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

% *Judgment delivered on: 12th September, 2014*

+ W.P.(C) 4807/2011

SHRI KRISHAN CHANDER

..... Petitioner

Represented by: Mr. Rajiv Aggarwal, Adv.

Versus

MCD

..... Respondent

Represented by: Ms. Saroj Bidawat, Adv.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the present petition, petitioner seeks quashing and setting aside of the order dated 18.02.2011 and further direct the respondent / MCD to pay Rs.4,64,300/- as death-cum-retirement benefits with interest @ 18% *per annum* to the petitioner.

2. The brief facts of the case are that Sh. Ram Chander, father of the petitioner joined on 19.09.1986 in the Horticulture Department of the respondent / MCD as a tanker driver. The services of the father of the petitioner were terminated on 27.11.1988. Being aggrieved, he raised an industrial dispute in ID No. 125/1990, which was decided by the Labour Court (V), Delhi, vide award dated 25.11.1995 holding therein that the termination of the petitioner was illegal and unjustified and accordingly directed the respondent / MCD to reinstate the father of the petitioner with continuity in service and with full back wages.

3. Accordingly, he sent a demand notice dated 03.01.1997 calling upon the respondent / MCD to implement the said award by reinstating him with continuity of service and by paying full back wages from the date of his illegal termination till the date of his reinstatement. And he submitted his joining report on 27.01.2000, which was duly received by the respondent / MCD.

4. Mr. Rajiv Aggarwal, Id. Counsel appearing on behalf of the petitioner submits that said Sh. Ram Chander was never reinstated in the service, despite the award of reinstatement in his favour. Accordingly, the father of the petitioner filed an application under Section 33 (C)(1) of the Industrial Dispute Act, 1947 claiming therein the amount of back wages and consequently, recovery was effected up to the period of 31.12.2003 by way of recovery certificate.

5. Mr. Aggarwal, further submits that meanwhile, father of the petitioner had raised one more industrial dispute being ID. NO. 20/1998 with regard to his regularization of service and the said industrial dispute was disposed of by Industrial Tribunal no. (1), Delhi, vide its award dated 17.11.2001 as per which the father of the petitioner was held entitled to regularization as a tanker driver from the date on which the respondent / MCD had regularized other daily wagers since 19.09.1986. It was further held that no workman junior to the father of the petitioner would be regularized prior to him.

6. Vide the said award it was further directed to the respondent / MCD to pay wages to the father of the petitioner applicable to a regular employee as tanker driver and the difference in the wages was also directed to be paid

within three months of the publication of the award otherwise, the respondent / MCD will be liable to pay interest @ 6% *per annum*.

7. Respondent / MCD had challenged the award dated 17.11.2001 by filing a Writ Petition before this Court, which was disposed of vide order dated 25.03.2008 holding therein that there was no infirmity in the award and the respondent / MCD was directed to regularize the father of the petitioner in his own turn as per the policy and as per his own seniority as and when the chance of regularization against the post comes up.

8. Mr. Aggarwal further submits that respondent / MCD did not comply with the directions passed in the award dated 17.11.2001. Therefore, the father of the petitioner sent a legal demand notice dated 01.06.2002 calling upon the respondent to implement the said award by regularizing him on the post of tanker driver. Since the respondent / MCD failed to comply with the directions, the father of the petitioner compelled to file an application under Section 33 (1) (C) of Industrial Tribunal Act, 1947 for the payment of difference of salary due in terms of award dated 17.11.2001 for the period of 01.04.1991 to 31.12.2003, accordingly, the same was paid by the respondent / MCD.

9. However, father of the petitioner Sh. Ram Chander had expired on 27.05.2005. Thereafter, mother of the petitioner namely, Smt. Nihali Devi filed a labour claim application being no. LCA 97/2008 claiming therein the amount of gratuity, leave salary, pension for the period from 27.05.2005 to 31.07.2008 and salary for the period from 09.01.2004 to 26.05.2005 in terms of awards dated 25.11.1995 and 17.11.2001 as he (Ram Chander) would

deemed to have been in continuous employment of the respondent / MCD as a regular tanker driver.

10. On completion of the pleadings, the Ld. Tribunal framed issue as under:

“Whether the workman is entitled to the amount as claimed in the claim petition?”

11. Ld. Counsel for the petitioner submits that during the pendency of the aforesaid LCA, the mother of the petitioner, Smt. Nihali Devi also expired on 01.01.2010 and thereafter the petitioner got substituted his name being the legal heirs of his father and mother. However, vide impugned order dated 18.02.2011, the Ld. Labour court held that the petitioner is not entitled to any relief on the following grounds:

“(i) In view of the judgments of the Hon’ble Supreme Court, if there is no specific Order or Award for payment, payment cannot be made and the relief sought by the LR of the workman has not been decided by the court in the form of the award.

(ii) The petitioner has not given the vital facts and in the absence of vital facts, the petition is vague and it cannot be decided in favour of the claimant.

(iii) In the whole petition it is not stated who is junior to the workman and when he was regularized, as the workman can only be regularized only before his junior is regularized.

(iv) Since the MCD has not passed any order of regularization, the workman / LR is not entitled to any amount.”

12. Hence the present petition.

13. Ms. Saroj Bidawat, Ld. Counsel appearing on behalf of the respondent / MCD submits that vide additional affidavit filed by the respondent / MCD, it is stated that the persons who were working regularly as daily wager w.e.f

01.04.1986 to 31.03.1988 were regularized w.e.f 01.04.1994. However, the petitioner / workman never worked after 22.11.1988 and hence, he was not considered for regularization, accordingly, not entitled to be regularized along with other employees who were in continuous service since 1986.

14. Ms. Bidawat, further submits that the workman would have been held entitled, if he joined duty after the award dated 25.11.1995, however, he never approached the Management to join duty, but recovered back wages through bank attachment without doing any work. It is further submitted that the workman had also recovered the difference of salary of daily wager and regular employee w.e.f 01.04.1991 to 31.12.2003 through bank attachment without any order of regularization and doing any work.

15. Ld. Counsel further submits that the date of birth of the workman was 12.04.1942 and if he was in service, his date of superannuation would have been 12.04.2002 and accordingly entitled for salary till the date of his retirement, i.e., 12.04.2002.

16. Ld. Counsel submits that the father of the petitioner has drawn the salary through the bank attachment till 31.12.2003, thus, he has overdrawn the salary of 20 months, which he has to refund back to the respondent / MCD.

17. I have heard ld. Counsels for the parties.

18. Vide award dated 25.11.1995, termination of the workman was held illegal and was entitled to be reinstated with continuity of service and with full back wages. In cross-examination, the claimant / workman stated that the aforesaid award was implemented, accordingly, the amount for the period 01.04.1991 to 31.12.2004 was recovered by the recovery certificate.

However, the fact remains that the aforesaid award has not been challenged by the respondent / MCD, accordingly, attained finality.

19. It is also admitted fact that the workers who were working from 1986 to 1988 have been regularized w.e.f 01.04.1994. Further admitted fact that the workman continued to receive the salary till his death, i.e., up to 2005 and the respondent / MCD did not pass the order for regularization which was directed vide award dated 25.11.1995. Thus, the statement of respondent / MCD cannot be accepted for the reason that after the award, the workman did not turn up to the respondent. Since, the order of regularization was not issued and was not in service, therefore, he was not entitled for regularization.

20. The fact remains that neither the workman was regularized in compliance of award dated 25.11.1995, nor challenged by the respondent / MCD, however, continued to pay the salary to the workman up to his death, i.e., up to 2005.

21. However, the Ld. Tribunal erred in passing the second award whereby opined that the workman was neither entitled for regularization till the date he was a daily wager on master roll nor for regularization from the date of his initial appointment.

22. Undisputedly, the Management had relied upon its policy and it cannot be disputed that the workman had been working as a tanker driver right from the date of his initial appointment, i.e., 19.09.1986. Accordingly, he becomes entitled for regularization as a tanker driver taking into consideration the fact that he was in continuous employment from 19.09.1986 onward specially in view of the fact that vide award dated

25.11.1995 passed in ID. No. 125/1990, Ld. Tribunal held the workman was entitled to be reinstated with full back wages and continuity of service. Accordingly, the respondent was directed to regularize the workman from the date from which the MCD had regularized the other similarly situated daily wager working since 19.09.1986 and after assuring that no junior to the present workman would be regularized prior to the workman.

23. The respondent was further directed to pay the wages to the workman of a regular employee after the workman having been employed as a tanker driver and the difference in wages be paid within three months from the date of publication of the award, failing which, workman shall be entitled for interest @ 6% *per annum*.

24. In view of the facts recorded above, there was no occasion, before the Presiding Officer, Labour Court XVI, Karkardooma, Delhi to record that until and unless the order of regularization is passed, the petitioner is not entitled to any amount. In my considered opinion, if the respondent failed to pass the order and comply the award dated 25.11.1995, it is not the fault of the petitioner, whereas the father of petitioner continued to receive the salary till his death, i.e., up to 2005, whereas he was due for superannuation in the month of April, 2002. Thus, legally he remained in service till April, 2002.

25. In view of above, Respondent / MCD is directed to pay the petitioner the gratuity, leave encashment, pension and salary as applicable upon the petitioner.

26. I hereby make it clear that the workman received salary up to year 2005 for which he was not entitled to, as he technically retired on last day of

April, 2002. Therefore, respondent / MCD shall deduct the amount overpaid to the workman, while paying dues to the petitioner.

27. I note that the workman had been fighting for his rights since 1988, i.e., before the Labour Court, before the Industrial Tribunal and before this Court. The present petition is second round as this court is concerned, therefore, I direct the respondent / MCD to pay interest @ 9% *per annum* on the accounts noted above from the date it becomes due till the date of payment.

28. I here make it clear that the order passed by this Court shall be complied within 8 weeks, failing which the petitioner shall be entitled for interest @ 12% *per annum* on account of delayed payment.

29. In view of above order dated 18.02.2011 is hereby set aside.

30. Accordingly, the present petition is allowed on the above terms with no order as to costs.

SURESH KAIT, J

SEPTEMBER 12, 2014

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