**(2010) 04 P&H CK 0136**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** None

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| The Divisional Forest Officer, Social Forestry Division now The Divisional Forest Officer (Territorial) | | APPELLANT |
| | Vs | |
| The Presiding Officer, Industrial Tribunal-cum-Labour Court, Sh. Ishwar and Anr | | RESPONDENT |

**Date of Decision:** April 26, 2010

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 16, 226
- Industrial Disputes Act, 1947 - Section 2, 25F, 25G

**Citation:** (2009) 8 SLR 138

**Hon'ble Judges:** Augustine George Masih, J

**Bench:** Single Bench

**Final Decision:** Dismissed

**Judgement**

Augustine George Masih, J.

By this Order, I propose to dispose of C. W.P. No. 2605 of 2009 titled as The Divisional Forest Officer, Social Forestry Division, Bhiwani now the Divisional Forest Officer (Territorial), Bhiwani v. The Presiding Officer, Labour Court, Rohtak, and Anr., C. W.P. No. 3252 of 2009 titled as The Divisional Forest Officer (Territorial), Bhiwani v. Sh. Ishwar and Anr. C.W.P. No. 4359 of 2009 titled as Divisional Forest Officer (Territorial), Rohtak v. Smt. Nirmala and Anr. and C. W.P. No. 2665 of 2009 titled as Divisional Forest Officer (Territorial), Rohtak v. Shri Jagbir Singh and Anr., as counsel for the parties have stated that common questions of law and the pleadings involved in the present writ petitions are same. In these writ petitions, the challenge has been put to the Award passed by the Industrial Tribunal-cum-Labour Court, Rohtak, vide which the references had been answered in favour of the

Worklady/Workman, holding them entitled to reinstatement in service with continuity thereof and 50% back wages from the date of demand notice.

2. Counsel for the petitioner has, while referring to the facts in C.W.P. No. 2605 of 2009 submitted that the respondent/Worklady as per her assertion before the Labour Court, was appointed as a Beldar-cum-Mali on daily wage basis on 15.07.1985 and continued to work with the petitioner/Management till 31.03.2000. The respondent/Worklady was terminated from service on 01.04.2000 without any notice or notice pay nor retrenchment compensation was paid to her in violation of Section 25F of the Industrial Disputes Act, 1947, (hereinafter referred to as "the Act"). On the basis of these assertions, the demand notice was preferred by the respondent/Worklady on 13.11.2000 (Annexure-P-2). As the petitioner/Management could not produce the records as summoned by the Labour Court on an application moved by the respondent/Worklady and it was stated by WW-2/Ramesh Kumar, o/o DFO Bhiwani, that he could not find the records summoned despite search nor could he produce the same in future, the Labour Court had proceeded to draw an adverse inference against the petitioner/Management and held that the respondent/Worklady had continuously worked from 15.07.1985 to 31.03.2000 and as the Management Witness had not disputed that no notice was served or notice pay paid nor retrenchment compensation was paid to her at the time of termination, thus, there was violation of the provisions of Section 25F of the Act. Since there was non compliance of the provisions of Section 25F of the Act, the respondent/Worklady was held entitled to reinstatement in service with continuity thereof and 50% back wages from the date of demand notice, i.e., dated 13.11.2000 (Annexure-P-2). On the passing of the Award, the same having not been found to in accordance with law, the present writ petition has been preferred by the petitioner.

3. Counsel for the petitioner contends that the appointment of the respondent/Worklady was de hors the statutory Rules, governing the service and in violation of Articles 14 and 16 of the Constitution of India and, therefore, the respondent/Worklady was not entitled to reinstatement in service on the previous past with continuity thereof. His submission is that even if the adverse inference, as had been drawn by the Labour Court, is taken to be in accordance with law as the petitioner/Management had failed to produce the summoned records, which were relevant for the adjudication of the case, but still for claiming reinstatement in service, the respondent/Worklady was required to contend that the work still existed and since no such assertion had been made by the respondent/Worklady in her demand notice or claim statement, no reinstatement in service could have been granted by the Labour Court. He contends that merely because Section 25F of the Act had been violated by the petitioner/Management would not ipso facto entitle the respondent/Worklady to be reinstated in service. For reinstatement, the Labour Court was required to go into the nature of the appointment, the availability of the post as also the availability of the work with the petitioner/Management, which factors have not been taken into consideration by the Labour Court in reinstating

the respondent/Worklady. Even if the termination of the services of the respondent/Worklady was not in accordance with the provisions of Section 25F of the Act, the respondent/Worklady at the most would be entitled to compensation for the period she had put in work with the petitioner/Management.

4. In support of this contention, counsel for the petitioner/Management relies upon the judgments of Hon''ble the Supreme Court in the case of Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Mishra and Ors. 2005 SCC (Labour and Service) 628, Municipal Council, Sujanpur v. Surinder Kumar 2006 SCC (L/S) 967, and Haryana Urban Development Authority v. Om Pal 2007 (2) SCC (L/S) 255. He on this basis contends that the Award passed by the Labour Court deserves to be set aside and cannot be sustained.

5. On the other hand, counsel for respondent/Worklady contends that the respondent/Worklady in her demand notice dated 13.11.2000 (Annexure-P-2) had specifically claimed reinstatement in service. In response to the claim statement filed by the respondent/Worklady, the petitioner/Management had in para-7 of the reply stated that the services of the respondent/Worklady were never terminated by the petitioner/Management. He on this basis contends that since the specific stand of the petitioner/Management was that it had not terminated the services of the Worklady, but she had herself not come at work on her own, this itself shows that the work was available with the petitioner/Management. He contends that the petitioner/Management is a Department of Forest and work is always available with it. Even in the present writ petition preferred by the petitioner/Management, it has not been pleaded that there is/was no work available with it, which would show that the contention of counsel for the petitioner/Management is without any basis. He submits that the petitioner/Management had before the Labour Court not pleaded that the appointment of the Worklady was de hors the statutory Rules, governing the service or in violation of the Articles 14 and 16 of the Constitution of India. He contends that this plea cannot be allowed to be raised in the present writ proceedings, preferred by the petitioner/Management challenging the Award.

6. I have heard counsel for the parties and have gone through the records of the case.

7. The first contention of counsel for the petitioner/Management that the appointment of the respondent/Worklady was not in consonance with the statutory Rules, governing the service and in violation of Articles 14 and 16 of the Constitution of India and, therefore, is not entitled to reinstatement in service, suffice it to say that the said plea cannot be allowed to be taken in the present writ petition, preferred under Article 226 of the Constitution of India, where the Award passed by the Labour Court is under challenge. Similar plea as has been raised by counsel for the petitioner/Management was considered by this Court in C.W.P. No. 7227 of 2009 titled as Executive Engineer National Highway PWD(B/R) v. Shri Suresh Kumar and Anr., decided on 02.03.2010, wherein it was held as follow:

The contention of counsel for the petitioner/Management that the appointment of the Workman was de hors the statutory rules and, therefore, is not entitled to reinstatement in service as the appointment was in violation of Articles 14 and 16 of the Constitution of India, also cannot be accepted.

Counsel for the Management could not dispute the fact that this ground was neither taken in the written statement filed before the Labour Court nor any evidence was led by the Management in support of this contention or it was argued before the Court below. The only conclusion, therefore, is that there was no issue on this aspect before the Labour Court and the Labour Court was, thus, not called upon to adjudicate upon this matter. The Labour Court had proceeded to decide the matter on the basis of the pleadings and evidence led by the respective parties. There being no illegality or irregularity, which had been committed by the Labour Court in passing its Award dated 30.05.2008 (Annexure-P-4), no interference by this Court is called for.

Counsel for the Management relies upon the judgment of Hon ''ble the Supreme Court in Civil Appeal No. 229 of 2010, titled as Ramesh Kumar v. State of Haryana, decided on 13.01.2010, wherein Hon''ble the Supreme Court had rejected the contention of counsel for the State of Haryana that the appointment of the Workman was not in consonance with the statutory Rules, and, therefore, de hors thereof and the Workman, thus, would not be entitled to reinstatement in service on the ground that the said plea was not taken either before the Labour Court or before the High Court and, therefore, was not allowed to be raised before Hon''ble the Supreme Court. He contends that this plea that the appointment of the Workman being de hors the statutory rules governing the service is being taken by the Management in the present case, in this Court State, therefore, this plea should be allowed to be raised and made the basis for denying the reinstatement of the Workman in service.

This contention of counsel for the petitioner/Management again cannot be accepted for the reason that while exercising jurisdiction under Article 226 of the Constitution of India and that too when an Award under challenge is of an Industrial Tribunal/Labour Court, the jurisdiction of this Court is restricted. The writ jurisdiction is to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. It should not be lost sight of the fact that the Court is deciding the validity of the Award passed by the Labour Court. The new plea now sought to be raised by the Management in the present writ petition, in any case, is a mixed question of fact and law, which cannot be allowed to be raised at this stage. The Award of the Labour Court having been passed on the basis of pleadings and evidence led by the respective parties, no fresh pleadings or grounds can be allowed to be taken except purely legal at the stage when writ jurisdiction of this Court is being invoked by the Management.

By now it is a settled principle of law and fulfills the requirement of principles of natural justice also that if there is no pleading or raising of a contention, there is no question of substantiating such non-existing contention by evidence, the assertion, which is not pleaded, even if there is evidence to support it, cannot be examined because the other side has no notice of it and if entertained, it would tantamount to giving advantage to one of the parties, cannot be disputed. The rules of fair play demand that a party seeking to establish a contention, which, if proved, would be sufficient to deny relief to the opposite side, is required to be specifically pleaded and then proved also cannot be disputed with as, if there is no pleading, there is no question of proving something, which is not pleaded provided both the parties are aware of that position and despite the absence of pleadings both the parties have led evidence on that point and had contested that.

In the absence of any pleadings before the Labour Court by the petitioner/Management and there being no evidence on the record nor any issues framed on that count and even no arguments in this regard was advanced before the Labour Court by the petitioner/Management, the Labour Court, thus, did not get any opportunity to consider the issue whether reinstatement should be denied to the respondent/Workman on the ground that his initial appointment was illegal or unconstitutional. If the new plea is allowed to be raised by the petitioner before this Court that would mean opening a new case altogether, which would not be permissible in law. A writ of certiorari can be issued by this Court for correcting errors of jurisdiction committed by the inferior Court or the Tribunal . It can also be issued if the inferior Court or the Tribunal acts illegally or improperly or where the procedure adopted in dealing with the dispute is opposed to the principles of natural justice. A writ can also be issued in cases of error of law, which is apparent on the face of the record having been committed by the Court or Tribunal, but where mix questions of facts and law are involved and there is no pleadings or evidence led by the parties before the Labour Court, the same cannot be allowed to be taken or raised during the proceedings under Article 226 of the Constitution of India.

Hon''ble the Supreme Court in the case of Harjinder Singh Vs. Punjab State Warehousing Corporation, , has, while dealing with this very question held that similar plea as has been sought to be raised for the first time before this Court in the writ jurisdiction challenging the Award of the Labour Court cannot be allowed to be raised when in the reply filed on behalf of the Management before the Labour Court, the claim of the Workman for reinstatement in service with back wages was not considered by the Management on the ground that his initial appointment was illegal or unconstitutional. Neither any evidence was produce nor any arguments was advanced in that regard and, therefore, the Labour Court did not get any opportunity to consider the issue whether reinstatement should be denied to the Workman by applying the new justice developed by the superior courts in recent years that the Court should not pass an Award which may result in perpetuation of

illegality. Para 11.1 of the judgment reads as follows:

11.1 A reading of the impugned order shows that the learned Single Judge did not find any jurisdictional error in the award of the Labour Court. He also did not find that the award was vitiated by any error of law apparent on the face of the record or that there was violation of rules of natural justice. As a matter of fact, the learned Single Judge rejected the argument of the Corporation that termination of the appellant''s service falls within the ambit of Section 2(oo)(bb) of the Act, and expressed unequivocal agreement with the Labour Court that the action taken by the Managing Director of Corporation was contrary to Section 25G of the Act which embodies the rule of last come first go. Notwithstanding this, the learned Single Judge substituted the award of reinstatement of the appellant with compensation of Rs. 87,582/- by assuming that 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, 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, the Labour Court did not get any 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, 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 deprive the appellant of what may be the only source of his own sustenance and that of his family.

Counsel for the petitioner now contends that Harjinder Singh ''s case (supra), was decided on 05.01.2010, whereas Civil Appeal No. 229 of 2010 titled as Ramesh Kumar v. State of Haryana, was decided by Hon ''ble the Supreme Court on 13.01.2010. When two coordinate Benches decide a case, the latter judgment shall prevail over the earlier judgment. He on this basis contends that in the case of Ramesh Kumar v. State of Haryana (supra), Hon ''ble the Supreme Court has taken a view that as the State of Haryana had not taken the plea that the appointment of the Workman being de hors the statutory Rules governing the service and in violation of Articles 14 and 16 of the Constitution of India, before the Labour Court and the High Court and was for the first time taken before Hon''ble the Supreme Court, the said plea could not be allowed to be raised, therefore, this Court should allow the petitioner/Management to raise this plea before this Court in the present petition. This contention of counsel for the petitioner is totally misplaced as a perusal of the judgment in the case of Ramesh Kumar v. State of Haryana (supra), would show that the basic view, which was taken by Hon ''ble the Supreme Court, was that no

objection was raised by the Department before the Labour Court as also before the High Court. The relevant part of the judgment dealing with this aspect reads as follow:

...Though, it was contended that the initial appointment of the appellant was contrary to the recruitment rules and constitutional scheme of employment, admittedly, the said objection was not raised by the Department either before the Labour Court or before the High Court at the first instance. It was only for the first time that they raised the said issue before the High Court when the matter was remitted to it that too the same was raised only during the arguments....

The observations of Hon ''ble the Supreme Court as reproduced hereinabove does not confer any right on the petitioner/Management nor does it permit the petitioner/Management to take such like pleas before the High Court at the first instance. What Hon ''ble the Supreme Court has observed is that the plea was required to be taken before the Labour Court, but in that particular case, the plea had also not been raised before the High Court and, therefore, it was only this factual aspect, which was recorded by the Hon ''ble Supreme Court. It cannot be interpreted to mean that the above observations of Hon ''ble the Supreme Court gives liberty or confers any right on the petitioner/Management to take the plea at the first instance before the High Court that the initial appointment of the Workman was contrary to the recruitment Rules and constitutional scheme of employment.

Harjinder Singh ''s case (supra), clearly settles the law on this issue and, therefore, contention raised by counsel for the petitioner/Management cannot be accepted. In any case, the plea of the Management with regard to the appointment of the Workman being de hors the Rules governing the service and in violation of Articles 14 and 16 of the Constitution of India, has been denied by the Workman in his written statement. Otherwise also since this plea had not been permitted by this Court to be raised in the present writ petition at the first instance, the assertion of the Management and response thereto by the Workman shall have no consequence or bearing on the fate of the case.

8. In view of the above, the contention as raised by counsel for the petitioner/Management cannot be accepted and is hereby rejected.

9. The second contention raised by counsel for the petitioner/Management is that merely because a finding had been recorded by the Labour Court that the services of the respondent/Worklady were terminated in violation of Section 25F of the Act, would not entitle the Worklady for automatic reinstatement in service with all consequential benefits, cannot be disputed with on principles. The judgments which have been relied upon by counsel for the petitioner/Management do hold the same as has been contended by counsel for the petitioner/Management. However, in the given facts and circumstances of the case, the Labour Court has rightly granted the relief of reinstatement in service with continuity thereof and 50% back wages. The

said relief cannot be said to be without any basis.

10. It is true that the claim for reinstatement has to be made by the respondent/Worklady. She had pleaded in her demand notice and in the claim statement that the provisions of the Industrial Disputes Act, 1947, have been violated entitling her to reinstatement in the service. The moment, claim for reinstatement was made by the respondent/Worklady in the claim statement and in the evidence led by the Worklady, it comes on record that the reinstatement had been claimed by the Worklady for non compliance of the provisions of the Industrial Disputes Act, 1947. The onus as far as the Worklady is concerned stands discharged. In case, no work was available with the petitioner/Management, it is for the petitioner/Management to plead the non availability of work. In the present case, it had neither been pleaded by the petitioner/Management before the Labour Court nor before this Court that no work was available to reinstate the respondent/Worklady. As a matter of fact, the stand of the petitioner/Management before the Labour Court was that the services of the Worklady were not terminated at all, but she had chosen not to report for duty and had not come at work on her own. This clearly shows that the work was available with the petitioner/Management from the date of her alleged termination. Even at the stage of final arguments before the Labour Court, it was not the stand of the petitioner/Management that no work was available and, therefore, reinstatement could not be granted. Even in this Court, the petitioner/Management has not pleaded that they do not have the work to reinstate the respondent/Worklady. The Labour Court had taken into consideration the fact that she had been out of service and granted only 50 per cent of the back wages, that too from the date of demand notice, which is fully justified. The contention of counsel for the petitioner/Management that the Labour Court should have taken into consideration the factors essential for reinstatement, i.e., nature of appointment, availability of work and similar aspects. The Labour Court does not act on its own, but is dependent on the evidence led by the parties. In case, the petitioner/Management would have taken such a stand before the Labour Court, there is no reason why the Labour Court would not have taken them into consideration. It is conceded position on the part of the petitioner/Management before this Court that such a plea was not raised before the Labour Court either in the pleadings or at the stage, when the case was argued. In the light of this position on facts, the contention as raised by counsel for the petitioner/Management with regard to the relief of reinstatement granted to the respondent/Worklady cannot be sustained. The Labour Court had taken into consideration the factors, which were relevant and based upon the pleadings and the evidence led by the parties, while granting relief to the respondent/Worklady, and accordingly had moulded the relief of granting of reinstatement in service and 50 per cent back wages only instead of full back wages. The Order dated 21.01.2008 (Annexure-P-1), passed by the Industrial Tribunal-cum-Labour Court, Rohtak, cannot, thus, be said to be without any basis and the said Order cannot be said to be not in accordance with law.

11. An additional plea has been taken in C.W.P. No. 2665 of 2009 by counsel for the petitioner/Management that the Labour Court had not mentioned in its Award that adverse inference is drawn for non production of the relevant records. He, therefore, contends that the findings as recorded by the Labour Court with regard to the Workman having completed more than 240 days in service in the 12 preceding months from the date of his termination cannot be sustained. This plea of counsel for the petitioner/Management cannot be accepted as the Labour Court had after exhaustively dealing with the evidence led by the parties concluded that because of non production of the records, the respondent/Workman had not been able to prove that he had completed more than 240 days in the last 12 preceding months. It is a known fact that the Management is the custodian of the records. It has not only to maintain the records, but to preserve them also. The Workmen, who generally are daily wagers, are neither issued appointment letters nor the termination orders. They, therefore, have to depend on the records, which are available with the Management. When the Workmen make a request to the Labour Court Court for summoning of the relevant records and a direction is issued by the Labour Court to the Management for the production of the same, the Management is obliged to produce the same before the Labour Court. In case, the records are relevant and are not produced before the Labour Court and it is stated by the Management Witness that he could not produce the records in future also, the Labour Court is left with no option, but to draw adverse inference. In the present case, it was admitted by WW-2/Shri Naresh Kumar, Forester, o/o D.F.O., Rohtak, an official of the Management, who had produced the working details of the respondent/Workman from 01.01.2000 to October, 2000. During the said period, the respondent/Workman had worked for 225 days. The said Management Witness stated that he could not produce the muster rolls for the months of November and December, 2000. Since these two months were crucial as they fell within 12 preceding months from the date of termination of the respondent/Workman, i.e., 31.12.2000. Non production of the muster rolls of these two months obviously created a presumption of adverse inference against the petitioner/Management. On the basis of the said adverse inference, the Labour Court had proceeded to give a finding that the respondent/Workman had completed more than 240 days in service in the 12 preceding months from the date of his termination with the Management. The findings recorded by the Labour Court is fully justified and in accordance with law and merely because it had not mentioned that because of non production of the muster rolls for the months of November and December, 2000, adverse inference is being drawn, would not invalidate the findings recorded by the Labour Court. For non production of the muster rolls for the months of November and December, 2000, a conclusion with regard to the adverse inference against the petitioner/Management can be drawn and it is accordingly drawn. The findings, thus, recorded by the Labour Court is upheld.

12. In view of the above, finding no merit in the abovementioned writ petitions, the same stand dismissed.