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

*Judgment Reserved on: August 13, 2015*
%        *Judgment Delivered on: August 14 , 2015*

\+        **LPA 831/2013**

MANISH & CO ..... Appellant
Represented by: Mr.Anshul Masih, proxy Adv.

versus

SHRI DEVENDER KUMAR MISHRA ..... Respondent
Represented by: Mr.K.C.Dubey, Mr.Atul Tripathi, Advs.

\+        **LPA 234/2014**

SHRI DEVENDER KUMAR MISHRA ..... Appellant
Represented by: Mr.K.C.Dubey, Mr.Atul Tripathi, Advs.

versus

M/S MANISH & CO ..... Respondent
Represented by: Mr.Anshul Masih, proxy Adv.

**CORAM:**
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**
**HON'BLE MS. JUSTICE MUKTA GUPTA**

**MUKTA GUPTA, J.**

1. M/s. Sockieting Tea Co. Pvt. Ltd. company incorporated under the Companies Act with the Registrar of companies at Kolkata took over the proprietorship firm M/s. Manish & Co. in 1995 with the result M/s. Manish & Co. became a unit of the parent company under the same management. Devender Kumar Mishra was appointed as Clerk-cum-Typist vide the appointment letter dated November 13, 1976 at a salary of ₹285/- per month.

No other conditions were stipulated in the employment letter dated November 13, 1976. It is the case of M/s. Manish & Co. that it took the decision to close down its Delhi unit in the exigencies of business and thus Devender Mishra was transferred to their head office at Kolkata on September 30, 1994. The order of transfer reads as under:

> "ORDER OF TRANSFER
>
> This is to inform you that due to exigencies of business your services are no longer required at our Delhi office. Your services stand transferred to our Calcutta office with immediate effect.
>
> You are therefore required to report immediately to our head office at Calcutta at the address given below:
>
> MANISH & CO.
> A unit of Sockieting Tea Co. Pvt. Ltd.
> 23/24, Radha Bazar Street
> Calcutta 700 001.
>
> You are required to report at the above stated office at Calcutta latest by 7th of October, 1994.
>
> Yours faithfully
>
> Pre Pro Manish & Co.
> Sd/-
> (V.K. Vaid)"

2. Devender Mishra protested against the said transfer being illegal, not stipulated in his appointment letter and sought cancellation of the transfer order so that he could join his duty in Delhi vide letter dated October 05, 1994 followed by subsequent communications between M/s. Manish & Co. and Devender Mishra. In the letter dated October 22, 1994 for the first time Manish & Co. came up with the plea that there is no business activity of the management at Delhi at present and the office had been closed, thus

Devender Mishra stood transferred to Kolkata with effect from October 01, 1994. An industrial dispute was raised by Devender Mishra claiming that his services were terminated illegally whereas M/s. Manish & Co. claimed that he abandoned the job having not joined at Kolkata.

3. On the claim of Devender Mishra the following reference was sent for adjudication to the learned Labour Court:

> "Whether Shri Devender Mishra abandoned his job on transfer or his services 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?"

4. The learned Labour Court noted that admittedly relationship of employer-employee existed between the parties and Devender Mishra was performing his duties in the management office at Delhi. Further the fact that he was transferred from Delhi office to the management head office at Kolkata vide order dated September 30, 1994 was also not disputed. However, since there was no reference as to whether the transfer was illegal it could not enlarge the scope of reference and thus the adjudication had to be confined to find out whether the present was a case of termination of service or abandonment of the same. Since terms of appointment letter did not note transfer as a condition of service of the management, which fact was admitted by the management witness No.1 Vijay Kishan Vaid, the Labour Court held that there was no express power vested in the management to transfer the workman concerned and no such implied power could be held to be available to the management. Reference was made to the decision reported in AIR 1960 SC 650 *M/s. Kundan Sagar Mills Vs. Ziyauddin and Ors*. Since transfer was not the term of reference it was held

that no relief could be granted on this count.

5. Referring to the various letters the learned Labour Court came to the conclusion that the plea of the management that it had closed its office at Delhi and thus Devender Mishra was transferred to Kolkata was incorrect in view of the admission of MW-1 who admitted that as an attorney he does the sale and purchase of papers, receives and makes payment and also looks after the sales tax work at Delhi. Thus there was a clear admission falsifying the defence of the management that the work at Delhi had been closed. MW-1 further admitted that after September 30, 1994 the workman concerned was not allowed to perform duties in the Delhi office. In view of this evidence on record the learned Labour Court held that the present was not a case of abandonment but termination which was illegal. Hence the Labour Court directed reinstatement with full back wages and continuity of service.

6. M/s. Manish & Co. challenged the award dated October 27, 2001 by way of writ petition being W.P.(C) No. 3523/2002 before this Court wherein vide the impugned judgment the learned Single Judge held that the issue of legality or otherwise of transfer was central to the adjudication of reference and the question of abandoning the job on a transfer of his service arose only if the transfer was legally valid and enforceable and if it is held that the transfer was illegal then the Devender Mishra was not obliged to comply with the same and report for duty at the transferred location. The learned Single Judge noted that it has come on record that the management had shut down its office/establishment at Delhi and though there may be some justification for Devender Mishra's retrenchment, admittedly no notice of retrenchment was given and the provision of Section 25F of the Industrial

Dispute Act (in short the ID Act) had not been complied with. Thus the retrenchment was actionable. The learned Single Judge further held that the award of reinstatement with back wages was however not called for in the facts of the case. Devender Mishra's services were terminated on September 30, 1994. The award was rendered on October 27, 2001 and he moved an application under Section 17B of the ID Act in 2004 which was dismissed on August 10, 2010 for non-prosecution. The management seriously contested the application and brought on record photographs to show that Devender Mishra was working in another establishment and filed an application under Section 340 Cr.P.C. which was not pressed on dismissal of Devender Mishra's application under Section 17B ID Act. In view of the fact that Devender Mishra did not press his application under Section 17B ID Act even after 10 years of the pendency of the writ petition and had attained the age of 63 when the impugned order was passed, the learned Single Judge awarded a lump sum compensation of ₹2,50,000/- in lieu of reinstatement with back wages.

7. From the evidence as noted by the learned Labour Court i.e. the evidence of the management witness Vijay Kishan Vaid who admitted continuing work of sale and purchase of paper, receiving and making payments and looking after sales tax work at Delhi, the finding of the learned Single Judge that the management's work at Delhi had been closed is erroneous.

8. In view of this material on record the very foundation of the management case that the services of Devender Mishra were transferred to the head office at Kolkata for the reason that the management office at Delhi had closed deserves to be rejected and on the basis of the further admission

that he was not permitted to work at Delhi after the transfer order dated September 30, 1994 was served on him, it is apparent that the present is a case of termination and not abandonment. Thus setting aside the finding of the learned Single Judge on this count we concur with the view taken by the learned Single Judge on the count that the retrenchment of Devender Mishra was in violation of Section 25 of the ID Act.

9. With regard to the consequent relief the learned Single Judge held that the present was not a case of reinstatement with back wages but for award of lump sum compensation.

10. In the decision reported as (2009) 15 SCC 327 *Jagbir Singh vs.Haryana State Agriculture Marketing Board and Anr.* the Supreme Court laid down that the Courts while granting the relief must apply their mind and reinstatement and payment of full back wages should not be granted automatically after holding termination to be illegal. Some of the factors to be considered while granting the consequent relief are whether the appointment had been made in terms of the statutory rules, delay in raising the industrial dispute, the period of appointment, availability of job etc.

11. The learned Single Judge has exhaustively noted the facts on this point i.e. that services of Devender Mishra were terminated on September 30, 1994 and the impugned award had been rendered on October 27, 2001 where after W.P.(C) No.3523/2002 was filed by the management, Devender Mishra did not press his application under Section 17B ID Act which was finally dismissed for non-prosecution on August 10, 2002, the management has placed on record material to show that Devender Mishra was working in another establishment and the application under Section 340 Cr.P.C. was withdrawn by the management only when application under Section 17B

filed by Devender Mishra was dismissed for non-prosecution.

12. The non-seriousness of Devender Mishra in pursuing the application under Section 17B ID Act evinces the fact that he was employed somewhere else. Further Devender Mishra has already attained the age of superannuation. He was around 45 years of age on September 30, 1994 when transfer order was issued. Thus a compensation of ₹2,50,000/- instead of reinstatement and back wages satisfies the requirement of law as laid down. Further Devender Mishra would also be entitled to the rate of interest @ 8% p.a. from the date of order of the learned Single Judge till the date of realization and to withdraw his provident fund already deposited with the concerned authorities.

13. For the reasons stated above though differing with the conclusion of the learned Single Judge on the findings of the fact as noted above we concur with the impugned judgment to the extent of relief granted to Devender Mishra being a lump sum compensation of ₹2,50,000/- and with an interest @ 8% p.a. from the date of order dated May 29, 2013 passed by the learned Single Judge till realization with his entitlement to withdraw the provident fund already deposited by the concerned authorities.

14. The two appeals are consequently dismissed.

**(MUKTA GUPTA)**
**JUDGE**

**(PRADEEP NANDRAJOG)**
**JUDGE**

**AUGUST 14, 2015**
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