

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

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Reserved on: 06th May , 2015
Date of Decision: 02nd July, 2015

+ W.P.(C) 1490/2012

UP AIRWAYS LTD., NOW KING AIRWAYS Petitioner
Through: Mr. Sudhir Nandrajog, Sr.
Advocate with Mr. Rajiv
Shankar Dvivedi, Ms. Omita
and Mr. Unnarkar, Advocates.

versus

PRITAM SINGHRespondent
Through: Mr. Shohit Chaudhry, Advocate.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By the present petition under Article 226 of the Constitution of India, the petitioner has assailed the award dated 19.01.2012 passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court-II (hereinafter referred to as the 'Tribunal'), Karkardooma Courts, Delhi, in I.D. No.18/1999, wherein the Tribunal held that the service of the respondent was illegally terminated by the management and thereby granted a relief of reinstatement in service with full back wages with continuity of service and all other benefits to him.

2. Briefly stating the facts as emerging from the petition are that on 13.04.1995 the respondent was appointed as the Senior Commander with the petitioner company on a pay scale of Rs.1,00,000/- (Rupees One lakh) per month (Rs.95,000/- basic + Rs.5,000/- HRA). The primary job of respondent was to act as Chief of Operations and he was suppose to supervise, plan, conduct and manage flight operations. On 27.02.1996 the respondent was also asked to function as an examiner in order to examine and supervise other pilots including co-pilots while performing his duties on behalf of the petitioner company. The petitioner company, since suffering from financial crunches, issued a memo dated 23.09.1996 to its employees highlighting that the company had surplus Commander and Co-Pilots. Since the second aircraft owned by the company was not functional and was grounded, it was decided, in consultation with all the Commanders and Co-Pilots to reduce the salary of the employees till the time the second aircraft became operational and the airlines recovered from financial difficulties. The respondent was party to this agreement.

3. The respondent vide letter dated 20.07.1997 demanded payment of arrears of his salary and perks from the petitioner. In the said letter the respondent admitted that he had joined the petitioner company as an Examiner as well as Chief of Operations w.e.f. 01.06.1995. Despite the fact that the company was not able to recover from financial difficulty and despite being fully aware of the fact that an aircraft was scheduled to fly on 22.07.1997 and the passengers were bound to fly from Mumbai to Delhi, respondent along with other Pilots went on a flash strike thereby refusing to fly the scheduled aircraft. Furthermore,

respondent refused to fly for the petitioner airlines in future also. Since, the act of respondent amounted to misconduct for which a disciplinary action is provided under the Company's Regulations, respondent was terminated from services of the petitioner company w.e.f. 23.07.1997.

4. After more than one year of his termination the respondent raised an industrial dispute challenging his termination and praying for restoration of his services with payment of full back wages. The Central Government, Ministry of Labour vide order No.L-11012/32/98-IR(C-I) dated 16.12.1998 referred the industrial dispute to the Tribunal for adjudication under the following terms of reference:

“Whether the action of the management UP Airways in terminating the services of Shree Pritam Singh, Senior Commander on 23.07.1997 is just, fair and legal? If not, to what relief is he entitled?”

5. In the said industrial dispute statement of claim was filed by the respondent to which the petitioner filed its written statement which led to the passing of the impugned award dated 19.01.2012.

6. Mr. Sudhir Nandrajog, learned senior counsel for the petitioner contended that the order passed by the Tribunal is unjustified and bad in law. The application filed by the respondent ought to have been dismissed at the threshold on the sole ground that he was not a workman within the definition of Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'ID Act'). The respondent has himself admitted in his letter dated 20.07.1997 that he was working on a managerial and supervisory capacity with the

petitioner and was drawing a salary of Rs.1,00,000/- (Rupees one lakh) per month and as such he is not covered in the definition of workman under the ID Act.

7. Learned senior counsel for the petitioner further contended that the Tribunal erred in relying on the sole testimony of the respondent especially in a situation where no cogent evidence was available on record to support his case. The Tribunal has not given its finding on the issue of respondent whether falling in the definition of workman under Section 2(s) of the ID Act, his *locus standi* in filing the instant application, the jurisdictional issue of the Tribunal in deciding the allegation of the respondent etc.

8. It was lastly contended on behalf of the petitioner that if the impugned award is not set aside then the petitioner would be put to great financial hardship. The respondent, is not entitled to automatic reinstatement on his alleged termination being held as unjustified by the Tribunal. Grant of back wages is also not automatic. Certain factors need to be considered before granting these reliefs which the Tribunal has not taken into consideration.

9. *Per Contra*, learned counsel for respondent contended that the petitioner company had illegally terminated the services of the respondent which fact was observed by the Tribunal before granting the relief to the respondent. The services of respondent were terminated without issuing him a charge-sheet and without conducting an enquiry. The contention of the petitioner company that the respondent is a Chief of Operation is misconceived, baseless and

factually incorrect. No such post exists in the petitioner organization. The Operation Manual clearly states that there are posts of 'Manager Operations' and 'Deputy Manager Operations', however, there is no such post as Chief of Operations.

10. Learned counsel for the respondent further contended that even if the workman performs some kind of supervisory job, the same cannot determine the character of employment. It is the principal employment that would determine the characteristic of employment. The job of a pilot may be a skilled one but even then it is a job of a workman. The job of the respondent is that of a pilot and that of commanding the aircraft. In case, the respondent pilot is burdened with some additional responsibilities and duties for which no additional salary is paid, the additional duty performed by the pilot cannot be termed as his principal nature of work.

11. It was lastly contended by learned counsel for the respondent that there is no truth in the allegation of the petitioner that he refused to perform his duties. The respondent was ready and willing to operate all flights for the petitioner company, however, it was the petitioner company who did not assign any roster to the respondent and in fact terminated him.

12. I have heard learned counsel for the parties and have perused the material on record.

13. Industrial disputes tend to reduce economic profits and inflict damages on both employer and employee. It poses problems for

rationalizing labour and capital and also creates problem in the production and financial profit of the industry that ultimately affects the economy of the country. Therefore, maintaining industrial peace and harmony is important for a worker as it is for an employer as it postulates the existence of understanding, co-operation and a sense of partnership between the employers and employees. Keeping several such factors in mind the ID Act was enacted with the object of making provisions for the investigation and settlement of industrial disputes, promoting measures for securing and preserving amity and good relations between employer and employees, preventing illegal strikes and lock-outs, providing relief to workmen during lay-off or after retrenchment, wrongful dismissal or victimization along with providing conciliation, arbitration and adjudication facilities. The object of the said enactment is to facilitate the workmen/ labourers to present their case. Its provisions are directed to secure industrial peace and harmony by providing a machinery and procedure for investigation and settlement of industrial disputes by negotiation. The workmen are given a beneficial status under its provisions which are essentially pro-workmen.

14. The ID Act aims at the settlement of disputes between the workman and the management. Since an industrial dispute is essentially a dispute between the workman and the employer, the provisions of the ID Act are invoked only on determination of the claimant as workman within the definition of Section 2(s) of the ID Act. At this stage it would be pertinent to reproduce the definition of

workman as provided under Section 2(s) of the ID Act which reads as under:-

“(s) 'workman' means any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge, or retrenchment has led to that dispute, but does not include any such person -

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

15. It is a settled principle of law that the designation of an employee is of no consequence to determine whether an employee is a workman or not. In determining such a question what is of consequence are his main or primary duties. If the employee performs some duties which are incidental or even in addition to his main or primary duties, that by itself will not take away his status as a "workman" provided, as a result of his main or primary duties, he falls

within the definition of workman under the Act. Where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman, the Court is duty bound to find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, which may not necessarily be in tune with the basic duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of the person.

16. In this context the Hon'ble Supreme Court in '**S.K. Maini Vs . M/s Carona Sahu Co. Ltd.**', (1994)II LLJ 1153 SC held as under:-

“9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large

number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this Court in *Burmah Shell Oil Storage and Distribution Co. of India Ltd., v. Burmah Shell Management Staff Association* (supra). In *All India Reserve Bank Employees Association v. Reserve Bank of India* (1965) II LLJ 175SC, it has been held by this Court that the word 'supervise' and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of the manual work of others. It has been rightly contended by both the learned Counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the employee concerned and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as Section 2(s) of the Industrial Disputes Act."

17. In the case before this Court, the Tribunal has reached a conclusion that the employee was a workman as defined under Section 2(s) of the ID Act under the observation that:-

“16. In the instant case it is abundantly clear that the main and principal duties of Shri Pritam Singh were to fly aircrafts. Sometimes he was asked to take test of other pilots to test their capabilities. That too will essentially be of technical nature only. Thus Shri Pritam Singh was doing work of technical nature only. Even if incidentally he was doing some supervisory duty the same will not convert his employment from technical into one in any other capacity. He was definitely not performing managerial or administrative functions. It is thus abundantly clear that Shri Pritam Singh is a “workman” as defined under Section 2(s) of the Industrial Disputes Act, 1947.”

18. So far as the factum of termination of services of the respondent by the petitioner is concerned, the Tribunal had held:-

“18. From the unrebutted evidence of the workman it is abundantly clear that his services were abruptly terminated by the management in a most illegal, unlawful and unjustified manner vide letter dated 23.07.1997 for alleged acts of misconduct without giving him any opportunity to explain. No domestic enquiry has been admittedly held by the management in this case before terminating the service of the workman. It is well settled that no workman can be dismissed for alleged misconduct unless he is issued a charge sheet and was given an opportunity to give his explanation to the charges leveled against him. A workman cannot be dismissed in the manner as has been done by the management in this case. The action of the management in terminating the services of workman Shri Pritam Singh thus cannot be held to be just, fair and legal. The same is clearly unfair.”

19. From a perusal of the record it is observed that petitioner had claimed in his written statement before the Tribunal that the respondent was not a workman as defined under Section 2(s) of the ID Act. It had also claimed that the respondent had refused to undertake the regular scheduled flights to various destinations from 22.07.1997 onwards. It was also stated therein that the respondent refused to fly for management, left Mumbai for Delhi in the evening of 22.07.1997 by another airlines. In support of its case, the petitioner had produced affidavits of Mr. Ashok Kapoor, Rajinder Singh and Group Captain H.S. Bedi by way of evidence.

20. Vide order dated 16.02.2010, the right of the management to adduce evidence was closed by the Tribunal due to non appearance of the said witnesses despite repeated adjournments and the affidavits of the said witnesses were excluded from consideration.

21. It is worth mentioning here that the respondent had stated in his cross examination on 07.07.2004 that his nature of duties were to fly the Aircraft as Commander and as Examiner his duties were to take tests of other pilots and test their capabilities. In these circumstances, reasoning of the Tribunal that the respondent was the workman as defined under Section 2(s) of the ID Act does not appear to be sound.

22. Otherwise also, the Tribunal was not right in reaching the conclusion that the services of the respondent were illegally terminated by the management on the ground that no domestic enquiry was conducted by the petitioner /management. It is a settled law that even if no enquiry has been held by an employer or if the enquiry held by

him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action; and it is open to the employee to adduce evidence contra. The Tribunal should not straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

23. The Hon'ble Supreme Court in '**Workmen of M/s. Firestone Tyre and Rubber Co. of India (P) Ltd. vs. Management and others**', 1973 AIR (SC) 1227 , speaking to the same effect held as under: -

“27. From those decisions, the following principles broadly emerge:-

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over

the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before

the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate v. Workmens* [(1971) 1 SCC 742] within the judicial decision of a Labour Court or Tribunal.”

24. Clearly, in the case before this court the petitioner/ management has not adduced evidence in support of its case. The evidence by way of affidavit adduced by the petitioner were refused to be taken on record and opportunity of the management to adduce its evidence was closed vide order dated 16.02.2010. In the absence of any evidence of the management, this court is unable to reach the conclusion whether the respondent was the workman as defined under Section 2(s) of the ID Act and that his services were illegally terminated by the management. The interest of justice requires that the petitioner be given opportunity to prove its case by adducing evidence. The respondent be also given an opportunity to adduce evidence in rebuttal.

25. In view of the aforesaid discussion the petition is allowed. The impugned award dated 19.01.2012 passed by learned Tribunal is set aside and the matter is remanded back to the concerned Tribunal to pass a fresh award, after affording opportunity to both the parties to adduce further evidence, at the earliest in accordance with law.

26. The petition stands disposed of.

27. The trial court record be sent back forthwith.

C.M. Appl. Nos.3298/2012 & 4138/2014

In view of my aforesaid findings, the applications are dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

JULY 02, 2015

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