

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

% Judgment reserved on : 08.02.2013
Judgment pronounced on : 19.02.2013

+ **LPA No.606/2012**

MOOL CHAND KHAIRATI RAM HOSPITAL
& AYURVEDIC RESEARCH INSTITUTE Appellant
Through : Mr. Sanjoy Ghose, Adv.

Versus

GEORGE XAVIER & ANR. Respondents
Through : Mr. N.D. Panchal, Adv.

CORAM:

**HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.K. JAIN**

V.K. JAIN, J.

1. The respondent before this Court was appointed as Lab Assistant with the appellant on 9.4.1983 and was promoted as Lab Technician with effect from 9.1.1985. Vide order dated 5.12.1985, the services of the respondent were terminated. Being aggrieved, the respondent raised an industrial disputes in this regard and the Labour Court, vide an award dated 26.5.1994, directed reinstatement of the respondent in service with continuity of service. W.P(C) No.2217/2000 was filed by the appellant, impugning the aforesaid award. Vide an interim order dated 22.1.2000, the

learned Single Judge stayed the award subject to the appellant paying Rs.50,000/- to the respondent and depositing another sum of Rs.50,000/- in the Court. On an application filed by the respondent under Section 17B of the Industrial Disputes Act, the learned Single Judge vide order dated 11.7.2003 passed under Section 17B of the Act directing the payment of minimum wages to the respondent with effect from the date of the award.

2. CM 11544/2003 was then filed by the appellant informing the Court that vide letter dated 27.8.2003 it had, without prejudice to its rights and contentions in the writ petition, offered the job of Lab Technician to respondent workman on the prevailing minimum wages in the said category, but he had not accepted the offer. The learned Judge, without prejudice to the pleas of the parties, directed the respondent to join the service with effect from 1.11.2003.

3. CM 9204/2004 was then filed by the respondent stating therein that despite having joined the duties on 1.11.2003 and his working as Lab Technician, he was paid wages with effect from 1.11.2003 only @ Rs.2180/- per month and thereafter @ Rs.2823/- per month with effect from 1.4.2004. He sought the same pay which the appellant was paying to other Lab Technicians working in the organization.

4. CM 12378/2010 and 13221/2010 were then filed by the appellant seeking clarification/ modification of the order dated 3.5.2010. The appellant wanted to know whether the wages to be paid to the respondent in terms of the order dated 3.5.2010 were wages of entry level of Lab Technician or of a Lab Technician with experience with effect from 1983. On such a plea being made, the learned Single Judge asked the appellant

as to what were the entry level emoluments in the appellant hospital in November, 2003. The answer given was that no such employment had been made. The appellant was then asked to enquire as to whether it was taking, from the respondent, any work different from the work being taken from other Lab Technicians, with whom the respondent were seeking parity. No reply to this query of the Court was given, though the matter remained pending for about two years and the respondent superannuated in the meanwhile. The learned Single Judge, vide the impugned order dated 3.5.2010 took the view that the respondent would be entitled to the pay equal to the pay of other Lab Technicians. The appellant was accordingly directed to pay, to the respondent, the wages/emoluments as were being paid to other Lab Technician Shri Chandrashekharan minus the amount already paid to him with effect from 1.11.2003 till 30.4.2010. Being aggrieved from the order passed by the learned Single Judge, the appellant is before us by way of this appeal.

5. Two submissions were made by the learned counsel for the appellant before us. The first contention was that in view of the provisions contained in Section 17-B of the Industrial Disputes Act, the respondent, even on joining duty in terms of offer made to him by the appellant was entitled to only those wages which he was drawing at the time his services were terminated. The second contention of the learned counsel for the appellant was that Shri Chandrashekharan, having joined in the year 1982, had the experience of about 21 years in the year 2003 whereas when the respondent was taken back on service he had the experience only of two years as Lab Technician.

6. In support of his contention that the respondent is entitled only to the last wages drawn by him at the time his services were terminated, the learned counsel for the appellant relied upon the decision of Gujarat High Court in Navinchandra Laxmidas Mandavia Vs. State of Gurajat and others [(2000) 1 LLJ 509 (Guj.)]. The learned counsel for the respondent, however, relied upon the decision of Madhya Pradesh High Court in M.P. State Cooperative Marketing Federation Ltd. Vs. Presiding Officer, Labour Court, Raipur and another [1992 (64)FLR 741], the decision of Madras High Court in V.A. Unnis Vs. The Management of M.A. Khizar Hussain and Sons and another [1987 LAB. I.C.527]. Both the parties relied upon the decision of the Supreme Court in Dena Bank Vs. Ghanshyam [(2001) 5 SCC 169].

In case of *Navinchandra (supra)*, the interim order staying the operation of the award of the Labour Court was passed subject to the provisions of Section 17-B of the Industrial Disputes Act. It was suggested on behalf of the workman that he had been reinstated and was entitled to get minimum wages under the Minimum Wages Act. The appellant/workman filed an application seeking directions for payment of the prescribed minimum daily wages of a driver to him. Relying upon the decision of the Supreme Court in Dena Bank Vs. Kiritkumar T. Patel [1998 1 LLJ 1], interpreting Section 17-B of the Act, it was observed that the payment which is required to be made by the employer to the workman under Section 17-B of the Act is in the nature of subsistence allowance which would not be refundable or recoverable from the workman, even if the award is set aside by the High Court or the Supreme

Court and, therefore, the words “*Full wages last drawn*” in the said Section cannot be read to mean wages which would have been drawn by the workman, if he had continued service, had the order terminating his services not been passed, since it had been set aside by the Labour Court or the Industrial Tribunal. It was further held that since the amount paid under Section 17-B is not refundable or recoverable in the event of award being set aside, it would result in the employer being required to give effect to the award during pendency of the proceedings challenging the award before the High Court or the Supreme Court, without his being able to recover the said amount, in the event of the award being set aside. The contention of the workman/ appellant that since he had been reinstated in service, there was no question of invoking provisions of Section 17-B, was rejected on the ground that the order of reinstatement had been made subject to the provisions contained in Section 17-B and that order had not been challenged.

On the other hand, in **M.P. State Cooperative Marketing Federation Ltd** (supra), where the award had been stayed subject to compliance of Section 17-B by the petitioner, and the workman had sought current wages of a guard on the ground that the petitioner was taking full work from him, the Court observed that its directions of stay of the impugned award did not oblige the petitioner to reinstate the workman which the petitioner had done voluntarily. It was further observed that had the petitioner not reinstated the workman, he would have had the choice to take employment elsewhere and in that case the petitioner would have been absolved of its liability to pay him wages

under Section 17-B of the Act. The Court was of the view that when the petitioner of his own reinstated the workman and was taking full work from him, the argument that his liability to pay the wages at the current rate minus the payment already made would arise only after final decision in the petition could not be accepted.

The decision of Madras High Court and the decision of Supreme Court in **Dena Bank(supra)** relied upon by the learned counsel for the respondent do not deal with the issue involved in this appeal.

7. Section 17-B of the Industrial Disputes Act obligates the employer to pay full last wages drawn by the workman during pendency of the proceedings filed by him challenging the award directing reinstatement of the workman, till the time such proceedings are pending in the High Court or the Supreme Court. This section does not mandate an employer to reinstate the employee during pendency of such proceedings. The employer may, therefore, choose not to take work from the employee while continue to pay full last wages drawn by him, during pendency of the proceedings before the High Court or the Supreme Court. Of course, the liability to pay full last wages drawn by the workman would arise only where the workman had not been employed in any establishment during such period and an affidavit has been filed by him to this effect.

The proviso to Section 17-B provides that where it is proved to the satisfaction of the Court before which such proceedings are pending, that the workman had been employed and had been receiving adequate remuneration during such period or part thereof, no such wages shall be payable to the workman for such a period or part, as the case may be. The

proviso, therefore, indicates that even if the workman has been employed during such period, but has not been getting adequate remuneration, he may be entitled to some payment from the employer though such payment would only be the difference between full last wages drawn by him and the remuneration received by him during such period, or part thereof, as the case may be. Thus, the emphasis of the Legislature is upon payment of adequate remuneration to the workman during the period proceedings challenging the reinstatement of the workman remained pending before the High Court or the Supreme Court.

8. In our opinion, if the employer instead of continue to pay full last drawn wages without taking any work from the workman decides to reinstate him so that he does not have to pay such wages without taking any work from the workman, he will have to pay, to the workman, such wages which he would have been paid had he been freshly employed by the petitioner before the High Court or the Supreme Court, as the case may be. It would be extremely unfair to the workman to deny appropriate wages while taking adequate work from him. The appropriate wages, in our opinion, in such a situation would be the wages which the employer would have paid to a fresh employee having the experience and qualifications of the workman who has been reinstated pending proceedings before the High Court or the Supreme Court. It can hardly be disputed that such wages cannot be less than the minimum wages to which such a workman is entitled to under the provisions of Minimum Wages Act. It would be extremely unfair to a workman to take work from

him in the year 2003 and pay him the wages of the year 1985. We are, therefore, not inclined to take such a view.

9. In the case before us, the respondent had the experience of about 11 months in the position of Lab Technician when the services of the respondent were terminated on 5.12.1985. Therefore, in our opinion, he is entitled to such wages as the respondent would have paid, on 1.11.2003, to a Lab Technician having experience of about 11 months in the position of Lab Technician.

10. Vide order dated 8.2.2013, while reserving the judgment, we directed as under:

“Statement of actual amount to be paid according to the appellant shall be filed before this Court after service of the same to the respondent-workman on or before 13.02.2013. The appellant shall also indicate in the affidavit, as to how much wages Shri Chandershekharan was getting on completing that much service, as the respondent had put in the post of Lab. Technician, before his services were terminated, and how much would be the wages corresponding to those wages, at the time respondent was taken back on duty as Lab. Technician. The respondent-workman shall also file his response on that statement on or before 15.02.2013.”

11. In compliance of our order dated 8.2.2013, the appellant has filed an affidavit of Mr. Satish Kumar, Manager (Personnel/HR) of the appellant, but no reply affidavit has been filed by the respondent. In his affidavit, Mr. Satish Kumar has stated that Mr. Chandershekharan was engaged as a Lab Technician in the year 1982 and he left the employment in an around in the year 2004. According to the deponent, Chandershekharan was earning Rs.7780/- per month in the year 2003, but the respondent cannot seek to equate himself with Mr. Chandershekharan since he had only about two years service at the time he was reinstated. The affidavit filed by the appellant thus does not comply with the order dated 8.2.2013 since it does not show as to how much salary Mr. Chandershekharan was getting on completion of about 11 months of service as Lab Technician and how much would be the wages on 1.11.2003, corresponding to the wages which Mr. Chandershekharan was getting on completion of 11 months of service. The affidavit does not indicate as to what was the starting salary of Mr. Chandershekharan in the position of Lab Technician. The affidavit also does not disclose as to what were the minimum wages payable to a Lab Technician between 1.11.2003 and the date of superannuation of the respondent. In these circumstances, we are left with no option but to fix an appropriate sum to be paid as the wages to the respondent for the period between 1.11.2003 and the date of his superannuation. Considering all the facts and circumstances of the case, we direct the appellant to pay a sum of Rs.5,000/- per month as the consolidated wages to the respondent for the period 1.11.2003 and the date of his superannuation. The balance

payment in terms of this order shall be worked out and paid by the appellant within four weeks from today.

The appeal stands disposed of accordingly.

V.K.JAIN, J

CHIEF JUSTICE

FEBRUARY 19, 2013
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