HIGH COURT OF BOMBAY **REPORTABLE**

Bench: Justice Sandeep V. Marne

Date of Decision: 24th January 2024

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2007 OF 2019

INTERIM APPLICATION NO. 4587 OF 2021

AIR INDIA LTD. ...PETITIONER

VERSUS

HEMANGI PRABHU AND ORS. ...RESPONDENTS

Legislation:

Industrial Disputes Act, 1947

Companies Act, 1956

Constitution of India

Subject: Challenge to the award of Central Government Industrial Tribunal-II, Mumbai, granting permanent status, backwages, and other benefits to respondents (wards of employees of Air India) employed under subsidiary companies.

Headnotes:

Challenging Tribunal Award – Air India Ltd. (AIL) challenged award granting permanent status to respondents (wards of employees) engaged through subsidiaries (AIATSL, AICL, AIASL) following compassionate grounds policy – AIL's primary contention was the absence of direct employment relationship with respondents and impact of recruitment freeze per Government Memorandum. [Para 2, 4, 6, 10, 32-33]

Tribunal Findings – Tribunal found respondents were appointed by AIL on compassionate grounds, exercising control and supervision, thus entitled to permanent status, backwages, continuity of service. [Para 29, 39]

High Court Analysis – HC found Tribunal misdirected in evaluating control and supervision; emphasized compassionate appointments must be against sanctioned vacant posts, which were abolished post-Government Memorandum (1997) – AIL had no vacancies for permanent appointments post-1997. [Para 30, 32-33, 40-41]

Erroneous Tribunal Conclusion – HC noted the Tribunal erred in granting permanency in AIL services to respondents, already receiving wages from AICL or AIASL, without considering limitation and feasibility due to recruitment freeze. [Para 42]

Remand to Tribunal – HC remanded the case to Tribunal for deciding alternate prayer for permanency in services of AICL or AIASL, keeping all questions open. [Para 46-48]

Decision – Petition partly allowed. Tribunal's award set aside, remanded for reconsideration on alternate prayer for permanency in services of AICL or AIASL. No costs awarded. [Paras 48-50]

Referred Cases:

- Balwant Rai Saluja Vs. AIR India Ltd. (2014) 9 SCC 407
- Kalyan Dombivali Muncipal Corporation Vs. Municipal Labour Union and Anr. Writ Petition No. 12211 of 2018 decided on 18 October 2023.
- Tata Iron and Steel Company Limited Vs. State of Jharkhand and Others (2014) 1 SCC 536
- Haryana State Coop. Land Development Bank Vs. Neelam (2005) 5 SCC 91
- Vishwanath Pandey Vs. State of Bihar and Others (2013) 10 SCC 545
- Ravi Karan Singh Vs. State of U.P. and others 1999 SCC OnLine All 132

- Voltas Ltd. Vs. State of Maharashtra and Others 2013(6) Mh.L.J. 460
- Central Inland Water Transport Corporation Ltd.and another Vs. Tarun Kanti Sengupta and another 1986 LAB.I.C. 1312

Representing Advocates:

Mr. Sudhir Talsania, Senior Advocate with Mr. Lancy D'souza and Ms. Deepika Agarwal for the Petitioner.

Mr. Haresh Shivdasani for Respondent Nos.1 to 6, 8, 9, 12 to 17, 19 to 22, 24, 25, 27 to 29, 31 to 33, 36 to 42, and 45.

Mr. Rakesh Singh with Ms. Heena Shaikh for Respondent No. 46.

JUDGMENT:

1. **Rule.** Rule is made returnable forthwith. With the consent of the parties, the Petition is taken up for final hearing and disposal.

2. This petition is filed by Air India Ltd (**AIL)** challenging the Award dated 6 March 2018 passed by the Central Government Industrial Tribunal-II, Mumbai in Reference No. CGIT-2/11 of 2007. By that Award, the Tribunal has declared that the workmen listed at Annexure-A to the Statement of Claim are entitled to the status of permanency from the dates of their initial appointments with further direction to the Petitioner to grant them the status of permanency from the dates of their initial appointments with full backwages, continuity of service and other consequential benefits as are paid to permanent workmen of AIL.

3. Briefly stated, facts of the case are that Petitioner is an airtransport company and was India's national carrier. It is a resultant company out of amalgamation between Air India Ltd. and the erstwhile Indian Airlines Ltd. The Respondent Nos. 1 to 45 are the wards of employees employed by AIL. AIL has various subsidiary companies such as Air India Air Transport Services Ltd. (**AIATSL**), Air India Charters Ltd. (**AICL**), Air India Engineering Services Ltd. (**AIESL**), etc. It is Petitioner's case that AIATSL provides ground handling services not just to AIL but also to several other airlines who are its clients. That AIATSL does not cater exclusively to AIL.

4. Petitioner claims that due to serious financial crises, which was threatening its very existence, the Government of India provided a bail-out package to the Petitioner under which the engineering department and ground handling services were demerged from the Petitioner and transferred to AIESL and AIATSL respectively.

5. On 26 March 1992, a 'Record Note' was executed between AIL and the Air India Employees' Guild, which at the relevant time was the major Union recognized by the Petitioner. As per the said Record Note, AIL agreed to provide compassionate appointments to the children of deceased/medically incapacitated employees on various terms and conditions provided for in the said Record Note.

6. It is Petitioner's case that the Ministry of Civil Aviation, Government of India imposed a ban on recruitment in AIL in any category vide Memorandum dated 23 June 1997 except the categories like Pilot, Air Engineers, Cabin Crew etc. Petitioner claims that in view of the said ban, no recruitment could be done nor any compassionate appointments could be granted to the wards of deceased/medically incapacitated employees after 23 June 1997.

7. It appears that the Respondent Nos. 1 to 45 made applications to AIL for grant of compassionate appointments on account of death/medical incapacity of their parents. It appears that their applications were scrutinized by AIL and they were called upon to submit the requisite documents for processing the cases on compassionate grounds. It appears that on account of ban on recruitment in AIL, the subsidiary company AICL offered them temporary appointments for fixed tenures. Petitioner claims that such appointments were accepted by Respondent Nos.1 to 45 without any demur. It appears that on account of non-availability of work with AICL, Respondent Nos. 1 to 45 were subsequently offered temporary appointments with AIATSL which subsequently offered them appointments on fixed term contract basis, which again, according to Petitioners, were accepted by them without any protest.

8. In the above background, Respondent Nos.1 to 45 filed Writ Petition No. 1072 of 2006 before this Court for grant of status and benefit of permanency and other consequential benefits. This Court held that it was not

possible for this Court to exercise its extraordinary jurisdiction for granting the relief as prayed for by Petitioners in that petition. This Court therefore granted liberty to Respondent Nos.1 to 45 to raise the demands in conciliation for the purpose of adopting the remedy of Reference. The conciliation proceedings raised at the behest of Respondent Nos.1 to 45 resulted in failure and accordingly the appropriate Government referred the dispute for adjudication to the Central Government Industrial Tribunal-2, Mumbai (**CGIT**). Respondent Nos.1 to 45 filed common Statement of Claim. The Statement of Claim was filed against Air India Limited, Air India Air Transport Services Ltd and Air India Charters Ltd. The main demand was to seek permanency from the dates of their initial appointments in the services of Air India Limited with full backwages, continuity and other consequential benefits and an alternate prayer was raised claiming status of permanency from the subsidiaries viz. Air India Charters Ltd. or Air India Air Transport Services Ltd. It appears that in such common Statement of Claim, 13 Respondents desired an amendment to the Statement of Claim with a view to bring on record consideration of their cases for compassionate appointment by AIL in the year 2008. The application for amendment, though opposed by Petitioner, came to be allowed by CGIT and the Petitioner filed additional Written Statement. It appears that the name of Air India Air Transport Service Limited (**AIATSL**) was changed to Air India Airport Services Limited (**AIASL**). Therefore any reference to AIATSL or to AIASL in the present judgment would be to the same company.

9. Based on the pleadings before it, the CGIT framed issues. Both the parties led evidence. CGIT delivered Award dated 6 March 2018 holding that Respondent Nos.1 to 45 were appointed on compassionate grounds by Air India Limited. It directed AIL to grant status of permanency to Respondent Nos. 1 to 45 from the dates of their initial appointments alongwith full backwages, continuity of service and other consequential benefits as paid to permanent workmen of Air India Limited. Aggrieved by the Award dated 6 March 2018, Petitioner-Air India has filed the present petition.

10. Mr. Talsania, the learned senior advocate appearing for Petitioner-AIL would submit that the impugned Award of CGIT is *ex-facie* perverse and unsustainable. That the evidence on record proves that Respondent Nos.1 to 45 have never worked with Petitioner-AIL and that therefore the question of granting them the permanency by AIL does not arise. That there is

overwhelming evidence plus several admissions given by the sole witness on behalf of Respondent Nos.1 to 45 that they have never worked with AIL. That AIASL and AICL are separate companies, who employed Respondent Nos. 1 to 45. That therefore CGIT could not have granted the relief of permanency in services of AIL to Respondent Nos.1 to 45.

11. Mr. Talsania, would rely upon the judgment of the Apex Court in **Balwant Rai Saluja**[1], in support of his contention that there is no employer-employee relationship between AIL and Respondent Nos.1 to 45 and that therefore there is no question of granting permanency to Respondent Nos.1 to 45 in the services of AIL.

12. Mr. Talsania would then criticize the impugned Award which proceeds on finding of fact that Officers of AIL exercised the supervision and control over Respondent Nos.1 to 45. According to Mr. Talsania, the said finding is without any basis. Alternatively, he would submit that even if supervision and control is established, the same does not create/establish master-servant relationship between
AIL and Respondent Nos.1 to 45. Relying upon the judgment of this

Court in **Kalyan Dombivli Municipal Corporation**[2], Mr. Talsania would contend that mere proof of supervision does not establish master-servant relationship. That the judgment of this Court in Kalyan Dombivli Municipal, when challenged before the Apex Court, has been upheld by dismissal of Special Leave Petition by order dated 20 November 2023.

13. Mr. Talsania would further submit that Respondent Nos. 1 to 45 have taken inconsistent stands in Writ Petition No. 1072 of 2006 and before CGIT. They contended in Writ Petition that the arrangement of their engagement by AIASL and AICL was sham and bogus, which theory was given up while making a demand for reference. He would rely upon the judgment of the Apex Court in **Tata Iron and Steel Company Limited**[3] prohibiting the industrial adjudicator from travelling beyond the scope of Reference. That the CGIT has erred in assuming jurisdiction to decide the issue of compassionate

[1] Balwant Rai Saluja Vs. AIR India Ltd. (2014) 9 SCC 407.
[2] Kalyan Dombivali Muncipal Corporation Vs. Municipal Labour Union and Anr. Writ Petition No. 12211 of 2018 decided on 18 October 2023.
[3] Tata Iron and Steel Company Limited Vs. State of Jharkhand and Others (2014) 1 SCC 536.
[4] Haryana State Coop. Land Development Bank Vs. Neelam (2005) 5 SCC 91.

appointment which was not referred to it. He would further submit that Respondent Nos.1 to 45 infact gave up the claim for compassionate appointment. Relying upon the judgment of the Apex Court in **Haryana State Coop. Land Development Bank**[4], he would submit that acceptance of alternate appointment coupled with failure to raise industrial dispute questioning implied rejection of compassionate appointments would come in the way of Respondent Nos. 1 to 45 from claiming compassionate appointments later. He would submit that in the present case, Respondent Nos.1 to 45 accepted appointments granted to them by AICL and AIASL without any protest or demur and that they cannot be now permitted to turn around and claim compassionate appointment. He would pray for setting aside the impugned Award passed by CGIT.

14. *Per-contra*, Mr. Shivdasani, the learned counsel appearing for the Respondent Nos. 1 to 45 would oppose the petition and support the order passed by the CGIT. He would submit that Respondents' parents were in employment of AIL and applications were made by Respondents for compassionate appointments in AIL. That AIL processed the said applications and subjected the Respondents to medical examination, typing test, etc. However, deliberately the appointments were granted in the subsidiary companies of AIL purely with a view to avoid any liability of masterservant relationship between the employees and AIL. He would submit that even though temporary appointments were granted in the subsidiary companies of AIL, the Respondents continued to discharge duties of AIL. That the Industrial Court has considered the entire defence relating to the supervision and control which is the ultimate test of employer-employee relationship. That the appointment of Respondents were processed by AIL, duty roster is maintained by AIL, their transfers are effected by AIL, record of attendance is maintained by AIL. After maintaining the attendance records, the time cards were sent to Respondent Nos.46 and 47 only for the purpose of payment of wages. Appreciation letters are issued by AIL. Regular training is given by AIL. That therefore the Appointment letters issued by Respondent Nos.46 and 47 are mere paper arrangements when infact they actually continued to be the employees of AIL. That Respondents possessed no power and were left with no choice but to accept employment offered to them. Therefore non raising of protest by them at the time of their initial engagement cannot be treated as a ground to raise presumption of absence of employer-employee relationship between them and AIL.

15. Mr. Shivdasani would further submit that the paper arrangement made in respect of employment of Respondents was throughout sham and bogus. That AIL was doing the ground handling work till 2013, despite which the Respondents were made to work for AIL through sham modality of Respondent No.47. That the entire objective of creation/incorporation of Respondent Nos.46 and 47 as subsidiary companies is to avoid liability towards workmen. That the said subsidiary companies are mere camouflage and sham created by AIL for avoiding the liability towards Workmen.

16. Mr. Shivdasani, would further submit that there was no freeze on making compassionate appointments. That the so-called freeze imposed by Government of India on recruitment did not cover compassionate appointments as such appointments were made by AIL in the year 2000 and 2016. That if there was any freeze, AIL would not have issued letters to the Respondent Nos. 1 to 45 to appear for personal interview for compassionate appointments. That a fresh policy has been issued for compassionate appointment by AIL on 6 April 2016. This would show that there was no ban on compassionate appointments. He would submit that ban on recruitment could apply only for appointments which result in increasing the complement of Workmen and not filling up of vacancies. That notice of change under Section 9-A read with ItemIV of Schedule-IV of the Industrial Disputes Act was not given before effect of ban on such recruitment qua compassionate appointments.

17. Mr. Shivdasani would further submit that the principle of discretion in compassionate appointments cannot be applied in the present case since the appointments of Respondents have already been made right since 1998 meaning thereby that they deserve to be appointed on compassionate grounds. That the judgment in **Balwant Rai Saluja** (supra) has no application to the present case since there a parity in nature of work performed by Respondents and other regular Workmen of AIL which parity did not exist in *Balwant Rai Saluja*. That the judgment in *Tata Iron and Steel Company Limited* is also not applicable to the facts and circumstances of the present case, under in which an order of Reference has been set aside. That the judgment of this Court in *Kalyan Dombivli Municipal Corporation* has no application as the case related to workers appointed under the Contract Labour (Regulation and Abolition) Act, 1970 whereas Respondents in the

present case are directly employed by AIL. In support of his contentions, Mr. Shivdasani would rely upon the following judgments:

(i) Vishwanath Pandey[4]

(ii) Ravi Karan Singh [5]

(iii) Voltas Ltd.[6]

(iv) Central Inland Water Transport CorporationLtd.[7]

18. I have also heard Mr. Rakesh Singh, the learned counsel appearing for Respondent No. 46-AIASL, who has surprising opposed the petition of AIL and has sought its dismissal by filing written submissions on 12 January 2024. He would submit that Respondent Nos. 1 to 45 were appointed on post of Customer Agents and Loaders with direction to report to AICL, being subsidiary company of AIL. That however supervision and control of concerned workmen was done by officers of AIL. That Respondent Nos. 1 to 45 are working with AIASL after its incorporation on 9 June 2003 for performing ground handling, baggage loading, off-loading duties in respect of its client airline. That the appointments are on fixed term contracts with AIASL.

19. Mr. Singh would further submit that AIL appointed Mr. Anil Kumar as Customer Service Supervisor at Kochi Airport on 18 December 2000 after alleged freeze on recruitment. That Memorandum dated 23 June 1997 does not provide for freeze on compassionate appointment. He would therefore submit that AIL cannot run away from its responsibilities towards Respondent Nos. 1 to 45. That the concerned employees have signed contract with AIASL not to claim any permanency. He would pray for dismissal of the Petition.

20. Rival contentions of the parties now fall for my consideration.

21. The issue that arose before the CGIT and which again arises for my consideration is whether Respondent Nos. 1 to 45 can be treated as having been appointed on compassionate basis in the services of AIL. Respondent

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[4] Vishwanath Pandey Vs. State of Bihar and Others (2013) 10 SCC 545

[5] Ravi Karan Singh Vs. State of U.P. and others 1999 SCC OnLine All 132

[6] Voltas Ltd. Vs. State of Maharashtra and Others 2013(6) Mh.L.J. 460

[7] Central Inland Water Transport Corporation Ltd. And another Vs. Brojo Nath Ganguly and another AND Central Inland Water Transport Corporation Ltd.and another Vs. Tarun Kanti Sengupta and another 1986 LAB.I.C. 1312

Nos. 1 to 45 were given appointments either in AICL or with AIASL on temporary basis and they continued to work with either of the said subsidiary companies. CGIT has held that though the appointments are shown to have been made in AICL or AIASL, the same were actually made by AIL on compassionate grounds. It is by recording this finding that CGIT has proceeded to hold that Respondent Nos. 1 to 45 are entitled to the status of permanency from the dates of their initial appointments as indicated in Annexure-A to the Statement of Claim. The core issue is thus whether the initial engagement of Respondents can be treated as having been made by AIL.

22. It would be relevant to reproduce the demand made by Respondents jointly to the three companies, AIL, AICL and AIASL on 2 June 2006. The demand reads thus:

The said workmen have worked continuously for several years for your Company and deserve to be made permanent. They have however not been made permanent and the Company has continued to employ them through different instrumentality/ subsidies/ sister concerns.

The wages paid to the concerned workmen are very low and paltry and do not compare favourably with the wages of permanent loaders and / or Customer Agents employed by Air India.

We are therefore placing the following demand.

DEMAND

The 45 workmen whose names are listed in the enclosure shall be made permanent in the services of Air India /Subsidies/Sister Concerns from the dates they started working as shown against their names in the enclosure with full back wages, continuity of service and all consequential benefits.

23. Thus, the demand was vague about the exact company in which permanency was sought. There was no assertion in the letter of demand that Respondent Nos. 1 to 45 were recruited in the services of AIL or though recruited in the services of AICL or AIASL, their services must be treated as rendered in AIL. They vaguely raised a demand for permanency *"in the services of Air India, subsidiaries, sister concerns"* from the date they started working with full

backwages, continuity of service and all consequential benefits. The demand letter thus shows that Respondents were agreeable for grant of permanency status in the subsidiary companies of AICL or AIASL. It appears that a Corrigendum was filed to the Statement of Demand on 18 August 2006 whereby the demand was modified as under :

The 45 workmen whose names are listed in the enclosure at Annexure "A" shall be made permanent in the services of Air India or Air India Air Transport Services Ltd./ India Charters Ltd., subsidiaries wholly owned by Air India Ltd. or any other subsidiary or sister concerns of Air India from the dates they started working as shown against their names in the enclosure with full back wages, continuity of service and all consequential benefits as paid to the permanent workmen of Air India."

24. Thus under the modified demand, the Respondent Nos. 1 to 45 claimed permanency in the services of *"Air India or Air India Air Transport Services Ltd, Air India Charters Ltd, subsidiaries wholly owned by Air India Ltd or any other subsidiary or sister concerns of Air India"*. The Corrigendum again did not proceed on an assertion that the employees were appointed by AIL on compassionate basis or that they must be granted permanency only by AIL. They were ready to accept permanency by other subsidiaries of AIL.

25. After the conciliation proceedings failed, the appropriate Government made an order of reference to CGIT vide order dated 13/14 February 2007. The order of reference reads thus :

NO-L-11012/68/2006-IR(CM-1)
Government of India// Bharat Sarkar
Ministry of Labour/Shram Mantralaya

New Delhi, Dated: 13-14/02/2007

ORDER

NO.L-11012/68/2006 (IR(CM-1) WHEREAS the Central
Government is of the opinion that an industrial dispute exists between the employers in relation to the management of *Air India Limited*, and their workmen in respect of the matters specified in the Schedule heroto annexed:

AND WHEREAS the Central Government considers it desirable to refer the said dispute for adjudication;

NOW THEREFORE, in exercise of the powers conferred by clause (d) of sub-section (1) and sub-section (2A) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) the Central Government hereby refers the said dispute for adjudication to the *Cent.Govt.Indus.Tribunal-cum-Labour Court, Mumbai No. 2*. The said Tribunal shall give its award within a period of three months.

The Schedule

"Whether the demand of Ms. Hemangi C. Prabhu and 44 others (list enclosed), to make them permanent in the services of Air India or Air India Charters Limited or any other subsidiary of Air India, from the date of their initial appointment with full back wages, continuity of services and all consequential benefits as paid to the permanent workmen of Air India, is justified & legal? If so, to what relief are these workmen entitled?"

Sign/-xxx (SNEH LATA JAWAS)

DESK OFFICER
T. No.-23001148

EMail-ircl@lisd.dolhi.nic.in

Copy forwarded for necessary action to:

*1. The Presiding Officer
Cent.Govt.Indus.Tribunal-cum-Labour Court

2. The Chairman and Managing Director,
The Air India Limited,
Air India Bulding, Nariman Point,
MUMBAI-400021

26. The Respondent Nos. 1 to 45 filed their Statement of Claim before the CGIT, in which following prayers are made **:**

24. In view of the foregoing, the Second Party prays that this Honourable Court may be pleased to

a) direct Air India Ltd. to grant to the workmen listed at Annexure'A' to the Statement of Claim the status of permanency from the date of their initial appointment as stated in Annexure 'A', with full back wages, continuity of service and all consequential benefits as paid to the permanent workmen of Air India Ltd;

Alternatively,

b) direct the subsidiaries of Air India Ltd. namely, Air India Charters Ltd. or Air India Air Transport Services Ltd. or any other subsidiary of Air India to grant to the workmen listed at Annexure 'A' to the Statement of Claim the status of permanency from the date of their initial appointment as stated in Annexure 'A', with full back wages, continuity of service and all consequential benefits as paid to the permanent workmen of Air India, with the backwages and consequential benefits up to February 2006 payable by Air India Ltd. or Air India Charters Ltd. and backwages and consequential benefits from 1.3.2006 by Air India Ltd. or Air India Air Transport Services Ltd.

c) any other or further reliefs as may be deemed fit and proper inthe circumstances of the matter.

27. Thus throughout, Respondent Nos. 1 to 45 were willing to get permanency status either in Air India Limited or in the services of his subsidiaries AICL and AIASL or any other subsidiary of AIL. Thus, Respondents never insisted that permanency must be granted only in the services of AIL.

28. On the basis of pleadings filed by rival parties, the CGIT framed following issues:

ISSUES

1) Whether the Second Party workmen were appointed by the First Party on compassionate or any other ground?
2) If whether the Second Party workmen are entitled to claim permanency?

3) Does First Part No.3 proves that, the workmen in the Reference were appointed as casual and on temporary basis for six months initially and their appointment were extended from time to time, thus they cannot claim permanency?
4) Whether the Second Party workmen prove that nature of their work is of perennial and permanent nature?
5) Whether workmen in the Reference are entitled for permanency?
6) If yes, with whom?
7) What order?

29. Thus, the first issue for consideration before the CGIT was whether the Respondent Nos. 1 to 45 were appointed on compassionate grounds by AIL. The Tribunal proceeded to answer Issue Nos.1, 2 and 3 together and has held that Respondent Nos. 1 to 45 were indeed appointed by AIL on compassionate or any other grounds. This conclusion is recorded by CGIT by recording a finding that the supervision and control on Respondent Nos. 1 to 45 was always exercised by AIL. The finding of supervision and control is recorded on the basis of various factors such as preparation of duty roaster, maintenance of attendance, imparting of training, effecting transfers etc. by AIL. I proceed to examine the correctness of findings recorded by CGIT on the first three issues.

30. In my view, the CGIT has completely misdirected itself by going into the aspect of supervision and control for the purpose answering the issue as to whether appointments of Respondent Nos. 1 to 45 were made by AIL on compassionate basis. Compassionate appointment is to be granted as per scheme formulated by the employer. Grant of compassionate appointment is not compulsory for the employer and it is a matter of welfare measure voluntarily introduced by the employer. It is only when a scheme is formulated for grant of compassionate appointment that Courts or Tribunals can issue directions or mandamus for consideration of case for compassionate appointment in the light of the scheme so formulated. In the present case, there is no doubt to the position that a scheme for compassionate appointment was indeed formulated by AIL by way of ‘Record Note’ which is in the form of Agreement between AIL and Air India Employees Guild executed on 26 March 1992. By that Record Note, Air India provided for a scheme to offer compassionate appointments to sons / daughters/ widow/

widowers/ near widower/ near relatives of deceased / medically incapacitated employees. Under the scheme, compassionate appointment was to be granted only to the Wards, who are not gainfully employed anywhere or in a case where there is no other means of livelihood to support the family. The conditions of eligibility of persons to be considered for compassionate appointment is provided in para-III and IV of the Scheme. Under para-IV, candidates applying for appointments on compassionate grounds were to be subjected to written test/interviews, wherever applicable for the purpose of ensuring that the concerned ward is not in a position to discharges duties of the post offered to him. The authority to make compassionate appointments was vested in the Chairman/Managing Director, Deputy Managing Director and Director, Human Resources Development of AIL. Para-VIII of the Scheme provided for the order of priority to be followed while making compassionate appointments under which dependents of employees dying in service due to accidents were categorized in priority-1 whereas employees dying in harness while in service and who are medically incapacitated were to be listed in Priorities-2 and 3 respectively. This is the broad scheme formulated by AIL for compassionate appointments.

31. Compassionate appointment is not a matter of right. Compassionate appointment is to be granted with a view to provide immediate succor to the family which has been suddenly put in indigent condition on account of loss of bread earning member. In a given case, where the employer finds that there are sufficient means for the family of the deceased employee to look after itself, compassionate appointment can be denied. Thus mere death/medical incapacitation of an employee does not result in automatic creation of right of compassionate appointment for his/her dependent ward. These broad principles governing compassionate appointments must be borne in mind while deciding the hotly debated issue in the present case about the nature of appointments of Respondent Nos. 1 to 45 and the exact company in which such appointments were made.

32. AIL has relied upon Memorandum dated 23 June 1997 issued by the Ministry of Civil Aviation, Government of India imposing total freeze on recruitment. Para-6 of the Memorandum reads thus :

6. Total Freeze on Recruitment:

No fresh recruitment should be made and existing vacancies should be forthwith abolished.

All current vacancies lying vacant for over one year should be deemed to be abolished in terms of Ministry of Finance's O.M. No.7 (7) E.Coord./93 dated 3rd May, 1993.

However, promotional prospects should not be affected adversely. Hence whereever higher posts are required for promotional purposes, they should be retained and only lower level posts should be abolished.

(Action: All concerned)

6.Optimisation of Man-power and Restructuring the Organisations:

Efforts should be made for optimum utilisation of the existing man-power and restructuring the organisation to make them more efficient and result oriented.

(Action: All concerned)

33. Thus as per the Memorandum dated 23 June 1997, notonly a total freeze on recruitment was imposed by directing that no fresh recruitment shall be made, AIL was directed to abolish all the existing vacancies. Thus, after issuance of Memorandum dated 23 June 1997, no vacancies were left in AIL for making any recruitment. The vacancies were reserved only for the purpose of effecting promotions and not recruitment in any form. Compassionate appointment is a facet of recruitment and in my view, once AIL was directed not to recruit any person by abolishing all existing vacancies, it was not permissible for AIL to undertake any form of recruitment including compassionate appointment. Thus is because compassionate appointment is also required to be made against a sanctioned vacant post. If all vacancies are abolished, no post remained vacant, against which compassionate appointment could be made. CGIT has not appreciated this aspect while erroneously holding that the ban on recruitment did not include freeze on compassionate appointments. The finding of the CGIT that the Memorandum dated 23 June 1997 does not provide for freeze on compassionate appointment is totally perverse and is recorded in ignorance of the fact that all vacancies as on 23 June 1997 under AIL stood abolished for making any form of recruitment.

34. Another factor relied upon by CGIT for presuming that compassionate appointments were permissible even after issuance of Memorandum dated 23 June 1997 is the stray case of compassionate appointment by AIL of Shri. Anil Kumar. It appears that Shri. Anil Kumar's appointment on compassionate basis was effected vide letter dated 14 February 2000. Mr. Talsania has submitted that the same was an isolated case arising out of the mistake on the part of the concerned officials of the AIL. In my view case of Shri. Anil Kumar cannot be cited for arriving at a definitive finding that there was no freeze on compassionate appointments. Firstly, issue of freeze on compassionate appointments is to be decided on the basis of interpretation of Memorandum dated 23 June 1997 and not on the basis of AIL's conduct. Secondly even if AIL's conduct is to be considered, it is an admitted position that after 23 June 1997 till 14 December 2000, no appointment on compassionate basis has been made in AIL for over 3 and ½ years. This is sufficient to indicate that there was indeed freeze on compassionate appointments as well. Thirdly, stray case of Shri. Anil Kumar, which is explained as a mistake, cannot lead to a presumption that Air India selectively granted compassionate appointments in respect of one section of employees or that it practiced hostile discrimination. Article 14 of the Constitution of India is a positive concept and cannot be enforced in a negative manner by insisting that a mistake or illegality committed in one case must be followed in other cases as well. In my view, appointment of Shri. Anil Kumar on compassionate ground was dehors the Memorandum dated 23 June 1997. However, this finding is recorded not to disturb Shri. Anil Kumar's appointment but only for the purpose of holding that the Memorandum dated 23 June 1997 contemplated freeze on every form of recruitment, including that on compassionate basis. It appears that another case of Shri. Swapnil R. Gawde effected on 3 July 2000 is highlighted. However, it appears that the same was made by Indian Airlines Ltd., which at that point of time, was not part of AIL and therefore the said case cannot be considered as a determinative factor as to whether there was freeze on compassionate appointment in AIL or not. The case of Mrs. Smitha Raja R.V. is highlighted wherein compassionate appointment is granted by letter dated 1 April 2016. In my view, the said compassionate appointment effected in June 2016 would not determine whether there was ban on compassionate appointment in the year 1997. Even otherwise, it appears that AIL floated the scheme of compassionate appointment again in the year 2008 and considered the cases of some of the Respondents for such compassionate appointments,

who appeared for interview. In my view, therefore even after considering three cases of alleged abrasions/departures highlighted by the Respondent Nos. 1 to 45, it is difficult to hold that there was no freeze on compassionate appointment in AIL. To my mind therefore, the finding of CGIT that the ban did not cover compassionate appointments, is perverse.

35. In the present case, no doubt the applications for compassionate appointments were entertained by AIL. They were also processed by AIL by calling upon the wards of deceased/medically incapacitated employees to submit the necessary documents. In some cases, typing tests and interviews are also apparently held. To illustrate in case of Ms. Hemangi Prahu, after she made an application for compassionate appointment to AIL. She was called upon to submit various documents by letter dated 19 May 1997. She was also subjected to typing test on 4 August 1997. However, AIL was not able to grant compassionate appointment to her on account of freeze imposed by the Memorandum dated 23 June 1997. AIL could have simply rejected her application by referring to Memorandum. However, on humanitarian grounds and as submitted by Mr. Talsania, on account of demands by the Guild, AIL decided to request its subsidiary companies to engage the services of such wards on temporary basis. This is how Ms. Hemangi Prabhu came to be engaged by AICL by letter dated 10 August 1998 appointing her as a trainee on consolidated stipend of Rs.3000/- per month over a period of six months. No doubt, the appointment letter dated 10 August 1998 refers to the application made by her to AIL on compassionate grounds. However, the fact remains that her appointment is made by AICL and not AIL. Thus though AIL entertained her application, AIL impliedly declined compassionate appointment to her. What is important to note here is Ms. Hemangi Prabhu accepted the said engagement without any demur. Neither she made any representation to AIL protesting about her temporary engagement in AICL nor she knocked the doors of any Industrial Adjudicator complaining about non-grant of compassionate appointment on regular basis in AIL. Ms. Prabhu acquiesced in her temporary engagement by AICL. The effect of the order of CGIT is now that this engagement of Ms. Hemangi Prabhu, about which she did not raise any objection and about which she did not file any proceedings, are now converted into compassionate appointment in a demand raised by her as late as on 2 June 2006 resulting in reference made to CGIT. Thus the relief which Ms. Prabhu did not seek in 1998 is granted subsequently in a demand raised by her on 2 June 2006.

36. The next issue is about correctness of conclusion of CGIT about supervision and control by AIL over Respondent Nos. 1 to 45 for drawing an inference of master-servant relationship. It has come in evidence that AIASL caters to the activities of not just of AIL but also of other commercial airlines. Thus apart from AIL, AIASL looks after ground handling activities of other airlines as well. As AIASL offers the services of its employees for ground handling activities of a particular airline, such airline is bound to decide how to best utilize the services of such deputed employees in its best interest. Mere decision of duty roaster or maintenance of attendance register or deciding issues of transfers or issue letters of appreciation would not mean that the concerned employees would become direct employees of AIL in any manner. The industry of air transport is unique, where the airline has to take necessary decisions for deployment of staff placed at its disposal by another company. It is not expected send requisitions to the employing company to decide duty roaster, making last minute arrangements etc. All these decisions are bound to be taken by the airline at whose disposal such staff is placed. In my view, therefore the entire enquiry into the aspect of supervision and control in the present case is totally misplaced and unnecessary for the purpose of deciding whether compassionate appointments were made by AIL or not.

37. Mr. Talsania has placed reliance on the judgment of the Apex Court in **Balwant Rai Saluja** (supra) and of this Court in **Kalyan Dombivli Municipal Corporation** (supra) in support of his contention that unless the tests prescribed by the Apex Court in para-65 of the judgment in *Balwant Rai Saluja* are satisfied, the employer-employee relationship cannot be established. Para-65 of the Judgment in *Balwant Rai Saluja* reads thus :

(65) Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

(i) who appoints the workers;
(ii) who pays the salary/remuneration;
(iii) who has the authority to dismiss;
(iv) who can take disciplinary action;
(v) whether there is continuity of service; and
(vi) extent of control and supervision I.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in *Bengal Nagpur Cotton Mills case, International Airport Authority of India cases* and *Nalco case*.

38. The judgment in *Balwant Rai Saluja* is followed by this Court in **Kalyan Dombivli Municipal Corporation** (supra), in which one of the factors applied by the Industrial Court for establishing employer-employee relationship between the concerned workers and the Municipal Corporation was supervision and control by the Municipal Corporation on the work of the concerned workers.
This Court held in paras-30 and 31 of the judgment as under :

30. To my mind, therefore merely because Respondent Unionwas able to prove that the some of the employees or Officers of the Municipal Corporation supervised some of the activities such as maintenance of muster roll, issuance of some directions etc. would not satisfy the test of exercise of direct control over the employee.

31. I am therefore of the view that Respondent-Union failed to meet any of the six tests specified by the Apex Court in its judgment in Balwant Rai Saluja. Even if some leeway is to be granted to the Respondent-Union by assuming that the sixth test of 'control and supervision' is satisfied in the present case, satisfaction of that test alone would not be sufficient and it is mandatory for it to satisfy tests nos. 1 to 5 as well. Therefore, it is difficult to hold that there was no employer-employee relationship between the Municipal Corporation and the workers.

39. Thus, mere satisfaction of the test of control and supervision is not sufficient for establishment of employer-employee relationship. In the present case, the CGIT has relied solely on control and supervision test for holding that the Respondent Nos. 1 to 45 are employees of Air India. However, if other five tests prescribed by the Apex Court in **Balwant Rai Saluja** are considered, it is clearly seen that the Respondent Nos. 1 to 45 will not be in a position to satisfy any of the said five tests. The Respondent Nos. 1 to 45 are undoubtedly appointed by AICL or AIASL. Their salaries and remunerations are paid by AICL and AIASL. The authority to dismiss them from service did not vest in AIL and no evidence is produced to show that AIL ever dismissed any employee engaged by AICL and AIASL. So far as disciplinary action is

concerned, again there is no evidence on record to indicate that AIL has ever punished the Respondent Nos. 1 to 45. So far as the last test of continuity of service is concerned, the same may not be of very much relevance in the present case as engagement of Respondent Nos. 1 to 45 is not a through a contractor. In my view, therefore mere establishment of control or supervision of Respondent Nos. 1 to 45 by AIL to some extent would not make the Respondents, employees of AIL in any manner.

Mr Shivdasani has sought to distinguish the judgment in **Balwant Rai Saluja** and **Kalyan Dombivli Municipal Corporation** by contending that there is no contractor involved in the present case. He is right in contending so. However, because the CGIT has gone, and in my view, quite unnecessarily, into the issue of employer-employee relationship between Respondent Nos. 1 to 45 and AIL and therefore to deal with those findings, reference to judgments in **Balwant Rai Saluja** and **Kalyan Dombivli Municipal Corporation** is required. Otherwise, this is not a case of AICL or AIASL acting as a contractor of AIL supplying only manpower to AIL. AICL and AIASL are separate companies engaged in various activities and Respondent Nos. 1 to 45 were engaged in their services. AICL and AIASL are/were the employers of Respondent Nos. 1 to 45. Therefore CGIT ought to have appreciated that grant of relief of permanency in AIL entails shifting of services of the employees from one company to another. This is not a case of a contract executed with a contractor or that Respondent Nos. 1 to 45 being contract workers. Mere utilization of services of employees of AIASL by AIL does not make them employees of AIL, that too as compassionate appointees on regular (permanent) basis.

41. There is yet another factor completely ignored by CGIT. Even if Respondent Nos. 1 to 45 were to be treated as employees of AIL, they would, at the highest become temporary employees of AIL. On account of abolition of all vacancies in AIL due to Memorandum dated 23 June 1997, no vacancy existed against which a permanent appointment of Respondent Nos. 1 to 45 could have been made. Therefore, even if it is assumed that Respondent Nos. 1 to 45 should be treated as employees of AIL, they cannot be granted permanency in services of AIL in absence of availability of vacant posts.

42. The impugned order of CGIT envisages grant of permanency status to Respondent Nos. 1 to 45 in the services of AIL with further direction to pay them backwages, continuity of service and other consequential benefits as

are paid to permanent workmen of AIL. Here again, there appears to be a clear error committed by the CGIT. Even though the demand was raised by the Respondents for the first time in 2006, that too for permanency either with AIL or with AICL or AIASL, CGIT has proceeded to direct that AIL must pay them full backwages as are paid to the other permanent employees of AIL from the dates of initial engagements of the Respondent Nos. 1 to 45. There are multiple errors in this direction. The employees have drawn wages from AICL or AIASL and the direction contemplates that AIL must pay full wages to them since dates of their engagements once again. Secondly, though the demand was raised belatedly on 2 June 2006 (without raising any compliant about payment of alleged lesser wages by AICL or AIASL from dates of engagement), the Order of CGIT directs that employees must get wages of permanent employees from dates of engagement with AICL or AIASL. Such a direction is clearly hit by limitation. Be that as it may. Since the Respondent Nos. 1 to 45 cannot be granted permanency in the services of AIL, the issue of limitation in award of backwages becomes academic.

43. What remains now is to deal with various judgments cited by Mr. Shivdasani.

(i)In **Vishwanath Pandey** (supra), the issue before the Apex Court was entirely different. In that case, the Appellant was appointed on compassionate basis in terms of policy framed by the State Government. However, instead of paying her regular pay scale, she was being paid pay admissible to Prakhand Teachers. The Apex Court held that the order of compassionate appointment was not rescinded or modified after coming into force of the 2006 Rules. That the appointment was made after lifting of ban on recommendations of District Compassionate Committee. In the light of those facts and also the policy not envisaging compassionate appointment on fixed pay, the Apex Court held that the Appellant therein was entitled to regular pay scale. The Judgment therefore does not have application to the facts and circumstances of the present case.

(ii) In **Ravi Karan Singh** (supra), the Division Bench of Allahabad High Court has decided the issue as to whether appointment on compassionate basis can be a permanent or temporary appointment. The Apex Court held that such appointment has to be treated as a permanent appointment. The judgment has no application in the present case as this Court has arrived at a conclusion that the initial appointment of Respondents are not

compassionate appointments made by AIL. Therefore the nature of such appointments (temporary or permanent) is irrelevant.

(iii) In **Voltas Ltd.** (supra), the Division Bench of this Court has held that terms of reference must be read alongwith the pleadings of the parties and other circumstances and that while making an order of reference, the appropriate Government exercises administrative function and not adjudicatory function. This Court has held that so long as the parties do not travel beyond the terms of reference, the Tribunal would be within its jurisdiction to adjudicate all disputes between the parties. The judgment is cited possibly to get over the position that Respondents claimed permanency in services of AICL and AIASL as well. This Court has not non-suited the Respondents on the ground of raising demand for absorption in AICL or AIASL as well. Therefore, the question of CGIT travelling beyond the scope of reference is not the reason for interfering in the impugned order. On the contrary, this Court has considered the merits of entitlement of Respondent Nos. 1 to 45 for seeking permanency in the services of AIL. The judgment in *Voltas Ltd.* would therefore have no application to the present case.

(iv) The last judgment relied upon by Respondent Nos. 1 to in **Central Inland Water Transport Corporation Ltd.** (supra). Reliance on the said judgment is to deal with a situation where none of the Respondents raised any demur about temporary appointments provided by AICL and AIASL. In *Central Inland Water Transport Corporation*, the Apex Court has held that on account of unequal bargaining power between employer and employees, a stipulation in appointment order or agreement, which they are made to sign on dotted lines cannot bind them. In my view, the Respondents cannot get away from their conduct of accepting temporary appointments with AICL or AIASL without raising objections. No doubt there is no equality in the bargaining power of AIL and the Respondents, who are vying for appointments. However, it must be noted that the Respondents accepted temporary appointments in AICL and AIASL knowing fully well that AIL had stopped compassionate appointments on account of recruitment ban imposed vide Memorandum dated 23 June 1997. It appears that on account of demands by the Union, AIL requested its subsidiary companies to temporarily accommodate the wards of its deceased/medically incapacitated employees since AIL was prevented from making compassionate appointments on its establishment. It is in the light of this position that the Respondents accepted

temporary appointments offered by AICL or AIASL. Now they cannot be permitted to turn around and claim that the appointments were actually made in AIL. The Judgment of the Apex Court in **Central Inland Water Transport Corporation Ltd.** would therefore have no application to the facts and circumstances of the present case.

44. In the battle between AIL and Respondent Nos. 1 to 45, Respondent No. 46 (AIATSL/AIASL) has attempted to oppose the petition through written submissions filed on 12 January 2024. AIASL has attempted to support the case of Respondent Nos. 1 to 45 with a view to avoid any liability on it. It has gone to the extent of contending that there was no freeze on compassionate appointment by AIL. It has contended that the supervision and control over Respondent Nos. 1 to 45 was always exercised by AIL. In short AIASL has attempted to fully support the claim of the employees, which approach appears to be different than the one adopted before CGIT. Before CGIT, AIASL as well as AICL opposed the reference. In this regard, the stand taken by Respondent Nos. 46 and 47 before the CGIT as summarized in the para Nos. 15 to 19 of the impugned award read thus:

15. First party No.2 also resisted claim by filing written statementEx.12 inter-alia contending therein that it is wholly owned subsidiary of erstwhile AIL which holds its entire share capital. AIATSL was incorporated on 9.6.03 and registered under the provisions of Companies Act 1956. It offers services like ground handling, baggage loading, off-loading etc. to its client airlines with whom it enters into an agreement for a fixed period. The employment of the concerned workmen with AIATSL would automatically end with the end of contract period. There is no certainty that the client airlines would renew their contract or enter into any fresh contract with AIATSL. Consequently, there is uncertainty about the work being available to the concerned workman. The concerned workmen have been working with AIATSL on fixed term contract basis for 3 years from February & March 2006 to February & March 2000 as per service conditions applicable therein which they have accepted. It is thus denied that AIATSL has been set up as a labour agent to deprive the concerned workmen and others of the status and permanency.

16. It is thus case of the first party No.2 that the concerned workmen are working on fixed term contract with AIATSL and on expiry of the same their employment would come to an end. As such they are not entitled to permanency and other benefits. It has thus sought dismissal of the reference.

17. First party No.3 also resisted claim by filing written statementEx.14 Inter-alia contending therein that it is wholly subsidiary of erstwhile AIL now known as NACIL and its entire share capital is held by NACIL. It is incorporated in 1971 and has its own memorandum of association contending the main and incidental objects of the company. It is an independent legal entity, distinct and separate from NACIL.

18. It is contended that the concerned workmen were engaged on casual and temporary basis initially for six months and their such appointment was extended from time to time before they took up their present appointment in AIATSL. As such there is no employer- employee relationship between the concerned workmen and AICL. The reference as against AICL (first party No.3) is not maintainable.

19. It is then contended that as per order of Hon'ble High Court inWP No. 299/2006, the Hon'ble Bombay High Court directed the concerned workmen to take the matter in AIATSL which was in a position to offer work to them and then the Hon'ble High Court opined that the concerned workmen are raising industrial dispute in respect of their demands for permanency in service. Therefore the concerned workmen have been working with AIATSL on a fixed term contract and they were engaged on temporary and casual basis initially by AIGL They were not appointed on regular and permanent vacancies for regular and perennial work. As such they are not entitled to relief of grant of permanency with all other consequential benefits as contended. The first party No.3 has also sought dismissal of the reference.

45. It is therefore quite perplexing as to how Respondent No. 46 (AIASL) can now alter its stand and seek to justify the case of Respondent Nos. 1 to 45. Be that as it may. I have already dealt with all the defences sought to be raised by AIASL about control and supervision, ban on recruitment, AIL not being employer of Respondent Nos. 1 to 45, etc. It is therefore not necessary to record findings on objections now sought to be raised by Respondent No. 46 in written submissions, in absence of any pleadings. It is also pertinent to note that AIASL caters to the needs not just of AIL but also of other airlines. Does it mean that once AIASL deploys services of its employee on client airline, AIASL's employee becomes the employee of the client airline? The answer to the question has to be obviously in the negative. I do not wish to delve deeper into the competing claims between AIL and AIASL, which have surfaced for the first time, that too through written submissions. AIASL

maintained a stand before CGIT that the employees are engaged on fixed term contract basis and do not have any right to claim permanency. It must stick to that defence, rather than attempting to belatedly shift the entire responsibility on AIL. This Court also takes judicial notice of the development that has occurred during pendency of present petition whereby AIL has been privatized and AIASL no longer remains subsidiary company of AIL. It appears that AIASL still continues to be a PSU of Government of India whereas AIL has been fully privatized.

46. Having held that, Respondents cannot be treated to have been appointed on compassionate grounds or any other grounds in AIL, the next issue is about the alternate prayer sought by them for permanency in the services of AICL or AIASL. In my view, the said prayer is not adjudicated by CGIT on account of grant of permanency to them in AIL. Therefore, for the purpose of deciding the prayer made by the Respondent Nos. 1 to 45 for permanency in the services of AICL or AIASL, the Reference is required to be remanded to CGIT. The Tribunal shall proceed to decide entitlement of Respondent Nos. 1 to 45 for permanency in the services of AICL or AIASL on its own merits.

47. It is however clarified that setting aside the impugned award does not mean grant of any automatic relief in favour of Respondent Nos. 1 to 45 *qua* Respondent Nos. 46 and 47. AIASL (Respondent No. 46) has taken a stand that appointment of Respondent Nos. 1 to 45 is contractual and they have agreed not to claim any permanency benefits. This defence will be considered by CGIT while examining the claim of Respondent Nos. 1 to 45 *qua* Respondent Nos.46 and 47. All questions in that regard are kept open.

48. I accordingly proceed to pass the following order :

ORDER

(i)The Judgment and Award passed by the CGIT in Reference No. CGIT - 2/11 of 2007 is set aside. It is held that Respondent Nos. 1 to 45 are not entitled to be treated as employees of Air India Ltd. in any manner.

(ii) Reference No. CGIT-2/11 of 2007 is remanded toCGIT, Mumbai for the limited purpose of deciding prayer clause (b) of the Statement of Claim.

(iii) Considering the passage of substantial period of time,the CGIT shall accord due priority for deciding the remanded Reference. The parties shall be at liberty to lead additional evidence if they so desire in respect of prayer clause (b) in the Statement of Claim.

49. With the above observations, the Writ Petition is **partly allowed**. Rule is made partly absolute. There shall be no order as to costs.

50. With disposal of the Writ Petition, the Interim

Application does not survive. The same also stands disposed of.