

(2004) 12 BOM CK 0089

In the Bombay High Court

Case No : Writ Petition No. 2781 of 1992

Maharashtra State Electricity Board and Another APPELLANT
Vs

Damodhar Sakharam Bhoyar deceased LRs. Vimlabai Bhoyar RESPONDENT
and Others

Date of Decision : 21-12-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25F

Citation : (2005) 3 BomCR 854 : (2005) 105 FLR 172 : (2005) 1 MhLj 1092

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : R.E. Moharir, for the Appellant; None, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this petition under Articles 226 and 227 of Constitution of India petitioners-employer challenged the order dtd. 29-3-1988 passed by 2nd Labour Court, Nagpur and the order dtd. 3-3-1992 passed by Industrial Court, Nagpur in revision confirming the same.

2. The original respondent No. 1 Damodhar was appointed as Watchman of the petitioners on 23-6-1981. He was to be medically examined before his appointment but that medical examination could not be done and thereafter he was sent for medical examination by letter dated 5-1-1987. Said respondent accordingly appeared before Civil Surgeon Chandrapur, who examined him and Submitted a report that he is suffering from Aortic Stenosis with incompetence. In view of this finding the petitioner referred the case of respondent to Medical Board and on 27-6-1987 he was informed by the petitioner-Board that he was not found fit for service and he would be terminated after 30 days.

3. The original respondent challenged this order by filing U.L.P. Complaint No. 745/87 before 2nd Labour Court, Nagpur. Second Labour Court, Nagpur allowed his complaint and the petitioner-Board was directed to reinstate him back in service with continuity and with backwages. The petitioner challenged this order by filing a revision u/s 44 of M.R.T.U. and P.U.L.P. Act before Industrial Court and

on 3rd March, 1992 the learned Member of Industrial Court was pleased to dismiss the said revision. The petitioner thereafter filed present petition which has been admitted by this Court on 20th August, 1993. On 23rd July, 1993 this Court directed respondent to get himself medically examined by Civil Surgeon to ascertain whether he can discharge duties of Peon in petitioners-Board. On 20-8-1993 this Court found that respondents did not produce any such fitness Certificate and permitted respondent to file it before the petitioner-Board and further directed petitioner-Board to appoint respondent as Peon after production of said Certificate. Subject to this, the order of Labour Court reinstating him as Watchman and ordering payment of back wages was stayed. The said order is operating since then. Respondent did not produce any such medical Certificate before the Board. It appears that during pendency of this petition he expired and by order dtd. 8th February, 1994 his legal heirs were permitted to be brought on record. Respondent Nos. 1, 2, 3 and 4 to the present petition are those legal heirs.

4. I have heard Advocate R.E. Moharir for petitioner-Board. None appears for respondents though Advocate Shri R.S. Ozza has filed power for respondent Nos. 3 and 4. The office endorsement also shows that respondent Nos. 3 and 4 are served on merits. The matter was taken up on 20th December, 2004 for final hearing and was adjourned after hearing Advocate Moharir, as nobody was present for respondents. Today also nobody appears for respondents.

5. Advocate R.E. Moharir has argued that the termination of petitioner does not constitute retrenchment at all and the Labour Court as also learned Member of Industrial Court has failed to comprehend the scope of Section 2(oo) of Industrial Disputes Act which defines the retrenchment. He points out that by clause (c) of this definition the termination of service of a workman on the ground of continue ill-health is exempted and therefore is not retrenchment. He states that the Labour Court as also the learned Member of Industrial Court has held that it is retrenchment and as provisions of Section 25-F of Industrial Dispute Act have admittedly been not followed, they have found fault with the termination and have ordered his reinstatement on the post of watchman with continuity and full back wages. He contends that this approach is unsustainable and because of non-appreciation of the law correctly there is failure to exercise jurisdiction. He invited attention of Court to the ruling of Hon'ble Apex Court which is reiterated at Anand Bihari and others Vs. Rajasthan State Road Transport Corporation, Jaipur and another, .

6. Perusal of judgment reported above reveals that it pertains to the drivers who were working with Rajasthan State Road Transport Corporation. The drivers had put in long service and in 1987 their medical examination revealed that they had developed defective eye-sight which was not of standard required to drive the buses which were engaged by Corporation. Corporation, therefore, constituted a medical Board and directed the workers to appear before that Board for testing their eye-sight. The Board reported that the drivers were totally unfit for driving

heavy motor vehicles. The Road Transport Corporation, therefore, issued a show cause notices to these drivers and after considering the explanation received from them, found that they could not be retained in service and terminated their services. These orders of termination were challenged by drivers before the High Court by filing Writ Petitions inter alia pointing out the provisions of Section 2(oo) of Industrial Dispute Act and breach of Section 25F thereof. There was also a challenge in relation to breach of agreement between parties but said part is not relevant for the present petition filed by Maharashtra State Electricity Board. The High Court upheld the contention of Road Transport Corporation that the termination of services of drivers did not constitute retrenchment. It is in the circumstances that the workers approached Hon"ble Apex Court. The observations made by Hon"ble Apex Court are important. In paragraph-5 after quoting provisions of Section 2(oo) the Hon"ble Apex Court has observed as under :-

"There is no dispute before us that the only Sub-clause of the definition which can cover the present termination of service is Sub-clause (c). There was some debate before us as to the exact import of the expression "continued ill-health". While it was urged on behalf of the workmen that ill-health which is spoken of there does not cover the cases of a loss of a limb or an organ or of its permanent use, and covers cases only of a general physical or mental debility or incapacity to execute the work, the argument on behalf of the Corporation was that it would include also cases of a permanent loss or incapacity of a limb or an organ such as eye or eye-sight, ear or hearing capacity, of hand or leg etc. which is necessary for discharging the duty in question. For this purpose reliance was placed on behalf of the Corporation on a decision of this Court in *Workmen of the Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Its Management* (1962) 1 LLJ 213. In that case the Court while interpreting the definition of retrenchment has held as follows :-

"The definition, "retrenchment" in Section 2(oo) of the Act means termination of service. A service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued that is to say, in the same manner in which it had been going on before and it is, therefore, brought to an end that is not a termination of the service. It is the contract of service which is terminated and that contract requires certain physical fitness in the workmen. Where therefore a workman is discharged on the ground of ill-health, it is because he was unfit to discharge the service which he had undertaken to render and therefore it had really come to an end itself. That this is the idea involved in the definition of word "retrenchment" is also supported by Section 25G of the Act which provides that whereas any workmen are retrenched and the employer proposed to take in his employ and person he shall give an opportunity to the retrenched workmen to offer themselves for re-employment and the latter shall have preference over other persons in the matter of employment. Obviously, it was not contemplated that one whose services had been terminated on grounds of physical unfitness or ill-health would be offered re-employment; it was

because his physical condition prevented him from carrying out the work which he had been given that he had to leave and no question of asking such a person to take up the work again arises. If he could not do the work he could not be offered employment again. It would follow that such a person cannot be said to have been retrenched within the meaning of the Act as amended by the Ordinance."

In Paragraph 6 Hon"ble Apex Court has thereafter observed expressing ill-health as in Sub-clause (c) as under :-

6. Even otherwise, it can scarcely be disputed that the expression "ill-health" used in Sub-clause (c) 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 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 expression "ill-health" is defined in the new Collins Concise English Dictionary to mean "not in good health; sick" in Webster's Comprehensive Dictionary (International Edition) to mean "disordered in physical condition; diseased; unwell; sick", in the Concise Oxford Dictionary (3rd Edition) to mean "out of health; sick; with disease; with anxiety (of health), unsound; disordered, morally bad", and in Shorter Oxford English Dictionary to mean : "Unsound disordered; out of health, not well". Therefore any disorder in health which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning can be covered by the said phrase. The phrase has also to be constructed from the point of view of the consumers of the concerned products and services. If on account of a workman's disease or incapacity or debility in functioning the resultant product or the service is likely to be affected in any way or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorised as ill-health for the purpose of the said Sub-clause. Otherwise, the purpose of production for which the services of the workman are engaged will be frustrated and worst still in cases such as the present one they will endanger the lives and the property of the consumers. Hence, we have to place a realistic and not a technical or pedantic meaning on the said phrase. We are, therefore, more than satisfied that the said phrase would include cases of drivers such as the present ones who have developed a defective or sub-normal vision or eye-sight which is bound to interfere with their normal working as drivers."

7. Thus, it is clear that on account of disease suffered by workman or incapacity or disability in functioning the resultant product or the service is likely to be affected in any way or is to become a risk to the health, life or property of

consumer such disease or incapacity is to be treated as ill-health for the purposes of Section 2(oo)(c). The Hon''ble Apex Court has further clarified that otherwise the very purpose of production for which the services of the workman are engaged will be frustrated and worst will be the case where the services of such workman may result in endangering the life and properties of the consumers. Considering this background Hon''ble Apex Court has laid down that a realistic and not a technical or pedantic meaning is to be given to said phrase. In paragraph-7 Hon''ble Apex Court has, therefore, concluded that termination of services of drivers by Road Transport Corporation on this count did not constitute retrenchment.

8. The facts of the present case need to be examined in this background. The learned Labour Court has held that it is not covered by Section 2(oo)(c) because it found that the opinion of Medical Board is not factually supported. The learned Labour Court has put a remark that it was not even the claim of petitioner that deceased-respondent could not perform his duties because of his disease from which he was suffering. It has, therefore, held that termination of service of respondent is not on account of continue ill-health. It has further held that as provisions of Section 25F of Industrial Disputes Act have not been complied with, the said termination is illegal and void ab initio. The learned Member of Industrial Court has also considered the matter in same background. Before the Industrial Court it was specifically pointed out that respondent was discharged from military services because he was found medically unfit. The learned Member of Industrial Court has, however, considered the fact that original respondent served, for six years without obtaining leave on the ground of ill-health and he was sent for medical examination only in order to complete the formalities. It held that he was never rendered incapable of performing his duties as watchman and as such it cannot be said to be a termination for continued ill-health. In paragraph 9 it has observed that it is important to note that during the long tenure of complainant, he never remained absent from duty on medical ground. It has been held in Marmeshwar Das case that person who is suffering from disease and that disease is spread over for some period of times, it is only a particular phase in worker''s life during the course of his employment and phase being marked by the character of its continuity and length thereof rendering thereby worker incapable of being available for employment for substantial period''. The learned Member has thereafter applied this test to come to the conclusion that in such circumstances it is retrenchment and in view of violation of Section 25F the respondent is entitled to relief as granted by lower Court.

9. It is to be noted that the respondent was discharged from military service on account of his medical unfitness. Thereafter, he joined services of M.S.E.B. but he could not immediately medically examined and when he was medically examined he was found to be unfit. If this medical examination would have taken place before his entry into service, he would not have got the employment at all. Even in the order of termination it is mentioned that the medical Board has found him unfit for retention in M.S.E.B. service. The Medical Board has examined the

case of original respondent in the light of duties which he was required to perform and has found that he is unfit for performing the duties of a watchman. In view of the observations made by Hon"ble Apex Court in case of Anandbihari (supra) it is clear that it is the effect of such ill-health which is required to be considered. If on account of that ill-health the Competent Medical Board finds that respondent is unfit to perform the job of his post, it becomes a case of continued ill-health. Merely because he actually performed that job without any difficulty for certain time cannot be a decisive factor and based upon such service put in by him, it cannot be said that it is a retrenchment. It is thus clear that the law as explained by Apex Court in above judgment has not been correctly applied by either the Labour Court or Industrial Court. Under the circumstances both the orders impugned here are quashed and set aside. Rule is made absolute in above terms with no order as to costs.