

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.705 OF 2000

Chitale Bandhu Mithaiwale .. Petitioner.

Vs.

Shri Sharad Narayan Naik & Anr. .. Respondents.

Mr. Kiran Bapat for the petitioner.

Mr. Prathamesh Bhargude i/b Mr.Sugandh Deshmukh for Respondent No.1.

Ms. Vaishali Nimbalkar AGP for the State.

CORAM : A.K. MENON, J.

RESERVED ON : 7TH FEBRUARY, 2018

PRONOUNCED ON : 28TH MARCH, 2018

JUDGMENT :

1. By this petition, the petitioner seeks to challenge the judgment and order dated 25th October, 1999 passed by the Industrial Tribunal, Pune whereby the petitioner was directed to reinstate the respondent no.1 on his original post with continuity of service and 50% of the back wages.

2. The brief facts are as under : The petitioner is a partnership firm. The petitioner is carrying on business as the manufacturers and sellers of sweetmeats. Respondent No.1 ("Respondent") was working as a probationer. The respondent was appointed pursuant to an advertisement in

the local newspaper for appointment to the post of clerk. The respondent made an application dated 22nd February, 1985 and he was appointed on 2nd April, 1985 effective the same date. In terms of the appointment order, the initial period of six months from 2nd April, 1985 to 2nd October, 1985 was to be treated as a period of probation during which the management could evaluate the services rendered by the respondent. If the services of the respondent were not found satisfactory, the management had the liberty of extending the period of probation for a further period of three months. Since the work of the respondent was not found satisfactory probation was extended upto 2nd January, 1986. During the extended period, on 2nd January 1986, the petitioner being dissatisfied with work of the respondent, informed him that his services would stand terminated from 2nd January, 1986 in terms of the appointment order. He was also offered 14 days wages as contemplated in the Bombay Shops and Establishment Act, 1948 (for short "the Act"). The respondent did not protest the termination and accepted the wages offered.

3. Later one Vividh Kamgar Sabha raised a dispute challenging termination of the services of the petitioner and some other workmen. The matter could not be settled in conciliation and the Appropriate Government referred the matter for adjudication to respondent no.2. The demand raised by the said Union was regarding termination of services of the respondent as well as co-employees and other demands but after the reference was made

the Union did not contest the matter of other employees. The respondent then decided to prosecute the case on his own and engaged an Advocate to proceed with the reference.

4. In the statement of claim, the respondent contended that his services were terminated illegally without any reason whatsoever, although the petitioner had given increment to the respondent. The termination was challenged as being violative of Section 25(f) and (g) of the Industrial Disputes Act. In its written statement, the petitioner contended that the services of the respondent were not satisfactory, even during the extended period of probation. Since the respondent had not completed 12 months service period, he was given only 14 days leave wages in lieu of notice. Evidence was led and the respondent was examined. He deposed that he was not given any written extension of probation and he therefore did not secure alternative employment since the Union had promised to get him his wages. In view of the contention of the respondent that the Union had promised him success in the dispute, the Union cross examined the respondent and it is contended that the Union's representative exposed the respondent for having made an incorrect statement that such promise was not made. In the cross examination by the petitioner, it is contended that the respondent admitted that he had received a letter appointing him on probation and extending the probation. He admitted that extension of probation was accepted.

5. The partner of the petitioner deposed to the effect that the

respondent's services being not satisfactory, he was asked to improve and the respondent assured that he would improve in his work. The Industrial Court, however, held against the petitioner and directed reinstatement by the impugned award. On behalf of the petitioner one Shri Narsinh Chitale deposed to the fact that the respondent was provided all statutory benefits such as Provident Fund and E.S.I. contribution. On the aspect of period of probation, he admitted that appointment letter erroneously stated that the period of probation was for three months since factually the period of probation was six months. Although the witness did not remember whether there were fixed service rules, he admitted that there was no occasion for issuing any memo to the respondent for unsatisfactory performance. He also could not explain why the Provident Fund form contains the reason for leaving employment as "resigned". These are the aspects which are not evident from deposition of the witnesses. The evidence on behalf of the petitioner therefore is largely silent on these aspects. However, the allegations of personal bias have been denied.

6. According to Mr.Bapat, learned counsel for the petitioner, the respondent had failed to render satisfactory services and the services were terminated in accordance with law. The impugned order, despite holding that the Industrial Disputes Act is not applicable, had entertained the dispute. Mr.Bapat submitted that the nature of the relationship between the parties and termination of the services were covered by Section 2(oo)(bb) of the

Industrial Disputes Act and termination does not amount to retrenchment. Mr.Bapat submitted that the termination of the services were without casting any stigma thereto and entirely within the rights of the petitioner and in accordance with the terms and conditions of employment.

7. According to Mr.Bapat in absence of any malafides being alleged and termination of the services having taken effect during first 8 months of service, there was no occasion to invoke the provisions of Section 25-F of the Industrial Disputes Act since the period of continuous services contemplated therein had not been achieved. According to Mr.Bapat the order of the Industrial Court cannot be sustained. Mr.Bapat admitted that in November 1985, the respondent was given rise in salary, however, the increment given was not indicative of ability of the respondent. Mr.Bapat drew my attention to the statement of claim wherein the respondent has alleged that the petitioner has incorrectly contended that the respondent had resigned which is the reason given in the Provident Fund form.

8. Mr.Bapat relied upon the contents of written statement and contended that it was not the respondent alone who was subjected to evaluation of the work and termination of the services but there were other employees similarly placed whose services were also terminated like the respondent and paid 14 days wages in lieu of notice.

9. In the course of his submission Mr.Bapat relied upon the following judgments :

- (i) Rajasthan State Road Transport Corpn. and Others vs. Zakir Hussain (2005) 7 SCC 447;*
- (ii) Deputy Director of Health Sciences, Nasik, Mandal Nasik & Ors. vs. Latabai Rajdhar Paturkar 1996 I CLR 328;*
- (iii) M/s. Rohini S. Kurghode & Ors. vs. M/s. E.Merck (I) Ltd. Writ Petition No.1103 of 2000 dated 26th October, 2016;*
- (iv) Unit Trust of India & Ors. vs. T.Bijaya Kumar & Anr. 1992 II CLR 964;*
- (v) Municipal Council, Samrala vs. Raj Kumar (2006) 3 SCC 81;*
- (vi) Bharatiya Kamgar Karmachari Mahasangh vs. M/s.Jet Airways India Ltd. Writ Petition No.2657 of 2017 dated 10th January, 2018.*

10. Relying upon the aforesaid decisions Mr.Bapat submitted that the case of the respondent was clearly covered under Section 2(oo)(bb) and the impugned order was clearly fallacious.

11. On behalf of the respondent Mr.Bhargude learned counsel submitted that the petitioner had based its case on two aspects, the first being that the order of termination would fall under Section 2(oo)(bb) of the Act and therefore not amounting to retrenchment. Secondly, on the footing that the Tribunal had come to the conclusion that the provisions of Industrial Disputes Act were not applicable and the Tribunal ought not to have reinstated the respondent. It is contended by Mr.Bhargude that argument canvassed based on Section 2(oo)(bb) were not raised earlier and is raised

for the first time before this Court and hence the same was not permissible.

12. Mr. Bhargude invited my attention to the appointment order and contended that the first paragraph clearly stipulates two periods, namely, from the date of appointment on 2nd April, 1985 to 2nd July, 1985 and from 2nd July, 1985 to 2nd October, 1985. He submitted that the period of probation as contemplated in paragraph 3 of the appointment letter sets out that the work of the respondent was not satisfactory. The petitioner had two options, it could either extend probation period for next three months i.e. from 2nd July, 1985 to 2nd October, 1985 or terminate his services without giving notice and by paying salary in lieu of the notice. In the present case the respondent is stated to have worked for more than 270 days i.e. first period of probation commenced from 2nd April, 1985 and ended on 2nd July, 1985. However, the petitioner allowed him to continue till 2nd October, 1985 and accordingly the probation was extended by the letter dated 29th October, 1985.

13. According to Mr. Bhargude this clearly indicates that the respondent has completed his probation period successfully and was entitled to be made permanent. Furthermore, his salary was increased in November 1985 and termination of the respondent was not simpliciter termination as a result of non-renewal of the contract of employment, nor the contract was terminated under the stipulation in that behalf for continuing the period of employment. He therefore submitted that the provisions of Section

2(oo)(bb) are not applicable since none of the circumstances are applicable in case of the petitioner. Mr.Bhargude further submitted that the Industrial Court had recorded a clear finding that the Petitioner's contention that the Respondent's work was unsatisfactory, was not correct. He therefore submitted that this Court cannot re-appreciate the evidence.

14. With reference to other arguments, the Tribunal should not have entertained the reference, he submitted that no reliance should be placed on a particular statement in the judgment and it should be read as a whole and that in paragraphs 15 and 16 the Tribunal dealt with the said aspect and the observations in paragraph 14 to the effect that though the workman has not completed one year's service so as to make the provisions of the Industrial Disputes Act applicable. The petitioner failed to demonstrate bonafides of their action, the termination of the service was not justified and the termination was a colorable exercise of power and in such cases the Tribunal will have jurisdiction to intervene and set aside the termination as capricious and unnecessarily harsh.

15. According to Mr.Bhargude, on a plain reading of the letter it becomes obvious that the respondent was initially engaged for a period of six months but subject to extension of probation. The manner in which the petitioner has treated the respondent's service reveals that the respondent was granted extension of probation on or about 29th October, 1985 notwithstanding the allegation of unsatisfactory performance. Even assuming

the same to be true, there is no occasion for the petitioner to increase salary while extending the probation. Thus, even though the petitioner has contended that the respondent's service could not be terminated and under the guise of unsatisfactory performance, the grant of increment is ample proof of the fact that there was no occasion to complain of the respondent's performance. Mr.Bhargude submitted that the impugned order correctly records that there is no proof, that the order of termination was justified and indeed the Industrial Court has found in favour of the respondent, the petitioner has failed to establish that the workman had not worked satisfactorily for the petitioner-employer. Mr.Bhargude further submitted that the appointment order contemplated two periods, first period being of three months and second period being of further three months and, therefore, it is not as if the petitioner had not contemplated extension of the probation.

16. Mr.Bhargude, learned counsel relied upon the following judgments :

- (i) *Greater Mumbai Area Development Authority and Ors. vs. Manju Jain and Ors. (2010) 9 SCC 157;*
- (ii) *Harjinder Singh vs. Punjab State Warehousing Corporation (2010) 3 SCC 192;*
- (iii) *Dilip Hanumantrao Shirke & Ors. vs. Zilla Parishad, Yavatmal & Ors. 1989 Mh.LJ. 794;*

(iv) Alexander Yesudas Maikel vs. Perfect Oil Seals and Isp & Ors. 1996 (1) LLJ 533. Bom.;

(v) Tata Consulting Engineers Vs. Ms. Valsala K. Nair & Ors. 1998 (1) L.L.N. 525;

(vi) Saudi Arabian Air Lines vs. Ashok Margovind Panchal & Anr. 2003 (1) Mh.L.J. 745;

(vii) M. Venugopal vs. The Divisional Manager, Life Insurance Corporation of India, Andhra Pradesh and Anr. AIR 1984 SC 1343.

17. Mr. Bhargude further submitted that the decision in the case of Deputy Director of Health Sciences (supra) and M. Venugopal (supra) were not applicable in the facts of this case since in both these cases, the parties were governed by the statutory rules which provided for permanency of services. Furthermore, in the decision in case of Santosh Gupta vs. State Bank of Patiala (1983) SCC 340 and State Bank of India vs. Shri N. Sundaramani was also not relevant since the decisions were of the year 1976 and 1980 respectively prior to the Industrial Tribunals (Amendment) Act, 1984.

18. According to him it would not be proper to infer that the judgment in Dilip Shirke (supra) is not a good law because it was referred to in the case of the Director of Health Services (supra) and the facts were different. Whereas the Deputy Director of Health Services (supra) judgment is dated 21st March, 1995, on the very next day this Court has passed an

order in the case of Alexander Maikel (supra) which relied upon Dilip Shirke's judgment. According to Mr.Bhargude reliance was placed on Rajasthan State Road Transport Corporation's (supra) is also misplaced. The facts in that case are also different and hence not applicable.

19. Mr.Bhargude relied upon the judgment in Dilip Shirke and Others (supra) which he pointed out is applicable to the petitioner and approved by the Division Bench of this Court in the case of *S.S.Sambre vs. General Manager SBI (1990) Mh.L.J. 998*. He also relied upon decision in Tata Consulting Engineers (supra). He submitted that the applicability of Section 2(oo)(bb) was not canvassed before the Tribunal and therefore cannot be now alluded to. He submitted that applicability of Section 2(oo)(bb) is a mixed question of fact and law and there is no basis in the pleading of the petitioner in his written statement, nor any argument was advanced in the case. Therefore the Industrial Court has no opportunity to consider the issue. Nothing prevented the petitioner from urging applicability of Section 2(oo)(bb) in the Industrial Court. On this basis Mr.Bhargude submitted that the impugned order is liable to be sustained and there was no occasion for this Court to interfere with the impugned order.

20. Having heard learned counsel for the parties at length, I find that principal defence is that there was no evidence to justify the termination of service on the ground of unsatisfactory performance, that the action of the

petitioner was contrary to Section 25G of the Act and procedure expected to be followed was not followed. Moreover before the Industrial Court applicability of Section 2(oo)(bb) was not resorted to and for that reason the petitioner should not be permitted to raise that plea at this belated stage in this petition for the first time. In Harjinder Singh (supra) the Supreme Court had held that the High Court was not justified in entertaining new plea raised on behalf of the respondent – Warehousing Corporation during the course of argument to overturn an otherwise well reasoned award. If the petitioner is permitted to urge this ground at this stage it would be inappropriate.

21. In Dilip Shirke (supra) it was held that amended Sub-clause (bb) of Section 2(oo) of the Industrial Disputes Act applies only to such cases where work ceases with the employment or the post itself ceases to exist or other analogous cases where contract of employment was found to be fair, proper and bonafide. But if the employer resorts to contractual employment as a device to simply take it out of the principal clause (oo) of Section 2 irrespective of the fact that the work continues or the nature of duties which the workman was performing still continues to exist in such case the action will have to be tested on the anvil of fairness, propriety and bonafides before coming to final decision.

22. In Saudi Arabian Airlines (supra) the Court held that in that case the post of security guard was a permanent post and therefore Section 2(oo)

(bb) would not apply. In that context, the Court checked and found that the petitioner had applied to the police authorities to issue a permanent airport pass to the security guard and on that basis it is found that if intention was to continue workman only for a period of two years it was not necessary to apply for permanent airport pass. The Court held that the order of Industrial Court directing the complainant to be made permanent on the date he completed 240 days was justified and therefore no interference was called for. I am of the view that the decision in Saudi Arabian Airlines (supra) was rendered in the facts of that case cannot be applied in the present case where there was nothing to establish that the Respondent was to be appointed permanently. In the instant case the person concerned was a probationer, initially employed for a period of six months and thereafter continued on probation. There is no occasion to equate the facts of Saudi Arabian Airlines (supra) to the case at hand. The impugned order records that burden of proving that the termination was issued in a bonafide exercise of powers given to the employer and there is no iota of evidence to prove that the work of the respondent was unsatisfactory. In absence of such evidence of unsatisfactory services, it cannot be said that the termination was bonafide. The impugned order did not find any favour to the respondent on the aspect of the records of the Provident Fund Authorities recording that the respondent had resigned. The Industrial Tribunal found that evidence on that aspect was not relevant since the employer had clearly indicated that the

services of the respondent were terminated. One other reason why the Industrial Tribunal found that the alleged unsatisfactory performance does not appear to be true is that in the letter of termination dated 2nd January, 1986, there is not even whisper of his services being unsatisfactory and that his services were being terminated for the said reason. Adverting to the provisions of Section 66 of the Act, the Court found that although the provision permits an employer to terminate the services of an employee who has not completed one year services by giving 14 days notice or wages in lieu of notice such right could not be exercised arbitrarily. In the present case, the Tribunal was not satisfied that the action of the petitioner was bonafide. It is for the aforesaid reasons that the Tribunal found that the order of the termination was bad and directed reinstatement of the respondent.

23. In the case of Unit Trust of India & Ors. (supra) the Supreme Court while dealing with termination of service of a probationer without giving him hearing before termination found that the High Court had held that the order was stigmatic in character, however, on further consideration by the Supreme Court held that the management had acted within framework of the Rules and law and its decision ought not to have been overturned. The facts of that case are that during the probation period the performance of the respondent was watched and it was found not satisfactory, despite this the probationer being given an opportunity to

improve. The management was therefore constrained to put an end to his service.

24. Perusal of the written statement will reveal that the petitioner had dealt with case of each of the workmen whose services had been terminated. The case of the respondent in this case and the only contention taken up is as follows :

“8. Shri Sharad Narayan Naik : The said employee was a probationer since 2.4.1985. After completion of his period of probation on 2.10.1985 he was given further extension of three months till 2.1.1986. During this period, he was given regular increment and the moment the extended period probation concluded, the work of Mr.Naik was unsatisfactory. His services were brought to an end by letter dated 2.1.1986. In all, his period of service is less than 12 months and accordingly, he was given 14 days leave wages lieu of notice as required by the provisions of the Mumbai Shops and Establishment Act, 1948 and therefore, the dispute in this respect raised is false and mischievous.”

25. The defence of the petitioner is that the respondent was a probationer, the period of probation was extended on 2nd October, 1985 by three months till 2nd January, 1986. Although he was given increment, the

work of the respondent was found unsatisfactory and his service was brought to an end by giving 14 days salary in lieu of notice, in view of the fact that the service rendered by the respondent was less than 12 months. There was no occasion for the Industrial Court to consider the submissions under Section 2(oo)(bb). In the present case, I do not see how Section 2(oo)(bb) will be of any assistance to the petitioner. It was not the case before the Tribunal that the respondent's case covered by Section 2(oo)(bb) and hence it is not necessary to deal with Mr.Bapat's contention apropos the invocation of Section 2(oo)(bb). Once having concluded that the application of Section 2(oo)(bb) cannot be invoked at this stage the question is whether the impugned order calls for interference.

26. Termination of service takes place as a result of the determination of the contract of employment under stipulations specifically provided in the contract, then the requirement of Section 25-F are not a *sine qua non*. It is contended that reference to the letter of appointment would indicate that intention of the petitioner was to continue the respondent in the employment because the petitioner admitted that the respondent was given all statutory facilities like Provident Fund, E.S.I. Contribution and that the appointment letter incorrectly mentions that the first probation would be for three months.

27. The impugned order after analysing the facts, evidence, submissions on both sides concludes that because an increment was granted

in November 1995, it could be presumed that performance of workman was acceptable since no employer would give an employee increment for unsatisfactory performance. It further goes on to hold that the contention of unsatisfactory performance does not appear to be correct because the termination order does not mention unsatisfactory performance of the respondent. According to the Industrial Court there is no evidence at all to substantiate the contention that the services of respondent were terminated because of unsatisfactory performance. This has led the Tribunal to hold that notwithstanding Section 66 of the Bombay Shops and Establishment Act, 1948 providing for a right to terminate services of an employee who has completed less than one year service by giving 14 days notice, this right cannot be exercised arbitrarily but only in a bonafide manner. It is burden upon an employer to establish that the termination was bonafide.

28. In other words the court held there is no evidence to prove unsatisfactory performance therefore it cannot be held that the termination of services of the respondent was a bonafide exercise of power under Section 66.

Section 66 reads thus :

“Section 66 : Notice of termination of service

*No employer shall dispense with the services of an employee
who has been in his (continuous employment)*

(a) for not less than a year, without giving such person at least thirty days notice in writing, or wages in lieu of such notice;

(b) for less than a year but more than three months, without giving such person at least fourteen days notice in writing, or wages in lieu of such notice;

(c) Provided that such notice shall not be necessary where the services of such employees are dispensed with for misconduct;

Explanation – For the purposes of this section “misconduct” shall include--

(a) absence from service without notice in writing or without sufficient reasons for seven days or more;

(b) going on or abetting a strike in contravention of any law for the time being in force; and

(c) causing damage to the property of his employer.”

29. The Industrial Court has further observed that the respondent was admittedly a workman employed as a probationer initially for six months and thereafter for extended period of three months i.e. total nine months in all. The impugned order recognises the fact that the respondent has not completed one year service so as to make provisions of the

Industrial Disputes Act applicable yet holds that termination was not justified and directed reinstatement of the workman. Even if we were to consider the act of retrenchment under the provisions of Industrial Disputes Act, the provisions of Section 25 of the Act would not come to rescue of the respondent since the same would not apply and the procedure under Chapter VA of the Industrial Disputes Act has no application in the instant case. The fact remains that the respondent was still on probation when his services were terminated. In the facts and circumstances of the present case, the right of the petitioner to avail of Section 66 could not have been denied on the basis of a perception of lack of bonafides which has found its way into the impugned order largely because an increment was given after initial period of six months.

30. I find approach of the Industrial Court in adopting this reason rather incongruous in the light of the fact that the petitioner was still a probationer and that the petitioner has adopted the provisions of Section 66 of the Bombay Shops and Establishment Act. The petitioner could have validly adopted this route and in my view there is nothing to prevent the petitioner from terminating the services of the respondent under the aforesaid provisions. Nothing has been shown to me in support of the contention that the test of bonafides of the employer in terminating services had to be satisfied before invoking the provisions of Section 66. In the

circumstances I am unable find any reason to support the impugned order and in my view the petition must succeed. In the circumstances I pass the following order :

- (i) The impugned order dated 25th October, 1999 passed by the Industrial Court in Reference I.T.No.18 of 1990 is hereby quashed and set aside.
- (ii) Rule made absolute in the above terms.
- (iii) No costs.

(A.K. MENON,J.)