

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

% **Date of decision: 12th January, 2021.**

+ **LPA 187/2020 & CMs No.17266/2020 (for stay of order dated 24th February, 2020), 17271/2020 (for permission to file additional documents), 17278/2020 (for stay of order dated 22nd June, 2020), 33520/2020 (for stay of order dated 28th October, 2020) & 628/2021 (for stay of order dated 10th December, 2020).**

MANAGEMENT OF NATIONAL HIGHWAYS

AUTHORITY OF INDIA

..... Appellant

Through: Mr. Dayan Krishnan, Sr. Adv. with
Ankur Mittal, Ms. Aishwarya Pandey
and Mr. Abhay Gupta, Advs.

Versus

VINITA

..... Respondent

Through: Mr. Sanjay Ghose, Mr. Rajiv
Agarwal, Ms. Meghna De, Ms. L.
Gangmei and Mr. N. Bhushan, Advs.

AND

+ **LPA 188/2020 & CMs No.17301/2020 (for stay of order dated 24th February, 2020), 17306/2020 (for permission to file additional documents), 17307/2020 (for stay of order dated 22nd June, 2020), 32909/2020 (for stay of order dated 28th October, 2020) & 1148/2021 (for stay of order dated 10th December, 2020).**

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CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The appeals impugn the common judgment dated 24th February, 2020 of the Single Judge, allowing W.P.(C) No.2019/2020 preferred by the respondent/workman and dismissing W.P.(C) No.1341/2020 preferred by the appellant National Highways Authority of India (NHAI). The respondent/workman as well as the appellant NHAI had preferred the writ petitions aforesaid with respect to the Award dated 12th February, 2019 of the Central Government Industrial Tribunal (CGIT)-cum-Labour Court in ID No.05/2015, directing the appellant NHAI to reinstate the respondent/workman with 60% back wages. The appellant NHAI in its writ petition impugned the Award, on the count of reinstatement as well as on the count of Award of 60% back wages and the respondent/workman in her writ petition, impugned non-grant of 100% back wages. As aforesaid, the Single Judge did not find any error, required to be corrected in judicial review, in the order of the CGIT-cum-Labour Court granting the relief of reinstatement with 60% back wages, in favour of the respondent/workman and rather found error in the back wages being confined to 60% only and has modified the Award of the CGIT-cum-Labour Court, by awarding 100% full back wages to the respondent/workman and has further directed the same to be paid along with interest at 9% thereon from the date when the back wages fell due till the date of payment.

2. The appeals came up first before this Court on 31st July, 2020, when

notice thereof was ordered to be issued; vide order dated 8th January, 2021, on the application of the appellant NHAI, the Recovery Certificate issued in enforcement of the Award of the CGIT-cum-Labour Court against the appellant NHAI was stayed.

3. The CGIT-cum-Labour Court, in its Award dated 12th February, 2019 in ID No.05/2015, on the following reference:-

“Whether termination of Smt. Vinita w/o Shri. Shekhar Kumar by the Management of National Highway Authority of India w.e.f. 25.01.2012 without complying with the provisions of law is just, fair and legal? If not, what relief the workman concerned is entitled to?”,

has found/observed that, (i) the respondent/workman joined the employment of the appellant NHAI, as an Accountant, w.e.f. 5th January, 2007, on contract basis, for two years, in response to the vacancy advertised by the appellant NHAI; (ii) the contract of employment of the respondent/workman was extended by the appellant NHAI from time to time; (iii) the respondent/workman was working in the Port Connectivity Division of the appellant NHAI, from 2007 till January, 2012; (iv) the respondent/workman took maternity leave w.e.f. 17th January, 2011 to 1st December, 2011 and returned to duty on 2nd December, 2011; (v) the respondent/workman was issued a Memorandum dated 2nd December, 2011, of unauthorised absence from duty; (vi) the respondent/workman sent a reply dated 7th December, 2011 thereto; (vii) the appellant NHAI served another Memorandum dated 29th December, 2011 on the respondent/workman, of absenteeism for 40 days in the year 2010 and 49 days in the year 2011; (viii) the respondent/workman sent a detailed reply

dated 6th January, 2012 thereto also; (viii) without disposing of the aforesaid memorandums, the appellant NHAI, vide letter dated 25th January, 2012 terminated the services of the respondent/workman; (ix) it was the defence of the appellant NHAI that the respondent/workman was appointed for specific period of two years from 5th January, 2007 to 4th January, 2009 and which period was extended for further two years up to 4th January, 2011 and thereafter the contract of employment of the respondent/workman was not extended or renewed; and, (x) it was also the defence of the appellant NHAI that the respondent/workman was a habitual absentee from duty without intimation and had remained unauthorisedly absent from duty, for 76 days in the year 2009, 135 days in the year 2010 and 50 days in the year 2011 and which conduct of the respondent/workman showed that she was not interested in the employment and thus the appellant NHAI did not extend her contract.

4. The CGIT-cum-Labour Court in its Award dated 12th February, 2019, on the basis of pleadings and evidence led, has held/reasoned that, (i) though the appellant NHAI appointed the respondent/workman on contract basis, but after being subjected to written test and interview held on All India level; (ii) the respondent/workman worked with the appellant NHAI for about five years; (iii) as such the relationship of employer-employee between the appellant NHAI and the respondent/workman stood proved and in any case was not in dispute; (iv) the argument of the appellant NHAI that non-renewal/non-extension of contract of employment after expiry of the specified period does not amount to retrenchment under Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (ID Act) did not have any merit because the contract of employment of the respondent/workman though

was for a long period, but did not show that it was for any specific project or scheme; (v) no evidence was adduced by the appellant NHAI to show that the employment of the respondent/workman, after holding test, interview and medical test on All India basis, was for any specific project or scheme of the appellant NHAI; (vi) it was also not the case of the appellant NHAI that the respondent/workman was not in its employment during the year 2011; (vii) office orders dated 23rd February, 2011 and 15th March, 2011 of the appellant NHAI showed that the respondent/workman was re-engaged on contract basis for a period of two years; (viii) in case the appellant NHAI wanted to discontinue the contractual service of the respondent/workman after 4th January, 2011, there was no occasion for the appellant NHAI to issue office orders dated 23rd February/15th March, 2011; (ix) the services of the respondent/workman had been disengaged/terminated, only vide letter dated 25th January, 2012, showing that the respondent/workman continued to work beyond 4th January, 2011, till 25th January, 2012 when order of termination was issued; (x) thus the contention of the appellant NHAI that the contract of employment of the respondent/workman was not extended beyond 4th January, 2011 and non-renewal /non-extension of contract of employment after expiry of the specified period does not amount to retrenchment under Section 2(oo)(bb) of the ID Act is not tenable because the respondent/workman had continued to work for the appellant NHAI even after expiry of the contract and till termination on 25th January, 2012; (xi) there was no explanation that if the service contract of the respondent/workman had expired on 4th January, 2011 and was not renewable, why the appellant NHAI issued office orders dated 23rd February/15th March, 2011 and why the maternity leave for 180

days w.e.f. 17th January, 2011 and earned leave for 90 days thereafter was granted to the respondent/workman; (xii) even if the respondent/workman was unauthorisedly absent from duty from 49 days in the year 2011, though not proved, it was the duty of the appellant NHAI to issue proper charge sheet and hold disciplinary/domestic enquiry prior to inflicting punishment of termination from service; (xiii) the only explanation of the witness of the appellant NHAI was that since the respondent/workman was a long term contract employee, no charge sheet and no enquiry was necessary; (xiv) provisions of Section 25F of the ID Act had also not been complied with by the appellant NHAI in the matter of termination of employment of the respondent/workman; (xv) the respondent/workman was performing duty at a post of regular and perennial nature; (xvi) the respondent/workman was thus entitled to reinstatement into service on the same post, with 60% back wages, inasmuch as the termination by the appellant NHAI of the services of the respondent/workman was *per se* illegal and it was the case of the respondent/workman that she was not gainfully employed anywhere since her termination on 25th January, 2012 by the appellant NHAI and the appellant NHAI had not rebutted the same; and, (xvii) since no disciplinary/domestic enquiry was held prior to inflicting the punishment of termination of service on the respondent/workman, it was a case of illegal retrenchment within the meaning of Section 25F of the ID Act.

5. The Single Judge of this Court, dealing with the challenge to the aforesaid order of the CGIT-cum-Labour Court by both the parties i.e. the appellant NHAI as well as the respondent/workman, as aforesaid, has found/observed/held that, (i) the reasoning given by the CGIT-cum-Labour Court did not call for any interference with the direction insofar as of

reinstatement; (ii) however the issue for consideration was whether quantum of back wages awarded was adequate or on the higher side or needed to be enhanced; (iii) the contention of the appellant NHAI was that a skilled workman like the respondent ought to have looked for another employment and would have ordinarily found some vocation and thus the Award of 60% back wages was on the higher side and should be reduced to nothing more than 25%; (iv) per contra, it was the contention of the counsel for the respondent/workman that the respondent/workman had sought payment of complete wages from the date of termination as the respondent/workman was not employed elsewhere; (v) though the respondent/workman had deposed so in her evidence but was not cross examined on the said aspect; (vi) if the appellant NHAI disputed the claim of the respondent/workman of not being employed elsewhere, the appellant NHAI ought to have produced evidence of the respondent/workman being gainfully employed elsewhere and which the appellant NHAI had not done; (vii) the appellant NHAI knew that the respondent/workman had a miscarriage in the year 2009 and was blessed with a baby in the year 2011; (viii) the new born baby of the respondent/workman had a medical condition which required the respondent/workman to stay constantly with her baby for several months and which requirement could not be disputed; (ix) the appellant NHAI, if had any doubt in this regard ought to have made enquiry inasmuch as the respondent/workman had worked with them for nearly five years; (x) humane approach of the appellant NHAI was however found wanting; (xi) the claim of the appellant NHAI of the respondent/workman having not reported back for duty stood belied from the reply of the appellant NHAI before the Conciliation Officer and in

which reply the appellant NHAI had admitted that they were still considering whether to allow the respondent/workman to join and resume her services; (xii) owing to such conduct of the appellant NHAI, the respondent/workman could not resume service with the appellant NHAI or take up employment elsewhere; and, (xiii) “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.”

6. We have heard the senior counsel for the appellant NHAI.

7. The senior counsel for the appellant NHAI has argued that, (i) the CGIT-cum-Labour Court erroneously held that the action of the appellant NHAI of disengaging/terminating the services of the respondent/workman amounted to retrenchment within the meaning of Section 25F of the ID Act; this finding was returned without considering Section 2(o)(bb) thereof; (ii) the Single Judge did not go into the said aspect at all and proceeded to decide the writ petitions, not on law but on equity; (iii) Section 25F of the ID Act provides that 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 or the workman has been paid wages in lieu of such notice; (b) the workman has been paid retrenchment compensation equivalent to 15 days average pay for every completed year of continuous service; and, (c) notice in the prescribed manner is served on the appropriate Government or such authority as notified; (iv) however for the action to qualify as retrenchment,

the definition of retrenchment in Section 2(oo) of the ID Act has to be seen and which defines retrenchment as meaning “the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action”; (v) however Section 2(oo) further proceeds to provide in clause (bb) thereof that “termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein” shall not be included within the meaning of retrenchment; (vi) in the present case the termination of the services of the respondent/workman was a result of the non-renewal of the contract of employment between the appellant NHAI and the respondent/workman, on its expiry and thus the same did not qualify as retrenchment; (vii) that the Supreme Court, in *Karnataka Handloom Development Corporation Ltd. v. Mahadeva Laxman Raval* (2006) 13 SCC 15 has extended the principles of *Secy., State of Karnataka v. Umadevi* (3) (2006) 4 SCC 1 to Industrial Law also; (viii) there can be thus no regularisation of contractual employees under the Industrial Law also; (ix) the order of the CGIT-cum-Labour Court affirmed by the Single Judge, of reinstatement of the respondent/workman in the employment of the appellant NHAI will thus amount to back door entry of the respondent/workman in the service of the appellant NHAI and which is prohibited/barred by *Umadevi* (3) supra; (x) that the Labour Court committed an error in holding the present case as one of retrenchment and the Single Judge did not go into the said legal issue and proceeded to decide the matter taking a humanitarian approach only and which is not

permissible in law; (xi) a perusal of the letter dated 5th January, 2007 of the appellant NHAI to the respondent/workman shows the appointment to be purely contractual; (xii) though while renewing the said contract, the proforma as used for renewal of contractual employees for a particular project was used but it is not the case of the appellant NHAI that the respondent/workman was employed as an Accountant for a particular project; (xiii) though the appellant NHAI vide its letter dated 4th May, 2012 in response to the representation of the respondent/workman had called her to discuss the matter of her re-engagement but the respondent/workman instead went to the Labour Court; (xiv) the respondent/workman in her claim petition before the CGIT-cum-Labour Court expressly admitted that her engagement with the appellant NHAI was on contract basis though she claimed the work for which she was engaged to be of permanent nature; and, (xv) the CGIT-cum Labour Court has erred in holding that because the respondent/workman continued to work for appellant NHAI inspite of expiry of the term of her contract, without renewal thereof she was entitled to be absorbed and which is not a correct proposition in law and the Single Judge has failed to even deal with the said aspect.

8. At this stage we interrupted the senior counsel for the appellant NHAI and stated that there was no direction either of the CGIT-cum-Labour Court or of the Single Judge for regularisation of the services of the respondent/workman with the appellant NHAI and further reminded that in law, reinstatement when ordered is at the same position at which the workman was immediately prior to termination.

9. The counsel for the respondent/workman also fairly states that it is not even the case of the respondent/workman that her services with the

appellant NHAI have been regularised or are to be regularised and the respondent/workman admits that the reinstatement of the respondent/workman with the appellant NHAI will be on contractual basis.

10. The senior counsel for the appellant NHAI, continuing his arguments, further contended that, (i) the reliance by the counsel for the respondent/workman on ***Bhuvnesh Kumar Dwivedi v. Hindalco Industries Ltd.*** (2014) 11 SCC 85 in his compilation of judgments is misconceived inasmuch as clause (bb) to Section 2(oo) of the ID Act as exists qua Delhi does not exist in Uttar Pradesh to which State the said judgment pertains; and, (ii) the appellant NHAI, in its writ petition in paragraph 10 and in Ground F had expressly raised the argument as is raised before this Court, of owing to clause (bb) of Section 2(oo) of the ID Act, the case being not covered by Section 25F of the ID Act.

11. We have however enquired from the senior counsel for the appellant NHAI, whether not ***Umadevi*** (3) supra was in the context of public employment and how the principles thereof can be attracted to an industry. We have further enquired that even though the appellant NHAI is an undertaking of the Government of India, whether not for the principles of ***Umadevi*** (3) supra to apply, existence of a procedure for recruitment by a public notice, giving equal opportunity to all, is necessary, for it to be said that through the medium of contractual employment, employment is being granted without undertaking the said procedure. From a perusal of the record, it does not appear that any such issue was raised before the CGIT-cum-Labour Court or any material was placed on record.

12. The senior counsel for the appellant NHAI fairly states that there is no such material on record and he has not examined the matter from the

said aspect.

13. As far as reference to ***Karnataka Handloom Development Corporation Ltd.*** supra is concerned, we find the same to be referring to ***Umadevi (3)*** supra only while recording the submission of the counsels for the appellant therein and do not find the Supreme Court to have in its judgment expressed any view or granted relief in that case by referring to ***Umadevi (3)*** supra. Reliance on the said judgment thus is not found apposite.

14. The counsel for the respondent/workman has argued that, (i) ***Umadevi (3)*** supra was concerned with regularisation; (ii) the Supreme Court in ***Maharashtra State Road Transport Corporation v. Casteribe Rajya Parivahan Karmchari Sanghatana*** (2009) 8 SCC 556 has examined the differences between ***Umadevi (3)*** and industrial law; (iii) the witness of the appellant NHAI, in cross examination admitted that the recruitment of the respondent/workman was not *ad hoc* but through a recruitment process, on a All India basis; (iv) it was also the claim of the respondent/workman that while the respondent/workman had been dismissed, another workman, also contractually engaged as an Accountant after the appointment of the respondent/workman, was being continued and which was also admitted by the witness of the appellant NHAI – this action of the appellant NHAI was in violation of Section 25G of the ID Act; (v) in fact the appellant NHAI has also regularised the service of the said junior of the respondent/workman; (vi) it was the categorical pleading and evidence of the respondent/workman before the CGIT-cum-Labour Court that she was unemployed and in her cross examination by the appellant NHAI no suggestion even was put to her that she was gainfully employed; and, (vii) it

was held by the Division Bench of this Court in ***Delhi Cantonment Board v. Central Govt. Industrial Tribunal*** (2006) 129 DLT 610 (DB) that there is no distinction between a permanent employee and a temporary employee and termination of service without complying with provision of Section 25F of the ID Act is illegal.

15. The senior counsel for the appellant NHAI in his rejoinder arguments has drawn attention to ***Karnataka Handloom Development Corporation Limited*** supra to contend that all the conditions specified therein of contractual employment i.e. the employment being for a specific time, being liable to be terminated and such terms having been brought to the notice of the employee, are satisfied in the present case. He has further contended that clause (bb) to Section 2(oo) was inserted only to satisfy the temporary requirements and has contended that the said Section 2(oo) controls Section 25F of the ID Act.

16. We have enquired from the senior counsel for the appellant NHAI, whether not, if his argument were to be accepted, the same will sound the death knell for the ID Act to the extent provides protection to the workman against whimsical termination by the employers. We have enquired, whether one clause in the statute can be permitted to defeat the objective for which the statute was enacted and the substantive provisions of the statute. We have further enquired, whether not interpreting Section 2(oo)(bb) as suggested, would lead to the employers engaging all workmen so i.e. by providing the employment to be temporary and contractual and renewing the same from time to time, each time temporarily and for specified period, and leaving it to the whim and fancy of the employers to whenever desire, get rid of any workman, merely by not renewing the contract.

17. In our view, for a case to be brought under clause (bb) of Section 2(oo) it is incumbent on the employer to plead and prove that the work for doing/execution of which the workman was engaged was not of a permanent nature but the need wherefor had arisen in the course of carrying on business/running the industry and for a certain contingency and for a short period and that the said need/requirement ended after the said period or shortly thereafter.

18. The senior counsel for the appellant NHAI contends that neither clause (bb) of Section 2(oo) uses the word 'temporary' nor does ***Karnataka Handloom Development Corporation Limited*** supra lay down the same as a condition while dealing with the said clause.

19. However in our view Section 2(oo)(bb) cannot be read in isolation. Section 2(s) defines 'workman' as meaning any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied. We emphasise, that the word 'permanent' is not used in Section 2(s) also, while defining workman. Thus anyone hired to do any work qualifies as a workman.

20. As far as the reliance by the senior counsel for the appellant NHAI on ***Karnataka Handloom Development Corporation Limited*** is concerned, reliance on what is observed/held therein without adverting to the facts, can be misleading. Supreme Court therein was concerned with engagement of the respondent therein by the appellant therein, a Public Sector Enterprise established by the State Government to promote and assist growth and development of handloom industry outside the cooperative sector in the State; the respondent was appointed for various spells of fixed periods, on a

fixed honorarium, as a expert weaver, to train the weavers in the unorganised sector and was lastly engaged specifically under a welfare programme of the State Government to train and rehabilitate the weavers; the respondent otherwise, along with his father and wife was independently doing weaving business and having a business relationship with the appellant. It was in these facts that the Supreme Court held that the respondent was not a workman within the meaning of Section 25F of the Act.

21. Reference in this context may also be made to (A) *State of Rajasthan v. Rameshwar Lal Gahlot* (1996) 1 SCC 595; (B) *Municipal Council, Samarala v. Raj Kumar* (2006) 3 SCC 81; and, (C) *Haryana State Agricultural Marketing Board Vs. Subhash Chand* (2006) 2 SCC 794, in all of which though Section 2(oo)(bb) was invoked but in the facts of (A) where appointment was for a fixed period or till a regularly selected candidate assumed office; (B) where appointment was made without following the statutory provisions for appointment and for the period when one post was vacant and two other employees were on leave and public works were suffering; and, (C) where appointment was made during paddy season. Rather, in *Rameshwar Lal Gahlot* supra it was expressly held that if it is found that power under clause (bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, the employer would not be entitled to invoke Section 2(oo)(bb).

22. In the present case the appellant NHAI failed to make out a case as is being urged before this Court, before the CGIT-cum-Labour Court and the burden of proof whereof, as per *S.M. Nilajkar Vs. Telecom District Manager, Karnataka* (2003) 4 SCC 27 was on the appellant NHAI. The

factual finding of the CGIT-cum-Labour Court and which is not under challenge is, that respondent/workman had continued to work for the appellant NHAI even after expiry of the contract and till termination on 25th January, 2012. Thus, compliance with Section 25F and 25G of the ID Act was/is essential and the respondent/workman is not covered by Section 2(oo)(bb) of the Act.

23. Reliance by the counsel for the respondent/workman on ***Maharashtra State Road Transport Corporation*** supra, in response to the argument of the senior counsel for the appellant NHAI, is also apposite. Though the Supreme Court therein was not concerned with Section 2(oo)(bb) supra but held that the power of Industrial and Labour Courts to take affirmative action in case of unfair labour practice and to order regularisation /permanency to employees affected by unfair labour practice is not affected by ***Umadevi (3)*** because the same was not for consideration therein and because the said judgment restricts powers of Supreme Court under Article 32 of the Constitution of India and High Courts under Article 226 of the Constitution of India to issue directions for regularisation in matters of public employment.

24. We are thus unable to find any merit in the challenge by the appellant NHAI to the direction of the CGIT-cum-Labour Court for reinstatement of the respondent/workman and which the counsel for the respondent/workman has fairly agreed, would be as immediately before termination.

25. We however find that the Single Judge has not given any reason for interfering with the discretion exercised by the CGIT-cum-Labour Court in restricting the Award of back wages to 60% only and no illegality therein

has been canvassed before us also. We find the CGIT-cum-Labour Court to have, considering the work for which respondent/workman was engaged and doing for the appellant NHAI and the leave taken by the respondent/workman, to have rightly restricted the Award of back wages to 60% only. It cannot be lost sight of, that stepping out of the house for discharging duties at work, entails an expenditure and which expenditure is saved if not required to so step out of home for work. Moreover duties rendered at home, in household work, also have a monetary value as recently observed by the Supreme Court in *Kirti v. Oriental Insurance Company Ltd.* 2021 SCC OnLine SC 3. We are thus satisfied that no interference with the Award of the CGIT-cum-Labour Court qua Award of back wages to the extent of 60% only was/is called for.

26. We accordingly dismiss the appeal impugning the order of reinstatement and allow the appeal impugning enhancement of Award of back wages from 60% to 100% with interest and restore the Award of CGIT-cum-Labour Court insofar as with respect to back wages also.

The appeals are disposed of.

RAJIV SAHAI ENDLAW, J.

SANJEEV NARULA, J.

JANUARY 12, 2021

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