

CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

O.A. NO. 76 OF 1993

~~T.A. NO.~~

DATE OF DECISION 6-7-94

Momin Nasiruddin. G., Petitioner

Mr. J.J. Yajnik, Advocate for the Petitioner (s)

Versus

Union of India & Ors. Respondents

Mr. Akil Kureshi, Advocate for the Respondent (s)

CORAM

The Hon'ble Mr. K. Ramamoorthy, Admn. Member.

The Hon'ble Mr. Dr.R.K.Saxena, Judicial Member.

JUDGMENT

1. Whether Reporters of Local papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgment ?
4. Whether it needs to be circulated to other Benches of the Tribunal ?

} No.

Momin Nasiruddin G.
Jeep Driver, residing
at Sanand,
District: Ahmedabad.

..... Applicant.

Versus.

1. Union of India
(to be served through the
Secretary, Ministry of Information
and Broad Casting, New Delhi)
Parliament Street,
New Delhi - 1.

2. The Executive Engineer (O)
All India Radio,
Civil Construction Wing,
All India Radio,
T.V.Center, Thaltej Road
Ahmedabad.

3. The Labour Commissioner (Central)
Shram Sadhna Bhavan,
Khanpur, Ahmedabad.

..... Respondents.

Advocate: Mr. J.J. Yajnik, for the applicant.

Mr. Akil Kureshi for the respondents.

J U D G M E N T

O.A.No. 76 OF 1993

Date: 6-7-94

Per: Hon'ble Dr. R.K. Saxena, Judicial Member.

Shri Momin Nasiruddin G., challenged by way of this application, the order of removal from service, Annexure A-2, passed on 3-4-1989 on the ground that no procedure of punishment was followed.

2. The facts of the case in brief are that the applicant was appointed as Jeep Driver vide order dated 20th June, 1984, Annexure A-1, by the Respondent No.2. This appointment order had six conditions, the relevant

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for the case at present are only three of them. The first condition was that the applicant was appointed on probation for a period of two years; the second was that appointment was on an adhoc basis and ^{would} ~~was~~ not confer any title of a permanent employment; and the third was that the appointment may be terminated at any time without any notice and without any reasons. The contention of the applicant is that after joining the service, he discharged his duties to the utmost satisfaction of the authorities and never was given any adverse remark to him. The probation period was satisfactorily completed and it was for that reason that the probation period was not extended yet his services were terminated on 3-4-1989 with effect from 6-4-1989 without showing any cause or without following any procedure. It was, however, orally made known to the applicant that he was a temporary Government servant. The applicant also came with the case that no complaint was made against his work and no enquiry was ever initiated before the impugned order of ^{was passed.} termination. On the completion of three years ^{of} services, the applicant contents that he had acquired the status of quasi permanent Government servant and, therefore, his services could not be terminated without adopting the procedure under Article 311 of the Constitution.

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It is further contended that even assuming without admitting that if there were complaints against him, his services could not be terminated without holding enquiry and without affording reasonable opportunity to him and thus the order of termination is contended to be illegal, bad in law and violative of Article 14 of the Constitution. The averment of the applicant is that after the termination of the services, he had made an application to the - - - - Assistant Commissioner of Labour under Ministry of Labour and the conciliation proceedings were initiated. Since conciliation efforts failed, the failure report was sent to the Commissioner of Labour, Delhi to refer the matter to the Tribunal, but nothing has been heard so far. Thus the case of the applicant is also that he is a workman and termination of services which amounts retrenchment, can not be done without adopting the procedure as given under section 25 F of Industrial Disputes Act. It is also contended that several employees junior to the applicant are continuing in service whereas the applicant has been removed. Thus it is prayed that the order dated 3-4-1989 terminating the services of the applicant be quashed and set aside, holding the same illegal and bad in law. In the alternative, the issuance of the directions to make a reference to the Industrial Tribunal, is also prayed.

3. The respondents contested the case on the ground that it was made clear to the applicant by the appointing authority through the appointment letter dated 20-6-1986 that the services of the applicant could be terminated at any time without any notice and without any reasons. It is ^{also} averred that this Tribunal has no jurisdiction and the contention is also to the effect that the appointment was made on purely adhoc basis and he was not regular in service and also that he has not discharged his duties to the satisfaction of the authorities. In support of this contention, Ann. R-1 to R-16, have been filed. The respondents also denied to have completed probation period satisfactorily because there ^{were} several complaints against him ~~for~~ not having discharged duties satisfactorily. It is also denied that the applicant had acquired the status of a quasi-permanent Government servant because he was appointed purely on adhoc basis and the services may be terminated [↓] at any time without notice and reasons. The respondents also took the plea that the conciliation proceedings having been initiated by the applicant, this application to this Tribunal becomes untenable.

4. The applicant filed rejoinder in reply to the counter affidavit filed by the respondents, and the same facts which were made in the application, are

reiterated. In this case the questions for determination are : (i) What is the status of the applicant; (ii) Whether the termination of the services of the applicant ought to have been preceded by the procedure prescribed therefor. So far as first question is concerned, the applicant has come with the plea that he was appointed by the respondents as Driver and our attention has been drawn towards the appointment letter Annexure A-1. This appointment letter indicates that Shri Momin Nasiruddin was offered the post of a Jeep Driver on adhoc basis and the appointment was ^{made} subject to the condition that the applicant would be on probation for two years, the appointment shall be on adhoc basis and no title to permanent employment would be conferred thereby, and the appointment would be terminable at any time without any notice or without any reason. It is not disputed on behalf of the respondents that the applicant was appointed as adhoc Driver with the conditions as mentioned in the appointment order. This appointment order, however, makes two contradictory propositions. On the one hand, the applicant is said to have been appointed ^e ~~ment~~ on adhoc basis but at the same time he ^{is} said to be kept on probation. When we enquired of the relevant rules under which the recruitment for the post of driver is made, the learned counsel for the respondents drew our attention towards Schedule XXV in which the age, qualification, pay scale and method of recruitment

^h
~~are~~ given. It appears that this Schedule is part of General Central Services Rules relating to Group 'C'. It is mentioned in this ^h schedule that the period of probation shall be of two years. Generally the period of probation ^h ~~is~~ starts when an employee is appointed in a substantive vacancy but not other wise In the present case when the appointment is contended ^h to have been made on adhoc basis, there can be no point of the applicant being placed on probation for a period of two years. In order to have harmonious construction of these two conditions, it can be derived that the appointment on adhoc basis itself was for a period of two years. The services of the applicant were not terminated soon after the expiry of the period of two years and he continued in service till 6th April, 1989 when his services were ordered to ~~come~~ to an end vide order dated 3-4-1989, Annexure A-2.

5. The contention of the learned counsel for the applicant is that even if the applicant is deemed to be a temporary employee or a quasi-permanent employee or holding substantive post, his services can not be terminated by simple order dated 3.4.1989 without following the prescribed procedure. The learned counsel for the respondents, on the other hand, argued that the



applicant was only adhoc appointee and according to the terms and conditions of the order of appointment, his services could be terminated without any notice and therefore, the services were terminated accordingly. The ground for termination according to the respondents is that the work of the applicant was not satisfactory.

In this connection, our attention has been drawn towards Annexure R-1 to R-16 which deal with the correspondence indicating that the applicant was habitually ^eabsenting / ^lhimself from his duties. Before we look into this fact, we would like to answer question No.1 about the status of the applicant.

6. Before this question is answered it also becomes necessary to find out whether All India Radio, where the applicant was appointed, is an industry or not. The term industry has been defined under section 2(j) of Industrial Dispute Act, 1947 it reads ;

(j) "industry" means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not, -

- (i) any capital has been invested for the purpose of carrying on such activity; or
- (ii) such activity is carried on with a motive to make any gain or profit, and includes -
 - (a) any activity of the Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);
 - (b) any activity relating to the promotion of sales or business or both carried on by an establishment.

7. This definition was not found clear and therefore, the matter went before Supreme Court several times. In the case State of Bombay & Ors. V/s. The Hospital Mazdoor Sabha & Ors., AIR 1960 SC 610, ^{it} was held that the State was carrying on an undertaking under section 2(j) when it runs a group of hospitals for the purpose of giving medical relief to the citizens and for helping to impart medical education, the activity was deemed an activity of industry within the meaning of the Industrial Disputes Act. ^{decision of this} The ~~case~~ case as well as the decisions of other cases came for scrutiny before Their Lordships of Supreme Court in a bunch of cases ^{prominently} ~~permanently~~ known as Bangalore Water Supply and Sewerage Board V/s. A. Rajappa & Ors., 1978 SCC(L&S) 215. ^{reviewed} These decisions were ~~re-drafted~~ and the majority view was that the view taken in the cases of Safdarjung, Solicitors, Gymkhana, Delhi University and Dhanrajgirji Hospital was not correct view and the law ^{is} laid down in Hospital Mazdoor Sabha case was found

correct and ^{was}/rehabilitated. In order to find out whether an activity is in the discharge of sovereign functions of the State or amounts to an industrial activity, the following parameters were laid down ;

I. 'Industry', as defined in Section 2(j) and explained in Banerji (supra), has a wide import.

(a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business, it does not cease to be one because of philanthropy animating the undertaking.

II. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji (supra) and in this judgment; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade

or business, may still be 'industry' provided the nature of the activity, viz. the employer-employee basis, nears resemblance to what we find in trade or business. This takes into the fold of 'industry' undertakings, callings and services, adventures 'analogous to the carrying on the trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in 1 (supra), cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, co-operatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering

to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt - not other renerosity compassion, developmental passion or project.

IV The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (supra), will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

8. When we examined the nature of the activities done by All India Radio, there remains no doubt in our mind that the respondents are doing acts which are covered by the term of an industry. Therefore, All India Radio is an industry and the applicant is definitely workman. This view had ^{also} been taken by this Tribunal in O.A. 516/88, Alisha Idusha Fakir V/s. Union of India & Ors. decided on 9-10-1992. In the light of these facts, it is crystal clear that the applicant was holding a status of a workman.

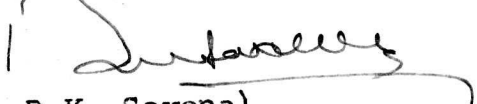
9. Now we come to the second question as to whether prescribed procedure was adopted by the respondents for the removal from or termination of his services. The averment of the applicant which has not been disputed by the respondents establishes the fact that he was appointed as Jeep Driver on 20-6-84 and he continued till 6-4-1989. In this way, he remained in service for about 5 years. According to the provisions of Industrial Dispute Act, a workman who has completed 240 days in service can-not be retrenched without following the procedure of giving one month's notice in writing indicating the reasons for retrenchment and is also paid compensation equivalent to 15 days average pay for every completed year of continuous service, A workman shall not be ^{deemed} to have

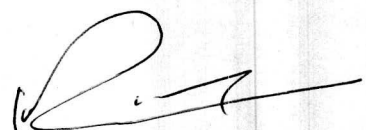
been retrenched if he has been removed by way of punishment inflicted after disciplinary action having been taken or for voluntary retirement or retirement on reaching the age of super annuation or non-renewal of contract or on the ground of continued ill-health. In this case, the respondents, no doubt, filed Annexure R-1 to & R-16 to show that the applicant had been absenting himself quite often from his duties but no disciplinary action was started against him. What appears from the facts is that actually the respondents wanted to take action against the applicant for the reason of his absenting himself from duty but another ground of unsatisfactory service was made basis and was removed by a simpliciter order. In our opinion, this is not the procedure which has been prescribed. In other words, the respondents did not adopt the procedure which was required for the termination of the services of a workman.

10. The question now arises^h whether the applicant can approach the Tribunal directly without exhausting the remedies available to him. When the applicant is held to be a workman, it was necessary for him to have approached the Industrial Tribunal through the procedure given therefor in the Industrial Disputes Act. It appears from the record that the applicant had initiated the proceedings by making a complaint before the Conciliation Officer and since the talks had failed.

the matter was referred by the Labour Commissioner and the report was sent to the Secretary, Ministry of Labour, Government of India. The applicant did not hear anything from the concerned Ministry and therefore, this application was filed. We hold the view that even this steps taken by the applicant cannot be construed to have exhausted the remedies. When the failure report was submitted by the Labour Commissioner to the Government, it was necessary that some decision whether reference was going to be made or not, ought to have been taken. Since we cannot take cognizance of the complaint because the remedies available to the applicant ^{having} ~~have~~ not been exhausted and since the applicant cannot approach the Industrial Tribunal till the necessary decision has been taken on the failure report of the Labour Commissioner, we therefore, direct the concerned authority to take final decision on the said failure report of the Labour Commissioner within a period of one month from today.

11. The applicant is also directed to exhaust remedies and to give a representation for taking decision by the concerned authorities on the failure report. The application is disposed of accordingly. The parties shall bear their own cost.


(Dr. R.K. Saxena)
Member (J)


(K. Ramamoorthy)
Member (A)

vtc.

AHMEDABAD BENCH

Application No. 04176/93 of 19

Transfer Application No. _____ Old w. Pett. No

CERTIFICATE

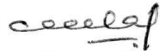
Certified that no further action is required to be taken and the case is fit for consignment to the Record Room (Decided).

Dated: 20/07/94

Countersigned :

(Bhaya
9-8-94)

Section officer/Court officer.


Signature of the
Dealing Assistant.

