

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO. 230 OF 2006
IN
WRIT PETITION NO. 583 OF 1997

Mrs. Meera Dandekar ... Appellant.
V/s.
M/s. Indian Institute of Bankers ... Respondent.

Mr. Yogendra Pendse for the Appellant.
Mr. Ashok D. Shetty a/w. Mr. Swapnil P. Kamble for the
Respondent

CORAM : A.S. OKA AND M.S. SONAK, JJ.

DATE OF RESERVING THE JUDGMENT : 23rd August 2018.
DATE OF PRONOUNCING THE JUDGMENT : 14th September 2018.

JUDGMENT: (Per M.S. SONAK, J.)

1] The challenge in this appeal is to the judgment and order dated 31st August 2000 made by the learned Single Judge of this Court allowing Writ Petition No. 583 of 1997 instituted by the respondent. By the impugned judgment and order, the learned Single Judge has set aside Labour Court's award dated 27th September 1996 in Reference (IDA) No. 520 of 1993 directing reinstatement of the appellant alongwith full backwages and continuity of service with effect from 25th April 1989.

2] Mr. Pendse, learned counsel for the appellant, submits that the learned Single Judge has misconstrued the scope and import of Section 2(oo) of the Industrial Disputes Act, 1947 (said Act). He submits that since the respondent - employer was relying upon the exception carved out in Section 2(oo) (c) of the said Act, the burden of establishing that the appellant's termination was indeed on account of '*continued ill-health*' was entirely upon the respondent -employer, which burden the respondent-employer had failed to discharge. Mr. Pendse submits that the respondent -employer neither referred the appellant for examination by any Medical Board nor was any independent material produced before the Labour Court to sustain the ground of '*continued ill - health*'. The order of termination was therefore, in the nature of an *ipsi dixit* and was rightly interfered with by the Labour Court.

3] Mr. Pendse submits that during the period of the appellant's absence, the appellant not only had to her credit requisite leave but further, such leave, was expressly sanctioned to the appellant. He submits that such a circumstance was not

irrelevant as held by the learned Single Judge. He submits that the appellant had in fact produced Medical Certificate dated 23rd February 1989 certifying that she would be fit to resume duties from 1st April 1989. This was followed by a written request backed with Medical Certificates for leave to resume duties in May 1989. The the respondent-employer without taking of this, issued the termination order dated 25th April 1989, which was quite correctly interfered with by the Labour Court.

4] Mr. Pendse submits that the learned Single Judge has misconstrued the decisions of the Hon'ble Supreme Court in case of ***Workmen of the Bangalore Woollen, Cotton and Silm Mills Co. Ltd. Vs. Its Management -1962 (1) LLJ 213*** and ***Anand Bihari and ors. vs. Rajasthan State Road Transport Corporation and anr. - 1991 (1) CLR S.C. 525.*** For all these reasons, Mr. Pendse submits that the impugned judgment and order warrants interference.

5] Mr. Shetty, learned counsel for the respondent, defends the impugned judgment and order by submitting that the same

is quite consistent with the rulings of the Hon'ble Supreme Court in *Workmen of Bangalore Woollen, Cotton and Silk Mills (supra)* and *Anand Bihari (supra)*. He submits that on the basis of the admitted facts, it was evident that the appellant was suffering from continued ill-health and termination on such a ground does not constitute retrenchment under Section 2(oo) of the said Act. He submits that the Labour Court's award was vitiated by surmises and conjectures and the same was quite correctly interfered with by the learned Single Judge.

6] Mr. Shetty, without prejudice to the aforesaid, also submits that the conduct of the appellant in refusing to resume duties, both before termination of her services and even after, when opportunities were granted to her to so resume warrant consideration in this matter. He refers to certain orders made by this Court to point out that despite grant of several opportunities to the appellant to have herself medically examined and then resumed duties, the appellant failed to do so. Mr. Shetty submits that all this is relevant to support the conclusion that the appellant did suffer from continued ill-health and consequently,

the termination of her services could never have been regarded as retrenchment under Section 2(oo) of the said Act.

7] The rival contentions now fall for our determination.

8] The Labour Court in its award dated 27th September 1996 had recorded a finding of fact that the termination of the appellant's services could not be regarded as a termination on the grounds of continued ill-health. The findings of fact recorded by the Labour Court are normally not interfered with by a Court exercising powers of judicial review, unless it is established that the same are based on no evidence or that some relevant and vital evidence has been ignored or that some irrelevant evidence has been taken into account. It is well settled that in such matters, the High Court does not exercise any appellate jurisdiction. Therefore, there is no question of going into reliability or adequacy of evidence. There is also no question of reappraisal of evidence. As long as the findings of fact recorded by the Labour Court are backed by legal evidence on which the findings can be said to be based, there is no good ground

to exercise powers of judicial review.

9] The material on record before the Labour Court establishes that from November 1987, the appellant was diagnosed as suffering from Coccyocodynia and was advised medical treatment which included surgery and physiotherapy. The appellant in fact underwent surgery on 5th January 1988. All this is backed by the Medical Certificates, which were submitted by the appellant along with her leave applications. Based upon such Medical Certificates, the respondent in fact granted the appellant leave from time to time. The record also bears out that the appellant on 14th July 1988 infact resumed duties, but was constrained to apply for further leave on account of severe back pain. Such leave was sanctioned by the respondent themselves for the period between 15th July 1988 to 30th September 1988 on the basis of Medical Certificates produced by the appellant. The appellant once again resumed duties on 1st October 1988, but had to again proceed on leave on medical advise. The appellant once again resumed duties on 5th December 1988, but on this date met with accident in the office, due to which, she suffered a

Vasogagal Attack. The Appellant was rendered unconscious and had to be hospitalised to take specialised treatment from Dr.N.H. Wadia, Neurophysician. Finally, on 23rd February 1989, the appellant produced a Medical Certificate on record certifying that she was cured of Coccyocodynia and that recovery on account of Vasovagal Attack was underway. The Certificate stated that the appellant would be in a position to resume duties by 1st April 1989.

10] The oral as well as documentary evidence on record again bears out that in the first week of April 1989 itself, the appellant both orally as well as in the writing informed the respondent-employer that she was advised little more rest and she would resume duties by 1st May 1989. However, by letter dated 8th April 1989, the respondent - employer issued an ultimatum requiring the appellant to resume duties by 15th April 1989 or face termination. The appellant, upon receipt of such communication, furnished her response on 25th April 1989. However, on the same date, the appellant's services came to be terminated on the ground of "*continued ill-health*".

11] The Labour Court has analysed the material on record in great details and has concluded that such material would not render the termination as one on the ground of “*continued ill-health*”. The Labour Court has noted that the burden of establishing that the termination was indeed on the ground of continued ill-health was squarely upon the respondent-employer. The Labour Court has also noted that the respondent-employer did not call upon or get the appellant medically examined before the satisfaction could be reached that she was suffering from continued ill-health. The Labour Court has also taken cognizance of the Medical Certificate dated 23rd February 1989, which had stated that the appellant was cured of Coccyocodynia and that she would be in a position to resume duties by April 1989. The Labour Court has also noted as one of the circumstances, the fact that the respondent-employer had from time to time granted the appellant leave of absence. The material on record produced by the respondent-employer itself bears out that there was leave to the credit of the appellant, which was availed by the appellant though, on some occasion as leave without pay. Taking into consideration all such material on record, we find it

difficult to hold that the finding of fact recorded by the Labour Court was based upon no evidence or that some relevant evidence was ignored or that some irrelevant evidence was taken into account. The finding of fact recorded by the Labour Court cannot be said to be perverse finding so as to warrant interference in exercise of powers of judicial review.

12] Section 2(oo) of the said Code defines retrenchment, to mean termination by the employer of the services of workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include, *inter alia*, termination of services of a workman on the ground of “*continued ill-health*”.

13] In *Anand Bihari (supra)*, the Hon'ble Supreme Court has held that the expression '*ill health*' used in sub-clause (c) of section 2(oo) has to be construed relatively and in its context. It must have a bearing on the normal discharge of duties. It is not any illness, but that which interferes with the usual orderly functioning of the duties of the post which would be attracted by

the sub-clause. Conversely, even if the illness does not affect the general health or general capacity and is restricted only to a particular limb or organ but affects the efficient working of the work entrusted, it will be covered by the phrase. For it is not the capacity in general but that which is necessary to perform the duty for which the workman is engaged which is relevant and material and should be considered for the purpose. The realistic and not a technical or pedantic meaning has to be placed on the phrase "*continued ill health*". These observations were made in the context of termination of services of Bus Drivers employed with Rajasthan State Road Transport Corporation on account of defective eye sight.

14] In the aforesaid decision, the Hon'ble Supreme Court despite holding that the termination of services of Bus Drivers, who had developed a defective eye sight did not constitute retrenchment under Section 2(oo) of the said Act proceeded to hold that such termination was unjustified, inequitable and discriminatory. Since the employer failed to come up with any realistic and practicable scheme for alternate employment or

payment of compensation to such Bus Drivers, the Hon'ble Supreme Court observed that *the workmen are not denizens of an Animal Farm to be eliminated ruthlessly the moment they become useless to the establishment. They have not only to live for the rest of their life but also to maintain the members of their family and other dependents, and to educate and bring up their children. Their liability in this respect at the advanced age at which they are thus retired stands multiplied. They may no longer be of use to the Corporation for the job for which they were employed, but the need of their patronage to others intensifies with the growth in their family responsibilities.*

15] The Hon'ble Supreme Court ultimately issued direction for offer of alternative jobs to the Drivers or some suitable compensation proportionate to the years of service put in by such Drivers. This later part of the decision in *Anand Bihari (supra)* has not at all been considered by the learned Single Judge in passing the impugned judgment and order.

16] In ***Madurai Mills Co. Ltd. vs. Meenakshi Ammal - (1983) 1 LLJ 1***, the learned Single Judge of the Madras High

Court has held that occasionally, the health of an individual may break down and the doctor may fail to diagnose the cause of the physical the ailment. But while continued ill health is only a state of the physical condition of a person, which need not necessarily be correlated to any organic disease in the system, a mere physical weakness at a particular moment of time would not constitute '*continued ill health*'. If that were to be the law, any passing ailment, which may temporarily render any employee unable to do work, would result in the far-reaching consequence of his discharge from service. In *Madurai Mills Co. Ltd. (supra)* , the learned Single Judge of the Madras High Court has held that a termination of services on account of anaemic condition of an employee cannot be held to be a case of termination on the ground '*continued ill-health*'.

17] In ***Lalit Mohan Puri vs. Pure Drinks (New Delhi) Ltd. - (1992) 2 LLJ 439***, the Division Bench of the Delhi High Court has held that the services of an employee cannot be terminated on the basis of presumption of continued ill-health. In this case, the employer asked the driver of a heavy vehicle, to appear

before an ESI doctor and upon failure of an employee to so appear, the employer terminated his services on the ground of continued ill health. The Division Bench of the Delhi High Court interfered with the award of the Labour Court which had upheld such termination by holding that this was a termination on the basis of presumption of continued ill-health and not proof of continued ill health. The Division Bench held that merely on the basis of some presumption raised under Section 114 of the Evidence Act, 1872, no termination on the ground of continued ill health could be sustained. The employer must have some direct evidence with it to show firstly, that the employee was suffering from ill-health and secondly, that he continued to be ill-health till time of termination of his service. Therefore, enquiry was necessary to prove that the employee had continued to be in ill-health and the termination could not have been effected on the basis of some mere presumption.

18] ***Peirce Leslie & Co. Ltd. vs. Rama Moily (1965) 2 LLJ 41.***), the Mysore High Court has ruled that the industrial adjudicator has to see whether continued ill-health of the

workman had made him unfit to perform his duties. However, it is one thing to say that a person is '*unfit*' to perform his duties and it is quite a different thing to say that he is unable to perform his duties because of his ill-health. For instance, when an employee falls ill and because of ill-health, he is '*unable*' to perform his duties during the period of illness, would not mean that because of the illness, he has also become '*unfit*' to perform his duties. The continued ill-health may or may not render him, in the course of time, unfit to perform the duties. It is quite possible that on his recovery from the illness, the workman may resume his job and may perform his duties as efficiently as he did prior to his illness. Therefore, in order to sustain termination on the ground of continued ill-health, the industrial adjudicator has to record a finding as to whether the continued ill-health had rendered him unfit to perform his duties.

19] In ***Raghavachari vs. Madras Printers and Lithographers Assn. - 1980 Lab IC 116***, the Division Bench of the Madras High Court has held that termination of services of a workman on the ground of Cardiac trouble cannot be said to

be a case of termination on the ground of “*continued ill-health*” and such termination was therefore, held as retrenchment.

20] In ***Marmeswar Das vs. Presiding Officer, Labour Court - 1984 Lab IC 837***, the Division Bench of the Gauhati High Court and ***Harvilas Kushwah vs. Sports Authority of India - 1996) 1 LLJ 450***, the learned Single Judge of the M.P. High Court have held that a termination of service with the bald statement that the termination was on account of medical unfitness, without spelling out any particular ailment or the period for which the workman had been suffering from the same would not be a termination on account of continued ill health.

21] Applying the aforesaid principles to the facts and circumstances of the present case, we are satisfied that the finding of fact recorded by the Labour Court that the termination of the appellant's services was not a termination on the ground of continued ill-health warranted no interference in the exercise of powers of judicial review.

22] With respect therefore, we are unable to agree with the view taken by the learned Single Judge that the length of absence, even though authorised by grant of leave raises a presumption of continued ill-health. In the facts of the present case, there was no scope to draw a presumption of this nature. In any case based merely upon such a presumption, the finding of fact recorded by the Labour Court did not warrant interference in the exercise of powers of judicial review.

23] The Labour Court in its award dated 27th September 1996 after concluding that the termination of the appellant services was neither legal nor proper has proceeded to award the appellant full back wages including continuity of the services with effect from 25th April 1989. For reasons, which we shall indicate hereinafter, we are of the opinion that the appellant deserves to be awarded back wages for the period between 25th April 1989 and 4th May 1999 only. To that extent, therefore, the Labour Court's award dated 27th September 1996 warrants interference.

24] The Labour Court's award dated 27th September 1996 was challenged by the respondent-employer by instituting Writ Petition No. 583 of 1997 before the Learned Single Judge of this Court. In this petition, an order was made on 6th March 1997, which records the statement made on behalf of the respondent-employer that if the appellant produces medical fitness certificate from a Doctor from the panel prepared by the Reserve Bank of India (RBI), the appellant would be re-employed in service. The counsel for the appellant also stated that the appellant was prepared for this. Despite being granted such opportunity, the appellant failed to appear before the Doctors from the Panel prepared by RBI. Therefore, by order dated 14th March 1997, the learned Single Judge issued Rule in the petition and stayed implementation of the Labour Court's award dated 27th September 1996.

25] The appellant challenged the order dated 14th March 1997 by instituting Letters Patent Appeal No. 227 of 1998. This was disposed of by the Division Bench of this Court by order dated 27.8.1998 granting the appellant yet another opportunity to

appear before the Doctor from the RBI Panel. This was again on the basis of the appellant's own statement that she was prepared to appear before such Doctors, if yet another opportunity was granted to her. The Division Bench, in its order dated 27th August 1998, directed the learned Single Judge to reconsider the grant of interim relief after perusing the medical report and hearing the parties.

26] The appellant, despite grant of such second opportunity failed to appear before the Doctors but chose to pursue her application under Section 17B of the said Act for payment of wages last drawn during pendency of Writ Petition No. 583 of 1997. This application was allowed by the learned Single Judge vide order dated 22nd January 1999. The respondent-employer instituted L.P.A. No. 34 of 1999 to question the order dated 22nd January 1999. The Division Bench set aside the order dated 22.1.1999, but granted the appellant yet another opportunity to get herself examined by the Superintendent of J.J. Hospital, Mumbai or any other Doctor nominated by him. The statement of Mr. Rele, learned senior advocate appearing for the

respondent-employer that if the appellant produces a Certificate of J.J. Hospital certifying her fitness, she would be taken back in employment pending disposal of the writ petition was also recorded in the order dated 5th March 1999.

27] In pursuance of directions in the aforesaid order dated 5th March 1999, the appellant did get herself examined by the Medical Board constituted by J.J. Hospital, which is evident from Certificate dated 4th May 1999 issued by the said Medical Board certifying that the appellant was now fit to resume duties. This Certificate is at page 345 of the LPA paper book.

28] The appellant contends that on the basis of Medical Certificate dated 4th May 1999, the appellant did attempt to resume duties, but was not permitted to do so by the respondent - employer. The learned counsel for the respondent - employer, however, vehemently denies this position and points out that there are no pleadings or affidavits to this effect. He points out that if the respondent-employer had indeed refused to permit the appellant to report for duties despite the

Medical Certificate dated 4th May 1999, it is only reasonable to assume that the appellant would have been quick to point out this position to the Court and even secure necessary orders on the basis of statements made by and on behalf of the respondent-employer as recorded in the order dated 5th March 1999. Mr. Shetty submits that in fact this is an instance which establishes that the appellant was never interested in reinstatement or in any case, incapable of discharging duties, if reinstated.

29] Mr. Pendse's contention that the appellant did attempt to resume duties on the basis of Medical Certificate dated 4th May 1999 but was not permitted to do so by the respondent-employer deserves no acceptance for reasons more than one.

(i) Neither in LPA nor in the synopsis to the LPA, which makes reference to events right up to December 2000, there is any reference to the appellant allegedly seeking to resume duties on the basis of Medical Certificate dated 4th May 1999 and the respondent-employer refusing to allow the appellant to do so;

(ii) Taking into consideration the number of proceedings instituted by the appellant from time to time, it is inconceivable that the appellant would not have rushed to this Court complaining, *inter alia*, about breach of the order dated 5th March 1999 made in LPA No. 34 of 1999, if really, the respondent- employer had prevented the appellant from resuming duties, despite being armed with the Medical Certificate dated 4th May 1999;

(iii) Neither any miscellaneous application nor any affidavit was filed in LPA complaining about breach of the order dated 5th March 1999 or that the appellant indeed attempted to resume duties but was prevented from doing so by the respondent – employer.

30] Mr. Pendse also attempted to contend that the appellant had serious objections to appear before the Panel of Doctors maintained by RBI since, according to the appellant such Panel had no legal truck with the employees of the Indian Institute of

Bankers (respondent-employer). This contention, is again, misconceived. The orders dated 6th March 1997 and 27th August 1998 had specifically recorded the appellant's own preparedness to appear before the Doctors from the RBI Panel. In any case, in terms of the order dated 5th March 1999, the appellant ultimately appeared before the Doctors from J.J. Hospital and therefore, the grievances as regards appearance before the Doctors from RBI Panel really did not survive.

31] Since the material on record establishes that the appellant despite the Medical Certificate dated 4th May 1999 failed to resume duties, we do not deem it appropriate to award the appellant any backwages for the period post 4th May 1999. The award of backwages to an employee whose termination is set aside, is on the basis that such employee was willing to work but was prevented by the employer from working inter alia on the grounds of illegal termination of services or such other reasons. In the present case, since it is apparent that at least from 4th May 1999 the respondent – employer had offered employment to the appellant, but it is the appellant who failed to resume

duties, there will be no justification to award the appellant backwages post 4th May 1999. There is also no dispute that even if the appellant were to have been reinstated, she would retire from service in the year 2013 itself, on attaining the age of superannuation. Therefore, at this stage, there is no question of granting any relief of reinstatement to the appellant.

32] For all the aforesaid reasons, we dispose of the Letters Patent Appeal by making the following order:

a] The impugned judgment and order dated 31st August 2000 is set aside;

b] The Labour Court's award dated 27th September 1996 is confirmed to the extent it sets aside the termination of the appellant's services vide letter dated 25th April 1989. Since the appellant has already crossed the age of superannuation in 2013 itself, there is no question of any reinstatement at this stage. However, the award to the extent it grants full backwages, is hereby set aside.

Instead, we hold that the appellant shall be entitled to backwages for the period between 25th April 1989 and 4th May 1999. We grant time of three months from today to pay backwags as aforesaid. In case, the backwages for this period are not paid within three months from today, they shall carry interest at the rate of 6% per annum from the date such payment was due till the date of actual payment.

c] There shall be no order as to costs, in the facts and circumstances of the present case.

(M. S. SONAK, J.)

(A.S.OKA, J.)

Dinesh
Sadanand
Sherla

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by Dinesh
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