

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

Reserved on: 02.02.2016

Pronounced on: 17.02.2016

+ **LPA 265/2014**
SARASWATI

.....Appellant

Through: Sh. J.P. Sengh, Sr. Advocate with Sh.
Sitab Ali Chaudhary, Ms. Sana Ansari and Ms.
Vanessa Singh, Advocates.

Versus

PRESS TRUST OF INDIA AND ANR.Respondents

Through: Sh. Raj Birbal, Sr. Advocate with Ms.
Raavi Birbal and Sh. Shriram Chauhan,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal is directed against the judgment and order of a learned Single Judge by which the decision of an Industrial Tribunal, setting aside the claimant/workman's termination of employment was interfered with. The impugned judgment held that the award of the Industrial Tribunal was erroneous.

2. The appellant (hereafter "employee") was appointed as photographer on 13.10.1987 by the respondent (hereafter "PTI"); initially she was placed on probation for a six months. Her appointment letter *inter alia*, contained the following stipulation:

"The probation period will be six months after which you may be confirmed in our service in an appropriate scale on the basis of an assessment of your work. The probation period may be extended by another six months."

During the period of probation your services are liable to be terminated by twenty-four hours' notice you be found not fulfilling the duties the duties assigned to you or not conforming to the discipline of the office. You may also please note that you are transferable to any of our offices in India as and when required."

3. The employee's six month probation was extended and she was not confirmed in service, because according to the PTI, her work was unsatisfactory. The probation period was extended by three months, on 10.05.1987. The letter extending the period of probation read as follows:

"It has been reported to me that your performance during the probationary period has not been upto our expectations. In order to give you another chance we are extending your probation by three months.

We hope you will improve your performance and endeavour to come upto our expectations during this period."

At the end of this extended period (hereafter "first extension") the employee's performance of work was not deemed satisfactory; the period of probation was further extended on 05.07.1988 by a letter, which also stated as follows:

"Further to our letter No. 4983 dated May 10, 1988, confirming extension of your probation by three months, we regret that your performance and conduct still leave much to be desired. However, we give you one more extension ending October 5, 1988, during which if there are any more adverse reports from the Photo Service Editor about your work of conduct your services will stand terminated on the expiry of this extension."

Citing no improvement and continued unsatisfactory work, the employer issued the following letter, in effect terminating the employee's contract, in

the following terms:

"Further to our letter No. 826 of July 5, 1988, I am sorry your record has not shown any improvement. I am, therefore, reluctantly constrained to terminate your services with effect from the close of 4.10.1988. You may collect all your dues from the Accounts Department."

5. The employee questioned the termination of her services, and sought reference of the dispute. On 15.11.1989, the appropriate government sent up an industrial dispute, for decision by the Tribunal. She alleged in her claim, that she carried out difficult assignments given to her, to the best of her ability and to the complete satisfaction of the management. Despite this, Mr. R.B. Bedi, her concerned immediate officer started harassing her by false and misconceived memos to which she replied from time to time. She carried out the work assigned, even risking her life, a fact proved by her having covered the Lawyer's agitation at Tis Hazari Courts when the police resorted to lathi charge, where not only was she injured, her camera and other equipment were damaged and her SB-20 Flash gun was taken away by the police. The employer did not compensate her for this, she alleged. According to the statement of claim, the termination was illegal retrenchment. It amounted to colourable exercise of power and had to be set aside.

6. The employer's reply did not dispute the essential facts such as the employee's contract, her extension of probation, etc. It stated that her job and work performance was always unsatisfactory and that she lacked initiative. She was in the habit of raking up issues. The employer stated that Mr. Bedi did not issue false and mischievous memos. The employer said that the claimant was given treatment in a government hospital and was

granted leave by the management for the period she was suffering. It denied that she, whether during the initial probationary period of probation of 6 months, or even subsequently, carried out her work satisfactorily. The probation period was extended on an overall assessment of her work. It was also denied that action of management was a colourable exercise of power, or an exercise for collateral purposes, or for victimizing the employee.

7. Both parties led evidence before the Tribunal; the employee examined herself and four other witnesses. She conceded that Mr. Bedi was a senior photographer, who sometimes used to appreciate her work. She complained that she was assigned more night duties than other photographers, but also admitted that she did not make this a grievance whilst in employment. She denied suggestions that she refused to perform certain assignments or that she was difficult to deal with. Mr. Bedi, the Chief Photographer was examined on behalf of the employer; he deposed that PTI had four photographers. He was one among the selectors who chose the employee at the initial recruitment stage. According to him, the employee was difficult to deal with and he found it difficult to carry her as a team member. She used to quarrel and neglect her duty, disobey and overstep her briefing. In this regard, whenever she was advised, she was in the habit of not paying any heed to the advice rendered to her.

8. In the course of its evidence, PTI marked several documents (MW-1/1 to MW-1/17). One of these was a file noting/report written by Mr. Bedi. This document dated 29.06.1988, contained a report regarding the employee's work performance, and stated, *inter alia*, as follows:

“Apart from poor quality of work she spread disaffection amongst the staff and encourages them to jointly raise issues

where they could hold the department to blackmail. So far I have been able to abort her attempts. To give you an example of her defiance, I will refer to an incident when she had covered a farewell party to a staff member, I had asked her to do a few pictures but she had used a complete roll. When told not to do so in future, she went around the whole PTI staff of that particular department and wrote back to me that she had talked to the entire staff of the department concerned and all of them are willing to compensate PTI by collecting contributions. (See annex 8 & 9). Similarly, she had tried to side track her immediate seniors at all times so much so that I had to issue her a note not to by-pass the Editor, Photo Service, when it comes to technical selection of pictures. (See Annex. 3,4 and 5). She does not hesitate to tell lies to suit her purpose.”

9. The Industrial Tribunal held that the PTI in effect issued a stigmatic order and flouted the obligation to comply with Section 25F of the Industrial Disputes Act (“the Act”) and directed the employee’s reinstatement. Its relevant findings are, *inter alia*, as follows:

“It is not shown by the management that the provisions of section 25(f) have been complied in this case by giving prior notice or paying wages in lieu of notice and compensation of service etc. at the time of termination of service. The Ex. MW1/16 only gives the reference to previous letter dated 5.7.88, which is not placed on record to show the court and directed the workman to collect all dues. Ex. MW1/11 gives inference that the performance of the workman at her post was not good upto the expectations of the management. This indicates the workman, as a photographer, was not competent person to carry the job of photographer, and in case this workman goes for job to another employer, she may not get job on the ground of this observation in Ex. MW1/11 and Ex. MW1/16. Thus, it also casts a stigma on the career of the workman, who joined as Senior Photographer. Even otherwise, the workman has challenged the allegations of management and had shown that her performance was good as discussed

hereinabove. As observed by Hon'ble Supreme Court in case of Chandra Prakash Sahi Vs. State of U.P. and another 2000(2), Supreme Court Cases 152, a probationer has no right on the post on which he is placed and therefore, his services can be terminated during or at the end of the period of probation on account of his unsuitability, but the management has to establish the unsuitability. However, the management has failed to do so in the case of this workman.

25. It is not disputed that employer cannot terminate the services of a probationer but the order should not be stigmatic. It should be on the genuine ground. If the employer proceeds on baseless and false ground out of malice such an action of employer is bad and illegal.”

10. The learned Single Judge by the impugned order, set aside the Industrial Tribunal's award. He held that the finding in the award, that the termination was in reality stigmatic, on a consideration of the memos and note issued by the Chief Photographer, were unwarranted. The Single Judge held it, *inter alia*, that:

“If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment. It need not be said that the appointing authority at the stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of such employee while discharging his duties for purpose of making assessment of the performance of such employee. Even if such employee while questioning the validity of an order of termination simplicitor brings on the record that some preliminary enquiry or examination of some allegations had been made, that will not vitiate the order of termination.”

11. The appellant urges firstly, that the termination amounts to retrenchment and cites *Management of K.S.R.T.C, Bangalore v M.Boraiah* reported as 1984 (1) SCC 244 in support of the contention that all classes of termination, including those of probationers, are comprehended under the definition in Section 2 (oo) of the Act. Therefore, PTI violated the law by ignoring Section 25F and the mandatory notice with the requisite payment. Mr. J.P. Sengh, learned senior counsel next argued that the real basis of the impugned termination was an alleged misconduct; he relied on the note submitted by Mr. Bedi and stated that this conduct, of reporting alleged misbehavior by stealth, behind the back of the employee, in fact justified the award by the Industrial Tribunal on the ground that in truth, the termination was motivated and a colourable exercise of power. He relied on *S. M. Nilajkar & Ors. v Telecom District Manager, Karnataka* reported as AIR 2003 SC 3553 and argued that the employer was under an obligation to establish that the termination was not a retrenchment, which had not been discharged in this case. He argued that the appellant's termination of services was an unfair labour practice on the part of the Respondent as provided in item 10 of Schedule V read with Section 2 (ra) of the Industrial Disputes Act, 1947 which provides that continuing a work as casual / temporary with the objective of depriving them the benefits and privileges of a permanent workman is an unfair labour practice. It is further submitted that unfair labour practice is a punishable offence under Section 25 T read with Section 25-U of the Industrial Disputes Act, 1947. He relies on the judgment of the High Court of Punjab & Haryana in *Bhiku Ram Vs Presiding Officer, Industrial Tribunal* reported as 1996 (3) LLJ 1126 (P&H) where it was held that while interpreting Section 2(oo) of the Act, the

Courts/ Tribunals should keep in mind the provisions of Section 2(ra) read with Section 25-T and Section 25-U of the Fifth Schedule of the Industrial Disputes Act, 1947. He also assailed the observations of the learned Single Judge, that the termination was covered by provisions of Section 2(oo)(bb) which states that where a contract of employment is for a particular period, the termination, by lapse of such time, would not be retrenchment.

12. Ms. Raavi Birbal, learned counsel for the PTI, urges that the view of the learned Single Judge is correct and his findings, in order, as they are based on a proper reading of the evidence. Thus, this Court should not interfere with it. She urges that the employee was clearly issued several memos, which could not be considered harassment, as they were work related. Stressing that the Tribunal gave undue weight to certain terms in the note of Mr. Bedi, it was submitted that they had to be read in the overall context as part of a document containing an honest appraisal of the work and performance of the employee. She highlighted that though the note was dated 29.06.1988 and could have in fact be the basis of an earlier decision not to renew the probation period, the PTI decided to give yet another chance to her. This coupled with the employee's silence in not questioning the two extensions of her probationary periods established that at the time, she accepted the assessment of work, by her superior official. Consequently the termination was neither motivated nor a camouflaged dismissal, but termination *simplicitor* on grounds of unsuitability to the job.

13. Two issues arise, from the immediately preceding factual discussion. Firstly, whether the provision of Section 2(oo) (bb) applies and secondly, whether the employee's termination was based on a *bona fide* assessment of her suitability or a disguised punitive order. It is well known that the form of

a termination order is not conclusive; the surrounding circumstances in any given case, assume importance. At the same time, decisions have emphasized that in the case of probationers, the employer has more leeway in considering her or his suitability. Thus, for instance, what may be considered a misconduct or blameworthy transgression warranting a full fledged departmental inquiry in the case of a permanent employee may not necessarily entail a like procedure; if the employer initially issues a charge memo or holds a preliminary inquiry but decides to discharge without casting any aspersions on the conduct of the employee, there can be a finding that it is not based on misconduct, but rather on an honest assessment or unsuitability (*Krishnadevaraya Education Trust v L. A. Balakrishna* 2001 (9) SCC 319; *Pavanendra Narayan Verma v Sanjay Gandhi PGI of Medical Sciences* 2002 (1) SCC 520 and *Dipti Prakash Banerjee v Satyendra Nath Bose Centre for Basic Sciences* (1999) 3 SCC 60). In *Dipti Prasad Banerjee (supra)* it was held that:

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

14. Applying the same principles in the case of probationers' termination,

, the Supreme Court noticed Section 2(oo) (bb) and held as follows in *Municipal Committee, Sirsa v Munshi Ram* 2005 (2) SCC 382. The Court observed as follows:

“16. From the above, it is clear assuming that there was some sort of misconduct, as noticed in the evidence of the witnesses of the management in the cross-examination, the same could not be used as evidence by the Labour Court or by the appellate court for coming to the conclusion that an order of termination which is otherwise simpliciter in nature is motivated by any consideration other than the decision of the management as to the satisfactory nature of the workman concerned.

17. As noticed above in the instant case, the respondent having been appointed as a probationer and his working having been found not to the satisfaction of the employer, it was open to the management to terminate his services. Assuming that there was an incident of misconduct or incompetency prior to his discharge from service, the same cannot ipso facto be termed as misconduct requiring an inquiry. It may be a ground for the employer's assessment of the workman's efficiency and efficacy to retain him in service, unless, of course, the workman is able to satisfy that the management for reasons other than efficiency wanted to remove him from services by exercising its power of discharge.”

In *State of Punjab v Sukhvinder Singh* 2005 (5) SCC 569 a decision by a Bench of three learned Judges, the Court held that:

“Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact-finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry is held behind his back, it is held that the order of discharge or termination from service is punitive in nature, even a bona fide attempt by the superior officer to decide whether the employee concerned should be

retained in service or not would run the risk of being dubbed as an order of punishment. The decision to discharge a probationer during the period of probation or the order to terminate the service of a temporary employee is taken by the appointing authority or administrative heads of various departments, who are not judicially trained people. The superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not having regard to his performance, conduct and overall suitability for the job. As mentioned earlier a probationer is on test and a temporary employee has no right to the post. If mere holding of an inquiry to ascertain the relevant facts for arriving at a decision on objective considerations whether to continue the employee in service or to make him permanent is treated as an inquiry 'for the purpose of imposing punishment' and an order of discharge or termination of service as a result thereof 'punitive in character', the fundamental difference between a probationer or a temporary employee and a permanent employee would be completely obliterated, which would be wholly wrong."

16. In this case, there is no dispute that the employee probationer's period of probation was extended twice; she did not protest at that time about any alleged harassment or work related discriminatory practice. No doubt, the materials on record showed that in one internal memo, her superior official had written rather strongly about her poor conduct and termed her as a "liar". However, this has to be seen contextually rather than in isolation. The said officer was concededly superior to the employee and was in the best position to judge her work. The employee admitted in her evidence that he was experienced and used to frequently guide her on the job and sometimes even appreciated her. Yet, he issued memos (all of which are on the record). They suggest his concern for proper performance of work; one even chides the employee for having taken too many photographs of an event which

required at the most four shots, resulting in wastage of precious and expensive film. The note – a detailed one, lists out shortcomings of the employee. Its tone and tenor is objective, perhaps severe and certainly not to the respondent's liking; but that is the point. A superior officer is expected to do his job and not sugar coat his prose looking behind his back, writing insipidly about the performance of his junior officers. Necessarily, he would not mince words. The Industrial Tribunal's approach and findings resulted precisely in what *Sukhvinder Singh (supra)* had warned against; *"bona fide attempt by the superior officer to decide whether the employee concerned should be retained in service or not would run the risk of being dubbed as an order of punishment."*

17. The material facts on the record show that despite the above note, the respondent employee's probation was extended on 05.07.1988 - thus giving her a third chance (the second extension of her probation). This clearly proved that the observations of Mr. Bedi were not meant to be taken as indicative of misconduct, but as an expression of opinion about the work performed by the employee. Consequently, this Court concurs with the findings and judgment of the learned Single Judge and holds this appeal to be unmerited. The appeal is, therefore, dismissed without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

FEBRUARY 17, 2016