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

Judgement pronounced on: 30th August, 2018

+ **LPA 79/2016**

NATIONAL AGRICULTURAL
COOPERATIVE MARKETING
FEDERATION OF INDIA

....Appellant

Through Mr Arun Dhiman, Advocate

versus

P.O. LABOUR COURT & ANR

...Respondents

Through Mr. Devesh Singh, ASC, Civil
with Ms. Sukriti Ghai, Adv. for
R-1, Mr. Kittu Bajaj, Adv. for
R-2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. Challenge in this appeal filed under Clause X of the Letters Patent Act is to the order dated 28.07.2015 passed by the learned Single Judge whereby the application filed under Section 17B of the Industrial Disputes Act, 1947(hereinafter referred to as "the Act") by the respondent no. 2/Ramesh Kumar seeking direction to the appellant/Federation to pay wages as per the minimum wages applicable under the statute was allowed.

2. The brief facts leading to the filing of the present appeal are that one Ramesh Kumar/respondent No. 2 was appointed by the appellant/Federation as a casual workman/Mechanic Helper vide its appointment letter dated 18.01.1994 for the period of three months on daily wages. The services of the respondent no.2 was extended from time to time and he was retrenched vide letter dated 02.02.1996 by the appellant. The respondent no. 2 raised an industrial dispute claiming illegal termination of his service by the appellant and preferred a dispute before the labour court whereby an award dated 16.10.2001 was passed in favour of the appellant. The relevant portion of the award is produced hereinafter:-

“18. In that view of the matter, the application is allowed. The petitioner/management is directed to pay to the respondent his last drawn wages or minimum wages which notified by the authorities from time to time whichever is higher, from the date of passing of the impugned award till the pendency of this writ petition provided he files an undertaking within two weeks that in case the petitioner succeeds in this writ petition and it is found that he has received wages in excess amount to the petitioner/management within four weeks from the date of passing of the judgement by this court.”

3. Thereafter, an application was moved by the appellant before the presiding officer for setting aside of the award dated 16.10.2001 but the same was dismissed. Aggrieved, a writ

petition was filed by the appellant for setting aside of the orders dated 29.01.2005 and 16.10.2001. In the said writ petition, an application under Section 17B of the Industrial Disputes Act, 1947 was moved by the respondent No. 2, seeking direction to the appellant/Federation to pay wages as per the minimum wages applicable under the statute, which was allowed by the learned Single Judge vide his order dated 28.07.2015. Hence, the present appeal was preferred by the appellant.

4. Mr Arun Dhiman, the learned counsel for the appellant strenuously contended that the learned Single Judge committed error in allowing the application moved by the respondent No. 2 in the writ petition vide order dated 28.07.2015 and that such findings were based more on hypothetical assumption of vital and necessary facts, based on mere surmises; that the learned Single Judge erred in not appreciating the fact that the respondent No. 2 was self employed, after the termination of his services in the appellant organisation, as he owned a TATA-407 vehicle in his own name and further deployed his vehicle for commercial gain; that he also had a driving licence for the said purpose; that the appellant is not entitled to benefit under Section 17B of the Act as he was self-employed and was receiving adequate remuneration during such period and would come within the ambit of “gainful employment in any establishment”. In order to substantiate his case, the learned Counsel for the appellant has placed reliance in the case of ***Lumax Automotive***

Systems Ltd. v. Its workmen represented by Hindustan Engineering and General Mazdoor Union reported in 2012 SCC Online Del 392, *Shriram Institute for Industrial Research v. Rajesh Kumar Gandhi* reported in 2012 SCC Online Del 4593, *Suraj & Ors. v. Tata Sons & Ors.* reported in 2015 SCC Online Del 11034 and *North East Road Karnataka Road Transport Corporation v. M. Nagangouda* reported in (2007) 10 SCC 765.

5. Per contra, Mr. Kittu Bajaj, learned for the respondent No. 2 contended that there is no infirmity in the order passed by the learned Single judge; that the vehicle was purchased by the respondent no. 2's father out of his retirement fund in the name of respondent No. 2; that the respondent no. 2 is not running any transport company and the vehicle is given to local drivers to earn livelihood after retirement; that the amount so earned is not sufficient to support the entire family; that the respondent no. 2 is not employed in any establishment after the termination of his services so as to not claim the benefit under Section 17B of the Act.
6. We have heard the learned counsels for the parties and perused the material placed on record.
7. Before delving into the contentions raised by the parties, it is relevant to produce section 17B of the Act.

“17B. Payment of full wages to workman pending proceedings in higher courts.- Where in any case, a Labour Court, Tribunal or National Tribunal by its

award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court: Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.”

The perusal of the above section shows the legislative intendment to give certain protection to the workman during the pendency of the proceedings before the High Court or the Supreme Court in relation to payment of wages. The provisions further show the liability created by statute upon an employer for payment of such wages. This entitlement is subject to the proviso to the said section. The essential ingredients of this provision appears to be:

- (a) By its award direct reinstatement of any workman.
- (b) The employer prefers any proceedings against such award in the High Court or Supreme Court.
- (c) The employer shall be liable to pay such workman during the pendency of such proceedings full wages drawn by the workman.

The liability to pay arises if the workman had not been employed in any establishment during such period and an affidavit to that effect is filed in Court.

(d) Even if the above conditions exist but it is shown to the satisfaction of the Court that workman had been employed and receiving adequate remuneration during any such period or part thereof then no back wages would be payable for that period.

8. The scope, purpose and legislative intent behind formation of Section 17B of the Act has been laid down in the case of ***Delhi Transport Corporation v Jagdish Chander*** reported in **120 (2005) DLT 664**, wherein it was held as under:-

10. The emphasis of Legislature is on the expression 'reinstatement' rather than on an 'award'. Where the workman is reinstated and the Management prefers any proceedings before the High Court or Supreme Court, the object appears to be that the workman if he was not gainfully employed during the relevant period should not starve and should be able to contest the proceedings before the Court meaningfully and without being deprived of the wages which he was entitled to receive under the terms of the award.

11. Obviously the intention of the Legislature was to provide definite protection to the workman against the long litigation and exploitation by the affluent Management. As such these welfare provisions are directly relatable to the prescribed benefit to the workman under various provisions of the statute. The provisions of the Act have been amended from time-to-time in light of the experience gained in its actual working, case law and industrial relation policy of the Government and while keeping in mind the recommendations of National Commission of Labour

which had made an in-depth study of the industrial relations, procedure and had identified number of areas which needed further amendments. As already indicated above, the provisions of Section 1(b) of the Act were inserted by Act 46 of 1982 however, it came into force with effect from 21st August, 1984.

12. This legislation provides the machinery and procedure for investigation and settlement of industrial disputes. The paramount object of the statute was to promote industrial harmony and expeditious settlement of industrial disputes. The cumulative effects of all amendments made to this law from time-to-time are intended to provide model grievance redressal procedure with more emphasis on reducing the time factor in all matters covered under the provisions of the Act and shorten the various procedures including voluntary settlement mechanism, conciliation proceeding, reference and pending proceedings before various Courts by fixation of time-limits. Another emphasized aspect of various amendments related to amelioration of the methodology and entitlement to receive wages by a reinstated workman. The objects and reasons which are index to the legislative mind, as stated in the enactment itself while introducing Section 17-B of the Act, in specific and with some emphasis refers to the following clause:

"(vi) It is observed that when Labour Courts pass awards of reinstatement, these are often contested by an employer in Supreme Court and High Courts. The delay in the implementation of the award caused hardship to the workmen concerned. It is, therefore, proposed to provide for payment of wages last drawn by the workmen concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or the High Court.

9. In view of the above settled law and keeping in mind the objective of the said Section, it is relevant in the facts and circumstances of the present case to adjudicate whether self-employment could be termed as gainful employment in an establishment as per Section 17B of the Act so as to disentitle workman the benefit under Section 17B of the Act. In the case of ***Sh. Rajinder Singh v. Delhi Transport Corporation*** reported in ***2009 SCC Online Del 1497***, it was held as under:-

“10. In the judgment of the apex court reported in (2008) 9 SCC 486 Talwara Cooperative Credit and Service Society Ltd.v. Sushil Kumar after taking into consideration the facts of the case, the Supreme Court awarded compensation of Rs. 2 lakhs instead of directing reinstatement with full back wages. In the present case already the respondent has complied with the direction given by the Labour Court by reinstating the petitioner in his employment and also by making the payment of 25% of the back wages. The petitioner did not feel satisfied so far the petitioner was denied the grant of full back wages. The Labour Court found the termination of the petitioner from his service being illegal on the ground that fair and proper opportunity was not afforded to the petitioner during the enquiry proceedings and therefore directions were given for the reinstatement of the petitioner with continuity of service. It is a trite law that grant of full back wages is not automatic or a cast iron rule wherever the termination is held as illegal. It would depend upon the facts of each case to decide the payment of back wages and the ratio in which it should be allowed. The Labour Court granted 25% of the back wages influenced by the fact that the petitioner failed to disclose his income earned by

him by selling vegetables. The Labour Court also found fault with the petitioner as he failed to explain the source of his sustenance and his family in the absence of any employment. There cannot be any doubt that once thrown out of employment the petitioner still has to sustain himself and his family members and for which one would undertake petty jobs not even befitting his status so that he and his family do not starve or lead the life of destitutes. The earning through such a source once being out of employment cannot be considered as a gainful employment to be equated with the employment from where he was illegally terminated. Nevertheless, it is expected of such a petitioner to at least truthfully state in his statement of claim and also in his evidence the exact source of his income during the course of his unemployment so as to enable the court to grant appropriate relief. Non-disclosure of such facts or suppression of such facts will certainly influence the tribunals and courts exercising discretionary jurisdiction and can be viewed seriously. However, considering the facts of the instant case that the petitioner served respondent DTC for 8 years and his services were wrongfully terminated and the industrial dispute was answered in his favour after a long gap of 14 years and also considering the fact that at the time of reinstatement, the petitioner was of about 47 years of age, I feel that the interest of justice would be best served if 50% backwages are awarded to the petitioner.”

In the case of ***Municipal Corporation of Delhi v. Santosh Kumari & Ors.*** reported in **2012 SCC OnLine Del 4390**, it was held that:-

“36. It is clear from the above that insofar as application under Section 17B of the ID Act is concerned, it was filed more than 4½ years of filing of the writ petition. In view of our

above mentioned detailed discussion, the workman can, at the most, be granted benefit of the wages under Section 17B of the ID Act from the date of filing the application. However, whether the workman be given even this benefit or not depends upon the outcome of the other plea raised by the appellant about the gainful employment of the workman. The provisions of Section 17B of the ID Act are very clear in this behalf and the legal position as set addressed in enough judgments, which is as follows:

Insofar as the workman is concerned, the only obligation put on him is to file an affidavit to the effect that he is not gainfully employed elsewhere. He does not have to prove anything else and the reason is obvious. No person can asked to give the proof of negative. Under Section 17B of the ID Act, it is an impossible for an employee to prove that he is not gainfully employed. Therefore, the moment such an affidavit is given by the employee, onus shifts upon the management contesting the application and intends to make out a case that the workman is not entitled to benefit of language under Section 17B of the ID Act because of this reason. An important question arises at this stage, viz., what kind of proof to show the gainful employment is to be furnished by the employer?

If there is a direct proof and evidence to show that the workman is under the employment of some other employer, and such proof is available with the employer and employer furnishes the same, that would be clinching. Difficulty, however, arises when clear-cut proof is not available with the employer, though some semblance of evidence is furnished, which would indicate that the workman is employed somewhere but to arrive at definite finding, some more reliable evidence is needed. We have come across the cases where photographs of such a

workman working in some establishments are filed and even the particulars of the employer are given, but it is stated by the management that the said employer with whom the concerned workman is purportedly employed is not ready to furnish any proof of the employment. Situation gets more complicated when the management pleads self-employment. In such cases also, some proof of workman running some small scale business or other such activity is furnished in the form of photographs or the ownership of shop, etc. without any further evidence. Invariably, in all such cases, the management seeks proof against the employer where the workman is purportedly working at present to prove the records and state about the said employment. Managements, in case of self-employment, also press the Court at times to summon the final records in the form of sales tax registration, registration under Shops and Establishments Act, etc. to find out whether the workman is doing the business under the provisions of the said Act. Such moves are normally resisted on the ground that the Court cannot hold inquiries into the aforesaid aspects and to determine and collect evidence on such aspects, viz., whether workman is working or not. Normally, such requests are rejected on the ground that the Court cannot hold inquiry once the workman has denied any gainful employment or self-employment.

37. We would like to point out at this stage that many cases have come across where workman initially doing any employment, but when confronted with some documentary evidence, they have accepted gainful employment. There is a tendency on the part of the workman to deny even when some semblance of evidence produced by the management which gives the indication some employment/self-employment.

38. No doubt, when the employer takes a vague plea that a workman is gainfully employed without furnishing any material or in support of this plea, the employer cannot take the help of the Court making the Court to undertake the exercise as to whether the workman is employed or not by indulging roving & fishing inquiry. We are of the view that interest of both the parties can be balanced by calling upon the workman to produce those documents, which are in exclusive possession of the workman and when the disclosure thereof is relevant to delineate the issue of gainful employment or self-employment. But it should be done only when the management produces some evidence in that behalf justifying further inquiry to know the truth. In such a situation, it would amount to finding the truth when on the one hand workman comes with complete denial and on the other hand, management has secured some evidence which may point towards the plausible/gainful employment. Such a course is not to be resorted to on the ipsi dixit of the management as no fishing and roving inquiry is to be conducted by the Court.

39. This, therefore according to us, is the balanced approach which needs to be adopted by the Court, viz., it does not amount to become a proof or a tool for fishing and roving inquiry, but whether the cases so demand calling upon his workman to produce the evidence in his possession when on the basis of some evidence produced by the management, a doubt arises that workman may be employed and the affidavit filed by him may not be wholly correct.

40. Examining the present case in this respect, we find that the reply to the application under Section 17B of the ID Act, it was stated that the workman is staying in village and therefore, he may be having agricultural or farming activities or may be

operating a shop. This plea was taken on the premise that since the workman had been dismissed from the service more than 15 years again without any income, it was not possible for him to raise his family. This was a bald plea taken without even the semblance of evidence to support the same. Though we do not entirely agree with the view of the learned Single Judge that in no case, there can be a direction to the workman to file bank accounts, etc. and such a general observation may not be correct having regard to what we have observed above, in the facts of this case, we are of the opinion that the appellant/management could not ask for filing the bank accounts, etc. unless it had furnished some evidence to show that the workman was self-employed either in agriculture activity or was running a shop. Therefore, in the facts of this case, we are of the view that the learned Single Judge is right in holding that no adverse inference can drawn against the workman for not filing the affidavit.

41. Insofar as merits of the wages are concerned, viz., the plea of the management that the workman could not have been given any relief as he had secured the employment producing the forged certificate; that aspect touches the merits of the writ petition and cannot be gone into proceedings under Section 17B of the ID Act. We, thus, are of the opinion that the workman is entitled to wages under Section 17B of the ID Act.”

In the case of ***Management of Connaught v. Om Prakash & Ors.*** reported in ***2007 SCC OnLine Del 872***, it was held as under:-

“17. Now, coming to the second contention that the respondent was gainfully engaged in self employment, we have gone through the records. Considering the records, the learned Single Judge has given a finding that the respondent was not

gainfully employed in any employment, by way of engagement with some other establishment. The learned Single Judge has also held that there is no sufficient evidence on record to disprove the statement of the respondent that he is unemployed since the date of termination from the job. The learned Single Judge has clearly held that deposition of the workman that he remained unemployed since the date of his termination from the job is unrebutted by the materials placed by the management/petitioner before this court. The learned Single Judge also held that the management has failed to prove that the workman is gainfully employed. The learned Single Judge has also referred to the decisions of the Supreme Court as also of this Court to the effect that even sporadic employment or intermittent income has no mitigation from the right of the workman to subsistence allowance in the form of payment u/s 17B of the Act. Once application under u/s 33(2)(b) of the Act is rejected, the workman continues to be in service as if no order of termination was passed. The workman has to survive and requires money for his day to day needs.

18. The aforesaid findings arrived at by the learned Single Judge are findings of fact. There is no other rebutting evidence to disprove and dislodge the aforesaid findings of facts. We are not inclined to accept the second contention raised before us by the counsel appearing for the appellant. Reliance on the decision of the Supreme Court in Administrator, Kamala Nehru Memorial Hospital v. Vinod Kumar, 2006 (1) CLR 253 is misplaced as the facts of the said case are clearly distinguishable. The said decision was rendered in the light of the fact that the workman was working as an advocate having decent professional income. Such materials are missing in

the present case. The other decision of the Supreme Court in North East Karnataka Road Transport Corporation v. M. Nagangouda, JT 2007 (2) SC 265 is also not applicable as the decision was rendered in the light of sufficient materials on record that the workman had sufficient income from agricultural operations.

19. It was submitted that the wife of the respondent has a business of her own, which is now being looked after by the respondent. The wife of the respondent can have her own business or vocation and the same under no circumstances could become the vocation or business of the respondent. Besides, intermittent employment/engagement cannot be said to be gainful employment in any undertaking. The second contention is also, therefore, without any merit and is rejected.”

10. Keeping in mind the settled proposition of law and the case laws as mentioned above, it is seen in the present case that the stand taken by the appellant are that the respondent No. 2 after the termination of his service from the Federation/appellant corporation was gainfully employed. It was stated by the appellant that he owned a vehicle TATA-407 DL-ILD 5387 in his own name which was used for commercial gain and also had a driving licence for the same. In order to substantiate the contentions raised herein, it is pertinent to observe the affidavit filed by the respondent no. 2. In the affidavit it has been stated by the respondent no. 2 that the vehicle TATA-407 bearing No. DL-ILD 5387 was purchased by his father in his name out of his retirement fund. He has stated that he had never plied his vehicle or earned any income from it. He has also placed on record, his passbook as well as the passbook of his father to

prove that all the credit entries in his passbook was because the amounts were deposited by his father on several occasions to facilitate payment of instalments of the vehicle. He submitted that the vehicle so bought was lent on hire to local drivers to earn livelihood after his father's retirement. The appellant has explicitly denied any gainful employment in any establishment after the termination of his service from the appellant corporation. In the present case, it is seen that there is no evidence adduced to prove that the respondent no. 2 was gainfully employed in any employment after the termination of his services from the appellant corporation. It is also well settled that if the workman after the termination of his service earns some petty amount to sustain his as well as his family's livelihood, then it would not amount to gainful self employment. No sufficient material has been placed on record to show that the respondent No. 2 was gainfully self- employed in any establishment. The contentions raised by the appellant is not sufficient to disprove the statement of the respondent no. 2. Seeing the factual background of the case, it is understood that the respondent No. 2 was not gainfully employed in any establishment after the termination of his services so as to deny him the benefit under Section 17B of the Act.

11. Accordingly, we find no infirmity in the order dated 19.09.2016 passed by the learned Single Judge. Keeping in mind the aforesaid facts, this court finds that there is no merit in the appeal. The appeal, therefore, stands dismissed.

12. Ordered accordingly.

SANGITA DHINGRA SEHGAL, J.

G.S.SISTANI, J.

AUGUST 30 , 2018

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