

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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W.P.(C) 6293/2001

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Date of decision: 4th May, 2010

NEW INDIA ASSURANCE CO. LTD.

..... Petitioner

Through: Mr. K.L. Nandwani, Advocate.

Versus

SH. NARENDER KUMAR

..... Respondent

Through: Mr. Inder Jit Singh, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The petitioner impugns the award dated 21st August, 2001 of the Industrial Tribunal holding that the respondent had worked for it continuously for 244 days and his termination was against the statutory requirements of Section 25F of the Industrial Disputes Act, rendering the termination *void ab initio*. The Industrial Tribunal held the respondent to be entitled to reinstatement with continuity in service and full back wages. This Court issued notice of the petition and subsequently after notice, vide order dated 18th December, 2001, subject to the petitioner depositing a sum of Rs.1,70,000/- in this Court, stayed the operation of the award. The counsel for the petitioner has informed that the petitioner in pursuance to this order deposited Rs.1,75,000/- which remains deposited in this Court. The respondent filed an application under Section 17B of the ID Act. The said application was allowed vide order dated 10th May, 2002 and the petitioner

directed to pay to the respondent w.e.f. 12th October, 2001 at the rate of last drawn wages i.e. at the rate of Rs.720/- p.m. The respondent applied for modification of the said order and vide order dated 30th September, 2005 the order aforesaid dated 10th May, 2002 was modified and payment under Section 17B was directed at the rate of minimum wages from time to time subject to the respondent filing an undertaking to refund the excess amount over and above the last drawn wages in the event of the petition succeeding. The amount of Rs.1,75,000 (Rupees One Lac Seventy Five Thousand Only) earlier deposited by the petitioner was also directed to be kept in fixed deposit and certain directions with respect to interest accrued thereon were also made. The appeal preferred by the petitioner against the order of modification of the 17B the order was dismissed. Vide order dated 23rd November, 2006, this Court directed that the arrears of difference between last drawn wages and minimum wages be deposited in this Court. A sum of Rs.94,812/- has been so deposited by the petitioner in this Court and permitted to be withdrawn by the respondent subject to undertaking to refund in the event of the petition succeeding.

2. That brings me to the challenge to the award.

3. It is the admitted position that the respondent worked with the Morena Branch of the petitioner for a period of 244 days only (with intermittent breaks) as Asstt. (Clerical). It is further the admitted position that he was appointed on daily rate basis; it is his case that he was assured by the Area Manager that his services would be regularized but in May, 1986 one Shri R.K. Bansal was appointed in his place. The respondent raised dispute contending that having completed more than 240 days in terms of Section 25B of the Act, his services could not have been so

terminated. He further pleaded that he made representations for his regularization and reinstatement but to no avail. He further pleads that he also tried his luck against recruitment as a Typist and even though he passed the written examination in January, 1987, he was failed in the typing test. He thus raised the dispute.

4. It is the case of the petitioner that the regular appointment in the petitioner company is made through procedures as per the rules of the company and for which tests are held; it is denied that any assurances as alleged were meted out to the petitioner and it is contended that none of the officials of the petitioner are empowered to mete out such assurances. It is further pleaded that the respondent was appointed purely on *ad hoc* basis for specified periods to clear the pending works till the regular appointment through written test and interview was affected and had no right to be appointed on a regular basis. It was pleaded that the appointment of the respondent being *ad hoc* and for a specified period, the question of notice or payment of retrenchment compensation to him did not arise. It was confirmed that the respondent had failed to qualify through the prescribed procedure.

5. The Industrial Tribunal finding it to be admitted that the respondent had worked for 244 days held that the services of the respondent were terminated without complying with Section 25F of the ID Act and thus held the termination to be bad. It was further held that the attempt of the respondent for regular selection test would not cure the legal defect of the termination.

6. The counsel for the petitioner has relied on *Secretary, State of Karnataka, Vs. Umadevi* (2006) 4 SCC 1, *Post Master General, Kolkata Vs. Tutu Das* (2007)

5 SCC 317 & *Mahadeo Bhau Khilare (Mane) Vs. State of Maharashtra and Sopan Vishnu Kapase Vs. State of Maharashtra* (2007) 5 SCC 524.

7. It was held in *Umadevi* (supra) that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee; if it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued; a temporary employee cannot claim to be made permanent on the expiry of his term of appointment; merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It was further held that the courts should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

It was thus contended that the award of the Labour Court is contrary to the said judgment.

8. In *Tutu Das* (supra) it was held that that the completion of 240 days of continuous service in a year would be attracted only in a case where retrenchment has been effected without complying with the provisions contained in Section 25F of the Industrial Disputes Act, but would not be relevant for regularization of service.

9. In ***Mahadeo Bhau Khilare (Mane)*** (supra) a distinction was made between an irregular appointment and an illegal appointment. It was held that appointments made without following the statutory rules were unconstitutional and that before a person can claim regularization in the service of the State, he must be in the service of the State; without being in service, the question of regularization did not arise.

10. Attention of the counsel for the petitioner was invited to ***Maharashtra State Road Transport Corporation Vs. Casteribe Rajya P. Karmchari Sanghatana*** (2009) 8 SCC 556. The Supreme Court in this judgment, with reference to ***R.N. Nanjundappa Vs T. Thimmiah*** (1972) 1 SCC 409 carved out a distinction between irregular appointments and illegal appointments. In ***R.N. Nanjundappa*** (supra) the Supreme Court held that if the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized; ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner, which does not go to the root of the appointment; regularization cannot be said to be a mode of recruitment. It was held that to accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules. The Supreme Court in ***Casteribe Rajya P. Karmchari Sanghatana*** (supra) held that the purpose of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 with which it was concerned in that case was to provide for prevention of unfair labour practices and the industrial and the labour courts were empowered, if unfair labour practice is proved, to

declare that unfair labour practice and direct the person indulging in the same, to cease and desist from such unfair labour practice and take such affirmative action including payment of reasonable compensation to the employee affected by the unfair labour practice. It was further held that such issues pertaining to unfair labour practice were not referred, considered or fall for consideration by the Constitution Bench in *Umadevi* case. In the facts of that case it was found that the industrial court, having found the employer in that case to have indulged in unfair labour practice of continuing employees for years with the object of depriving them of status and privileges of permanent employees, was entitled to direct the employer to reinstate the employees.

11. At first blush it appeared to this Court that the Supreme Court in *Casteribe Rajya P. Karmchari Sanghatana* aforesaid had laid down that the judgment of the Constitution Bench of the Supreme Court in *Umdevi* does not come in the way of the Industrial/Labour Courts issuing directions as in the present case, even in favour of casual workman and which orders will have the effect of regularizing their employment. However, on closer analysis, it is found that the exception is only on the ground of unfair labour practice. Else, the law as laid down by the Constitution Bench in *Umadevi* would bind the Labour/Industrial Court also. Even otherwise, it cannot possibly be held that though the High Court and the Supreme Court, even on finding a case for regularization to have been made out, are barred from doing so, the Labour/Industrial Court has freedom in this regard. In the opinion of this Court, the concept of 240 days of continuous service in Section 25B and Section 25F of the ID Act has to be necessarily read in the light of the judgment in *Umadevi* and cannot be read *de hors* the same. If the appointment of

the workman in the industry is illegal, even if he continues for more than 240 days, such illegality would not empower even the Industrial/Labour Court to direct his absorption/regularization/reinstatement except on a finding of unfair labour practice to have been indulged in.

12. In the present case the petitioner is a nationalized company. It is the case of the respondent himself that at the relevant time the branch of the petitioner at Morena, Madhya Pradesh had been newly set up. In the circumstances, the action of the petitioner of engaging the respondent temporarily till it could make recruitment in accordance with its rules & regulations cannot be said to be an unfair labour practice. It is also not as if such casual appointment/arrangement was continued for years together as is generally found to be the case in all judgments where such reliefs are granted. Here, the engagement exceeds the statutory period of 240 days by merely 4 days. The respondent himself admits that the petitioner thereafter had conducted test for regular appointments and in which he also appeared though remaining unsuccessful. Thus by no stretch of imagination can an element of unfairness be attributed to the petitioner. The temporary, casual, daily rated appointment of the respondent otherwise was illegal and as per the law in *Umadevi* case, the petitioner is not entitled to be reinstated.

13. The counsel for the respondent relies on *Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board* 2007 LLR 1233 where the Supreme Court has held that if the Industrial Tribunal records a finding of violation of Section 25F by the employer, it should strike down the termination order as being bad in law. However in the present case, the appointment of the respondent having been found to be illegal and the petitioner having been found to

have not indulged in any unfair labour practice, the finding of the petitioner having violated Section 25F is being set aside. The said judgment is thus of no avail to the respondent. The counsel for the respondent also relies on *MCD Vs. N. Kumar* (144) 2007 DLT 493 but which does not consider the aforesaid aspects and thus cannot come to the rescue of the respondent.

14. The award impugned in this petition thus cannot be sustained and is set aside/quashed. The counsel for the respondent points out that the petitioner in compliance of the order under Section 17B of the ID Act has paid a total sum of Rs.45,360/- to the respondent from October, 2001 to December, 2006 at the rate of last drawn wages i.e. Rs.720/- p.m. and has further paid a total sum of Rs.1,27,840/- to the respondent from 1st January, 2007 to April, 2010 at the rate of Rs. 3,196/- p.m. Even though the respondent is liable to refund the excess amount over and above the last drawn wages so received, but it is deemed expedient to relieve the respondent from the said obligation. However the petitioner shall be entitled to refund forthwith of the sum of Rs.1,75,000/- and Rs.94,812/- deposited as aforesaid and stated to be lying in this Court. Though certain directions with respect to the interest accrued on the deposit of Rs.1,75,000/- were made but since the deposit obtained from the petitioner is found to be on the basis of an award which has been struck down, the interest accrued on the amounts deposited by the petitioner be also refunded to the petitioner.

The parties are also left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

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