

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

% *Judgment Reserved On : March 04, 2015*
Judgment Delivered On : March 17, 2015

+ **LPA 496/2013**

ALL INDIA INSTITUTE OF MEDICAL SCIENCES ...Appellant
Represented by: Mr.Rajat Katyal, Mr.Rishab
Kaushik and Mr.Suvarna Kashyap,
Advocates

versus

JITENDER KUMARRespondent
Represented by: Mr.Varun Prasad, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Instant appeal brings out the necessity for Courts, while exercising writ jurisdiction, to be careful if the writ petition relates to a challenge to an award by an Industrial Adjudicator under the ID Act, 1947. The care being to ensure that the case projected by the petitioner conforms to the case pleaded before the Industrial Adjudicator. Further, one has to be careful in considering the Annexures filed with the writ petition; and it to be ensured that the Annexures were documents proved before the Industrial Adjudicator.

2. A writ petition laying a challenge to an award would obviously pray for a writ of certiorari to be issued; record of the Industrial Adjudicator to be called, and then seen whether the Industrial Adjudicator has misinterpreted the law or misdirected the inquiry.

3. The respondent raised an Industrial Dispute regarding his relationship with the appellant and claimed that since the year 1994 he was working as a Khalasi at a monthly remuneration of ₹1,800/- with the appellant and that his services were illegally terminated on June 02, 1995 when Junior Engineer of the appellant verbally told him that there was no work for him.

4. As per the appellant the respondent worked intermittently in the year 1994 for 165 days and between January and July, 1995 for 97 days. The engagement was on daily wage basis. The respondent stopped reporting for work on July 22, 1995.

5. The appropriate Government made a reference to the Labour Court on December 30, 1997. The terms of reference being:-

“Whether Sh.Jitender Kumar has abandoned his job or his services have been terminated illegally and/or unjustifiably by the Management, and if so, to what relief is he entitled and what directions are necessary in this respect.”

6. The respondent filed a statement of claim on July 01, 1998 in which he pleaded that he joined service under the appellant as a Khalasi for a monthly salary of ₹1,800/- in the year 1994 and that his services were terminated orally on June 02, 1995 without any notice.

7. Relevant would it be to highlight that the respondent never pleaded that he suffered an injury while working with the appellant due to which he contacted Tetanus. He never pleaded that on account thereof he was unable to report for duty for sometime. He never pleaded that he undertook treatment at any hospital for Tetanus.

8. The appellant filed a reply on February 17, 1999 pleading that in the year 1994 the respondent worked as a daily wage Khalasi for 165 days and till July 22, 1995, in the year 1995 for 97 days. It was pleaded

that the respondent last worked on July 22, 1995 and abandoned the work thereafter. The appellant also took a plea that it was not covered by the definition of industry and hence pleaded that it was not amenable to the jurisdiction of the learned Labour Court.

9. The respondent filed a rejoinder denying that he abandoned duties. He reiterated that he was verbally told not to report for duty.

10. Even in the rejoinder he never pleaded sickness as the cause for not being able to report for duty after July 22, 1995.

11. The respondent filed an affidavit by way of evidence which was exhibited as WW-1/A and an additional affidavit by way of additional evidence exhibited as WW-1/B.

12. In the first affidavit he stated that his services were illegally terminated on February 06, 1995. In the second he pleaded that his services were terminated on July 22, 1995. He proved two documents Ex.WW-1/1 and Ex.WW-1/2 being demand letters dated November 15, 1996 and January 02, 1997 in which the respondent raised the grievance of his service being illegally terminated.

13. Though we find no mention in the deposition of the respondent to two postal receipts dated January 13, 1997, and the other on which the date cannot be noted, the two have been exhibited as WW-1/3 and WW-1/4. Another UPC receipt on which the date is not clear has been exhibited as Ex.WW-1/5. An undated letter sent by the respondent raising the Industrial Dispute has been exhibited as Ex.WW-1/6.

14. Relevant would it be to note that in neither affidavit the respondent pleaded that he suffered an injury while working and contacted Tetanus which required him to take treatment from a hospital and this was the reason why he could not report for duty.

15. On behalf of the appellant affidavit by way of evidence was filed under the signatures of Sh.R.K.Dua, a Junior Engineer, Electrical who deposed that in the year 1994, with breaks in service, the respondent worked for 165 days and for 97 days between January 23, 1995 to July 22, 1995 and that the respondent voluntarily stopped reporting for work.

16. Vide award dated May 16, 2009 the learned Labour Court held that the appellant was not an industry. The learned Labour Court also held that in view of the evidence led, the respondent had abandoned the job.

17. The respondent laid a challenge to the award by filing W.P.(C) No.7315/2010 in which he pleaded that he had been working with the appellant since March 01, 1994 and that all of a sudden he fell sick on March 02, 1995. Annexing as Annexure P-2 a photocopy of an OPD Card purportedly issued by LNJP Hospital and claiming that the same was Ex.WW-1/6, the respondent pleaded that due to said sickness he could not report for duty and that he came back for work on June 01, 1995 but was not given work. Annexing as Annexure P-3 he relied upon another certificate issued by LNJP Hospital showing that he was under treatment for Tetanus. The certificate bears the date July 05, 1995. He pleaded that his services were illegally terminated on June 06, 1996.

18. Unfortunately the appellant did not bring to the notice of the learned Single Judge in the counter affidavit filed that the respondent was changing tracks. It was not pleaded that in the statement of claim before the Labour Court the respondent did not claim that he became sick on March 02, 1995 and reported for work in July, 1995. The appellant did not bring it to the notice of the learned Single Judge that in the statement of claim as also the affidavit by way of evidence filed before the learned Labour Court the case of the respondent was that his services were illegally terminated on June 02, 1995. Further, the appellant did not bring

it to the notice of the Court that as per the appellant, the respondent had worked from January 23, 1995 till July 22, 1995 for a period of 97 days.

19. Vide impugned decision dated April 11, 2013 the writ petition filed by the respondent has been allowed. The learned Single Judge has held that the appellant would be an industry. The learned Single Judge has held that abandonment of a job cannot be likely inferred. Referring to the medical certificates relied upon by the respondent the learned Single Judge has held that the same would evince that the respondent was hospitalized on March 02, 1995 and remained under treatment for 64 days. The learned Single Judge has held that the respondent had not worked for 240 days and thus the termination of the service did not foul Section 25F of the ID Act but relying upon a seniority list of Khalasies the learned Single Judge held that Khalasies were appointed later on and thus Section 25G and Section 25H of the ID Act were breached. Direction issued is to reinstate the respondent in service without back wages.

20. From the facts noted by us hereinabove it is apparent that the learned Single Judge was not rendered any assistance by the appellant whose counsel did not even plead before the learned Single Judge that the record of the Labour Court which had been summoned should be looked into.

21. We need not speak much on the impugned decision for the reason it is the result of no proper guidance being given to the learned Single Judge.

22. The respondent could not plead a case in the writ petition contrary to or at variance with the case pleaded before the Labour Court. In the writ petition, the respondent could not rely upon any document not proved before the Labour Court. Referring to the photocopy of an OPD

card annexed as Annexure P-2 as Ex.WW-1/6, the respondent made false pleadings in the writ petition. Not being informed that Ex.P-2 was not Ex.WW-1/6 and that the document exhibited as Ex.WW-1/6 before the Labour Court was undated letter raising an industrial dispute, the learned Single Judge not only relied upon Ex.P-2 but even Ex.P-3 to hold that for a period of 64 days between March 02, 1995 and July 05, 1995, the respondent remained under treatment and thus it could not be said that he voluntarily abandoned the job. Not being guided properly, the learned Single Judge overlooked that as per the claim of the respondent he had worked till June 02, 1995, when his services were illegally terminated. As per the management of the appellant the respondent had last worked on July 22, 1995. The abandonment of the job was premised on the plea that the respondent stopped reporting for work from July 23, 1995 and all of a sudden for the first time raised the grievance of his service being illegally terminated when he sent the demand letter Ex.WW-1/1 on November 15, 1996.

23. The impugned decision suffers from errors apparent on the face of the record, and for which the counsel for the appellant is to be blamed. The counsel for the workman pleaded facts in the writ petition contrary to the facts pleaded in the statement of claim before the Labour Court and filed documents, giving them a wrong exhibit number, which were not even filed before the Labour Court.

24. The learned Single Judge has concurred with the finding of fact returned by the Labour Court that the respondent did not work for 240 days.

25. In view of the fact that it is a case of voluntarily abandoning work, and for which we may highlight one point. In the writ petition the respondent sought to plead that he could not work from March 02, 1995

till July 1995 because he was under treatment at LNJP Hospital, but as a matter of fact he worked till July 22, 1995. The respondent had been taking contradicted pleas. The appellant was consistent that the respondent last worked on July 22, 1995. In the statement of claim filed on July 01, 1998 the respondent pleaded that his services were orally terminated on June 02, 1995. In the first affidavit by way of evidence filed he pleaded that his services were illegally terminated on February 06, 1995, and in the second affidavit by way of evidence he pleaded that his services were illegally terminated on July 22, 1995. It is thus apparent that the claim in the writ petition that the respondent could not work from March 02, 1995 till July 1995 on account of he suffering from tetanus, is false. As a matter of fact the respondent had worked till July 22, 1995. The abandonment of service was to be considered with respect to the action of the respondent in keeping quite till he sent the notice Ex.WW-1/2 on November 15, 1996.

26. In that view of the matter it is irrelevant that later on other persons were given employment as a daily wage. It is irrelevant that a few people engaged as daily wager after the respondent was first engaged were retained in service. The reason being that if a daily wager stops reporting for work, the employer would be justified in taking an additional hand. If a daily wager employed earlier, voluntarily leaves the job, it hardly matters that the one taken later continues with the job.

27. Section 25G of the ID Act, 1947 recognizes the principle last come first go, but is applicable if the management retrenches the services of a workman. It has no application where a workman voluntarily abandons the job. Similarly, Section 25H would have no application where the employee is not retrenched and somebody else is engaged if the employee voluntarily abandons the job.

28. No arguments were advanced before us on whether the appellant is an industry.

29. The writ petition is allowed. Impugned judgment and order dated April 11, 2013 is set aside and WP(C) 7315/2010 filed by the respondent is dismissed.

30. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 17, 2015
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