

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

Date of Decision: 09.09.2015

+ **W.P.(C) 43/2012**

DTC

..... Petitioner

Through: Mr Uday N. Tiwary and Mr Sunil K. Ojha,
Advs.

versus

MOHAR SINGH

..... Respondent

Through: None

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in this writ petition under Articles 226 and 227 of the Constitution of India is to the impugned award dated 03.10.2009 passed by the Presiding Officer, Labour Court, Karkardooma Courts, Delhi in ID No. 1066/06/04, vide which the respondent – workman was directed to be reinstated, if found medically fit, with valid driving license in the same post.

2. The factual matrix of the case which resulted in passing of the impugned award are as follows:

3. The Govt. of NCT of Delhi referred the dispute vide reference No. F.24(113)/03 – LaB / 2699 – 03 dated 12.05.2004 with following terms reference:

“Whether the services of Shri Mohar Singh s/o Ghanshyam have been terminated illegally and / or unjustifiably by the management, if so, to what relief is he entitled and what directions are necessary in this respect?”

4. The respondent – workman filed his statement of claim alleging therein that he

was employed as a driver with effect from 26.08.1988. His services were terminated with effect from 22.09.1989 without giving any reason against the principles of natural justice. The termination tantamount to hostile discrimination. His appeals dated 10.10.1997, 24.12.1998, 11.08.2003 and 04.11.2003 were rejected. The management did not conciliate the matter before the conciliation officer as such he prayed for reinstatement alongwith back-wages.

5. The claim was contested by the management inter alia on the allegations that the workman was appointed as R/C driver with effect from 26.08.1988. He remained absent for 57 days from August, 1988 to February, 1989 and again for 67 days w.e.f. February, 1989 to August, 1989. Another opportunity was given to the workman giving a scope for improvement for another six months. On the basis of absence, his services were dispensed with from 22.09.1989. The workman examined himself and reiterated the stand taken in the claim petition. He relied upon Ex.WW1/1 which shows that he was in the employment as Retainer-Crew-Driver and his services were dispensed with with effect from 22.09.1989. On the other hand, the management examined MW-1 – Mr G.D. Srivastava, Depot Manager, who deposed that the respondent – workman was appointed on 26.08.1988 and he remained unauthorizedly absent during this period. In cross examination it had come that the respondent – workman was Retainer-Crew-Driver. He produced photocopies of the attendance register Ex.MW1/A and the Office Order No. 9 Ex.MW1/B. On the basis of evidence coming on record, the Ld. Labour Court observed that there was no dispute that the workman was a Retainer-Crew-Driver and not a permanent employee. The attendance sheet was also gone into for showing the number of days when the workman remained absent. However, the learned Labour Court relied upon the word ‘retrenchment’ in Ex.MW1/A produced by the management for arriving at a conclusion that it was a case of retrenchment and that being so, it was incumbent upon the management to follow Section 25F of the Industrial Disputes Act. In the instant case, the management has not complied with Clause (c) of Section 25F of the ID Act. As such, it was observed that the services of the workman were dispensed with without any justification and he was entitled for reinstatement. It was further held that he was not entitled for continuity of services or any consequential benefits. No back-wages were

awarded. It is this award which is under challenge in this writ petition.

6. Despite service of notice, the respondent – workman did not appear to contest the matter.

7. The impugned award has been assailed by learned counsel for the petitioner inter alia on the following grounds:

- (i) The workman was employed as Retainer-Crew-Driver and as per para 4(xiv) of the Executive Instructions governing the employment of Retainer-Crew-Driver, the services can be dispensed with without notice and without assigning any reason.
- (ii) It was not a case of retrenchment as the respondent – workman had not completed 240 days of work in the preceding year. Therefore, Section 25F of the ID Act has no application.
- (iii) There was a gross delay in approaching the Court as the reference was made in the year 2004 i.e. after 14 years of the dispensing with the services of the workman.
- (iv) The award itself has become infructuous as the only relief granted to the workman was that of reinstatement in service. The workman already stands superannuated in the year 2009 after attaining the age of 55 years.

8. Coming to the first limb of the argument, it is not in dispute that the respondent – workman was appointed as Retainer-Crew-Driver as per Clause 3 of the Executive Instructions, which is as under:

- “3. *From time to time retainer crews may be appointed at the various units of the undertakings to the extent considered necessary by the General Manager for ensuring efficient operation of the bus services and the discharge of the functions of the undertaking as developed in it under the provisions of the DMC Act, 1957, and to see that buses or other vehicles are not held up at any time for want of operational crews.*”

As per para (xiv) of the Executive Instructions, the services of the retainer crews can be dispensed with by the corporation without any notice and without assigning any reasons. The relevant instruction in this regard is as under:

“(xiv) The services of the retainer crews can be dispensed with by the Undertaking without notice and without assigning any reason. Further their services can also be dispensed with if they fail to turn up at the Units or perform duty as laid down in these instructions for five days continuously, without permission of the officer under whom they are working and without adequate reasons.”

9. Under the circumstances, in view of the Executive Instructions, the services of the workman being Retainer-Crew-Driver have been dispensed with by the Undertaking without notice and without assigning any reason. Further his service could have been dispensed with if he failed to turn up at the Units or perform duty as laid down in these instructions for five days continuously. The attendance register Ex.MW1/A for the relevant period was produced by MW1 for showing that the respondent – workman remained absent for 57 days during the period from February, 1988 to August 1989 and again 67 days leave without pay with effect from February, 1989 to August, 1989. It was submitted that out of total working days of 392 days the respondent – workman had only worked for 144 days. Moreover, before dispensing with the services of the respondent – workman, he was paid a cheque on account of one month’s notice salary besides retrenchment compensation. As such, in view of the Executive Instructions service of the workman could have been terminated more particularly when failed to turn up at the unit and perform duty for five days continuously without permission of the competent officer.

10. The Labour Court, however, took it as a case of ‘retrenchment’ of the workman on the basis of attendance register Ex.MW1/A produced by the management which reflects that the workman was retrenched and therefore went on observing that in the case of retrenchment, the management has to follow Section 25-F of the ID Act.

11. Section 25-F of Industrial Disputes Act reads as under:

“25F. Conditions precedent to retrenchment of workmen.- No

workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2 for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government 3 or such authority as may be specified by the appropriate Government by notification in the Official Gazette].”

‘Continuous service’ has been defined in Section 25B of the ID Act and the relevant clauses are (i) and (ii) which are reproduced as under:-

“25B. 2 Definition of continuous service.- For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock- out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

12. In order to get benefit of Section 25-F it is incumbent upon the workman to prove that he worked continuously for 240 days for the preceding one year. The burden of proof lies upon the workman to show that he had worked continuously for 240 days in the preceding one year and it is for him to adduce evidence apart from examining himself to prove the factum of being in employment of the employer.

13. In *Ranip Nagar Palika v Babuji Gabhaj Thakore & Ors.*, (2007) 13 SCC 343 the Hon'ble Supreme Court referred to the legal position by referring to a number of earlier decisions on this point by observing as under:

"7. In a large number of cases the position of law relating to the onus to be discharged has been delineated. In *Range Forest Officer v. S.T. Hadimani* (2002 (3) SCC 25), it was held as follows:

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10.8.1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in *State of Gujarat v. Pratamsingh Narsinh Parmar*, (2001) 9 SCC 713. In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days

in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today.”

The said decision was followed in ***Essen Deinki v. Rajiv Kumar*** (2002 (8) SCC 400).

8. In ***Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan*** and Anr. (2004 (8) SCC 161), the position was again reiterated in paragraph 6 as follows:

“6. It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in *Range Forest Officer v. S.T. Hadimani* (2002 (3) SCC 25). No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed.

9. In ***Municipal Corporation, Faridabad v. Siri Niwas*** (2004 (8) SCC 195), it was held that the burden was on the workman to show that he was working for more than 240 days in the

preceding one year prior to his alleged retrenchment. In **M.P. Electricity Board v. Hariram** (2004 (8) SCC 246) the position was again reiterated in paragraph 11 as follows:

"11. The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in the case of *Municipal Corporation, Faridabad v. Siri Niwas* JT 2004 (7) SC 248 wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents. This is what this Court had to say in that regard:

"15. A court of law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent."

11. In **Manager, Reserve Bank of India, Bangalore v. S. Mani and Ors.** (2005(5) SCC 100) a three-Judge Bench of this Court again considered the matter and held that the initial burden of proof was on the workman to show that he had completed 240 days of service. Tribunal's view that the burden was on the employer was held to be erroneous. In *Batala Cooperative Sugar*

Mills Ltd. v. Sowaran Singh (2005 (8) SCC 25) it was held as follows:

“So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in **Range Forest Officer v. S.T. Hadimani** (2002 (3) SCC 25) the onus is on the workman.”

The position was examined in detail in **Surendranagar District Panchayat v. Dehyabhai Amarsingh** (2005 (7) Supreme 307) and the view expressed in Range Forest Officer, Siri Niwas, M.P. Electricity Board cases (supra) was reiterated.

11. In **R.M. Yellatti v. The Asst. Executive Engineer** (2006 (1) SCC 106), the decisions referred to above were noted and it was held as follows:

“17. Analyzing the above decisions of this court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the

Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.”

The above position was again reiterated in *ONGC Ltd. and Another v. Shyamal Chandra Bhowmik* (2006 (1) SCC 337) and *Surendranagar Distt. Panchayat v. Gangaben Laljibhai and Ors.* (2006 (9) SCC 132).

8. It was held in all these cases that the burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer.”

14. Reverting to the case in hand, absolutely no evidence was led by the workman for showing that he continuously worked for 240 days. On the other hand, the petitioner – management proved the attendance register Ex. MW1/A for the year 1988 to 1989 for showing that the respondent – workman remained absent for 57 days during the period from February, 1988 to August 1989 and again 67 days leave without pay with effect from February, 1989 to August, 1989. Out of total working days of 392 days the respondent – workman had only worked for 144 days. Despite perusing the attendance register and noticing the number of days for which the respondent – workman remained absent and noticing that the respondent – workman remained habitually absent and before termination he was paid one month’s salary besides retrenchment compensation merely on the ground that sub Clause (c) of Section 25F of the ID Act was not complied with, it was held that the termination was in violation of Section 25F of ID Act entitling the respondent – workman to reinstatement in service. This finding is perverse and cannot be sustained.

15. There is also force in the submissions of learned counsel for the petitioner that there was inordinate delay on the part of the respondent – workman in approaching the Court. Although the services of the workman were dispensed with on 22.09.1989, he approached the Court only after 14 years as the reference was made in the year 2004.

16. Learned counsel for the petitioner relied upon *Assistant Engineer, C.A.D., Kota*

v. Dhan Kunwar, AIR 2006 SC 2670 wherein the claim was raised after about 8 years and it was submitted that highly belated claims should not have been entertained by the Labour Court. Dealing with this aspect of the matter, the Hon'ble Supreme Court observed as under:

"5. It may be noted that so far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case. However, certain observations made by this Court need to be noted. In ***Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors.*** (2000 (2) SCC 455) it was noted at paragraph 6 as follows:

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

17. Relying upon this judgment, the Hon'ble Supreme Court observed that the Labour Court should not have granted relief and the appeal was allowed. Similar view

was taken in *U.P. State Road Transport Corporation v. Babu Ram*, 2006 (6) SCALE 514 where the claim was raised after 15 years. The Hon'ble Supreme Court remanded the matter back to the High Court to consider the question of delay in seeking reference.

18. In the instant case, as per list of dates, as mentioned in the writ petition, for the first time the respondent – workman made a representation / appeal to take him back into service on 10.10.1997 and 24.12.1998 i.e. after a lapse of about 6 years from the date when he was removed from his services. Despite the fact that the appeals were dismissed he again submitted an appeal on 11.08.2003 which was dismissed on 04.11.2003. There is nothing on record to show as to why the first representation / appeal was made after a lapse of about 8 years and then after the dismissal of the appeals why the respondent – workman kept on submitting fresh appeals thereafter instead of raising the industrial dispute, which ultimately led to making reference after a lapse of about 14 years. This aspect ought to have been taken note of by the Labour Court while passing the impugned award.

19. Last but not the least, according to the petitioner – management as per the Office Order No.99/63 (d), Regulations, the age of superannuation of the driver of the Corporation is 55 years which can be extended up to 60 years. It is alleged that the respondent – workman has already attained the age of superannuation i.e. 55 years in December, 2009 and therefore the order of reinstatement of the workman in terms of award dated 03.10.2009 has become infructuous. Now, no relief can be given to the respondent – workman as no other relief of continuity of service or any subsequent benefits or back-wages were granted to the workman.

20. In view of the aforesaid, the findings of the Labour Court cannot be sustained and accordingly the petition is allowed and the impugned award is set aside.

The writ petition stands disposed of accordingly.

Pending application, if any, also stand disposed of.

(SUNITA GUPTA)
JUDGE

SEPTEMBER 09 2015/rd