

(2008) 02 BOM CK 0180

In the Bombay High Court

Case No : Writ Petition No's. 1346 and 3457 of 1997

Hindustan Computers Ltd.

APPELLANT

Vs

Miss. Natty Rose Pessu
 Ms. Natty Rose Pessu Vs HCL
Ltd. and Others

RESPONDENT

Date of Decision : 26-02-2008

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25B, 25B(2), 25F
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 2, 28, 44

Citation : (2008) 4 BomCR 839 : (2008) 4 MhLj 669

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : Himanshi B. Takke, instructed by Milind More, Niranjan Mogre,
instructed by Haresh Mehta and Co, for the Appellant;

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—Both these petitions impugn the judgment and order rendered by the Labour Court on 16/4/1995 thereby allowing Complaint (ULP) No. 334 of 1987 partly and confirmed by the Industrial Court at Mumbai in Revision Application (ULP) No. 57 of 1995 which came to be dismissed. The first petition has been filed by the employer i.e. M/s. Hindustan Computer Ltd. whereas the second petition has been filed by the employee.

2. It is the case of the employee that she was appointed as "Personal Assistant" with effect from 29/1/1987 and on probation period of one year. However, on 22/9/1987 her services came to be terminated by the company and, therefore, on or about 22/12/1987 she filed Complaint (ULP) No. 334 of 1987 before the 3rd Labour Court at Mumbai under Item 1 of Schedule IV read with Section 28 of the MRTU & PULP Act, 1971 ("the Act" for short). The said complaint was allowed by directing reinstatement but without backwages by the Labour Court. The order of denial of backwages was not challenged by the employee by filing a

revision application u/s 44 of the Act and, therefore, the findings recorded by the Labour Court in the impugned order had received finality on the point of non-compliance of Section 25F of the I.D. Act and denial of backwages so far as she was concerned. The Industrial Court agreed with the findings recorded by the Labour Court and held that there was no case made out to cause interference u/s 44 of the Act.

3. As per the employee the order of termination was punitive and it was not preceded by a departmental enquiry. She stated that on 6th August 1987 while she was on duty her personal leather bag was found missing from her drawer during the lunch hour and the said bag was containing important documents and personal belongings. She could not trace it on making enquiries with her colleagues and, therefore, she submitted a written complaint to respondent No. 2. As there was no response from him, she submitted a complaint to the Marketing Director at Delhi who also did not respond to the complaint and, therefore, on 13/8/1987 she filed a police complaint regarding the theft of her bag from the office premises and during working hours. The police had undertaken investigations and had resorted to summoning some of the employees. One more letter was addressed by her on 24/8/1987 to the Marketing Director regarding the incident of theft and seeking his intervention and, therefore, the respondent No. 2 started acting vindictively. On 29/8/2007 when she reported for duty, the respondent No. 2 refused to allow her to work and instead she was called in his cabin and the keys of the cabin were demanded from her. She was also asked to sign on some blank papers and submit her resignation. The petitioner-employee did not do any of such things and, addressed a letter dated 29/8/1987 to the Marketing Director at Delhi informing him about the incident. The petitioner addressed a letter dated 1st September 1987 to the respondent No. 2 requesting him to refrain himself from illegal acts and to allow her to work. On 3rd September 1987 she was issued with a show cause notice alleging that on 25th August 1987 at about 10 a.m., while in the office, she had assaulted one Mr. Bharat at 10 a.m. and the said act amounted to misconduct of serious nature calling for disciplinary action. The letter further alleged that on 27th August 1987 she had remained absent unauthorizedly. She submitted her reply on 4th September 1987 and finally on 22nd September 1987 she was served with the order of termination.

4. While opposing the complaint the employer contended that the complainant was on probation for a period of one year as set out in the appointment order and as her performance during the probationary period was found to be unsatisfactory, the impugned order dated 22nd September 1987 was issued, before the complainant could complete the probationary period of one year. The management further stated that the show cause notice issued to her had no bearing on the order of termination and it was a termination simplicitor without any stigma on her career or character and, therefore, it did not amount to retrenchment as defined u/s 2(oo) of the I.D. Act.

5. The Labour Court discarded the contentions of deemed confirmation as well as the requirement for conducting an enquiry before the termination order was issued. It held that during the period from 29/1/1987 till 21/9/1987 she had completed 240 days of service and, therefore, she was required to be given notice or notice pay and compensation as required u/s 25F of the Act as she had put in more than one year's continuous service. This view taken by the Labour Court is unsustainable on all counts.

6. Firstly the concept of counting of 240 days comes into picture only when the tenure of the employee has been spread over twelve months and such concept does not come into effect if the employee concerned has worked for nine months continuously. Section 25B of the I.D. Act defines the term "continuous service". Sub-section (2) of Section 25B reads thus:

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case.

7. Whether the termination of a probationer on account of unsatisfactory performance amounts to retrenchment within the meaning of Section 2(oo) is another issue which is required to be dealt with. Some of the clauses of the appointment order and which are relevant for the present consideration are reproduced as under:

2. You will be on probation for a period of one year. Upon satisfactory completion of probation, you will be confirmed in the regular cadre of the company provided your work and conduct are both satisfactory. After completion of the probation period, till such time that you are intimated in writing regarding your confirmation, you shall continue to be on probation. The probation period is extendable at the sole discretion of management by another six months.

3. During Probation/extended period of probation in the event of your resignation or termination of services either side will have to give 24 hours notice or 1 days basic salary in lieu thereof. Subsequently either side will have to give notice of one month or basic salary in lieu thereof.

15. Please sign the duplicate copy of this appointment letter and return to us your acceptance of the appointment and the terms and conditions. You are advised to go through the contents of this appointment letter before signing the duplicate copy.

It is thus clear that the employee was on probation for a period of one year which was likely to be extendable for another six months and until she was intimated in writing about her confirmation, she was to continue on probation. During the period of probation the service could be terminated by either side by giving 24 hours notice or one day's basic salary in lieu thereof. On confirmation of service either side could terminate the employment by giving notice of one month or basic salary in lieu thereof. Before joining the employee was required to go through the terms and conditions and submit her acceptance in writing on the duplicate copy. Clause 15, therefore, indicated that all the terms and conditions set out in the appointment order were acceptable to the employee before she joined the employment on probation as Personal Assistant in the pay scale of Rs.610-850-1200-1800-2100. The employee was aware that the confirmation of her service was not automatic and it was solely dependent upon her work and conduct having been found satisfactory. In the case of *Vidya Vardhaka Sangha and Anr. v. Y.D. Deshpande and Ors.* 2005 LLR 1233, the Supreme Court held that the appointment made on probation / ad-hoc basis for a specific period of time comes to an end by efflux of time and the person holding such post can have no right to continue on the same. In the case of *State of Punjab and Others Vs. Sukhwinder Singh*, , it has been held that the probationer is on test and his regularisation in service or continuation beyond the period of probation is dependent on his performance, conduct and over all suitability for the job. It is well settled that the very object of probation is to enable the management to assess the suitability of the employee during the said period. If the management comes to the conclusion that if the employee is not suitable for the establishment, it may be possible to extend the probationary period, but once the management comes to the conclusion that a particular employee is not suitable, it would be unjust to saddle the management with a deadwood. The main question that is required to be considered is whether the Labour Court was justified in holding that the impugned termination was retrenchment and the said issue in similar circumstances has been decided by a Division Bench of the Andhra Pradesh High Court in the case of *Divisional Manager, LIC of India and Anr. v. M. Venugopal* 1993 I CLR 372. A similar clause of confirmation subject to satisfactory performance was set out in the appointment order and it more particularly stated as under:

11. Confirmation and increments:

(i) On your satisfactorily completing the period of probation and your observance and compliance with all conditions set out in this letter of appointment, you will be confirmed in the services of the Corporation in Clause II. Your confirmation will depend inter alia upon the fulfilment of the minimum business guarantee set out in para 10 above and upon your record of post-sales service to the Corporation's policy holders and other functions performed by you in the area allotted to you to the satisfaction of the competent authority.

Their Lordships in para 13 of the said judgment stated thus,

Thus, only after fulfilling all the conditions laid down in Clause 11 of the appointment order, the writ petitioner will be entitled for confirmation. In case he is not able to fulfil the conditions prescribed, he is not entitled for confirmation, that is, his probation can be terminated or discharged. Thus, it is implicit in the appointment order itself that in case the writ petitioner is not able to fulfil the conditions laid down therein, he will not be confirmed and ultimately he will be discharged or terminated as a probationer. This appointment order consequently comes within the ambit of Section 2(oo)(bb) Part II of the Act. When once the appointment of the writ petitioner is on contract basis with a condition that he will be terminated, if he has not fulfilled the conditions laid down in the appointment order during the probation, it cannot be said that his termination will amount to retrenchment as contemplated u/s 2(oo). When once his appointment comes u/s 2(oo)(bb) Part II, Section 25F is not attracted at all. Therefore, we hold that the termination of the petitioner's probation without following the procedure contemplated u/s 25F of the Act, is not bad nor illegal....

I am in agreement with the view taken by the Andhra Pradesh High Court and I am satisfied that the said view squarely applies to the instant case as well. Hence the Labour Court was in grave errors while holding that there was non-compliance of Section 25F of the I.D. Act and thus directing reinstatement in service. The impugned award is, therefore, required to be set aside as it is illegal and void ab initio.

8. As the petition of the employee has been admitted by this Court, I must also deal with the grievance raised therein and that is in respect of denial of the backwages. The learned Judge of the Labour Court in para 13 of his judgment has referred to the affidavit filed by the employee at Exhibit U-5 and in the same she had stated the details of her employment after the termination order was served. The learned Judge, therefore, took into consideration the fact that the employee was in employment and denied the benefit of backwages while granting reinstatement in service. No fault could be found with this reasoning. It was submitted by the learned Counsel for the employee that during the pendency of these petitions, she remained unemployed and, therefore, petition be allowed. I am required to consider the challenge to the order passed by the Labour Court on 16/4/1995 and which order has been confirmed by the Industrial Court. The employee did not agitate by filing a separate revision application, as noted earlier, the issue of denial of backwages and, therefore, now the employee cannot be allowed to take the plea that her subsequent unemployment entitles her to be reinstated. This is far-fetched as the said issue is required to be considered on the basis of the evidence that the parties lead before the trial Court.

9. In the premises Writ Petition No. 1346 of 1997 succeeds and the same is hereby allowed. The impugned order passed by the Labour Court in Complaint (ULP) No. 334 of 1987 is hereby quashed and set aside and the said complaint is dismissed. Rule is made absolute accordingly.

10. Writ Petition No. 3457 of 1997 fails and the same is hereby dismissed. Rule is discharged.

11. No costs.