

(2014) 09 AHC CK 0079
In the Allahabad High Court
Case No : Special Appeal No. 19 of 2007

Indian Oil Corporation Ltd.

APPELLANT

Vs

R.P. Garg

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Industrial Employment Standing Orders Act, 1946 — Section 10, 11, 12, 12A, 13

Citation : (2014) 9 ADJ 591 : (2015) 2 ALJ 38 : (2014) 107 ALR 841 : (2015) 145 FLR 93 : (2014) 4 UPLBEC 3222

Hon'ble Judges : Vineet Saran, J; Harsh Kumar, J

Bench : Division Bench

Advocate : Vivek Ratan Agarwal and Vijay Ratan Agarwal, Advocate for the Appellant; Gopal Misra, Advocate for the Respondent

Judgement

@DELETEUPPERDATA

1. The brief facts of the case are that the writ petitioner-respondent, R.P. Garg was, vide letter dated 21.4.1986, appointed as an Electrician Grade-III with the appellant-Indian Oil Corporation. He joined on the said post on 25.9.1986. The initial appointment of the respondent, as per the terms of the appointment letter, was on probation for a period of six months, which could be extended or reduced depending on the work of the employee being found satisfactory during the probationary period. It was also mentioned in the appointment letter that the services will not be regarded as confirmed unless a letter of confirmation to the effect was issued to the employee and the annual increments were to be granted on the specific recommendation of the Departmental Head for good work and conduct of the individual during the period concerned. The respondent-writ petitioner continued in service till 26.4.1989, when the termination order was issued to him stating that no confirmation letter had yet been issued and hence his services could not be regarded as confirmed; and that his services were no longer required by the Corporation, and hence terminated with immediate effect. Challenging the said order, the respondent-writ petitioner (employee) filed a writ

petition No. 8502 of 1989, which has been allowed by the learned Single Judge by judgment and order dated 1.12.2006, whereby the termination order dated 26.4.1989 was quashed and the Corporation was given liberty to pass fresh orders, if it so desires, in accordance with law. Aggrieved by the said judgment and order passed by the Writ Court, this appeal has been filed by the appellant-Corporation. We have heard Sri Vijay Ratan Agarwal, learned Senior Counsel alongwith Sri Vivek Ratan Agarwal, learned counsel for the appellant-Corporation as well as Sri Gopal Misra, learned counsel for the respondent-writ petitioner and have perused the record.

2. The submission of Sri Vijay Ratan Agarwal, learned Senior Counsel appearing for the appellant-Corporation is that in terms of the appointment letter dated 21.4.1986, the writ petitioner-employee was to continue on probation until the letter of confirmation was issued by the Corporation. It is contended that even though the initial period of probation was only six months from the date of reporting on duty, but since the same could be extended or reduced (depending on the satisfactory working of the writ petitioner during the period of probation), even in the absence of period of probation having been contended, since the letter of confirmation had not been issued, the writ petitioner-employee would be deemed to be on probation. It is thus contended that the termination simplicitor by order dated 26.4.1989 was rightly passed as the writ petitioner was on probation, and the same was without any stigma.

3. The next submission of the learned Senior Counsel for the appellant is that though no reason may have been given (nor was required to be given) in the termination order (as the writ petitioner-employee was only a probationer), yet in the counter-affidavit it has been clarified that the order of termination was issued because at the time of joining/making an application for appointment, the writ petitioner-employee had concealed material information to the extent that, as per the appellant-Corporation, the employee was earlier employed with the U.P. Rajya Vidyut Utpadan Nigam Limited with a bond for three years, for which he had been sent on training by the Nigam to Nagpur, and before completing the training he had left his service with the Nigam, (which was in contravention of terms of bond) and joined the appellant-Corporation. According to the appellant-Corporation, the same is a material concealment and for that reason, the writ petitioner-employee was not found suitable for being continued in service.

4. Sri Gopal Misra, learned counsel appearing for the respondent-writ petitioner has submitted, that at the time of appointment of the writ petitioner-employee, there were no certified Standing Orders of the Corporation, and it was only after the same were certified in the year 1991 that it had become applicable and as such, the service of the writ petitioner would not be governed by the Standing Orders certified in the year 1991, which may have provided for the probation period of 6 months extendable upto 12 months, and confirmation in job against a permanent post only after satisfactory completion of probation period. He has submitted that the case of the writ petitioner-employee would be governed by

the model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as the "Act of 1946") and as per the terms of the said model Standing Orders, the maximum period of probation could be 3 months, and on completion of the said period of 3 months, the employee would be deemed to have been confirmed.

5. Sri Misra has further contended that the reason supplemented by the appellant-Corporation in the counter-affidavit with regard to termination of his service cannot be looked into, as fresh reasons given in the counter-affidavit cannot supplement the reasons given in the termination order. It is also submitted that prior to joining the Corporation, the writ petitioner was only a trainee with the U.P. Rajya Vidyut Utpadan Nigam Limited and, according to Sri Misra, until the writ petitioner had completed his training, he was not in service of the Nigam and as such, according to him, there was no concealment of any material information. It is also contended that even the Rules of the appellant-Corporation do not consider a trainee to be in service. It was lastly contended that the work and conduct of the writ petitioner, while in service, was fully satisfactory and for the said reason, he had also been granted two annual increments, which, as per the terms of the appointment letter, was required to be granted on the specific recommendation of the Departmental Head certifying his good work and conduct. Sri Misra has further submitted that in case there was any inconsistency between the appointment letter and the Standing Order, it was the Standing Orders, which would prevail.

6. We have heard learned counsel for the parties at length and have carefully gone through the records as well as the decisions cited by the learned counsel for the parties.

7. Learned Senior Counsel for the appellant admits that there were no certified Standing Orders of the appellant-Corporation as on the date of appointment or on the date of termination. It was only in the year 1991 that the Standing Orders of the Corporation were certified by the authority concerned. It is also admitted that in the absence of there being any certified Standing Orders of the Corporation, the model Standing Orders, as framed under the Act of 1946, would be applicable. The appellant-Corporation also does not dispute the fact that the terms of the appointment as given in the appointment letter were contrary to the terms of the model Standing Orders.

8. Under the Industrial Employment (Standing Orders) Act, 1946, Schedule I gives the model Standing Orders in respect of "Industrial Establishment Not Being Industrial Establishments In Coal Mines". Learned counsel for the parties agree that it is these model Standing Orders, which will be relevant for the purposes of the present case. For ready reference, the relevant Orders 2(a), (b) and (c) are reproduced below:

"2. Classification of workmen--(a) Workmen shall be classified as-

(1) permanent,

- (2) probationers,
- (3) badlis,
- (4) temporary,
- (5) casual,
- (6) apprentices.

(b) A "permanent" workman is a workman who has been engaged on a permanent basis and includes any person who has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial establishment, including breaks due to sickness, accident, leave, lock-out, strike (not being as illegal strike) or involuntary closure of the establishment.

(C) A "probationer" is a workman who is provisional who is provisionally employed to fill a permanent vacancy in a post and has not completed three months' service therein. If a permanent employee is employed as a probationer in a new post he may, at any time during the probationary period of three months, be reverted to his previous permanent post.

9. Section 12-A of the Act of 1946 provides that model Standing Orders would remain applicable till the industrial establishment framed its own Standing Orders and are certified under the said Act. For ready reference, Section 12-A of the Act of 1946 is reproduced below:

"12A. Temporary application of model standing orders.--(1) Notwithstanding anything contained in Sections 3 to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under Section 7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of Section 9, sub-section (2) of Section 13 and Section 13A shall apply to such model standing orders as they apply to the standing orders so certified.

10. The Standing Orders of the Indian Oil Corporation as certified under the Act of 1946, which indisputably came into force in the year 1991, also deal with the Classification of workmen as well as the probation. The relevant Orders 3, 3.1 and 3.2 of the aforesaid Standing Orders of 1991 are reproduced below:

"3. Classification of Workmen.

Workmen shall be classified as under:

- 1. Permanent
- 2. Probationer
- 3. Temporary
- 4. Casual

5. Apprentice

3.1 Permanent: A "permanent" workman is one who has been employed as a permanent hand and who has satisfactorily completed his probationary period and has been confirmed in his job against a permanent post.

3.2 Probationer: A "probationer" is one who has been provisionally employed to fill up a permanent vacancy in a post and has not completed six months of continued satisfactory service from the date of his appointment. The probationary period shall ordinarily be six months but the period may be extended or reduced. In no case will probation be longer than 12 (twelve) months. If a workman confirmed against on post, he may at any time during the probationary period be reverted to his previous permanent post."

11. The appointment letter of the writ petitioner was issued on 21.4.1986. The following three conditions mentioned in the appointment letter, which are relevant for the purposes of the present case, are reproduced below:

"He will be on probation for a period of six months from the date you report of duty, but the period of probation may be extended or reduced. If your work is found to be satisfactory during the probationary period in services will be continued.

Your service will not be regarded as confirmed unless a letter of confirmation to the effect is issued to you.

Annual increment would be subject to the rules of the Corporation in this behalf and would be granted on a specific recommendation of the Departmental Head for good work and conduct of the individual during the period concerned."

12. As already been mentioned above, learned counsel for the appellant-Corporation has accepted that the Standing Orders of the Corporation were certified in the year 1991, and that till then the model Standing Orders under the Act of 1946 were applicable. As such, it is clear that at the time of appointment on 21.4.1986 as well as on the date of termination of the writ petitioner, which was on 26.4.1989, the model Standing Orders under the Act of 1946 were applicable. It has also been accepted by the learned counsel for the appellant-Corporation, that in view of provisions of Section 12-A, the terms contrary to the model Standing Orders, which may have been mentioned in the appointment letter, would not have any binding force. Meaning thereby, as per the model Standing Orders, the condition that the writ petitioner would be treated as a confirmed employee only after the letter of confirmation is issued, would not" be binding on the parties. Similarly, the term of period of probation mentioned in the appointment letter as 6 months, which could be extended, would also not be binding and it would be the term mentioned in the model Standing Orders, which would be binding on parties.

13. Clause (b) of Order 2 of model Standing Orders defines a "permanent" workman to be a workman who has been engaged on a permanent basis and

includes any person who has satisfactorily completed a probationary period of three months. While defining "probationer" in Clause (c), it has been provided that it would be a workman who is provisionally employed to fill a permanent vacancy in a post and has not completed three months service. The said provision does not contemplate any extension of the probationary period and on the contrary, on completion of probationary period of three months, the workman becomes a permanent workman as Clause (b) contemplates that such a person, who has satisfactorily completed three months as a probationer, would be permanent workman.

14. With regard to his contention that the service of writ petitioner was satisfactory, learned counsel for the respondent-writ petitioner has relied on fact that the writ petitioner was granted two annual increments, which could have been done, and had actually been given on the specific recommendation of the Departmental Heads with regard to his good work and conduct. There was nothing reported to be unsatisfactory with regard to the work and conduct of the writ petitioner.

15. The submission of the learned counsel for the appellant-Corporation is that the provision in Clause (b) of Order 2 of Model Standing Orders regarding the workman having satisfactorily completed the probationary period of three months would include suitability also and thus, if the writ petitioner had given wrong information, or concealed material information, at the time of entering into the service, the same would not pass the test of suitability, and, as such, the contention is that he, being a probationer, could be discharged by way of termination simplicitor. Such submission of the appellant is not worthy of acceptance.

16. Suitability is always different from satisfactory work and conduct. While judging the work and conduct, the same has to be judged to the satisfaction of the employer, and it is only on his unsatisfactory work and conduct that he can be discharged during the period of his probation. Supplying of wrong information, or concealment of material information, by the writ petitioner could be termed as a misconduct, for which the employee-writ petitioner would be entitled to be given an opportunity of hearing before any action is proposed or taken against him on the ground of such misconduct. It is not for us, in the writ jurisdiction, to judge as to whether the information given by the writ petitioner at the time of entering into the service, with regard to his alleged earlier employment, would amount to misconduct or not. The explanation given by the respondent-writ petitioner in this regard, that the writ petitioner was merely a trainee in the Nigam and was never in employment, has to be considered before any action is taken against the writ petitioner, which can only be done after giving opportunity, and the same has not been done in the present case.

17. Even otherwise, in the counter-affidavit the respondent cannot supplement reasons, which are not contained in the impugned order. In this regard, the learned Single Judge has rightly relied on the decision of the Apex Court in the

case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , wherein it has been held that when statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned, and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. As such, we cannot take cognizance of the reasons for termination as have been given in the counter-affidavit filed in the writ petition.

18. The decisions of the Apex Court, as have been relied upon by the learned counsel for the appellant-Corporation, in our opinion, do not apply to the facts of the present case. In the case of Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, , the case before the Apex Court was that of a probationer whereas in the present case, what has to be first considered by this Court is as to whether the writ petitioner was on probation or had automatically become a permanent employee. Since we have already held, that in the facts of the present case the writ petitioner was deemed to have been confirmed after completion of three months of probation, the case relating to probationer would not be applicable. In the case of Shri Kedar Nath Bahl Vs. The State of Punjab and Others, , the matter under consideration was again with regard to a probationer and as such, the facts of the said case are different from the one at hand. Similar is the position in the other two cases, which have been relied upon by the learned counsel for the appellant-Corporation, which are Raj Kumar Yadav Vs. The State of Uttar Pradesh, and State of Punjab and Others Vs. Sukhwinder Singh, . As such, in our opinion, the ratio of the said decisions would not apply to the facts of the present case.

19. In the case of Wasim Beg Vs. State of Uttar Pradesh and Others, , the Supreme Court has classified "probationer" to be of three categories. The first category is such where there is automatic confirmation, i.e. when there is no provision for extension of probation period. The second category is where an initial period of probation is provided but can be extended, in which case there is no automatic confirmation. The third category is where no maximum period is provided, in which case the employer has to pass a specific order of confirmation. Since we have already held that the model Standing Orders would be applicable in the present case, thus we are of the opinion that the case of the writ petitioner would fall in the first category, where the period of probation would be only three months, after which the probationer would be deemed to be a permanent employee, meaning thereby that there was automatic confirmation of the writ petitioner on completion of three months probation.

20. A similar matter had come up before a learned Single Judge of this Court in the case of M/s Jwala Prasad Babul Lal v. Labour Court, 1978 (36) FLR 440, wherein it has been held as under:

".....But even assuming that the workman concerned was not operative as defined in the Standing Orders, the probationary period as prescribed in the model Standing Orders would be applicable to him in accordance with Section 12-

A of the Industrial Employment (Standing Orders) Act, 1946. According to the Standing Orders a workman is required to be on probation for a period three months only, after the expiry of the period of three months he secures the status of a permanent workman under clause 2(b) and (c). In the instant case, the workman concerned had worked for a period of more than three months, as such he had acquired the status of a permanent workman under the model Standing Order....."

21. As such, we are of the opinion that even though the reasons given by the learned Single Judge for treating the writ petitioner as a permanent employee may be different from one which have been given hereinabove, but in the facts of the present case, the writ petitioner could not be treated as a probationer after having put in more than two years of service, and his service could not have been terminated without assigning any reasons, treating him to be a probationer, as has been done by the order dated 26.4.1989.

22. As we have already held, in the facts of the present case and in terms of the model Standing Orders, the writ petitioner had automatically been confirmed, and would be treated as permanent workman on the completion of three months service in the year 1986 itself and thus, the termination simplicitor, treating the writ petitioner to be a probationer, vide order dated 26.4.1989 has rightly been quashed by the learned Single Judge, which does not call for interference in this appeal. The special appeal stands dismissed. No order as to costs.