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

Date of Decision: 06.03.2013

+ **W.P.(C) 247/2011 and C.M. Nos.451/2011 & 9727/2011**

GNCT OF DELHI AND ORS

..... Petitioners

Through: Ms. Zubeda Begum & Ms. Sana
Ansari, Advocates.

versus

JITENDRA KUMAR

..... Respondent

Through: Mr. Anuj Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (ORAL)

1. The petitioner Directorate of Health Services (DHS), i.e., the management has assailed the award dated 19.05.2010 passed by the Labour Court, Kakardooma Courts Delhi in I.D. No.1217/06, whereby the reference made by the Appropriate Government on 25.10.2006 to the following effect has been answered:

“Whether the services of Sh. Jitender Kumar S/o Sh. Jeet Lal & Ors. As per ‘annexure’ A have been terminated illegally and / or unjustifiably by the management, and if so, to what sum of money as monetary relief along with other consequential benefits in terms of existing laws/government Notification and to what other relief they are entitled and what directions are necessary in this respect?.”

2. The reference has been answered in favour of the workmen, and the petitioner management has been directed to take back the workmen on the same post without altering their status, as it prevailed prior to their termination, on 20.10.2005. At the same time, the prayer for regularisation and regular pay scale made by the workmen has been declined on the ground that the said prayer had already been denied by the Central Administrative Tribunal (CAT) and upheld by this Court. The petitioner management has been further directed to pay Rs.50,000/- to each of the workmen towards back wages.

3. The background facts may first be stated. The workmen were appointed as Daily Wage Nursing Orderlies when they applied in response to an advertisement issued by the Maharishi Balmiki Hospital (MBH). The advertisement-though not placed on record, has been shown to the Court. The said advertisement, in effect, stated that the walk-in interviews would be conducted for appointing Nursing Orderlies on contingent basis till regular appointments are made, or for 89 days, whichever is earlier. The workmen, it appears, applied against the said advertisement and were selected in the interview process.

4. The Medical Superintendent, MBH issued a memorandum dated 29.11.2001 making the appointment of the respondent workman, which reads as follows:

“

MEMORENDUM

*After having been approved for **contingent appointment***

for 89 days to the post of Group 'D' is hereby offered the post of Group 'D' on daily wages basis.

- 1. The appointment will be terminated at any time by one month notice given by either side viz. The appointee or the appointing authority however, without assigning any reason. The appointing authority however reserves the right of terminating the services of the appointee forthwith or before the expiry of the stipulated period of notice or the unexpired portion thereof.*
- 2. The appointment will be subject to his being declared medically fit by the competent authority and the verification of character & Antecedents.*
- 3. The candidate have to produce the original certificates regarding the date of birth/educational qualifications/ including certificates regarding belonging to SC/ SC/ Ex-Serviceman and physically handicapped (Whichever is applicable).*
- 4. The post is contingency arrangement till a regular candidate joins or 89 days whichever is earlier.***
- 5. The other conditions of services will be governed by the relevant rules & orders in force from time to time.*
- 6. No TA/DA will be paid for this his accepting/reporting to this office after the selection for submitting the acceptance.*

Sh. Jitander Kumar is therefore directed to furnish his acceptance to the offer as above within 7 days positively, failing which it will be presumed that he is not interested in the appointment and offer will stand automatically cancelled after expiry of the above period.

*Sd/-
(DR. S.P. BARUA)
Medical Superintendent*

*Sh. Jitander Kumar S/o Sh. Jit Lal
H. No. RZ- 20A Lokesh Park
Najafgarh Delhi”*

[Emphasis supplied]

5. It appears the petitioner management sought to undertake the process of recruiting Nursing Orderlies on regular basis to fill up the sanctioned posts in MBH. Threatened by the said move, the daily wage nursing orderlies workmen-including the respondent, filed an Original Application (OA) before the central Administrative Tribunal (CAT). The apprehension of the workman was that their services may be terminated once the regular nursing orderlies are appointed. The workmen sought the relief of regularisation. The OA preferred by the workmen was, however, dismissed by the CAT vide order dated 29.04.2003, while granting the limited relief that they were allowed to appear in the test for recruitment of Nursing Orderlies on regular posts in terms of the advertisement issued by the petitioner, but without any reservation or weightage for service rendered by them as daily rated wage earners. The writ petition preferred by the workmen to assail the order passed by the CAT, being CW 5071/2003, was dismissed by this Court on 11.08.2003.

6. After over two years of the dismissal of the said writ petition, the services of the workmen were terminated vide order dated 20.12.2005. The DHS issued office order No.295 terminating the services of the 15 workmen including the respondent, which reads as follows:

“

OFFICE ORDER NO. 295

Consequent upon recruitment on Group-‘D’ posts

(Regular basis) on the recommendation of Selection Board, the service of the following daily wagers working in M.B. Hospital on daily wages basis against the vacant posts of Group-‘D’ are hereby terminated with effect from 20-12-2005(AN) in accordance with the terms and conditions (Group-‘D’) on the basis of last come first go policy:-

1. *Sh. Lalit Kumar Sharma S/o Sh. Srichand Sharma*
2. *Sh. Anil Kumar Tiwari S/o Sh. H.C. Tiwari*
3. *Sh. Gopal Krishna S/o Sh. Krishan Kumar*
4. *Sh. Sandeep Kumar Gahlot S/o Sh. Hawa Singh Gahlot*
5. *Sh. Vinod Kumar S/o Sh. Shree Niwas*
6. *Sh. Sonu S/o Sh. Satbir Sharma*
7. *Sh. Neeraj S/o Harpal*
8. ***Sh. Jitander Kumar S/o Sh. Jit lal***
9. *Sh. Yogender Kumar S/o Sh. Ram Prakash Sharma*
10. *Sh. Satya Parkash S/o Sh. Raghubir Singh*
11. *Sh. Rafique Ahmed S/o Sh. Md. Aslam*
12. *Sh. Parmod S/o Sh. Hukum Chand*
13. *Sh. Vijay Kumar S/o Sh. Puran Chand*
14. *Sh. Giri Raj S/o Sh. Mansa Ram*
15. *Sh. Satya Naerayan Singh S/o Sh. Ram Phal Singh*

(DR. ANIL MEHRA)
DIRECTORATE OF HEALTH SERVICES”
(emphasis supplied)

This was followed by an office order issued by MBH on 20.12.2005,

which was *pari materia* with the office order No.295. Consequently, the workmen raised an industrial dispute and the reference was made by the Appropriate Government on 25.10.2006, as aforesaid.

7. The first submission of learned counsel for the petitioners is that the termination of the services of the workman did not tantamount to retrenchment, since the respondent workman was appointed on a fixed term contract. The respondent was clearly put to notice that he was being engaged as a daily wager on contingent basis – the contingency being the appointment of regular workmen against the sanctioned posts. It was clearly stated in the advertisement, as well as in the appointment order, that the respondents shall serve only till such time as the regular incumbents are in place, or for a period of 89 days, whichever is earlier.

8. Ms. Begum submits that the present case fall within the exception contained in clause (bb) of Section 2(oo) of the Act, which defines “retrenchment”. Therefore, the termination of the services of the respondent workmen was not retrenchment and, consequently, Section 25-F and the other provisions of the Act had no application in the facts of this case. She further submits that the relief sought by the respondent and the other workmen was barred by *res judicata*, as the workmen had already approached the CAT without success, and thereafter had even approached this Court. In support of her plea that the principles of *res judicata* are applicable to proceedings before the Labour Court, she has placed reliance on ***Pondicherry Khadi and Village Industries Board Vs P. Kulothangan and Anr.***, AIR 2003 SC 4701. She submits that the Labour Court has erred in restricting the application of the said principle of *res judicata* only qua the

relief of regularisation. She also placed reliance on *State of Haryana and Others Vs. Piara Singh and others*, (1992) 4 SCC 118, wherein the Supreme Court had observed that the normal rule is regular recruitment through the prescribed agency, but exigencies of administration may sometimes call for an ad hoc and temporary appointment to be made. In such a situation, efforts should always be to replace such an ad hoc / temporary employee by regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selections/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly appointed candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

9. She also places reliance on a short order passed by the Supreme Court in *Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others*, (1997) 4 SCC 391, in support of her submission that the termination of the service of the respondent did not tantamount to retrenchment. In this case, the petitioners were appointed as Drivers, Peons, etc. by the Principal, Cooperative Training Institute, on daily wage basis. They were subsequently terminated by the Principal. The workmen alleged violation of Section 25-F of the Act. The question arose whether their termination could be described as retrenchment within the meaning of Section 25F of the Act. The Supreme Court held that every Department of the Government cannot be treated as an “industry”. When the appointments are regulated by statutory rules, the concept of “industry” to that extent stands excluded. The petitioners had not been appointed to the posts in accordance with the Rules

but were engaged on the basis of need of work. They were temporary employees working on daily wages. It was, therefore, held that under the circumstances, their disengagement from service could not be construed to be retrenchment under the Act. The concept of retrenchment, it was held, could not be stretched to such an extent as to cover the said employees. It was also held that the termination of the services could not be said to be arbitrary.

10. She also relies on *Naresh Chand and Ors. Vs. The Presiding Officer, CGIT, New Delhi & Respondents 510, Army Base Workshop*, 2008 V AD (Delhi) 367. In this case, though the initial engagement of the workman was for a fixed period, they continued to work for about a year after the expiry of initial period of contract. The Division Bench rejected the contention of the workmen that since they had been continued beyond the original period of engagement, they were out of the clutches of Section 2(oo)(bb). It was held that their status did not change merely on account of their continued engagement.

11. On the other hand, the submission of learned counsel for the respondent Mr. Anuj Aggarwal is that no evidence was led by the petitioner before the Labour Court in support of their submission that the initial engagement of the respondent was made on contingency basis, till the appointment of regular workmen against sanctioned posts, and that the respondent's termination was warranted on account of such appointments. He places reliance on *S.M.Nilajkar and Ors. Vs. Telecom, District Manager, Karnataka*, AIR 2003 SC 3553, wherein the Supreme Court laid down the conditions which are required to be satisfied for the invocation of

sub clause (bb) of Section 2(o). The Supreme Court in this judgment observed in paras 13 and 14 as follows:

“13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied:

(i) that the workman was employed in a project or scheme of temporary duration;

(ii) the employment was on a contract, and not as a daily-wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;

(iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and

(iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment. (emphasis supplied)

14. The engagement of a workman as a daily-wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or up to the occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of the employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee

from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of sub-clause (bb) abovesaid. In the case at hand, the respondent employer has failed in alleging and proving the ingredients of sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment.” (emphasis supplied)

12. He also places reliance on ***Management of Horticulture Department of Delhi Administration Vs. Trilok Chand and Another***, 82 (1999) DLT 747, in support of his submission that the party who chooses not to lead evidence omits to do so at its own risk and expense. Mr. Aggarwal submits that even before this Court, the petitioner has not sought to explain the reasons for its not leading any evidence before the Labour Court in support of its case that the respondent workman was removed from service on account of the engagement of the regular nursing orderlies.

13. Mr. Aggarwal submits that the petitioner is guilty of adopting an unfair labour practice of terming the respondents appointment as contingent or fixed term. He submits that, admittedly the appointment of the workman was made through public advertisement and after conducting an interview against sanctioned posts. There was, therefore, no justification to term the appointments as contingent or for a fixed term. He places reliance on the decision of the Division Bench of the Punjab & Haryana High Court in ***Bhikku Ram, S/o Sh. Lalji v. Presiding Officer Industrial Tribunal cum Labour Court***, (1996) III LLJ 1126 P&H, wherein the Punjab & Haryana

High Court held that while interpreting and applying various parts of Section 2(oo), the Court/Tribunal should keep in mind the provisions of Section 2(ra) read with Section 25T and 25U and the 5th Schedule to the Act. He submits that adoption of such *modus operandi* by the employer has been frowned upon in ***Bhikku Ram*** (supra).

14. Mr. Aggarwal also places reliance on the decision of the Supreme Court in ***Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana)***, (2010) 3 SCC 637, in support of his submission that while exercising its jurisdiction under Article 226 of the Constitution of India, this Court is bound to keep in mind the Act and other similar legislative instruments, which are social welfare legislations, and they should be construed and interpreted keeping in view of the goals set out in the preamble of the Constitution and the provisions contained in part IV of the Constitution including Articles 38, 39(a) to (e), 43 and 43A. He submits that the Industrial Tribunal is vested with wide discretion while adjudicating an industrial dispute relating to discharge or dismissal of a workman, and the exercise of such discretionary jurisdiction by the Labour Court should not be interfered with by the High Court in exercise of its writ jurisdiction. In that case, the Labour Court had directed reinstatement of the workman with 50% back wages which had been interfered with by the High Court. The High Court had set aside the Award directing reinstatement with 50% back wages and, instead, granted the compensation of Rs. 50,000/- to the appellant workman.

15. Mr. Aggarwal further submits that the decision of the Supreme Court in ***Himanshu Kumar Vidyarthi*** (supra) has been considered by this Court in

Trilok Chand (supra). This Court while dealing with **Himanshu Kumar Vidyarthi** (supra), observed;

“.....In this case, decided by a Division Bench, no doubt certain observations were made by the Supreme Court which give the impression that temporary working of daily wages would not be considered to be retrenched under the Act. However, a close look would show that the case was mainly decided on the ground that the concerned department namely, Cooperative Training Institute, Deogarh was not be treated as “industry” within the meaning of Section 2(j) of the Act and further in this case Supreme Court did not take into consideration the earlier case decided by it holding to the contrary and as noticed above. Not only this even in the following subsequent judgments, Supreme Court has taken the view that provision of Section 25-F would be applicable even in a case of daily rated workman. These cases are:

- (i) **Rattan Singh V. Union of India**, reported in (1997) 11 SCC 396.
- (ii) **Municipal Corporation of Delhi v. Praveen Kumar Jain** reported in (1998) 9 SCC 468.
- (iii) **Samistha Dubey v. City Board Etawah**, reported in 1999 LLR 460 (SC).

23. *In view of the aforesaid restatement of law as recent as in 1999 as well, I respectfully follow the same in preference to the view expressed in the case of Himanshu Kumar Vidyarthi and others v. State of Bihar and others (supra).”*

16. Mr. Aggarwal also submits that this Court should also decide the respondent’s application which is pending consideration under Section 17B of the Act, so that the respondent may be granted the subsistence allowance during the pendency of the writ petition, even in case this Court is inclined

to accept the petitioner's submission on the merits of the dispute.

17. Learned counsel for the respondent during the course of his submissions has shown to the Court an order dated 24.07.2008 issued by the Health and Family Welfare Department, Government of NCT of Delhi whereby the competent authority regularized the services of Group-D staff in the various hospitals, mentioned against their names. So far as MBH is concerned, the names of the various workmen whose services were regularized are mentioned from serial Nos. 112 to 142. The date of joining of persons upto serial No. 125 was 01.12.2001, i.e., the same date on which the respondent had also joined. Mr. Aggarwal submits that while the respondent and other workmen were terminated by the order dated 20.12.2005, others similarly recruited were not only continued, but were also regularized. He submits that several other workmen were recruited from 18.05.2007 onwards and even they were regularized but the respondents and the other workmen were discriminated against.

18. Learned counsel for the petitioner in her rejoinder submits that letter of appointment issued to the respondent was express enough and formed part of the Labour Court record. Attention is also drawn to the written statement filed by the petitioner before the Labour Court, wherein the petitioner had stated that vacancies for ST categories were kept vacant in MBH and against those posts daily wagers were appointed. Reference had been made in the written statement to the case titled, "***Dr. B.R.Ambedker Memorial Foundation (Regd.) and Ors. Vs. Union of India and Ors.***" bearing CWP No. 6456/2003 and C.M. Appln. No.11203/2003 before this Court, wherein the Court had directed that the appointment to the quota of

ST be not filled up till further orders. This order was conveyed vide Services Department letter dated 31.10.2003. The aforesaid ban to fill up the posts on regular basis in the ST category had been lifted by the High Court, whereafter the Department constituted a Committee to declare the result of ST category candidates. The Committee selected a total of 23 candidates for the post of Group D/Nursing Orderly out of ST category. Of the 23 selected candidates, so far 18 candidates had joined the MBH on the post of Nursing Orderly on regular basis in place of daily wagers.

19. Learned counsel for the petitioner submits that the respondent workmen, in their rejoinder filed before the Labour Court, did not specifically deny the said averments and merely stated that the same was a matter of record. Therefore, there was no occasion for the petitioner to lead any evidence on the aforesaid aspect. Reference is also made to the order of termination which, in clear terms, stated that the service of the daily wagers working in MBH against vacant posts of Group-D are terminated in accordance with the terms and conditions for daily wage employment on the basis of 'last come – first go' policy. Despite this being the position, the respondent workman had not challenged the decision on the ground that persons junior to them, or those appointed subsequently, had been retained while they had been terminated.

20. Ms. Begum, has also placed reliance on the decision of the Supreme Court in *Manager, RBI, Bangalore Vs. S. Mani and Others*, AIR 2005 SC 2179, to submit that where the onus to prove an issue lies on the workman, the mere failure of the management to lead evidence would not lead to the inference that the issue stands proved in favour of the workman.

21. Having considered the rival submissions, perused the impugned award and the record, I am of the view that the appointment of the respondent workman was contractual and for a fixed term. The same fell within the exception carved out in clause (bb) of section 2(o) of the Act, and such termination did not tantamount to retrenchment within the meaning of the Act. Consequently, section 25F and other provisions of the Act had no application in the present case.

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.

25. The submission of Mr. Aggarwal that, in the present case, the petitioner had not led any evidence before the Labour Court to establish that the initial engagement of the respondent was made on contingent basis and, consequently, the said plea cannot be accepted, has no merit.

26. In the facts of the present case, all the conditions laid down by the Supreme Court in *S.M. Nilajkar* (supra) for a case to fall within sub clause (bb) of section 2(oo) of the Act are clearly satisfied. In one way, the appointment of daily wage nursing orderlies till the regular recruitment of nursing orderlies could be described as for a project or a scheme. The “scheme” being to provide stopgap arrangement till the appointment of regular incumbents. The employment of the respondent was on contract basis. It was not as a daily wager simplicitor. The employment of the respondent clearly provided that the same was made till the recruitment of the regular nursing orderly or 89 days, whichever is earlier. The employment of the respondent was terminated when the objective of making stop gap arrangement was achieved i.e. when the “scheme” or the “project” came to an end. The respondent was clearly put to notice at the initial stage itself i.e. at the time when the advertisement was published and the applications were invited, as well as at the time of issuance of the appointment order that the engagement is only on contingent basis till the recruitment of the regular incumbent or 89 days, whichever is earlier.

27. The respondent entered into the contract of employment consciously with the petitioner and consequently he had notice on the date of commencement of his employment itself that his employment was short lived and as per the terms of the contract, the same was liable to be terminated on the expiry of the contract, and the recruitment of nursing orderly on regular basis. The respondent, therefore, had no reason to complain against the action of the petitioner in terminating his employment by the Office Order No.295 issued by the petitioner, followed by the Office

Order issued by MBH on the same day i.e. 20.12.2005.

28. I agree with the submission of learned counsel for the petitioner that the advertisement issued, and the appointment order issued by the petitioner were clear enough in the present case to show that the appointment of the respondent and the other workman was made on contract basis. Even otherwise, the respondent and the other workman were well aware of this position. When the petitioner issued the advertisement to make regular recruitment, knowing their status as temporary workman appointed on contingent basis, the respondent and the other workman - with a view to protect their employment, moved the CAT to seek the relief of regularisation on the ground that they had been serving the petitioner since the date of their appointment on 29.11.2001. The CAT did not grant them regularisation but permitted them to participate in the open recruitment process for recruitment of nursing orderly on regular basis. It is not clear whether the respondent applied for being appointed as a nursing orderly on regular basis and undertook the test or not. However, it is clear that the respondent, in any event, was not regularly recruited.

29. In their statement of claim filed before the Labour Court, the respondent himself stated that he was *“being treated as a daily rated/casual/muster roll worker and was being paid wages as fixed and revised from time to time under the Minimum Wages Act by the appropriate government”*. The workman also contended that his appointment as daily rated muster roll workman amounted to an unfair labour practice. Pertinently, the respondent and the other workman did not challenge the statement contained in the memorandum dated 29.11.2001 appointing them

on contingent basis as daily rated nursing orderly by claiming that the contingency i.e. of making regular appointments was a sham.

30. Pertinently, the respondent and the other workman did not question the correctness of the contents of the Office Order No.295 dated 20.12.2005 issued by the petitioner, and the office order issued by the MBH to the same effect on the same day, terminating the services of the respondents.

31. In their written statement, the petitioner repeatedly stated that the appointment of the workman was on contingent basis as daily wagers till regular appointments are made. The petitioner also sought to explain the delay in the recruitment process and consequent delay in the termination of the services of the respondent workman by stating as follows:

“It is also stated that vacancies for ST categories were kept vacant in MB Hospital and in place daily wages appointed. The Hon’ble Delhi High Court in case titled Dr. B.R. Ambedkar Memorial Foundation (Regd) and Ors. Vs. Union of India and Ors bearing CWP No.6456/2003 and C.M. No.11203/2003 had directed that the appointment to the Quota of ST be not filled up till a further order which was conveyed vide Services Department letter dated 31.10.2003. The ban to fill up the posts on regular basis in case of ST Category had been lifted by the Hon’ble High Court this dte. Constituted a committee to declare the result of ST category. The committee selected total 23 candidates for the post of Group-D/Nursing orderly out of ST category. Out of total 23 selected candidates, so far 18 candidates have joined in MB hospital to the post of nursing orderly on regular basis in place of daily wagers.

The workmen have been paid upto 20.12.2005 i.e. date of termination of their services”.

32. In their rejoinder, the respondent and the other workman did not specifically dispute the aforesaid averments of the petitioner. Therefore, it stood admitted by the respondents that the committee constituted by the petitioner had selected 23 candidates for the Group D nursing orderly posts in the ST category, out of whom 18 had joined MBH on regular posts in place of daily wagers.

33. In the light of the aforesaid position, the submission of Mr. Aggarwal that the petitioner had not led any evidence to substantiate its plea has no force. There was no plea raised by the respondent workman in the first place to claim that the contingency disclosed by the petitioner while making the appointment of the respondent workman and the other workman was a sham. The fact that the respondents were appointed on contingent basis i.e. till the recruitment of the regular nursing orderly, as a daily wager is also not in dispute. Rather it is an admitted position even in the statement of claim. The facts stated in the written statement that out of the 23 selected candidates, 18 had joined on regular posts of nursing orderly in MBH had not been disputed. The respondent also did not dispute the contents of the office order dated 20.12.2005 which recited “*consequent upon recruitment of Group D posts (regular posts) on the recommendation of selection board*”, the services of the respondent was terminated “*on the basis of last come first go policy*”. Therefore, the conduct of the regular recruitment process; the selection of the regular recruits by the selection board, and; the termination by following the last come first go policy were not disputed. In this background, there was nothing more that the petitioner was called upon to establish by leading any evidence. The need to lead evidence arises

when the facts are disputed. None of the material facts were in dispute in this case. The respondent is now seeking to raise a dispute before this Court for the first time by claiming that there was no connect between the regular recruitment process and the termination of the services of the respondent. The same cannot be permitted. No such case was made out before the Labour Court.

34. The petitioner has been able to explain the apparently long time it has taken to make the recruitment of regular nursing orderly. The delay occurred on account of the stay being granted in recruitment against ST category posts by this Court. Once the stay was lifted, the recruitment process was completed. The respondent and the other workman had been beneficiaries of the said delay. They cannot be allowed to take advantage of the same. The status and nature of their appointment does not change merely because a few years went by before the recruitment process was completed, and they continued to serve as daily wager nursing orderly in the meantime.

35. The submission of Mr. Aggarwal that the appointment of the respondent on contingent basis or for 89 days, whichever is earlier, tantamounted to adoption of unfair labour practice does not impress me. The decision in ***Bhikku Ram*** (supra) has no application in the facts of the present case.

36. At the same time, I do not agree with the general submission of learned counsel for the petitioner that the termination of the services of any temporary worker, who has not been appointed in terms of the recruitment

rules, does not tantamount to retrenchment. Reliance placed by her on ***Himanshu Kumar Vidyarthi*** (supra) appears to be misplaced.

37. As argued by Mr. Aggarwal, ***Trilokchand*** (supra) has analysed the decision in ***Himanshu Kumar Vidyarthi*** (supra) and has observed that the Supreme Court has taken the view in ***Rattan Singh*** (supra), ***Praveen Kumar Jain*** (supra), ***Samistha Dubey*** (supra), that section 25F would be applicable even in the case of the daily rated workman.

38. I do not agree with the learned counsel for the petitioner in her submission that the claim of the respondent was barred by principles of *res judicata*. No doubt, the said principles apply to proceedings before the Labour Court as held by the Supreme Court in ***Pondicherry Khadi and Village Industries Board*** (supra). However, I agree with the conclusion of the industrial adjudicator that the said principle of *res judicata* was applicable only qua the relief of regularisation in the present case. The respondent workman and the other workmen had approached the CAT much prior to the termination of their services. At that stage, they had sought the relief of regularisation which was denied by the CAT as also by this Court. The termination order, aforesaid, came nearly two years after the said litigation had concluded with the dismissal of the writ petition. The termination order was not the subject matter of adjudication either before the CAT or before this Court. Consequently, the dismissal of the original application by the CAT, or the writ petition by this Court, had no bearing on the issue of termination. The issue of termination was neither raised nor decided in that round of litigation.

39. I cannot agree with the submission of Mr. Aggarwal that this Court would not interfere with the industrial award even when the same is found to be patently erroneous. The fundamental premise on which the impugned award proceeds is that the appointment of the respondent was not contractual. Consequently, the termination of the respondent has been held to tantamount to retrenchment. When there is such glaring legal infirmity in the award, this Court would be failing in its duty in ignoring the same. It is not a case of mere exercise of its discretion by the industrial adjudicator, which the petitioner is calling upon this Court to interfere with. It is a fundamental and patent error in the award which has been brought to the notice of this Court by the petitioner. Accordingly, the impugned award cannot be sustained and is hereby set aside.

40. The submission of Mr. Aggarwal founded upon the order dated 24.07.2008 issued by the Health and Family Welfare Department, GNCT of Delhi cannot be gone into in these proceedings at this stage, since there are not averments made by the respondents in respect thereof and, consequently, the petitioner has had no occasion to deal with the same. The said order came to be issued after the making of the reference on 25.10.2006. Consequently, it is open to the respondent to take appropriate action on the basis of the said office order. However, it is made clear that this Court has not expressed any opinion in relation to the validity of the submissions made by the respondent founded upon the said office order.

41. Since the respondent was not retrenched and the impugned award is liable to be set aside, considering the fact that the respondent served for over

four years before his termination, in lieu of wages under section 17B of the Act, I direct the petitioner to pay to the respondent a sum of Rs.25,000/- within four weeks. Consequently, the petition is allowed in the aforesaid terms and the impugned award stands set aside.

42. The parties are to left to bear their respective costs.

VIPIN SANGHI, J.

MARCH 06, 2013

BSR /sl/sr