

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

+ **W.P.(C) No.7947/2010**

% **Date of Decision: 20.04.2011**

Municipal Corporation of Delhi Petitioner

Through Mr.Gaurang Kanth, Advocate.

Versus

Sh.Sultan Singh & Ors Respondents

Through Mr.Rajinder Nischal, Advocate.

CORAM:

HON'BLE MR.JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE SUDERSHAN KUMAR MISRA

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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 |

ANIL KUMAR, J.

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1. The petitioner, Municipal Corporation of Delhi has challenged the order dated 29th January, 2010 passed by Central Administrative Tribunal, Principal Bench, New Delhi in T.A No.1317/2009 titled "Sh.Sultan Singh & Ors v. Municipal Corporation of Delhi" directing the petitioner to examine the claim of the respondents on the basis of the evidence produced before the Tribunal and thereafter process the

payment of difference of pay of the post held and duties discharged by the respondents on the higher post of Garden Chaudhary if the claim of the respondents is found to be genuine and order dated 7th October, 2010 in review application No.270/2010 dismissing the review application.

2. Brief facts to comprehend the disputes are that the respondents filed a writ petition being W.P(C) No.10158-86/2005 praying for a direction to pay difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents have been performing the duties and responsibilities of Garden Chaudhary.

3. The respondents had contended that they had joined as Malies/Chowkidars and were regularized with effect from different dates which were detailed by the respondents in their petition. The respondents also disclosed the dates and particulars since when they had been performing the duties and responsibilities of Garden Chaudhary pursuant to directions by their superior officers. The respondents contended that the petitioners admitted that the respondents were performing the duties and responsibilities of Garden Chaudhary in the lists sent by the petitioner to its horticulture department dated 23rd January, 2003 by the central zone. The

respondents also relied on a list dated 10th August, 2004 disclosing the particulars of the Malies/Chowkidars who had been working as Garden Chaudhary in south zone and another list dated 6th January, 2004 of west zone.

4. The respondents categorically asserted that the petitioner is taking the work of Garden Chaudhary from them but paying the salary of Mali/Chowkidar. According to the respondents the pay scale of Mali is Rs.2550-3200/- and that of Garden Chaudhary is Rs.3050-4590/-.

5. The respondents also relied on an award given by an Industrial Tribunal in I.D No.122/1995 in case of Sh.Jai Chand, Mali in which the petitioner was directed to pay the difference of emoluments to said Sh.Jai Chand from the date he had been performing the duties of Garden Chaudhary. The writ petition being W.P(C) No.4799/2000 filed against the award in favour of Sh.Jai Chand, Mali was dismissed on 24th September, 2004 and the award was upheld.

6. The respondents contended that they had sent a legal notice dated 22nd February, 2005 to the petitioner Corporation seeking difference in wages of Malies/Chowkidars and that of Garden Chaudharies and on failure of petitioner to pay the difference filed the

writ petition contending inter-alia that since the respondents had been performing the duties and responsibilities of Garden Chaudhary at the instance of the petitioner with effect from various dates disclosed in the writ petition, they are entitled for the difference in salaries between Malies/Chowkidars and Garden Chaudharies. According to them they were asked to do the work of Garden Chaudharies by the concerned persons of the department of horticulture and various lists duly prepared and signed by different officials of MCD indicating the dates since when they are working as Garden Chaudhary were sent to the Municipal Corporation of Delhi/petitioner.

7. In the circumstances the respondents sought that a writ of mandamus or any other writ or order be issued directing the petitioner to pay the difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents had been performing the duties and responsibilities of Garden Chaudharies. The writ petition filed by the respondents was contested by the petitioner and a counter affidavit dated 13th August, 2008 and a supplementary affidavit dated 25th September, 2008 was filed. The petitioner denied that the respondents were performing the duties and responsibilities of Garden Chaudhary with effect from the dates mentioned in the writ petition. According to the petitioner no order appointing respondents as Garden

Chaudhary was given to them. The petitioner also denied that the petitioner had been taking the work of Garden Chaudhary from the respondents. The petitioner contended that the respondents were never assigned the duties of Garden Chaudhary. According to the petitioner the post of Garden Chaudhary is a selection post and an employee after qualifying the trade test and on fulfilling other conditions of the recruitment rules framed for the post could be appointed. The respondents, according to the petitioner are not having requisite qualifications as per the recruitment rules. Regarding the case of Sh.Jai Chand it was contended that the ratio of said case is not applicable in case of the respondents.

8. Though the respondents had filed different lists as detailed hereinabove where it was admitted that the respondents had been working as Garden Chaudharies in different zones which fact was, however, denied by the petitioner in its affidavit dated 18th April, 2006, therefore, the Court passed an order dated 21st April, 2006 directing the petitioner to file a supplementary affidavit clearly indicating whether the documents relied on and filed by the respondents are genuine or not.

9. Consequent to the order dated 21st April, 2006 the petitioner filed the supplementary affidavit in the writ petition being W.P(C) No.10158-

86/2005 dated 13th August, 2008 categorically stating that the lists which were filed by the respondents were issued by the zonal horticulture departments i.e Central zone, south zone and west zone respectively and were received by Horticulture headquarter. Out of the three lists, it was contended that original of one of the list was available and original of two lists were not traceable, however, photocopy of one of the two lists were not traceable on the record. The petitioner also pleaded that the three lists were issued by concerned zonal head of the department of horticulture without any inspection and order from any competent authority. It was contended that the additional work as Garden Chaudhary at zonal level was assigned without the existence of any vacant post in violation of the recruitment rules.

10. Yet another supplementary affidavit dated 25th September, 2008 was filed on behalf of the petitioner disclosing that as per CPWD yardstick one Garden Chaudhary is required for 18 malies and at present the sanctioned strength of malies/chowkidars is 6000 and thus 333 Garden Chaudharies are required. The petitioner also disclosed that only 169 Garden Chaudharies and 39 Technical Supervisors were working with the horticulture department who had been promoted from the feeder cadre. It was also contended that as per the existing recruitment rules, malies with 8 years of regular service with

qualification of matric with agriculture as one of the subject and subject to qualifying trade test are eligible for promotion to the post of Garden Chaudhary.

11. The writ petition filed by the respondent was transferred to the Central Administrative Tribunal and was registered as T.A No.1317/2009 titled “Sultan Singh & Ors v. Municipal Corporation of Delhi”.

12. The Tribunal heard the pleas and contentions of the parties and directed the petitioner to examine the claim of the respondents on the basis of the evidence that is the three lists issued by different zones in respect of respondents working as Garden Chaudharies and other functions and process the payment of difference of pay of the post held and the duties discharged by the respondents relying on Selvaraj v. Lt.Governor of Island , Port Blair and Ors, (1998) 4 SCC 291 and Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and Ors, 1999 (1) SLJ 23 (SC). The respondent has also relied on W.P(C) No.5742/2010, GNCT of Delhi v. B.S.Jarial and Anr where the Division Bench had held that when a person is told to discharge the function and duties of a higher post till the same is filled up and he works for years together as in that case the Deputy Superintendent was made to

work as Superintendent for more than 7 years, it would be unjust to deny him wages in the said post. The Tribunal categorically noted the plea of the respondents that they are performing the higher duties for long years for want of a regular promotion on officiating basis, and having discharged the duties of higher post by resorting to what is referred by the Tribunal as the 'quantum of proportion rule', held that they are entitled for emoluments of the higher post. The mention of 'quantum of proportion rule' appears to be a typing error. What the Tribunal intended to say was 'quantum meruit rule'.

13. The Tribunal has also noted that no assistance on the part of the petitioner, Municipal Corporation of Delhi was rendered despite the notice to the petitioner and the counsel for the petitioner rather even on the second call had not appeared on behalf of Municipal Corporation of Delhi. The Tribunal did not keep the case pending being an old case and had decided the same in accordance with Rule 60 of Central Administrative Tribunal (Procedure) Rules, 1987.

14. The petitioner, thereafter, had filed an application for review of order dated 29th January, 2010 being review petition No.270/2010 which was, however, dismissed by the Tribunal by order dated 7th October, 2010 holding that the Deputy Director (Horticulture) is the

competent authority for entrustment of duties and repelled the plea of the petitioner that Deputy Director (Horticulture) was not competent to entrust the responsibility for higher post on Malies/Chowkidars. Aggrieved by the order of the Tribunal dated 29th January, 2010 directing the petitioner to consider the claim of the respondents on the basis of the evidence adduced by them and the order dated 7th October, 2010 dismissing their review application and holding that Deputy Director (Horticulture) was the competent authority to entrust the responsibilities of higher post, the petitioner Municipal Corporation of Delhi has filed the present writ petition inter-alia on the grounds that the appointments of the respondents was contrary to the recruitment rules as the appointment was to be made by the competent authority as per directions of DPC and category 'C' DPC is required to have DOH (Chairman), DDH (Member), ADH (Member), ADH/S.C (Member) and A.O (H) Convener. It is contended that any appointment made without the recommendation of above mentioned DPC is not valid and the appointments made by Deputy Director (Horticulture) was not competent. The petitioner reiterated that the respondents were not having requisite qualification and no lists have been produced by them that they were appointed to the post of Garden Chaudharies. Regarding the lists issued by different zones, the petitioner asserted that they were issued without permission of the competent authority and contrary to

the provisions of the recruitment rules. The petitioner further disclosed that a Garden Chaudhary is in charge of 10-20 Malies and as per CPWD yardstick, one Garden Chaudhary is required for 18 malies and at present considering the strength of malies/chowkidars of 8000, approximately 444 Garden Chaudharies are required. The petitioner also disclosed that there are only 187 Garden Chaudharies working with the horticulture department. The petitioner, however, in the writ petition admitted that due to the exigencies of the work, the concerned head of the department asked some of the malies/chowkidars to do the work of Garden Chaudharies also. The admission made by the petitioner in its writ petition in paragraph 4 is as under:-

“4. That it is most respectfully submitted that the Garden Chaudhary is a supervisory post and in addition to the work of Mali's the Garden Chaudhary is supposed to be in charge for a group of Mali's, i.e., say 10-20 Mali's. As per CPWD yardstick, one garden Chaudhary is required for 18 Mali's and at present the sanctioned strength of Malies/Chawkidars is approximately 8000. Therefore, the total Garden Chaudhary required would be approximately 444. However at present there are only 187 posts Garden Chaudhary working with the Horticulture Department who have been promoted from the feeder cadre (Earlier there were 169 sanctioned post of Garden Chaudhary and 39 Technical supervisors, however later both of them merged and there were total 208 posts of Garden Chaudharies. Later the Petitioner Department converted 21 posts as Horticulture Inspectors. Therefore at present there are only 181 posts of Garden Chaudharies). **Hence due to the exigencies of work, the concerned head of the Department asked some of the Mali's/Chawkidar's to do the work of Garden Chaudhary also. It is pertinent to mention here that the said work was assigned in**

addition to their own duty at the zonal level without the existence of any vacant posts and also without obtaining any permission from the competent authority. Further, the said charge was given in violation of the conditions of the Recruitment Rules. It is also to be noted that no appointment letter/office order was ever issued to the Respondents w.r.t. their additional work.”

The respondents opposed the pleas and contentions of the petitioner taking the same pleas and contentions which were taken on their behalf before the Central Administrative Tribunal.

15. This Court has heard the learned counsel for the parties in detail and has perused the documents produced along with the writ petition. In the counter affidavit which was filed in the original petition, the plea of the petitioner was that the respondents are not performing the duties and responsibilities of Garden Chaudharies and they are performing the duties of Malies/Chowkidars. Para 2 of the counter affidavit dated 18th April, 2006 filed on behalf of the petitioner by Sh.Kiran Dabral, Additional Deputy Commissioner (Horticulture), Horticulture Department (HQ) is as under:-

“2. That the contents of para No.2 of the petition are denied for want of knowledge, however, it is submitted that they have been performing duties of Mali/Chowkidar not Garden Chaudhary under the answering respondent-MCD.”

However, after the Tribunal passed the order dated 29th January, 2010 directing the petitioner to examine the claim of the respondents

afresh on the basis of evidence produced before the Tribunal which could not be negated by the petitioner, the petitioner in the present writ petition has changed its plea and has contended that due to exigencies of work, concerned head of the department asked some of the Malies/Chowkidars to do the work of Garden Chaudhary also. In para 4 of the present petition it was rather contended that the work of Garden Chaudhary was assigned to Mali/Chowkidar in addition to their own duty at the zonal level without the existence of any vacant post.

16. It is apparent that the petitioners have taken different stands and have filed affidavits of its officers without disclosing the correct facts. The Tribunal while passing the order dated 29th January, 2010 directed the petitioner to examine the claim of the respondents afresh on the basis of evidence produced before the Tribunal. The Tribunal had taken into consideration the lists prepared by the Horticulture department, Central Zone of those Malies/Chowkidars who have been looking after the charge of Chaudharies. The said list dated 23rd January, 2003 was prepared by the Assistant Director Central Zone and Deputy Director Central Zone and bear the endorsement of Horticulture Officer (Headquarter). The list dated 10th August, 2004 also details the particulars of the Malies who are looking after the work of Chaudharies in South Zone, Horticulture Department which list is also endorsed by

the Deputy Director, South Zone besides SO (H) and other officials. Another list on which reliance has been placed is the list dated 5th January, 2004 giving details of officiating Chaudharies in the West Zone which is also endorsed by Deputy Director (Horticulture) besides other officials. The Court in the earlier writ petition which was later on transferred to the Tribunal had to direct the petitioner to file a supplementary affidavit about the lists of officiating Chaudharies by its order dated 21st April, 2006. The petitioner in response changed its stand and admitted that the lists were received in the Horticulture Headquarter from Zonal Horticulture Department i.e Central Zone, South Zone and West Zone, however, contended that they are by the officials who were not competent. It was also admitted that though the original list issued by West Zone was available in the record of the Headquarter, however, the lists issued by Central Zone and South Zone were not available and only copies were available.

17. Pursuant to the lists issued by zonal department by Deputy Directors who were taking the work of Garden Chaudharies from the Malies/Chowkidars, no action was taken against any of the officials or the Assistant Directors or any other person as to why they are taking the work of Garden Chaudharies from Mali and Chowkidar, as this was allegedly contrary to the recruitment rules and they were not allegedly

authorized to do so. The petitioner has also tried to contend that there were no vacancies of Garden Chaudharies and, therefore, the Malies/Chowkidars, respondents could not be asked to discharge the work of Garden Chaudharies.

18. This plea of the petitioner that the posts of Garden Chaudharies was not available is contrary to its own admission that considering the strength of Malies/Chowkidars total Garden Chaudharies required are approximately 444 and only 187 Garden Chaudharies are working with the Horticulture department. This has also been contended that earlier there were 169 Garden Chaudharies and 39 technical supervisors which posts were merged and there were total 208 Garden Chaudharies. If the petitioner require 444 Garden Chaudharies and have only 208 Garden Chaudharies, it cannot be inferred that the work of Garden Chaudharies was not available with the Municipal Corporation of Delhi/petitioner. If the work of Garden Chaudharies has been available and the petitioner has not appointed Garden Chaudharies and in the circumstances Deputy Director Horticulture has taken the work of Garden Chaudharies from some of the Malies/Chowkidars and has also kept a detailed record which was sent to the Headquarter of the Horticulture department of the petitioner and despite receiving such record, no action was taken against any of the

officials for taking the work of Garden Chaudharies or objected that they were not authorized to appoint Garden Chaudharies , would reflect that the horticulture department or the alleged competent authority consented to the appointment of the respondents as Chaudharies not on the regular basis but only to take the work from them.

19. The learned counsel for the petitioner has argued the matter on the premise that the respondents are claiming to be appointed to the post of Garden Chaudharies without having qualifications as contemplated under the recruitment rules. No doubt on account of having worked as Garden Chaudharies on *ad hoc* basis for a number of years, the respondents may not be entitled to be appointed to the post of Garden Chaudharies contrary to the recruitment rules, however, perusal of their petition which was filed in the High Court which was later on transferred to the Central Administrative Tribunal whose order is impugned by the petitioner, reveals that what the respondents are demanding is only that the petitioner should pay the difference of wages of Malies/Chowkidars and that of Garden Chaudhary from the date the respondents have been performing the duties and responsibilities of Garden Chaudharies.

20. After the order dated 29th January, 2010 was passed by the Tribunal directing the petitioner to consider the claim of the respondents on the basis of the evidence produced before the Tribunal, the petitioner had filed an application for review on the ground that DOPT guidelines do not prescribe for any relaxation for promotion of Malies to Garden Chaudharies and thus as per recruitment rules and DOPT guidelines, promotion could not be granted to the Malies for the simple reason that they had been officiating on the said post of Garden Chaudharies for several years.

21. Para 4(v) to 4(viii) and para 5 of the review petition filed by the petitioner are as under:-

"4.

(v) That as per the existing RR's malies with 8 years of regular service with qualification Matric with agriculture, as one of the subject and subject to qualifying the Trade Test, are eligible for promotion to the post of Garden Chaudhary.

(vi) That the DOPT guidelines do not prescribe for any relaxation for promotion of Malies to Garden Chaudhary and thus as per RR's and DOPT guidelines, promotion cannot be granted to Malies for the simple reason that they have been officiating on the said post for several years. The rules prescribe that unless they fall within the zone of consideration, they cannot be considered.

(vii) That at present there are 169 Garden Chaudhary and 39 Technical Supervisors working with the Horticulture Department who have been promoted from the feeder cadre.

(viii) That thus it is crystal clear that there are no promotional posts available on which the respondents could be considered at this stage. However, the petitioner corporation states that the respondents would be considered for appointment of Garden Chaudhary in

accordance with the RR's and DOPT guidelines, in the order of their seniority subject to their meeting the eligibility criteria.

5. That thus while deciding the T.A No.1317/09, inadvertently it could not be brought to the notice of this Hon'ble Court, that the question "Whether the workmen are entitled to pay of higher post of Garden Chowdhary on the basis of their officiation on the said post while they were holding the substantive post of Mali" came up for consideration before the Hon'ble High Court of Delhi and while deciding C.W.P No.7869/02; 8679/05; 13288-91/05; 12025/06; the Hon'ble High Court Held: " Since the directions were given by the workmen to look after the responsibilities of higher post of Garden Chaudhary by the Assistant Director (Horticulture) who was not the competent authority under the recruitment rules, the workmen are not entitled to pay of higher post of Garden Chowdhary."

Accordingly two awards given by the Tribunal which are in favour of the workmen and against the management of the Municipal Corporation of Delhi are hereby set aside. The two awards which are against the workmen and in favour of the management of the Municipal Corporation of Delhi are maintained as this Court does not find any perversity in the said awards for the reasons given hereinabove. The copy of the order dt.15.12.09 is annexed as Annexure."

22. Apparently the petitioner misconstrued the claim of the respondents who were not seeking promotion to the post of Garden Chaudharies but are only claiming difference in pay of Mali/Chowkidar and Garden Chaudharies as they had been performing the work of Garden Chaudharies after the Deputy Director Horticulture directed them to perform the said work which was also intimated to headquarter Horticulture without any objection either from the Horticulture department or any other competent authority at any time. This is also

not the plea of the petitioner that Headquarter of Horticulture Department and alleged competent authority was not aware of work of Garden Chaudharies being taken from Malies/Chowkidars as sufficient number of posts of Garden Chaudharies were not filled and all the posts according to accepted norms were not created.

23. While seeking the review of order dated 29th January, 2010 it was rather pleaded that the Mali/Chowkidars are not entitled for difference in pay for performing the duties of Garden Chaudharies pursuant to the directions of the Assistant Director (Horticulture) as it was adjudicated in Civil writ petition Nos.7869/2002, 8679/2005, 13288-91/2005 and 12025/2006. Before this Court the copies of these orders have not been produced by the learned counsel for the petitioner. This is, however, clear that the facts and circumstances in those writ petitions were different as apparently in those cases Assistant Director (Horticulture) had asked the malies/chowkidars to perform the duties of Garden Chaudharies in contradiction to the present case where the Deputy Director (Horticulture) has asked the respondents to perform the duties of Garden Chaudharies and the details of these persons and the dates from which they have been performing was duly intimated to the Horticulture headquarter without any objection of any type either by the Horticulture headquarter or from the petitioner in any manner. If the

Deputy Director and other officials had been asking the malies/chowkidars to perform the duties of Garden Chaudharies contrary to any directions or rules, action should have been proposed or taken by the petitioner against them. This is also apparent that the work of Garden Chaudhary has been available as the post of Garden Chaudharies based on the number of posts of Malies/Chowkidars have not been filled.

24. The Tribunal while dismissing the application for review of the petitioner by order dated 7th October, 2010 has held that the Deputy Director (Horticulture) is the competent authority relying on the decision of the Apex Court in *State of West Bengal & Ors v. Kamal Sen Gupta & Anr*, (2008) 2 SCC (L&S) 735.

25. The learned counsel for the petitioner has not produced any guidelines, circulars to show that if the work is available and the Garden Chaudharies are not appointed, then who is competent to appoint Malies/Chowkidars on *ad hoc* basis as Garden Chaudharies and to take from them the work of Garden Chaudharies. If on account of exigencies of the work the head of the department asks Malies/Chowkidars to do the work of Garden Chaudharies which is now admitted by the petitioner in the present writ petition impugning the

order of the Tribunal then why the difference of pay of Mali/chowkidar and Garden Chaudhary be not be paid to them, has not been satisfactorily explained by the petitioner. Applying the principle of quantum meruit as was held by the Supreme Court in case of Selvaraj (Supra) the petitioner has to pay to the respondents emoluments available in the higher pay scale during the time they actually worked on the post of Garden Chaudhary in the facts and circumstances. In Selvaraj vs. Lt. Government of Island, Port Blair, (1998) 4 SCC 291, the employee was not regularly promoted to the post of Secretary (scouts) but he was regularly asked to look after the duties of Secretary (scouts). Applying the principle of quantum meruit it was held by the Supreme Court that the authorities should have paid to the employee the emoluments available in the higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promote. In Secy.-cum-Chief Engineer v. Hari Om Sharma, (1998) 5 SCC 87 the employee was promoted as a stop-gap arrangement as Junior Engineer I and he had given an undertaking that on the basis of stop-gap arrangement, he would not claim any benefit pertaining to that post. It was held that the Government in its capacity as a model employer cannot be permitted to raise such an argument, and the undertaking which is said to constitute an agreement between the parties cannot be enforced at law.

An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872. In W.P(C) No.5742/2010, decided on 25th August, 2010, GNCT of Delhi v. B.S.Jarial and Anr. another Division Bench had held that when a person is told to discharge the function and duties of a higher post till the same is filled up and he works for years together as in that case the Deputy Superintendent was made to work as Superintendent for more than 7 years, it would be unjust to deny him wages for the said post. The Division Bench had held that if an employee is directed to work on a higher post he has no option but to work at higher post at the dictate of the employer, as for his not so doing would attract penalty proceedings against him. In Sh.Bhagwan Dass and Ors. Vs State of Haryana & ors., 1987 (3) SLJ 93 it was observed by the Supreme Court that whether the appointment was for temporary period or the scheme was temporary in nature is not relevant and what is to be seen is that once it is established that the nature of duties and functions discharged and the work done is similar, the doctrine of equal pay for equal work would be attracted. The employee in this case had been posted to officiate as Sub Post Master in

HSG-I at the post office and he shouldered the higher responsibilities of the department and, therefore, he became entitled for emoluments of the post of HSG-I for those periods and he could not be denied those emoluments.

26. The petitioner has relied on (1997) 6 SCC 200, Mohd.Swaleh v. Union of India & Ors and W.P(C) No.4231/2002 decided on 17th March, 2011 titled MCD v. Sh.Bhanwar Singh & Anr. In Bhanwar Singh & Anr (Supra) the Single Judge of the High Court had set aside an award passed against the Municipal Corporation of Delhi holding that the workman was entitled in future to wages as of a Garden Chaudhary. The workman in the said case had filed a complaint under Section 33 of Industrial Disputes Act, 1947 regarding the terms of his employment having been changed during the tenure of general dispute between the employer MCD and the Chowkidar, Beldar, Bullockmen, Bhishties, Coolies, Machinemen, Hedgemen, Garden Chaudhary etc. employed with it. It was asserted by the workman that term of his employment had been changed by his transfer from Shahdara zone where he was working to the Headquarters (Horticulture Department). In these circumstances the reference was made 'Whether the workman was entitled to wage of Garden Chaudhary for the period 3rd December, 1988.' The Tribunal had held that the workman though was not entitled

to the relief of regularization on the post of mali with effect from 1st March, 1978, however, he was held entitled to wages equal to regular malies with effect from 1st March, 1978 till the date of his regularization up to 31st March, 1998 without any increment. It was also held that the workman shall be entitled to receive wages of regular Garden Chaudharies in proper pay scale. The learned Single Judge relying on W.P(C) No.4023/1997 titled Municipal Corporation of Delhi v. Jagdish Chander where it was held that proper procedure has to be followed for promotion to the post of Garden Chaudhary had set aside the award holding that the workman was entitled for emoluments as of mali only as he was asked to work as Garden Chaudhary by the Assistant Director who was not authorized to do so. Apparently the case relied on by the petitioner is distinguishable as the respondents are not claiming regular appointment to the post of Garden Chaudhary. The respondents are claiming difference in wages as they were directed to perform the work of Garden Chaudharies by the Deputy Director (Horticulture) and the details of respondents who had been directed to work as Garden Chaudharies and the tenure during which they worked as Garden Chaudharies, were sent to the Horticulture headquarter and Municipal Corporation of Delhi without any objection or action on the part of petitioner. In the case of respondents it is also apparent that the work of Garden Chaudharies was available. In the circumstances, on the

basis of ratio of Sh.Bhanwan Singh & Anr (Supra) it cannot be held that the respondents are not entitled for difference in wages.

27. In Mohd.Swaleh (Supra) it was held by the Supreme Court that a Deputy Registrar of Central Administrative Tribunal who was ordered by the Vice Chairman to discharge the function of the Registrar would not be entitled for emoluments of the Registrar as the Vice Chairman did not have the power to appoint another Government servant, permanently to the said post, as the appointing authority was the President of India. It was held that in absence of any delegation of power in respect of Group 'A' post, Vice Chairman was not empowered to make the appointment of the Registrar. In contradistinction in case of respondents it has been held that the Deputy Director could take the work of Garden Chaudharies from the malies/chowkidars which is Group 'D' post workman and this fact was not objected to either by the petitioner at any time nor by the Horticulture headquarter. If the action of the Deputy Director or the headquarter Horticulture was illegal then the petitioner should have taken some action against some of the officials or at least should have objected about taking the work of Garden Chaudharies from malies and chowkidars for years together. In the circumstances, apparently the ratio of the cases relied on by the petitioner would not entitle it for any relief to decline the difference in

wages to the respondent during the period they worked as Garden Chaudharies which is left for determination by the petitioner after consideration of evidence produced by the respondents.

28. Considering the entire facts and circumstances it is apparent that the claim of the respondents have always been that they should be paid the difference in pay of Mali/Chowkidar and the Garden Chaudhary as they were made to work on the post of Garden Chaudhary whereas the petitioner had first denied that they worked as Garden Chaudharies, then took the plea that the Assistant Director (Horticulture) was not competent to ask the respondents to work as Garden Chaudharies and that the respondents cannot be appointed to the post of Garden Chaudharies in accordance with the recruitment rules. There is no doubt that respondents are not claiming appointment to the post of Garden Chaudharies on account of having worked on ad-hoc basis on the post of Garden Chaudhary contrary to rules or that some of them not having the requisite qualifications are entitled for relaxation.

29. In the entirety of facts and circumstances therefore, the learned counsel for the petitioner has failed to make out any such grounds which will impel this Court to exercise its jurisdiction under Article 226 of the Constitution to set aside the orders of the Tribunal dated 29th

January, 2010 and 7th October, 2010 as no illegality or unsustainability or perversity in the orders of the Tribunal has been made out.

30. The writ petition is, therefore, dismissed. Parties are left to bear their own cost.

ANIL KUMAR, J.

APRIL 20, 2011
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SUDERSHAN KUMAR MISRA, J.