

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on 27th July, 2016
Decided on 5th September, 2016

+ LPA 63/2014
MAHINDER SINGH Appellant
Through: Ms.Asha Madan, Advocate

versus
M/S. INDIAN AIRLINES LTD. Respondents
Through: Mr.Lalit Bhasin, Ms. Ratna
Dwivedi Dhingra and Ms.Bhawna
Dhami, Advocates

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CORAM:
HON'BLE MR.JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Mahinder Singh, in this intra court appeal impugns the judgment of learned Single Judge dated 13th November, 2013 passed in WP(C) No. 7875/2001 titled as *M/s. AIR India Ltd. vs. Mohinder Singh & Anr.* whereby the award dated 19th July, 2001 passed by the Industrial Tribunal-III directing reinstatement of appellant-workman with continuity of service and full back wages was set aside and the writ petition filed by the respondent-management was allowed.

2. The facts in detail have been set out in the judgment of the learned Single Judge. Hence, we are not repeating the same except where necessary.

3. The appellant was initially appointed as a driver on temporary basis by the respondent on 29th July, 1986. The temporary appointment was extended from time to time for a period of 1 to 3 months. By the

letter dated 29th June, 1987 the appellant was given regular appointment on the post of 'driver' pursuant to his application and subsequent interview in a regular pay scale of Rs.480-14-620-16-700-18-754. He was to remain on probation for a period of one year initially with further stipulation that such probation period could be extended or alternatively his services may be terminated if performance was not found satisfactory. The relevant clause 4, as contained in the appointment letter dated 29th June, 1987, reads as under:-

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

4. By the order dated 10th August, 1988, while the appellant was on probation, his services were terminated in terms of Clause 4 of the appointment letter vide termination letter which reads as under:-

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

To
MR. MOHINDRA SINGH
VAYUDOOT NEW DELHI

Ref. PF/HQ/Pers./2111

10-8-88

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

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

SD/
(AMOD SHARMA)

CC: RM (HR)
SUPERVISOR (M.T.)
PERSONAL FILE”

5. Against the termination of his services, the appellant raised an industrial dispute which was referred to the Industrial Tribunal which held that there was violation of Section 25-F of the Industrial Disputes Act. Hence, the management was directed to reinstate the appellant with continuity of services and full back wages. The said award was challenged by the management by filing WP(C) No. 7875/2001 which was allowed and the order of the industrial tribunal was set aside.

6. The cornerstone of the submission of the learned counsel for the appellant is the Division Bench judgment in the case of ***Delhi Cantonment Board vs. Central Govt. Industrial Tribunal & Ors.***, 129 (2006) DLT 610. By placing reliance on this decision, learned counsel for the appellant submitted that in the industrial law there is no distinction between a permanent employee and a temporary employee and the learned Single Judge fell in error in following the judgment of a Single Judge in the case of ***Mahesh Chand vs. Management of M/s. LE Meridian***, 2013 LLR 899. The conclusion arrived at by learned Single Judge was on an erroneous ground that the appellant was still on probation even though the probation period had already expired and, therefore, termination of his services did not amount to retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act. On the other hand, the submission of learned counsel for the respondent/management was that the judgment in the case of ***Delhi Cantonment Board*** (supra) did not take into consideration the earlier

judgments rendered by the Supreme Court in *Kalyani Sharp India Ltd. vs. Labour Court No.1 Gwalior & Anr.*, (2002) 9 SCC 655; *Escorts Limited vs. Presiding Officer & Anr.*, (1997) 11 SCC 521; *M. Venugopal vs. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and Anr.*, (1994) 2 SCC 323; *Management of Apparel Export Promotion Council* and, therefore, learned Single Judge in *Mahesh Chand* (supra) observed that the judgment in *Delhi Cantonment Board* (supra), was rendered without noticing the earlier Supreme Court judgment. The view taken by the Supreme Court was followed by the learned Single Judge while passing the impugned judgment.

7. Undisputedly, the appellant was initially appointed on temporary and contractual basis from time to time by the respondent since 29th July, 1986 and he was being issued appointment letters appointing him as driver on monthly basis for a period of 1 to 3 months. Subsequently vide letter dated 29th June, 1987, he was appointed as a regular driver on probation for a period of one year initially and in case his services were not found satisfactory, the management could either extend his probation or terminate his services. Relying upon clause 4 of the appointment letter, his services were terminated as his performance was not found to be satisfactory. Termination of service of the appellant on account of ‘unsatisfactory performance’ was not considered to be stigmatic relying upon *Muir Mills Unit of NTC (UP) Ltd. vs. Swayam Prakash Srivastava & Anr.*, 2007 II AD (SC) 32; *State of Punjab vs. Bhagwan Singh*, (2002) 9 SCC 636; *Abhijit Gupta vs. SNB National Centre, Basic Sciences and Others*, 2006 V AD (SC) 525 and *Chaitanya Prakash and Anr. vs. H. Omkarappa*, 2010 II LLJ 146 (SC). This finding of the

learned Single Judge has not been challenged by the appellant either in the grounds of appeal or during the course of argument and rightly so, as mere use of word “unsatisfactory performance” does not make the termination order stigmatic.

8. According to the appellant, the probation period of one year came to an end on 31.5.1988/28.6.1988 which was never extended and, therefore, termination of the services of the appellant on 10th August, 1988 invoking clause 4 of the appointment letter was illegal and without jurisdiction. The conclusion arrived at by learned Single Judge is on an erroneous ground that the appellant was still a probationer and, therefore, termination of his services did not amount to retrenchment within the meaning of Section 2(oo) of the ID Act.

9. Section 2(oo) (bb) of Industrial Disputes Act reads as under:-

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

(a)

(b)

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

(c) ”

10. The question whether the termination of services of the workman during the probation period tantamounts to retrenchment came up for consideration before Supreme Court in several decisions.

11. In ***M. Venugopal*** (supra), service of the Workman was terminated during the extended probation period on account of non-fulfilment of the

condition of achieving minimum business target stipulated in the order of appointment. The Supreme Court held that termination of services of the Workman was not deemed to be “retrenchment” within the meaning of Section 2(oo) of the Act even in respect of the period prior to introduction of clause (bb) in Section 2(oo) of the Act. Thus, non compliance of the requirements of Section 25-F was held not to vitiate or nullify the order of termination of Workman.

12. Again in ***Escorts Limited*** (supra), Workman was appointed on temporary basis for a period of two months. The terms of appointment enabled the employer to terminate the services at any stage without assigning any reason. The Supreme Court held that the termination of services under the said terms even though effected before the expiry of the specified period, did not amount to retrenchment. Consequently, Section 25-F and 25-G of the Act did not come into play.

13. In ***Kalyani Sharp India Ltd.***(supra), workman was terminated during the period of probation. The Labour Court as well as the High Court took a view that termination amounted to retrenchment for non-compliance of Section 25-F of the Industrial Disputes Act. The Supreme Court reversed the views of the Labour Court and the High Court and observed thus :

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

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

14. In view of the aforesaid judgments of the Supreme Court governing the field it can be safely culled out that termination of service of a probationer in terms of the stipulation contained in the contract of employment does not tantamount to "retrenchment" within the meaning of Section 2(oo) of the Act since it is covered by clause (bb) of Section 2(oo) of the Act. Thus, Section 25-F of the Act does not get attracted in such cases. These decisions were not considered in **Delhi Cantonment Board** (supra). Therefore, in **Mahesh Chand**(supra), a learned Single Judge of this Court took the view that in case of termination of a probationer Section 25-F of the Act is not attracted in view of Section 2(oo)(bb) of the Act which was followed by learned Single Judge in this case. Reliance was also placed on a decision rendered by a division bench of this Court in LPA 472/2013 titled **Satish Kumar vs. Delhi Fire Services**, where it was observed as under:-

"From the above, it is clear that retrenchment means termination by the employer of the services of a Workman for any reason whatsoever "except those expressly included in the section". For the point of time, when the Supreme Court was considering the cases before it, Section 2(oo)(bb) was not in vogue. However, the Supreme Court had noticed that provision because when the judgment was rendered, the amendment had been brought about and clause (bb)

had been introduced. After examining the same and analysing it in detail, the Supreme Court came to the conclusion that every termination by an employer of the services of a Workman would amount to retrenchment except in those cases which were expressly excluded by the said Section 2(oo) of the said Act itself. Insofar as the present case of termination is concerned, we are of the opinion that it falls under the exception carved out in Section 2(oo)(bb) of the said Act inasmuch as the contract of employment of the appellant itself contained the stipulation whereunder his services could be terminated without assigning any reason during the probation period.”

15. The submission of learned counsel for the appellant that the probation period of the appellant came to an end on 31.5.1988/28.6.1988 as the same was not extended further is bereft of any merit as there is nothing in the terms of the letter of appointment from which it can be construed that after expiry of the period of probation, the appellant would be treated as a ‘*deemed confirmed employee*’.

16. Substantially similar question arose in ***Head Master, Lawrence School Lovedale v. Jayanthi Raghu and Anr.***, AIR 2012 SC 1571 In that case, the first respondent i.e. Jayanthi Raghu was appointed on the post of Mistress with effect from 01.09.1993. It was stipulated in the letter of appointment that she would be on probation for a period of two years which may be extended for another one year, if necessary. In November, 1995, while she was working as a Mistress in the appellant’s school, as alleged, she had received some amount from one Nathan. A meeting was convened on 09.09.1997 and in the proceedings, certain facts were recorded. The said allegations though treated ‘stigmatic’ by Ld. Single Judge, yet the Division Bench on a studied scrutiny of the factual scenario, opined that the same do not cast any ‘stigma’. However, the Division

Bench, concurred with the ultimate conclusion of the Ld. Single Judge on the basis that by virtue of the language employed in Rule 4.9 of the Rules of Lawrence School, Lovedale (Nilgiris), she had earned the status of a confirmed employee having satisfactorily completed the period of probation and, therefore, her services could not have been dispensed with without holding an enquiry.

Rule 4.9 was to the following effect:

"4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School."

The fulcrum of the controversy was whether the appellant school was justified under the Rules treating the respondent teacher as a probationer and not treating her as a deemed and confirmed employee. The Supreme Court referred to the following earlier decisions operating in the field:

"10.In Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711, the Constitution Bench has opined that a probationer cannot, after the expiry of the probationary period, automatically acquire the status of a permanent member of the service, unless of course, the rules under which he is appointed expressly provide for such a result.

11. In G.S. Ramaswamy and Ors. v. Inspector-General of Police, Mysore³, AIR 1966 SC 175 another Constitution Bench, while dealing with the language employed under Rule 486 of the Hyderabad District Police Manual, referred to the decision in Sukhbans Singh (supra) and opined as follows: -

"It has been held in that case that a probationer cannot after the expiry of the probationary period automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. Therefore even though a probationer may have continued to act in the post to which he is on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of service which govern him specifically lay down that the probationer will; be automatically confirmed after the initial period of probation is over. It is contended on behalf of the petitioners before us that the part of r. 486 (which we have set out above) expressly provides for automatic confirmation after the period of probation is over. We are of opinion that there is no force in this contention. It is true that the words used in the sentence set out above are not that promoted officers will be enable or qualified for promotion at the end of their probationary period which are the words to be often found in the rules in such cases; even so, though this part of r. 486 says that "promoted officers will be confirmed at the end of their probationary period", it is qualified by the words "if they have given satisfaction". Clearly therefore the rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this rule if he has given satisfaction."

*12. In **State of Uttar Pradesh v. Akbar Ali Khan**, AIR 1966 SC 1842, another Constitution Bench ruled that if the order of appointment itself states that at the end of the period of probation, in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation, an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication, the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be*

confirmed from the mere fact that he is allowed to continue after the end of the period of probation.

13. In State of Punjab v. Dharam Singh, AIR 1968 SC 1210, the Constitution Bench, after scanning the anatomy of the Rules in question, AIR 1966 SC 1842 AIR 1968 SC 1210 addressed itself to the precise effect of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. The said Rule stipulated that the total period of probation - including extensions, if any, shall not exceed three years. This Court referred to the earlier view which had consistently stated that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. Under these circumstances, an express order of confirmation is imperative to give the employee a substantive right to the post and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is difficult to hold that he should be deemed to have been confirmed. When the service rules fixed a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. It is so as such an implication is specifically negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it.”

Thereafter, it was held as under:

“The status of confirmation has to be earned and conferred. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that

would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed. The Division Bench has clearly flawed by associating the words 'if confirmed' with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation."

17. In the instant case also, the appellant was not conferred with the status of confirmed employee. From Clause 4 of the letter of appointment, it cannot be inferred that after expiry of period of probation for a period of one year, the petitioner got the status of a confirmed employee. Since, he was still on probation, and in terms of Clause 4 of the Appointment Letter, his services have been terminated in view of his 'unsatisfactory performance' same does not tantamount to 'retrenchment' within the meaning of Section 2(oo) of the Act.

18. The reasoning given by the learned Single Judge does not suffer from any perversity which warrants interference. That being so, the appeal is devoid of merit and is accordingly dismissed, however, leaving the parties to bear their own costs.

**SUNITA GUPTA
JUDGE**

**SANJIV KHANNA
JUDGE**

SEPTEMBER 05, 2016/rs