

(2019) 08 DEL CK 0145

In the Delhi High Court

Case No : Civil Writ Petition No. 6700 Of 2016, Civil Miscellaneous Application
No. 27429 Of 2016

New Delhi Municipal Council

APPELLANT

Vs

Subh Narayan Sah & Anr

RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(ra), 17B, 25B, 25B(2)(a)(ii), 25B(1), 25F, 25G, 25H

Citation : (2019) 08 DEL CK 0145

Hon'ble Judges : C. Hari Shankar , J

Bench : Single Bench

Advocate : Malvika Trivedi, Rajiv Agarwal, Megha De., Shilpa Gupta

Final Decision : Partly Allowed

Judgement

C. Hari Shankar, J

1. This writ petition is directed against award, dated 30th September, 2015, passed by the learned Labour Court, whereby Respondent No.1 (hereinafter referred to as "the respondent", for the sake of convenience) was directed to be reinstated with continuity of service and full back wages.

2. The reference, dated 8th January, 1993, by the appropriate Government, where from these proceedings emanated, contained the following single term of reference:

"Whether the services of Sh. Subh Narain Sahu 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. According to the Statement of Claim filed by the respondent, he joined the services of the petitioner, on 15th July, 1990, as a beldar and was treated, throughout, as a daily wager/casual/muster roll worker, on wages, as prescribed from time to time under the Minimum Wages Act, 1948. His counterparts, who

were doing identical work, it was contended, were treated as regular employees with regular pay scales and other benefits. He alleged that his services had been terminated with effect from 15th June, 1991, without assigning any reasons and without issuing any memo or charge sheet to him and without holding any inquiry. As such, he assailed his termination as being violative of Sections 25F, 25G and 25H of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act"). He claims to be unemployed since 15th June, 1991. After serving a demand notice to the petitioner, which did not meet with any fruitful response, the respondent first approached the Conciliation Officer and, on finding the conciliation proceedings abortive, initiated an industrial dispute.

4. The petitioner, in its written statement before the Labour Court, contended thus:

(i) The petitioner was not an "industry".

(ii) The relationship of employer and employee, between the petitioner and the respondent, was not disputed; however, the petitioner asserted that the respondent was employed with it only for the period from 16th July, 1990 to 14th June, 1991, "with usual breaks". It was asserted that he was employed only for casual work and paid wages as per the rates prescribed by the Delhi Administration from time to time.

5. In these circumstances, the petitioner contended that the removal, of the respondent, from its services, with effect from 15th June, 1991, was not illegal, as the work for which he had been engaged on casual basis, was completed.

6. The Labour Court framed the following issues, for its consideration:

"(i) Whether the establishment of the management is an industry as defined under the ID Act?

(ii) Whether the services of the workman Sh. Subh Narain Sahu has been terminated illegally and/or unjustifiably?

(iii) To what relief, is the workman entitled in terms of reference?"

7. The respondent filed his affidavit-in-evidence and relied upon nine documents, exhibited as Ex. WW-1/1 to Ex. WW-1/9. The petitioner did not avail of the opportunity to cross-examine the respondent and, consequently, the right to cross-examine the respondent was closed on 20th March, 1996. This order was never challenged by the petitioner.

8. It was deposed, by the respondent, in his affidavit-in-evidence, that (i) he had joined the employment of the petitioner on 15th July, 1990, as beldar, (ii) he was being treated as a daily rated/casual muster roll worker and was being paid wages as fixed and revised from time to time under the Minimum Wages Act, 1948, (iii) he had an unblemished and uninterrupted record of service to his credit, (iv) his services had been terminated w.e.f. 15th June, 1991, without assigning any valid reason, (v) the job against which he was working was of

permanent and regular nature, (vi) no memo or charge sheet was served, on him, prior thereto, nor was any domestic inquiry conducted against him for any alleged misconduct, (vii) no notice was given, no notice pay was offered and no compensation was paid to him prior to his termination, (viii) he had remained unemployed since 15th June, 1991.

9. Four opportunities were granted, to the petitioner, to lead its evidence, on 24th April, 1996, 3rd July, 1996, 21st August, 1996 and 16th October, 1996. However, no evidence was led on its behalf. On 16th October, 1996, the petitioner was proceeded ex parte. The application, of the petitioner, to set aside the said order was dismissed, by the learned Labour Court vide order dated 19th March, 1997, which was challenged, by the petitioner, before this Court, by way of W.P. (C) 3676/1997.

10. In the said W.P. (C) 3676/1997, a submission was made, on 9th July, 2003, by both learned counsel ad idem, that the order, dated 19th March, 1997, rejecting the application of the petitioner for setting aside the ex parte proceedings, could not be sustained. As such, the said order was set aside.

11. In the meantime, however, an ex parte award was passed, against the petitioner, on 4th September, 1997. With the leave of the Court, W.P. (C) 3676/1997 was amended to challenge the said award.

12. Vide order dated 21st September, 2004, this Court observed that the award, dated 4th September, 1997, was founded on the order, dated 19th March, 1997 supra, whereby the petitioner's application for setting aside the ex parte proceedings, dated 16th October, 1996, had been dismissed by the Labour Court. In view of the setting aside of the said order, dated 19th March, 1997, by this Court on 9th July, 2003, this Court observed, in its order dated 21st September, 2004 in the aforementioned W.P. (C) 3676/1997, that there was no option but to set aside the award dated 4th September, 1997, and allow the petitioner to lead evidence in support of its case. While doing so, this Court made it a point to observe that the petitioner had been negligent in conducting the case and had not filed its affidavit by way of evidence despite having been granted four opportunities. The following passage, from the said order, dated 21st September, 2004, merits reproduction, in this regard:

"From the paper book, it appears that the Petitioner has been negligent in conducting the case and did not file its affidavit by way of evidence despite four opportunities having been granted. A last opportunity is now granted to the Petitioner to file its affidavit by way of evidence within four weeks from today, subject to the Petitioner paying costs of Rs.10,000/- to the Respondent-Workman."

This Court, therefore, granted a last opportunity to the petitioner to file its affidavit by way of evidence, within four weeks, subject to costs of Rs. 10,000/-, payable to the respondent. Both parties were directed to appear, before the Labour Court, on 4th October, 2004.

13. On 20th November, 2004, the petitioner filed the affidavits of its witnesses namely H.S. Jutla and R.P.S. Panwar.

14. Both management witnesses deposed, in their affidavits-in-evidence (which were identical, word for word, to the extent of typing errors), that the respondent was engaged by the petitioner on temporary muster roll basis as Beldar, on daily wages, for work which was temporary in nature. They, however, specifically stated that the respondent had worked for 84 days during the period 16th July to 13th October, 1990, 3 days during the period 24th October 1990 to 41st October, 1990 (the date is obviously wrong, even though the copy is certified), 54 days from 1st December, 1990 to 13th January, 1991 and 94 days from 15th March, 1991 to 14th June, 1991, working out to a total of 235 days. They, therefore, asserted that the respondent had not completed 240 days of continuous employment with the petitioner in the relevant preceding year, nor did he work 180 days at a stretch. It was further stated, in the said affidavits, that the respondent was engaged on temporary work such as the removal of malba, and that such workers were engaged intermittently as per seasonal exigencies and requirements.

15. On 5th February, 2015, the petitioner was directed to produce both its witnesses, positively, on 3rd March, 2015, for examination. The witnesses did not appear on the said date, and the opportunity, to the petitioner, to produce its witnesses and lead its evidence was closed.

16. The impugned Award notes the fact that, as a result, the evidence led by the workman went un-rebutted and the petitioner failed to support the averments contained in its written statement by leading its own evidence.

17. The impugned Award holds thus:

(i) On the issue of whether the petitioner was an "industry", reliance was placed on Bangalore Water Supply and Sewerage Board v. A. Rajappa, AIR 1978 SC 969. Observing that the petitioner was meeting the demands of the public by providing electricity, water and other facilities, and was employing persons for this purpose, and that no evidence had been led, by the petitioner, to the contrary, the learned Labour Court decided this issue against the petitioner and in favour of the respondent. Ms. Malvika Trivedi, arguing for the petitioner, fairly did not press this submission during arguments; accordingly, the necessity to return any findings thereon, by this court, stands obviated.

(ii) On the issue of legality of the respondent's termination, too, the learned Labour Court observes that, despite grant of an opportunity, by this Court, to the petitioner, to lead its evidence, the petitioner had, by its own inaction, allowed the said opportunity to go abegging. The testimony of the respondent had remained un-rebutted, as he was not cross-examined by the petitioner. The employment of the respondent, and his termination, by the petitioner, was admitted by it. The only defence, of the petitioner, was that the respondent had been employed for casual work, which had come to an end. The particulars of the

said "casual work" were not, however, forthcoming. Neither were the periods of "alleged breaks", which, according to the petitioner, were given to the respondent, mentioned. The testimony of the respondent, to the effect that he remained in continuous employment from 16th July, 1990 to 14th June, 1991, remained unchallenged. There was no reason to disbelieve the same. This issue, too, was therefore decided in favour of the respondent and against the petitioner.

In the circumstances, the learned Labour Court directed reinstatement of the respondent with continuity of service and full back wages.

18. The case of the petitioner, in this writ petition, is that the respondent was engaged only for seasonal work, as beldar, and that he had been terminated on the season coming to an end. It is alleged that the respondent had admitted this fact. A perusal of the affidavit-in-evidence of the respondent discloses, however, that this contention is incorrect. The affidavit of the respondent merely states that he was "being treated as a daily rated/casual/muster roll worker". He has specifically averred, in his affidavit, that the job against which he was working was of a permanent and regular nature. He has also averred that he had completed 240 days of continuous employment.

Rival submissions at the Bar

19. Ms. Malvika Trivedi, arguing on behalf of the petitioner, candidly conceded that the petitioner was remiss in prosecuting its case before the Labour Court, and that, therefore, it could not really be said that the Labour Court had gone astray in proceeding as it did. She, however, asserts that the extant legal position is that, even if the management failed to lead evidence to the contrary, the onus, to establish the factum of having worked for 240 days in a calendar year, remained on the workman, and that the said onus could not be discharged merely by filing affidavits, but had to be supported by positive evidence. She would, therefore, seek to contend that the Labour Court erred in treating the default, on the part of her client, in producing its witnesses, to prove the affidavits-in-evidence tendered by them, as concluding the case against it, and in favour of the respondent-workman. She presses, into service, in this regard, the following authorities:

- (i) C.N. Ramappa Gowda v. C.C. Chandregowda, (2012) 5 SCC 265,
- (ii) Manager, Reserve Bank of India, Bangalore v. S. Mani, (2005) 5 SCC 100,
- (iii) Range Forest Officer v. S. T. Hadimani, (2002) 3 SCC 25,
- (iv) Pankaj Dixit v. K. B. S. H. Export House, 2018 SCC OnLine Del 6880
- (v) DTC. v. Mohar Singh, 2018 SCC OnLine Del 11874,
- (vi) Bhavnagar Municipal Corporation v. Jadeja Govubha Chhanubha, (2014) 16 SCC 130.
- (vii) District Development Officer v. Satish Kantilal Amrelia, (2018) 12 SCC 298,

(viii) Jagbir Singh v. Haryana State Agriculture Marketing Board, (2009) 15 SCC 327,

(ix) Vice-Chancellor, Lucknow University v. Akhilesh Kumar Khare, (2016) 1 SCC 521, and

(x) Radha v. Food and Civil Supplies Department, 2018 SCC OnLine Del 10400.

20. By way of demurrer, Ms. Trivedi argued that the Labour Court ought not to have directed reinstatement with full back wages, and contended that the prevalent legal position was in favour of awarding compensation, even where retrenchment was found to be unjustified. She relied, for the said purpose, on the following authorities:

(i) Bharat Sanchar Nigam Limited v. Man Singh, (2012) 1 SCC 558,

(ii) Senior Superintendent Telegraph (Traffic), Bhopal v. Santosh Kumar Seal, (2010) 6 SCC 773,

(iii) Delhi Development Authority v. Presiding Officer, Labour Court No.1, 174 (2010) DLT 387

21. Ms. Trivedi also relied on Himanshu Kumar Vidyarthi v. State of Bihar, (1997) 4 SCC 391, to combat the findings, of the Labour Court, that her client was an "industry", amenable to the provisions of the ID Act.

22. Ms. Trivedi concluded her submissions by highlighting, once again, that the Labour Court had concentrated on the default of the petitioner, instead of addressing itself to the onus cast, by the law, on the respondent-workman, and whether the said onus stood discharged or not. She pointed out that the workman had, in his statement of claim as well as in his affidavit-in-evidence, admitted to being a daily wager.

23. Adverting to the affidavit-in-evidence of the management witnesses, Ms. Trivedi submits that the crucial "gap" between 235 days (as admitted by them) and 240 days (as contended by the respondent) made all the difference, and that the Labour Court erred in failing to take notice thereof. In any event, she submits that the evidence of the said witnesses having been disallowed by the Labour Court, it would not be permissible, for the respondent, to capitalise on the "admission", as contained in the said affidavits, of his having worked for 235 days.

24. Arguing in reply, Mr. Rajiv Agarwal sought to submit as under:

(i) It stood admitted, by the petitioner, that the respondent had worked for a period of 235 days.

(ii) In fact, in working out the period of 84 days in 1990, the management witnesses had erred as the petitioner had worked from 15th July, 1990 to 14th October, 1990, uninterrupted without leave, which worked out to 89 days. It was a well settled position that weekends were includible while computing the

number of days for which the workman had worked.

(iii) Similarly, the "usual breaks", interspersing the periods for which the workman had been engaged by the management, were also includible, while computing the total number of days for which the workman had worked.

(iv) The respondent had also specifically averred that his juniors had been retained and regularised, while he had been retrenched. Attention is invited, in this context, to the averment, in sub-para (viii) of para 3 of the Statement of Claim filed by the respondent, which recited that the respondent had been "picked and chosen for termination of services by the management out of his juniors and senior colleague who are still working in the employment". He pointed out that the said averment had been responded to, by the petitioner, in its written statement, only by denying it "for want of knowledge". As such, the dispute was not limited to Section 25F, but also encompassed section 25G of the ID Act.

(v) No issue, regarding the respondent having worked, for the petitioner, for 240 days in a calendar year, had been framed by the Labour Court.

(vi) On the aspect of grant of full back wages, Mr. Agrawal placed reliance on the following decisions:

(a) Surendra Kumar Verma v. Central Government Industrial Tribunal-Cum-Labour, New Delhi (1980) 4 SCC 443,

(b) Judgment, dated 25th August, 2011, of a learned Single Judge of this Court in W.P. (C) 6024/1999 (Management of M.C.D. v. Presiding Officer, Industrial Tribunal),

(c) D.T.C. v. Ram Kumar, (1982) II LLJ 191 Del,

(d) Tapash Kumar Paul v. Bharat Sanchar Nigam Limited, AIR 2015 SC 357, and

(e) Raj Kumar Dixit v. Vijay Kumar Gauri Shanker, (2015) 9 SCC 345.

Analysis

25. There is no dispute about the fact that, after having filed the affidavits of its witnesses namely H. S. Jutla and R. P. S. Panwar, the petitioner defaulted in producing them, in the witness box, for proving their affidavits and having them tendered in evidence. (Whether the opportunity, provided by the Labour Court, to the petitioner, to do so, were sufficient, or not, is an aspect which I shall address later in the course of this judgment.) The Labour Court proceeded, consequent to the said default, on the premise that the decision, to close the right, of the petitioner, to cross-examine the respondent, who deposed as WW-1, having gone unchallenged, and the petitioner having failed to produce, in the witness box, its witnesses, to prove their affidavits-in-evidence, the deposition of the respondent, in his affidavit-in-evidence, read with his examination during trial, had necessarily to be accepted, resulting in his entitlement to an award in

his favour.

26. Ms. Trivedi has seriously questioned the propriety of such an approach. According to her, even if her client had defaulted in leading its evidence, the onus to establish his having worked for 240 days in a calendar year, was squarely on the respondent, and the said onus could not have been discharged merely by filing a self-serving affidavit. She, therefore, sought to fault the Labour Court in abdicating its responsibility to examine whether substantive evidence, apart from his own affidavit had, in fact, been led, by the respondent-workman, to establish the factum of his having worked, for the petitioner, for 240 days in the preceding calendar year. She relied, for the said purpose, on a number of judicial pronouncements, to which reference has already been made hereinabove, and to which I shall allude, presently.

27. Ms. Trivedi has submitted, emphatically, that the learned Labour Court concentrated only on the default, as it perceived, on the part of the appellant, in leading evidence to prove its stand, in the process completely ignoring the burden of proof that primarily lay on the respondent-workman, to establish his Statement of Claim. This, she submits, was especially significant, as the workman had admitted that he was a daily wager.

28. Opposing the writ petition, Mr. Agarwal, appearing for the respondent-workman has, at the outset, pointed out that, in view of the admission, on the part of the petitioner, that the respondent-workman had worked, for the petitioner, in 1990-1991, for 235 days, with "usual breaks", no further proof, of the respondent-workman having worked for 240 days, in the said calendar year, with the petitioner, was required, as "usual breaks" were includable, while estimating the number of days, for which the workman had rendered service. He invites my attention, in this context, to Section 25B of the ID Act, specifically to clause (1) thereof [referred to, hereinafter, for the sake of convenience, as "Section 25B(1)"], which reads thus:

"25B. Definition of continuous service. - For the purposes of this Chapter, -

(1) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;"

Periods, during which the respondent-workman was unable to work owing to no fault of his were, therefore, Mr. Agarwal would seek to contend, includible while assessing the period for which the workman had been in "continuous service". Viewed thus, he submits, the periods of "usual breaks", during the year 1991, would also be includible in working out the period of continuous service of his client and, as the said "usual breaks" would, in any case, be more than 5 days, the assertions, of the management-witnesses, in their affidavits- in-evidence, pertaining to the period, in the 1990-1991 year, during which the respondent-

workman had worked for the petitioner, support the petitioner stand that he had worked continuously, for over 240 days in the preceding calendar year, entitling him, thereby, to regularisation.

29. Mr. Agarwal also relies on Section 25G of the ID Act, which stipulates that, in the event of retrenchment, ordinarily, the principle of "last come - first go" has to be followed. He points out that, while retrenching his client, the petitioner had regularised his juniors, which Section 25G did not permit. Section 25G of the ID Act reads thus:

"25G. Procedure for retrenchment. - Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

The specific averment, of his client, in his Statement of Claim, filed before the learned Labour Court, pertaining to the infraction of this provision, Mr. Agarwal would seek to point out, had merely been "denied for want of knowledge", in the written statement, filed by the petitioner by way of response thereto. This, he submits, amounts to rebuttal at all, thereby resulting in the averment, in his clients Statement of Claim, as remaining un-rebutted.

30. Mr. Agarwal also points out that no issue, regarding the respondent-workman having worked, for a period of 240 days in a calendar year, had been framed by the learned Labour Court. It was not open, therefore, according to him, to the petitioner, to seek to raise a controversy on this aspect.

31. On the issue of entitlement, of the respondent-workman, to full back wages, Mr. Agarwal relies on the following decisions:

(i) Surendra Kumar Verma v. Central Government Industrial Tribunal-Cum-Labour, New Delhi, (1980) 4 SCC 443,

(ii) M.C.D. v. Presiding Officer, Industrial Tribunal [judgment dated 25th August, 2011 in W.P. (C) 6024/1999],

(iii) D.T.C. v. Ram Kumar, (1982) II LLJ 191 Del,

(iv) Tapash Kumar Paul v. Bharat Sanchar Nigam Limited, AIR 2015 SC 357, and

(v) Raj Kumar Dixit v. Vijay Kumar Gauri Shanker, (2015) 9 SCC 345.

32. Ergo, submits Mr. Agarwal, no occasion exists, for this Court to interfere with the impugned award.

Analysis and Findings

33. Ms. Trivedi has advanced, essentially, only two submissions, viz. (i) that the

respondent had failed to discharge the burden, which lay on him, to prove that he had worked for 240 days in a calendar year, as would entitle him to regularisation under the ID Act, and (ii) that, even if the grievance of the respondent was found to be substantiated on merits, nevertheless, the appropriate direction would be to grant him lump-sum compensation, rather than reinstate him in service.

34. A comparative analysis of the Statement of Claim, filed by the respondent-workman, and the written statement, filed by the petitioner, before the learned Labour Court, reveals the following:

(i) It is an admitted position that the respondent-workman joined the services of the petitioner on 15th July, 1990. The averment, to this effect, in para 1 of the Statement of Claim, is admitted to be a matter of record, in the corresponding para of the "Reply on Merits", in the written statement. Besides, para 2 of the said "Reply on Merits" avers that the respondent-workman "was employed w.e.f. 16/7/90 to 14/6/91 with usual breaks".

(ii) The Statement of Claim, in para 3(i), that the job, being performed by the respondent-workman was "of a permanent and regular nature". This assertion is boldly denied, in the corresponding para 2 of the written statement.

(iii) Needless to say, therefore, the averment, in para 3(ii) of the Statement of Claim, to the effect that, by treating the respondent-workman as a daily rated/casual/muster roll worker, and paying him lesser remuneration than those regularly employed for identical work, amounted to an "unfair labour practice", within the meaning of clause (ra) of Section 2 of the ID Act read with Item No. 10 of the 5th Schedule thereto, has also been denied, in the corresponding para of the written statement.

(iv) In sub-para (v) of para 3 of the Statement of Claim, it is specifically asserted that the respondent-workman was "deemed to have acquired the status of a permanent employee after completing 240 days of continuous employment and he cannot be thrown out of job in the manner it has been done". The corresponding sub-para of para 4 in the written statement "(denies) that the workman completed 240 days of continuous employment" with the petitioner.

(v) The affidavits-in-evidence, tendered by the two witnesses who appeared on behalf of the petitioner, unfortunately, disclose total and abject want of care, in the manner in which they have drafted and filed before the Labour Court. MW-1 H. S. Jutla process, in para 3 of his affidavit averment-evidence, thus:

"That the workman was engaged during the period from 16.07.1990 till 14.06.1991 with the petitioner with breaks in service. The detailed breakup of the period he

With Shri H. S. Jutla 16.7.1990 to 13.10.1990 =
84 days

With Sh. Ashok Mehta 24.10.1990 to 41.10.1990=

3 days

With Sh. Ashok Mehta 1.12.1990 to 13.1.1990 =

54 days

With Sh. R.P.S.Panwar 15.3.1991 to 14.6.1991 =

94 days

Tota

235 days"

(vi) The affidavit-in-evidence tendered by MW-2 R.P.S. Panwar, is equally unhelpful, deposing, as it does, thus (in para 3):

"That the workman was engaged during the period from 16.07.1990 till 14.06.1991 with the petitioner with breaks in service. The detailed breakup of the period he worked with NDMC is given below.

With Shri H. S. Jutla 16.7.1990 to 13.10.1990 =

84 days

With Sh. Ashok Mehta 24.10.1990 to 41.10.1990=

3 days

With Sh. Ashok Mehta 1.12.1990 to 13.1.1990 =

54 days

With Sh. R.P.S.Panwar 15.3.1991 to 14.6.1991 =

94 days

Tota

235 days"

It is, therefore, uncomfortably apparent that the two witnesses, who were cited, on behalf of the petitioner-Management, have filed affidavits-in-evidence without, apparently, even reading the contents thereof once over. That responsible officials of the petitioner could tender such affidavits, before a Court of law, betokens a sorry state of affairs in the establishment of the petitioner. It is impossible, from the said affidavits, to work out the actual number of days, during which the petitioner worked, for the one-year period prior to the date of his termination. There is, however, substance in the contention of Mr. Agarwal that, in view of the said affidavits, the petitioner cannot be allowed to contend that the respondent had served the petitioner, during the year immediately preceding the date of his disengagement, for any period short of 235 days.

35. The muster rolls, during the aforesaid period, pertaining to the respondent, also constitute part of the record of the Labour Court.

Reference would be made, to the said muster rolls, in greater detail, hereinafter.

The question of burden of proof, and the discharge thereof

36. Adverting, now, to the point of law which arises for determination in this case, and having examined the judgments, on which Ms. Trivedi has placed reliance, I am of the opinion that, in view of the decision, of the Supreme Court, in Range Forest Officer (supra) which has been followed, subsequently, by the Supreme Court in Rajasthan State Ganganagar S. Mills Ltd v. State of Rajasthan, (2004) 8 SCC 161 and Manager, Reserve Bank of India, Bangalore (supra), the burden of proof, to establish the factum of continuous service for 240 days, in the year immediately preceding the date of termination, is unquestionably on the workman.

37. Range Forest Officer (supra), was a short order, in which the following pronouncement of the law is to be found, in para 3:

".....In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

(Emphasis supplied)

38. In Rajasthan State Ganganagar S. Mills Ltd (supra), too, the workman sought to press, into service, the affidavit, tendered by him in evidence before the Labour Court, as sufficient to establish his claim of having worked for over 240 days in the year immediately preceding his termination by the management. The Supreme Court rejected this prayer, in para 6 of its judgment, in the following words:

"It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in

Range Forest Officer v. S.T. Hadimani, (2002) 3 SCC 25. No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed."

(Emphasis supplied)

39. In this case, therefore, the Supreme Court went a step further, by holding that default, on the part of the management, in production of the muster roll, for any particular period, could not result in a finding adverse to the management and in favour of the workman, insofar as the factum of the workman having worked, for the management, for 240 days in the year immediately preceding his termination, was concerned.

40. The aforesaid two decisions of the Supreme Court, in Range Forest Officer (supra) and Rajasthan State Ganganagar S. Mills Ltd (supra) were followed, by the Supreme Court, in Bhavnagar Municipal Corporation (supra). Para 7 of the said decision reads as under:

"It is fairly well-settled that for an order of termination of the services of a workman to be held illegal on account of non-payment of retrenchment compensation, it is essential for the workman to establish that he was in continuous service of the employer within the meaning of Section 25-B of the Industrial Disputes Act, 1947. For the respondent to succeed in that attempt he was required to show that he was in service for 240 days in terms of Section 25-B(2)(a)(ii). The burden to prove that he was in actual and continuous service of the employer for the said period lay squarely on the workman. The decisions of this Court in Range Forest Officer v. S.T. Hadimani, (2002) 3 SCC 25, Municipal Corpn., Faridabad v. Siri Niwas, (2004) 8 SCC 195, M.P. Electricity Board v. Hariram, (2004) 8 SCC 246, Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan, (2004) 8 SCC 161, Surendranagar District Panchayat v. Jethabhai Pitamberbhai, (2005) 8 SCC 450 and R.M. Yellatti v. Executive Engineer, (2006) 1 SCC 106 unequivocally recognise the principle that the burden to prove that the workman had worked for 240 days is entirely upon him. So also the question whether an adverse inference could be drawn against the employer in case he did not produce the best evidence available with it, has been the subject-matter of pronouncements of this Court in Municipal Corpn., Faridabad v. Siri Niwas, (2004) 8 SCC 195 and M.P. Electricity Board v. Hariram, (2004) 8 SCC 246, reiterated in RBI v. S. Mani, (2005) 5 SCC 100. This Court has held that only because some documents have not been produced by the management, an adverse inference cannot be drawn against it."

(Emphasis supplied)

41. The above mentioned judgments, therefore, make it abundantly clear that, in law, the burden, to prove that he had, in fact, worked for the employer for 240 days in the year immediately preceding the date of his termination, lies on the

workman, and, at least ordinarily, cannot be discharged merely by filing affidavits. Equally, it would not be permissible to draw an adverse inference, against the management/establishment, merely because certain documents have not been filed by it. To this extent, therefore, the submissions of Ms. Trivedi merit acceptance.

42. One may mention, here, that, in *Director, Fisheries Terminal Department v. Bhikubhai Meghajibhai Chavda*, (2010) 1 SCC 47, one finds that the Supreme Court has entered a cautionary caveat, to the principles enunciated in the aforesaid decisions, keeping in mind the difficulty which daily wage earners would face, in producing collateral evidence regarding the number of days during which they worked for the employer. Even while recognising that the position, in law, was well settled, that the burden of proof was on the workman to show that he had worked for 240 days in the last twelve months preceding his alleged retrenchment, the Supreme Court, nevertheless, opined that, once the workman had come forward and deposed to the said effect, the burden of proof is shifted to the employer to prove that the workman had not, in fact, completed 240 days in the requisite period, to constitute continuous service. Paragraphs 15 to 17 of the said decision may be reproduced, in this context, thus:

"15. The respondent claims that he was employed in the year 1985 as a watchman and his services were retrenched in the year 1991 and during the period between 1985 to 1991, he had worked for a period of more than 240 days. The burden of proof is on the respondent to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. The law on this issue appears to be now well settled.

16. This Court in *R.M. Yellatti v. Asstt. Executive Engineer*, (2006) 1 SCC 106 has observed: (SCC p. 116, para 17)

"17. ... However, applying general principles and on reading the [aforesaid] judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."

17. Applying the principles laid down in the above case by this Court, the evidence produced by the appellant has not been consistent. The appellant claims that the respondent did not work for 240 days. The respondent was a workman hired on a daily-wage basis. So it is obvious, as this Court pointed out

in the above case that he would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the appellant employer to prove that he did not complete 240 days of service in the requisite period to constitute continuous service."

(Emphasis supplied)

43. Though, plainly read, Director, Fisheries Terminal Department (supra) relaxes, somewhat, the rigour of Range Forest Officer (supra), and Rajasthan State Ganganagar S. Mills Ltd (supra), it may be noted, in this context, that the judgment in Manager, Reserve Bank of India, Bangalore (supra), on which Rajasthan State Ganganagar S. Mills Ltd (supra), was rendered by a bench of three Hon"ble judges, whereas all other decisions are of benches of two Hon"ble judges each.

44. Be that as it may, the golden thread that runs through all these decisions is that the burden, to establish the factum of his having served the employer for 240 days in the year preceding his retrenchment/termination, is unequivocally on the workman, and is required to be discharged by cogent evidence. This Court is spared the necessity of navigating through these decisions, in the present case, for the simple reason that collateral evidence has, in fact, been placed, on record, by the petitioner. As noted hereinabove, affidavits-in-evidence have been filed by both the witnesses appearing for the petitioner, namely H.S. Jutla and R.P.S. Panwar. Para 4 in each of these affidavits, which is the para dealing with the number of days, during which the respondent is stated to have served the petitioner, during the year immediately preceding his superannuation, i.e. the period between 16th July, 1990, and 14th June, 1991, as already noted hereinabove, is incapable of interpretation, as worded. Even so, both the said affidavits admit that, during the year immediately preceding the termination, of the respondent from service, by the petitioner, he had served the petitioner for 235 days.

45. It may be noted that, on the record of the learned Labour Court, a statement, signed by the Assistant Engineer (Civil) in the office of the petitioner on 8th November, 2004, and exhibited as Ex. MW-1/13, is also available, which reflect the number of days, during which the respondent served the petitioner, over the period of one year immediately preceding his disengagement from service, as 233, as opposed to 235, which is the figure reflected in para 4 of the affidavits-in-evidence filed by the witnesses appearing on behalf of the petitioner before the Labour Court.

46. Inconsistency, therefore, is apparently rife in the stand, adopted by the petitioner, with respect to the number of days, with the respondent served, in his office, during the period 16th July, 1990 to 14 th June, 1991.

47. The muster roll of the respondent, during the said period 16th July, 1990 and 14th June, 1991 was also exhibited before the learned Labour Court. It is seen,

on perusing the said muster roll, that three annotations have been employed, by the petitioner, to denote the fact of whether, on any particular day, the respondent was present, or not. These are "A", "P" and "R", with "A" denoting "absent", "P" denoting "present" and "R" denoting "rest". The manner in which the number of days have been worked out, by the two witnesses, deposing on behalf of the petitioner, in their respective affidavits-in-evidence (in para 4 of each of the said affidavits), indicates that the days of "rest" have also been included in the number of days for which the respondent worked. From the muster rolls available, if one were to total the number of days, which respondent has been marked "P" or "R", the number of days works out to 233. It is also seen that, in the period 1st October, 1990 to 24th October, 1990 and in the period 1st January, 1991 to 31st January, 1991, the petitioner has not marked respondent "A", "P" or "R" but has merely drawn a line across the said dates. Inasmuch as no such line has been drawn across the dates in any other case, it is not possible to understand what the said line denotes. If the respondent were absent on the said date, he ought to have been marked "A". Indeed, it would be seen that, for other days in the same month, which the said line has been drawn across the aforesaid periods, the respondent has, in fact, been marked "A". In my opinion, given the prevarication exhibited in the affidavits-in-evidence filed by the witnesses who deposed in favour of the petitioner, the inconsistency between the number of working days as deposed in the said affidavits-in-evidence, vis-à-vis the muster rolls relating to respondent, and the somewhat enigmatic scoring out of certain days, during the aforesaid one year, the respondent would be entitled to the benefit of doubt, for the days, for which, instead of marking him "A", "P" or "R", the petitioner has chosen to draw a line across the said dates. Adding the said days to the remaining 233 days, the number of days, for which respondent attended the office of the petitioner, during the one-year period immediately preceding his termination, would work out to 252 days, which would be in excess of the requisite 240 days, as stipulated in Section 25B of the ID Act. The grant of this benefit, to the respondent would also be justified, as the number of days worked out, even by the two witnesses, who deposed on behalf of the petitioner, was just 5 days short of the magic figure of 240. The manner in which the aforesaid figure of 233 has been worked out may be presented, in a tabular fashion, thus:

Sr. No.

Periods

Days when Present

Rest Days

Total

1.

16.7.90 to 31.7.90

14

2

16

2.

1.8.90 to 31.8.90

27

4

31

3.

1.9.90 to 30.9.90

24

4

28

4.

1.10.90 to 24.10.90

11

-

11

5.

24.10.90 to 31.10.90

3

-

3

6.

1.12.90 to 31.12.90

27

4

31

7.

1.1.91 to 31.1.91

18

3

21

8.

15.3.91 to 31.3.91

15

2

17

9.

1.4.91 to 30.4.91

26

4

30

10.

1.5.91 to 31.5.91

29

2

31

11.

1.6.91 to 14.6.91

12

2

14

Total

233

* Apart from the above, for 11 days in the period 01st October, 1990, to 24th October, 1990 and for 8 days in the period 01st January, 1991 to 31st January, 1991, a line has been drawn on the attendance column, against the respondent's name.

48. The material filed by the petitioner, before the learned Labour Court, being inherently inconsistent in nature, and, as worked out hereinabove, the number of

days, for which the respondent served the petitioner, during the period 16th July, 1990 to 14th June, 1991, adding up to more than 240, I am of the opinion that the sworn statement of the respondent, as contained in the affidavit-in-evidence tendered by him before the learned Labour Court, which the petitioner chose not to test by cross-examination, despite grant of an opportunity, deserves to be accepted. The respondent would, therefore, be entitled to be treated as having served the petitioner for more than 240 days in the year immediately preceding 15th June, 1991, when his services were disengaged.

49. The submission of Mr. Agarwal, appearing on behalf of the respondent, to the above effect is, therefore, accepted, and the contention, to the contrary, as urged by Ms. Trivedi, stands rejected.

50. There is, however, substance, in the submission of Ms. Trivedi, that the retrenchment of the petitioner, even if found to have been affected in violation of Section 25F of the ID Act, would not necessarily entail, in its wake, a right, in favour of the respondent, to reinstatement, ipso facto. On the question of whether a finding of illegal retrenchment ought, in every case, to invite, as a fallthrough, a direction for reinstatement, with or without back wages, the position in law, as reflected in recent decisions of the Supreme Court, is that, instead of awarding reinstatement, the wronged workman ought to be awarded lump-sum compensation. The principle has been authoritatively enunciated, in *Bharat Sanchar Nigam Limited v. Bhurumal*, (2014) 7 SCC 177, in the following words:

"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. 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."

(Emphasis supplied)

51. The ratio decidendi emanating from the above-extracted passages from Bharat Sanchar Nigam Limited (supra) [which have been quoted, with approval, in the recent decision in State of Uttarakhand v. Raj Kumar, 2019 SCC OnLine 16], as well as the rationale thereof, apply, with full force, to the facts of the present case. The respondent had worked for less than a year, as Beldar, before his services were disengaged. It cannot be said that the petitioner was guilty of "unfair labour practice", as defined in Section 2 (ra) of the ID Act, read with the Item No. 10 of the 5th Schedule thereto. As such, this case, too, would merit disposal with the direction to grant lump-sum compensation, to the respondent, instead of reinstating him in service.

52. The Order, dated 21st September, 2004, passed by this Court in W.P. (C) 3676/1997 reveals that, at the time of his disengagement on 15th June, 1991, the respondent was drawing a salary of Rs. 1,050/- per month. Computed over a period of 28 years, for which the respondent would have continued to work, had he been reinstated in service, as directed by the learned Labour Court, the total wages which he would have drawn (not allowing for inflation, grant of increment, etc., as he was only a Beldar), would be Rs. 3,52,800/-. As, however, the respondent has not served the petitioner after 14th June, 1991, I am of the opinion that the lump-sum wages, be payable to him for the period from 14th June 1991 onwards, by way of compensation, should be limited to Rs. 2,50,000/-. In this context, I may note the fact that, in para 3 of CM 44436/2016, preferred by him under Section 17B of the ID Act, the respondent has categorically stated that he was not gainfully employed in any establishment, after the termination of his services by the petitioner. No evidence, indicating gainful employment, by the respondent, after his termination, has been adduced by the petitioner, in its reply to the aforesaid application of respondent. Payment,

as directed by this Court, to be made to the respondent, under Section 17B of the ID Act, has also been made, thereby indicating that the said order has been accepted by the petitioner.

53. The respondent, therefore, in my view would be entitled to be paid a lump-sum compensation of Rs. 2, 50,000/-, less the amount paid to him under Section 17B of the ID Act, by the petitioner.

54. Resultantly, the writ petition of the petitioner is allowed in part, by upholding the finding, of the learned Labour Court, to the effect that the respondent had been illegally retrenched from service, but modifying the relief granted to him for payment of a lump-sum compensation of Rs. 2,50,000/-, from which the amount already paid to him, under Section 17B of the ID Act, would be entitled to adjustment.

55. In view of the protracted litigation, which the respondent has to fight, despite having succeeded before the learned Labour Court, I deem it appropriate to award costs, in his favour, quantified at Rs. 25,000/-.

56. Payments, in terms of this judgment, be made, to the respondent, within a period of four weeks from the date of presentation, before the petitioner, of a certified copy of this judgment.

57. Record of the learned Labour Court be returned forthwith.