

(1998) 07 OHC CK 0025

In the Orissa High Court

Case No : O.J.C. No"s. 3638 and 3668 of 1992 and 1152 of 1995

Amiya Charan Jena

APPELLANT

Vs

Managing Director, Orissa Handloom Development
Corporation Ltd.

RESPONDENT

Date of Decision : 27-07-1998

Acts Referred:

Orissa State Handloom Development Corporation Limited Employees Service Rules,
1986 — Rule 20

Citation : (1997) 75 FLR 220 : (2000) 1 LLJ 977

Hon'ble Judges : R.K. Patra, J;Pradipta Ray, J

Bench : Division Bench

Advocate : M.K. Mallik, P. Nayak, R. Mohanty, N.C. Panigrahi and S.C. Dash, for
the Appellant; Bijan Ray, B.K. Bal, B. Mohanty, B.B. Choudhary, A.K. Mohanty,
S.K. Dwibedy and R.K. Biswal, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—All the aforesaid three cases were referred to a Full Bench to decide, inter alia, the constitutional validity of Rule 20 of the Orissa State Handloom Development Corporation Employees" Service Rules, 1986. The Full Bench by judgment dated October 9, 1996 1997 (1) OLR 506 held that Rule 20 is neither arbitrary nor violative of Articles 14 and 16(1) of the Constitution of India and remitted the cases to the Division Bench for disposal on merits and that is how these cases have come before us.

2. In paragraphs 30 to 32 of the judgment, the Full Bench has recorded its findings. We may for the sake of convenience extract the same hereunder:

"Rule 20 of the Rules can be invoked by the Corporation for termination of services of a probationer after the expiry of the period of probation. There has to be some limit to the expression "after the expiry of probation", as the sword of Damocles cannot be kept hanging on the head of probationer. In other words, this rule can be invoked by the Corporation within a reasonable time after the

expiry of the period of probation. What would be the reasonable time would depend on the facts of each case, which shall be considered by the appropriate Bench while dealing with the merits of the case. That apart, the appropriate Bench shall also consider by lifting the veil as to whether the termination of services of the employees concerned was by way of punishment or it was only a termination simpliciter. We are not entering into the facts of each case as it is the function of the appropriate Bench to consider each case on merit.

31. The reference is, therefore, answered as follows:

(i) Considering the relevant Rules 16 to 20 of the Rules, we hold that there cannot be deemed confirmation and there has to be an order of confirmation in writing by the Managing Director after the expiry of the maximum period of probation.

(ii) Rule 20 of the Rules cannot be said to be bad in law as it applies only to a probationer and not to a confirmed/ permanent employee of the Corporation.

(iii) The Managing Director has to apply his mind under Rule 18 within reasonable time as to whether an employee should be confirmed or not. If the work of the employee concerned is found suitable, he may pass an order of confirmation in writing. If the services of the probationer is not found suitable, consequential orders may be passed by the Managing Director. The power under para 2 of Rule 18 has to be exercised within a reasonable period; and what is the reasonable period will depend on the facts of each case.

(iv) By resorting to Rule 20 of the Rules, the services of a probationer cannot be terminated by way of punishment after the maximum period of probation, and the Court can lift the veil to ascertain whether the order was an order of termination simpliciter for unsatisfactory performance of the probationer or it was by way of punishment. If it was by way of punishment, though the employee may continue to be a probationer after completion of the maximum period of probation, it cannot be passed without proper inquiry by giving reasonable opportunity to the employee, as in that case it will be violative of the principles of natural justice.

38. Before parting, we may refer to Rule 16 of the Rules, which provides that all persons appointed in the Corporation services, either by direct recruitment or promotion, shall be on probation. We are of the view that this rule is not exhaustive, as the Corporation may appoint persons on contract, on temporary basis, on daily wage basis, etc. Therefore, while dealing with each case, the appropriate Bench shall also consider the question as to whether the employee was actually put on probation or not."

3. Let us briefly have resume of the facts of each of the cases.

O.J.C No. 3638 of 1992

The petitioner in this case challenges the validity of the office order dated April

29, 1992 (Annexure-3) by which his services as Sales Assistant were terminated with effect from April 30, 1992 under Rule 20 of the Orissa State Handloom Development Corporation Employees' Service Rules, 1986 (hereinafter referred to as the "Rules") on payment of one month's salary. His case is that on June 24, 1981 he was appointed as a Sales Assistant on daily wage/consolidated wage basis under the Orissa State Handloom Development Corporation Limited (hereinafter referred to as "the Handloom Corporation"). By office order No. 2563 dated May 20, 1983 (Annexure-1) he was appointed on regular basis of Sales Assistant in the pay scale of Rs. 255-360/- per month. The Rules were brought into force with effect from July 1, 1986. While serving as such, the Handloom Corporation issued the impugned office order terminating his service. According to the petitioner, Rule 20 which applies to a probationer cannot be invoked to terminate his service inasmuch as he after serving the Corporation for one year and eleven months was appointed on regular basis by office order vide Annexure-1 and, as such, he shall be deemed to have been confirmed in the post after completing his probation and the order of termination of service could not have been passed without holding an inquiry.

The Handloom Corporation has filed its counter-affidavit. Its case is that under Rule 17 of the Rules all employees shall be on probation on their appointment and no employee shall be deemed to be confirmed unless confirmation is done in writing by the Managing Director. The petitioner was appointed on probation and had not been confirmed. No confirmation order was issued to him by the Managing Director. Since he was continuing on probation, no illegality was committed in terminating his service under Rule 20 of the Rules.

4. In interpreting Rules 16 to 20 of the Rules, the Full Bench has, as noticed above, held that there cannot be deemed confirmation and after the expiry of the maximum period of probation, there has to be an order of confirmation in writing by the Managing Director. In the order of appointment of the petitioner (Annexure-1) as Sales Assistant, it was clearly stipulated that the appointment was purely temporary and could be terminated at any time without assigning any reason whatsoever and he would be on probation for a period of two years in case the vacancy continued for a period exceeding two years. There is nothing on record to show that the Managing Director of the Handloom Corporation passed any order confirming the petitioner as Sales Assistant. He thus continued to be a probationer. No exception as such can be taken if his services are terminated during the probation period.

5. Learned counsel for the Handloom Corporation produced before us the proceeding file of the petitioner from which it appears that a departmental proceeding was initiated against him for having allegedly misappropriated a sum of Rs. 1,16,291.03. The Enquiry Officer held him responsible for misappropriation of Rs. 32,381.07. The Disciplinary Authority found him guilty of the charge and while directing by order dated August 25, 1989 his reinstatement, inflicted penalty of stoppage of increments etc. Thereafter the petitioner on being

reinstated continued in service till the impugned order was passed on July 29, 1992. From the materials placed before us, we do not find anything to hold that his services were terminated by way of punishment. The Full Bench has observed that Rule 20 can be invoked by the Handloom Corporation for termination of service of a probationer within a reasonable time after the expiry of the period of probation. What would be the reasonable time would depend on the facts of each case. On the facts of this case, it cannot be held that Rule 20 was invoked beyond reasonable time. The petitioner continued as a probationer and he cannot claim to have been confirmed merely because of efflux of time. There is no allegation of mala fide by the petitioner. His services having been brought to an end in terms of his order of appointment and not by way of punishment, the impugned order of termination cannot be voided.

There is, therefore, no merit in this writ application which is accordingly dismissed.

O.J.C. No. 3668 of 1992:

6. The petitioner Prasanna Kumar Dash was appointed as a Junior Clerk temporarily for a period of three months in the pay scale of Rs. 255-360/- per month vide office order No. 4428, dated August 23, 1982 (Annexure-1). By office order No. 4478 dated December 6, 1983 (Annexure-2), he came to be appointed on ad hoc basis as a Sales Assistant in the pay scale of Rs. 255- 360/- per month. In the order of appointment (Annexure-2), it was mentioned that his service could be terminated at any time without assigning any reason whatsoever and he would be on probation for a period of two years from the date of his joining as Sales Assistant. According to him, after expiry of period of probation on December 5, 1983 there was no extension. A departmental proceeding was initiated against him. On its conclusion by office order No. 7211 dated August 16, 1989 (Annexure-4) he was found guilty of misappropriation of Rs. 62,420.01. His four increments were stopped with cumulative effect and the period of suspension was treated as such. He was directed to be reinstated in service. He joined his duties on being reinstated on August 18, 1989. While working in Head Office as Sales Assistant, the impugned office order No. 3447 dated April 29, 1992 (Annexure-5) was passed terminating his service under Rule 20 of the Rules on payment of one month's salary. The contention of the petitioner is that his services could not have been terminated without initiating a disciplinary proceeding and without assigning the reasons of terminating his service.

7. The Handloom Corporation has filed its counter-affidavit. Its case is that under the rules all employees even appointed in regular scale of pay are placed on probation. There is no order confirming the services of the petitioner and, as such, he continued as a probationer. Disciplinary proceeding was drawn up in 1988 for misappropriation of Rs. 62,420.01. He was placed under suspension on March 24, 1988. The charge was enquired into and on the basis of the finding recorded, the order of penalty was imposed as per Annexure-4. In the said order,

it v/as further indicated that the petitioner should not be allowed to handle stock and cash. On being reinstated as per the aforesaid office order, the petitioner joined the Head Office. The Handloom Corporation is running in financial crisis. Accordingly, the management decided to terminate the services of the petitioner with effect from April 30, 1992 by invoking Rule 30. In this case also the Handloom Corporation invoked Rule 20 in terminating the services of the petitioner. There has been no order of confirmation in writing by the Managing Director. Therefore, he cannot claim to have been confirmed merely because of efflux of time. We have gone through the personal file of the petitioner which was produced by the learned counsel appearing for the Handloom Corporation. There is nothing on record to indicate that his services were terminated by way of punishment. No doubt, there was a departmental proceeding against him and certain penalties were imposed and he was directed to be reinstated in service. While serving for about 2 and half years following reinstatement, the impugned order of termination of service was passed. The petitioner has not made any allegation of mala fide against the opposite parties. In absence of any material to suggest that his services were brought to an end by way of punishment, no valid exception can be taken and the employer terminated the service of the petitioner who was on probation by invoking Rule 20.

For the aforesaid reasons, we do not find any merit in this writ application which is dismissed.

O.J.C. No. 1152 of 1995:

8. The petitioner in this writ application seeks to challenge the office order No. 3916 dated May 16, 1992 (Annexure-11) terminating his service as Sales Assistant.

9. The case of the petitioner is that he was first appointed by office order No. 7050 dated May 22, 1985 (Annexure-1), as an attendant on daily wage basis at Odisi, New Delhi Branch of the Handloom Corporation. Later by office order No. 5318 dated September 18, 1986 (Annexure-2) he was appointed as Sales Assistant on ad hoc basis temporarily in the pay scale of Rs.255-390/- per month and was posted at Odisi, New Delhi, In the said order, it was stated that he was to be governed by the rules of the Handloom Corporation as applicable from time to time so far as his service conditions are concerned. The appointment was purely on temporary basis and could be terminated at any time without any notice and without assigning any reason whatsoever. Later by office order No. 4678 dated June 26, 1989 (Annexure-3) he was transferred to the show room to be opened at Allahabad and was posted to Odisi, Varanasi until further orders. While working as Sales Assistant at Varanasi, he was served with notice No. 5759 dated October 29, 1991 (Annexure-5) to explain the charges of shortage of certain quantities of fabrics and misappropriation of cash etc. The petitioner on receipt of the charge applied in his letter dated January 1, 1992 to give him a month's time to submit explanation. While the matter stood thus, he was transferred from Varanasi and was posted to the Marketing Section of the Head

Office at Bhubaneswar as per office order No. 1331 dated February 18, 1992 (Annexure-7). By office order No. 983 dated August 5, 1992 (Annexure-8) one M.R. Ray, Deputy Manager, Accounts, Head Office, was appointed as the Enquiry Officer to enquire into the charges framed against the petitioner as per Annexure-4. The petitioner made oral and written request to the Enquiry Officer to permit him to go through the audit report and other records. The Enquiry Officer in his letter dated April 30, 1992 (Annexure-9) allowed the prayer of the petitioner. The enquiry was accordingly adjourned to May 8, 1992. On that day (April 30, 1992), the Marshalling Officer filed a list of witnesses (four in number) to be examined on behalf of the Corporation. The Enquiry Officer directed issue of notice to these witnesses to attend the enquiry on May 8, 1992. In the midst of the proceeding, the Managing Director passed order dated February 18, 1992 (Annexure-10) attaching 50% of his salary towards recovery of the shortage and misappropriated amount of Rs. 2,65,219.09 pending finalisation of the departmental proceeding. Three months thereafter the impugned order of termination of service of the petitioner was passed.

10. The contention of the petitioner is that departmental proceeding having been initiated against him in which the Enquiry Officer was appointed, the Handloom Corporation could not have terminated his service without bringing the proceeding to its logical end. In other words, the order of termination is not an order simpliciter but it was passed by way of punishment.

The Handloom Corporation has filed its counter affidavit resisting the claim of the petitioner. Its case is that as the petitioner did not submit his explanation to the charges levelled against him, the Enquiry Officer was appointed to go into the charges. On April 30, 1992 the Enquiry Officer held the enquiry and permitted the petitioner to peruse the audit report by May 15, 1992. The petitioner did not turn up to peruse and verify the audit report within the time granted by him. A sub-Committee had been formed by the Board of Directors of the Handloom Corporation to review all the misappropriation cases and the said sub-Committee recommended to initiate recovery proceeding in all cases of misappropriation and shortage and accordingly, the Managing Director issued office order dated February 18, 1992 (Annexure-10) directing attaching of 50% of his salary. Its further case is that the Managing Director is competent to terminate the service of an employee under Rule 20 and the said power was invoked in terminating the service of the petitioner.

11. Counsel for the parties referred to and cited number of cases dealing with the probationer and what would be his status after expiry of the specific period of probation. We need not delve into those cases because the Full Bench of this Court interpreted all the relevant rules including Rule 20 of the Orissa Handloom Development Corporation Employees Service Rules. We have already extracted the conclusions arrived at by the Full Bench in the judgment. At the risk of repetition it may be stated that the Full Bench has held that Rule 30 applies to the probationer and does not suffer from any vice. There could not be deemed

confirmation and there has to be an order of confirmation in writing by the Managing Director. Services of a probationer cannot be terminated by involving Rule 20 by way of punishment after the maximum period of probation and the Court can lift the veil to ascertain whether the order was an order of termination simpliciter or it was by way of punishment.

12. Keeping in view, the law laid down by the Full Bench, we may now proceed to examine whether the impugned order was an order of termination simpliciter or was in fact made by way of punishment. It is, therefore, relevant to extract the impugned orders.

"The services of Shri Jugal Kishore Barik, Sales Assistant now working in Head Office is terminated with effect from May 16, 1992 afternoon under Rule 20 of the "Orissa State Handloom Development Corporation Ltd. Employees" Service Rules, 1986 on payment of one month's salary."

Ex facie the order does not show that it was made by way of punishment. It looks innocuous and seems to have been passed by resorting to Rule 20 which provision is applicable to probationer. It is not in dispute that there is no order in writing confirming the petitioner in service. As such, he continued as a probationer.

13. In *State of Maharashtra v. Veerappa R. Saboji (SC)* R.S. PATHAK, J. (as he then was) in his separate judgment observed as follows:

"The law, it seems to me, is that where the services of a temporary Government servant or a probationer Government servant are terminated by an order which does not ex facie disclose any stigma or penal consequences against the Government servant and is merely a termination, order simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of it that a stigma is cast on the Government servant or that it visits him with penal consequences, then plainly the case is of punishment. There may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Article 311(2) of the Constitution have not been satisfied.....

What I say here in no way detracts from what this Court has laid down in *The State of U.P. Vs. Ram Chandra Trivedi*, . The Court did deprecate there the act of the High Court in probing into the departmental correspondence that passed between the superiors of the Government servant for the purpose of determining whether the impugned order was passed by way of punishment. But it does not appear from the facts recited in that case that the Government servant had made out any case that the impugned order had been made by way of punishment and that on the claim being disputed by the State it was necessary

to ascertain whether the case sought to be proved by the Government servant stood rebutted or confirmed by the departmental correspondence. I am unable to spell out from the judgment any absolute rule enunciated by this Court that where the order terminating the services of a temporary or a probationer Government servant is *ex facie* an order of termination simpliciter, the Government servant is barred from establishing that it is in fact an order by way of punishment, and that on the Government servant succeeding in establishing it to be so the Court is prohibited from examining the official records for the purpose of verifying the true position."

There can be no dispute that the law relating to termination of service of a probationer is the same as that applicable to a temporary Government servant or an employee like that of the petitioner governed by rules or regulations framed by the Corporation which is a "State" within the meaning of Article 12 of the Constitution. See *Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora*, .

In the *State of Punjab and Another Vs. Shri Sukh Raj Bahadur*, , the question that fell for consideration before the Supreme Court was whether in the midst of the enquiry a probationer could be reverted to his substantive post. In other words, whether the order of reversion was by way of punishment. In paragraph 16 of the judgment, it was held as follows at pp 379-380:

"On a conspectus of these cases, the following propositions are clear-

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.
2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being impartial.
3. If the order visits the public servant with any evil consequences or casts on aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.
4. An order of termination of service in unexceptionable form proceeded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.
5. If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said Article."

In that case the Supreme Court found that the departmental proceeding did not proceed beyond the stage of submission of charge-sheet followed by

delinquent's submission of explanation thereto. The enquiry was not proceeded with there were no sittings of any Enquiry Officer, no evidence was recorded and no conclusion arrived at in the enquiry. Accordingly, the order of reversion was held to be not by way of punishment.

In *Samsher Singh Vs. State of Punjab and Another*, : it was observed inter alia, as follows:

"Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a resort based on misconduct."

In *New India Assurance Co. Ltd. Vs. Pennamma Kurien and Others*, it was held as follows at p 30:

"..... It is settled law that the Court can lift the veil of the innocuous order to find whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pass the order then an enquiry into misconduct should be conducted and an action according to law should follow. But if it is motive, it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated in terms of the order of appointment or rules giving one month's notice or pay/salary in lieu thereof. Even if an enquiry was initiated, it could be dropped midway and action could be taken in terms of the rules or order of appointment ..."

14. Coming to the facts of the case at hand, it would appear that after the charge was communicated to the petitioner he did not offer any explanation and wanted time to go through the audit report and other documents. The Enquiry Officer although was appointed, he did not proceed with the enquiry and before the petitioner could file any reply to the charges before the Enquiry Officer, the impugned order of termination was passed. Rule 20 having been invoked in the case of the petitioner within a reasonable time, the petitioner cannot contend that without bringing the departmental enquiry to its logical end, his services could not have been terminated.

15. In consideration of the facts and circumstances of the case and on perusal of the relevant file produced by the learned counsel for the Corporation, we have not been able to persuade ourselves to hold that the order of termination was passed by way of punishment.

16. For the reasons mentioned above, we do not find any merit in this writ application which is accordingly dismissed.

17. All the writ applications are dismissed. There would be no order as to costs.

Pradipta Ray, J.

18. I agree.