

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

Reserved on: 04th January, 2018

Pronounced on: 11th June 2018

+ W.P. (C) 14315/2005 & CM No.10731/2005

D.T.C

..... Petitioner

Through: Ms. Manisha Tyagi, Advocate

versus

KISHAN LAL (MASON)

..... Respondent

Through: Mr. Narendra Gautam, Advocate with
respondent in person

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

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JUDGMENT

C. HARI SHANKAR, J.

1. Kishan Lal, the respondent before this Court in the present proceedings, was appointed, as a mason, with the petitioner-Corporation (hereinafter referred to as “the DTC”), on 22nd November, 1983, on daily wages @ ₹ 52.50 per day, payable monthly. Petitioner and respondent are *ad idem* that the respondent continued to work, for the petitioner, as mason, with what the petitioner terms “usual break in his service as per rules”, till 3rd February, 1993, on which date his services were verbally terminated. This led the respondent to initiate an industrial dispute, which culminated in the passing, by the learned Labour Court, of the impugned Award, dated 18th September, 2003, which held the termination of the services of the respondent to be

unjustifiable and illegal and, as a sequitur to the said finding, directed reinstatement of the respondent “with continuity of service, with full back wages from the date of his alleged termination”.

2. The present writ petition, by the DTC, is directed thereagainst. It merits mention that, consequent on the passing of the impugned Award by the Learned Labour Court, the petitioner reinstated the respondent in service, albeit on daily wages of ₹ 110.10 per day, *vide* order dated 20th July, 2005, even while challenging the said Award before this Court. The said order of reinstatement, therefore, states that the respondent’s “case for back wages and other consequential benefits will be decided as per the decision of the Hon’ble Court of law”.

3. Notice was issued, in the present case, on 2nd September, 2005. While doing so, this Court stayed the effect and operation of the impugned Award, subject to deposit, by the petitioner in this Court, of 50% of the back wages awarded by the learned Labour Court, to be retained in a fixed deposit renewable from time to time. The petitioner was also directed to deposit a sum of ₹ 7500/–, in this Court, towards litigation expenses of the respondent, which amount was to be released, in favour of the respondent, as and when he entered appearance, irrespective of the outcome of the writ petition. Consequent on the respondent entering appearance, release, of the said amount of ₹ 7500/–, in his favour, was directed, *vide* subsequent order dated 7th December, 2005.

4. CM 9092/2006, under Section 17-B of the Industrial Disputes Act, 1947 (hereinafter referred to as “the ID Act”) was also filed, by the respondent, in these proceedings, which came to be decided by this Court *vide* order dated 24th April, 2007. Taking stock of the fact that the petitioner had chosen to file the present writ petition, assailing the Award passed by the learned Labour Court, almost two years after it came to be passed, the petitioner was directed to pay, to the respondent, “the minimum wages/last drawn wages, whichever is higher from the date of publication of the award, i.e. w.e.f. 25.09.2004, till the respondent/workman was reinstated in service i.e. till 28.07.2005.” Simultaneously, the interim order of stay, passed by this Court on 2nd September, 2005, was made absolute.

5. The writ petition has now come up for hearing, and I have heard Ms. Manisha Tyagi, learned counsel for the petitioner and Mr. Narendra Gautam, learned counsel for the respondent, at length. The record of the learned Labour Court has also been requisitioned, and perused in detail.

6. With the above prefatory background, the facts may be delineated, in greater detail as under:

(i) On 22nd November, 1983, the respondent was appointed as a mason, with the DTC, on wages of ₹ 52.50/- per day, payable monthly. It is not in dispute that he continued serving

the DTC till 3rd February, 1993. As already noted hereinabove, the petitioner sought to contend, before the learned Labour Court, that the respondent continued, for the above period, “with usual break in his service as per rules”. The specifics of such “usual breaks” are not forthcoming; neither has the petitioner placed, on record, any rules, applicable to it, which permit engagement of daily wagers for years at a stretch, with breaks in service. It is worthwhile to note, in this regard, that employment of workman as “casuals, continuing them as such for years, which the object of depriving them of the status and privileges of permanent workmen”, is specifically enlisted as an “unfair labour practice”, within the meaning of the expression as defined in Section 2 (ra) of the Industrial Disputes Act, 1947 (hereinafter referred to as “the ID Act”). As such, it is difficult to understand how rules, applicable to a governmental corporation such as the petitioner, could actually permit employment of workmen for years on casual/daily wage basis, with artificial breaks in service. Be that as it may, no such rule, as already noted hereinabove, has been placed on record, or brought to my notice even during arguments in court, which would permit such a pernicious practice,.

(ii) Before proceeding further, it is also necessary to note an assertion, by the petitioner, in its pleadings before the learned Labour Court, that the engagement of the respondent, was for “specific periods to carry out specific works”. This assertion,

too, finds no support from the documents on record. The orders, whereby the respondent was engaged, from time to time, with the petitioner, are more or less stereotyped, and do not indicate that these engagements were for “specific works”, though they were for specific periods of time. All such orders are not on record; however, of the orders which have been exhibited before the learned Labour Court, one such order, dated 21st July, 1986 (Ex.WW-1/5), whereby the respondent was engaged for a period of 89 days, from 23rd July, 1986 to 19th October, 1986, may be reproduced, to cite an example:

“No.CWS_I/CL/14/86/2118

Dated:-21.7.86.

The following persons are hereby engaged as mason on daily rates of pay @ Rs.29.00 per day each for a period of 89 days i.e. from 23.7.86 to 19.10.86 (AN) on the terms and conditions enumerated hereunder:-

S.No.	Name	Father's name	Pay Token No.
1.	Sh.Ziley Singh		9473
2.	“Krishan Lal	Sh. Mool Chand	45486

- a) Their engagement is purely on temporary basis.
- b) Their services shall automatically stand dispensed with on 19.10.1986(AN).
- c) Their services can be dispensed with at any time without any notice & without assigning any reason therefor.
- d) They shall have to perform any duty whatsoever assigned to them, pertaining to other Class-IV employees.

e) They shall have to perform 8 ½ hrs duty in a day.

f) They will get free bus pass for travel from their residence to the place of duty and back in the Union Territory of Delhi.

g) They will be paid only for the days they actually perform their duties.

h) They will have to contribute towards E.S.I. Scheme as per rules.

They are directed to report to the S.O.(Civil), CWS-I, for duty.

(K.M.Khosla)

ADMINISTRATIVE OFFICER
(R&M)

(iii) Before the learned Labour Court, the respondent placed, as Ex.WW-1/3 to WW-1/45, various orders, whereby he was re-engaged, from time to time, for specific periods, by the petitioner. A tabular statement, setting out the periods for which the said orders were passed, may be presented thus:

Date of order	Exhibit No.	Period of Engagement	Number of days
10 th October, 1985	WW-1/3	10 th October, 1985 – 8 th December, 1985	60
21 st February, 1986	WW-1/4	21 st February, 1986 – 20 th May, 1986	89
21 st July, 1986	WW-1/5	23 rd July, 1986 – 19 th October, 1986	89
22 nd July, 1988	WW-1/6	23 rd July, 1986 – 22 nd August, 1986	30

24 th February, 1987	WW-1/7	25 th February, 1987 – 24 th March, 1987	29
22 nd May, 1987	WW-1/8	23 rd May, 1987 – 22 nd June, 1987	30
24 th June, 1987	WW-1/9	25 th June, 1987 – 24 th July, 1987	30
16 th September, 1987	WW-1/10	17 th September, 1987 – 16 th October, 1987	30
28 th October, 1988	WW-1/11	29 th October, 1988 – 28 th November, 1988	30
7 th December, 1988	WW-1/12	8 th December, 1988 – 7 th January, 1989	31
18 th January, 1989	WW-1/13	19 th January, 1989 – 31 st March, 1989	72
29 th March, 1990	WW-1/14	30 th March, 1990 – 28 th April, 1990	30
4 th April, 1989	WW-1/15	5 th April, 1989 – 4 th May, 1989	30
9 th May, 1989	WW-1/16	10 th May, 1989 – 9 th June, 1989	30
27 th July, 1989	WW-1/17	27 th July, 1989 – 25 th August, 1989	30
5 th September, 1989	WW-1/18	6 th September, 1989 – 5 th October, 1989	30
18 th October, 1989	WW-1/19	19 th October, 1989 – 18 th November, 1989	30
18 th July, 1990	WW-1/21	19 th July, 1990 – 17 th August, 1990	30
27 th February, 1991	WW-1/23	27 th February, 1991 – 26 th March, 1991	30
10 th September, 1990	WW-1/24	11 th September, 1990 – 10 th October, 1990	30
12 th October, 1990	WW-1/25	13 th October, 1990 – 11 th November, 1990	30
14 th November, 1990	WW-1/26	15 th November, 1990 – 11 th December, 1990	30
18 th December, 1990	WW-1/27	19 th December, 1990 – 17 th June, 1991	30
26 th December, 1989	WW-1/28	27 th December, 1989 – 24 th February, 1990	60
23 rd January, 1991	WW-1/29	24 th January, 1991 – 22 nd February, 1991	30

2 nd April, 1991	WW-1/31	3 rd April, 1991 – 2 nd May, 1991	30
8 th May, 1991	WW-1/32	9 th May, 1991 – 7 th June, 1991	30
19 th June, 1991	WW-1/33	20 th June, 1991 – 19 th July, 1991	30
13 th August, 1991	WW-1/34	14 th August, 1991 – 12 th September, 1991	30
8 th May, 1991	WW-1/36	9 th May, 1991 – 7 th June, 1991	30
2 nd January, 1992	WW-1/37	3 rd January, 1992 – 24 th January, 1992	22
3 rd February, 1992	WW-1/38	4 th February, 1992 – 4 th March, 1992	30
13 th March, 1992	WW-1/39	13 th March, 1992 – 31 st March, 1992	19
21 st April, 1992	WW-1/40	21 st April, 1992 – 20 th May, 1992	30
10 th June, 1992	WW-1/41	10 th June, 1992 – 4 th July, 1992	25
13 th July, 1992	WW-1/42	14 th July, 1992 – 12 th August, 1992	30
3 rd September, 1992	WW-1/43	4 th September, 1992 – 3 rd October, 1992	30
1 st January, 1993	WW-1/45	1 st January, 1993 – 30 th January, 1993	30

(iv) As is apparent, the above orders do not cover the entire period during which the respondent claims to have been engaged by the petitioner. However, the respondent has filed, as Ex. WW-1/1 collectively, wage slips, denoting payment on monthly wages, to him, by the petitioner, for the months February, 1985, March, 1985, June, 1985, September, 1985, October, 1985, November, 1985, February, 1986, March, 1986, April, 1986, May, 1986, July, 1986, August, 1986, October, 1986, June, 1989, July, 1989, August, 1989,

October, 1989, November, 1989, January, 1990, February, 1990, March, 1990, April, 1990, May, 1990, June, 1990, July, 1990, August, 1990, September, 1990, October, 1990, November, 1990, December, 1990, January, 1991, February, 1991, March, 1991, April, 1991, May, 1991, June, 1991, July, 1991, August, 1991, September, 1991, January, 1992, February, 1992, March, 1992, April, 1992, May, 1992, June, 1992, July, 1992, August, 1992, September, 1992, October, 1992, November, 1992, December, 1992 and March 1993, as well.

(v) Exs. WW-1/1 to WW-1/45, seen holistically, make it clear that the respondent, was, in fact, engaged by the petitioner, nearly continuously for the period 22nd November, 1983 to 3rd February, 1993, on daily wage basis.

(vi) It appears that, in March, 1990, trade tests and interviews were held, for temporary appointment to the post of Mason in the DTC. The respondent was also called, to attend the trade test, for the said purpose, *vide* communication dated 8th March, 1990 (Ex. MW-1/1). It is accepted, by the petitioner, that the petitioner qualified in the said trade test, whereupon he was offered temporary appointment to the post of Mason, *vide* order, dated 4th February, 1991 (Ex. MW-1/2) issued by the petitioner. Condition No. 2 of the terms and conditions attached to the said order required the appointees to “undergo medical examination

conducted by the Medical Board of the DTC and produce a Certificate of Fitness”.

(vii) The respondent replied to the aforementioned communication, dated 4th February, 1991, *vide* his letter dated 15th February, 1991 (Ex. WW-1/3) specifically accepting the terms and conditions subject to which the appointment had been offered to him.

(viii) It appears that, pursuant thereto, the medical examination of the respondent was conducted by the Medical Board of the DTC, which issued a Certificate, dated 29th February, 1991 (Ex. WW-1/ME), certifying that the Board “could not discover any disease (communicable or otherwise) constitutional affection infirmity, except defective, distinct and near vision and convergent squint in rt. eye”. At the foot of the said Certificate, it was stated that the respondent was “unfit”.

(ix) The respondent has disputed the correctness of this Certificate, and has, in support of his case, sought to submit that he was subsequently examined by the ESI Hospital as well as by the Guru Nanak Eye Centre, both of whom declared him “fit for mason work”. (The prescriptions of the ESI Hospital and the Guru Nanak Eye Centre, both of which bear the said endorsement, stand collectively exhibited, before the learned Labour Court, as Ex. WW-1/2.) As such, the respondent has

sought to assert that the “unfit” certificate given by the Medical Board of the DTC was biased and could not be relied upon. *Per contra*, it has been vehemently contended, by Ms. Manisha Tyagi, learned counsel appearing for the DTC, that it was not open to the respondent to rely on medical certificates issued by “outside” hospitals, in preference to the certificates issued by the DTC’s own Medical Board. Ms. Tyagi emphasises, in this regard, the fact that the respondent himself had accepted, in writing, the terms and conditions of his appointment, which specifically required him to obtain a certificate of fitness from the Medical Board of the DTC.

(x) Despite the above certification, by its own Medical Board of the respondent as “unfit”, it is appears that the DTC continued, nevertheless, to draw, from the respondent, the work of mason till 3rd February, 1993, when his services were verbally terminated. It may be noted, here, that although no written order, terminating the respondent’s services, is available on record, the fact of termination, of his services, by the petitioner, on 3rd February, 1993, is, however, not disputed by the respondent. The petitioner and respondent are also *ad idem* that, while terminating the respondent’s services, the formalities of Section 25F of the ID Act, i.e., one month’s written notice and compensation as required by clause (1)(b) thereof, were not fulfilled by the petitioner.

(xi) Aggrieved by the aforesaid termination of his services by the petitioner, the respondent sent a demand notice to the petitioner, on 22nd March, 1990 and followed it up by initiating an industrial dispute, which was referred by the Secretary (Labour), Government of National Capital Territory of Delhi, for adjudication to the learned Labour Court, with the following single term of reference:

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

(xii) Consequent, thereto, the respondent filed his Statement of Claim, before the learned Labour Court, assailing the termination, of his services, by the petitioner and praying, consequently, for reinstatement with full back wages continuity of service.

(xiii) The DTC filed its written statement, in response to the Statement of Claim by the respondent, in which it adopted the stand that the respondent had been “engaged as a mason on daily rates of pay with the management from time to time, with usual breaks in his service as per rule for a specific period to carry out the specific work of Civil Engineering Department of this Department”. Following thereto, as the respondent had been found “unfit” by the Medical Board of the DTC, for temporary appointment as mason (though the written statement seeks to

contend that the selection was for appointment on monthly rates of pay), it was submitted that continuance of the respondent, in the service of DTC, would be contrary to the rules and regulations applicable to it. As such, the written statement prayed that the respondent's claim be rejected.

(xiv) The respondent filed a rejoinder, to the aforementioned written statement of the petitioner; however, nothing substantial was pleaded therein.

(xv) The respondent led his own evidence, as WW-1, whereas the petitioner, equally, cited the evidence of only Ms. Swantantra, Senior Manager, as its witness MW-1. Affidavits-in-evidence were filed by the respondent, as WW-1, and by MW-1 Ms. Swantantra, and they were respectively cross-examined by the opposite parties.

(xvi) The respondent, in his affidavit-in-evidence, essentially reiterated the contents of his Statement of Claim, asserting that he had continuously served the petitioner from 21st November, 1983 till 3rd February, 1993, without interruption, except for artificial breaks, and that it was not open for the petitioner, therefore, to terminate his services without any valid reason. He also contested the correctness of the declaration, by the Medical Board of the DTC, that he was "unfit". Nothing substantial was

elicited during cross-examination, of the respondent, before the learned Labour Court.

(xvii) MW-1 Ms. Swantantra, Senior Manager, DTC, stressed, in her affidavit-in-evidence, that the respondent having, *vide* his letter dated 15th February, 1991 (*supra*), accepted all terms and conditions, subject to which he was offered temporary appointment as mason, it was not open, to him, to challenge his termination, once he had been found unfit by the Medical Board of the DTC; far less could he maintain a claim for regular appointment. In her cross-examination, however, MW-1 Ms. Swantantra admitted the fact that the respondent had continuously worked with the DTC till 2nd February, 1992. She sought to defend his termination, on the ground that he had been found unfit by the Medical Board of the DTC. She further sought to contend that, as the respondent was a daily wager, no notice, pay, or retrenchment compensation was required to be paid, to him, at the time of his termination.

(xviii) Consequent to the adducing of evidence as noted hereinabove, and, after hearing the arguments addressed by the rival parties, the learned Labour Court passed the impugned Award, dated 18th September, 2003, declaring the termination, of the services of the respondent, by the petitioner, to be illegal and unjustified and, consequently, directing his reinstatement with continuity in service and full back wages. A single issue

was framed, by the learned Labour Court, which read “As per terms of reference”. Insofar as the validity of the termination of the respondent’s services was concerned, the learned Labour Court adopted a somewhat peculiar reasoning, opining that, as no appointment letter had been issued to the respondent, it could not be said that he had ever been appointed by the petitioner, so that there could be no question of termination of his services. Following thereupon, the learned Labour Court held, in a starkly contradictory vein that, as the respondent had served the petitioner for the long period of 10 years, “he could not have been removed without complying provisions of Sec.25-F of the I.D. Act.”. As no compensation or notice, as required by Section 25-F of the ID Act, had been given to the respondent, the learned Labour Court held, in conclusion (as already noted hereinabove), that the termination of his services was illegal and unjustified. In view of the fact that the respondent had served the DTC for ten years, the learned Labour Court further went on to declare that he was fit for the post of Mason, and directed the DTC, consequently, to reinstate him with continuity of service and full back wages w.e.f. 3rd February, 1993.

(xix) By means of the present proceedings, the petitioner assails the aforementioned award dated 18th September, 2003.

7. Having heard learned counsel and perused the record, I agree with the finding, of the learned Labour Court, that the termination of

the respondent's services by the DTC, could not sustain in law, albeit for reasons other than those adduced by the learned Labour Court.

8. I confess my inability to agree with the reasoning, of the learned Labour Court, that the petitioner was never appointed in service, and consequently, could not have been terminated, as termination without appointment is unknown to law. The finding that the respondent was never appointed in served by the DTC is obviously incorrect, in view of the periodical letters of appointment, from time to time, which were exhibited and formed part of the record before the learned Labour Court. Besides, the learned Labour Court apparently overlooked the fact that there was no dispute about the fact that the respondent had, in fact, been appointed as Mason on daily wages by the petitioner on 22nd November, 1983. This fact having come on record by way of affidavits-in-evidence, both by the respondent, testifying as WW-1 as well as by MW-1 Ms. Swantantra, and having remained undisturbed in cross-examination, the learned Labour Court obviously erred in returning a finding that the respondent had never been appointed by the petitioner. Besides, the said conclusion is contrary to the finding, immediately following in the impugned Award, to the effect that the termination of the respondent's services was illegal, being violative of the Section 25-F of the ID Act. It is difficult to understand how the learned Labour Court could, in one breath, hold that, as the respondent had never been appointed as mason by the petitioner, his services as mason could not have been terminated by it, and, in the very next breath, that the termination of the respondent's services, by the

petitioner, infringed Section 25-F of the ID Act. These findings appear, to me, to be mutually inconsistent.

9. I am, nevertheless, in agreement with the conclusion of the learned Labour Court, that the termination of the services of the respondent, by the petitioner, on 3rd February, 1993, was unsustainable in law.

10. The reason is obvious.

11. It is not in dispute that the respondent worked for the petitioner, continuously for the period 22nd November, 1993 to 3rd February, 1993.

12. Section 25F of the ID Act reads thus:

“25F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

13. “Retrenchment” is defined in clause (oo) of Section 2 of the ID Act, thus:

“(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) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(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; or

(c) termination of the service of a workman on the ground of continued ill-health;”

All species of the termination of workman, by the employer, therefore, qualify as “retrenchment”, save and except those which conform to sub-clauses (a), (b), (bb) and (c). Of these, it is obvious that sub-clauses (a) (which deals with voluntary retrenchment), (b) (which deals with retirement on superannuation) and (bb) (which deals with

termination as a result of non-renewal of the contractual employment) of Section 2 (oo) do not apply.

14. Clause (c), which deals with termination of the services of a workman “on the ground of “continued ill-health”. These words are instructive, and of considerable significance in the facts of the present case.

15. The expression “ill-health” is comprehensive and all-encompassing in nature, and good cover any ailment, from a common cold to a terminal illness. The statute, however, does not exempt termination of the service of a workman, *on the ground of ill-health*, from the ambit of the expression “retrenchment”; it is only termination, *on the ground of continued ill-health*, that is so exempt. The use of the word “continued” has to be regarded as deliberate and with a purpose, the position, in law, that the legislature indulges neither in surplusage, nor in tautology, being trite and well settled. To this court, it is clear that the intention of the legislature, in drafting clause (c) in Section 2 (ra) of the ID Act, is to except, from the parameters of the expression “retrenchment”, only cases in which the workman has, over a period of time, been ailing, i.e. suffering from “continued ill-health”, the ailment being such as would incapacitate him from discharging his duties. The expression “continued ill-health” is not an expression of art; it is a commonly understood and well-comprehended phrase, and has, therefore, to be accorded its commonly understood, and well-comprehended, meaning, always

bearing in mind the fact that the ID Act is a labour-centric legislation. Where, therefore, the workman has, over a period of time, been suffering from “continued ill-health”, and, “on that account”, his services are terminated, the management may not have to suffer the rigours of Section 25F; else, the provision would kick in with full force, and mandate the grant, to the workman, of one month’s written notice, indicating the reasons for retrenchment, or wages for the period of notice, as well as compensation, equivalent to 15 days’ average pay, for every year of completed continuous service, or any part thereof in excess of 6 months, as well as notice, in the prescribed manner, to the appropriate Government.

16. Viewed thus, there is, in the present case, nothing, on record, to indicate either that the respondent suffered from “continued ill-health”, or that his services were terminated, by the DTC, on that ground. In fact, the very fact that the respondent had, without slur or blemish, served the petitioner continuously for ten years, indicates, on the face of it, that the respondent could not be said to be suffering from “continued ill-health” irrespective of the merits or otherwise, of the certificate issued by the Medical Board of the DTC.

17. In these circumstances, the termination of the services of the respondent, by the petitioner, clearly qualified as “retrenchment”, within the meaning of Clause (oo) of Section 2 of the ID Act.

18. Section 25-F unequivocally prohibits retrenchment of any workman employed in any industry “who has been in continuous service for not less than one year under an employer” without affording, to the workman, one month notice or pay in lieu thereof, as well as retrenchment compensation. It is not in dispute that the petitioner did not comply with these requirements, while terminating the services of the respondent.

19. Sub-clause (a) of Clause (2) of Section 25-B of the ID Act treats a workman as having been “in continuous service” under an employer “for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than:

- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
- (ii) two hundred and forty days, in any other case.”

In the case of the respondent, it is obvious that the latter requirement, i.e. of having worked, for the petitioner, for 240 days in 12 calendar months, would apply.

20. The period of service, for which the respondent was engaged by the DTC, as evidenced by Exs. WW-1/1 to WW-1/45, to which reference has already been made hereinabove, clearly establishes that the respondent had, in fact, served the petitioner continuously for more than 240 days, for more years than one. As such, it was not

permissible, for the petitioner, to retrench his services without complying with the requirements of Section 25-F of the ID Act.

21. The sequitur, to the above analysis is, inevitably, that the termination, of the services of the respondent by the petitioner, must be held to violate Section 25-F of the ID Act, and, consequently, to be illegal. The finding, in the impugned Award of the learned Labour Court, to the effect that the termination of the respondents services, by the petitioner, was illegal and unjustified, being in violation of Section 25-F of the ID Act is, therefore, unexceptionable.

22. To what relief, then, would the respondent be entitled? The impugned Award, of the learned Labour Court, holds that the respondent was “fit for the post of mason” and directs the petitioner to reinstate him as such, with continuity of service and full back wages from the date of his termination. Though the said directions do not, expressly, refer to “regularization”, the grant, to the respondent, of the benefit of continuity of service, would necessarily involve his being regularized. A reading of the writ petition indicates that the petitioner, too, has understood the directions, contained in the impugned award, as requiring it to reinstate and regularize the respondent as mason.

23. In *Secretary, State of Karnataka vs. Umadevi*, (2006) 4 SCC 1, a Constitution Bench of the Supreme Court frowned on the practice of regularizing persons employed on casual/daily wage/ad hoc basis, merely because of their having continued, as such, for long periods of

time. The extent to which *Uma Devi (supra)* affects the power of Labour Courts and Industrial Tribunals to direct regularization, came up for consideration in several decisions, the niceties of which this Court has had occasion to grapple, in its judgment, dated 8th March, 2018 in W.P.(C) No.225/2005 (B.S.N.L. vs. Smt. Shashi Kanta Rishi). A brief recapitulation of the legal position emerging from the said decisions would be apposite, at this juncture.

24. A two Judge Bench of the Supreme Court, in *Maharashtra State Road Transport Corporation vs Casteribe Rajya Parivahan Karmchhari Sangathana, (2009) 8 SCC 556*, was concerned with the award of an Industrial Court, directing grant of permanency, to a workman who had been engaged on casual basis. *Uma Devi (supra)* was pressed into service by the Corporation in that case. The Supreme Court categorically held that employing persons on casual basis for years, with the object of depriving them of the status and privileges of permanent employees, was an unfair labour practice and that, once such an unfair labour practice was shown to have taken place, Labour Courts were empowered to issue preventive, as well as positive, directions to the erring employer. The power of the Labour Court and Industrial Tribunal to do so, it was held, was not addressed in *Uma Devi (supra)*, which dealt with the jurisdiction of the High Court, under Article 226 of the Constitution, and of the Supreme Court, under Article 32 of the Constitution, to direct regularization. As such, it was opined that *Uma Devi (supra)* did not denude Industrial Tribunals and Labour Courts of the statutory powers conferred on

them by the ID Act to order permanency of workers who had been victims of unfair labour practice.

25. *B.S.N.L. vs Bhurumal, (2014) 7 SCC 177*, again by a Bench of two learned Judges of the Supreme Court, too, dealt with directions, issued by the Industrial Tribunal, for reinstatement of the respondent-workman, along with back wages. Though the said decision did not involve any question of regularization of the workman, as such, observations were entered, by the Supreme Court, in its judgment, to the effect that, as the workman was working on daily wage basis, he had no right to seek regularization even after reinstatement, relying on *Uma Devi (supra)*.

26. *Hari Nandan Prasad vs Employer I/R to Management of Food Corporation of India, (2014) 7 SCC 190*, again, dealt with two Awards, which held the termination of the workman, in that case, to be violative of Section 25F of the ID Act (*supra*), and, consequently, directed his reinstatement along with regularization in service. It was observed, by the Supreme Court, that the principle in *Uma Devi (supra)*, that regularization of a daily wager, who had not been appointed after undergoing a proper selection procedure, was impermissible, as it was violative of Article 14 of the Constitution of India, would also apply to Industrial Tribunals. Even so, the Supreme Court went on to clarify that, save and except for cases in which directing regularization would violate Article 14 of the Constitution of India, the power to direct regularization in other appropriate cases

continued to vest in Industrial Tribunal/Labour Court even after *Uma Devi (supra)*. It was further opined, in the said judgment, that permanency could not be conferred, where such conferment would require creation of posts, which lay exclusively within the domain of the executive. Where, however, posts were in existence, it was held that the Industrial Tribunal/Labour Court would be entirely within its authority in directing regularization. It was further held, in the said decision, that the power, to grant the benefit of regularization, to casual employees, would properly be exercised, by Industrial Tribunals/Labour Courts, only where the employer was found to have indulged in unfair labour practice by not filling up the posts even when they were available, and continuing to employ workers on temporary/daily wage basis, while extracting, from them, the same work as was being rendered by regular employees, at much lesser wages.

27. The next decision on the point, again by two learned Judges of the Supreme Court, was *Ajaypal Singh vs Haryana Warehousing Corporation, (2015) 6 SCC 321*. There, too, the services of the appellant-workman were terminated in contravention of Section 25-F of the ID Act, resulting in directions being issued by the learned Labour Court, for his reinstatement with full back wages. The matter travelled, inevitably, to the Supreme Court, where *Uma Devi (supra)*, predictably, was invoked by the respondent-Corporation. The Supreme Court echoed the view earlier expressed in *Maharashtra State Road Transport Corporation (supra)*, holding that *Uma Devi*

(*supra*) was not concerned, in any manner, with the provisions of the ID Act, or with the powers of the Industrial Tribunals and Labour Courts thereunder. Neither, it was observed, did *Uma Devi (supra)* consider the effect of unfair labour practices being adopted by the employer. The ID Act, it was noticed, specifically proscribed adoption of unfair labour practices, exposing employers, guilty thereof, to punitive criminal consequences. Having expressed its view thus, the Supreme Court went on to hold that, where posts were not available, it would be impermissible for Labour Court to direct regularization merely because the workman in question had continued on casual/daily wage/ temporary basis for a number of years. However, where similarly situated workmen had been regularized by the same employer, non-regularization of others, it was observed, would violate Article 14 of the Constitution of India. In such cases, the power of the Labour Court and Industrial Tribunal, to direct regularization, was upheld.

28. Close on the heels of *Ajaypal Singh (supra)* came *Sudarshan Rajpoot vs U.P. Road Transport Corporation, (2015) 2 SCC 317*, in which the workman, who was engaged on contract basis, was removed from service consequent to his suffering an accident. The Labour Court held that the termination of the respondent was illegal and directed his reinstatement with full back wages. The matter travelled to the Supreme Court, which held that the act of the respondent-Corporation, in continuing the workman on contractual basis, during the life of which he had rendered more than two hundred forty days

for three years, amounted to “unfair labour practice” and was statutorily prohibited. In such circumstances, the Supreme Court held that the workman was eligible to be treated as permanent. In view of the law earlier enunciated in *Maharashtra State Road Transport Corporation (supra)*, it was held that the reliance, by the management, on *Uma Devi (supra)* was misguided. The direction of the learned Labour Court, to reinstate and regularize the workman in service, was, therefore, upheld.

29. The power and authority of the Industrial Tribunal/Labour Court to direct regularization, where unfair labour practice, by the employer was found to have taken place, also stands recognized and underscored by another Two-Judge Bench of the Supreme Court in *Durgapur Casual Workers Union vs FCI, (2015) 5 SCC 786*.

30. *ONGC Ltd. vs Petroleum Coal Union Labour, (2016) 6 SCC 494*, again by two learned Judges of the Supreme Court, directly addressed the issue of the jurisdiction of the Labour Court/Industrial Tribunal to direct regularization of workmen who had completed two hundred and forty days of service in a calendar year. The High Court in that case, held that ONGC was guilty of unfair labour practice by retaining workmen on temporary basis and upheld the Award, of the Industrial Tribunal whereby their regularization was directed. The matter travelled to the Supreme Court, which, at the very outset (in para 27 of its report) categorically affirmed the power of the Industrial Tribunal, to direct regularization in such circumstances. It was held,

in this regard, that the Tribunal had “every power to adjudicate an industrial dispute and impose upon the employer new obligations to strike a balance and secure industrial peace and harmony between the employer and workmen and ultimately deliver social justice which is the constitutional mandate as held by the Constitution Bench of this Court in a catena of cases.” Following thereupon, the Supreme Court categorically ruled that the Tribunal had “rightly passed an award directing the corporation to regularise the services of the workmen concerned”. The specific plea, of ONGC, that the workmen concerned were appointed without following due procedure under the recruitment rules was also repelled, by the Supreme Court, in the following words (occurring in para 31 of the report):

“The plea of the Corporation that the reason for not regularising the workmen concerned under the Certified Standing Orders of the Corporation is allegedly due to the fact that the appointment of the workmen concerned was made without following due procedure under the Recruitment Rules and that their appointments were illegal. This plea cannot be accepted by us in view of the legal principle laid down by this Court in the above decision, wherein it is clearly laid down that the Corporation cannot deny the rights of the workmen by taking the plea that their initial appointment was contrary to Articles 14 and 16 of the Constitution.”

In view of the fact that the workmen had completed more than 240 days of service in twelve calendar months, it was held that they were entitled for regularisation.

31. While all the above decisions were rendered by Benches of two learned Judges of the Supreme Court; a three-Judge Bench of the

Supreme Court considered the same issue in *State of Jammu and Kashmir vs District Bar Association*, (2017) 3 SCC 410 and affirmed the view taken in *Maharashtra State Road Transport Corporation (supra)*, upholding the power of Labour Courts and Industrial Tribunals to direct regularization of workmen who had been continued for long period of time on casual/temporary basis without according them permanency, and that *Uma Devi (supra)* did not affect this power in any manner.

32. The offshoot, of all these decisions, clearly is that, while the Industrial Tribunal and Labour Court undoubtedly possess the jurisdiction to direct regularization of the workman, without being inhibited in this regard, by *Uma Devi (supra)*, such direction could legitimately be issued only where two conditions were cumulatively satisfied, viz., firstly, that the employer is guilty of an “unfair labour practice”, qua the workman, or workmen concerned, and, secondly, that there exists vacancies, against which the said workman/workmen could be regularised or permanently absorbed. In the absence of such vacancies being available, any direction to the employer to regularize the services of the workman, would require creation of posts, which cannot, ordinarily, be ordained by judicial fiat, as held, *inter alia*, in *Maharashtra State Road Transport Corporation (supra)*.

33. “Unfair labour practice”, it may be noted, is defined, in clause (ra) of Section 2 of the ID Act as meaning “any of the practices specified in the Fifth Schedule”, and, among the unfair labour

practices enumerated in the Fifth Schedule, Serial Note 10 covers the act of an employer “to employ workmen as ‘*badlis*’, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.”

34. This Court is, therefore, convinced that the Labour Court, or Industrial Tribunal, is not possessed of the jurisdiction to straightaway direct regularisation of workmen, on the ground that they have been continued as *badlis*, temporaries, or casuals, for long periods of time. Findings, to the effect that the employer indulged in unfair labour practice, within the meaning of Serial No. 10 of the Fifth Schedule to the ID Act, and that vacancies, against which the workmen could be regularly appointed/absorbed, exist, would need to be returned, before any such direction is issued. Else, the words “with the object of depriving them of the status and privileges of permanent workmen”, in Serial Note 10 of the Fifth Schedule to the ID Act, would stand reduced to a redundancy.

35. Of course, the “object” referred to, in Serial No 10 of the Fifth Schedule to the ID Act, being essentially reflective of a state of mind, the Labour Court/Industrial Tribunal may not be required, in every case, to embark on a detailed psychoanalytical exercise, and it may be possible, where the workmen have continued as casuals for long, to infer the existence of the requisite *mens rea*. One may refer, profitably, in this context, to the following passage, from ***Regional Manager, SBI vs Mahatma Mishra, (2006) 13 SCC 727***:

“Unfair labour practice is not to be readily inferred. Before a conclusion in that behalf is drawn, the conditions precedent therefor must be satisfied. The Labour Court failed to show as to how the appellant can be said to have taken recourse to unfair labour practice. *It was not a case where the respondent was being appointed consistently for a number of years with artificial breaks.* It was also not a case where the purport and object for such appointment was to violate the provisions of the Industrial Disputes Act.”

(Emphasis supplied)

While, therefore, in cases (such as the present) where the workman is continued, for a long period of time, on casual basis with artificial breaks, “unfair labour practice”, on the part of the employer, may be inferred, the Labour Court/Industrial Tribunal would be required, even in such cases, to so infer, and return an appropriate finding of the existence of unfair labour practice, based on such inference.

36. In the present case, the respondent-Workman continued as Mason, on “casual”/daily wages basis, for almost ten years, from 22nd November, 1983 till 3rd February, 1993, and it is nobody’s case that the manner of discharge, by him, of his duties, was, at any stage, found wanting. In fact, it is borne out from the record that, even after he had been certified “unfit”, by the Medical Board of the DTC, for appointment as “mason”, he continued to work, in the same capacity, again without any complaint from his employer at any stage. Though the DTC has, in its pleadings before the learned Labour Court, sought to contend that the periodical engagement, of the respondent, with the “usual breaks in service”, was “as per rules and regulations” applicable to the DTC, not a single such rule, or regulation, has been

produced or even cited, either before the learned Labour Court, or before this Court. I may reiterate that any such rule or regulation, even if it existed, would be perilously liable to evisceration, as infracting Article 21 of the Constitution of India. The right to peaceful existence, which subsumes, in itself, security of home and hearth, stands guaranteed to every Indian citizen thereby. The pressure and agony of having to serve, for over ten years, on daily wages, with the unsheathed Damoclean sword hanging perilously overhead, cannot be imagined, or envisioned, by one who does not suffer it. There is not a whisper of an averment, anywhere in the record of the learned Labour Court, or in the record of the present writ petition, to explain why a public Sector undertaking such as the DTC could not, when it admittedly required the services of the respondent for as long as a decade, offer him the security and stability of regular employment. Startlingly, according to the DTC, the offer of appointment, extended to the respondent in 1990, was also for engagement on daily wages. Non-regularisation of the respondent, while extracting regular work from him on daily wages appears, therefore, so far as the DTC was concerned, to have been regarded as predestined. *Ex facie*, therefore, it appears that, in fact, no rule or regulation, permitting such a pernicious practice, exists, and that the continuance, of the respondent, on casual basis for such an inordinately long period of time, was entirely attributable to the vagaries and whims of the DTC.

37. Interestingly, it was even sought to be contended, in the written statement filed before the learned Labour Court, as also in the present

writ petition, that the periodical engagement of the respondent was against “specific works”, whereas, in fact, none of the periodical orders of engagement of the respondent contained any such recital. These submissions, on the part of the DTC, therefore, appear to have been made solely so as to justify its absolutely unconscionable act of retaining, on daily wages, the respondent-workman, for over 10 years, while extracting, from him, the regular work of mason. Applying *Mahatma Mishra (supra)*, it is apparent that the DTC is guilty, in the present case, of having resorted to “unfair labour practice”.

38. Was, then, the learned Labour Court justified in directing grant of full back wages, with continuity of service, to the respondent-workman?

39. The respondent having served the petitioner, as mason, for over ten years, and having, in fact, been offered temporary appointment as mason on 8th March, 1990, it cannot, very well, lie in the mouth of the petitioner to contend that no vacancy, of mason, existed, in which the respondent could be accommodated. I am not prepared to countenance the declaration, by the Medical Board of the petitioner, of the respondent as “unfit”, as a hurdle thereto. Allowing the said Certificate, of the Medical Board, to divest the respondent of his right to regularization as mason would, in my view, result in manifest travesty of justice, and would result in the petitioner being allowed to capitalize on its own wrong.

40. That apart, it is unclear as to how defective distant or near vision, or a squint in one eye, would ineffectively inhibit the manner in which the respondent would be discharging his duties. In any event, the fact that the respondent actually served the petitioner, as mason, from November, 1983 till February, 1993 and, thereafter, from 2005 till the date of his superannuation, without any fault being found with the manner in which he was working, belies any possibility of the ocular handicap, if any, of the respondent, operating as an impediment in the effective discharge by him, of his duties, as mason. Apparently, the DTC was only seeking to capitalise on its superior bargaining power, by subjecting the respondent to a “medical examination”, by its own Medical Board, obtaining his consent, thereto by effectively dangling, before him, the carrot of temporary appointment, and, thereafter, disqualifying him on medical grounds, after he had served the petitioner, for nearly a decade, in the very same capacity. To a specific query, by me, as to how it could be said that the respondent was “unfit” to work as mason, when he had satisfactorily discharged his duties, as mason, for over ten years, there was, predictably, no response from learned counsel for the petitioner.

41. Judicial notice may, in this context, be also legitimately taken, of the fact that the workman was certified as “fit for work as mason”, both by the ESI Hospital as well as by the Guru Nanak Eye Centre (Ex. WW-1/2). These were both Government Hospitals. Of these, the ESI Hospital functions under the aegis of the Employees State Insurance Act, 1948, and was specifically meant to cater to the

medical needs of workmen in Government undertakings. It is possessed, therefore, of statutory colour and complexion. It cannot be presumed that these Hospitals, especially the ESI Hospital, would dole out certificates of fitness, specifically certifying the fitness to discharge work relating to a particular vocation, for the mere asking. The certificates, too, obfuscate the acceptability, of the certificate given by the Medical Board of the DTC, certifying the workman, who had already worked, satisfactorily, as mason, with the DTC itself, for over 10 years, and continued to work, as mason, even after issuance of the said certificate, to a considerable extent. No attempt was made, by the DTC, either before they learned Labour Court, or before this Court, to question the credibility of the said certificates, issued by the ESI Hospital and the Guru Nanak Eye Centre.

42. I am unable, therefore, to find any reason, far less justification, to interfere with the impugned Award, or the directions contained therein. I concur with the view, of the learned ASJ, that the respondent would be entitled, in law, *to full wages, as was being paid to regular masons in the employment of the DTC, during the entire period from the date of his termination, i.e. 3rd February, 1993, till the date of his superannuation, as well as to retiral benefits, as were being granted to regular masons, computed on the basis thereof.*

Conclusion

43. The writ petition is, consequently, dismissed. The petitioner is directed to disburse, to the respondent, the entire amount due to him, computed in accordance with para 42 *supra*, within a period of one month from the date of availability of a certified copy of this judgement. Further retiral benefits would continue to be disbursed, to the respondent, on the same basis.

44. There shall be no order as to costs.

**C.HARI SHANKAR
(JUDGE)**

**JUNE 11, 2018
rk/dsn**