
(2010) 02 DEL CK 0182

In the Delhi High Court

Case No : Writ Petition (C) No. 1413 of 1997

Chief Engg. (I and F), Flood Control Wing Delhi Administration APPELLANT
Vs

Kuldip Singh and Another RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Citation : (2010) 02 DEL CK 0182

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Zubeda Begum and Sana Ansari, for the Appellant; Varun Prasad and Harish Sharma, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This writ petition takes exception to the award dated 18th September, 1996 of the Labour Court holding the services of the respondent / workman to have been illegally terminated by the petitioner and directing the petitioner to reinstate the respondent with full back wages and continuity of service. This Court while issuing notice of the petition, vide ex parte order dated 3rd April, 1997 stayed the operation of the award. The said order was subsequently made absolute during the pendency of the petition vide order dated 18th November, 1999.

2. The respondent claims that he was engaged initially w.e.f. 1st July, 1986 as beldar on muster roll and was posted at Peeragarhi upto 18th November, 1988 in the Flood Control Division; that he thus completed more than 240 days of service within the meaning of Section 25B of the Industrial Disputes Act; that he reported for work on 19th November, 1988 and onwards but was refused work and was verbally told that his services have been terminated w.e.f. 19th November, 1988. Alleging the said termination to be violative of Section 25G, E & H, he raised a dispute and reference was made to the following effect:

Whether the services of Sh. Kuldip Singh have been terminated illegally and /or unjustifiably by the management and if so, to what relief is he entitled and what

directions are necessary in this respect?

3. The petitioner filed a reply to the statement of claim of the respondent. In the said reply, it was not disputed that the petitioner was initially appointed on 1st July, 1986 as Beldar; however, it was contended that this was purely on a temporary basis on daily wages and as per the terms of employment the same was terminable at any time without prior notice; the appointment was done afresh every month and on different works as per requirement. The petitioner contended that the respondent did not complete 240 days service in a year. It was stated that from July, 1986 to March, 1987 he had worked for 228 days and from April, 1987 to March, 1988 he had worked for 228 days and from April, 1988 to 18th November, 1988 he had worked for 157 days. The petitioner also pleaded that the respondent had remained absent from duty w.e.f. 19th November, 1988 for about nine months and came forward for reappointment on 4th August, 1989, only giving reasons for absence as illness and due to his father's accident. However the petitioner, after filing the reply before the Labour Court, stopped appearing in the proceedings and was proceeded against ex parte and neither cross examined the witnesses of the respondent nor lead any evidence.

4. In the aforesaid state of affairs, the Presiding Officer of the Labour Court has held that the respondent/workman had completed more than 240 days of service in the years 1987 & 1988 and accordingly his services could not be terminated without notice.

5. The counsel for the petitioner has contended that the Labour Court has erred in believing the ex parte evidence of the respondent alone to the effect that he had worked for more than 240 days in a year; she contends that the Labour Court did not make any independent enquiry in this regard and the award is thus liable to be set aside. It is also contended that inspite of the plea of the petitioner in its reply that it is the respondent who had stopped approaching for work w.e.f. 19th November, 1988, the Labour Court has not returned any finding on that aspect of the matter. On being questioned as to what other evidence the respondent could have lead to prove his employment continuously for 240 days, the counsel states that the respondent could have examined other witnesses and / or summoned the muster roll of the petitioner. It is also argued that the respondent has not named the official of the petitioner who is alleged to have been approached w.e.f. 19th November, 1988 and / or who refused employment to the respondent. It is contended that if the respondent had been refused employment on 19th November, 1988 as alleged, he would have raised the dispute immediately and would not have waited for 9-10 months. It is further the case of the petitioner that the respondent was a daily wagger and not entitled to any notice of termination. It is contended that the nature of work for which the respondent was engaged was purely of a temporary nature i.e. of cleaning of drains etc. during monsoon season and the services of the respondent were not such as required throughout the year. It is contended that only if the work for

which a workman is engaged continuously for 240 days is of a perennial nature, than it is the policy/law that rather than keeping the workman on a daily/temporary basis, his services should be regularized and he should not be terminated. The counsel has during the course of hearing also handed over a copy of the muster roll dated 28th April, 1987 containing the name of the respondent at serial no.9 and stated to be bearing the signatures of the respondent also and which contains the type written material "Accepted a purely temporary appointment on day-to-day basis. Terminable at any time without any notice, on the daily wages of each of the work". It is further argued that the Labour Court has proceeded on the basis that on reinstatement the order for 100% back wages was automatic. It is argued that such order is contrary to the principle of "no work no pay" and the services of the respondent as of today are not needed by the petitioner. Reliance is also placed on the order dated 14th January, 2010 of the Division Bench of this Court in LPA No. 2030/2006 titled Sh. Shyam Babu v. Government of NCT of Delhi where in similar circumstances, the workman who had been engaged on a temporary basis for two years was granted only the relief of Rs. 1,00,000/- by way of compensation in lieu of reinstatement.

6. I have enquired from the counsel for the petitioner as to whether the petitioner took any steps for having the ex parte award set aside. The answer is in the negative. I have also enquired whether the respondent would be in possession of any document which would have shown the duration of his employment with the petitioner. No concrete answer to the said question also is given. I am, in the circumstances, unable to accept the contention of the petitioner that the Labour Court proceeded to make an award without proper enquiry or material. In this regard, it is also significant that the petitioner in the reply filed before the Labour Court itself had not really disputed the dates of employment as stated by the respondent/workman. The difference in the dates and the number of days for which the respondent was employed, pleaded by the petitioner and the respondent is on account of the petitioner in its petition having not included Sundays and other holidays and the respondent having done so. The counsel for the respondent has contended that in computation of 240 days the intervening holidays are also to be counted. This contention is found to be correct as per the judgment in Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, . The counsel has also contended that it is not even a ground taken by the petitioner that Sundays and intervening holidays are not to be counted in computing the period of 240 days as aforesaid.

7. Thus it will be seen that the award, inasmuch as returning the factual finding of the respondent having been employed by the petitioner for 240 days in the preceding year, cannot be faulted with. Even otherwise, the same is a finding of fact and this Court in the writ jurisdiction will not interfere with the said finding of fact particularly when the said finding is not shown to be perverse in any manner whatsoever. Similarly, the onus to prove that the respondent, after 18th November, 1988 had stopped approaching for work was on the petitioner and

which the petitioner failed to discharge.

8. Once the finding of fact is to be accepted, axiomatically the finding of the Labour Court of the employment of the respondent having been illegally terminated cannot also be faulted with.

9. The question which then arises is as to what should be relief in such circumstances and whether this Court should in the exercise of writ jurisdiction interfere in the relief granted by the Labour Court.

10. The counsel for the respondent relies upon the recent dicta of the Supreme Court in *Harjinder Singh Vs. Punjab State Warehousing Corporation*, where a bench of two judges of the Supreme Court by reference to the earlier judgments of three judge benches of the Supreme Court has held that the courts are to ensure that a workman who has not been found guilty cannot be deprived of what he is entitled to get - obviously when a workman has been illegally deprived of his device then that is misconduct on the part of the employer and employer cannot possibly be permitted to deprive a person of what is due to him; where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement. The said judgment further noticed that though of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations but the Supreme Court held that the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining specious and untenable grounds put forward by the employer. Accordingly, the order of the Labour Court of reinstatement with back wages was restored and that of the High Court in writ petition was set aside. Though the counsel for the respondent has also handed over compilations of a large number of other judgments including on the aspect of Section 2(oo)(bb) of the I.D. Act but in view of the trend over the years having been noticed in recent dicta in *Harjinder Singh (supra)*, it is not deemed necessary to burden this judgment with a discussion of the same.

11. I find that another bench of two Judges of the Supreme Court also recently in *Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another*, has however awarded compensation in lieu of reinstatement.

12. The question which thus arises for consideration by this Court is as to which judgment of the aforesaid two of the Supreme Court to follow in the present case. To determine the same, I have perused the facts of each of the two cases minutely. In *Harjinder Singh (supra)*, the workman was in regular employment and whose designation during the course of employment was changed from work

charge Motor Mate to Work Munshi and who had also been given an increment. He was continued in service even beyond the tenure specified in the order passed by the officials of the employer from time to time and was thereafter issued one months notice of termination by way of retrenchment. The plea of the employer in that case was that the projects at which the workman was employed had been completed. Per contra, in Jagbir Singh (supra) the workman was engaged as a daily wager and was being paid consolidated wages during his employment. The facts of Jagbir Singh (supra) are thus more akin to the facts of the present case. It was further held that "justice is the buzzword in the matter of adjudication under the Industrial Disputes Act; it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically; rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance". It was emphasized that while granting relief, application of mind on the part of the Industrial Court is imperative and reinstatement with full back wages cannot be the natural consequence and cannot be granted automatically only because it would be lawful to do so. It was held that several factors have to be considered, a couple of them being as to whether appointment of the workman had been made in terms of statute/rules and the delay in raising the industrial dispute. The Supreme Court in that case considering the factors of the period during which the services were rendered, the fact that the respondent had stopped its operation for which the workman was employed and considering the long time which had lapsed since the service had been terminated held the relief of reinstatement to be not appropriate. It was observed that the nature of appointment, the period of appointment, the availability of the job, etc. should weigh with the court for determination of such an issue. It was further held that a superior authority, as the employer in that case was, is obligated to make recruitments only upon compliance with the equality clause contained in Articles 14 and 16 of the Constitution of India and any appointment in violation of the said constitutional scheme as also the statutory recruitment rules, if any, would be void. It was also not found to be in public interest to order reinstatement after a long lapse of time. Yet other factor which was found to be relevant was, whether in making the initial employment, the statutory rule, if any, had been complied with and whether the workman had obtained some other employment on the date of termination or passing of the award. It was further held that due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules; merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularised. It was held that the courts have distinguished between a daily wager who does not hold a post and a permanent employee. In view of all the said factors in that case, compensation in lieu of

damages was awarded.

13. In the present case also the employment of the petitioner was as a daily wager and was on an ad hoc basis. The work for which the respondent was employed was also of a temporary / seasonal and not a perennial nature. I may also notice that the respondent in the present case did not even oppose the application for interim relief of stay of the award. The respondent did not apply u/s 17B of the Act also till the year 2004 when an application was filed but was subsequently withdrawn on 2nd March, 2005. No application thereafter has been filed. All this leads me to hold that in the facts of the present case, reinstatement is not the appropriate remedy. However, the termination of employment of the respondent having been found to be illegal, he will definitely have to be compensated therefore.

14. This Court in Autocentre Workshop Vs. Delhi Administration and Others, has held that the Court under Article 226 of the Constitution ought to consider the interest of both the parties and should counter weigh the conflicting rival claims without paying undue weightage to either the workmen or the employer. It was held that compensation in lieu of reinstatement has to reflect two factors viz. the amount payable as back wages and the amount payable in lieu of reinstatement which may be denied due to myriad factors.

15. Seen in this light, I feel that leave apart the award for payment of back wages, even if an order u/s 17B of the Act at the rate of last paid wages from the date of the award till now is made, a sum of Rs. 3,00,000/- (approximately) would be due to the respondent. The back wages for approximately seven years @ Rs. 1590/- per month as disclosed from the document handed by the petitioner, would also be in the amount of Rs. 1,35,000/-. In the course of hearing, it was informed that the respondent is now about 50 years of age and would thus have several years of service remaining. If he was to be reinstated, the petitioner would also have the burden of his family pension etc. Per contra, it cannot be lost sight of that the respondent has not worked for the petitioner and in all likelihood has been employed elsewhere. Considering all these things, I feel that compensation in the sum of Rs. 4,00,000/- would be equitable in lieu of reinstatement and back wages.

16. However, it is not deemed appropriate to order the release of the said sum of Rs. 4,00,000/- to the respondent/workman immediately. It is often found that such lump sum payments do not reach the intended beneficiary. Since the respondent is found to have gotten by despite his termination from the employment of the petitioner in the last about 20 years, it is felt that he has no immediate need of the said sum. It is deemed expedient to have the said sum deposited for the benefit of the respondent and be released to the respondent either upon him attaining the age of 58 years or earlier in the event of any other family exigency. Accordingly, while disposing of this petition by modifying the award from that of reinstatement with back wages to that for compensation in the aforesaid sum, the petitioner is directed to deposit the said amount in this

Court within a period of four weeks from today. Upon deposit of the said amount, the same be kept in a fixed deposit having maximum interest initially for a period of three years. The respondent/ workman shall be entitled to apply to this Court for release of the said amount before that period and or release of interest earned on the said sum upon showing sufficient cause therefore.