

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

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

+ **W.P.(C) 5277/2010**

AEROFLOT RUSSIAN AIRLINES

..... Petitioner

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

Versus

RAJINDER UPADHAYAY & ANR.

..... Respondents

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

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this writ petition by M/s Aeroflot Russian Airlines is to the award dated May 26, 2010 passed by the Central Government Industrial Tribunal cum Labour Court II, Karkardooma Courts in I.D No.28/2007 whereby the Tribunal has answered the reference in favour of the respondent No.1 by holding the action of the petitioner in terminating/dismissing the services of the respondent No.1 with effect from December 30, 2006 as unjustified and illegal with a further direction of his reinstatement in service with full back wages minus wages for three months, with continuity in service, to be paid within a period of one month from the date of publication of the award.
2. The industrial dispute was referred by the appropriate government for the adjudication of the Tribunal on the following terms:

“Whether the action of the management of Aeroflot, Russian International Airlines, New Delhi in dismissing the services of Sh.Rajinder Upadhayay, Traffic Assistant with effect from December 30, 2006 is justified and legal. If not, to what relief is the concerned workman entitled”

3. It was the case of the respondent No.1 herein before the Tribunal that he being qualified and suiting the terms of the petitioner airlines besides passing the requisite tests and formalities was appointed as Traffic Assistant on probation for a period of 6 months from July 01, 1997. The petitioner executed a service contract with him incorporating therein the terms and conditions with which both the parties have been bound. Once 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. He successfully completed the probation period and was confirmed by the petitioner. His last drawn salary was Rs.24,500/- p.m and his last tenure of service with the management was Dispatcher/Traffic Assistant as has been mentioned in the salary sheet. His employment being clerical in nature, he is covered within the definition of ‘workman’ as defined under Section 2(s) of the Industrial Disputes Act, 1947 (‘Act’ in short).

4. It was the case of the respondent No.1 that there was discontentment amongst the employees due to unfair labour practices of the petitioner in the payment of increments, bonus, allowances and other facilities. He was deprived of medical facilities, insurances benefit, 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 with a view to make the regular employees as

contract employees. The employees were threatened, to sign the contract of fixed terms of appointment. In fact, according to the respondent No.1 the petitioner with mala fide intention of terminating his services forced him to sign a fresh contract of fixed terms of appointment of one year in the year 2002. The terms of appointment was extended on year to year basis till 2005-2006 due to the respondent No.1's excellent performance. However on December 30, 2006, all of sudden and without assigning any reason whatsoever the petitioner illegally and wrongfully terminated his services by not extending the fixed term service contract.

5. The claim was contested by the petitioner by challenging the very maintainability of the claim petition on the ground that the respondent No.1 was not a 'workman'. According to the petitioner the respondent No.1 was employed in a managerial and administrative capacity with the petitioner and his salary was Rs.24,500/- p.m. The petitioner would also state that the respondent No.1 has never raised any dispute with regard to the said service contract. The petitioner had also pleaded that in terms of clause 25.2 of the contract after the reduction of scope of work and reorganization in Aeroflot the respondent No.1's services could be terminated by giving one month notice or salary in lieu thereof. Acting bonafidely in terms of the said clause the petitioner terminated the services of the respondent No.1 after complying with all the legal requirements inasmuch as an amount of Rs.3,21,006/- was paid to the respondent No.1 vide cheque dated December 29, 2006 which was asked to be collected by the respondent No.1 on any working day of the petitioner.

6. The Tribunal on the basis of pleadings and the evidence, led by the parties, was of the view that the respondent No.1 was a 'workman'. The

basis for coming to such a conclusion was that the respondent No.1 was performing clerical duties only which could not be rebutted by the petitioner. The Tribunal was of the view that the new service contract was signed by the respondent No.1 and he was given a high sounding designation as Airport Manager/Assistant Airport Manager. The Tribunal further held that now it is a settled position of law that undue importance need not be given to a designation of an employee or to the class to which he belong. A nomenclature and designation are not very much material in deciding whether an employee is a workman or not. What is important is the nature of duties like whether they are technical, clerical or supervisory, administrative or managerial in character. The Tribunal after relying upon various judgments of the Supreme Court held that the main and principal duties carried out by the respondent No.1 was clerical in nature as there is no evidence to show that there are any number of persons working under him whose work are required to be supervised. On the second issue as to whether the signing of the fresh service contract of fixed term of one year got signed by the petitioner in the year 2002 after 15 years was validly done by the petitioner and whether the petitioner had rightly invoked clause 25 of the said agreement for terminating the services of the respondent No.1. The Tribunal held that the action of the petitioner in getting the contract of fixed term of appointment of one year signed from the respondent No.1 after he had put in 15 years of service amounts to unfair labour practice as opposed to public policy. It also held invoking clause 25 of the Service Contract for terminating the services of the respondent No.1 is not justified and granted the relief which has already been reflected above.

7. Mr.B.K.Singh, learned counsel for the petitioner would submit that the impugned award is a 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.7,35,000/- under Section 17-B of the Act and Rs.5,07,997/- deposited in this Court towards 50% of the back wages granted by the Tribunal.

8. The respondent No.1 having got over and above Rs.12,00,000/-, he would not be entitled to any further relief. That apart on the finding of the Tribunal, the respondent No.1 is a “workman”, it was his submission that the respondent No.1 was working as a Airport Manager in terms of service contract dated January 01, 2002 and was a senior most manager at Airport Office and as such was responsible to all the affairs at the airport office and all the employees were working under his supervision and control. That on December 31, 2006 due to no scope of work he was removed legally from the service in terms of the service contract. He would state that the respondent No.1 had not filed any document to establish the nature of duties being performed by him. He had also annexed his service contract which clearly reveals that he was appointed as ‘Airport Manager’. He would further state that the petitioner has exhibited documents which duly establish the nature of the duties performed by the respondent No.1, that of managerial and administrative capacity. He would state that mere filing of an affidavit by the 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 the conclusion that the respondent No.1 is a ‘workman’. He would also state that the respondent No.1 had during his

cross examination admitted that he was appointed as an 'Airport Manager'. That apart the petitioner's witnesses have categorically deposed that the respondent No.1 was working in managerial and administrative capacity as Airport Manager/Assistant Airport Manager. He would also rely upon the testimony of MW2 who had in his affidavit stated that all the employees of commercial handling as well as ramp handling at the airport office were directly under the respondent No.1's supervision and control. He would state that around 93 employees were working at the airport office. He would also state that MW2 has detailed the nature of duties performed by the respondent No.1, which included the following:

“(i) To define rosters, assigns duties to all airport employees (Ex.C-2, C-3).

(ii) Duty Managers were also under his supervision and control (Ex.C-11, C-12).

(iii) Grant leave to all the employees working at the airport (Ex.C-8, C-11, C-12, C-13, C-14, C-15).

(iv) To supervise and control all the employees/workmen at the airport office vis-a-vis all commercial as well as ramp handling employees.

(v) To issue show cause and to recommend and/or to conduct departmental enquiry against all the employees working under him.

(vi) He was fully authorized to deal with various government agencies at airport vis. Custom, Immigration, Airport Authority, Delhi Police, CISF etc. and to write letters to them on behalf of the management (Ex.C-4, C-5, C-6, C-7, C-9, C-10).

(vii) 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.”

9. In the last he would state that since the airport office of the petitioner has been closed, there is no scope for reinstatement of the respondent No.1 as Airport Manager/Assistant Airport Manager. 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) *111 (2194) DLT 489 Tata Sons Ltd. vs. S.Bandayopadhy.*
- (p) *2001 (5) SCC 169 Dena Bank vs. Ghanshyam*
- (q) *1999 (2) SCC 106 Dena Bank vs. Kirtikumar T. Patel*
- (r) *AIR 1997 SC 1125 L.Chandra Kumar vs. Union of India & Ors.*

10. On the other hand, Mr.Jitesh Pandey, learned counsel appearing for respondent No.1 would support the award of the Tribunal by stating that the Tribunal had held the respondent No.1 to be a workman after appreciating the evidence including the documents led 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 'Airport Manager/Assistant Airport Manager' is a misnomer as the respondent No.1 even after signing a new contract continued to perform the same nature of work that he was performing before the new contract of employment. He would state that 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 i.e. Dispatcher/Traffic Assistant. He would state that no letter promoting the respondent No.1

from Traffic Assistant to Airport Manager/Assistant Airport Manager was produced before the Court and even after the alleged promotion no increment of any nature or in any form was granted to the respondent. He would state that the petitioner had failed to establish before the Tribunal as to why the respondent No.1 used to sign the documents as Airport Manager and sometimes as Assistant Airport Manager. He would also state that the documents signed by the respondent No.1 were under the instructions of Station Manager when he was not available in the office. He would state that the petitioner representative had failed to put any similar question or suggestion in regard to the averments made by the respondent No.1 in his affidavit pertaining to his nature of duties. He would state that MW1 during his cross examination has admitted that Airport Manager and Assistant Airport Manager are two different posts and their duties also differ. Assistant Airport Manager is a lower post to Airport Manager. According to him, the witness has admitted that if a person is made Assistant Airport Manager from Airport Manager then it is a demotion. Similarly according to him, MW2 during his cross examination admitted that the petitioner has not codified the nature of duties. He would also state that Mr.Anil Chaudhary and Mr.Mohan Lal are since 2006 performing the same duties in the Airport which was being performed by the respondent No.1, which shows that the airport office of the petitioner management is still working and the post is still in existence. He would further state that the factum of closure was never pleaded by the petitioner before the Tribunal and such stand can't be taken now. He would deny the fact that the respondent has received an amount of Rs.5,07,997/- as back wages as alleged by the petitioner in its written submissions. He would rely upon the following judgments in

support of his contentions:

- (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.*

11. 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 w.ef. 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 Airport 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 Airport Manager so also his appointment having been made tenural to be on year to year basis, 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 an Airport Manager and

whether the non-renewal of his terms of appointment beyond a period of December 31, 2006 is illegal, arbitrary, if at all the industrial dispute is 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, 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.

12. 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:

13. 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.

14. 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'.

15. 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.

16. 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. 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)*.

17. 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. 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.

18. In *Tata Sons Ltd.'s case (supra)*, this Court held, an employee who is a highly educated i.e. Chartered Accountant working in the field of risk management cannot be called as a 'workman'. In *Dena Bank's case (supra)*, the Supreme Court was primarily concerned with the benefits under Section 17-B of the Act. Insofar as *L. Chandra Kumar's case (supra)* is concerned, suffice to state, the Supreme Court was concerned about the scope of jurisdiction of the High Court under Article 226 of the Constitution of India.

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

19. 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'.

20. 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'.

21. 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.

22. 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.

23. 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.

24. 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 Airport Manager though his duties and responsibilities remained unchanged and was also being paid same salary thereafter.

25. The issue of workman, is purely a question of fact. It is also settled position that to prove a claimant is 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, has made a reference to the duties performed by him. According to him, his nature of duties included baggage tracing, preparation of reports, schedule, list, taking care of luggage and passengers, baggage loading/uploading/counting of baggage, passenger check in at the checkin counter, issuing passenger tickets and extra baggage tickets, despatch of all office communications, replies to the queries from Headquarters and other offices as instructed by the superiors. It is also his case that he never performed any managerial or administrative duties. According to him, the nomenclature of Duty Manager is misleading. He would also state, the documents filed by the petitioner showing him as Assistant Airport Manager/Airport Manager itself shows that the designation was superficial. He in his cross examination, has denied the suggestion given by the petitioner's representative about his working as an Assistant Airport Manager. He reiterated his case that he was working at the Airport as Traffic Assistant/Dispatcher.

26. On the other hand, the petitioner's case solely rested on the designation of Airport Manager/Assistant Airport Manager given to the respondent No. 1. In fact, one of the petitioner's witness has deposed that the respondent No. 1 was promoted from the rank of Traffic Assistant to the Airport Manager. The petitioner, apart from relying upon the designation, has also stated that the duties of the respondent No. 1 included; (i) to define roster, assign duties to all Airport employees, (ii) Duty Managers were also under his supervision and control (iii) grant leave to all the employees working at the Airport (iv) to supervise and control all the employees at the Airport office vis-a-vis all commercial, handling employees, (v) to issue show cause and to recommend/conduct

departmental enquiry, (vi) fully authorized to deal with various government agencies at the Airport, (vii) authorized to verify and decide the loading and off-loading of passengers.

27. Since the pleading of the parties is at variance and the witnesses have denied the stand of the opposite party, the question is whether as an Airport Manager/Asstt. Airport Manager, the respondent No. 1 was in fact, doing the duties which he has referred to in his affidavit or the one as referred by the petitioner through its witness in examination in chief. The parties have filed the following documents in support of their case.

S. No.	PARTICULARS
1	Copy of letter written to General Manager by Mr. Rajinder Upadhyay, Airport Manager
2	Original notice/office order dated 17.03.2004 by Mr. Rajinder Upadhyay as Asstt. Airport Manager
3	Original notice/office order dated 02.04.2004 Issued for Duty Managers/Arrival Staffs by Mr. Rajinder Upadhyay as Asstt. Airport Manager
4	Copy of letter dated 24.06.2005 addressed to RDCOS, BCAs, Mahipalpur, New Delhi signed by Mr. Rajinder Upadhyay as Asstt. Airport Manager
5	Copy of letter dated 18.08.2005 addressed to ASI, IGI Airport, New Delhi signed and issued by Mr. Rajinder Upadhyay as Asstt. Airport Manager
6	Copy of letter dated 10.11.2005 addressed to AFRRO/ADMN. IGI Airport, Terminal-II, New Delhi signed and issued by Mr. Rajinder Upadhyay as Asstt. Airport Manager
7	Copy of letter dated 02.12.2005 addressed to DGM, Airport Authority of India, Terminal-II, IGI Airport, Terminal-II, New Delhi signed and issued by Mr. Rajinder Upadhyay as Asstt. Airport Manager
8	Original leave application dated 10.03.2006 of Mr. Anil Bahuguna approved by Mr. Rajinder Upadhyay as Airport Manager
9	Copy of certificate dated 03.04.2006 issued to Mrs. Durglishvili/ Nino by Mr. Rajinder Upadhyay as Airport Manager
10	Letter dated 16.05.2006 addressed to Airport Manager, M/s. Combata Aviation Pvt. Ltd. signed by Mr. Rajinder Upadhyay as Airport Manager
11	Original leave application form dated 18.05.2006 of the Employee signed by Mr. Rajinder Upadhyay as Airport Manager
12	Original leave application form dated 21.05.2006 of the Aeroflot employees signed by Mr. Rajinder Upadhyay as Airport Manager
13	Original leave application form dated 18.06.2006 of the Aeroflot employees signed by Mr. Rajinder Upadhyay as Airport Manager
14	Copy of leave application form dated 04.07.2006 of the Aeroflot Employees signed by Mr. Rajinder Upadhyay as Airport

	Manager
15	Original leave application form dated 10.07.2006 of the Aeroflot employees signed by Mr. Rajinder Upadhyay as Airport Manager

28. On the other hand, the respondent No. 1 has filed the following documents:

- (i) Letter dated December 30, 2003 extending the service contract of the respondent No. 1 till 31.12.2004 and letter of termination.*
- (ii) Service Contract of the year 1987*
- (iii) Staff Salary list for the month of December 2006*
- (iv) Service Contract dated 01.01.2002*

29. I note, in most of the communications after 2002, the respondent No. 1 has been addressed/represented as an Asstt. Airport Manager or Airport Manager. In his letter at page 97 of the paper book, the respondent No. 1 has stated that his duties were also to look after/check smooth functioning of Airport office and proper working of the handling staff. That apart, vide his communication dated April 02, 2004 (page 99), he has issued instructions to all the Duty Manager/arrival staff. It is also noted, vide letter dated June 24, 2005, the respondent No. 1 as an Airport Manager of the petitioner company has been making communication with the Bureau of Civil Aviation Security for issuance of AEP to the newly recruited staff of the petitioner Airlines. That apart, I find that he has been making correspondence with the different authorities of the government as an Asstt. Airport Manager/Airport Manager. In fact, at page 104 of the paper book, I note, he has approved the leave of Mr. Anil Bahuguna who was working as a Traffic Assistant. Similarly, he approved leave of one Mohan Kumar Sharma, Duty Manager (page 107); Sandeep Kumar, CGO Supervisor (page 109);

Sanjay Dutt, Duty Manager (page 110); Jai Dev Dahiya, Traffic Supervisor (page 111)

30. The conclusion of the aforesaid correspondence is, that w.e.f. 01.01.2002, the respondent No. 1 was given a higher responsibility as an Asstt. Airport Manager/Airport Manager. The same even if had not resulted in payment of higher wages, would not be material as long as the respondent No. 1 had, with open eyes accepted such a salary. Reliance placed by the respondent No. 1 on staff salary list of the month of December 2006, wherein, his basic pay was shown to be Rs. 26,000/-, the one, which he was drawing as a Traffic Assistant would not make any difference insofar the issue of workman is concerned. I hold that given the facts noted in the record, the respondent No. 1 was performing managerial and administrative duties. He would not fall within the definition of Section 2(s) of the Act. The Tribunal has not cared to refer to the position of law as it exists and the finding that respondent No. 1 was doing only clerical duties, is perverse. The Tribunal even did not care to discuss the documentary evidence on record before holding such. This itself is a ground for the Tribunal to answer the reference against the respondent No. 1. Even otherwise, assuming that the respondent No. 1 was 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 the respondent No. 1 himself that the last extension of his appointment was till 31.12.2006. Further, it is not the case of the respondent No. 1 that the alleged termination/dismissal is in violation of Section 25-G & H of the Act. The petitioner was within its right to dispense with the services of the respondent No. 1 in accordance with service contract which would be in conformity with Section 2(o)(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.

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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, indicate 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(o) 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.”

31. 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 December 20, 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 the amount of Rs.7,35,000/- as benefits under Section 17-B of the Act.

32. In view of the above discussion, the writ petition filed by the petitioner needs to be allowed. The award dated May 26, 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 No.2662/2013

In view of the order passed in the writ petition, the application is disposed of as infructuous.

(V.KAMESWAR RAO)
JUDGE

JULY 14, 2014
akb/km