R-10

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W. P. (C) No.5454/1998**

% **Date of Decision : 08.02.2013**

SUNDER SINGH

..... Petitioner

Through: Mr. Anuj Aggarwal, Advocate

versus

P.O. INDUSTRIAL TRIBUNAL-I & ANR.

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J (ORAL)

1. The petitioner has assailed the award passed by the Industrial Tribunal I, Tis Hazari Courts, Delhi dated 12.06.1997 in ID No.838/89, whereby the reference made by the appropriate government dated 09.11.1989 regarding the termination of the services of the petitioner has been answered against the petitioner workman and in favour of the respondent management.

2. The admitted facts are that the petitioner was appointed by an office

order dated 06.08.1987 initially for a period of six months or until appointment of a regular employee as Beldar in the dog destruction gang. The appointment was purely temporary and liable to be terminated without any notice. By another office order dated 19.02.1988, the petitioners appointment was extended by another six months from 04.02.1988. Once again, the appointment was made on purely temporary basis and liable for termination without notice.

3. The services of the petitioner were similarly extended for a period of six months from 04.08.1988; and for two periods of three months each from 04.11.1988 and 31.01.1989. The services were terminated with effect from 01.02.1989. The petitioner claimed that he had served for over 240 days in the year preceding to his termination and raised an industrial dispute claiming breach of sections 25F,G&H of the Industrial Disputes Act, 1947 (the Act) read with Rule 76 and 77 of the Industrial Disputes (Central) Rules, 1957.

4. The defence of the respondent management was premised on section 2 (oo) (bb) of the Act. It was contended that the appointment of the petitioner was a fixed term appointment and, therefore, his termination was not covered by the expression 'retrenchment'. Consequently, section 25F and other provisions, relied upon by the petitioner, did not operate in his case. This submission of the respondent was accepted by the Industrial Tribunal, and the reference was answered against the petitioner.

5. Mr. Aggarwal, learned counsel for the petitioner has referred to the cross examination of the witness of the respondent management MW-1 in

which he admits that the petitioner was working against a regular post of Beldar as a daily wager. He submits that the work performed by the petitioner was of perennial nature against a regular post. He further submits that it was also admitted by MW-1 that no retrenchment compensation was given to the petitioner.

6. The submission of learned counsel for the petitioner is that the modus operandi adopted by the respondent of issuing fixed term appointment letters successively, and continuously, stretching over a period of 1 ½ years tantamounts to unfair labour practice in terms of section 2 (ra) read with Item 10 in 5th Schedule to the Act. The said item defines unfair labour practice, inter alia, to mean "*to employ workman as badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workers*". He submits that section 2 (oo)(bb) has been interpreted by the Division Bench of the Punjab and Haryana High Court in a detailed and considered decision in ***Bhikku Ram, S/o Sh. Lalji v. Presiding Officer Industrial Tribunal cum Labour Court***, *(1996) III LLJ 1126 P&H* in the light of section 2 (ra) and item 10 of the 5th Schedule. He submits that the said judgment squarely applies in the facts of this case, as the respondents did not make recruitment against the regular vacant posts, and continued to appoint the petitioner on casual basis for successive periods only to evade the provisions of the Act and other beneficial legislation framed by the Parliament for protection of the rights and interests of the workman.

7. The respondents have not appeared to defend the present proceedings. In fact, there has been no appearance on the part of the

respondent on the last few days as well.

8. Having considered the facts and circumstances of the case, and the decisions cited by Mr. Aggarwal, I am of the view that the impugned award cannot be sustained and the issuance of fixed term appointment letters successively to the petitioner was not bonafide and was, in fact, an endeavour to evade the provisions of the Act and other beneficial legislations framed for protection of workman. The Division Bench in ***Bhikku Ram*** (supra) has, inter alia, observed as follows:

> *"21. Therefore, while interpreting and applying various parts of Section 2(oo), the competent Court/ Tribunal shall have to keep in mind the provisions of Section 2(ra) read with Section 25 T and U and various paragraphs of the Fifth Schedule and if it is found that the action of the employer to engage a workman on casual basis or as a daily-wages or even on temporary basis for long periods of time with intermittent breaks and subsequent termination of service of such workman on the pretext of non-renewal of contract of employment or termination of contract of employment on the basis of a stipulation contained therein is an act of unfair labour practice, such an action of the employer will have to be nullified and the Court will be fully justified in rejecting the plea of the employer that termination of service of the workman does not amount to retrenchment but is covered by Clause (bb). In the context of various paragraphs of the Fifth Schedule, Clause (bb) which is an exception to the principal section will have to be given a narrow interpretation. This clause has the effect of taking away a right which was vesting in the workman prior to its insertion. Therefore, the same cannot be allowed to be used as a tool of exploitation by the employer who, as already observed above, enjoys a position of dominance as against the workman. The employer is always in a position to dictate the terms of service vis-a-vis the workman or to be workman. The employer can*

unilaterally impose oppressive and unreasonable conditions of service and the workman will be left with little choice but to accept all such conditions. The employee cannot possibly protest against the incorporation of arbitrary, unreasonable and even unconsciounable conditions of service in the contract of employment. Any such protest by the employee or a to be employee will cost him job or a chance to enter employment. In respect of a work of permanent or continuing nature, the employer can always give an employment of fixed term or incorporate a condition in the contract of employment/appointment letter that the employment will come to an end automatically after a particular period or on the happening of a particular event. In such a situation, if the Court finds that the conditions are arbitrary and unreasonable and the employer has forced these conditions upon a workman with the sole object of avoiding his obligation under the Industrial Disputes Act, a bald plea of the employer that the termination of service is covered by Clause (bb) will be liable to be rejected.

24. Therefore, in every case of termination of service of a workman, where the workman claims that he has worked for a period of 240 days in a period of twelve months and termination of his service is void for want of compliance with the requirement of Section 25F and where the employer pleads that termination of service has been brought about in accordance with the terms of contract of employment or termination is as a result of non-extension of terms of employment, the Court will have to carefully scrutinise all the facts and apply the relevant provisions of law. It will be the duty of the Court to determine the nature of employment with reference to the nature of duties performed by the workman and the type of job for which he was employed. Once the employee establishes that he was employed for a work of permanent/continuous nature and that employer has arbitrarily terminated his service in order to defeat his rights under the Industrial Disputes Act or other labour legislations, a presumption can appropriately be drawn by the Court that the employer's action amounts to unfair labour

practice. In such a case, burden will lie on the employer to prove that the workman was engaged to do a particular job and even though the employee may have worked for 240 days such employment should be treated as covered by the amended clause because the service was terminated on the completion of the work. A stipulation in the contract that the employment would be for a specified period or till the completion of a particular job may legitimately bring the termination of service within the ambit of Clause (bb), However, if the employer resorts to methodology of giving fixed term appointment with a view to take it out of the Section 2(oo)and terminate the service despite the continuity of the work and job requirement, the Court may be justified to draw an inference that the employers' action lacks bona fide or that he has unfairly resorted to his right to terminate the service of the employee."

9. The Division Bench has also considered various other judgments and concluded in para 35 as follows:

"35. From the above, it is clear that termination of service of a workman, who has worked under an employer for 240 days in a period of twelve months preceding the date of termination of service will ordinarily be declared as void if it is found that the employer has violated the provisions of Section 25F (a) and (b). If the employer resists the claim of the workman and invokes Section 2(oo)(bb), burden lies on the employer to show that though the employee has worked for 240 days in twelve months prior to termination of his service, such termination of service cannot be treated as retrenchment because it is in accordance with the terms of the contract of employment or on account of non-renewal of the contract of employment. It has also to be shown by the employer that the workman had been employed for a specified work and the job which was being performed by the employee is no more required. Only a bona fide exercise of right by an employer to terminate the service in terms of the

contract of employment or for non-renewal of the contract will be covered by Clause (bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed term employment as a conduct or mechanism to frustrate the rights of the workman, the termination of the service will not be covered by the exception contained in Clause (bb). Instead the action of the employer will have to be treated as an act of unfair labour practice, as specified in the Fifth Schedule of the Act. The various judgments rendered by the different High Courts and by the Supreme Court clearly bring out the principle that only a bona fide exercise of the powers by the employer in cases where the work is of specified nature or where the temporary employee is replaced by a regular employee that the action of the employer will be upheld. In all other cases, the termination of service will be treated as retrenchment unless they are covered by other exceptions set out hereinabove."

10. From the facts of the case, it is evident that the respondent adopted the *modus operandi* to appoint the petitioner for fixed terms successively and continuously only to evade the rights that the petitioner would get vested with, if he were to be regularly appointed. Admittedly, there were regular vacant posts of beldar lying vacant. Yet the respondent did not make regular appointments. The nature of work was also perennial. The conduct of the respondent in making successive fixed term appointment has to be judged in the light of section 2(ra) read with Item 10 of the 5th Schedule to the Act. There is absolutely no explanation furnished by the respondents for making fixed term appointment and for continuing the same successively and continuously.

11. Consequently, the impugned award cannot be sustained and is set aside and it is held that the services of the petitioner were illegally terminated in breach in section 25F of the Act.

12. The next question that arises for consideration is as to what relief the petitioner would be entitled in the factual background of the case. The petitioner had served on casual basis for a period of 1 ½ years. His services were terminated way back on 01.02.1989. Since then, more than 24 years have lapsed. I am, therefore, not inclined to direct reinstatement of the petitioner with back wages in view of the decision of the Supreme Court in ***Jagbir Singh v. Haryana State Agriculture Marketing Board & Anr.***, *AIR 2009 SC 3004.*

13. Though in the statement of claim filed before the tribunal, the petitioner had made a statement that he had remained unemployed, that statement was made way back in the year 1989 itself. Learned counsel for the petitioner has not been able to point out any similar averment in the writ petition. Moreover, the writ petition was preferred nearly nine months after the passing of the impugned award, which also shows that the petitioner did not feel any sense of urgency that an unemployed daily wager would feel for approaching the Court.

14. The petitioner, admittedly, was not holding a post as he was not a regular or permanent appointee. Considering the fact that the petitioner was working as a class IV worker i.e. Beldar, in my view, the ends of justice would be met if the petitioner is granted compensation of Rs.2 lacs.

15. The respondent is directed to make payment of the said amount to the petitioner within six weeks. In case the payment is not made, the same shall carry interest at the rate of 10% per annum from today till payment. The petitioner shall also be entitled to costs of Rs.10,000/-.

VIPIN SANGHI, J.

FEBRUARY 08, 2013
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