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

% *Date of Judgment: 24.01.2018*

+ **W.P. (C) 6701/2014**

PANKAJ DIXIT & ORS Petitioners
Through: Mr.Vijay Kinger, Advocate with
Ms.Roopaa Nagpal, Advocate.

versus

M/S K.B.S.H. EXPORT HOUSE & ANR Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

1. In this writ petition, the petitioners have challenged the impugned exparte Award dated 02.07.2010 in case ID No.714/2016 by which the learned Presiding Officer, Labour Court-XVI, Karkardooma Courts, Delhi (hereinafter referred to as 'Industrial Adjudicator') answered the reference No.F-24(3567)/2004/Lab./6842-46 dated 29.03.2005 made to it by the Government of NCT of Delhi under Section 10(1)(c) and 12 (5) of the Industrial Disputes Act, 1947 (in brief 'ID Act') against the petitioners. The said reference reads as under: -

“Whether the services of Pankaj Dixit & 3 Ors. have been terminated illegally and/or unjustifiably by the management if so, to what sum of money as monetary relief alongwith consequential benefits in terms of existing law/Govt. Notification and to what other relief

are they entitled and what direction are necessary in this respect?”

2. All workmen referred in the said reference filed their joint statement of claim. It is alleged that the petitioner no.1 Pankaj Dixit was appointed as Operator on 20.01.2001 at a salary of Rs.2,800/- per month. The petitioner no.2 Santosh Pandey was appointed as Tailor on 05.09.2001 at a salary of Rs.2,800/- and petitioner no.3 Jeet Kumar was appointed as Operator on 25.08.2001 at a salary of Rs.2,800/-. It is inter-alia alleged that since they demanded ESI cards, appointment letter, wage slips, identity cards, provident fund slips, bonus and minimum wages etc., the respondent got annoyed and without any notice or charge-sheet or domestic inquiry, terminated their services on 16.09.2003 in violation of Section 25F of ID Act. Their wages for the period from 01.09.2003 to 16.09.2003 have also not been paid.
3. The respondent did not appear before the Industrial Adjudicator. All three petitioners herein tendered their respective affidavits in evidence.
4. The petitioner no.1 testified in his affidavit tendered in evidence that he was appointed on 20.01.2001 as Operator and his last drawn salary was Rs.2,800/- per month. The respondent did not provide him facilities of ESI, PF, HRA and other benefits and terminated his services without giving any charge-sheet or holding any inquiry. He also claimed that the respondent

withheld his earned wages from 01.09.2003 to 16.09.2003. The petitioner no.2 deposed in his affidavit tendered in evidence that he was appointed on 05.09.2001 as Tailor and his last drawn salary was Rs.2,800/- per month. The respondent did not provide him facilities of ESI, PF, HRA and other benefits and terminated his services without giving any charge-sheet or holding any inquiry. He also claimed that the respondent withheld his earned wages from 01.09.2003 to 16.09.2003. The petitioner no.3 testified in his affidavit tendered in evidence that he was appointed on 25.08.2001 as Operator and his last drawn salary was Rs.2,800/- per month. The respondent did not provide him facilities of ESI, PF, HRA and other benefits and terminated his services without giving any charge-sheet or holding any inquiry. He also claimed that the respondent withheld his earned wages from 01.09.2003 to 16.09.2003.

5. The petitioners have not adduced any other evidence documentary or oral that they were employed by the respondent as claimed by them at any point of time. Since the petitioners have not filed any document that they were in continuous service with the respondent and have completed 240 days in a calendar year preceding the date of their termination, the reference was answered against them by the Industrial Adjudicator.
6. Learned counsel for the petitioners submits that the vital piece of evidence available on record has not been considered by the

Industrial Adjudicator. He submits that the respondent/management neither appeared before the Conciliation Officer nor before the Industrial Adjudicator with malafide intention. He submits that the services of the petitioners have been terminated by the respondent/management in violation of Section 25F of ID Act. He submits that the unrebutted evidence adduced by the petitioners should have been accepted by the Industrial Adjudicator and the reference should have been answered in their favour by ordering their reinstatement with back wages.

7. Despite service of the notice, none has appeared on behalf of respondent/management.
8. I have heard the learned counsel for the petitioner.
9. 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.]”

10. 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.
11. 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.

12. It is evident from a bare reading of Section 25B of the ID Act that the workman should have completed at least 240 days 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 25 F of the ID Act.
13. A conjoint reading of section 25B and 25F of the ID Act make it clear that an employee/workman who has not completed at

least 240 days 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.

14. 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.

15. 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."

16. 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**.
17. Like the present case where the workman files his own affidavit to favour him cannot be regarded as sufficient evidence in the court to conclude that he had worked for 240 days in a year. The **Hon'ble Supreme Court** has observed in **Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan and Anr., 2004 (8) SCC 161**, as under: -

"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.”

18. This principle of law was followed by the **Hon’ble Supreme Court** in a later judgment namely **Municipal Corporation, Faridabad v. Siri Niwas, 2004 (8) SCC 195**, wherein it was held that 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.
19. Similar view was taken by the **Hon’ble Supreme Court** in **Manager, Reserve Bank of India, Bangalore v. S.Mani and Ors., 2005 (5) SCC 100**, and it was held that initial burden of proof was on the workman to show that he had completed 240 days of service.
20. In this regard the other judgment of the **Hon’ble Supreme Court** in **Batala Cooperative Sugar Mills Ltd. v. Sowaran Singh, 2005 (8) SCC 481**, **ONGC Ltd. and Another v. Shyamal Chandra Bhowmik, 2006 (1) SCC 337** and **R.M. Yellatti v. The Executive Engineer, 2006 (1) SCC 106** can be referred to.

21. While keeping in mind the vested principle of law laid down by the Hon'ble Supreme Court and Section 25(F) and 25(B) of the ID Act to the facts of the present case, the petitioners have failed to adduce any cogent evidence to prove that they were ever employed as workman/employee by the respondent. They had not adduced any documentary evidence like letter of appointment or wages or salary slip or identity card etc. They had also not examined any witness to prove their employment with the respondent. Even in their affidavits tendered in evidence, the petitioners have not even mentioned the date of alleged termination by the respondent.
22. In these circumstances, when the petitioners have not adduced any cogent evidence oral and documentary that they were in continuous service with the respondent for 240 days in the year immediately preceding to their alleged termination, the reference was answered by the Industrial Adjudicator rightly against the petitioners.
23. Therefore, I do not find any merit in the writ petition. The same is accordingly dismissed with no order as to costs.

(VINOD GOEL)
JUDGE

JANUARY 24, 2018
"shailendra"