IN THE COURT OF SH. JOGINDER PRAKASH NAHAR, PRESIDING OFFICER LABOUR COURT-IX, ROUSE AVENUE DISTRICT COURT, D.D.U. MARG, NEW DELHI

LID No. 320/2018
CNR-DLCT13-002754-2018

Subhash Yadav,
S/o Shri M.P. Yadav,
R/o 15/331, Block No.15,
Kalyan Puri, Delhi-110091

…… Workman

Versus

East Delhi Municipal Corporation
Through its Commissioner,
419, Udyog Sadan, Patparganj,
Industrial Area, New Delhi-110092

…… Management

Date of Institution	**:**	**25.07.2018**
Date of Award reserved on	**:**	**22.07.2022**
Date of Award	**:**	**22.07.2022**

A W A R D

1. By this award, I shall dispose of the statement of claim of the workman as filed by him directly before Labour Court against the management under Section 10 (4A) of the Industrial Disputes Act, 1947 read with Section 10 of the Industrial Disputes Act, 1947.

2. Brief facts as stated by the workman are that his services were illegally terminated vide order dated 29.09.2017. He was initially offered a temporary post of Chowkidar/Security Guard for 10 days by MCD vide work order dated 03.03.2000. Over a period of time similar work order was given to him

under continuous service of the management. Vide order dated 12.07.2012 the workman was appointed as Daily Wager. He has unblemished and uninterrupted record. He has worked in various schools under MCD/EDMC. Lastly he was posted at MCD Primary School, Block-19, Kalyanpuri, Delhi-110091. He worked for 16 hours daily. His service was illegally terminated without any show cause notice. No opportunity to hear was given. No rule of natural justice was followed and no inquiry was conducted. His representation to the management dated 06.11.2017 was duly received which was not replied by the management. The legal notice dated 28.06.2018 was also not replied nor any action was taken. Hence, the workman has submitted that he has worked for more than 240 days in a year. His termination is in violation of Section 25 F, Section 25 G and Section 25 H of Industrial Disputes Act, 1947 read with Rules 76 to 79 of Industrial Disputes (Central) Rules 1957. No seniority list was displayed by the management. Violation of Section 25 N of Industrial Disputes Act, 1947 was conducted as permission from appropriate government was not taken by the management before illegal termination. The management has committed unfair labour practice under Section 2 (ra) of Industrial Disputes Act, 1947. Workman could not find employment from the date of his illegal termination despite best efforts till date and hence it is prayed that he may be granted reinstatement with full back wages and all consequential benefits of continuity of service along with cost under Section 11 (7) of Industrial Disputes Act. 1947.

3. In the written statement filed by the management it is submitted that no demand notice was served on the management. The claim is without cause of action. Workman was daily wager employee. Deputy Chief Minister and Education Minister of GNCTD had raided the EDMC School at Kalyanpuri where the classroom was rented out by Guard and two people were arrested

after the raid at said school at Kalyanpuri. The raid was conducted at 10:00 PM. It was rented out at night to cook food where fretsaws, hammers and other tools stored in the cupboard. Safety of kids was put in danger. Hence, the management has taken legal action against the workman. The raid was conducted on 29.09.2017 in the night. A copy was also published in National Dailies such as Nav Bharat Times. The judgment relied upon by the workman is not applicable in this case. Hence, management has prayed that the claim of the workman is false which is liable to be dismissed.

4. On the pleading of the parties and averments made following issues were framed on 04.10.2018 which are as under :

(1) Whether the services of the workman had been terminated illegally and/or unjustifiably by the management ? OPW

(2) If the answer to the above mentioned issue is in affirmative, then as to what consequential relief is the workman entitled for ? OPW

(3) Relief.

5. The workman has got examined himself as WW1 being the sole witness and vide separate statement of his AR dated 02.09.2019 the workman's evidence was closed. The witness of management MW1 Sh. Anil Kumar Baliyan was examined on 19.03.2021 and 05.10.2021 being the sole witness and vide separate statement of AR the management's evidence was closed on 05.10.2021.

6. The workman has relied on following citations :

1) **Delhi Transport Corporation v. Rakesh Kumar, decided on 14.05.2018, 2018 LAB. I.C. 3350 from Hon'ble High Court of Delhi.**

2) **Karnataka State Road Transport Corporation v. Smt. Lakshmidevamma & Anr., decided on 01.05.2001, AIR 2001 SC 2090 from Hon'ble Supreme Court (Constitution Bench).**

3) **MCD v. Praveen Kumar Jain & Ors., decided on 21.01.1998, (1998) 9 SCC 468 from Hon'ble Supreme Court.**

4) **Anoop Sharma v. Executive Engineer, Public Health Division No.1, Panipat (Haryana), decided on 09.04.2010, (2010) 5 SCC 497 from Hon'ble Supreme Court.**

5) **Krishan Singh v. Executive Engineer, Haryana State Agriculture Marketing Board, Rohtak (Haryana), decided on 12.03.2010, (2010) 3 SCC 637 from Hon'ble Supreme Court.**

6) **Jasmer Singh v. State of Haryana & Anr., decided on 13.01.2015, (2015) 4 SCC 458 from Hon'ble Supreme Court.**

7) **Delhi Cantonment Board v. Central Govt. Industrial Tribunal & Ors., decided on 19.01.2006, 2006 (88) DRJ 75 (DB) from Hon'ble High Court of Delhi.**

8) **Bihari Lal Vs. MCD, in WP (C) No. 1078/2012, decided on 20.05.2013 from Hon'ble High Court of Delhi.**

9) **The Management of Municipal Corporation of Delhi v. Presiding Officer, Industrial Tribunal & Anr. in WP (C) No. 6024/1999 and CM Nos. 704/2011 and 10905/1999, decided on 25.08.2011 from Hon'ble High Court of Delhi.**

7. Final arguments are heard between the parties and issue-wise findings are as follows :

8. **ISSUE NO. (1)**

(1) Whether the services of workman had been terminated illegally and/or unjustifiably by the management ? OPW

8.1 The workman has deposed as WW-1 and tendered his evidence by way of affidavit as Ex. WW1/A. It is deposed by the workman that he was working on temporary post of Chowkidar at Primary School, Block No.7,

Kalyanpuri, Delhi. It is denied that he stopped reporting for duties. It is denied that rooms were let out to outsider after the school working hours. He was alone at the time when the raiding party comprising of Deputy Chief Minister, MLC and Police officials raided the school premise. It is denied that school premises was let out to two other persons who were present at the time of raid. It is deposed voluntarily that they were visitors of the workman. This deposition is contrary to deposition of workman in same cross examination dated 02.09.2019 that he was alone at the time of raid. It is deposed that the visitors came to him to meet at 10:00 PM.

8.2 From the above deposition of workman it has come on record that when the school premises were raided then two persons were present with the workman. The management could not know and ascertain about the said two person. The case of the management is that the school premises were let out. In cross examination it is not disputed that the workman started working with management since the year 2000 and his last working day was 28.09.2017. It is submitted by the management that the workman was daily wager only. However daily wager also needs protection of Industrial Disputes Act, 1947. However it is admitted fact that the workman had worked continuously for a period of 240 days till the last date of his employment i.e the date of his termination/employment. Merely because the workman is a daily wager benefit of Section 25 F cannot be denied to the workman.

8.3 It was held in case titled **Delhi Cantonment Board v. Central Govt. Industrial Tribunal & Ors., decided on 19.01.2006, 2006 (88) DRJ 75 (DB), from Hon'ble High Court of Delhi (Division Bench)=129 (2006) DLT 610, (2006) IIILLJ 752 Del** at the relevant para no. 6, 8 and 9 are reproduced hereasunder :

6. The definition of 'workman' in Section 2 of the Industrial Disputes Act states that a workman means :-

any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i)who is subject to the Air Force Act, 1950 (45) of 1950), or the Army employee of a person, or

(ii)who is employed in the police service or as an officer or other employee of a person, or

(iii)who is employed mainly in a managerial or administrative capacity, or

(iv)who being employed in a supervisory capacity, draws wages exceedings one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

7. A perusal of the above definition shows that there is no distinction in industrial law between a permanent employee and a temporary employee. As long as the person is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, he is a workman under the Industrial Disputes Act, and will get the benefits of that Act.

8. Thus, it has been held in Chief Engineer (Irrigation) Chepauk, Madras v. N.Natesan (1973) II LLJ 446 (447) (Mad.) and in Management of Crompton Engineering Co.(Madras) Private Ltd. v. Presiding Officer, Additional Labour Court (1974) I LLJ 459 (Mad.) that even a temporary employee falls within the definition of workman. Similarly in Elumalai v. Management of Simplex Concrete Piles (India) Ltd. (1970) II LLJ 454 and Tapan Kumar Jena v. General Manager, Calcutta Telephones (1981) Lab.I.C. (NOC) 68 (Cal.) it was held that a casual employee is also a workman. In other words, every person employed in an industry, irrespective of whether he is temporary, permanent or a probationer is a workman vide Hutchiah v. Karnataka State Road Transport Corporation (1983) I LLJ 30(37) (Kant.), provided he is doing the kind of work mentioned in Section 2(s).

9. Since the respondents were workmen under the Industrial Disputes Act, Section 25F of the Act had to be complied with if they had put in 240 days of service in the year prior to the date of termination of service. Respondents had admittedly put in over 240 days of service. Hence the termination of

their service was illegal, since compliance of Section 25F is a condition precedent to the termination of service vide State of Bombay v. Hospital Mazdur Sabha 1960 I LLJ 251 SC, National Iron & Steel Co.Ltd. v. State of West Bengal 1967 II LLJ 23 SC, Mohanlal v. Management of Bharat Electronics Ltd. 1981 LIC 806 (815) SC, Avon Services (Production Agencies) Ltd. v. Industrial Tribunal 1979 I LLJ I SC. etc.

8.4. The management has pleaded that during the raid on 29.09.2017 the class room was rented out and two people were arrested in the raid. However during deposition of MW-1 only newspaper clipping Ex. MW1/1 dated 30.09.2019 (as recorded in Ex. MW1/A) and E-newspaper Ex.MW1/2 were placed on record. Ex. MW1/1 and Ex. MW1/3 were marked as Mark-A and Mark-B which are not in original. Mark-MW1/A is office note before Deputy Commissioner Shahdara regarding the alleged incident. These note is based on notice received over mobile phone from the Principal. The Principal is not produced in evidence. The Mark-MW1/A mentions that the school building was used for residential purpose. On this ground recommendation was made for termination of service of the workman. Clothes, carpenting tools and food items were placed in one of the class room, however written statement mentions that the class rooms were let out by the workman. Hence there is contradiction in Mark-MW1/A and Para no. 2 of the written statement. It is deposed by MW-1 in evidence by way of affidavit Ex. MW1/A at para no.2 that various carpenter tools were found in the class room. However the name of carpenter tools are not detailed in Mark-MW1/A. It appears that no tools were seized from the spot. The deposition of WW1 confirms that two persons were present with him at 10:00 PM on the said raid. Neither the management brought the name of such visitors on record nor the workman had mentioned the name of such visitors. However only deposition of MW1 does not prove that the workman had rented out the school premises. In absence of any evidence of such renting out of the school premises it cannot be said that the workman had let out the school premises. In statement of claim at para no. 3

and at para no. 4 of evidence by way of affidavit Ex. WW1/A the workman had deposed that he used to render regular duty of at least 16 hours on daily basis. Further, during holiday he ended up doing duties continuously from 24 hours to 36 hours. There is no cross examination of workman in this respect which shows that the workman has to keep tools with him to manage his daily affairs for serving such long hours on duty. Hence keeping clothes, food items is natural for the workman to keep with him to survive at his work place. The nature of carpenting tools are not disclosed by the management if they cannot be used by the workman during the course of his duties. In absence of which the workman cannot be faulted with for keeping clothes, food and some tools with him to properly render his service. The burden of proof is on the management to show the misconduct if any committed by the workman. In the present case the management has failed to show having conducted any inquiry against the workman before terminating his service. No charge sheet was given. The relevant citation is reproduced hereasunder :

> **Sachiv Krishi Upaj Mandi Samiti, Sanawad v. Mahendra Kumar S/o Mangilal Tanwarao, 2004 LLR 405 = 2003 SCC OnLine MP 720 : (2004) 101 FLR 176 (MP) : (2004) 4 LLJ (Supp) (NOC 307) 953 : 2004 LLR 405** that if the termination of an employee is based on no inquiry, no charge and not by way of punishment, then it becomes a case of illegal retrenchment. In such case, the workman will be entitled to reinstatement with full back wages.
> 4. Parties led evidence. It was, however, concluded on facts and evidence **that respondent has worked continuously for more than 240 days in one calendar year**, that **no charge-sheet** or any **inquiry** was held prior to his termination, that **no retrenchment compensation** was paid prior to impugned termination, and <u>that it was a case of dismissal without any basis or charge</u>.
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> 5. Learned Counsel for the petitioner was unable to point out to me any mistake of law or fact in the impugned award, in so far as the aforementioned findings of facts were concerned. These findings are the only findings which need to be rendered on facts and evidence. Indeed, in order to attract the protection of labour laws, these are the only issues which need to be examined on facts on both sides. As observed supra, **if the termination of an employee is based on no inquiry, no charge and not by way of**

punishment, then it becomes a case of illegal retrenchment. If an employee has worked for more then 240 days in one calendar year then he is entitled to have the protection of Labour Laws provided the employer is an Industry subjected to Labour Laws.

6. Learned Counsel for the petitioner contended that no order for payment of back wages could be given. I do not agree to this submission, as it has no merit. **Firstly, once the termination is held to be bad in law then directions to pay back wages is a natural consequence** and has to follow. It is only when the employer (as in this case petitioner) is able to show and prove that terminated employee was working for gains even after termination, the order for payment of back wages will not be passed.

7.7. The **burden to prove that employee was working for gains after termination lies on the employer.** In the **absence of any evidence not tendered, the direction to pay back wages has to follow**. It is, however, **necessary for the employee to state on oath that he remained unemployed after the termination of his service.** In this case, the petitioner failed to lead any evidence on this issue against the respondent and on the other hand, the respondent did say that he remained unemployed. In view of this, the direction to pay back wages cannot be said to be illegal or unreasonable once it was held that termination is bad in law.

In view of above it is held that the management has illegally and unjustifiably terminated the workman without following the principle of natural justice.

8.5 Had no inquiry being conducted by the management then management could have proved the misconduct of workman before the present court in view of citation reproduced below :

Delhi Transport Corporation v. Rakesh Kumar, decided on 14.05.2018, 2018 LAB. I.C. 3350 from Hon'ble High Court of Delhi at para no. 9 and 10 which are reproduced hereasunder :

9. The only question involved in this writ petition for adjudication is the effect of not making a proper prayer/request in its written statement by the Management to adduce evidence before the Tribunal/Industrial Adjudicator in case the Tribunal/Industrial Adjudicator found that the domestic enquiry conducted by the management stands vitiated. Admittedly, the petitioner had not retained any such right in its written statement to adduce evidence in case the enquiry is found to have been vitiated by the Industrial Adjudicator.

10. A constitution Bench of the Hon'ble Supreme Court in Karnataka State

Road Transport Corpn. Vs. Lakshmidevamma (Smt) and Anr. 2001 (5) SCC 433 has settled the issue and upheld the view taken by its Division Bench in Shambhu Nath Goyal Vs. Bank of Baroda (1983) 4 SCC 491 in which it was held that the management has right to adduce evidence to justify its domestic enquiry only if it had reserved its right to do so in the application made by it under Section 33 of the Industrial Disputes Act, 1947 or in the objection that the management had to file to the reference made under Section 10 of the Act, meaning thereby that the management had to exercise its right of leading fresh evidence at the first available opportunity and not at anytime thereafter during the proceedings before the Tribunal/Labour Court. The relevant para No.3, 6, 16 to 20 of the judgment read as under:-

"3. The rights which the employer has in law to adduce additional evidence in a proceeding before the Labour Court or Industrial Tribunal either under Section 10 or Section 33 of the Industrial Disputes Act questioning the legality of the order terminating the service must be availed of by the employer by making a proper request at the time when it files its statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken by it."

6. Thus it is seen from the above observations of the Court in Rajendra Jha case that the same is decided on the facts of the said case without laying down any principle of law nor has the Court taken any view opposed to Shambhu Nath Goyal case . Therefore, having considered the two judgments, we are of the opinion that there is no conflict in the judgments of this Court in the cases of Shambhu Nath Goyal and Rajendra Jha.

16. While considering the decision in Shambhu Nath Goyal case we should bear in mind that the judgment of Varadarajan, J. therein does not refer to the case of Cooper Engg. However, the concurring judgment of D.A. Desai, J. specifically considers this case. By the judgment in Goyal case the management was given the right to adduce evidence to justify its domestic enquiry only if it had reserved its right to do so in the application made by it under Section 33 of the Industrial Disputes Act, 1947 or in the objection that the management had to file to the reference made under Section 10 of the Act, meaning thereby that the management had to exercise its right of leading fresh evidence at the first available opportunity and not at any time thereafter during the proceedings before the Tribunal/Labour Court.

17. Keeping in mind the object of providing an opportunity to the management to adduce evidence before the Tribunal/Labour Court, we are of the opinion that the directions issued by this Court in Shambhu Nath Goyal case need not be varied, being just and fair. There can be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic enquiry. At the same time, it is also of advantage to the workmen inasmuch as they will be put to notice of the fact that the management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready. This procedure also eliminates the likely delay in permitting the management to make belated

application whereby the proceedings before the Labour Court/Tribunal could get prolonged. In our opinion, the procedure laid down in Shambhu Nath Goyal case is just and fair.

18. There is one other reason why we should accept the procedure laid down by this Court in Shambhu Nath Goyal case . It is to be noted that this judgment was delivered on 27-9-1983. It has taken note of almost all the earlier judgments of this Court and has laid down the procedure for exercising the right of leading evidence by the management which we have held is neither oppressive nor contrary to the object and scheme of the Act. This judgment having held the field for nearly 18 years, in our opinion, the doctrine of stare decisis requires us to approve the said judgment to see that a long-standing decision is not unsettled without a strong cause.

19. For the reasons stated above, we are of the opinion that the law laid down by this Court in the case of Shambhu Nath Goyal v. Bank of Baroda is the correct law on the point.

20. In the present case, the appellant employer did not seek permission to lead evidence until after the Labour Court had held that its domestic enquiry was vitiated. Applying the aforestated principles to these facts, we are of the opinion that the High Court has rightly dismissed the writ petition of the appellant, hence, this appeal has to fail. The same is dismissed with costs."

8.6 In view of fact discussed above the management has failed to prove the misconduct if any committed by the workman. Merely two persons were apprehended with the workman keeping in view his long working hours it cannot prima facie be said that it was a misconduct. Their nature of visit remains unverified. For unlawful/illegal visitors no police complaint is proved on record by the management. Hence the opportunity of heard was not given to the workman and principle of nature justice was violated and on this account alone the termination by management needs to be set aside. The necessary citation is reproduced hereasunder :

It was held in case titled **M.G. Umamahesh And Ors. v. The State of Karnataka**, dated 12th August, 2003 Equivalent citations: ILR 2003 KAR 3672 from Hon'ble High Court of Karnataka wherein it was held at para no. 12 and 13 that once the service are regularised then order of cancellation or withdrawal of employees had acquired a vested right. Opportunity of hearing should be granted to them to put forth their case. Non grant of such opportunity leads to remanding matter back to redo the same a fresh affording opportunity of hearing. The relevant paras are reproduced

hereasunder:

12. Sri V. Lakshminarayan, learned Counsel for the petitioners, nextly contends that the second respondent without affording an opportunity of hearing to the petitioners could not have passed the impugned order and, therefore, the same is in violation of principles of natural justice.

In the present case, by an order made on 5.11.1999, the services of the petitioners came to be regularised as Assistant Plantation Superintendents. By this, they have acquired a vested right and a new status. Any person can ill-afford to lose that sta**tus and also the monetary benefits attached to that status. If the authority intends to de-recognise the status once conferred, that a person against whom an order to his prejudice may be passed should be informed the tentative opinion of the authority for cancellation/withdrawal of the earlier order and give him an opportunity to offer his explanation, if any, and then only pass an order. This exercise is done by the respondent authority. This would satisfy the requirements of principles of natural justice.** Therefore, the impugned order cannot be straight away condemned as one made without following the principles of natural justice. However, Sri Lakshminarayan, learned Counsel for the petitioners would contend that the principle 'no one shall be condemned un-heard' applies event to administrative orders. In the facts and circumstances of the present case, according to learned Counsel, apart from issuing a show cause notice, the authority passing order should have also granted a personal hearing to the persons who would be effected by the tentative opinion of the authority, since the tentative opinion expressed in the show cause notice, if it is confirmed would adversely affects the status and/or privileges of the petitioners. Therefore, submits that the respondent authority without affording an opportunity of personal hearing to the petitioners could not have passed the impugned order.

13. Sri M. Kumar, learned Counsel for the respondent authority, after obtaining appropriate instructions from the respondent authorities would firstly submits that the respondents before passing the impugned order had afforded an opportunity of "hearing" to the petitioners by issuing them a show cause notice and further directing them to offer their explanation, if any and this procedure would satisfy the requirement of principles of natural justice, and inspire of it, if the petitioners are of the view, that they should be heard in the matter, the respondent authority would give them an opportunity of oral hearing and pass a fresh order. The Submission of the learned Counsel is very fair and just. That only shows that the respondents do not have any animus against the petitioners nor they intend to deprive them their lawful rights, if they so deserve. The stand of the respondents really requires to be appreciated by this Court, for the sole reason, that they do not intend to stand on technical formalities.

In view of the submission of the learned Counsel, it may not be necessary for this Court to express its view on the issue, whether the show cause notice issued by the respondents directing the petitioners to show cause against their tentative opinion would satisfy the requirements of principles of natural justice and whether was it absolutely necessary for the respondents to have

afforded the petitioners an opportunity of hearing before framing the impugned order.

Before I conclude, let me refer to the case law on which reliance was placed by the learned Counsel for the petitioners. The learned counsel firstly relies upon the observations made by the apex court in Narasingha Patra and another's case. In the said decision, the pay scales of the Matriculates, who had undertaken ITI training, had been fixed at Rs. 300-410. That came to be modified by a subsequent order, after notice to the appellants therein, but an opportunity of hearing had not been granted. The appellants therein had approached the Central Administrative Tribunal. The Tribunal was of the view that since show cause notice was issued to the appellants, there was total compliance of the principles of natural justice. Therefore, had rejected the application filed by the appellants. Aggrieved by that order, the appellants therein had approached the Supreme Court. **Before the Supreme Court, a specific contention was taken that the appellants were not heard in the matter and without hearing them, an order withdrawing the earlier benefits granted to them could not have been made.** While considering this issue, the Apex Court was pleased to observe as under:

"We heard the Counsel. We are of the **view that in the totality of the circumstances the representations submitted by the appellants should be considered afresh after giving them an opportunity of being heard.** The State Government shall do so within a period of three months from today and pass appropriate orders. The State Government shall not feel fettered by any of the observations contained in the order of the Tribunal. Pending the disposal of the representations, no recovery of amount alleged to have been paid shall be made."

The other case law on which reliance was placed on is the case of Director, ESI Scheme, Orissa and Anr. v. Dr. Sabita Mohanty (SMT.) reported in 1995 SCC (L and S) 865, wherein the Hon'ble Apex Court was pleased to observe as under:

"We are afraid, this perception of the tribunal as to the ends of justice and their expeditious attainment prevailing over the delays inherent in what the tribunal assumes to be a dispensable formality of the filing of a counter and hearing of the other side is wholly erroneous and entirely unsupportable. Indeed, these words of Lord Wright in General Medical Council v. Spackman are worth recalling;

"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

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8.7 It is admitted by MW-1 that junior workman than to the claimant herein are still working with EDMC on daily wage basis. However, no fresh

daily wage Chowkidar were engaged by EDMC after termination of the workman. No seniority list was shown by EDMC to the workman before terminating his service. MW-1 is not the member of raiding team and he has no personal knowledge of the misconduct allegedly committed by the workman. He cannot say if any memo or charge sheet was served on the workman during his entire service and it is admitted as correct that it was not issued. Therefore, when the juniors are admitted still working with the management then section 25 G of Industrial Disputes Act, 1947 come into picture. The retrenchment of the workman is held illegal in violation of Section 25 G of Industrial Disputes Act, 1947. The relevant citation titled **Jasmer Singh v. State of Haryana & Anr., decided on 13.01.2015, (2015) 4 SCC 458 from Hon'ble Supreme Court.** The relevant para no. 3 and 21 are reproduced hereasunder :

> 3. The appellant-workman was **working as daily paid worker** in the office of Sub Divisional Officer/Engineer, Provincial Division No. 3, PWD (B&R), Karnal since 1.1.1993 and remained in service upto December, 1993. He had completed more than 240 days of continuous service in one calendar year. His services were terminated on 31.12.1993 without complying with the mandatory provisions of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The respondent-management neither issued notice nor notice pay nor retrenchment compensation was given to him. The principle of 'last come first go' was not followed as provided under Section 25G of the Act and the persons who were juniors to him in service were retained. Therefore, he has raised an industrial dispute under the provisions of the Act before the Conciliation Officer requesting for setting aside the order of termination as the same is void ab initio in law and sought an order for reinstatement with back wages and other consequential benefits.
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> 21. The said relief in favour of the appellant-workman, particularly the full back wages is supported by the legal principles laid down by this Court in **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya**, wherein the Division Bench of this Court to which one of us was a member, after considering three-Judge Bench decision, has held that if the order of termination is void ab initio, the workman is entitled to full back wages.

It was held by Hon'ble Supreme Court of India in case titled Regional

Manager, S.B.I vs Rakesh Kumar Tewari on 3 January, 2006 case no.: Appeal (civil) 7 of 2006

Section 25G provides for the procedure for retrenchment of a workman. The respondents have correctly submitted that the provisions of Sections 25G and 25H of the Act do not require that the workman should have been in continuous employment within the meaning of Section 25B before he could said to have been retrenched. The decision in Central Bank of India v. S. Satyam (1996) 5 SCC 419 is clear authority on the issue. We see no reason to take a contrary view. Section 25G requires the employer to "ordinarily retrench the workman who was the last person to be employed in a particular category of workman unless for reasons to be recorded the employer retrenches any other workman". This "last come first go", rule predicates. 1) that the workman retrenched belongs to a particular category; 2) that there was no agreement to the contrary; 3) that the employer had not recorded any reasons for not following the principle. These are all questions of fact in respect of which evidence would have to be led, the onus to prove the first requirement being on the workman and the second and third requirements on the employer. Necessarily a fair opportunity of leading such evidence must be available to both parties. This would in turn entail laying of a foundation for the case in the pleadings. If the plea is not put forward such an opportunity is denied, quite apart from the principle that no amount of evidence can be looked into unless such a plea is raised. [See Siddik Mahomed Shah vs. Mt. Saran AIR 1930 PC 57 (1); Bondar Singh & Or. Vs.Nihal Singh and Ors. (2003) 4 SCC 161].

In J.K.Iron and Steel Company Ltd. vs. The Iron and Steel Mazdoor Union Kanpur (1955) 2 SCR 1315, the court noted that even though industrial tribunals are not bound by all technicalities of civil courts:

"they must nevertheless follow the same general pattern. Now the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the area of conflict and to see just where the two sides differ. It is not open to the Tribunals to fly off at a tangent and disregarding the pleadings, to reach any conclusions that they think are just and proper".

In the first appeal, the respondent had raised no allegation of violation of Section 25G in his statement of claim before the Industrial Tribunal. His only case was that Section 25H of the Act had been violated. Section 25H unlike Section 25G deals with a situation where the retrenchment is assumed to have been validly made. In the circumstances, if the employer wishes to re employ any employee, he must offer to employ retrenched workman first and give them preference over others. The two sections viz 25G and 25H therefore operate in different fields and deal with two contradictory fact situations. The Tribunal ignored the fact that there was no pleading by the respondent in support of an alleged violation of Section 25G. Indeed the order of reference by the Central Government did not also refer to Section 25G but only to Section 25H. In the circumstances it was not open to the Tribunal to "go off on a tangent" and conclude that the termination of service of the respondent was invalid because of any violation of Section 25G by the appellant.

Besides the Tribunal in both appeals did not consider the plea of the appellant that there was no vacancy against which the respondent had been appointed and that it was merely an ad hoc arrangement. In taking into consideration the names of the two employees who were appointed temporarily after the termination of services of the respondent, the Tribunal did not also consider in what capacity these persons had been appointed namely whether they were actually appointed as messenger in place of the respondent. The respondent's case in the first appeal of violation of paragraph 497 of the Shastri Award was also wholly misconceived. That paragraph deals with the rights of apprentices and has no application to temporary employees like the respondent. Assuming that there was a violation of the Shastri Award by the appellant in both cases either in not issuing appointment letters or not maintaining a seniority list, service book in respect of temporary employees etc., this would not mean that therefore the respondents had been properly appointed and their services wrongly terminated. Admittedly no procedure whether in law or under any award or settlement was followed in appointing either of the respondents in both appeals. No condition of services were agreed to and no letter of appointment was given. The nature of the respondents' employment was entirely ad hoc. They had been appointed without considering any rule. It would be ironical if the person who have benefited by the flouting of the rules of appointment can rely upon those rules when their services are dispensed with. The Tribunal also failed to deal with the issue raised by the appellant in the first appeal that no grievance had been made nor any demand raised by the respondent either in his application under Section 33 C (2) or otherwise that his services had been illegally terminated. It may be that the principles of res judicata may not disqualify the respondent from contending that his termination was invalid, nevertheless non raising of the issue earlier was a factor which the Tribunal should have taken into consideration in weighing the evidence. Significantly the High Court upheld the decision of the Tribunal as if the Tribunal had proceeded under Section 25H. As we have said Section 25H proceeds on the assumption that the retrenchment has been validly made. Therefore, the High Court's view that the termination was invalid under Section 25H cannot in any event be sustained.

Section 25H says:

"25H. Re-employment of retrenched workmen.- Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons".

A statutory obligation is thus cast on the employer to give an opportunity to the retrenched workman to offer himself for re-employment. In fact pursuant to settlements entered into between the appellant and the employees' union, several advertisements had been issued by the appellant offering re-employment to retrenched workers. It may be that these facts were not raised by the appellant either before the Tribunal or the High Court, but as was said

in Regional Manager SBI vs. Raja Ram (2004) 8 SCC 164 at p. 168: "However the respondent's counsel is incorrect in his submission that the benefit of the Scheme could not have been availed of by the respondent because no offer was made to the respondent by the appellant. The settlements were advertised and it was for the respondent to have taken advantage of the Scheme.

Although the settlements are, strictly speaking, not relevant to the question of the correctness of award, nevertheless their terms are necessary to be considered for the purpose of deciding whether, assuming everything in favour of the respondent and against the appellant, the respondent should be reinstated as a casual employee since the Scheme had been propounded by the employer with workmen with a view to granting benefit to persons whose services had been terminated as casual employees".

Neither of the respondents in the appeals had offered themselves for re-employment. The conclusion of the Tribunal in both appeals that the circulars endorsed an unfair labour practice being followed by the appellant or that the appellant had indulged in unfair labour practice was also incorrect. Unfair labour practice has been defined in Clause (ra) of Section 2 of the Act as a meaning any of the practices specified in the Fifth Schedule. The Fifth Schedule to the Act contains several items of unfair labour practices on the part of the employer on the one hand and on the part of workmen on the other. The relevant item is Item 10 which reads as follows:

"To employ workmen 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 workmen".

We have already dealt with this issue in Raja Ram's case (supra) where we had said: "before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years, as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. Besides, it needs to be emphasized that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was in the circumstances, likely to acquire the status of a permanent employee".

We see no reason to take a contrary view particularly when the facts in Raja Ram's case are materially indistinguishable from those in the appeals now before us.

In directing reinstatement, neither the High Court nor the Tribunal had

> considered that the order might affect the interest of those others who were employed after the respondent. As was said in Central Bank of India vs. S. Satyam (supra): "The other persons employed in the industry during the intervening period of several years have not been impleaded. Third party interests have arisen during the interregnum. These third parties are also workmen employed in the industry during the intervening period of several years. Grant of relief to the writ petitioners (respondent herein) may result in displacement of those other workmen who have not been impleaded in these proceedings, if the respondents have any claim for re-employment".
>
> Besides in the second appeal admittedly several persons had been appointed prior to the respondent on a temporary basis. They would have prior rights to reemployment over the respondent on the basis of the principles contained in Sections 25G or 25H.

8.8 MW-1 has no personal knowledge of incident. The misconduct by the workman is not proved on record though opportunity was available with the management to prove the same during trial. Hence there is no evidence against the workman that he has misconducted in the nature alleged by the management that the workman has allegedly rented out the property of the school to two strangers. Hence, the termination of the workman is invalid, illegal and in violation of Section 25 F and 25 G of Industrial Disputes Act, 1947. The present issue is accordingly decided in favour of the workman and against the management.

9. **ISSUE NO. (2)**

> **(2) If the answer to the above mentioned issue is in affirmative, then as to what consequential relief is the workman entitled for ? OPW**

9.1 The findings under issue no. 1 are equally applicable under the present issue and be read as part and parcel of the present issue. The same are not repeated herein for the sake of brevity.

9.2 Since the service of the workman is terminated illegally and unjustifiably then in view of citation titled as Jasmer Singh Vs. State of Haryana (Supra) the termination is held void ab initio. This fact is uncontroverted that the workman joined on 03.03.2000 and vide order dated 12.07.2012 he was appointed regular daily wager/Chowkidar. The service of workman was illegal terminated on 29.09.2017. Hence the workman has rendered the service for a period of 18 years and which is a long service period. No misconduct was ever found against the workman and he did his duty diligently. Further the violation of Section 25 G of Industrial Disputes Act, 1947 detailed in para no.4 and 9 of citation titled as "**The Management of Municipal Corporation of Delhi v. Presiding Officer, Industrial Tribunal & Anr. in WP (C) No. 6024/1999 and CM Nos. 704/2011 and 10905/1999, decided on 25.08.2011 from Hon'ble High Court of Delhi"** has laid down the law on illegal termination the workman is not even required to show that he had completed 240 days of service in a year. The relevant para reproduced hereasunder :

> 4. The admitted position being that the workman did not complete 240 continuous days of service in twelve months of a calendar year, the question of violation of Section 25F ID Act did not arise. As regards the **claim under Section 25G ID Act**, a perusal of the impugned Award of the Labour Court reveals that after filing its written statement, the management did not adduce any evidence. The workman, on the other hand, filed an affidavit and was also cross-examined. While he did not deny that he was **daily wage worker**, he denied the suggestion that there was any difference in the nature of work being performed by him and that performed by his counterparts in regular service. He denied that the sanction of work against which he was employed had expired or that he was gainfully employed elsewhere.
>
> 9. Mr. Rajiv Aggarwal referred to the decision of the Supreme Court in Harjinder Singh v. Punjab State Warehousing Corporation AIR 2010 SC 1116 to urge that for the **purposes of Section 25G ID Act there was no necessity of showing that the workman had completed 240 days** of continuous service in one calendar year. Mr. Kanth did not dispute the above proposition but submitted that the seniority list now produced by the MCD along with the writ petition does not reflect the name of the workman at all, and therefore there was no basis for the contention of the workman that

persons junior to him had been regularized in contravention of Section 25G ID Act.

9.3 In view of above the workman is held entitled to reinstatement with full back wages and all consequential benefits as laid down in citation titled **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya and Ors., (2013) 10 SCC 324** wherein the concept of reinstatement was also discussed. The relevant para reproduced hereasunder :

> "38.1. In cases of **wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule**.
>
> 38.2 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.
>
> 38.3 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 was 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 was 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 averment 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 was 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.
>
> 38.4 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 or full back wages**.

38.5 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 victimising the employee or workman, then the court or tribunal concerned 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 keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is **no justification to give a 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.

38.6 In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation 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 frame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees".

10. **R E L I E F**

10.1 In view of findings under issues above it is held that the management has illegally terminated the workman in violation of principle of Section 25F, 25G and 25H of Industrial Disputes Act, 1947. Accordingly it is held that workman is held entitled and granted the following reliefs:

(i) Immediate reinstatement from the date of publication of this Award with

(ii) Full back wages since 29.09.2017 from the date of her illegal termination @ his last drawn wages per month i.e., agreed wages between the parties.

(iii) All consequential benefits from the date of his illegal termination till the date of his reinstatement.

(iv) All the due amount be paid within one month of the date of publication of present Award with interest @ 6% per annum from the date of publication till its realization.

(v) The workman is also awarded the cost of litigation for a total sum of Rs.20,000/- u/Sec. 11(7) of Industrial Disputes Act, 1947.

Application/Claim stands answered in the aforesaid terms.

11. A copy of Award be sent to the competent authority/appropriate Government i.e., Deputy Labour Commissioner, Government of NCT of Delhi of Distt./Area concerned for publication which thereafter become enforceable u/Sec. 17A of Industrial Dispute Act, 1947. Award is passed accordingly. File be consigned to record room.

Announced in the open Court
on 22.07.2022.

(JOGINDER PRAKASH NAHAR)
PRESIDING OFFICER:LABOUR COURT-IX
ROUSE AVENUE DISTRICT COURT
NEW DELHI