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(1993) 04 OHC CK 0007

In the Orissa High Court

Case No : O.J.C. No. 3514 of 1990

Bhabani Prasad Dash — APPELLANT

Vs

Arbitrator-cum-Director of Textiles and Others — RESPONDENT

Date of Decision : 28-04-1993

Acts Referred:

Citation : (1993) 76 CLT 149 : (1994) 1 LLJ 559

Hon'ble Judges : B.L. Hansaria, C.J;D.M. Patnaik, J

Bench : Division Bench

Advocate : B.C. Dash and B.K. Patnaik, for the Appellant; B. Pr. Das and B.P. Das, for the Respondent

Final Decision : Allowed

Judgement

B.L. Hansaria, C.J.—The petitioner was appointed on April 30, 1986 as an Assistant Engineer (Civil) by the Managing Director, Utkal Weavers'' Co-operative Spinning Mills Ltd. Khurda, and was put on probation for six months. As his performance was not found satisfactory, some further time was given to watch his performance and as he did not improve according to the employer, his services came to be terminated by an order dated December 19, 1988 as at Annexure-3. The legality of this order has been assailed in this petition.

2. It may be stated at the threshold that before Annexure-3 was issued, it is an admitted position that no disciplinary proceeding was drawn and it is because of this that Annexure-3 speaks about the same having been issued in accordance with Clause 7 of letter No. 10680(3) dated April 30, 1986, a copy of which is at Annexure-2. Which says, inter alia, that the service can be terminated by giving one month''s notice or one month''s pay in lieu of notice, and so, in Annexure-3 one month pay has been offered.

3. This case was once heard on April 6, 1993 and on knowing that the maximum period of probation provided by Rule 12 of the Staff Service Rules, 1980, which is 24 months, had expired by the time the termination order was issued, a need

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was felt to examine the question as to whether it can be stated that the petitioner had stood automatically confirmed on the expiry of 24 months from the date of appointment, because of which the order in the present case could not have been issued without holding any enquiry.

4. Shri Patnaik, the learned counsel appearing for the petitioner, has brought to our notice three decisions of the apex Court in which the view taken is that if an incumbent is appointed on probation and the maximum period of probation expires during which period the employer neither discharges nor confirms such employee, then in the absence of any statutory indication, it can be held that there was implied confirmation. This is the view expressed by a two-Judge Bench in M.K. Agarwal v. Gurgaon Gramin Bank , in paragraph 4 of which reference has been made to earlier decisions of the apex Court, the same being State of Punjab Vs. Dharam Singh, , and Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others,

5. Of the aforesaid decisions, Dharam Singh is by a Constitution Bench and in that case a probationer was officiating in a permanent post and was allowed to continue in that post even after expiry of three years beyond which probationary period could not have been extended by the Service Rules in question. It was, therefore, held that the incumbent must be deemed to have been confirmed in that post despite no express order of confirmation having been passed. This decision was followed in Om Prakash''s case wherein also the appellant had continued in the post after completion of the maximum period of probation provided under the concerned Service Regulations because of which it was stated that he stood confirmed and his reversion to lower post by treating him to be on probation was held to be bad.

6. As against the aforesaid three decisions relied upon by Shri Patnaik, Shri Das appearing for the employer brings to our notice a judgment of a three-Judge Bench in Dhanjibhai Ramjibhai Vs. State of Gujarat, in which while assailing the order of termination one of the contentions advanced was that the appellant must be deemed to have been confirmed on the expiry of the period of probation. This contention mentioned in paragraph 4 of the judgment has been dealt with in paragraph 6 and the contention was not accepted by stating that though the order of appointment had recited that the petitioner would be on probation for a period of two years which was in conformity with the concerned Recruitment Rule which prescribes such period of probation, automatic confirmation could not be read, because of the rules themselves had further stated that the period of probation may be extended. It was, therefore, stated that the period of two years was merely the initial period for which an officer may be appointed on probation; but as per the rule the period could be extended, and so, it was held that the period of two years did not represent the maximum period of probation.

7. The facts of the present case are entirely different inasmuch as even the maximum period of probation visualised by the Staff Service Rules, 1980 had

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expired by December 19, 1988, and so, the case squarely attracts the ratio of the three decisions relied upon by Shri Patnaik and the petitioner must be deemed to have become confirmed by the date the order of termination was passed.

8. The further question is whether the services of such an incumbent could have been terminated merely by relying on the aforesaid service condition which permits termination of service by giving one month''s notice or pay for one month in lieu thereof. That this would not be permissible is also not a disputed question of law by now in view of what was first held by a two-Judge Bench in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , in which such a provision finding place in the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules was described as the ''Henry VIII'' clause in paragraph 101 and it has also been stated about such a provision that the same would be violative of Section 23 of the Contract Act being opposed to public policy. The decision in Brojo Nath Ganguly was approved by a Constitution Bench in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, in which the majority held that the termination of service of permanent employee without I holding enquiry is invalid.

9. Before concluding, we may, however, refer to a submission made by Shri Das by drawing our attention to a document at Annexure-7 series which is at page 50 of the brief in which some reference has been made to a dismissal order passed against the petitioner on March 13, 1987. Shri Patnaik submits that the petitioner''s services had once been terminated on March 13, 1987 (which was within the maximum period of probation visualised by the Service Rules) but on representation being made he was allowed to continue and ultimately on December 19, 1988 his services came to be terminated. As in the present case we are not concerned with the dismissal order passed on March 13, 1987. We are not required to state as to whether the order is valid or not. As the impugned order before this Court is of December 19, 1988, the same cannot be sustained because of what has been stated above. So, the order of termination as contained in Annexure-3 cannot be sustained.

10. In the result, the petition is allowed by setting aside Annexure-3 and by directing reinstatement of the petitioner in service. Shri Patnaik prays that as the petitioner is hard-hit and has been out of job for about four and a half years by now, a direction may be given to give him full arrear salary. As to this, Shri Das submits that the financial position of the co-operative society is rather bad and it is not in a position to pay any arrear amount. Having known that the total amount of salary if allowed at full would come in the neighbourhood of Rs.78,000/- as the petitioner''s monthly salary at the relevant time was Rs. 1500/-, as would appear from Annexure-2, we have asked Shri Das to receive instruction as to what amount would be reasonable according to the co-operative society on account of arrear salary. Shri Das prays for two weeks'' time which is allowed. Let the case be placed for orders to decide this aspect of the matter

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immediately after two weeks. In the meantime, Shri Patnaik would receive instruction as to whether the petitioner was in employment anywhere during the interregnum, and if not, a proper affidavit in this regard shall be filed within me aforesaid period. We have kept in abeyance only the decision of this Court relating to arrear salary but the order of reinstatement shall be given effect to within a period of one month from to day, failing which the petitioner would become entitled to get his full wages from May 1, 1993 even without having worked.

D.M. Patnaik, J.

11. I agree.

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