

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

Date of decision: 14th November, 2011

+ **W.P.(C) 437/2008**

% **SH. YASHPAL SINGH** Petitioner
Through: Mr. Atul T.N., Adv.

Versus

GOVT. OF NCT OF DELHI & ANR. Respondents
Through: Mr. G.S. Sharma, Adv. for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the award dated 11.05.2007 of the Industrial Adjudicator on the following reference:

“Whether the services of S/Sh. Yashpal Singh & Sanjay have been terminated illegally and / or unjustifiably by the management, and if so, to what reliefs are they entitled and what directions are necessary in this respect.”

and holding that the respondent No.2 management of M/s Delhi Flying Club Ltd. / employer did not violate any provision of Industrial Disputes Act, 1947 in the matter of termination of the services of the petitioner with effect from 14.07.1998 and the petitioner workman had failed to prove that he was unemployed since then and accordingly holding the petitioner to be not entitled to any relief. Though reference was qua the petitioner as well as Sh. Sanjay but the award records that Sh. Sanjay settled with the respondent No.2 employer during the pendency of the proceedings before the Industrial Adjudicator and did not appear for evidence.

2. Notice of the petition was issued and pleadings have been completed. The record of the Industrial Adjudicator has been requisitioned and perused. The counsels have been heard.

3. The petitioner was employed as a Driver with the respondent No.2 / employer since 1st April, 1996. His services were terminated vide a letter dated 14.07.1998; it was stated therein that due to reduction in the, flying, aircraft maintenance and other training activities of the respondent No.2 /

employer, the management in December, 1997 decided to discontinue the transport facilities but did not immediately dispense with the services of the petitioner in the hope of revival of the activities; however, since the activities of the respondent No.2 employer could not be revived, the services of the petitioner were no longer required; the said letter enclosed a cheque for ₹3,446/- being one month's notice period pay and also informed the petitioner that compensation as provided for retrenchment under the law shall be paid along with other dues on finalization of accounts.

4. It was the plea of the petitioner workman before the Industrial Adjudicator:

- (i) That his services had been terminated for union activities and by way of victimization;
- (ii) That the cheque aforesaid for ₹3,446/- had been accepted by him under protest;
- (iii) That the respondent No.2 / employer had not moved any application before the Secretary, Ministry of Labour,

Government of NCT of Delhi about discontinuation of transport facilities;

- (iv) That the respondent No.2 / employer was still running two vehicles;
- (v) That the cheque for ₹8,463/- towards retrenchment compensation was sent to him subsequently but not accepted by him;
- (vi) That except for flying activities, all other activities of the respondent No.2 / employer were intact;
- (vii) That besides working as a Driver, he was working as a peon also;
- (viii) That since other activities of the respondent No.2 / employer were continuing, he could not have been retrenched.

5. I may notice that this Court had asked the petitioner to file his application for appointment and appointment letter. The petitioner filed the same under cover of affidavit dated 20.05.2008. A perusal thereof shows

that the petitioner had applied for the post of Driver and was appointed a Driver only.

6. The Industrial Adjudicator has in the award impugned in this petition held:

- (i) That the petitioner was not involved in any union activities and no case for victimization was made out;
- (ii) That the plea of being engaged as a peon also was an afterthought;
- (iii) That he was engaged for plying the vehicles of the respondent No.2 / employer;
- (iv) That though the petitioner pleaded that the respondent No.2 employer continued to engage other Drivers but could not prove the same;
- (v) That the respondent No.2 / employer besides the petitioner employed two other Drivers also all of whom had become surplus;

- (vi) That the retrenchment compensation was not required to be paid at the time of retrenchment and could be paid and was paid subsequently also;
- (vii) That the word “closure” did not mean closure of the entire undertaking and closure of a distinct venture though part of a business was legal and permissible;
- (viii) That failure to pay compensation simultaneously with closure does not vitiate the termination;
- (ix) That no wrong could be found in the retrenchment by the respondent No.2 of the senior most Driver.

7. Though the petitioner in the petition has challenged the entire award and which would include challenge as to the findings of closure also but the counsel for the petitioner during the hearing confined the challenge to the termination being bad for the reason of the closure / retrenchment compensation being not paid / tendered at the time of closure / termination but having been tendered after three months therefrom. He, in this regard relied on *Management of M/s Brahmaputra Board Vs. Ashok Kumar* 2006 (5) AD (Delhi) 67 (DB) and has contended that though the said judgment

was cited before the Industrial Adjudicator also as also noted in the award but has not been followed. It is contended that this Court in the said judgment held the termination to be bad for the reason of compensation having been paid after a delay of 19 days; the delay in the present case is much longer.

8. The counsel for the respondent No.2 employer has contended that the judgment aforesaid is on Section 25F of the Act and not on Section 25FFF of the Act applicable in the present case. Reliance is placed on ***Management of Hindustan Steel Ltd. Vs. The Workmen*** (1973) 3 SCC 564 to contend that closure compensation under Section 25FFF of the Act need not to be paid simultaneously with the notice. Reference in this regard is also made to ***Hathising Manufacturing Company Ltd. Vs. UOI*** 1960 II LLJ 1. Though the counsel for the petitioner has not challenged the finding of the Industrial Adjudicator of closure, the counsel for the respondent No.2 employer has also invited attention to the cross examination of the petitioner wherein he had admitted that the transport facilities of the respondent No.2 employer had been done away with. It is also contended that it was neither the plea

nor the argument of the petitioner that the closure was not *bonafide* or that Section 25F was attracted. It is thus contended that the Industrial Adjudicator has rightly dealt with the said issue on the basis of judgments referred to in the award.

9. The counsel for the petitioner has in rejoinder also referred to Section 9A and the Fourth Schedule of the Act. He has contended that under Section 9A, an employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in Fourth Schedule is required to give a notice of 21 days. It is contended that as per serial No.11 of the Fourth Schedule any increase or reduction in the number of persons employed or to be employed in any occupation or process or department or shift not occasioned by circumstances over which the employer has no control is a condition of service for change whereof Section 9A has to be complied. He contends that the termination is bad for the said reason also.

10. The counsel for the petitioner workman however fairly admits that the aforesaid contention was not raised before the Industrial Adjudicator and has been raised for the first time during the hearing. This Court in exercise of powers of judicial review would not allow any new plea especially when the same is not a pure question of law. The Supreme Court recently in ***Greater Mohali Area Development Authority vs. Manju Jain*** (2010) 9 SCC 157 reiterated that a plea for which no factual foundation has been laid before the tribunal below, cannot be allowed to be agitated in the Writ Petition. Thus it is not deemed expedient to deal with the said argument.

11. As far as reliance by the petitioner on ***Management of M/s Brahmaputra Board*** (supra) is concerned, the said judgment is expressly on Section 25F of the Act and does not even consider a case under Section 25FFF of the Act. The position as to payment of compensation as far as under Section 25FFF of the Act is concerned is clearly covered by the judgments aforesaid relied upon by the counsel for the respondent No.2 employer. There is thus no merit in the only plea urged by the petitioner.

13. The findings of the Industrial Adjudicator of closure having been effected, are findings of fact and no perversity therein is shown. I have in ***MVL Industries vs. Harendra Singh*** MANU/DE/1972/2011 referred to case law to the effect that in exercise of powers of judicial review, evidence cannot be reappreciated.

14. There is thus no merit in the petition. The same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

NOVEMBER 14th, 2011
'gsr'.