

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

Judgment reserved on 28.04.2015

% Judgment pronounced on: 18.05.2015

+ **W.P.(C) 16715/2006 & C.M. Nos. 18322/2012 & 20581/2014**

UOI THROUGH THE SECRETARY
MINISTRY OF DEFENCE

..... Petitioner

Through: Mr.Manish Mohan, Advocate
alongwith Ms.Sidhi Arora, Ms.
Manisha Rana Singh, Ms.Hina
Shaheen and Ms.Puja Sarkar,
Advocates.

versus

SHRI ANIL KUMAR & ORS.

..... Respondents

Through: Ms.Sangeeta Tomar, Advocate.

AND

+ **W.P.(C) 16718/2006 & C.M. Nos. 18454/2012 & 20503/2014**

UOI THROUGH THE SECRETARY
MINISTRY OF DEFENCE

..... Petitioner

Through: Mr.Manish Mohan, Advocate
alongwith Ms.Sidhi Arora, Ms.
Manisha Rana Singh, Ms.Hina
Shaheen and Ms.Puja Sarkar,
Advocates.

versus

SHRI RAM KUMAR & ORS.

..... Respondents

Through: Ms.Sangeeta Tomar, Advocate.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. Vide the present order I am disposing of Writ Petitions (Civil)
No.16718/2006 & 16715/2006 since in both the cases, common question of

facts and law is involved.

2. Admittedly, the petitioner had employed the respondents Sh.Ram Kumar and Sh.Anil Kumar as casual labour in November, 1993 and December, 1993 respectively and they had worked for about five years when their services were terminated on 21.07.1998. The respondents had challenged their termination which was referred for adjudication and vide award dated 02.02.2006 the Presiding Officer of the Central Government Industrial Tribunal-cum-Labour Court (CGIT) held that the termination of the workmen was illegal and directed the petitioner to reinstate them with 50 % back wages with effect from 21.07.1998 within two months from the date of the award.

3. The case of workmen before CGIT was that their names were mentioned in the unit muster roll and pay register and on their demand for regularisation of their services, they were terminated on 21.07.1999 without any notice/compensation and the salary for three months was also not paid.

4. In reply the petitioner had given the chart showing the number of days, for which both the workmen had worked with them:

Number of days of service rendered by Sh.Anil Kumar

1993	-	13 days
1994	-	240 days

1995	-	240 days
1996	-	236 days
1997	-	240 days
1998	-	137 days

Number of days of service rendered by Sh.Ram Kumar

1993	-	04 days
1994	-	240 days
1995	-	240 days
1996	-	240 days
1997	-	238 days
1998	-	164 days

5. The case of petitioner was that the respondents-workmen were also issued temporary passes to enter and leave the Defence Complex and that they were working as a casual labour and that their services were not terminated but they had stopped coming to the work and finally their names were struck off on 1.11.1998 after 55 days of their continuous absence. Another plea taken was that the petitioner is not an 'industry' within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the I.D.Act).

6. The labour court after recording the evidences in both the cases reached to the conclusion that the workmen had continuously worked for 240 days in the preceding year from the date of their termination and that at the time of retrenchment no compensation and no pay in lieu of notice was

paid and that the termination was illegal. It was further held that since it was admitted by the management that muster roll register was maintained and the casual labour was employed and the management was not discharging the work of sovereign nature, although it was an undertaking of the government, it falls in the category of 'industry' in view of law laid down in **Bangalore Water Supply & Sewerage Board vs. A. Rajappa** : (1978) 2 SCC 213.

7. This order has been challenged by the petitioner.

8. The first plea of the petitioner is that the court had no jurisdiction since army is not an industry and it exercises sovereign function and the dispute arising therein cannot be termed as an industrial dispute and has relied on the findings in case of **Bangalore Water Supply & Sewerage Board's case** (supra) and in **Jagmittar Sain Bhagat and Others vs. Director, Health Services, Haryana and Others** : (2013) 10 SCC 136.

9. It is argued by learned counsel for the respondents that this plea of the petitioner is baseless because the petitioner had themselves stated that they used to supply logistic support to army at supply depot which proves that they were not discharging the sovereign function. It is submitted that even defence establishments are covered under Schedule 1 entry 8 of the I.D.Act.

Reliance is placed on the findings of the Supreme Court in the case of **Agriculture Produce Market Committee vs. Ashok Harikuni and another** (2000) 8 SCC 61.

10. I have given due consideration to the rival contentions on behalf of the parties.

11. The first contention of the petitioner is that they are not an 'industry' under Section 2 (j) of the I.D. Act only because they are defence establishments which were only discharging sovereign function. It is further argued on behalf of the petitioner that the Supreme Court in **State of U.P. vs. Jaibir Singh**: (2005) 5 SCC 1 has not agreed with the findings in **Bangalore Water Supply & Sewerage Board's** case (supra) and that is why the matter was referred to the Chief Justice of India for referring it to a Larger Bench for reconsideration of the judgment in **Bangalore Water Supply & Sewerage Board's** case (supra).

12. The Supreme Court in **Bangalore Water Supply & Sewerage Board's case** (supra) has clearly held that 'industry' as defined in Section 2 (j) has a wide import, where, systematic activity organized by co-operation between employer and employee for the production and/or distribution of goods and service calculated to satisfy human wants and wishes, prima facie, there is

an ‘industry’ in that enterprise. Absence of profit making motive or gainful objective is irrelevant. The decisive test is the nature of activity with special emphasis on the employer-employee relations. Sovereign functions strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by the government or statutory bodies. Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they fall within Section 2 (j) of the I.D.Act. There is no dispute to the fact that the findings in **Bangalore Water Supply & Sewerage Board’s case** is given by the seven judges’ bench of the Supreme Court while the findings in **Jaibir Singh’s case** (supra) has been given by five judges’ bench of the Supreme Court and there is no stay to the operation of the order in **Bangalore Water Supply & Sewerage Board’s case**. Hence, the law laid down in **Bangalore Water Supply & Sewerage Board’s case** stands good. In this case seven Judges bench has given wide meaning to the definition to the expression “industry”.

13. Relying upon the findings in **Bangalore Water Supply & Sewerage Board’s case**, the Supreme Court in **Agricultural Produce Market Committee’s case** (supra) has held as under:

“21. In other words, it all depends on the nature of power and the manner of its exercise. What is approved to be "Sovereign" is defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory. These are not amenable to the jurisdiction of ordinary civil courts. The other functions of the State including welfare activity of State could not be construed as "sovereign" exercise of power. Hence, every governmental function need not be "sovereign". State activities are multifarious. From the primal sovereign power, which exclusively inalienably could be exercised by the Sovereign alone, which is not subject to challenge in any civil court to all the welfare activities, which would be undertaken by any private person. So merely if one is an employee of statutory bodies would not take it outside the Central Act. If that be then Section 2 (a) of the Central Act read with Schedule I gives large number of statutory bodies which should have been excluded, which is not. Even if a statute confers on any statutory body, any function which could be construed to be "sovereign" in nature would not mean every other functions under the same statute to be also sovereign. The court should examine the statute to sever one from the other by comprehensively examining various provisions of that statute. In interpreting any statute to find if it is 'industry' or not we have to find its pith and substance. The Central Act is enacted to maintain harmony between employer and employee which brings peace and amity in its functioning. This peace and amity should be the objective in the functioning of all enterprises. This is to the benefit of both, employer and employee. Misuse of rights and obligations by either or stretching it beyond permissible limits have to be dealt with within the frame work of the law but endeavor should not be in all circumstances to

exclude any enterprise from its ambit. That is why courts have been defining "industry" in the widest permissible limits and "sovereign" functioning within its limited orbit."

14. Therefore, where statutory authority or a government organization is discharging sovereign functions, but if it indulges in other functions which are not sovereign in nature, they are governed by the provisions of the I.D.Act and if they are indulging into such activities covered by definition of Section 2 (j) of the I.D.Act, they are considered 'industries' within the meaning of I.D.Act.

15. From the facts proved on record it is clear that the petitioner had employed casual labours including respondents performing the activities which were not sovereign in nature. The burden was upon the petitioner to prove on record that they were not engaging themselves into any industrial activity and were solely performing the sovereign function. No such evidence has been produced on record. A simple bland plea was taken in the written statement that they are not 'industry' within the meaning of Section 2 (j) of the I.D.Act. For the reasons discussed above, it is apparent that this plea of the petitioner that they are not an 'industry' within the meaning of 2 (j) of the I.D.Act is of no merit and the C.G.I.T. has correctly reached to the conclusion that the petitioner is an 'industry'.

16. The second plea of the petitioner is, since the respondents-workmen were casual employees, their discontinuation from the job cannot be construed as retrenchment. Reliance has been placed on **Himanshu Kumar Vidyarthi & Ors. vs. State of Bihar & Ors.**: AIR 1997 SC 3657

17. It is argued on behalf of the respondents-workmen that even though the respondents were working as a daily wager, their termination which was violative of Section 25-F of the I.D.Act amounts to retrenchment. Reliance has been placed on findings in the case of **Management of Horticulture, Department of Delhi Administration vs. Trilok Chand and Another**: 82 (1999) DLT.

18. I have given due consideration to the findings. The retrenchment has been defined under Section 2 (oo) of the I.D.Act which reads as under:

“2. (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)² 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;]”

19. From the bare reading of the provision it is amply clear that the termination of the services of a workman for any reason whatsoever constitutes retrenchment except for the reasons exempted under the provision.

20. In the case of **SBI vs. N. Sundara Money** : (1976) 1 SCC 822, the Supreme Court has elaborated the elements which constitute retrenchment.

The relevant paragraph reads as under :

“9. A break-down of Section 2(oo) unmistakably expands the semantics of retrenchment. 'Termination...for any reason whatsoever' are the keywords. Whatever the reason, every termination spells retrenchment. So the sole question is has the employee's service been terminated? Verbal apparel apart, the substance is decisive. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced. May be, the present may be a hard case, but we can visualise abuses by employers, by suitable verbal devices, circumventing the armour of Section 25F and Section 2(oo). Without speculating on possibilities, we may agree that 'retrenchment' is no longer terra incognita but area covered by an expansive definition. It means 'to end, conclude, cease'. In the present case the employment ceased, concluded, ended on the expiration of one year, ten months nine days -- automatically maybe, but cessation all the same. That to

write into the order of appointment the date of termination confers no moksha from Section 25F(b) is inferable from the proviso to Section 25F(1). True, the section speaks of retrenchment by the employer and it is urged that some act of volition by the employer to bring about the termination is essential to attract Section 25F and automatic extinguishment of service by effluxion of time cannot be sufficient.”

21. Also in case of **L.Robert D’Souza vs. Executive Engineer, Southern Railway and Another**: 1982 SCC L & S 124, the Supreme Court has held that even casual or seasonal workman who rendered service of one year or more could not be retrenched in violation of provisions under Section 25-F of the I.D.Act. In another case **Rattan Singh vs. Union of India** : (1997) 11 SCC 396, the Apex Court has again held that provisions of Section 25-F were applicable to termination of even a daily rated workman who had continuously served for a requisite statutory minimum period in a year and such a termination of services without compliance of provisions of Section 25-F of the I.D.Act was illegal. The same principles have been laid down by the Supreme Court in case of **Samistha Dubey vs. City Board, Etawah**: 1999 (2) LLR 1 and **Municipal Corporation of Delhi vs. Praveen Kumar Jain & Ors.**: 1998 (9) SCC 468.

22. The contention of the petitioner is that in view of the findings of the Supreme Court in **Himanshu Kumar Vidyarthi’s** case (supra), the casual

workers are not entitled for the benefit of Section 25-F of the I.D.Act.

23. I have given due consideration to this argument of learned counsel.

24. The Division Bench of this court in Management of Horticulture of Delhi Administration's case (supra) has considered Himanshu Kumar Vidyarthi's case (supra) and has held as under:

21. Notwithstanding the aforesaid position in law Mr. Anil Grover, learned counsel appearing on behalf of the petitioner argued that respondent is not to be treated as workman and is not entitled to the benefit of the provision of Section 25-F of the Act and in support of his submission he tried to draw sustenance from another judgment of Supreme Court in the case of Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others reported in 1997 (2) LLN 982. In this case, decided by a Division Bench, no doubt certain observations were made by the Supreme Court which give the impression that temporary working of daily wages ... would not be considered to be re- trenched under the Act. However, a close look would show that the case was mainly decided on the ground that the concerned department namely, Cooperative Training Institute, Deogarh was not to be treated as "industry" within the meaning of Section 2(j) of the Act and further in this case Supreme Court did not take into consideration the earlier case decided by it holding to the contrary and as noticed above. Not only this even in the following subsequent judgments, Supreme Court has taken the view that provision of Section 25-F would be applicable even in a case of daily rated workman. These cases are:

1. Rattan Singh Vs. Union of India .

2. Municipal Corporation of Delhi Vs. Praveen Kumar Jain reported in 1998 (5) LNN Supp (vide supra)

3. Samishta Dubey Vs. Citi Board, Etawah reported in 1999 (2) LLR 1 (vide supra).

22. In view of the aforesaid restatement of law as recent as in 1999 as well, I respectfully follow the same in preference to the view expressed in the case of Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others reported in 1997 (2) LLN 982 (vide supra). Accordingly, this point is also decided against the petitioner.

25. The findings in **Himanshu Kumar Vidyarthi's** case (supra) are thus distinguished by the Division Bench of this court in **Management of Horticulture of Delhi Administration's case** (supra). The learned counsel for the petitioner has failed to show any other pronouncement of the Supreme Court of this court, whereby it has been held that the daily wagers are not covered under Section 25-F of the I.D.Act.

26. From the above settled propositions of law, it is apparent that even a casual worker is entitled to the benefit of 25-F of the I.D.Act and if his services were terminated without compliance of Section 25-F of the I.D.Act, such termination is illegal. There is no dispute to the factual position in this case. The findings of the fact by the labour court clearly show that the workmen were entitled for the compensation and the notice pay under Section 25-F of the I.D.Act at the time of his termination/disengagement, the compensation and the notice pay was not paid to the respondents-workmen.

27. The petitioner has also argued that the services of the respondents-

workmen were not terminated but they had abandoned the same by remaining continuously absent from duty and their names were struck off from the muster roll only after 55 days from the date of their absence. The labour court, however, on the basis of evidences on record reached to the conclusion that the services of the workmen were in fact terminated. The findings of the fact are based on the evidences and thus cannot be interfered with by this court under Article 226 and 227 of the Constitution of India. The findings of the labour court that the services of the respondents-workmen were illegally terminated by the petitioner are thus as per the evidence on record and the established principle of law. There is no infirmity or illegality in the said findings.

28. The another plea taken by the petitioner is that the respondents-workmen were working on a daily wage basis as a casual worker or a daily wager and had been working for intermittent duration and for a short period and therefore, the order of grant of reinstatement with 50% back wages is illegal and against the settled principle of law laid down by the Supreme Court in series of judgments including **Madhya Pradesh Administration vs. Tribhuban**: (2007) 9 SCC 748 and **Mahboob Deepak vs. Nagar Panchayat, Gajraula & Ors.**: (2008) 1 SCC 575. It is further argued that while granting

relief, it is imperative upon the industrial court to apply its mind and payment of back wages cannot be the natural consequence and has relied upon finding of *Ashok Kumar Sharma vs. Oberoi Flight Services*: (2010) 1 SCC 142 and *Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal & Ors.*: (2010) 6 SCC 773.

29. It is argued on behalf of the respondents-workmen that Sh.Anil Kumar and Ram Kumar had been working with the petitioner since November, 1993 and December, 1993 respectively and had served them for five years and therefore the labour court has rightly passed the order of reinstatement in favour of the respondents-workmen and there is no illegality in the said order.

30. I have given due consideration to the rival contentions. The issue involved is 'whether the impugned order is bad in law or perverse on the ground that on finding the termination of the workmen, who were working as casual worker, violative of provisions of I.D.Act the order of reinstatement with 50 % of the back wages as a natural consequence ought not to have been passed and learned labour court ought to have applied its mind in the given circumstances of the case, and ought to have granted some other more appropriate relief in terms of law propounded on this aspect'.

31. Over the years, the law governing grant of reinstatement with back wages have undergone tremendous changes while earlier the normal rule was the order of reinstatement on finding the termination of the services being illegal, this rule now has changed. In **M.P. Administration's case** (supra) the Supreme Court has laid down the principles governing the grant of back wages while setting aside the termination. In that case the workman was appointed on a temporary basis from time to time with break in service. He worked for the period from 13.12.1991 to 01.03.1994. After his termination he raised the industrial dispute. The tribunal while setting aside the termination being illegal granted retrenchment compensation along with notice pay together with interest at the rate of 9% per annum. The award was challenged by the workman before the High Court. The High Court while allowing the writ petition directed reinstatement of the workman with full back wages. The order of the High Court was challenged before the Supreme Court and the Supreme Court has held as under:

“6. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division Bench of the Delhi High Court should have directed reinstatement of the respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public

employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee.”

32. In case of **Gurmail Singh vs. Principal, Government College of Education & Others** : (2000)9 SCC 496, the Supreme Court has held that the grant of reinstatement is a discretionary relief and must be granted upon taking into consideration all the attending circumstances. The court had observed in the said case that since the workman was appointed on a temporary basis it was unlikely he would have been made unemployed for a long time and also observed that it could have been unjust to direct reinstatement after a period of more than 30 years and awarded a compensation of a sum of Rs.50,000/-in lieu of reinstatement and back wages. In case of **Jagbir Singh vs. Haryana State Agriculture Marketing Board and Another**: (2009) 15 SCC 327, the Supreme Court has observed as under:

7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that

relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.”

33. The Supreme Court in **Mahboob Deepak’s** case (supra) has laid down the factors which are relevant while determining whether the award of reinstatement should be passed. The court has observed as under:

7. The factors which are relevant for determining the same, inter alia, are:

- (i) whether in making the appointment, the statutory rules, if any, had been complied with;*
- (ii) the period he had worked;*
- (iii) whether there existed any vacancy; and*
- (iv) whether he obtained some other employment on the date of termination or passing of the award.*

34. In that case the appellant was appointed as a daily wager on 30.07.1988. His services were terminated on 16.07.1989. The labour court found the termination illegal and passed the order of reinstatement with other facilities and ordered the payment of back wages. On challenge, the High Court set aside the award. The Supreme Court while holding that the termination was illegal had awarded compensation of Rs.50,000/- in lieu of reinstatement holding as under:

8. The respondent is a local authority. The terms and conditions of employment of the employees are governed

by a statute and statutory rules. No appointment can be made by a local authority without following the provisions of the recruitment rules. Any appointment made in violation of the said rules as also the constitutional scheme of equality as contained in Articles 14 and 16 of the Constitution of India would be a nullity.

9. Due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules. Merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularised.

35. In **Senior Superintendent Telegraph (Traffic), Bhopal's** case (supra)

the Supreme Court has again held as under:

9. In the last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate.

10. xxxx xxxx xxxx

11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice. In our considered view, the compensation of Rs 40,000 to each of the workmen (Respondents 1 to 14) shall meet the ends of justice. We order accordingly.

36. In the present case also admittedly, the respondents-workmen were working as daily wage employees. They worked for the period as mentioned hereinabove. They were not appointed through employment exchange. They also did not have any lien on the post. They were appointed only for the purpose of casual jobs as casual labour. They had intermittently worked for about five years when their services were terminated. The appointments of employees by the petitioner are governed by statute and the statutory rules govern the terms and conditions of its employees. The order of reinstatement would amount to giving employment to the respondents-workmen whose appointment was admittedly not as per rules and regulations governing the appointment in the employment of the petitioner. Also the respondents were working as casual labours and unlikely to remain unemployed for long. In *the Secretary, State of Karnataka vs. Uma Devi & Ors.* : (2006) 4 SCC 1, the Supreme Court has held that '*the back door entries cannot be allowed*'.

37. In the light of settled preposition of law, it is apparent that the labour court has not applied its mind and has followed the norms of automatic reinstatement on finding the termination being illegal. The attending circumstances of the case do not call for the application of the normal rules.

The ends of justice would meet in these cases if the compensation is awarded to the respondents in lieu of reinstatement and back wages.

38. Keeping in view all the facts and circumstances of the case, I am of the opinion that compensation of Rs.70,000/- to each of the workmen in both the writ petitions would be the adequate relief.

39. The order dated 02.02.2006 of the labour court is modified to the extent that instead of reinstatement with 50 % back wages, the respondents-workmen would be entitled for compensation for a sum of Rs.70,000/- each. The compensation shall be paid to the respondents-workmen within four weeks from the date of this order, failing which the respondents-workmen are entitled for interest on the said sum to the tune of 9 % per annum.

40. Both the writ petitions are disposed of in the above terms.

41. In view of disposal of the writ petitions, all the pending applications also stand disposed of.

DEEPA SHARMA, J

MAY 18, 2015

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