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

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Date of Decision: 04th December, 2019

+ W.P.(C) 9843/2018

NITYA NAND SINHA

..... Petitioner

Through: Mr. Bankey Bihari, Mr. Birendra
Bikram, Advocates with petitioner in
person.

versus

M/S HL PROMOTERS PRIVATE
LIMITED AND ANR

..... Respondents

Through: Mr. Neeraj Malhotra, Senior
Advocate with Mr. Saifur R. Faridi
and Ms. Cassandra Zosangliani,
Advocates for R1.
Ms. Barnali Basak, Advocate for
R2/GNCTD.

**CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA**

J U D G M E N T

1. The petitioner has challenged the order dated 31st May, 2018 whereby the learned Labour Court rejected the statement of claim of the petitioner.
2. The petitioner raised an industrial dispute against the respondents on the averments that he was in the permanent and continuous employment of the respondent since 01st December, 2014; he was designated as a General Manager but he never performed managerial, supervisory and administrative nature of duties during his tenure; the primary, basic and dominant nature of

duties of the workman were to generate regular reports; preparation of sketches; preparing “*Request for quotation*” with drawings to call the contractors to get quotations and then preparing comparative statement, analysis of rates; preparing “*Note for record*” for approval, preparing “*Letter of Intent*”; preparing contractor’s agreement technical portion of approval and submitting the same to his superior, Mr. Sanjeev Suri, Regional Head of Engineering; taking of measurements at site and other miscellaneous jobs; the workman was never authorized to take any independent decision and there was no subordinate staff working under him; the workman during his tenure of service performed his duties with utmost dedication, sincerity and honesty; he had a flawless record of service to his credit; no job description was issued to the workman and the duties performed by him were purely clerical, technical, manual etc; initially, the workman was employed on probation for a period of six months which was to be confirmed on completion of the probation period; the petitioner is a workman within the definition of Section 2(s) of the Industrial Disputes Act; his last drawn wages were Rs.4,00,000/- per month and the respondent has not paid the performance incentive at the rate of 20.2% of the salary since the date of joining; the respondent instead of appreciating the petitioner started harassing the petitioner and pressurized him to either submit resignation or face dire consequences which was not accepted by the petitioner who made a complaint dated 27th May, 2015 to the Director of the respondent; the respondent illegally terminated the petitioner’s services on 16th June, 2015 on the ground that the performance in the probation period was not found satisfactory; the termination is illegal and violative of Section 25(h) of the Industrial Disputes Act; the petitioner issued a demand notice dated 23rd

October, 2015 to the respondent which was replied on 04th December, 2015; the petitioner is not gainfully employed since the date of his termination; and the petitioner is entitled to reinstatement with continuity of service and back wages along with all consequential benefits.

3. Respondent No.1 filed the written statement in which a preliminary objection was raised on the ground that the petitioner was working as a General Manager at last drawn salary of Rs.4,00,000/- per month and was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act; the petitioner was entrusted with managerial, administrative and supervisory work described in his job description; the petitioner was responsible to supervise, manage and ensure that all resources for the project are available as per plan to meet deadlines; the petitioner was responsible to supervise the works and ensure that the quality and safety standards are maintained while achieving time and cost targets fixed on a weekly and monthly basis and also responsible for ensuring statutory compliances on site; the petitioner was responsible to maintain excellent working relations with the contractors by properly supervising various work contracts assigned to the contractors and to make sure that the work progresses as per the timeline fixed and upto the standard and quality as prescribed.

4. The following issues were framed by the Labour Court on 14th October, 2016;-

- “(i) Whether the claimant is a workman as defined under Section 2(s) of the Industrial Disputes Act, 1947 (as amended up to date)?*
- (ii) Whether the claimant/applicant was on probation on the alleged date of alleged termination, if so, its effect? OPM*

- (iii) *Whether the services of the claimant were terminated by the management illegally and unjustifiably as claimed by the claimant? OPW*
- (iv) *Whether the claimant is entitled to the relief claimed in the statement of claim? OPW*
- (v) *Relief”*

5. The Labour Court treated issue No.1 as a preliminary issue and decided the same against the petitioner holding that the petitioner was not a workman within the definition of Section 2(s) of the Industrial Disputes Act.

The findings of the Labour Court are reproduced hereunder:-

“In the light of aforesaid, the claimant by no stretch of imagination falls under the category of workman as defined under Section 2(s) of the Industrial Dispute Act, 1947. Mere a statement that he never performed any managerial, supervisory and administrative nature of duties could not be epso facto be presumed. Thus the claimant was performing the work of Supervisory or the Administrative Category and as such he does not fall within the definition of workman, as provided U/s 2 (s) of I.D. Act. Resultantly, preliminary issue is decided against the workman. Consequently, claim of the workman is rejected. Award is passed accordingly. Requisite copies of the award be sent to the competent authority for publication as per provisions of Industrial Dispute Act.”

Submissions of the petitioner

6. The petitioner was a workman irrespective of designation and salary as he was neither having any subordinate staff nor having any independent decision making capacity; the hiring of five subordinate staff was kept on hold by the petitioner's superior and the petitioner was forced to work for six people at a time; the petitioner never worked in any managerial, administrative and supervisory capacity; severe charges were made against the petitioner in *Annexure A* to the termination letter; the termination was

stigmatic and not a termination *simplicitor*, which resulted into the petitioner without job since over four years; the termination and its *modus operandi* adopted by respondent No.1 tantamount to victimization and unfair labour practices as defined under Schedule V read with Section 2 (ra) of the Industrial Disputes Act; Issue no.1 “*Whether the claimant is a workman as defined under Section 2(s) of the Industrial Disputes Act, 1947*” is a mixed question of law and fact and ought to have been decided only after calling upon the parties to lead their respective evidences; learned Labour Court passed the impugned award merely on the basis of assumption and without going into the aspect of the nature of duties discharged by the petitioner; the said issue cannot be decided on the basis of the designation and salary; the designation of an employee is not of much importance and what is important is the nature of duties performed by the employee; and rather all the issues should be decided together after scrutinizing the evidence led by the parties to the dispute. All the issues framed by the Labour Court are mixed questions of facts and law and could not have been summarily decided without the evidence by respective parties. Reliance was placed on ***S.K. Maini v. M/s Carona Sahu Company Ltd.***, JT 1994 (3) S.C. 151, ***D.P. Maheshwari v. Delhi Administration***, (1983) 4 SCC 293, ***Anand Regional Co-op. Oil S. Union Ltd. v. Shailesh Kumar Harsha Bhai Shah***, (2006) 6 SCC 548, ***S.K. Verma v. Mahesh Chandra***, (1983) 4 SCC 214, ***Sharad Kumar v. Govt. of NCT of Delhi***, 2002 (3) SCALE 442, ***Workman of Dimakuchi Tea Estate v. The Management of Dimakuchi Tea Estate***, AIR 1958 SC 353, ***The Management of Express Newspapers Pvt. Ltd. v. The Presiding Officer, Labour Court, Madurai***, AIR 1964 SC 806, ***Manoj Singhania v. Union of India***, 150 (2008) DLT 513, ***Kailash Chand v. DTC***,

217 (2015) DLT 698 (DB) *The Management of Brooke Bond v. Y.K. Gautam*, AIR 1973 SC 2634, *Rajesh Kohli v. High Court of J & K*, (2010) 12 SCC 783, *Management Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik*, AIR 1966 SC 1051.

Submissions of respondent No.1

7. Vide Appointment Letter dated 2nd December, 2014, the Petitioner was appointed as a General Manager (Engineering) in Grade D of the Company at a yearly package of Rs.48,00,006/-. The location of the Petitioner's appointment was at Bahadurgarh Site Office, Haryana. In terms of Clause 5 of the Appointment Letter, the Petitioner was to be on probation for a period of six months from the date of joining, which could be extended by the Company if the performance or conduct of the Petitioner was not found satisfactory. Unless such confirmation was communicated, the Petitioner was deemed to continue with the appointment on the probationary basis. The Petitioner accepted the terms of his appointment and accordingly, signed the same. In terms of Clause 7 of the Appointment Letter, the Company was authorized to terminate the employment of the Petitioner without any notice or salary in lieu thereof, if the Petitioner was found to be in breach of any of the Company's policy on discipline, computer and internet usage or found guilty of dishonesty, disobedience, disorderly behaviour, negligence, absence from duty without permission, sexual harassment, violation of Tata Code of Conduct, violation of the Safety and Quality policies of the Company or any other conduct considered by the Management to be detrimental to the interests of the Company.

8. The Petitioner was appointed as a General Manager (Engineering) and was performing managerial, administrative and supervisory work. The

Petitioner was responsible for supervision and management of the overall Project as per agreed design and cost parameters. He was also responsible to manage and ensure that all resources for the project were available as per plan to meet deadlines. As part of his job, the Petitioner was responsible to supervise the works and ensure that the quality and safety standards were maintained while achieving time and cost targets fixed on a weekly and monthly basis and also responsible for ensuring statutory compliances on the Project Site. Another aspect of the role of the Petitioner was to maintain excellent working relationships with the independent contractors by supervising various work contracts assigned to them and to make sure that the work progresses as per the timeline fixed and prescribed quality standards.

9. The roles and responsibilities of the Petitioner were laid down in the job description of a Project Head, which is reproduced hereunder:

Strategic

- *Responsible for supervision and management of the overall project within the stipulated time and cost parameters meeting acceptable standards of Quality and Safety.*
- *Provide inputs on Project feasibility and Project planning*
- *Ensure adhering to Plans & Cost Estimates for all projects*

Operational

Work execution at Site

- *Supervise and co-ordinate daily execution by various contractors*
- *Ensuring construction as per agreed designs and cost management to ensure profitability.*
- *Overseeing the procurement and contractual requirements on an overall basis*
- *Ensuring all statutory compliances are maintained up to date at sites and other parties like contractors have also required statutory compliances*

- *Interpretation of drawings/ designs*
- *Assist deputy project manager in preparation of detailed activity schedule*
- *Determine requirements and order/ requisition material (cement and steel) at site*
- *Maintain and verify measurement sheets for various activities*
- *Ensure availability of materials, equipment etc that are to be provided at site and coordinate to ensure the same*
- *Supervise work at site to ensure that contractors are executing as per contract and to required quality and contract specifications and work completion is on schedule*
- *Provide technical guidance on site whenever & wherever required and resolving critical issues on site*
- *Monitor the costs at site actively and ensure they are within budget.*
- *Ensure that there is a conducive and safe work environment at the site*
- *Ensure proper storage, record keeping and inventory of all materials at site*
- *Ensure adequate security is provided at site to minimize pilferage, etc.*
- *Ensure that reporting to regional and HO on the project is timely and participate in all project review meetings*
- *Ensure that Site accounts and petty cash are maintained accurately and as per the required guidelines*

Vendors & Contractors

- *Assist where required in the selection of local vendors and contractors/sub contractors*
- *Develop and maintain relationships with key vendors and contractors*
- *Escalate issues to the local representatives of the contractors as per the requirements.*

Quality & Safety

- *Ensure that all Quality Assurance & Quality Control activities are being carried out effectively and in a timely manner, so that the quality of material (cement, steel, etc) & equipment being used at the site is of high quality and reliable.*
- *Ensure the preparation & implementation of safety plans*

- *Ensure that safety training is regularly conducted for all staff including contractor staff*

Developmental

- *Keep abreast of developments in the area*
- *Participate in recruitment of appropriate talent in line with approvals for work area*
- *Manage the team effectively by coaching, mentoring, provide periodic feedback and exposure to enhance learning*

10. The Petitioner's work during his employment with Respondent No.1 mainly involved managerial and supervisory work viz. review of preliminary work done by other clerical staff, taking management decisions like hiring consultants, floating tenders, liaising and supervising for seeking statutory approvals, instructing junior staff to carry out the work and asking them to report to him etc. This is amply evident from a perusal of the minutes of weekly review meetings of Respondent No.1 as well as contemporaneous emails.

11. Whether a particular employee is a workman within the meaning of Section 2 (s) of the Industrial Disputes Act, or a person is employed in supervisory capacity, the test to determine this is to understand what was the primary, basic or dominant nature of duties for which the person whose status is under enquiry was employed. Where an employee has multifarious duties and a question is raised whether he is a workman or not, the Court has to find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, which may not necessarily be in tune with the basic duties, these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be taken into consideration and the gloss of some additional duties must be rejected while determining the status

and character of the person. Perusal of the job description of the Project Head, the designation the Petitioner was employed at, minutes of weekly review meetings and the emails exchanged between the Petitioner and Respondent No. 1 clearly show that the Petitioner was entrusted with managerial, supervisory, and administrative tasks and was performing them as part of his duties and role assigned.

12. Even assuming for the sake of arguments, that the Petitioner was doing some clerical work as alleged, in view of the legal position that the primary nature of duties of an employee are to be seen while undertaking an exercise for the purposes of Section 2 (s) of the Industrial Disputes Act, the Petitioner cannot be classified as a workman. The perusal of the record clearly establishes that the dominant purpose of employment of the Petitioner with Respondent No. 1 was management and supervision of the Project. It is for these reasons, the Petitioner was drawing hefty annual salary package of Rs.48,00,006/-. It is unprecedented that a workman is employed at such higher remuneration. The Company has also executed a letter of authority in favour of the Petitioner pertaining to the Project, whereby the Petitioner has been authorized to take various important actions on behalf of the Company, having a binding effect on the Company.

13. The Petitioner's role in Respondent No. 1 company was administrative, managerial and supervisory. No organization confers such wide powers on any of its employee unless such an employee is a high-ranking official, whose duties pre-dominantly are supervisory and managerial. One of the factors in considering if an employee is a supervisor or not is whether such an employee can bind the employer by taking some kind of decision on his behalf. Execution of the Letter of Authority dated

10th December 2014 conclusively proves that the Petitioner was authorized to bind the Respondent No.1.

14. The Petitioner's contention that the finding of the Ld. Labour Court was premature and the decision that the petitioner was not a workman could not have been taken without leading evidence, is bad in law on multiple accounts. Firstly, there is no bar under law to decide maintainability of a claim as a preliminary issue. The petitioner has relied on ***D.P. Maheswari v. Delhi Administration***, (1983) 4 SCC 293 in which the Supreme Court held that the "*Tribunals and Courts who are requested to decide preliminary questions must ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences*, meaning thereby, a tribunal or Court can decide the issue of maintainability at the threshold if it is absolutely necessary and if the outcome of the threshold issue is likely to make rest of issues redundant.

15. The Petitioner's performance during his probation period with the Company was not befitting of any employee, let alone of an employee at the designation and role the Petitioner was entrusted in the Company. Since very early of his joining the Company, the Petitioner exhibited incompetency as well as undisciplined behaviour. Non-performance of the assigned tasks by the Petitioner, clubbed with deliberately not responding and coordinating with the colleagues resulted in great hardship to the day to day functioning of the Company as well as delay in the execution of the Project. The copy of enquiry report on the Petitioner's incompetency is *Annexure A* to the termination letter dated 16th June, 2015. Despite having been advised and requested to ably perform his duties, the Petitioner did not mend his ways and continued to behave to work in a manner which was against the interest

of the Company. The Petitioner filed a complaint with the Chief Ethics Officer of the Company, highlighting alleged violations by one Mr. Sanjeev Suri of the Tata Code of Conduct on 27th May, 2015. An internal enquiry thereafter was undertaken by the Company to look into the allegations made and a report was submitted on 4th June, 2015. The said enquiry concluded that the issues raised by the Petitioner in his complaint to the Chief Ethics Officer mainly arose out of personality or ego clashes between the Petitioner and his superiors in the Company and appeared to have been made out of agitated behaviour and personal animosity against fellow employees. The enquiry report concluded that the Petitioner failed to accept any directions from his immediate superiors and deliberately took adverse views despite management decisions, thereby derailing the progress of the Company and the Project. The Petitioner failed to display the requisite professional competency.

16. Being a General Manager and Project Head, the Petitioner was given responsibilities and roles to perform various tasks and was liable to ensure that his team achieves the targets within the deadlines and to supervise various works being executed by the contractors. The petitioner, however, failed to perform the same with required dedication and was also unable to work harmoniously with his co-workers. Despite being given repeated warnings and opportunities, the petitioner exhibited erratic behaviour with his co-workers, deflecting blames on others and behaved disrespectfully towards his co-workers. Despite being afforded several opportunities and efforts of the Petitioner's reporting officer, reviewer and the HR, the Petitioner failed to display any improvement in his competency, behaviour and disciplinary front. The Company, therefore, did not confirm the

Petitioner's employment and he continued to be on probation period. Since the Petitioner failed to display any sign of improvement in his competency or behaviour, the Company was constrained to terminate his employment with immediate effect vide letter dated 16th June, 2015. In terms of Clause 7 (a) of the Appointment Letter, by which the Company was authorized to terminate Petitioner's employment without any notice or salary in lieu thereof. The Company in good faith decided to terminate the petitioner's services by providing one month salary in lieu of one month notice period. Full and final settlement of petitioner's dues was made by the Company in due course. The termination of Petitioner's services by the Company was lawful, and under the terms and conditions of his appointment.

17. The services of a probationer have been terminated during the period of probation in terms of the contract of employment/letter of appointment. It is settled legal position that such termination does not tantamount to 'retrenchment' within the meaning of Section 2 (o)(o) of the Industrial Disputes Act, 1947.

18. In ***Governing Council of Kidwai Memorial Institute of Oncology, Bangalore v. Dr. Pandurang Godwalkar***, (1992) 4 SCC 719, the issue pertained to termination of an employee, appointed as Lecturer in Surgical Oncology in the Appellant Institute on probation for one year on a condition that "*failure to complete the period of probation to the satisfaction of the competent authority will render the [Respondent] liable to be discharged from service.*" The Respondent's services were terminated before the expiry of the period of probation. Challenged by the Respondent, the order of termination was quashed by the Karnataka High Court. Setting aside the order of the Karnataka High Court, the Supreme Court held:

“7. When an appointment is made on probation, it presupposes that the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. He is to be confirmed after the expiry of probation only when his service during the probation is found to be satisfactory and he is considered suitable for the post against which he has been appointed.

If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the over-all 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.

8. Even if such employee while questioning the validity of an order of termination simpliciter brings on record that some preliminary enquiry or examination of some allegations has been made, that will not vitiate the order of termination.”

19. In ***M. Venugopal v. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, AP***, (1994) 2 SCC 323, the services of the Appellant (appointed as Development Officer with a probation period of 1 year) were terminated during the extended period of probation on account of failure to improve his performance. The order of termination was quashed by the Single Judge of Andhra Pradesh High Court, which was however subsequently set aside by the Division Bench. Upholding the order of the Division Bench, the Supreme Court held that since the termination of the Appellant’s services was a result of the contract between the Appellant and the Respondent, it would not qualify as retrenchment under Section 2 (o)(o) of the Industrial Disputes Act and hence non-compliance of the requirement of Section 25-F shall not vitiate or nullify the order of termination of the Appellant. The Supreme Court further held that *“Even under general law, the service of a probationer can be terminated after making an overall assessment of his performance during the period of*

probation and no notice is required to be given before termination of such service.

20. Similar view has been taken by the Supreme Court in ***Kalyani Sharp India Ltd. v. Labour Court No.1, Gwalior***, (2002) 9 SCC 655 wherein the services were terminated during probation. It was held:

“It is clear that the respondent has been appointed as a Trainee Service Technician and for a period he had to undergo the training to the satisfaction of the appellant and if his work was not satisfactory during the period the facility could be withdrawn at any time and he would be regularised only on completion of his training. Thus, the respondent’s services were terminated before the expiry of the probationary period. In such a case, question of issue of notice before terminating the service as claimed by the respondent does not arise.”

21. In ***Kalyani Sharp*** (*supra*), the Supreme Court relied on ***Escorts Ltd. v. Presiding Officer***, (1997) 11 SCC 521, wherein it was held that since the termination was in accordance with the terms of the contract though before the expiry of period of probation, it fell within the ambit of Section 2 (o)(o) (bb) of the Industrial Disputes Act and did not constitute retrenchment.

22. In ***Mahinder Singh v. M/s Indian Airlines***, 2016 SCC Online Del 5008, the Division Bench of this Court, referring and relying on the settled legal position, held that the termination of service of probationer in terms of the stipulation contained in the contract of employment does not amount to “retrenchment” within the meaning of Section 2 (o)(o) of the Industrial Disputes Act.

23. Same view was taken by Division Bench of this Court in ***Management of Apparel Export Promotion Council v. Surya Prakash***, 178 (2011) DLT 624. The Division Bench held as under:

“9. The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularized only after satisfactory completion of the probation period. These terms were accepted by the workman and were never challenged before the Tribunal or writ court. In fact the Respondent-workman has not led any evidence in the Courts below that the appointment letter was issued with malafide intent to terminate his services.

10. In our considered opinion, the termination of the services of the workman in accordance with the condition mentioned in the employment contract clear fall within the domain of exception to definition of retrenchment as provided in clause(bb) of Section 2(oo) of the Act as reproduced above.”

24. Clause 5 of the Petitioner’s Appointment Letter dated 1st December 2014, categorically stipulated that the Petitioner was to be on probation for a period of six months from the date of his appointment, extendable further if the Petitioner’s conduct was not found satisfactory. The Petitioner was to remain on probation unless his appointment was confirmed in writing by the Respondent No.1.

25. Since the appointment of the Petitioner was not confirmed by way of any written communication, he remained on probation in June 2015. When his services were lawfully terminated on the grounds of incompetency and behavioral issues. In view of the above said legal position, the services of the Petitioner were lawfully terminated by the Respondent No.1.

26. The petitioner has attempted to argue that his termination was stigmatic, which is not correct. Reliance is placed on ***Chaitanya Prakash v. H. Omkarappa***, (2010) 2 SCC 623, wherein one Omkarappa was appointed

as an Executive Director (Marketing) by the Appellant No.2 and was to remain on probation for one year from the date of his appointment. Given his misconduct and the deficiencies in his performance and failure to improve despite multiple opportunities, his probation was not confirmed and employment was ultimately terminated by the appropriate authority. Negating the claim that the termination as stigmatic, the Supreme Court held:

“18. It is no longer res integra that even if an order of termination refers to unsatisfactory services of the person concerned, the same cannot be said to be stigmatic.”

“The Board of Directors constituted of responsible persons and they while deciding the suitability of the respondent not only considered the performance Assessment Report but also considered all other records, and thereafter they took a considered and conscious decision that the respondent was not suitable for confirmation and terminate his service.

xxx xxx xxx

24. The said decision of the Board of Directors appears to be in parity with the ratio of the aforesaid decisions of this Court (supra). The reasons mentioned in the letter dated 29.11.1999-terminating the services of the Respondent cannot be said to be stigmatic.”

27. The issue whether the claim of the Petitioner is barred by Section 2 (o)(o) (bb) of the Industrial Disputes Act or not, is a pure question of law and can be decided at any stage of the proceedings. That apart, Respondent No.1 had taken the argument that Petitioner’s claim was not maintainable as he was terminated during his probation and in fact one of the issues framed by the Ld. Labour Court was as to whether the Petitioner was on probation or not. Reliance is placed on ***Kalyani Sharp*** (supra) in which the Supreme Court dealt with a similar issue. It was the employee’s argument therein that

the contention that the termination of services of the employee were not affected by Section 25-F of the Industrial Disputes Act, was not argued before the Labour Court or the High Court and hence, could not be raised at before the Supreme Court for the first time. Rejecting the objections, it was held:

“So far as the first contention is raised on behalf of the Respondent is concerned, we may state that the argument emerges from the documents which the respondent has relied before the Labour Court to show about his employment and the termination of service. No fresh investigation of facts is required. It is a simple case of application of law in the matter. Hence the preliminary objection is rejected.

28. Even otherwise, the Petitioner did not qualify as a workman under Section 2 (s) of the Industrial Disputes Act as he was employed by the Respondent No.1 as a General Manager (Engineering) who was responsible for supervision and management of the overall Project. Borne out of the record (the job description of the Petitioner in the Respondent No.1), the Petitioner was performing mainly managerial and supervisory functions. Record also shows that the Petitioner had junior staff working for him, was authorized to hire subordinates and assign work to them. All of this clearly evidences that he was performing supervisory functions. Admittedly, the Petitioner was drawing a hefty salary of INR approximately 4 lacs per month (INR 48,00,006/- per annum). It is unconceivable that a workman would be employed by any organization at such higher remuneration for clerical job.

29. In terms of Section 2 (s) of the Industrial Disputes Act, a person who is employed in any industry and performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work qualifies as a workman.

Any person who has been employed mainly in a managerial or administrative capacity, however, is not a workman. The Petitioner was performing managerial and supervisory role during his employment with Respondent No.1 and hence, did not qualify as a workman.

30. The test to determine whether an employee was a workman or performing managerial and supervisory duties is to understand what was the primary, basic or dominant nature of duties for which the person whose status is under enquiry was employed.

31. The Petitioner was appointed as a General Manager (Engineering)/ Project Head and was responsible for the overall supervision and management of the Project. He was responsible to manage and ensure that all resources of the Project were available as per plan to meet the deadlines. His role and responsibilities were laid down in the job description of the Project Head. The Petitioner was aware of his responsibilities and himself uploaded the Goal Sheet (describing his roles) on Respondent No.1's web portal (ESS Portal).

32. The perusal of the weekly review meetings of the Respondent No. 1 would specifically show that the Petitioner's role as a Project head involved reviewing preliminary works done by clerical staff, taking management decisions like hiring consultants, floating tenders, liaising and supervising for statutory approvals, instructing junior staff to carry out work etc. It is due to the above managerial position, the Petitioner was drawing a hefty salary of INR 48,00,006/- per annum. It is unconceivable that a workman would be employed by any organization at such higher remuneration.

33. It is settled law that where an employee has powers of assigning distribution of work, there is supervision. The record shows that the

Petitioner was authorized to hire subordinates and assign work to them evidence that he was performing supervisory functions.

34. Another important evidence of Petitioner's managerial role in Respondent No. 1 was his authorization to take decisions on behalf of Respondent No. 1. This authorization was conferred upon the Petitioner by way of a Letter of Authority issued by Respondent No.1 on 10th December 2014, immediately after his appointment on 2nd December 2014.

35. In terms of this Letter of Authorization, the Petitioner was authorized to engage, retain, hire and employ any person as may be required for the purposes of the Project. The petitioner was also authorized to sign on various documents on behalf of Respondent No.1 which would have binding effect. These facts when seen in light of the settled legal position that an employee qualifies as a supervisor when he can bind the employer by taking some kind of decision on his behalf, it is conclusively established that the Petitioner was performing managerial role. No organization confers such wide powers on any employee unless such employee is a high-ranking official, with duties which are predominantly supervisory and managerial. This belies Petitioner's stand in the petition that he was never authorized to take any independent decision.

36. There is no bar under law to decide the maintainability of a claim as a preliminary issue. While relying on ***D.P. Maheswari v. Delhi Administration***, (1983) 4 SCC 293, the Petitioner conveniently ignored the observation of the Hon'ble Supreme Court that- "*Tribunals and Courts who are requested to decide preliminary questions must ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences*". Implicit in this observation of the

Supreme Court is the proposition that there is no bar on Courts to decide the issue of maintainability at the threshold if the outcome of the threshold issue is likely to make rest of the issues redundant.

37. The Petitioner, from the date of his appointment with Respondent No.1 was to be on probation for a period of six months. Given however his failure to display the requisite professional competency, including but not limited to inability to work harmoniously with his co-workers, constant insubordination, erratic behavior to name few; his employment could not be confirmed by Respondent No.1. This was also in accordance with Clause 5 of Petitioner's Appointment Letter.

38. Despite being afforded multiple opportunities, the Petitioner failed to display any signs of improvement. Respondent No. 1 was, therefore, constrained to terminate Petitioner's employment in accordance with Clause 7 of the Appointment Letter. Full and final settlement of Petitioner's dues was also made immediately by Respondent No.1.

39. The termination of Petitioner's services from Respondent No. 1 occasioned solely due to the Petitioner's failure to perform the assigned tasks with required dedication, clubbed with his subordination and undisciplined behavior. The result of an internal enquiry conducted by the Respondent No.1 as well as the contemporaneous emails evidence this.

40. The enquiry initiated on the Petitioner's own complaint to the Chief Ethics Officer of Respondent No.1 also concluded that the issues raised by the Petitioner mainly arose out of personality or ego clashes between the Petitioner and his superiors at Respondent No.1 and appeared to have been made out of agitated behavior and personal animosity against fellow employees.

Discussions and Findings

41. The respondent appointed the petitioner as a General Manager (Engineering) in Grade-D on 01st December, 2014 at an yearly package of Rs.48,00,006/- (Rs.4,00,000/- per month approx.). Immediately upon the appointment, respondent No.1 conferred a letter of authority upon the petitioner on 10th December, 2014 authorising him to engage, retain, hire and employ any person as may be required for the purposes of the Project. The petitioner was also authorized to sign on various documents on behalf of the respondent No.1 which would have binding effect. The minutes of weekly revenue meetings show the petitioner's role as a Project head involved reviewing preliminary works done by clerical staff, taking management decisions like hiring consultants, floating tenders, liasing and supervising for statutory approvals, instructing junior staff to carry out work etc.

42. This Court is satisfied that the primary, basic and dominant nature of duties of the petitioner was managerial and supervisory and the petitioner was not a '*workman*' within the meaning of Section 2(s) of the Industrial Disputes Act. There is sufficient material on record to decide this issue. The petitioner's ground that no evidence is required to decide the same is rejected.

43. This Court also heard the parties on the respondents objection that the petitioner was on extended probation and was not a '*workman*' within the meaning of Section 2(s) of the Industrial Disputes Act and his termination does not amount to '*retrenchment*' within the meaning of Section 2(oo)(bb) of the Industrial Disputes Act, which is a pure question of law and no

evidence is necessary to decide the same.

44. Clause 5 of the appointment letter dated 2nd December, 2014 provides that the petitioner shall be on probation for period of six months and the probation would continue till his appointment was confirmed in writing. The petitioner has not been confirmed in writing and, therefore, the petitioner shall be deemed to be on extended probation period. Clause 5 of the appointment letter is reproduced hereunder:

“5. Probation

You shall be on probation for a period of six months. This probationary period may be extended from time to time in case your performance is not upto mark per the performance management system in the company and/or your conduct are not found satisfactory to the Company. The confirmation of the services will not be deemed to have taken place unless and until, informed to you, in writing. Until such confirmation letter is issued to you, you will be deemed to continue your appointment on probationary basis”

45. The law with respect to the termination of the service of a probationer is well-settled that the probationer is not a ‘workman’ within the meaning of Section 2(s) of the Industrial Disputes Act and the service of a probationer can be terminated during the period of probation and such termination does not amount to retrenchment within the meaning of Section 2 (oo) of the Industrial Disputes Act.

46. Applying the aforesaid principles to the present case, the petitioner, being on extended probation, is held not a ‘workman’ within the meaning of Section 2(s) of the Industrial Disputes Act and his termination does not amount to ‘retrenchment’ within the meaning of Section 2(o)(o) of the Industrial Disputes Act. Reference be made to the following judgments:

- (i) In ***M. Venugopal v. Divisional Manager***, (1994) 2 SCC 323,

the service of the workman was terminated during the extended probation period. The Supreme Court held that the termination before the expiry of the period of probation fell within the ambit of Section 2(oo)(bb) of the Industrial Disputes Act and it did not constitute retrenchment.

(ii) In *Escorts Limited v. Presiding Officer*, (1997) 11 SCC 521, the workman was appointed on temporary basis for a period of two months. The terms of appointment enabled the employer to terminate the services at any stage without assigning any reason. The Supreme Court held that the termination of service under the said term, even though effected before the expiry of the specified period, did not amount to retrenchment.

(iii) In *Kalyani Sharp India Ltd. v. Labour Court No. 1 Gwalior*, (2002) 9 SCC 655, the trainee was terminated during the period of probation. The Supreme Court held that there was no infirmity in the termination of trainee on probation. The relevant portion of the said judgment is reproduced as under:

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

completion of his training. Thus the respondent's services were terminated before expiry of the probationary period. In such a case, question of issue of notice before terminating the service as claimed by the respondent does not arise. Escorts' case (supra) is identical with the present case. Following the said decision and for the reasons stated therein these appeals are allowed. The order made by the High Court affirming the award made by the Labour Court is set aside and the claim made by the respondent is dismissed."

(iv) In **Mahinder Singh v. Indian Airlines Ltd.**, 2016 SCC OnLine Del 5008, the Division Bench of this Court following **M. Venugopal** (supra), **Escorts Limited** (supra) and **Kalyani Sharp India Ltd.** (supra) held that the termination of service of a probationer in terms of the stipulation contained in the contract of employment does not amount to "retrenchment" within the meaning of Section 2(oo) of the Industrial Disputes Act since it is covered by clause (bb) of Section 2(oo) of the Act and Section 25-F of the Act does not get attracted in such cases. Relevant portion of the said judgment is reproduced hereunder:

"14. In view of the aforesaid judgments of the Supreme Court governing the field it can be safely culled out that termination of service of a probationer in terms of the stipulation contained in the contract of employment does not tantamount to "retrenchment" within the meaning of Section 2(oo) of the Act since it is covered by clause (bb) of Section 2(oo) of the Act. Thus, Section 25-F of the Act does not get attracted in such cases."

(Emphasis Supplied)

(v) In **Mahinder Singh** (supra), the Division Bench rejected the workman's contention that he would be treated as deemed confirmed

employee as his probation period had come to an end and the same was not extended further. The Division Bench held that the workman was not a confirmed employee. Relevant portion of the said judgment is reproduced hereunder:

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

16. Substantially similar question arose in Head Master, Lawrence School Lovedale v. Jayanthi Raghu, AIR 2012 SC 1571 In that case, the first respondent i.e. Jayanthi Raghu was appointed on the post of Mistress with effect from 01.09.1993. It was stipulated in the letter of appointment that she would be on probation for a period of two years which may be extended for another one year, if necessary. In November, 1995, while she was working as a Mistress in the appellant's school, as alleged, she had received some amount from one Nathan. A meeting was convened on 09.09.1997 and in the proceedings, certain facts were recorded. The said allegations though treated ‘stigmatic’ by Ld. Single Judge, yet the Division Bench on a studied scrutiny of the factual scenario, opined that the same do not cast any ‘stigma’. However, the Division Bench, concurred with the ultimate conclusion of the Ld. Single Judge on the basis that by virtue of the language employed in Rule 4.9 of the Rules of Lawrence School, Lovedale (Nilgiris), she had earned the status of a confirmed employee having satisfactorily completed the period of probation and, therefore, her services could not have been dispensed with without holding an enquiry.

Rule 4.9 was to the following effect:

“4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till

the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School.”

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

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

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

“It has been held in that case that a probationer cannot after the expiry of the probationary period automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. Therefore even though a probationer may have continued to act in the post to which he is on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of service which govern him specifically lay down that the probationer will; be automatically confirmed after the initial period of probation is over. It is contended on behalf of the petitioners before us that the part of r. 486 (which we have set out above) expressly provides for automatic confirmation after the period of probation is over. We are of opinion that there is no force in this contention. It is true that the words used in the sentence set out above are not

that promoted officers will be enable or qualified for promotion at the end of their probationary period which are the words to be often found in the rules in such cases; even so, though this part of r. 486 says that “promoted officers will be confirmed at the end of their probationary period”, it is qualified by the words “if they have given satisfaction”. Clearly therefore the rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this rule if he has given satisfaction.”

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

13. In State of Punjab v. Dharam Singh, AIR 1968 SC 1210, the Constitution Bench, after scanning the anatomy of the Rules in question, AIR 1966 SC 1842 AIR 1968 SC 1210 addressed itself to the precise effect of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. The said Rule stipulated that the total period of probation - including extensions, if any, shall not exceed three years. This Court referred to the earlier view which had consistently stated that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only in the absence of any indication to the contrary in the original

order of appointment or promotion or the service rules. Under these circumstances, an express order of confirmation is imperative to give the employee a substantive right to the post and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is difficult to hold that he should be deemed to have been confirmed. When the service rules fixed a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. It is so as such an implication is specifically negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it.”

18. Thereafter, it was held as under:

“The status of confirmation has to be earned and conferred. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates “if confirmed”. A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed. The Division Bench has clearly flawed by associating the words ‘if confirmed’ with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation.”

19. In the instant case also, the appellant was not conferred with the status of confirmed employee. From Clause 4 of the letter of appointment, it cannot be inferred that after expiry of period of probation for a period of one year, the petitioner got the status of a confirmed employee. Since, he was still on probation, and in terms of Clause 4 of the Appointment Letter, his services have been terminated

in view of his 'unsatisfactory performance' same does not tantamount to 'retrenchment' within the meaning of Section 2(oo) of the Act."
(Emphasis Supplied)

(vi) In Kamal **Kumar v. J.P.S. Malik, Presiding Officer**, 1998 (45) DRJ, **Management of M/s Otis Elevator Co. (India) Ltd. vs. Presiding Officer, Industrial Tribunal-III**, 2003 LLR 701, **R. Kartik Ramchandran v. Presiding Officer, Labour Court**, 2006 LLR 223 and **Raj Kumar Rastogi v P.O. Labour Court-X**, (2015) 221 DLT 242, this Court held that a trainee/ probationer was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act.

Conclusion

47. The petitioner is not a 'workman' as defined in Section 2(s) of the Industrial Disputes Act.

48. The writ petition is dismissed and the rejection of his claim by the Industrial Tribunal is upheld.

DECEMBER 04, 2019
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J.R. MIDHA, J.