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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 9174/2009

VINOD KUMAR

..... Petitioner

Through: Mr. Anuj Aggarwal, Advocate

versus

MCD

....Respondent

Through: Ms. Saroj Bidawat, Advocate

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

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08.01.2016

1. The challenge in this writ petition under Articles 226 and 227 the Constitution of India is to the award dated 24.03.2008 passed by the Presiding Officer, Industrial Tribunal No.11, Karkardooma Courts, Delhi whereby it was held that the workman (the petitioner herein) was not entitled to any relief.
2. Shorn of unnecessary details, the case of the the petitioner (hereinafter referred to as 'the workman') is that he was working as an approved regular substitute Safai Karamchari at Circle No. 19-D CSE Department, West Zone with the respondent (hereinafter referred as 'the management') since 1996. He was granted regular duty till 2002 and thereafter the management started creating artificial break in the service. He completed the duty for more than 240 days in a year and was entitled for regularization of his services from the date of his initial appointment along with all consequential benefits. When the management did not grant him those benefits, he filed a complaint through the union, namely, Nagar Nigam Karamchari Sangh, Delhi Pradesh for the regularization of his services before the Conciliation Officer, Govt. of N.C.T. Delhi, Labour Department, Delhi. During the pendency of the said proceedings before the Conciliation Officer, the management terminated his services w.e.f 10.02.2003 without seeking permission from

the Conciliation Officer as the same amounts to change in his service conditions during the pendency of his claim before the Conciliation Officer and in violation of Section 33-A of the Industrial Disputes Act, 1947(hereinafter referred to be as 'the Act'). As such, he filed a complaint under Section 33-A of the Act against the management. Before terminating his services, the management did not give any prior notice expressing its intention to terminate his services nor any charge-sheet was issued to him. Even no domestic enquiry was conducted by the management. He raised an industrial dispute which was referred by the Secretary (Labour), Govt. of NCT of Delhi for adjudication to the Labour Court vide order No. F. 24 (4747) / 03 / Lab. / 2246 - 50 dated 07.05.2004 u/s 10(1)(d) and 12(5) of the I.D. Act, 1947 with the following terms of reference:

1. *“Whether Sh. Vinod S/o Sh. Kishan is entitled to be regularized on the post of Safai Karamchari in proper pay scale from his initial date of appointment and, if so, what relief is he entitled and what directions are necessary in this respect?”*
2. *“Whether Sh. Vinod S/o Sh. Kishan has abandoned job or his services have been terminated by the management illegally and / or unjustifiably and if so, to what relief is he entitled and what directions are necessary in this respect?”*
3. The workman filed his claim alleging his termination to be illegal and sought reinstatement with all consequential benefits. He also sought directions to the management to regularize his service from the date of his appointment.
4. The claim of the workman was contested by the management inter alia on the ground that the claimant is habitual defaulter in his duty and wilfully remained absent from 16.12.2002 till 30.10.2003. After orders by the Conciliation Officer, he joined his duties but again remained absent w.e.f. 04.11.2003. He was engaged as substitute Safai Karamchari on daily wages since 06.03.1998 and as per the policy of regularization, he is not eligible to be considered for regularization on the post of Safai Karamchari. It was denied that his services were terminated in violation of Section 33-A of the Act. It was averred that the workman was not entitled to any relief whatsoever.
5. On the pleadings of the parties, following issues were framed on 08.02.2005:

1. *Whether the claimant Sh. Vinod has abandoned the services? OPM.*
2. *Whether the services of the claimant have been terminated illegally and unjustifiably? OPW.*
3. *Whether the cause of the workman has been duly espoused?*
4. *Whether the workman is entitled for regularization? OPW.*
5. *In terms of reference.*

6. Both the parties led their respective evidence. Issue nos. 1 and 2 were taken up together by learned Presiding Officer. It was held that as per pleadings of the workman, management had terminated his services during pendency of proceedings before the Conciliation Officer which was in violation of provisions of Section 33-A of the Act. It was observed that the alleged change in conditions of service had occurred during pendency of proceedings before the Conciliation Officer and not during pendency of an industrial dispute before the Tribunal as such as per provisions of Section 33-A (a) of the Act, the Conciliation Officer, before whom proceedings were pending on the date of alleged termination of services of the workman, only had jurisdiction to adjudicate whether there was an illegal and unjustified termination of services or whether there was abandonment of services by the workman. The Tribunal lacks jurisdiction to entertain and adjudicate both these issues.

7. As regards issue no. 3, same was decided against the workman and in favour of the management on the ground that the workman failed to prove that his cause has been duly espoused as required under the law.

8. As regards issue no. 4, same was also decided against the workman on the ground that the onus was on the workman to prove that he is liable to be considered for regularization from the date of initial appointment on the post of Safai Karamchari. The workman admitted in his cross examination that there is policy for regularization of daily wagers. The workman relied upon a circular issued by the Office of Chief Labour Welfare Officer. However, it was observed that the same does not assist the workman in any manner and, therefore, he was not entitled for regularization. Accordingly, the

workman was held to be not entitled to any relief or any direction and the issue was answered accordingly.

9. Feeling aggrieved by this award, present writ petition has been filed by the workman.

10. Mr Anuj Aggarwal, learned counsel for the petitioner submitted that the learned Industrial Adjudicator erred in holding that the case of the workman was not duly espoused and thus not covered under Section 2(k) of the Act. Reliance was placed on ***J.H. Jadhav v Forbes Gokak Ltd.***, AIR 2005 SC 998 for submitting that there is no particular form prescribed to effect the espousal. The basis requirement of law is regarding support of the case by a union and the said support may be made available in any form. It is not necessary that there should be a specific resolution to that effect. Reference was also made to the testimony of Mr Akhilesh Ranjan, WW2 who filed the affidavit stating therein that the the petitioner – workman is a member of the union and his case has been espoused by the union and the certificate to that effect was issued by the General Secretary which was Ex.WW2/1 as such the findings of learned Industrial Adjudicator in this regard requires to be set aside.

11. Learned counsel for the petitioner further urged that Industrial Tribunal erred in holding that in case of violation of section 33, the Conciliation Officer was vested with the power to adjudicate upon the industrial dispute. The adjudicating authority in case of violation of Section 33 as well as in case of alleged illegal termination is the Industrial Tribunal and not the Conciliation Officer.

12. As regards regularization is concerned, reference was made to the counter affidavit filed by the respondent in this writ petition wherein it was admitted that the petitioner – workman is working against the vacant post since 1976 and, therefore, he is covered under the policy of regularization of daily wage employees and will be considered on his term as per the seniority. It was further submitted that similarly situated employees who were appointed in 1996 have been regularized by the respondent corporation in the year 2004 and have been paid arrears of wages as well as all consequential benefits. As such, it was submitted that in view of the admission made in the counter affidavit, the workman is entitled for regularization.

13. As regards the issue regarding abandonment, learned counsel submits that the onus to prove this fact was upon the respondent – corporation which the corporation failed to prove. On the other hand, the workman wrote as many as 20 letters to the management for allowing him to join duty. On the other hand, the management failed to prove that any notice was ever sent by the corporation calling upon the workman to join duty. Lastly, it was submitted that before terminating the services of the workman neither any enquiry was conducted nor the provisions of Section 25F of the Act were complied with, as such the impugned award deserves to be set aside.

14. Countering the submission of learned counsel for the petitioner – workman, Ms Saroj Bidawat, learned counsel for the respondent – corporation submitted that as per the policy of the respondent – corporation substitute safai karamcharis are first required to be converted into daily wagers and only thereafter they can be considered for regularization. In fact, after pronouncement of decision of Hon'ble Supreme Court in *Uma Devi's* case, the department has frozen the policy of regularization, however, in view of the averments made in the counter affidavit, the petitioner – workman who was reinstated in the year 2004 will be considered for regularization as per his turn as per the policy of the corporation.

15. I have given my considerable thoughts to the respective submissions of counsels for the parties and have perused the record.

16. A perusal of the impugned award goes to show that Issue Nos.1 and 2 pertaining to whether the workman abandoned the services or his services were terminated illegally and unjustifiably were not decided by the Industrial Tribunal on the sole ground that since the termination of services of the workman took place during the pendency of proceedings before the Conciliation Officer, therefore, it was the Conciliation Officer who had to adjudicate this dispute.

17. Section 33 of the Act states that during the pendency of the conciliation proceedings or proceedings before the Labour Court or other authorities, as mentioned in this Section, the employer will not alter the condition of service to the prejudice of the workman. The relevant clauses of this Section are reproduced as under:-

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,-

(a) In regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) For any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute,

Save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman]-

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) For any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.”

18. Section 33A speaks about the provision for adjudication of the dispute when condition of service etc. is changed during pendency of proceedings. This Section reads as under:-

“33A. Special provision for adjudication as to whether conditions of service etc., changed during pendency of proceeding.- Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal] any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner,-

- (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and*
- (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.”*

19. A combined reading of both these sections goes to show that if a dispute is pending before a conciliation officer or board or before Labour Court or Tribunal then the employer will not change the condition of service to the prejudice of the workman without obtaining permission in writing of the authority before which the proceedings are pending. In case of contravention, the employee can make a complaint in writing under Section 33A of the Act. A bare reading of Section 33A(a) of the Act goes to show that if a complaint is made by the employee regarding contravention of provisions of Section 33 to the conciliation officer then the conciliation officer can only try to mediate or promote the settlement of the industrial dispute. As regards the adjudicating power is concerned, that lies with the arbitrator, labour court, tribunal or the national tribunal even if the dispute was pending before the conciliation officer which is manifest from the words “as if it were a dispute referred to or pending before it”. That being so, the conciliation officer was not competent to adjudicate whether the workman had abandoned the services or the services of the workman were terminated illegally and unjustifiably as he lacked adjudicating power. That being so, the finding of the learned tribunal that it lacks jurisdiction to decide both these issues cannot be sustained and are accordingly set aside.

20. Since both these issues relates to the factual matrix of the case, under the circumstances, the same cannot be considered in this writ petition. Accordingly, the impugned award dated 24.03.2008 passed by the Presiding Officer, Industrial Tribunal 11 Karkardooma Courts, Delhi is set aside and the matter is remanded back to the Tribunal for deciding all the issues afresh. Learned counsel for both the parties fairly conceded that no fresh evidence is required to be led by them in regard to any of the issues.

Keeping in view the fact that the matter is quite old as such, it is impressed upon the learned Industrial Tribunal to decide the matter as expeditiously as possible but not exceeding three months from the date of receipt of this order. Parties are directed to appear before the Presiding Officer, Industrial Tribunal concerned on 27.01.2016. Registry is directed to send immediately the trial court record as well as copy of the judgment to the Industrial Tribunal concerned for necessary compliance.

21. Writ petition stands disposed off accordingly.

SUNITA GUPTA, J

JANUARY 08, 2016

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