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Jitender Kumar vs.directorate of Health Services Govt of Nct of Delhi

Jitender Kumar vs.directorate of Health Services Govt of Nct of Delhi

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Court : Delhi

Decided On : Oct-22-2019

Appellant : Jitender Kumar

Respondent : Directorate of Health Services Govt of Nct of Delhi

Advocate for Pet/Ap. : Mr. Rajiv Agarwal, Mr. Anuj Agarwal, Mr. Sugandh Kochhar, Mr. Naushad Ahmed Khan, Mr. Atul T.N, Mr. Devendra Verma

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI JITENDER KUMAR Reserved on:

10. h October 2019 Decided on:

22. d October, 2019 LPA792014 ..... Appellant Through: Mr. Rajiv Agarwal, Mr. Anuj Agarwal and Mr. Sugandh Kochhar, Advocates. versus DIRECTORATE OF HEALTH SERVICES GOVT OF NCT OF DELHI ..... Respondent Through: Mr. Naushad Ahmed Khan, ASC (Civil) for GNCTD. YOGENDER KUMAR & ORS LPA7312014 ..... Appellants Through: Mr. Rajiv Agarwal, Mr. Anuj Agarwal and Mr. Sugandh Kochhar, Advocates. Mr. Atul T.N. and Mr. Devendra Verma, Advocates. versus DIRECTORATE OF HEALTH SERVICES GOVT OF NCT OF DELHI Through: Mr. Naushad Ahmed Khan, ASC ..... Respondent (Civil) for GNCTD. CORAM: JUSTICE S.MURALIDHAR JUSTICE TALWANT SINGH %

JUDGMENT

Dr. S. Muralidhar, J.:

1. Both these appeals arise out of a set of facts and involve the same LPA Nos. 79/2014 & 731/2014 Page 1 of 11 question of law and are accordingly being disposed of by this common judgment.

2. LPA No.79/2014 by Jitender Kumar is directed against a judgment dated 6th March, 2013 passed by the learned Single Judge, allowing W.P.(C) No.247/2011 filed by the Directorate of Health Services (DHS) of the Government of NCT of Delhi (GNCTD) (Respondent No.1), whereby an Award dated 19th May, 2010 passed by the Labour Court in ID No.1217/2006 in favour of the present Appellant was set aside.

3. LPA No.731/2014, filed by eleven Appellants, is directed against the judgment dated 11th August, 2014 passed by the learned Single Judge, allowing W.P.(C) No.4460/2013, whereby following the order dated 6th March, 2013 passed in W.P.(C) No.247/2011, the Award dated 19th May, 2010, in favour of the Appellants was set aside.

4. The background facts are that the Appellants/Workmen were appointed as daily-wage Nursing Orderlies, pursuant to their applications, in response to an advertisement issued by the Maharishi Balmiki Hospital (MBH). The advertisement stated that walk-in interviews would be conducted for appointment of the Nursing Orderlies on contingent basis, till regular appointments were made, or for 89 days, whichever is earlier. The Appellants/Workmen applied and were selected for the said post through an interview.

5. The Medical Superintendent, MBH, issued a Memorandum dated 29th LPA Nos. 79/2014 & 731/2014 Page 2 of 11 November, 2011, appointing each of the Appellants/Workmen on a contingent basis for a period of 89 days to Group-D posts on a daily wage basis. Clause (4) of the said Memorandum stated that the post was a contingency arrangement, till a regular candidate joined or for a period of 89 days, whichever is earlier.

6. Apprehending that once Nursing Orderlies were appointed on a regular basis, their services would be terminated, the Appellants approached the Central Administrative Tribunal (CAT), with an application seeking regularization. The said application was dismissed by the CAT by an order dated 29th April, 2003, granting the Appellants the limited relief for appearing in the test for recruitment of Nursing Orderlies, on regular basis, but without any reservation or weightage for the services rendered by them, as daily rated wage-earners. Meanwhile, the W.P.(C) No.5071/2003, filed by them against the order dated 29th April, 2003, of the CAT, was disposed of by this Court on 11th August, 2003.

7. More than two years thereafter, on 20th December, 2005, the DHS issued Office Order No.295, terminating the services of the Appellants with effect from that date on the basis of last come first go policy. A corresponding office order was issued by the MBH on the same date. Aggrieved by the termination of their services, the Appellants/Workmen raised an industrial dispute. A reference was made by the appropriate government on 25th October, 2006 on whether the services of the Appellants had been terminated illegally or unjustifiably by the management, and if so, what monetary and other consequential benefits, in terms of the existing laws, and LPA Nos. 79/2014 & 731/2014 Page 3 of 11 what other reliefs would they be entitled to, and what directions were necessary in that regard?. 8. The

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filed their written statement to claim in ID No.1217/2006. The Appellants/Workmen tendered their affidavits of examination-in-chief. However, they were not cross-examined by the

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lead any evidence.

9. The Industrial Adjudicator passed an Award dated 19th May, 2010, in which, inter alia, it was held that the services of the Appellants had been terminated

abruptly without following the procedure contemplated in the Industrial Disputes Act, 1947 (ID Act) and in violation of Section 25-F thereof. Each of the Appellants was held entitled to the relief of reinstatement with Rs.50,000/- in lieu of back wages. It was further held that the earlier orders of the CAT, which pertained to the regularization of the services of the Appellants, would not operate as res judicata, to decide the plea of illegality of termination of their services.

10. Aggrieved by the aforementioned Award, the

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filed two writ petitions viz. W.P.(C) Nos.247/2011 and 4460/2013. As already noticed, W.P.(C) No.247/2011 was allowed by the learned Single Judge by the impugned order dated 6th March, 2013, inter alia, holding that the appointment of the Appellants/Workmen was contractual and for a fixed term, that therefore, it fell within the exception carved out in clause (bb) of Section 2 (oo) of the ID Act, and that such termination did not amount to retrenchment, within the meaning of the ID Act. Consequently, Section 25-F of the ID Act and other provisions thereof, were held to have no application LPA Nos. 79/2014 & 731/2014 Page 4 of 11 to the facts of the case. It was further held that the plea that the Appellants were seeking to raise before this Court that there was no connection between the regular recruitment process and their termination could not be permitted to be raised, since the said plea had not been raised before the Labour Court and was being raised before the Court for the first time. However, since the Appellants had served the

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for over four years, prior to termination of their services, it was directed that the

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pay each of the Appellants Rs.25,000/-, in lieu of wages under Section 17-B of the ID Act 11. This Court has heard the submissions of Mr Rajiv Aggarwal, learned counsel appearing for the Appellants and Mr Naushad Ahmed Khan, learned ASC (Civil) appearing for the

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12. Under Section 2 (oo) of the ID Act, retrenchment has been defined to mean as under: retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-- (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such LPA Nos. 79/2014 & 731/2014 Page 5 of 11 contract being terminated under a stipulation in that behalf contained therein; or (c) termination of the service of a workman on the ground of continued ill- health 13. Thus, it would be seen that in terms of Clause (bb), which has been referred to by the

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and accepted by the learned Single Judge, the termination of the services of the workmen, as a result of the non-renewal of the contract, on the expiry of such contract in their behalf, would not amount to retrenchment.

14. In S.M. Nilajkar v. Telecom, District Manager, Karnataka AIR2003(SC) 3553, the Supreme Court held that where the management pleads that clause (bb) of Section 2 (oo) of the ID Act is attracted; the burden of proof would be on the management to establish the same by way of evidence. Paragraphs 13 and 14 of the said judgment read as under: 13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb) subject to the following conditions being satisfied: (i) that the workman was employed in a project or scheme of temporary duration; (ii) the employment was on a contract, and not as a daily- wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract. LPA Nos. 79/2014 & 731/2014 Page 6 of 11 (iv) the workman ought to

have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily-wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or upto to occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of Sub-clause (bb) abovesaid. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of Sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of Sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment. 15. As already noticed in the present case, the

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have failed to lead any evidence themselves and also failed to cross-examine any of the workmen. The question as far as the Labour Court is concerned, was only whether Section 25-F of the ID Act, stood attracted. Interestingly, in the written statement filed by the

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, no plea was taken that clause (bb) of Section 2 (oo) of the ID Act was attracted. In any event, there was no LPA Nos. 79/2014 & 731/2014 Page 7 of 11 evidence to support such a plea. The learned Single Judge, therefore, was in error in permitting the

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to raise the plea for the very first time in the High Court. Notwithstanding this, in the absence of any evidence to show that the termination was in terms of the contract, such a plea could not have been entertained and adjudicated upon.

16. The fact remains that in these cases, the services of the Appellants were continued well beyond the period of 89 days, in terms of the initial appointment orders, which took effect from 1st December, 2001. Admittedly, they continued serving for over four years till the actual date of termination of their services, by the order dated 20th December, 2005.

17. In similar circumstances, in Union of India v. Ramchander (2005) 9 SCC365 the Supreme Court has held that the management had violated Section 25-G of the ID Act, by terminating their services, without following the statutory procedure. Paragraphs 3 and 4 of the said decision read as under: 3. We have heard the Appellants counsel and also the counsel for the

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. The counsel for the Appellants contended that the

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were appointed as casual labourers for a period of 89 days and they had no right to be reinstated in service as they had completed 89 days, the period for which they were appointed. On the other hand, counsel for the

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contended that they were appointed as against the selection posts and the employment exchange and they had also undergone medical examination and that the termination orders served on the

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were to see only that these

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did not continue in service for a period of 240 days. they were also sponsored by LPA Nos. 79/2014 & 731/2014 Page 8 of 11 4. The

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were appointed against casual labourers but nevertheless they continued in service for four spells and that too their re-appointments were made immediately within a few days of termination on completion of 89 days. It shows that sufficient work was available with the employer and had there been no termination on completion of 89 days, they would have completed 240 days of continuous employment. In that view of the matter the Appellants had violated Section 25-G of the Industrial Disputes Act. We did not find any error or illegality in the decision rendered by the Division Bench. We direct the Appellants to re-employ the

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as daily-wagers. However, the directions of the High Court for payment of entire salaries and allowances for the period they were out of service was not justified under the circumstances. The termination of the

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was from 11-1-1995 and now a fairly long period has passed and in the meantime, the

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must have been engaged in employment in any other work. Therefore, we direct the

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with 50% back wages from the date of their termination till their re-employment. The Appellants shall re- employ the

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within a period of one month. The appeals are disposed of accordingly. No costs. the Appellants to re-employ 18. On similar facts, in Rabinarayan Mohapatra v. State of Orissa (1991) 2 SCC599 the Supreme Court granted relief to a Hindi teacher appointed in a government school in Orissa. In Krishan Singh v. Executive

Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana) (2010) 3 SCC637 an identical issue was decided in favour of the workmen and they were reinstated with 50% back-wages.

19. The mandatory nature of Section 25-F of the ID Act was explained by the Supreme Court in Sudarshan Rajpoot v. Uttar Pradesh State Road Transport Corporation (2015) 2 SCC317 whereby the Supreme Court LPA Nos. 79/2014 & 731/2014 Page 9 of 11 disapproved the practice of engaging workmen on casual temporary basis to continue their services well beyond the initial period, and then abruptly terminating their services, without complying with the requirements of the law.

20. As far as the decisions of this Court are concerned, a reference may be made to the decision dated 24th August, 2006 in LPA No.116/2006 (PWD v. Satyapal), where after referring to the judgment of the Supreme Court in Haryana State F.C.C.W. Store Ltd. v. Ram Niwas (2002) 2 LLJ1153(SC), this Court observed in paragraphs 9 and 10 as under: 9. It is apparent from the above that the device of issuing work orders was to satisfy the letter of the law as contained in Section 2(oo)(bb) but in was in fact it was nothing but an employment on the continuous basis. The very purpose for which Section 2(oo)(bb) was introduced was to avoid saddling an employer with the liability under Section 25F where a worker had been engaged for a very short period of say, two or three months. It was not meant to be invoked in a situation where the worker is in continuous employment, as in this case, for over three years. If one were to interpret Sections 2(oo)(bb) in the manner that the appellant suggests, it would permit the law to be misused to avoid a statutory liability. It must be kept in mind that the ID Act is intended to protect a workman whose services have been continuously engaged for a considerable period of time. It is in this background that the provision of Section 2(oo)(bb) should be interpreted.

10. The decision of the Hon'ble Supreme Court in Haryana State F.C.C.W. Store Ltd's case (supra) also indicates that the idea of introducing Section 2(oo)(bb) in the ID Act was to meet a situation where a worker is engaged for a very short period. In that case the two workers, Ram Niwas and Shiv Kumar were engaged

on 25.5.1993 and 2.6.1993 respectively as watchman/chowkidar on contract basis for keeping guard over LPA Nos. 79/2014 & 731/2014 Page 10 of 11 stocks lying in the open area at the Hasanpur Mandi in Haryana. The engagement of both the workers was terminated with effect from 26.4.1994, after the entire stock lying in the open area was cleared. Thus their engagement was for a fixed period of less than one year. It was in those circumstances that the Hon'ble Supreme Court, applying Section 2(oo)(bb) of the ID Act, held that the disengagement/termination of the workers concerned did not amount to retrenchment. The said judgment, which turned on those facts, cannot apply to the instant case where on facts it has been concurrently found that the worker has been employed for more than 3 years continuously.

21. Subsequently, in its decision dated 27th February, 2015 in LPA4542014 (University of Delhi v. Ram Shekhar Jha), a division Bench of this Court, upheld the plea of the workman and held his termination to be bad in law.

22. In that view of the matter, the impugned orders of the learned Single Judge in both the writ petitions are hereby set aside and the Award, holding the termination of the Appellants services to be bad in law is hereby restored with the back wages as directed therein. The direction in the impugned orders of the learned Single Judge that each of the Appellants should be paid a sum of Rs.25,000/-, in lieu of wages under Section 17-B of the ID Act is not disturbed. In other words, the amounts already paid to the Appellants, need not be returned by them to the

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23. The appeals are allowed in the above terms. No costs. OCTOBER22 2019/rd S. MURALIDHAR, J.

TALWANT SINGH, J.

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