



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4328 OF 2014

- | | | |
|------------------------------------|---|-----------------|
| 1. The Commissioner, |] | |
| Nashik Municipal Corporation, |] | |
| Rajiv Gandhi Bhavan, |] | |
| Sharanpur Road, Nashik |] | |
| | | |
| 2. The Health and Medical Officer, |] | |
| Nashik Municipal Corporation, |] | |
| Rajiv Gandhi Bhavan, |] | |
| Sharanpur Road, Nashik |] | ... Petitioners |

Versus

- | | | |
|--------------------------------------|---|-----------------|
| 1. Chandrakant Deoram Kale, |] | |
| Age – Adult, |] | |
| R/o. 728, MH Colony, Satpur, Nashik. |] | |
| | | |
| 2. The Member, |] | |
| Industrial Court, Nashik. |] | ... Respondents |

Mr. Murlidhar L. Patil for Petitioners.

Mr. Aditya Gupta i/b Mr. Ahmed Padela for Respondent No.1.

CORAM :- SANDEEP V. MARNE, J.

RESERVED ON :- 29 SEPTEMBER, 2023

PRONOUNCED ON :- 05 OCTOBER, 2023

JUDGMENT :-

1. ***Rule.*** With the consent of the learned counsel for the parties, rule is made returnable forthwith and called out for hearing.

2. By this Petition, Petitioner–Nashik Municipal Corporation challenges the Judgment and Order dated 17/07/2013 passed by the Industrial Court, Nashik, in Revision Application (ULP) No.13 of 2013. By the said Order, the Industrial Court has dismissed the Revision Application (ULP) No.13 of 2013 filed by the Municipal Corporation challenging the Judgment and Order dated 30/10/2012 passed by the Labour Court, Nashik, in Complaint (ULP) No.195 of 2003. The Labour Court has directed reinstatement of the Respondent in service with continuity with back wages with effect from 04/12/2003.

3. Briefly stated, facts of the case that the Respondent No.1 was engaged by the Municipal Corporation as ‘*Safai Kamgar*’ in pursuance of General Body Resolution dated 28/04/1995 on temporary basis for a period of 6 months by order dated 29/06/1995. The tenure for his appointment was extended from time to time and the last extension was by General Body Resolution dated 19/12/1998. By Order dated 19/01/1999, the appointment was extended for a period from 01/01/1999 to 31/11/1999.

4. It is the case of the Petitioners – Municipal Corporation that Respondent No.1 remained absent from service on various occasions as under -

- (i) From 16/01/1999 to 09/04/1999 - 87 days
- (ii) From 17/03/2001 to 28/05/2001 - 73 days
- (iii) From 12/07/2001 to 19/07/2001 - 8 days

- (iv) From 27/11/2001 to 07/12/2001 - 11 days
- (v) From 09/12/2001 to 16/02/2002 - 70 days

5. On 18/04/2001, a show-cause notice was issued to Respondent No.1 for his absence. On 21/01/2001, the Respondent No.1 gave an undertaking on a stamp paper that he would not remain absent without permission. However, he continued to remain absent, which led to issuance of one more show-cause notice on 24/12/2001. By order dated 02/04/2002, Respondent No.1 was terminated for remaining unauthorizedly absent.

6. Respondent No.1 filed Complaint (ULC) No.195 of 2003 challenging termination order dated 02/04/2002. The complaint was resisted by the Municipal Corporation by filing Written Statement. The Labour Court proceeded to pass Judgment and Order dated 30/10/2012 holding that the Respondent No.1 had become a regular employee and therefore his services could not be terminated without holding domestic enquiry. For the reason of failure to hold domestic enquiry, the Labour Court held the termination order to be bad-in-law and directed reinstatement of the Respondent No.1 with back wages from 04/12/2003.

7. The Petitioner Municipal Corporation filed Revision Application (ULP) No.13 of 2012 before the Industrial Court challenging the decision of the Labour Court. However, the Industrial Court also held that the Respondent No.1 was a regular employee and could not be

terminated without holding enquiry. The Revision Application was accordingly rejected by Order dated 17/07/2013 which is the subject-matter of challenge in the present Petition.

8. I have heard Mr. Patil, learned Counsel appearing for Petitioners who would submit that the very assumption made by the Labour Court and Industrial Court that the Respondent No.1 was a regular employee, was factually wrong. That, services of Respondent No.1 were never regularized and he continued to be a mere temporary employee. That, holding of departmental enquiry was not warranted for termination of services of a temporary employee. He would further submit that the Respondent No.1 remained absent on several occasions and therefore the Municipal Corporation cannot be faulted for terminating his services, who was habitually remaining absent.

9. Mr. Gupta would appear on behalf of the Respondent No.1 to oppose the Petition. He would submit that Petitioner's status as a permanent employee was never under dispute before the Labour Court and Industrial Court. That, the Respondent No.1 was suffering from Tuberculosis requiring a prolonged treatment. That, absence of Respondent No.1 is attributable to his medical treatment. That, obtaining prior permission for medical treatment is not contemplated in law. He would further submit that even if the Respondent No.1 is not to be treated as a regular employee, there is no dispute to the position that he had completed 240 days service and that therefore his services could not be terminated without following the procedure envisaged under Section 25F

of the Industrial Disputes Act. In support of his contention, Mr. Gupta would rely upon the Judgments in *Jairaj N. Shetty Vs. Union of India*¹, *Kishore B. Dave Vs. The Dean, J.J. Group of Hospitals and Others*² and *Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another*³.

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

11. Perusal of the order passed by the Labour Court would indicate that the Labour Court had proceeded on an assumption that the Respondent No.1 was a regular employee. This presumption is based on the basis of an order dated 19/01/1999 issued by the Municipal Corporation. The relevant finding by the Labour Court in this regard is to be found in para 7 of its Order which reads thus :-

“7.It is also not disputed that as per the letter dt.19/01/1999 of the respondents corporation, service of the complainant was continued as a regular employee on the post of Safai Kamgar for 11 months period dt.01.01.1999 to 30.11.1999, as per Government Notification. Thus, this copy of letter produced by the complainant clearly shows that the complainant was working with the respondents continuously by extension of his service period from time to time.”

12. Even the Industrial Court has proceeded on an assumption that the Respondent No.1 was a regular employee. The Industrial Court

¹ 2005(4) Mh.L.J. 163

² 1986 SCC OnLine Bom 366 : (1986) 52 FLR 380 (Bom) : (1994) 3 LLJ (Supp) 1001 : (1986) 1 CLR 173

³ (1980) 4 Supreme Court Cases 443 : 1981 Supreme Court Cases (L & S) 16

has also drawn the said presumption on the basis of a letter dated 19/01/1999. The relevant finding of the Industrial Court in this regard in para 11 of its Judgment is as under :

“11.It is also not dispute that, as per the letter dt.19.01.1999 of the respondents corporation the services of the complainant was continued as a regular employee on the post of Safai Kamgar for 11 months period i.e. from 01.01.1999 to 30.11.1999, as per Government Notification.”

13. It is on the basis of a presumption that the Respondent No.1 was a regular employee that, the Labour Court and the Industrial Court have further held that his services could not be terminated without holding domestic enquiry. The Labour Court has held that to prove the misconduct of absence, domestic enquiry ought to have been held by the Municipal Corporation.

14. The moot question is therefore whether the Respondent No.1 acquired the status of a regular or a permanent employee of the Municipal Corporation. As observed above, both Labour Court and the Industrial Court have placed reliance on the letter dated 19/01/1999 for holding that the Respondent No.1 was a regular employee. Mr. Patil has placed on record copy of letter dated 19/01/1999. Perusal of the said letter would show that services of 114 temporary employees have been continued for a period from 01/01/1999 to 30/11/1999 for 11 months. The order nowhere directs that the services of the said employees are regularized by the Municipal Corporation. The name of the Respondent No.1 is included in the said letter dated 19/01/1999. Thus the order /

letter dated 19/01/1999 merely continued his services for 11 months up to 30/11/1999. The order / letter did not regularize the services or conferred him the benefit of permanency. Thus, the entire basis for passing of orders by the Labour Court and the Industrial Court is factually incorrect.

15. Since the Respondent No.1 was never a regular employee of the Municipal Corporation, there is no question of conducting any domestic enquiry before terminating him from services. The termination is not effected as a measure of disciplinary action. The termination, on the other hand, is effected in terms of the conditions of appointment which empowers the Municipal Corporation to terminate the services of a temporary employee. I, therefore, find that the finding recorded by the Labour Court and the Industrial Court that the Respondent No.1 was a regular employee and that conduct of a domestic enquiry was mandatory before his termination to be totally perverse and unsustainable.

16. The services of the Respondent No.1 have been terminated by the Municipal Corporation on account of habitual absenteeism. His days of absence are as under :-

- (i) 1999 - 87 days
- (ii) 2001 - 115 days
- (iii) 2002 - 47 days

17. A temporary employee cannot remain absent for such a long period. The defence of medical treatment for Tuberculosis would not justify absence for such a long period, without following a due procedure. There is nothing on record to indicate that the Respondent No.1 ever communicated to the Municipal Corporation that he was suffering from Tuberculosis. On the contrary, he submitted an undertaking in May 2001 admitting his unauthorized absence and undertook not to remain absent in future. While seeking pardon for his past absence, he permitted Municipal Corporation to take action if he remained absent in future. Thus, the Respondent No.1 never took the defence of his alleged medical treatment. For the first time after his termination, he produced a fitness certificate dated 02/09/2003 showing that he was suffering from Tuberculosis. The Respondent No.1 has placed on record along with his Affidavit-in-reply certain medical certificates. However, all these certificates are after his termination effected on 02/04/2002. Therefore, reliance of the Respondent No.1 on those certificates would not enure to his benefit. Some records are also sought to be produced to show that he took some treatment prior to his termination. However, there is nothing on record to indicate that the said certificates were produced from time to time before the Municipal Corporation. The first correspondence made by the Respondent No.1 with the Municipal Corporation is on 02/02/2002 stating that he was sick from 27/10/2001 and reported for duty after recovery from sickness and he was prevented from joining duty. The statement in the letter dated 02/04/2002 appears to be contrary to the fitness certificate issued 1½ years later on 02/09/2003 when the Respondent No.1 was shown to be fit to join his duty with effect from 03/09/2003.

18. The Labor Court and the Industrial Court ought to have borne in mind that the Respondent No.1 was merely a temporary employee and had remained unauthorizedly absent for a long period of time. In such circumstances, the Labour Court and the Industrial Court ought not to have passed order of his reinstatement.

19. What remains now is to deal with the Judgments relied upon by Mr. Gupta :-

(i) In ***Jairaj Shetty*** (*supra*), the issue was about completion of 240 days of service. The Division Bench of this Court held that the condition of completion of 240 days of service could be satisfied in any one of the earlier year. In the present case, the Labour Court and the Industrial Court have proceeded to set aside termination on an erroneous assumption that the respondent No.1 was a regular employee. No material was produced by the Respondent No.1 to demonstrate that he had completed 240 days of service in any one of the preceding years. Mr. Gupta has attempted to demonstrate before me by way of reverse process that Respondent No. 1 may have completed 240 days of service by deducting period of absence during each year from the figure of 365 days. To my mind, such system of determining period of service is flawed. Also, even if it is assumed that Respondent No. 1 may have completed 240 days in any of preceding years of service, I do not find any error in terminating his service after issuance of two show cause notices by the Municipal Corporation. Respondent No. 1 was habitual in remaining absent. The Municipal Corporation did issue him a Notice on 24/12/2001 before terminating his services. Respondent No. 1 cannot be permitted under these circumstances of taking undue advantage of technicalities of non-

payment of wages for 1 month in lieu of notice under Section 25-F of the Industrial Disputes Act 1947. The Judgment in ***Jairaj Shetty*** would, therefore, not come to the assistance of the Respondent No.1.

(ii) ***Kishore Dave*** (*supra*) is relied upon, in support of contention while calculating service of 240 days. The period of sickness is required to be ignored. However as observed earlier, the Respondent No.1 did not produce any certificate before the Municipal Corporation to prove his sickness. The Judgment would therefore have no application to the present case.

(iii) ***Surendra Verma*** (*supra*) is relied upon in support of contention that reinstatement as a thumb rule is reinstatement except where the employee has secured another employment or reinstatement put unbearable burden on the employer. In the present case, since the termination is not found to be erroneous, there is no question of granting the relief of reinstatement to the Respondent No.1.

20. I therefore find the order passed by the Labour Court and the Industrial Court to be indefensible.

21. Writ Petition accordingly succeeds. The Order dated 30/10/2012 passed by the Labour Court, Nashik, in Complaint (ULP) No.195 of 2003 as well as the Judgment and Order dated 17/07/2013 passed by the Industrial Court, Nashik, in Revision Application (ULP) No.13 of 2013 are set aside.

22. Writ Petition is accordingly allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)