

\$~

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

Date of Decision: 30th November, 2015

+ W.P.(C) 7426/2001
M.C.D.

..... Petitioner

Through: Ms Amita Gupta, Advocate

versus

SURENDER KUMAR & ANR.

..... Respondent

Through: Ms Neelam Tiwari, Advocate

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By way of this writ petition under Article 226 of the Constitution of India, the petitioner/Municipal Corporation of Delhi has challenged the award dated 10th March, 1998 passed by the Presiding Officer, Labour Court-VII, Tis Hazari, Delhi in ID No.331/1988.

2. The respondent (hereinafter referred to as 'the workman') was working as a *beldar/mali* w.e.f. 26th August, 1978 with the petitioner and felt aggrieved by the action of the petitioner whereby he was not allowed to join duties on 12th February, 1985, as such, raised an industrial dispute. On failure of the conciliation proceedings, the appropriate Govt. referred the dispute to the Labour Court for adjudication with the following terms of reference:-

“ Whether Shri Surender Kumar has abandoned his service or the management has refused his duties illegally and/or unjustifiably and if so, to what relief is he entitled and what directions are necessary in this respect?

3. Statement of claim was filed by the workman alleging *inter alia* that he joined as *beldar/mali* in the management of the petitioner w.e.f. 26th August, 1978 as a daily rated/casual/muster roll in the Garden Department, Civil Line Zone, Delhi and his services were regularized w.e.f. 1st April, 1992 in the proper pay scale.

4. In January, 1985, the workman was posted in Patel Chest Nursery and he was on leave on 12th January, 1985. According to him, he was arrested by the police at midnight on 12th January, 1985 in a criminal case registered at Police Station Vijay Nagar, Ghaziabad u/s 395/412/307/325 IPC and remained in custody till 11th February, 1985 and then he was released on bail. On 12th February, 1985 he is alleged to have informed to his superior officers about his arrest and involvement in a criminal case but he was not allowed to join the duties by his superiors on the ground that he would not be allowed to join the duties unless he is acquitted in the criminal case and copy of the order of acquittal is furnished by him. On 2nd November, 1987, he served a notice of demand on the management claiming reinstatement. Instead of reinstating him, vide letter dated 18th February, 1988, the management called upon him to explain as to why he had been absenting from duty. On 25th February, 1988, he sent a reply alleging that because of his involvement in a criminal case, he could not join the duties. At the most, the management could have placed him under suspension but refusal to allow him to join duties amounts to termination of his services. It was also alleged that if his services have been terminated or dismissed for any kind of misconduct, opportunity should have been given to him for being heard. It was alleged that termination of his services is contrary to the provisions of Section 25F, G and H of the Industrial Disputes Act r/w Rule 76-77 of the Industrial Disputes Act (Central) Rules 1957. It was also alleged that the management has not paid twelve days earned wages for the period of January, 1985. On these facts, he claimed reinstatement with full back wages.

5. The claim was contested by the petitioner/management. It was not disputed that he was employed as a casual/daily rated/muster roll *beldar/mali* in the Garden Department, Civil Line Zone, Delhi. However, it was denied that his services were regularized w.e.f. 1st April, 1982 as a *mali*. It was also denied that he reported for his duties on 12th February, 1985 and informed his superior officers about his arrest and involvement in a criminal case. It was also denied that the superior officers of the workman told him that he would not be allowed to join duties till he is acquitted in the criminal case. On the other hand, it was alleged that the workman never informed his

superior officers about his arrest and involvement in criminal case and that he remained absent without intimation or information to the department. It was also alleged that a letter/memo was issued to the workman but he neither reported for duty nor gave any intimation about his acquittal.

6. In order to substantiate, the workman examined himself and was cross-examined by the management, however, management did not produce any evidence nor did anybody appear on behalf of the management. As such, on 16th January, 1998, management was proceeded *ex-parte*. After evaluating the oral as well as the documentary evidence led by the workman, the learned Labour Court observed that there was no dispute regarding relationship of employer and employee between the parties. There was also no dispute that the workman remained absent from duties with effect from 12th January, 1985 till 11th February, 1985. It was also observed that there was no abandonment of service as there was no *animus desserendi* on the part of the workman. He could not join his duties due to his arrest in the criminal case. After he was released on bail, he reported for duties but was not allowed to resume his duties till he is acquitted in the criminal case. It was further observed that the workman sent a notice of demand dated 2nd November, 1987, Ex.WW1/A which was duly received by the management whereby also it was brought to the notice of the management that the workman was arrested in the criminal case yet the department did not take any action against the workman. Instead a memo dated 18th February, 1988 was issued for the first time by the management whereby he was called upon to report for duties within three days along with explanation for long absence.

7. The workman sent a reply Ex.WW1/8 stating that he is ready to work and should be allowed to join his duties immediately. Instead of intimating the workman as to where he should report for duties, the management wrote back to the workman vide letter Ex.WW1/9 that the explanation is not found to be satisfactory and he is not interested in resuming his duty. It was further observed that no reason has been given by the management as to why it remained silent from 12th January, 1985 till 18th February, 1988 when for the first time a memo was issued to the workman. Silence of three years itself

proved negligence on the part of the management. If the management considered the involvement of the workman in a criminal case to be a misconduct then it was its duty to hold a disciplinary inquiry against him and inflict necessary punishment for the alleged misconduct. But no such action was taken. When the workman reported for duties on 12th December, 1985, he was not allowed to join the duties. Under Section 2(oo) of the Act, the termination of services in any manner whatsoever except by way of punishment for misconduct amounts to retrenchment. In such case, it is the bounden duty of the management to observe the requirement of Section 25F of the Act. In the instant case, there was total non-compliance of Section 25F of the Act. As such, the retrenchment was held to be illegal. Accordingly, the impugned award was passed.

8. Assailing the findings of the learned Labour Court, the learned counsel for the petitioner submits that except for the bald statement of workman there is no evidence on record to prove that the workman was not allowed to join duties. Moreover, no steps were taken by the workman to join duties. For more than 30 years, he did not work with the management. Under the circumstances, at the most, the workman is entitled for compensation.

9. Rebutting the submissions of the learned counsel for the petitioner, counsel for the respondent submits that it was an *ex-parte* award. Initially the management filed the written statement but thereafter they did not choose to appear. No attempt was made by the management to get the *ex-parte* order set aside. Even in these proceedings, the petitioner has not challenged the *ex-parte* order but is aggrieved only by the operative portion of the award. The learned Labour Court rightly appreciated the oral as well as documentary evidence led by the workman and passed the award. The counsel further submits that after the passing of the award, an application was moved by the workman for making necessary correction in the award as there was no specific mention in the award that the workman was entitled to reinstatement with continuity of service and back wages. The clarification was given by the learned Labour Court vide order dated 2nd July, 1999 whereby it was observed that if the termination is illegal then, the status of the workman as an employee of the management revives as if no order of termination had

been passed against him and he is deemed to be in service. Reliance was placed on ***Mohan Lal vs. Management of Bharat Electronics Ltd.***, AIR 1981 SC 1253 where it was held that if the termination of service is *ab initio void* and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits.

10. Counsel further submits that the writ petition is highly belated as the same was filed after a lapse of about three years and seven months and on this ground alone, the same is liable to be dismissed. Reliance was placed on ***Ajay Kumar & Ors. vs. Killburn Office Automation Ltd.***, MANU/DE/4753/2009 and ***Delhi Jal Board vs. Its Workman (Sh. Balbir Singh)***, 2009 (122) FLR 486.

11. The counsel also submits that the petitioner is guilty of suppressing material facts as pursuant to the award passed by the Labour Court whereby the workman was held entitled to back wages w.e.f. 2nd November, 1987, the workman preferred an application u/s 33C(1) of the Industrial Disputes Act for recovery of back wages and recovered back wages for the period from 2nd November, 1987 till July, 2003 and an application for recovery of back wages for the subsequent period, i.e., 1st August, 2003 till 30th June, 2004 was pending as averred in the counter affidavit. The counsel submits that had this fact been disclosed, the Court would not have even issued notice to the respondent. Reliance was placed on ***G.M. Haryana Roadways vs. Jai Bhagwan and Anr.***, (2008) 4 SCC 127. Lastly, it was submitted that the scope of interference in the writ petition is very limited. In the instant case, the award neither suffers from any error of law nor jurisdictional error which warrants interference. As such, petition is liable to be dismissed.

12. The undisputed facts are that the workman joined the services of the petitioner in the Garden Department, Civil Line Zone, Delhi as a *beldar/mali* on daily wage basis on 26th August, 1978. The workman did not attend his duties w.e.f. 12th January, 1985 till 11th February, 1985. According to the workman, he was arrested at midnight on 12th January, 1985 by the police in a criminal case registered at Police Station Vijay Nagar, Ghaziabad u/s 395/412/307/325 IPC and was released on bail on 11th February, 1985.

Thereafter on 12th February, 1985 he informed his superior officers about his arrest but he was not allowed to join the duties till he was acquitted in the criminal case.

13. The first question which arises for consideration is whether the workman had abandoned services of the management or he was not allowed to join the duties. What is the true meaning of the expression “abandonment of service” was considered by the Hon’ble Supreme Court in **G.T. Lad and Ors. vs. Chemical and Fibres of India Ltd.**, (1979) 1 SCC 590 and it was observed as under:-

“5(a). Re. Question No. 1: In the Act, we do not find any definition of the expression 'abandonment of service'. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word 'abandon' has been explained as meaning 'to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something'. According to the Dictionary of English Law by Earl Jowitt (1959 edition) 'abandonment' means 'relinquishment of an interest or claim'. According to Blacks Law Dictionary 'abandonment' when used in relation to an office means 'voluntary relinquishment. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an abandonment of office'.

*6. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In **Buckingham Co. v. Venkatiah and Ors.**, AIR 1964 SC 1272 it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case.”*

14. It is, therefore, to be seen whether in the circumstances of the instant case, it can

be said that the workman had voluntarily abandoned the service of the management. There is un rebutted testimony of the workman that due to his arrest in the criminal case on 12th January, 1985 till he was released on bail on 11th February, 1985, he could not join his duties. Immediately thereafter on 12th February, 1985, he reported to the superior officers about his involvement in the criminal case and was not allowed to join his duties. That being so, it cannot be said that there was an intention on the part of the workman not to report for duties or he had abandoned the services of the management. Moreover, despite the fact that as per the management also, the workman did not report for duty w.e.f. 12th January, 1985, no action was taken against him till 18th February, 1988, when for the first time a memo was issued to the workman to report for duties within three days along with explanation for long absence. Much prior thereto the workman had sent a notice of demand dated 2nd November, 1987 wherein he had apprised the department about his arrest in the criminal case. In reply to the memo also, he reiterated the submissions and expressed his willingness to join his duties. But instead of informing him as to where he had to join duties, it was simply reported that the explanation was not found to be satisfactory. Moreover, the management did not rebut the case of the workman by leading any evidence and in fact the management stopped appearing before the Labour Court. With the result, it was proceeded *ex-parte* on 16th January, 1998. No effort was made by the management to get the *ex-parte* order set aside. Under the circumstances, the findings of the learned Labour Court holding that it was not a case of abandonment of service but of retrenchment by the management even without compliance of provisions of Section 25F of the Act does not call for interference.

15. There is also force in the submission of learned counsel for the respondent that there is inordinate delay on the part of the petitioner in approaching this Court challenging the impugned award.

16. Delay and laches is one of the factors that require to be borne in mind by this Court when discretionary power under Article 226 of the Constitution is to be exercised.

17. In *Assistant Engineer, C.A.D., Kota v. Dhan Kunwar*, AIR 2006 SC 2670 the claim was raised after about 8 years and it was submitted that highly belated claims

should not have been entertained by the Labour Court. Dealing with this aspect of the matter, the Hon'ble Supreme Court observed as under:

"5. It may be noted that so far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case. However, certain observations made by this Court need to be noted. In **Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors.** (2000 (2) SCC 455) it was noted at paragraph 6 as follows:

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was *ex-facie* bad and incompetent."

18. In **Delhi Jal Board v Its Workman (Sri Balbir Singh)**, 2009 (122) FLR 486, there was a delay of four years in filing the writ petition challenging the award passed by the Labour Court. The Ld. Single Judge of this Court refused to entertain the writ petition on account of delay and laches. Substantially similar view was taken in **Ajay Kumar & Ors. v Killburn Office Automation Ltd.**, (supra) where the delay in filing the writ petition after expiry of more than two years from the date of award was considered to be fatal and the writ petition was dismissed on account of delay and laches.

19. The submission regarding suppression of material fact also has force. In **G.M.**

Haryana Roadways(supra), it was observed by Hon'ble Supreme Court that suppression of material fact is viewed seriously by the superior courts exercising their discretionary jurisdiction.

20. In **S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors.**, AIR 2004 SC 2421, Hon'ble Supreme Court on suppression of fact held:

"As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case."

21. The said observation was quoted with approval in **Arunima Baruah v. Union of India (UOI) and Ors.**, (2007) 6 SCC 120, wherein the question which was raised was: How far and to what extent suppression of fact by way of non- disclosure would affect a person's right of access to justice? The court noticed that so as to enable it to refuse to exercise its discretionary jurisdiction, the suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the Appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case.

22. Recently, in **Prestige Lights Ltd. v. State Bank of India**, (2007) 8 SCC 449, Hon'ble Supreme Court held:

"The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

Had the aforementioned facts been brought to the notice of this Court, the Special Leave Petition might have been dismissed summarily. Even delay in filing the same might not have been condoned. The Court was not required to waste so much of time when the State itself had, for all intent and purport, accepted the award."

23. In the counter affidavit, the workman has disclosed that he had filed application

under Section 33C(1) for recovery of his back wages which were recovered for the period from 2nd November, 1987 till July, 2003. The application for recovery of back wages for subsequent period was pending. Had this fact been disclosed, the fate of the writ petition would have been different.

24. Last but not the least, the scope of interference by this Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India while interfering with the award of the Labour Court is no longer *res integra*.

25. In ***Sadhu Ram vs. DTC***, (1983) 4 SCC 156, three judges of the Supreme Court has discussed the jurisdiction of this court under Article 226 of the Constitution and has held as under:

“3. We are afraid the High Court misdirected itself. The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of fact decided by those Tribunals.....”

26. In ***Harbans Lal vs. Jagmohan Saran***, (1985) 4 SCC 333, the Supreme Court has clearly held that the High Court cannot re-appreciate the evidence in exercise of its jurisdiction under Article 226 in a writ of Certiorari. In that case the Prescribed Authority as well as the trial court had concurrently reached to the conclusion on the basis of evidence before it that one “M” was sitting in the vegetable shop of the appellant-tenant on behalf of the appellant. In the writ petition under Article 226 for a writ of certiorari which was filed by respondent/landlord, the high court declined to accept the appellant’s case that he was carrying on brick kiln and cold storage business and held that the appellant was unable to establish any legal relationship of agency between himself and ‘M’ who was occupying the shop within the meaning of Section 12(1)(b) of U.P.Act and the high court had also held that the property must be deemed to be vacant and it remanded the case to the prescribed authority for passing orders on the respondent’s application for release of the property. The said order of the High Court was challenged before the Supreme Court and the Supreme Court in this case has clearly held “We are

satisfied that the High Court travelled outside its jurisdiction in embarking upon a reappraisal of the evidence”.

27. This view was reiterated in *Harjinder Singh vs. Punjab State Warehousing Corporation*, (2010) 3 SCC 192 and *Jasmer Singh vs. State of Haryana & Anr.*, Civil Appeal No. 346/2015 decided on 13th January, 2015.

28. What can be culled out from the aforesaid decisions is that the limitations on the jurisdiction of this court are well settled. A writ in the nature of certiorari may be issued only if the finding of the Labour Court suffers from an error or jurisdiction or from a breach of principles of natural justice or is vitiated by a manifest or apparent error of law. No such issue has been established. The Court will not countenance the picking of holes here and there in the award on trivial points and thereby attempting to frustrate the entire adjudication process before the Industrial Adjudicator on hypertechnical grounds as is being sought to be done by the petitioner in the present case.

29. For the foregoing reasons, I find no merit in the submissions made on behalf of the petitioner. The award does not suffer from any infirmity so as to warrant interference by this Court. As a result, the writ petition fails and is accordingly dismissed but with no order as to costs.

(SUNITA GUPTA)
JUDGE

NOVEMBER 30 2015/rs