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

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Decided on: 24.02.2020

+ **W.P.(C) 2019/2020**
SMT. VINITA

..... Petitioner

Through: Mr.Rajiv Agarwal, Mr.L. Gangmei
and Ms.Meghna De, Adv.

versus

THE MANAGEMENT OF NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Respondent

Through: Mr.Ankur Chhiber, Adv.

+ **W.P.(C) 1341/2020**

MANAGEMENT OF NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Petitioner

Through: Mr.Ankur Chhiber, Adv.

versus

SMT. VINITA

..... Respondent

Through: Mr.Rajiv Agarwal, Mr.L. Gangmei
and Ms.Meghna De, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

CM APP No. 4643/2020

1. Allowed, subject to all just exceptions.
2. The application stands disposed off.

W.P.(C) 2019/2020 & W.P.(C) 1341/2020 & CM APPL. 4642/2020 (stay)

3. These petitions arise out of the order dated 12.02.2015 passed by the learned Labour Court of the CGIT in case ID No. 5 of 2015, which had directed the reinstatement of the workman-claimant with 60% back wages. The management challenges the award on the ground that it has erred both in fact and in law, and in any case the award of 60% back wages is on the higher side.

4. The learned counsel for the management contends that the workman had been absent for a long tenures in 3 preceding calendar years 2009, 2010 and 2011, without any justification; that she remained absent from duty for 180 days on account of maternity leave, 90 days for earned leave and 2 days for medical leave. In effect, she remained absent for almost 9 months. Be that as it may, in so far as the workman is entitled to accept leave, no issue can be raised about it. Furthermore, if she was absent in years 2009, 2010 and 2011 without due permission, then appropriate proceedings in that regard ought to have been initiated by the management but the same was not done.

5. The learned counsel for the workman submits that it is a matter of record that the workman has received appreciation for her work from the management. She was a good worker and had discharged her duties to the satisfaction of the management. She suffered a miscarriage in the year 2009, which is why she was on leave for 76 days. In any case, the management has not shown or specified as to how they have reached to the conclusion that she was absent for 76 days in three consecutive years. He contends that even gazetted holidays have been included in the alleged period of absence.

However, these were not the reasons for termination of her contract. The learned counsel for the management contends that the contract came to an end in the year 2011 and her absenteeism was a factor which determined the aforesaid decision.

6. The workman was appointed for a specific period of two years from 05.01.2007 to 04.01.2009, which was further extended for further two years upto 04.01.2011. Thereafter, her contract was not renewed. It was co-terminus with the project for which she was working. Her contract was last extended from 04.01.2011 till 15.03.2011, but despite that, the management continued to take her services which ended on 25.01.2012. The rationale was of her being absent in the earlier years. The management's contention is *ex-facie* unsustainable because the alleged absence in the years 2009, 2010 as well as in 2011, stands implicitly condoned and subsumed in her subsequent extension of contract for another four years.

7. The aforesaid alleged absenteeism was never a factor when the contract was extended in the year 2011. Furthermore, her absence in the year 2011 itself was on account of her statutory benefits and the same cannot be a reason for termination of her services. She was never put to notice on any of the previous years apropos her so-called absenteeism. Therefore, the management's contention that she was a habitual absentee, is without basis and cannot form the substance for her termination of contract. The other persons who were similarly placed continued to work in the same position.

8. The learned counsel for the workman submits that another contractual worker, namely, Smt. Nanda Yadwad, who was engaged much after her continued service, the requirement for a person in her position, still subsists.

It is in these circumstances, that the management had been directed for her reinstatement, specially considering the fact that she had worked for 240 days prior to preceding year without compliance of Section 25 (f), (g) and (h) of the Act, therefore, the impugned order had reasoned as under:-

“14. Another contention of the Managements is that the claimant was unauthorisedly absent from duty for 49 days w.e.f. 14/10.2011 till 01/12/2011 and the said period was in excess of the notice period a decision was taken by the Management to terminate the contract of her service. It emerges that the Management has terminated/disengaged the services of the claimant due to her unauthorized absence from the duty for 49 days. Claimant WW1 has specifically deposed that she took maternity leave w.e.f. 17/01/2011 to 01/12/2011 and when she resumed duty on 2/12/2011, she was issued a memo dated 2-12-2011 (Ex. WW1/12), seeking her explanation for the unauthorized absence from duty. Vide reply letter dated 07/12/2011 (Ex.WW1/13), the claimant ad given a detailed explanation inter-alia that vide her application dated 26/07/2011 she had requested Manager (PC), NHAI to grant further leave for about three months as her infant child required special care and attention and as no reply thereof was received from the office she understood that her request was acceded to; that when she was about to join his duty, the baby encountered with certain medical complications associations with loose motions and had to be taken to the Paediatrician on 11/10/2011; it was diagnosed that since the baby was not properly digesting outside food stuff properly, baby had to be kept on mother-deed since 11/10/2011; that she had made informative calls to the mobile number 9717620878 of Manager (PC) on 20-10-2011, 9-11-2011 and 21-11-2011 and that as soon as the baby's health recovered, she reported for duty on 2/12/2011 (Forenoon) vide her joining report. In the said explanation, the claimant has specially stated that she had never intended and remained absent from the duty without information to office and thus, allegations leveled in the memo dated 2/12/2011 were false and she had requested for dropping the

said memo. Instead of considering her requested for dropping the said memo dated 2/12/2011, the Management issued another memo dated 29/12/2011(Ex.WW1/4), mentioning that she was a habitual absentee & remaining absents for 40 days in the year 2010 and 49 days in the year 2011 (i.e. from 14-10-2011) and further she failed to submit application for leave and remaining on unauthorized absence which act amounted to lack of devotion to duty and hence she was called to show cause why disciplinary action be not initiated against her. It would not be out of place of mention here that in memo Ex.WW1/14 through details/period of absence from duty by the claimant during the year 2011 were given, however it was lacking in respect of 40 days in the year 2010. The claimant vide her detailed reply dated 6/1/2012 (Ex.WW1/15) took objection for the same and asserted about informative calls made by her in the office. She requested for adjustment in respect of left out period of leave from 14/10/2011 to 1/12/2011 (49 days) with ELs, MLs, HPLs and any other kind of leave standing to her credit and in case of any shortfall, amount may be recovered from her salary. The claimant also sent a representation dated 25/1/2012 (Ex.WW1/16) to the Chairman, explaining her plight of undue harassment meted out to her vide office memo dated 29/12/2011 and had requested for intervention . However, vide order dated 25/11/2011(Ex.MW1/14), services of the claimant were terminated, stating that her present/existing contract had expire on 4/1/2011 and that the competent authority had decided not to extend her contract further and hence her contract as "Accountant" with NHAI stands discontinued, with immediate effect. It is worthwhile to mention here that in case service contract of the claimant had expired on 4/1/2011 and was not renewable, then as to why the Management issued aforesaid office order dated 23rd February/15th March, 2011 and why the maternity leave for 180 days w.e.f. 17/12/2011 and earned for 90 days thereafter were grated to him. No explanation has been furnished to the same by the side of the Management. It is not in dispute that the claimant was appointed to the post of Accountant through written test conducted on All India basis, followed by interview and that the post she was serving was of

regular and perennial in nature. She continuously worked with the Management for about five years w.e.f. 5/1/2007 till 4/1/2012. Even if it assumed for the sake of arguments that the claimant happened to be on unauthorized absence from duty for 49 days in the year 2011, in that eventually it was moral and legal duty of the Management to issue proper charge sheet and to hold disciplinary/domestic enquiry prior to infliction punishment of terminating from service. MWI Adarsh Kumar-sole witness examined by Management had admitted that no enquiry was conducted before terminating the claimant but he volunteered that it was not required because the claimant was a long term contract employee. It is fairly settled that if the terminating of an employee is based on no enquiry, no charge-sheet and not by way of punishment, then it becomes a case of illegal retrenchment. As such, this Tribunal is of the considered view that action of the Management in disengaging/terminating the services of the claimant herein amounts to retrenchment.

15. I may mention that provisions of Section 25-F of the Act which provides for conditions precedent to retrenchment of workmen, are absolute and inexorable and it 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 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 or such authority as may be specified

by the appropriate Government by notification in the Official Gazette.

The above provision makes it clear that the employer is required to give notice to the appropriate Government apart from giving one month's notice in writing or one month's wages in lieu of the notice and payment of retrenchment compensation to the concerned workman. MW1 Adarsh Kumar – witness of the Management has admitted that no retrenchment compensation was paid to the claimant. There is also nothing on record to show that any notice was issued by the Management prior to terminating of the claimant herein. As such, the Management has violated the provisions of Section 25-F of the Act.

16. There is long line of decisions of Hon'ble Apex Court as well as of various High Courts that provisions of Section 25-F of the Act are mandatory in nature and termination of her workman from services in derogation of the provisions of Section 25-F of the Act will render action of the Management Bank to be illegal and void under the law.

17. Since there is no evidence on record that any valid notice was issued by the Management to the workman at the time of termination or in lieu of such notice, any compensation was paid to her as such action of the Management in terminating the service of the workman w.e.f. 25/1/2012 is held to be illegal and void.

18. Now the residual question is whether the claimant/work is entitled to any incidental relief of payment of back wages and/or reinstatement of service with full back wages. It is proved on record that claimant was continuously in the employment of the Management since 05/01/2007. There is no show cause notice or charge-sheet issued to the claimant/workman by the Management. Moreover, the job of the workman is of perennial and regular nature which fact is also admitted by the witness of the Management MW1. The claimant has pleaded and testified that she is totally unemployed since her termination i.e. 25/1/2012.”

9. The aforesaid rationale, does not call for any interference for reinstatement. However, the issue which remains is that as to whether the quantum of 60% back wages is adequate or on the higher side or needs to be enhanced. The learned counsel for the management submits that the skilled workman ought to have looked for another employment. However, being an accountant by qualification, she ought to have and would have ordinarily found some vocation in the interim period. Therefore, the award of 60% back wages is on higher side and should be reduced to nothing more than 25%.

10. The learned counsel for the workman submits that for a workman who has sought payment of complete wages from the date of termination of services, the issue of her being engaged elsewhere was never raised before the learned Labour Court nor was any evidence in this regard ever led. He submits that the specific deposition of the workman that she had not been employed from the date of the termination of service i.e. 25.01.2012, has gone unchallenged. Therefore, it was rightly so accepted in the impugned order. It records as under:

“Having regard to the legal position as discussed above and the fact that the claimant was performing duty to a post of regular and perennial nature, this Tribunal is of the firm view that the claimant herein is entitled for reinstatement into service on the same post, with 60 per cent back wages inasmuch as termination of the claimant/workman is per-se illegal and the claimant/workman is not gainfully employed anywhere since after her termination by the Management.”

11. However, the learned counsel for the management refers to its reply wherein it is stated that the claimant was concealing the gainful employment due to *mala fide* intention. Be that as it may, this reply of the management was never supported by any evidence to the effect that the workman was gainfully employed elsewhere. She had deposed that from the date of termination of the service that she remained unemployed and it has been so recorded in the impugned order that: *“It seems that claimant is concealing her gainfully employment due to some malafide intention, however she has not produced any material in support of this contentions as such it is not believable that she is unemployed since 25.1.2012.”*. In his cross-examination, Mr. Adarsh Kumar, Deputy General Manager had admitted that: *“management is not aware of the gainful employment of the claimant after her termination. ...”*.

12. The Court would note that for a workman, who states and asserts that she was not gainfully employed, it is an impossibility to prove the negative. Nobody can prove the void. The void exists as it does. If the management had sought to challenge her not being employed, then it ought to have produced evidence to the effect that she was actually gainfully employed elsewhere. They did not do so. Therefore, the conclusion of the learned Labour Court to the effect that she was not gainfully employed is correct and cannot be interfered with.

13. The learned counsel for the petitioner refers to the dicta of the Supreme Court in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya*, (2013) 10 SCC 324 which held, *inter alia*, as under:-

“38. The propositions which can be culled out from the aforementioned judgments are:

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

.....

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.”

14. In terms of the aforesaid judgment, the wrongful termination of the services of the petitioner-workman would entitle her to continuity of service and back wages. The management perhaps knew that the workman had a miscarriage in the year 2009 and she was blessed with a baby in the year 2011. The new-born baby had a medical condition which required the mother to stay with her constantly for many months. There is no doubt about the medical condition and requirement of the mother for her baby. It may

have been prudent and an act of caring for its employee, for the management to have discreetly found out about her circumstances, especially since she had worked well with them for half a decade or so. The management's humane approach towards its employee was lacking in this particular circumstance. By letter dated 04.05.2012, the management had asked her to join the services with them and that she could visit the office at a convenient date and time with regard to the terms and conditions of her contract. She promptly responded by letter dated 24.05.2012 which reads as under:

“With reference to your letter dated 4.05.2012 on the above cited subject matter, I hereby tender my consent to join the NHAI on the same terms and conditions in continuity to and in accordance with my contract of service which was in force prior to 25.01.2012.”

15. The learned counsel for the management submits that the workman never reported back for duty. This contention is refuted by the learned counsel for the workman on the ground that despite the management's letter, she was not taken back and it is so recorded in conciliation proceedings in reply filed before the Conciliation Officer which reads, *inter alia*, as under:

“(A) The representation dated 31.01.2012 of the workman consequent to her termination addressed to Member (Fin.) NHAI was duly examined and it was decided to take a lenient view in the matter. Smt. Vinita was called by this office in this connection. She had rendered her consent to join NHAI on the same terms and conditions in continuity to her contract of service which was in force prior to her termination.

(B) The notice was received and as the matter regarding taking a lenient view had not reached finality, no reply was

given to the same. As part of the deliberation the workman was also called to the office.”

16. When the management itself admits that the workman's joining was an issue on which they were yet to take a view, and despite her offering to resume services, the management did not allow her to join services, she cannot be held responsible for that. Furthermore, since she had offered to continue her services, she knew that she will join services, she possibly could not have taken up any other assignment, work or part time employment elsewhere. In the circumstances, she would be entitled to 100% full back wages.

17. The petition being W.P.(C) 2019/2020 filed by the workman is allowed and disposed off in the above terms. The petition being W.P.(C) 1341/2020 filed by the management, alongwith pending application, is dismissed.

18. Since the petitioner-workman had been deprived of her due remuneration, the monies shall be paid alongwith interest @9% when the said monies became due. The monies shall be paid to the workman-claimant within four weeks from the date of receipt of a copy of this order.

NAJMI WAZIRI, J

FEBRUARY 24, 2020

Neelam