

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9279 OF 2017

- 1] Chief Executive Officer,
Zilla Parishad, Osmanabad
- 2] District Health Officer,
Zilla Parishad, Osmanabad
- 3] Medical Officer,
Primary Health Center,
Salgara (D), Tq. Tuljapur,
Dist. Osmanabad

Versus

Smt. Chhaya Machindra Nagtilak,
Age : 47 years, Occu. : Nil,
R/o. Gajanan Niwas,
In front of M.S.E.D. Office,
Kurul Road, Mohal,
Tq. Mohal, Dist. Solapur

.. Respondents

...
Mr. S.V. Deshmukh, Advocate for petitioners
Mr. D.S. Kudle, Advocate for respondent
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 06-10-2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for appearing parties finally, by consent.

2. The petitioners purport to take exception to two concurrent orders passed *hitherto* on a complaint bearing U.L.P. no.

21 of 2010 instituted by present respondent alleging unfair labour practices referred to under Section 28(1), Schedule IV item 1 (a), (b), (d), (e), (h) & (g) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices (for short **"M.R.T.U. and P.U.L.P. Act"**) allowed by labour court, Latur under its judgment and order dated 21-08-2014 and confirmed in revision, by Industrial Court under its judgment and order dated 20-03-2017.

3. Briefly referred to the case of respondent - employee is, she has been working with petitioner as an Auxiliary Nurse Midwife since 1984. She worked without any interruption continuously since 1984 to 01-06-2000. On 01-06-2000, on account of ill health, she had applied for leave, however, leave had not been sanctioned. She had been suffering from tuberculosis and had been under medical treatment. After regaining health, she had approached petitioners, to resume duties and had filed application accordingly on 19-03-2002. Petitioners had referred her to medical board. Medical board on 24-04-2002 certified her to be fit with a note that the past leave period cannot be regularized on medical ground. Despite aforesaid, instead of repeated requests, respondent had not been allowed to join and ultimately, she filed written application on

29-01-2007 for allowing her to resume duties, however, to her shock and surprise, she came to know on 30-04-2007 that she has been terminated. She had no wherewithal to approach the court and was not aware about the legal remedy and finally as advice come her way, she had lodged complaint under section 28(1) of the M.R.T.U. and P.U.L.P. Act.

4. Petitioners have opposed claims made under the complaint, contending that since respondent had been continuously absent from duty, she had been issued a notice to remain present on 20-06-2000, and the same had been sent to her through post and again some notices were issued to her on 18-07-2000 and 29-07-2000, however, respondent did not join and ultimately, on 30-12-2000, through a special messenger, her father had been approached on the address as appearing in the service book who had declined to accept notice, stating that she has started residing separately and not to make communication on his address. Accordingly, a panchanama came to be drawn. Thereafter, on 01-02-2002, notice had been published in newspaper asking her to join services. It was only then she had approached petitioners in March - 2002 with the medical certificate and was sent to medical board and medical board had communicated that she would be fit to join duty, however, her

past absence cannot be regularized on medical ground. Even thereafter, respondent had been issued notice to join the duty. However, the respondent did not join. On 05-07-2002, a report had been made that inspite of notice, she has not joined service. Even a show cause notice had been sent to her on 09-07-2002 by registered post acknowledgment due, which came back unserved and finally, termination order had been passed on 24-12-2002. It is contended that said order as well had been sent to her by post. On 29-01-2007, the respondent purportedly had approached petitioners, however, since her services had been terminated, her request to resume duties could not be considered.

5. The labour court had framed issues, as to whether complainant proves that respondents have engaged in unfair labour practice as defined under schedule IV items 1(a), (b), (d), (e), (g) and (h) of the M.R.T.U. and P.U.L.P. Act and whether complainant is entitled for the relief as prayed. Labour court has considered it is an admitted fact that complainant had joined duty with petitioners in 1984 and had continued to work till 31-05-2000. The fact of her seeking medical leave, had also not been disputed. Labour court has observed that though the medical board had issued fitness certificate on 19-03-2002, however, she had been told that an order in respect of joining her

duty will be issued and kept her waiting till 2007. In the interregnum, as averred on behalf of petitioners that further developments had taken place, were not emerging from evidence. It was only after she had applied for resumption in writing in 2007, she had been communicated on 30-04-2007 that her services were terminated. The court has observed that although it is the stand of the petitioners that before terminating services of respondent, they issued several letters and notices and published notice in daily newspaper and still, the complainant did not join duty. It is her fault. Petitioners have purportedly relied on documents which are allegedly placed on record at Exhibits C-8 and C-9 and on perusal of the same, the court has found that there is no evidence about service of letters, notices on the complainant or that she had knowledge that such letters or notices had been issued to her. Labour court has also noted the stand of petitioners that notices and letters were issued to complainant but address of the complainant had not been traceable and she had not given correct address and, as such, they were unable to serve notice on her. The court has also noted that departmental enquiry was intended, however, for want of service of notice, enquiry could not be conducted. The court had gauged that record is deficient of depicting proper efforts having been taken by petitioners to communicate and serve letters and

notices on complainant or that notice had been tried to be served in respect of contemplated departmental enquiry. Labour court has found that there is nothing on record placed by petitioners, so as to conclusively show that they had issued letters, notices and show cause notices and intended to conduct enquiry in respect of absence of complainant. The court has then considered that when a permanent employee is complained of absence, resistance to claims of employee, for inability to trace complainant, would not be a proper ground. Labour court has also considered that termination of permanent employee in this case has been without departmental enquiry and there does not appear to be any credible material about service of letters, notices, show cause notices on her.

6. Labour court has also adverted to that petitioners' evidence is discrepant and deficient. Petitioners' witness had not been *privy* to any of notices nor letters those were issued in his presence. He was not even in a position to tell as to what was the document contained in envelope exhibited at C-9/29. He has further referred to that there had been no publication of termination of complainant for want of resumption. The court had found that he had no personal knowledge about the same. In the circumstances, court has observed that it appears that

termination of service of complainant would be unfair labour practice. Her services have been terminated without there being any evidence of misconduct and labour court had allowed the complaint.

7. While the matter was taken to Industrial court pursuant to section 44 of the M.R.T.U. and P.U.L.P. Act, the industrial court as well found that there had been no acknowledgment taken from the complainant in respect of service of letters or notices or show cause notices claimed to have been issued from time to time. Only paper publication has been filed, and medical board had certified complainant to be fit to join duty and, thereafter, there is no credible material placed on record to show that there was any effort whatsoever including about service of termination order. The court had further found that in case of remittance by registered post acknowledgment due, presumption of service on the addressee is available. However, proper address of complainant has not been shown and explained. It has been observed by industrial court that there is no document on record to demonstrate service of letter or notice or show cause notice for conducting departmental enquiry. The court has noted the absence of notice by registered post acknowledgment due being placed on record with regard to termination order, and about

service of the letters and notices, no document has been placed on record save one the returned registered post acknowledgement due which is not in respect of termination. Court has also adverted to that absence without permission, may entail departmental enquiry. In such a case, even if delinquent employee remains absent, *ex parte* departmental enquiry can be conducted. Industrial court has particularly referred to that in terms of grounds of revision in paragraphs no. 2 and 3, petitioners have made a categorical statement that documents and report of the enquiry was given to complainant during the enquiry. In the same breath, petitioners stated that after service of notice to complainant, she did not participate in the departmental enquiry. Again it is stated that enquiry of complainant is conducted as per charges levelled against her. Industrial court has further observed that perusal of record and proceedings and documents filed before labour court along with Exhibit C-8 dated 03-11-2014, it emerges that there were no documents to demonstrate that before terminating the services of respondent, petitioners had conducted departmental enquiry. Industrial court has also considered that while labour court had directed reinstatement of complainant in service with continuity, it has declined to grant backwages as also no costs are awarded. Industrial court found that order to be not perverse and,

therefore, has declined to interfere with the labour court's order.

8. Learned counsel Mr. S.V. Deshmukh appearing for petitioners vehemently contends that while it emerges on record that the complainant – respondent had deliberately absented her from employment, in such a case, no enquiry is necessary. For said purpose, he purports to refer to and rely on a decision of division bench of this court dated 10-10-2017 in writ petition no. 10198 of 2016 (*Balaprasad Brijlal Sarda Vs. The State of Maharashtra and others*) whereunder, relying on a decision in the case of *Vijay Sathye Vs. Indian Airlines Ltd.* reported in 2014 (1) SCC (L & S) 760, it has been considered that if an employee is absent beyond the period prescribed for leave, he should be treated as having resigned and ceased to be in service. Before division bench of this court (supra), it was a case wherein petitioner had dispute with secretary in 2000 and that had weakened him mentally and could not attend duties. In July, 2001, petitioner went to attend duties but was not allowed to join. In 2003, petitioner was sent to medical board and was declared fit. However, the Irrigation Division was transferred to Jayakwadi Irrigation Division No. 3 and there he was not allowed to join as his leave was not sanctioned. Thereafter, it was in 2012, he approached *Lok-Aayukta*. In that case, division bench had found that petitioner had been

continuously absent for six years and had not taken steps to have the leave sanctioned and had not sought permission before leaving service. Referring to judgment of supreme court (*supra*), it had been considered that in that case, act of petitioner amounted to abandonment of service. He, therefore, submits that while the facts would depict that there was absence from service for unreasonable inordinate delay, same would tantamount to abandonment, as observed by division bench.

9. Learned counsel Mr. Deshmukh aptly points out that as a matter of fact, the court in said *Sathye's* case, in paragraph no. 13 thereof, also referred to *Syndicate Bank V. General Secretary, Syndicate Bank Staff Association and Anr.* reported in *AIR 2000 SC 2198*. Learned counsel Mr. Deshmukh therefore urges this court to consider that if not abandonment, the respondent ought to be considered as to have resigned from service.

10. Learned counsel Mr. D.S. Kudle appearing for respondent – employee submits that two courts *hitherto*; labour court and industrial court i.e. fact finding and revisional court have concurred on that petitioners are guilty of commission of unfair labour practices as alleged against them. The fact finding court has found that there is no effort whatsoever as contended,

to serve complainant with regard to notices, letters or show cause notices. He submits that there is only a single notice which is purportedly issued to complainant – respondent, however, the same had not been sent to complainant – employee at her registered address with employer. He submits that although it has been submitted during the course of submissions that notices, letters and show cause notices were issued on the address as per service record and other address, there is no corresponding record made available to support such submission. So far as termination is concerned, he submits that there is absolutely no record available to show that termination order had even been issued or for that matter, ever served on respondent. He submits that there was no reason for respondent – complainant not to resume duties as she is in dire need of employment. As a matter of fact, her attempt to resume duties, had been tried to be obfuscated by sending her to medical board. While the medical board had declared her to be fit to join her duty, she had not been allowed to join duty on the pretext that she would be sent an order accordingly in respect of the same. Since for quite a while, after the medical board had declared her fit to join duty and her efforts to join duty, had not been meeting with fruitful response, she has ultimately been forced to make a written application. It is only thereafter, a purported termination order of 2002 is stated to

have been passed. However, she was informed only in 2007. Labour court has adjudged that there is no material and whatever material is placed on record, is not credible about efforts really having been made for service of letters, show cause notice or notices. He submits that record is bereft even in respect of any attempt to serve the termination order of December, 2002 on respondent. He submits that while the factual scenario is such and decisions which are sought to be relied on are wide apart on facts, no analogy from the same can be brought in and applied to the present case.

11. In order to support his submission, he submits that while major punishment such as termination is being inflicted, departmental enquiry ought to have been held. He, for said purpose refers to and relies on decision of division bench of this court in the case of *Prabhakar S/o Mallikarjun Suryawanshi and others Vs. State of Maharashtra and others* reported in 2018(3) Mh.L.J. 503.

12. The situation shows that respondent had been an employee of petitioner since 1984 continuously without any interruption. On 01-06-2000, she had applied for medical leave which had not been sanctioned. Subsequently, she appears to have made an application *albeit* contended to be on publication in

newspaper, she had been sent to medical board and medical board had indeed declared her fit. Thereafter, although petitioners claim to have issued notices and letters to respondent - complainant, the same does not appear to have been supported by any credible evidence, save and except some endorsements by officers on some letters. Even the termination order dated 24-12-2002 does not appear to have been served on respondent – complainant at all.

13. There appears to be a single attempt to issue notice to respondent by registered post acknowledgment due that too not on her official address which albeit is claimed that it was as per address which was given in her application. This record is in respect of one of the communications of August, 2002. The termination order is dated 24-12-2002. The labour court has observed that even the witness on behalf of the petitioner has not been able to tell as to the contents of the envelope. While on appreciation of evidence, fact finding court has found that the evidence does not disclose that proper efforts have been ever made to serve any letter, notice or show cause notice on the respondent.

14. The practice and procedure adopted have not only

been not proper but had also not been fair and, thus, it appears that before revisional court, it has been tried to urge that departmental enquiry had, in-fact, been contemplated, however, the same could not be proceeded with for the reasons as referred to about non traceability of proper address of the respondent-complainant. It has been adverted to that *ex-parte* enquiry is possible. There had been no effort to publicise notices etc. including termination, as once had been resorted to.

15. Thus, it emerges that no proper efforts or efforts which are contended, are deficient ones and while the courts have considered that reinstatement would ensue in the circumstances and having regard to the circumstances, respondent would not be entitled to backwages, it does not appear to be a case to meddle with the prevailing position under orders passed by courts *hitherto*, in the discretionary powers of this court.

16. Writ petition, therefore, is not entertained and is dismissed.

17. Rule stands discharged.

18. In view of dismissal of writ petition, civil application no. 11625 of 2018 does not survive and same stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/