IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10361 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==

CHIEF EXECUTIVE & 1 other(s)
Versus
VANJIBHAI LALJIBHAI CHAUDHARY

==

Appearance:
MR YOGEN N PANDYA(5766) for the Petitioner(s) No. 1,2
MR HARSHAD K PATEL(2844) for the Respondent(s) No. 1

==

CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 10/08/2022

ORAL JUDGMENT

1. Heard learned advocates for the respective parties. Perused the record.

Downloaded on : Thu Aug 11 21:32:01 IST 2022

2. The petitioner – Aga Khan Rural Support Programme (India) through Chief Executive has filed this petition challenging the award of the labour Court dated 30.6.2008 in Reference (L.C.B.) No.41 of 1998, by which, the Labour Court directed that the respondent be reinstated in service with continuity and with 15% back wages. The case of the respondent – workman before the labour Court was, as stated in the Statement of Claim at Exh.7 that he was working as a Community Organizer cum Trainee. That he was appointed in December, 1994 on probation for a period of one year. That his services were terminated with effect from 30.12.1995 and, therefore, that termination amounted to retrenchment carried out in violation of the provisions of Section 25(F) of the Industrial Disputes Act. The petitioner apart from taking the objection as to the respondent being a workman and that the institution was a Trust and not "Industry" within the meaning of the definition of "Industry" under Section 2(j) of the Act also contended that the termination was not retrenchment and in fact it

Downloaded on : Thu Aug 11 21:32:01 IST 2022

was putting an end to service during the course of probation. The labour Court, by the award under challenge not agreeing with the submission of the learned advocate for the employer opined that there was violation of the provisions of Section 25(F) of the ID Act and, therefore, ordered reinstatement.

3. Mr. Yogen N. Pandya, learned counsel for the petitioner would submit that reading the order of appointment and the subsequent extensions made from time to time would indicate that the appointment was purely on a probation. Before the expiry of the period of probation, a month before, on 30.11.1995, the Trust issued notice to the petitioner specifically stating that this communication be treated as a notice for one month for relieving the respondent with effect from 30.12.1995. That, according to Mr. Pandya, termination of service because of non-extension of probation would not be retrenchment. He would rely on a decision of this Court in the case of ***Gujarat Cancer and Research Institute***

Downloaded on : Thu Aug 11 21:32:01 IST 2022

v. Sanjay Chandrakant Vyas reported in ***2001(3) GLH 732***. Reliance was also placed on a decision of this Court in the case of ***Saurashtra University v. Shambhubhai Hirjibhai Padalia*** reported in ***2006(1) GLH 443.***

4. Mr. Harshad K. Patel, learned counsel for the respondent workman would submit that if the condition of the appointment order is read, it is specifically stated that the respondent may be continued in service for a period of over two years. That being so termination prior thereto, was in violation of the conditions of the appointment order. Though the period of probation was extended from time to time, such extensions and the subsequent termination was nothing, but unfair labour practice and therefore, no fault can be found with the award of the labour Court awarding reinstatement.

5. Considering the submissions made by the learned advocates for the respective parties, it is evident that the respondent was appointed as Community Organizer with

Downloaded on : Thu Aug 11 21:32:01 IST 2022

the petitioner vide order dated 12.12.1994. The terms of the appointment clearly indicated that the respondent was appointed on probation for a period of one year which can be shortened. The appointment order clearly stated that the initial probation was upto 30.9.1995. On record of the petition are subsequent orders extending the period of probation by an order of 25.9.1995 upto 31.12.1995. These orders specifically stated that the extension of probation is subject to satisfactory work. By an order of 30.11.1995 finally having found the performance of the respondent employee not being satisfactory in accordance with the terms of appointment, one month's notice was given. Dues were paid and the services of the respondent were put to an end on the expiry of the probation period.

6. Though Mr. Patel has supported the award of the Labour Court by filing an affidavit in reply which is tendered during the course of hearing today, an award of the findings recorded thereunder are clearly

Downloaded on : Thu Aug 11 21:32:01 IST 2022

unsustainable.

7. Viewed from the definition of “retrenchment” defining Section 2 (oo) (bb), the `term’ excludes termination of service of a workman as a result of non-renewal of a contract of the employment or termination on expiry in view of a stipulation as contained in the order therein.

8. In the decision in the case of ***Shambhubhai Hirjibhai Padalia (Supra)*** considering the decision of the Hon’ble Supreme Court in the case of ***Municipal Committee, Sirsa v. Munshi Ram reported in 2005(2) SCC 382***, the Coordinate Bench of this Court held as under:

> *“5. Even on merits, the finding given by the Labour Court is not sustainable in view of the fact that the respondent-workman was merely a probationer. He was appointed for a period of one year and the said probation period was extended for three months and during the extended period of probation, the respondent was*

THE HIGH COURT OF GUJARAT WEB COPY

Downloaded on : Thu Aug 11 21:32:01 IST 2022

terminated. Mr.Krishnan relied upon a judgment of the Honourable Supreme Court in the case of Municipal Committee, Sirsa vs. Munshi Ram, (2005) 2 S.C.C. 382, wherein it is observed that the respondent having been appointed as a probationer and his working having been found not to the satisfaction of the employer, it was open to the management to terminate his services. Assuming that there was an incident of misconduct or incompetency prior to his discharge from service, the same cannot ipso facto be termed as misconduct requiring an inquiry. It may be a ground for the employer's assessment of the workman's efficiency and efficacy to retain him in service, unless, of course, the workman is able to satisfy that the management for reasons other than efficiency wanted to remove him from services by exercising its power of discharge.

5.1 Mr.Krishnan has further relied upon a decision of the Honorable Supreme Court in the case of Kalpataru Vidya Samasthe (R) & Anr. vs. S.B. Gupta & Anr., (2005) 7 S.C.C. 524, wherein the Honourable Supreme Court has observed that it is now a well settled principle of law that the appointment made on probation/ad hoc for a specific period of time and such appointment comes to an end by efflux of time and the person holding such post can have no right to continue in the post. The Honorable Supreme Court has further observed that having accepted the terms and conditions stipulated in the appointment order and allowed the period for which he was appointed to have been

Downloaded on : Thu Aug 11 21:32:01 IST 2022

lapsed by efflux of time, he is not permitted to turn his back and say that the appointment was de hors the Rules or the terms and conditions stipulated in the appointment were not legally valid.

5.2 Mr.Krishnan further relied upon the decisions of the Honourable Supreme Court in the case of CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. & Anr., (2005) 7 S.C.C. 467, and in the case of Rajasthan State Road Transport Corporation & Ors. vs. Zakir Hussain, (2005) 7 S.C.C. 447, wherein, after referring to its decision in the case of State of U.P. vs. Kaushal Kishore Shukla, (1991) 1 S.C.C. 691, the Honorable Supreme Court observed that the respondent in the instant case is a temporary employee of the Rajasthan State Road Transport Corporation on probation for a period of two years. His services were terminated by an order of termination simpliciter. The order is innocuous without any stigma or evil consequences visiting him. The Court further held that the said order is not open to challenge. In this very judgment, the Court further observed that the terms of appointment are governed by the letter of appointment and, therefore, the management was well within its right to terminate the services of the respondent probationer during the period of probation if his services were not found to be satisfactory during the said period. The courts below and the High Court have committed serious error in decreeing the suit as prayed for and for directing reinstatement with full back wages.

Downloaded on : Thu Aug 11 21:32:01 IST 2022

5.3 On the basis of the aforesaid decisions, Mr.Krishnan submitted that the award passed by the Labour Court is contrary to the well settled principles of law and hence, the same is required to be quashed and set aside.

5.4 Mr.Krishnan has further submitted that the Labour Court has also committed a very serious error in awarding back wages as the respondent workman himself has admitted that he was a temporary employee. Even otherwise a specific plea was not raised or pressed into service and despite this fact, the Labour Court has awarded back-wages. In support of his submission, he relied upon a decision of the Honorable Supreme Court in the case of Allahabad Sansthan vs. Daya Shankar Rai & Anr., (2005) 5 S.C.C. 124, wherein the Court has observed that a law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which the industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. The Court has further observed that respondent No.1 had filed the written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman

Downloaded on : Thu Aug 11 21:32:01 IST 2022

did not say that he continued to remain unemployed. The Court, therefore, came to the conclusion that in absence of any such pleadings, the respondent-workman was not entitled to the back wages."

9. Even in the case of ***Gujarat Cancer and Research Institute (Supra)*** in context of the term `retrenchment' under Section 2 (oo) (bb) of the ID Act, the Court held as under:

"4. Assailing the above award, the learned counsel for the petitioner submitted that the termination of service of the respondent was bona fide and strictly in accordance with the stipulation contained in that behalf in the appointment order. That it was not necessary to give any reason for not confirming the respondent or for not renewing the contract of service. It was also submitted that the order by which the respondent was discharged from service did not contain any charge of stigma and the termination was neither by way of retrenchment nor as a measure of punishment. The termination was squarely covered by the exception clause provided in Section 2(oo) (bb) of the I.D. Act, according to the submission. The learned counsel relied upon the judgment of the Supreme Court in M.VENUGOPAL v. DIVISIONAL MANAGER, LIFE INSURANCE CORPORATION OF INDIA [(1994) 2 SCC 323] wherein (in a case

Downloaded on : Thu Aug 11 21:32:01 IST 2022

of termination of service of a probationer) it is observed as under:

> *".......Any such termination, even if the provisions of the Industrial Disputes Act were applicable in the case of the appellant, shall not be deemed to be "retrenchment" within the meaning of Section 2 (oo), having been covered by exception (bb). Before the introduction of clause (bb) in Section 2 (oo), there were only three exceptions so far as termination of the service of the workman was concerned, which had been excluded from the ambit of retrenchment (a) voluntary retirement; (b) retirement on reaching the age of superannuation; and (c) on ground of continued ill-health. This Court from time to time held that the definition of "retrenchment" being very wide and comprehensive in nature shall cover, within its ambit termination of service in any manner and for any reason, otherwise than as a punishment inflicted by way of disciplinary action. The result was that even discharge simpliciter was held to fall within the purview of the definition of "retrenchment". [State Bank of India v. N.Sundara Money (1976) 1 SCC 822), Santosh Gupta v. State Bank of Patiala (1980) 3 SCC*

Downloaded on : Thu Aug 11 21:32:01 IST 2022

340]. Now with introduction of one more exception to Section 2 (oo), under clause (bb) the legislature has excluded from the purview of "retrenchment" (i) 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; (ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment no such stipulation is provided or prescribed, then such contract shall not be covered by clause (bb) of Section 2 (oo). In the present case, the termination of service of the appellant is as a result of the contract of employment having been terminated under the stipulations specifically provided under Regulation 14 and the order of the appointment of the appellant. In this background, the non-compliance of the requirement of Section 25-F shall not vitiate or nullify the order of termination of the appellant."

4.1 The learned counsel also relied upon the judgment of the Supreme Court in OSWAL PRESSURE DIE CASTING INDUSTRY v. PRESIDING

Downloaded on : Thu Aug 11 21:32:01 IST 2022

OFFICER [(1998) 3 SCC 225] wherein it is held that it was not open for the Court to sit in appeal over the assessment made by the employer of the performance of the employee. Once it was found that the assessment made by the employer was supported by some material and was not mala fide it was not proper for the Court to interfere and substitute its satisfaction with the satisfaction of the employer. The approach of the High Court in expecting some evidence and material to show the performance of the workman to be below the expected norms was also deprecated.

4.2 The judgment of the Supreme Court in KEDAR NATH BAHL v. THE STATE OF PUNJAB [AIR 1972 SC 873] was also relied upon in support of the submission that where a person is appointed as a probationer in any post and the period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically.

5. In a recent judgment of the Supreme Court in KRISHNADEVARAYA EDUCATION TRUST v. L.A.BALAKRISHNA [2001 AIR SCW 253], it is observed that normally services of an employee on probation would be terminated when he is found not to be suitable for the job without assigning any reason and it is normally preferred that the order itself does not mention the reason. However, if such an order is challenged, the employer will

Downloaded on : Thu Aug 11 21:32:01 IST 2022

have to indicate the grounds on which the service of probationer was terminated. It is in terms held that the probationer is on test and if his services are found not satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the service.

6. The learned counsel for the respondent-workman argued that the impugned order of termination was, ex facie, mala fide and the petitioner itself having followed the provisions of retrenchment in offering retrenchment compensation, it cannot be heard to say that the termination was not by way of retrenchment. It was further argued that although the order of appointment is couched in innocuous terms, it was not supported by any allegations impinging upon the efficiency and performance of the respondent. The learned counsel relied upon the ratio of the judgment in V.P.AHUJA v. STATE OF PUNJAB [2000 AIR SCW 792] wherein it is held that termination order founded on the ground that the probationer had failed in the performance of his duties was, ex facie, stigmatic; and such order could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the probationer. In the facts of that case, the probationer was discharged with an order which, inter alia, stated that he had failed in the performance of his duties administratively and technically. The case was fully covered by the

Downloaded on : Thu Aug 11 21:32:01 IST 2022

decision of the Supreme Court in DIPTI PRAKASH BANERJEE v. SATVENDRA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES, reported in AIR 1999 SC 983. The detailed discussion on the subject in the aforesaid decision of the Supreme Court in DIPTI PRAKASH BANERJEE v. SATVENDRA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES can be found in para 22 of the judgment which reads as under: " If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid." In the facts of that case, the order of termination referred to certain orders which contained the material which might amount to stigma. In the context of those facts, it was held that the words amounting to stigma might not be contained in the order of

Downloaded on : Thu Aug 11 21:32:01 IST 2022

termination itself but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto which might vitiate the order of termination.

7. It was also argued on behalf of the respondent that the appointment of the respondent on probation initially for a period of six months as also the extension of the probation for a further period of six months was by itself inconsistent with the Model Standing Orders. It could not, however, be shown as to whether and how the provisions of the Industrial Employment (Standing Orders) Act, 1946 or Model Standing Orders prescribed thereunder were applicable in the facts of the present case.

8. The restrictive provisions relating to retrenchment are not applicable in the facts of the present case as the termination of service of the respondent was squarely covered by the exception clause added to the definition of "retrenchment" in Section 2 (oo) (bb) of the I.D. Act. This is both a case of termination of service of a workman as a result of non-renewal of contract of employment and the contract being terminated under an express stipulation in that behalf contained in the contract. Therefore, the finding of the Labour Court to the effect that the provisions of Sections 25F, 25G and 25H of the I.D. Act were violated is incorrect. It is also seen in the judgment of the Supreme Court in OSWAL PRESSURE DIE

Downloaded on : Thu Aug 11 21:32:01 IST 2022

CASTING INDUSTRY (supra) that the Court cannot substitute its own satisfaction for the satisfaction of the employer who decided to extend the period of probation or not to confirm the employee in service on completion of the period of probation. On this aspect of the matter, it was also pointed out, on behalf of the petitioner, from the deposition of the respondent himself that he had admitted to have committed a number of mistakes in carrying out the typing work assigned to him. In such circumstances, it was for the employer to decide whether to tolerate such mistakes and give further opportunity to the workman to improve his performance. However, pointing out such mistakes before the Labour Court cannot in any way be said to be casting stigma upon the respondent. In this view of the matter, the Labour Court appears to have misdirected itself in examining the question whether the petitioner ought to have confirmed the respondent in service instead of firstly extending the period of probation or lastly terminating his service.

9. In the facts and for the reasons discussed hereinabove, the termination of service of the respondent is neither retrenchment nor by way of punishment. There is no evidence or material on record suggesting that the period of probation was extended by the petitioner with an ulterior motive or with an intention to deny to the respondent the benefits of permanency in service. Therefore, the observations

Downloaded on : Thu Aug 11 21:32:01 IST 2022

in that regard in the impugned award are baseless and perverse. Accordingly, the impugned award is not sustainable in law and therefore hereby set aside.

In absence of any submissions on the issue and in the peculiar facts and circumstances, the respondent shall not be required to refund any amount which might have been paid under the earlier interim orders of this Court granting the additional benefit of wages at the current rates. Rule is made absolute accordingly with no order as to costs."

10. For the aforesaid reasons therefore, the award of the Labour Court, Bharuch dated 30.6.2008 passed in Reference (L.C.B.) No.41 of 1998 is quashed and set aside.

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT
WEB COPY

11. The petition is allowed. Rule is made absolute to the aforesaid extent. No order as to costs. Direct service is permitted.

[BIREN VAISHNAV, J.]

VATSAL S. KOTECHA

Downloaded on : Thu Aug 11 21:32:01 IST 2022