

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

+ LPA 1114/2005

MANAGEMENT OF APPAREL
EXPORT PROMOTION COUNCIL

..... Appellant

Through: Mr. A.P. Dhamija, Advocate with
Mr. J.P. Singh, Advocate.

versus

SURYA PRAKASH

..... Respondent

Through: Mr. Arun Kumar Srivastava,
Advocate.

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Reserved on : 30th November, 2010

Date of Decision : 07th January, 2011

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J

1. Present Letters Patent Appeal has been filed challenging the judgment and order dated 24th April, 2005 passed in W.P.(C) 830/2003 whereby the learned Single Judge while allowing the writ petition has remanded the matter back to the Labour Court for readjudication.

2. The brief facts of the present case are that the respondent-workman was working with the appellant as a Peon w.e.f. 12th September 1989 and worked continuously without break till 18th June, 1990. The workman initially worked for the period from 12th September, 1989 to 07th May, 1999, as a daily wager and thereafter, on

08th May, 1990 he was issued an appointment letter. The Clause 2 of the appointment letter reads as under :

“You will be on probation for a period of one year which may be extended at the absolute discretion of the Management. On satisfactory completion of the period of probation, your services will be confirmed in writing.”

3. The appellant vide letter 18th June, 1990 terminated the services of respondent. The matter was referred to the Labour Court wherein it was held that the termination of the respondent workman was not retrenchment but was governed under the exception to the definition of retrenchment under Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (hereinafter referred to as “Act”). The said section is reproduced hereinbelow:-

“2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include –

(a) voluntary retirement of the workman; or

xxx

xxx

xxx

2(bb) termination of the service of the workman as a result of the non-removal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.”

(emphasis supplied)

4. The relevant portion of the award passed by the Labour Court is as under:-

“9. The termination of services of the Claimant was w.e.f. 19.6.90 under Clause III made vide letter Ext.

WW1/2. Since the Claimant himself has relied upon the letter of appointment Ext. WW1/1, he cannot escape from the services conditions as were imposed against him vide Clause II as above. It is not a case of the Claimant that appointment letter Ext. WW1/1 was issued as a colour-ful exercise so as to terminate his service and to violate with impunity the mandate of Section 25-F of the I.D. Act. It being so, the termination of the services of the Claimant vide letter Ext. WW1/2 is not at all a case of retrenchment so as to call for compliance of section 25-F of the I.D. Act. The termination of the Claimant is government under exception to Section 2(oo) of the I.D. Act.”

5. Being aggrieved, the respondent-workman filed a writ petition being W.P.(C) No.830/2003 whereby the learned Single Judge while allowing the writ petition remanded the matter back to the Labour Court. Hence this appeal.

6. Mr. A.P. Dhamija, learned counsel for the appellant submitted that the workman was appointed on probation of one year as per the appointment letter dated 08th May, 1990 and as his termination was during the probation period, it did not amount to retrenchment under Section 2(oo) of the Act. Mr. Dhamija further submitted that the workman did not work for requisite 240 days as daily wager which is mandatory to get the benefit under Section 25-F of the Act. To emphasis his submission, he placed reliance upon the judgments in ***Sur Enamel & Stamping Works (P) Ltd. Vs. Their Workmen, (1964) 3 SCR 616, Escorts Ltd. Vs. Presiding Officer and Anr., (1997) 11 SCC 521 and Kalyani Sharp Indi Ltd. Vs. Labour Court No. 1, Gwalior & Anr., (2002) 9 SCC 655.***

7. Mr. Arun Kumar Srivastava, learned counsel for the respondent submitted that the appointment letter was a colourable exercise of power done with malafide intent to terminate the respondent's services.

8. Having heard the learned counsel for the parties and perused the record, we find that the respondent-workman worked in the capacity of a daily wager from the period starting 12th September, 1989 upto 07th May, 1990 and thereafter, he worked as a probationer w.e.f. 08th May, 1990. To put the issue in right perspective, it is observed that from 8th May, 1990 onwards the terms and conditions of service of the respondent-workman were governed as per clauses contained in the letter of appointment dated 8th May, 1990. The respondent-workman's services were terminated vide letter dated 18th June, 1990 during the probation period w.e.f. 19th September 1990 under Clause 3 of the appointment letter which reads as under-

“3. Your services can be terminated by giving 24 hours notice during the period of probation. After confirmation, your services may be terminated by giving one month's notice or one month's salary in lieu thereof or in case you desire to leave the services of the Council you shall have to give one month's notice in writing.”

9. The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularised only after satisfactory completion of the probation period. These terms were accepted by the workman and were never challenged before the Tribunal or writ court. In fact, the

respondent-workman has not led any evidence in the Courts below that the appointment letter was issued with malafide intent to terminate his services.

10. In our considered opinion, the termination of the services of the workman in accordance with the condition mentioned in the employment contract clear fall within the domain of exception to definition of retrenchment as provided in clause (bb) of Section 2(oo) of the Act as reproduced above. We may refer with profit to a judgment in *Escorts Ltd. Vs. Presiding Officer and Anr., (1997) 11 SCC 521* wherein it has been held as under:-

“4. We do not consider it necessary to go into the question whether the workman had worked for 240 days in a year and whether Sundays and other holidays should be counted, as has been done by the Labour Court, because, in our opinion, Shri Shetye is entitled to succeed on the other ground urged by him that the termination of services of the workman does not constitute retrenchment in view of clause (bb) in Section 2(oo) of the Act. Clause (bb) excludes from the ambit of the expression “retrenchment” as defined in the main part of Section 2(oo) “termination of the services of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein”. The said provision has been considered by this Court in M. Venugopal v. Divisional Manager, LIC. The appellant in that case had been appointed on probation for a period of one year from 23-5-1984 to 22-5-1985 and the said period of probation was extended for further period of one year from 23-5-1985 to 22-5-1986. Before the expiry of the said period of probation, his services were terminated on 9-5-1986. It was held that since the termination was in accordance with the terms of the contract though before the expiry of the period of probation it fell within the ambit of Section 2(oo)(bb) of the Act and did not constitute retrenchment. Here also the services of the workman were terminated on 13-2-1987, as per the terms of the contract of employment contained in the appointment letter dated 9-1-1987 which enabled the appellant to terminate the services of the workman at any stage without assigning any reason. Since the services of the workman were terminated as per the terms of the contract of employment, it does not amount to retrenchment under Section 2(oo) of the Act and the Labour

Court was in error in holding that it constituted retrenchment and was protected by Sections 25-F and 25-G of the Act.”

11. Further, the provisions of Section 25-F of the Act are available to an employee who has put in continuous service for one year. Section 25-B contains a notional definition that once 240 days service has been put in by the workman in the preceding twelve months it will be deemed to be continuous service for a year. We are of the view that once the workman was appointed and was put on probation for a period of one year, this appointment amounts to a fresh appointment. The days put in by the workers on his probation cannot be considered for counting 240 days for the concept of continuous service. The Supreme Court in ***Sur Enamel and Stamping Works Ltd. v. Workmen***, (1964) 3 SCR 616 held that once an employee is reappointed, this reappointment amounts to fresh appointment and the period of employment prior to such reappointment cannot be considered in computing the days for the purposes of Section 25F the Act. The relevant portion of judgment in ***Sur Enamel*** (supra) reads as under :-

“ On the plain terms of the section only a workman who has been in continuous service for not less than one year under an employer is entitled to its benefit. “Continuous service” is defined in Section 2(eee) as meaning uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal or a lock-out or a cessation of work which is not due to any fault on the part of the workman. What is meant by “one year of continuous service” has been defined in Section 25-B. Under this section a workman who during a period of twelve calendar months has actually worked in an industry for not less than 240 days shall be deemed to have completed one year of continuous service in the industry. Nagen Bora and Monoharan were both reappointed on 10-3-1959. Their services were terminated on 15-1-1960. Thus their total period of employment was less

than 11 months. It is not disputed that period of their former employment under the company prior to their reappointment on 10-3-1959 cannot be taken into consideration in computing the period of one year, because it is common ground that their reappointment on 10-3-1959 was a fresh appointment. The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25-B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less than 12 calendar months and, next that during those 12 calendar months had worked for not less than 240 days. Whereas in the present case, the workmen have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25-B would not be satisfied by the mere fact of the number of working days being not less than 240 days.”

(emphasis supplied)

12. In fact, the Supreme Court in ***Haryana State Cooperative Supply Marketing Federation Limited Vs. Sanjay, (2009) 14 SCC 43*** has held that when a casual employee is employed in different establishments, may be under the same employer, the concept of continuous service cannot be applied.

13. Consequently, the provisions of Section 25-F of the Act are not available to the respondent-workman. Accordingly, the present appeal is allowed and the impugned order is set aside.

MANMOHAN, J

CHIEF JUSTICE

JANUARY 07, 2011