

(2012) 08 DEL CK 0509

In the Delhi High Court

Case No : Writ Petition (C) No. 1016 of 2008 and CM 1991 of 2008 (Stay) and W.P. (C) 2494 of 2010

Dav College Managing Committee

APPELLANT

Vs

Bimla Devi
 Bimla Devi Vs Dav College Managing Committee

RESPONDENT

Date of Decision : 06-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Delhi School Education Act, 1973 — Section 2(h), 2(s), 25, 8(3)

Industrial Disputes Act, 1947 — Section 10(s), 2(j), 2(s), 25F

Citation : (2012) 7 AD 81

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Mohak Bhadana and Ms. Judy James and Ms. Shweta Garg, for the Appellant; Judy James and Ms. Shweta Garg and Mr. Mohak Bhadana, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. These writ petitions are filed against the common award dated 1st October, 2007 whereby Smt. Bimla Devi was held to be a worker and entitled to a compensation of Rs. 2 lakhs in lieu of reinstatement. The facts in brief are that Smt. Bimla Devi was appointed as an Aya on 20th July, 1995 on ad-hoc/temporary basis on a consolidated salary of Rs. 1200/- per month and she worked thereon till 10th May, 1996. On 1st July, 1996 Smt. Bimla Devi was again appointed as Aya on ad-hoc/temporary basis on a consolidated salary of Rs. 1500/- which continued till 19th March, 1998 when her services were terminated due to closure of the Nursery Wing in the school. Against the said termination representation was made by Smt. Bimla Devi to the Education Department and the Deputy Education Officer, Zone-1 directed reinstatement of Smt. Bimla Devi. On 6th July, 1998 Smt. Bimla Devi was again allowed to join duty on the post of

Aya on daily wages on her agreeing to perform all the duties of Aya. However, thereafter Smt. Bimla Devi failed to report on duty with effect from 27th August, 1998. The letters sent to her were returned with the endorsement "refused". A dispute was raised on which the following reference was sent "whether the termination of services of Smt. Bimla Devi is illegal and/or unjustified and if so to what relief is she entitled and what directions are necessary in this respect". Based on the pleadings, the learned Tribunal framed the following issues:

- (i) Whether the Claimant is not a workman u/s 2(s) of ID Act as alleged by the management in P.O. No. 1 of its written statement?
- (ii) Whether the management is not an industry as defined u/s 2(j) of ID Act, if so to what effect?
- (iii) Whether the claimant had abandoned the job with the management at his own accord as alleged in P.O. No. 3 of W.S.
- (iv) To what relief, if any, is the workman entitled against the management in terms of reference?

2. As regards issue no. (i) it was held that the onus to prove that the claimant was not a workman u/s 2(s) of the ID Act was upon the management who has failed to make any submission on this point and this issue was not pressed by the authorized representative of the management during the course of hearing. As regards issue no. (ii) that the management was not an industry and u/s 25 of the Delhi School Education Act, 1973 (in short DSE Act) no Civil Court has the jurisdiction, the learned Tribunal held that since the management has not challenged the reference made by the appropriate Government, therefore Labour Court enjoys the jurisdiction as per terms of reference and decided the second issue also against the management. As regards issue no. (iii) it was held that the management failed to prove that the workman abandoned the job and thus this issue was also decided against the management. Thus, a compensation of Rs. 2 lakhs was awarded to Smt. Bimla Devi in lieu of reinstatement.

3. Learned counsel for the management contends that in terms of Section 8(3) of the DSE Act against any order of dismissal, removal, reduction in rank, the employee has a right to file an appeal before the Education Tribunal. Section 2(h) of the DSE Act includes teachers and every other employee working in a recognized school. Thus, Bimla Devi falls within the ambit of an employee u/s 2(h) of the DSE Act and the remedy available to her is of filing an appeal before the Education Tribunal. The Industrial Tribunal had no jurisdiction to entertain the dispute and adjudicate thereupon. Reliance is placed on Presiding Officer Delhi School Tribunal Vs. Govt. of Nct of Delhi, , Kapoor Chand and Others Vs. Delhi Administration and Others, and Dharamvir Singh Vs. NCT of Delhi & Ors. 150 (2008) DLT 735. Further it is contended that the compensation awarded to the workman is on the higher side as she was only a temporary employee working on ad-hoc basis. She has worked only for three years and thus was not entitled to the compensation amount.

4. Learned counsel for Smt. Bimla Devi on the other hand contends that the availability of the remedy under the DSE Act does not bar the remedy available under the Industrial Dispute Act, 1947 (in short the ID Act). Smt. Bimla Devi is a workman as defined u/s 2(s) of the ID Act and thus entitled to a remedy available before the Industrial Tribunal. In any case the Tribunal got the jurisdiction from the reference sent which order has not been challenged by the management. In the absence of a challenge to the order of reference, the management cannot now raise this issue. Reliance is placed on Apeejay School Vs. Sh. Darbari Lal and Others, and Prabhu Dayal Public School Vs. Prahlad; Jawahar Lal Singh, Arbind Kumar W.P.(C) 3260/1996 decided by this Court on 29th July, 2008. The Learned Tribunal erred in not directing reinstatement of Smt. Bimla Devi and since she has still 10 to 15 years of service to go, she should be directed to be reinstated. In any case the compensation awarded to the claimant Smt. Bimla Devi is too less and is required to be enhanced by this Court.

5. I have heard learned counsel for the parties. The issues to be decided first in the present petition are whether the worker Smt. Bimla Devi falls within the ambit of definition of "workman" u/s 2 (s) of the ID Act and whether in view of the applicability of the provisions of DSE Act, the remedy under the ID Act is barred. In Apeejay School (supra) this Court, while dealing with the provisions of DSE Act and ID Act, held:

14. In the opinion of this Court, the first question which arises for consideration is whether Section 25 of the School Act, barring the jurisdiction of the Civil Court, bars the jurisdiction of the Industrial Adjudicator also. The question is no longer res integra. The Supreme Court in Gujarat State Co-operative Land Development Bank Ltd. Vs. P.R. Mankad and Others, , in the context of Section 166(1) of the Gujarat Co-operative Societies Act, 1961 barring the jurisdiction of the Civil or Revenue Court in respect of disputes required to be referred to the Registrar held that the bar was only to the jurisdiction of the Civil Court or the Revenue Court and not of the Labour Court or any Industrial Tribunal constituted under the I.D. Act to adjudicate industrial disputes. The language was held to clearly indicate the intention of the Legislature not to oust the jurisdiction of the Industrial Adjudicator to determine claims and industrial disputes which cannot be adjudicated by the ordinary Civil Courts.

15. Also, in National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, , the bar of Section 10 of the CPC was held to be referable to a suit instituted in a Civil Court and it was held that the proceedings before the Labour Court cannot be equated with the proceedings before the Civil Court; it was further held that the Civil Court and the Labour Court are not courts of concurrent jurisdiction.

16. In view of the aforesaid, I conclude that there is no express bar in the School Act to the jurisdiction of the Industrial Adjudicator under the I.D. Act.

17. That takes me to the next question, as to whether the jurisdiction of the Industrial Adjudicator under the I.D. Act can be said to be impliedly barred by the School Act. The strongest argument of the senior counsel for the petitioner, in the opinion of this Court, is of the Legislature itself by the amendment of 1982 (though not enforced as yet) having intended to exclude the schools from the ambit of the I.D. Act. However, the fact remains that for whatsoever reason, the said amendment has not been brought into force as yet. The question which arises is, whether in spite of the amendment having not been brought into force, the Court can interpret the existing provisions in the Statute in the spirit of the proposed amendment. That would further amount to this Court bringing into force the amendment which the Legislature / Executive in its wisdom has not chosen to bring into force for the last over quarter of a century.

6. In *Prabhu Dayal Public School* (supra) this Court held:

13. It has to be understood that the Industrial Disputes Act 1947 and the Delhi School Education Act 1973 operate in their own spheres and in case of overlapping, subject to the rule of repugnancy and subject to the rule that the special act overrides the general act, every attempt has to be made to give effect to the statutory provisions of the two enactments.

14. In the instant case with the management taking the decision to close down the transport department the employees in the transport department obviously became surplus, in that, the post which they were holding came to be abolished. But for the fact some of them were workman, others, i.e. non-workman had to suffer cessation of their employment. The respondents were lucky. Being workman they got the necessary protection under the Industrial Disputes Act 1947 and on said count while dispensing with their services the management rightly paid retrenchment compensation.

7. Learned counsel for the management has relied upon *Kapoor Chand & Ors.* (supra) wherein this Court held that bus conductors, drivers were essential for the school and hence they were the employees within the definition of Section 2(h) of the DSE Act. However, in the said decision there is no discussion about the applicability of the DSE Act viz-a-viz the ID Act and hence the same has no relevance to the facts of the present case. Similarly, in *Dharamvir Singh* (supra) this Court was dealing with the alternate remedy available to an employee in the form of an appeal to the Delhi School Tribunal. Even in *Presiding Officer, Delhi School Tribunal* (supra) this Court was not dealing with the applicability of the DSE Act and the ID Act inter-se and hence the decisions, relied upon by the learned counsel for the management, have no application to the facts of the present case. A perusal of Section 10(s) of the ID Act shows that the worker *Smt. Bimla Devi* falls within the ambit of the same. The DSE Act does not bar applicability of the ID Act and thus the learned Industrial Tribunal on a reference being made cannot be said to be not vested with the jurisdiction to entertain the claim of the claimant. Further the management has not even challenged the order of reference. Thus, I find no merit in the first contention of the

management that the provisions of ID Act were not applicable and the remedy available to Smt. Bimla Devi was by way of filing an appeal before the Delhi School Tribunal.

8. As regards the issue of compensation learned counsel for the management states that the compensation of Rs. 2 lakhs is on the higher side whereas learned counsel for Smt. Bimla Devi urges that she should have been reinstated once the termination was held to be illegal.

9. In Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another, the workman was engaged as a daily wager. He was paid consolidated monthly wages. He worked with the Respondent upto 18th July, 1996. Thereafter his services came to an end. He raised an industrial dispute contending that his services were retrenched illegally in violation of Section 25F of the ID Act. He claimed reinstatement with continuity of service with full back wages. The Industrial Tribunal-cum-Labour Court held that the workman had worked for more than 240 days and the Respondent violated Section 25F by not giving him notice, pay in lieu of notice and retrenchment compensation before his termination. The Labour Court, accordingly, declared that the workman was entitled to reinstatement with continuity of service and full back wages from the date of demand notice i.e. 27th January, 1997. The Respondents challenged the award before the High Court which set aside the award holding that the workman was neither entitled to be reinstated nor could he be granted back wages. In this backdrop of the matter, the Hon"ble Supreme Court held that High Court erred in not awarding compensation to the workman while upsetting the award of reinstatement and back wages and granted compensation of Rs. 50,000/- to the workman. The relevant paras of the Report reads as under:-

7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

8-13. xxx

14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This

Court has distinguished between a daily wager who does not hold a post and a permanent employee.

15. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages.

16. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation.

17. While awarding compensation, a host of factors, inter alia, manner and method of appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances.

18. In a case such as this where the total length of service rendered by the appellant was short and intermittent from 1-9-1995 to 18-7-1996 and that he was engaged as a daily wager, in our considered view, a compensation of Rs 50,000 to the appellant by Respondent 1 shall meet the ends of justice. We order accordingly. Such payment should be made within six weeks from today failing which the same will carry interest @ 9% per annum.

It is well settled that even if the termination is held to be illegal, the relief of reinstatement with back wages does not follow automatically and the relief can be moulded suitably by awarding adequate compensation to the claimant. In the case in hand Smt. Bimla Devi has worked for three years approximately. She was a temporary/adhoc employee and in the light of the law laid down by the Hon''ble Supreme Court, I am of the view that the learned Trial Court did not err in not reinstating her and the compensation awarded is adequate. Thus, Smt. Bimla Devi is neither entitled to reinstatement nor higher compensation. The compensation of Rs. 2,00,000/- is adequate. Both the petitions and application are accordingly dismissed. The Registry shall release the awarded amount, which is deposited by the Petitioner in WP(C) No. 1016/2008 in terms of order dated 8th February, 2008 and lying in the fixed deposit, to the workman Bimla Devi with interest, if any, accrued thereon.