

(1991) 02 MAD CK 0024
In the Madras High Court
Case No : W.A. No. 657 of 1988

Miss T.N. Chandra

APPELLANT

Vs

South India Corp (Agencies) Ltd. and another

RESPONDENT

Date of Decision : 13-02-1991

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 2, 25, 25B, 2A

Tamil Nadu Shops and Establishments Act, 1947 — Section 25F, 41, 45

Citation : (1991) 02 MAD CK 0024

Hon'ble Judges : D.J. Jagannadha Raju, J;A.S. Anand, J

Bench : Division Bench

Judgement

Raju, J.—The above writ appeal has been filed against the order of the learned single Judge dated March 15, 1988 in W.P. No. 386 of

1981 where under the learned Judge allowed the writ petition filed by the first respondent before us praying for a Writ of Certiorari seeking to

quash the proceedings of the second respondent dated March 31, 1981 in TSE No. 32/1980 by the which the order of termination of the service

of the appellant passed by the first respondent on June 14, 1980 came to be set aside in an appeal filed under S. 41(2) of the Tamil Nadu Shops

and Establishments Act, 1947.

2. The appellant was given employment under an order of appointment dated December 12, 1979 with reference to her application dated July 23,

1979 as a Composite on probation with effect from December 1, 1979. The earlier events are not relevant for purpose of our consideration and

the rights of parties indisputably have to be considered only with reference to the order dated December 12, 1979. As could be seen from the said

order of appointment she was appointed on a consolidated salary of Rs. 400

per month (inclusive of allowance) and she will be on probation for a period of six months. The relevant terms of the orders of appointment in the regard are as follows :-

4. She will be on probation for a period of six months during which time her services are terminable during which time her service are terminable

any time without notice and she will not be entitled for any leave, bonus etc.

5. The confirmation of her services will be considered after six months if found satisfactory at the discretion of the management"".

While so, by an order dated, June 14, 1980, due first respondent terminated the services of the appellant with effect from close of business on

June 14, 1980 in terms of para 4 of the appointment order referred to supra.

3. Aggrieved, the appellant preferred an appeal before the second respondent under S. 41(2) of the Tamil Nadu Shops and Establishments Act,

1947 contending that her termination was without rhyme or reason, that it is violative of S. 41 in that neither any on notice of one month nor one

month's wages in lieu thereof was given, that the order of termination was without any a reasonable cause, that since on the date of the order she

has already completed six months" probation, she must be deemed to have been made permanent, that, therefore, the question of terminating here

services did not arise, that the termination would amount to retrenchment within the meaning of S. 2(00) of the Industrial Disputes Act, 1947 since

the mandatory requirements of S. 25F of the Act have not been complied with and that the termination also lacked bona fides.

4. The first respondent-Management appears to have filed a reply that the appellant was initially working only as a casual on daily-rated wages as

and when there was need, that such engagement was sporadic and not continuous, that she was only appointed as a probationer on a consolidated

salary and not in a graded scale, that the office order dated December 6, 1979 was withdrawn and substituted by the order dated December 12,

1979, that during the period of probation, as per reports her performance was found extremely unsatisfactory and, therefore, her services were

terminated in terms of paragraph 4 of the order and as per the stipulations contained in the very order of appointment and, therefore, no notice was

required to be given and that the order of termination was reasonable and valid.

5. The second respondent, who is the appellee under the Tamil Nadu Shops and

Establishments Act, 1947, considered the question as to whether the order of termination was in compliance with the provisions of S. 41(2) of the Act and came to the conclusion that since the order of the termination on June 14, 1980 was actually made 14 days after the expiry of a period of six months from December 1, 1979, the Management ought to have complied with the provisions of S. 41(2) of the Act and inasmuch as no reasonable cause was given for termination and there was no notice of payment of one month's wages in lieu thereof, the order of termination had to be set aside and consequently allowed the appeal. The said order of the second respondent dated March 31, 1981 was challenged in the writ petition before the learned single Judge.

6. The learned single Judge mainly considered the question as to whether a "probationer" was entitled to the benefits given to an "employee" under the provisions of the Tamil Nadu Shops and Establishments Act, 1947, and came to the conclusion that a probationer like the appellant cannot be construed to be an employee under the first respondent, an employer, and that it is only after the satisfactory completion of the probation there can be jural relationship of an employer and employee and that too after the issue of a specific order in that regard and therefore, the termination was for sufficient ground and was in terms of the very appointment order. Consequently, the writ petition by the Management was allowed and it is against the said order the above appeal has been filed.

7. Mr. K. Chandru, learned counsel appearing on behalf of the appellant, submitted that even a "probationer" will be a "person employed" within the meaning of S. 2(12) of the Act, that the appellant was entitled to the benefits of Chapter VA of the Industrial Disputes Act, 1947, and inasmuch as the provisions of S. 2A of the Industrial Disputes Act and S. 41(2) are in parimateria with one another, a person can have recourse to either of the remedies and both forums can go into the questions, that the order of termination did not comply with the requirements of S. 41(2) of the Act and, therefore, the termination of the appellant cannot be sustained. The learned counsel placed reliance upon the decisions reported in Mohan Lal Vs. Management of Bharat Electronics Ltd., Mr. G. Gopinath, learned counsel appearing for the first respondent referred to some of the decisions placed before the learned single Judge and reiterated the

submission made as well as the reasoning of the learned single Judge and contended that the learned single Judge and contended that the order of the learned single Judge does not all for our interference in this appeal. The learned counsel placed reliance upon the following decision in support of his submission; Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others,

8. We have carefully considered the respective submissions of the learned counsel appearing on either side but unable to subscribed to the views

expressed by the learned single Judge or uphold the order under appeal before us. In the decision reported in Mohan Lal Vs. Management of

Bharat Electronics Ltd., , the Supreme Court held that a termination in violation of S. 25 of the Industrial Disputes Act, would be ab initio void and

the workman would be entitled to a declaration that he continues to be in service with all consequential benefits. In Krishna District Co-operative

Marketing Society Limited, Vijayawada Vs. N.V. Purnachandra Rao and Others, the Supreme Court held that if the employees are "workmen"

and the management is an "industry" as defined in the Industrial Disputes Act, and the action taken by the Management amounts to "retrenchment"

then the rights and liabilities of the parties are governed by the provisions of Chapter V-A of the Industrial Disputes Act and the said rights and

liabilities may be adjudicated upon and enforced in proceedings before the authorities u/s 40(1) and (3) of the Andhra Pradesh Shops and

Establishment Act, 1966. In The Management of Safire Theatre, Madras Vs. The Additional Commissioner for Workmen's Compensation,

Madras and Others, , a Full Bench of their Court held that Section 2-A of the Industrial Dispute Act does not fully bar the remedy under S. 41 of

the Shops Act, and if decision is rendered under S. 41(2) of the Shops Act before the Government had made a reference under S. 10 of the

Industrial Disputes Act, that decision would be final between the parties and that the remedies under both the Acts, subject to certain conditions

pointed out, are available to a worker. In State Bank of Travancore Vs. Dy. Commissioner of Labour, Coimbatore and Another, , a learned single

Judge of this Court held that where the worker satisfied the definition of a person employed and the management satisfied the definition of an

employer within the meaning of the Act, any contract between the employer and

the person employed cannot over ride the express provisions of the Shops Act, particularly S. 41 thereof. The decision in *M. Palaniswami Vs. Madukkarai Cement Works Employees' Co-operative Stores Limited and Another*, of a learned single Judge of this Court was referred to in order to show that even in respect of a probationer, this court considered the question of termination in the light of S. 41 though ultimately on merits the claim of the worker was rejected.

9. As far as the decisions referred to by the learned counsel appearing for the first respondent are concerned, it is seen from the decision reported in *Venkatacharya v. Mysore Sugar Co. Ltd.*, 1956 I LLJ 41 that a Division Bench of the Karnataka High Court held that a probationer is not in the same position as others in service, that a probationer is in a state of suspense attended with the uncertainty of an inchoate arrangement, that prima facie his rights and claims against the employer are less than being under probation is merely undergoing a stage preparatory and prior to confirmation. The learned Judges of the Division Bench quoted with approval the definition of "probation" contained in the Law Lexicon of Ramnatha Ayyar that probation means the testing of a person's capacity, conduct or character especially before he is admitted to regular employment. In *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, a three member Bench of the Supreme Court held that a person appointed on probation for six months continues only as a probationer even after the period of six months if at the end of the said period he is either not terminated or confirmed and that at the end of the six months period the employer can either confirm him or terminate his services, because his services are found unsatisfactory. The decision in *Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others*, was referred to show that there could be no objection to a probationer being terminated from service in terms of the conditions of his engagement and for the reasons provided therefore before confirmation. In the decision in *State Bank of India Vs. The Additional Commissioner for Workmen's Compensation and Another*, , a Division Bench of this Court held that the effect of non-compliance with the provision in S. 45(1) regarding issue of one month's notice or payment of wages in lieu thereof will not render the order of termination void so long there was

reasonable cause for such termination.

10. In the light of the above position of law, it could be seen that no doubt a worker, who is entitled to the benefits of Chapter V-A of the

Industrial Dispute Act can have such rights adjudicated upon even in the proceedings before the Shops Act Authority, but before doing so, he must

satisfy such entitlement to the benefits of the provisions contained in Chapter V-A of the Industrial Dispute Act in accordance with the provisions

of the said Act. As opined by the Supreme Court, it should be first established that the appellant is a "workman" and the Management an

"industry" and the action taken constitutes "retrenchment" within the meaning of the Industrial Disputes Act. It also becomes necessary to

established that the appellant has been in "continuous service for not less than one year" and satisfies the terms of S. 25B for that purpose. So far

as the case on hand is concerned, no sufficient material seems to have been produced and there is nothing on record before us in the shape of

concrete material to find out the existence of those essential requirements. Therefore, the claims could be considered, as has been done by the

authority below, only with reference to the provisions of the Shops Act.

11. So far as the appellants authority under the Shops Act is concerned, it came to the conclusion that there had been violation of Section 41(1) in

this case since the order of termination came to be passed fourteen days after the period of six months from December 1, 1979 which is the period

of probation fixed and, therefore, the respondent ought to have complied with the provisions of S. 41(1) of the Act. On that view, the appellate

authority further concluded that since the respondent had not given any reasonable cause for termination or complied with the stipulation for one

month's notice or wages in lieu of such notice in spite of her having worked for a continuous period of six months, the order of termination stood

vitiated and was liable to be set aside. The learned single Judge, before whom the said order was challenged, set aside the order of the appellate

authority for the reasons (a) that the appellant cannot be construed as an employee within the meaning of S. 2(12) of the Act because only after the

satisfactory completion of the probation, there can be a relationship of an employer and an employee by the issue of a fresh appointment order

and (b) the termination of the services of the appellant was on the ground of her

unsatisfactory service on the same being for a reasonable cause

and not on account of any misconduct, there is no question of conducting an enquiry and, therefore, the order of termination has to be upheld.

12. The position and status of a probationer has to be considered before his right to claim benefits of S. 41 of the Act could be determined. A

probationer is as much an appointee to a post as any one else and he holds a temporary appointment till he has proved himself fit to fill the post

permanently. But it is also a well-accepted principle of service jurisprudence that a temporary appointee does not commence his probation and it is

only a regular appointment which made the appointee a probationer. The facts that till confirmation he has no right to the post held by him does not

by itself deny him the status of an employee and reduce him to nothing. A careful reading and analysis of S. 2(12) of the Act does not in any

manner run counter to the above principles. In our view, the primary and basic requirement of the said provision appears to be that he should be a

"person wholly or principally employed" in connection with the business and it is not the case of the respondent that the appellant was one who did

not satisfy this criteria. Consequently, we are unable to endorse the view of the learned single Judge that before, completion of probation and

confirmation, no juristic relationship of an employer and employee exists. In our view, neither the decision of the Division Bench of Karnataka High

Court nor the decision of the Supreme Court relied upon by the learned counsel for the first respondent can be claimed to be the basis or an

authority for such a proposition and consequently, we hold that for the purposes of the Shops Act, the appellant has to be treated as a "person

employed" and inevitably entitled to the benefits of S. 41 of the Act.

13. S. 41(1) of the Act is both prohibitory and mandatory and it stipulates in categorical terms that no employer shall dispense with the services of

a person employed continuously for a period of not less than six months, except for (a) a reasonable cause and (b) without giving such person at

least one month's notice or wages in lieu of such notice. There should be a conjoint compliance with both of these requirements and the existence of

one does not dispense with the requirement of the other. The other situation where such notice shall not be necessary is where the services of such

person are dispensed with on a charge of misconduct supported by satisfactory

evidence recorded at an enquiry held for that purpose. The first respondent's claim itself is not that the appellant was charged with any misconduct supported by satisfactory evidence recorded at an enquiry held for that purpose. Therefore, the proviso to S. 41(1) of the Act has no application to the case and that it is the main part of S. 41(1) which stipulates the requirements referred to above that need be substantiated to exist by the Management if the order of termination of the appellant has to be upheld. So far as the case on hand is concerned, the learned single Judge did not record any finding that one month's notice or wages in lieu thereof was given by the first respondent to the appellant. As a matter of fact, the specific stand of the first respondent before the appellate authority was that no notice was required to be given.

14. The next aspect is as to whether the first respondent substantiated the existence of a reasonable cause for the termination. The order of termination, as such, merely stated that "in terms of para 4 of appointment order" the services of the appellant are terminated. There is no other reason given in the order and the reference to paragraph 4 cannot by itself be the reason. At best, it may have reference to the source of power which has been invoked but cannot constitute the cause, much less the reasonable cause. It was only for the first time, in the reply filed before the appellate authority, that the first respondent has stated that since the reports about her conduct were extremely unsatisfactory, her services were terminated. We are also of the view that when clause 4 of the order of appointment reserves power to terminate at any time without notice "during which time" meaning thereby only within the six months, the termination order could not have been passed without notice to the appellant when it was actually made after six months. Even for that matter, there was no attempt on the part of the first respondent to substantiate the existence of the so-called reason being the cause of such termination. That apart, termination of services for her "extremely unsatisfactory conduct" was not contemplated by a para 4 of the order of appointment, which permitted the termination of her services "during" the period of six months for unsatisfactory service. The petitioner could not have been thrown out of job on the ground of "extremely unsatisfactory conduct" without following the procedure established by law and putting the employee to notice.

15. For all the above reasons, we are of the view that there was no sufficient or proper compliance of S. 41(1) of the Act and consequently the order of termination cannot be upheld, as has been done by the learned Single Judge. The order of the learned Judge is set aside, the writ appeal stands allowed and consequently the writ petition shall stand dismissed, but in the circumstances, there will be no order as to costs.