the Supreme Court in the case of **Telecom District Manager and others** *versus* **Keshab Deb; (6)** and the Division Bench judgment of this Court

(1) 2008(4) S.C.C. 261
(2) (2008)1 S.C.C. 575
(3) (2007)9 S.C.C. 748
(4) (2007)1 S.C.C. 575
(5) (2006)4 S.C.C. 1
(6) 2008(3) S.C.T. 33.

delivered in **State of Haryana through Executive Engineer** *versus* **Ishwar Singh and others, (7)** the Hon'ble Single Judge observed that the workman would be entitled to compensation to the tune of Rs. 35,000 in lieu of reinstatement and allowed the writ petition filed by the State.

(5) Learned counsel for the appellant has contended that the order of Hon'ble Single Judge cannot be sustainable in view of recent decisions of Hon'ble the Supreme Court rendered in the cases of **Harjinder Singh** *versus* **Punjab State Warehousing Corporation in Civil Appeal No. 587 of 2010, decided on 5th January, 2010 ; Ramesh Kumar** *versus* **State of Haryana, Civil Appeal No. 229 of 2010** and in the case of **Krishan Singh** *versus* **Executive Engineer, Haryana State Agricultural Marketing Board, Civil Appeal No. 2335 of 2010, decided on 12th March, 2010.**

(6) It has further been argued that Hon'ble the Single Judge has failed to appreciate the scope of judicial review in a writ of certiorari as laid down by Hon'ble the Supreme Court in **Syed Yekoob** *versus* **K.S. Radhakrishnan and others, (8)** and **Surya Devi** *versus* **Ram Chander Rai and others (9).**

(7) It has further been argued that in the reply filed on behalf of the respondent-management 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.

(8) Further argument advanced by the learned counsel for the appellant is that Hon'ble Single Judge has failed to appreciate the fact that the appellant has been substituted by another temporary employee which was in violation of Sections 25-G and 25-H of the Act. According to Section 25-H of the Act, a duty has been cast upon the employer to offer an opportunity to the retrenched workmen to offer themselves for re-employment on a preferential basis. The violation of Sections 25-G and 25-H of the Act is established and the same amounts to unfair labour practice, apart from being arbitrary and violative of Articles 14 and 16 of the Constitution.

---

(7) 2008(3) S.C.T. 789

(8) AIR 1964 S.C. 477

(9) 2003(6) S.C.C. 675

(9) It has been lastly argued by the learned counsel for the appellant that the judgments relied upon by Hon'ble Single Judge were wholly distinguishable in the case of the appellant, particularly in the fact situation that the said judgments pertain to daily wagers or those employees whose services were terminated on account of their misconduct of employee or after very short duration of service or with break(s) in service or where there was no proper appointment letter issued or appointment made was against non permanent post or appointment was not against a clear vacancy.

(10) As opposite the learned counsel for the appellant, the learned counsel for the respondent-State has defended the order passed by Hon'ble Single Judge as being in consonance with the judgments of Hon'ble the Supreme Court. Learned State counsel has also submitted that the case titled as **Jagbir Singh** *versus* **Haryana State Agriculture Marketing Board (10),** is distinguishable in the fact situation of this very case. By referring to para 7 of the said judgment, learned State counsel has stated that reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation, even though the termination of an employee is in contravention to the prescribed procedure.

(11) Learned State counsel has further argued that the compensation in lieu of reinstatement would meet the ends of justice. He has further made a reference to the case law titled as **Madhya Pradesh Administration** *versus* **Tribhuban** (*supra*), wherein it has been held that at one point of time reinstatement with full back wages used to be automatically granted but there is a change in the said trend found in recent decisions of the Hon'ble Supreme Court. He has further argued that the appellant/workman is not entitled to back wages in the absence of any evidence to show that the appellant/workman was not employed during the interregnum period of about 25 years.

(12) We have heard the learned counsel for the parties and perused the record.

(13) There are certain admitted facts which we would like to record, i.e. the appellant/workman was appointed against the post. The name of the appellant/workman was sponsored by the Employment Exchange. He was interviewed by the Departmental Selection Committee. On the recommendation of the Committee, he was appointed as Superior

Field Worker on *ad hoc* basis for a period of six months or until another candidate recommended by the Subordinate Services Selection Board, Haryana reported for duty, whichever was earlier. To appreciate the factual assertion made by the appellant, para 5 and para 6 of his demand notice dated 13th June, 1994, are reproduced hereunder :—

> "5. That a large number of persons who had been appointed subsequent to the applicant being junior to the applicant are still working. The applicant's services were terminated without following the principle of last come first go. A copy of the termination order is also annexed herewith as Annexure A-2.
>
> 6. That on the joining of Shri Jai Singh on the post of Superior Field Worker on 16th January, 1985, the applicant was adjusted on the post of Basic Health Worker by the Chief Medical Officer, Gurgaon,—*vide* his office order dated 17th January, 1985 without any break. Both the posts of Superior Field Worker and Basic Health Worker were in the same grade and same cadre. The State Govt. merged both posts in one cadre and redesignated the posts as multi purpose Health Worker with effect from 7th January, 1985."

(14) Admittedly, the appellant/workman completed six months as against the terms of the appointment letter. Before the Tribunal, the stand of the State is that the appellant had been appointed against the post reserved for Ex-serviceman. The appellant continued to hold the post for about 3½ years. From the admission order passed by this Court on 6th July, 2009, it is proved on record that the services of the appellant/ workman were terminated on the ground that the appellant had been appointed and working against a reserved post meant for Ex-servicemen category. The admission order passed by this Court reads as under :—

> "Learned counsel for the appellant has invited this Court's attention to the conclusion drawn by the Presiding Officer, Industrial Tribunal-cum-Labour Court, Gurgaon (hereinafter referred to as the Labour Court), dated 22nd October, 1998, where in paragraph No. 12, it is inter-alia noticed as under :—
>
> "A workman appointed on temporary basis who had rendered duty for 3½ years could not have been replaced by another and *ad hoc* appointee."

It is, therefore, the contention of the learned counsel for the appellant that the claim of the appellant was not only based on Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act)", but also on Section 25-G of the Act. Insofar as the instant issue is concerned, learned counsel for the appellant has invited this Court's attention to the averments contained in the writ petition filed at the behest of the State Government, wherein paragraph No. 6, it is *inter-alia* noticed as under :—

"6. That on the basis of above recommendation of Sainik Board, Haryana and selection made by the Departmental Selection Committee, Shri Jai Singh, an ex-serviceman was given appointment,—*vide* this office letter No. EXXD/M-10/84, 247, dated 3rd January, 1985 in District Gurgaon and Shri Deepak Kumar, Superior Field Worker belonging to general category, who was working against the reserved post of ex-serviceman, was relieved by CMO, Gurgaon,—*vide* his letter No. 67, dated 16th January, 1985. As such, Shri Deepak Kumar was replaced on joining of an ex-serviceman candidate according to the Government instructions dated 26th May, 1983 (Annexure P-4)."

(15) The services of the appellant were terminated,—*vide* order dated 16th January, 1985. As per the termination order, it has no where been stated that services of the appellant were terminated on account of his being a general candidate. It is not made out that the appellant/workman had been allowed to join against the post reserved for Ex-serviceman. A bare reading of the appointment letter of the appellant, Exhibit M-1 and appointment letter of Shri Jai Singh, Exhibit W-1 (before the Labour Court) and termination order of the workman Deepak Kumar, dated 16th January, 1985 would remove the cloud regarding the factual aspect of the matter. The relevant portion of aforementioned appointment letters/order,

relating to all the three, are reproduced below in seriatim :—

Relevant portion of appointment letter of Shri Deepak Kumar son of Shri Parma Nand reads thus :

"Subject : Recruitment of Temporary Superior Field Worker under N.M.E.P.

You are hereby offered a temporary post of S.F.W. in the pay scale of mentioned below plus dearness allowance sanctioned by the Haryana Government from time to time and fixed T.A. under rural area (If conditions of T.A. Rules are fulfilled) :—

1. S.F.W. : Rs. 400–600 ;

"2. Your appointment will be temporary for a period of six months or till time candidate recommended by the Subordinate Services Selection Board, Haryana for duty whichever is earlier."

**

Relevant portion of appointment letter of Shri Jai Singh reads thus :

"Subject : Appointment of ex-serviceman candidate on ad hoc basis to the post of Superior Field Worker.

It is to inform you that this directorate has appointed Shri Jai Singh, who belongs to ESM category, as SFW,—*vide* this directorate letter No. 247, dated 3rd January, 1985 on *ad hoc* basis on joining of this candidate, the services of Shri Deepak Kumar, who belong to general category may be terminated with immediate effect.

As and when Shri Jai Singh join his duty in your office, this office may be informed immediately and the date of termination of service of Shri Deepak Kumar may also be intimated so that record of the directorate can be completed. Please acknowledge its receipt."

***

Relevant portion of termination order of Shri Deepak Kumar reads thus :

> "In accordance with directorate letter No. ECD/M-10/84/247, dated 3rd January, 1985, Shri Jai Singh, SFW has joined his duty on 16th January, 1985 after noon. Therefore Shri Deepak Kumar, SFW is relieved today on 16th January, 1985 afternoon from his duty."

(16) From the bare reading of the aforementioned letter/order, it is made out that the letters/order are not reconcilable. The plea of the appellant for being appointed against the post reserved for the category of Ex-servicemen is only a ploy to dispense with the services of the appellant/ workman.

(17) We also do not agree with the argument advanced by the learned counsel for the State that even if the termination is found to be contrary and in violation of Sections 25-G and 25-H of the Act, the appellant/workman should only be given compensation and not reinstatement.

(18) Hon'ble the Supreme Court, while determining the paramount for invoking of writ of certiorari in **Harjinder Singh's case** *supra*, has observed as under :—

> "10. We have considered the respective submissions. In our opinion, the impugned order is liable to be set aside only on the ground that while interfering with the award of the Labour Court, the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution-**Syed Yakoob** *versus* **K.S. Radhakrishnan and others,** AIR 1964 SC 477 and **Surya Dev Rai** *versus* **Ram Chander Rai and others** 2003(6) SCC 675. In Syed Yakoob's case, this Court delineated the scope of the writ of certiorari in the following words :—
>
> > "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 properly, as for instance, it decides a question without giving an opportunity, 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 surpervisory 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 or questioned 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 (vide Hari Vishnu Kamath *versus* Syed Ahmad Ishaque 1955 (1) SCR 1104, Nagandra Nath Bora *versus* Commissioner of Hills Division and Appeals Assam 1958 SCR 1240 and Kaushalya Devi *versus* Bachittar Singh AIR 1960 SC 1168).

xx xx xx xx xx xx xx

xx xx xx xx xx xx xx

17. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that "the concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to

the rule of law and meaning and significance to the ideal of welfare State" — State of Mysore *versus* Workers of Gold Mines AIR 1958 SC 923.

xx xx xx xx xx xx xx xx

xx xx xx xx xx xx xx

22. In Government Branch Press *versus* D.B. Belliappa (1979) 1 SCC 477, the employer invoked the theory of hire and fire by contending that the respondent's appointment was purely temporary and his service could be terminated at any time in accordance with the terms and conditions of appointment which he had voluntarily accepted. While rejecting this plea as wholly misconceived, the Court observed :

"It is borrowed from the archaic common law concept that employment was a matter between the master and servant only. In the first place, this rule in its original absolute form is not applicable to government servants. Secondly, even with regard to private employment, much of it has passed into the fossils of time. "This rule held the field at the time when the master and servant were taken more literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household, were not his own, but those of his pater families". The overtones of this ancient doctrine are discernible in the Anglo-American jurisprudence of the 18th century and the first half of the 20th century, which rationalised the employer's absolute right to discharge the employee. "Such a philosophy", as pointed out by K.K. Mathew, J. (*vide* his treatise: "Democracy, Equality and Freedom", p. 326), "of the employer's dominion over his employee may have been in tune with the rustic simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal, corporate employers". To bring it in tune with vastly changed and changing socio-economic conditions and mores of the day, much of this old, antiquated and unjust doctrine has been eroded by judicial decisions and legislation, particularly in its application to persons

in public employment, to whom the Constitutional protection of Articles 14, 15, 16 and 311 is available. The argument is therefore overruled.

The doctrine of laissez faire was again rejected in Glaxo Laboratories (India) Ltd. *versus* Presiding Officer (1984) 1 SCC 1, in the following words:

"In the days of laissez-faire when industrial relation was governed by the harsh weighted law of hire and fire the management was the supreme master, the relationship being referable to contract between unequals and the action of the management treated almost sacrosanct. The developing notions of social justice and the expanding horizon of socio-economic justice necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring in capital. Moving from the days when whim of the employer was suprema lex, the Act took a modest step to compel by statute the employer to prescribe minimum conditions of service subject to which employment is given. The Act was enacted as its long title shows to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. The movement was from status to contract, the contract being not left to be negotiated by two unequal persons but statutorily imposed. If this socially beneficial Act was enacted for ameliorating the conditions of the weaker partner, conditions of service prescribed thereunder must receive such interpretation as to advance the intendment underlying the Act and defeat the mischief."

23. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the

constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private."

(19) Further we are not able to convince ourselves with the logic given by the learned counsel for the State that appellant/workman has not explained as to how he survived throughout during the long interregnum period of 25 years. In our view, the affidavit submitted by the appellant/ workman in compliance with Section 17-B of the Act is sufficient and positive proof of his being not in any employment. If the State is to assail the assertion made by the workman, in that eventuality, the onus is upon the State to establish the fact that the appellant had remained in some employment or did not remain un-employed.

(20) In our considered opinion, the State/Management cannot be allowed to trample the rights of citizens, particularly, the workmen and labourers, whose contribution in nation building is substantial, essential and real. The upward movement of labourers, workers and under privileged is synonym to the growth and development of the nation as laid down under our constitutional scheme.

(21) In the instant case, there is nothing on record to suggest that the workman influenced the selection process. We feel that if the official of the State has made selection being not in consonance with the procedure established by law, the State is at liberty to initiate any action against such an official including the damages to which the State has been made to suffer on account of such an action. In cases, where violations of the provisions of the Act is established, the workman cannot be deprived of the benefit of the Act which intends to accord to him. Denial would result not only in negation of the welfare legislation but would be inconsistent with aims and objectives sought to be achieved by the Constitution and concept of welfare state.

(22) The ultimate aim sought to be achieved by the constitutional scheme is to achieve the aims and objectives as enshrined in the Preamble. When the dispute is between unequal the system of justice has to be by the side of weak, poor, down-trodden and under privileged. It is only by responding to the needs of the class have-not's workers, peasants, dalits and all subjugated classes. The dreams of the founders of the nation can be realised.

(23) In the result, the present Letters Patent Appeal is allowed. The impugned judgment passed by Hon'ble Single Judge is set aside and the award passed by the learned Labour Court is restored. The appellant/ workman is entitled to cost of Rs. 35,000 from the respondent/State.

R.N.R.