

*rrpillai***IN THE HIGH COURT OF JUDICATURE AT BOMBAY****ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO. 2657 OF 2017**

Bharatiya Kamgar Karmachari Mahasangh

... Petitioner

vs.

M/s. Jet Airways India Ltd.

... Respondent

Mr. Sanjay Singhvi, Senior Advocate i/b. Mr. Mayuresh D. Nagle for the Petitioner.

Mr. Sudhir Talsania, Senior Advocate i/b. Mr. Abhay Kulkarni for the Respondent.

CORAM : A.K. MENON, J.**DATE : 10th JANUARY, 2018****P. C.**

1. By this Writ Petition, the petitioner has challenged an award dated 30th March, 2017 passed by the Industrial Tribunal under Reference No. CGIT-2/56 of 2013 by which the said Reference came to be rejected while holding that the demand of the Union for reinstatement with full back wages in respect of 169 workmen was not justified.

A few facts may be gone into :

2. The respondent company is engaged in the business of operating a commercial airline, flying aircraft for transporting passenger and cargo. The petitioner represents about 169 workmen (" the workmen") who were temporarily engaged by the respondent in various cadres vide separate appointment letters, one of which is dated 9th August, 1999. A specimen of such appointment letter appears

at Exhibit-A. These workmen carried out work of different cadres like loaders-cum-cleaners, drivers and operators who were engaged from 1998 onwards. The contention of the petitioner is that the workmen were treated as temporary inspite of completing 240 days in service.

3. Mr. Singhvi, the learned Senior Counsel for the petitioner referred to the specimen appointment letter and pointed out that initially, though the period was specified as 9th August, 1999 to 31st October, 1999, the duration of the employee's engagement was extended from time to time and eventually on or about 25th April, 2003 his services were terminated. Initially about 22 workmen's services were terminated and in Writ Petition No.2127 of 2002 this Court vide order dated 25th September, 2002 observed that in case any employee or workmen represented by the Union whose services were terminated, the termination order will not be given effect for a period of two weeks. Thereafter on 22nd October, 2002 a strike notice came to be served on the management. The matter was then referred to the Conciliation and the strike was averted. The reference in question was then made by the Central Government, Ministry of Labour and Employment and the terms of reference are as follows :

“Whether Bharatiya Kamgar Mahasangh had raised a demand on the Management of M/s. Jet Airways that Shri Anchekar Sadanand and other 168 workmen whose names are given in the list, be reinstated in the service from the date from which they have been removed from the services, as also full back wages, continuity of service and all other benefits be made available to them. Is it justified and legal? If yes, then what are the reliefs the aforesaid workmen are entitled for?”

4. The reference resulted in a statement of claim. The sole witness on behalf of the petitioner, Mr. Sandeep Vishnu Jadhav was examined. He deposed for self and on behalf of the 168 other workmen. Mr. Jadhav was also cross examined. The respondent's Human Resources Manager was also examined and cross examined and finally award came to be passed rejecting the reference.

5. The main plank of the challenge is the petitioner's contention that the workmen have completed 240 days of service and therefore were required to be absorbed in employment and granted permanency. That they were not temporary workers, because the nature of work was of a permanent, perennial and regular in nature. This fact, it is contended, was recognised by the respondent since on 23rd July, 2002 when the respondent issued a notice announcing that interviews would be held from 30th July, 2002 onwards for considering the temporary workmen for regular employment after verification of antecedents and their past record.

6. On or about 25th April, 2003, all these persons' services were abruptly terminated by issuing letters on the expiry of their individual contracts. One such letter is at Exhibit-B. The letter seeks to enclose the amount of a full and final settlement due on the expiry of the fixed term contract. The statement of claim sets out a case that the workmen have been victimised and that all 169 workmen had acquired status of probationers, were entitled to be made permanent and that the company's action amounted to retrenchment of workmen, especially because retrenchment compensation had been offered. Further it is contended that the alleged "fixed term" was only a ruse to avoid absorbing the petitioner's members as

permanent workmen. Particulars were adverted to as to why workmen were to work in three shifts and the fact that the nature of their work was one that could be of a permanent nature and hence their services could not have been terminated in this fashion.

7. On behalf of the respondent maintainability of the complaint was questioned and it was contended that no dispute as contemplated under the Industrial Disputes Act has been raised and that merely because a complaint was filed during the course of the conciliation proceedings it does not result into Industrial dispute. That the very nature of the point referred indicated that this is merely a demand and there was no foundation for such a demand. It is contended that a settlement had been reached on 2nd May, 2002 with the Bharatiya Kamgar Sena in accordance with provisions of the Act for the period 10th April, 2002 to 31st March 2005 (***“the Settlement”***) and it is submitted that while the Settlement was still in force, a fresh Charter of Demands was made. It is contended that the Bharatiya Kamgar Sena had raised its Charter of Demands on 27th April, 2001 which resulted in prolonged negotiation and ended in the Settlement and during the course of negotiations the said Union gave up the demand for grant of permanency and consequently the Settlement came to be signed.

8. Mr. Singhvi submitted that the Settlement does not come in the way of the petitioner union seeking to agitate the issue of permanency. It was pointed out that even during the pendency of the Settlement, a strike call which was not acted upon resulted in the Union approaching the Conciliation Officer and this Court by way

of a Writ Petition. Mr. Singhvi submitted that all workmen had been engaged continuously for around 240 days and more and as such by virtue of Clause 4-C of the Model Standing Orders, the said members were entitled to be absorbed as permanent employees and that even in the letters of so called termination upon expiry of the term, retrenchment compensation has been paid which indicated that the management of the respondent had considered them to be eligible to be absorbed. He therefore submitted that the impugned order is liable to be set aside.

9. Mr. Singhvi submitted that the applicability of the Model Standing Orders has been considered in several of the following judgments :

- (1) *Union of India and Others vs. Ramchander and Another* [(2005) 9 SCC 365]
- (2) *Haryana State Electronics Development Corpn Ltd. vs. Mamni* [(2006) 9 SCC 434].
- (3) *Tata Consulting Engineers vs. Ms. Valsala K. Nair & Ors.* [(1998(1) L.L.N.525]
- (4) *Federation of Indian Airlines vs. Union of India* [(2011) SCC Online Del 1140]
- (5) *Bajaj Auto Limited vs. Rajendra Kumar Jagannath Kathar and Ors.* [(2013) 5 SCC 691]
- (6) *Bajaj Auto Limited vs. Bhojane Gopinath D. and Others* [(2004) 9 SCC 488]
- (7) *Western India Match Company Ltd. vs. Workmen* [(1974) 3 SCC 330]
- (8) *New Hind Textile Mills, Unit of N.T.C. (SM) Ltd. Mumbai vs. Rashtriya Mill Mazdoor Sangh* [(2003) (4) L.L.N. 583].
- (9) *Indian Tobacco Company Ltd. Vs Industrial Court and Ors.* [(1994) III LLJ 459 Bom]
- (10) *Tata Textile Mills (U.C.) and Ors. vs. Munnialal Nanhoo Yadav and Ors* [(1994) III LLJ 476 Bom]
- (11) *Engineering Workers Association vs. J. D. Jamdar & Ors.* [(2004) SCC Online Bom 446]
- (12) *Pune Municipal Corporation & Ors. vs. Dhananjay Prabhakar Gokhale* [2006 II CLR 105].
- (13) *Municipal Council, Tirora and Anr. vs. Tulsidas Baliram Bindhade* [2016(6) Mh.L.J.] 867.
- (14) *Raigad Zilla Parishad vs. Gajanan H. Patil and Ors.* [2009 (1) Mh. L. J.792]

He laid emphasis on the judgment of the Supreme Court in the case of *Western India Match Company (supra)* and stressed upon the fact that the Standing Orders would operate with statutory force and that by virtue of completion of 240 days the Standing Orders would be effected and would prevail over the Settlement.

10. According to Mr. Singhvi merely by not pressing certain demands, the right to press the demand had not been given up. Relying upon the observations in case of *Ramchander (supra)*, Mr. Singhvi submitted that once it was found that the person has completed 240 days, the employee concerned was entitled to be absorbed and otherwise there would be a violation of Section 25F. In *Haryana State Electronics (supra)* Mr. Singhvi relied upon the similar observation that upon completion of 240 days the employee concerned was entitled to be absorbed and merely because the initial appointment was for a short period of 89 days re-appointment of the employee concerned was not being in dispute, the termination could not be held to be bonafide and was intended to defeat the object of the Act and hence not covered by Section 2(oo)(bb) of the Act.

11. It was further contended that in the case of *Tata Consulting Engineers (supra)* it was held that termination of services was illegal due to non compliance with Section 25F because a person was appointed on temporary basis but had continued in uninterrupted services for a period of 240 days. In *Federation of Indian Airlines (supra)* on 18th October, 2007 the Airports Authority of India had notified its 2007 Regulations and prior to that the Regulations dated 28th September, 2007 had been issued by the DGCA for the Airports of Delhi, Mumbai,

Hyderabad and Bangalore and that a Circular issued by the DGCA prevented the airlines from providing ground handling services where there was no passenger interface. Mr. Singhvi further submitted that the Delhi High Court had also noticed the fact that the Union of India had from 1st January, 2011 directed that various activities such as handling, screening of baggage, etc. would be carried out by the Union through its agencies and shall not be given to any private respondents. In *Bajaj Auto Limited vs. Rajendra Kumar (supra)*. Mr. Singhvi relied upon paragraph 25 in which the Court had referred to an earlier case of *Bhojane Gopinath (supra)* in which the court held that the Gujarat High Court should not have directed reinstatement of workmen with 50% back wages but the situation warranted grant of a reasonable amount of compensation. Relying specifically on the case of *Bhojane Gopinath (supra)*, Mr. Singhvi sought to justify his further demand and submitted that the Model Standing Orders would prevail and the Memorandum of Settlement did not by any means prevent the workman from exercising right to permanency. The other judgment referred to by Mr. Singhvi was that of *Raigad Zilla Parishad (supra)* where a single Judge of this Court came to the conclusion that termination of services in that case of Sanitary Inspector was not covered under Section 2(oo)(bb) of the Industrial Disputes Act since it was in the nature of retrenchment.

12. Mr. Talsania, the learned Senior Counsel representing the respondent contended that the letters appointing the workmen were clearly meant to operate for a limited period of time and not beyond. He invited my attention to Exhibit-A and the duration specified therein. For ease of reference the relevant portion is

extracted below :

“We are pleased to engage you as Loader cum Cleaner in our Company at Mumbai Airport, on a temporary basis, for a period from August 09,1999 to October 31, 1999. Your temporary appointment will come to an end on October 31, 1999.”

Mr. Talsania then submitted that the argument that the Model Standing Order applied in the instant case is not relevant since according to him the appropriate Government is the Central Government and therefore Model standing orders would not come into operation. This was promptly denied by Mr. Singhvi who contended that in the instant case the appropriate government is the State Government in view of air transport service being referred to in the definition of appropriate government in Section 2(a). He therefore submitted that the Model Standing Order would prevail.

13. Mr. Talsania further submitted that the provision pertaining to clause 32 of the Model Standing Orders where workmen were engaged in technical or manual work clearly provided that it will not operate in derogation to any right under contract of service or as custom, usage, agreement or settlement or award applicable to the establishment. Therefore in view of the aforesaid provision the Model Standing Orders will be of no application. He also invited my attention to the Charter of Demands dated. 27th April, 2001, copy of which is annexed to the additional affidavit on behalf of respondent in which Bharatiya Kamgar Sena had set out and enlisted their various demands. Under demand no. 6 titled “Other

facilities”, clause J referred to “Permanency”. Clause J is reproduced here for ease of reference.

*“(J) **Permanency** : Those workmen who have completed 240 days of service should be made permanent and permanency letter should be given to the workmen.”*

This demand was pending as of 2001 but in the Memorandum of Settlement this demand has not been pressed because clause 18 of the Memorandum of Settlement clearly records that the demands which are not specifically dealt with in the settlement will be treated as not pressed and treated as withdrawn. Mr. Talsania therefore submitted that the current action is merely the result of a change in the union and that the impugned order required no interference.

14. On the other hand Mr. Talsania referred to the the following Judgments :

- (1) *Rohini S. Kurghode vs. E. Merck Ltd.* [(2016) SCC Online Bom 9220]
- (2) *Municipal Council, Samrala vs. Rajkumar* [(2006) 3 SCC 81]
- (3) *Pune Municipal Corporation vs. Dhananjay Prabhakar Gokhale* [(2006) 5 Bom CR 727].
- (4) *Rajasthan State Road Transport Corporations vs. Deen Dayal Sharma* [(2010) 6 SCC 697].

In the case of *Rohini S Kurghode (supra)* a single judge of this Court had considered samples of an appointment letter and a termination letter and had found that the complainant was estopped from challenging their appointment on the basis of contract entered into from time to time, that by accepting such appointment he had waived their right to seek relief. Reliance was placed on the learned Single judge in the case of *M. Venugopal (supra)* wherein the Supreme Court also reiterated

Municipal Council, Samrala (supra) wherein the paragraph 10, the Court observed that section 2(oo)(bb) contained two parts. The first part contemplated the result of non-renewal of the contract of employment or its expiry and the second part provided for termination pursuant to specific provision in that behalf.

15. In *Pune Municipal Corporation (supra)* it was held that the respondent was in the service of the Corporation as a daily wager and he was not given permanency despite completing 240 days. He had approached the Industrial Tribunal alleging unfair labour practices. The Tribunal allowed the complaint and the management had filed a Writ Petition which came to be dismissed by single Judge and in the Writ Appeal, the Division Bench, while allowing the appeal, set aside the impugned order and held that once there was no dispute that under valid and lawful settlement, workmen had agreed that the claims of permanency would be applicable only after 5 years of continuous services, no claim under the Model Standing Order No. 4-C excluding such a settlement can be entertained.

16. In my view there can be no quarrel about the fact that in the present case the claim made by the workmen in their Charter of Demands dated 27th April, 2001 in paragraph 6 (J) the claim of permanency was clearly given up. The words used in clause 18 of the Memorandum of settlement is that the demand for permanency was not pressed and was withdrawn. Given the express withdrawal, in my view there is no occasion to now contend that the settlement cannot prevail over the Model Standing Order. In *Western India Match Company (supra)* the issue that arose was whether the terms of employment specified in Model Standing Order

should prevail over corresponding terms in contract of service and whether a special agreement can be enforced inspite of existence of Model Standing Orders. The Supreme Court observed that if a prior agreement, inconsistent with the Standing Orders will not survive, an agreement posterior to and inconsistent with the Standing order should also not prevail. Paragraph 8 also observes that the employer cannot observe two sets of the Standing Order governing the classification of workmen, it is also not open to him to enforce, simultaneously, the Model Standing Order regulating the classification of workmen and a special agreement between him and an individual workman settling his categorisation. Mr. Singhvi had contended that in the instant case also the Memorandum of Settlement was signed in the place of Special agreement as contemplated in the case of *Western India Match Company Ltd.(supra)*. He therefore submitted that the Standing Order should prevail and once the Court finds that the Standing Order operates. In *India Tobacco (supra)* Paragraph 21 observes that the contract of Service between the parties could be described as inconsistent with the Model Standing Orders and the Standing Orders must prevail over the contract of employment. In that case the Court also had referred to Standing Order 32 which is reproduced here for ease of reference :

“Standing order 32 : Nothing contained in these standing orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under the contract of service, custom or usage or an agreement settlement or award applicable to the establishment.”

17. It was observed by the Court that the provision contained in the Standing Orders would not operate to the prejudice of any right under the Contract of service, customs or usage or agreement, settlement or award. The Court was of the view that the prohibition against operation of the Standing Orders would come into force when better rights acquired by an employee under the contract of service are likely to be prejudiced and in that case it could not be said that the contract of employment offers better rights to respondent no.2 in respect of period of probation in comparison to what is contained in the Model Standing Order. Moreover in *Municipal Council, Tirora* (supra) the entire line of the judgments on the issue has been considered. The division bench of this Court has specifically considered entitlement of permanency in services. The Court has considered *Pune Municipal Corporation*(supra), *Western India Match Company Ltd. (supra)*, *Indian Tobacco (supra)*, *Umadevi, Ramachander (supra)* amongst other judgements. The Division Bench rejected an argument to the effect that judgments of the Division Bench of this Court in *Pune Municipal Corporation (supra)* and the judgments of the Supreme Court referred to in *Pune Municipal Corporation (supra)* were per incuriam and not good law because of the judgment of the Supreme Court in *U.P. State Electricity Board vs. Harishankar Jain [(1978) 4 SCC 16]* had not been looked into. In conclusion *Municipal Council, Tirora (supra)* held that in the absence of vacant sanctioned posts, Municipal Council workmen said to be in continuous service of 240 days or more cannot invoke clause 4-C of the Model Standing Orders to claim permanency or regularisation.

18. Mr. Singhvi had contended that the workmen had a right to claim permanency and that right could not be affected by the Memorandum of Settlement. In the course of submission Mr. Singhvi had also referred to the case of *Engineering Workers Association (supra)* wherein a single Judge of this Court had observed that the Standing Order would prevail and override provisions to the contrary contained in any employment contract. This view is seen to be overruled by the Division Bench in the case of *Tulsidas Baliram Bindhade(supra)* in which the Division Bench found that the addition of words “while incorporating the Model Standing Order in that case was not correct and that the judgment in *Engineering Workers Association (supra)* was expressly overruled.

19. In *Rajasthan State Road Transportation (supra)*, the Supreme Court observed that they are unable to hold that standing orders constitute a Statutory provision as contemplated in the case of Sukhdev Singh. It was also observed that the standing orders could be considered to be statutorily imposed condition of service rather than a Statutory provision. Such reference is also found in *Municipal Council, Sarmala (supra)* as also in *Pune Municipal Corporation (supra)*. In this respect it is appropriate to note that in *Municipal Corporation, Tirora (supra)* the Division bench of this Court has in no uncertain terms reiterated the fact that mere completion of 240 days would not by itself be a carte blanche for workmen to claim permanency in the services of employer. In the present case, one of the contentions of the petitioner is that the workmen in question had completed 240 days. It is not the case of the petitioner that they were entitled to be absorbed in

posts that were vacant and available. Thus mere completion of 240 days in my view would not entitle the petitioner members to claim permanency under the model standing order in view of the Settlement and specific provisions of clause 18 thereof.

20. I have no hesitation in holding that the present case is one of non renewal of the contracts on their expiry by efflux of time. Moreover the Apex Court has also observed that the Model Standing Order is not a statutory provision but at best a statutorily imposed condition of service. Conditions of service can be altered by a settlement or award. In the instant case the memorandum of settlement clarified that none of the workmen are claiming permanency. This is quite apart from the fact whether the Standing Order applies in the first place considering the definition of 'appropriate government'. Prima facie it does appear that the central government is the appropriate government especially since air transport service has been referred to in section 2(a)(i) besides the airline business is defined as a "Public Utility Service" under section 2(n)(i) but it is not necessary to consider this aspect given the facts at hand.

21. In *Pune Municipal Corporation (supra)* clause 9 of the judgment of the Division Bench reliance was placed on clause 32 of the standing order to conclude that the settlement in which the workmen agreed not to claim permanency till completion of 5 years would prevail in view of the operation of clause 32 of the Standing Order. Thus in my view if the Model Standing Order can be subjected to constraints imposed by terms of the Settlement and there is no substance in the contention that the model standing order should prevail in the instant case.

22. I am of the view that the judgments relied upon by Mr. Singhvi do not assist him to overcome the effect of the waiver of the claim for permanency embodied in the Settlement. It is evident that this waiver formed a crucial part of the Settlement and in all likelihood played the role of a catalyst to clinch the bargain secured by the parties to the Settlement. The petitioner's members cannot resile from their unconditional withdrawal of the demand for permanency after having taken advantage of the benefits under the Settlement. It is not in dispute that the appointment letters are in identical form as in case of one Mr. Sandip Vishnu Jadhav. The relevant portion is already quoted above. The letter contract in no uncertain terms engaged Mr. Jadhav a Loader cum Cleaner at Mumbai Airport on a temporary basis for a period August 9, 1999 to October 31, 1999 and further holds that the appointment will come to an end on 31st October, 1999. In addition there is clause 5 which entails that even during the temporary tenure the company may terminate his services without assigning any reason. These terms are accepted by the workmen and there is no dispute about this. On 25th April 2003 Mr. Sandip Vishnu Jadhav was handed over his full and final settlement, Exhibit-B by which the final settlement was dealt with, specifically mentioning that the amount was paid on expiry of the fixed term contract. It is a different matter that the amount included retrenchment compensation. In that respect Mr. Singhvi may have made a point to the effect that there was no occasion to pay retrenchment compensation if the dues were being paid on expiry of the contract. He had contended that this itself would show that the term of the contract was not fixed and it was actually termination which amounted to retrenchment but that alone will not displace the

effect of the Settlement, the term of which must prevail as it squarely falls in the ambit of Section 2(oo)(bb). On the other hand the payment of what is described as retrenchment compensation was by way of a one time and in the over all scheme of things, it is obvious that the Bharatiya Kamgar Sena which was favoured in the case of the workmen at the material time gave up the plea of permanency and a comprehensive settlement was signed on 2nd May, 2002 which was a package deal. In my view when the terms of engagement are specific and have a fixed term, the union is seen to have accepted the respondent's interpretation and not only did not press the demand but in fact withdrew it.

23. It is not necessary to enter upon the controversy pertaining to the change in policy whereby the management of airlines were barred from engaging workmen for ground handling work. The fact that the respondent company is also one of the petitioner in the case of *Federation of India Airlines (supra)* does not change the fate of the petitioners. The fact that prior to framing rules in 2002 policies by the Ministry of Civil Aviation permitted carrying out of ground handling work by workman of choice of the airline including fixed term employees but that could have no impact on the nature of the relationship in the present case. In the present case although clause 5 of the appointment letter provided for termination without assigning reasons, it is the case of the plaintiff that such option has not been exercised. It is therefore admitted that the first part alone has been resorted to and the provisions of section 2(oo)(bb) come into play. In my view provisions of Section 2(oo)(bb) are clearly attracted. Section 2(oo)(bb) reads as follows

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)voluntary retirement of the workman ; or

(b)retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

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) termination of the service of a workman on the ground of continued ill- health;]

24. In conclusion I find that exceptions to retrenchment includes termination of services of the workman as a result of non renewal of contract of employment between the employer and workman concerned on its expiry. In the instant case, the contract at Exhibit-A expired by efflux of time on 31st October, 1999. Renewals were also for a specific period of time and upon expiry of this period Exhibit B enclosing a full and final settlement came to be issued. The amounts offered were accepted without demur or protest. I am of the view that it was not open to the workmen to resile from the fact that they had consciously made a choice of not only not pressing the demand but actually withdrawing it as seen from clause 18. Merely because the workmen owe allegiance to a different union today, the petitioner union cannot now seek to avoid the express provisions of Memorandum of Settlement. In my view the demand of permanency was unequivocally given up after having expressly raised the Charter of demand dated 27th April, 2001. For all the aforesaid reasons it is not possible to entertain the contention that the said

workman are entitled to be absorbed on permanent basis. There is nothing perverse about the impugned order dated 30th March, 2017 and which calls for interference of this Court. Accordingly, I pass the following order :

- (i) Writ Petition is dismissed.
- (ii) No orders of costs.

(A.K. MENON, J.)