

32.

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

+ Date of Decision: 24.01.2013

% W.P.(C) 894/2007 and C.M. Nos. 1543/2007, 3985/2010 & 3986/2010

**COUNCIL FOR ADVANCEMENT OF PEOPLE'S
ACTION & RURAL TECHNOLOGY (CAPART) Petitioner**

**Through: Mr. S.K. Rungta, Senior Advocate
along with Mr. Prashant Singh,
Ms.Prateti Rungta, Ms. Rashmi
Jajonia & Mr. Jewan Chandra,
Advocates.**

Versus

SHRI RAMESH CHANDER Respondent

Through: Mr. Varun Prasad, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

VIPIN SANGHI, J. (ORAL)

1. The petitioner management by this writ petition has assailed the industrial award dated 11.09.2006 made by the Central Government Industrial Tribunal-cum-Labour Court-II (hereinafter referred to as CGIT), Rajendra Bhawan, Rajendra Place, New Delhi in I.D. No.37/2003 arising out of the industrial disputes raised by the respondent workman, which were referred by the Appropriate Government for adjudication. The terms of reference read as follows:

“1. Whether the demand of the union in relation to equal wages for equal work as performed by Shri Ramesh Chander

for performing the work at par with the permanent employees for the period w.e.f. 01.04.1986 to 30.09.1988 as Peon and w.e.f. 01.10.1988 to 01.09.1996 is just, fair and legal? If yes, what relief he is entitled to and from what date.

2. Whether the action of the management of Council for Advancement of Pupil's Action and Rural Technology, New Delhi in terminating the services of Shri Ramesh Chander, Ex. Clerk w.e.f 21.08.1998 during probation period for not obeying the lawful order of competent authority, without holding domestic inquiry is just, fair and legal? If not, what relief the workman is entitled to and from what date.”

2. The CGIT by the impugned award answered the points of reference in favour of the respondent workman. In the claim statement filed by the respondent, he stated that he was initially employed as a Peon on daily wages w.e.f. 01.04.1986 and worked in that capacity up to 30.09.1988. Thereafter he was again appointed to the post of L.D.C. on daily wages w.e.f. 01.10.1988. The petitioner was issued the appointment letter dated 20.06.1996 appointing him to the post of L.D.C. and his services were regularized as L.D.C. w.e.f. 02.09.1996 in the pay scale of Rs.950-20-1150-EB-25-1500. This letter of appointment stated that the appointment was offered against a post sanctioned for the North Zone Regional Committee, Jaipur of the petitioner Council for Advancement of People's Action and Rural Technology (CAPART). The appointment memorandum contained, inter alia, the following clause:

“2. The appointment is subject to the following conditions:-

(i) The appointee will be on probation for a period of two years which will be extended at the discretion of the competent authority. If no orders are passed by the

competent authority on expiry of the said period of two years, the period of probation shall be deemed to have been extended till such time as specific orders are passed in this regard. During the probation, he will be required to undergo such training etc. as may be considered necessary, as part of duty. The appointing authority, however, reserves the right of terminating the service of the appointee forthwith or before the expiry of notice period by making payment to the appointee a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof.”

3. The respondent claimed that the appointment to the post of L.D.C. was of regular nature.

4. The respondent further submitted that he was directed to put up two files mentioned in the communication dated 07.01.1998 issued by the petitioner management, failing which he was threatened that he would be suspended and disciplinary action would be initiated against him. He further claimed that without issuing any charge-sheet or conducting any inquiry, vide order dated 14.08.1998, his services were terminated with effect from 21.08.1998. The respondent claimed the order of termination to be a camouflage. It was claimed that the termination was, in fact, penal though on the face of it, the same appeared to be innocuous. He further claimed that one Sh. Rajender Kumar, Research Assistant, who was also terminated at the same time, was eventually taken back into service as his termination was set aside in a departmental appeal. But the respondent was denied similar treatment. The respondent, therefore, alleged discriminatory treatment at the hands of the petitioner. He claimed that though he had served continuously from 1.4.1986 to 30.09.1988 as Peon, and thereafter as L.D.C. from

01.10.1988 to 01.09.1996, whereafter his services were also regularized in the same position from 02.09.1996, his services were terminated on 21.08.1998 without one month's notice or one month's pay in lieu of notice and he was also not paid any compensation, gratuity etc. As aforesaid, the termination was not preceded by any domestic enquiry. Consequently, the respondent claimed that the termination of his services was illegal, unjustified and unfair. He claimed regularization of his services from the date another daily wager/LDC Shri Gulshan Chadha, junior to him, was regularized, i.e., 01.09.1994. As is evident from the terms of reference, he also claimed equal wages at par with permanent employees for the period 01.04.1986 to 30.09.1988 as Peon, and w.e.f. 01.10.1988 to 01.09.1996 as L.D.C. He placed reliance on office memorandum issued by the Ministry of Personnel, Public Grievance and Pension, Department of Personnel & Training, Government of India, dated 07.06.1988 to claim that daily rated workers were also entitled to the wages equivalent to their regular counterparts.

5. In their written statement, the petitioner management claimed that termination of the respondent's services was in accordance with the terms of his services contained in para 2(i) of his appointment letter dated 26.06.1996. It was claimed that though the termination was on account of unsatisfactory service and negligence on the part of the respondent, the termination order was innocuous and was not penal in nature. The respondent contended that the services of probationer may be terminated during probation if his performance is not satisfactory prior to the expiry of the period of probation. So far as the respondent's claim for parity in pay scale with his counterparts-

who were permanent employees of the petitioner, was concerned, reliance was placed on legal pronouncements to submit that a daily wager cannot claim parity of pay with regular employees even if the work performed by them is identical. The petitioner also set out the act of misconduct/negligence attributed to the respondent and also led evidence on this aspect to justify the termination of the respondent's services. The petitioner claimed that the respondent was sent a cheque on 14.01.2002 in lieu of one month's notice pay on 15.01.2002, which was returned by him vide letter dated 17.01.2002 to the petitioner. The petitioner also sought to distinguish the case of Rajender Kumar, Research Assistant, on the ground that the termination was for different reasons and, consequently, the two cases could not be compared.

6. After recording evidence the issues for determination were taken up for consideration – the first being with regard to the respondent's claim for equal wages with his permanent counterparts. In this regard, the Industrial Adjudicator took note of the decision cited by the petitioner reported as *State of Orissa & Others Vs. Balaram Sahu & Others*, 2003 SCC (L&S) 65. This decision had been rendered by following the earlier decision of the Supreme Court in *State of Haryana Vs. Jasmer Singh*, (1996) 11 SCC 77. The Supreme Court had disallowed the claim of equal pay for equal work made by the NMR workers as it was claimed by the State that the duties & responsibilities of the employees in regular establishment were more onerous than those of NMR workers who were employed in various projects on daily basis. While disregarding the aforesaid decision, the Industrial Adjudicator has placed reliance on a three-judge bench of the Supreme Court in

Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, 1990 1 L.L.J. 320. The Industrial Adjudicator has also referred to the statement made by the petitioner's witness MW-1 in support of his decision.

7. On the second issue-with regard to the termination being legal or illegal, the learned Industrial Adjudicator returned a finding in favour of the petitioner that the termination order is not stigmatic. It was also held that the services of the respondent were terminated within the period of probation of two years and that no inquiry was needed in case termination was stigmatic or punitive. However, the Industrial Adjudicator decided the said issue against the petitioner management since the petitioner had not paid one month's salary at the time of termination of the respondent's services in view of Clause 12(i) of the Service Bye-Laws, which read thus:

“(i) The appointee will be on probation for a period of two years which will be extended at the discretion of the competent authority. If no orders are passed by the competent authority on expiry of the said period of two years, the period of probation shall be deemed to have been extended till such time as specific orders are passed in this regard. During the probation, he will be required to undergo such training etc. as may be considered necessary, as part of duty. The appointing authority, however, reserves the right of terminating the services of the appointee forthwith or before the expiry of notice period by making payment to the appointee a sum of equivalent to the pay and allowances for the period of notice or the unexpired portion thereof.”

8. The Industrial Adjudicator also referred to the case of Sh. Rajender Kumar, who had been similarly terminated without payment of the salary and compensation for the termination period and had been reinstated on a

departmental appeal. Since the respondent had served the petitioner for 12 years earlier as Peon and thereafter as L.D.C., he was held entitled for 25% back wages along with consequential benefits and continuity of service.

9. The submissions of Mr. Rungta, learned senior counsel for the petitioner, in relation to the award made on the first point of reference are that the approach of the learned Industrial Adjudicator in disregarding the decision cited by the petitioner in the case of **Balram Sahu** (supra), by placing reliance on an earlier decision of the Supreme Court in **Bhagwati Prasad** (supra) was laconic. He submits that in **Balram Sahu** (supra), the Supreme Court had applied the earlier decision in **Jasmer Singh** (supra), wherein the Supreme Court had held that the persons employed on daily wages could not be treated at par with persons regularly appointed. Daily rated workers are not required to possess qualification prescribed for regular workers nor were they required to fulfill the requirement relating to age at the time of recruitment. They are not selected in the manner in which the regular employees are selected. Consequently, the requirements of selection are not as rigorous. A regularly appointed person is also liable to be transferred and be subjected to disciplinary action by the authorities, to which the daily rated workers are not. In **Balram Sahu** (supra), reliance was placed by the respondent workman on a three-judge bench decision of the Supreme Court in **Chief Conservator of Forests Vs. Jagannath Maruti Kondhare (1996) 2 SCC 293** in support of their claim for equal pay for equal work. The Supreme Court, however, rejected the workman's submission founded upon that decision in paragraphs 13 & 14, which read as follows:

“13. On a careful consideration of the materials placed on

record, we are of the view that the principles firmly laid down in the well-considered decision of Jasmer Singh [(1996) 11 SCC 77 : 1997 SCC (L&S) 210] squarely applied on all fours to the cases on hand and the respondent workers would be entitled to only, apart from the regularization order for which the appellants have had no serious objections, the payment of minimum wage prescribed for such workers if it is more than what they were being paid and that the High Court was in serious error in directing that the respondents should be paid the same salary and allowances as were being paid to the regular employees holding similar posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff, for any or all purposes including a claim for equal pay and allowances. The fact that no materials were placed before the High Court as to the nature of duties of either categories should have been viewed as a dissenting factor so far as the workers are concerned and dissuaded the High Court from embarking upon an inquiry in the abstract and with no factual basis and not to empower the court to assume and presume equality in the absence of proof to the contra or of any unequal nature of the work performed by them. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination. In the light of the decision directly on this issue rendered in Jasmer Singh [(1996) 11 SCC 77 : 1997 SCC (L&S) 210] we are unable to persuade ourselves to countenance the claim for minimum basic salary given in some unreported decisions brought to our notice which appear on the face of it to be certain directions given on the peculiar facts and circumstances of the same without an objective consideration of any principle of law. An order made to merely dispose of the case before court by issuing certain directions on the facts and for the purposes of the said case, cannot have the value or effect of any binding precedent and particularly in the teeth of the decision in Jasmer Singh case [(1996) 11 SCC 77 : 1997 SCC (L&S) 210] .

14. For all the reasons stated above, the appeals are allowed and the orders of the High Court are set aside insofar as the pay equal to that of the regular employed staff has been ordered to be given to the NMR/daily-wager/casual workers, as indicated above, to which they will not be eligible or entitled, till they are regularized and taken as the permanent members of the establishment. For the period prior to such permanent status/regularization, they would be entitled to be paid only at the rate of the minimum wages prescribed or notified, if it is more than what they were being paid as ordered by this Court in Jasmer Singh case [(1996) 11 SCC 77 : 1997 SCC (L&S) 210] . There will be no order as to costs”.

[Emphasis supplied]

10. Consequently, learned senior counsel for the petitioner submits that the Industrial Adjudicator could not have disregarded the decision of the Supreme Court in **Balram Sahu** (supra) and that being the latest decision rendered after consideration of the earlier decisions, was binding and ought to have been followed by the Industrial Adjudicator.

11. Mr. Rungta has also drawn the attention of the Court to the decision of the Supreme Court in **Secretary, State of Karnataka & Others Vs. Umadevi & Others**, AIR 2006 SC 1806, and in particular paragraph 46 thereof, to submit that the respondent workman, as a casual employee, could not seek parity of pay scale or wages with permanent counterparts. In the relevant paragraph 46 of its decision in **Umadevi** (supra), the Supreme Court observed as follows:

“46. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that are being paid to regular

employees be paid to these daily wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them”.

(Emphasis supplied)

12. So far as the award made on the second issue is concerned, Mr. Rungta submits that the finding returned by the Tribunal is in favour of the petitioner that the termination was made during the period of probation, and was non-stigmatic. However, the reference has been answered in favour of the respondent and the termination has been held to be illegal only on account of the fact that payment of one month's salary in lieu of notice period has not been made in terms of Section 12(1) of the Service Bye-Laws quoted above, simultaneously at the time of termination of the respondent's services.

13. Mr. Rungta submits that the mere failure to make payment of the salary for the notice period would not render the termination illegal, much less null & void. Mr. Rungta submits that the services of the respondent probationer could have been terminated without notice under Bye Law 13(1)(i). the said Bye-Law reads as follows:

“13. Termination of Service:

1. The service of an employee may be terminated by the appointing authority.

i) during the period of probation or extended period

of probation following the first appointment, by a notice of one month in writing or on payment of pay for such period as the notice shall short of one month or at any time without notice on payment of one months' pay”.

14. In support of his submission Mr. Rungta has placed reliance on ***Oriental Insurance Company Limited Vs. T. Mohammed Raisuli Hassan***, (1993) 1 SC 553, wherein the Supreme Court held as follows:

“5. When the above term in the clause relating to the condition of service of the respondent with the appellant is seen as a whole, there is nothing to indicate or suggest, even remotely, that non-service of one month's notice as a condition precedent for termination of the respondent's service would result in vitiation or invalidation of termination, if effected. On the contrary, the second part of the term contained in the clause, “breach of this condition, will entitle the company to recover from you one month's salary in lieu of notice” makes it obvious that the same would be the consequence if there was a breach of condition on the part of the company in the matter of service of one month's notice before termination of the respondent's service. Hence, we are constrained to hold that the non-service of one month's notice in writing by the appellant to the respondent before terminating the latter's service did not invalidate or vitiate such termination. From this, it follows that courts below had misread the said clause, by which either party was required to serve notice for putting an end to service of the respondent and consequently committed an apparent error in taking the view that non-service of one month's prior notice to the respondent had vitiated the termination of his service.

15. He also places reliance on the judgment of the learned Single Judge of the Andhra Pradesh High Court in ***P. Usha Radhey Mohan Vs. M.V. Ramu, Manager (Personnel) CMC, Hyderabad***, 1998 LawSuit (AP) 4, decided on

01.01.1998. In this case, the Andhra Pradesh High Court placed reliance on the decision of the Supreme Court in ***Oriental Insurance*** (supra) and observed as follows:

“5. The Supreme Court took the same view in Oriental Insurance Co. Ltd. v. T. Mohammed Raisuli Hassan, 1982 FJR 242. The Supreme Court held that there was nothing to indicate or suggest, even remotely, that the non service of one month’s notice as a condition precedent for termination of the employee’s service would result in vitiation or invalidation of the termination. Service of such notice as a condition precedent to terminating the service of the employee is not a mandatory requirement so that the breach of the same could result in vitiation of that termination. The Supreme Court further observed that the non service of one month’s notice before termination of the employees service would, at the most, entitle him to claim one month’s salary in lieu thereof and nothing else.”

16. On the other hand, the submission of learned counsel for the respondent is that so far as the finding of the first issue/reference is concerned, the same is not premised only on the judgment of the Supreme Court in ***Bhagwati Prasad*** (supra). He submits that in the cross-examination of the petitioner’s witness, the said witness had admitted that *“at the time of daily wagers were performing duties in our establishment they were allowed to the payments and other benefits as per the instruction of Central Government”*.

17. Learned counsel for the respondent has also sought to place reliance on the Office Memorandum dated 21.10.1990 issued by the Directorate General of Works, CPWD, Government of India, in pursuance of the

Supreme Court judgment in the case of *Surinder Singh & Anr. Vs. Engineer-in-Chief, CPWD & Others* (1986) 1 SCC 639 decided on 17.01.1986, whereby the method of calculation of wages of daily rated workers was provided. This memorandum provided that the total monthly emoluments admissible to regular counterparts of the daily rated workers, at the minimum of the respective scale of pay, may be multiplied by the number of days in a particular month after deducting therefrom the days of absence plus the days of rest falling in the week/weeks in which the worker remained absent and the result may be divided by number of days in the month. The figure so arrived at will be the daily rate of wages for the worker.

18. So far as the second aspect is concerned, i.e., with regard to the respondents termination, learned counsel for the respondent submits that the petitioners have not even raised the challenge to the finding of the Industrial Adjudicator in favour of the respondent on the ground of discrimination. Learned counsel submits that the case of Rajender Kumar, who was identically placed with the respondent, has not been disputed by the petitioner. He has also tendered in Court the copy of the memorandum dated 04.09.1998 issued to Sh. Rajender Kumar, terminating his services while he was on probation and the order passed in the appeal preferred by him to the Chairman, EC, CAPART on 25.05.2000. In this order, the Chairman observed as follows:

“WHEREAS the appeal has been considered by the Chairman, CAPART vis a vis provision of Bye-Law 12(1) and (2) (ii) and 13(1) (i) and the terms of letter of appointment. It is observed therefrom that it is mandatory to give one month’s notice or

payment of such period as the notice falls short of one month before terminating of services. The said stipulation of the Bye-Laws and terms of appointment letter has not been complied with in the instant case and to that extent the order of termination could be construed to be in contravention of the Bye-Laws and the stipulation of the appointment letter.

NOW THEREFORE, the Chairman, CAPART hereby accepts the appeal preferred by Shri Rajendra Kumar and directs his re-appointment to the post of Research Assistant w.e.f. the date of his re-joining the service in CAPART. The intermittent period between the date of termination of his services and his re-joining the services will be treated as dies non and will not count for any purpose for the service rendered in CAPART. It is further ordered that his period of probation could be extended if considered necessary.”

19. He further submits that the appointment order in respect of the respondent was issued on 26.06.1996, whereas his termination has taken place on 14.08.1998, i.e., after two years of service in probation. He submits that the termination was, therefore, beyond the period of probation of two years. Learned counsel further submits that in cross-examination the petitioner's witness had admitted that the termination of the respondent was based on misconduct. He submits that the same was, therefore, punitive.

20. The next submission of the learned counsel for the respondent is that, in any event, the respondent was entitled to protection under Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) since he had continuously been serving for 12 years-earlier as a Peon and thereafter as L.D.C. He submits that even a probationer is entitled to protection available to a workman under the Act, as a probationer is also a workman. Consequently, Section 25-F had application and termination of service in

breach of Section 25-F, i.e., without payment of compensation simultaneously in terms of Section 25-F (a) & (b) would be null & void. In this regard, he has placed reliance on the decision of Division Bench of this Court in *Delhi Cantonment Board Vs. Central Government Industrial Tribunal & Others*, 2006 (88) DRJ 75 (DB), wherein the Division Bench has observed:

“4. Learned counsel for the appellant submitted that the respondents were on probation and hence their services could be terminated without enquiry. In our opinion, the basic flaw in this argument is that it relies on a principle of service law, whereas we are concerned with industrial law. The principle of one branch of law cannot be automatically applied in another branch.

5. In service law there is an important difference between a temporary employee and a permanent employee. A permanent employee has a right to the post whereas a temporary employee does not, vide State of U.P. v. Kaushal Kishore Shukla: [1991]1SCR29 . However, there is no such distinction in industrial law. It may be noted that the Industrial Disputes Act makes no distinction between a permanent employee and a temporary employee (whether a probationer, casual, daily wage or adhoc employee).

8. Thus, it has been held in Chief Engineer (Irrigation) Chepauk, Madras v. N.Natesan (1973) II LLJ 446 (Mad.) and in Management of Crompton Engineering Co.(Madras) Private Ltd. v. Presiding Officer, Additional Labour Court (1974) I LLJ 459 (Mad.) that even a temporary employee falls within the definition of workman. Similarly in Elumalai v. Management of Simplex Concrete Piles (India) Ltd. (1970)IILLJ454Mad and Tapan Kumar Jena v. General Manager, Calcutta Telephones (1981) L.I.C. 68 (Cal.) it was held that a casual employee is also a workman. In other words, every person employed in an industry, irrespective of whether he is temporary, permanent or a probationer is a workman vide Hutchiah v. Karnataka State Road Transport

Corporation (1983)ILLJ30Kant , provided he is doing the kind of work mentioned in Section 2(s).”

9. Since the respondents were workmen under the Industrial Disputes Act, Section 25F of the Act had to be complied with if they had put in 240 days of service in the year prior to the date of termination of service. Respondents had admittedly put in over 240 days of service. Hence the termination of their service was illegal, since compliance of Section 25F is a condition precedent to the termination of service vide State of Bombay v. Hospital Mazdur Sabha (1960)ILLJ251SC , National Iron & Steel Co.Ltd. v. State of West Bengal (1967)ILLJ23SC , Mohanlal v. Management of Bharat Electronics Ltd. 1981 LIC 806 SC, Avon Services (Production Agencies) Ltd. v. Industrial Tribunal (1979)ILLJ1SC . etc.”

21. He also places reliance on ***Anoop Sharma Vs. Executive Engineer, Public Health Division No.1, Panipat (Haryana)***, (2010) 5 SCC 497, and, in particular, paragraphs 17, 23 & 24 thereof, to submit that the failure to make payment of the salary, payable at the time of termination would render the termination a nullity. The relevant extracts from this decision read as follows:

“17. This Court has repeatedly held that Sections 25-F(a) and (b) of the Act are mandatory and non-compliance therewith renders the retrenchment of an employee nullity—State of Bombay v. Hospital Mazdoor Sabha [AIR 1960 SC 610] , Bombay Union of Journalists v. State of Bombay [AIR 1964 SC 1617 : (1964) 6 SCR 22] , SBI v. N. Sundara Money [(1976) 1 SCC 822 : 1976 SCC (L&S) 132] , Santosh Gupta v. State Bank of Patiala [(1980) 3 SCC 340 : 1980 SCC (L&S) 409] , Mohan Lal v. Bharat Electronics Ltd. [(1981) 3 SCC 225 : 1981 SCC (L&S) 478] , L. Robert D'Souza v. Southern Railway [(1982) 1 SCC 645 : 1982 SCC (L&S) 124] , Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court [(1980) 4 SCC 443 : 1981 SCC (L&S) 16] , Gammon India Ltd. v.

Niranjan Dass [(1984) 1 SCC 509 : 1984 SCC (L&S) 144] , Gurmail Singh v. State of Punjab [(1991) 1 SCC 189 : 1991 SCC (L&S) 147] and Pramod Jha v. State of Bihar [(2003) 4 SCC 619 : 2003 SCC (L&S) 545] .

23. *The stage is now set for considering whether the respondent had offered compensation to the appellant before discontinuing his engagement/employment, which amounts to retrenchment within the meaning of Section 2(oo) of the Act. In his statement, the appellant categorically stated that before discontinuing his service, the respondent did not give him notice pay and retrenchment compensation. Shri Ram Chander, who appeared as the sole witness on behalf of the respondent stated that the compensation amounting to Rs 5491 was offered to the appellant along with letter, Ext. M-1, but he refused to accept the same. The respondent did not examine any other witness to corroborate the testimony of Ram Chander and no contemporaneous document was produced to prove that the compensation was offered to the appellant on 25-4-1998. Not only this, the respondent did not explain as to why the demand draft was sent to the appellant after more than three months of his alleged refusal to accept the compensation on 25-4-1998.*

24. *If there was any grain of truth in the respondent's assertion that the compensation was offered to the appellant on 25-4-1998 and he refused to accept the same, there could be no justification for not sending the demand draft by post immediately after the appellant's refusal to accept the offer of compensation. The minimum which the respondent ought to have done was to produce the letter with which the draft was sent at the appellant's residence. The contents of that letter would have shown whether the offer of compensation was made to the appellant on 25-4-1998 and he refused to accept the same. However, the fact of the matter is that no such document was produced. Therefore, we are convinced that the finding recorded by the Labour Court on the issue of non-compliance with Section 25-F of the Act was based on correct appreciation of the pleadings and evidence of the parties and the High Court*

committed serious error by setting aside the award of reinstatement.”

(Emphasis supplied)

22. He also refers to the judgment of the Supreme Court in ***Devinder Singh Vs. Municipal Council, Sanaur***, AIR 2011 SC 2532, wherein the Supreme Court observed:

“13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act.

14. It is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on a regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

15. Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of “workman”.

20. This Court has repeatedly held that the provisions contained in Sections 25-F(a) and (b) are mandatory and

termination of the service of a workman, which amounts to retrenchment within the meaning of Section 2(oo) without giving one month's notice or pay in lieu thereof and retrenchment compensation is null and void/illegal/inoperative. State of Bombay v. Hospital Mazdoor Sabha [AIR 1960 SC 610] , Bombay Union of Journalists v. State of Bombay [AIR 1964 SC 1617] , SBI v. N. Sundara Money [(1976) 1 SCC 822 : 1976 SCC (L&S) 132] , Santosh Gupta v. State Bank of Patiala [(1980) 3 SCC 340 : 1980 SCC (L&S) 409] , Mohan Lal v. Bharat Electronics Ltd. [(1981) 3 SCC 225 : 1981 SCC (L&S) 478] , L. Robert D'Souza v. Southern Railway [(1982) 1 SCC 645 : 1982 SCC (L&S) 124] , Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court [(1980) 4 SCC 443 : 1981 SCC (L&S) 16] , Gammon India Ltd. v. Niranjana Dass [(1984) 1 SCC 509 : 1984 SCC (L&S) 144] , Gurmail Singh v. State of Punjab [(1991) 1 SCC 189 : 1991 SCC (L&S) 147] and Pramod Jha v. State of Bihar [(2003) 4 SCC 619 : 2003 SCC (L&S) 545] ."

[Emphasis supplied]

23. In his rejoinder, Mr. Rungta, learned senior counsel for the petitioner has submitted that, in fact, the petitioner does not fall within the definition of the expression 'industry' as it is only engaged in providing grants to voluntary organizations for promoting rural technology. He submits that the respondent did not invoke Section 25-F before the Industrial Tribunal and the petitioner did not have the occasion to meet the said submission. Consequently, the respondent should not be permitted to rely upon Section 25-F at this stage. He further submits that the termination of the respondent's services would not amount to 'retrenchment' as defined in the Act. He submits that the said termination falls within Section 2(oo) as the respondent's termination has taken place under a stipulation contained in the memorandum appointing him.

24. Mr. Rungta submits that in **Devender Singh** (supra) relied upon by the respondent, the Supreme Court had not permitted the respondent employer to raise the plea that the action is covered by Section 2(oo) because no material was produced by the employer to show that the engagement of the appellant workman was discontinued by relying upon the terms & conditions of the employment.

25. So far as the petitioner's grievance in relation to the adjudication on the first point of reference is concerned, I find that there is merit in the same. It is now well-settled that a workman appointed and working as a casual worker/daily wager *de hors* the recruitment rules, for which no regular vacancy exists, cannot claim parity of pay with his regular counterparts.

26. The submission of Mr. Rungta that the Industrial Adjudicator erred in not following judgment of the Supreme Court in **Balram Sahu** (supra) and, instead, relied upon **Bhagwati Prasad** (supra) is well founded. In **Balram Sahu** (supra), the Supreme Court had relied upon its earlier decision in **Jasmer Singh** (supra), wherein the distinction between persons employed on daily wages and those regularly appointed was clearly brought out. The nature of their engagement; responsibilities, age, qualifications, accountability, rights and; obligations differ substantially. The Constitution Bench in **Umadevi** (supra) placed the matter absolutely beyond any doubt in this respect. Consequently, merely because the casual worker/daily wager may be performing what seem like the same job as the regular counterpart, he would not become entitled to receive pay as payable to the regular workman.

27. At the same time, the Director General of Works, CPWD, Government of India has issued the memorandum dated 21.10.1990 in pursuance of the decision of the Supreme Court in **Surinder Singh** (supra). The petitioner CAPART is a society under the aegis of Ministry of Rural Development, Government of India. The aforesaid memorandum dated 21.10.1990 issued by the Government of India in respect of the Directorate General of Works, CPWD would get attracted to the petitioner as the petitioner just like the CPWD are two different wings of the same body, i.e., the Government of India. The respondent, in my view, be entitled to be paid wages in terms of the said office memorandum dated 21.10.1990. This memorandum stipulates:

“The total monthly emoluments admissible to regular counterparts of the daily rated workers at the minimum of the respective scale of pay may be multiplied by number of days in a particular month after deducting therefrom the days of absence plus the days of rest falling in the week/weeks in which the worker remained absent and the result may be divided by number of days in the month. The figure so arrived will be the daily rate of wages of the worker.”

The impugned award in respect of the first term of reference stands modified to that extent.

28. The respondent was initially appointed as a Peon on daily wages w.e.f. 01.04.1986 and worked in that capacity till 30.09.1988. Thereafter, he was appointed to the post of L.D.C. on daily wages w.e.f. 01.10.1988. Vide appointment letter dated 20.06.1996, he was regularly appointed as LDC w.e.f. 02.09.1996 in the relevant pay scale. Merely because the petitioner made the respondent's appointment to the post of LDC on probation, it

would not mean that the respondent could, firstly, be continued in probation for an indefinite period and, secondly, even if his probation was continued indefinitely, and his services were found to be unsatisfactory, his services could have been terminated without compliance of Sections 25-F & 25-G. In any event, he would, in that eventuality, be entitled to revert to his original position as a Peon.

29. The submission of Mr. Rungta that because the respondent was a probationer, his services could be dispensed with any time, cannot be accepted in absolute terms. The right vested in the respondent on account of his having worked for more than 240 days initially as a Peon between 01.04.1986 to 30.09.1988 and, thereafter, as LDC w.e.f. 01.10.1988 till the date of his termination, in a calendar year and in the year preceding his termination, by virtue of Section 25-F could not be taken away merely on account of the fact that the respondent was a probationer. Pertinently, the so-called probation of the respondent continued from 02.09.1996 till the date of his termination, i.e., 14.08.1998. In all, the respondent served the petitioner for a period of about 12 years – initially as a Peon and, thereafter, as LDC. I agree with learned counsel for the respondent that even a probationer is a workman under the Act. This is clear from the various decisions cited by the respondent including the decision of the Division Bench in ***Delhi Cantonment Board*** (supra).

30. The submission of Mr. Rungta that the failure to make payment of the notice pay/compensation at the time of termination would not be fatal to the termination order, also has no merit. The decision in ***T. Mohammed Raisuli Hassan*** (supra) was rendered by the Supreme Court in the context of a

materially differently worded clause. The clause considered by the Supreme Court, in terms, provided that “*breach of this condition will entitle the company to recover from you one month’s salary in lieu of notice*”, which made it obvious that the same would be the consequence, if there was a breach of condition on the part of the company in the matter of service of one month’s notice before termination of the respondent’s service. However, in the present case, bye-law 13(i) extracted above, does not state that the failure to give one month’s notice or pay in lieu thereof would not invalidate the order of termination of the probation. On the other hand, **Anoop Sharma** (supra) while taking note of various earlier decisions re-emphasises the legal position that Sections 25-F (a) & (b) of the Act are mandatory and non-compliance thereof would render the retrenchment of an employee a nullity. To the same effect is the judgment in **Devinder Singh** (supra).

31. I cannot permit the petitioner to raise, at this stage, a submission that the petitioner is not an industry. No such submission was raised before the Labour Court. The Labour Court has not examined the said issue on the basis of the evidence that the parties may have led, had the issue been raised.

32. The submission that the termination of the respondent falls within Section 2(oo)(bb) of the Act also has no merit. The said provision excludes from the realm of “retrenchment” the termination of the services of the workman as a result of non-renewal of contract of employment between the employer and the workman on its expiry, or of such contract being terminated under a stipulation in that behalf contained therein. In the present case, section 2(oo)(bb) is not applicable because the contract of employment

was not a fixed term contract.

33. The termination of the respondent's services by resort to Clause 2(i) of the memorandum dated 26.06.1996 is not an order since the memorandum dated 14.08.1998 terminating the respondent's services did not comply with the condition prescribed in Clause 2(i) of the memorandum dated 26.06.1996, i.e., *"by making payment to the appointee a sum equivalent to the pay & allowances for the period of notice or unexpired portion thereof"*.

34. The petitioner has not been able to establish before the Labour Court that it had sent the notice pay to the respondent contemporaneously with the termination notice. The Labour Court has returned a finding of fact in this respect and has also held that the cheque was sent to the respondent workman in 2002, which was then received by him. Since the notice pay was not sent to the respondent along with the termination order, the said termination order was, obviously, bad as the bye-law did not give leeway to the petitioner to send the notice pay on a subsequent date and did not save the termination order sent without a notice pay from invalidity.

35. I also find merit in the submission of the respondent that the petitioner has not been able to explain the discriminatory treatment meted out to the respondent in comparison with Sh. Rajinder Kumar, whose case was identically situated as that of the petitioner. In fact, in the case of Sh. Rajinder Kumar the petitioner admitted that the termination order, of the kind issued to the respondent, was illegal as it is mandatory to give one month's notice or payment for such period of notice under bye-law 12(i) and 12(2) (2).

36. In view of the aforesaid discussion, the writ petition is partly allowed in the terms aforesaid.

37. The parties are left to bear their respective Costs.

VIPIN SANGHI, J.

JANUARY 24, 2013
BSR