

(1973) 10 OHC CK 0016
In the Orissa High Court
Case No : First Appeal No. 65 of 1972

Baikunthanath Pratihari

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 29-10-1973

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Article 7

Citation : (1974) 40 CLT 532

Hon'ble Judges : B.K. Ray, J

Bench : Single Bench

Advocate : B.R. Rao and B.L.N Swamy, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

B.K. Ray, J.—This is an appeal by the Plaintiff against the decree disallowing a part of his claim to arrear salary.

2. The case of the Plaintiff may briefly be stated as follows : He was serving a (sic) teacher in the B.M. High School at Bhubaneswar. The school was closed for summer vacation from 23-5-1965 to 4-7-1965. On 24-5-1965, he received an order of transfer from the Circle Inspector of Schools, (Defendant No. 3) through the Headmaster of the school directing him to join in the, Nigamananda High School, Gop on 28-6-1965. From 28-6-1965 to 28-10-1965 he remained on leave on medical ,grounds, During this period of leave, he filed a writ application in this Court (vide O.J.C. No. 257 of 1965) challenging the order of transfer. Along with this application, he also filed a petition for stay of operation of the order of transfer. This Court by order dated 28-10-1965 granted stay of the impugned order. Thereafter, the Plaintiff, while his writ application was pending in this Court, made several attempts to join as a teacher in the B.M. High School without any effect as the authorities concerned did not allow him to join in spite of the order of stay granted by this Court. The writ application filed by the

Plaintiff was ultimately allowed on 20-11-1968 and the impugned order of transfer was quashed. Thereafter, the Plaintiff was called upon to join his post in the B.M. High School, and accordingly, he joined there on 4-12-1968. After joining the post the Plaintiff claimed his leave salary from 5-7-1965 to 28-10-1965 with permission to prefix the summer vacation and also his salary from 29-10-1965 till 4-12-1968. His claim for leave salary from 5-7-1965 to 28-10-1965 with permission to prefix the summer vacation was allowed, but his salary from 29-10-1965 to 4-12-1968 was not paid. During the pendency of the writ application the Plaintiff filed a petition in this Court on 13-4-1966 claiming, full salary till the date of disposal of the writ application and this Court disposed of the application on 20-11-1968. In the final order disposing of the writ application this Court observed that it was open to the Plaintiff to seek his remedies for arrear salary according to law. According to the Plaintiff, as he was willing to perform his duty from 29-10-1965 to 4-12-1968, but could not do so being prevented by the authorities and as the impugned order of transfer was quashed by this Court, he is entitled to full salary during this period.

On these allegations the Plaintiff filed the suit on 10-5-1971 claiming Rs. 9, 220. 42 as his arrear salary from 29-10-1965 to 4-12-1968.

3. The defence taken by all the Defendants is that the Plaintiff was not entitled to any amount as according to them during the period in question he being fully aware of the fact that he was to join at the Nigamananda High School.

4. The trial Court has held that the Plaintiff was willing to perform his duty during the period between 29-10-1965 and 4-12-1968 and that he was prevented to do so by Defendant No. 3. In spite of this finding the trial Court only granted relief to the Plaintiff to recover arrear salary to the tune of Rs. 1,970. 32 for the period from 10-5-1968 till 4-12-1968 as according to it the rest of the Plaintiff's claim was barred by limitation. It is against that part of the decree disallowing the Plaintiff's claim from 29-10-1965 to 9-5-1968 the present appeal has been filed.

5. It is contended by Mr. B.R. Rao, learned Counsel for Appellant that this Court having stayed the order of transfer of the Appellant from the B.M. High School to the Nigamananda High School on 28-10-1965, the Appellant could, not have joined the Nigamananda High School on the strength of the order of transfer. Therefore, the Appellant approached the authorities after the stay order of this Court to allow him to join the B.M. High School and he was not permitted to do so. This factual position is not disputed. The position, therefore, is that even though the Appellant was ready and willing to join his post in the B.M. High School and to render service after 28-10-1965, he not being permitted to do so is not at fault. The impugned order of transfer was ultimately vacated by this Court by order dated 20-11-1968 and thereafter the Appellant was called upon to join, his post at the B.M. High School which he joined in the after-noon of 4-12-1968. According to the Appellant, the period of his absence from duty from 29-10-1965 up to 4-12-1968 cannot be regarded as unauthorised absence, and hence, he is entitled to full salary for this period. Mr. Rao in support of his

contention relies upon a decision reported in Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh, . In that case, the Appellant Devendra Pratap Narain Rai Sharma held the post of Inspector Kanungo in the Revenue Department Of the State of. Uttar Pradesh and was selected for the post of Tahasildar on probation. By order dated 21-4-1952 he was suspended and an enquiry was commenced against him on charges of misdemeanor. As a result of this enquiry, are commendation was made to the Land Reforms Commissioner to revert Devendra Pratap to the post of Naib Tahasildar. The Commissioner in his turn recommended to the State Government that Devendra shall be dismissed from service. The State Government accepted the recommendation and dismissed Devendra from service by order dated 16-9-1953. Devendra then instituted a suit challenging the legality of the order of dismissal. The High Court of Allahabad decreed the suit and granted a declaration that the order passed by the State Government dated 16-9-1953 was void. Thereafter, Devendra was reinstated in service on 30-3-1959. He was then posted at Tahsil Puranpur and took charge on 28-4-1959 Devendra then applied to the Accountant General for payment of arrear salary and allowances due to him. The Accountant General, in reply, informed Devendra that as regards his claim for arrear pay for the period between 21-4-1952 and 28-4-1959 a reference had been made to the State Government about the terms and conditions of his reinstatement. Devendra was again suspended by order dated 11-7-1959 and an enquiry was commenced against him. The State Government decided that from 21-4-1952 till 16-9-1953 Devendra would be entitled to subsistence allowance and for the period from 17-9-1953 till he took over charge on 30-3-1959 he would be entitled to pay of Rs. 1/- per month as token pay. Devendra thereafter moved the High Court of Allahabad in another application challenging the fresh order of the State Government suspending him and initiating a fresh enquiry against him. In the same application, he also prayed for a direction permitting him to draw his full salary and allowances with all increments amounting to Rs. 27, 238/10/-. Regarding the claim for arrear salary, the High Court held that he having been reinstated there was no justification for denying him the full salary till he was again suspended. The High Court, however, rejected the Petitioner's prayer to quash the fresh order of suspension and enquiry. Devendra thereafter carried an appeal to the Supreme Court. The Supreme Court held that when an order of dismissal was declared invalid in a civil suit, the effect of the decree of the civil suit was that the Appellant was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. It further held that the effect of adjudication of the" civil Courts is to declare that the Appellant had been wrongfully prevented from attending to his duty as a public servant and that it would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to join. On the authority of that decision Mr. Rao says that when an order of dismissal of a Government servant is quashed by a civil Court, the Government servant shall not be deemed to have been dismissed from service. Hence, the period of absence from duty of such a Government servant

due to the impugned order of dismissal shall be considered to be a part of duty, because the Government servant was wrongfully prevented from attending to his duty. The result therefore is that the Government servant shall be entitled to his full remuneration for the period he was absent from duty on account of the order of dismissal. Mr. Rao relies upon another decision of this Court in *Dr. Jnanendra Nath Das Vs. State of Orissa*, . In that case the Petitioner who was a District. Health Officer was suspended on 1-6-1950 and was subsequently dismissed on 12-3-1954. The High Court quashed the order of dismissal on 13-4-1959. On 6-2-1961, the Petitioner filed a writ application in the High Court for full remuneration from 30-5-1950 to 27-5-1960. This application was withdrawn. Subsequent to it, another application was also filed under Article 226 of the Constitution for the same relief in 1963. It was held in that decision relying upon the aforesaid decision of the Supreme Court that when the High Court quashed the order of dismissal the right to full salary from 1-6-1950 to 12-3-1954 accrued due to the Petitioner with effect from 13-4-1959 and that he was entitled to the said arrears. It was further held that since by the time the subsequent petition under Article 226 of the Constitution was filed claiming arrear salary the Petitioner's claim had been barred by limitations he was not entitled to any relief. Mr. Rao, therefore, argues that when an order of dismissal or suspension of a Government servant is quashed by the civil Court, he is entitled to his full salary from the date of the impugned order till the date when he resumes duty and the cause of action for recovery of the arrear claim arises on the date when the civil Court quashes the impugned order. This claim, however, is subject to the law of limitation. A similar view has been taken in another decision relied upon by Mr. Rao reported in *K.M Subramaniam v. State* AIR 1971 Mad. 202. On the authority of those decisions Mr. Rao contends that "since the impugned order of transfer was quashed by this Court by order dated 20-11-1968, the Appellant shall be deemed to be in service from 29-10-1965 to 4-12-1968 when he actually joined duty on being called upon by the authorities in pursuance of the order of this Court dated 20-11-1968 and hence he is entitled to full salary for this period. It is further urged by Mr. Rao that the cause of action for a suit for recovery of this arrear salary arose in favour of the Appellant on 20-11-1968 when this Court quashed the order of transfer. The suit having been filed on 10-6-1971 it is within time. This contention of Mr. Rao is well founded. The authorities concerned by not respecting the order of stay passed by this Court on 28-10-1965 and by not allowing the Appellant in the present case to join a post in the B.M. High School at Bhubaneswar prevented him illegally to perform his duty although he was ready and willing. As a result of this, the Appellant could not join any post, and therefore, could not draw his salary. Hence from 28-10-1965 up to 4-12-1968 Appellant's absence from duty cannot be said to be unauthorised and he is entitled to his salary for this period. The trial Court has also found in favour of the Appellant on this point but has not allowed his full claim on the ground that under Article 7 of the Limitation Act a major part of his claim is barred as it is beyond the period of three years from the date when his salary becomes due. It has lost sight of the fact that the cause of action for his

entire claim arose only on 20-11-1968 when this Court quashed the impugned order of transfer. As long as the impugned order of transfer was in force and as long as the Appellant was not allowed to join duty on the strength of the said order, he could not claim his remuneration for the period subsequent to the impugned order of transfer till it was quashed and he was allowed to join duty. The decision reported in Dr. Jnanendra Nath Das Vs. State of Orissa, , referred to above clearly lays down that the cause of action arises only when the impugned order is quashed by the Civil Court.

On the analysis of law and of the facts revealed in the present case it must be held that the suit was within time having been filed within a period of three years from 20-11-1968.

6. In the result, this appeal succeeds and is allowed. The judgment and decree of the trial Court disallowing the Plaintiff's claim for arrear salary prior to 10-5-1968 are set aside. The Appellant shall be entitled to costs throughout.