

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

Date of decision: 17th March, 2011

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W.P.(C) 4231/2002

MCD.

..... Petitioner

Through: Ms. Amita Gupta with Mr. Rahat
Bansal & Ms. Pooja Sharma,
Advocates.

versus

SH. BHANWAR SINGH & ANR.

..... Respondents

Through: Mr. Anuj Aggarwal, Advocate.

AND

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W.P.(C) 5810/2004

M.C.D.

..... Petitioner

Through: Ms. Amita Gupta with Mr. Rahat
Bansal & Ms. Pooja Sharma,
Advocates.

versus

SH. BHANWAR SINGH

..... Respondent

Through: Mr. Anuj Aggarwal, Advocate.

AND

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W.P.(C) 5822/2004

M.C.D.

..... Petitioner

Through: Ms. Amita Gupta with Mr. Rahat
Bansal & Ms. Pooja Sharma,
Advocates.

versus

SH. BHANWAR SINGH

..... Respondent

Through: Mr. Anuj Aggarwal, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. The three petitions though impugn three separate awards/order of the Industrial Tribunal but all between the employer MCD and its same employee/workman.
2. The workman on 8th October, 1996 filed a complaint with the Industrial Tribunal under Section 33A of the Industrial Tribunal Act, 1947 of the terms of his employment having been changed during the pendency of a general dispute between the employer MCD and the Chowkidar, Beldar, Bullockmen, Bhishties, Coolies, Machinemen, Hedgemen, Garden Chaudhary etc. employed with it. The terms of employment were alleged

to have been changed by his transfer from Shahdara (North) Zone where he was then working to the Headquarters (Horticulture Deptt.).

3. The first reference of the dispute between the employer MCD and the respondent workman was made on 7th October, 1997 of the following disputes:-

“Whether the transfer of Sh. Bhanwar Singh from Shahdara (North) to Head Quarter (Horticulture Deptt.) made by the management vide order dated 2nd August, 1996 is illegal and/or malafide and if so, to what relief is he entitled and what directions are necessary in this respect?”

4. Since thereafter another reference dated 26th December, 1997 was made as under:-

“1. Whether Shri Bhanwar Singh is entitled to be regularized on the post of Mali w.e.f. 1978 instead of 1.4.88 in proper pay scale and whether he is entitled to wages in proper pay scale as given to regular employees for his muster roll employment and if so, what directions are necessary in this respect?”

“2. Whether Shri Bhanwar Singh is entitled to wages of Garden Chaudhary for the period since 3.12.88 and if so, what directions are necessary in this respect?”

5. The first of the aforesaid three matters to be decided was the award dated 10th October, 2001 in the reference in para 3 aforesaid with respect to the transfer of the workman. The Industrial Tribunal held the transfer to be illegal for the reason of the same having been effected owing to the workman having misbehaved with his superior and thus being punitive and without affording any opportunity of hearing to the workman. The Industrial Tribunal further held that the workman had not been allowed to resume duties in the transferred office also and hence held the workman entitled to payment of arrears of back wages for the entire period till the date of resuming duties at Shahdara (North) Zone. Aggrieved therefrom W.P.(C) No.4231/2002 has been filed. Vide interim order dated 17th September, 2002 the operation of the award for payment of arrears of back wages for the entire period from the order of transfer till the date of resuming duties was stayed. However the counsel for the workman informs that prior to the said interim order, the workman had executed the said award and has recovered back wages from the date of order of transfer till

the year 2004. The counsel for the employer MCD has no instructions in this regard. However since the counsel for the workman states that the said monies have been recovered, the question of the workman being entitled to recover the same again will not arise.

6. The reference dated 26th December, 1997 as mentioned in para 4 above was decided vide award dated 2nd April, 2003. The Industrial Tribunal though did not hold the workman entitled to the relief of regularization on the post of Mali w.e.f. 1st March, 1978, nevertheless held the workman entitled to wages equal to regular Malis w.e.f. 1st March, 1978 till the date of his regularization i.e. up to 31st March, 1988 but without any increments. The workman was also held entitled to receive the wages of regular Garden Chaudhary in the proper pay scale w.e.f. 3rd December, 1988. Aggrieved therefrom W.P.(C) No.5810/2004 has been filed. Vide interim order dated 20th April, 2004 the operation of the said award was also stayed. However the counsel for the workman again informs that the entire amount due under the said award has also been already received by the workman. The counsel for the employer MCD has

no instructions in this regard. However as aforesaid, in view of the said statement of the counsel for the workman, the occasion for recovery now of the said amount also shall not arise.

7. The complaint under Section 33A mentioned in para 3 above was decided by the Industrial Tribunal on 2nd April, 2003. In view of the awards aforesaid, no further order was made on the said complaint.

8. During the pendency of the present proceedings and as recorded in order dated 18th November, 2005 in W.P.(C) No.5810/2004, the workman stated that without prejudice to his rights and contentions he was willing to join back duties with the employer MCD either as a Mali or as a Garden Chaudhary. The employer MCD offered to take back the workman, again without prejudice to its rights and contentions, as a Mali only. It was accordingly directed that the workman will join duties with the employer MCD w.e.f. 24th November, 2005 as a Mali. It is informed that the workman has joined duties and has been working since then with the employer MCD. The counsel for the workman of course contends that as

before, the work as of a Garden Chaudhary is being taken from the workman though emoluments as of a Mali only are being paid. It is further stated that the emoluments from 2004 till November, 2005 have not been received.

9. In view of the aforesaid position, the question, besides as to the validity of the two awards aforesaid, which arises is as to whether in the event of the employer MCD succeeding, the respondent workman would be liable to refund the monies already recovered and as to whether the workman is to hereafter continue with the employer MCD as a Mali or as a Garden Chaudhary under the award aforesaid.

10. The counsel for the workman invites attention to paras 36 to 38 of *Yogeshwar Prasad v. National Institute, Education Planning & Administration* 2010(11) SCALE 379 to contend that the amounts already recovered cannot be directed to be refunded. However the said judgment is not found to be laying down any such principle. The Apex Court in the judgment aforesaid including in the judgments referred therein held that

the amounts were not to be refunded for the reason that the payment thereof was not attributable to the employee from whom they were sought to be recovered back. In each of the cases what was observed was that the excess payment was owing to no fault of the employee. Faced with the same, the counsel for the workman invites attention to para 40 of the same judgment further stating that where the payment was not attributable to misrepresentation or fraud by the employee it could not be refunded. The said paragraph would also not come to the rescue of the workman. The principles of restitution would apply. The payments recovered by the workman in the present case are in execution of the award and if the said award were to be interfered with, the workman would certainly be liable to restitute the amounts recovered under the award.

11. The first question which arises is, whether the Industrial Tribunal was justified in, though not holding the workman entitled to regularization on the post of Mali w.e.f. 1st March, 1978, directing the MCD to pay to him wages equivalent to a regular Mali with effect from that date.

12. In my opinion, the said award cannot be justified. The Supreme Court in *Indian Drug and Pharmaceuticals Limited Vs. Workman, Indian Drugs and Pharmaceuticals Limited* (2007) 1 SCC 408 reiterated that a daily rated or casual worker is only a temporary employee and that a temporary employee has no right to post and is distinct from a permanent employee who has a right to the post. It was held that it is only a permanent employee who has a right to continue in service till the age of superannuation unless dismissed or removed after an inquiry or his service is terminated for some other valid reasons; a temporary employee has no age of superannuation because he has no right to the post at all. It was reiterated that no direction can be given that a daily wage employee should be paid salary of a regular employee. Such awards of the Labour Courts on the basis of emotions and sympathies were held to be based on no legal principle.

13. The award of the Industrial Tribunal to the said extent is therefore clearly illegal and the monies realized by the petitioner in enforcement of the said award cannot be said to be legally due from the petitioner MCD to

the respondent workman and on the principal of restitution the respondent workman would be liable to refund the same.

14. Need after such a long lapse of time is not felt to deal with the award in so far as with respect to the transfer of the workman from Shahdara (North) Zone to Headquarters (Horticulture Deptt.). It is informed that the workman upon re-joining pursuant to the order dated 18th November, 2005 (supra) is since working at Shahdara (North) Zone only. The counsel for the respondent workman agrees that if the employer MCD in accordance with its policy / rules on transfer hereafter desires to transfer the respondent workman, it would be entitled to do so.

15. However the question arises, whether the Industrial Tribunal was justified in directing the MCD to pay to the workman the wages from the date of order of transfer till the date of rejoining. The said direction was premised on factual finding that the MCD did not permit the workman, neither at the place from where transferred nor at the place to which he was transferred, to work. Such payment was also sought to be justified owing to finding that the workman was working as Garden Chaudhary but at the

place of transfer was given work at a junior post of Mali which he could not be expected to join.

16. The counsel for the employer MCD has also invited attention to the complaint aforesaid under Section 33A of the Act preferred by the workman where the workman had admitted that since the transfer order was illegal he had not joined to the transferred place. It is contended that in the light of the said admission of the workman, the finding of the Industrial Tribunal of the workman having been refused work at the transferred place cannot be accepted.

17. The only other question which remains for consideration is whether the award in so far as holds the workman to be entitled in future to wages as of a Garden Chaudhary is in accordance with law or not and calls for any interference in these proceedings of judicial review.

18. The Industrial Tribunal has held the workman to be so entitled upon returning a finding that the work as of a Garden Chaudhary was being taken from the workman.

19. It is the contention of the counsel for the employer MCD that Garden Chaudhary is a post and procedure for promotion/appointment whereto has been prescribed and without the workman having been promoted to the said post he could not be held entitled to emoluments of the said post.

20. Per contra, the counsel for the workman relies upon para 6 of *Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma* AIR 1998 SC 2909. However a perusal of the said judgment shows that what was laid down therein was that if a person was directed to officiate on a higher post with greater responsibilities, then even though not promoted to the said post, would be entitled to emoluments thereof. It is nobody's case that the workman in the present case was promoted to the higher post of Garden Chaudhary. The only claim which the workman could have had and/or which he could have raised was of being entitled to promotion to the post of Garden Chaudhary. Without being so promoted, the award for paying emoluments to a post to which he was not directed to officiate or promoted could not have been made.

21. I have in WP(C) 4023/1997 titled ***Municipal Corporation of Delhi Vs. Jagdish Chander*** dated 23rd March, 2010 dealt with the procedure for promotion to the post of Garden Chaudhary. No such procedure was admittedly followed in the present case. In the absence of the promotion or any document to show that the employer MCD had directed the workman to officiate for the said post, the award holding the workman entitled to emoluments thereof cannot be sustained.

22. Insofar as the direction in the award dated 10th October, 2001 for payment to the workman of the emoluments for the period for which he admittedly did not work owing to the transfer aforesaid, it is felt that the finding of the Industrial Tribunal of the workman having not been permitted to join the work be not disturbed at this stage. Nothing has been brought on record to show that the MCD during the said period issued any letters to the workman calling him to join work and the workman inspite thereof absented. Even otherwise, considering the economic strata of the society to which workman belongs, it would be unduly hard on him to now

refund the said amount already recovered or to allow MCD to adjust the same out of his future emoluments.

23. I am also of the opinion that since the employer MCD did not act promptly and did not protect itself against the execution of the award, now after a long lapse of time it would be inequitable to direct the monies recovered by the workman in execution of the award to be refunded or to be adjusted in the future emoluments of the workman. However the respondent workman shall not be entitled to any amount for the period from 2004 till joining, as claimed to be due.

24. The petitions therefore succeed to the aforesaid extent. The award dated 2nd April, 2003 of the Industrial Tribunal holding the petitioner entitled to the relief of wages equivalent to a regular Mali w.e.f. 1st March, 1978 till the date of regularization i.e. 31st March, 1988 is set aside. However, for the reasons aforesaid, the MCD is not found entitled to restitution of the amount already recovered. The award dated 10th October, 2001 is however not interfered with for the reasons aforesaid.

Accordingly, it is directed that the workman w.e.f. 24th November, 2005 shall be entitled to emoluments as of a Mali only and not as of the Garden Chaudhary. The petitions are disposed of. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MARCH 17th, 2011
Pp/M