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**(1971) 04 KL CK 0002**  
**In the High Court Of Kerala**  
**Case No : Writ Appeal No. 55 of 1969**

Clemend V. Fernandez

APPELLANT

Vs

Giovanola Binny Co., Ltd.

RESPONDENT

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**Date of Decision :** 08-04-1971

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 10, 33, 33(1)(a), 33(1)(b), 33(2)(b)

**Citation :** (1971) KLJ 447

**Hon'ble Judges :** T.C. Raghavan, Acting C.J.; V.P. Gopalan Nambiyar, J; K.K. Mathew, J

**Bench :** Full Bench

**Advocate :** S. Eswara Iyer, for the Appellant; P.K. Kurien, for the Respondent

**Final Decision :** Allowed

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## Judgement

K.K. Mathew, J.—This is an appeal from the judgment of a learned single Judge allowing a writ petition filed by the management in question for quashing an award passed by the Industrial Tribunal, Calicut, on the basis of an application filed by the appellant-worker u/s 33A of the Industrial Disputes Act, 1947, hereinafter referred to as the Act. The appellant was appointed as a fitter by the management for a period of one month with effect from 18th November, 1963. Thereafter by an order dated 8-1-1964, marked as Ex. M-2 before the Tribunal, the appellant was appointed as production worker. The terms of the appointment were that the appellant would be on probation for a period of one year with effect from 1-1-1964, that during the period of probation his services are liable to be terminated without any reason being assigned, that if after the period of probation it is found that his work and conduct are satisfactory he would be confirmed in his appointment, and that he will be bound by the rules of the Company's Standing Orders in force from time to time. The management terminated the services of the appellant by Ex. W-2 order on 19-1-1965. That order reads:

We regret to advise that it has been decided not to confirm your appointment. In

the circumstances we are considering your employment as terminated with effect from to-day.

At the time when this order was passed an industrial dispute (I.D. No. 74/1964) between the management and the workers was pending adjudication before the Tribunal. That dispute arose in consequence of a strike in the factory of the management, the cause of the strike being the failure of the management to accede to the demand of the workers who were all probationers to confirm them. One of the issues referred for adjudication concerned the confirmation of the workers.

2. The appellant alleging that the termination of his services by Ex. W-2 contravened the provisions of section 33 of the Act filed an application u/s 33A of it for reinstatement. His case was that he was an active participant in the strike and the management, therefore, harboured ill-will towards him on that account; and his services were terminated not because it was found by the management that his work or conduct was unsatisfactory, but for the reason that he had engaged himself in organising the strike which was unpleasant to the management, and therefore, the order terminating his services was an act of victimisation. The management on the other hand contended that the appellant was not confirmed in the post although the period of his probation was over and that the management had the right to terminate the services of the appellant without assigning any reason as he continued in service only as a probationer. They also contended that the work and conduct of the appellant were unsatisfactory during the period of probation.

3. The Industrial Tribunal came to the conclusion that the termination of the appellant's services was not bona fide, but was a colourable exercise of the power reserved to the management under the appointment order, and that the real motive of the management for terminating the services was the activities of the appellant in connection with the organisation of the strike. The Tribunal, therefore, held that the management has contravened the provisions of section 33 of the Act, and ordered the reinstatement of the appellant with arrears of wages. It was to quash this award that the management filed the writ petition.

The learned single Judge was of the view that the appellant continued to be a probationer as no order of confirmation was passed at the time when his appointment was terminated by Ex. W-2 order though the period of his probation had expired, and that the management had the absolute right under the contract of appointment to terminate his services without assigning any reason. The learned Judge saw no ground to distinguish the case from the case of *Stanley Kendez v. Giovanola-Binny Ltd.* 1968 KLJ 537 as according to him "it would be meaningless to refer to a person's employment as on probation if the management has the right to terminate his services only on the ground of proved misconduct, and that it is the very essence of the concept of probation that a person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption". He

further said that "the only difference between a probationer whose term of probation has not expired and one who is continuing in service after the expiry of the stipulated period of probation without any order of confirmation having been passed, is that the former has a guaranteed period of trial namely the probationary period during which he is not liable to be discharged on the ground of unsuitability whereas the latter is liable to be discharged at any time. It must then follow that an order discharging the probationer from service would not amount to an alteration of the conditions of service even if it is passed not exactly on a date coinciding with the end of the probationary period but only a few days thereafter and that the decision in *Stanley Kendez v. Giovanola Binny Ltd.* 1968 KLJ 537 would equally govern both types of cases". He therefore came to the conclusion that there was no contravention of section 33 of the Act and quashed the award.

When the appeal came up for hearing before a Division Bench the Bench thought that the ruling reported in *Stanley Kendez v. Giovanola Binny Ltd* 1968 KLJ 537 requires reconsideration, and so the case was referred to a Full Bench; and that is how the matter has come before us.

4. On behalf of the appellant Mr. Sankarankutty Nair contended that the management contravened the provisions of Section 33 of the Act, in that Ex. W-2 order was passed not on the ground that the appellant's work or conduct during the period of his probation was unsatisfactory, but for the reason that he was concerned in lawful trade union activities, that though the management had the undoubted right to terminate the services of the appellant for the reason that his work or conduct during the period of probation was unsatisfactory, the management cannot exercise the power for other collateral purposes. In other words, counsel contended that the power of the management not to confirm the appellant and thereby terminate his services could be exercised only for the purpose for which the power was reserved under the order of appointment, and not for collateral purposes; and that whatever might be the form of the order an industrial tribunal can go into the question of the bonafides of the termination of the services of the appellant u/s 33A as the powers of the tribunal under the Section are much the same as when it functions u/s 10.

5. To enable the appellant to file an application u/s 33A and get relief, the appellant must show that in regard to any matter connected with the dispute in I.D. No. 74/1964 which was pending at the time, there was an alteration of the conditions of his service to his prejudice; or that without the express permission of the tribunal before which the dispute was pending the management has for a misconduct connected with the dispute discharged or punished the appellant by way of dismissal or otherwise, and that the appellant was concerned in the dispute. The conditions of service applicable to the appellant in regard to this matter is contained in the Standing Orders marked as Ex. M-1 before the Tribunal. As already stated, the learned Judge has proceeded on the basis that under Ex. M-2, the order of appointment, the appellant had no right to be

confirmed automatically, that on the other hand, it was specifically provided therein that he would be confirmed only if his work and conduct were found to be satisfactory, and therefore, the management had the undoubted right to terminate the services of the appellant without assigning any reason.

6. It is a well-established proposition in industrial law that even if the management has power under the contract of employment or under the Standing Orders to terminate the services of a worker that power can be exercised only for the purpose for which it was conferred. The power cannot be exercised for a collateral purpose to victimise the workmen. In other words, bona fides in the exercise of the power is absolutely essential, even if the power is unfettered by the terms of the contract. The form of the order in such a case is not conclusive and the tribunal can go behind the order to find the reasons which led to the order, and then consider for itself whether the termination was a colourable exercise of the power. It is unnecessary to cite all cases. Suffice it for the purpose to refer to the decisions of the Supreme Court in *Assam Oil Company Vs. Its Workmen*, *The Chartered Bank, Bombay Vs. The Chartered Bank Employees' Union*, and *Management of Murgugan Mills Ltd. Vs. Industrial Tribunal Madras and Another*, .

7. But no court can question, not even an industrial tribunal, the bona fide opinion of an employer that an employee has not satisfactorily completed his probation, even if the opinion is based on insufficient grounds. Whether a court can inquire into the reasonableness of the grounds for forming the opinion is doubtful. But if the grounds are so unreasonable that no reasonable man will form an opinion on their basis, the court can infer that no opinion was formed. These matters were considered by Remfry J., in *Wechsler v. Johnston & Hoffman* (Calcutta O.S. No. 455 of 1928: unreported) referred to by Barwell and Kar in their "*Law of Service in India*", Vol. I, page 67. (Since the ruling is not available we make this rather extensive quotation from the book.)

The real ratio of Remfry J's decision in *Wechsler's* case lay in the analogy he drew from a chain of English decisions where the Courts had to construe contracts involving something to be done by the one party "to the satisfaction" of the other.

He considered the case of *Dallman v. King* (1837-4 Bing. N.C. 105) wherein a landlord was shown to have allowed his tenant to carry out certain repairs and to deduct the costs of so doing from the rent, provided that the repairs were such as had the landlord's "approval". The tenant executed repairs which the landlord declined to approve. It was contended by the landlord that so long as his refusal was bona fide it was immaterial whether it was reasonable. In the court of first instance the jury found as a fact that the repairs were reasonable and proper. In the Common Pleas *Tindal C.J.*, *Coltman* and *Vaughan JJ.* held that the parties would be presumed to have intended what was reasonable. The jury having found as they did, the landlord was not entitled to withhold his approval capriciously. Accordingly the plaintiff was allowed to succeed.

The next case considered was *Braunstein v. Accidental Death Insurance Co.* (1861-31 L.J.Q.B. 17). There the Plaintiff sued on a Policy one of the terms of which was that there must be proof of death "satisfactory" to the directors and evidenced as they shall think necessary. It was alleged that the directors refused to be satisfied. For them it was argued that they might so refuse, even capriciously and without any reasonable ground. Three members of the Court of Queen's Bench repelled that contention, Wrightman J. holding that the Court must introduce into the contract the word "reasonable", for otherwise the directors need never pay. Crompton J., stated the general rule to be that when a party is to do anything to the "satisfaction" of another, it is to be done reasonably, and that such a contract did not mean that the directors could refuse to be satisfied however capricious, chimerical, unjust or unreasonable their grounds. Blackburn J. said it would require very strong words to lead him to think that the Plaintiff took out a Policy to be paid only if the directors thought fit, to pay it. The contract must mean such proof as would reasonably be satisfactory, and not such matters as the directors might capriciously require.

In the next case cited, *Standhard v. Lee* (1863-3 B & S 364), certain work was to be carried out to the "entire satisfaction" of the Defendant's engineer. The Court, composed of Cockburn C.J., Crompton and Mellor JJ., said, "We quite agree that stipulations and conditions of this kind - that is to say as to "satisfaction" should, when the language of the contract permits of it, receive a reasonable construction, as it is to be understood that the party in whose favour such a clause is inserted, meant to secure only what was reasonable". It was added, however, that where it was clear that one party intended to insist upon, and the other to submit to, terms, however unreasonable they might be, the Court must enforce them.

The last case which Remfry J. considered in *Wechsler's* case was *Diggle v. Ogston Motor Co.*, (1915-84 L.J.K.B. 2165). There the Plaintiff had been employed as Manager for a year, "subject of course, to your carrying on your duties to the satisfaction of the directors and to economical costs of production". He was dismissed within the year, and he brought an action for damages on the basis of a wrongful dismissal. The Jury found that the directors were really and genuinely dissatisfied, but that there were no good reasons for such dissatisfaction. In the County Court the action was dismissed and so was an appeal to the Divisional Court, Ridley J. observing that whilst he agreed that in general a right of approval must be exercised in a reasonable and not in an arbitrary or capricious way, he thought that if, in the case before them, they were to substitute the opinion of the jury for the approval of a party whom the jury itself found as a fact had been genuinely dissatisfied, it would be going too far. He further said that the distinction was between honest and bona fide dissatisfaction, and deceitful and mala fide dissatisfaction, thus excluding the topic of reasonability as any test of the validity of the decision come to by the party entitled to be satisfied.

Remfry J. considered that the views of Ridley J. in Diggle's case were opposed to a long chain of authority and respectfully declined to follow them.

The employer's reasons, if he chooses to give them, for not being satisfied with the work or conduct of the workman might not bear critical scrutiny; but if the satisfaction has been arrived at bona fide, no industrial tribunal can interfere. But if on the other hand, an employer has really been satisfied about the work and conduct of an employee, but refuses to confirm him and terminates his services without assigning any reason, and it is established before the tribunal that the refusal of confirmation and the consequent termination of service were to victimise the employee on account of his participation in lawful trade union activities unpleasant to the management, and not because the management was not satisfied with the work or conduct of the employee, there will be no difficulty in coming to the conclusion that the action of the management was really to punish him for the activity which the management considered to be misconduct.

8. When the application was filed by the appellant before the industrial tribunal u/s 33A of the Act the management contended that the appellant's work and conduct were unsatisfactory. But beyond cross-examining the appellant they adduced no evidence before the tribunal to prove their contention that the appellant's work or conduct was unsatisfactory. In fact, counsel for the management expressly stated before the tribunal that the management relied on their contractual right under the order of appointment to terminate the services of the petitioner without assigning any reason. The finding of the tribunal that the appellant's services were terminated not for the reason that his work or conduct was unsatisfactory during the period of probation, but as a punishment for the supposed misconduct of the appellant in organising and participating in the strike must be accepted as correct.

In *Express Newspapers Ltd. v. Labour Court*, Madras 1964-1 LLJ 9 a person was appointed on the following terms:

Your appointment will, in the first instance, be on probation for six months. If during this period we find you satisfactory, and you find the job suitable, we will confirm you.

However, before the expiry of the probation period his services were terminated on the ground that his work was found unsatisfactory. In the industrial dispute in regard to the discharge of this employee the labour court found that the employee was victimised for his trade union activities. Accordingly the labour court directed his reinstatement with back-wages. The writ petition filed by the employer challenging the award was dismissed. The appeal taken to the Supreme Court by special leave was also dismissed. The court held that there can be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed, that it is clear that without anything more an appointment on

probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated, and that at the end of the six months period the employer can either confirm him or terminate his service, because his service is found unsatisfactory; if no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

In *Utkal Machinery Ltd. v. Santi Patnaik* 1966-1 LLJ 398 an employee on probation for six months was discharged after she had completed 4 months service. The Labour Court dealing with the dispute held that the discharge of the probationer was punitive. No evidence was adduced by the employer to substantiate the plea that the work was unsatisfactory. The Labour Court held that the action of the management was mala fide. It directed the payment of 2 years' salary by way of compensation. The discharge was sought to be justified on the contractual right of the management. The Supreme Court held that there was no justification for terminating the services in the absence of evidence in regard to the unsatisfactory character of the work of the employee. The court said that the discharge was mala fide and awarded one year's salary as compensation. We think that the principle of the decision is that notwithstanding the contractual right of the management to terminate the probation within the period of probation without notice and without assigning any reason, an industrial tribunal can interfere with an order of discharge, if it is mala fide. In other words, the power of the management to terminate the probation during the period of probation in the exercise of its contractual right without assigning any reason, cannot be exercised mala fide or for collateral purposes. The power can be exercised only for the purpose for which it was intended. You cannot exercise a power granted for one purpose, for a different purpose and seek refuge under a provision which gives you a privilege not to disclose the reason for exercising the power. In industrial law the motive for the exercise of a contractual power can be inquired into notwithstanding the fact that the power under the contract is untrammelled. In this respect, we fail to see any distinction between the case of an employee who is discharged during the period of probation under a power reserved in the contract of employment and a case where he is discharged after the period under a like power. In both cases the power stems from the contract of employment. If in the former case the service of an employee cannot be terminated for a collateral reason, although the contract of employment gives the employer an absolute power to do so without assigning any reason, we fail to see how it can be done, at the end of the probationary period. In the *Express Newspapers* case 5 the Supreme Court did not say that the management can refuse to confirm an employee after the period of probation mala fide, and discharge him. On the other hand, the indication in the judgment is that he must be confirmed, if his work and conduct are satisfactory. As we have said, we are unable to perceive any distinction between

cases of termination of probation before the period of probation has expired and cases where the employer exercises his so called inherent right to confirm or terminate the employment after the period of probation. If in the former cases the contractual power to terminate probation is exercised mala fide an industrial tribunal can interfere and set aside the order, the same result will follow in the latter case also if the power is exercised mala fide. The decision in Stanley Kendez v. Giovanola Binny Ltd. 1968 KLJ 537 is no authority for the proposition that an industrial tribunal cannot entertain a complaint u/s 33A, if the discharge of an employee after the period of probation, but before confirmation, was mala fide. We do not think that the so called inherent right of management to discharge an employee after the period of probation but before confirmation can be exercised for a collateral reason, namely, to victimise him. And if it is established that the discharge was really to punish him for a misconduct, section 33 (1) (b) would be contravened if no previous permission of the tribunal is obtained.

It was said that although an industrial tribunal can interfere and set aside the discharge of an employee when there is mala fides, even though the management has an unlimited contractual power to do so, that power can be exercised only when an industrial dispute is referred to the tribunal u/s 10 of the Act and not when it is considering a complaint u/s 33A. We are unable to agree with this distinction. The language of section 33 A would indicate that the tribunal has to dispose of the complaint as if it were a dispute referred to it u/s 10. The rulings of the Supreme Court in Kamarhatty Co. Ltd. Vs. Shri Ushnath Pakrashi, and Management of Murgugan Mills Ltd. Vs. Industrial Tribunal Madras and Another, are clear that when a complaint is filed u/s 33A the tribunal has all the powers as if the dispute were a dispute referred to it u/s 10. In the former case the court said after referring to section 33 A that it is clear that a complaint u/s 33 A of the Act is as good as a reference u/s 10 of the Act and the tribunal has all the powers to deal with it as it would have in dealing with a reference u/s 10.

9. The terms and conditions embodied in Ex. M-2 order of appointment have really been superseded by the Standing Orders of the Company Ex. M1. That is the effect of the decisions in Salem-Erode Electricity Distribution Co. v. Their Employees' Union 1966-1 LLJ 443 and Agra Electric Supply Co. v. Alladin 1969-2 LLJ 540. Under clause (3) of the Standing Orders the workmen have been classified as permanent, temporary probationer, casual and apprentice. The definition clause defines a permanent workman" and "probationer" as follows: A "permanent" workman is one who has been engaged on a permanent basis and whose name has been entered in the muster roll of permanent workmen and who may be given a ticket or token and who has completed a probationary period fixed by the Company not exceeding 12 months in the same or another occupation to the satisfaction of the Company.

A "probationer" is one who is provisionally employed to fill a permanent vacancy

and has not completed the probationary period of service fixed by the company. If a permanent workman is employed as a probationer in a new post, he may at any time during the probationary period be reverted to his permanent post. (See clause 3).

Clauses 10 (i) and (ii) read:

(1) The employment of any permanent workman may be terminated by one month's notice or by payment of one month's wages in lieu of notice.

If he draws wages on a piece rate basis the one month's wages shall be computed on the average daily earnings of such workman for the days actually worked during the previous wage period.

The reason for the termination of service shall be recorded in writing and communicated to the workman, if he desires, at the time of discharge.

(ii) Probationers, other than those transferred from regular posts in the workshops, temporary workmen and apprentices may leave or their services may be terminated without notice to or by the company and without assigning any reason.

Looking at the definition of the word "probationer" it might be difficult to say that the appellant was a probationer after the expiry of the maximum period of probation fixed by the company, namely 12 months. There is no provision in the Standing Order for extension of the period of probation. The definition of "permanent workman" might indicate that the appellant was a permanent workman, Mr. P.K. Kurien, appearing for the management, said that the appellant's name was not included in the muster roll and that he was not given a ticket or token, although he would satisfy the other conditions laid down by the definition of a permanent workman. If the appellant had completed the maximum probationary period fixed by the company, namely 12 months, no other implication might be possible than that the appellant must be deemed to have been confirmed. The principle of the decision of the Supreme Court in *State of Punjab Vs. Dharam Singh*, is that if an employee is allowed to continue in a post on the completion of the maximum period of probation the implication is that he is deemed to have been confirmed. That the name of the appellant was not included in the muster roll or that no ticket or token was given to him may not make any difference in his status. These are ministerial acts to be done by the management and a tribunal would be right in treating as done those things which ought to have been done.

Whether the appellant was a permanent workman or not, it is very doubtful that he was a probationer within the meaning of the definition of the term in the Standing order at the time when Ex. W-2 order was passed. Be that as it may, we are prepared to assume that the appellant was a probationer within the meaning of the definition of the term when Ex. W-2 order was passed. What then? Has the management an unlimited right under the Standing Orders which

might have a statutory flavour in view of the decision in *Agra Electrical Supply Co. v. Alladin* 1969-2 LLJ 540 to terminate the services of the appellant for a reason other than that the management was not satisfied with the work or conduct of the appellant merely because clause 10 (ii) of the Standing Orders confers an absolute discretion on the management to confirm or not a probationer after the period of probation? We have already given our reasons for thinking that in industrial law the management has no such power even if the contract under which the power was conferred does not in any way limit it. It makes no difference that the power is conferred on the management by the Standing Orders. It is not necessary to deal with the controversy whether Standing Orders are contractual or statutory in character. See the article "Nature of Standing Orders under Industrial Employment-(Standing Orders) Act 1946" by Yogendra Singh in 1967-9 J. I.II. 443 . The power, we repeat, can only be exercised for the object for which it was granted. If the management was satisfied that the appellant's work and conduct were satisfactory it could not have terminated his services under clause 10 (ii) of the Standing Orders. A power is exercised fraudulently if its repository intends to achieve an object other than that for which it has been conferred. If a power is granted for one purpose, it cannot be exercised for a different purpose. See *State of Punjab Vs. Dharam Singh*, , *Sadler v. Sheffield Corporation* 1926 Ch. 66. *Dyson v. Sheffield Corporation* 1924-1 Ch. 483 and *Hanson v. Rudoliffe* 1922-2 Ch. 490.

It might be that the expression "conditions of service" used in section 33(1) (a) of the Act would imply the continuance of the relationship of employer and employee, and therefore, when there is a complete cessation of that relationship, there could not be any alteration of the conditions of service of the concerned workman to his prejudice. See *Manu v. Aspinwall & Co.* 1963-1 LLJ 212. If this view is correct--we do not wish to express any opinion upon it--then sub-section (1) (a) of section 33 could not have been contravened by termination of the services of the appellant. But in view of the finding of the tribunal that the services of the appellant were not terminated for the reason that his work or conduct was unsatisfactory, but to punish him for the supposed misconduct in organising the strike, which was connected with the pending dispute and the appellant being concerned in the dispute, the management contravened the provisions of section 33 (1) (b) of the Act, as no previous permission of the tribunal was obtained. If the discharge was really for a misconduct connected with the matter in dispute, no matter how the order discharge is worded, then the permission of the tribunal was required as contemplated by the Sub-clause. Alternatively, if under the Standing Orders the appellant was not a probationer or that he was a permanent workman, Ex. W 2 order was in contravention of section 33 (2) (b), as the appellant was really discharged for his supposed misconduct in organising the strike which was not connected with the pending dispute in I.D. No. 74/1964, namely confirmation of probationers, and as the approval of the tribunal was not obtained. See *National Machinery Manufacturers v. Vyas* 1964-1 LLJ. 624 at 631, 633. From whatever angle the matter is looked

at, it seems to us that there was contravention of section 33 of the Act and the award passed was not liable to be quashed. We, therefore, set aside the order of the learned single Judge and allow the appeal. In the circumstances, we do not make any order as to costs.