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

+ **Date of Decision: 17.05.2013**

% **W.P.(C) 7210/2000**

MANGEMENT OF LHMC & S.K.HOSPITAL Petitioner
Through: Mr. R.V. Sinha, Advocate.

versus

USHA DAWAR Respondent
Through: Mr. Mahesh Srivastava & Mr. Ashok
Kumar Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (ORAL)

1. The petitioner management has preferred the present writ petition to assail the award dated 29.05.2000 passed in I.D. No.95/90, whereby the Central Government Industrial Tribunal, New Delhi (the CGIT) has answered the reference made to it by the Appropriate Government vide notification dated 22.08.1990 – with regard to the termination of the respondent's services w.e.f. 08.02.1988, in favour of the respondent and directed the reinstatement of the respondent in service with full back wages.

2. The respondent was appointed as a Lower Division Clerk vide letter dated 28.07.1986 w.e.f. 04.08.1986. The terms of appointment are relevant. The said appointment letter reads as follows:

*“With reference to his/her interview dated 25.07.86 for the post of Lower Division Clerk in the Lady Harding Medical College I Smt. Sucheta Kriplani Hospital. **Smt. Usha Dawar** WDC/927/83 is informed that she **has been selected for appointment to the post of Lower Division Clerk purely on ad-hoc basis for a period of Three months or till the post is filled on a regular basis whichever is earlier** with immediate effect on the following terms and conditions:*

- 1. Initial pay of Rs.260/- p.m. in the scale of Rs. 260-6-290-EB-6-326-8-366-EB-8-390-10-4000.*
- 2. Other allowances as admissible from time to time to the Central Government employees.*
- 3. The ad-hoc appointment to the post will not bestow on her any claim for regular appointment to the post nor will the service rendered by her on ad-hoc basis in the said post count for the purpose of seniority in the grade or eligibility for promotion to the next higher post.*
- 4. The service can be terminated without any notice and without assigning any reason.***
- 5. He/She will have to produce Medical Certificate of fitness.*
- 6. He/She is requested to submit of a recent certificate of character from two Gazetted Officers. One certificate to be countersigned by a First Class Magistrate.*
- 7. If he/she accepts the offer on these conditions, he/she should report for duty to the undersigned/_____ immediately/by _____ 04.08.86 failing which the offer will be treated as CANCELLED. ”*

(Emphasis supplied)

- 3. Vide office order dated 22.12.1987, inter alia, the services of the respondent were extended on ad-hoc basis for a period of six months or till the posts are filled on regular basis.*

4. After the aforesaid extension, vide order dated 08.02.1988 the services of the respondent were terminated. There is no dispute that the termination order itself is innocuous and does not make any allegation against the respondent. The respondent, thus, raised an industrial dispute, as aforesaid.

5. In their written statement, the stand of the petitioner management was that the respondent was involved in a criminal case registered as F.I.R. No.413 dated 09.08.1987 under Sections 204/498-A read with Section 34 I.P.C. at Police Station Tilak Nagar and she was arrested on 09.08.1987 and released on bail on 24.08.1987. The aforesaid was stated to be the reason on account of which the services of the respondent were terminated. It was also stated that she was not terminated on account of being declared surplus but due to the aforesaid instance.

6. The petitioner also placed reliance on the terms of appointment and, in particular, clause 4 of offer of appointment, which entitled the petitioner to terminate the services of the respondent at any time without any notice and without assigning any reason. The other objection raised by the petitioner was with regard to its not being an 'industry' within the meaning of the Industrial Disputes Act, 1947 (the Act). The CGIT rejected the submissions of the petitioner. Since no notice had been issued to the respondent, and no retrenchment compensation paid, the termination was held to be illegal. Consequently, reinstatement with full back wages was directed.

7. The submission of the petitioner is that even though the CGIT noticed the provision contained in Section 2(oo)(bb) of the Act, it was not appreciated that the appointment of the respondent was for a fixed term

under a contract, and termination had taken place in accordance with the stipulation in that behalf contained in the contract. It was, therefore, a case covered by Section 2(oo)(bb), and termination of the respondent's services did not tantamount to retrenchment.

8. On the other hand, the submission of learned counsel for the respondent is that, admittedly, the termination was not on account of the respondent becoming surplus or the posts being filled up by regular appointees. According to the respondent, the termination was mala fide inasmuch, as, it was on account of the respondent's involvement in the aforesaid criminal case. It was not preceded by any show-cause notice or inquiry.

9. According to the respondent, since the termination was without compliance of Section 25-F, the same is null & void. Learned counsel for the respondent has placed reliance on ***Harjinder Singh Vs. Punjab State Warehousing Corporation***, (2010) 3 SCC 192, to submit that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues.

10. Learned counsel also places reliance on the judgment of the Supreme Court in ***Anoop Sharma Vs. Executive Engineer, Public Health Division No.1 , Panipat (Haryana)***, (2010) 5 SCC 497, wherein the Supreme Court – while placing reliance on earlier decisions, held that non-compliance of Section 25-F of the Act renders the termination null & void ab initio. The Supreme Court restored the award directing the reinstatement of the workman in that case.

11. Reliance is also placed on the judgment of the Supreme Court in ***Kuldeep Singh Vs. G.M., Instrument Design Development and Facilities Centre & Another***, JT 2010 (13) SC 557. This is an instance of a case where the Court had found the termination to be in breach of Section 25-F of the Act.

12. Learned counsel for the respondent has also sought to place reliance on the order passed by the Central Administrative Tribunal (CAT) in the case of four other employees like the respondent, on their plea for seeking regularization. The CAT had directed that their services should not be dispensed with till they are tested for the purpose of being regularly appointed. This order was passed by the CAT on 11.07.2000. I may only note that the judgment of the Supreme Court in ***Secretary, State of Karnataka & Others Vs. Umadevi & Others***, AIR 2006 SC 1806, had not been rendered by then.

13. The respondent has also referred to the judgment of the Supreme Court in ***Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs Workmen***, (1960) 1 SCR 703. The Supreme Court

had observed in this case that the rights vested in the workman under Chapter V-A of the Act (in which Section 25-F also falls) are based on humane public policy and the statute which gives such right should be accordingly construed and where there are disqualifying provisions, the matter should be construed strictly with reference to the words used therein. At this stage, I may only note that clause (bb) was inserted in Section 2(oo) by the Amendment Act 49 of 1984 w.e.f. 18.08.1984.

14. Reliance is also placed on the judgment in ***Haryana State Electronics Development Corporation Limited Vs. Mamni***, JT (2006) 11 SC 232. In this case the employee's appointment had been made for a period of 89 days as Junior Technician (Electronics) on ad-hoc basis and was successively renewed after granting just about a day's break in between. The Supreme Court observed that such action on the part of the appellant was not bona fide. It only needs to be noted that the appointment in this case was not made on the premise that the same shall continue for a specified period, or till filling up of the post by regular appointees, whichever is earlier. I may also note that in the present case the respondent's appointment was extended only once, and during this extended period her services were terminated by placing reliance on Clause 4 of the termination letter.

15. Section 2(oo) of the Act defines the expression "retrenchment" as follows:

"(oo) 1[" 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) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) 2[termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill- health;]”

16. The opening words of Section 2(oo) show that-for the termination to constitute retrenchment, the same should be a case of termination by the positive voluntary act by the employer. When the termination takes place – not on account of the act of the employer, such as, in the case of abandonment of his service by the workman, or in the case of the death of the workman, it would not amount to “retrenchment”, as such termination cannot be said to be “by the employer”. It is the same concept which stands further clarified by clauses (a) and (b), since, voluntary retirement occurs on the volition of the workman, and not the employer retirement of the workman on reaching the age of superannuation is a case of termination by efflux of time, in terms of the service conditions of the workman.

17. Clause (bb) of Section 2(oo) deals with two situations when the employment of the workman stands discontinued or terminated. These are:

- (i) Where the termination of the services of the workman has occurred on account of the omission of the employer in renewing the contract of employment upon its expiry, or
- (ii) upon such a contract being terminated by the employer under stipulation in that behalf contained in the contract. In either of these situations, the termination does not amount to “retrenchment” within the meaning of Section 2(oo). The first part of clause (bb) of Section 2(oo), as noticed above, deals with the case of the omission of the employer to renew the contract of employment which lapses by efflux of time. Therefore, even this is a case of no positive action on the part of the management for termination of the service of the workman. However, the second part of clause (bb) of Section 2(oo) deals with a case of termination of the services of the workman by a positive act of the employer “*under a stipulation in that behalf*” contained in the contract of employment. The law, therefore, preserves the stipulation in the contract of employment which empowers the employer to terminate the services of the workman, in terms of the stipulation. Clause (c) is also an instance of termination of the service of the workman by a positive act on the ground of continued ill-health of the workman.

18. The issue whether, or not, the termination of the service of the workman by the employer amounts to retrenchment would, therefore, have to be examined in the light of the terms of the contract, and the act of

termination of workman's service by the employer.

19. In the present case, it is not disputed that the employment of the respondent was purely on ad-hoc basis for a fixed term, i.e., three months, or till the post is filled up on regular basis, whichever is earlier. It was extended for another period of six months, or till the post is filled up on regular basis. The contract also provides that the services of the respondent could be terminated without any notice and without assigning any reason. The termination of the fixed term contract has taken place in terms of the stipulation contained in the contract, i.e., in clause 4 thereof. Therefore, in my view it does not tantamount to retrenchment as it is covered by the exclusionary clause (bb) of Section 2(oo).

20. The stipulation contained in clause 4, and its invocation to terminate the services of the respondent cannot be said to constitute an unfair labour practice. This is for the reason that the employment of the respondent itself was for a fixed term, i.e., for fixed term of three months and, on extension, by another six months or till the post was filled up on regular basis – whichever is earlier. If employment is for a fixed term, or till the filling up of the post – whichever is earlier, the inclusion of the clause which provides that the services may be terminated without any notice, or without assigning any reason, can neither be described as unfair or arbitrary. The employer may need to terminate the services of the workman without notice for a variety of reasons. The respondent was put to notice when she was appointed about the nature of her employment as being purely ad-hoc and for a fixed term, which too, could be curtailed at any time without prior notice or assigning any reason. She cannot have a grievance in this regard on a later

date after she has accepted the appointment with such a condition.

21. The submission of learned counsel for the respondent that the termination cannot be said to be bona fide has no merit. Firstly, the termination has taken place within two months of the very first extension of the contract of employment by six months, or till the posts were regularly filled up. It was not a case where the employer has sought to exploit the condition that the appointment was ad-hoc and for a fixed term, by repeatedly renewing the contract with artificial breaks as was the case in *Haryana State Electronics Development Corporation Limited* (supra).

22. This Court had the occasion to consider Section 2(oo)(bb) of the Act in *GNCT of Delhi and Ors Vs. Jitendra Kumar*, W.P.(C) 247/2011 decided on 06.03.2013. In that case, contingent appointment of the respondent had been made for 89 days on daily wage basis. The appointment could be terminated at any time on one month's time without assigning any reason. The Appointing Authority reserved the right to terminate the services of the appointee forthwith, or before the expiry of the stipulated period of notice or the unexpired period thereof. The post was declared to be a contingency arrangement till the regular candidate joins, or for 89 days, whichever was earlier. While concluding that the termination of such a service falls within Section 2(oo)(bb) and, consequently, Section 25-F and other provisions of the Act relating to retrenchment had no application in that case, this Court observed as follows:

“22. The advertisement in response to which the respondent had applied and got selected itself was clear enough inasmuch, as, it stated that a walk-in interviews would be conducted for

appointment of nursing orderly on contingent basis till regular appointments are made, or for 89 days, whichever is earlier. The respondent and the other workman who participated in the said recruitment process were, therefore, clearly put to notice that they are not being appointed on regular basis. They were informed that they were being on contingent basis, the contingency being that as and when the regular appointments are made, their services would be terminated or for 89 days whichever is earlier. Their appointments were not open ended or for an indefinite period.

23. The petitioner did not make the said fixed term appointment only to avoid the application of various beneficial legislations applicable to workmen. This is clear from the fact that there was a good reason for making such contingent appointments for fixed term. Regular recruitment in terms of the recruitment rules, it is well known, is a time consuming process. The same requires various clearances as it involves budgetary provisioning and other administrative clearances. An open public recruitment requires public advertisement, grant of time for making application, conduct of written examinations and interviews – as may be required under the recruitment rules, evaluation of the candidates on merit and finally the compilation of the results and notification thereof. With a view to make arrangements for its immediate needs, MBH conducted walk-in interviews to recruit nursing orderlies on daily wages while putting them to notice that their appointment would be contingent till regular appointments are made, or for 89 days, whichever is earlier.

24. The respondent, therefore, could not claim that he was under a bonafide impression that his appointment was on long term basis, or open ended. It was not even the respondents case that he had been regularly recruited in terms of the recruitment rules. Merely because walk-in interviews were conducted after a public advertisement, the respondents appointment could not be claimed to have been made in accordance with the recruitment rules on regular basis. As held by this Court in Naresh Chand (supra), the continuation of

the engagement of the workman after the expiry of the fixed period, does not relieve them of the rigours of clause (bb) of section 2(oo) of the Act. Such continuation beyond the period of 89 days in the present case, therefore, did not change the status of the respondent as a fixed term employee.”

The termination of the respondent's services cannot also be said to be mala fide on account of disclosure made by the petitioner in its written statement that the termination had been effected on account of registration of a criminal case against the respondent and her arrest in the said case. It is not the respondent's case that the termination letter/order discloses any reason for the termination of her service. It is not the respondent's case that the termination order was not innocuous or that it was stigmatic. It is well-settled that one has to go by the order of termination and not by the reasons which may have prevailed in the background, and may furnish the cause of termination for the services of the workman, when such termination is under a stipulation contained in the contract of employment. Reference may be made to the decision in ***State of U.P. Vs. Ram Chandra Trivedi*** (1976) 4 SCC 52 wherein relying on the decision in ***I. N. Saksena Vs. State of Madhya Pradesh***, AIR 1967 SC 1264, the Supreme Court held that the Courts could not go into departmental correspondence to discover if any stigma could be inferred if there were no express words in the impugned order of termination that could be considered as stigmatic. A similar view was also taken in ***Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and Another***, (1992) 4 SCC 719, wherein it was held that “*the principle of tearing of the veil for finding out the real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge*

so levelled and the action taken. If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment.”

The reliance placed by learned counsel for the respondent on several decisions referred to above, in my view, is of no avail. Since the termination of the respondent in the present case does not tantamount to retrenchment, the decisions in **Harjinder Singh** (supra), **Anoop Sharma** (supra) and **Kuldeep Singh** (supra) have no application. As I have noticed above, the decision in **Associated Cement Companies Limited** (supra) was rendered much prior to the amendment of the Act by Amendment Act 49 of 1984 w.e.f. 18.08.1984, whereby clause (bb) was inserted in Section 2(oo). In any event, since the present is a case falling under the exception contained in clause (bb) of Section 2(oo), the said decision is of no avail to the respondent.

23. The order passed by the CAT in the case of four other employees has no bearing on the respondent's case. In any event, that order was passed before the judgment of the Supreme Court in **Umadevi** (supra) came to be rendered in the year 2006.

24. The direction to grant reinstatement with full back wages, in any event, was wholly uncalled for in the facts of the present case. The respondent had served the petitioner only between 04.08.1986 and 08.02.1988, i.e., for a period of about 18 months, and that too, on ad-hoc

basis. In such like situations, even if the termination does tantamount to retrenchment and there is non-compliance of Section 25-F of the Act, it is well-settled that compensation in lieu of back wages and reinstatement is the appropriate relief to grant. Reference may be made to *Jagbir Singh Vs. Haryana State Agriculture Marketing Board & Another*, (2009) 15 SCC 327. However, since the termination of the respondent's services does not tantamount to retrenchment, she is not entitled to any compensation, let alone reinstatement with full back wages, as granted by the CGIT.

25. Accordingly, the petition is allowed and the impugned award is set aside, leaving the parties to bear their respective Costs.

VIPIN SANGHI, J.

MAY 17, 2013
BSR