Before Jaswant Singh & Sant Parkash, J.

JYOTI AND OTHERS—*Appellants*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

LPA No.40 of 2021

January 14, 2021

(A) ***Industrial Disputes Act, 1947 – S. 2(j) and (s) – Contractual employees –Retrenchment – Alternative remedy under Industrial Dispute Act, 1947 – Held, Appellants are working as Data Entry Operators under Haryana Shehari Vikas Pradhiaran, which is not 'Housing apartment', but statutory authority constituted by State Legislature – Prima facie, appellants covered under definition of "workmen" – Therefore, order passed by Single Judge relegating appellants to alternative remedy under Industrial Dispute Act, 1947 upheld.***

Held that, in the instant case, it is seen that learned Single Judge has relegated the appellants under the ID Act, 1947 which has been opposed by them before us only on the ground of not being covered under the definition of "workmen" by relying upon the judgment of Hon'ble Supreme Court in MGT Som Vihar's case (supra). A bare perusal of the Judgment shows that the issue involved in the said case and the issue raised in the present case are completely different. The Hon'ble Supreme Court had held that a person working in an apartment is not covered under the definition of "workmen" as defined under the ID Act, 1947 and therefore award passed by Tribunal under the ID Act was incorrect. In the present case, the appellants are working as Data Entry Operators under respondent No.2-HSVP, which is not a 'Housing apartment', but a statutory authority constituted by State Legislature. That apart, no other basis has been shown, even prima facie, that appellants are not covered under the definition of "workmen". Thus, the reliance placed upon the judgment by appellants is totally misconceived and therefore, the argument is rejected.

(Para 7)

(B) ***Constitution of India, 1950 – Arts. 14 and 16 – Retrenchment – Right of contractual employees to seek continuation of services – Held.***

(i) Principle of 'last come first go' applicable to case of retrenchment

but not in case where initial appointment of employee is against public policy or employer finds work and conduct of employee to be not satisfactory;

(ii) In case work and conduct of employee not found to be satisfactory, then services of such employee, although being a senior, pales into insignificance and services of such employee can be terminated in accordance with terms and conditions of such employee;

(iii) Contractual/temporary employee cannot claim any protection against termination so long as action taken by authority not shown to be vitiated by infirmities viz. illegality, perversity, unreasonableness, unfairness or irrationality and so long as the action is not demonstrably defiant of logic;

(iv) Renewal of contract cannot be sought by temporary/contractual employee as matter of right as its renewal of employment depends upon perception of management as to usefulness of employee and need for incumbent in position held by such employee.

Thus, since initial appointment of appellants was against public policy, therefore, services rightly terminated by employer - Futile exercise to relegate appellants to remedy under Industrial Disputes Act, 1947 when it is apparent that appointments are illegal, being directly in conflict with public policy.

Thus, from a cumulative reading of all the judgments referred hereinabove, inter alia, following principles which are relevant to the facts of the case can be culled out:-

(i) principle of 'last come first go' is applicable to a case of retrenchment but not in the case where initial appointment of an employee is against public policy or the employer finds the work and conduct of an employee to be not satisfactory;

(ii) in case the work and conduct of an employee is not found to be satisfactory, then the services of such an employee, although being a senior, pales into insignificance and the services of such an employee can be terminated in accordance with the terms and conditions of such employee;

(iii) a contractual/temporary employee cannot claim any protection against termination so long as the action taken by the authority is not shown to be vitiated by the infirmities viz. illegality, perversity, unreasonableness, unfairness or irrationality and so long as the action is not demonstrably defiant of logic;

(iv) renewal of contract cannot be sought by a temporary/contractual employee as a matter of right as its renewal of employment depends upon the perception of management as to the usefulness of the employee and the need for an incumbent in the position held by such employee.

(Para 17)

Further held that, in the present case, as noted hereinabove, since the initial appointment of appellants was against public policy, therefore, their services were rightly terminated by the respondent-employer.

(Para 18)

Sandeep Sharma, Advocate
for the appellants.

JASWANT SINGH, J.

(1) The appellants, four (4) in number, have filed the present appeal, being aggrieved against the order dated 06.01.2021 passed by learned Single Judge, who has disposed of the writ petition with a liberty to the writ petitioners to avail their alternative remedy of applying for a reference under the Industrial Disputes Act 1947.

(2) Learned counsel for the appellants has argued that the appellants were working as Data Entry Operators in the office of Haryana Shehari Vikas Pradhiaran (for short 'HSVP') since 2018 and 2019 and their services have been wrongly dispensed with by ignoring the principle of "Last come first go" as a few of their juniors are still working in the department. Reliance in this regard has been placed upon the judgments passed by a Division Bench of this Court in ***LPA No. 170 of 2010*** titled as **Indian Hardware Industries** versus **Presiding Officers** as also passed in CWP No. 15454 of 2012 titled as "Farzand Ali Vs State of Punjab".

(3) It is further argued that learned Single Judge has wrongly relegated them under the Industrial Disputes Act, 1947 as they do not come within the definition of "workmen". Reliance in this regard has been placed upon the judgment passed by Hon'ble Supreme Court in **Civil Appeal No. 6565 of 1997** titled as ***MGT Som Vihar Apt. Owerns' Housing and Maintenance Society Ltd*** versus ***Workmen C/o Indian Engg. Genl. Mazdoor***[1], whereby it has been held that housing

[1] 2002(9) SCC 652

sectors are not covered under the Industrial Disputes Act.

(4) We have heard learned counsel for the appellants at length and have also scrutinized the paper book. According to us following two issues arise for our consideration:

1. WHETHER ORDER PASSED BY LD. SINGLE JUDGE RELEGATING THEM TO ALTERNATIVE REMEDY UNDER INDUSTRIAL DISPUTE ACT, 1947 WAS CORRECT?
2. RIGHT OF CONTRACTUAL EMPLOYEES LIKE APPELLANTS TO SEEK CONTINUATION OFTHEIR SERVICES:

ISSUE No. 1.

(5) The concept of workman is central to the concept of an industrial dispute as an industrial dispute can be raised either by a "workman" or an "employer." Since the Industrial Disputes Act, 1947 (for short **"ID Act"**) is a piece of beneficial legislation, the courts have enlarged the scope and applicability of this Act by giving wide interpretation to the term "workman." Section 2(s) defines workman as 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**, terms of employment be express or implied and includes any such **person who has been dismissed, discharged or retrenched in connection with, or as a consequence of dispute**. It excludes persons employed in army/Navy/Air Force/Police and those employed in *mainly managerial or administrative, supervisory capacity* and drawing wages of more than Rs. 6500.

(6) The basic purpose of statute is to settle all the disputes that arise amongst the parties in an expeditious manner after taking in evidence from both the sides. Further, the proceedings being summary in nature, rigors of Evidence Act are not as strictly applicable as they are applicable to a civil suit. Still further, proceedings under the ID Act, 1947 culminate into an award at a much faster pace as compared to civil suits filed for similar claims. Thus, any person who falls within the definition of "workmen" under Section 2(s) of the ID Act, 1947 and is working in an Industry as defined under Section 2(j) of ID Act, 1947 must be relegated to their alternative efficacious remedies.

(7) In the instant case, it is seen that learned Single Judge has

relegated the appellants under the ID Act, 1947 which has been opposed by them before us only on the ground of not being covered under the definition of "workmen" by relying upon the judgment of Hon'ble Supreme Court in ***MGT Som Vihar's*** case (supra). A bare perusal of the Judgment shows that the issue involved in the said case and the issue raised in the present case are completely different. The Hon'ble Supreme Court had held that a person working in an apartment is not covered under the definition of "workmen" as defined under the ID Act, 1947 and therefore award passed by Tribunal under the ID Act was incorrect. In the present case, the appellants are working as Data Entry Operators under respondent No.2-HSVP, which is not a 'Housing apartment', but a statutory authority constituted by State Legislature. That apart, no other basis has been shown, even *prima facie*, that appellants are not covered under the definition of "workmen". Thus, the reliance placed upon the judgment by appellants is totally misconceived and therefore, the argument is rejected.

RIGHT OF APPELLANTS TO SEEK CONTINUATION OF THEIR SERVICES:

(8) We would have ordinarily left this issue open for decision in case the same was not pressed before us, but in view of the fact that the appeal has been pressed on merits as well, we would like to adjudicate the issue of locus of contractual employees seeking directions from the court for continuation of their jobs as well.

(9) A bare perusal of the order dated 29.10.2020 **(Annexure P-16)** impugned in the writ petition reveals that the services of writ petitioners and other similarly placed employees have been dispensed with as their initial appointment was not as per law since neither any advertisement was published nor any public notice was issued before accepting the application forms of writ petitioners for the post of Data Entry Operators. Considering these facts, to which there was no rebuttal by the writ petitioners, the authority decided to dispense with the services of writ petitioners. This basic fact is not denied by the writ petitioners either in their writ petition or in the grounds of appeal taken before us.

(10) Time and again Hon'ble Supreme Court has deprecated practice of appointment of employees on *ad hoc* or contractual basis because it amounts to back door entry, nevertheless contractual appointments cannot be prohibited in view of administrative exigencies, nature of work undertaken and urgent need for employees.

(11) In case of appointment against public post, authorities are bound to comply with mandate of Articles 14 & 16 of the Constitution which includes proper advertisement of the post; testing on rational selection process by Public Service Commission or Staff Selection Commission or committee duly appointed under statutory Recruitment Rules & Regulations governing the post and compliance of all mandatory & procedural formalities. It is well known fact that in case of contractual appointments or appointments for limited tenure which may or may not be extended, very few people apply and many competent people do not apply. Inspite of said ground reality, the State Authorities as well as private employers opt for contractual appointments because services of contractual employees can be terminated as per terms and conditions of contract e.g. completion of tenure of contract or completion of project or prior notice or salary in lieu of notice. Every employer wants competent and honest men of integrity. By way of appointment on contract basis, employer gets opportunity to revisit its selection process and search better employees. If an employer is satisfied with its existing contractual employees, there is no need to go for fresh appointments. In case an employer feels that he needs and may get better employees, he has every right to go for search of fresh employees instead of continuing services of old employees.

(12) It is settled principle of service jurisprudence dealing with contractual and *ad hoc* service that equity can exist only so long as it does not conflict with statutory provisions under the law. In the present case it is apparent that the writ petitioners were appointed without any advertisement or public notice and thus their entry was *per-se* illegal. Consequently, the authority concerned was well within its right to dispense with the services of appellants. Reference in this regard can be made to judgment passed by Hon'ble Supreme in ***UPSC*** versus ***Girish Jayanti Lal Vaghela***[2] ***whereby at page 494 in Para 21***, the Hon'ble Supreme Court has held as under :

> " **21**. It is neither pleaded nor is there any material to show that the appointment of Respondent 1 had been made after issuing public advertisement or the body authorised under the relevant rules governing the conditions of service of Drugs Inspectors in the Union Territory of Daman and Diu had selected him. His contractual appointment for six

[2] 2006(1) S.C.T. 621: (2006) 2 SCC 482

months was dehors the rules. The appointment was not made in a manner which could even remotely be said to be compliant with Article 16 of the Constitution. The appointment being **purely contractual, the stage of acquiring the status of a government servant had not arrived. While working as a contractual employee Respondent 1 was not governed by the relevant service rules applicable to Drugs Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the benefit of general provident fund nor was he entitled to any pension which are normal incidents of a government service. Similarly, he could neither be placed under suspension entitling him to a suspension allowance nor could he be transferred.**

Some of the minor penalties which can be inflicted on a government servant while he continues to be in government service could not be imposed upon him nor was he entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that Respondent 1 was a government servant."

(Emphasis Supplied)

(13) Even otherwise, if a fresh contract contemplated is to secure better talent with higher qualifications or seek a fresh batch of contractual employees having more set of skills and enthusiasm, the employer will always have the authority to decide on what is best for improving its functioning with better qualifications which can be need based and based on work requirement. There cannot be a blanket ban that the fresh recruitment of contractual employees itself must stop or the replacement by higher qualified/better qualified contractual employees cannot be made.

(14) The argument raised by learned counsel for appellants that the principle of "last come first go" should have been applied is completely misconceived in view of the impugned order dated 29.10.2020 **(P-16)** passed by the authority. Even otherwise, the afore-referred principle is applicable only in the cases where an employer is retrenching the services. Present case is not of retrenchment but of removal on account of illegality committed by the department at one point of time.

(15) The aforestated principle of "last come first go"has been dealt by the Hon'ble Supreme Court in ***State of U.P.*** versus ***Kaushal Kishore Shukla***[3] ***at page 697*** where it has held as under :

> **" 5**. …..xxxxxx The High Court held that since junior persons to the respondent in service were retained, the order of termination was rendered illegal. In our opinion, the principle of 'last come first go' is applicable to a case where on account of reduction of work or shrinkage of cadre retrenchment takes place and the services of employees are terminated on account of retrenchment. **In the event of retrenchment the principle of 'last come first go' is applicable under which senior in service is retained while the junior's services are terminated.But this principle is not applicable to a case where the services of a temporary employee are terminated on the assessment of his work and suitability in accordance with terms and conditions of his service if out of several temporary employees working in a department a senior is found unsuitable on account of his work and conduct, it is open to the competent authority to terminate his services and retain the services of juniors who may be found suitable for the service.**
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> **Such a procedure does not violate principle of equality, enshrined under Articles 14 and 16 of the Constitution. If a junior employee is hard-working, efficient and honest his services could not be terminated with a view to accommodate the senior employee even though he is found unsuitable for the service. If this principle is not accepted there would be discrimination and the order of termination of a junior employee would be unreasonable and discriminatory. On the admitted set of facts, the order of termination in the instant case, could not be rendered illegal or unjustified on the ground of juniors being retained in service. The view taken by the High Court is not sustainable in law.**
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> Xxxxxx
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> 7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving

[3] 1991(1) S.C.T. 760 : (1991) 1 SCC 691

him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article

311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. "

(Emphasis Supplied)

(16) Similarly, while dealing with termination of a contractual employee, Hon'ble Supreme Court in the case of ***Gridco Ltd*** versus ***Sri Sadananda Doloi***[4], after noticing its earlier decisions has concluded in Para 26 to 28 as under:-

" 26. A conspectus of the pronouncements of this court and the development of law over the past few decades thus show that **there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State.** Remedy for a breach of a

[4] 2012(1) S.C.T. 563 : 2011(15) SCC 16

contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. **So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge.**

27. Applying the above principles to the case at hand, we have no hesitation in saying that there is no material to show that there is any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. The Regulations governing the service conditions of the employees of the Corporation, make it clear that officers in the category above E-9 had to be appointed only on contractual basis.

28. It is also evident that **the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him**. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of

any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an over-sympathetic or protective approach towards the latter. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise. "

(Emphasis Supplied)

(17) Thus, from a cumulative reading of all the judgments referred hereinabove, *inter alia*, following principles which are relevant to the facts of the case can be culled out:-

(i) principle of 'last come first go' is applicable to a case of retrenchment but not in the case where initial appointment of an employee is against public policy or the employer finds the work and conduct of an employee to be not satisfactory;

(ii) in case the work and conduct of an employee is not found to be satisfactory, then the services of such an employee, although being a senior, pales into insignificance and the services of such an employee can be terminated in accordance with the terms and conditions of such employee;

(iii) a contractual / temporary employee cannot claim any protection against termination so long as the action taken by the authority is not shown to be vitiated by the infirmities *viz.* illegality, perversity, unreasonableness, unfairness or irrationality and so long as the action is not demonstrably defiant of logic;

(iv) renewal of contract cannot be sought by a temporary / contractual employee as a matter of right as its renewal of employment depends upon the perception of management as to the usefulness of the employee and the need for an incumbent in the position held by such employee.

(18) In the present case, as noted hereinabove, since the initial

appointment of appellants was against public policy, therefore, their services were rightly terminated by the respondent — employer.

(19) In view of the facts and authoritative pronouncements of the Hon'ble Supreme Court in aforementioned cases, we find that the **present appeal** as well as the writ petition are without any merit, and therefore, are ordered to be **dismissed,** as it would be a futile exercise to relegate the appellants to a remedy under the Industrial Disputes Act, 1947 when it is apparent that their appointments are illegal, being directly in conflict with public policy.

(20) Since the main appeal has been dismissed, no orders are required to be passed in the pending miscellaneous application(s), if any, and the same stand(s) disposed of.

Ritambhra Rishi