

(2016) 03 P&H CK 0086

High Court Of Punjab And Haryana At Chandigarh

Case No: CWP No. 20688 of 2014

Amritpal Singh

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision: March 17, 2016

Acts Referred:

- Constitution of India, 1950 - Article 14, Article 16, Article 226
- Industrial Disputes Act, 1947 - Section 10(1)(c), Section 2A

Citation: (2016) 4 RSJ 165 : (2016) 3 SCT 446

Hon'ble Judges: Rajiv Narain Raina, J.

Bench: Single Bench

Advocate: Rajbir Singh, Advocate, for the Appellant; Nikhil K. Chopra, DAG, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Narain Raina, J.

1. This Court passed an interim order on 14th October, 2014, in the instant case which reads as follows:

"The petitioner qualified as a workman under the Industrial Disputes Act, 1947 while working in the respondent department. His services were terminated in 1983. He raised an industrial dispute which was referred by the appropriate Government to the Labour Court, Chandigarh. The Labour Court answered the reference in favour of the petitioner and granted reinstatement with continuity of service with 50% back wages. The award was passed on 7.12.1992. The State Government questioned the award before this Court in CWP No. 1269 of 1994 which was decided by the learned Single Judge on 12.3.2010. The petitioner gave up his right to back wages before this Court and the challenge to the award was nullified. It may be noted that the petitioner was taken back in service on 22.2.1994 and is continuing in service. The order of the learned Single Judge dated 12.3.2010 has become final between the

parties. After the decision of this Court, the services of the petitioner were regularized in 1994 but for some strange reasons, the Government has regularised the service of the petitioner with effect from 18.1.1995 for which no reason is forthcoming.

Thereafter, the petitioner has made several representations praying from the Administrator that he may be given continuity of service with effect from 19.7.1982 as a result of operation of the award of the Labour Court with continuity of service which part of the award was not touched upon by this Court in the aforesaid writ petition and is consequently final.

The petitioner claims continuity of service from 1982 but it is not clear whether there is any hidden agenda in this petition to lay a claim of seniority with effect from 1982. The reason for fixing of the date of 18.1.1995 is not clear.

Notice of motion.

Ms.Monica Chhibber Sharma, DAG, Punjab accepts notice on behalf of the respondents and waives service on them. Learned counsel to supply 3 sets of the paper-book to the learned State Counsel during the course of the day. Written statement, if any, be filed before the next date. Ms.Monica Chhibber Sharma, DAG, Punjab would take instructions from the Secretary of the Department as to the reason why the date 18.1.1995 was assigned to the petitioner. She would also apprise this Court as to what has happened to the persons who are junior to the petitioner in terms of dates of initial appointment and from which dates they were regularized. The petition is silent on these aspects.

List on 23.12.2014.

Order dasti."

2. The first reflex of this Court, while issuing notice to the State, was to understand; whether there was a hidden agenda in this petition to lay a claim of seniority with effect from 1982 and to what effect.

3. The necessary facts for adjudication of them lis are these in brief: The petitioner was appointed as Tracer in the office of Chief Engineer (Drainage), Irrigation Works, Punjab on purely ad hoc basis for six months vide letter dated 29th July, 1982 (Annex P-1) with the condition that his services were liable to be terminated at any time without assigning any reason. The petitioner's services were terminated by letter dated 11th October, 1983 (Annex P-4) with effect from 10th October, 1983. Against this order, the Labour Court adjudication took place. The demand notice was served for the first time after 8 years of termination. The Labour Court by its award dated 7th December, 1992 granted relief of reinstatement since there was no limitation prescribed for making a reference. This is how the petitioner was reinstated with continuity of service, but was allowed 50% back-wages only from the date of demand notice i.e. 3rd April, 1991. The Irrigation Department questioned the award

before this Court, which resulted in the order dated 12th March, 2010. The Court did not interfere with the award since the petitioner meanwhile was taken back in service on 22nd February, 1994, but after the workman made a statement that he would forgo his claim for back-wages.

4. It has been explained in the written statement filed by the State that the services of the petitioner were regularized with effect from 18th January, 1995 in terms of the instructions of even date. The Government of Punjab issued policy instructions on regularization of ad hoc employees vide circular dated 17th November, 1995 in terms of which the services of the petitioner were regularized, but he cannot claim in my considered view the benefit of seniority from the date of initial appointment in the year 1982. These policy instructions were issued by way of an advice to the Department to fix seniority as per instructions from the date of regular appointment in cases pending in the courts. Earlier the Government use to fix seniority by granting benefit of original ad hoc appointment, but that view was wrong and discontinued. The change was necessitated with the declaration of law by the Supreme Court in State of Punjab Vs. Gurdeep Kumar Uppal, , JT 2001 (5) SC 57 and State of Haryana Vs. Veterinary and AHTS Association & another, JT 2001 (10) SC 561, wherein the Supreme Court held that the benefits of ad hoc service cannot be counted towards the higher pay scale and seniority.

5. In March, 1983, the Punjab Public Works Department appointed 35 Draftsman/Tracers through employment exchange, who have been declared surplus from Thein Dam Construction Administration, Shahpur Kandi. The petitioner's name was placed at Sr. No. 11 of the list and was allocated to SYL Construction Circle-I, Chandigarh. It was in that office the services of the petitioner were terminated by order dated 11th October, 1983 (Annex P-4).

6. The question arising for determination is; whether continuity of service granted by the Labour Court upon setting aside the termination order will confer a right of seniority from the initial date of appointment on ad hoc basis. Reinstatement awarded by the Labour Court puts claimant in the original position when termination took place, which means the petitioner was only put back to initial ad hoc service without changing the nature and character of the employment which the Labour Court had no power to alter nor did it venture to do so. There may be no limitation period prescribed in approaching the Labour Court because a reference can be made at any time under Section 10(1)(c) of the Industrial Disputes Act, 1947 and therefore the delay of 8 years in raising a dispute could not deprive the petitioner of relief of reinstatement which he ultimately got from the Labour Court. However, those 8 years are relevant in the matter of fixation of seniority in a Government office in the cadre where appointments and promotions are taking place periodically giving rise to issues of seniority perpetually settling down and hardening the spine of gradation not to be disturbed except for unimpeachable reasons. In the matter of seniority, 3rd party rights become significant for the court

to consider while granting relief and when affected parties are not party to the petition relief may well be refused. When the respondent department filed a writ against the award, it was only the recovery of back-wages that were stayed when notice was issued. But there was no stay on reinstatement awarded and that is how the petitioner was reinstated to service in implementation of the award.

7. Presently, the case set up in the fresh round of litigation is that while the petitioner was not in service, persons junior to him who had remained in service were regularized from the date of the initial appointment i.e. on 29th July, 1982. It is common ground that persons junior to the petitioner at the time of termination were regularized from the dates of initial appointment in terms of policies of Punjab Government. The persons, who were appointed after the appointment of the petitioner, were promoted even to higher posts and they became senior to the petitioner, which position the petitioner asserts should be corrected by court intervention. The petitioner relies on an order delivered in CWP No. 20791 of 2008 titled "Surinder Kumar & others Vs. State of Punjab & another" on 18th March, 2011 involving Draftsmen in SYL Canal Project, whose names were also sponsored by the employment exchange [like the petitioner] and appointed as temporary employees for a period of six months till suitable candidates were selected by the Subordinate Service Selection Board, Punjab and appointed to service after the posts of Draftsman/Junior Engineer were excluded from the purview of the Board vide letter dated 12th September, 1983.

8. The petitioner was appointed firstly on 29th July, 1982; then again on 2nd February, 1983 and then on 11th March, 1983 with services terminated on 11th October, 1983. In those circumstances, this court in Surinder Kumar's case applied the rule against unreasonable discrimination and allowed the writ petition holding that the petitioners therein shall be deemed to have been regularized from the date of their initial engagement on ad hoc/temporary basis to signal parity of treatment fine tuning it with the principle of equality of treatment ensured by Article 14 of the Constitution. The court ruled that the State cannot be permitted to discriminate between the petitioners and similarly situated employees. In Surinder Kumar's case, the court did not deal with the situation where termination was in 1983 or a situation where an employee wakes up after 8 years and calls in question his termination order while in the interregnum the department seniority is settling down giving rise to valuable 3rd party right protected against intrusion in the seniority list after somnolence of claimant failing to call in question his order of termination. In Surinder Kumar's case, the services of the petitioners were not terminated nor had they to go in search of awards of Labour Court, as in the present case. There can hardly be any doubt that the court in Surinder Kumar's case was concerned with discrimination alone and not whether ad hoc service deserves to be counted towards seniority failing which the result could not have been legally achieved in a vacuum. Therefore, by his own act of remaining silent for 8 years, the petitioner has waived his rights and acquiesced in the passing time cannot be given

the undue benefit of seniority at least for that period of time since continuity awarded by the Labour Court only takes him back on ad hoc service. It is well settled that regularization can only take place in case there is policy in position. There was a policy in Surinder Kumar's case, so is there in this case, but continuity awarded by Labour Court is not a necessary component for purposes of ranking in a seniority list.

9. I have already explained at great length the significance of seniority in the constitutional scheme of things in *Kulwant Kumar Kalsan Vs. State Of Haryana & others*, , 2015 (2) RSJ 359 holding that it is neither a fundamental right nor a constitutional issue nor of any constitutional value and is not a necessary part of the apparatus in Article 16 of the Constitution, which legal position is explained by the 5 judge Coram of the Supreme Court in *M. Nagaraj & others Vs. Union of India & others*, , (2006) 8 SCC 212 from where I borrowed the reasoning that it is a lesser species of rights which has no jurisprudential value other than in promotion otherwise it is deadwood. It is only when seniority and right to be considered for promotion converge would they become a fundamental right as explained by the Supreme Court in *Major General H.M. Singh Vs. Union of India & another*, , (2014) 3 SCC 670. In this day and age an appointment to public service with names sponsored through the employment exchange is not sufficient compliance of the equal opportunity clause in Article 16 of the Constitution which desires open competition from all sources of the employment market advertised through the national press media. There is sufficient body of precedent on the point which requires no further elaboration.

10. Therefore, I would not be prepared to accept or be persuaded to give undue advantage of seniority to the petitioner either from 29th July, 1982 or from 11th March, 1983 till at best the date when the petitioner raised a dispute by serving a demand notice i.e. 3rd April, 1991 during which period the petitioner slept over his rights, then this period has to be excluded from seniority. By applying rule against unfair discrimination, the petitioner can at the most get his seniority from the date of raising the industrial dispute, which is; to reiterate, the date of demand notice, relief which I would reluctantly consider. Needless to say the choice of day, month and year in raising an industrial dispute under Section 2A of the ID Act is entirely personal to aggrieved person and not a thing which is par for the course so as to govern seniority and adversely affect the rights of others who have settled down meanwhile in their respective slots in the running roster of vacancies in the cadre. This unpredictable date is always a fortuitous circumstance on which seniority cannot be pegged down to the others' detriment. However, after the date of demand notice is conveyed the vice of unfair discrimination could possibly arise and if that has to be removed, which it shan't, the petitioner still cannot get any benefit of seniority from the remote past because persons likely to be affected have not been impleaded as parties to this petition, who are stakeholders to seniority and have to be heard. This deficit in procedure forecloses the case of the petitioner for

grant of ante-dated seniority.

11. There is yet another way to examine the case which could potentially lead to denial of relief. One is to look at the case from the point of view of labour laws in the Industrial Disputes Act, 1947, whilst the other arises from service law principles. Delay in raising industrial dispute regarding termination of service may not disentitle petitioner from claiming relief of setting aside the order of termination when illegal and therefore the consequential relief of reinstatement may follow but it could be moulded by the industrial arbitrator in its discretion. The other side of the coin is to factor admitted delay of 8 years in challenging an order of termination which in my considered view according to service law jurisprudence would always be fatal to the claim, the remedy taken away from the writ court or the civil court if a suit was brought after limitation period has expired it would be dismissed. The termination order in this case was not challenged within three years of its passing and would be hit with the law in *State of Punjab Vs. Gurdev Singh*, , AIR 1991 SC 2219. Even if the termination order is void it remains good till it is not set aside by court. If the limitation has run out for purposes of suit the order becomes final and not open to challenge. This is how 8 years before the Labour Court and 3 years before civil court are to be measured. When the challenge is not maintainable by passage of time and the order attains finality, the right to retain old seniority is waived by acquiescence and stands lost forever. If a suit is barred on the cause of action the right to sue before the writ court is lost and the writ court remedy would then be seen as was reasoned by the Supreme Court in the constitution bench judgment in *State of Madhya Pradesh Vs. Bhailal Bhai*, , AIR 1964 SC 1006 ruling as follows:

"It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution"

Then again:-

"It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy. But where the delay is more than this period, it will almost always be proper for the

court to hold that it is unreasonable."

12. This shuts all the doors which may lead to the desired relief claimed. Accordingly, no relief whatsoever can be granted to the petitioner in the matter of seniority. However, the entire period would be countable towards pension etc. The case built on continuity awarded by the Labour Court has to be read in this manner. Even if we assume that the initial appointment came through a process of proper selection and such appointment was in consonance with the constitutional scheme of public appointments even then the relief cannot be filtered down to the petitioner by a direction of the Court. It may be noted that there is no prayer for counting past service before regularization towards pension in this petition. In the circumstances, it was not compelling on the respondent-Department to process the non-statutory legal notice dated 18th February, 2014 served upon it. Notwithstanding the above line of reasoning, the pension issue is left open to be dealt with in accordance with law.

13. For the reasons recorded above, the present writ petition I dare say has no substance and is hereby dismissed.