

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 05th August, 2011

W.P.(C) No. 5999/2010

Ram Pravesh

.....Petitioner

Through: Mr. K. Vishwanath, Adv.
Vs.

D.K. Electricals & Anr.

.....Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.Oral:

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1. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner seeks to set aside the Award dated 23.3.2009 passed by the learned ADJ, whereby the claim of the petitioner challenging his termination and

reinstatement with back wages was dismissed by the learned labour court.

2. The facts of the case as per the petitioner shorn of unnecessary details are that the petitioner was working with the respondent management since 20.1.1991 as a wire machine operator drawing a salary of Rs.3700/- per month. That he took one month leave on 23.12.2005 to go to his native village for some work and returned on 20.1.2006 at the expiry of his leave period but was refused to be taken back on duty due to which the petitioner sent a demand notice dated 26.7.2006 to the respondent which was not replied to. That consequently the petitioner preferred an industrial dispute raising claim for reinstatement and back wages which vide award dated 23.3.2009 was dismissed and feeling aggrieved with the same, the petitioner has preferred the present petition.

3. Arguing for the petitioner, Mr. Vishwanath, learned counsel submits that the learned labour court failed to appreciate that the respondents were running two units under two different names and styles i.e. D.K. Electricals and

Chintamani Sharma & Sons from the same premises and there was a functional integrality, unity of ownership and common control of the same management with interchangeable staff and therefore the petitioner was not in a position to establish his employment with a particular management out of the said two firms. Counsel also submits that the petitioner was taken in service on 20.1.1991 and he remained in service till 19.1.2006 till his termination w.e.f. 20.1.2006. Counsel further submits that no appointment letter was issued by the management of either of the firms in favour of the petitioner and no records were being maintained by both the said firms although 20 employees were working in the said two establishments. Counsel submits that the petitioner was provided ESI benefit and the petitioner had duly proved on record ESI slip and ESI card as Exs. WW1/3 and WW1/4. Based on the said ESI slip and card, counsel submits that with the help of the said documents, the petitioner had successfully established his employment with the respondent management at least for the period from 1994 till 2005. Counsel further submits that the respondents did

not choose to contest the said claim of the petitioner and therefore the learned labour court ought to have accepted the un rebutted claim of the petitioner.

4. I have heard learned counsel for the petitioner.

5. It is a settled legal position that the onus lies on the workman to prove his continuous employment for a period of 240 days or more to claim protection under Section 25F of the Industrial Disputes Act. The petitioner claimed his employment with the respondent w.e.f. 20.1.1991 on the post of wire drawing machine operator but neither any documentary nor oral evidence was produced by the petitioner to prove his employment with either of the respondents w.e.f. 20.1.1991. It is also the case of the petitioner that on 23.12.2005 he went to his native village after getting his leave sanctioned and when he returned back on 20.1.2006 he was not taken back in service and was asked to come back after two months. On 20.4.2006 when the petitioner had again approached the respondent to report for his duty then again he was not taken back by Mr. Devender Sharma who is the owner of both the respondents. In this background, the

petitioner has claimed that his services were illegally terminated by the respondent management on 20.1.2006 and despite service of demand notice dated 26.7.2006 he was not reinstated back into the service. It has been time and again reiterated by the Apex Court and this court that the onus is on the workman to prove that he has worked continuously for a period of 240 days and he is required to produce necessary evidence for the same besides deposing himself on oath. It would be relevant here to reproduce the relevant para from the judgment of the Apex Court in the case of ***Director, Fisheries Terminal Division vs. Bhikubhai Meghajibhai Chavda (2010)1SCC47*** wherein it was held that:

"14. Section 25B of the Act defines "continuous service". In terms of Sub-section (2) of Section 25B that if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer 240 days within a period of one year, he will be deemed to be in continuous service. The respondent claims he was employed in the year 1985 as a watchman and his services were retrenched in the year 1991 and during the period between 1985 to 1991, he had worked for a period of more than 240 days. The burden of proof is on the respondent to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. The law on this issue appears to be now well settled. This Court in the case of R.M. Yellatty v. Assistant Executive Engineer : (2006) 1 SCC 106 has observed:

However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view

that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."

6. Although, it may not be easy for a workman to prove his continuous employment with the employer where the employer does not issue an appointment letter or does not maintain the relevant records yet at the same time it is hard to believe that the establishment who has employed about 20 employees would not maintain any statutory records. As per the own case of the petitioner, he was issued a temporary ESI slip which shows his induction on 2.2.94 and another ESI card issued in his favour in the year 2005 would be a clear indicator of the fact that the management; be it respondent no.1 or 2 was duly registered under the Employees State Insurance Act for extending benefits to its employees under the said Act. The argument of the counsel for the petitioner

that since the petitioner was able to prove the said ESI slip and card issued in his favour in the year 1994 and 2005, they are sufficient enough to prove the continuous employment of the petitioner for a period of more than 240 days. The argument is not only fallacious but irrational also because of the wide gap between the two and more so when the ESI slip proved on record as Ex. WW1/3 clearly mentions the validity of the said slip only for a period of nine months. The findings of the learned labour court carrying a discussion on the said ESI slip and ESI card are reproduced as under:

“8. Ex.WW1/3, as described above is a temporary ESI Slip, which bears the stamp of management no.2 as employer of the workman. No doubt, Ex. WW1/3 describes date of induction of workman in service as 2.2.94, but the document itself clearly emphasizes that the same is valid only for a period of nine months. Case of the workman is that in the year 2005 management took back Ex. WW1/3 (and that is why its original could not be produced during evidence) and issued fresh ESI card Ex. WW1/4. In other words, as per workman Ex. WW1/3&4 were issued by the same management and that is management no.2 Chintamani Sharma & Sons.

9. But that is not so. For, code number of the factory is different in the sense that the code number of factory in Ex. WW1/3 (bearing stamp of management no.2) is 11 7967 51 while the code number of factory in Ex. WW1/4 (bearing no name of employer) is 11 7961 51. Therefore, the ESI

card Ex. WW1/4 is not of management no.2, Chintamani Sharma & Sons.

10. It could be argued that ESI card Ex. WW1/4 is of management no.1 D.K. Electricals. But workman has failed to adduce any evidence to corroborate his bald pleadings that managements constitute a single industrial establishment or are run by same person under two different names for obvious purposes. Need for corroboration by way of evidence is considered necessary also in view of stereotyped omnibus pleadings of the authorized representative for workman in all the cases filed by him and pending in this court."

7. Counsel for the petitioner failed to persuade this court to impeach the said findings as illegal, irrational or perverse. It would also be evident from the said findings that the petitioner workman failed to adduce any cogent evidence to prove that the said two establishments have any kind of functional integrality with common management and interchangeable staff. Simply because of the fact that the respondents did not choose to contest the claim of the petitioner before the learned labour court or before this court alone would not put the petitioner to any advantage as in the absence of the respondents also the petitioner was to discharge his onus to prove his continuous employment for a period of 240 days or more.

8. In the light of the above discussion, this court does not find any illegality, perversity and irrationality in the impugned award passed by the learned labour court.

9. The present petition is devoid of any merit and is hereby dismissed.

KAILASH GAMBHIR, J

AUGUST 05, 2011

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