

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P. (C) 5342/2004

Judgment delivered on: February 17,2009

Shri Mool Chand

..... Petitioner

Through: Mr.Rashmi B. Singh, Advocate

versus

Municipal Corporation Delhi

..... Respondent

Through: Mr. Usha Saxena, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. (Oral)

1 . By way of this writ petition filed under Article 226 of the Constitution of India the petitioner seeks to challenge the

impugned award whereby the Labour Court rejected the claim of the petitioner for his reinstatement and further entitlement to the back wages.

2 . Brief facts of the case for deciding the present writ petition are as under:-

The petitioner was employed as a Chowkidar with respondent No.1 on 11.6.1996 and worked Continuously upto 2.7.1997 and his services were terminated by respondent No.1 vide order dated 3.7.1997. The petitioner raised an industrial dispute and upon reference from Secretary, Labour Department an award was passed by the Labour Court on 4.12.2002. Aggrieved with the said award present petition has been preferred by the petitioner.

3 . Counsel appearing for the petitioner submits that the petitioner was appointed on the post of Chowkidar on Muster Roll basis on 11.6.1996 and his last drawn salary was Rs.1677/- per month. Counsel further submits that the petitioner/workman has not been paid his salary since 1.12.1996 and when he requested for the payment of his salary he was threatened by the

Junior Engineer, Shri I.K. Srivastav that in case he raised the demand of payment of salary his services would be terminated. Counsel for the petitioner further submits that the petitioner had worked for a period of 240 days preceding the date of his termination but his services were illegally terminated on 31.7.1997 without adhering to the provisions of Section 25 F of the I.D. Act. Counsel further submits that before the Tribunal it was amply proved that the petitioner had worked for 240 days preceding the date of his termination which fact was also duly admitted by the Management. Counsel for the petitioner has referred to para 9 of the impugned award to contend that Mr. D.S. Chhabra, Executive Engineer (MW-1) in his cross-examination duly admitted that in the year 1996-1997 the petitioner/workman had worked for 197 and 152 days respectively. Even the other witness produced by the respondent/Management Mr. I.K. Srivastava (MW-2) also deposed that the workman was engaged 15 times vide periodical sanctions, preceding the date of his termination. Counsel for the petitioner thus states that there was no dispute so far as the

deployment of the petitioner for 240 days is concerned, however, the Tribunal rejected the claim of the petitioner on the ground that the respondent had engaged the services of the petitioner for specified period and once the specific period was over, the respondent under sub-clause (bb) of section 2 (oo) of the Act was well within its right to terminate the services of the petitioner/workman. The contention of the counsel for the petitioner is that for invoking sub-clause (bb) of section 2 (oo) of the I.D. Act the respondent has to take a categorical stand disclosing the employment of the petitioner in a particular project and for a particular period. No such averment was made by the respondent in their written statement to the statement of claim filed by the petitioner and nor even in the counter affidavit filed by the respondent to the present writ petition and therefore, the counsel for the petitioner contends that the findings of the Tribunal holding that the case of the present petitioner/workman was covered under sub-clause (bb) of Section 2 (oo) of the Act is perverse and illegal. In support of her argument counsel for the petitioner has also placed reliance

on the judgment of **Punjab & Haryana High Court in 1996 LLR 259 Bhikku Ram Vs. Presiding Officer, Industrial Tribunal cum Labour Court, Rohtak and Madhya Pradesh High Court reported in 1998 (79) FLR 850 Executive Engineer, CPWD Vs. Madhukar Purushottam K. and another.**

4 . Refuting the said submissions of the counsel for the petitioner, counsel for the respondent submits that the petitioner had failed to prove his continuous employment with the respondent for a period of 240 days preceding the date of his termination and therefore the petitioner was not entitled for any protection under Section 25 F of the Industrial Disputes Act. Counsel for the respondent further submits that respondent has taken a categorical stand in their written statement as well as in the counter affidavit clearly stating that the petitioner was engaged on temporary basis for short durations from time to time depending upon the sanction granted by the competent authority which in the present case lastly expired on 31.7.1997. Counsel for the respondent further submits that since the

further sanction was not granted by the competent authority to the petitioner thereby the respondent was well within its rights to take a decision to dispense with the services of the petitioner. Counsel thus urges that the Tribunal had rightly invoked sub-clause (bb) of section 2(oo) of the I.D. Act in the facts of the present case and the order of the Ld. Labour Court cannot be held to be either illegal or perverse.

5 . I have heard learned counsel for the parties and perused the record.

6 . In view of various judgments of the Apex court and this Court, it is now well settled that irrespective of whether a workman was a daily wager or not, once he has completed 240 days of continuous service, the termination of his services without complying with the provisions of Section 25F of the Act, is illegal. It was held by a division bench of this court in the case of Delhi **Cantonment Board v. Central Government Industrial Tribunal and Ors., reported as 129(2006) DLT 610(DB)**, that in industrial law there is no difference between permanent and temporary employees as in service law and that as long as a person is a 'workman' within the meaning of

section 2(s) of the Act and had put in 240 days of service in the year prior to the date of termination of his service, it is mandatory to comply with the provisions of Section 25 F of the Act. The judgment rendered by a single judge of this court in the case of **Management of Horticulture Department of Delhi Administration Department of Delhi Administration Vs. Trilok Chand and Anr., reported in 82(1999) DLT 747** in this regard is also noteworthy, relevant extract of which is being reproduced as under:

“Notwithstanding the aforesaid position in law Mr. Anil Grover, learned counsel appearing on behalf of the petitioner argued that respondent is not to be treated as workman and is not entitled to the benefit of the provision of Section 25-F of the Act and in support of his submission he tried to draw sustenance from another judgment of Supreme Court in the case of Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others reported in In this case, decided by a Division Bench, no doubt certain observations were made by the Supreme Court which give the impression that temporary working of daily wages ... would not be considered to be retrenched under the Act. However, a close look would show that the case was mainly decided on the ground that the concerned department namely, Cooperative Training Institute, Deogarh was not to be treated as ``industry`` within the meaning of Section 2(j) of the Act and further in this case Supreme Court did not take into consideration the earlier case decided by it holding to the contrary and as noticed above. Not only this even in the following subsequent judgments, Supreme Court has taken the view that provision of Section 25-F would be applicable even in a case of daily rated workman. These cases are: 1. Rattan Singh Vs. Union of India (1997) 11 SCC 396 2. Municipal Corporation of Delhi Vs. Praveen Kumar Jain. (1998) 9 SCC 468 3. Samistha Dubey Vs. Etawah reported in 1999 LLR 460 (SC).”

7 . It is evident from a study of the law laid down in the abovementioned judgments that once the requirement of 240 days of continuous service is fulfilled, the workman cannot be retrenched without complying with the provisions of Section 25F of the Act.

8 . In the instant case, since the petitioner was a workmen under the Industrial Disputes Act and it has come in the cross examination of Sh. D.S. Chabra, Executive Engineer, who deposed as MW1 that in the years 1996 and 1997 the petitioner had worked for 197 and 152 days, respectively, which clearly meant that the petitioner completed his 240 days, as mandated by law, in preceding 12 months prior to his termination of service. Further, Mr. I.K. Srivastava, MW 2 also deposed that the workman was engaged from time to time vide periodical sanctions, which were 15 in number, preceding the date of his termination, this clearly proves that the petitioner was in continuous service. Therefore, Section 25F of the Act had to be complied with if he had put in 240 days of service in the year prior to the date of termination of service. Petitioner had admittedly put in over 240 days of service. Hence the termination of his service was illegal, since compliance of Section 25F is a condition precedent to the termination of service in view of the decisions of the

Hon'ble Apex Court in **State of Bombay v. Hospital Mazdur Sabha 1960 I LLJ 251 SC, National Iron & Steel Co.Ltd. v. State of West Bengal 1967 II LLJ 23 SC, Mohanlal v. Management of Bharat Electronics Ltd. 1981 LIC 806 (815) SC, Avon Services (Production Agencies) Ltd. v. Industrial Tribunal 1979 I LLJ I SC.** etc.

9 . A perusal of the impugned award shows that the Tribunal committed error in not properly perusing the record and in reaching to the conclusion that the petitioner failed to prove 240 days of his service in the year prior to the date of termination of service. Therefore, the award is modified in this regard.

10 . The contention of the respondent that the termination of the respondent's services did not come within the purview of the term "retrenchment" as contained in Section 2(*oo*)(*bb*) of the Industrial Disputes Act, is also without any merit. At this juncture it would be worthwhile to reproduce Section 2 (*oo*) of the ID Act, which is as under:

(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 superannuating 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-removal 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;

11 . The definition of “retrenchment” was introduced in the Act by Act 43 of 1953 with effect from 24-10-1953. Clause (*bb*) was inserted in the definition by Act 49 of 1984 with effect from 18-8-1984. The definition is conclusive in the sense that “retrenchment” has been defined to mean the termination of the service of a workman by the employer for any reason whatsoever. If the termination was by way of punishment as a consequence of disciplinary action, it would not amount to “retrenchment”. Originally, there were two other exceptions, namely,

(i) voluntary retirement of the workman and

(ii) retirement of the workman on reaching the age of superannuation if the contract of employment contained a stipulation to that effect.

12 . By the Amending Act 49 of 1984, two further exceptions were introduced in the definition by inserting clause (*bb*) with effect from 18-8-1984; one was the termination of service on the ground of continued ill-health of the workman and the other was termination of service on account of non-renewal of the contract of employment on the expiry of the term of that contract. If such contract of employment contained a stipulation for termination of service and the services of the workman are terminated in accordance with that stipulation, such termination, according to clause (*bb*), would also not amount to “retrenchment”.

13 . What the clause (*bb*) of Section 2 (*oo*), therefore, means is that there should have been a contract of employment for a fixed term between the employer and the workman, containing a stipulation that the services could be terminated even before the expiry of the period of contract. If such contract, on the expiry of its original period, is not renewed and the services are terminated as a consequence of that period, it would not amount to “retrenchment”. Similarly, if the services are terminated even before the expiry of the period of contract but in pursuance of a stipulation contained in that contract

that the services could be so terminated, then in that case also, the termination would not amount to “retrenchment”.

14 . In the instant case, nothing has come on record so as to prove the ingredients of Section 2 (oo) (bb) of the ID Act. There is nothing on record to show that the petitioner was engaged for a particular time span or duration or for a particular project or work by the respondent. It has been the consistent view of this court that to exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of Sub-clause (bb) abovesaid. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of Sub-clause (bb), as stated hereinabove. All that has been averred is that the petitioner was engaged as a casual worker or daily- wager in a project. For want of proof attracting applicability of Sub-clause (bb), it has to be held that the termination of the services of the petitioner does not fall in exception (bb) and thus, it amounted to retrenchment.

15 . Be that as it may, it has also come on record in the deposition of Sh. I.K. Srivastava, Junior Engineer, who deposed as

MW 2 that Sh. Hori Lal has been engaged in place of the petitioner and he is still continuing at the said place. Clearly, the post against which the petitioner was working was of a regular nature and vacancies still existed and his services had been illegally terminated without following the established position of law thus, clearly, such an appointment had been made with the object of depriving the petitioner of the status and privilege of a permanent employee.

16 . In view of the above discussion, the petition is allowed and the award passed by the Labour court is set aside with the directions to the respondent to reinstate the petitioner with 50% backwages within four weeks from today failing which the interest @ 9% pa shall also be payable to the petitioner.

Petition is allowed with the above directions.

February 17, 2009
pkv

KAILASH GAMBHIR, J.