

\$~R-185

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 7875/2001**

Decided on 13th November, 2013

M/S AIR INDIA LTD. Petitioner
Through: Ms. Bhavna Dhami, Adv.

versus

MAHINDER SINGH & ANR. Respondents
Through: Ms. Seema Salwan and Mr. R.K.
Saini, Advs.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

(JUDGMENT)

A.K. PATHAK, J (ORAL)

1. Petitioner-Management has challenged the Award dated 19th July, 2001 passed by the Industrial Tribunal-III, Delhi whereby petitioner has been directed to reinstate the respondent no.1-Workman with continuity of service and full back wages.

2. Industrial dispute raised by the Workman was referred to Industrial Tribunal by the Secretary (Labour), Government of NCT of Delhi, for adjudication in following terms :-

“Whether the termination of the services of Sh. Mahender Singh is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

3. Workman alleged that he was working with the Management from 29th July, 1986 as a Driver. He was eager to form a trade union in view of the unfair labour practices adopted by the Management. He protested against the personal use of official car by the brother of Managing Director at which the Managing Director got annoyed and in order to victimize him Management transferred him from Palam Airport to Safdurjung Airport and thereafter again to Palam Airport. Ultimately, his services were illegally terminated on 10th August, 1988. Demand notice dated 9th September, 1988 served on the Management by him was replied by the Management vide letter dated 19th September, 1988 but he was not taken back in service. His termination was stigmatic. He prayed that he be reinstated with continuity of service and full back wages.

4. In the written statement, it was not denied that workman had been working from 29th July, 1986. However, it was denied that his services were terminated illegally. It was alleged that workman was transferred due to administrative exigencies and not by way of punishment. Due to his

unsatisfactory performance during the probationary period his service was terminated. It was denied that termination was stigmatic. It was alleged that Workman was not entitled to reinstatement. A preliminary objection was taken to the effect that Management was owned by the Govt. of India, therefore, appropriate Government was Central Government, thus, claim of Workman was not maintainable.

5. In rejoinder, Workman denied the allegations levelled in the written statement and reaffirmed the averments made in the statement of claim. Workman claimed that his performance was good, inasmuch as, no enquiry was held by the Management to enquire about his conduct.

6. On 13th May, 1992 following issues were framed by the Industrial Adjudicator :-

1. Whether the reference is without jurisdiction and incompetent as alleged in the W/S?

2. As per terms of reference.

7. Parties were afforded opportunity to lead evidence. Upon scrutiny of evidence adduced by the parties, Industrial Adjudicator has held that Workman had completed 240 days of regular service before issuing of letter of appointment whereby he was put on probation. Appointment letter

Ex.MW2/1 had been issued just to deprive the Workman of his regular service of 240 days and consequential benefits. Management had failed to prove misconduct of Workman. On the contrary, from the statement of Workman it could be safely inferred that Workman was victimised for his raising objections about misuse of official car by the brother of Managing Director. It was concluded that since Workman had completed 240 days of service, Section 25-F of the Industrial Disputes Act, 1947 ('the Act', for short) was attracted for non compliance of Section 25-F the termination was bad in law. Management was directed to reinstate the workman.

8. Facts, as unfolded, are that Workman was initially engaged on temporary basis as a 'Driver' between 29th July, 1986 and 29th July, 1987. One of such letter placed on record indicates that he was engaged on contract for fixed period(s). Vide letter of appointment dated 29th June, 1987 he was appointed on the post of 'Driver' pursuant to his application and subsequent interview in a regular pay scale of Rs.480-14-620-16-700-18-754/-. This letter of appointment was accepted by the Workman on 11th August, 1981 and in token of acceptance he appended his signatures thereon. He was put on probation for a period of one year initially with further stipulation that such probation period may be extended or alternatively his

services may be terminated if performance was not found satisfactory. The relevant Clause 4, as contained in the appointment letter dated 29th June, 1987, reads as under :-

“You will be on probation for a period of one year initially. If during such probationary period, your services are not found satisfactory, the period of probation may be extended or, alternatively, your service may be terminated.”

9. Vide order dated 10th August, 1988 probation of the Workman was not confirmed and his services were terminated. Relevant it would be to refer the termination order at this stage, which reads as under :-

From:

COMPANY SECRETARY
& CHIEF MANAGER CORPORATE
AFFAIRS VAYUDOOT LTD.(HQRC)
SAFDARJUNG AIRPORT
NEW DELHI – 110003

To MR. MOHINDRA SINGH
VAYUDOOT NEW DELHI

Ref. PF/HQ/Pers./2111

10-8-88

This has reference to your appointment letter No. PF/HQ/Pers/1489 dt. 29-6-87 for the post of Driver.

As per the clause no. 4 of the above mentioned letter, due to unsatisfactory performance your services are hereby being terminated with immediate effect.

SD/

(AMOD SHARMA)

CC: RM (HR)

SUPERVISOR (M.T.)

PERSONAL FILE

10. Before passing the aforesaid order appraisal report Ex. MW3/1 was considered. A perusal of aforesaid order shows that workman was terminated in terms of Clause 4 of the service as contained in the appointment letter dated 29th July, 1981 duly accepted by the Workman on 11th August, 1987 and is not stigmatic. Workman was terminated during the probation period since his performance was found unsatisfactory. Workman was not terminated by way of punishment. Mere use of words 'unsatisfactory performance' will not make the termination order stigmatic. In Muir Mills Unit of N.T.C. (U.P.) Ltd. vs. Swayam Prakash Srivastava & Anr. 2007 II AD (S.C.) 32, on the expiry of probation period of Workman a letter was issued to him stating therein that his performance was found unsatisfactory and as such he had failed to complete the probationary period

successfully, thus, his service was being terminated. Use of words 'performance not being found satisfactory' was not taken as stigmatic. In State of Punjab vs. Bhagwan Singh (2002) 9 SCC 636 Supreme Court held that even if the termination order of the probationer refers to the performance being 'not satisfactory', such an order cannot be said to be stigmatic and the termination would be valid. In Abhijit Gupta vs. S.N.B. National Centre, Basic Sciences and others 2006 V AD (S.C.) 525 petitioner was appointed as an 'Administrative Officer'. In the appointment letter it was made clear that petitioner was being appointed on probation for a period of one year. His probation period was extended because of his unsatisfactory performance from time to time, inasmuch as, letters were written to him intimating that his performance was not good. Finally by the letter dated 7th April, 1998 he was informed that his services were 'unsatisfactory' in the areas of drive, initiative, promptness and leadership' and that despite advised verbally and through letter, what were deficiencies in his work he had shown no imprudent. His attendance, office work and attention to the academic work and the affairs of the guest house were also unsatisfactory. He was informed that his probation period was not extended on the expiration of his probation period on 9th April, 1999 without further

extension. Petitioner challenged his termination on the ground that it was stigmatic and by way of punishment for alleged misconduct. Supreme Court did not find the letter punitive in nature and considered it to be termination as a consequence of non confirmation of probation period.

11. In Chaitanya Prakash and Another vs. H. Omkarappa 2010 II LLJ 146 (SC), Supreme Court held thus :-

“It is no longer res integra that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in Abhijit Gupta vs. S.N.B. National Centre, Basic Sciences (supra), wherein also a similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be satisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The

Supreme Court negative the said contention and upheld the order of termination.

(Emphasis supplied by this court)

12. Accordingly, I am of the view that the impugned order is not stigmatic and termination of Workman is simplicitor in terms of Clause 4 of the appointment letter.

13. Learned counsel for the Workman has vehemently contended that Workman had completed 240 days of service in the year prior to the date of his termination, thus, compliance of Section 25-F of the Act was mandatory, irrespective of the fact that Workman was a probationer. Reliance has been placed on Delhi Cantonment Board vs. Central Govt. Industrial Tribunal & Ors. 129 (2006) Delhi Law Times 610 (DB). In the said case a Division Bench of this Court, in the context of definition of 'Workman' as contained in Section 2(s) of the Act, held thus "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".

14. I do not find much force in the above contention of learned counsel. In Mahesh Chand vs. Management of M/s LE Meridien 2013 LLR 899, a Single Judge of this Court has considered Delhi Cantonment (supra) and has held thus :-

“34. From the above, it would be observed that the Supreme Court has consistently taken the view that the termination of the services of a probationer in terms of a stipulation contained in the contract of employment does not tantamount to ‘retrenchment’ within the meaning of Section 2(oo) of the Act, as it is covered by clause (bb) of Section 2(oo).

35. Since the judgment in Punjab Land Development (supra) is not an authority for the proposition decided in Kalyani Sharp India Ltd. (supra), Escorts Limited (supra), Ms. Venugopal (supra), Management of Apparel Export Promotion Council (supra), the ratio of the judgment in Punjab Land Development (supra) does not render the subsequent decisions referred to above, per incuriam. It has already been noticed, Delhi Cantonment Board (supra) does not refer to the judgments Kalyani Sharp India Ltd. (supra), Escorts Limited (supra), M. Venugopal (supra), Management of Apparel Export Promotion Council (supra). I, therefore, prefer to follow the view taken in Kalyani Sharp India Ltd. (supra) etc. over the view of the Division Bench in Delhi Cantonment Board (supra).”

(Emphasis laid by this court)

15. Relevant it would be to refer to Section 2(oo)(bb) of the Act at this stage, which reads as under :-

Section 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)

(b)

(bb) termination of the service 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; or

(c)

16. In *M. Venugopal vs. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and Anr.* (1994) 2 SCC 323 service of the Workman was terminated during the extended probation period on account of non-fulfilment of the condition of achieving minimum business target stipulated in the order of appointment. Supreme Court held that termination of services of the Workman was not deemed to be “retrenchment” within the meaning of Section 2(oo) of the Act even in respect of the period prior to introduction of clause (bb) in Section 2(oo) of the Act. Thus, non compliance of the requirements of Section 25-F was held not to vitiate or nullify the order of termination of Workman. In *Escorts Limited vs. Presiding Officer & Anr.* (1997) 11 SCC 521, Workman was appointed on

temporary basis for a period of two months. The terms of appointment enabled the employer to terminate the services at any stage without assigning any reason. The Supreme Court held that the termination of services under the said terms even though effected before the expiry of the specified period, did not amount to retrenchment. Consequently, Section 25-F and 25-G of the Act did not come into play. In *Kalyani Sharp India Ltd. vs. Labour Court No.1 Gwalior & Anr.* (2002) 9 SCC 655, Workman was terminated during the period of probation. The Labour Court as well as the High Court took a view that termination amounted to retrenchment for non-compliance of Section 25-F of the Industrial Disputes Act. Supreme Court reversed the views of the Labour Court and the High Court and observed thus :

“6 The order of employment itself clearly sets out the terms thereafter which makes it clear that the facility of providing training to him could be put to an end at any time without assigning any reason whatsoever and his services could be regularised only on satisfactory completion of his training. If these clauses are read together, it is clear he was under probation during the relevant time and if his services are not satisfactory, the same could be put an end to. It is clear that the respondent had been appointed as a Trainee Service Technician and for a period he had to undergo the training to the satisfaction of the appellant and if his work was not satisfactory during that period the facility could be withdrawn at any time

and he would be regularised only on completion of his training. Thus the respondent's services were terminated before expiry of the probationary period. In such a case, question of issue of notice before terminating the service as claimed by the respondent does not arise. Escorts case [(1997) 11 SCC 521 : 1998 SCC (L&S) 235] is identical with the present case. Following the said decision and for the reasons stated therein these appeals are allowed. The order made by the High Court affirming the award made by the Labour Court is set aside and the claim made by the respondent is dismissed.”

17. In view of the Supreme Court judgments governing the field it can be safely culled out that termination of service of a probationer in terms of the stipulation contained in the contract of employment does not tantamount to “retrenchment” within the meaning of Section 2(oo) of the Act since it is covered by clause (bb) of Section 2(oo) of the Act. Thus, Section 25-F of the Act does not get attracted in such cases. M. Venugopal (supra), Escorts Limited (supra) and Kalyani Sharp (supra) have not been considered in Delhi Cantonment Board (supra), thus, this judgment of Division Bench cannot be preferred as against the settled legal proposition as laid down by the Apex Court. A learned Single Judge of this Court has already considered Delhi Cantonment (supra) in Mahesh Chand (supra) and has held that in case of termination of a probationer Section 25-F of the Act is not attracted in view of Section 2(oo)(bb) of the Act. I am in agreement with

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my learned brother on this point and am of the view that in case of termination of a probationer on account of non confirmation of probation due to unsatisfied performance would not amount to retrenchment in view of Section 2(oo)(bb) of the Act.

18. A Division Bench of this Court vide judgment dated 12th July, 2013 passed in LPA 472/2013 titled Satish Kumar vs. Delhi Fire Services, in somewhat similar circumstances, has taken similar view in the following manner :-

“From the above, it is clear that retrenchment means termination by the employer of the services of a Workman for any reason whatsoever “except those expressly included in the section”. For the point of time, when the Supreme Court was considering the cases before it, Section 2(oo)(bb) was not in vogue. However, the Supreme Court had noticed that provision because when the judgment was rendered, the amendment had been brought about and clause (bb) had been introduced. After examining the same and analysing it in detail, the Supreme Court came to the conclusion that every termination by an employer of the services of a Workman would amount to retrenchment except in those cases which were expressly excluded by the said Section 2(oo) of the said Act itself. Insofar as the present case of termination is concerned, we are of the opinion that it falls under the exception carved out in Section 2(oo)(bb) of the said Act inasmuch as the contract of employment of the appellant itself contained the stipulation

whereunder his services could be terminated without assigning any reason during the probation period.”

19. Respondent was on probation and his service has been terminated in view of his unsatisfactory performance in terms of Clause 4 of the appointment letter, thus, his termination does not amount to ‘retrenchment’ within the meaning of Section 2(oo) of the Act, thus, Industrial Adjudicator has committed a patent error of law in holding that termination was bad for non-compliance of Section 25 of the Act.

20. In the light of the above discussions, writ petition is allowed and impugned Award is set aside.

A.K. PATHAK, J.

NOVEMBER 13, 2013

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