

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 169 OF 2019

Smt. Vidya Vijay Kadam  
R/o. At-Po- Aditya Sanskruti,  
A-3/22, Manajinagar, Narhe Road,  
Pune - 411 041.

.... Petitioner

Versus

Executive Officer,  
Shri. Saibaba Sansthan Vishvastha Vyavastha,  
At-Po-Shirdi, Tal-Rahata,  
District - Ahmednagar.

.... Respondent

.....

**Appearances : -**

Mr. R. S. Samant, Advocate for the petitioner.  
Mr. N. R. Bhavar, Advocate for respondent.

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**CORAM : RAVINDRA V. GHUGE, J.**

**DATED : 23<sup>RD</sup> SEPTEMBER, 2019**

**ORAL JUDGMENT : -**

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioner is aggrieved by the Judgment and Award dt. 18.06.2018, delivered by the Labour Court, Ahmednagar, by which Reference (I.D.A.) No. 02/2015, has been rejected.
3. This matter was heard at length on 16.09.2019 and after the submissions of the learned advocates were concluded, the learned

advocate for the petitioner submitted that though the petitioner was terminated for pursuing higher education and had applied for leave, which was not considered, she is still willing to waive her back-wages from 21.06.2013 till September-2019, provided, she is reinstated in service with continuity.

4. The learned counsel for the respondent - Shri. Saibaba Sansthan, Shirdi, had sought time to take instructions in order to gather the response of the Management. Today, the learned advocate for the Management submits that, it is unable to consent to the relief of reinstatement without back-wages. Reliance is placed upon the judgment delivered by this Court in the matter of New India Co-operative Bank Ltd. v. Shankar B. Bangera [2006 III CLR 904].

5. Before I embark upon writing this judgment, I deem it appropriate to record that this case brings up peculiar facts and the issue before this court is as to whether an employer should adopt a pragmatic approach or should take a pedantic view when it comes to an employee pursuing higher education to improve her skills in Nursing Science so as to be of a greater advantage to the Hospital conducted by Shri. Saibaba Sansthan, Shirdi.

6. The undisputed factors in this case, are as under:

- [a] By an appointment order dt. 06.01.1992, the management of Shri. Saibaba Sansthan, Shirdi, appointed the petitioner as a trained Nurse on probation for two years.
- [b] By communication dt. 12.01.1992, the petitioner informed the Management that she has accepted her appointment on probation and will be reporting for duty on 22.01.1992.
- [c] She was granted regularization and permanency in employment on 23.07.1993.
- [d] She had obtained 90 days maternity leave in between 07.08.1997 to 04.11.1997, as per the Maternity Benefit Act.
- [e] She obtained leave to pursue higher education in the college of Bachelor of Homeopathic Medicine and Surgery (B.H.M.S.) and was granted leave for 4 years and 6 months in between 04.11.1998 to 04.05.2003. This leave was without pay considering the duration of absence.

- [f] In between 05.05.2003 to 30.11.2003, for a period of 210 days, she was granted leave without wages to pursue B.H.M.S. Internship, which was mandatory.
- [g] In between 14.03.2004 to 11.06.2004, she was granted 90 days maternity leave.
- [h] Between 05.05.2008 to 03.07.2008, she was granted 15 days earned leave and 45 days' leave without pay, for pursuing higher education in the B.Sc. Nursing Course.
- [i] From 04.05.2009 to 30.06.2009, she was granted leave without pay for 57 days for her examination in B.Sc. nursing course.
- [j] The petitioner then pursued her further education i.e. M.Sc. Nursing. She applied for leave to pursue the said course.
- [k] Since her leave application was not entertained, she moved a representation for reconsidering her application as she desired to complete her M.Sc. Nursing course.

[l] The Management issued her a notice on 04.01.2013, contending that she is absent without leave.

[m] The petitioner replied to the notice vide her communication dt. 22.01.2013, indicating that she is already pursuing her M.Sc. Nursing Course and has spent Rs. 75,000/- for her educational fees though being without any salary for the period of absence and since acquiring education is a noble cause and would train her better to serve the hospital as a nurse, her leave application be considered. She also pointed out that B.Sc. Nursing and M.Sc. Nursing have now become mandatory qualifications at different levels by the Indian Nursing Council for working as trained Nurses.

[n] On 22.02.2013, the Management called upon the petitioner to report for duties within seven days, failing which it would be presumed that she has abandoned the employment. The petitioner replied to the said notice with promptitude on 11.03.2013, and explained the entire facts and circumstances to the Management making an appeal that they should favourably consider her request for leave.

[o] The petitioner again forwarded a communication on 11.03.2013, once again requesting the Management that she has obtained admission for M.Sc. Nursing with a great difficulty and a personal struggle and she has completed one year and would very soon complete her second year so as to be qualified as a trained Nurse with M.Sc. nursing qualification.

[p] On 20.06.2013, the Management issued a letter of termination to the petitioner with effect from 21.06.2013, admittedly without issuing her a charge-sheet, without conducting any enquiry and on the ground that she has remained unauthorizedly absent.

7. The learned advocate for the Management has strenuously opposed this petition and submits that, though the Management did not conduct an enquiry as regards the charges levelled on the petitioner that she was unauthorizedly absent with effect from 06.11.2012, she did not have her leave sanctioned and she has therefore committed a misconduct. No sympathy can be shown towards her. Her termination is legal, proper and justifiable. He reiterates that, though the M.Sc. Nursing course with the Sinhgad

College of Nursing, Pune, commenced on 29.09.2012, the petitioner commenced her absence from 06.11.2012.

8. This case brings out, as recorded above, peculiar circumstances. Shri. Saibaba Sansthan operates a multispecialty hospital. It is conceded by the parties that, it has become a medical centre at Shirdi with advanced treatment facilities.

9. In this backdrop, when called upon to submit as to whether a nurse with such improved/enhanced qualification would be an advantage to such a hospital or not, the learned advocate for the Management submits that there cannot be any debate that a highly trained nurse would always be an advantage to any hospital. However, he is instructed to contend that the petitioner should not have remained absent and should have joined the course only if the leave was sanctioned.

10. The learned advocate has also relied upon the judgment delivered by this Court in the matter of New India Co-operative Bank (supra), wherein this Court has considered the view of the Hon'ble Apex Court in the matter of V.C., Banaras Hindu University v. Shrikant (*Manupatra SC-2006-386*) and Syndicate Bank v. General Secretary, Syndicate Bank Staff Association, [2000 II CLR 472], that,

opportunity of hearing would not necessarily mean that a full fledged enquiry has to be conducted. It would mean that, a person can be called upon to explain the reasons for remaining unauthorizedly absent.

11. In the above backdrop, I find it appropriate to record that in this case, the petitioner had moved an application for seeking leave as she intended to join the M.Sc. Nursing Course for enhancing her qualifications and her training skills as a Nurse. The Management could have considered this case pragmatically and could have granted leave as the petitioner had earlier improved her qualifications for which she was granted leave without pay. She had pursued her education in B.H.M.S., B.Sc. Nursing and then M.Sc. Nursing. It is unfortunate for a student to be a drop out. It would be very difficult for an employee who is already married, has children, has to take care of her family and at the same time is performing her duties as a Nurse to support the family. Her desire and drive to acquire higher education and enhance her qualification, is a matter of appreciation rather than taking a pedantic approach that she did not take prior permission of the Management before seeking admission.

12. It is in the peculiar facts of this case as recorded above, that this court will have to decide as to whether the Management can be

said to be justified in declining permission to such an employee to pursue higher studies, when such a leave could have been granted without pay. Is it not a case wherein this Management has, by its conduct, deprived itself of a highly qualified nurse, whose devotion and dedication is evident from her desire to enhance her qualifications despite all odds, as recorded above.

13. The learned advocate for the petitioner submits, on instructions, that the petitioner is a member of a lower middle class family. Her struggle to make two ends meet and become an earning source for the family, was the reason that she had pursued her higher education and despite these facts, she is willing to waive the entire back-wages from November-2012 till September-2019, which is almost a period of seven years. She makes a statement that she would utilize her higher studies and her enhanced qualifications for the benefit of the hospital operated by Shri. Saibaba Sansthan, Shirdi and would work with devotion. She only prays for notional continuity of service since she has been working from 22.01.1992 and her entire service over a period of 27 years would be wiped out, if she would not be granted continuity in service.

14. In the above backdrop, I have scrutinized the impugned award of the Labour Court dt. 18.06.2018, by which Reference

(I.D.A.) No. 02/2015, has been answered in the negative. The Management had failed to conduct an enquiry on the ground that the petitioner had abandoned service.

15. The Management had dispensed with the service of the petitioner on the ground that she had abandoned employment. None of her explanations were considered, inasmuch, as her request to grant leave was also not considered. She raised an industrial dispute and approached the Labour Court alleging unlawful termination. As the Management had reserved a right to conduct an enquiry before the Labour Court, the parties were permitted to lead evidence. Surprisingly, neither a charge-sheet was drafted so as to be placed on record before the Labour Court, nor did the Management lead evidence first. It is settled law that, when an enquiry is to be conducted before the Labour Court, the Management has to begin with its evidence. I also find from the impugned judgment that, the Labour Court failed to consider that, peculiar facts are found in this case and the Labour Court could not have mechanically proceeded to reject the Reference by concluding that the absence has been admitted by the employee. Time and again, the Labour Court has repeated in the Judgment that the absence has been admitted by the employee. The Labour Court failed to note that, unauthorized

absence has to be proved by the Management and at the same time, it has to be noted as to whether there were compelling circumstances which constrained the employee to remain absent.

16. The law on abandonment of service is now well settled and especially in the case of [Novartis India Ltd. Vs. State of West Bengal and Ors. [AIR 2008 SC (Supp) 836], wherein it has been held that a permanent employee cannot be presumed to have abandoned employment. The claim of the Management that an employee has abandoned service is in fact a charge of unauthorized absenteeism and unless the duration of being conspicuously away from employment is too large, there can be no presumption that a permanent employee has abandoned employment.

17. The issue as to whether the petitioner abandoned the employment is also circumspect in view of the fact that she had repeatedly tendered her leave applications informing the Management that she has acquired admission for the M.Sc. Nursing Course in the Sinhgad College of Nursing, Pune, with great difficulty and she had collected money to pay Rs. 75,000/- per year for a two years course. When she was informed by the Management in January-2013, that she was not reporting for duties, she has specifically replied on 22.01.2013, that she was already half way

through in her M.Sc. Nursing Course. She could not abandon such course, admission to which she had acquired with great difficulty. The language used in her reply clearly indicates the heartfelt appeal that she made to the Management to allow her to complete her course.

18. The Management had reserved its right to prove the charge of absenteeism before the Labour Court, in their written statement. This is perfectly in tune with the judgment delivered by the learned Five Judges Bench of the Apex Court in the matter of Karnataka State Road Transport Corpn., v. Smt. Lakshmiddevamma and another [AIR 2001 SC 2090]. It is, however, conspicuous that the Management had not even issued a charge-sheet to the petitioner. Reserving a right to conduct an enquiry in the Labour Court without even tendering a charge-sheet, is somewhat unusual to labour jurisprudence.

19. In New India Co-operative Bank (supra), it was a case of an employee who had joined the cooperative Bank on 01.10.1985 and was absent from 07.10.1992 to 24.10.1992. He was called upon to explain as to why he was absent. Instead of doing so, he tendered an application for leave and disappeared until he was issued with a final

notice dt. 26.06.1993, informing him that the Management would presume that he had no interest in employment, that he did not desire to resume duties and had voluntarily abandoned employment. Despite service of such notice, the employee was totally silent and offered no response. On 14.07.1993, the Bank informed him that, he is deemed to have abandoned employment and his name has been struck off from the muster roll. It is, thereafter, that he approached the appropriate authorities under the Bombay Industrial Relations Act and claimed reinstatement with continuity and back-wages. This court concluded in the light of these facts that the explanation tendered by the employee before the Labour Court after his removal from employment was a false explanation and not worthy of credence. It was in this backdrop that this Court interfered with the order of the trial Court and declined reinstatement to such an employee.

20. As recorded in the foregoing paragraphs, the facts as regards the case in hand are completely different and are self-explanatory. Neither did the Management consider the said factors in proper perspective, nor did the Labour Court note the said factors. I have no doubt that if a factor like an employee wholeheartedly and dedicatedly pursuing higher education, after repeatedly requesting

the management for leave, were missing, this would have been an open and shut case. I find that, the facts in this case are such that the Judicial Conscience of a court would not be convinced that the employee deserves the penalty of termination from service which amounts to civil death. This is one case in which I find that the Judicial Conscience of the court reminds the court of its duty to do justice. My task has been made easier by the petitioner who has fairly made a statement through her counsel that she would give up the entire back-wages from November-2012 to September-2019 and is willing to report for duties from October-2019. The only prayer made is that she be granted notional continuity in the employment, lest her entire past service from 22.01.1992 would be wiped out.

21. In the above backdrop, I am of the view that the respondent-Management clearly appears to be stonehearted and not alive to the above fact situation wherein their own employee, coming from a humble background has pursued higher education and has acquired the possible highest qualification of M.Sc. Nursing. These were enough circumstances for such a management to have been compassionate and pragmatic.

22. In view of the above, this petition is partly allowed. The

impugned Award dt. 18.06.2018, stands quashed and set aside and Reference (I.D.A.) No. 02/2015, stands answered in the affirmative, with the following directions: -

- [a] The petitioner – second party workman shall be reinstated in employment from 03.10.2019.
- [b] She shall not be entitled for any wages for the period from 06.11.2012 to 30.09.2019.
- [c] For the above period, she would be granted continuity in service so as to connect her employment from 22.01.1992 till this date.
- [d] She would not be entitled for increments for the period November-2012 to September-2019.
- [e] As the petitioner has acquired sufficient qualifications, she shall not henceforth join any further course for enhancing her educational qualification without seeking prior permission of the Management and without being granted such permission. If she violates this condition, the Management would be at liberty to presume that she is not interested in the employment.
- [f] The petitioner makes a statement in the court to show her *bona fides* that, she would dedicatedly work in the Hospital of Shri. Saibaba Sansthan at Shirdi, until her age of superannuation, she being about 48 years of age today and has about 10 to 12 years service left.

This would be a sort of a bond with the respondent-management and if the petitioner violates this condition, the Management would be at liberty to presume that her continuity in service is given up. This would deprive her of gratuity and retiral benefits.

[g] Though the petitioner would not be entitled for any increments on the basis of notional continuity of service, she would be entitled to such a pay scale which has been made applicable to similarly situated nurses with similar service age.

23. Rule is made absolute in the above terms.

**[ RAVINDRA V. GHUGE ]**  
**JUDGE**

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