(1974) 02 BOM CK 0007

Bombay High Court

Case No: Special Civil Application No. 2823 of 1973

Kashibai Sachidanand		APPELLANT
	Vs	
Hindustan Pencils Private Limited		RESPONDENT

Date of Decision: Feb. 5, 1974

Acts Referred:

- Constitution of India, 1950 - Article 227

Citation: (1975) 31 FLR 54 : (1975) 2 LLJ 73 : (1975) MhLj 419

Hon'ble Judges: D.B. Deshpande, J; C.K. Dudhia, J

Bench: Division Bench

Judgement

Deshpande, J.

The petitioner was employed as an operator with the respondent, where she served for about seven years. She went on leave from August 10, 1971 to August 16, 1971 as she was pregnant. Delivery appears to have taken place on August 19, 1971. She gave birth to twins, one of which was born dead, and the other died soon. This resulted in her prolonged illness She does not appear to have recovered from this illness when her services were terminated on October 2, 1971 by the respondent on the ground of her overstaying the leave, though she pleaded illness in her explanation to the show cause notice and tried to explain her failure to get the leave extended. When all her efforts to join the work and get reinstated through the union failed, the dispute was referred to the labour court on January 21, 1973. Her claim was resisted by the respondent on the ground that her overstaying the leave resulted in automatic termination of her services and by not getting the leave extended, she had voluntarily abandoned the job. No oral evidence was led at the trial. The labour court accepted the case of the respondent and rejected her claim on September 24, 1973. Legality of this order is challenged in this petition under Art. 227 of the constitution.

2. Dr. Kulkarni contends that finding of the labour Court that the petitioner abandoned her services voluntarily is perverse. It is indeed difficult to meet the force of this contention. Failure of the petitioner to enter the witness box appears to have weighed very much with the labour court. There can be no question that such failure must result in rejection of the disputed part of her case. But the petitioner''s averments that she was pregnant, and had delivered twins on August 19, 1971 and both the twins died and she was continuously ill from August 10, 1971 to the date of her reporting for duty and was under medical treatment and certificates to that effect dated August 8, 1971 and September 14 1971 were sent by her and received by the respondent, were never disputed. The dispute centered round whether the applications for extension of leave were made and whether medical certificates were sent in time and whether she was sought to be victimised at all. The labour Court has obviously failed to grasp the importance of these averments and implication of their remaining undisputed.

3. Now, if the petitioner was continuously ill from August 10, 1971 till she reported for joining duty in November, 1971 to the respondent, the question of the petitioner having abandoned the job voluntarily ordinarily should not and cannot obviously arise. Her conduct in sending letters and medical certificates on September 14, 1971 and prompt explanation on September 24, 1971 to show cause notice dated September 23, 1971. strongly militate against her having ever intended to give up the job or abandon the services We have already indicated that the fact of her continuous illness as also the genuineness of the medical certificates tendered by her to the respondent though not in time is not disputed in the written-statement filed by the respondent and thus could not be disputed in the course of hearing of this matter before us by Mr. Shetye Whatever the effect and consequences of her failure to apply for extension of leave and to send the medical certificates in time, her absence from duty and overstaying the leave, shall have to be attributed to her undoubted continuous illness and not to any intention of abandoning the services or the job. In the face of these facts, any inference of the petitioner having abandoned the services shall have to be ignored as being patently perverse.

4. Mr. Shetye, however, contends that the question of drawing any inference from the mere continuous illness of the petitioner cannot arise in cases where, as here, the relevant standing order in terms raised a statutory fiction of the worker like the petitioner having abandoned the services voluntarily on overstaying the leave. Strong reliance was placed on the judgment of the Supreme Court in The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, and the judgment of this court in the case of Chipping and Painting Employers, Association Private Limited Vs. A.T. Zambre and Another, . In our opinion, the reliance on both these judgment is misplaced. The relevant standing order 8(ii) in Buckingham & Carnatic Company''s case in terms provided for a fiction of the employees having "left the company''s service without notice thereby terminating his contract of service" in the event of any employee having absented himself for eight consecutive working days, while corresponding standing order 19 in Ch & P. Employers''

Assocn''s case (supra) also contemplated a fiction of the employee having "voluntarily abandoned his services" in the event of any worker failing to report for work for one month or more without prior permission or even a fortnight of the expiration of leave originally granted or subsequently extended We do not find any such provision in the relevant standing Orders governing conditions of service of the workman of the respondent concern. Mr. Shetye drew our attention to clause No 13 of the certified standing orders which were relied on by the labour Court with out objection. It is, however, not disputed that these Standing Orders were certified on May 13, 1973 long after the present controversy arose during the period from August to November, 1971 and the petitioner''s services were terminated. Provisions of the Model Standing Orders would, therefore, govern the petitioner''s conditions of service. The relevant clause of sub-clause (4) of clause 13 of the Model Standing Orders is to the following effect :

"A workman remaining absent beyond the period of leave originally granted or subsequently extended, shall be liable to lose his lien on his appointment unless he returns within eight days of the expiry of the sanctioned leave and explains to the satisfaction of the authority granting leave his inability to resume his duty immediately on the expiry of his leave."

The rest of the clause deals with the consequences of losing the lien and is irrelevant. Unlike the Standing Orders in the two above-mentioned cases, this clause does not create any legal fiction as such of the workmen having abandoned or left the services.

5. Far from creating any such fiction, the above clause rather militates against any assumption of automatic termination of service. Under this clause overstaying the leave period results only in "liability to lose the lien" and not, in "the loss of lien" itself, as appears to have been the case in National Engineering Industries Ltd. Vs. Its Workmen, , on which also reliance was placed by Mr. Shetye. The word "liable" does not necessarily convey the sense of any inevitable or unavoidable consequence every time. According to the dictionary meaning the word also conveys the sense if being "answerable for, subject or amenable to tax or penalty, under obligation to do, exposed or open to." As held in The State Vs. Amru Tulsi Ram and Another, the word carries with it an element of discretion which does not admit of being exercised arbitrarily. The precise import of the word must necessarily depend on the context and the entire setting and the governing object of the clause or the statute or the rule in which the word finds place. The Standing Orders are intended to protect workmen from the arbitrary and high handed treatment of the employers and at the same time to ensure their regular attendance and prevent dislocation of the work. Such provisions are required to be liberally construed in the light of the objects. Moreover use of the word "shall" or "may" is never decisive in determining the mandatory character or nature of any clause or provision. The very fact that liability to lose the lien on overstaying the leave is made defeasible by returning to work within eight days and by explaining the delay itself militates against any absolute liability having been intended under this clause. It is not difficult to conceive of manifold vicissitudes and contingencies in human life beyond the control of the workman which may tender

overstaying of the leave inevitable even beyond eight days. Rule-makers could not have contemplated the loss of lien on the job of the workman whose overstaying the leave beyond eight days may result from dislocation of communications or the detention of the workman by the Government for no fault of his. This is only one of the many illustrative contingencies which enables avoiding of the liability of overstaying the leave Continuous illness furnishes yet another illustration of the valid ground to avoid the liability to which overstaying is likely to expose any workman. It is difficult to believe that authors of the Standing Orders could have intended to furnish overstaying the sick leave as an excuse to terminate the services even when sickness prevented the worker from going to work. Existence of a valid ground thus avoids the loss of lien. This appears to us to be implicit in the scheme of the clause itself. Thus the failure of workman to report on duty after the expiry of the originally granted leave or his failure even to report within eight days of such expiry makes the workman only "liable to lose his line on his appointment" and exposes him to the possibility of the loss of the job. This by itself cannot result in his loss of the job if he has valid and unavoidable cause for such late reporting. This appears to us to be the true construction of clause 133(4) of the Model Standing Orders.

6. Looked at from this point of view, it is difficult to hold that the petitioner lost her lien on the appointment merely because she could not join the duty immediately after the expiry of her leave on august 17, 1971 or within eight days therefrom. The assumption that over-staying the leave itself, in the absence of anything more, results in automatic termination of services is wholly unwarranted. As long as the failure to join the duty is attributable to some valid ground or the other, the petitioner cannot be said to have lost her lien on the appointment within the meaning of this clause. The petitioner''s continuous illness did furnish valid explanation. Termination of her services thus is wrong and the order must be held as null and void. We find it difficult to accept the contention of Mr. Shetye to the contrary and uphold the order passed by the Labour Court. The Labour Court obviously was misled into assuming that certified standing orders were applicable to the case before him. Though the standing orders were not certified till about the time when the trial commenced before the labour Court. The labour Court''s assumption that the petitioner was liable to lose her lien on the job merely because of her failure to report on August 17, 1971 or her failure to apply for the extension of the leave is unwarranted.

7. It is necessary to add that the ratio of the three cases cited by Mr. Shetye in inapplicable to the facts of the case for one more reason. In all these cases, it was found on fact that workman concerned did not have any valid ground to overstay. The pleas of the workmen therein about illness were not accepted as true, on facts. The question of the effect of the existence of the valid ground for overstaying on the statutory fiction did not fall for consideration at all in these cases. On the contrary effect of such valid ground fell directly for consideration in two unreported judgments of this court, namely, the judgments of this in Velvet Dyeing and Finishing Co. v. Abdul Aziz (1973) Special Civil Application No. 2466 of 1972, decided by Vaidyalingam and Dudhia JJ., on June 220 1973 (Unrep.) and judgment in Invest a Machine Tools and Engineering Co. Ltd. v. R. N.

Kulkarni. (1963) Special Civil application No. 1855 to 1962 decided by Tambe and Palekar. JJ on January 12 1963 (Unrep.) Relevant clauses of the Standing Orders have been liberally construed therein. We are fortified in our view by the observation made therein.

8. [Rest of the judgment is not material to this report.]