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

% *Date of Decision : 18th May, 2018*

+ **W.P.(C) 1068/2017**

SHRI HEMU GAUTAM

..... Petitioner

Through: Mr. Sarfaraz Khan, Advocate
along with Mr. Ataur Rahman, Advocate.

versus

SOFTAGE INFORMATION TECHNOLOGIES LTD.

..... Respondent

Through: Mr. S.C. Verma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (Oral)

1. The petitioner/workman has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India by impugning the Award dated 02.09.2016 in LIR No.4243/16 (ID No.606/15) passed by the learned Presiding Officer, Labour Court, Karkardooma Courts, Delhi (in short "Industrial Adjudicator") on making a reference No.F24 (116)/Lab./SD/2013/10563 dated 12.06.2013 by the Secretary (Labour), Government of NCT of Delhi. The terms of the reference are as under:-

"Whether the workman Sh. Hemu Gautam, s/o Sh. Satish Gautam is absenting from his duty on his own or his services 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?”

2. The facts giving rise to prefer the writ petition are that the petitioner had joined services with the respondent/management as Data Entry Operator on 31.12.2010. He worked there till 11.07.2011. The petitioner was posted in the Corporate Office of the respondent/management. After 19.01.2011 he was placed at B-39, ^{2nd} Floor, LPC Department, Connaught Place, New Delhi to do the processing work relating to the cheques. The petitioner filed a claim on 12.07.2011 claiming the difference of wages in minimum wages and the wages actually paid to him before the Deputy Labour Commissioner. Later on he was transferred to Corporate Office at 28A/10, Jia Sarai, New Delhi. The petitioner did not attend the duties from 12.07.2011. On 01.08.2011 a notice was issued to the petitioner regarding his absence from duties from 12.07.2011.
3. The petitioner pleaded to have sent an application for leave for the period from 18.07.2011 to 31.07.2011. This fact has been vehemently denied by the respondent/management. The management admittedly struck off the name of the petitioner from the attendance roll and muster roll and did not conduct any domestic enquiry. The arrears of the minimum wages to the tune of Rs.11,441/- were admittedly paid to the petitioner. MW-1 has denied to have received any leave application from the petitioner for the period from 18.07.2011 to 31.07.2011.

However, the petitioner in his cross-examination stated that he sent his application for leave from 18.07.2011 to 31.07.2011 but he had admitted that his application neither bears the signatures of any sanctioned authority nor the signatures of recipient of the application.

4. It is fairly admitted by the learned counsel for the petitioner during the course of the arguments that the petitioner has worked with the respondent/management for less than 240 days in the year preceding to the date of his termination i.e. 01.08.2011.
5. Before appreciating the contention of the learned counsel for the petitioner, it would be beneficial to refer Section 25F of the ID Act, which 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 pay² [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 Government¹ [or such authority as may be specified by the appropriate Government by notification in the Official Gazette.]”

6. A bare perusal of the above provision shows that for applicability of Section 25F of the ID Act, the workman should have been employed in the industry in continuous service for not less than one year.
7. The word “continuous service” has been defined in Section 25B of the ID Act, which reads as under: -

“25B. 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;

(b) for a period of six months, if the workman, during a period of six 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) ninety- five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.
Explanation.-- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which--

(i) he has been laid- off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

8. It is evident from a bare reading of Section 25B of the ID Act that the workman should have completed at least 240 days of service immediately preceding the date of his alleged termination by the employer only then he will be deemed to be in continuous services for the purpose of availing the benefit of Section 25F of the ID Act.
9. A conjoint reading of section 25B and 25F of the ID Act makes it clear that an employee/workman who has not completed at least 240 days of service during the year immediately preceding the date of his alleged termination has no right to complain violation of Section 25F of the ID Act by his employer.

10. It is trite that onus of proof is on the claimant to show that he had worked 240 days with the employer in the given year preceding the date of his alleged termination. The onus would be discharged from the workman if he adduces cogent evidence both oral and documentary.
11. The **Hon'ble Supreme Court** in the case of **Range Forest Officer v. S.T. Hadimani, 2002 (3) SCC 25**, held as under: -

“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."

12. This judgment has been followed by the **Hon'ble Supreme Court** in the case of **Chief Engineer, Ranjit Sagar Dam & Anr. Vs. Sham Lal, AIR 2006 SC 2682** and **Essen Deinki v. Rajiv Kumar, 2002 (8) SCC 400.**
13. On the appreciation of the evidence, the Industrial Adjudicator came to the conclusion that after the transfer of the petitioner, he did not return to duty after 11.07.2011 at the transferred place, and that his non-joining of service at the transferred place amounts to abandonment of service as held by a learned Single Judge of this Court in **Competent Security Services Vs. Govt. of NCT of Delhi & Ors 2015 LLR 169** in Writ Petition (c) 1660 of 2011 decided on 15.12.2014. The Industrial Adjudicator has found that the petitioner had not completed 240 days in the preceding one year prior to his termination and the services of the petitioner were not terminated illegally or unjustifiably by the respondent/management.

14. In view of the admitted position at the bar that the petitioner has worked with the respondent/management for less than 240 days in the preceding year prior to his termination, there is no illegality or perversity in the impugned Award. I do not find any merit in the writ petition and same is hereby dismissed.

(VINOD GOEL)
JUDGE

MAY 18, 2018

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