
(1989) 09 OHC CK 0031
In the Orissa High Court
Case No : O.J.C. No. 223 of 1981

Ananda Chandra Mohanty

APPELLANT

Vs

Jharsuguda Municipal Council and Others

RESPONDENT

Date of Decision : 14-09-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25F
Orissa Municipal Act, 1950 — Section 71, 71(1), 71(2), 73, 73(1)
Orissa Municipal Rules, 1953 — Rule 409, 411, 421

Citation : (1990) 69 CLT 264

Hon'ble Judges : S.C. Mohapatra, J; P.C. Misra, J

Bench : Division Bench

Advocate : M.S. Panda, for the Appellant; C.V. Murty, C.A. Rao and C.M.K. Murty for opp. party No. 3 and Addl. Standing Counsel for opp. party No. 4, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—Termination of service of Petitioner a driver of Jharsuguda Municipality, is the subject matter for this application under Article 226 of the Constitution of India.

2. Petitioner was appointed as a driver on 6-2-1969 purely on temporary basis. In the letter of appointment (Annexure-I) it was stated that his service is terminable at any time without any prior notice. While Petitioner was continuing to serve, his service was terminated on 15-6-1975 (Annexure-2) dated 12-5-1975. Petitioner preferred an appeal to the State Government on 10-7-1975 (Annexure-3) and waiting for five years reminded about the pendency thereof on 9-5-1980 (Annexure-4). No step for disposing of the appeal having been taken, Petitioner approached this Court in O.J.C. 1193 of 1980 where this Court directed the State Government to dispose of the appeal within 60 days. Thereafter, by letter dated 12-1-1981 (Annexure-5) Petitioner was intimated that his appeal has been rejected. Aggrieved by the same, this writ

application has been filed.

3. Case of the opposite parties is that the service of the Petitioner was terminated as the Municipality decided to sell away the vehicle in respect of which he was appointed as driver since his appointment was purely temporary.

4. In the rejoinder affidavit, Petitioner asserted that the jeep O.R.S. 235 was still under the ownership of the Municipality and has not been sold.

5. Admittedly, Petitioner is an employee of the Municipal Council constituted and governed under the Orissa Municipal Act, 1950 (hereinafter referred to as the "Act") and the rules made thereunder. Being a creature of the Statute, Municipal Council is to exercise powers as vested in the Statute and in the manner provided therein and not otherwise.

6. Employment under a Municipality is governed u/s 73 of the Act. It reads as follows:

73. Municipal Council may determine its establishment:

(1) Every Municipal council may, with the previous sanction of the State Government and subject to the provisions of this Act, and the rules made thereunder, from time to time determine the officers and servants required to be employed by it or by any joint Committee, constituted u/s 61 or by Committee of the municipality and shall fix or alter the number, designation, grades, salaries, fees and allowances payable to such Officers and servants.

(2) Notwithstanding anything contained in Sub-section (1), the municipal council may, in the case of any emergency, make provision for temporary employment under it of an officer or servant for a period not exceeding six months:

Provided that the qualification for employment and the salary and and allowances in respect of such officer or servant shall not be different from those prescribed in respect of officers or servants of similar cadre:

Provided further that the creation of any post for the purpose of this Sub-section shall immediately be communicated to the State Government.

(3) The qualifications of candidates for any employment shall be such as may be prescribed.

Plain reading of this provision makes it clear that Municipal Council is not free to appoint any person to any post with any service condition. It has to determine the officers and servants required to be employed by it. The same is to be sanctioned by the State Government. Number of such officers and servants can be fixed or altered. Their designation, grade, salaries, fees and allowances can also be fixed or altered.

7. In the present case neither of the parties gave us the opportunity to know whether the post of driver of a jeep was created following the procedure laid down in Section 73. It is also not the assertion of the Petitioner that he was

temporarily appointed to a post created u/s 71(1). Such assertion was not made in the petition of appeal made to the State Government. When provision of law is clear and a creature of the Act has been regulated in the matter of employment by provision of law limiting its power, without a finding which would be a finding of fact on the basis of materials that the requirement of law was satisfied, it is difficult in extraordinary writ jurisdiction to give a finding in favour of the Petitioner against a statutory body.

8. If Municipal Council would have no power, other than u/s 71(1), appointment having been given, it might have been presumed that Section 71(1) was complied with. However, Sub-section (2) of Section 71 authorises Municipal Council to make temporary appointments in case of emergency, notwithstanding the limitations under Sub-section (1) Petitioner was appointed temporarily. Such appointment is within the power of the Municipal Council under Sub-section (2). Accordingly, it can safely be presumed that Petitioner was appointed as a driver temporarily under Annexure 1 in exercise of the power u/s 71(2) of the Act. Municipal Council's power to give such appointment is limited to six months only by statutory provision. It has no power to extend such appointment or to continue the appointment of a person times without number for various periods of six months to defeat the requirement of Sub-section (1). Therefore, despite continuance of the Petitioner in service as a driver for more than six months, Petitioner does not acquire any right to the post after conclusion of six months since Municipal Council has no power under the law to continue such appointment. Continuance of the Petitioner cannot be treated as estoppel by conduct since it is contrary to law on the principle that there is no estoppel against law. In case termination would have been on account only of lack of qualification, continuance for a long period would have given rise to the question of estoppel as has been held in ILR 1972 Cut. 1364 (M.K. Raghavan v. Municipal Council Jharsuguda and Anr.). In the present case, Municipal Council had no power to continue the temporary employment of the Petitioner beyond six months limited by statute.

9. Mr. M.S. Panda, learned Counsel for the Petitioner relied upon Rules 409 and 411 and submitted that appointment of the Petitioner and his continuance for more than two years is a circumstance to confirm the Petitioner in service and under Rule 421, three months notice would be necessary to terminate the employment. The same not having been complied with, termination is contrary to the provision of statute and is liable to be quashed. In case appointment of the Petitioner would have been to a post created u/s 73(1) and such appointment would have been on probation, submission of Mr. Panda would have some strength. In the present case as is revealed from Annexure-1, appointment was purely temporary which comes within Section 73(2). Accordingly, the provisions of the rules relied upon by Mr. Panda have no application. Decision reported in 1978 (2) S.L.R. 618, (Shri Akhilesh Chandra Bhargava v. Union of India and Anr.) of Gujarat High Court is accordingly, distinguishable.

10. Relying upon the decision reported in 1978 (2) S.L.R. 598 (V.N. Pande v. State of Rajasthan) of Rajasthan High Court, Mr. Panda submitted that reason for termination being proposal for sale of the vehicle which has not yet been sold, there was no valid reason for the termination and accordingly, the order of termination is liable to be quashed with a direction to reinstate the Petitioner with all service benefits. In case Municipal Council would have statutory power to continue the employment of the Petitioner beyond six months, the submission of Mr. Panda would have been considered on merits. When statute limits the power of a statutory body created under the statute, no court can give a direction which would contravene the provisions of the statute. Accordingly, the question of validity of termination requires no consideration.

11. Mr. Panda relied upon the decision reported in 1980 (2) S.L.R. 760 (Subhashchandra Chaudhary and Anr. v. The Bihar State Warehousing Corporation and Ors.) of Patna High Court and submitted that service of Petitioner though temporary, he was holding a permanent post and accordingly, termination by an innocuous order under Annexure-1 is liable to be quashed." Submission of Mr. Panda is misconceived. There is no material that the post held by Petitioner was a permanent post. Continuance in contravention of the provision of statute in a post not created u/s 73(1) of the Act cannot make the post permanent. Accordingly, the decision is distinguishable.

12. Relying upon the decisions reported in Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, , U.P. Income Tax Department Contingent Paid Staff Welfare Association Vs. Union of India (UOI) and Others, and two decisions of this Court reported in 67 1989 C.L.T. 324 (Nrusingha Charan Sahoo and Ors. v. State of Orissa and Anr.) and (1989) 310. J.D. 30 (S and L.) (Rajendra Prasad Jena and Anr. and Ors. v. Orissa State Electricity Board, represented through its Secretary and Ors.), Mr. Panda submitted that Petitioner is a driver and is a workman under the Industrial Disputes Act and accordingly, termination service of Petitioner without complying with Section 25F of the said Act is not sustainable under law. Petitioner's service stood terminated on completion of six months by operation of Section 73(2) of the Act since Municipal Council had no power to continue such temporary appointment beyond the period prescribed. Payment of salary to him for service rendered beyond that period is protected under the provisions of contract Act. Section 25F of the Industrial Disputes Act is not attracted where Statute limits the power of appointing a person temporarily. Accordingly, the decision relied upon by Mr. Panda are of no assistance to the Petitioner.

13. Petitioner has approached this Court with inordinate delay which tends towards laches since termination simpliciter gives no right of appeal to an employee of the Municipality u/s 71 of the Act which provides for appeal against a penalty imposed. However, Petitioner having failed on other grounds further discussion of this question is unnecessary in the present case.

14. In tile result, there is no merit in this writ application which is accordingly,

dismissed. There shall be no order as to costs.

P.C. Misra, J.

15. I agree.

Writ application dismissed.