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

% **Date of Decision: 27th August, 2019**

\+ W.P.(C) 3422/2014 & CM No.7040/2014 & 30976/2019

M/S DECCAN CHARTERS PRIVATE LIMITED ..... Petitioner
Through: Mr. Praveen Kumar, Advocate.

versus

SARITA TIWARI ..... Respondent
Through: Mr. Rishi Jain, Advocate.

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

J U D G M E N T

1. The petitioner has challenged the *ex-parte* award of the Labour Court whereby the Labour Court awarded reinstatement with full back wages to the respondent.

2. The petitioner appointed the respondent as *"Trainee AME"* on 01st August, 2006 at a monthly salary of Rs.15,000/-. The terms of the appointment of the respondent are contained in the appointment letter dated 01st August, 2006. Clause D of the appointment letter provides that the respondent shall be on probation for three months from the date of joining and she shall be deemed to continue on probation until confirmed in writing and such period, after initial period of probation, shall be deemed to be an extension of probation. Clause E of the appointment letter provides that the respondent's services can be terminated during the probation or extended

probation by giving seven days notice in writing and payment in lieu thereof. Clauses D and E of the appointment letter are reproduced hereunder:

> *"D) You will be on probation for a period of three months from the date of your joining. Until confirmed in writing, you shall be deemed to continue on probation and any such period after initial period of probation shall be deemed to be extension of probation.*
> *E) During the period of your probation or extended probation your contract may be terminated by either side without assigning any reason thereof and by giving seven days notice in writing or payment in lieu thereof."*
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> *(Emphasis supplied)*

3. The job profile of the respondent was training oriented. The job profile of the respondent is given in para 3(a) of the writ petition which has not been disputed by the respondent in corresponding para 3(a) of reply on merits in the counter affidavit. The relevant portion of para 3(a) of the writ petition is reproduced hereunder:

> *"3(a) ... The job profile of Respondent was training oriented and she was supposed to do following things:*
> *i) Follow the good maintenance practice as per (Airworthiness Advisory Circular) AAC No.3 of 2000 Date: 3rd February, 2000.*
> *ii) Be familiar with current regulations (CAR, AAC, AIC, Aircraft Rules etc.), quality control cum quality assurance manual, maintenance system manual and engineering organisation manual.*
> *iii) Familiarise with AMM, IPC, WDM, CMM, SB, SILs, AD.*
> *iv) To learn about the basics of aircraft system since she was not having sufficient knowledge of Avionics.*
> *v) Read and understand the avionics equipment installed on aircraft, their functions and testing procedures.*
> *vi) Understanding the aircraft system block diagrams, wiring diagrams and troubleshoot guides.*
> *vii) To assist the Engineer for carrying out the scheduled/unscheduled inspection on aircraft Avionics system.*
> *viii) Have proper knowledge of tools/test equipment and should have thorough knowledge to use/operate them.*

ix) Keep the test equipment, tools and equipment clean, neat and tidy.
x) Ensuring the required tools, test equipments and required literatures/documents/procedures/task cards are available for the work.
xi) Understand the safety requirements and follow it while working on aircraft.
xii) Carry out the work as per concerned AME's instructions;
xiii) Removal and installation of avionics equipment as and when required under supervision.
xiv) Securing of panels, clearing of tools, personal belongings from the aircraft and ensuring no loose articles left behind.
xv) Providing support to carry out defect analysis and rectification.
xvi) Keeping record of work carried out by the individual under supervision by maintaining the personal logbook duly signed by the Engineer concerned."

(Emphasis Supplied)

4. According to the petitioner, the respondent's performance was not satisfactory and therefore, she was not confirmed; on 13th October, 2006 i.e. within the initial period of probation, a warning letter was issued to the respondent that she was not punctual in reporting to the office and had little interest in work; on 07th August, 2007, the petitioner issued a show cause notice to the respondent on the complaint made by Senior AME who informed the management that the respondent misbehaved with him when he was giving maintenance tips to the respondent to improve her work standard, and the petitioner terminated her service on 09th August, 2007. The respondent raised an industrial dispute which was referred to the Labour Court.

5. The Labour Court held the termination of the respondent to be illegal. The Labour Court granted reinstatement with full back wages and continuity of service along with the consequential benefits to the respondent.

6. Learned counsel for the petitioner urged at the time of the hearing that the respondent was on probation and was not a '*workman'* within the definition of Section 2(s) of the Industrial Disputes Act; that the appointment letter clearly provides that the probation would continue unless the confirmation is in writing; the appointment letter provides that the services during the probation period can be terminated by seven days' notice; and on 07th August, 2007, the respondent misbehaved with Senior AME when he was giving maintenance tips to the respondent to improve her work standard. It was further submitted that there is no infirmity in the termination of the respondent. Reliance is placed on ***Management of M/s. Otis Elevator Company (India) Ltd. v. Presiding Officer, Industrial Tribunal-III,*** 2003 (68) DRJ 528 and ***Raj Kumar Kaushik v. The Bharat Scouts and Guides***, (2017) 239 DLT 173.

7. Learned counsel for the respondent urged at the time of the hearing that the respondent is a workman within the meaning of Section 2(s) of the Industrial Disputes Act; the notice dated 07th August, 2007 was issued to her as one of the senior staff, with malice and intention to hurt her financially and mentally, instigated his junior to issue the show cause notice; one week time was given to the respondent to file the reply but instead of waiting for the reply and without affording an opportunity or time to reply to the notice dated 07th August, 2007, the petitioner terminated her service on 09th August, 2007 in total disregard of the principles of natural justice; and there was no infirmity in the award of reinstatement with back wages granted by the Labour Court.

8. Section 2(oo)(bb) of Industrial Disputes Act reads as under:-

*"**Section 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) ……..
(b) ……..
(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) ……."

9. 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 in terms of the appointment and such termination does not amount to retrenchment within the meaning of Section 2 (oo) of the Industrial Disputes Act.

10. 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.

11. 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.

12. 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 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."*

13. 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."*
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> *(Emphasis Supplied)*

14. 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'.*
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> *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.*
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> *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 eases; 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 negatived 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)

15. 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.

16. In the present case, the respondent was a *"Trainee AME"* on probation for a period of three months from the date of joining i.e. 01st August, 2006. Clause D of the appointment letter provides that the petitioner shall be deemed to continue on probation until confirmed in writing and such period, after initial period of probation, shall be deemed to be extension

of probation. Clause E of the appointment letter provides that the service of the petitioner can be terminated without assigning any reason during the probation or extended probation period. Admittedly, the respondent has not been confirmed in writing and therefore, the respondent shall be deemed to be on extended probation period. Following the principles laid down in the aforesaid judgments, this Court is of the view that the petitioner is not a workman within the definition of 2(s) of the Industrial Disputes Act and there is no infirmity in her termination during the extended probation period.

17. The writ petition is allowed and the impugned award of the Labour Court granting reinstatement with back wages to the respondent is set aside. However, the amount paid by the petitioner to the respondent under Section 17-B of the Industrial Disputes Act shall not be recovered.

18. The pending applications are disposed of.

J.R. MIDHA, J.

AUGUST 27, 2019
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