

(2023) 05 DEL CK 0022

In the Delhi High Court

Case No : Civil Writ Petition No. 279 Of 2014, 2410 Of 2015, Civil Miscellaneous Application No. 43718, 43489 Of 2021

M/S Mirc Electronics Limited

APPELLANT

Vs

Shashank Gupta & Anr

RESPONDENT

Date of Decision : 04-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21, 136, 226
Code Of Civil Procedure, 1908 — Order 14 Rule 1(5)
Industrial Disputes Act, 1947 — Section 2(s), 2(o), 2(oo), 9A, 11A, 25F, 25F(a), 25F(b), 25G, 25N, 25O

Citation : (2023) 05 DEL CK 0022

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Birendra Mishra, Poonam Atey, Md. Ziyaul Rahman, Atul Nagarajan, Rajat, K. Pallavi

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. By this common order, I shall decide the titled writ petitions, as they both arise from the same factual matrix assailing the order / award dated August 03, 2013 ('impugned order', hereinafter) passed by the Labour Court, Karkardooma, Delhi in LC No. 84/2010.

2. For the sake of convenience and brevity, the petitioner company in W.P.(C) 279/2014, who is the respondent in W.P.(C) 2410/2015 shall be referred to as 'the company' hereinafter. Similarly, the respondent in W.P.(C) 279/2014, who is the petitioner in W.P.(C) 2410/2015 shall be referred to as the 'employee' hereinafter. The company in its petition has challenged the impugned order whereby the Labour Court has awarded a sum of Rs. 5 lakh to the employee as lump sum compensation in lieu of reinstatement and back wages. The employee in his petition has prayed for, inter alia, reinstatement with continuity of service,

full back wages and all consequential benefits along with interest on withheld payments.

3. It is an admitted fact that the employee was initially appointed as a Computer Operator with effect from April 20, 1992 to perform typing and clerical services in corporate taxation department of Onida group of companies, manufacturing consumer electronic goods on the rolls of group company Onida Savak Limited. Thereafter on April 01, 2005, the said company merged with its parent company, i.e., MIRC Electronics Limited, and he become employee of the company with continuity of service and all benefits of the previous employment with other group companies.

4. It is the case of the company that on April 30, 2008, the services of the employee were terminated as a measure of cost cutting, due to prevalent recession, and for the reason that his services were no longer required as a result of shifting of the electronics unit of the company from Noida to Roorkee. While terminating the services of the employee, he was offered the salary of one month in lieu of notice as per the terms and conditions of his employment. However, the employee refused to accept the notice, which was then sent to him by registered post. Thereafter, he sought clarification regarding the same vide letter dated August 29, 2008, in reply where to, the company vide letter dated September 23, 2008 informed him that his services have already been terminated and he was requested to obtain full and final settlement. As the employee failed to comply with the said request, the company sent the cheques of dues/ payables towards the full and final settlement as well as gratuity, which he duly received, en-cashed and utilised.

5. Thereafter, the employee through legal notice dated November 28, 2008 disputed the termination, and further on March 24, 2009 filed a statement of claim before the Labour Court bearing DID No. 61/2009. Though the company had filed reply to the statement of claim, to avoid litigation, the employee was offered employment at Thane site of the company. However, the employee refused the said offer. On August 8, 2013, the Labour Court passed the impugned award.

6. Mr. Birendra Kumar Mishra, learned counsel appearing for the company has submitted that the Labour Court erred in passing the impugned award, insofar as the onus to prove that the employee was, in fact a workman was wrongly placed upon the management, which is contrary to the law laid down by the Supreme Court in the case of *Workmen of Nilgiri Co-op Marketing Society v. State of Tamil Nadu*, (2004) 3 SCC 514 wherein it was held that the onus to prove that the claimant is a workman is on the claimant and not on the management. He has also placed reliance on the judgments in *Kirloskar Brothers 6) Ltd. v. The Presiding Officer*, ILR 1976 (1) Delhi 565; *Burmah Shell Oil Storage v. Burmah Shell Management Staff*, AIR 1971 SC 922, and *HR Adyanthaya v. Sandoz (India) Ltd.*, (1994) 5 SCC 737.

7. The prime contention of Mr. Mishra is that the Labour Court has failed to appreciate the fact that the employee was employed in a managerial capacity and he was having supervision over other staff working under him. He was engaged in an advisory capacity in relation to taxation and allied matters, and was drawing salary equivalent to that of a manager; had access to information made available only to managers/senior executives, and was even provided with facilities available only to managers. That apart, he had access to a separate canteen on the first floor, which is exclusively for managers and senior executives, whereas other workers use the staff canteen in the basement. He stated that the following facts have been admitted by the employee in evidence:-

"i. It is correct that the senior grade of executive was MI to M2 and for managers M3 onwards.

ii. I was in M2 grade when my services were terminated. It is correct that I was Senior Executive in IT department.

iii. That there were other persons in clerical and supervisory cadre in accounts department.

iv. We were given voucher of Rs.350/- as canteen coupon vol. same were reimbursement coupons. It is correct that these coupons were not given to workers but given only to managers and executives."

8. That apart, Mr. Mishra has stated that the Labour Court while awarding the compensation erred insofar as it did not appreciate and consider the fact that the employee has refused the offer of reinstatement, and as such, he cannot seek or be given any award of compensation in lieu of reinstatement, as he is clearly not in need of a job. He further stated that the Labour Court has turned a blind eye to the principle of "no work no pay". The Labour Court should not have made the impugned award in view of this principle and certainly should not have given compensation in lieu of back wages for the period for which the employee has not done any work. To buttress his arguments, he has referred to the judgments in the cases of *Union of India v. K.V. Jankiraman*, (1991) 4 SCC 109; *U.P. State Brassware Corporation Limited v. Uday Narain Pandey*, (2006) 1 SCC 479; *Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.*, (2009) 15 SCC 327; *Gujarat Agricultural University v. All Gujarat Kamdar Karamchari Union*, (2009) 15 SCC 335; and *State of Haryana v. Bani Singh Yadav*, 2005 (2) SLR 622.

9. Mr. Mishra has also relied upon the judgment of the Supreme Court in the case of *Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.*, (2002) 3 SCC 496, to contend that the impugned judgment/award was made without considering the settled principle of law that judicial precedents cannot be relied upon without considering the factual matrix of the case in hand as against that of such precedents. According to him, the Labour Court ignored the facts and circumstances as well as the material available on record which clearly established that the respondent was performing purely managerial/supervisory functions while discharging his duties. As such, granting compensation while

ignoring the terms and conditions of employment is unwarranted and uncalled for. He further submitted that the impugned award is not sustainable in law and is perverse for the reason that the employee had not sought compensation for retrenchment in his claim. There is no basis for the Labour Court to arrive at the exorbitant and excessive figure of Rs. 5 lakh as compensation.

10. It is also the case of the company that there is no illegality or arbitrariness in the termination of the employee, as he was not terminated for any misconduct, but because his services have become redundant due to the closure of the Noida unit of the company. Therefore, the requirement of domestic/departmental enquiry does not arise. Moreover, under the letter of appointment, the employee was entitled for one month's salary in lieu of notice, which was duly paid to him. That apart, Mr. Mishra stated that the employee has already accepted the full and final settlement as well as gratuity, and as such he is estopped from challenging the termination. He stated that in any case, it is settled law that even if a workman is retrenched illegally, reinstatement with back wages would not follow as an automatic consequence. In any case, the employee had rejected the offer of alternative appointment given by the company, which goes to show that the prayer of reinstatement made by the employee is not bona fide.

11. Mr. Atul Nagarajan, learned counsel appearing for the employee, has submitted at the outset that the Labour Court, after holding that the termination of the employee was illegal and in violation of the principles of natural justice and several provisions of the Industrial Disputes Act, 1947 ('ID Act', hereinafter), has only given a paltry compensation of Rs. 5 lakh without directing for the normal relief of reinstatement, continuity of service, and full back wages along with consequential benefits as prayed for.

12. It is the case of the employee that he proceeded on sanctioned leave from July 01, 2008 to July 31, 2008, after which, when he went to resume his duties, he was informed by the HR Manager of the company that his services have been terminated. Thereafter, the HR Manager exerted pressure on him to resign voluntarily in lieu of his full and final settlement and experience certificate. The employee, vide letter dated August 29, 2008, enquired inter alia the reasons for his termination, to which the company replied vide letter dated September 23, 2008 informing him that his services have been terminated with effect from September 30, 2008, but failed to provide any reasons thereof.

13. Subsequently, the employee sent a legal notice to the company on November 28, 2008 seeking reinstatement, in reply to which the company sent an ante dated rectification letter bearing date of November 28, 2008 posted on December 01, 2008, altering the date of his termination from September 30, 2008 to June 30, 2008, citing it to be typographical error. Thereafter, on March 24 2009, the petitioner raised an industrial dispute and filed his statement of claim.

14. On August 26, 2009, the company during the pendency of the proceedings

and after a gap of one year after the termination of the employee, released only a part payment of the petitioner's dues such as one month's pay, earned leaves, gratuity etc. without any interest, alleging the same to be the employee's full and final settlement amount and deliberately withheld his experience certificate, which was not provided even after the direction of this Court dated December 20, 2016.

15. On the basis of the pleadings, the learned Labour Court framed the following issues:

- i. Whether the present workman is not covered under the definition of "workman" as mentioned under Section 2 (s) of the ID Act, and if so to what effect? OPM
- ii. Whether the services of the workman have been terminated illegally and/or unjustifiably by the management if so, to what effect? OPM
- iii. Relief.

16. On August 03, 2013, the Labour Court passed the impugned award of 5 lakh as lump sum compensation in lieu of reinstatement and back wages holding inter alia as under:-

"22. From the material placed on record as well as depositions made by the witnesses it do not find element which shows that the claimant not covered under the definition of workman' as defined u/s.2 fsj of I.D. Act. The claimant have denied that he i/i/as working in Administrative or management cadre. He was reported to Mr S.K.Sachdev who i/i/as his immediate boss and followed his command at time to time. He do not have power to prepare Form 16 of TDS return or filled up the Annual Confidential report sanctioned the leave to any subordinate staff etc. Therefore, in view of the aforesaid discussion the issue no.1 is decided in favour of workman.

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29. In view of the contention raised by the authorized representative of the parties and material placed on record as well as aforesaid discussion. The discussion previous paragraph of the award be read part &partial of this issue too and same is not repeated here for sake of brevity. It's held that the claimant is covered under the definition of workman' and while terminating the services of the workman, necessary notice/charge- sheet, domestic enquiry has to be done by the management. The management also bound to conduct the regular domestic enquiry but same is not done by management which is violation of principle of natural justice. In the facts and circumstances, the management has terminated his service on the basis of recession of the management between re-organization of the several department including taxation, however there is no ocular trustworthy evidence with respect to the recession in the management though the balance-sheet filed by the workman is contrary to the contention raised by the management which shows that the management was in those

benefits on the several accounts.

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31. In view of the finding on the above issues, it is a matter of record that the claimant is covered under the definition of workman' as defined w/s. 2(s) of the Industrial Disputes Act, 1947. The workman has not received the full and final settlement dues and the services of the workman i/i/as terminated illegally and unjustifiably by the management. The claimant vi/as employed with the management in the year 1992. The management terminated the services of the workman vide termination letter dated 30.06.08 without assigning any reason and without holding any enquiry, by giving him one month's salary in lieu of one month's notice, stating that their services are no longer required. Though the nature of work of the workman illas clerical duties pertaining to the taxation matter assisting to the Onida Company, recorded the copy of the income tax file etc. in group taxation department (financial & account). The claimant was responsible for the management's taxation system including tax data of the management. He iilas also required to compute the taxes & file the statement account of employee. The management throughout has testified that there was no complaint whatsoever against the workman. The claimant was performing his duties honestly and sincerely. The management has alleged that the services of the workman terminated due to business exigencies including administrative reasons. But there is no verbal or written evidence brought on record to show what was the business exigencies including administrative reasons to terminate the services of the workman. The workman has served the management more than 16 years of his service. The claimant do not wish to join outside Delhi even offer was made by the management. Thus, question of reinstatement in the service at Delhi does not arise since the recession, alleged reorganization of the management department."

On January 20, 2014, instead of implementing the award, the company challenged the same by way of the captioned writ petition.

17. The employee is aggrieved by the said award to the extent that it declined the normal relief of reinstatement with continuity of service and full back wages along with all consequential benefits, which is arbitrary, unjustified, and suffers from errors apparent on the face of the record and is in violation of Articles 14, 19 and 21 of the Constitution of India. Mr. Nagarajan stated that the Labour Court has failed to appreciate and take into account the fact that the employee has been in regular service with the company for over 16 years, that there is no complaint against him and also that he has been illegally deprived of his employment.

18. It was the case of the employee before the Labour Court that he had been performing clerical duties and other duties as directed by his superiors, and as such, is covered under Section 2(s) of the ID Act. Mr. Nagarajan has submitted that there is nothing in the cross examination of the employee conducted by the

company before the Labour Court to establish that the employee is not entitled to the benefits under Section 2(s) of the ID Act. The company through evidence of their HR Manager had contended that there were subordinate staff working under the employee, however they have failed to adduce any evidence in this regard. It is an admitted fact that the company has not placed any documents either regarding the roles and responsibilities of the employee or to show that he has sanctioned any leave or signed any leave application/appraisal letter / promotion letter. The Labour Court has observed in paragraphs 16 to 19 of the impugned judgment/award that the company has not discharged the burden by producing the relevant record to show that the claimant was not a workman within the meaning of Section 2(s) of the ID Act Regarding Issue No.1, Mr. Nagarajan has relied on the judgment of the Supreme Court in Anand Regional Cooperative Oil Seeds Growers Union v. Shailesh Kumar Harshad Bhai Shah, (2006) 6 SCC 548, and of this Court in the cases of Shri Muralidharan v. The Management of M/s Circle Freight International India Pvt. Ltd., WP(C) 7023/2003 decided on April 30, 2007 and Mathur Aviation v. Lt. Governor and Ors., 1977 IILLJ 255.

19. He has also submitted that the illegal and mala fide termination, apart from going against the principles of natural justice, is also in violation of Section 9A read with Schedule IV (10&11) of the ID Act. In this regard, he referred to the judgment of the Supreme Court in the case of Lokmat Newspapers Pvt. Ltd. v. Shankarprasad (1991) 6 SCC 275. He also stated that the Labour Court in its award, contradicted its own findings wherein on one hand, in paragraphs 28 and 29 of the impugned award, it was held that the termination of the employee is in total violation of Sections 25 (G), 25 (N) and 25 (O) of the ID Act leading to the conclusion that there was no recession based re-organisation of the company's departments and there was no closure of the unit. On the other hand, the Labour Court while denying relief to the employee recorded that the question of reinstatement of workman in the service does not arise of "recession alleged reorganization of the management's department". Mr. Nagarajan has vehemently contended that once it has been held that the termination of services of the employee is in contravention of the provisions of the ID Act, the petitioner is entitled in law to reinstatement with full back wages and continuity of service with all consequential benefits as has been held in Uttaranchal Forest Development Corporation and Anr. v. Jabar Singh and Ors. 2007 (2) SCC 112. He has also relied upon the judgment in the case of Mohan Lal v. Management of Bharat Electronics, 1981 SCC (L&S) 478 to contend that when the termination itself has been held to be illegal, the termination order is void ab initio and inoperative as there is neither termination nor cessation of service and a declaration should follow that the workman continues to be in service with all consequential benefits.

20. He further stated that if the company wants to deviate from this settled position of law, it has to show that the employee was gainfully employed elsewhere, which it has clearly failed to do in the present case, as is evident from

the findings of the Labour Court. In this regard he has referred to the judgment of the Supreme Court in the case of Bhuvnesh Kumar Dwivedi v. Hindalco Industries Ltd., AIR 2014 SC 2258. It is the case of the employee that the impugned award is contrary to the decision of the Supreme Court in the case of Devinder Singh v. Municipal Council, Sanaur, AIR 2011 SC 2532, wherein it was held as under-

"20. This Court has repeatedly held that the provisions contained in Section 25F(a) and (b) are mandatory and termination of the service of a workman, which amounts to retrenchment within the meaning of Section 2(00) without giving one month's notice or pay in lieu thereof and retrenchment compensation is null and void/illegal/inoperative State of Bombay v. Hospital Mazdoor Sabha MANU/SC/0200/1960 AIR 1960 SC 610, Bombay Union of Journalists v. State of Bombay MANU/SC/0135/1963: AIR 1964 SC 1617, State Bank of India v. N. Sundara Money (supra), Santosh Gupta v. State Bank of Patiala MANU/SC/0313/1980: (1980) 3 SCC 340, Mohan Laiv Bharat Electronics Ltd. MANU/SC/0327/1981 (1981) 3 SCC 225, L. Robert D'Souza v Southern Railway (supra), Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court MANU/SC/0316/1980 (1980) 4 SCC 443, Gammon India Ltd. v. Niranjan Dass MANU/SC/0237/1983 (1984) 1 SCC 509, Gurmail Singh v. State of Punjab MANU/SC/0640/1990: (1991) 1 SCC 189 and Pramod Jha V. State of Bihar MANU/SC/0179/2003: (2003) 4 SCC 619.

21 In Anoop Sharma v. Executive Engineer, Public Health Division, Haryana (supra), the Court considered the effect of violation of Section 25F, referred to various precedents on the subject and held the termination of service of a workman without complying with the mandatory provisions contained in Section 25F (a) and (b) should ordinarily result in his reinstatement."

He has also placed reliance on the judgment in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and Ors., MANU/SC/0942/2013, wherein the following observations were made by the Supreme Court:-

"33. The propositions which can be culled out from the aforementioned judgments are:

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

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors

iii) 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 /i/as 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 14/as 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 averments 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 in/as 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.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or 'that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the

services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

vii) The observation made in J.K. Synthetics Ltd. v. KP. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

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37. In the result, the appeal is allowed, the impugned order is set aside and the order passed by the Tribunal is restored. The management shall pay full back wages to the Appellant within four months from the date of receipt of copy of this order, failing which it shall have to pay interest at the rate of 9% per annum from the date of the Appellant's suspension till the date of actual reinstatement."

21. Further, Mr. Nagarajan has contended that the Labour Court has failed to differentiate between the service of a daily wage worker and a permanent workman. He submitted that the Supreme Court in BSNL v. Bhurumal, 2013 (15) SCALE 131, after analysing its earlier judgments including Deepali Gundu Survase (supra) on the issue of reinstatement with full back wages, has clearly distinguished the treatment that should be given to an illegally terminated daily wage worker hand and an illegally terminated permanent /regular workman as under:-

"23. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular / permanent workman are terminated illeaally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious."

22. That apart, it is also submitted that the impugned order does not provide any justifiable relief to the employee, but merely puts a premium on the breach of the law. As regards the offer of alterative employment provided by the company, he has stated that the same was merely a smoke screen in order to circumvent the law and prejudice the Labour Court. He stated that it is a settled legal position that the offer of appointment which is a conditional offer cannot be forced upon the workman so as to deny him his legitimate right to receive

wages. The likely posting at any place other than the place where the employee was bona fide required to work would amount to writing a unilateral contract of service conditions, which cannot be in consonance with the provisions of the ID Act, and therefore such an offer, if not acceptable to the workman, cannot be foisted upon him. Lack of an offer of proper work by the company to the employee is evident from the cryptic invitation provided to him. It is the case of the employee that the same was done to defeat the provisions of law, and to 'victimise' the employee during the pendency of the proceedings.

23. Mr. Nagarajan has also contended that the Labour Court has ignored Order XIV Rule 1 (5) of the Code of Civil Procedure, 1908, which mandates that the courts after a reading of the plaint and written statement should frame the issues on which the decision of a case depends. In the present case, after the belated amendment of the written statement by the company and the rejoinder thereto of the employee, no issues were framed by the Labour Court on the following points

"i. Whether closure of Noida unit where the employee was last employed was bona fide real.

ii. Whether fresh offer of employment given on account of alleged closure of Noida unit at a different factory in Maharashtra during pendency of the proceedings was bona fide under the defined provisions of the ID Act."

The Labour Court has relied upon these issues in the judgment / award, but without framing the same.

24. To buttress his arguments, Mr. Nagarajan has relied upon the judgment of the High Court of Calcutta in *M/s Precious Carrying Corporation v. The Second Labour Court* on October 08, 2013 in WP(C) 6303 (W) of 2012, wherein it was observed as under:-

"The Court, at the time of considering an application for amendment, would confine itself to the satisfaction whether such an amendment is necessary for the purpose of adjudication of the disputes involved in a proceeding. It goes without saying that mere allowing an application for amendment cannot be construed that the facts narrated therein become sacrosanct and does not require to be proved any further as the facts brought by way of an amendment, are required to be proved in a similar and identical manner as those made in the original proceedings."

25. He has also relied upon the judgments of the Supreme Court in the cases of *Sudarshan Rajpoot v. UP State Road Transport Corporation*, Civil Appeal No. 10353/2014; *Tapash Kumar Paul v. BSNL and Anr.*, Civil Appeal No. 4980/2014; *Jasmer Singh v. State of Haryana and Anr.*, Civil Appeal No. 346/2015; *Mackinnon Mackenzie and Company Ltd. v. Mackinnon Employees Union*, Civil Appeal No. 5319/2008; *M/s Hindustan Tin Works Pvt. Ltd. v. The Employees of M/s Hindustan Tin Works Pvt. Ltd. and Ors.*, (1979) 2 SCC 87; *Surendra Kumar*

Verma and Ors. v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi and Anr., (1980) 4 SCC 443; Bhuvnesh Kumar Dwivedi v. Hindalco Industries Pvt. Ltd., AIR 2014 SC 2258; and the judgment of this Court in Asha Verma v. CEAT India Ltd., WP(C) 7802/2008 to contend that the employee is entitled to full back wages and consequential benefits.

ANALYSIS

26. Having heard the learned counsel for the parties and perused the record. The above two writ petitions have been filed challenging the award dated August 3, 2013 of the Labour Court. The challenge insofar as by the company is concerned, the same is to the finding of the Labour Court, that the employee is a "Workman" under Section 2(s) of the ID Act and also on the award compensation of Rs. 5 lakh along with interest @ 9% per annum, in the eventuality, the company failed to pay the amount to the employee after 30 days of the publication of the award till realization.

27. Whereas the challenge to the award by the employee is primarily on the ground that the Labour Court has not given reinstatement with back wages to him and had awarded a compensation of Rs. 5 lakh.

28. At the outset, I intend to refer to the submissions made on behalf of the company through Mr. Mishra, that given the nature of appointment of the employee, he was not a "Workman" within the definition of Section 2(s) of the ID Act. The contentions, primarily are the following:-

(i) The employee was employed in a Managerial capacity and was having supervision over the staff working under him.

(ii) He was engaged in an advisory capacity in relation to Taxation and allied matters and was drawing salary equivalent to that of a Manager.

(iii) He had access to information made available to Manager and Senior Executive.

(iv) He had access to a separate canteen on the first floor, which is exclusively for Managers and Senior Executives, whereas the other workers use the staff canteen in the basement.

29. Even on the aspect of award of compensation to the employee, the submission of Mr. Mishra were the following:

(i) The employee refused to accept the offer of employment at Thane.

(ii) The Labour Court had not invoked the principle of no work no pay.

30. The additional grounds to challenge the award are:

(i) There is no illegality or arbitrariness in the termination of the employee.

(ii) The termination was effected not because of misconduct, but because his

services have become redundant due to the closure of the Noida Unit of the company.

(iii) Under the terms of appointment, the employee was entitled for one month's salary in lieu of notice, which was duly paid to him.

(iv) The employee has already accepted full and final settlement as well as gratuity, and as such he is estopped from challenging his alleged termination.

31. Having noted the broad submissions made by the counsel appearing for the Company, I intend to first deal with the issue whether the employee was a "Workman" within the definition of Section 2(s) of the ID Act. The issues which were framed by the Labour Court have already been reflected above.

32. The plea of Mr. Mishra was that the Labour Court has erred in putting the onus to prove that the employee is a Workman on the company instead on the employee. Though, the submission looks appealing on a first blush, but the fact of the matter is that the objection that the employee is not a Workman was taken by the company. In that sense, the onus shall be on the company to prove the objection taken by it. In support of its stand, the company through Mr. Mishra had stated that the employee was a Senior Executive in Financial and Accounts Department and the salary of Senior Executives was Rs. 22,981/-, 26,506/-, 19,265/- respectively. The employee was in the Executive Cadre, and had supporting clerical staff, whose salary was between Rs. 12,000/- to Rs. 16,000/-.

33. The Labour Court had primarily referred to the cross examination of MW1, A.K. Dhingra, who has deposed as under:

"....there were subordinate staff working under him and he was discharging duties of executive. In their company manager is responsible for his department such as the person of finance dept. will be responsible for all finance and accounts related activities of the company. It is denied that there was no document to show that the workman was discharging the duty of 'Executive'. The claimant was functioning as 'Sr. Executive' in Taxation Department who works under the manager and under his there are subordinate staff and he gets work done from his subordinate. The department head used to do appraisals of Shashank Gupta. Departmental head can be Manager, AGM, DGM, GM. He do not remember who was the HOD of Shashank Gupta. Because time to time there were different people. At the time of alleged termination of the workman Sh. S.C. Rastogi was the HOD. He cannot tell without checking the record as to whether the claimant had sanctioned and leaves or signed any leave application or appraisals letter or promotion letter. Ms. Shobha, Bahukhandi, Rajinder Singh, Balmukund Shukla, S. Gosh, J.P. Sharma were his subordinate staff in accounts department. He has not filed any documents on record which show that the claimant used to give any instructions to the above named persons. Form 16 and TDS returns of all the employees working in the counter were issued from Mumbai office....."

(emphasis supplied)

34. The case of the employee was that he was assisting the General Manager-Taxation, S.K. Sachdev. S.K. Sachdev and one S.C. Rustagi were responsible for taking care of all Taxation and Accounts related matters. They were solely responsible for taking independent decisions and give advises on all taxation, accounting and incidental matters. He was entrusted to do his job inter alia taking details from payroll and account department of the Group Company, feed them in computer as per the fixed format for necessary actions and for finalization of the I.T. Returns and TDS Certificates. His last pay drawn salary was Rs. 2,94,692/- per annum.

35. I have already reproduced the conclusion of the Labour Court on issue No.1, whether the employee is a "Workman" in paragraph 16 above. The same is a finding of fact of the Labour Court that the management has not produced any documentary evidence to show that the claimant was working in the capacity of administrator, managerial or supervisory. The Labour Court has also relied upon the judgment of the Supreme Court in the case of Sharad Kumar v. Government of NCT of Delhi & Ors., 2002 LLR 545, wherein it is held that the nature of duties and not the designation that will determine whether an employee is a "Workman" or not. The Labour Court had also relied upon the judgment of this Court in the case of LKP Merchant Financing Ltd. v. Government of NCT of Delhi & Ors., 2003 LLR 367 (Del HC) wherein it was reiterated that the designation or salary of an employee is not the criteria to determine whether an employee is a Workman or not.

36. The plea that the onus to prove that he is Workman on the employee and not on the management, the Labour Court had rightly relied upon the judgment in the case of Shankerbhai Mathalal Prajapat v. Maize Products, (2003) 96 FLR 829, wherein the following has been stated as under:

"Moreover, the Labour Court has totally shut its eyes to the fact that issue with regard to the maintainability of the reference was agitated by the respondent and it was the respondent's duty by placing adequate and reliable evidence before the Labour Court to establish that the petitioner was not a workman. For that purpose, the respondent was required to place before the Labour Court the nature of duties assigned to the petitioner while he worked as a Junior Shift Chemist in the starch department. Neither oral nor any documentary evidence has been produced. The respondent has neither placed on record the duty manual nor a copy of the advertisement that might have been issued inviting the applications to fill up the post of Junior Chemist. If that be so it can well be said that the respondent has totally failed to discharge its duty and the Labour Court has committed grave error in not deciding the issue in favour of the petitioner. Needless to say that it is the respondent's duty to produce cogent and reliable evidence to substantiate its say. It may be noted that the nature of objection that has been raised by the respondent goes to the very root of this proceedings, and therefore, it is for the respondent to establish the fact that the petitioner is

not a workman within the meaning of Section 2(o) of the I.D. Act.”

(emphasis supplied)

37. Similarly, the Labour Court has also relied upon the judgment in the case of *Burmah Shell Oil Storage & Distribution Co. of India v. Burmah Shell Management Staff Association & Ors.*, (1971 2 SCR 758, wherein it has been held as under:

“.....a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other types of work. Therefore, in determining which of the employees in various categories are covered by the definition of ‘workman’ one has to see what is the main or substantial work which they are employed to do.”

38. The Labour Court has in paragraphs 21 and 22 summed up its reasoning in holding the employee as a Workman, which I reproduce as under:

“21. The determinative factor is main duties of the concerned employee and not some works incidentally done. The managerial or administrative function required a person to control the work of the other and it does not mean that a person who does that work and get assistance for doing that work, can be described as a person who is working in a managerial or administrative capacity. Similarly, a person cannot be said to be working in a supervisory capacity merely because he was to supervise persons who help him in doing the work he himself has to perform. The claimant was looking after the taxation matter of the company. He also used to get clerical work from his subordinates staff. The management alleged that claimant was also required to assist and facilitate other employees in the use and operations of the computer packages as available in the company. Apart from the nature of duties, the designation of the workman is itself at the initial stage al clerk-cum-typist as used to typed letter he was being promoted in accordance with the "rules and regulations of the management but the nature of work as given to the claimant was never been as supervisory. Mr. Shashank Gupta used to take consultation from the consultant of the company, Mr. S.K. Sachdeva as and when required by him pertaining to taxation matters and used to get clerical work from his subordinates staff. He has not granted any power to control or command to any other employee for this good work for the purpose of promotions. The workman was also not the leave sanction authority or any kind of power has been assigned to sanction any amount of fund therefore, it cannot be said that the claimant was not covered under the provisions of section 2 (s) of Industrial dispute Act, 1947.

22. From the material placed on record as well as depositions made by the witnesses it do not find element which shows that the claimant not covered under the definition of 'workman' as defined u/s.2 (s) of I.D. Act. The claimant have denied that he was working in Administrative or management cadre. He was reported to Mr. S.K. Sachdev who was his immediate boss and followed his command at time to time. He do not have power to prepare Form 16 of TDS

return or filled up the Annual Confidential report, sanctioned the leave to any subordinate staff etc. Therefore, in view of the aforesaid discussion the issue no.1 is decided in favour of workman.”

(emphasis supplied)

39. From the above, it is clear that the finding of fact of the Labour Court is that:

(1) The determinative factor is the main duties of the concerned employee and not some incidentally done.

(2) A person cannot be said to be working in a managerial or administrative capacity merely because he was to supervise persons who help him in doing the work he himself has to perform.

(3) The employee was looking after taxation matters of the company, he also used to get clerical work from his supporting staff.

(4) His initial designation was Clerk-cum-Typist as he used to type letters before he was promoted. The nature of work given to the employee was never been supervisory.

(5) He used to take advice from S.K. Sachdev as and when required by him pertaining the taxation matters.

(6) He used to get clerical work done from his subordinate staff.

(7) He was not the leave sanctioning authority or any kind of power assigned to sanction any amount of fund and as such he cannot be said to be covered under the definition of Workman under Section 2(s) of the ID Act.

40. I agree with the aforesaid conclusion of the Labour Court merely because the employee has a designation of Senior Executive would not mean that he was working in a Managerial / Supervisory capacity. The designation would not be only criteria to determine whether a person is a Workman or not. It is the nature of duties which are performed become relevant in that regard.

41. Mr. Mishra had relied upon the judgments in the case of Workmen Nilgiri Co-operative Society Ltd. (supra), Kirloskar Brothers Ltd. (supra), Burmah Shell Oil Storage (supra) and HR Adyanthaya (supra) in support of his contention that the onus to prove that the employee was a Workman was on the employee and not on the management. This proposition has to be seen in the context that it was the objection of the company that the employee is not a Workman. So, in that context, surely the company was required to show to the Court as to why the employee was not a Workman. In that sense, the onus was on the company. It is a well settled law that the person who sets up a plea, in this case of Workman, the burden would be upon him.

42. Having said, I find that the Labour Court has on the basis of evidence including the stand taken by the employee has come to a conclusion that the employee is a Workman. The relevant aspects considered by the Labour Court

have already been reflected by me in the above paragraphs.

43. If that be so, I am of the view that the said finding of fact cannot be disturbed by this Court, more so, in exercise of jurisdiction under Article 226 of the Constitution of India. A Coordinate Bench of this Court in the case of V2 Retail Limited v. Vijay Singh, 2020 SCC OnLine Del 280, while considering an award passed by the Industrial Adjudicator has held that a finding of fact of the Labour Court cannot be interfered with in a proceeding under Article 226 of the Constitution of India. In paragraph 5 the Court has held as under:-

"5. This Court is of the view that no ground for exercising the extra ordinary writ jurisdiction is made out by the petitioner. The pure finding of fact of the Labour Court that the resignation of the respondent was not voluntary, cannot be agitated in writ proceedings. That apart, this Court does not find any infirmity in the well reasoned award of the Labour Court. The compensation awarded by the Labour Court is fair and reasonable and does not warrant any interference."

44. The reliance placed by Mr. Mishra on the judgment of the Supreme Court in the case of Haryana Financial Corporation and Anr. (supra) is concerned, there is no dispute on the proposition of law which has been laid down in the said judgment. The said judgment has no applicability in the facts of this case.

45. Having said that the next issue which arises for consideration is whether the termination of the employee was justified. In this regard, the findings of the Labour Court in paragraph 29 are as under:

"29. The management has contended in the written statement that the termination of the claimant was not due to any misconduct. Admittedly, it is stated that there was no domestic enquiry or any charge sheet was required as termination is granted on the terms & condition of the appointment letter. The management accordingly, maintained the requirement of section 25-F as well as Catiena of judgment laid down by Apex Court. The termination letter was issued by Sr. Manager (HR) Sh. A.K (Dhingra, though the appointment letter was issued by Sh. S.K. Shachdev, HOD of Finance & Account Department which is against the constitution of India.

29. In view of the contention raised by the authorized representative of the parties and material placed on record as well as aforesaid discussion. The discussion previous paragraph of the award be read part & partial of this issue too and same is not repeated here for sake of brevity. It's held that the claimant is covered under the definition of 'workman' and while terminating the services of the workman, necessary notice/charge-sheet, domestic enquiry has to be done by the management. The management also bound to conduct the regular domestic enquiry but same is not done by management which is violation of principle of natural justice. In the facts and circumstances, the management has terminated his service on the basis of recession of the management between re-organization of the several department including taxation, however, there is no ocular, trustworthy evidence with respect to the recession in the management

though the balance-sheet filed by the workman is contrary to the contention raised by the management which shows that the management was in those benefits on the several accounts. The management while terminating the services of the workman have not terminated the service of the Rajbir Singh who is also in the same department of the management which is violation of section 25-G, of the Industrial dispute Act. For the purpose of closure of the Unit, management has to follow the provision of section 25-N & O of I.D. Act which require prior permission from the Government, same has been categorically violated by the management. It is matter of fact that the service of the permanent employee in any government or semi government agency cannot be terminated in an arbitrarily manner by violating the principles of natural justice. The Supreme Court of India in case Uptron India Limited vs. Shammi Bhan & Anr 1998 96) SCC 538 wherein it is held that:-

".....it is now well settled that the services of a permanent employee, whether employed by the government, or got. Company or govt. instrumentality....., cannot be terminated abruptly and arbitrarily, either by giving him a month's or three month's notice or pay in lieu thereof....."

46. From the above, it is noted that the primary grounds for the Labour Court to hold that the termination was not justified are the following:-

(i) The requirement of Sections 25(G), 25N and 25(O) of the ID Act were not followed.

(ii) The principles of natural justice have not been followed.

(iii) The case of the company was that his services was terminated in view of recession in the management leading to re-organization of several departments including the Taxation but no trustworthy evidence with regard to the recession in the management could be proved as the balance sheet filed by the employee was contrary to the contention raised by the company which shows that the company was in profit in several accounts.

47. The Labour Court has also concluded discrimination, inasmuch as it had retained services of one Rajbir Singh, who was also working in the same department and in that sense there is a violation of Section 25(G) of the ID Act and in any case, the Labour Court held that the provisions of Section 25N and O of the ID Act were required to be followed which have not been followed. The aforesaid finding is not a perverse finding and as such, cannot be faulted. In this regard, the judgment of the Coordinate Bench of this Court in the case of V2 Retail Limited (supra) is squarely applicable to this issue as well.

48. Now coming to the third issue whether the Labour Court was justified in granting the compensation to the employee. The plea of Mr. Mishra is that during the pendency of the proceedings before the Labour Court the company had offered to appoint the employee at Thane, which offer was not accepted by the employee and hence, the principle of no work no pay, would be attracted and the

employee could not have been given compensation. Though, the submission looks appealing on a first blush, but on a deeper consideration, it is noted that the offer of employment was not in Noida, the place of work of the employee but at a place in Thane District, i.e., Maharashtra, which is surely different from Noida. The offer was not accepted by the employee, the same is not unjustified as he could not have been appointed at a place different from Noida in view of Section 9A of the ID Act and hence, the principle of no work no pay sought to be invoked by Mr. Mishra is not applicable. The judgments as noted in paragraph 8 above are not applicable to the facts of this case and are clearly distinguishable. That apart, if the termination is bad, the consequence shall be grant of monetary benefits.

49. Now, the issue which arises for consideration as urged by Mr. Atul Nagarajan is whether the employee was required to be reinstated in service instead of granting compensation of Rs. 5 lakh. The law in this regard is well settled by the Supreme Court in its latest judgment wherein it has held that in every case of termination even if illegal, it is not necessary that reinstatement with back wages must follow automatically. The Supreme Court / this Court has clearly held that the compensation in lieu of reinstatement with back wages is an appropriate relief that can be granted in a case where there is an illegal termination. In this regard, I may refer to the judgment in the case of Ranbir Singh v. Executive Eng. P.W.D., 2021 SCC OnLine SC 670, wherein the Supreme Court in paragraphs 5 & 6 has held as under:

"5. However, we notice that there is another line of decisions, and the latest of the same, which is brought to our notice by Shri Samar Vijay Singh, learned AAG, is Raj Kumar (supra). We may refer only to paragraphs-9 and 10:

"9. In our opinion, the case at hand is covered by the two decisions of this Court rendered in BSNL v. Bhurumal [BSNL v. Bhurumal, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] and Distt. Development Officer v. Satish Kantilal Amrelia [Distt. Development Officer v. Satish Kantilal Amrelia, (2018) 12 SCC 298 : (2018) 2 SCC (L&S) 276].

10. It is apposite to reproduce what this Court has held in BSNL [BSNL v. Bhurumal, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] : (SCC p. 189, paras 33-35)

"33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimisation, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not

automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see *State of Karnataka v. Umadevi* (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily-wage worker is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularised under some policy but the workman concerned terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied.””

6. In the light of the state of the law, which we take note of, we notice certain facts which are not in dispute. This is a case where it is found that, though the appellant had worked for 240 days, appellant's service was terminated, violating the mandatory provisions of Section 25F of the Act. The authority involved in this case, apparently, is a public authority. At the same time, it is common case that the appellant was a daily wager and the appellant was not a permanent employee. It is relevant to note that, in the award answering Issue No. 1, which was, whether the termination of the appellant's service was justified and in order, and if not, what was the amount of back wages he was entitled to, it was found, inter alia, that the appellant could not adduce convincing evidence to establish retention of junior workers. There is no finding of unfair trade practice, as such. In such circumstances, we think that the principle, which is enunciated by this Court, in the decision, which is referred to in *Raj Kumar* (supra), which we have

referred to, would be more appropriate to follow. In other words, we find that reinstatement cannot be automatic, and the transgression of Section 25F being established, suitable compensation would be the appropriate remedy.”

(emphasis supplied)

50. Having said that, it is not a case of the employee that the amount of Rs. 5 lakh which otherwise has been granted to him is on the lower side.

51. Even otherwise, it is the case of the employee that his total annual emoluments were Rs. 2,94,692/- on the date when he was terminated. He has worked between the years 1992 to 2008. In other words, he has put in 16 years of service with the Company. If it is his plea that Section 25F of the ID Act has been violated, the same contemplates a notice period of one month or pay in lieu thereof and he shall be paid 15 days of average salary for each completed year.

52. Noting the above condition in Section 25F of the ID Act, it is not disputed that the employee was given the notice of one month before effecting his retrenchment / termination. It is the case of the company that he has been paid all the benefits in full and final settlement including Gratuity. It is not the case that compensation as contemplated under Section 25(F) has been paid.

53. If that be so, the payment of 15 days of average salary for the 16 years of service put in by him, shall work out to approximately Rs. 1,96,461/-. In other words, on the date of retrenchment, the Company should have paid the employee an amount of Rs. 1,96,461/-, as a condition precedent under Section 25F of the ID Act. In the present case, not only Rs. 1,96,461/-, the employee has been directed to be paid compensation of Rs. 5 lakh, that too with interest to be payable after the award becomes implementable. In that sense, the compensation which has been granted to the employee is just and proper. I am of the view that even the Award cannot be interfered with on this ground. Insofar as the judgments referred by Mr. Atul Nagarajan in support of his submission that the petitioner is entitled to the reinstatement with full back wages and consequential benefits are concerned, they have no applicability in view of the latest position of law of the Supreme Court in the case of Ranbir Singh (supra).

54. In view of my above conclusion, both the writ petitions are dismissed.

CM APPL. 43718/2021 in W.P.(C) 279/2014

CM APPL. 43489/2021 in W.P.(C) 2410/2015

Dismissed as infructuous.