
(2009) 12 JH CK 0077
In the Jharkhand High Court

Anirban Ghose, Ajit Kumar Nayak, Manas Kumar Satpathy
and Soumen Biswas

APPELLANT

Vs

The State of Jharkhand, The Sub-Divisional Officer, Anand
Kishore Panda and Achintya Kumar Ghosh Proforma

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Bihar Shops and Establishments Act, 1953 — Section 26(2), 26(2)

Citation : (2010) 124 FLR 266

Hon'ble Judges : Amareshwar Sahay, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Amareshwar Sahay, J.—Heard the learned Counsel for the parties.

2. The petitioners have challenged the order dated 18.12.2002 contained in Annexure-5 to this writ petition passed by the Sub-Divisional Officer, Gumla, (Respondent No. 2) in Case No. 1 of 2000, whereby in purported exercise of power Section 26(2) of the Bihar Shops and Establishments Act, 1953, the Sub-Divisional Officer, Gumla, held that the applicant Anand Kishore Panda (Respondent No. 3 herein) is still the employee of Professional Assistance for Development Action (herein after called as "PRADAN" for the sake of convenience) and thereby he is entitled to get the subsistence allowance and salary as per Rules.

3. The facts giving rise to this writ petition in short are that the respondent No. 3, who was an employee and was posted as Assistant (Account, Finance and Administration) in the concerned Society i.e. "PRADAN" and in course of employment he was suspended from service after he was found to be indulging in financial irregularities. During the period of his suspension, respondent No. 3 tendered his resignation from service on 14.9.1999. A criminal case was also lodged against him, in which respondent No. 3 was taken into custody. Subsequently after he came out from the jail custody, he filed an application u/s

26(2) of the Bihar Shops & Establishments Act before the Sub-Divisional Officer, Gumla, which was registered as Case No. 1 of 2000; a copy of the same has been annexed as Annexure-1 to this writ application.

4. From perusal of the application filed by the respondent No. 3 it appears that the prayer was made by the respondent No. 3 that the O.P. i.e. the Employer be directed to pay the amount due to him.

5. The Employer i.e. the petitioners herein appeared and filed objection objecting to the maintainability of the application filed by the employee u/s 26 (2) of the Bihar Shops & Establishments Act. They also took the plea that the application was barred by limitation since it was filed beyond the period of 90 days as prescribed under the Act.

6. With regard to the maintainability of the application u/s 26 (2) of the Bihar Shops & Establishments Act before the Sub- Divisional Officer, Gumla, it appears from the impugned order that the Sub-Divisional Officer has held that since the application was already admitted on 26.6.2000 and, therefore, at that stage the objection about the maintainability of the petition would be entertained.

7. From perusal of Section 26 (2) of the Bihar Shops & Establishments Act, it appears that this provision was inserted by way of amendment in the year 1975 by Act 2 of 1975, and it envisages that "Every employee, dismissed or discharged or whose employment is otherwise terminated, may make a complaint in writing in the prescribed manner, to a prescribed authority within 90 days of the receipt of the order of dismissal or discharge or termination of his employment. For ready reference Section 26(2) of the Bihar Shops & Establishments Act is reproduced herein below:

26(2) Every employee, dismissed or discharged or whose employment is otherwise terminated, may make a complaint in writing in the prescribed manner, to a prescribed authority within 90 days of the receipt of the order of dismissal or discharge or termination of employment on the one or more of the following grounds, namely:

- (i) there was no reasonable cause for dispensing with his service; or
- (ii) no notice was served on him as required by Sub-section (1); or
- (iii) he has not been guilty of any misconduct as held by the employer; or
- (iv) no compensation as prescribed in Sub-section (1) was paid to him before dispensing with his service.

8. From bare perusal of the aforesaid provisions quoted herein above, it also appears u/s 26(2) of the Bihar Shops & Establishments Act only that the employee who has either been dismissed or discharged or terminated from service can make an application in writing in the prescribed manner, to a prescribed authority within 90 days of the receipt of the order of dismissal or discharge or termination of his employment, whereas in the present case

admittedly the respondent No. 3 resigned from service by tendering his resignation in writing as contained in Annexure-3 to the writ application, though the same is disputed by the respondent No. 3 that it was not voluntarily resignation.

9. The fact remains that the employee i.e. respondent No. 3 tendered his resignation and the Employer accepted the same. The resignation by the employee cannot come under the purview of either dismissal or discharge or termination of employment, whereas Section 26(2) of the Bihar Shops & Establishments Act, speaks that any action under this section can be taken by the employee who has been either dismissed or discharged or terminated from his service. Therefore, in my view, the application filed by the respondent No. 3 before the Sub- Divisional Officer, Gumla, u/s 26(2) of the Bihar Shops & Establishments Act was itself not maintainable in the eye of law. Consequently, the impugned order dated 18.12.2002 passed by the Sub- Divisional Officer, Gumla, (Respondent No. 2) in Case No. 1 of 2000 in purported exercise of power u/s 26 (2) of the Bihar Shops & Establishments Act itself became without jurisdiction, since the application filed before him itself was not maintainable.

10. In view of the discussions and findings above, this writ application is allowed and the order as contained in Annexure-5 to this writ application dated 18.12.2002 passed by the Sub-Divisional Officer, Gumla, in Case No. 1 of 2000 is hereby quashed. 11. However, in the facts and circumstances of the case, there will be no order as to the costs.