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

Date of Decision: 6th October, 2015

+ W.P.(C) 11815/2009 & CM No. 17788/2014

DELHI STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD.

..... Petitioner

Through: Mr Amiet Andley, Advocate
versus

VIJAY KUMAR

..... Respondent

Through: Mr Rajiv Aggarwal and Mr Sachin
Kumar, Advocates

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By way of present petition, the petitioner lays a challenge to the Award dated 20th March, 2009 passed by the Presiding Officer, Industrial Tribunal-II, Karkardooma Courts, Delhi in ID 182/2005 vide which the respondent/workman was held entitled to be reinstated with 40% back wages. As regard regularization, it was held that he was entitled to be considered for regularization in accordance with the policy of regularization framed by the management, however, he was not entitled to same wages as are paid to regular employees of the same category.

2. Learned counsel for the petitioner submits that the petitioner engaged the respondent as sweeper on muster roll for cleaning/sweeping w.e.f. the year 1992. The respondent got the wages only for the specific days he

reported for duty. However, the conduct of the respondent/workman was always unsatisfactory and the respondent used to remain absent from his duty. In November, 2000, he came on duty only for eight days, in December, 2000, he reported for duty only for three days while in January, 2001, he came on duty for six days. He remained absent from duty w.e.f. 1st May, 2001 without any intimation. Special messenger was sent at his residence from time to time. Telegram was also sent asking him to join his duties but he did not report for duty, therefore, his name was struck off the muster roll w.e.f. 1st May, 2001. After more than three years, the respondent issued a demand notice on 8th December, 2003 for reinstatement in job. The consequent dispute was referred by the Secretary Labour, Govt. of NCT of Delhi to the Labour Court whereupon the impugned award was passed. It is submitted that the award is on erroneous appreciation of the provisions of Section 25B of the Industrial Disputes Act 1947 (in short 'the Act'). In order to avail the benefit under the ID Act, the respondent had to demonstrate that he had completed 240 days within a period of 12 calendar months commencing and counting backwards from the relevant date i.e. 01.05.2001 (i.e. between 01.05.2000 to 01.05.2001) which he failed to prove, therefore, he was not entitled to the benefits under the ID Act and his disengagement cannot be held to be retrenchment under Section 2(OO) of the Act. Further the Labour Court ordered reinstatement of the workman with back wages without taking note of the fact that the respondent provided no evidence that he was out of job and not gainfully employed after his so called termination. In the absence of the same, there was no justification whatsoever to order reinstatement with back wages.

3. Lastly, it was submitted that even if it is taken that the respondent was retrenched in violation of the provisions contained in Section 25B of the Act, the workman is not entitled to reinstatement but only compensation as he was only working as a daily wager. The dispute was raised by him after three years of termination of his employment. A long period of 15 years has elapsed from the date the name of respondent was struck off the muster roll. The petitioner does not have a policy of regularization of muster roll/daily wagers. The petitioner has already deposited the awarded amount of Rs.84,332/- with the Registrar of this Court in compliance of order of this Court dated 18th September, 2009. The respondent has also been paid wages under Section 17B of the ID Act. As such, lump sum compensation in lieu of reinstatement be awarded to respondent after deducting the amount deposited in the Court and the amount already paid to the respondent under Section 17B of the ID Act.

4. Learned counsel for the respondent, on the other hand, submits that in the statement of claim, the workman had made a specific allegation that he worked for 240 days and there was no specific denial of this fact in the written statement. That being so, since the petitioner never denied the factum of workman having worked for 240 days during the preceding year, the workman neither summoned the record from the petitioner nor examined any co-workmen. However, the management who was in possession of this valuable piece of evidence failed to place on record the entire record, with the result the Labour Court rightly drew an adverse inference against the management for holding that the workman worked for 240 days preceding the date of his termination. That being so, it was incumbent upon the management to have complied with the provisions of Section 25F of the Act

which they failed to comply. As such, the termination was in violation of the provisions of Section 25F of the Act. The workman is entitled for regularization of service since the date his juniors were regularized and the amount deposited by the petitioner be released to him. There is no infirmity in the impugned order which calls for interference. Reference was also made to the scope of interference while exercising power under Section 226 of the Constitution of India by this Court. As such, it is submitted that the petition, being devoid of merits, deserves dismissal with costs.

5. I have heard the learned counsel for the parties and have perused the record. For appreciation of the respectful submissions of the learned counsel for the parties, it will be in the fitness of things to have a brief narration of the facts.

6. The respondent/workman was employed on 5th November, 1992 as muster roll sweeper. His services were terminated w.e.f. 1st May, 2001, as such, he raised an industrial dispute. The Govt. of NCT of Delhi referred the dispute for adjudication with the following terms of reference:-

"Whether Sh. Vijay S/o Sh.Nathi ram has been terminated illegally and or unjustifiably by the management, and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/Govt. notifications and to what other relief is he entitled and what directions are necessary in this respect?"

" Whether Sh. Vijay Kumar is entitled to regularization on the post of sweeper and if so, from which date and what directions are necessary in this respect ?"

" Whether Sh. Vijay Kumar muster roll sweeper is entitled to same wages as are admissible to their regular counterparts from his initial date of joining an if so, what directions are necessary in this respect ?"

7. Notice of reference was issued to both the parties. The workman filed statement of claim alleging therein that he joined employment of the management on 5th November, 1992 as a muster roll sweeper. He could not attend his duties during the period 1st May, 2001 to 10th March, 2002 because he was suffering from Hepatitis/jaundice. He joined his duties on 11th March, 2002 along with medical and fitness certificate but he was not allowed to join his duties. After repeated persuasion, his application for joining along with medical certificate was acknowledged by the management. He had been approaching the management for duties but he was not allowed to join his duties and was told that his services have already been terminated w.e.f. 1st May, 2001. It was alleged that the termination of his services/non-regularization since initial date of his joining and denial of difference of salary on the principle of equal pay for equal work is wholly illegal, as absence from duty on medical grounds do not constitute misconduct. Services of the workman could not have been terminated on this ground. It was further alleged that the workman had acquired status of permanent employee after putting in regular service of 240 days.

8. The claim of the workman was contested by the management, inter alia, on the ground that workman was engaged as sweeper on muster roll, however, his conduct was totally unsatisfactory. He was neither regular nor punctual in discharge of his duties. It was further alleged that in the month of November, 2000 - he worked only for eight days, in the month of December, 2000 - he worked only for three days and in the month of January, 2001, he attended duties only for six days. Since he was a daily rated worker, no action was taken against him. He did not report for duty w.e.f. 1st May, 2001 and remained absent without intimation. Despite

sending special messenger at his residence and telegram dated 23rd August, 2001 the workman did not report for duty. Management also sent a notice to the workman dated 04.03.2002 in respect of his absence. As such, the workman was neither entitled to reinstatement nor to regularization nor to difference of salary as he was purely a daily rated worker.

9. On the basis of the pleadings of the parties, following issues were framed:-

- "(1) Whether cause of the workman has been duly espoused?*
- (2) Whether the services of the workman have been terminated illegally and or unjustifiably by the management ?*
- (3) Whether the workman is entitled to regularization on the post of sweeper and, if so, from which date ?*
- (4) Whether the workman is entitled to the same wages as are admissible to his counterparts from the initial date of joining ?*
- (5) As per terms of reference."*

10. The workman examined himself whereas on behalf of the management, one Satpal was examined as MW1. After going through the record of the case, Issue No.1 was decided in favour of the workman by observing that cause of the workman has been duly espoused. As regards Issue No. 2, learned Labour Court considered the testimony of the workman wherein he deposed that he could not attend to his duties during the period 1st May, 2001 to 10th March, 2002 because he was suffering from Hepatitis/Jaundice. He joined his duties on 11th March, 2002 along with medical and fitness certificate but he was not allowed to join duties and was informed that his services have been terminated w.e.f. 1st May, 2001. On the other hand, MW-1-Satpal Singh, Executive Engineer of the management placed on record the muster roll Ex.MW1/C for proving that the workman reported for duty only for eight days in the month of November, 2000, three

days in December, 2000 and six days in the month of January, 2001. He remained absent from duty w.e.f. 1st May, 2001 without intimation and despite sending a special messenger and telegram Ex.MW1/A requesting him to join duties, he did not bother to join. He further deposed that the management never terminated services of the workman rather he himself wilfully remained absent from his duties for a very long period and when he did not join his duties, the management finding no way out, made alternative arrangement by transferring another sweeper from sub-division. Show cause notice Ex.MW1/B was also served upon the workman to join his duties within three days but he failed to join.

11. As regards the question as to whether the workman had put in service of more than 240 days in a year, learned Labour Court referred to Para No. 5(XI) of the statement of claim wherein workman has specifically averred that he had put in continuous service of more than 240 days and, therefore, his services could not have been terminated without complying with provisions of Section 25F of the ID Act. This fact was not disputed by the Management in the written statement. Moreover, MW1 proved only part of the record pertaining to attendance of the workman as Ex.MW1/C. This record certified his attendance w.e.f. 1st April, 2001 to 31st August, 2001. However, the management did not produce record pertaining to the period January to March, 2001. If the days from 1st January, 2001 to 31st August, 2001 are reckoned, then they come to 243 days. The witness admitted that workman remained employed with the management during 5th November, 1992 to 1st May, 2001. However, prior to 2001, no record was produced to show that workman had not completed 240 days of service in a particular year during 1992 to 2000. Relying upon *MCD vs. Sukhvir Singh and Ors.*

in CWP No.1684/1991 decided on 14th February, 1994 by a Single Judge of this Court, it was held that when employer failed to produce best evidence like wage register or any other document before the Labour Court reflecting the muster roll, the Court would be justified in coming to the conclusion that version of the workman was correct. In the present case, to the admission of the management, workman had worked with management from November, 1992 to May, 2001. Though the management had produced on record muster roll for the period 1st April, 2001 to August, 2001, nevertheless for rest of the period, it has not produced the record. It was not the case of the management that the previous record was not available with it, as such, for non-production of the record an adverse inference is warranted against the management that had the record been produced it would not have supported the version of the management, as such, it was held that it stands proved that workman had put in service of more than 240 days during the year 2000 or in the years prior thereto in accordance with provisions of Section 25B of the ID Act.

12. It was further observed that admittedly the name of the workman was deleted from the muster roll w.e.f. 1st May, 2001. MW-1 had also admitted in his affidavit that workman sent application along with medical certificates through another person then it means that the workman was ill. Even otherwise if workman was absenting himself from his duties without intimation and without any reasonable or sufficient cause, it was misconduct on his part. Therefore, proper course for the management was to hold a departmental inquiry against the workman and if found guilty, his services could have been dispensed with but no such action was taken. Moreover, the provisions of Section 25F of the ID Act were not complied with,

therefore, the termination of services of the petitioner was held to be illegal and unjustified.

13. As regards Issue No.3 as to whether the workman was entitled to regularization on the post of Sweeper and if so from which date it was held that the workman had been employed with the Management as daily wager and not against any sanctioned post, therefore, the Tribunal was not competent to order his regularization. Although it was observed that daily wagers do not have a right to regularization but in view of the observations made by the Hon'ble Supreme Court in *Secretary, State of Karnataka vs. Umadevi & Ors.*, AIR 2006 SC 1806, it was for the management to frame the scheme of regularization of such workman and, therefore, it was ordered that the management is under duty to frame a policy for regularization and consider the case of workman in accordance with the said policy.

14. The workman was held not entitled to equal wages as are admissible to his counterpart from the initial date of joining. Ultimately, the aforesaid award was passed.

15. It is the submission of the learned counsel for the petitioner that in order to prove that the respondent/workman was in continuous service for a period of one year for the purpose of Section 25B and Chapter V-A the onus of proving the factum of completing 240 days within a period of 12 calendar months commencing and counting backwards from the relevant date, i.e., 1st May, 2000 to 1st May, 2001 was upon the workman. This submission find support from *Range Forest Officer vs. ST Hadimani*, (2002) 3 SCC 25 reiterated in *Ranip Nagar Palika vs. Babuji Gabhaji Thakore and Ors.*,

(2007) 13 SCC 343 where it was held that the onus of proof in such a case lies on the workman. He has to adduce evidence apart from examining himself to prove the factum of being in the employment of the employer. However, the circumstances appearing in the instant case are peculiar, inasmuch as, the averments made by the workman in Para 5(XI) wherein the workman specifically averred that he had put in continuous service of more than 240 days was not denied by the management in the written statement. The workman reiterated this fact in his examination-in-chief filed by way of affidavit and there was no challenge to this averment except for the fact that it was put to him in cross-examination that in November, 2000; December, 2000 and January, 2001, he reported for duty only for eight days, three days and six days respectively to which he stated that due to lapse of time, he does not remember this fact. However, the management had placed on record the muster roll Ex.MW1/C only to prove the fact that he did not attend his duties for whole of the month in November, 2000; December, 2000 and January, 2001. It was rightly observed by the Labour Court that having produced the muster roll register for few months, it was incumbent upon the management to place on record the relevant record for the preceding years also in order to ascertain whether the workman worked for 240 days within a period of 12 calendar months. This is more so because it is not the case of management that it was not in possession of muster roll register for earlier months/year. It is settled law that when a party in possession of best evidence which would throw light on the issue in controversy withhold it, court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him and further that such party cannot rely on the abstract doctrine of onus of proof or on the fact

that he was not called upon to prove it as held as far back in the year 1968 by Hon'ble Supreme Court in AIR 1968 SC 1413 ***Gopal Krishanji vs. Mohd. Hazi*** and reiterated till date. As such, for withholding the material evidence, an adverse inference was drawn against the management and this finding cannot be faulted with. Thus, it was rightly observed that the workman had worked for 240 days in the 12 calendar months preceding his termination. That being so, before termination of his services, it was incumbent upon the management to have complied with the provisions of Section 25F of the Act.

16. It is undisputed case of the parties that the condition incorporated in Section 25F of the ID Act were not complied with before striking off the name of the workman from the muster roll, as such, the termination was rightly held to be illegal by the Labour Court.

17. As regards regularization in the service is concerned, admittedly the workman was only a muster roll employee and, as such, being a daily wager had no right to be regularized. That being so, the Tribunal also did not direct his regularization but only left to the wisdom of the management to frame a policy for regularization and then consider the case of the workman.

18. The only question which remains for consideration is whether the respondent should be reinstated in service or should be paid compensation in lieu of reinstatement. The respondent/workman was only a muster roll sweeper. He did not undergo any process of selection before he was appointed as sweeper on daily wages.

19. This is by now more or less settled proposition of law that even in a case where a workman is retrenched in violation of the provisions contained in Section 25F of the Act, the Court may, in appropriate cases, award compensation, instead of directing reinstatement of the workman with or without back wages. The question whether the workman should be reinstated in service or paid compensation in lieu of reinstatement with or without back wages depends upon a number of factors such as (a) the period of the service rendered by him; (b) the nature of his appointment as to whether it was permanent/temporary/regular/ad hoc/on daily wage basis; (c) whether the workman was appointed following due process of selection in accordance with the prescribed Recruitment Rules or not; (d) whether the workman was appointed against a duly sanctioned post or not; (e) whether there is an existing post against which the workman can be reinstated and (f) the time period which has elapsed since retrenchment of the workman. However, there is no principle having universal application that the Tribunal or the High Court must necessarily direct reinstatement with or without back wages or must necessarily award compensation in lieu of reinstatement. Every case will have to be determined taking into consideration all the facts and circumstances, prevalent in the case under consideration.

20. In ***Mahboob Deepak v. Nagar Panchayat, Gajraula***, (2008)1SCC 57, Supreme Court held that the following factors are relevant for determining this issue:-

“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.”

21. In **Asst Engineer, Rajasthan Development Corp. and Anr. v. Gitam Singh** (2013) 5 SCC 136, Supreme Court, after considering its various earlier decisions on the subject, inter alia, observed as under:-

“26. From the long line of cases indicated above, it can be said without any fear of contradiction that this Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of this Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Therefore, the normal rule that dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wager and an employee holding the regular post for the purposes/of consequential relief.”

22. In the aforesaid case, the workman, who had worked on daily wages for about one year, was awarded compensation of Rs. 50,000/-

23. In **Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.**, (2009) 15 SCC 327, the workman was employed on daily wage basis and had worked for one year and two months. Instead of directing reinstatement, with or without back wages, Supreme Court awarded compensation, amounting to Rs. 50,000/- to him.

24. In **Sita Ram v. Moti Lal Nehru Farmers Training Institute**, (2008) 5 SCC 75, Supreme Court, considering the period during which the services were rendered by the workmen, the fact that the employer had stopped its

operations and the services were terminated in the year 1996, held that the case before it was not a fit case for directing reinstatement in service and directed payment of compensation of Rs. 1,00,000/- to them.

25. In ***Ghaziabad Development Authority and Anr. v. Ashok Kumar and Anr.***, (2008) 4 SCC 261, the workman was appointed on daily wages of Rs. 17/- per day, without there being a sanctioned post and had worked for six years on such a post. Supreme Court directed payment of compensation, amounting to Rs.50,000/- to him.

26. In ***Municipal Corporation v. Ram Pal***, 2007 (115) FLR 284, the workman was appointed on ad hoc basis. The services of the workman were terminated in the year 1992. Noticing that even if she was reinstated in service on ad hoc basis, her services could not be regularized in view of Constitution Bench decision in Secretary, ***State of Karnataka and others v. Uma Devi and others***, 2006 (II) LLJ 722 SC, the Court directed payment of compensation, amounting to Rs. 25,000/- to her in place of reinstatement with back wages.

27. In ***Haryana Urban Development Authority v. Om Pal***, (2007) 5 SCC 742, Supreme Court, noticing that the workmen had worked for a very short period set aside the award directing his reinstatement with back wages and award compensation, amounting to Rs. 25,000/- to him.

28. In ***Bharat Sanchar Nigam Limited v. Man Singh***, (2012) 1 SCC 558, the services of the workmen, who were daily wagers during the year 1984-85 were terminated, without following Section 25F. They raised an industrial dispute after about 05 years. The Labour Court directed their reinstatement and the award was upheld by the High Court. Setting aside the

reinstatement, Supreme Court directed payment of compensation to them, holding that the case of a daily wager was required to be distinguished from a workman who was a permanent employee.

29. The respondent/workman, in the instant case, was a daily wager. He did not undergo any process of selection and was not appointed against the sanctioned post. Moreover, the past record of the workman reflected that he was quite irregular in joining his duties as the workman did not deny the fact that in November, 2000, December, 2000 and January, 2001, he reported for duties only for eight days, three days and six days respectively. Even w.e.f. 1st May, 2001, he absented from duties without any intimation to the management. He admitted in cross-examination that the management sent some messenger at his residence calling upon him to report for duty. Telegram dated 23rd August, 2001 and notice dated 4th March, 2002 was also sent by the management asking him to report for duty but he did not join. The dispute was raised by him after three years of termination. A long period of 15 years have elapsed from the date the name of respondent was struck off the muster roll. As per the case of petitioner it has no policy of regularisation.

30. Considering all these facts and circumstances, while setting aside the order passed by the Industrial Tribunal regarding reinstatement and consideration of his case for regularization, the petitioner is directed to pay a lump sum amount of Rs.1.5 lacs as compensation to the respondent within eight weeks from today after adjusting the amount of back wages which has already been deposited pursuant to the order dated 18th September, 2009. However, the amount which has already been paid to the workman pursuant

to order u/s 17B of the ID Act is not required to be adjusted. The deposited amount be released in favour of the respondent.

31. The petition and pending application, if any, stand disposed of.

(SUNITA GUPTA)
JUDGE

OCTOBER 06, 2015
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