
(2005) 11 MAD CK 0072
In the Madras High Court
Case No : Writ Appeal No. 1579 of 1998

Bharat Petroleum Corporation Ltd.

APPELLANT

Vs

D. Nagendra

RESPONDENT

Date of Decision : 11-11-2005

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25(F)

Citation : (2006) 1 LLJ 938 : (2005) 4 MLJ 685

Hon'ble Judges : S.R. Singharavelu, J; M. Karpagavinayagam, J

Bench : Division Bench

Advocate : G. Masilamani assisted by M. Vijayan, for King and Patridge, for the Appellant; R. Viduthalai, Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—Nagendra, respondent herein, was appointed as a Heavy Vehicle Driver by Bharat Petroleum Corporation Ltd., appellant herein, by an order dated 21.07.1989, as a probationer. By Anr. order dated 17.08.1990, his services were terminated after the probation period was over. Aggrieved by that order of termination, in not confirming his appointment, he filed a writ petition, seeking for quashing of the said order. A learned single Judge allowed the Writ Petition, quashing the order and directing the appellant to appoint the respondent as a fresh candidate in the circumstances of the case. Challenging the same, the appellant has filed this appeal.

2. The facts would be summarised as follows :

"(a) D.Nagendra, respondent, joined the appellant Corporation on 01.08.1989 as a Heavy Vehicle Driver. He was on probation for a period of 12 months. The period of probation was completed on 31.07.1990. On 17.08.1990, an order of termination was served on him, terminating his services from 19.08.1990. That was the subject matter of the Writ Petition.

(b) According to the respondent herein before the learned single Judge, as per

the appointment order, as contained in Clause 4 (b), he could be terminated only during the probationary period and not after completion of the probationary period, which falls on 31.07.1990 and, as such, the termination order was illegal. It was also urged that he had completed 240 days during the period of 12 months from 01.08.1989 to 31.07.1990 and, as such, termination of his services would amount to retrenchment and non-compliance of the procedure contemplated u/s 25(F) of the Industrial Disputes Act, 1947, would also make the termination order void.

(c) The learned single Judge, by the order dated 30.10.1998, would accept both of his grounds and allowed the Writ Petition; however, instead of ordering reinstatement with backwages, he directed the management to appoint the respondent in the Corporation as a fresher. This is the subject matter of challenge in this appeal."

3. Mr.G.Masilamani, learned Senior Counsel, appearing for the appellant Corporation, while assailing the learned single Judge's order, would make the following submissions:

(i) as per the appointment order, the period of probation is one year and after expiry of one year, the management analysed his record of performance and concluded that his services were not satisfactory and, therefore, his termination, after the period of probation, would be legal, especially in the light of the condition contained in Clause 4 (c) that his services would automatically be terminated on the expiry of probation period, unless confirmed.

(ii) Termination cannot be considered to be a retrenchment as contemplated u/s 25(F) of the Industrial Disputes Act. Termination of the respondent is only in terms of the appointment order, which, in other words, is non-renewal of the contract, saved by Section 2(oo)(bb) of the Act, which is an exception to "retrenchment". Hence, the service of 240 days in a year would not be a ground to hold that non-compliance of Section 25(F) of the Act would make the order illegal.

4. This Court, on noticing that the respondent had not chosen to appear before this Court either in person or through his counsel even after service of notice, thought it fit to appoint Mr. R. Viduthalai, learned Senior Counsel, as Amicus Curiae, to assist this Court, which was accordingly done.

5. Mr.G.Masilamani, learned Senior Counsel, substantiating his plea, would cite the following decisions :

(i) Dhanjibhai Ramjibhai Vs. State of Gujarat, ;

(ii) M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, ;

(iii) Dr Amritlal Dharshibhai Jhankharia Vs. State of Gujarat and Another, ; and

(iv) Kalyani Sharp India Ltd. Vs. Labour Court No. 1, Gwalior and Another, .

6. Mr. R. Viduthalai, while attempting to sustain the order of the learned single Judge, would cite 1984 (I) L.L.J. 110 (K.S.R.T.C. v. Sheikh Abdul Khader and Ors.). However, he would cite two other authorities, namely, M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, and Registrar, High Court of Gujarat and Another Vs. C.G. Sharma, , to show that there cannot be any automatic or deemed confirmation merely because the employee was allowed to continue beyond the period of probation, which would support the case of the appellant.

7. We have carefully considered the submissions made by the learned Senior Counsel appearing on either side.

8. The questions that arise for consideration are, whether the order of termination dated 17.08.1990, terminating the services of the respondent from 19.08.1990, is legally valid or not; and whether the order passed by the learned single Judge, holding that the termination order is illegal, is justified or not ?

9. At the outset, it shall be stated, that in the order of appointment, dated 01.08.1989, it has been specifically stated Under Clause 4 (a) that "your appointment will be effective from the date you join duties and from that date you will be on probation for a period of 12 months. Under Clause 4 (b), it is stated that "during your probationary period, your service will be liable to be terminated without any notice." Under Clause 4 (c), it is stated that "unless you are confirmed in writing, your services shall stand automatically terminated on the expiry of the probationary period or any extension thereof."

10. In this case, there is no dispute that the respondent had joined duty on 01.08.1989 and he completed one year of probation, ending on 31.07.1990. Admittedly, there is no confirmation in writing. On the other hand, by the order dated 17.08.1990, a termination notice was served on the respondent, stating that after a careful review of his work as a probationer in the Corporation, his services were being dispensed with from 19.08.1990. It was also made clear in the said order that he was not being confirmed in services.

11. The main point that was argued before the learned single Judge was, that since 12 months" period was completed, the termination order Under Clause 4 (b) was illegal and, therefore, the services of the respondent could not be terminated, after probationary period was ended.

12. Accepting the said argument, the learned single Judge held, that on the expiry of probationary period, since no letter was issued, the respondent automatically became a permanent employee and, as such, the order of termination was against the terms of Clause 4 (b).

13. While dealing with the said issue, it would be better to refer to various decisions.

14. In Dhanjibhai Ramjibhai Vs. State of Gujarat, , it has been held as follows :

"A distinction is sought to be drawn between a probationer whose services are terminated on the expiry of the period of two years and a probationer, who has completed the normal span of two years and whose services are terminated some time later after he has put in a further period of service. We are unable to see any distinction. It is perfectly possible that during the initial period of probation the confirming authority may be unable to reach a definite conclusion on whether the candidate should be confirmed or his services should be terminated. Such candidate may be allowed to continue beyond the initial period of two years in order to allow the confirming authority to arrive at a definite opinion. It seems to us difficult to hold that a candidate enjoys any greater right to confirmation if he is allowed to continue beyond the initial period of probation."

15. In *Dr Amritlal Dharshibhai Jhankharia Vs. State of Gujarat and Another*, , it has been held as under :

"The appellant has challenged his termination from service. It has been contended by learned counsel for the appellant that after the appointment of the appellant by the resolution of 10-9-1970, he has completed two years of probationary period, hence he must be deemed to be confirmed. His termination on the basis that it was during the probationary period on account of his unsatisfactory work must, therefore, be set aside since he was not on probation on the date of the termination order. No material has been produced before us to show that the appellant was confirmed after the completion of probationary period or that there was any provision in the relevant rules applicable to his service which conferred automatic confirmation on completion of two years" probationary period."

16. In *Registrar, High Court of Gujarat and Another Vs. C.G. Sharma*, , it has been observed as follows :

"26...we find that even if the period of two years expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, work has to be satisfactory which is a pre-requisite or pre-condition for confirmation and, therefore, even if the probationer is allowed to continue beyond the period of two years as mentioned in the Rule, there is no question of deemed confirmation. The language of the Rule itself excludes any chance of giving deemed or automatic confirmation..."

17. In the light of the above observations made by the Supreme Court, it may not be correct for the learned single Judge to conclude that the respondent automatically became a permanent employee as the order of termination was not passed during the period of probation.

18. As a matter of fact, a reading of Clause 4 (a) to (c), as a whole, would clearly indicate that the respondent would be allowed to work for a period of 12 months as a probationer; his probationary period would be considered at the discretion of the Corporation; during the probationary period, his services would be liable to

be terminated without any notice and, unless he was confirmed in writing, his services would stand automatically terminated on the expiry of probationary period.

19. The above rule would make it clear that the respondent cannot claim the deemed confirmation as a right, merely because he has completed the probationary period of 12 months.

20. The function of confirmation completely vests with the management Corporation, which implies the exercise of judgment by the Corporation with the confirming authority on the overall suitability of the employee for permanent absorption of his services. That can be done only after the period of probation is completed.

21. In this case, the order of termination, though would state that on a careful review and overall performance of his work the management decided to dispense with the services of the respondent, did not contain detailed reasons to arrive at such a conclusion. However, it is the stand of the Corporation from the counter affidavit before the learned single Judge, that the respondent driver involved in accident cases on 04.12.1989 and 19.04.1990 and also was caught red-handed by the Vigilance Cell of Cuddapah, while he was trying to pilfer petroleum products. Admittedly, this was not denied by the respondent before the learned single Judge.

22. Therefore, in our view, the order of termination by the appellant, on the basis of the careful review of the work of the respondent as a probationer, which was found to be unsatisfactory, was perfectly legal.

23. In regard to the point that the respondent had worked for 240 days, we are to state that it cannot be considered to be a retrenchment, as defined u/s 2(oo) of the Industrial Disputes Act, 1947, after the introduction of Sub-clause (bb) therein.

24. The judgment cited by Mr. Viduthalai, Amicus Curiae, in Management of Karnataka State Road Transport Corporation, Bangalore Vs. M. Boraiah and Another, would not apply to the present case, because it was rendered prior to introduction of Sub-clause (bb) u/s 2(oo) of the Act.

25. For the reasons stated above, we are of the opinion that the order of the learned single Judge is liable to be set aside and, accordingly, it is set aside.

26. Before parting with the case, this Court records its appreciation for the services rendered by Mr. R. Viduthalai, learned Senior Counsel, who has presented the case in a lucid fashion and assisted the Court effectively by producing the decisions, both for and against.

27. Writ Appeal is allowed. No costs.