

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3193 OF 2018

M/s. Ashwini General Hospital &
Intensive Care Centre,
Arunoday Apartments, Navghr,
“X” Road, Goddev Junction,
Bhayander (East)-401 105.

... Petitioner

Versus

Veronica Johnson Pereira,
Mulgaon (Kanodiwadi),
House No.711, Vasai (West),
Tal. Vasai, Dist. Palghar.

...Respondent.

Mr. Mahesh Shukla, a/w. Mr. Niraj Prajapati for Petitioner.

Mr. Ramesh Rammurthy, a/w. Mr. Saikumar Rammurthy, a/w. Kavita Ms.
Anchan, a/w. Ms. Seema Sorte a/w. Mr. Karthik Pillai for Respondent.

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 30 AUGUST 2023.

PRONOUNCED ON : 13 SEPTEMBER 2023.

JUDGMENT:

1. This petition is filed by Petitioner–Ashwini General Hospital

and Intensive Care Center challenging the award dated 06 November 2017 passed by the Presiding Officer, Labour Court, Thane by which the Labour Court has directed reinstatement of Respondent in service with full backwages and continuity of service.

2. Petitioner is a general hospital owned by Dr. Manoj Mrinal Mujumdar. It appears that Ashwini Hospital was earlier operated by Dr. Tiwari. Respondent claims to have been appointed in the hospital by Dr. Tiwari on 12 November 1991. Dr. Manoj Mujumdar purchased the premises and started operating the hospital since 1993. This is how Respondent came in employment of Petitioner hospital. There is some degree of contest amongst the parties about the exact date of appointment of Respondents. As against Respondent's assertion that she joined service as Nurse since 12 November 1991, Petitioner claims that she joined in the year 1995.

3. Petitioner claims that Respondent resigned from employment in December 2005 and collected all her dues. It is Petitioner's case that Dr. Manoj Mujumdar has quit his profession and executed agreement dated 11 October 2010 with Dr. Rajiv Agarwal and Dr. Rakhi Agarwal who took over the entire operations of the hospital including the responsibility in respect of all the staff employed in the hospital. Petitioner claims that from the date of execution of the said agreement, he migrated United States of America and had no connection with the hospital in any manner.

4. Respondent raised industrial dispute claiming that her services were terminated by Dr. Manoj Mujumdar on 01 March 2013. The dispute was referred to Labour Court, Thane and was registered as Reference (IDA) No.56 of 2014. Respondent filed a Statement of Claim stating that she was in employment since 12 November 1991 and that she was terminated by Dr. Manoj Mujumdar on 01 March 2013. Dr. Manoj Mujumdar appeared in the reference and filed his written statement on behalf of Petitioner hospital stating that Respondent was employed in the year 1995 and not from 12 November 1991 since the hospital itself started in the year 1993. He further pleaded that Respondent resigned from employment in the month of December 2005 and was paid all consequential dues. That therefore there was no question of terminating her services on 01 March 2013.

5. The Labour Court, Thane passed Award dated 06 November 2017 directing reinstatement of Respondent in service with full backwages and continuity of service w.e.f. 1 March 2013. Petitioner has challenged present petition challenging the Award dated 06 November 2007.

6. Mr. Shukla, the learned counsel appearing for Petitioner would submit that since Respondent had already resigned from service in December 2005, there was no question of her termination on 01 March 2013. That Dr. Manoj Mujumdar was not in India on 01 March 2013. That identity card produced by Petitioner pertaining to her details would

indicate that she was in employment of Dr. Rajiv Agarwal and Dr. Rakhi Agarwal. That discharge card of Ashwini Hospital dated 20 August 1992 relied upon by Respondent is signed by Bhakti Tiwari, thereby belying Respondent's contention that she was employed by Dr. Manoj Mujumdar since 12 November 1992. Since the hospital was bought by Dr. Manoj Mujumdar in the year 1992, there was no possibility of he employing Respondent in November 1992.

7. Mr. Shukla would further contend that in accordance with the Agreement, the entire responsibility in respect of hospital's employees was taken over by Dr. Rajiv Agarwal and Dr. Rakhi Agarwal and therefore Dr. Manoj Mujumdar has no connection with the alleged termination of the year 2013. He would take me through evidence on record containing an admission that Respondent's P.F. account was closed in support of his contention that Respondent had resigned from service of Dr. Manoj Mujumdar in December 2005. That no evidence was produced by her to show her employment till the year 2013. On the issue of backwages, he would contend that the Respondent admitted in her evidence that she took care of expenditure including education of her daughter, which would indicate gainful employment. He would rely upon judgment of the Apex Court in *Kendriy Vidhlaya Sangathan Vs. S. C. Sharma* 2005 (2) SCC 368 in support of his contention that the burden of proof in respect of not being in gainful employment lies on the Respondent. He would pray for setting aside the impugned Award.

8. *Per contra*, Mr. Rammurthy the learned counsel appearing for Respondent would oppose the petition and support the impugned Award. He would submit that defence of Petitioner about voluntary resignation by Respondent in December 2005 is total fallacious. He would rely upon Clause-17 of the Conducting Agreement dated 11 October 2010 under which it was agreed to continue service of two employees, including Respondent, indicating that Respondent was in service in the hospital when the agreement was executed. That the Labour Court has rightly rejected the defence of resignation in December 2005. That Respondent was not in gainful employment after her termination on 01 March 2013 and the Labour Court rightly awarded full backwages. He would pray for dismissal of the petition.

9. Rival contentions of the parties now fall for my consideration.

10. Respondent claimed before the Labour Court that she was terminated from service of Dr. Manoj Mujumdar on 01 March 2013. To demolish the said claim, Dr. Manoj Mujumdar took a defence that Respondent had voluntarily resigned from service in December 2005 and that therefore there was no question of her termination in March 2013. This defence of Petitioner is belied by Clause-17 of the Agreement dated 11 October 2010 which reads thus -

“17. It is mutually agreed by and between the Parties hereinto that, two of the staff members Miss Sherly, and Miss Veronica will continue in their status and benefits.”

11. Thus, Petitioner-Dr. Manoj Mujumdar agreed in the Agreement executed on 11 October 2010 that Respondent would be continued in the hospital alongwith her status and benefits. Use of the word 'continue' in the agreement would indicate that Respondent remained in service of Dr. Manoj Mujumdar as on the date of execution of agreement dated 11 October 2010. This would show that Petitioner took a false stand before the Labour Court that Respondent had left his service in December 2005.

12. Respondent has placed on record identity card for the year 2011 issued by Ashwini General Hospital which would indicate her continuation in service after execution of agreement dated 11 October 2010. She has also produced before the Labour Court e-mail dated 08 March 2013 addressed to Dr. Manoj Mujumdar after cessation of her service stating that she was in service for 25 long years and requesting for her gratuity. Based on evidence produced before it, the Labour Court has upheld Respondent's contention that she continue to work till 01 March 2013 when she orally terminated.

13. Another defence taken by Petitioner-Dr. Manoj Mujumdar is that he had left the country after execution of agreement and was not present in India on 1 March 2013 when Respondent was allegedly terminated. No evidence is placed on record by him to show that he was out of the country on 1 March 2013. On the contrary, Respondent stated in her evidence that Dr. Majumdar used to visit India often. Also in view

of totally false statement made on oath by him that Respondent had resigned in December 2005, his theory of non-presence in India on 01 March 2013 is unbelievable.

14. Also Dr. Manoj Mujumdar had merely given the hospital for being conducted for a period of 05 years to Dr. Rajiv Agarwal and Dr. Rakhi Agarwal. After expiry of the tenure of the agreement, Dr. Manoj Mujumdar was to take back management of the hospital. He was on outstation assignment and wanted to cater to the needs of patients by appointing doctors to conduct the hospital. In this connection following recitals to the Agreement would be relevant-

“AND WHEREAS the Party of First Part unable to use the said premises known as “Ashwini General Hospital” though it has name and fame since the Party of First Part has outstation assignment hence has appointed the fit and proper person, his father as a constituted Attorney to do various acts, deeds, things and matters vide a Power of Attorney Dt. 17/06/2008 and in his absence he wish to continue and cater the needs of Patients at large, some fit and Proper Doctors to be appointed to continue the Hospital activities, and in view of the same the Party of Second Part has shown their willingness to continue and carry on the Hospital activities in the said premises and considering the good relations between Party of First Part and Party of Second Part. The Party of First Part, agreed and allow the party of Second Part.”

15. Therefore merely because conductors was appointed to conduct activities of the hospital for a fixed tenure with a specific agreement that Petitioner would be continued in service, it is difficult to hold that Respondent become employee of such conductors (Dr. Rajiv

Agarwal and Dr. Rakhi Agarwal). Respondent continued in the service of Dr. Manoj Mujumdar.

16. Also of relevance is the fact that reference was sought against 'Ashwini General Hospital and Intensive Care Center' and not specifically against Dr. Manoj Mujumdar. In fact, Dr. Manoj Mujumdar's name does not even appear in the cause title of the Reference. Mr. Shukla submitted during the course of his argument that tenure of the agreement dated 10 October 2011 has been extended. Thus, after receipt of notice in the reference, it is Dr. Manoj Mujumdar who appeared before the Labour Court and defended reference. He led evidence by filing affidavit of evidence dated 17 November 2016. Even the present petition is filed by Dr. Manoj Mujumdar and not by the conductors of the hospital. This conduct would undoubtedly prove that Dr. Manoj Mujumdar is the ultimate owner of the hospital and continued to be the employer of Respondent till the date of her termination.

17. Petitioner's reliance on cross-examination of Respondent with regard to closure of P.F. account does not make his case any better. In her cross-examination, Respondent stated that she did not remember whether she had withdrawn amount in P.F. account but specifically stated that her P.F. account is closed in the year 2013. She further stated that during the period from 2011 to 2014 Dr. Manoj Mujumdar used to visit India quite often. Thus, there nothing in the cross-examination of Respondent which would support false defence adopted by Petitioner.

18. It is admitted position that neither show cause notice was issued nor any inquiry conducted against Respondent before termination of her services. The theory of resignation put-forth by Petitioner has been falsified on account of specific covenant in the agreement for continuation of service of Respondent.

19. After holding Respondent's termination as illegal, the Labour Court has directed her reinstatement with full backwages and continuity in service with effect from 01 March 2013. Mr. Shukla has relied upon Apex Court judgment in *Kendriya Vidyalaya Sanghatan* (supra) in which it is held as under:

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

20. Respondent has stated in her Statement of Claim and the Affidavit in Evidence that she was not gainfully employed. On the contrary Petitioner drawn presumption of employment on the basis of Respondent's statement that she was able to manage expenses of her family including education of her daughter. There is no concrete material placed on record by either sides in support of their contentions.

Therefore, award of full backwages in the present case would be unwarranted. Respondent's termination is found to be illegal, and it is proved that Petitioner-Dr. Majumdar took a false plea of resignation before the Labour Court and has continued that plea in this Court as well. For making false statements on oath, Petitioner-Dr. Majumdar deserves to be saddled with costs.

21. Admittedly Respondent has not been paid any gratuity for the service rendered by her. Considering the facts and circumstances of the case, the relief granted in Respondent's favour needs to be molded. From the affidavit and reply filed to the present petition on 12 April 2023, the current age of Respondent is about 59 years. Considering her advanced age, her reinstatement in service now may not be advisable. Also it is not clear who exactly is conducting hospital as of now. In such circumstances instead directing Respondent's reinstatement, it would be appropriate to award compensation to Respondent. In her evidence Respondent stated that her last drawn salary was Rs.12,000/- per month. Considering last drawn salary, the amount of backwages up till now would come to roughly about 16,25,000/-. In addition, the Respondent would be entitled to gratuity for services rendered by her. In my view, ends of justice would meet if the amount of compensation is fixed at Rs. 10,00,000/- (Rs. Ten Lakh Only), which would represent roughly 50% backwages and gratuity. This amount would be towards full and final settlement for Respondent. Considering that a compensation package of

Rs.10,00,000/- is being awarded to Respondent for her wrongful termination, although a perfect case for imposition of exemplary costs on Petitioner-Dr. Mujumdar is made out, I am refraining myself from doing so.

22. I accordingly proceed to pass following order.

(i) Impugned award dated 06 November 2017 passed by Labour Court, Thane is upheld to the extent of declaration of Respondent's termination as illegal;

(ii) The Order for reinstatement and backwages is however modified by directing that Respondent shall be entitled to be paid compensation of Rs. 10,00,000/- (Rs. Ten Lakh Only) in lieu of reinstatement, backwages, gratuity and other terminal benefits.

(iii) The amount of Rs. 10,00,000/- shall be paid by Petitioner to Respondent within 4 weeks from today or else the amount would carry an interest @ 6% p.a. upon expiry of period of 4 weeks.

(iii) With the above directions, Writ Petition is disposed of.

23. After the judgment was pronounced the learned counsel for Petitioners submit that the order be stayed for a period of 06 weeks. The request is opposed by the learned counsel for the Respondent. Considering the findings recorded in the judgment, the prayer made by the learned counsel for the Petitioner is rejected.