

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

Judgment Reserved on February 11, 2014

Judgment Delivered on May 27, 2014

+ **W.P.(C) 3202/2007**

MAHIPAL SHARMA

..... Petitioner

Represented by: Ms.Deepali Gupta, Advocate

versus

NEW DELHI MUNICIPAL COUNCIL

..... Respondent

Represented by: Ms. Manpreet Kaur, Advocate
with Mr. Arun Bhardwaj,
Advocate

+ **W.P.(C) 1045/2006**

NEW DELHI MUNICIPAL COUNCIL

..... Petitioner

Represented by: Ms. Manpreet Kaur, Advocate
with Mr. Arun Bhardwaj,
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versus

MAHIPAL SHARMA

..... Respondent

Represented by: Ms.Deepali Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. Since the challenge in these writ petitions is to the award dated September 13, 2004 passed in I.D 277/98 by both the parties to the

industrial dispute, the same are being disposed of by this common order. The parties shall be referred to in this judgment as per their status in W.P.(C) 3202/2007. In other words, Mr.Mahipal Sharma shall be referred as ‘petitioner’ and the New Delhi Municipal Council as the ‘respondent’.

2. The industrial dispute was referred for the adjudication of the Labour Court on the following terms of reference:

“Whether the services of Sh.Mahipal Sharma have been terminated illegally or unjustifiably by the management and if so to what relief is he entitled and what directions are necessary in this respect?”

3. The facts as culled out from the record are, it was the case of the petitioner that he was appointed as Driver on May 01, 1990 by the respondent on a fixed salary of Rs.2,500/- per month for driving heavy motor vehicles. Initially wages were paid to the workman through contractor and this continued till November 30, 1994. Thereafter, he was posted at Auto Workshop, Laxmibai Nagar, where he worked regularly since his appointment. He continued to work there till April 30, 1997 when his services were terminated orally. It was his case that the respondent have regularized the services of large number of drivers and made appointment directly after the termination of the services of the petitioner as Heavy Motor Vehicle Driver. No reasons were forthcoming for terminating the services of the petitioner. Demand Notice dated November 10, 1997 was sent to the petitioner and thereafter conciliation proceedings were initiated by the petitioner which culminated in failure and pursuant thereto the reference was made.

4. It was the case of the respondent that the petitioner had not completed 240 days in any preceding 12 months from the date of

termination. On merit it was the case of the respondent that the petitioner was never appointed by it on muster roll. According to the respondent, he was appointed by the contractor. It was also averred that the petitioner worked for 2 years from October, 1995 to April, 1997 on contract basis.

5. The issue framed by the Labour Court is 'terms of reference'.

6. I note that during the deposition of the petitioner it has come on record that he was appointed by the respondent through contractor namely Vikram Sethi and on November 30, 1994 the contractor was removed and the petitioner was taken by the management directly under its control and was posted at Autowork Shop at Laxmibai Nagar. The petitioner had also deposed that the management had regularized the services of workmen who were junior to him. He had also deposed that fresh appointments were made from outside for the post of Heavy Motor Vehicle Driver. The Labour Court was of the view that the deposition of the petitioner that persons junior to him have been regularized has not been questioned by the respondent in the cross examination of the petitioner.

7. The respondent filed an affidavit in support of its case but unfortunately no appeared in support of the affidavit.

8. The Labour Court ultimately was of the view that the vouchers have not been properly proved by the respondent. It came to the conclusion that the respondent had terminated the services of the petitioner in violation of Section 25F of the Industrial Disputes Act, 1947 ('Act' in short) and the work of collection of garbage dumper is of regular nature in NDMC. This activity cannot be handed over to a contractor nor the contractor has been named by the respondent in the pleadings. The plea of the respondent that its case is covered by Section

2(oo)(bb) of the Act was not accepted and the respondent was directed to reinstate the petitioner without any directions for back wages.

9. Learned counsel for the petitioner would submit that the denial of back wages to the petitioner is totally unjustified. According to her, when termination is held as illegal then full back wages should have been granted by the Labour Court. She would further state that it has come during the cross examination that he remain unemployed and dependant on his parents which would show that he was not gainfully employed elsewhere and the Labour Court should have granted back wages. She would rely upon the following judgments in support of her contentions:

(a) 2010 (1) Scale Harjinder Singh vs. Punjab State Warehousing Corporation.

(b) 1979 (2) SCC 80 Hindustan Tin Works Pvt. Ltd. vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd. & Ors.

(c) 2006 (88) DRJ 75 (DB) Delhi Cantonment Board vs. CGIT & Ors.

(d) 2003 SCC (L&S) 380 S.M.Nilajkar & Ors. vs. Telecom District Manager, Karnataka.

(e) Kamla vs. The Management of Director of Social Welfare LPA 85/2009 decided on April 02, 2009.

10. On the other hand, learned counsel for the respondent would urge that the petitioner was engaged as a Driver on contract basis and he continued to work on contract basis and was being paid on trip basis and was never employed on muster roll. According to her, one of the conditions was that he should make at least 50 trips in a month to get Rs.2,500/- per month @ Rs.50/- per trip. She would state that for making

regular appointment a particular process under the rules and regulations have to be followed which has not been done in this case. She would further state that the respondent has not completed 180 days at a stretch nor 240 days in a year preceding the date of alleged termination. So the provisions of Section 25-F of the Act would not be applicable. She would state that the onus to prove that he has completed 240 days is on the petitioner. She would rely upon the judgment of this Court in NDMC vs. Ramesh Chander W.P.(C) 4186/2006 dated November 07, 2013 wherein this Court had held that the onus to prove that he had worked for 240 days is on the workman, which in this case the workman had failed to discharge and the order of reinstatement of the petitioner is bad.

11. Having heard the rival submissions made by the learned counsel for the parties, before I deal with the said submissions suffice to state that the petitioner has challenged the award to the limited extent that the Labour Court had not granted back wages to him. I also may point out here that no ground has been taken by the petitioner in the writ petition with respect to his case that juniors and outsiders have been appointed/regularized by the respondent. In other words, it is not his case before this Court that persons junior and outsiders have been regularized/appointed.

12. The questions which fall for consideration in this case are as follows:

- (1) Whether relationship of employer employee exists between the petitioner and the respondent.
- (2) Whether the petitioner has completed 240 days preceding the date of his alleged termination.
- (3) Whether there is a violation of Section 25-F of the Act and if

yes, what relief he would be entitled to.

13. As per the own case set-up by the respondent, it is noted that initially the petitioner was engaged through a contractor. Subsequently in the year 1997 the respondent appointed the petitioner not through contractor but on contract basis. It is the case of the respondent that on engagement on contract basis the respondent was being paid Rs.50/- for each trip he used to undertake. If the stand of the respondent is meaningfully understood, the petitioner was working under the control and supervision of the respondent. The mode of payment was for each trip undertaken by the petitioner. The payment for each trip signifies the mode but that would not mean that relationship of employer and employee did not exist between the petitioner and the respondent.

14. Insofar as the petitioner had put in 240 days in a year preceding the date of alleged termination, suffice to note that the petitioner did work with the respondent between the year October, 1995 to April, 1997, which is a period of more than one year. The stand of the respondent before the Labour Court was that the respondent had not completed 180 days at a stretch nor completed 240 days in a year preceding the alleged termination. This stand of the respondent had come on a specific pleading of the petitioner that he had worked for 240 days. Surely the onus to prove that the petitioner had not completed 180 days at a stretch nor 240 days in a year preceding the alleged termination was on the respondent. Unfortunately the contents of the affidavit filed by the respondent and the vouchers against which the payment was made to the petitioner would not be proved as the officer who had filed the affidavit did not enter the witness box. I find that during the cross examination of the petitioner no suggestion was given that he had not worked for 240

days. In the absence of any suggestion it is but obvious that the stand of the petitioner that he had worked for 240 days has been proved. If the petitioner has completed 240 days then the termination could not have been effected without complying with the provisions of Section 25F of the Act. It is not a case of the respondent that the provisions of Section 25F of the Act have been complied with. If that is so, then the termination has been rightly held to be bad.

15. The question which need to be answered is what should be the relief the petitioner is entitled to.

16. In its latest opinion reported as (2013) 5 SCC 136 Assistant Engineer, Rajasthan State Agriculture Marketing Board Sub Division Kota vs. Mohan Lal, the Supreme Court after considering its earlier judgment had granted compensation of Rs.1,00,000/- to the workman where the workman had worked for a period between November 01, 1984 and February 17, 1986 and who had raised industrial dispute after 6 years. The relevant portion of the judgment is reproduced hereunder:

9. In L. Robert D'Souza [L. Robert D'Souza v. Southern Railway, (1982) 1 SCC 645 : 1982 SCC (L&S) 124] this Court in para 27 held as under: (SCC p. 664)

“27. ... Therefore, assuming that he was a daily-rated worker, once he has rendered continuous uninterrupted service for a period of one year or more, within the meaning of Section 25-F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories, notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with preconditions to valid

retrenchment, the order of termination would be illegal and invalid.”

What has been held by this Court in L. Robert D'Souza [L. Robert D'Souza v. Southern Railway, (1982) 1 SCC 645 : 1982 SCC (L&S) 124] is that Section 25-F of the ID Act is applicable to a daily-rated worker. We do not think that there is any dispute on this proposition.

10. In RBI v. S. Mani [(2005) 5 SCC 100 : 2005 SCC (L&S) 609] , this Court in para 54 of the Report held as under: (SCC p. 120)

“54. Mr Phadke, as noticed hereinbefore, has referred to a large number of decisions for demonstrating that this Court had directed reinstatement even if the workmen concerned were daily wagers or were employed intermittently. No proposition of law was laid down in the aforementioned judgments. The said judgments of this Court, moreover, do not lay down any principle having universal application so that the Tribunals, or for that matter the High Court, or this Court, may feel compelled to direct reinstatement with continuity of service and back wages. The Tribunal has some discretion in this matter. Grant of relief must depend on the fact situation obtaining in a particular case. The industrial adjudicator cannot be held to be bound to grant some relief only because it will be lawful to do so.”

11. In Nagar Mahapalika v. State of U.P. [(2006) 5 SCC 127 : 2006 SCC (L&S) 934] , this Court, while dealing with the non-compliance with the provisions of Section 6-N (which is in pari materia with Section 25-F) of the U.P. Industrial Disputes Act held that the grant of relief of reinstatement with full back wages and continuity of service in favour of retrenched workmen would not automatically follow or as a matter of course. Instead, this

Court modified the award of reinstatement with compensation of Rs 30,000 per workman. In Municipal Council, Sujapur v. Surinder Kumar [(2006) 5 SCC 173 : 2006 SCC (L&S) 967] this Court after having accepted the finding that there was violation of Section 25-F of the ID Act, set aside the award of reinstatement with back wages and directed the workman to be paid monetary compensation in the sum of Rs 50,000. In Mamni [Haryana State Electronics Development Corpn. Ltd. v. Mamni, (2006) 9 SCC 434 : 2006 SCC (L&S) 1830] this Court modified the award of reinstatement passed by the Labour Court, though the termination of the workman was in violation of Section 25-F of the ID Act, by directing that the workman should be compensated by payment of a sum of Rs 25,000.

12. In SBI v. Mahatma Mishra [(2006) 13 SCC 727 : (2008) 1 SCC (L&S) 988] this Court observed that: (SCC p. 734, para 12)

“12. ... It [was] one thing to say that services of a workman [were] terminated in violation of mandatory provisions of law but it [was] another thing to say that relief of reinstatement in service with full back wages would be granted automatically.”

13. In HUDA v. Om Pal [(2007) 5 SCC 742 : (2007) 2 SCC (L&S) 255] this Court in paras 7 and 8 of the Report held as under: (SCC p. 745)

“7. Moreover, it is also now well settled that despite a wide discretionary power conferred upon the Industrial Courts under Section 11-A of the 1947 Act, the relief of reinstatement with full back wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors, one of which would be as to whether the recruitment was

effected in terms of the statutory provisions operating in the field, if any.

8. The respondent worked for a very short period. He only worked, as noticed hereinbefore, in 1994-1995. The Industrial Tribunal-cum-Labour Court, therefore, in our opinion committed an illegality, while passing an award in the year 2003, directing the reinstatement of the respondent with full back wages. Although we are of the opinion that the respondent was not entitled to any relief, whatsoever, we direct the appellant to pay him a sum of Rs 25,000.”

14. In Uttaranchal Forest Development Corpn. v. M.C. Joshi [(2007) 9 SCC 353 : (2007) 2 SCC (L&S) 813] , this Court was concerned with a daily wager who had worked with Uttaranchal Forest Development Corpn. from 1-8-1989 to 24-11-1991 and whose services were held to be terminated in violation of Section 6-N of the U.P. Industrial Disputes Act. The Labour Court had directed the reinstatement of the workman with 50% back wages from the date the industrial dispute was raised. Setting aside the order of reinstatement and back wages, this Court awarded compensation in a sum of Rs 75,000 in favour of the workman keeping in view the nature and period of service rendered by the workman and the fact that industrial dispute was raised after six years.

15. In M.P. Admn. v. Tribhuban [(2007) 9 SCC 748 : (2008) 1 SCC (L&S) 264] this Court upheld the order of the Industrial Court passed in its jurisdiction under Section 11-A of the ID Act awarding compensation and set aside the judgment of the Single Judge and the Division Bench that ordered the reinstatement of the workman with full back wages. This Court in para 12 of the Report held as under: (SCC p. 755)

“12. In this case, the Industrial Court exercised its discretionary jurisdiction under Section 11-

A of the Industrial Disputes Act. It merely directed the amount of compensation to which the respondent was entitled had the provisions of Section 25-F been complied with should be sufficient to meet the ends of justice. We are not suggesting that the High Court could not interfere with the said order, but the discretionary jurisdiction exercised by the Industrial Court, in our opinion, should have been taken into consideration for determination of the question as to what relief should be granted in the peculiar facts and circumstances of this case. Each case is required to be dealt with in the fact situation obtaining therein.”

16. In Mahboob Deepak [Mahboob Deepak v. Nagar Panchayat, Gajraula, (2008) 1 SCC 575 : (2008) 1 SCC (L&S) 239] this Court stated that an order of retrenchment passed in violation of Section 6-N of the U.P. Industrial Disputes Act may be set aside but an order of reinstatement should not however be automatically passed. This Court observed in paras 11 and 12 of the Report as follows: (SCC p. 578)

“11. The High Court, on the other hand, did not consider the effect of non-compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. The appellant was entitled to compensation, notice and notice pay.

12. It is now well settled by a catena of decisions of this Court that in a situation of this nature instead and in place of directing reinstatement with full back wages, the workmen should be granted adequate monetary compensation. (See M.P. Admn. v. Tribhuban [(2007) 9 SCC 748: (2008) 1 SCC (L&S) 264].)”

17. The judgment in Assistant Engineer, Rajasthan State Agriculture Marketing Board Sub Division, Kota case (supra) has been followed by the Supreme Court in its latest opinion reported as 2014 (2) Scale 399 Hari Nandan Prasad & Anr. vs. Employer I/R to Management of FCI & Anr., wherein the Supreme Court has held as under:

“It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

Jagbir Singh has been applied very recently in Telegraph Deptt. Vs. Santosh Kumar Seal (2010) 6 SCC 773, wherein this Court stated: (SCC p.777, para 11)

In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of

reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.

Taking note of the judgments referred to in the aforesaid paragraphs and also few more cases in other portion of the said judgment, the legal position was summed up in the following manner:

“It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and

even after he is reinstated, he has no right to seek regularization (See: State of Karnataka vs. Uma Devi (2006) 4 SCC 1). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

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”.

18. I note that the judgment of this Court in Ramesh Chander case (supra) relied upon by the respondent is not applicable in the facts of this case inasmuch as in the said case the petitioner NDMC could able to

prove muster roll from where it is proved that the respondent has not worked for 240 days, whereas in this case except making a bald averment and by not producing the relevant record the respondent had not even care to put a question to the workman of his having not completed 240 days in the cross examination nor any of the witness had appeared for the respondent in the witness box to prove the contents of the affidavit.

19. Before I come to the relief, I deal with the judgments referred to by the petitioner. The judgments as referred to in the case of Harjinder Singh's case (supra), Hindustan Tin Works Pvt. Ltd. case (supra), Delhi Cantonment Board case (supra), S.M.Nilajkar's case (supra) and Kamla case (supra), since the Supreme Court has held that when termination is held illegal for not following Section 25F of the Act, reinstatement with full back wages is not automatic and the judgment of the Supreme Court in Harjinder Singh's case was referred to and distinguished in the case of Assistant Engineer, Rajasthan State Agriculture Marketing Board Sub Division, Kota case (supra) and in Hari Nandan case (supra) and the fact that the petitioner has worked only for 7 years in all with effect from 1990 out of which 2 years directly under the respondent and the petitioner has been litigating for the last 17 years, I deem it appropriate that a compensation of Rs.1,00,000/- in lieu of reinstatement be granted to the petitioner, which would be in the nature of full and final settlement without any claim of whatsoever nature in future. The said amount shall be payable to the petitioner within a period of 2 months from today, otherwise interest @10% p.a would accrue to him.

20. The writ petitions are accordingly disposed of without any order as to costs. The award is modified in terms of the above.

CM No.962/2006 in W.P.(C) 1045/2006

In view of the order passed in the writ petition, the application is disposed of as infructuous.

(V.KAMESWAR RAO)
JUDGE

MAY 27, 2014
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