

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.2446 of 2017 (O&M)

Date of Decision: 9.2.2017

M/s Perfect Facilities Management Pvt. Ltd.

... Petitioner

Versus

Presiding Officer and another

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Aashish Chopra, Advocate for the petitioner

Mr.Rakesh Dhiman, Advocate for Caveator-respondent no.2

RAJIV NARAIN RAINA, J.

1. This order will dispose of the writ petitions* tabulated in the foot-note of this order, as common questions of law and fact are involved in all these petitions. For the sake of convenience, the facts are being taken from CWP No.2446 of 2017.

2. The respondents have been heard on Caveat through their counsel Mr. Rakesh Dhiman, Advocate, the petitioner through Mr. Aashish Chopra.

3. The challenge in these writ petitions is to the awards passed by the Presiding Officer, Labour Court-II, Gurgaon on 19th September, 2016 answering the references in favour of the respondents-workmen. The workmen have been reinstated in service from the date of termination i.e. on 10th July, 2014 with continuity of service and 50% back-wages by setting aside the terminations. The date of termination is common to all these cases.

Other consequential benefits arising out of reinstatement have been granted.

The Labour Court has referred to a large number of judgments to reach the conclusion that the termination of services of the workmen was illegal and unjustified. The workmen had been retrenched without following due procedure prescribed under Section 25-F of the Industrial Disputes Act, 1947 (for short “the Act”) without serving notice, giving notice pay or offering retrenchment compensation which breach invalidates the removal from service brought about without assigning any reason.

4. Aggrieved by retrenchment, the workmen raised industrial disputes by serving a demand notice on 14/15th July, 2014 on the management. Nine of the respondents in this bunch of cases were confirmed while one was a probationer whose case falls in CWP No.2447 of 2017. The demand notice led to conciliation proceedings before the Labour-cum-Conciliation Officer, Gurgaon. Attempts were made to settle the matter amicably on 12th, 21st, 25th and 28th of August, 2014, but the parleys did not result in a settlement between the Management and the workmen and the disputes festered. The Conciliation Officer made a failure report on 4th September, 2014 and sent it to the appropriate government for its further attention and action. The failure report led to References No.35 etc. of 2014 for adjudication of the disputes by the Labour Court. Notices were issued to the parties on 21st October, 2014 and after full-fledged trial and recording of evidence, the parties were heard and the awards were pronounced on 19th September, 2016.

5. It is common ground that respondent workmen had raised disputes with the management demanding increase in salary and grant of increments and if the demands were not conceded, the workmen had decided to resort to direct action compelling collective bargaining to

improve their lot and conditions of service which was not illegitimate trade unionism.

6. The petitioner-company is engaged in the business of maintenance and upkeep of residential areas for which they required labour. That is how the respondents-workmen in these 10 petitions were engaged. Nine were confirmed hands and one was on probation when the axe fell. They were engaged in the year 2011 to work in different capacities such as Lift Operators, Assistant Plumbers, Senior Electricians, MSTs, Carpenters, House Keeping Supervisors and Supervisor Maintenance. The appointment orders are exhibited on record of the labour court. Initial appointment was on probation for six months or more at the discretion of the Management. Clause 7 of the letter of appointment promised that after expiry of probation period, confirmation shall be notified in writing. There was a recital in Clause 7 that the services were terminable after confirmation by giving one month's notice or one month's salary in lieu thereof to bring about the termination.

7. Mr. Aashish Chopra, learned counsel for the Management has strenuously argued that this bunch of cases does not involve termination or retrenchment. It is a case of abandonment of service. Threatened by direct action, the Management had asked the workers to return to work, failing which they will be treated as having voluntarily giving up the job. To appreciate the correctness of this argument, it would be necessary first to take a look at the reply to the demand notice. Therein, the workers are accused of voluntarily choosing not to return to the work. The word "abandonment" has not been used in the reply Ex.D-3. The workers are accused of conniving with each other in raising an illegal demand from the

not show up for work. They further threatened that they would drag the company to Court. In the reply, the Management refers to some letter dated 15th July, 2014 through which it is asserted that the workers were informed that if they did not return to work, despite various calls given by the management and if they remain absent from duty, without assigning any reason, then it will be presumed that the workers are not interested in working with the Company. Most importantly, this letter of 15th July, 2014 on which the management's case is built was not produced by it before the Labour Court. Therefore, it is not in the list of exhibited documents. Furthermore, the letter has not been put in cross-examination of any of the witnesses or in the examination-in-chief of Management witnesses. When the letter dated 15th July, 2014 has not been produced by the Management before the Labour Court, it cannot be read for the first time in writ proceedings as it will become a new plea not open for examination and not having been put through the mill of evidence by proper mode of proof it has no legal value as probative evidence. The Labour Court has returned a firm finding to this effect that the letter has not seen the light of the day. RW 1 produced by the Management admitted in his testimony that the Management did not issue any letter to the workmen about alleged absenteeism or serve any charge-sheet for alleged absenteeism as misconduct. The witness had maintained that the workmen had been paid off on 5th September, 2014 which the Labour Court, after appreciating the evidence on record, has held to be a false plea because prior to that day, the services of the workmen had already been terminated in July, 2014.

8. Abandonment of service is a matter of intention and looking to the close proximity of the termination/disengagement/retrenchment and

conciliation proceedings having taking place in August, 2014, the question of abandonment does not arise. The only document which may have helped the Management in some way or the other was the moot letter dated 15th July, 2014, but the Labour Court has returned a positive finding that there is no proof produced before the court on conveying or receiving of this letter. Even there is no oral statement of RW-1 on the point. Industrial disputes had arisen when before the Conciliation Officer; the Management flatly refused to reinstate the workmen on the ground that they have already made appointments and replaced the respondents herein. Hence, the Labour Court reasoned that subsequent to conciliation proceedings, making offer of appointment of pay notice etc. After the event is an eye-wash to avoid liability. I agree with the labour court on this score and reject the argument of Mr. Chopra as misconceived and unwarranted in the facts.

9. It is the further contention of Mr. Chopra in his challenge to the awards that the case falls in exception to Section 2 (oo) (bb) of the Act. It is argued that the workmen could be dealt with as per the terms and conditions of employment. This is one aspect. But more importantly, the condition in Clause 7 of the appointment letter requires special mention and consideration. The last sentence of Clause 7 empowers the Management to terminate the services even after confirmation by giving one month's notice or one month's salary in lieu thereof by the party bringing about such termination. The letter of appointment stipulates that services during probation could be terminated without assigning any reason, but after confirmation, on expiry of the period of probation i.e. six months, the confirmation would have to be made in writing. If no confirmation order is made, then the last sentence of Clause 7 would not come into operation. In

probation or were confirmed and whether termination would, by definition, amount to “retrenchment” which term accommodates a wide expression used in the Act, “for any reason whatsoever”. In either case, the mandatory provisions of Section 25-F of the Act would have to be complied with as they could not be taken away or whittled down by the petitioning Management. Mr. Chopra in his oral address did not dispute that nine of the workmen were confirmed while one was on probation and that is why he has asked the Court to single out CWP No.2447 of 2017 for separate consideration.

10. The Labour Court has elaborately dealt with the effect of Section 2 (oo)(bb) of the Act on these cases. Section 2 (oo) (bb) contemplates two situations as an exception to retrenchment; one, non-renewal of contract after it expires; and the second, “such contracts” being terminated under the stipulation contained therein. If the case falls in any of these two situations, it would not amount to “retrenchment” and therefore, retrenchment compensation under Section 25-F of the Act need not be paid at the time of termination. In this case, there is no fixed-term contract of service between the parties. The appointment letter being the contract of employment fails to specify fixed-term period of employment, then the second part of “such contract” does not justify termination under a stipulation that service will end on the expiry of the tenure, the period of fixed-term of service, meaning thereby, if such contract, on the expiry of period of service if workman is not renewed and the services are terminated as a consequence thereof, it would not amount to “retrenchment”. Similarly, if the services are terminated even before the expiry of period of contract, but in pursuance of a stipulation contained in 'that contract' and the services

“retrenchment”. The Labour Court understood the law and remained guided by the leading authorities including Escorts Limited vs. Presiding Officer, (1997) 11 SCC 521. The Labour Court has rightly distinguished the decision of this Court in Haryana State Agricultural Marketing Board vs. Subhash Chand & others, 2006 LLR 393 wherein it has been held that if termination of service of workman in view of exception contained in Clause (bb) of Section 2 (oo) of the Act was not retrenchment, question of applicability of Chapter V-A of the Act would not arise.

11. So far as termination after confirmation is concerned, the Labour Court has appropriately relied on the broad ratio of law laid down in Delhi Transport Corporation vs. D.T.C.Mazdoor Congress and others, AIR 1991 SC 101 that terminating service of permanent employee without prior notice or without holding enquiry is arbitrary, unfair, unjust and contrary to public policy. A clause of the kind in the last sentence of Condition No.7 of the appointment letter is described as Henry VIII Clause embedded in the principle of hire and fire. The 1947 Act makes no distinction between a probationer and a confirmed employee and both fall under the shadow of Section 25-F of the Act. Termination brought about by violating Section 25-F of the Act is *ab initio* void in view of its mandatory nature. The Labour Court did well in noticing D.K.Yadav vs. J.M.A. Industries Ltd., 1993 SCR (3) 930 on the right of an employer to terminate the services of an employee when results in deprivation of right to livelihood then it is to be effected in accordance with just, fair and reasonable procedure. When these cases do not fall in abandonment or to the inclusions in the exceptions to retrenchment and those findings have been recorded after properly appreciating the evidence on record, the question of setting aside the well

outlines of supervisory writ jurisdiction. The awards do not deserve to be tinkered with when they serve the ends of justice.

12. While leaving, it would be only fair to notice two judgments, one of the Supreme Court and the other of the Division Bench of this Court cited by Mr. Chopra to carve out a case within a case. These are in cases such as Uptron India Ltd. vs. Shammi Bhan, AIR 1998 SC 1681: (1998) 6 SCC 538 and Bhagwan Singh vs. Punjab State Coop. Bank Ltd. And another, 2009 (6) SLR 664 relied on. The observations of the Supreme Court in *Shammi Bhan* have been noticed by the Labour Court in paragraph 20 of the award. The contention of Mr. Chopra is that the present case deals with private company, and therefore, *Shammi Bhan* would not apply because the strict construction applies only to employment in government and its instrumentalities or statutory corporations, government company and other authorities within the meaning of Article 12 of the Constitution or only those protected against arbitrary termination where an employee has been confirmed and conferred permanent status. However, this case has not been decided by the Labour Court only on this principle but instead on broad impact of the ruling on employment even in the private sector. At any rate, the other principle is dealt with by the Supreme Court regarding Clause (bb) of Section 2 (oo) of the Act which is clarified yet again by the Supreme Court holding that the original term of service if is not renewed on the expiry of specified period or the service of an employee is terminated before expiry thereof in terms of the contract only then the exception can come to hold. Therefore, there can be no automatic termination as suggested by Mr. Chopra in the context of terms and conditions of appointment letter and the provisions of law in the Act cannot be contracted out by employer since no

of unfair shunting out employees after confirmation without any reason assigned in writing.

13. The decision of this court in *Bhagwan Singh* is also of no avail to the petitioner. The case is distinguishable on facts. This was a case of a workman being appointed for a fixed period of 89 days which was renewed from time to time. The termination was on account of non-renewal of the contract. The argument raised by the Management was that the termination was not in the nature of punishment and merely because the services of a temporary workman were terminated on account of bad reports, the order could not be held to be punitive in nature. It was in these circumstances that this Court denied reinstatement with back-wages and held that at best the workman could be awarded compensation. To be clear on facts, even after termination the workman had been employed.

14. Similarly, in *Escorts Limited* cited by Mr. Chopra which has also been cited before the Labour Court and noticed, the Supreme Court relied on its earlier dicta in M. Venugopal v. Divisional Manager, LIC (1994) 2 SCC 323. There can be no blind reliance on these judgments as Mr. Chopra, learned counsel suggests. The position was explained later in *Shammi Bhan* after noticing several judgments of the Supreme Court while dealing with the status of a permanent employee in a public limited company. Though *Escorts Limited* case has been noticed, but the ratio of *Shammi Bhan* appears somewhat different. It would, therefore, be apt to notice paragraphs 31 to 33 of the judgment in *Shammi Bhan, supra* as under:-

“31. From the facts set out above, it would be seen that the respondent was a permanent employee of the petitioner. There was no fixed-term contract of service between them. There was, therefore, no question of

services being terminated on the expiry of that contract. In the absence of a fixed-term contract between the parties, the question relating to the second contingency, namely, that the termination was in pursuance of a stipulation to that effect in the contract of employment, does not arise.

32. The contract of employment referred to in the earlier part of Clause (bb) has to be the same as is referred to in the latter part. This is clear by the use of words "such contract" in the earlier part of this Clause. What the clause, therefore, means is that there should have been a contract of employment for a fixed-term between the employer and the workman containing a stipulation that the services could be terminated even before the expiry of the period of contract. If such contract, on the expiry of its original period, is not renewed and the services are terminated as a consequence of that period, it would not amount to "Retrenchment". Similarly, if the services are terminated even before the expiry of the period of contract but in pursuance of a stipulation contained in that contract that the services could be so terminated, then in that case also, the termination would not amount to "retrenchment". This view finds support from a decision of this Court in *Escorts Ltd. vs. Presiding Officer*, (1997) 11 SCC 521.

33. This case does not fall in either of the two situations contemplated by Clause (bb). The 'Rule of exception', therefore, is not applicable in the instant case and consequently the finding recorded by the Tribunal on "retrenchment" cannot be disturbed."

15. In view of the above discussion, I find no legal infirmity either on facts or in law in the impugned awards dated 19th September, 2016 passed by the learned Industrial Tribunal-cum-Labour Court-II, Gurgaon

and would dismiss these petitions by endorsing the view of the Labour Court in invalidating the terminations of the respondent workers.

16. However, the dismissal of these petitions will not preclude the respondent-workmen from claiming any amount higher than 50% back-wages awarded and in case such an action is brought, this order would not be read in those proceedings as upholding that part of the awards which, if presented, would be heard independently on their own merit and in accordance with law, as this Court has expressed no opinion on this aspect.

9.2.2017
MFK

(RAJIV NARAIN RAINA)
JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

No

*

Sr.No	Case No.	Parties' Name
1.	CWP No.2446 of 2017(O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
2.	CWP No.2447 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
3.	CWP No.2448 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
4.	CWP No.2449 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
5.	CWP No.2450 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
6.	CWP No.2451 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
7.	CWP No.2452 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
8.	CWP No.2453 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd.

		vs. Presiding Officer and another
9.	CWP No.2454 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another
10.	CWP No.2455 of 2017 (O&M)	M/s Perfect Facilities Management Pvt. Ltd. vs. Presiding Officer and another

9.2.2017
MFK

(RAJIV NARAIN RAINA)
JUDGE