Before Rajiv Narain Raina, J.

HALDARI COOPERATIVE CREDIT & SERVICE SOCIETY LIMITED,—*Petitioner*

versus

RAMESHWAR AND ANOTHER,—*Respondents*

CWP No.1565 of 1994

2nd January, 2012

Constitution of India 1950 - Art. 21, 39 & 226/227 - Industrial Disputes Act,1947 - S.33-C(2) - Contract Act,1872 - S.23 - Workman employed as Chowkidar peon - Condition of service that he would sleep at night in the office to guard property and would be responsible for any loss occasioned by his absence - Application under S.33-C(2) moved by workman claiming wages for overtime, on account of night duty - Application opposed on the ground that there was no work for the workman to do at night except sleep and at any rate he had agreed to work at the salary already fixed - Labour Court doubled the salary of the workman - High Court declined to interfere in writ jurisdiction, as order of appointment (resolution) exploitative - Condition of service to guard property 24x7, inhuman and violative of Art. 21 of the Constitution - Right to peaceful sleep without fear of being visited by personal harm, being a biological necessity is protected by Art. 21 of the Constitution and cannot be waived, in this case by the contract of employment - An unconstitutional and an unfair term in a contract can be struck down.

Held, That this Court feels that the conclusion of the Labour Court in awarding an amount of Rs.11,522/- against the management by way of arrears of salary/overtime from the respondent-management does not deserve to be interfered with in supervisory jurisdiction exercised by this Court under Article 226 of the Constitution against orders and awards passed by the Labour Court. A large measure of exploitation is evident from the resolution dated 27.04.1985. The condition imposed of night duty to protect employer's property is harsh and inhuman and would amount to 24/7 working hours for which it would not be unlawful to order some compensation or overtime as in substance done by the labour court in its discretion. I feel that this amount should be treated as a solatium on humanitarian principles for

apparent overtime. This extra duty performed is res ipsa loquitur. The right to peaceful and undisturbed sleep without fear of being visited by personal harm in the morning, I should imagine, is in the nature of a fundamental right protected by Article 21 of the Constitution of India. It is a biological necessity essential for health. A right encompassed or conferred by Article 21 cannot be waived even by consent or by any voluntary act. I would draw strength for this from Olga Tellis Vs. Bombay Municipal corporation, (1985) 3 SCC 545. The offending condition would also, to my mind, fall foul of the law as explained in Central Inland Water Transport Corporation Vs Brojo Nath Ganguly, (1986) 3 SCC 156 as opposed to public policy being an unconscionable and an unfair term in the contract of employment and violative of Section 23 of the Contract Act, 1872 when tested on the jurisprudential doctrine of distributive justice embodied in Article 39 of the Constitution.

(Para 6)

G.S. Sandhu, Advocate, *for the petitioner.*

RAJIV NARAIN RAINA, J.

(1) This petition has been filed by the petitioner-Management under Articles 226/227 of the Constitution of India praying for setting aside of the order dated 20.09.1993 (P-4) passed by the Presiding Officer, Labour Court, Ambala on an application preferred by respondent No.1/workman under Section 33-C(2) of the Industrial Disputes Act, 1947 (for short 'the Act'). The management remained ex-parte before the Labour Court after filing its written statement.

(2) The facts in brief are that the respondent-workman was engaged by the petitioner-Society by a resolution dated 27.04.1985 as a chowkidar/peon. He was granted the pay of Rs.200/- per month w.e.f. 27.04.1985. It was a condition laid down in the resolution that he would sleep at night in the office of the society to protect their property and that in case *"He will not sleep in the office, then he will be responsible for any loss"* occasioned by his absence.

(3) It appears that after five years of service, the respondent-workman filed an application under Section 33-C(2) of the Act in 1990 (P-2) claiming overtime from 27.04.1985 to 3.11.1989 at rates proportionate to the increase in salary during the period from Rs.200/- to Rs.542/- to

Rs.625/- per month. In this manner, the total claim of Rs.15,433/- was made. The management filed a written statement before the Labour Court taking the defence that he had consented and agreed to do the work of peon-cum-chowkidar together at a monthly pay of Rs.200/- and that there was no work at all for the workman to do at night except sleeping in the premises of the society. Still further that he was a resident of the village where the premises of the employer were situate and therefore had agreed to do this job.

(4) In response to the writ petition, the workman has filed a written statement stating that the management made no effort to get the ex-parte proceedings set aside before the Labour Court, nor has the order by which ex-parte proceedings were ordered against the management been assailed in this petition. It is stated that there is a difference between pleading and proof. It was the workman's case in the Section 33-C (2) application that he was not monetarily compensated for work as chowkidar during the night.

(5) I have heard Mr. G.S. Sandhu, Advocate for the petitioner and have examined the record with his assistance. Learned counsel may be right that the doctrine of equal pay for equal work would not apply to the present case since there is no other employee whose work could be compared with. The doctrine would come into operation only where similarly situated employees are getting different emoluments. The only case pleaded against the order of the Labour Court in the writ petition is that the Labour Court was incorrect in applying the principle of equal pay for equal work and for making an order which doubled up the salary. The core issue with regard to jurisdiction under Section 33-C(2) has not been touched in the pleadings; that such proceedings being in the nature of execution proceedings ought to be preceded by a pre-existing right; and that the resolution dated 27.04.1985 (Annexure P-1) was in fact the appointment order of the workman which did not create such pre-existing right.

(6) This Court feels that the conclusion of the Labour Court in awarding an amount of Rs.11,522/- against the management by way of arrears of salary/overtime from the respondent-management does not deserve to be interfered with in supervisory jurisdiction exercised by this Court under Article 226 of the Constitution against orders and awards passed by the Labour Court. A large measure of exploitation is evident from the resolution dated 27.04.1985 (Annexure P-1) and this Court by an interim order dated 17.02.1994 had called upon the management to deposit within two weeks

from the date of the order half the amount ordered by the Labour Court and the recovery of the remaining amount had been stayed in the first motion order. Mr. Sandhu, learned counsel informs me that an amount of Rs.5761/- stands deposited with the Labour Court within the time prescribed in the interim order dated 17.02.1994. What remains in the case is only a further amount of Rs.5761/- to be paid in case the writ fails. It is not the case that the workman derelicted in the performance of his duties. The condition imposed of night duty to protect employer's property is harsh and inhuman and would amount to 24/7 working hours for which it would not be unlawful to order some compensation or overtime as in substance done by the labour court in its discretion. I feel that this amount should be treated as a solatium on humanitarian principles for apparent overtime. This extra duty performed is *res ipsa loquitur*. The right to peaceful and undisturbed sleep without fear of being visited by personal harm in the morning, I should imagine, is in the nature of a fundamental right protected by Article 21 of the Constitution of India. It is a biological necessity essential for health. A right encompassed or conferred by Article 21 cannot be waived even by consent or by any voluntary act. I would draw strength for this from **Olga Tellis *versus* Bombay Municipal Corporation (1).** The offending condition would also, to my mind, fall foul of the law as explained in **Central Inland Water Transport Corporation *versus* Brojo Nath Ganguly (2),** as opposed to public policy being an unconscionable and an unfair term in the contract of employment and violative of Section 23 of the Contract Act, 1872 when tested on the jurisprudential doctrine of distributive justice embodied in Article 39 of the Constitution.

(7) Mr. Sandhu, learned counsel for the appellant argued with vehemance to start with but in all fairness has not pressed the matter further and sees the wisdom in adopting such a course. Consequently, without going into the issues of pre-existing right or consent of the workman or that he laid claim for money after five years, I would dismiss this petition. The labour court would now disburse the amount lying with it to the respondent workman and call upon the appellant to make over the remaining amount as well expeditiously.

(8) The petition is accordingly dismissed.

P.S. Bajwa/J. Thakur

(1) 1985 (3) SCC 545
(2) 1986 (3) SCC 156