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

Judgement reserved on: 27.09.2021

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Judgement pronounced on: 24.12.2021

+ **LPA 258/2020**

NORTH DELHI MUNICIPAL CORPORATION Appellant

Through: Ms. Namrata Mukim, Standing
Counsel with Ms. Garima, Jindal,
Adv.

versus

BAL KISHAN & ANR. Respondents

Through: Ms. Meghna De, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

TALWANT SINGH, J.:

CM APPL. 25761/2020

1. This application has been moved on behalf of the respondent no. 1 - workman under Section 17B of the Industrial Disputes Act, 1947 (hereinafter referred to 'the Act') read with Section 151 of the Code of Civil Procedure, 1908 (in short 'CPC') praying as under:

“a. Direct the Appellant to pay full wages last drawn inclusive of maintenance allowance or minimum wages fixed and revised from time to time under the Minimum Wages Act Whichever is higher w.e.f. 28;05.2007 to till the final disposal of present Appeal.

2. It has been mentioned by the applicant/respondent no. 1 in his application that the present appeal was preferred by the appellant-Corporation/ North Delhi Municipal Corporation (hereinafter referred to as NrDMC) against judgement dated 18.02.2020 passed in W.P. (C.)

7811/2008 by which the learned Single Judge was pleased to set aside the award dated 28.05.2007 passed by the Labour Court in ID No. 645/2006 and vide said order dated 18.02.2020, the learned Single Judge had granted regularization to the workman with 30% back wages and continuity of service for all purposes.

3. The opening paragraph of the award dated 28.05.2007 passed by the learned Presiding Officer, Labour Court no. XVI, defining the terms of reference is reproduced here under:

“Government of the National Capital Territory of Delhi through its Sect. (Labour) vide reference No. F.24(4815)/02/Lab. 6160-64 dated 24.03.03, referred the dispute for adjudication between the management of M/s. M.C.D. and its workman Sh. Bal Kishan in the following terms of reference:

‘Whether the services of Sh. Bal Kishan S/O Sh. Nathu Ram R/o House No. 112, Village Dhaka, Delhi have been terminated illegally and/or unjustifiably by the management and if so, to what sum of money as monetary relief along with consequential benefit in terms of existing laws/Government notification and to what other relief is he are they entitled and what directions are necessary in this respect?’

4. The labour court had dismissed the claim of the workman but the learned Single Judge has set aside the award and granted re-instatement with regularisation but the NrDMC, instead of implementing the said judgment has challenged the same before the Division Bench. So, the applicant-workman moved this application under Section 17B of the Act praying for payment of full back wages last drawn or minimum wages, whichever is

higher, inclusive of any maintenance allowance as per provision of Section 17B of the Act.

5. It has been specifically stated that the respondent no. 1-workman is not gainfully employed in any establishment from the date of the award dated 28.05.2007 till date. The averments in the application are duly supported by an affidavit of the workman and in the affidavit itself, it has been reiterated that the applicant/respondent no. 1 is not employed in any establishment after passing of the award till date.

6. Notice was issued. The NrDMC has filed a joint reply to all the pending applications including the present application on 22.01.2021. The reply to the present application starts from paragraph 16 of the said joint reply. The submission of the NrDMC is that even before the learned Single Judge, it had made the submission that the workman was gainfully employed elsewhere but it was difficult to know the exact whereabouts of the work/job done by the respondent no. 1. Hence, proof could not be obtained. The workman left the services of the NrDMC in the year 2000 and he was around 27 years of age at that time and it is difficult to accept that such an able-bodied person was sitting at home and not working anywhere to feed his family members. If the present application is allowed, it will pose a burden on the public exchequer as NrDMC is facing acute financial crunch and money should not be allowed to go into wrong hands.

7. It has been further stated on behalf of NrDMC that if the stand of the workman is admitted that his family members are surviving hand to mouth, he must be working somewhere, but unfortunately the NrDMC is unable to

find the details of the same. On this basis, it has been prayed that the application be dismissed.

8. We have heard arguments and our considered view is summarised in the following paragraphs:

8.1 The present application has been moved under Section 17B of the Act, the said section is reproduced hereunder:

"17B. Payment of full wages to workman pending proceedings in higher court:

where in any case a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be."

8.2 Vide impugned order dated 18.02.2020, passed in W.P.(C) 7811/2008, the learned Single Judge passed the following directions:

"3. The management has clearly accepted that the four other workmen were identically placed with the petitioner apropos the criminal cases, they were permitted to continue their services with the management. But an exception was made for

the petitioner. He was inexplicably denied the same treatment and benefit. This is arbitrary and unfair treatment to the respondent. It is untenable in law and, therefore, would have to be set aside.

4. The petitioner was working as a Safai Karamchari. There is a policy of regularization by the MCD apropos persons who came on its muster roll. The petitioner was on muster roll with effect from 05.06.1995. Therefore, in terms of the scheme of regularization, he shall be regularized. Let requisite steps in this regard be taken within a period of six weeks from the date of W.P.(C) 7811/2008 Page 5 of 5 receipt of copy of this order. The petitioner shall be paid 30% of the back wages. The petitioner shall be given continuity of service for all purposes. Appropriate communication in this regard shall be issued by the respondent within six weeks from the receipt of a copy of this order.

5. The learned counsel for the respondent/management submits that the workman was gainfully employed elsewhere. However, apart from this bald statement, there is no proof.

6. The petition is disposed-off in the above terms.

7. A copy of this order be given dasti under the signature of the Court Master to the learned counsel for the parties.”

8.3 In paragraph 3 quoted above, it is clearly held that other four workers with criminal cases were retained but exception was made in case of petitioner [workman/respondent no. 1 herein], so it has to be set-aside. Hence, it has been held that termination of the workman has been set-aside vide order dated 18.02.2020. Thereafter, in paragraph 4, the learned Single Judge has discussed the policy of regularisation prevalent in NrDMC. Apart from regularization, the applicant-workman-respondent no. 1 was directed to be paid 30% of the back wages and it was ordered that he shall have continuity of service for all purposes.

9. Appeal in this case was filed on 16.09.2020. We are concerned only with the period w.e.f. 18.02.2020, i.e., the date when reinstatement has been ordered. The application as well as affidavit filed by the applicant-workman-respondent no. 1 clearly state that he is not employed anywhere from the date of the award. The stand of the NrDMC is that since he is an able-bodied person, so it cannot be presumed that he is sitting idle. Moreover, as per NrDMC, it is difficult to find details of the present employment of the applicant-workman-respondent no. 1 and if an order under Section 17B of the Act is passed, it will burden the public exchequer as NrDMC is reeling under a financial crunch and the public money will go in wrong hands.

10. None of the grounds taken in the reply of the NrDMC are tenable. The law provides that if re-instatement has been ordered by Court and the employer, instead of complying with the said directions, chooses to challenge the said order, the workman is entitled to full wages last drawn by him, inclusive of any maintenance allowance admissible to him during the pendency of the said challenge by the employer.

11. Learned counsel for the NrDMC has relied upon the following judgements in support of her contentions that the workman is not entitled to the relief under Section 17B the Act.

(i) '***Bharat Coking Coal Ltd. v. Their Workmen And Anr. 2004 (1) JCR 514 Jhr***'. In this judgement, it has been held that in a case where the award does not order for reinstatement, the High Court does not get jurisdiction under Section 17B of the Act to pass an order under that provision. The ratio of this judgement is not applicable to the present case because the workman

was terminated by NrDMC and as quoted in paragraph 3 above, the reference was also made by the Government of NCT of Delhi to the Labour Court to determine as to whether the services of the workman were illegally and/or unjustifiably terminated by the Management. Hence, this is a case of reinstatement as has been duly ordered by the learned Single Judge in paragraph 3 of his judgement dated 18.02.2020 whereby the award passed by the Labour Court was set aside. Thereafter, the learned Single Judge has ordered for regulation of workman in paragraph 4 of his judgement.

ii) Next judgement relied upon by learned counsel for NrDMC is '*Employers in relation to the Management of Rajrappa Washery of Central Coalfields Limited v. Their Workmen*', LPA no. 01/2009 decided on 14.10.2009, wherein it was held that since the award passed by the Tribunal was in respect of regularisation of service and not for reinstatement, so the order passed under Section 17B of the Act is against the spirit and object of the said provision. As mentioned above, as per the order passed by the learned Single Judge, the workman has been ordered to be reinstated, as was done in respect of four other workmen, as detailed in paragraph 3 of the impugned judgement, and thereafter, the learned Single Judge has directed that as per the policy of regularisation, the workman be regularised. We have to keep in mind that the reference made by the Government to the Labour Court was regarding '*illegal termination*' of the workman. Even, in the statement of claim filed by the workman, he has prayed for his reinstatement with full back wages and benefits. The regularisation has been ordered as per the policy of the NrDMC. Hence, ratio of this judgement is also not applicable to the facts of the case.

(iii) In W.P.(C) 6539/2020 titled '**North Delhi Municipal Corporation v. Satish**' *MANU/DE/0229/2021*, one of us, i.e., Hon'ble Mr. Justice Rajiv Shakti has held as under:

"In this behalf, Courts have to remain cognizant and make an enquiry qua the following four aspects:

(a) First, whether there is, in place, an award, passed by a forum referred to in Section 17B of the I.D. Act which directs reinstatement of the respondent/workman.

(b) Second, whether the employer has preferred proceedings against such an award either in the High Court or in the Supreme Court.

(c) Third, whether the workman has filed an affidavit stating therein that he is not employed in any establishment.

(d) Lastly, whether the workman is employed in any establishment [during the relevant period] and has received adequate remuneration for the services rendered. Thus, for the period the workman is found to be employed no wages are payable to the employer."

The indices given in the aforesaid judgment are present in the instant case, with the caveat that the scope and ambit of the expression "award" needs to be understood and explained in the context of the facts obtaining in the instant case. The discussion on this aspect is set forth in the latter part of the judgment.

(iv) Learned counsel for the NrDMC has also relied upon a judgement of the High Court of Himachal Pradesh in CWP No. 361/2018 titled '**M/s Control Print Limited v. Ajitpal Singh Rana**'. The relevant portion of the judgement is quoted here under:

“20. Further, the statute requires satisfaction of the following conditions:

(i) An award by a Labour Court, Tribunal or National Tribunal directing reinstatement of a workman is assailed in proceedings in a High Court or the Supreme Court;

(ii) During the pendency of such proceedings, employer is required to pay full wages to the workman;

(iii) The wages stipulated under Section 17B are full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any Rule;

(iv) Such wages would be admissible only if the workman had not been employed in any establishment during such period and an affidavit had been filed to such effect.

21. A Single Bench of this Court in Food Craft Instt. Vs. Remeshwar Sharma and Anr. [(2007) 2 LLJ 350 Del] culled out the following principles, from various judicial pronouncements touching upon various facets for grant of interim relief under Section 17B of the ID Act, in the following manner: ”

(i) An application under Section 17B can be made only in proceedings wherein an industrial award directing reinstatement of the workman has been assailed.

(ii) This Court has no jurisdiction not to direct compliance with the provisions of Section 17B of the Industrial Disputes Act if all the other conditions precedent for passing an order in terms of the Section 17B of the Act are satisfied [Re: (1999) 9 SCC 229 entitled Choudhary Sharai v. Executive Engineer, Panchayati Raj Department & Anr.].

(iii) As the interim relief is being granted in exercise of jurisdiction under Article 226 of the Constitution of India, the High Court can grant better benefits which may be more just and equitable on the facts of the case than the relief contemplated by Section 17B. Therefore, de hors the powers of the Court under Section 17B, the Court can pass an order directing payment of an amount higher than the last drawn wages to the workman

[Re: (1999) 2 SCC 106 (para 22), Dena Bank v. Kirtikumar T. Patel].

(iv) Such higher amount has to be considered necessary in the interest of justice and the workman must plead and make out a case that such an order is necessary in the facts of the case.

(v) The Court can enforce the spirit, intendment and purpose of legislation that the workman who is to get the wages from the date of the award till the challenge to the award is finally decided as per the statement of the objections and reasons of the Industrial Disputes (Amendment) Act, 1982 by which Section 17B was inserted in the Act [Re: JT 2001 (Suppl.1) SC 229, Dena Bank v. Ghanshyam (para 12)].

(vi) An application under Section 17B should be disposed of expeditiously and before disposal of the writ petition [Re: 2000 (9) SCC 534 entitled Workman v. Hindustan Vegetable Oil Corporation Ltd.].

(vii) Interim relief can be granted with effect from the date of the Award [Re: JT 2001 Supplementary (1) SC entitled Regional Authority, Dena Bank v. Ghanshyam; 2004 (3) AD (DELHI) 337 entitled Indra Perfumery Company v. Sudarshab Oberoi v. Presiding Officer].

(viii) Transient employment and self–employment would not be a bar to relief under Section 17B of the Industrial Disputes Act [Re: 2000 (1) LLJ 1012 entitled Taj Services Limited v. Industrial Tribunal; 1984 (4) SCC 635 entitled Rajinder Kumar Kundra v. Delhi Administration; 109 (2004) DLT 1 entitled M/s. Birdhi Chand Naunag Ram Jain v. P.O., Labour Court No. IV & Others].

(ix) The Court while considering an application under Section 17B of the ID Act cannot go into the merits of the case, the Court can only consider whether the requirements mentioned in Section 17B have been satisfied or not and, if it is so, then the Court has no option but to direct the employer to pass an order in terms of the statute. It would be immaterial as to whether the petitioner had a very good case on merits [Re: 2000 W.P(C)

No.11803/2005 Page 7 of 11(5) AD Delhi 413 entitled Anil Jain v. Jagdish Chander].

(x) A reasonable standard for arriving at the conclusion of the quantum of a fair amount towards subsistence allowance payable to a workman would be the minimum wages notified by the statutory authorities under the provisions of the Minimum Wages Act, 1948 in respect of an employee who may be performing the same or similar functions in scheduled employments. [Re: Rajinder. Kumar Kundra v. Delhi Administration, (1984) 4 SCC 635; Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328; decision dated 3rd January, 2003 in Writ Petition (Civil) Nos. 3654 & 3675/1999 entitled Delhi Council for Child Welfare v. Union of India; DTC v. The P.O., Labour Court No. 1, Delhi & Ors., 2002 II AD (Delhi) 112 (para 12, 13)]

(xi) Interim orders directing payment to a workman can be made even on the application of the management seeking stay of the operation and effect of the industrial Award and order. Such interim orders of stay sought by the employer can be granted unconditionally or made conditional subject to payment or deposits of the entire or portion of the awarded amount together with a direction to the petitioner employer to make payment of the wages at an appropriate rate to the workman. Such an order would be based on considerations of interests of justice when balancing equities.

(xii) For the same reason, I find that there is no prohibition in law to a direction by the Court to make an order directing payment of the wages with effect from the date of the Award. On the contrary, it has been so held in several judgments that this would be the proper course [Re: Regional Authority, Dena Bank & Anr. v. Ghanshyam, reported at JT 2001 (Suppl. 1) SC 229 and Indra Perfumery Co. Thr. Sudershab Oberoi v. Presiding Officer & Ors., 2004 III AD (Delhi) 337].

(xiii) While passing an interlocutory direction for payment of wages, the Court may also secure the interests of the employer by making orders regarding refund or recovery of the amount which

is in excess of the last drawn wages in the event of the industrial award being set aside so as to do justice to the employer.

(xiv) A repayment to the employer could be secured by directing a workman to give an undertaking or offer security to the satisfaction of the Registrar (General) of the Court or any other authority [Re: para 12, 2002 (61) DRJ 521 (DB), Hindustan Carbide Pvt. Ltd. v. Govt. of NCT of Delhi & Ors. (supra)]

(xv) In exercise of powers under Article 226 and Article 136 of the Constitution, if the requisites of Section 17B of the Industrial Disputes Act, 1947 are satisfied, no order can be passed denying the workman the benefit granted under the statutory provisions of Section 17B of the Industrial Disputes Act, 1947 [Re: 1999 (2) SCC 106, Dena Bank v. Kirtikumar T. Patel (para 23)].

(xvi) Gainful employment of the workman; unreasonable and unexplained delay in making the application by the workman after the filing of the petition challenging the award/order; offer by the employer to give employment to the workman would be a relevant High Court of H.P.

(xvii) It will be in the interest of justice to ensure if the facts of the case so justify, that payment of the amount over and above the amount which could be directed to be paid under Section 17B to a workman, is ordered to be paid only on satisfaction of terms and conditions as would enable the employer to recover the same [para 13 of Regional Manager, Dena Bank v. Ghanshyam].

(xviii) The same principles would apply to any interim order in respect of a pendent lite payment in favour of the Workman." [emphasis supplied]"

12. In our view, the judgment rendered by the Himachal Pradesh High Court does not help the cause of the NrDMC. The parameters concerning Section 17B of the Act referred to above fit the present case squarely.

13. The management has also raised the point that since the award passed by the labour court is not in favour of the workman, so he has no right to move an application under Section 17B of the Act.

14. There is no provision for appeal provided in Industrial Disputes Act against the decision of a labour court, which is in the form of an award. However, a writ petition before High Court may be preferred by the aggrieved party. Here in this case, the writ petition was filed by the workman, who was denied his claim by the impugned award. In ***Shyam Sunder & Others vs Ram Kumar & Another*** Appeal (civil) 4680 of 1993 decided on 30 July, 2001, it was held by Hon'ble Supreme Court that "*the legal position that emerges on review of the second category of decisions is that the appeal being continuation of suit*"

14.1. It is important to note that the cause was frozen, in a sense, before the Labour court; in the writ petition, the workman carried forward the cause because he failed before the Labour Court. The observations of the Supreme Court in the case of ***Dayawati and Another vs. Inderjit and Others*** AIR 1966 SC 1423, being apposite, are extracted hereafter:-

“10.....The only difference between a suit and an appeal is this that an appeal "only reviews and corrects the proceedings in a cause already constituted but does not create the cause." As it is intended to interfere in the cause by its means, it is -a part of it, and in connection with some matters and some statutes it is said that an appeal is a continuation of a suit....”

14.2. Thus, in our view, the writ petition is only a continuation of the reference/claim originally filed by the workman before the labour court, hence, the decision of the learned Single Judge to reinstate the workman

with 30% back wages and to consider his case for regularisation as per prevalent policy, is in the nature of Award in favour of the workman. The said decision of the learned Single Judge has been challenged by the management by filing the present LPA, hence this Court, in our view, has the jurisdiction to grant relief under Section 17B of the Industrial Disputes Act, as prayed for by the workman by moving the application under consideration.

15. In the present case, it is the employer, i.e., NrDMC, which has challenged the impugned order by filing LPA No.258/2020 on 16.09.2020. As per affidavit of the workman, he is not gainfully employed; he cannot prove the negative. Once the workman makes such an assertion, the onus shifts to the employer; the initial onus undoubtedly is on the workman. The Corporation has failed to negative the claim of the workman that he is not gainfully employed. The disposal of the appeal will take some time. Workman and his family members cannot be allowed to starve in the meantime.

16. In our view, the workman is entitled to full wages last drawn by him. Since the respondent no. 1-workman has been ordered to be regularized/reinstated with all consequential benefits, the Management, i.e., NrDMC shall pay his full last drawn wages or the minimum wages, whichever is higher, from 18.02.2020 onwards and keep on paying the same to him during the pendency of the present appeal, without prejudice to the rights and contentions of the parties in the main LPA. We have ordered to pay the last drawn wages/minimum wages (whichever is higher) w.e.f. 18.02.2020, as there is no unreasonable delay in moving the application under Section 17B

of the Act by the applicant/workman. The said application was moved on 07.10.2020 and the LPA itself was filed on 16.09.2020.

17. It is made clear that the payment of wages and allowances in compliance of present order will not prejudice the stand of the NrDMC in any way and the LPA will be heard and decided on merits.

18. Hence, the application is disposed of with directions to appellant/ NrDMC to pay the last drawn wages/minimum wages, whichever is higher, w.e.f. 18.02.2020; clear the arrears within one month from today and start paying the same to him regularly w.e.f. 01.01.2022 during the pendency of the present LPA.

19. The application, i.e., CM APPL. 25761/2020 is accordingly disposed of.

TALWANT SINGH
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

DECEMBER 24, 2021
nk/pa