

# ALLAHABAD HIGH COURT

Dr. Surendra Kumar Shukla

Vs

Union of India

Civil Misc. Writ Petn. No. 7151 of 1984

(B.N. Sapru and A.N. Dikshita, JJ.)

04.10.1985

## JUDGMENT

**B.N. Sapru, J.**

1. Till the year 1973 there used to be Assistant Medical Officers Class II in the Railways. Recruitment was through the Union Public Service Commission. After 1-1-1973 the post of Assistant Medical Officer Class II was upgraded to Class I and they were designated as Assistant Divisional Medical Officer. These persons were again recruited through the Union Public Service Commission. Due to non-availability of Class I Assistant Divisional Medical Officer, the Railways Board authorized the General Managers of different Railways to make ad hoc appointments of Assistant Medical Officer in Class II. The scale of pay of the Assistant Medical Officer Class II was lower than the pay scale of Assistant Divisional Medical Officer in Class I.

2. The system of making ad hoc appointments in Class II as Assistant Medical Officer appears to have continued even till now. The petitioner was recruited on an ad hoc basis as Assistant Medical Officer in 1975. The appointment was for six months or till a regular Assistant Divisional Medical Officer recruited through the Union Public Service Commission became available and the services could be terminated at any time without notice. In the year 1979 the petitioner's services as Assistant Medical Officer Class II were terminated. The petitioner filed a Writ Petition in the Lucknow Bench of this Court being *Dr. Surendra Kumar Shukla v. Union of India*,<sup>1</sup> which was admitted and the Court

passed an interim order to the effect that unless some other person had been appointed to the post held by the petitioner, he would continue as Medical Officer. In the counter-affidavit, it is stated that since some other person had joined in place of the petitioner, the interim order could not be given effect to. The petitioner made a representation to the Ministry of Railways through the General Manager to allow the petitioner to continue. Consequent upon the order of the Railways Board, the petitioner was given an appointment order by the General Manager of the North Eastern Railway dt. 5-9-1980. This appointment was again for six months or till a candidate approved of by the Union Public Service Commission became available.

3. Then followed an order dt. 11-11-1983 terminating the petitioner's services and appointing Smt. Radha Sinha on an ad hoc basis in his place. It is this order which is the subject of challenge in this writ petition.

4. Sri Shanti Swarup Bhatnagar appearing on behalf of the petitioner has attacked the order dt. 11-11-1983 passed by the General Manager, North Eastern Railway, on several grounds. It is unnecessary to deal with all of them because the petition can be disposed of on one question alone.

5. It is submitted by Sri Shanti Swarup Bhatnagar that the petitioner was a workman within the meaning of the I.D. Act and as his services had been terminated without complying with the provisions of S. 25-F of the LD. Act (hereinafter to be referred to as 'the Act') the order is invalid.

6. It is now well settled that if the services of a workman are terminated by an employer without complying with the provisions of S. 25-F of the Act, the order of termination is null and void and the employee is deemed to continue in service.

7. In the supplementary counter-affidavit filed on behalf of the respondents the provisions of Para 203(C)(1.7) of the Indian Railway Medical Manual, Chapter II, have been reproduced which give the duties of an Assistant Divisional Medical Officer as under :

"Assistant Divisional Medical Officer - He will treat Railway patients

and meet other administrative requirements where he is in charge of a hospital or a health unit or any other institution, he will be responsible for its establishment and administration."

8. In para 5 of the supplementary counter- affidavit, it is stated as follows :

"That the Assistant Divisional Medical Officer/Assistant Medical Officer has to perform supervisory and managerial functions as well under the Assistant Divisional Medical Officer/ Assistant Medical Officer. The staff is also under their administrative control They are also required to place indents for medicines and are in overall control of the health unit."

9. It will be immediately seen that para 203(C)(17) prescribes the duties of an Assistant Divisional Medical Officer and not those of an Assistant Medical Officer Class II.

10. In para 15 of the writ petition, it was asserted that there is no distinction between the functions and duties of Assistant Divisional Medical Officer Class I and the ad hoc doctors appointed as Assistant Medical Officers Class II and it is further asserted that the postings are interchangeable. It is also asserted that the Assistant Medical Officer Class II are allowed to function and officiate as in charge in higher positions though they have not been favored with any orders of promotion or officiating allowance.

11. In para 19 of the counter-affidavit, the assertions made in para 15 of the writ petition are described as wholly misconceived and wholly irrelevant. It is then stated that there is no regular post of Assistant Medical Officer Class II. It appears from the reading of the counter-affidavit that the Assistant Medical Officer Class II are there only to assist the Assistant Divisional Medical Officers temporarily.

12. Sri Raja Ram Agrawal and Sri Lal Jisinha appearing on behalf of the respondents have urged that the petitioner was not a workman' within the meaning of the Act and consequently the provisions of S. 25-F did not apply in the case of the petitioner.

13. The question whether a doctor is a workman within the meaning of the Act was considered by a Division Bench of this Court in the case of *Dr. P. N. Gulati v. Presiding Officer, Labour Court, Gorakhpur*,<sup>2</sup> It was held that a doctor's work is of a technical nature and as such he is a workman within the meaning of S. 2(s) of the Act.

14. The question as to when a person is a workman' within the meaning of S. 2(s) of the Act has been considered by the Supreme Court in several cases. The latest decision is in the case of *Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., Bombay*,<sup>3</sup> After noticing its earlier judgment in the case of *S. K. Verma v. Mahesh Chandra*,<sup>4</sup> and its decision in *Ved Prakash Gupta v. Delton Cable India (P) Ltd.*<sup>5</sup> it was observed by the Supreme Court in para 16 as follows :

"The test that one must employ in such a case is what was the primary, basic or dominant nature of duties for which the person whose status is under enquiry was employed. A few extra duties would hardly be relevant to determine his status. The words like managerial or supervisory have to be understood in their proper connotation and their mere use should not detract from the truth."

15 . We have, therefore, to examine what was the primary duty for which the petitioner was employed. It is clear from the facts recited above that the primary purpose of the respondents in employing the Assistant Medical Officer Class II is to treat the patients who are employees of the Railways and their families. The duties of a doctor are technical. Any supervisory functions such a doctor may exercise, are incidental to the discharge of his duties as a Medical Attendant of the Railway employees and their families. Judged in this light, the petitioner was a 'workman' and not employed in supervisory capacity, within the meaning of S. 2(s) of the Act.

16. The provisions of S. 25-F have admittedly not been complied with before the impugned order of termination was made and as such the impugned order would be void and of no legal effect and the petitioner would be deemed to have continued in service despite the impugned order of termination.

17. Here we must notice the objection of the respondents that in case this Court comes to the conclusion that the petitioner is a 'workman', he must be relegated

to his remedy under the Act and no relief should be given to him under Art. 226 of the Constitution.

18. Strong reliance in this connection is placed by the respondents upon a Full Bench decision of Patna High Court in the case of *Dr. Sudha Bindu v. Union of India* <sup>6</sup> In that case, the Patna High Court held that there was no sufficient evidence before the Court to determine whether the Assistant Medical Officer Class II was or was not a 'workman' and as such refused to interfere under Art. 226 of the Constitution. It was left open to the petitioner in that case to agitate the question as to whether she was or was not a 'workman' in appropriate proceedings.

19. In the case before us, the duties performed by the petitioner have been placed before this Court and this Court has no difficulty in determining the question which could not be determined by the Patna High Court.

20. We must also say that the Railways have been disputing the petitioner's status as a 'workman' and it was so even during the course of arguments. It is not, therefore, proper for the Railway Administration to urge that the petitioner should have had the wisdom and the knowledge to know that he was a workman' and his remedy was under the Act. The petitioner, though he raised this plea, may himself have been doubtful as to whether the plea would succeed and, therefore, he came to this Court under Art. 226 of the Constitution as apart from this question, he has other questions to urge.

21 . In the end, we must say that the petitioner has been out of employment since 1983 and it will be very hard to drive him to proceedings under the Act specially when we find that the impugned order is void.

22 . It is also urged by Sri Shanti Swarup Bhatnagar that the right to livelihood, which, in this case, means employment of the petitioner, is also protected by Art. 21 of the Constitution and he submits that as such this writ petition should not be rejected on the ground that the petitioner has an alternative remedy under the Act. The right to livelihood has been recognized as a fundamental right protected by Art. 21 of the Constitution In the case of *Olga Tellis v. Bombay*

*Municipal Corporation*, <sup>7</sup> In respect of the employees, like the petitioner, the right to employment would be a right protected under Art. 21 of the Constitution as his livelihood depends on his continued employment. This is an additional circumstance for not relegating the petitioner to his remedy under the Act.

23 . In the result, the writ petition succeeds, and the impugned order dt. 11-11-1983 (Annex. 4 to the writ petition) is quashed. The petitioner shall be deemed to be in service and shall be entitled to his emoluments etc. to which he would have been entitled had the impugned order been not made. The petitioner is entitled to his costs.

Petition allowed.

Cases Referred.

1. Writ Petition No. 48 of 1980
2. 1977 Lab IC 1088
3. (1985) 3 SCC 371: (1985 Lab IC 1008)
4. (1983) 4 SCC 214: (1983 Lab IC 1483)
5. (1984) 2 SCC 569: (1984 Lab IC 658)
6. (Civil Writ Journ. Case No. 3796 of 1982) decided on 28-2-1983
7. (1985) 3 SCC 545: (AIR 1986 SC 18J)