

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

Date of decision: 15th February, 2011.

+ W.P.(C) No.16309/2006

% MR. ADARSH KUMAR KHANNA Petitioner
Through: Ms. Pragya Ohri, Mr. Manu
Aggarwal & Mr. R.M. Karanjawala,
Advocates.

Versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravinder Agarwal, Adv. for R-1
UOI.
Ms. Shweta Bharti, Ms. Sangmitra
Sawant, Mr. Shantanu & Mr.
Neelesh Singh, Advocates for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 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 writ petition impugns the letter dated 10th March, 2006
purportedly of the respondent no.2 Mother Dairy Fruit & Vegetables Pvt.
Ltd. repudiating/cancelling the appointment of the petitioner as Managing

Director and seeks mandamus to the respondents to pay compensation equivalent to salary for the unserved period of employment. Notice of the writ petition was issued. Though the writ petition was accompanied with an application for interim relief but no interim relief was granted. The pleadings have been completed and the counsels for the parties have been heard.

2. The petitioner claims to be a leading Dairy Technologist, qualified from the National Dairy Research Institute, Karnal, Haryana and having served M/s Hindustan Lever Ltd. and M/s Britannia Industries Ltd. in the Dairy Sector. The petitioner, vide letter dated 30th April, 2004 was appointed as the Managing Director of M/s Mother Dairy Foods Processing Ltd. on the terms and conditions contained therein and for a period of five years from 30th April, 2004. The petitioner while serving as the Managing Director of M/s Mother Dairy Foods Processing Ltd., on 2nd September, 2005 i.e. after about one and a half years only of his appointment, suffered a major paralytic stroke and was hospitalized and thereafter confined to the house. M/s Mother Dairy Foods Processing Ltd.

continued to pay the salary/emolument of the petitioner. However, the said M/s Mother Dairy Foods Processing Ltd. vide letter dated 10th March, 2006 impugned in this writ petition repudiated/cancelled the contract with the petitioner with effect from 6th March, 2006.

3. The aforesaid termination is challenged averring the same to be in contravention of Articles 21, 14 & 19(1)(g) of the Constitution of India, as being in violation of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Disabilities Act), as being arbitrary and in contravention of the principles of natural justice.

4. Though the appointment of the petitioner as Managing Director as well as the letter dated 10th March, 2006 was with/by M/s Mother Dairy Foods Processing Ltd. but the said company was not impleaded as a party/respondent in the writ petition as filed in October, 2006. Rather, pleadings in the writ petition were as if the appointment of the petitioner as Managing Director was with respondent no.2 M/s Mother Dairy Fruit &

Vegetables Pvt. Ltd. The National Dairy Development Board (NDDB) was impleaded as the respondent no.3 in the writ petition.

5. Upon objection being taken by the respondents no.2 & 3 in this regard i.e. that the company with which the petitioner was appointed as the Managing Director had not been impleaded, an application being CM No.13491/2008 was filed by the petitioner for impleadment of the said M/s Mother Dairy Foods Processing Ltd. as respondent no.4 and which was allowed on 18th January, 2010. However, the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. thereafter filed CM No.20997/2010 for recall of the order dated 18th January, 2010 pleading that M/s Mother Dairy Foods Processing Ltd. already stood merged with the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. Vide order dated 6th December, 2010, the order dated 18th January, 2010 was recalled and the memo of parties as originally filed, was ordered to be the correct memo of parties.

6. The counsel for the petitioner has during the hearing confined the arguments only under the Disabilities Act. Attention is invited to Section

47 thereof which prohibits dispensation of service or reduction in rank of an employee who acquires disability during his service. It is contended that owing to the said provision, the petitioner is entitled to compensation equivalent to the emoluments due to him for the remaining period of five years for which he was appointed as the Managing Director.

7. Per contra, the counsel for the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. in which now M/s Mother Dairy Foods Processing Ltd. in which the petitioner was the Managing Director has amalgamated, has argued:-

(i) that the writ petition is liable to be dismissed merely on the ground that the company in which the petitioner was the Managing Director and which was in existence on the date of the filing of the writ petition was not even impleaded as a respondent and the application for impleadment was also filed belatedly. It is urged that the amalgamation of M/s Mother Dairy Foods Processing Ltd. into

the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd.
after the institution of the writ petition would be of no avail.

(ii) that no basis for the argument under the Disabilities Act to which the arguments are now confined has been laid in the writ petition; there is nothing to show that the petitioner has suffered the disability within the meaning of the said Act. Attention is invited to the Rule 4 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 (Disabilities Rules) prescribing the authorities entitled to issue a Disability Certificate. It is urged that no Disability Certificate has at any time been produced or shown before this Court also.

(iii) attention is next invited to Section 3 of the Disabilities Act providing for the constitution of the Central Co-ordination Committee and it is contended that the grievance if any under the Disabilities Act, is to be made before the said Committee and not by way of this writ petition.

(iv) it is contended that emoluments of nine months have already been paid to the petitioner without the petitioner performing his duties as Managing Director and no further payment can be directed to be made on sympathetic grounds.

(v) it is contended that the petitioner as Managing Director was not an employee so as to entitle to benefit of Section 47 of the Disabilities Act. Reliance in this regard is placed on para 7 of ***Shri Ram Prasad Vs. Commissioner of Income Tax*** AIR 1973 SC 637.

8. The counsel for the petitioner in rejoinder has urged that the petitioner as Managing Director was also an employee; that the Disabilities Act is a Social Welfare Legislation and purposive interpretation to provisions thereof has to be given. Reliance in this regard is placed on the observations of the House of Lords in ***Kammins Ballrooms Co. Ltd. Vs. Zenith Investments (TORQUAY) Ltd.*** 1971 AC 850. Reference is also made to ***Kumari Shrilekha Vidyarthi Vs. State of U.P.*** (1991) 1 SCC 212 (para 22) to contend that irrespective of the relationship of the petitioner

with M/s Mother Dairy Foods Processing Ltd. being contractual, the said company being a state within the meaning of Article 14 of the Constitution of India, its obligations to the petitioner partake a public character. It is contended that no prejudice whatsoever has been caused to the respondents by non-impleadment of M/s Mother Dairy Foods Processing Ltd. at the time of institution of the writ petition.

9. Having considered the matter, I am of the view that even if the provisions of the Disabilities Act were to be held to be applicable, the petitioner still would not be entitled to compensation equivalent to the balance period of his employment as Managing Director and which is the only relief claimed. A perusal of the letter dated 30th April, 2004 of appointment of the petitioner shows that though the period of appointment was for a period of five years from 30th April, 2004 but Clause 7(b) thereof provided that the employment could be terminated by either party giving to the other party three months notice or the company paying three months remuneration in lieu thereof. The petitioner thus had no right/certainty of continuance as a Managing Director for five years from 30th April, 2004,

for him to be entitled to compensation equivalent to the unserved/balanced period. Clause 7(b) (supra) did not entitle such termination by three months notice or remuneration in lieu thereof subject to any specific exigencies. The employment of the petitioner was liable to be terminated at mere whim and fancy of the M/s Mother Dairy Foods Processing Ltd., without even stating any reasons.

10. A perusal of the letter dated 10th March, 2006 of repudiation/cancellation impugned in this writ petition shows that M/s Mother Dairy Foods Processing Ltd. had invoked the aforesaid Clause 7(b) only for repudiating/cancelling the appointment of the petitioner.

11. The question which thus arises is whether M/s Mother Dairy Foods Processing Ltd. could under Section 47 of the Disabilities Act be compelled to continue with the petitioner as Managing Director for five years or be compelled to pay the emoluments for the balance period of five years when it was entitled otherwise to terminate the employment. In this regard it may be noticed that Section 47 of the Disabilities Act does not

have a non-obstantive clause viz. “notwithstanding anything to the contrary contained in any contract.....”. Section 47 of the Disabilities Act is not intended to create a new contract between an employer and an employee. It only prohibits dispensation with service for the reason of disability. However, if an employer otherwise under the contract of employment with the employee, is entitled to dispense with the services of the employee owing to the same being terminable merely by giving three months notice, Section 47 of the Act cannot come in the way of the said termination. Section 47 of the Act is a protection for a situation where an employer otherwise was not entitled to terminate the employment but became entitled to so terminate the employment for the reason of disability having been suffered by the employee and the employee being unable to perform the tasks for which he is employed.

12. The Supreme Court recently in ***Dalco Engineering Private Ltd. v. Shree Satish Prabhakar Padhye*** AIR 2010 Supreme Court 1576 had an occasion to consider the provisions of the Disabilities Act. Before the Supreme Court also, argument was raised that the Act being a Socio-

economic Legislation should be interpreted liberally. While agreeing with the said contention, the Supreme Court held that the said argument was with a caveat that the Courts cannot obviously expand the application of a provision in a Socio-economic legislation by judicial interpretation, to levels unintended by the Legislature or in a manner which militates against the provisions of the statute itself or against any constitutional limitation. It was further held that express limitations placed by the Socio-economic statutes cannot be ignored so as to include in its application, those who are clearly excluded by the statute itself.

13. If the arguments of the petitioner herein were to be accepted, the same would tantamount to this Court re-writing the contract between the parties and doing away from the said contract, a right which the employer had reserved unto itself, to without furnishing any reason terminate the employment. The same is not permitted, as aforesaid.

14. Though the writ petition is liable to be dismissed on this finding alone but propriety demands that the other arguments raised be also dealt with.

15. The first other question which arises is whether non-impleadment at the time of institution of the writ petition of M/s Mother Dairy Foods Processing Ltd. is fatal to the writ petition. In my opinion, no. The petitioner even at the time of filing of the writ petition was lying paralyzed. The writ petition on his behalf has been filed by his wife and who could not be expected to be in the full know of the affairs. It is otherwise not disputed that both respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. as well as M/s Mother Dairy Foods Processing Ltd. are the subsidiaries of the respondent no.3 NDDB. The mistake in not impleading M/s Mother Dairy Foods Processing Ltd. at the time of institution of writ petition can thus be not fatal. Moreover, the application for impleadment was allowed and which order was recalled only owing to the M/s Mother Dairy Foods Processing Ltd. having since merged in the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd.

16. The next question raised is of whether a Managing Director can be an employee. The Supreme Court in ***Ram Prasad*** (supra) relied upon by the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. has held that whether a Managing Director is an employee or not, can be determined only from the Articles of Association of the company employer and the terms of employment and there is no hard and fast Rule. Though neither of the parties has placed before this Court the Articles of M/s Mother Dairy Foods Processing Ltd. but the petitioner admittedly was not a promoter of the said company and had no financial stake therein or in profits save to the extent of his remuneration under his letter of appointment. The petitioner was a professional in comparison to entrepreneur Managing Director. A perusal of the appointment letter shows that the petitioner in the matter of leave, travelling concession, medical benefits, use of company's car and telephone at residence etc. was to be governed by the Rules of the Company; he was not entitled to engage himself in any other activity. The letter of appointment itself at several places intended the petitioner as Managing Director to be in the employment of the company. The Supreme Court in ***ESI Corporation Vs.***

Apex Engineering (Pvt.) Ltd. (1998) 1 SCC 86 has held that a Managing Director by himself cannot be said to be the owner of the factory which belongs to the company and particularly when the Managing Director was to work under the directions of the entire body of Directors, as is the case in the present case also.

17. I therefore hold the petitioner to be an employee of M/s Mother Dairy Foods Processing Ltd. since merged in the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd.

18. The only other argument raised for excluding the applicability of the Disabilities Act was that Section 47 of the Act prohibits only an “establishment” which is defined in Section 2(k) of the Act as meaning a corporation established by or under a Central, Provincial or State Act or an authority or body owned or controlled or aided by the Government or a local authority or a Government Company as defined in Section 617 of the Companies Act, 1956 and including Departments of Government. It was contended that neither M/s Mother Dairy Foods Processing Ltd. nor the

respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. can be said to be a corporation established by or under a Central Act or controlled or aided by the Government or a Local Authority or a Government Company within the meaning of Section 617 of the Companies Act, 1956.

19. The Supreme Court in *Dalco Engineering Private Ltd.* (supra) has negated the argument that since all companies are incorporated under the Companies Act, they would be a corporation established by or under a Central Act. It was held that the words “a corporation established by or under a Central, Provincial or State Act” is a standard term used in several enactments to denote a statutory corporation established or brought into existence by or under a statute; a company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act; that the word “established” refers to coming into existence by virtue of an enactment. From the caption/marginal note of Section 47 of the Act describing the purport of the Section as non-discrimination in Government employment, it was held that private employers are excluded from the applicability

thereof. It was however held that the word “Government” is used in the caption broadly to refer to ‘State’ as defined in Section 12 of the Constitution.

20. The matter thus has to be decided in the light of the law as aforesaid laid down. The counsel for the respondent no.2 M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. informs that both M/s Mother Dairy Foods Processing Ltd. and M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. are the subsidiaries of respondent no.3 NDDB. Undoubtedly, respondent no.3 NDDB has been established by or under the National Dairy Development Board (NDDB) Act, 1987. It is however contended that M/s Mother Dairy Foods Processing Ltd. and M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. however were not established under the said Act and are incorporated companies and merely because their entire shareholding was/is held by the respondent no.3 NDDB would not make them a corporation established under the NDDB Act.

21. A perusal of the NDDB Act however shows that Section 43 thereof empowers the NDDB to, for implementation of any of its objectives and subject to the previous approval of the Central Government form one or more companies either by itself or in conjunction with any of the subsidiary or with any other undertaking. No arguments by either counsels on the said aspect, were addressed. However, in view of the admission, of both M/s Mother Dairy Foods Processing Ltd. as well as M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. being the subsidiaries of respondent no.3 NDDB, I have no doubt that they have been formed in exercise of powers under Section 43 of the NDDB Act. That being the position, they would certainly be a corporation established by or under the NDDB Act and hence an establishment within the meaning of Section 2(k) of the Act and the provisions of Section 47 of the Disabilities Act, would thus apply to M/s Mother Dairy Foods Processing Ltd. as well as the M/s Mother Dairy Fruit & Vegetables Pvt. Ltd.

22. The aforesaid also falls from the judgment aforesaid in ***Dalco Engineering Private Ltd.*** which has held that the benefit of Section 47 of

the Disabilities Act is intended to be restricted to employees of an enumerated establishment which fall within a State under Article 12. M/s Mother Dairy Foods Processing Ltd. and M/s Mother Dairy Fruit & Vegetables Pvt. Ltd. would fall within the definition of State under Article 12 of the Constitution of India and hence would be an establishment for this reason also.

23. No other argument was raised. Though sympathies remain with the petitioner, but I am unable to grant any relief in law. The writ petition is therefore dismissed but with no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

FEBRUARY 15, 2011

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(Corrected and released on 28th February, 2011)