Devinder Singh vs Municipal Council,Sanaur on 11 April, 2011

Equivalent citations: AIR 2011 SUPREME COURT 2532, 2011 AIR SCW 3455, 2011 LAB. I. C. 2799, 2011 (4) AIR JHAR R 318, (2011) 130 FACLR 337, (2011) 5 MAH LJ 503, (2011) 4 MPLJ 62, (2011) 3 SCT 139, (2011) 5 ALL WC 4597, (2011) 3 CAL LJ 58, (2011) 2 CURLR 461, (2011) 4 LAB LN 505, (2011) 3 ESC 514, 2011 (6) SCC 584, (2011) 8 SERVLR 516, (2011) 3 ALLMR 1008 (SC), (2011) 4 SCALE 631, 2011 (8) ADJ 48 NOC

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Bench: Asok Kumar Ganguly, G.S. Singhvi

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL
APPEAL NO.3190

OF 2011

(Arising out of Special Leave Petition No. 12187 of 2009)

Devinder Singh .....Appell

Versus

Municipal Council, Sanaur .....Respo

J U D G M E N T

G.S. Singhvi, J.

1. Leave granted.

2. This appeal is directed against the order passed by the Division Bench of the Punjab and Haryana High Court in the writ petition filed by the respondent whereby the award passed by Labour Court, Patiala (for short, "the Labour Court") for reinstatement of the appellant was set aside and it was declared that he shall be entitled to wages in terms of Section 17-B of the Industrial Disputes Act, 1947 (for short, "the Act").

3. The appellant was engaged by the respondent with effect from 1.8.1994 for doing the work of clerical nature. He was paid consolidated salary of Rs.1,000/- per month. He continued in the service of the respondent till 29.09.1996. His service was discontinued with effect from 30.9.1996 without giving him notice and compensation as per the requirement of Section 25-F of the Act.

4. The appellant challenged the termination of his service by raising an industrial dispute, which was referred by the State Government to the Labour Court. In the statement of claim filed by him, the appellant pleaded that he had continuously worked in the employment of the respondent from 1.8.1994 to 29.9.1996; that his service was terminated without holding any enquiry and without giving him notice and compensation and that persons junior to him were retained in service. In the written statement filed on behalf of the respondent, it was pleaded that the appellant was engaged on contract basis and his service was terminated because the Director, Local Self Government did not give approval to the resolution passed for his employment. According to the respondent, the resolution passed for engaging the appellant was sent to the Deputy Director for approval, but the same was returned with the remark that the approval may be obtained from the Director, Local Self Government. Thereafter, the resolution was sent to the Director, Local Self Government but no response was received from the concerned authority and, therefore, it became necessary to discontinue the service of the appellant.

5. After considering the pleadings of the parties and the evidence produced by them, the Labour Court passed an award for reinstatement of the appellant without back wages. The Labour Court held that the appellant had worked for more than 240 days in a calendar year preceding the termination of his service and that his service was terminated with effect from 30.9.1996 without complying with the mandatory provisions contained in Section 25F of the Act. The Labour Court rejected the plea that the termination of the appellant's service is covered by Section 2(oo)(bb) of the Act by observing that no evidence was produced by the respondent to prove that it was a case of termination of service in accordance with the terms of the contract of employment.

6. The Division Bench of the High Court entertained and allowed the writ petition filed by the respondent by relying upon the judgments of this Court in Secy., State of Karnataka v. Umadevi (2006) 1 SCC 1;

State of M.P. v. Lalit Kumar Verma (2007) 1 SCC 575; Uttranchal Forest Development Corporation v M.C. Joshi (2007(2) SCC (L&S) 813; M.P. Administration v. Tribhuban (2007) 9 SCC 748; Mahboob

Deepak v. Nagar Panchayat, Gajraula (2008) 1 SCC 575 and Ghaziabad Development Authority v. Ashok Kumar (2008) 4 SCC

261. The Division Bench was of the view that the Labour Court should not have ordered reinstatement of the appellant because his appointment was contrary to the recruitment rules and Articles 14 and 16 of the Constitution and it would not be in public interest to sustain the award of reinstatement after long lapse of time. Simultaneously, the Division Bench declared that the appellant shall be entitled to wages in terms of Section 17-B of the Act.

7. Shri R.L.Batta, learned senior counsel for the appellant argued that the impugned order is liable to be set aside because while interfering with the award of the Labour Court, the Division Bench of the High Court ignored the judicially recognised parameters for the exercise of power under Article 226 of the Constitution. Learned senior counsel further argued that the High Court was not justified in upsetting the award of reinstatement simply because there was some time gap between reference of the dispute by the State Government and adjudication thereof by the Labour Court. Learned senior counsel then relied upon the judgments of this Court in Harjinder Singh v. Punjab State Warehousing Corporation (2010) 3 SCC 192 and Anoop Sharma v. Public Health Division, Haryana (2010) 5 SCC 497 and argued that the Labour Court did not commit any illegality by ordering reinstatement of the appellant because his service was terminated in clear violation of Sections 25-F and 25-G of the Act.

8. Shri Sanjay Jain, learned counsel for the respondent argued that the High Court did not commit any error by setting aside the award of reinstatement because initial appointment of the appellant was not sanctioned by law. Learned counsel submitted that the action taken by the respondent was legally correct and justified because the Director, Local Self Government did not approve the resolution passed by the respondent for engaging the appellant. Shri Jain further submitted that service of the appellant was terminated in accordance with the conditions stipulated in the contract of employment and, as such, it cannot be termed as retrenchment within the meaning of Section 2(oo) of the Act.

9. We have considered the respective submissions and carefully perused the record. Sections 2(oo), 2(s) and 25F of the Act which have bearing on the decision of this appeal read as under:

> "2. (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include -
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of

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

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

2 (s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

25F. Conditions precedent to retrenchment of workmen.-

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

10. The definition of the term "retrenchment" is quite comprehensive.

It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment.

11. In State Bank of India v. N. Sundara Money (1976) 1 SCC 822, a three Judge Bench of this Court analysed Section 2(oo) and held:

> ".....Termination ... for any reason whatsoever' are the key words. Whatever the reason, every termination spells retrenchment. So the sole question is, has the employee's service been terminated? Verbal apparel apart, the substance is decisive. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced. Maybe, the present may be a hard case, but we can visualise abuses by employers, by suitable verbal devices, circumventing the armour of Section 25-F and Section 2(oo). Without speculating on possibilities, we may agree that "retrenchment"

is no longer terra incognita but area covered by an expansive definition. It means "to end, conclude, cease"....."

The ratio of the aforementioned judgement was approved by the Constitution Bench in Punjab Land Development And Reclaimation Corporation Ltd., Chandigarh v. Presiding Officer Labour Court, Chandigarh (1990) 3 SCC 682.

12. Section 2(s) contains an exhaustive definition of the term `workman'. The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term `workman'.

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act.

14. It is apposite to observe that the definition of workman also does not make any distinction between full time and part time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole time job is a workman and the one employed on temporary, part time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

15. Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of `workman'.

16. In Birdhichand Sharma v. First Civil Judge,Nagpur 1961 (3) SCR 161 this Court considered the question whether bidi rollers were workmen within the meaning of the term used in the Factories Act, 1948. The factual matrix of the case reveals that the workers who used to roll the bidis had to work at the factory and were not at liberty to work at their houses. Their attendance was noted in the factory and they had to work within the factory, though there was freedom of doing work for particular hours.

They could be removed from service on the ground of absence for eight days. The wages were paid on piece-rate basis. After considering these facts, the Court held that the bidi rollers were workmen. The Court observed that when the operation was of a simple nature and did not require supervision, the control could be exercised at the end of the day by the method of rejecting bidis which did not meet the required standard and such supervision was sufficient to establish the employer employee relationship.

17. In Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments 1974 (3) SCC 498 the three Judge Bench held that the tailors employed in a tailoring shop, who were paid according to their skill and work and the quality of whose work was regularly checked were employees covered by the Andhra Pradesh (Tilengana Area) Shops and Establishments Act, 1951.

18. In L. Robert D'souza v. Executive Engineer (1982) 1 SCC 645 the Court held that even a daily rated worker would be entitled to protection of Section 25-F of the Act if he had continuously worked for a period of one year or more.

19. Section 25 couched in negative form. It imposes a restriction on the employer's right to retrench a workman and lays down that no workman employed in any industry who has been in continuous

service for not less then one year under an employer shall be retrenched until he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or he has been paid wages for the period of notice and he has also been paid, at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months and notice in the prescribed manner has been served upon the appropriate Government or the authority as may be specified by the appropriate Government by notification in the Official Gazette.

20. This Court has repeatedly held that the provisions contained in Section 25F (a) and (b) are mandatory and termination of the service of a workman, which amounts to retrenchment within the meaning of Section 2(oo) without giving one month's notice or pay in lieu thereof and retrenchment compensation is null and void/illegal/inoperative--State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610, Bombay Union of Journalists v. State of Bombay AIR 1964 SC 1617, State Bank of India v. N. Sundara Money (supra), Santosh Gupta v. State Bank of Patiala (1980) 3 SCC 340, Mohan Lal v. Bharat Electronics Ltd.(1981) 3 SCC 225, L. Robert D'Souza v. Southern Railway (supra), Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court (1980) 4 SCC 443, Gammon India Ltd.

v. Niranjan Dass (1984) 1 SCC 509, Gurmail Singh v. State of Punjab (1991) 1 SCC 189 and Pramod Jha v. State of Bihar (2003) 4 SCC 619.

21 In Anoop Sharma v. Executive Engineer, Public Health Division, Haryana (supra), the Court considered the effect of violation of Section 25F, referred to various precedents on the subject and held the termination of service of a workman without complying with the mandatory provisions contained in Section 25-F (a) and (b) should ordinarily result in his reinstatement.

22. We may now advert to the impugned order. A careful analysis thereof reveals that the High Court neither found any jurisdictional infirmity in the award of the Labour Court nor it came to the conclusion that the same was vitiated by an error of law apparent on the face of the record. Notwithstanding this, the High Court set aside the direction given by the Labour Court for reinstatement of the appellant by assuming that his initial appointment/engagement was contrary to law and that it would not be in public interest to approve the award of reinstatement after long lapse of time. In our view, the approach adopted by the High Court in dealing with the award of the Labour Court was ex facie erroneous and contrary to the law laid down in Syed Yakoob v. K.S. Radhakrishnan AIR (1964) SC 477, Swaran Singh v. State of Punjab (1976) 2 SCC 868 P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar (2001) 2 SCC 54, Surya Dev Rai v. Ram Chander Rai (2003) 6SCC 675 and Shalini Shyam v. Rajendra Shankar Path (2010) 8 SCC 329.

23. In Syed Yakoob v. K.S. Radhakrishnan (supra), this Court identified the limitations of certiorari jurisdiction of the High Court under Article 226 of the Constitution 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 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 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."

In the second judgment - Swaran Singh v. State of Punjab (supra), this Court reiterated the limitations of certiorari jurisdiction indicated in Syed Yakoob v. Radhakrishnan (supra) and observed:

> "In regard to a finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only if in recording such a finding, the tribunal has acted on evidence which is legally inadmissible, or has refused to admit admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice."

In Surya Dev Rai v. Ram Chander Rai (supra), the two-Judge Bench noticed the distinction between the scope of Articles 226 and 227 of the Constitution and culled out several propositions including the following:

"(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction

--by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction--by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice."

24. We are also convinced that the reasons assigned by the High Court for setting aside the award of reinstatement are legally untenable. In the first, it deserves to be noticed that the respondent had engaged the appellant in the back drop of the ban imposed by the State Government on the filling up of the vacant posts. The respondent had started a water supply scheme and for ensuring timely issue of the bills and collection of water charges, it needed the service of a clerk. However, on account of the restriction imposed by the State Government, regular recruitment was not possible. Therefore, resolution dated 27.04.1995 was passed for engaging the appellant on contract basis. The relevant portions of the resolution are extracted below:

"MUNICIPAL COUNCIL,SANAUR,(PATIALA).

COPY OF RESOLUTION NO.30 DATED 27.04.1995 It has been informed by the office to the house that one vacancy of Clerk in the office of Municipal Council, Sanaur is being vacant to the water supply branch.

Due to ban imposed by the Punjab Government vacancy cannot be filed in at present. Municipal Council is operating two tubewells and is directly supplying water to the-general public. At present Municipal Council is operating two tubewells and is directly supplying water to the general public. Municipal Council has given about 1500 water connections. In respect of issuance of water bills and their respective deposit there is need of one Clerk. This vacancy can be filled in after receiving sanction from the government. Therefore at present for the working of the office business as per the instruction of the Government, sanction may kindly be accorded for employing a person as Clerk on contract basis on the consolidated salary of Rs. One thousand per month. This matter was discussed seriously by the house because to provide water to the general public in the summer season is very essential. Therefore, to run smoothly - the work of water supplying Shri Devinder Singh son of .Shjri Hazura Singh of Mohalla kanian, Sanaur is hereby engaged for a period of six months on contract basis on a consolidated salary of Rs. One thousand with effect from 02.05.1995. Resolution was unanimously passed.

Sd/- President Minicipal Council, Sanaur Patiala

25. In furtherance of the aforesaid resolution, the respondent engaged the appellant, who was already in its employment, as a Clerk for a period of six months on contract basis on consolidated salary of Rs. 1,000/- per month. At the end of six months, the respondent passed another resolution dated 30.11.1995 and again employed the appellant for a period of six months from 1.11.1995 to 20.4.1996. This exercise was repeated in 1996 and the appellant's term was extended for six months from 1.5.1996. However, his engagement was discontinued w.e.f. 30.9.1996 without giving any notice or pay in lieu thereof and compensation as per the requirement of clauses (a) and (b) of Section 25- F of the Act. It is true that the engagement of the appellant was not preceded by an advertisement and consideration of the competing claims of other eligible persons but that exercise could not be undertaken by the respondent because of the ban imposed by the State Government. It is surprising that the Division Bench of the High Court did not notice this important facet of the employment of the appellant and decided the writ petition by assuming that his appointment/engagement was contrary to the recruitment rules and Articles 14 and 16 of the Constitution. We may also add that failure of the Director, Local Self Government, Punjab to convey his approval to the resolution of the respondent could not be made a ground for bringing an end to the engagement of the appellant and that too without complying with the mandate of Section 25-F(a) and

(b).

26. The other reason given by the High Court is equally untenable.

The appellant could hardly be blamed for the delay, if any, in the adjudication of the dispute by the Labour Court or the writ petition filed by the respondent. The delay of four to five years in the adjudication of disputes by the Labour Court/Industrial Tribunal is a normal phenomena.

If what the High Court has done is held to be justified, gross illegalities committed by the employer in terminating the services of workman will acquire legitimacy in majority of cases. Therefore, we have no hesitation to disapprove the approach adopted by the High Court in dealing with the appellant's case.

27. The plea of the respondent that the action taken by it is covered by Section 2(oo)(bb) was clearly misconceived and was rightly not entertained by the Labour Court because no material was produced by the respondent to show that the engagement of the appellant was discontinued by relying upon the terms and conditions of the employment.

28. In the result, the appeal is allowed. The impugned order is set aside and the award passed by the Labour Court for reinstatement of the appellant is restored. If the respondent shall reinstate the appellant within a period of four weeks from today, the appellant shall also be entitled to wages for the period between the date of award and the date of actual reinstatement. The respondent shall pay the arrears to the appellant within a period of three months from the date of receipt/production of the copy of this order.

.....J. (G.S. Singhvi) .....J. (Asok Kumar Ganguly) New Delhi, April 11, 2011.