

(1993) 02 BOM CK 0105
In the Bombay High Court
Case No : L.P.A. No. 143 of 1992

Nirmal Tejnath Dhar

APPELLANT

Vs

Matru Sewa Sangh Mahal

RESPONDENT

Date of Decision : 04-02-1993

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A, 2, 25, 2A

Citation : (1993) 3 BomCR 469 : (1993) 2 LLJ 1094

Hon'ble Judges : M.B. Ghodeswar, J;H.D. Patel, J

Bench : Division Bench

Advocate : B.M. Khan, for the Appellant; S.A. Bobde, for the Respondent

Judgement

H.D. Patel, J.—By this Letters Patent Appeal the judgment of this Court delivered on September 8, 1992 by the learned Single Judge in Writ Petition No. 37 of 1986 is impugned.

2. The facts as revealed from the record are few and simple. The respondent "Matru Sewa Sangh" appointed the appellant as Public Health Nurse against the vacant post on probation for a period of nine months vide order dated May 30, 1979. Even before the probation period expired, the appellant was appointed as Nursing Officer (Principal) in the pay scale of Rs. 600-30-750-40-950 on probation for a period of one year vide another order dated September 1, 1979. The said order clearly stipulated that the appointment will be for the duration of Multipurpose Health Workers Training Centre in the Institution. The appellant was confirmed in the post of Nursing Officer by an order dated September 27, 1980. The scale of pay as disclosed in the order was Rs. 500-30-650-45-1000. The Training Centre was organised under the scheme sanctioned and continued from year to year by the Ministry of Health, Government of India. By the said order of confirmation the appellant was informed by an endorsement made therein as follows :

"On termination of the scheme, it will be considered as to on what consolidated

pay and on what initial pay she could be absorbed by the Institution."

By an office order dated July 27, 1981 the appellant was informed that as the Training Centre was likely to be discontinued from September 1, 1981, the service of the appellant will not be required. Accordingly the service of the appellant was brought to an end. The appellant was subsequently absorbed as part-time Health Assistant on consolidated honorarium of Rs. 400/- per month with effect from October 1, 1981 for a period of six months. With the expiry of this period, the services of the appellant were brought to an end on March 31, 1982.

3. It may be relevant to note here that the Multipurpose Health Workers Scheme which was discontinued from September 1, 1979 in which the scheme the appellant worked as Nursing Officer, re-started again from April 1, 1982. The appellant approached the respondent with a request to re-employer here as a Nursing Officer, but the said request was not considered. The appellant had challenged her non-absorption as Nursing Officer before this Court by filing a writ petition, but it seems that the said petition was rejected in limine probably on the ground that alternative remedy is available, because the appellant was a workman.

4. The appellant, however, raised an industrial dispute u/s 2-A of the Industrial Disputes Act. The dispute could not be settled not on consideration of the failure report, the appropriate Government referred the dispute for adjudication by the Presiding Officer. Labour Court, Nagpur. The reference was made in the following terms :

"Mrs. Nirmal T. Dhar, who had been terminated from the employment of M/s. Matru Sewa Sangh Mahal, Nagpur, should be reinstated with payment of back wages and continuity of service w.e.f. April 1, 1982."

By an Award dated October 30, 1985 the reference was answered in the affirmative. The respondent was directed to reinstate the appellant in service with continuity of employment and payment of full back wages.

4. The award of the Labour Court was challenged by the respondent in Writ Petition No. 37 of 1986. The said writ petition was allowed by this Court, with the result that; the award came to be set aside. It must be said to the credit of the respondent that despite the fact that the writ petition was allowed and the award set aside, the services of the appellant were continued after she was reinstated in the post of Health Assistant which she held at the time of termination on March 31, 1982. The appellant feeling aggrieved by the order of the learned Single Judge has filed this appeal.

5. At the outset it must be stated that the services of the appellant were brought to an end with effect from April 1, 1982 and that is the dispute which has been referred by the appropriate authority for adjudication by the Labour Court. If the Court finds that the termination is bad, wrongful and illegal, the consequential

relief of reinstatement with full back wages must follow. At the time of termination the appellant was working as part-time Health Assistant on a consolidated salary of Rs. 400/- per month. It is a coincidence that the services of the appellant were discontinued from April 1, 1982 on which date the discontinued Multipurpose Training Workers Scheme was also restarted. Naturally the appellant was tempted to claim the post of Health Officer on reinstatement as well as the wages of that post. It is in this background that we find the appellant making a claim for that post in the pleadings as well. Simply because reinstatement is claimed in a post where the appellant had worked once before, it cannot be said that the respondent was confused by the pleadings of the appellant and could not properly defend the case. The main context was in respect of the discontinuance of the appellant from the job she was employed in and nothing more. If the discontinuance was improper and illegal, then only the question of granting relief arise. It is at that point of time that the Court has to decide to which post the reinstatement should be ordered. The Labour Court was justified in coming to the conclusion that the appellant's challenge could not be in respect of her termination as Health Officer which was effected from September 1, 1981 but the challenge is limited to termination which was brought about by the respondent with effect from April 1, 1982 while she was working as Part-time Health Assistant on consolidated salary of Rs. 400/- per month. We do not find that the respondent employer was misled simply because of the appellant's claim to a post where once she worked.

6. The learned Court below found that the termination was illegal because the termination of the appellant was brought without proper notice and non-payment of retrenchment compensation. In short, the termination was in contravention of Section 25-F of the Industrial Disputes Act. It is not in dispute that the respondent did not issue any notice or have paid the dues as contemplated by Section 25-F. The respondent, however, disputes that they were bound to comply with Section 25-F of the Industrial Disputes Act. Their first contention was that the appointment of the appellant as Health Officer was to last only till the Health Training Workers Scheme was in force. Upon discontinuance of the Scheme, the services were bound to be terminated and the said termination will not be a retrenchment because of the exception carved out in Section 2(00)(bb) of the Industrial Disputes Act. Therefore, there is no contravention of Section 25-F of the Industrial Disputes Act. In any even the period during which the appellant worked as a Health Officer will have to be excluded from computing 240 days, firstly because of the exemption granted and secondly because the post in which the appellant worked was of supervisory nature and hence she was not a "workmen" as defined under the Act.

7. The scope and ambit of sub-clause (bb) of Section 2(00) is exhaustively considered by this Court in Dilip Hanumantrao Shirke and others Vs. Zilla Parishad Yavatmal and others, . It is probable that the said section may apply to the appointment and termination of the appellant in respect of the post of Health Officer in the Multipurpose Health Workers Training Scheme and the learned

Single Judge did apply this provision of Section 25-F of the Industrial Disputes Act were not applicable because the termination was not retrenchment. But one cannot lose sight of the fact that the termination under challenge was not one related to the post of Health Officer. Secondly the provisions of Section 2(00)(bb) will not apply because if the assurance given by the respondent that the appellant would be absorbed in case the Multipurpose Health Workers Training Scheme is discontinued and that absorption will be either on a consolidated pay or on such initial pay to be considered by the Institution. This Court had occasion to decide what the word "absorb" would mean in a decision rendered by this Court in *Regional Manager, Maharashtra State Road Transport Corporation Nagpur & Anr. v. Regional Secretary, Maharashtra State Road Transport Kamgar Sanghatana, Karnaja* 1984 LIC 1721. It was held that the word "absorption" would be given the meaning which the word "amalgamation" would receive. An amalgamation is explained as a process by which two things are united. by such assimilation there is fusion of two services of absorbing unit in continuance of the service in another. In this situation it is difficult to assume that the provisions of sub-clause (bb) of Section 2(00) of the Industrial Disputes Act would apply to the present case.

8. It may be relevant at this juncture also to emphasise that the sub-clause (bb) inserted by Act No. 49 of 1984 is not declaratory in nature, not it is retrospective in operation a held in *S. S. Sambre v. Chief Regional Manager, state Bank of India, Nagpur* 1992 I LLJ 84. The Supreme Court in the *Workmen of M/s Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. v. Management & Ors.* 1973-LLJ 278 also held that Section 11-A has no retrospective effect. Even on this ground, sub-clause (bb) of Section 2(00) of the Industrial Disputes Act will not be attracted in the present case.

9. Once the word adsorption is given the particular meaning, there can be no doubt that the employment of the appellant as Health Assistant from October 1, 1981 was continuous, the earlier services having been amalgamated with the continued services. It is immaterial that the earlier service was under a particular scheme. In any even as held in *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr.* 1981-I-LLJ-386, it is clear that the workman who actually worked for not less than 240 days during the period of 12 months shall be deemed to have been in continuous service for a period of one year whether or not he has been in such continuous service for a period of one year. In other words, it is enough that he has worked for 240 days in a period of 12 months, it is not necessary that he should have been in service of the employer for the whole year. If the Labour Court has come to the conclusion that there was contravention of Section 25-F, he has assumed that the appellant was in continuous service as required by the said section. According to the respondent the period during which the appellant worked as Health Office should be excluded initially because the employment in that capacity is outside the ambit of Section 2 (00) by virtue of sub-clause (bb) of the Industrial Disputes Act. We have already covered this ground at length above, and no

useful purpose would be served by repeating the same. The other ground was that the appellant was not a "workman" as defined under the Act while she was in employment as a Health Officer and therefore the period of her employment in this capacity should be excluded for computing 240 days. The contention is devoid of any substance. The Labour Court on the basis of evidence adduced held that the appellant was a "workman" even during the period she was engaged to work in the scheme as Health Officer on the basis of admission given by the witness that the job of Health Officer is not different from the job of a Public Health Nurse which work the appellant otherwise performed. We have also perused the available evidence on record and our opinion is not different than that down by the learned Presiding Officer of the Labour Court. Therefore, there is no substance even in this contention of the appellant. Since we have concurred with the Labour Court that the duties performed by the appellant were that of a "workmen" we refrain from entering with the controversy what would be the position in case our conclusion was otherwise.

11. In the result, the appeal is allowed. The impugned judgment of the learned Single Judge is set aside. Necessarily the Award of the Labour Court comes into operation. In the circumstances of the case, the parties are directed to bear their respective costs.