

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.959 OF 2002

Meena Nandkishor Maheshwari	...Petitioner
v/s.	
The Municipal Corporation of Gr.Mumbai	...Respondent

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Mr.Aditya Chitale a/w Mr.Avinash Belge i/b Mr.J.S.Jamkhandi for the
Petitioner.

Mr.A.Y.Sakhare, Senior Advocate with Mr.R.S.Mirpury a/w Mr.Harshad
Pimple for the Respondent/MCGM.

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CORAM : A.A. SAYED &
M.S.KARNIK,JJ.

DATED : 13 OCTOBER 2017

JUDGMENT: *(Per A.A. Sayed, J.)*

1 By this Petition under Article 226 of the Constitution, the Petitioner has impugned the action on part of the Respondent Corporation in refusing to allow her to resume her duties with effect from 16 October 1995 and thereby terminating her services without following due process of law.

2 Pursuant to an advertisement in August 1989, the Petitioner was appointed as a Laboratory Technician in Cooper Hospital, Pathology Department, by an appointment order dated 1 December 1989. It is averred in the Petition that the Petitioner was working as a substitute for Technician

Mrs.Mahalaxmi who was on leave and was later appointed on clear vacancy within 6 months of her joining. In July 1991, the Petitioner proceeded on maternity leave with half pay since she had not completed three years of service. According to the Petitioner, till 2 August 1994, she did not avail any leave which would create any adverse effect in her leave record and she had worked continuously for three years. According to the Petitioner, on 29 July 1994, she made an Application for earned leave of 30 days as she had family problems. By further Application dated 3 September 1994 she had applied for extension of leave. On 19 September 1994, the Petitioner received Memo stating that she had remained absent from duty since 2 August 1994 without permission. On 26 September 1994, the Petitioner replied to the said Memo pointing out that she had submitted her Application dated 29 July 1994 and 3 September 1994 for earned leave and extension thereof and she cannot resume her duties immediately and her earned leave may be sanctioned. According to the Petitioner, she could not resolve her family problems immediately and therefore she made Applications for extension of leave from time to time till her earned leave with full pay/half pay is consumed and thereafter for leave without pay. On 23 February 1995, the Petitioner applied for extension of leave from 27 February 1995 to 1 April 1995. On 24 February 1995, the Petitioner received Memo calling upon her to resume duties forthwith failing which

disciplinary proceedings would be taken against her. On 17 June 1995, the Petitioner was issued Memo calling upon her to resume duties before 15 July 1995 failing which she would be subjected to disciplinary action under the BMC (Service) Regulations, 1989 ('BMCR of 1989' for short). On 12 July 1995 the Petitioner made an Application pointing out that she is due for delivery and the due date is 3 August 1995. On 3 August 1995 the Petitioner was called upon to submit original medical certificates, proof of due date of delivery and undertaking in prescribed form. The Petitioner accordingly complied with the requisition by her letter dated 22 August 1995. On 2 September 1995 the Petitioner was issued a letter informing her that she should resume duties from 15 October 1995 after expiry of maternity leave. According to the Petitioner, the contents from Memo would establish that the disciplinary action for absence of the Petitioner from 2 August 1994 is dropped if the Petitioner resumed her duties on or before 15 October 1995. According to the Petitioner, she reported at place of her work for resuming duties on 16 October 1995, however, she was not allowed to resume duties. The Petitioner claims that she was informed by the Medical Superintendent that she would receive communication from the Health Department for resuming her duties. The Petitioner alleges that she made a number of representations to the office of the Respondents including the Municipal Commissioner for resuming her duties, however, she neither

received any reply to her written communications nor she was informed about any disciplinary action to which she would be subjected for absence from 2 August 1994 to 15 October 1995. According to the Petitioner, she had approached the Chairman, Public Health Committee, who recommended the case of the Petitioner to the Municipal Commissioner, who assured intervention in the matter and assured investigation. It is the contention of the Petitioner that personal hearing was given to her on 28 December 2000 and her services were not terminated atleast till then. The Petitioner claims that she could not approach this Court earlier in the year 1997-98, when she realized that some vested interests are interfering with the employment of the Petitioner with the Respondents as she met with major accidents twice during the said period and only after recovery therefrom, the Petitioner once again approached the Respondents. However, all her efforts were turned futile and she was constrained to file the present Petition in March 2002.

3. On behalf of the Respondent-Corporation an Affidavit-in-Reply dated 29-01-2015 has been filed by Dr.Smt.Navneetha Jadhav, Sr.Medical Officer working in Dr.R.N.Cooper Hospital. The case of the Respondent-Corporation in the said Affidavit-in-Reply is as follows - that the Petitioner remained absent without prior permission from 02-08-1994 onwards i.e.

before the completion of 5 years of service. The Petitioner was continuously absent from 02-08-1994 to 15-10-1995 without any leave being sanctioned to her. The Petitioner extended her leaves without obtaining any prior sanction/approval from the Respondent-Corporation. The Respondent-Corporation had issued several memos dated 22-02-1995, 17-06-1995, 03-08-1995 and 02-09-1995 etc. informing her to resume duties immediately. However, the Petitioner did not reply to the said notices and instead of resuming duties, she continued to make applications for further leaves. The office of Dr.R.N.Cooper Hospital had informed the Petitioner to resume duties immediately and further intimating her that if she fails to resume duties as directed, she will cease from the Municipal service as per Rule 28(c) of BMCR of 1989. The copies of the memos dated 17-06-1995 and 02-09-1995 issued by the Medical Superintendent of the Hospital have been relied upon by the Respondent-Corporation. The Petitioner was assigned with emergency duty such as to investigate reports of patients who were admitted in the Hospital and further treatment of the patients depending on these reports. As the Petitioner continuously remained absent, great inconvenience to the patients was caused and also to the Respondent-Corporation in their day to day working. The Petitioner was appointed on the employment of the Respondent on temporary basis from 01-12-1989. However, she remained

absent from 02-08-1994 continuously. The period of five years of service was completed on 01-12-1994 i.e. during her absence. The Petitioner did not resume duties and remained absent by giving applications for leave for the same reason i.e. for looking after her child till 16-07-1995. The Petitioner had applied for maternity leave from 17-07-1995 to 14-10-1995. By memo dated 03-08-1995 the Petitioner was asked to submit original medical certificates and by memo dated 02-09-1995 she was asked to report for duty on expiry of her maternity leave. By application dated 11-10-1995, the Petitioner applied for resumption of duty from 16-10-1995. However, she did not give the medical certificate of delivery. Since the Petitioner remained absent from 1994, she ceased to be an employee of the Respondent-Corporation in view of Rule 164(2)(ii) of BMCR of 1989. It was necessary to forward her application for resumption of duty to higher authority for sanction and/or further necessary action. Accordingly, the Medical Superintendent of Cooper Hospital forwarded her application to the Executive Health Officer. Since the Petitioner remained absent from 1994, the Medical Superintendent of Dr.R.N.Cooper Hospital removed the name of the Petitioner from the pay sheet to avoid excess payment and for audit purpose. Since the day to day work of the Hospital suffered due to continuous absence of the Petitioner, a substitute was appointed in her place. After going through all the record of the case of the Petitioner, the

Executive Officer had put up the case before the Municipal Commissioner. Accordingly, the then Municipal Commissioner by an order dated 08-03-2001 ordered that "She need not be reinstated". By letter dated 30-03-2001, the Respondent-Corporation informed the Petitioner that her application dated 11-10-1995 for resumption of duty and subsequent representation in that regard are rejected by the Municipal Commissioner vide order dated 08-03-2001. Under Rule 164 (2) of BMCR of 1989, no Corporation employee who is not permanent employee shall be granted extra ordinary leave on any one occasion in excess of the following limits:

- (i) If the service is less than 3 years : 3 months
- (ii) If the service is 3 years or more
but less than 5 years : 6 months
- (iii) If the service is 5 years or over : as admissible to permanent Corporation employee.

The Petitioner had remained absent from duty from 02-08-1994 i.e. prior to completion of 5 years of service and hence she is not treated as permanent employee. After deducting the permissible leave, the Petitioner had remained absent for more than six months, which was not permissible under Rule 164(2)(ii) of BMCR of 1989 and therefore the Petitioner ceased to be an employee of the Corporation as per Rule 28(c) of BMCR of 1989 i.e. automatic cessation of temporary service. The Petitioner was well

aware of the order passed by the Municipal Commissioner and in view of Rule 28(c)(ii) of BMCR of 1989 the Petitioner is not entitled to any relief, as she has automatically ceased to be in the employment of the Respondent-Corporation.

4. We have heard the learned Counsel for the Petitioner and the learned Senior Counsel for the Respondent-Corporation.

5. Learned Counsel for the Petitioner submitted that (I) it is a settled law that removal of an employee from the muster roll/general pay sheet is termination of service. He submitted that it is admitted by the Respondent-Corporation for the first time through their Affidavit-in-Reply dated 29-01-2015 that the Petitioner's name was removed from the muster roll/general pay slip by the Medical Superintendent of Dr.R.N.Cooper Hospital and substitute was appointed in her place. The action of the Respondent-Corporation was illegal and against the principles of natural justice as she could have been terminated only after departmental inquiry and she was proved guilty of misconduct pursuant to the show cause notice. The action of the Medical Superintendent amounted to illegal termination of the Petitioner. The learned Counsel for the Petitioner has placed reliance of the judgment of the Supreme Court in **Delhi Cloth & General Mills (Ltd.) vs.**

Shambhau Nathu Mukharjee & Ors. (1978) 1 SCR 591 in support of his contention that striking of the name of the workman from the rolls by the Management is termination of service.

II. As contemplated under sub-rule (ii) of Rule 28(c) of BMCR of 1989, a show cause notice was required to be issued to a Corporation employee calling upon him/her to show cause as to why the order to strike out his/her name from the muster roll should not be passed before treating the Corporation employee of having ceased to be an employee. It is admitted by the Respondent-Corporation in their Affidavit-in-Reply that no such show cause notice was ever issued to the Petitioner. Hence, the action of the Respondent-Corporation of removing the Petitioner's name from the muster roll without issuing show cause notice to her is illegal and contrary to Rule 28(c)(ii) of BMCR of 1989.

III. The order/remarks dated 08-03-2001 passed by the Municipal Commissioner on the Petitioner's case stating "She need not be reinstated" is illegal and it is not in accordance with law. The only manner in which the Petitioner could have been terminated was by way of order of dismissal passed by the Competent Authority as contemplated in Rule 28(c) of BMCR of 1989 after issuing her show cause notice and holding an inquiry. Hence,

the order dated 08-03-2001 is illegal.

IV. Inasmuch as the Petitioner was not issued a show cause notice and was not granted hearing, the principles of natural justice are violated and she was not granted a reasonable opportunity before taking an action of termination of her services.

6. Learned Senior Counsel for the Respondent-Corporation submitted that the Petitioner was a temporary employee and has been negligent in performance of her duties. He submitted that the letter dated 17-06-1995 (Exh.E to the Petition) and letter dated 02-09-1995 (Exh.H to the Petition) are nothing but show cause notice, wherein the Petitioner was informed that if she fails to resume duties on or before 15-07-1995 action as per Rule 27(i)/28(c) of BMCR of 1989 will be taken. Moreover, in view of order passed by the Municipal Commissioner on 08-03-2001, the question of resumption of duty by the Petitioner could not have arisen.

7. We have given our due consideration to the rival contentions and perused the material on record.

8. The Respondent-Corporation in their Affidavit-in-Reply have annexed at Exh.A the particulars of the leaves of the Petitioner. They read as under:

“Sub: Leave to Smt. Meena Maheshwari, Lab. Tech.

No.	Page No.		Leave Particulars
1.	4	29-7-94	33 days leave application (admissible) from 2-8-94 to 3-9-94 -No one to look after her child
2.	8	3-9-94	33 days leave application from 5-9-94 to 8-10-94 (admissible) -No one to look after her child
3.	10		Reply to memo sent to her on 19-9-94 under No.HO/11456/JE
4.	16		34 days HPL from 10-10-94 to 12-11-94 -No one to look after her child.
5.	18	14-11-94	34 days HPL/LWP from 14-11-94 to 17-12-94- same reason
6.	20	15-12-94	34 days LWP from 19-12-94 to 21-1-95- same reason
7.	22	19-01-95	34 days LWP from 23-1-95 to 25-2-95
8.	24	23-02-95	34 days LWP from 27-2-95 to 1-4-95
9.	26	29-03-95	34 days LWP from 3-4-95 to 6-5-95- same reason
10.	28	03-05-95	34 days LWP from 8-5-95 to 10-6-95
11.	30	08-06-95	34 days LWP from 12-6-95 to 15-7-95 -No one to look after her child -Bed rest due to pregnancy

12.	38	12-07-95	3 months M.L. 17-7-95 to 14-10-95 (E/D 11-8-95)
13.	44	21-08-95	Reply to memo No.HO/21-8-95 with original cfts.
14.	51		Papers regarding her absence have been sent to HO/A.O.(Enquiry) on 20-9-95 under No.HO/7657/JE of 20-9-95- whether she is allowed to resume duty.
15.			Last leave enjoyed Abortion leave for 42 days from 6-6-94 to 18-7-94
16.	76		Report sent to HO under No.HO/7067/JE dated 2-9-95 to conduct P.E. Against her.
17.	80		Memo under No.HO/4406/JE dt.17-6-95 to resume duty on or before 15-7-95- otherwise action will be taken as per rule 28(c)
18.	82		Memo under No.HO/5514/JE of 3-8-95 to submit original medical certificates also of abortion as she was on M.L.
19.	86		Memo under No.HO/7068/JE of 2-9-95 to report duty on expiry of her leave (M.L.)
20.	88		Memo under No.HO/11042/JE of 22-2-95 request for extending of leave cannot be considered.
21	93		Papers sent for enquiry to H.C.(Eng.) H.O. Office under No.HO/5568/SSWS dt.9-7-96
22	96-97		Leave certified as E.L. 69 days from 2-8-94 to 9-10-94 H.P.L. 100 days from 10-10-94 to 17-1-95 LWP- 6 months- from 18-1-95 to 17-7-95 E.L. 1 day on 18-1-95

However employee completed her 5 yrs service while on leave as on 30-11-94.

- | | | |
|----|-------------------------------------|--|
| 23 | 99
HI/8617/SS of
18-10-96 | LWP 5 months 28 days- 19-1-95 to 16-7-95
M.L. on full pay for 90 days from 17-7-95 to
14-10-95 LWP 1 days on 15-10-95 |
| 24 | 106
HO/3068/RNC/
E of 26-6-97 | Pps sent to H.O.'s office for guidance
whether leave as certified to be granted to
the employee as she has completed 5 yrs
of service while on leave. |

9. It is, thus, noticed that right from 02-08-1994 to 15-10-1995 the Petitioner was continuously absent despite the fact that her leave applications were not sanctioned by the Respondent-Corporation and she also extended her leave without prior sanction/approval from the Respondent-Corporation. The Respondent-Corporation had issued several Memos to the Petitioner being memos dated 22-02-1995, 17-06-1995, 03-08-1995 etc. informing her to resume duties immediately. However, the Petitioner continued to make Applications for further leave. It is pertinent to note that though the Petitioner has averred in her Petition that the Respondent-Corporation has refused to let her resume duties with effect from 16 October 1995 and thereby illegally terminated her services, the present Petition has been filed only some time in March 2002 i.e. after a period of about six & half years. The cause of action for filing the Petition therefore, on the own showing of the Petitioner had arisen on 16 October

1995. The file remarks/order dated 08-03-2001 passed by the Municipal Commissioner on the Petitioner's case stating that "she need not be reinstated" appears to have been passed on the representation of the Petitioner after she had approached the Chairman of Public Health Committee, who had intervened and recommended the case of the Petitioner be considered by the Municipal Commissioner.

10. The Respondent-Corporation had by their letter dated 02-09-1995 directed the Petitioner to report for duty on expiry of her maternity leave, failing which she was threatened that action would be taken against her as per Rule 28(c) of BMCR of 1989. The said letter dated 02-09-1995 reads as follows:

"Madam,

With reference to maternity leave from 17.7.1995 to 14.10.1995, Smt. Meena Maheshwari, Lab. Tech., of this Hospital is hereby directed to report duty immediately on expiry of her maternity leave, failing which action as per Rule 28(c) of BMC (S) Regulation, 1989 will be taken against her which she should note."

11. It would be necessary to have a look to Rule 28(c) of BMCR of 1989. It reads as follows:

"28(c) Automatic Cessation of temporary service:-

(i) If a temporary Corporation employee remains

continuously absent from duty beyond the period of leave admissible to him under these rules, he shall cease to be a Corporation employee.

(ii) Before treating the Corporation employee as having ceased to be a Corporation employee, the Competent Authority shall issue a notice in writing to the said Corporation employee calling upon him to show cause why the order to struck off his name from the roll maintained for the Corporation employees be not passed.

(iii) If no satisfactory cause is shown by the concerned Corporation employee, the Competent Authority may pass an order treating the Corporation employees as having ceased to be Corporation employee. “

(emphasis supplied)

It may be stated here that the learned Counsel for the Petitioner has also relied upon the aforesaid Rule 28(c)(ii) to contend that there was a breach of the said provision.

12 Rule 28(c)(ii) of BMCR of 1989 thus contemplates a show cause notice to be issued to the Corporation employee if the employee continuously remains absent from duty beyond the period of leave. The notice is required to be issued calling upon the employee to show cause why an order be not passed to strike off his name from the roll of the Respondent-Corporation. In the present case, the contention of the learned Senior Counsel that the letter dated 02-09-1995 was a show cause notice

to the Petitioner cannot be accepted. The said letter does not call upon the Petitioner to show cause why an order should not be passed striking off her name from the roll of the Respondent Corporation. The Petitioner was in the service of the Respondent-Corporation for about five years. In our view, in absence of any Show Cause Notice being issued to the Petitioner calling upon her why the order to strike off her name from the roll maintained for the Corporation employees should not be passed, there was a clear breach of Rule 28(c)(ii) of the BMCR of 1989 by the Respondent-Corporation. In these circumstances, we are of the view that the impugned action on part of the Respondent-Corporation in refusing to allow the Petitioner to resume her duties thereby terminating her services was without following due procedure as contemplated in Rule 28(c)(ii) and in violation of principles of natural justice and the impugned action of the Respondent Corporation was bad in law and the termination of the Petitioner is liable to be set aside and accordingly set aside.

13 However, in the facts and circumstances of the present case, in our view, it would not be appropriate to reinstate the Petitioner in service. It is seen that the Petitioner was continuously absent from duty from 2 August 1994 to 15 October 1995 without any leave being sanctioned to her. The Petitioner was issued several memos informing her to resume duties

immediately, however, the Petitioner only made further Applications to extend her leave which were not sanctioned. The Respondent Corporation has averred in their Affidavit-in-Reply that because of the continuous absence of the Petitioner great inconvenience was caused to the patients in the hospital and to the Respondent Corporation in their day to day working. It is averred by the Respondent Corporation that the Petitioner was assigned with emergency duty such as to investigate reports of the patients who were admitted in the hospital and further treatment of the patients depending on these reports. In these circumstances, a substitute was appointed in her place. We find that the Petitioner has not been responsible in relation to her employment. Moreover, on the own showing of the Petitioner she was not allowed to resume duties from 16 October 1995 when she allegedly reported at the place of her work. Thus, as stated earlier, the cause of action arose on 16 October 1995 however the present Petition is filed only in March 2002. The Petition therefore, suffers from delay and laches. It is also pertinent to note that the Petitioner herself has averred in the Petition that she was appointed as a substitute for Technician Mrs.Mahalaxmi who was on leave. Her initial appointment was therefore on temporary basis. Moreover, the learned Counsel for the Petitioner has relied also upon Rule 28(c) of BMCR of 1989 which speaks about a temporary employee. Considering the above and as also the passage of time, this is

not a fit case where the Petitioner is required to be reinstated. In our view, the grant of compensation to the Petitioner in lieu of reinstatement would be apposite in the facts of the present case.

14. Taking an overall view of the matter, in our opinion, the following order would meet the ends of justice:

ORDER

- i) The impugned action on the part of the Respondent Corporation in refusing to allow the Petitioner to resume duties with effect from 16 October 1995 thereby terminating her services and by striking off her name from the roll of the Respondent Corporation is held bad in law.
- ii) The Respondent Corporation is directed to pay a sum of Rs.1,00,000/- to the Petitioner as compensation in lieu of reinstatement within a period of ten weeks from today.
- iii) The Petition is partly allowed. The Rule is made partly absolute in the aforesaid terms. There shall be no order as to costs.

(M.S.KARNIK,J.)

(A.A.SAYED,J.)