

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 811 OF 2010

Smt. Shobha Desai,
L-B-10, Flat, Housing Board
Colony, Porvorim,
Bardez-Goa

... Petitioner

V e r s u s

1. The Dean
Goa Medical College,
Panaji-Goa.
2. State of Goa,
through its chief Secretary,
having office at
Secretariat, Porvorim,
Bardez, Goa.
3. The Presiding Officer
The Industrial cum Labour
Court, Panaji, Goa.

... Respondents

Mr. P. Sawant, Advocate for the Petitioner.

Mr. Arun Talaulikar, Additional Government Advocate for the Respondents.

<u>Coram</u>	:	<u>C. V. Bhadang, J.</u>
<u>Reserved for Judgment on</u>	:	<u>25th September, 2019</u>
<u>Judgment pronounced on</u>	:	<u>17th October, 2019</u>

JUDGMENT

1. The challenge in this petition under Article 227 of the Constitution of India is to the judgment and award dated 18.08.2009 passed by the Industrial Tribunal cum Labour

Court at Panaji (Tribunal, for short) in Ref. No. IT/48/1996. The challenge under Article 226 of the Constitution of India has since been deleted on 10.01.2011. By the impugned award, the Tribunal has held that the termination of the petitioner (party no.1) w.e.f. 06.01.1989 is legal and justified and has therefore refused to grant any relief to the petitioner.

2. The brief facts necessary for the disposal of the petition may be stated thus :

That the petitioner was appointed on temporary basis to the post of Auxiliary Nurse Midwife (ANM) in the Goa Medical College by an order dated 19.03.1979. According to the petitioner, sometime in the year 1987, she suffered an attack of "spinal canal sterosis" and was forced to proceed on leave. She was accordingly sanctioned leave till 22.04.1988. However, the subsequent application for leave was not considered and by an order dated 06.01.1989, her services came to be terminated by taking recourse to Rule 5(1) of Central Civil Services (Temporary Services) Rules, 1965 (Rules of 1965, for short).

3. Feeling aggrieved, the petitioner raised an industrial dispute under the provisions of the Industrial Dispute Act,

1947 (Central Act 14 of 1947), which was referred for adjudication to the Tribunal.

4. The petitioner filed a statement of claim and contended that there was no disciplinary proceedings initiated before imposing a major penalty of termination from service. It was contended that the respondent no.1 (Party no.2) has resorted to unfair labour practice and that the termination was not legal nor justified. The petitioner sought reinstatement in service with full back wages and consequential benefits.

5. The respondents contended that the petitioner was appointed as Auxiliary Nurse Midwife, purely on temporary basis. She was irregular in attendance and had failed to report to duty on expiry of the leave on 23.04.1988. She failed to report for duties inspite of being called upon to do so by a telegram dated 05.05.1988. In short, it was contended that the petitioner had unauthorisedly remained absent and had failed to comply with the direction to resume duty.

6. It was pointed out that by an order dated 01.02.1988, the petitioner was transferred from Goa Medical College to Rural Health Centre (RHC) Mandur. It was contended that the unauthorised absence of the petitioner was only to avoid the

order of transfer. It was contended that the respondent no.1 was within his authority and was justified in terminating the services of the petitioner under Rule 5(1) of the Rules of 1965.

7. Before the tribunal, the petitioner examined herself, while the respondents examined Smt. Cecilia Joy Pereira. The learned Tribunal found that although the order of termination is innocuous in nature and does not “apparently cast a stigma on the petitioner”, however, the evidence of Smt. Cecilia Pereira shows that the services of the petitioner were terminated on account of misconduct i.e. for continuous unauthorised absence. The Tribunal found that the order was punitive in nature and not one of termination simplicitor. The Tribunal thereafter went on to consider whether the services of the petitioner, could have been terminated without holding an enquiry, by taking recourse to Rule 5(1) of the Rules of 1965. The Tribunal has found that the absence of the petitioner from 23.04.1988 till the date of her termination i.e. 06.01.1989 was unauthorised. The Tribunal has ultimately found that the petitioner who was working as a Auxiliary Nurse Midwife had not complied with her order of transfer and had remained unauthorisedly absent for a long period which is a serious act of misconduct which exhibits lack of interest and devotion to duty. It is also found that such conduct is not conducive to

office discipline and, therefore, the Tribunal has held that the termination of the petitioner was legal and justified. Feeling aggrieved, this petition is filed.

8. I have heard Mr. Sawant, the learned Counsel for the petitioner and Mr. Talaulikar, the learned Additional Government Advocate for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment passed by the learned Tribunal.

9. The learned Counsel for the petitioner has placed reliance on Chapter 4 of Swamy's Complete Manual on Establishment and Administration For Central Government Offices (Swamy's Manual, for short), in order to submit that the procedure as laid down in the said chapter has not been followed. It is submitted that even if a Government servant remains unauthorisedly absent from duty, he ought to be proceeded against under the relevant disciplinary Rules. The learned Counsel pointed out that in this case, the termination of service is without holding any enquiry. It is submitted that even a temporary Government servant is entitled to protection against dismissal or termination, without holding an enquiry, particularly when such termination is on account of a specific

misconduct. It is submitted that the termination in this case although claimed to be innocuous as per Rule 5 of the Rules of 1965, the same is punitive in nature for alleged unauthorised absence of the petitioner. He, therefore, submitted that the termination effected without holding an enquiry is bad and non est in the eyes of law. The learned Counsel has extensively taken me through the oral evidence as well as the various applications filed for seeking leave in order to submit that the petitioner on account of her illness namely 'spinal canal stenosis' was unable to attend to her duties and to resume on expiry of her sanctioned leave. The learned Counsel was at pains to point out that the protection granted by Article 311(2) of the Constitution of India, is not limited to only employees holding a permanent or a quasi permanent posts and the protection extends even to temporary employees. On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of **Nar Singh Pal vs. Union of India & Ors. (2000) 3 SCC 588** and **Shri Bhagwan Lal Arya vs. Commissioner of Police, Delhi & Ors. (2004) 4 SCC 560**, in order to submit that the termination in this case ought to be held to be illegal and unjust. The learned Counsel submitted that the petitioner has already attained the age of superannuation and therefore the relief of reinstatement is not competent. He, therefore, submits that the petitioner be

granted appropriate compensation in lieu of reinstatement along with full back wages and all the benefits including the retiral benefits.

10. Mr. Talaulikar, the learned Additional Government Advocate has supported the impugned judgment. It is submitted that the learned Tribunal after considering the oral and documentary evidence on record, has rightly held that the petitioner had unauthorisedly remained absent for a long period which is a serious act of misconduct, exhibiting lack of interest and devotion to duty. It is submitted that the respondents were therefore justified in terminating the services of the petitioner. The learned Additional Government Advocate has placed reliance on the decision of the Supreme Court in the case of **Champaklal Chimanlal Shah vs. Union of India AIR 1964 SC 1854** and **Parshotam Lal Dhingra vs. Union of India, AIR 1958 SC 36.**

11. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. The Tribunal has come to the conclusion that the petitioner has failed to prove that her termination is by way of an unfair labour practice as specified in the Vth Schedule of the Industrial Disputes Act. The

Tribunal, in my mind, has rightly found that the petitioner has not adduced any such evidence and, therefore, the said finding which was otherwise not specifically assailed, does not need any interference.

12. As noticed earlier, the Tribunal has found that although the order of termination is innocuous, and apparently does not cast any stigma, however, on the basis of the evidence of Smt. Cecilia Joy Pereira, it does appear that the petitioner was terminated for misconduct i.e. for continuous unauthorised absence and, therefore, it cannot be said to be a termination simplicitor. The Tribunal has noticed that the termination is effected without any enquiry. The Tribunal has also found that the termination being on account of a specific misconduct, it was the duty of the respondents to hold a regular departmental enquiry. The Tribunal has placed reliance on the decision of the Supreme Court in the case of **Nar Singh Pal** (supra) to hold that once the employee attains the 'temporary' status, he becomes entitled to certain benefits, including the constitutional protection envisaged by Article 311 (2) of the Constitution of India and his services cannot be terminated for misconduct without holding an enquiry or complying with the principles of natural justice. The Tribunal has also found that the petitioner was terminated after over ten years of service

by taking recourse to Rule 5(1) of the Rules of 1965 which are only applicable in the case of termination simplicitor and not to a "punitive order of termination". The Tribunal has thus held that consequently the respondent was not justified in terminating the services of the petitioner by invoking the provisions of Rule 5(1) of the Rules of 1965. To this extent, the findings recorded by the Tribunal are all in favour of the petitioner. However, the Tribunal has thereafter went upon considering the evidence led in order to find whether the misconduct is sufficiently proved on record so as to justify the termination. For that purpose, the Tribunal has placed reliance on the illustrated decision of the Supreme Court in the case of **The Workmen of M/s. Firestone Tyre & Rubber Co. of India Pvt. Ltd. vs. The Management (1973) 1 SCC 813.**

13. Thus, the only question is whether after holding that the termination was not a termination simplicitor and was on account of a specific misconduct of continued unauthorised absence and further having held that the termination could not have been effected by taking recourse to the provisions of Rule 5(1) of the Rules of 1965, whether the Tribunal could have refused the relief of reinstatement and back wages after holding the termination as legal and justified.

14. In the case of **Fire Stone Rubber Company** (supra), the Hon'ble Supreme Court has held thus :

“Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and employee to, adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action; and it is open to the employee to adduce evidence contra. The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the, merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

The Tribunal gets jurisdiction. to consider the evidence placed before-it for the first time in justifications of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

It has never been recognised that the Tribunal should straight away, without anything more, direct

reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his, action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee, and to enable the Tribunal itself to be satisfied about the alleged misconduct, once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to, suggest victimisation.” (Emphasis supplied)

The aforesaid principles have been reiterated by the Supreme Court in the case of **United Bank of India vs. Tamil Nadu Banks Deposit Collectors Union & anr., AIR 2008 SC 642.**

15. It can thus be seen that a case where no enquiry is held is at par with a case of a defective enquiry and the Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken if

no enquiry has been held or after the enquiry conducted by an employer is found to be defective. The Supreme Court has further held that it has never been recognised that the Tribunal should straight away without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or enquiry conducted/held was found to be defective.

16. It is therefore necessary to examine the evidence led by the parties. It has come on record that the petitioner had remained absent for a period of ten months w.e.f. 08.04.1988. In this regard, we have the evidence of MW1 Smt. Cecilia Pereira along with leave applications (exhibit 8 colly) and leave memo at exhibit E-9. The Tribunal has extensively considered this evidence in para 20 of the judgment, in respect of which there is no serious contest. It appears that the petitioner was granted commuted leave w.e.f. 05.02.1988 to 11.02.1988 which was followed by earned leave for 41 days w.e.f. 12.02.1988 till 23.03.1988 and a further period of 15 days as commuted leave from 24.03.1988 to 7.04.1988 on the ground of sickness. Even after this, the petitioner failed to resume duty and applied for extension of her commuted leave till 20.04.1988 and two days of earned leave on 21.04.1988 and 22.04.1988. A further extension by way of earned leave was

sought from 23.04.1988 to 31.05.1988. By a telegram dated 05.05.1988 (exhibit E-3), the petitioner was informed that the leave is not sanctioned and asking her to report for duty. In spite of the same, the petitioner did not report for duty and applied for further commuted leave from 01.06.1988 to 31.07.1988, 01.08.1988 to 19.09.1988 and 20.09.1988 to 29.10.1988. It has come in the evidence of MW1 Smt Cecilia that except the leave from 05.02.1988 to 07.04.1988, the leave for subsequent period from 08.04.1988 to 29.10.1988 was not sanctioned. It is a matter of record that prior thereto the petitioner was served with a transfer order dated 01.02.1988 under which she was transferred from Panaji Hospital to Rural Health Centre, Mandur. It can further be seen that the earned leave from 23.04.1988 to 31.05.1988 was sought on the ground of the petitioner taking medical treatment at Bhatia Hospital at Bombay which application was not supported by a medical certificate and thus the Tribunal has found and, to my mind rightly so, that there is no material that the petitioner was admitted or had taken any treatment at Bhatia Hospital during the period from 23.04.1988 to 31.05.1988. Quite to the contrary, the petitioner claimed that during this period, she had taken treatment of a homeopathic Doctor by name Kashinath Sardessai. She has not produced any medical certificate from the said Doctor. The Tribunal has

noted the decision of the Supreme Court in the case of **Viveka Nand Sethe vs. Chairman J & K Bank Ltd., (2005) 5 SCC 337** and **Delhi Transport Corporation vs Sardar Singh, (2004) 7 SCC 574** in holding that mere making of an application for leave from work does not in any way assist the concerned employee and there is a requirement for obtaining the leave in advance. Even so far as the treatment taken from Dr. Sardesai is concerned, the petitioner had failed to examine the concerned Doctor or to show that the concerned Doctor was competent to treat the medical condition of the petitioner which is stated to be 'Spinal Canal Sterosis'. In this regard, the following observations of this Court in the case of **Vernon Lobo vs. Himalaya Drug Company & anr. (Writ Petition No.285/1997)** are to the point. In this case it was held that *"As regards the medical certificate, the fact whether the person who issues such certificate is really one from the medical profession or not, whether such doctor had occasion to have medical check up of the workman at the relevant time or not, whether the doctor who might have given the opinion regarding particular sickness in such certificate really has an opportunity to check up the person in respect of whom the medical certificate is stated to be issued, whether the concerned doctor had taken proper care to undertake*

necessary medical tests to arrive at a correct diagnosis which is stated to be disclosed in such certificate...."

17. On behalf of the petitioner, reliance is placed on the following para of Swamy's Manual :

"(2) When a temporary Government servant applies for leave beyond the prescribed limit of extraordinary leave and the leave sanctioning authority is not satisfied with the genuineness of the grounds on which further leave has been asked for, nor does it consider the grounds as exceptional, the leave cannot be granted. In such a case, the Government servant should be asked to rejoin duty within a specified date failing which he would render himself liable for disciplinary action. Disobedience of orders to rejoin duty within the specified period would afford good and sufficient reasons for initiating disciplinary action under CCS (CCA) Rules, 1965. If he rejoins duty by the stipulated date, he may be taken back to service and the period of absence not covered by leave be treated as overstayal of leave and dealt with in accordance with the orders regarding regularisation of overstayal of leave.

...

(5) A Government servant who remains absent unauthorisedly without proper permission should be proceeded against immediately and this should not be

put off till the absence exceeds the limit prescribed in Rule 32(2)(a) of the CCS (Leave) Rules, 1972. However, the disciplinary authority should consider the ground adduced by the Government servant for his unauthorised absence before initiating disciplinary proceedings. If the disciplinary authority is satisfied that the ground adduced for unauthorised absence are justified, the leave of the kind applied for and due and admissible may be granted to him."

18. It is difficult to see as to how the aforesaid provisions can come to the aid of the petitioner. All that Rule (viii)(2) provides is that where a temporary Government servant applies for leave beyond the prescribed limit of extraordinary leave and the leave sanctioning authority is not satisfied with the genuineness of the grounds on which further leave has been asked for, nor does it consider the grounds as exceptional, the leave cannot be granted and, in such a case, the Government servant should be asked to rejoin duty within a specified date failing which he would render himself liable for disciplinary action. It further provides that disobedience of orders to rejoin duty within the specified period would afford good and sufficient reasons for initiating disciplinary action under the CCS (CCA) Rules, 1965. Rule (viii)(5) also points out that the government servant who remains absent unauthorisedly without proper permission, shall be proceeded

against immediately. The contention based on the aforesaid provision appears to be that it was incumbent upon the respondents to hold a disciplinary enquiry. However, as noticed earlier, the Tribunal in a case where no departmental enquiry has been held or where the enquiry held is found to be defective, can for the first time consider evidence led to find out whether the termination can be sustained, which has accordingly been done in this case.

19. The reliance on the decision in the case of **Bhagwan Lal Arya** (supra), to my mind, is misplaced. In that case, a police constable, whose services were governed by Delhi Police (Punishment & Appeal) Rules 1980, was removed from services on account of absence of more than two months on medical grounds without sanction of leave. It can thus be seen that the case turned on its own facts where the competent authority had sanctioned leave without pay for the period of illness of the said police constable as no other leave was due to him. Subsequently, a chargesheet came to be issued for his unauthorised absence for the same period. The Supreme Court found that the punishment of removal from service was not permissible to be imposed as per the Service Rules and was highly excessive and disproportionate.

20. In the case of **Nar Sigh Pal** (supra), the services of a casual labourer who had applied temporary status was prosecuted for the offence punishable under Sections 324, 427 and 504 of IPC for assaulting the gateman. During the pendency of the criminal trial, the services were terminated on the basis of the misconduct of the petitioner having committed the said assault. The Supreme Court found that the order of termination was not a simple order of retrenchment but was punitive in nature amounting to dismissal. In that case, the appellant was granted a clean acquittal from the prosecution. It was in these circumstances held that the order of dismissal could not be justified on the ground of the appellant's involvement in the criminal case.

21. In the present case, the Tribunal on the basis of the evidence led has found that the petitioner had remained unauthorisedly absent for a long period which was a serious act of misconduct introducing lack of interest and devotion to duty. Thus, the finding by the learned Tribunal that the termination of the petitioner is legal and justified, does not suffer from any infirmity so as to require interference in the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

22. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

arp/*