

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

Judgment Reserved on February 07, 2014
Judgment Delivered on July 14, 2014

+ **W.P.(C) 5289/2010**

AEROFLOT RUSSIAN AIRLINES

..... Petitioner

Represented by: Mr. B.K.Singh with Mr. Abhishek
Kishore, Advocate

versus

MOHAN KUMAR SHARMA AND ANR.

..... Respondents

Represented by: Mr.Jitesh Pandey, Adv. for R-1
Ms.Vanessa Singh, Adv. for R-2

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO
V.KAMESWAR RAO, J.

1. The challenge in this writ petition is to the award dated May 31, 2010 passed by the Central Government Industrial Tribunal cum Labour Court-II, Karkardooma Courts ('Tribunal' in short) in I.D No.31/2007 whereby the Tribunal answered the reference in favour of the respondent No.1 namely Mohan Kumar Sharma by holding the action of the petitioner terminating/dismissing the services of respondent No.1 with effect from December 30, 2006 as unjustified and illegal and with a further direction of reinstatement with full back wages and continuity of service within one month from the date of publication of the award.
2. The industrial dispute was referred by the appropriate government for the adjudication on the following terms:

“Whether the action of the management of Aeroflot,

Russian International Airlines, New Delhi in dismissing the services of Sh. Mohan Kumar Sharma, Traffic Assistant w.e.f. 30.12.2006 is justified and legal? If not, to what relief is the concerned workman entitled?

3. It was the case of respondent No.1 herein before the Tribunal that he being well qualified and suiting the terms of the petitioner airlines besides passing the requisite test and formalities has been appointed as Traffic Assistant on probation for a period of six months with effect from May 01, 1988. The petitioner executed the service contract with him incorporating therein the terms and conditions with which both the parties have been bound. One such condition incorporated in the service contract between the parties was that the respondent No.1 was to retire after attaining the age of 60 years. According to him he successfully completed the probation period and was confirmed by the petitioner. His last drawn salary was Rs.24,000/- per month. His last tenure of service with the petitioner was Dispatcher/Traffic Assistant as has been mentioned in the salary sheet. According to him the employment was exclusively of clerical nature and he is the workman within the definition of 'workman' as defined in Section 2(s) of the Industrial Disputes Act, 1947 ('Act' in short). It was the case of the respondent No.1 that there was a discontentment amongst the employees due to unfair practices of the petitioner in the payment of increments, bonus, allowances and other facilities. He was deprived of medical facilities, insurance benefits, shift allowance, night allowances and authorized leaves etc. The union has been raising demands against the petitioner. The petitioner resorted to illegal and malicious means of pressurizing and coercing the employees to furnish fresh biodata along with photographs in order to make the regular employees as contract employees. The employees were

threatened, to sign the contract for fixed term appointment. It was the case of respondent No.1 that the petitioner was resorting to anti-labour practices and they used to subject the employees to sign blank papers, vouchers and agreements under duress with the threat of termination in case anyone refused to do so. The petitioner with mala fide intention of terminating the services of the respondent No.1 forced him to sign a fresh service contract of fixed term appointment of one year in the year 2002 after more than 18 years of dedicated service. It was also his case that his services were extended on year to year basis in 2002-03, 2003-04, 2004-05, 2005-06. Unfortunately after December 30, 2006, without assigning any reason whatsoever the petitioner wrongfully and illegally terminated his services by not extending the illegally fixed term of the service contract.

4. The petitioner contested the claim of the respondent No.1 by taking a stand that the claim petition is not maintainable as the respondent No.1 is not a 'workman' as he was employed in a managerial and clerical capacity with a salary of Rs.24,000/- per month. It was also the case of the petitioner that the respondent No.1 had never raised nor disputed the service contract executed in the year 2002 till December 31, 2006 when the same was not extended. The petitioner would take support of Clause 25.2 of the Service Contract which stipulated that after reduction of the scope of work and reorganization in Aeroflot the services of the respondent No.1 could be terminated by giving one month's notice or salary in lieu thereof. Further it is the case that pursuant to the termination an amount of Rs.3,34,242/- was given to the respondent No.1 vide account payee cheque dated December 29, 2006.

5. The Tribunal answered the reference by holding that the

respondent No.1 was a workman, the basis being, the respondent No.1 was performing clerical duties and there was no employee under him whose work he was required to supervise and report. Further the Tribunal also held that it is a well settled position of law that for determining the question whether a person employed in a industry is a workman or not, not only the nature of work performed by him but also the terms of appointment in the job performed are also relevant consideration and undue importance need not be given to the designation of employee.

6. On the issue of fresh service contract for a fixed term of one year got signed from the respondent No.1 in the year 2002, the Tribunal was of the view that the respondent No.1 was coerced to do so as it cannot be expected that the respondent No.1 would willingly and voluntarily sign such a contract for a fixed term of one year. The Tribunal held that the same amounts to be unfair labour practice and opposed to public policy and held the dismissal of the respondent No.1 as unjustified and illegal.

7. Mr.B.K.Singh, learned counsel for the petitioner would submit that the impugned award is perverse one and the Tribunal had not considered the relevant documents on record before passing the impugned award. He would state that the respondent No.1 has already received an amount of Rs.12,25,819/- under Section 17-B of the Industrial Disputes Act, 1947. He would also state that an amount of Rs.2,78,400/- stands deposited in this Court as 50 per cent of the back wages and as such he is not entitled to any relief. That apart on the finding of the Tribunal that the respondent No.1 is a workman, it was his submission that the respondent No.1 working as a 'Duty Manager' in terms of service contract dated January 01, 2002 was one of the senior

most manager who used to define roster, allocate duties and correspond with various government authorities viz Custom agency, Airport Authority, Delhi Police, CISF etc. He had also the power of initiating the departmental inquiries. His non-renewal of appointment after December 31, 2006 was primarily because of lack of work which is in terms of the appointment. He would state that the respondent No.1 had not filed any document to establish the nature of duties performed by him. He had filed the service contract which clearly reveals that he was working in managerial and administrative capacity being a 'Duty Manager'. He would state that mere filing of affidavit by respondent No.1 is at best depict the respondent No.1's own statement in his favour which cannot be regarded as sufficient evidence for any Court or Tribunal to come to a conclusion that respondent No.1 is a 'workman'. According to him, the respondent No.1 in his affidavit has stated that the dominant nature of his duties includes preparation of reports, schedule, allocation sheet (roster), flight message checklist, taking care of luggage and passengers baggage loading, unloading, counting of baggage etc. which ex-facie shows the duties being managerial and administrative in nature. In fact the learned counsel for the petitioner relied upon some of the portion of the respondent No.1's cross examination also which according to him would reveal that he was working in managerial and administrative capacity. He also relied upon the petitioner's witnesses deposition in support of its case, wherein MW2 has stated that there were two Duties Manager and approximately 90 employees working under their direct supervision and control. He also take support of affidavit of MW2 wherein he has spelt out the duties of respondent No.1. It is his case that the evidence of the petitioner's witnesses have remained unimpeached. He would rely upon

the following judgments:

- (a) 1994 (5) SCC 737 *H.R.Adyanthaya vs Sandoz (India) Ltd.*
- (b) 2004 (8) SCC 387 *Mukesh K Tripathi vs. Senior Divisional Manager, LIC & Ors.*
- (c) 2005 (3) SCC 232 *Management of M/s Sonapat Cooperative Sugar Mills Ltd. vs. Ajit Singh*
- (d) 2005 LAB.I.C 1500 *Inthru Noronha vs. Colgate Palmolive (India) Ltd. and others*
- (e) 2006 (92) DRJ 37 *Bennett Coleman & Co. Limited vs Yadeshwar Kumar*
- (f) 2007 (2) SCC (L&S) 781 *Ganga Kishan Sahkari Chini Mills Ltd. vs. Jaivir Singh*
- (g) 139 (2007) DLT 623 *Sunita Sharma vs. Sarika Gulati & Anr.*
- (h) 138 (2007) DLT 743 *Jasbir Kaur & Ors. vs. Rakesh Kumar & Anr.*
- (i) 2007 (93) DRJ 448 *K. George Chaco vs. The Secretary (Labour) & Anr.*
- (j) 2007 (93) DRJ 616 *Standing Conference of Public Enterprises vs. Government of NCT of Delhi, Delhi.*
- (k) *Standard Chartered Bank vs. Vandana Joshi & Anr. in W.P.(C) 979/2009*
- (l) *Photocopy of Black's Law Dictionary regarding definition of 'Manager'.*
- (m) 147 (2008) DLT 199 (DB) *V.K.Sharma vs. Govt. of NCT of Delhi & Anr.*

- (n) 2002 (3) SCC 25 *S.T.Hadimani vs. State of Karnataka and Anr.*
- (o) 2002 (7) AD (Delhi) 580 *Sanjay Gupta vs. Dr. Shroff's Charity Eye Hospital (DB)*
- (p) 1968 (4) DLT 595 *Mohinder Singh vs. Union of India (DB)*
- (q) 1999 (2) SCC 317 *Rajendra & Ors. vs. State of Rajasthan*
- (r) 2007 (14) SCC 98 *GM, Tanda Thermal Power Project vs. Jai Prakash Srivastava & Anr.*

8. On the other hand, learned counsel for the respondent No.1 would support the award of the Tribunal, wherein the Tribunal has held that the respondent No.1 was a 'workman' after appreciating the evidence including the documents filed by the parties and the service contract which got signed by the petitioner from the respondent No.1. He would state that the designation of Duty Manager is a misnomer as the respondent No.1 even after signing the new contract continued to perform the same nature of work that he was performing before the new contract of employment. According to him, the act of the petitioner management was strategically planned so as to take the respondent No.1 out of the definition of the 'workman'. Even after 2002 the petitioner continued to issue the same salary slip with same designation of Dispatcher/Traffic Assistant. He would state that no letter promoting him has been produced before the Court. No increment of any nature or in any form was granted to the respondent No.1. He refers to the cross examination of MW1 to contend that the said witness could not say if the respondent No.1 was working as Dispatcher or not. He also could not disclose the name of any employee whose name the respondent

workman had reported for disciplinary action. He would rely upon the following judgments in support of his case:

- (a) *AIR 1985 SC 985 Arkal Govind Raj Rao vs. Ciba Geigy of India Ltd., Bombay*
- (b) *2001 AIR SC 3290 Hussan Mithu Mhasvadkar vs. Bombay Iron & Steel Labour Board & Anr.*
- (c) *Tanojkumar B. Chatterji vs. Solapur Municipal Corporation Establishment under Bombay Provincial Municipal Corporation Act 2004 (4) Bom. CR 957*
- (d) *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya decided by Hon'ble Supreme Court in Civil Appeal No.6767/2012*
- (e) *AIR 1979 SC 1652 Shankar Chakarvarti vs. Britannai Biscuit Co. Ltd.*
- (f) *2005 (5) ALT 36 Chief Manager, ITDA (TW Dept.) & Ors. vs. Presiding Officer, Industrial Tribunal-cum-Labour Court & Anr.*

9. Having considered the rival submissions made by the counsel for the parties, I note, the Tribunal primarily decided the issues; (1) whether the respondent No. 1 is a 'workman' or not and; (2) whether the action of the petitioner by getting the fresh service contract for a fixed term of one year in the year 2002 signed has been validly done and the termination of the services of the respondent No. 1 in terms of Clause 25 of the Agreement is proper. Before I deal with the rival submissions, one aspect which need to be decided at this stage and which has a bearing on the final outcome of the decision on the writ petition, is, whether the respondent No. 1 could have at all challenged the legality of the terms of

appointment dated 01.01.2002, that too in the year 2007. The said agreement is a deviation from the old appointment on two counts (1) the designation of the respondent No. 1 has been changed from Traffic Assistant to Duty Manager and (2) the appointment has been made on a tenure to be renewed on year to year basis. It is a conceded position that the respondent No. 1 did not challenge the fresh terms of appointment insofar as his designation as 'Duty Manager' so also his appointment having been made tenural to be on year to year basis, at least, in any judicial forum. No document has been filed to show otherwise. I further note from the claim petition itself, that, it was the case of the respondent No. 1 himself that, his appointment was being renewed on year to year basis. The last renewal was till December 31, 2006. There is no renewal of appointment thereafter. Even though a prayer for withdrawal of 2002 service contract in view of a judgment of the Tribunal in a case filed by one Rajesh Kumar was made, but, that too, after almost five years from the date of issuance of fresh terms of appointment as the respondent No. 1 raised an Industrial Dispute before the Conciliation Officer only in the year 2007. The challenge insofar service contract of 2002 is concerned, it is belated, that too when his appointment was not renewed after December 31, 2006. The respondent No. 1 has, from time to time, accepted the yearly renewal of his contract. No complaint to any authority on the contract was made. Regrettably, I find, even the reference proceeds on a premise that the dismissal of the services of the respondent No. 1 as Traffic Assistant w.e.f. December 30, 2006 is justified and legal. There is no reference with regard to the vires of the service contract of 2002. In the absence of any reference, the prayer as made by the respondent No. 1 in his claim petition is unsustainable. The

Tribunal should have proceeded on a premise that the engagement of the respondent No. 1 was on a year to year basis as a 'Duty Manager' and whether non-renewal of his terms of appointment beyond a period of December 31, 2006 is illegal, arbitrary, if at all the industrial dispute was maintainable. The challenge to the service contract of 2002 was not an issue connected to the terms of reference. That apart, I find, the Tribunal while coming to the conclusion that the service contract was illegal and arbitrary, had not considered the case by taking into consideration the afore-stated pertinent aspects. It could not have held that the respondent No. 1 has not signed the contract willingly and voluntarily and as such, the same is illegal. Such a conclusion is not borne out from the record. The conclusion need to be set aside.

10. On the issue of 'workman', before I deal with this issue, I feel it appropriate to deal with all the judgments relied upon by the counsel for the parties.

Authorities relied upon by the counsel for the petitioner:

11. In *H.R. Adyanthaya's case (supra)*, the Supreme Court was primarily dealing with the person who was working as a Medical Representative. The Supreme Court held that the work "*skilled*" does not include the work of sales promotion such as of Medical Representative as the work is different from the work of a workman under Section 2(s) of the Act. Thus, the Medical Representative is not a 'workman'. The Supreme Court, by referring to various judgments, that an employee to be a workman must be engaged in the work of any of the categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory. In *Mukesh K. Tripathi's case (supra)*, the question arose when exactly an apprenticeship can be called as a 'workman'. The

Supreme Court held, for a person to be a workman under the Act, he must be employed to do the work of any of the categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory. The same must be established even if a person does not perform managerial or supervisory duties with a view to hold that he is a 'workman', it must be established that he performs skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward.

12. The *Sonepat Cooperative Sugar Mills Ltd's case (supra)* is also on similar lines inasmuch as to fall within the definition of 'workman', job of employee concerned must fall within one or the other expressions, any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Merely showing that the employee concerned had not been performing any managerial or supervisory duties, does not, ipso facto make him a 'workman'. In *Inthru Noronha's case (supra)*, the Bombay High Court has stated that the workman who was promoted to the executive cadre was engaged in managerial capacity and the work performed by him was not clerical in nature, hence, not a 'workman'.

13. In *Bennett Coleman & Co. Limited's case (supra)*, this Court has on similar lines, held that in order to ascertain whether a person is a 'workman' or not, the prominent and main functions are to be considered.

14. In *Ganga Kisan Sahkari Chini Mills Ltd.'s case (supra)*, it was held that it was not the employer who has to show the nature of appointment. Rather, it is the work of the employee to show his nature of appointment. In *Sunita Sharma's case (supra)*, this Court has held that documentary evidence will always get preponderance over oral evidence because it is well known axiom of law that man may tell lies, but,

documents cannot. In *Jasbir Kaur's case (supra)*, this Court has reiterated the aforesaid proposition. In *George Chaco's case (supra)*, this Court has held that government is entitled to make a prima facie view before making a reference. In *Standing Conference of Public Enterprise's case (supra)*, this Court has held that the burden of proof was on the claimant to show that he was a 'workman'. In *Standard Chartered Bank's case (supra)*, the Bombay High Court has held on similar lines as was held by the Supreme Court in *Sonepat Cooperative Sugar Mills Ltd.'s case (supra)*.

15. In *V.K.Sharma's case (supra)*, a conclusion based on evidence and material referred and relied upon by the Labour Court, an appellate Court cannot re-examine the said factual finding. The Division Bench upheld the conclusion of the learned Single Judge.

16. In *S.T. Hadimani's case (supra)*, the workman's claim that he has worked for 240 days was denied by the employer. It was held that it was for the claimant to lead evidence to that effect and his affidavit is not a sufficient evidence for that purpose.

17. In *Sanjay Gupta's case (supra)*, this Court was considering an issue, with regard to the maintainability of a writ petition against a private hospital. This Court held the writ petition not maintainable.

18. In *Mohinder Singh's case (supra)*, this Court was dealing with an issue related to a Board registered under the Societies Registration Act is amenable to the writ jurisdiction under Article 226 of the Constitution being an 'authority'.

19. In *Rajendra and Others' case (supra)*, the Supreme Court held that the Court cannot issue a writ of mandamus to compel an employer to keep employees no longer needed.

20. In *G.M. Kanda Thermal Power Project's case (supra)*, the Supreme Court, on similar lines, held, reinstatement cannot be directed where there does not exist any post.

Authorities relied upon by the counsel for the respondent No.1:

21. In *Arkal Govind Raj Rao's case (supra)*, the Supreme Court has held that duties of the claimant being clerical in nature, the claimant is a workman.

22. In *Hussan Mithu Mhasvadkar's case (supra)*, it was held that since Board was not an industry, the claimant was not employed in industry, he cannot be considered to be engaged in doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. He will not fall within the definition of 'workman'.

23. In *Tanojkumar B. Chatterji's case (supra)*, the Bombay High Court held, mere designation is not determinative. The Court has to have regard to the real nature of the duties and functions of the supervisor.

24. In *Deepali Gundu Surwase's case (supra)*, the Supreme Court held that if termination is held to be bad, the employees would be entitled to full back wages.

25. In *Shankar Chakarvarti's case (supra)* and *Chief Manager, ITDA (TW Dept.) & Ors.' case (supra)*, the Courts have held that any party appearing before the Court must make a claim or demur the claim of the other side, when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour.

26. Now, on the issue of 'workman', it is the case of the respondent No.1 that initially he was appointed as a Traffic Assistant in the year 1987. It was also his case that w.e.f. 01.01.2002, a new service contract was signed by him. According to him, the petitioner has given him a

misleading designation of Duty Manager though his duties and responsibilities remained unchanged and was also being paid same salary thereafter.

27. The issue of workman is purely a question of fact. It is also a settled position that to prove a claimant as a workman it is necessary to determine the nature of duties performed by him. In other words, the designation/nomenclature of the post would not matter. In the present case the respondent No.1 in his examination in chief had made reference to the duties performed by him. According to him, the dominant nature of his work included preparation of reports, schedule, allocation sheet, flight message checklist, taking care of luggage and passengers, baggage loading, unloading, counting of baggage in make-up area, passenger checkin at the checkin counter, issuing passenger tickets, extra baggage tickets as instructed by his superiors. It was also his case that he has never performed any managerial/administrative duties. In his cross examination the witness has stated as under:

“I use to do loading/unloading of baggage, check in counter, issue excess baggage tickets, MCO, passenger tickets, transit boarding of passenger and other related work to the flight.

I use to feed sale of the tickets, EBT, MCO and other data feeding of the PSA. I used to make sales report for the end of the month for the above mentioned work.

I recognize my signature at Point ‘A’ in exhibit CW1/4 this is exhibit CW1/4 is allocations slip and I signed this allocations slip as Duty Manager.

It is correct that CW1/4 duty has been assigned to the employees of the company.

It is incorrect to say that the workman whom duty was

assigned in the document signed by me as Duty Manager were not assigned by me.

It is wrong to suggest that under me 10 to 15 persons were working whom I assigned duty (Vol.) The duty roster of the staff was prepared by the Russian official and I use to put my signatures only as per the instruction of Russian Mgt.

Exhibit C1/7 is written by me and every column was filled by me. It is correct that every staff was assigned duty in my handwriting in exhibit C1/7 (Vol.) I use to get the allocations sheet of the staff from my Russian Manager (who used to be my immediate Boss on the flight and accordingly I used to put staff on there allocation as per instruction of my immediate boss).

It is correct that I also make message checklist as a Senior Staff.

It is correct that the document filed by the Mgt. Exhibit CW1/R2 to R54 are admitted documents and signed by me.”

28. On the other hand, petitioner’s case rested on the designation of ‘Duty Manager’ given to the respondent No.1. The petitioner’s witness i.e. MW2 in his affidavit has listed the duties of respondent No.1 which included the following:

- (i) To define rosters, allocate duties of the employees of commercial handling;
- (ii) To supervise and control all the employees//workmen of the ramp handling services in connection with the flight operation of the Aeroflot;
- (iii) To recommend for an institution of departmental enquiry against all the employees working under him;
- (iv) He was fully authorized to deal with various government agencies at airport viz. Custom, Immigration, Airport Authority,

Delhi Policy, CISF etc. and to write letter to them on behalf of the management;

(v) He was also fully authorized to verify and decide the loading and offloading of the passenger as well as he had authority to permit excess baggage of the passenger subject to and under the guidelines of the airlines.

29. That apart I find that the petitioner has filed the following documents in support of its case:

S. No.	PARTICULARS
1	Letter issued by Mr.Mohan Kumar Sharma in capacity of Duty Manager seeking departmental enquiry of Ms. Reema, employee Working under him
2	Original Duty Report dated 19-02-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
3	Original Duty Report dated 25-02-2005 along with information of Flight operation, Flight Message Checklist and Allocation sheet Duly signed by Mr. Mohan Kumar Sharma.
4	Original Duty Report dated 16-04-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
5	Original Duty Report dated 20-04-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
6	Original Duty Report dated 24-04-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
7	Original Duty Report dated 03-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
8	Original Duty Report dated 05-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
9	Original Duty Report dated 09-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
10	Original Duty Report dated 16-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
11	Original Duty Report dated 23-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
12	Original Duty Report dated 31-05-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
13	Original Duty Report dated 18-10-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.

14	Original Duty Report dated 20-10-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
15	Original Duty Report dated 30-10-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
16	Original Duty Report dated 20-12-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
17	Original Duty Report dated 31-12-2005 alongwith Flight Message Checklist and Allocation Sheet duly signed by Mr. Mohan Kumar Sharma.
18	Copy Duty Reports dated 30-04-2006 signed by Mr.Mohan Kumar Sharma in capacity as Duty Manager.
19	Copy Duty Reports dated 01-05-2006 signed by Mr.Mohan Kumar Sharma in capacity as Duty Manager.
20	Copy Duty Reports dated 18-05-2006 signed by Mr.Mohan Kumar Sharma in capacity as Duty Manager.
21	Copy Duty Reports dated 22-05-2006 signed by Mr.Mohan Kumar Sharma in capacity as Duty Manager.

30. Insofar as the documents filed by the respondent No.1 are concerned, the same include service contract of the year 1988; staff salary list for the month of December, 2006; service contract of the year 2002; letters dated December 30, 2003, December 31, 2005, December 29, 2006, December 17, 2005 of the General Manager of the petitioner airlines addressed to the respondent No.1.

31. I note that in most of the communications after 2002 which have been filed by the petitioner herein the respondent No.1's designation has been shown as 'Duty Manager'. The said letters have been duly signed by the respondent No.1. The documents include communication to the Airport Manager, Duty Report, Flight Message Checklist, Information of Flight Operation, Allocation Sheet etc. The cross examination of the respondent No.1 which has been reproduced above reveals (1) Exh.CW1/4 is allocation slip and he signed as a Duty Manager, by which, duties have been assigned to the employees; (2) The duty roster was prepared by the Russian Manager; (3) That every staff was assigned duty in his handwriting (Exh.C1/7); (4) He use to put staff on their

allocation as per instruction of his immediate boss; (5) The documents are admitted; (6) That in hierarchy, he was after the Russian official, to whom he use to report. The cumulative effect of the testimony and documents filed by the petitioner would prove that the respondent No.1 was doing duties as, depicted by MW2. He had staff working under him, he was dealing with various agencies and doing all the duties as was being done by the Russian Official (in his absence) which surely would depict he in fact discharging managerial and administrative duties which is one of the exception to Section 2(s) of the Act. Reliance on a salary sheet of the month of December, 2006 would not make any difference insofar as the issue of workman is concerned. I note that the Tribunal has not cared to refer the documents as referred to by this Court in the aforesaid paragraph. Further the Tribunal has not cared to refer to the position of law as it exist and the finding that the respondent No.1 was doing clerical duties is perverse. This itself was a ground for the Tribunal to answer the reference against the respondent No.1. Even otherwise assuming that the respondent No.1 is a 'workman' the Tribunal had clearly erred in overlooking the terms of appointment being tenural and extendable on year to year basis. It is the case of respondent No.1 himself that the last extension of his appointment was till December 31, 2006. Further it is not the case of respondent No.1 that the alleged termination/dismissal/non-renewal is in violation of Section 25G & H of the Act. The petitioner was within its right to dispense with the services of respondent No.1 in accordance with the service contract which would be in conformity with Section 2(oo)(bb) of the Act. In this regard suffice to note the following judgment of the Supreme Court, wherein the Supreme Court has held as under:

In *Bhavnagar Municipal Corporation Versus Salimbhai Umarbhai Mansuri*, Civil Appeal No. 5510 of 2013, dated July 16, 2013, wherein the question before the Supreme Court was that whether termination of services of the respondent on the expiry of the contract period would amount to retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act, 1948 (for short “the ID Act”). The Supreme Court has held as under:

“6. We are of the view that the Labour Court as well as the High Court have completely misunderstood the scope of Section 2(oo), (bb), as well as Section 25G and H of the ID Act. The contract of employment and the terms and conditions contained therein are crucial in the application of the above-mentioned provisions. Facts would clearly indicate that the respondent had worked only for 54 days in two fixed periods and on expiry of the second term his service stood automatically terminated on the basis of the contract of appointment. A reference to the contract would be useful to understand the nature of appointment of the respondent.

XXX XXX XXX XXX

9. Section 2(bb) says that if the termination of the service of workman is as a result of non-renewal of the contract between the employer and the workman on its expiry of such contract being terminated under a stipulation in that behalf contained therein, the same would not constitute retrenchment.

10. Facts would clearly indicate that the respondent’s service was terminated on the expiry of the fixed periods mentioned in the office orders and that he had worked only for 54 days. The mere fact that the appointment orders used the expression “daily wages” does not make the appointment “Casual” because it is the substance that matters, not the form. The contract of appointment consciously entered into by the employer and the employee

would, over and above the specific terms of the written agreement, indicates that the employment is short-lived and the same is liable to termination, on the fixed period mentioned in the contract of appointment.

11. Learned counsel appearing for the respondent submitted that the respondent is entitled to the benefit of Section 25G & H, the same are extracted herein below:

“25G. Procedure for retrenchment.-

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re- employment of retrenched workmen.-

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re- employment and such retrenched workman] who offer themselves for re- employment shall have preference over other persons.”

12. Section 25H will apply only if the respondent establishes that there had been retrenchment. Facts will clearly indicate that there was no retrenchment under Section 2(oo) read with Section 2(bb) of the ID Act. Consequently, Section 25H would not apply to the facts of the case. Similar is the factual and legal situation in the civil appeal arising out of SLP(C) No.5387 of 2012 as well.”

32. Further as the issue of closure of the establishment was not pleaded by the petitioner before the Tribunal, which is both a question of

law and fact. I do not think that the issue need to be gone into and in any case, in view of my above conclusion, it is inconsequential. Further, I note, in terms of the order dated July 11, 2011, the respondent No.1 was getting the benefits of Section 17-B of the Act. According to the petitioner, till date, the respondent No. 1 has received an amount of Rs.12,25,819/- as benefits under Section 17-B of the Act.

33. In view of the above discussion, the writ petition filed by the petitioner need to be allowed. The award dated May 31, 2010 of the Tribunal is set aside. The amount as stood deposited in this Court in terms of the order dated August 06, 2010 shall be released in favour of the petitioner.

CM Nos. 10404/2010, 795/2011 & 5067/ 2011 in W.P.(C) 5289/2010

In view of the order passed in the writ petition, the applications are disposed of as infructuous.

(V.KAMESWAR RAO)
JUDGE

JULY 14, 2014
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