

The Management of Brooke Bond India (Private) Ltd.

Vs

Y. K. Gautam

Civil Appeal No. 2490 of 1969

(P. Jagmohan Reddy, S. N. Dwivedi JJ)

22.08.1973

JUDGMENT

JAGANMOHAN REDDY, J. –

1. The respondent was appointed by the appellant as a salesman on probation in terms of an appointment letter of September 15, 1965, and on the same day joined the service. Clause (1) of the letter of appointment read as follows :

"You will serve a probationary period of six months; this period of probation may be extended by a further period of three months or more in suitable cases in the absolute discretion of the Company. The Company has the right to terminate your services during the period of probation or the extended period of probation or before confirmation in writing without notice and without assigning any reasons whatsoever."

After the agreement which contained the above clause was signed, the respondent was immediately directed by the appellant by another letter of the same date, namely September 15, 1965, to proceed to Bhilwara for the initial training of a salesman and report to Mr. Agarwal. He was further directed to keep a diary and note the important points of the day's working and was required to furnish to the appellant a training report every weekend. In compliance with these directions he went and joined at Bhilwara, and on November 24, 1965, he was asked to go and take charge at Swai Madhopur where he fell ill. On December 8, 1965 he asked for leave for one month from December 1, 1965 and again on January 1, 1966, he applied for further leave for one month enclosing a medical certificate. On January 4 1966, the appellant asked the respondent his present state of health and the probable date he intended to resume duty.

2. The Company by its letter of January 10, 1966, terminated the services of the respondent. The letter said :

"We regret to terminate your services with immediate effect in terms of clause (1) of your appointment letter dated September 15, 1965." After the termination, conciliation proceedings seem to have been initiated, but they were abortive. Thereafter the dispute was referred to the Tribunal by the Government of Rajasthan by its notification dated October 11, 1966, to adjudicate the following question :

"Whether the termination of the services of Shri Y. K. Gautam by M/s. Brooke Bond India Private Ltd., Ajmer is legal and justified ? If not, to what relief Shri Gautam is

entitled ?"

3. The Tribunal relied on two cases of this Court, namely, *Utkal machinery Ltd. v. Miss Santi Patnaik*, ((1966) 1 LLJ 398 : (1966) 2 SCR 434 : AIR 1966 SC 1051) and *Express Newspapers Ltd. v. Labour Court, Madras*, ((1964) 1 LLJ 9 : AIR 1964 SC 806) for the proposition that the appellant was not justified in discharging the respondent from service without holding a proper inquiry and that there was no evidence adduced on behalf of the management of show that the work of the probationer was unsatisfactory. It referred to the adverse reports of N. K. Patwardhan, P. I. Sonwaney and A. N. Bose, the Area Manager, which were not communicated to the respondent, but instead he was given an independent charge on November 24, 1965, at Swai Madhopur after these reports were made. The Tribunal after observing that if the work of the respondent was not satisfactory he would have been charge-sheeted and dealt with according to rules of natural justice, came to the conclusion that the respondent's services were terminated before the expiry of the period of probation, without giving him any opportunity to show cause for his discharge, and that since the services of the respondent were terminated during his probationary period when he was ill without any inquiry, it was unjustified and illegal and accordingly the order of termination dated January 10, 1966, was set aside. The appellant was directed to reinstate the respondent to his former job within one month from the date of publication of the award with continuity of service and pay him full back wages from the date of discharge till the date of reinstatement. It further directed that after reinstatement, it shall be within the Company's right to confirm him or not for valid and genuine reasons by bona fide exercise of its power. It is this award which has been challenged before us by special leave.

4. The question for determination is : where an employer employs an employee on probation on the express terms that he can terminate the probation whenever he like, has the Tribunal jurisdiction to interfere with that order of termination, and if so, the circumstances under which it can be done ? In case it is held that the discharge was improper what is the relief to which the employee would be entitled to ?

5. The learned advocate for the appellant contends that in this case it is not proved that the order of termination was mala fide or amounted to victimization of the employee, nor did it amount to an unfair labour practice, as such the Tribunal had no jurisdiction to set aside the order of discharge when under the terms of employment of the respondent the appellant could terminate his services even during the period of probation and without assigning any reasons. In any case he submitted that on the evidence the appellant was justified in terminating the services as respondent was found to be unfit for service in their employment.

6. In what circumstances can an employee's services be terminated was considered in *The Management of U. B. Dutt and Co. v. Workmen of U. B. Dutt and Co.* (1962 Supp 2 SCR 822 : AIR 1963 SC i 411 : (1964) 2 SCJ 241 : (1962) 1 Lab LJ 374) In that case this Court observed at p. 826 :

"As far back as 1952, the Labour Appellate Tribunal had occasion to consider this matter relating to discharge by notice or in lieu thereof by payment of wages for a certain period without assigning any reasons : [see *Buckingham Carnatic Co. Ltd. etc. v. Workers of the Company etc.*, (1952) LAC 490.] It was of opinion that even in a case of this kind the requirement of bona fide is essential and if the termination of service is a colourable exercise of the power or as a result of victimization or unfair labour practice the industrial tribunal would have the jurisdiction to intervene and set aside the termination. Further it held that where the termination of service is

capricious, arbitrary or unnecessarily harsh on the part of the employer judged by normal standards of a reasonable man that may be cogent evidence of victimization or unfair labour practice. These observations of the Labour Appellate Tribunal were approved by this Court in *The Chartered Bank, Bombay v. The Chartered Bank Employees' Union*, (1960) 3 SCR 441 ((1960-61) 18 FJR 354 : (1960) 2 LLJ 222) and *Assam Oil Company v. Its Workmen*, (1960) 3 SCR 457 ((1960-61) 18 FJR 380 : (1960) 1 LLJ 587)."

This principle which was made applicable to termination of permanent employees was extended to probationers by the decisions in *Express Newspapers Ltd. S case* (supra) and *Utkal Machinery Ltd.'s case* (supra). In the former case the terms of appointment of a probationer were as follows :

"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."

Before, however, the probation period of six months expired, the employee received a letter stating :

"We regret to inform you that we have found your work unsatisfactory and that we are compelled to terminate your probation. Your accounts will be settled forthwith."

It was contended on behalf of the management that the employee having been appointed only as a probationer, the termination of his services for unsatisfactory work was well within the rights of the management. The Labour Court, however, came to the conclusion that it was a case of victimization and directed his reinstatement with back wages from the date of termination. In a writ petition challenging the validity of the Labour Courts order a Single Judge of the Madras High Court held that the order was valid. This view was confirmed by a Division Bench. In appeal against that order this Court observed 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 and 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. It will be observed that in that case the appointment was in the first instance to be on probation for six months and it is only thereafter that if the work is found satisfactory that the employee will be confirmed.

7. It is urged that in the instant case the terms of appointment gave power to the employer to terminate the services of the employee even before the period of probation expired without assigning any reason. While there may be some justification on the terms of appointment in that case for the Court to observe that the employer had no right to terminate the services before the expiry of six months, it makes no difference to the principle that the employer cannot terminate the services even of a probationer on any grounds which have not been recognised as a justification for such termination.

8. In *Utkal Machinery Ltd's case* (supra), the terms of employment of the probationer were similar to the one which we are considering in this case, namely, that during the probationary period the services of the employee could be terminated without any notice or without assigning any reason. Even in such a case this Court observed that when the validity of such termination is challenged in

an industrial adjudication, it would be competent to the industrial tribunal to enquire whether the order of termination has been effected in the bona fide exercise of its power conferred by the contract. If the discharge of the employee has been ordered by the management in bona fide exercise of its power, the industrial tribunal will not interfere with it, but it is open to the industrial tribunal to consider whether the order or termination is mala fide or whether it amounts to victimization of the employee or an unfair labour practice or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motive and not in bona fide exercise of the power arising out of the contract. In such a case it is open to the industrial tribunal to interfere with the order of the management and to afford proper relief to the employee. This view is borne out by the decision of this Court in Assam Oil Company Ltd. v. Its Workmen. ((1960) 1 LLJ 587 : (1960) 3 SCR 457 : AIR 1960 SC 1264) There can, therefore, be no doubt that the Tribunal can, in case where an industrial dispute is raised, go into the question of the validity of the order of termination, even in the case of a probationer whose services have been dispensed with before the probation expired without assigning any reasons. What has, therefore, to be seen is whether the action of the appellant is mala fide or whether it amounts to victimization of the employee or to an unfair labour practice, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motive and is not in bona fide exercise of the power arising out of the contract. It is, therefore, necessary to examine the evidence.

9. The respondent before he was employed by the appellant was, according to his averment, employed as Assistant Manager in Tea Estate, Darjeeling from May 15, 1957 to October 20, 1961, that he left that job for a better job as Manager, Ganeshilal and Sons, Jalpaiguri where he worked from November 1, 1961 to September 15, 1964. He also left this job and served as the Superintendent of the Third National Agricultural Fair, Ahmedabad, organised by Bharat Krishak Samaj from October 1, 1964 to May 30, 1965. On the conclusion of the Fair he joined service in Aquasol Products, Vatva as Sales Manager from June 1, 1965, to August 30, 1965, where he was drawing a salary of Rs. 400 per month. Then he had applied for a job in the appellant's company as salesman and was appointed as such after he had given a written examination, appeared at an interview and was found medically fit. The case of the respondent was that he was persuaded to join the appellant company by Malhotra the Divisional Sales Manager and that even though he had inquired several times from the said Malhotra about the terms and conditions of service he was not told about them but was assured that written terms and conditions of service were of no consequence and that he would get a permanent job in the Company after the completion of training. On such assurances the respondent left the job of Sales Manager with M/s. Aquasol Products and joined the service of the appellant on September 15, 1965. But to his great surprise he was made to sign the letter of appointment which put him on probation. He wrote to the Company on the same day stating thus :

"It is most unfortunate that the letter of appointment along with a movement order No. P.I.S. CSP dated the 15th September, 1965 proved beyond my expectation and I very frankly write to state that I would have never joined duties had the appointment letter been issued to me earlier. Since I have already resigned there was no alternative left but to sign.

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However on your assurance I am proceeding to Bhilwara as directed vide your letter No, PIS : CSP dated the 15th September, 1965.

Please confirm in writing whether I am trainee or probationer. Please reply at your earliest."

When the respondent did not receive any reply to his letter of the 15th September, he again wrote a letter on September 24, 1965, seeking confirmation regarding his status as a trainee. He further wrote that as assured by the appellant, and in the absence of any confirmation by the appellant, he believed that he had been appointed in the capacity of a permanent salesman and had been sent only for training. Both these letters were sent under Certificate of Posting. But the appellant denied that it had received those letters. Whether it did or did not receive the letter is not of great significance except for the fact that these letters show that the respondent was clearly disappointed on his being appointed as a probationer when he was expecting to be appointed as a permanent salesman, although he did not mind being under training in that capacity. The allegation that he was inducted to accept the job by Malhotra has been denied by Malhotra and there is no reason not to accept his denial, nor, as the Tribunal has found, the respondent having accepted the terms of appointment mentioned in the appointment letter can be permitted to say that the conditions of service laid down in the letter of appointment are not applicable to him merely because he signified his protest in his letter dated September 15, 1965.

10. From the record it is apparent that the appellant had made confidential inquiries from the erstwhile employers of the respondent by its letters dated September 16, 1965, i.e. from the Officer-in-Charge. The Third National Agricultural Fair, Ahmedabad, Organised by the Bharat Krishak Samaj; from M/s. Aquasol Products, Vatva and from M/s. Goenka and Company, Darjeeling. In reply to these enquiries the latter firm in their letter of November 24, 1965, stated that the respondent worked as a trainee at their different tea estate from May 10, 1958 to October 21, 1958 and had left of his own accord, and in respect of the respondent's suitability for work they considered it as a matter best known to the appellant and they were unable to make any comment. In so far as the Third National Agricultural Fair is concerned, they stated on September 24, 1965 that the appointment of the respondent was purely on temporary basis for the duration of the Fair, that he was in charge of the Establishment Section in particular and general supervision of office and stores, this his services were terminated on the closure of the Fair finally at Ahmedabad, and that he carried out those duties quite satisfactorily. It was also stated that during the short period of the respondent's service with the Third National Agricultural Fair, the respondent was found to be quite responsible and hardworking with initiative. M/s. Aquasol Products also certified on September 26, 1965, that the respondent left the service for his own better prospects, that his general conduct and efficiency were satisfactory and that regarding his suitability to handle the responsibility of stock and cash to the tune of over Rs. 4,000 it would be very much premature to say anything as the respondent was with them for a very short period. These replies to the references made to the respondent's previous employers show that the respondent's work with them was satisfactory and that he was efficient.

11. As against this the appellant Company has produced three reports of its officers - Ext. A, B and C - to show that the respondent's work, while employed with it, was not satisfactory and that he would not be an asset to the Company. Exhibit A - report of N. K. Patwardhan dated November 16, 1965, shows that the respondent was weak in accounts work, that he had to explain to the respondent in detail about compilation of weekly sheets, that the respondent was not able to prepare other returns correctly and that the respondent did not know what was called "Debit Notes" and "Credit Notes". None of these sheets prepared by the respondent was produced. Exhibit B - the report of P. T. Sonwaney dated November 15, 1965, shows that the respondent had poor approach to dealers and hot tea shops, was weak in pushing, sales talk not proper, was very slow in cash memo preparation and panel display, was not a very keen and enthusiastic worker, required a lot of

guidance and frequent checking. It was, however, admitted that none of the customers had complained about his work. Exhibit C the report of Mr. A. N. Bose dated November 22, 1965, shows that the work of the respondent was much below the mark, his approach to dealers very faulty and perfunctory, that he was slow and displayed no enthusiasm or interest. Shri Bose said that he talked with the respondent on all matters touching on his work and it appeared that the respondent had not taken to his work seriously and that he felt that he was wasting his talents in doing the job. At the end of this report there is an endorsement 'Discussed with D.S.M.' i.e. with Malhotra who was the Divisional Sales Manager. According to the evidence it is only after these reports, the last of which was on September 22, 1965, that the appellant Company decided that the respondent was not suitable for the job and his services should be terminated.

12. The training of the respondent seems to have been completed by the first week of November 1965 and the assessment of the officers of the company was in respect of five weeks work. It appears from the letter of September 15, 1965, and also from the evidence that the trainee had submitted weekly reports and that he had submitted five weekly reports. The sixth report which the respondent says he submitted with the endorsement of Agarwal has not been admitted by the appellant. The endorsement of Agarwal dated November 4, 1965, on that report is as follows :

"Shri Gautam has completed his training period. During his short stay he had occasions to work independently. He is hard working and takes keen interest. He is fair at accounts. He will prove an asset to our organisation."

Agarwal denies this endorsement on Ext. T. When his signature was shown to him he said : "It does not tally with that of 'A' to 'B'. I have never signed such a document". According to Agarwal all the weekly reports are handwritten and since the respondent was to come to Ajmer, the sixth week's report was handed over to him personally. In cross-examination he admitted that he used to put his signature on the report prepared by the trainee after having gone through it, that he did not put any other remark on it but that he used also to prepare a separate report on the trainee. According to him the respondent after completing his six weeks training went to Ajmer.

13. It is, however, significant that on November 24, 1965, the Company asked the respondent to proceed to Swai Madhopur to take over the depot from B. M. Modi, Permanent Salesman, who was granted annual leave effective from the date he was free from the M.D. and C.D. charge. In this letter addressed to the respondent, it is stated :

"Needless to add that you will take over Tonk C.D. also at a stretch from Mr. Modi
.....

The area is a very potential one and we particularly look forward to good figures of sales in the next two weeks. We hope Mr. Gautam with the experience he has had of working independently at Ajmer I depot, will make this assignment a success."

This letter is signed by A. N. Bose and he admits that he wrote this letter. In his evidence he further states that he had asked Gautam to proceed to Swai Madhopur and work there as Salesman on November 24, 1965. This letter would clearly indicate that even after the adverse report given by Bose against the respondent two days before Bose was willing to entrust the respondent with responsible work and put him in independent charge of one of the important stations of the appellant Company with the full confidence that with the experience the respondent had of working independently at Ajmer the sales would increase. In view of this letter the respondent's advocate

alleges that the three reports Exts. A, B and C have been got up subsequently which suggestion was made to all the three officers when they were examined before the Tribunal. They of course denied that the reports were fabricated subsequently. In any case it is quite clear that the respondent appears to have been frustrated on knowing that his appointment was on probation when he was expecting to be appointed on a permanent basis and having burnt his boats in leaving his earlier job where he was drawing Rs. 400 per month, he might have given initially the impression of being not very satisfied, but that Bose did not consider it as of any significance is clear, because within two days after the report Ext. C he was prepared to entrust him with responsible work. The reports Exts. A, B, and C, in our view, mostly emphasis the lack of enthusiasm of the respondent. In so far as his not being conversant with the accounts etc. is concerned, if the accounts sent by him were in fact not properly kept, about which there is no evidence, and even if Agarwal's endorsement on the sixth weekly report is held not proved, there was nothing to show that he would not learn during the next three or four months to keep proper accounts. The Company also does not say that the respondent was not ill or that he was malingering. It appears that he was suffering from typhoid and after recovering from typhoid he produced a medical certificate to show that he was suffering from lumbago.

14. Taking the evidence as a whole one is left with the impression that the stand of the appellant Company that the respondent was not suitable for the job is not made out having regard to its action two days late of entrusting the respondent with an independent charge of a potential area with full expectation that the sales of that area would increase. In these circumstances the order of the appellant Company dated January 10, 1966, is capricious and unreasonable and the termination is not justified. The Tribunal's award cannot, therefore, be assailed.

15. The learned advocate for the appellant next contends that the relief for reinstatement cannot in any case be sustained, because the appellant has lost confidence in the respondent. In support of this contention he has cited the decision of this Court in the Workmen of Sudder Office Cinnamara v. The Management of Sudder Office and Another. ((1971) 2 LLJ 620 : 1972 Lab IC 1262 : (1971) 24 FLR 229) That was a case where a workman in charge of stores of the value of Rs. 6 lakhs was discharged and it was held that the Company could no longer place its confidence in him. In these circumstances, this Court agreed with the High Court which set aside the award reinstating the workman. The Court however noted that counsel for the employer had on their behalf stated that they were prepared to pay ex-gratia six months' salary to the workman over and above the amount due to him was not made in lieu of any right which the workman had. The case before us is not one where the post held by the respondent can be said to be one of trust, nor can it be said that the employer had lost confidence in the respondent. The direction of the Tribunal is, in our view, quite reasonable. The appellant on reinstatement will have an opportunity of watching the work of the respondent and will have the right and freedom to make up its mind as to whether the services of the respondent should be retained or dispensed with on justifiable grounds.

16. In the result, the appeal is dismissed with costs.

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