

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

Judgment Reserved on March 12, 2014
Judgment Delivered on March 14, 2014

+ **W.P.(C) 7971/2003**

MUNICIPAL CORPORATION OF DELHI Petitioner
Represented by: Mr.Rahul Srivastava , Advocate

versus

SMT. SUNDARI Respondent
Represented by: Mr.Rajiv Aggarwal, Advocate
with Mr.Sachin Sharma, Ms.
Neelam Tiwari, Advocates

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this writ petition is to the award dated January 27, 2003 passed by the Labour Court in I.D. No. 292/95 whereby the Labour Court has directed reinstatement of the respondent in petitioner-Corporation with 50% back wages with effect from April 07, 1986 onwards.

2. At the outset, I may note the submission of Mr. Rajiv Aggarwal, learned counsel for the petitioner as recorded in the order dated February 14, 2014 wherein he has stated that the award of the Labour Court stands satisfied inasmuch as the petitioner has reinstated the respondent in the year 2005 and has paid back wages to her till August 12, 2003 and for the period thereafter, till reinstatement, the benefit of wages have been given to the respondent under Section 17-B of the Industrial Disputes Act, 1947 (Act, in short).

3. The letter of the reinstatement dated May 29, 2006 reads as under:

“In continuation to the Office Order No.- 5242/AO(H)/RCS/2005 dated 29.09.05, Smt. Sundari Devi W/o Sh. Kanwal Dhari is hereby directed to work against a vacant post of Ward Aya till further orders subject to the outcome of the WP(C) No.-7971/03.

The RMS/T.N.Hospital is hereby directed to allow her to work.

This issue with the approval of Competent Authority.”

4. Since the order of the reinstatement of the respondent is subject to further orders to be passed in this writ petition, I deem it appropriate to consider and decide the writ petition.

5. The impugned award was passed by the Labour Court on a reference made by the appropriate Government, which is as under:

“Whether the services of Smt. Sundari have been terminated illegally and/or unjustifiably by the management and if so, to what relief is she entitled and what directions are necessary in this respect”.

6. It is the case of the respondent that she joined the petitioner-Corporation with effect from September 12, 1985 and was posted at Tilak Nagar Hospital as a Ward Aya and she was being treated as a daily rated/casual/muster roll worker and was being paid wages at minimum wages as fixed and which were being revised from time to time by the appropriate Government for unskilled casual worker. According to her, counter parts doing the identical work, being treated as regular employees were being paid their salaries in the pay scale of Rs. 200-250,

which was revised to Rs.775-1040/- with effect from January 01, 1986. The regular employees were enjoying the benefits like uniform, Earned Leave, Casual Leave, Restricted Holidays, Medical Leaves etc. whereas the same were being denied to her. She would further contend that her services were terminated with effect from April 07, 1986 without assigning any reason and in violation of Section 25-G and 25-H of the Act inasmuch as after her termination, a new man Siya Ram was taken in employment in her place.

7. The case of the petitioner-management was that the respondent was appointed for a specific period of three months as a daily-wager Ward Aya in Tilak Nagar Hospital on September 10, 1985. After the period was over, she was automatically relieved. Subsequently, she was given fresh engagement for a period of one month and thereafter, by another two months vide order dated January 08, 1986 with a clear condition that after the expiry of sanctioned period, she would be treated to have been relieved from her duties. The petitioner further contested the case; that she had not worked for 240 days in any year preceding her alleged termination.

8. Two issues were framed by the Labour Court, the first one being; “whether the services of the workman were terminated illegally and/or unjustifiably” and the second one being; to “what relief the workman would be entitled to”.

9. On the first issue, the Labour Court, relying on the deposition of Dr. S.P.Taneja that after the respondent was disengaged from the services, another person namely Siya Ram has been employed and further admitting, that a large number of Ward Ayas have joined the

employment of the petitioner-management from the year 1980-1999 and they are still in the employment of Management; that the petitioner did not send any letter thereby calling upon the respondent to join the services of the petitioner when new persons have been employed by the petitioner, held that the petitioner-management has violated the provisions of Section 25-G & 25-H of the Act read with Rules 76 and 77 of the Industrial Disputes (Central) Rules, 1957, granted the relief which has already been reflected above.

10. Mr. Rahul Srivastava, learned counsel appearing for the petitioner would submit that the Tribunal has erred in granting the reinstatement to the respondent with 50% back wages. He would state that the respondent's engagement was for a specific period and was only a daily-wager and had not even put in 240 days of service, preceding her alleged termination. Mr. Rahul Srivastava relied upon the judgments of the Supreme Court reported as *(2006) 6 SCC 221 Reserve Bank of India Vs. Gopinath Sharma and Another*, *(2005) 3 SCC 409 Karnataka State Road Transport Corporation and Another Vs. S.G. Kotturappa and Anr.*, *(2002) 3 SCC 25 Range Forest Officer Vs. S.T. Hadimani* in support of his case.

11. On the other hand, Mr. Rajiv Aggarwal, learned counsel appearing for the respondent would support the award of the Labour Court. According to him, the Labour Court has rightly granted the reinstatement of the respondent with 50% back wages. He relied upon the recent judgment of the Supreme Court in the case of *BSNL Vs. Bhurumal*, *2013 (15) SCALE 131* and the judgment of the Single Judge of this Court in Writ Petition No. 6024/1999 decided on August 25, 2011, *The Management of Municipal Corporation of Delhi Vs. Presiding Officer*,

Industrial Tribunal and Anr. in support of his contention.

12. Having considered the learned counsel for the parties, the question which arises for consideration is whether, in view of the terms of engagement of the respondent, and in view of the provisions of Section 2(oo)(bb) of the Act, whether the provisions of Section 25-G and 25-H of the Act would be applicable. I note that the last term of engagement of the respondent reads as under:

“The Z.H.O./West Zone vide his orders dated 26.12.85 has allowed to Miss Sunderi d/o Sh.Jivdhan to work on daily wages (7 day off) as Ward Aya in Tilak Nagar Hospital.

She is allowed to work for another two months w.e.f. 3.2.86 or from date of joining. After expiry of two months she considered herself relieved.”

13. A perusal of the engagement letter dated January 08, 1986 would show that her engagement was for a period of two months with effect from February 03, 1986 or from the date of joining. In any case, the engagement was only for a period of two months and after expiry of said two months, she was to consider herself to be relieved. The respondent was relieved on April 07, 1986. There is no fresh engagement or she had not been continued thereafter. Even, it is noted, Siya Ram was on rolls, much before the respondent was relieved. Given the nature of engagement of the respondent, which is covered within the exception (bb) to Section 2 (oo) of the Act, the issue is no more res-integra having been settled by the Supreme Court in the case of *Bhogpur Co-op Sugar Mills Ltd. Vs. Harmesh Kumar*, (2006) 13 SCC 28, wherein the Supreme Court has held as under:

“6. We are not oblivious of the distinction in regard to the legality of the order of termination in a case where Section 25-F of the Act applies on the one hand, and a situation where Section 25-G thereof applies on the other. Whereas in a case where Section 25-F of the Act applies the workman is bound to prove that he had been in continuous service of 240 days during twelve months preceding the order of termination, in a case where he invokes the provisions of Sections 25-G and 25-H thereof he may not have to establish the said fact. [See Central Bank of India vs. S. Satyam & Ors.(1996) 5 SCC 419, Samishta Dube vs. City Board, Etawah & Anr. (1999) 3 SCC 14, Regional Manager, SBI vs. Rakesh Kumar Tewari (2006) 1 SCC 530 and Jaipur Development Authority v. Ram Sahai & Anr.Civil Appeal No. 4626 of 2006 decided on 31st October, 2006]

7. However, category-wise seniority is required to be maintained when different categories of workmen are appointed so as to apply the principle of 'last-cum-first go'. A seniority list is also required to be maintained so as to enable the employer to offer services to the retrenched employees maintaining the order of seniority. The said provisions, however, would have no application in a case where Section 2(oo)(bb) of the Act is attracted. The said provision reads, thus:

"2. (oo) retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include

*(a)-(b) * * **

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

8. Termination of services of a workman as a result of non-renewal of the contract of employment on its expiry

or termination of such contract of appointment under a stipulation in that behalf contained therein would, thus, not attract the definition of the term 'retrenchment'. [See Municipal Council, Samrala v. Sukhwinder Kaur, (2006) 6 SCC 516 and Municipal Council, Samrala v. Raj Kumar, (2006) 3 SCC 81]

The issue is squarely covered by a decision of this Court in Morinda Coop. Sugar Mills Ltd. v. Ram Kishan and Others [(1995) 5 SCC 653] wherein it was opined:

"It would thus be clear that the respondents were not working throughout the season. They worked during crushing seasons only. The respondents were taken into work for the season and consequent to closure of the season, they ceased to work.

The question is whether such a cessation would amount to retrenchment. Since it is only a seasonal work, the respondents cannot be said to have been retrenched in view of what is stated in clause (bb) of Section 2(oo) of the Act. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is illegal. However, the appellant is directed to maintain a register for all workmen engaged during the seasons enumerated hereinbefore and when the new season starts the appellant should make a publication in neighbouring places in which the respondents normally live and if they would report for duty, the appellant would engage them in accordance with seniority and exigency of work."

9. Yet again, recently in Haryana State Agricultural Marketing Board v. Subhash Chand and Another[(2006) 2 SCC 794], this Court held:

"It is the contention of the appellant that the respondent was appointed during the wheat season or the paddy season. It is also not in dispute that the appellant is a statutory body constituted under the Punjab and Haryana Agriculture Produce Marketing Board Act. In terms of the provisions of the said Act, indisputably, regulations are

framed by the Board laying down the terms and conditions of services of the employees working in the Market Committees. A bare perusal of the offer of appointment clearly goes to show that the appointments were made on contract basis. It was not a case where a workman was continuously appointed with artificial gap of 1 day only. Indisputably, the respondent had been re-employed after termination of his services on contract basis after a consideration period(s)."

[See also Municipal Council, Samrala v. Sukhwinder Kaur, (2006) 6 SCC 516 and State of Rajasthan v. Sarjeet Singh & Anr., 2006 (10) SCALE 417]"

14. The judgment relied upon by the learned counsel for the petitioner in the case of *Reserve Bank of India (supra)* is also on similar lines, wherein the Supreme Court has, in para 22, held as under:

"22. In our view, respondent No. 1 was not appointed to any regular post but was only engaged on the basis of the need of the work on day to-day basis and he has no right to the post and that his disengagement cannot be treated as arbitrary. The High Court, in our view, has totally misdirected itself in holding that non-consideration of the name of respondent No. 1 on acquiring higher qualification is not misconduct, hence, dismissal of the workman on this ground is wrongful within the meaning of Item 3, Schedule II to the Industrial Disputes Act, 1947 without giving any reason as to how non-inclusion of name for day-to-day appointment amounts to wrongful dismissal. The High Court completely erred in relying on Section 25G of the I.D. Act while not holding that the workman has been

retrenched within the meaning of Section 25F and thus misdirected itself about the applicability of provisions of Section 25G of the I.D. Act even if it does not involve retrenchment. The High Court also failed to consider that the inclusion of the name in the waiting list for appointment as 'Ticca Mazdoor' on day-to-day basis does not confer any right for regular appointment or to hold any post. As already noticed, no relief can now be given to respondent No. 1 especially when the system of keeping waiting list for Ticca Mazdoor has been dispensed with since 23.7.1993 and at present the Bank does not maintain any list. The High Court, therefore, wrongly proceeded on the basis as if the daily wage appointment is for a regular post on which a person can be reinstated. The High Court has also committed an error in giving the relief of reinstatement with back wages without considering whether the concerned workman was gainfully employed from 1976 till date of judgment, there being no evidence on record. Likewise, the High Court ought to have seen that respondent No. 1 was not entitled to any back wages on the basis of the well settled principle "No work No Pay". In our opinion, the High Court has completely erred in ordering an appointment to a similar post on which a person just before the name of respondent No. 1 is at present working without considering the fact that such person must be senior to the workman concerned and was

already promoted to the next cadre in Class III”.

15. Further, in para 26 , the Supreme Court held as under:

26. *Haryana State Agricultural Marketing Board v. Subhash Chand and Anr.* relates to the disengagement of casual employees. The question arose was as to whether the provisions of Section 25-G are to be complied with. In this case, the respondent was appointed on contractual basis by the appellant during paddy seasons on consolidated wages. Upon termination of the services, the respondent raised an industrial dispute. The appellant took the stand that the respondent was employed only for 208 days during the previous year whereas the respondent contended that he had worked for 356 days. The Labour Court held that the termination was violative of Section 25-G of the I.D. Act and hence an unfair labour practice. The appellant filed a writ petition against the decision of the Labour Court which was dismissed by the High Court. Setting aside the decision of the Labour Court, the High Court held Fifth Schedule to the I.D. Act inapplicable and hence dispensing with the engagement of the respondent cannot be said to be unwarranted in law”.

16. Insofar as the judgment relied upon by the learned counsel for the petitioner in the case *Karnataka State Road Transport Corporation (supra)* is concerned, the Supreme Court was dealing with a case where the workman had not completed 240 days. Further, it was not the case of the workman that the provisions of Section 25-G and 25-H of the Act

have been violated. Rather, the Supreme Court in para 18 of the said judgment was of the view that the respondent had not completed 240 days during the period of 12 months preceding termination as contemplated under Section 25-F read with Section 25-B of the Act. The case in hand can be differentiated on the facts. The judgment relied upon by the petitioner is not applicable.

17. Similar is the case of the *Range Forest Officer (supra)* wherein the Supreme Court had held that the Tribunal was not right in placing the onus on the Management to prove that workman has worked for 240 days in the year preceding his termination. It was for the workman to lead evidence to show that he had, in fact, worked for 240 days, preceding the year of his termination, and since in that case, the respondent could not prove that he had worked for 240 days, the Supreme Court set aside the award of the Labour Court.

18. Insofar as the judgment relied upon by the learned counsel for the respondent in *BSNL's case (supra)* is concerned, the same would not be applicable in the facts of this case inasmuch as in that case, the engagement was not for a specified period to be governed by exception to Section 2 (oo) i.e. (bb). In that case, the respondent was working as a Line Man on daily basis and while working, he got an electrical shock, because of this accident, he was hospitalized. Thereafter, he was not allowed to resume duties which amounted to wrongful termination. In those facts, the Supreme Court in para 25, has observed as under:

“25. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of

the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied”.

19. Similar is the position in the case of *Management of MCD's case (supra)* wherein the workman was employed in M.C.D. as a Carpenter in the Engineering Department from 15th May, 1986 to 14th November, 1986 and again, he worked from 15th November, 1988 to 14th April, 1989 on a consolidated salary of Rs. 1150/-. It is not a case where his engagement was on contract basis for a fixed term. It was in those circumstances, the Industrial Tribunal has held that the termination was in violation of Section 25-G of the Act without following the principles of “*first come last go*”. It is not such a case here. The terms of the engagement of the respondent were very clear and the respondent was relieved pursuant to the terms of the engagement. The case falls within the exception (bb) of Section 2 (oo) of the Act, which defines “retrenchment”.

20. In view of the aforesaid position, the order of the Tribunal is not legally sustainable, but, keeping in view the fact that the petitioner has

implemented the award inasmuch as the respondent has been reinstated on a vacant post and almost nine years have elapsed thereafter, it would not be proper if such an engagement is terminated now by allowing the writ petition filed by the petitioner-Corporation. I am of the view, this Court should not interfere in exercise of the power under Article 226 of the Constitution of India, in the facts of this case. The writ petition is dismissed.

21. No costs.

CM Nos. 13243/2003 & 2142/2014

In view of the order passed in the writ petition, the applications are also disposed of as infructuous.

**(V.KAMESWAR RAO)
JUDGE**

MARCH 14, 2014
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