

9/11

20

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ LETTERS PATENT APPEAL No. 1162/2007

Reserved on: 5th April, 2011

% Date of Decision: 3rd May, 2011

M.C.D. Appellant

Through Mr. Gaurang Kantha, Adv.

VERSUS

RAJPAL & ORS. Respondents

Through Mr. Rajiv Aggarwal & Mr. Anuj
Aggarwal, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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

SANJIV KHANNA, J.:

1. By the impugned judgment dated 9th March, 2007, Writ Petition (Civil) No. 5563/2003 filed by Rajpal and Ors. the respondents herein, has been allowed. It has been held that the respondents are entitled to reinstatement in service as daily wagers with consequential

benefits, i.e. back wages, in view of the violation of Section 25G of the Industrial Disputes Act, 1947 (Act, for short).

2. At the instance of the respondents, the following two disputes were referred for adjudication under the Act:-

"1. "Whether the services of S/Sh. Raj Pal, Arvind Kumar Pandey, Ram Milan, Om Vir, Krishna Kumar, Ajay Singh and Rajender Singh have been terminated illegally and/or unjustifiably by the management and if so, to what relief are they entitled and what directions are necessary in this respect?"

2. "Whether S/Sh. Raj Pal, Arvind Kumar Pandey, Ram Milan, Om Vir, Krishna Kumar, Ajay Singh and Rajender Singh, daily rated/causal/muster roll are entitled to be regularised on the post of Mali/Beldar in proper pay scale and if so, from which date and what directions are necessary in this respect?"

3. Before the Industrial Tribunal, the contention of the appellant herein, Municipal Corporation of Delhi was that the respondents had worked for short durations between 2 to 4 months in respect of specific projects and they were, therefore, "not workmen" as defined under the Act. It was also contended that the respondents had not worked for 240 days in a year and, therefore, Section 25F of the Act was not attracted. Along with the reply, the appellant had enclosed Annexure 'A' giving details of the period during which the

respondents had worked with them. The said details have also been enclosed with the present appeal as Annexure A-2. After considering the evidence on record, the industrial adjudicator on the first issue gave the following finding:-

"The perusal of all the muster rolls show that workmen Ajay Singh, Rajender Singh and Ram Milan have not worked for 2 months from 16.9.94 to 15.11.94, which is also admitted by the workmen, Om Vir Arvind Kumar Pandey and Krishna Kumar have worked intermittently from December, 93 to 15.11.94 and worked for about 166 days. There are three gaps in their service of 40 days, 32 days & 2 months. Thus, they have also not put up the continuous service and they have also not put up the continuous service and they have not completed 240 days. Raj Pal has worked most, however, his total days of work comes to 210 days. He has 4 breaks in his service i.e. first break of about one year, second break for about 2 months, third for about 40 days and fourth break for about 32 days. He has also not completed continuous service of 240 days for a calendar year."

4. On the question/issue No. 2, the industrial adjudicator held against the respondents.

5. It is clear from the above that the industrial adjudicator did not examine Section 25-G of the Act. There is a dispute whether the said contention was raised before the industrial adjudicator at the time of arguments.

6. Learned single Judge in the impugned judgment dated 9th March, 2007, has not examined the provisions of Section 25F of the Act but has applied and has held that Section 25G of the Act was violated. It has been held the principle of 'last to come first to go' has not been adhered to. The findings recorded by the learned Single Judge in this regard are as under:-

"5. The learned industrial adjudicator on completion of the pleadings, permitted evidence to be led in support of the respective contentions. The petitioners inter alia set up a claim that apart from the fact that their services have been illegally terminated during the pendency of the conciliation proceedings, however, the same was also bad for non-compliance of Section 25-G of the Industrial Disputes Act, 1947 inasmuch as the persons junior to them have been retained on the rolls of the MCD. On this plea, the petitioners had filed an application dated 5th May, 2006 under Section 11(3) (b) of the Industrial Disputes Act, 1947 praying for production of the muster roll of the workmen for the period mentioned against their name. It may also be noted that the petitioners in para VII of their claim filed before the industrial adjudicator, had assailed the action of the respondent in terminating their services on grounds of violation of Sections 25-F, G & H. In its written statement, the MCD had made the submission that it did not deny the same and merely submitted that no comments were necessary to these averments on behalf of the petitioner.

6. At this stage, it becomes necessary to notice the evidence which was brought by the parties on record. The respondent had examined Shri Kewal Singh, the

Assistant Director (Horticulture) of Rohini Zone as MW-2. In his cross-examination, this witness had clearly stated that the petitioners had worked under him in Keshav Puram for four months when he was section officer at the site. It was also submitted that the attendance of all the muster roll employees is marked in the muster roll including these concerned workmen. However, so far as the violation of Section 25-G of the Statute is concerned, reliance was placed on the seniority in which workmen on muster roll have been engaged. Shri Kewal Singh in his deposition clearly stated that a combined seniority list is placed for Mali and Beldar for all the 12 zones. For this reason, there is no doubt that this seniority list is the material document evidencing that the respondent had complied with the requirement of Section 25-G. I find that there is no dispute that this document was not produced before the industrial adjudicator.

7. It is also important to note that MW-2 Kewal Singh had also clearly stated that no appointment letter was issued to the muster roll employees. No particulars of the work to which the petitioners were assigned has been placed before the court. Such documents would have established the plea which has been set up by the respondent before this court to the effect that the petitioners were engaged for a fixed tenure appointment. This witness has also admitted the fact that several beldars were engaged in the years 1994, 1995 & 1996 in similar conditions. There was no evidence that services of such beldars were terminated on or before the termination of the services of the petitioners. In the light of the admission made by the respondent, so far as the petitioners' plea for violation of Section 25-G is concerned, it would have to be held that the plea of the petitioners of violation of Section 25-G of the Industrial Disputes Act, 1947 was amply borne out from the record."

7. In paragraph 5, learned Single Judge has referred to an application dated 5th May, 2006, under Section 11(3)(b) of the Act. The said application was filed before the writ court and was not filed before the industrial adjudicator. In paragraphs 6 and 7 of the impugned judgment reference has been made to the statement of the witness produced by the management MW-2 Kewal Singh, Assistant Director, Horticulture, Municipal Corporation of Delhi to hold that there was violation of Section 25G of the Act.

8. It is correct that to apply Section 25G of the Act, it is not necessary that the workman should have worked for 240 days in a calendar year. At the same time, a person is not entitled to benefit under Section 25G of the Act if conditions required are not fulfilled/satisfied. While onus on many a condition⁴ is on the management, but onus regarding "particular category" is on the workman. In ***Regional Manager, SBI vs. Rakesh Kumar Tewari, 2006 (1) SCC 530***, it has been observed by the Supreme Court:

"14. Section 25G requires the employer to "ordinarily retrench the workman who was the last person to be employed in a particular category of workman unless for reasons to be recorded the employer retrenches any other workman". This "last come first go" rule predicates (1) that the workman

*retrenched belongs to a particular category (2) that there was no agreement to the contrary and (3) that the employer had not recorded any reasons for not following the principle. These are all questions of fact in respect of which evidence would have to be led, the onus to prove the first requirement being on the workman and the second and third requirements on the employer. Necessarily a fair opportunity of leading such evidence must be available to both parties. This would in turn entail laying of a foundation for the case in the pleadings. If the plea is not put forward such an opportunity is denied, quite apart from the principle that no amount of evidence can be looked into unless such a plea is raised. [See **Siddik Mahomed Shah v. Mt. Saran; Bondar Singh and Ors. v. Nihal Singh and Ors.**]."*

9. It may also be noted that the principle and the rule laid down in Section 25G of the Act is normally adhered to but the said rule need not be applied when there is a valid justification. [See **Harjinder Singh vs. Punjab State Warehousing Corpn., 2010 (1) SCC 192; Rakesh Kumar Tewari (supra)**]

10. In the present case, as noticed above Section 25G has not been adverted to and examined by the Industrial adjudicator. There is a dispute why the said Section has not been referred to in his order/award dated 4th September, 2002. Whereas the respondents workmen have alleged that Section 25G of the Act was urged and

referred to but not dealt with; the appellant management, on the other hand has submitted that the workers had not urged and argued the said aspect.

11. It may be noted that in Section 2(oo)(bb) of the Act, certain categories of employees are exempt and not covered under the definition of 'workman'. The said provision reads :-

"(bb) termination of the service of the workman as a result of the non-renewal 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"

The contention of the appellant is that in view of the said provision the respondents are not workmen but this aspect has not been adverted to by the learned single Judge.

12. In view of the aforesaid reasoning, we deem it appropriate to remand the matter to the industrial adjudicator to examine the issues afresh. We are doing this in spite of the time gap as the learned Single Judge in the impugned judgment has decided and recorded findings on factual aspects which were not examined by the industrial adjudicator. This is necessary and required as the writ court has

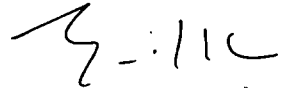
power of judicial review but is not the first appellate court or forum, which can examine factual disputes on merits. It may also be noticed that before Section 25G of the Act is to be applied and requirements mentioned therein have to be satisfied. The first requirement is to decide the "particular category" to which the workman belongs. There are other requirements as well which require examination. On the other requirements, the onus is on the employer i.e. the management, the appellant herein. Similarly, the contention of the appellant regarding Section 2(oo)(bb) of the Act can be also examined by the Industrial Adjudicator.

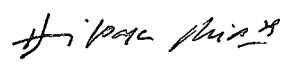
13. We also find that the pleadings in the present case relating to Section 25G are vague even in the affidavit by way of evidence filed by the respondents, (copy of such affidavit filed by Rajpal, is available on record), at best is ambiguous. It is merely alleged that there has been violation of Section 25F, G and H of the Act read with Rules 76, 77 and 78 of the Industrial Disputes Central Rules, 1957. No other details, facts and particulars have been stated.

14. In view of the aforesaid, we allow the present appeal and set aside the impugned judgment and remand the matter to the

21

Industrial Adjudicator. Parties will appear before the industrial adjudicator, who shall go into the said issues afresh, including Section 25G of the Act. It will be open to the parties to amend the pleadings and lead fresh evidence in support of their claims before the Industrial Adjudicator. To cut short the delay, parties will appear before the Industrial Adjudicator on 26th May, 2011. No costs.


(SANJIV KHANNA)
JUDGE


(DIPAK MISRA)
CHIEF JUSTICE

May 3rd, 2011
Kkb/VKR