

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

+ Judgment delivered on: August 12, 2015

% **W.P.(C) No. 2800/2004**

ASHOKA HOTELPetitioner

Through: Ms. Amit Seth, Advocate

versus

GOVT. OF NCT OF DELHI & ORS.Respondents

Through: Ms. S. Janani, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I. S. MEHTA, J.

1. The present petitioner, i.e., management of M/s Ashoka Hotel, 50-B, Chanakyapuri, New Delhi – 110021 (*hereinafter referred to as the 'petitioner-management'*) has preferred the present Writ Petition under Articles 226 and 227 of the Constitution of India against the Order of Reference dated 09.10.2000 made by Secretary (Labour), Government of National Capital Territory of Delhi vide reference No. F.24 (3302)/2000-Lab/34022-26, its consequential order dated 03.12.2001 passed by Shri Brijesh Sethi, Presiding Officer, Labour Court No. VII, Delhi debarring Shri Saran Suri, Advocate from putting in appearance under Section 36 of the Industrial Disputes Act, 1947 and the impugned Award dated

16.05.2003 passed by Shri C.K. Chaturvedi, Presiding Officer, Labour Court No. VII, Delhi against the petitioner-management by reinstating the respondent-workman with full back-wages and continuity of service.

2. The brief facts stated are that the respondent-workman, Shri Naveen Manchanda has alleged that he worked as Typist/Clerk in Ashoka Hotel for a period of more than 480 days in different spells of time from 22.12.1997 to 18.05.1999. The petitioner, i.e., management of Ashoka Hotel without giving any prior notice or notice-pay in violation of Section 25-F of the Industrial Disputes Act, 1947 terminated the services of the respondent-workman. The respondent-workman alleged that he had completed 240 days of work in the calendar year 1998. The said claim was not accepted by the management and consequently, the Secretary (Labour), Government of National Capital Territory of Delhi referred the said dispute for adjudication to the Labour Court on the following terms:

“Whether the services of Sh. Naveen Manchanda 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?”

The petitioner-management, i.e., management of Ashoka Hotel, in its Written Statements *qua* against the respondent-workman filed before the learned Labour Court did not specifically deny respondent-workman’s engagement with the petitioner-management as typist/clerk for the specific period which is given as under:

S. No.	Period of Engagement	No. of days
1.	22.12.97 to 21.02.98	62 days
2.	23.02.98 to 22.04.98	59 days
3.	24.04.98 to 23.06.98	61 days
4.	25.06.98 to 24.08.98	61 days
5.	26.08.98 to 25.10.98	61 days
6.	01.11.98 to 01.01.99	61 days
7.	11.01.99 to 10.03.99	59 days
8.	19.03.99 to 18.05.99	61 days

It is further argued by the petitioner-management that the respondent-workman was working as casual worker and he did not complete 240 days of service and his contract ended with each period of work and, therefore, the case is covered by Section 2(o)(bb) of the Industrial Disputes Act, 1947 and is not retrenchment as the respondent-workman had not rendered continuous service and even if he did so, it does not make him eligible to be regularised.

Thereafter, the respondent-workman in support of his claim filed an affidavit dated 02.05.2002 by way of evidence. Subsequently, the petitioner-management was proceeded ex-parte on 09.12.2002. The management did not prefer to move any application for setting-aside the ex-parte order made on 09.12.2002. Thereafter, one Shri S.K. Bhatnagar, i.e., authorized representative of the petitioner-management filed an authority letter to represent the petitioner-management before the learned Labour Court and also placed some documents of the respondent-workman on record and after concluding the arguments, the impugned

Award dated 16.05.2003 was passed by the learned Labour Court. The petitioner-management, aggrieved from the said order dated 03.12.2001 and the impugned Award dated 16.05.2003, preferred the present Writ Petition.

3. (i) The learned counsel appearing on behalf of the petitioner-management, Mr. Amit Seth, pointed out that under Section 36 of the Industrial Disputes Act, 1947, once the permission of engaging the counsel is granted after the consent of the other party, the same cannot be withdrawn and the order dated 03.12.2001 passed by Shri Brijesh Sethi, Presiding Officer, Labour Court No. VII, Delhi is bad in law in the light of the judgment rendered by this Court in the case of *M/s Bhagat Brothers vs. Paras Nath Upadhyay, LPA 212/2008, decided on 13.08.2008*, as the consent given is deemed to be given for the future course too.
- (ii) The learned counsel appearing on behalf of the petitioner-management submitted that while passing the impugned Award dated 16.05.2003 the learned Presiding Officer, Labour Court misdirected himself in law and has approached the matter in a totally perverse/or in excess of jurisdiction. What was referred to the Presiding Officer, Labour Court was whether the termination of the workman was illegal or unjustified. The said Award dated 16.05.2003 does not give any finding of unjustifiability of the termination. The dispute as mentioned in the

Award “RETRENCHMENT” was not an independent issue and not incidental to the point referred for adjudication.

(iii) The learned counsel appearing on behalf of the petitioner-management also submitted that the services of the respondent-workman were casual in nature and he was purely engaged on temporary/ad-hoc basis and he had not completed 240 days in service as required, as such the same could not be construed as “retrenchment” as contemplated in sub-clause (bb) of Section 2(oo) of the Industrial Disputes Act, 1947.

(iv) The learned counsel for the petitioner-management also came up with the further argument that the grant of relief of reinstatement with full back-wages in the absence of any pleadings is bad in light of the judgment rendered by the Hon’ble Supreme Court in the case of *Hindustan Tin Works Pvt. Ltd. vs. The Employers of Hindustan Works Pvt. Ltd. & Ors., AIR 1979 SC 75*. Moreover, now a days, compensation in lieu of reinstatement is the proper course.

4. The learned counsel, Ms. S. Janani, appearing on behalf of the respondent-workman denied the factum of averments made against the respondent-workman and came up with the plea of unfair practices adopted by the petitioner-management depriving the respondent-workman of his regularisation under the Industrial Disputes Act, 1947.

5. The aforesaid pleas raised by the petitioner-management loses its significance in the absence of any prejudice caused to the management as

per the statement of facts and documents available on record. In the instant case, the reply on behalf of the management was filed on 07.03.2001 giving opportunity to the respondent-workman to file the rejoinder thereto. The rejoinder, thereafter, was filed on 19.07.2001 along with an application under Section 36 of the Industrial Disputes Act, 1947. The said application of the respondent-workman was allowed vide order dated 03.12.2001 passed by Shri Brijesh Sethi, Presiding Officer, Labour Court-VII, Delhi.

It is not out of place to point out that the reply of the petitioner-management was taken on record when Shri Saran Suri was appearing on behalf of the petitioner-management. When Shri Saran Suri appeared on behalf of the management, the respondent-workman filed an application under Section 36 of the Industrial Disputes Act, 1947, which was later allowed. The petitioner-management did not challenge the order dated 03.12.2001 and the petitioner-management was thereafter represented through authorised representative, Shri S.K. Bhatnagar, who participated in conducting the present dispute on behalf of the petitioner-management.

6. Thereafter, the petitioner-management was proceeded ex-parte vide order dated 19.12.2002, and further, the management did not prefer to file an application for setting aside the ex-parte order. The non-filing of the application for setting aside the ex-parte order dated 19.12.2002 implies that the petitioner-management consciously did not file the application

for setting aside the aforesaid ex-parte order before the learned Labour Court.

Rather, the petitioner-management consciously further participated in the proceedings before the learned Labour Court and placed the relevant records of the respondent-workman on the record.

7. Sub-section (3) Section 36 of the Industrial Disputes Act, 1947 is reproduced hereinunder:

“36. Representation of parties.-

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.”

The respondent-workman by invoking the aforementioned Section 36(3) of the Industrial Disputes Act, 1947 moved an application before the learned Labour Court to prohibit the management from being represented through the engaged counsel and consequently, the learned Labour Court passed the order dated 03.12.2001 allowing the said application of the respondent-workman. The petitioner-management did not prefer to challenge the aforesaid order and subsequently, participated in further proceedings through authorised representative, Shri S.K. Bhatnagar, who filed the authority letter on behalf of the petitioner-management. The subsequent plea raised by the petitioner-management that the learned Labour Court debarred the petitioner-management from contesting the case through their counsel on merits which resulted in the

passing of the harsh order dated 03.12.2001 against the management, does not seem to be correct.

8. It is pertinent to mention here that the management themselves participated in further proceedings through Shri S.K. Bhatnagar, Asst. Manager (HR), Ashoka Hotel who factually is a better qualified person than the workman and the management themselves did not prefer to challenge the aforesaid order dated 03.12.2001. Therefore the plea taken is not bonafide and unsustainable by virtue of the petitioner-management's acts and conduct.

Similarly, the learned Labour Court vide order dated 09.12.2002 proceeded ex-parte against the petitioner-management and the management, consciously, participated, in further proceedings before the learned Labour Court through their authorised representative, Shri S.K. Bhatnagar without challenging the ex-parte order before the learned Labour Court or any other higher forum.

The authorised representative for the petitioner-management produced the relevant attendance record of the respondent-workman before the learned Labour Court. The pleadings of the parties were already completed before the passing of the order dated 03.12.2001 and the dispute factually was “whether the workman has completed 240 days of continuous service as workman with the petitioner-management during

the relevant calendar year". Subsequently, the management through authorised representative, Shri S.K. Bhatnagar produced the relevant attendance records of the respondent-workman before the learned Labour Court which were exclusively under the domain and control of the petitioner-management. There is no specific plea of the petitioner-management as to what kind of prejudice has been caused to them by virtue of the two aforesaid orders dated 03.12.2001 and 09.12.2002 passed by the learned Labour Court.

In the absence of any specific plea, the respondent-workman cannot be dragged into unending litigation for no fault on his part.

9. The terms of reference as referred by the Secretary (Labour), Government of National Capital Territory of Delhi for adjudication to the learned Labour Court was as under:

"Whether the services of Sh. Naveen Manchanda 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?"

Subsequently, the learned Labour Court after going through the pleadings of the parties, framed the following issues on 01.03.2002:

- i) Whether the claimant is not a workman as defined under Section 2(5) of the Industrial Disputes Act, 1947?

ii) Whether the claimant has completed 240 days with the management?

iii) As per terms of reference.

The issues as mentioned (*Supra*) were framed and neither of the parties preferred to challenge the aforesaid order.

The petitioner-management did not raise any objection when the reference was made by the Secretary (Labour), Government of National Capital Territory of Delhi to the learned Labour Court, nor was any objection raised before the learned Labour Court. The plea of the petitioner-management that the learned Labour Court failed to give any findings relating to unjustifiability of termination of respondent-workman is also not correct.

The petitioner-management after making reference by the appropriate Government participated in the proceedings before the learned Labour Court and filed the Written Statements and further participated in the proceedings when the issues between the parties were framed. The onus of proving the justifiability of the action of the management *qua* against the workman was on the petitioner-management, and the petitioner-management, consciously, did not prefer, to lead the evidence on their behalf. Rather, they preferred to file the attendance records of the

respondent-workman before the learned Labour Court. Therefore, the raising of this objection is not available to the petitioner-management.

10. The dispute raised by the respondent-workman with the petitioner-management was that the respondent-workman, who was a commerce graduate having good typing speed and knowledge of computer, was appointed by Ashoka Hotel as typist/clerk on a consolidated salary of Rs. 3000/- per month against the permanent post and the work assigned to the respondent-workman was perennial in nature. However, the petitioner-management malafidely gave appointment to the respondent-workman on short-term basis by giving artificial breaks. The respondent-workman worked with the management from 22.12.1997 to 18.05.1999 as follows:

S.No.	Period of Engagement	No. of days
1.	22.12.97 to 21.02.98	62 days
2.	23.02.98 to 22.04.98	59 days
3.	24.04.98 to 23.06.98	61 days
4.	25.06.98 to 24.08.98	61 days
5.	26.08.98 to 25.10.98	61 days
6.	01.11.98 to 01.01.99	61 days
7.	11.01.99 to 10.03.99	59 days
8.	19.03.99 to 18.05.99	61 days

11. The respondent-workman was given all benefits as that of the permanent employees working with the management of the Ashoka Hotel. The respondent-workman who had completed 240 days with artificial breaks with the petitioner-management was removed from service w.e.f. 19.05.1999 without assigning any reason or notice in violation of Section

25-F of the Industrial Disputes Act, 1947. The petitioner-management raised the objection that the respondent-workman worked with the management for a short-term period and he has not completed 240 days of continuous service in calendar year and the nature of work was temporary in nature, and there was no sanctioned post and therefore, the claim of regularization of workman is not a matter of right as claimed by the respondent-workman.

12. The whole question hinges around whether the respondent-workman has completed 240 days of continuous service with the management of the Ashoka Hotel in a calendar year.

Here, the petitioner-management does not specifically deny the period of workman's engagement with the management. However, the petitioner-management denies that the respondent-workman worked for a period of 240 days and states that the respondent-workman worked for a shorter period on a temporary basis.

However, the attendance records of the respondent-workman filed by the petitioner-management before the learned Labour Court makes it apparent that the respondent-workman worked with the petitioner-management for a period of 457 days and the same is as follows:

S. No.	Month	No. of days worked
1.	December 1997	-
2.	January 1998	-
3.	February 1998	28 days
4.	March 1998	31 days
5.	April 1998	30 days
6.	May 1998	31 days
7.	June 1998	30 days
8.	July 1998	31 days
9.	August 1998	31 days
10.	September 1998	30 days
11.	October 1998	25 days
12.	November 1998	29 days
13.	December 1998	31 days
14.	January 1999	31 days
15.	February 1999	28 days
16.	March 1999	23 days
17.	April 1999	30 days
18.	May 1999	18 days

13. The plea of the petitioner-management that the respondent-workman worked with the management temporarily for a limited period is not convincing because the Statement of Claim of the respondent-workman itself shows that there are eight periods of continuous service with artificial breaks of few days and the same workman, continued in further service, which otherwise means that the management is indulging in unfair labour practice by giving artificial breaks and prohibiting the respondent-workman from regularising under the Industrial Disputes Act, 1947.

14. The mechanism and device of artificial breaks which ultimately leads to unfair labour practice is nothing but a tool to escape from the

provisions and the objective of the Industrial Disputes Act, 1947. What is required is harmony and peace in the industry to promote the business activity which would be beneficial to both - the management as well as the workmen. As such, Section 2(oo)(bb) of the aforesaid Act in such cases would not be attracted. The Hon'ble Supreme Court in this regard made the following observations in the case titled as ***Haryana State Electronics Development Corporation Ltd. vs. Mamni, AIR 2006 SC 2427:***

*“In this case, the services of the respondent has been terminated on a regular basis and she had been re-appointed after a gap of one or two days. Such a course of action was adopted by the Appellant with a view to defeat the object of the Act. **Section 2(oo)(bb) of the Industrial Disputes Act, 1947, therefore is not attracted in the instant case.**” (Emphasis Supplied)*

15. In the instant case, the respondent-workman worked with the petitioner-management for a period of 457 days since February, 1998 till 18.05.1999 as per the attendance record filed by the petitioner-management before the learned Labour Court. Once the workman completes his continuous service of 240 days, he attains a different status with the management under the Industrial Disputes Act, 1947 and his employment with the management is protected under Section 25-F of the Industrial Disputes Act, 1947. In cases where the workman is protected under Section 25-F of the aforesaid Act, the management has to adopt due procedure for retrenchment as laid down in Section 25-F of the said Act.

The expression ‘retrenchment’ is specifically defined under Section 2(oo) of the Industrial Disputes Act, 1947 which is reproduced hereinunder:

“(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;”

16. Admittedly, the petitioner-management has violated the provisions of Section 25-F of the Industrial Disputes Act, 1947. It is apparent that the retrenchment action of the petitioner-management is not justified in the absence of any iota of misconduct on the part of the respondent-workman throughout his engagement with the petitioner-management and his termination was in violation of procedure laid down under Section 25-F of the Industrial Disputes Act, 1947.

The contention of the learned counsel for the petitioner-management that compensation in lieu of reinstatement would meet the ends of justice has already been rejected by this court in the most recent case of ***Subhash Chand vs. MCD, (Review Petition No. 257/2015 and***

CM Nos. 8362-8362-8363/2015 in W.P.(C) 5861/2007, decided on 02.07.2015) where reinstatement in service with full back-wages was observed to be the appropriate relief. The Apex Court in the recent judgment rendered in the case of *Jasmer Singh vs. State of Haryana, 2015 II AD (S.C.) 215* has placed reliance on its earlier judgment rendered in the case of *Deepali Gundu Surwase vs. Kranti Junior Adhapak Mahavidyalaya (D.Ed.) and Others, (2013) 10 SCC 324* and reaffirmed that the injury suffered by an employee, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. Once it is found that the workman has completed 240 days of continuous service with the management in a particular calendar year, it is for the management to comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947. An order of reinstatement with continuity of service and full back-wages in favour of the workman is the appropriate relief to meet the ends of justice.

As in the instant case, the respondent-workman has completed 457 days of continuous service between February, 1998 to May, 1999 with the management of Ashoka Hotel as per the petitioner-management's own attendance records filed before the learned Labour Court, thereby entitling the respondent-workman to reinstatement in service with continuity of service and full back-wages. Accordingly, the impugned order and the Award do not require any interference and the plea taken by the

petitioner-management as discussed above is nothing but procedural
adventurism.

17. In view of the above discussion, no ground is made out to allow the present Writ Petition and the same is dismissed. No order as to costs.

I.S.MEHTA, J

AUGUST 12, 2015

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