

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

+ **W.P. (C) 3509/2007**

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Reserved on: 16th August, 2012
Decided on: 23rd August, 2012

MANSOOR AHMAD

..... Petitioner

Through: Ms. Amita Gupta and Mr. Praveen
Kumar, Advocates.

versus

OBEROI FLIGHT CATERING

..... Respondent

Through: Mr. Jayant K. Mehta, Mr. Sukant
Vikram and Mr. Abhinav Sharma,
Advocates.

+ **W.P.(C) 533/2008**

EIH LTD.

..... Petitioner

Through: Mr. Jayant K. Mehta, Mr. Sukant
Vikram and Mr. Abhinav Sharma,
Advocates.

versus

MASOOR AHMAD

..... Respondent

Through: Ms. Amita Gupta and Mr. Praveen
Kumar, Advocates.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present petitions can be disposed of together as they lay a challenge to the common award dated 26th March, 2007. Shri Mansoor Ahmad, the Petitioner in W.P.(C) 3509/2007 hereinafter referred as the workman was appointed as a Loader with the Respondent on 3rd December,

1977 on a monthly stipend of Rs. 150/-. On 13th December, 1985 he was confirmed as Loader on a monthly salary of Rs. 312/- only with effect from 4th September, 1978. Thereafter he was appointed as Commis III on a monthly salary of Rs. 1001/- and he continued working there till 30th May, 1988. According to the workman in April, 1988 the Respondent/management called upon its employees to work at hotel Madina Oberoi at Saudi Arabia. Since workman opted for the same, he was temporarily transferred to Saudi Arabia. The workman was assured of absorption on returning back to India. However, on 20th April, 2003 when the workman was relieved from hotel Madina Oberoi at Saudi Arabia and came back to India, he was refused duty by the management. On 13th October, 2003 the workman was offered an employment at Chennai which he admittedly refused to accept. A demand notice dated 22nd October, 2003 was sent to the management for reinstatement. In view of the failure of the conciliation proceedings, the Government sent a reference to the industrial adjudicator with the following terms of reference: “whether Shri Mansoor Ahmed S/o of Shri Mustaq Ahmed has abandoned his services or his services have been terminated illegally and unjustifiably by the management and if so to what sum of money as monetary relief along with consequential benefits in terms of existing laws/ Government Notifications and to what other relief is he entitled and what directions are necessary in this respect?”. After recording of evidence, the learned Tribunal came to the conclusion that the services of the workman were terminated illegally and instead of granting relief of reinstatement a compensation of Rs. 2,00,000/- was granted with interest @ 9 % per month from the date of award. Both the sides are aggrieved by the impugned award. According to the workman since the termination was held

to be illegal and unjustified, the relief of reinstatement with back wages ought to have been granted to him, whereas the management prays that the finding of the learned Trial Court that the termination was illegal is contrary to the evidence on record and in fact it was a case of abandonment of service by the workman.

2. Learned counsel for the workman contends that vide memo dated 30th May, 1988 when the workman was sent to Saudi Arabia, his employment with the Respondent was protected as it was assured that he would be absorbed with the Respondent on return to India in the same pay scale. The management initially stated that the workman had left the job and his employment at Saudi Arabia was a new contract and thus they were not liable to reinstate him. It was further stated that there was no suitable vacancy which stand of the management was clearly arbitrary and mala-fide. When the workman threatened them of legal consequences, he was offered a job at Chennai with a pay of Rs. 5000/- as compared to the pay of Rs. 20,000/- he was getting in Saudi Arabia. Since the pay of the workman was not protected, he was justified in not joining at Chennai. Further the workman was not even given the necessary position above Commis-III which he had held during the last employment.

3. Learned counsel for the Respondent on the other hand contends that learned Trial Court erroneously did not consider the memo dated 30th May, 1988 on the ground that it was only one page which was exhibited though as per the record both the pages were exhibited, and thus wrongly held the document to be incomplete. Further, the memo dated 30th May, 1988 was very clear as the workman was to be absorbed on coming back from Saudi

Arabia only in case suitable vacancy was available. Since no vacancy was available initially, he was not adjusted and as and when a vacancy was available in October, 2003 he was offered the job at Chennai on 13th October, 2003 which he refused to accept admittedly as per his own cross-examination. The contention of the learned counsel for the workman that the same pay scale was not given is incorrect as the workman was working as a Commis-III at Saudi Arabia and he was offered the position of Demi Chef at Chennai which is a higher position. Reliance is placed on *Punjab & Sind Bank and Ors. Vs. Sakattar Singh (2001) 1 SCC 214*; *Shri Gian Chand Vs. Secretary (Labour) Delhi Administration 1994 (28) DRJ (DB)*; *Trina Engineering Company (P) Ltd. Vs. Secretary (Labour) 2006 (2) LLJ 307*; *Mr. V. Gupta Vs. M/s. L.M.P. Precision Engineering Co. Pvt. Ltd. 1993 IV AD (DELHI) 160* and *Ram Narain Jha Vs. T.M. Apartments Pvt. Ltd. 2007 (99) DRJ 724*.

4. I have heard learned counsel for the parties. The bone of the contention in the present case is the memorandum dated 30th May, 1988 the salient clauses whereof are reproduced as under:

“ With reference to your application for appointment at Hotel Madina Oberoi, Madina, Saudi Arabia (foreign employer), your case has been favourably considered. Accordingly you are being relieved from duties at Oberoi Flights Services w.e.f. 31.5.1988.

You are advised that on your return to India, you will be absorbed in the unit from where you are transferred or in any other unit within the chain in India provided:

1. Your performance has been satisfactory during your posting abroad;
2. There is a suitable vacancy; and

3. You have not your self terminated or abandoned your contract or employment with the foreign employer or that your service have not been terminated by your foreign employer for any reason whatsoever, in which event your employment with our company shall also stand termination with no further dues or benefits payable to you, save and except any gratuity or Provident fund standing to your credit at the time of your joining.

The period of your service with the foreign employer shall not be your gratuity, provident fund, leave and other statutory contractual or customary benefits available to local employees in India.

If you are employed a fresh upon your return to India in any of our unit in India, you will be provided with the equivalent job on the same basis like any other staff holding such job.

During your employment with the foreign employer, you shall be governed with the terms of the contract with the foreign employer (copy enclosed).”

5. A perusal of the memorandum clearly shows that the workman was assured of absorption in the Unit from where he was transferred or in other unit within the chain in India, provided there was a suitable vacancy and the workman had not abandoned the job. Thus, the stand of the management in its letter dated 22nd July, 2003 that when the workman went abroad to take up the job it was a new contract of employment with foreign employer and the employment with the management ceased from that day onward is wholly incorrect. However, the said letter also stated that there was no suitable vacancy existing. Be that as it may, vide letter dated 13th October, 2003 the management offered employment to the workman at its unit at Chennai in RL-9 grade as ‘Demi Chef De Partie’. However, the workman

refused to join, which fact is evident from perusal of his cross-examination. As per the memorandum dated 30th May, 1988 the workman was not assured of a job at Delhi itself. It was clearly stated that the job would be given at the place from where he was transferred or any other unit wherever vacancy was available. Since no vacancy was available, the workman could not be offered job at Delhi. In this regard evidence by way of affidavit of MW1 and Ex. WW1/D are relevant wherein it is stated that it was not obligatory on the part of the management to employ the workman, in case there was no suitable vacancy existing. Further they had checked with all their units in the group about suitable openings, however there was no suitable vacancy existing in any of the units.

6. The learned Trial Court grossly erred in not considering the memo dated 30th May, 1988 on the ground that the complete memo has not been produced. A perusal of the Trial Court Record shows that the memo dated 30th May, 1988 has been exhibited fully on both pages. This memo between the parties is the formal contract and their terms of appointment would be guided by the same. It is not the case of the management that the services of the workman were found deficient or not satisfactory. MW1 has clearly stated that there was no vacancy available at Oberoi Flight Service at New Delhi and thus the workman could not be taken back in service.

7. Section 2(oo)(bb) reads as under:

“2.(oo)“retrenchment” means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) xx xx xx xx

(b) xx xx xx xx

(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.”

8. Thus, it is evident if the terms of employment permit discharge simplicitor, the same cannot be interfered with. The Hon’ble Supreme Court in *Devinder Singh Vs. Municipal Council, Sanaur AIR 2011 SC 2532* held:

“10. The definition of the term “retrenchment” is quite comprehensive. It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment.”

9. The scope of interference in a writ petition against the order of the Tribunal is limited. The Hon’ble Supreme Court in *Harjinder Singh Vs. Punjab State Warehousing Corporation* held:

“10. We have considered the respective submissions. In our opinion, the impugned order is liable to be set aside only on the ground that while interfering with the award of the Labour Court, the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution — *Syed Yakoob v. K.S. Radhakrishnan* [AIR 1964 SC 477] and *Surya Dev Rai v. Ram Chander Rai* [(2003) 6 SCC

675] . In *Syed Yakoob case* [AIR 1964 SC 477] , this Court delineated the scope of the writ of certiorari in the following words: (AIR pp. 479-80, paras 7-8)

“ The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The

adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide *Hari Vishnu Kamath v. Ahmad Ishaque* [AIR 1955 SC 233 : (1955) 1 SCR 1104] , *Nagendra Nath Bora v. Commr. of Hills Division* [AIR 1958 SC 398 : 1958 SCR 1240] and *Kaushalya Devi v. Bachittar Singh* [AIR 1960 SC 1168]).

It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior court or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior court or tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record.

Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.”

10. Thus, in case the Tribunal omits to consider material evidence on record which has bearing on the facts of the case, then the writ Court is bound to interfere in the impugned award passed. In the case at hand the material evidence i.e. memo dated 30th May, 1988 was not considered by the learned Tribunal. The memo clearly provided that the Petitioner would be entitled to be absorbed on return to India in the unit from where the Petitioner was transferred or in any other unit within the chain in India provided, inter alia, there is a suitable vacancy. As per the letter dated 22nd July, 2003 there was no vacancy available with the management, and vide letter dated 13th October, 2003 the workman was offered a job at Chennai. However, the Petitioner refused to accept it. It is a clear case where the workman had abandoned his job by not joining at Chennai. Nothing has been placed on record to show that the Respondent was being given a lower grade/post than what he was entitled to.

11. In view of the above position, the impugned award cannot be sustained and is set aside accordingly. The petitions are disposed of accordingly.

(MUKTA GUPTA)
JUDGE

AUGUST 23, 2012
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