

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

% *Judgment Reserved On : February 09, 2015*

Judgment Delivered On : February 27, 2015

+ **LPA 454/2014**

UNIVERSITY OF DELHIPetitioner
Represented by: Mr.Santosh Kumar, Advocate with
Ms.Rashmi B.Singh, Advocate
versus

RAM SHEKHAR JHA & ANR.Respondents
Represented by: Mr.Rajiv Aggarwal, Advocate with
Mr.Sachin Kumar, Advocate for
R-1
Mr.Shoaib Haider, Advocate for
R-2

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CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The brief factual backdrop leading to the filing of the two captioned intra-court appeals is that the respondent No. 1 : Ram Shekhar Jha was employed as a casual daily wager (Mali) by the Sports Council

of the University of Delhi on July 13, 1981. He used to be paid wages by recording work done as and when assigned as a Mali in the Muster Roll, meaning thereby his wages were fluctuating each month depending upon the number of days work was made available to him. Employment was discontinued on January 11, 1986.

2. Ram Shekhar Jha raised an industrial dispute alleging that Section 25F of the ID Act, 1947 was violated and for which assertion of the legal wrong done to him he pleaded that in the last calendar year, reckoned from January, 1985 till January, 1986, he had served for more than 240 days. He also put another string to his bow by pleading that the principle of ‘*last-come, first-go*’ enshrined in Section 25G of the ID Act, 1947 was also breached, inasmuch as persons taken in as daily wagers after him were retained in service and work was being taken from them. The appellant-university denied the assertions. The matter proceeded to the Labour Court II when the appropriate Government made a reference of the dispute as under:-

“Whether the services of Shri Ram Shekar Jha 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?”

3. The reference was registered as ID No.481/1986 by the Labour Court II. Ram Shekhar Jha filed a statement of claim pleading that he had rendered service for more than 240 days in the preceding calendar year reckoned from the date when his employment was discontinued as also that the principle of ‘*last-come first-go*’ was violated because persons taken as daily wagers after him were being given work. The appellant rebutted the pleadings in the statement of claim and on the basis of the pleadings before it, the Labour Court settled three issues which read as follows:-

“1) Whether the reference is bad in law in view of preliminary objection taken in the WS?

2) Whether the present dispute is not an Industrial Dispute in view of S.2 (A) of the Industrial Disputes Act?

3) As in terms of reference.”

4. Vide award dated September 17, 1991, the Labour Court held in favour of Ram Shekhar Jha, giving the opinion on the three issues settled as under:-

(i) As regards the first issue it was held that the employer has a special status and whether a legal entity or not, if he is an employer, he can sue and be sued in regard to the statutory provisions under the Act. Reliance was placed by the Labour Court on the decision reported as (1975) 2 LLJ 265 Management of Cuttak – Motor Association Vs. Administrative Staff of Cuttack Motor Association & Ors. The Labour Court held that whether Delhi University Sports Council has a legal status or entity or not was irrelevant. It was concluded that since Ram Shekhar Jha was employed by the Delhi University Sports Council, the reference was maintainable. To put it pithily, the Sport Council was nothing but the alter ego of the university.

(ii) As regards the second issue, placing reliance upon the decision reported as AIR 1964 SC 1272 Buckingham & Carnatic Co Vs. Venkatiah. , it was held that Ram Shekhar Jha had no intention to abandon the job. Since his services had been illegally terminated, the provisions of Section 2(A) of the Act are applicable.

(iii) As regards the third issue the Tribunal held, as a matter of fact, that the evidence establishes Ram Shekhar Jha having worked for more than 240 days as a Mali in the preceding calendar year and further that persons

inducted after him as daily wager were retained in service. Holding that the termination was in violation of Section 25(F) as also Section 25(G) of the ID Act, it was held that Ram Shekhar Jha was retrenched in violation of law.

5. Directing Ram Shekhar Jha to be reinstated in service the award proceeded to direct that Ram Shekhar Jha would be entitled to receive full back wages for the period interregnum when his services were dispensed with i.e. January 11, 1986 till he was reinstated in service and further that he would be entitled to the benefit of continuity in service for said period.

6. Aggrieved by the award dated September 17, 1991, the appellant filed WP(C) No.562/1992 in this Court praying that the award be quashed. Interim stay of the award was prayed for. On February 27, 1992 the learned Single Judge of this Court passed an order directing that the writ petition be listed after Ram Shekhar Jha was reinstated in service and accordingly the appellant reinstated Ram Shekhar Jha in service on March 12, 1992, but in the same capacity in which he had served till when his services were discontinued i.e. as a daily wager. Pursuant to the order dated March 12, 1992, Ram Shekhar Jha rejoined service on March 16, 1992.

7. The writ petition was admitted and needless to state no order was required to be passed under Section 17(B) of the ID Act, 1947 because Ram Shekhar Jha was reinstated in service, albeit as a daily wager : the status of his employment when employer-employee relationship was severed.

8. Due to docket explosion in the record room of this Court, W.P.(C) No.562/1992 did not mature for hearing keeping in view its priority position.

9. Another significant milestone event took place. Ram Shekhar Jha learnt that the appellant had a policy to regularize the services of daily wage employees by confirming them against sanctioned posts as and when they fell due on superannuation, death or voluntary abandonment of the post by the incumbent thereof and/or when new posts were sanctioned. Ram Shekhar Jha further learnt that persons junior to him as daily wagers were regularized in service on August 01, 1986. He raised another industrial dispute which was referred by the Appropriate Government for adjudication to the Industrial Tribunal No.1, Karkardooma, Delhi with the term of reference being as under:-

“Whether Shri Ram Shekar Jha is entitled to be regularized in the proper pay scale from the date of his initial appointment and if so, to what directions are necessary in this respect?”

10. The reference was registered by Industrial Tribunal No.1 as ID No.224/1996. Vide award dated July 03, 2002, the Industrial Tribunal held that evidence established that persons inducted as daily wagers after Ram Shekhar Jha were regularized and made permanent on August 01, 1986 and thus it was held that even Ram Shekhar Jha would be entitled to be regularized in service under the appellant with salary in the regular scale of pay.

11. The learned Presiding Officer of the Industrial Tribunal took note of the fact that Ram Shekhar Jha had been reinstated in service on March 16, 1992 and that W.P.(C) No.562/1992 filed by the appellant challenging the award dated September 17, 1991 was pending. The Industrial Tribunal consciously therefore held that it was not passing any direction for back wages in the regular scale of pay for the period January 11, 1986 till when Ram Shekhar Jha joined back service on March 16, 1992. Holding, that the entitlement thereto would depend upon the

outcome of the decision yet to be pronounced in W.P.(C) No.562/1992. For the remainder period Ram Shekhar Jha was entitled to wages as per scale applicable to permanent employees.

12. The award dated July 03, 2002 was neither challenged by the appellant nor it was implemented, in that, Ram Shekhar Jha was continued in employment as a daily wager and was being paid wages computing the number of days work was assigned to him. Therefore Ram Shekhar Jha filed a writ petition which was registered as WP(C) No.2793/2003 in this Court praying for the implementation of the award dated July 03, 2002 and seeking a restraint order against the appellant-university from employing other candidates against permanent vacancies before regularizing his service.

13. The two writ petitions : W.P.(C) No.562/1992 filed by the appellant laying a challenge to the award dated September 17, 1991 and W.P.(C) No.2793/2003 filed by Ram Shekhar Jha praying for implementation of the award dated July 03, 2002 were consolidated and heard together.

14. Vide impugned judgment and order dated January 31, 2014, the learned Single Judge noted that the award dated July 03, 2002 had not been challenged by the University and further that the University had passed an order on January 07, 2005 regularizing the service of Ram Shekhar Jha with effect from August 01, 1986. The learned Single Judge further took note of the fact that the order dated January 07, 2005 was without any condition. Affirming the findings of fact recorded in the two awards, the learned Single Judge held that Ram Shekhar Jha would be entitled to salary as a regular employee with effect from August 01, 1986, denying back wages from January 11, 1986 i.e. the date when Ram

Shekhar Jha's service was terminated till July 31, 1986 (for the apparent reason with effect from August 01, 1986 Ram Shekhar Jha was held entitled to his service being regularized as per the award dated July 03, 2002 which was not challenged by the University of Delhi.

15. The appellant has challenged the decision dated January 31, 2014 by filing the two captioned appeals.

16. From the cornucopia of facts noted by us it is clear that giving effect to the interim order dated February 27, 1992 passed by this Court, an order was passed by the appellant on March 12, 1992 reinstating Ram Shekhar Jha in service, albeit as a daily wager, and he resumed duties on March 16, 1992 and continued to work but receive salary as a daily wager till when the University passed the order on January 27, 2005 making him permanent. Post said period Ram Shekhar Jha has been paid salary due to a permanent employee. Thus, there is no scope for any debate as to what emoluments should be paid by the appellant to Ram Shekhar Jha post March 16, 1992, for the reason the appellant has not challenged the award dated July 03, 2002. If Ram Shekhar Jha has worked for the University post March 16, 1992, the question of he working anywhere else and earning a wage does not arise. Since as per the award dated July 03, 2002, which has not been challenged by the University, Ram Shekhar Jha was entitled to regularization in service with effect from August 01, 1986, Ram Shekhar Jha has to receive salary in the scale of a permanent employee for said period i.e. March 16, 1992 onward.

17. The question would be concerning the period January 11, 1986 till the period March 16, 1992, but we truncate this period by reckoning it from July 31, 1986, because even Ram Shekhar Jha has not challenged the award dated July 03, 2002, and as noted above in the award the

Industrial Tribunal has withheld back wages to be paid in the regular pay scale, or for that matter even as a daily wager from January 11, 1986 till July 31, 1986.

18. Thus, the period with which we are concerned would be July 31, 1986 till March 16, 1992.

19. On the issue of grant of back wages when termination was found to be contrary to law, in the decision reported as (1979) 2 SCC 80 Hindustan Tin Works Private Limited v/s Employees of Hindustan Tin Works Private Limited it was observed that there cannot be a strait-jacket formula for the grant of back wages. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. More or less, it depends upon the discretion of the Court/Tribunal keeping in mind the relevant considerations. Such discretion must be exercised in judicial and judicious manner for cogent and convincing reasons and not arbitrarily.

20. These relevant considerations to be kept in mind while exercising the discretion to pay or deny back wages were highlighted by this Court in the decision reported as 2014 (3) SCT 581 (Delhi) Govt. of NCT of Delhi & Ors. Vs. Mithilesh Swami: where it was held as under:-

“14. The discretion to pay or deny back wages has to be on the following principles:-

(i) Where the termination or disengagement is found to be tainted with mala fides i.e. it is found that the employer used the power to dismiss/disengage the services as a camouflage, full back wages need to be paid for the reason the employer was not litigating bona fide.

(ii) As a corollary to the first, if the employee bona fide exercises power to terminate the services of the employee or disengage the employee from service, upon a procedural or a technical defect being found in the decision making process or

it being opined that the weight of the evidence did not justify services being terminated, back wages may be denied in full or in part. The reason would be that the employer had acted bona fide and on the subject of weight of evidence or a default in procedure there is always a possibility of two equally reasonable persons taking diametrically opposite views.

(iii) With respect to point No.(ii) above, denial of full or part back wages has to be with reference to:-

(a) Length of previous service rendered.

(b) Likelihood of the employee finding alternative employment.

(c) Reason for the delay in adjudication.

15. With respect to points (a), (b) and (c), the logic would be that where a person has served for say 2 to 3 years, it would be unjust to burden the employer with full back wages inasmuch as the employer should not be made to suffer due to docket explosions in judicial Fora and courts. Further, presumably such an employee would be young in age and in today's environment of 'catch them young' there would be a greater chance for such an employee to be finding alternative employment in the interregnum. Further, on the likelihood of the employee finding alternative employment, the nature of the job performed would be relevant, for the reason for some kind of skilled/semi-skilled jobs it is easy to find alternative employment and qua some it is difficult. For example it is easy for a person with driving skills to drive a light motor vehicle to find a job, but not so for a person who drives a heavy duty vehicle. The reason is the number of passenger cars vis-a-vis heavy duty vehicles on the roads in India would be in the ratio 100:1. On the subject of delay in adjudication, if it is found that the employer unnecessarily dragged on the proceedings by seeking adjournment, said circumstance has to be weighed against the employer and vice versa.

16. We highlight that aforesaid facts and circumstances are illustrative and not exhaustive. But one thing is clear, the decision to deny back wages has not to be a mechanical

exercise or at the whims and fancies of the decision maker. Every relevant fact and circumstance, for and against the employer and the employee have to be taken into account.”

21. Facts of the present case reveal that Ram Shekhar Jha was first employed as a daily wager on July 13, 1981 and he worked for 4 years and 6 months as a daily wager when his services were terminated on January 11, 1986. It was not that there was no work. Persons junior to him were retained. The principle of ‘last-come first-go’ was breached assuming the University had to retrench extra hands. The fact that with effect from August 01, 1986 daily wagers engaged in service after Ram Shekhar Jha was employed as a daily wager were regularized in service it can safely be inferred that the process of consideration of regularization was in contemplation and thus we find malice in terminating service of Ram Shekhar Jha. It was obviously to give benefit to a person junior to him.

22. Under the circumstances the view taken by the learned Single Judge stands the scrutiny of law. It is trite that an appeal is on a principle of law and not against the discretion exercised by the learned Single Judge. Of course, if it can be shown that the discretion has been exercised on a wrong principle of law, corrective action can be taken.

23. The instant appeals do not attract the latter use of power by the Appellate Court.

24. The appeals are dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 27, 2015/mamta