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

+ **LPA No.740 of 2011 & LPA No.742 of 2011**

%

*Reserved on: 23rd April, 2012
Pronounced on: 18th May, 2012*

1) LPA No.740/2011 & CM No.16855/2011

AIR INDIA LTD.

... APPELLANT

through : Mr. Lalit Bhasin with Ms. Bhavna
Dhani, Ms. Ratna D. Dhingra and Mr.
Shreya S. Dabas, Advocates.

VERSUS

GOVT. OF INDIA & ORS.

... RESPONDENTS

through: Mr. Ashok Agarwal, Advocate for R-2.
Mr. Sachin Datta, CGSC with Ms.
Gayatri Verma, Advocates for UOI.

2) LPA No.742/2011 & CM No.16886/2011

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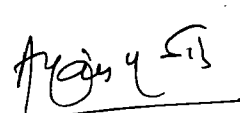
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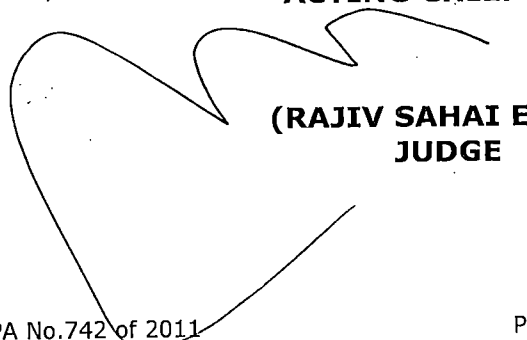
HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI (Acting Chief Justice)

For Orders, see LPA No.734 of 2011.


ACTING CHIEF JUSTICE


**(RAJIV SAHAI ENDLAW)
JUDGE**

MAY 18, 2012

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LPA Nos. LPA No.740 of 2011 & LPA No.742 of 2011

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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% Reserved on: 23rd April, 2012
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1) LPA No.734/2011 & CM No.2217/2011

AIR INDIA LTD.

... APPELLANT

through: Mr. Lalit Bhasin with Ms. Bhavna
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3) LPA No.742/2011 & CM No.16886/2011

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through : Mr. Lalit Bhasin with Ms. Bhavna
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VERSUS

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CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI (Acting Chief Justice)

1. The controversy involved in these intra-Court appeals questioning the impugned order of the learned Single Judge is in a narrow compass and has arisen in the following factual backdrop.

The matter goes back to the year, 1990 when the appellant herein had issued Notification inviting applications for filling up of certain vacancies in the category of Helper Engineer. A panel was prepared in the year 1990 itself, of the selected candidates. The validity of this panel was for a period of two years. Selected candidates were offered appointment, on the basis of their merits, from time to time as and when vacancies arose. The term of the panel was extended and it finally expired on 15.7.1994. No further appointments were made on regular basis from this panel. The appellant had also engaged different categories of casual workers. A series of writ petitions were filed by many such casual workers in this Court seeking regularization of their services. These writ petitions

were filed in the year, 1994-95. In one such writ petition, viz., W.P.(C) No.4113/1994 titled **S.K. Saini and Indian Airlines Ltd.**, interim order dated 07.12.1995 was passed in this Court directing the appellant to prepare panels for engaging casual workers on a daily rated basis in different categories from amongst the casuels who had worked with the petitioner on daily rated basis. Pursuant to these directions, the appellant prepared a panel and started engaging workers from this panel. This writ petition was finally decided along with other connected petitions directing the appellant to engage casual workers on daily rated basis as per its requirements firstly from the panel prepared and approved on 20.11.1990.

2. As per the appellant, since the appellant had to accommodate the left over persons in the selected panel prepared on 20.11.1990 on priority basis, for absorbing these persons, the appellant had no option but to discontinue some other casual employees who were engaged later and thus, their services were discontinued. Some of these persons felt aggrieved by the orders passed by this Court in W.P.(C) 4113/1994. They challenged that order by filing Special Leave Petition No.16382-16399/1997, which was dismissed by the Supreme Court on 15.9.1997. Some other casual employees also filed 09.5.1997 in W.P.(C) No.4113/1994 filed Writ Petition (C) No.1644/1997 along with other petitions in this Court in the year 1997-98 praying for regularization. In this writ petition, orders dated 21.8.1998 were passed dismissing those writ petitions as barred by constructive *res judicata*. SLP preferred by those

workers against that judgment was also dismissed by the Supreme Court vide orders dated 12.10.1998.

3. According to the appellant, though the matter rested at that, Delhi Offices & Establishments Employees Union, Respondent No.2, espoused the cause of these workers by sending representation to the Assistant Labour Commissioner, on behalf of these workmen, for reinstatement and regularization with consequential benefits. The appellant filed reply thereto submitting that the matter had already been decided by this Court and the Supreme Court and therefore, these workers could not raise dispute of this nature. Conciliation proceedings ended in failure. Thereafter, reference order dated 22.11.2000 was made.

4. Challenging this reference order, the appellant filed W.P.(C) 2019/2001. We may point out that in the reference with regularization and termination of the workmen were refused to. There was no purpose or justification in referring the issue of regularization which had already been decided by this Court in earlier writ petition. Realizing this mistake, counsel for the Central Government conceded that the reference was not properly termed. On this statement, writ petition was disposed of on 20.9.2004 and the order was passed in the following terms:

"Learned counsel for the Central Government says that the reference order made on 22nd November, 2000 may be quashed because it is contrary to the judgment of the Division Bench of this Court in CW 2644/97 (Gurpal Singh & Ors. vs. India Airlines & Ors.) decided on 21st August, 1998.

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In view of the statement of learned counsel for the Central Government, that has been made on instruction, the impugned reference is quashed.

Learned counsel for Respondent No.4 says that as per his instructions the aforesaid judgment of the Division Bench of this Court is not being implemented and that he would like to take steps in this regard. There is no prohibition against Respondent No.4 in taking such steps as permitted by law. However, for the record, learned counsel for the Petitioner says that as far as he is instructed, the judgment is being implemented."

5. Two more such references were made in a similar manner, which were also quashed in two other writ petitions vide orders dated 03.5.2005.

6. Thereafter, the appropriate Government made another reference on 23.1.2006 with the following terms:

"Whether the termination of the services of Shri Om Prakash and 17 others by the Management of Indian Airlines Ltd. is legal and justified? If not, to what relief they are entitled to?"

7. Challenging this, the appellant filed W.P.(C) No.9204 of 2006, which has been decided by the learned Single Judge of this Court vide impugned order dated 03.6.2011. While dismissing the writ petition, the learned Single Judge held that the contention raised on the basis of which reference is challenged can be taken up before the Industrial Tribunal. Challenging this order, LPA No.734 of 2011 is filed. Two other references were made on identical terms on behalf of some other casual workers and writ petition challenging those references are dismissed in a similar manner. Other two appeals challenging those orders are preferred on identical grounds. It is for this reason all these three appeals were heard together.

8. Challenge to the impugned judgment is circumscribed by the learned counsel for the appellant with the following propositions:

- (i) The dispute referred by the Government for adjudication has already been adjudicated upon by this Court in various writ petitions (particulars whereof are given above). Therefore, the reference is barred on the principle of *res judicata/constructive res judicata*. In this behalf, it was submitted that the disengagement of the workmen was necessitated due to the judgment delivered on 09.5.1997 by the Division Bench of this Court in W.P.(C) No.4113 of 1994 in the matter of **Sushil Kumar Saini Vs. Indian Airlines & Others**, wherein the 1993-12995 panel was set aside and the 1990 panel was restored. Some of the workmen had challenged the disengagement but it was held by the learned Single Judge in the case of **Shri J.D. Biswas Vs. Indian Airlines** being W.P.(C) No.4799 of 1997 that disengagement having been necessitated under the orders of this Court, there could be no question of non-compliance with the provisions of Section 25(F), 25-(oo) 25(g) of the Industrial Dispute Act, 1947. It is, therefore, submitted that the present reference is not maintainable as it seeks to reopen the issues already decided by this Court.

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(ii) When the first reference made was quashed and set aside by this Court, there could not have been second reference on the same purported dispute. The reference is identical to the earlier reference which was quashed by this Court on a statement made by the learned Counsel for the Union of India that the earlier reference was repugnant to the judgment of the Division Bench of this Court. The earlier reference mentions "reinstatement" and "regularization" whereas the present reference deals with "termination" of services. It is submitted that the earlier reference covered the termination of services for the reason that the question of reinstatement can only arise pursuant to termination.

It is submitted that a reference once made cannot be withdrawn, cancelled or superseded if the dispute is substantially the same. The two reference specifically cover the issue of disengagement/termination of the workman as would also be evident from the prayers made in the writ petitions which were subject matter of Division Bench of this Court.

If the workmen were aggrieved by any action on the part of the appellant arising out of the judgment of the Division Bench of this Court, the remedy available to them would be to seek directions/clarifications from this Court and not by

raising any dispute under the Industrial Disputes Act, 1947.

The counsel for the appellant relied upon the following judgments in support of his submissions:

- (a) ***State of Bihar Vs. D.N. Ganguly and Others***, AIR 1958 SC 1018.
- (b) ***Shri Ambika Prasad Vs. Indian Airlines (NR) and Ors.***, [W.P.(C) No.2963 of 1998].
- (c) ***Food Corporation of India Vs. Union of India***, 137 (2007) DLT 387.

9. Learned counsel for the respondent, on the other hand, argued on the same line on which the impugned judgment proceeds. In view thereof, before discussing the respective arguments of the counsel for the parties, we would like to take stock of the impugned judgment, viz., the basis on which the said judgment is premised.

Impugned Judgment:

10. The first thing pointed out by the learned Single Judge is that the termination of services of the workmen represented by these workmen has not been adjudicated in any form. Earlier, few workmen had filed W.P. (C) No.3343/1999 wherein prayer was made for declaring the action of the petitioner in terminating the services of 81 workers engaged during the year 1997-98 and by replacing them with fresh hands as arbitrary and discriminatory. This petition was contested by

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the appellant, *inter alia*, on the ground that if they were aggrieved by their termination, they should invoke the machinery under the I.D. Act which provides for appropriate forum for their grievance. No doubt, the appellant had challenged the maintainability of the said petition also on the ground that action was taken by the appellant pursuant to directions given by this Court in its judgment dated 09.5.1997 in W.P. (C) No.4113/1994. However, this writ petition was dismissed as withdrawn vide judgment dated 29.1.2002 which makes the following reading:

"After some hearing, learned counsel for the petitioner seeks leave to withdraw the petition with liberty to approach the competent authority under the Industrial Disputes Act. Liberty granted. Petition is dismissed as withdrawn."

Thus, that writ petition was not decided on merits. Rather it is at the behest of the appellant's contentions that the appropriate forum was the Industrial Tribunal under the I.D. Act that they approached the machinery provided under the ID Act.

Challenging that reference, the appellant had filed W.P.(C) No.2019/2001 on the ground that there could not have been any reference qua regularization as the issue of regularization had already been decided W.P.(C) No.2644/1997. This mistake was realized and because of this reason, counsel for the Central Government made statement that the said reference be quashed. We have already extracted to orders passed on 29.9.2004 in the said writ petition on the basis of this statement. Fact remains that the validity of the termination of the workmen was not decided. It is thereafter

that the appropriate Government has made reference in question limiting to the termination of the workmen which issue has not been judicially tested so far.

Second reason given by the learned Single Judge is that the respondent No.1, after fully satisfying itself that *prima facie* there exists an industrial dispute has made a reference to the Central Government Industrial Tribunal. It is not the case of the appellant that there was no material before the Government about its satisfaction.

The third reason given by the learned Single Judge is that the defence of the appellant that the termination of these workmen is pursuant to the directions in compliance with the judgment rendered in W.P.(C) No.2644/1997 is a matter which touches upon the merits of the case and that will have to be considered by the Tribunal.

11. On the aforesaid reasoning, the learned Single Judge dismissed the writ petition keeping it open for the appellant to take all the pleas which were raised in the petitions before the CGIT where the matters have been referred for adjudication.
12. In the light of the aforesaid, we now proceed to discuss the propositions advanced by the learned counsel for the appellant.

(i) Whether reference is barred on the principle of *res judicata/constructive res judicata*?

Learned counsel for the appellant insists on the applicability of the principle of *res judicata/constructive res judicata* on the basis of following two decisions:

- (a) Decision dated 09.5.1997 passed in W.P.(C) No.4113/1994.

(b) Decision dated 10.9.1999 passed by a learned Single Judge of this Court in W.P.(C) No.4799/1997 in the case of **J.D. Biswas (supra)**.

13. Insofar as the judgment in W.P.(C) No.4113/1994 is concerned, argument is that it was because of the directions contained in that judgment, the services of these workmen were dispensed with/terminated.
14. Insofar as contention of the appellant that disengagement/termination of the services of the workmen is the result of directions of the Division Bench in W.P.(C) No.4113/1994 is concerned, we are of the opinion that the learned Single Judge has rightly dealt with this contention. This, at the most, would amount to defence of the appellant justifying the termination. However, whether this plea is correct and whether the action taken is in compliance with the said judgment is a matter which has to be examined by Adjudicating Authority. We may record that the learned Single Judge has pointed out the contention of both the parties on this aspect, which are as under:

"The workers had also taken a plea before Conciliation Officer that petitioner had not prepared a seniority list and were violating the order of this court. Their stand was that the petitioner had exhausted the panel of 1990 and people from outside were being engaged. Their further stand was that they have a right to be considered first before outsiders were engaged. They had also taken a stand that petitioner had failed to comply with the order of this court in W.P.(C) 2644/1997 wherein directions had also been given to petitioner for considering casual workers therein as well as other similarly placed persons who had been engaged on daily rated by interim order or otherwise be given an opportunity of being considered for regular appointment at the time when the petitioner would like to fill regular vacancies. Their further stand is

that petitioner has vacant posts and they are employing fresh hands taking the advantage of orders passed in WP (C) No.4113/1994. In WP (C) 4799/1997, a casual employee had challenged his termination by filing a petition under Article 226 of the Constitution of India. The effect of the said judgment will be seen by the Tribunal. Whether the contentions raised are correct or not are required to be examined by the Tribunal. It will not be proper for this court to take up the job of Tribunal while exercising the jurisdiction under Article 226. It will be open to the petitioner to raise all the pleas before the Tribunal which are raised before this court."

15. We are in agreement with the aforesaid view in dealing with the contention of the appellant predicated on the judgment rendered in W.P.(C) No.4113/1994.
16. We would like to state here that the applicability of principle of *res judicata/constructive res judicata* when the workmen approach the High Court in the first instance under Article 226 of the Constitution and after invoking that remedy, machinery under I.D. Act is invoked. In those cases where the workmen are employed with any statutory authority or other authority which is amenable to writ jurisdiction, they have option to either file writ petition (depending upon the nature of relief sought) or to raise industrial dispute invoking the provisions of I.D. Act if the aggrieved person is a workman within the meaning of Section 2(s) of the I.D. Act. Such a workman, thus, has more than one fora to redress his grievance and he chooses any of the forum available. However, once having elected to choose remedy under one forum, again the same cause of action cannot be challenged before another forum. This is based on doctrine of election: 'Doctrine of Election' is based on the maxim "that a person cannot approbate or

reprobate at the same time". This same principle is stated in White and Tudor's Leading Cases in Equity Vol. 1 and Eds. at page 444 as follows:

"Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both."

This doctrine has been applied in India also, based on sound public policy (see - **Beepathuma Vs. Shankaranarayana**, (1964) 5 SCR 836; **R.N. Gosain Vs. Yashpal Dhir**, AIR 1993 SC 352; **Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat** (1970) 1 SCR 322).

17. Therefore, once the workers filed the writ petition and this writ petition is dismissed, normally, they would be precluded from raising industrial dispute claiming the same relief which was the subject matter of the writ petition. This would be so even if the writ petition is dismissed *in limine* but by speaking order, i.e., reasons are given for dismissal of the writ petition on the ground that the petitioner was not entitled to the relief sought. In such a case, the remedy under I.D. Act would not be available thereafter and would be barred on the principle of *res judicata*. However, the position may be different if the writ petition is dismissed without passing speaking order and touching upon the merits of the case.
18. The position in law materially changes when the writ petition is dismissed *in limine* by a non-speaking, one word order viz. "Dismissed". It has been held that principles of *res judicata* would not apply in such a situation. In **Daryao and others Vs.**

State of U.P. 1961 AIR 1457, the proposition of law was stated by the Apex Court in the following words:-

"We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the high Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order than such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all: but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the court and that makes it difficult and unsafe to hold that such a summary, dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Art. 32."

19. To the same effect is the judgment of the Supreme Court in the case of **Pujari Bai Vs. Madan Gopal**, 1989 AIR 1764, the following pertinent observations were made:-

"This takes us to the question of res judicata. The question is whether the suit of the appellant was barred by res judicata in view of the summary dismissal of her writ petition earlier. It is not disputed that the writ petition filed by the appellant against the order of the Assistant Consolidation Officer was dismissed in limine. This order dated April 14, 1969 was passed by the Division Bench of Punjab and Haryana High Court. It was a one word order. The question of res judicata apparently arises when a controversy or an issue between the parties has been heard and decided.

But the technical rule of res judicata, although a wholesome rule shed upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided. It is not safe to extend the principle of res judicata to such an extent so as to found it on mere guesswork. To illustrate our view point, we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the writ petition is dismissed after contest by a speaking order obviously it will operate as res judicata in any other proceeding, such as, of suit, Article 32 or Article 136 directed from the same order or decision. If the writ petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principles of res judicata. It thus becomes clear that when a writ petition after contest is disposed of on merits by a speaking order, the question decided in that petition would operate as res judicata, but not a dismissal in limine or dismissal on the ground of laches or availability of alternative remedy. The High Court and the courts below, therefore, were not right in throwing out the suit of the appellant on the ground of res judicata."

20. The position of law which emerges from the aforesaid judgment can be summarized as under:

"i. If a workman files a writ petition on a particular cause of action and the said writ petition is entertained and decided on merits and disposed of/dismissed even in limine but by passing a speaking order, on the same cause of action the concerned employee is precluded from raising industrial dispute. This would be so on the "doctrine of election" as well as on the "principles of *res judicata*".

ii. In case the writ petition is dismissed in limine by a nonspeaking order it would be unsafe to presume that writ petition was dismissed on merits and therefore in such a case it could not operate as *res judicata* and therefore would not be a bar from raising industrial dispute."

21. In a case where writ petition is filed, but the maintainability of the same is challenged on the ground that there is an alternate efficacious remedy under the I.D. Act and the writ petition is dismissed/withdrawn/disposed giving liberty to the appellant to invoke remedy under the I.D. Act, it would obviously be a case which is not decided on merits and the principle of *res judicata* will not apply.
22. However, thereafter, W.P.(C) No.4799/1997 filed by Shri J.D. Biswas was dismissed by the learned Single Judge of this Court and effect thereof has not been considered by the learned Single Judge. The question would, therefore, be as to whether the judgment of the learned Single Judge in W.P.(C) No.4799/1997 operates as *res judicata* in the sense whether the aforesaid issue has been determined by the Court. That was a case filed by an individual person, viz., Shri J.D. Biswas who had alleged that his termination from service was in

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contravention of Section 25(f) and 25(g) of the I.D. Act as well as contrary to the judgment dated 09.5.1997 in W.P.(C) No.2155/1995. The appellant had contested the petition on the ground that if violation of Section 25 (f) and 25 (g) of the I.D. Act is raised, then the matter would fall within the jurisdiction of Industrial Tribunal. It was also contended that J.D. Biswas was given casual engagement on daily rated basis. It was also argued that Biswas and other similarly situated persons were disengaged from the services in compliance with the directions contained in the judgment dated 07.5.1997 in W.P.(C) No.4113/1994 and W.P.(C) No.2155/1995. The Court while dismissing that writ petition, *inter alia*, observed as under:

"5.....It may be appreciated that in the instant case the termination of the petitioner's services is not by the employer for any reasons. The termination of petitioner's service has been necessitated on account of the directions issued by the Division bench of this court in C.W.2155/95.

6. It is the admitted position that this petitioner filed CW 2155/95. Pending the writ petition, the Division Bench of this Court passed an interim order dated 26.5.1995 directing the respondent to consider the petitioner for casual job during the pendency of the writ petition. In compliance with the said interim order the petitioner was appointed casual commercial helper w.e.f. 21.2.1996 to 29.4.1997 and from May 1997 to 13.8.1997. Thus, the petitioner admittedly worked as casual helper from 21.2.96 to 29.4.97 i.e. for 397 days by force of the interim order passed by this court as the respondent was directed to consider the petitioner for casual work during the pendency of the writ petition No.2155/95. But for the interim order passed on 26.5.1995 the petitioner would not have been able to work even as casual worker for the period aforesaid and the respondent was obliged to absorb the petitioner as a casual worker by force of said interim order. **CW 2155/95 was disposed of vide order**

dated 9.5.1997 whereby the Division Bench of this court quashed/set aside the 1993-95 casual workers' panel as arbitrary and directed the respondent to firstly engage casuals from pre-existing 1990 panel according to the seniority which led to the termination/discontinuance of the petitioner's service. Thus, the termination of petitioner has been in compliance with the directions issued in CW 2155/95. It is also not disputed that judgment and order passed by the Division Bench of this Court in CW 2155/95 was unsuccessfully carried to the Supreme Court by way of SLP No.16392-16399 of 1997 and the said SLP came to be dismissed on 15.9.1995.

7. It need hardly be said that the interim order dated 26.5.1995 being an arrangement pending the final decision in the writ petition, would end only during the life of the writ petition and not beyond and neither party can claim as of right the benefit obtained under interim arrangement. Now, simply because the petitioner worked as casual worker under the interim order passed by the Division Bench, that would not vest any legal right in the petitioner claiming benefit at par with a casual worker appointed in normal course. The provisions contained in Sections 2(o), 25F AND 25G of the Act would come into play provided the casual employment and termination thereof are the acts of violation on the part of the employer and not in the case of the casual employment which is by force of interim order by the Court and the termination thereof consequent upon the direction by the court in the petition wherein the rights of the parties to the petition got crystallized on the out-come of the petitioner. Termination of service consequent upon the direction to the respondents, cannot be equated with retrenchment so as to attract Section 2(o) of the Act by making Section 25F of the Act applicable."

(emphasis supplied)

23. We find that Shri J.D. Biswas was in the same position as these workmen. He was also the petitioner who filed W.P.(C) No.2155/1995 which was taken up along with W.P.(C) No.4113/1994 and these judgments were decided vide common judgment dated 07.5.1997. His second writ petition, viz., W.P.(C)

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No.4799/1997 was dismissed by a learned Single Judge of this Court on merits categorically holding that his dismissal was in compliance with the said judgment dated 07.5.1997. Though that judgment was rendered by the learned Single Judge on merits, present workmen were not the party to those proceedings, therefore, they are not bound by the decision rendered in the case of **J.D. Biswas (supra)** and on this ground, it may not be said that the principle of *res judicata* applies to them. No doubt, when the case is dealt with by the Tribunal on merits, the appellant can rely upon the judgment in **J.D. Biswas (supra)** and the effect of that can be considered by the Tribunal. At the same time, the reference order made by the Government cannot be set aside/quashed invoking the principle of *res judicata*.

24. We, thus, answer this question holding that the reference is not barred.

(ii) Whether the second reference is barred when earlier reference was quashed by this Court?

25. From the facts noted above, we have pointed out that the first reference was made on 22.11.2000, which was challenged by the appellant in Writ Petition (Civil) No.2019/2001. This reference was quashed vide orders dated 20.9.2004 on the statement of counsel for the Central Government as the reference included the question of regularization which was contrary to the judgment dated 21.8.1998 passed in W.P.(C) No.2644/1997. Thereafter, the present reference has been made confining to the validity of termination. The submission of the learned counsel for the appellant was that once the first reference is quashed, for whatever reason, and that reference included the validity of termination as well, the second reference cannot be made. It was argued that the appropriate remedy was to amend the reference

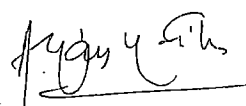
by excluding the question of regularization. However, the counsel for the Central Government itself conceded for quashing of the reference and therefore, the Central Government was not empowered to make another reference on the same.

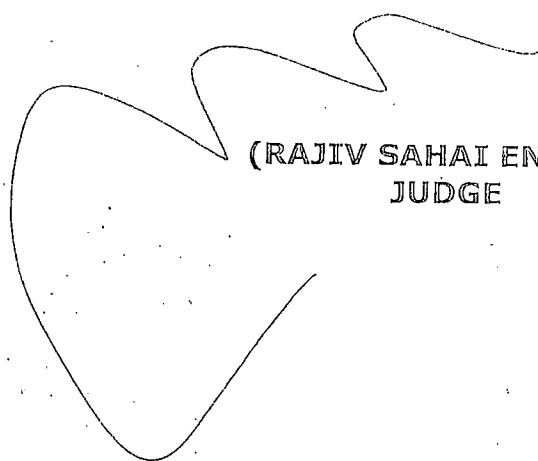
26. We are unable to accept this submission, which is hyper-technical. As pointed out above, the first reference pertained to regularization as well as termination of services. Since the question of regularization could not be referred as this issue had been decided by the Division Bench of this Court, instead of amending the reference the Central Government acceded to quash thereof and to make fresh reference. There was, thus, technical error in the first reference. No doubt, the purpose could have been served by amending that reference. However, simply because that is not done and on the quashing of the said reference (which virtually amounted to withdrawal of the said reference because of the aforesaid effect), the Government passed fresh reference order limiting it to termination, that cannot be treated as illegal. We state at the cost of repetition that the termination of the respondents have not been decided on merits in any proceedings till date.

27. The judgment of the Supreme Court in ***D.N. Ganguly (supra)*** relied upon by the appellant has no bearing on the facts of this case. In that case, the Apex Court held that the I.D. Act does not confer any power on the appropriate Government to cancel or supersede a reference made under Section 10(1) of the I.D. Act. Here, that is not done. Instead, it was the appellant itself who had challenged the validity of the reference and realizing

its mistake and statement was made in the Court on the basis of which reference was quashed in the Court.

29. Judgment in the case of *Food Corporation of India (supra)* rendered by a learned Single Judge of this Court held that the defects in Notification cannot be supplied by mere amendment or rectification and it can only amend supplement or modified existing reference provided it is connected with the original reference. Here, the Government did not rescind or withdraw the reference. Rather, it was quashed by the Court and that too, at the instance of the appellant. Now, the appellant cannot turn around and say that there cannot be any reference qua termination at all.
30. The upshot of the aforesaid discussion leads us to conclude that the impugned judgment of the learned Single Judge does not call for any interference. Accordingly, these appeals are dismissed.


ACTING CHIEF JUSTICE


(RAJIV SAHAI ENDLAW)
JUDGE

MAY 18, 2012
pmc